

2005

# The Right of Publicity and Autonomous Self-Definition

Mark P. McKenna

*Notre Dame Law School*, [markmckenna@nd.edu](mailto:markmckenna@nd.edu)

Follow this and additional works at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/law_faculty_scholarship)



Part of the [Intellectual Property Law Commons](#)

---

## Recommended Citation

Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. Pitt. L. Rev. 225 (2005-2006).

Available at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/600](https://scholarship.law.nd.edu/law_faculty_scholarship/600)

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# THE RIGHT OF PUBLICITY AND AUTONOMOUS SELF-DEFINITION\*

*Mark P. McKenna\*\**

Arnold Schwarzenegger recently sued a company that was marketing a machine gun-toting bobblehead doll made in his image.<sup>1</sup> Schwarzenegger claimed that the producer was free-riding on the value of his image, violating his right of publicity.<sup>2</sup> But where the Terminator turned Governor of California saw an attempt to exploit his hard-earned reputation, others saw valuable political speech intended to parody Schwarzenegger.<sup>3</sup> The case ultimately settled,<sup>4</sup> but not before drawing attention to the breadth of the

---

\* © 2005 Mark P. McKenna (McKennaM@slu.edu).

\*\* Assistant Professor, Saint Louis University School of Law. I owe debts of gratitude to individuals far too numerous to identify here. But a few deserve special mention, particularly Liz Magill, Barb Armacost, Tom Nachbar, Jennifer Mnookin, and Curt Bradley, whom I thank for their thoughts on this project and for their encouragement. I also received helpful comments from Alice Haemmerli, Jacqueline Lipton, and participants in workshops at Saint Louis University, the University of Kansas, and the First Annual Intellectual Property and Telecommunications Scholars Roundtable at Michigan State-DCL College of Law. Thanks also to Mary Jo Eldridge and Kate Heideman for excellent research assistance. Thanks to Maria McKenna for everything else, except any errors, which are my own.

1. Oak Prod. v. Ohio Disc. Merch., No. SC081563 (Cal. Super. Ct. 2004).

2. The right of publicity generally is defined as the right to prevent commercial use of one's identity. 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2000). The right is concerned primarily with uses of an individual's identity (her name, likeness, or some other identifiable feature) to sell products or services, or in some cases, as the product itself. Because the "right of publicity" terminology is a result of an artificial distinction in the law's conception of the harm of identity appropriation, I use "right of publicity" in this article only when referring to particular claims recognized by the positive law. I refer generically to claims regarding commercial uses of identity as "identity appropriation claims."

3.

What part of the word "parody" does Governor Schwarzenegger not understand? One of the wonderful things about democracy is that we are able to ridicule and belittle our politicians. When politicians wield so much power it is a good thing to keep their egos somewhat in check with humorous renditions of their features. I see little reason why a 3D spring-mounted bust should receive less First Amendment protection than a political cartoon.

Ernest Miller, *Lawsuit Launched Over Schwarzenegger Bobbleheads*, at <http://www.corante.com/copyfight/archives/003723.html> (May 18, 2004). Notably, the company that produced the Schwarzenegger bobblehead also produces bobbleheads in the images of many other political figures, apparently without any objection from those individuals. See O.D.M., Inc. (offering bobbleheads of Tom Daschle; Laura, Barbara, George H.W. and George W. Bush; Jesse Jackson; John Kerry; Rudy Giuliani; and Hillary Clinton; among others), at <http://www.bosleybobbbers.com> (last visited May 28, 2005).

4. See "Arnold Schwarzenegger Terminates Bobblehead" (discussing terms of the settlement, by which the producer was allowed to continue making gun-free Arnold bobbleheads), at <http://www.bobble-->

current right of publicity, which has expanded to allow claims against an ever-increasing range of conduct.<sup>5</sup> As critics of Schwarzenegger's case recognized, his was only the latest in a long line of (often successful) attempts by celebrities to extend the claim's boundaries.<sup>6</sup> And there is no end to that trend in sight; one can discern no principle in the current doctrine or its dominant theory on which any limitation might be based.<sup>7</sup>

Because the right of publicity has focused entirely on the economic value of a celebrity's identity, courts considering claims have no basis to differentiate among the variety of ways in which others might exploit that value. They cannot, for example, justify treating uses that evoke the President of the United States differently from those that evoke Britney Spears. Nor can they explain why the use of Schwarzenegger's picture on the cover of a magazine should be treated differently than the sale of bobblehead dolls made in his image. All of these uses are intended to exploit value and could, as an *a priori* matter, fall within the ambit of the right of publicity.<sup>8</sup> Indeed, courts by and large have refused to draw the one distinction a theory based on

heads.com/bobbleheads/arnold-terminates-bobblehead.html (last visited May 28, 2005).

5. Since the right of publicity is a state common law and/or statutory claim currently recognized by twenty-eight states, there is no single "right of publicity" claim. MCCARTHY, *supra* note 2, § 6:3. I use the singular in this article because there is increasing uniformity among the various formulations, and there is near unanimous agreement at the theoretical level. In fact, the differences between the various versions of the right of publicity tend to relate to the claim's scope, including whether the right is descendible or the extent to which the First Amendment restricts its application, rather than its existence or its justification. In the few situations where there are substantial differences among formulations, I will attempt to note the differences.

6. See, e.g., *Doe v. TCI Cablevision*, 110 S.W.3d 363, 365-74 (Mo. 2003) (en banc), *cert. denied*, 540 U.S. 1106 (2004) (upholding plaintiff's claim against use of a character name in a comic book series that was based on the name of a former hockey player); *Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799-801 (Cal. 2001) (allowing holder of rights of publicity of actors who portrayed the Three Stooges to assert a claim against t-shirts bearing reproduction of Saderup's charcoal drawing of the Three Stooges).

7. See Justin Levine, *California's Ridiculous (and Unconstitutional) "Right of Publicity" (I told you so folks!)* (arguing that the Schwarzenegger case demonstrates that the right of publicity is "on a collision course with the First Amendment" since one "cannot meaningfully distinguish between politicians and other forms of public figures"), at <http://www.socallawblog.com/archives/001505.html> (Apr. 30, 2004).

8. Some versions of the right of publicity would explicitly exempt from liability "newsworthy" uses like depictions of Schwarzenegger on magazine covers. See CAL. CIV. CODE § 3344(d) (West 1997) ("[U]se of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required."); *Stephano v. News Group Publ'n, Inc.*, 474 N.E.2d 580, 584-85 (N.Y. 1984) (holding that publications concerning newsworthy events or matters of public interest do not constitute uses in "trade" or for "advertising purposes" as used in N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 1997)). These limitations, however, reflect a recognition of the potential impact of the right of publicity on core First Amendment values and are not based on any limiting principle in the theory of the right of publicity.

economic value is capable of drawing—between claimants whose identities have value and those whose identities do not.<sup>9</sup>

Some critics have blamed the uncertainty in Schwarzenegger's case, and the growth of the right of publicity generally, on courts' failure to recognize and apply a clear and robust First Amendment defense that would limit the claim's reach.<sup>10</sup> Surely a healthy dose of the First Amendment is in order. Broader recognition of such a defense, however, would not cure all that ails the right of publicity: it owes its existence as an "independent" claim to a constrained view of the harm caused by identity appropriation and a simplistic distinction between celebrities and non-celebrities.

The right of publicity is described as a descendant of the right of privacy.<sup>11</sup> The notion of privacy as a legal right dates to Samuel Warren and Louis Brandeis and their 1890 article *The Right to Privacy*.<sup>12</sup> Warren and Brandeis wrote their famous article with a particular abuse in mind—the press's habit of publishing private facts or private photographs.<sup>13</sup> Disturbed by this trend, the authors attempted to make the case for a new claim based

9. See MCCARTHY, *supra* note 2, § 4:16 ("Majority view: non-celebrities have a right of publicity.").

10. See Eugene Volokh, *Right of Publicity vs. The First Amendment* (arguing that Schwarzenegger should lose his case on First Amendment grounds, but acknowledging uncertainty about the outcome), at [http://volokh.com/2004\\_04\\_25\\_volokh\\_archive.html#108339068847029941](http://volokh.com/2004_04_25_volokh_archive.html#108339068847029941) (Apr. 30, 2004); see also F. Jay Dougherty, *All the World's Not a Stoooge: The "Transformativeness" Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1 (2003-2004); Eugene Volokh, *Freedom of Speech and The Right of Publicity*, 40 HOUS. L. REV. 903 (2003) (discussing difficulties with the California Supreme Court's test for transformativeness).

11. Section 1:7 of McCarthy's treatise is titled, appropriately enough, "'Publicity' law develops from 'privacy law.'" MCCARTHY, *supra* note 2; Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 167 (1993) ("The right of publicity was created not so much from the right of privacy as from frustration with it."); see also Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1203-15 (1986) (detailing history).

12. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); see also MCCARTHY, *supra* note 2, § 1:4 (citing the Warren and Brandeis article as the first historical landmark in publicity and privacy rights).

13. See Warren & Brandeis, *supra* note 12, at 196.

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. . . . It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people.

*Id.* at 196.

explicitly on an individual's right to be "let alone,"<sup>14</sup> a notion they believed was implicit in existing case law. Warren and Brandeis recognized that most people would not suffer identifiable economic harm as a result of the publications they targeted, but they nevertheless felt money damages were an important remedy. Thus, much of the article is devoted to making the case for emotional harm as a compensable injury. In the years thereafter, courts overwhelmingly fixated on the fact that the invasions Warren and Brandeis targeted caused "hurt feelings" of some sort and assumed that "hurt feelings" were the gravamen of a privacy claim.

Having embraced this conception of privacy directed at "hurt feelings," courts sensibly could expand the concept to cover identity appropriation claims by non-celebrities who might want to avoid attention. Celebrities, however, actively seek and profit from attention and courts and commentators therefore assumed that they suffer no hurt feelings from receiving publicity, regardless of its form. Thus, privacy claims were unavailable to celebrities, and they needed some other claim to prevent commercial uses of their identities.<sup>15</sup> The right of publicity was created specifically to meet that need. Of course, having concluded that the privacy theory was inapplicable to celebrities, supporters of the right of publicity could not claim that the new claim vindicated any emotional interests. As a result, they distinguished the right of publicity from privacy claims on the basis of the economic value of celebrity identities.<sup>16</sup>

---

14. *Id.* at 193, 197.

15. In his landmark article, *The Right of Publicity*, Melville Nimmer made the case for an independent claim by detailing the inadequacies of privacy law and other possible claims for addressing what he perceived as the "needs of Hollywood." Melville Nimmer, *The Right of Publicity*, 19 *LAW & CONTEMP. PROBS.* 203 (1954).

16. A recent Supreme Court of Missouri case provides a typical description of the two strands of existing law. *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (en banc). The court wrote:

The tort of misappropriation of name is one of four recognized torts falling under the general heading of invasion of privacy. The interest protected by the misappropriation of name tort "is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or others." Recently, development of the misappropriation of name tort has given rise to a separate yet similar tort termed the "right of publicity," which is said to "protect a person from losing the benefit of their [sic] working creating a publicly recognizable persona." Though facially similar, the protections afforded by each tort are slightly different: "the [misappropriation of name tort] protects against intrusion upon an individual's private self-esteem and dignity, while the right of publicity protects against commercial loss caused by appropriation of an individual's [identity] for commercial exploitation. . . . Despite the differences in the types of damages that may be recovered, the elements of the two torts are essentially the same. To establish the misappropriation tort, the plaintiff must prove that the defendant used the plaintiff's name without consent to obtain some advantage. In a right of publicity action, the plaintiff must prove the same elements as in a misappropriation suit,

On closer examination, the distinction between celebrity and non-celebrity interests has been dramatically over-emphasized. First, courts and commentators accepted too easily that identity appropriation claims by private citizens were a simple extension of the privacy rationale advanced by Warren and Brandeis. Although private citizens suffer harms of exposure from commercial uses of their identities that are similar to the harms caused by traditional invasions of privacy, they also suffer a qualitatively different, and more important, harm. The things and people with which individuals choose to associate reflect their character and values. An individual's choices therefore can be viewed as the text of her identity, and unauthorized uses of a person's identity in connection with products or services threaten to recreate that text and affect the way the individual is perceived by others. The individual uniquely bears the costs of those perceptions, both emotional and economic, and she therefore has an interest in controlling the uses of her identity. Importantly, this interest in autonomous self-definition is just as relevant for celebrities as it is for non-celebrities.

Second, courts' refusal to allow celebrities' privacy claims was based upon an unwarranted conclusion that the only type of compensable "hurt feelings" were those that resulted from publicity generally. Courts dismissed, to the extent they considered, the possibility that one might suffer hurt feelings from particular forms of publicity, even if she accepted publicity in other forms. In this regard too, celebrity and non-celebrity interests in controlling uses of their identities are quite similar.

The failure of courts and commentators to appreciate these common interests put the onus on them to justify the independent right of publicity on the basis of economic value. Most courts have not attempted to meet that challenge and have simply assumed that the economic value of a celebrity's identity should be allocated to the celebrity.<sup>17</sup> Those that have articulated a normative basis for such an allocation almost uniformly have relied on a

---

with the minor exception that the plaintiff must prove that the defendant used the name to obtain a commercial advantage.

*Id.* at 368-69 (internal citations omitted). As a practical matter, the only difference between the two types of claims is that right of publicity cases generally are brought by celebrities, while non-celebrities bring privacy claims, sometimes together with a publicity claims, to the extent they bring claims at all.

17. See Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 COLUM.-VLA J.L. & ARTS 123, 127-28 (1996) ("In fact, the decisions [regarding the right of publicity] do not tend to include justifications for placing what is, after all, called a *public* image, within the plenary control of private individuals. Rather, the courts tend to assume that, if someone hones an image, that person generally has the right to capture the benefit of all its uses.").

version of Lockean labor theory endorsed by the majority of commentators.<sup>18</sup> According to the Lockean theory, the economic value of identity should be allocated to the celebrity because the value is primarily the result of the celebrity's labor. On the basis of that justification, the right of publicity is the beneficiary of overwhelming support.<sup>19</sup> Sheldon Halpern has even argued that:

Forty years of judicial and legislative effort have produced a coherently defined and rather clearly enumerated independent right of publicity protecting the economic associative value of identity. With limited (if not idiosyncratic) dissent, the development was fostered and encouraged by legal scholarship. Debate over policy limitations and boundaries was thoughtful and productive and had largely come to an end with the maturation of the right of publicity.<sup>20</sup>

Halpern, unfortunately, is correct that dissent with respect to the right of publicity has been limited and that legal scholarship has contributed to the current condition of the law. But the right of publicity is anything but coherent.

Despite the labor theory's widespread acceptance, it has very little explanatory power with respect to current law. More importantly, the labor theory fails as a normative justification of identity ownership because it gives celebrities much more credit than they deserve for creating the economic value of their identities.<sup>21</sup> Even if celebrities do play a role in creating the value of

18. Cf. Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 388 (1999) ("Both proponents and critics of the right of publicity generally perceive it as a property claim grounded in Lockean labor theory.").

19. See MCCARTHY, *supra* note 2, § 1:4; Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 853 (1995) ("After forty years of wandering in a definitional wilderness, the right of publicity appears to have reached the promised land of independent status, a distinct right and remedy unmoored from privacy . . ."); Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 3 (1997) ("This article contends that once the historical, sociological, and cultural influences are duly considered, the right-of-publicity's place in our legal system becomes more defensible, both theoretically and practically."); cf. Madow, *supra* note 11, at 133-34 ("[T]here is a solid, indeed an overwhelming, consensus within the American legal community that the right of publicity is a good thing. . . . [T]his 'initial phase of questioning' was brought to a close much too hastily . . .").

20. Halpern, *supra* note 19, at 869 (footnotes omitted). Notably, Halpern cites as evidence of the "thoughtful and productive" debate over the right of publicity only two cases regarding the descendability of the right of publicity under Tennessee law. *Id.* at 869 n.72 (citing *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979)). Neither case analyzes the theoretical foundation of the claim itself.

21. Thus, critics of the right of publicity rightly have assailed the labor theory as a basis for allocation of all economic value to the celebrity. See, e.g., Lee Goldman, *Elvis Is Alive, But He Shouldn't*

their identities, there is no need to allow them to capture all of that value: Complete dominion over one's identity creates little, if any, marginal incentive for the individual to develop one's skills.<sup>22</sup> Consequently, the right of publicity, in its current form, stands on shaky ground.

Nevertheless, critics of the right of publicity have gone too far in suggesting that celebrities should have no control over their identities.<sup>23</sup> All individuals have a legitimate interest in autonomous self-definition, and celebrities deserve protection against uses of their identities that implicate that interest. This article offers a framework for an autonomy-based identity appropriation claim, which is both more theoretically sound and capable of identifying the boundaries of a legitimate claim.

*Be: The Right of Publicity Revisited*, 1992 BYU L. REV. 597, 598 (rejecting conventional justifications of the right of publicity and arguing that trademark law provides adequate protection of any legitimate interest); Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control*, 45 U. KAN. L. REV. 329 (1997) (rejecting a right of publicity claim that does not require proof of likelihood of confusion); Madow, *supra* note 11 (arguing that right of publicity has not been adequately justified in light of its consolidation of the power to make cultural meaning).

22. On this point, critics of the right of publicity have had some unlikely allies. In *The Economic Structure of Intellectual Property Law*, William Landes and Richard Posner express general skepticism about a Lockean theory of intellectual property. They argue that the creation of all intellectual property is a cumulative process and, as a result, the extent to which such works realistically can be considered the exclusive fruit of any person's labor is unclear. More specifically, Landes and Posner reject an instrumental version of the labor theory in the context of the right of publicity, as they correctly note that allocating the economic value of identity to celebrities provides minimal incremental encouragement to invest in becoming a celebrity. WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 223 (Harvard University Press 2003).

23. Madow, for example, grossly overstates the cultural consequences of the right of publicity in several important ways. First, his discussion rests on the assumption that recognition of publicity rights concentrates the power to make cultural meaning in those who already control image making. In fact, many of the would-be users of celebrity identity are large corporations, advertisers, and other media entities responsible for significantly greater "meaning making" than individual celebrities. Thus, if the goal is decentralization of image making, stronger rather than weaker publicity rights might be called for, at least in some cases. Cf. Justin Hughes, "*Recoding*" *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 935 (1999) [hereinafter Hughes, "*Recoding*"] (noting that right of publicity plaintiffs are often individuals taking on large corporations). Second, if Madow correctly describes the process by which symbolic meaning is created—if meaning is the result of a collective social process and individual choices (a bottom-up rather than a top-down process)—then law would seem incapable of concentrating meaning making. The law cannot control individual responses to celebrity images and, for the most part, it does not try. Individuals responding to the information projected by celebrities may not be able to express their received meaning commercially, but the law will not limit or define the meaning of celebrities to them. Finally, even if we assume that the law is capable of concentrating cultural meaning making, the right of publicity is an ineffective mechanism by which to control meaning as long as it allows claims only against commercial uses of identity, as traditionally understood (a requirement courts admittedly have not always observed carefully). A rule prohibiting all commercial use of celebrity identities would limit most of us very little. See *id.* at 947 (noting the many examples of recoding that have not been circumscribed by existing law).



Part I of this article explores the history of identity appropriation claims and their roots in privacy law. It identifies more precisely the harms targeted by Warren and Brandeis and compares those harms to the ones caused by commercial uses of identity, finding significant differences. Part II critiques the prevailing theories of the right of publicity. It exposes the disparity between the theories and the claim's actual shape, and shows each of those theories to be normatively inadequate. Part III reunites celebrity and non-celebrity identity appropriation claims, distinguishing both from the privacy claims Warren and Brandeis anticipated, and discusses the contours of a theoretically justifiable identity appropriation claim based on an interest in autonomous self-definition.

### I. THE RIGHT OF PUBLICITY'S UNEASY EVOLUTION FROM THE RIGHT OF PRIVACY

The right of publicity gives individuals claims against unauthorized commercial use of their identity.<sup>24</sup> The paradigmatic right of publicity claim targets the use of an individual's name or likeness in advertising for the defendant's products or services,<sup>25</sup> but the scope of the claim has broadened along multiple axes. First, "identity" is now broadly construed to include almost any attribute associated with an individual, including a distinctive voice,<sup>26</sup> a phrase associated with an individual,<sup>27</sup> and even a character the individual has portrayed.<sup>28</sup> In some cases, the attributes claimed need not even

---

24. See MCCARTHY, *supra* note 2, § 1:3.

25. Despite its name, New York's statutory right of privacy, which preempts any common law right of publicity, is akin to a right of publicity claim since it allows living persons a claim against use of their "name, portrait, picture or voice" for "advertising purposes or for the purposes of trade." See N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992); *Stephano v. News Group Publ'n, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984) (recognizing preemption of the common law right of publicity by N.Y. CIV. RIGHTS LAW §§ 50 and 51). "Portrait or Picture," however, has been liberally interpreted to include look-alikes. See *Onassis v. Christian Dior—New York, Inc.*, 472 N.Y.S.2d 254 (N.Y. Sup. Ct. 1984), *aff'd*, 488 N.Y.S.2d 943 (N.Y. App. Div. 1985) (granting Jacqueline Kennedy Onassis a preliminary injunction against use of a look-alike in an advertisement despite the fact that no actual picture or portrait of Ms. Onassis was used, and stating that the New York statute "is intended to protect the essence of the person, his or her identity or *persona* from being unwillingly or unknowingly misappropriated for the profit of another").

26. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (challenging use of a soundalike in commercial advertising on the ground that claimant had a distinctive voice); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (finding that the defendant's use of a soundalike version of a Bette Midler song was sufficient to support a right of publicity claim by Midler).

27. See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983), *aff'd*, 810 F.2d 104 (6th Cir. 1987) (challenging use of the phrase "Here's Johnny" for portable toilets).

28. See, e.g., *Wendt v. Host Int'l, Inc.*, 125 F.3d 806 (9th Cir. 1997) (challenging on right of

be unique to the plaintiff if the context of the use is sufficient to evoke that person.<sup>29</sup> Second, courts have prohibited a variety of uses that traditionally were not regarded as commercial in nature, such as the use of the Three Stooges' pictures on t-shirts,<sup>30</sup> the use of Rosa Parks's name as the title of a song,<sup>31</sup> and the use of a former hockey player's name as a character in a comic book series.<sup>32</sup>

Many observers have been troubled by this expansion, but it should not have come as a surprise. The growth of the right of publicity was a predictable consequence of its singular focus on protecting the economic value of commodified identity, which can be exploited in a variety of ways. Since the centrality of economic value was a direct result of courts' rejection of privacy in the context of celebrity identity appropriation, understanding the right of publicity necessarily begins with the right of privacy.

publicity grounds an airport restaurant's licensed use of animatic robots based on actors' characters on the *Cheers* TV show); *McFarland v. Miller*, 14 F.3d 912, 914 (3d Cir. 1994) (challenging use of "Spanky McFarland" name for restaurant, as well as the use of the image of the actor who portrayed "Spanky" in the *Our Gang* television series).

29. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (challenging advertiser's use of a robot with a blonde wig standing next to game show board on the ground that it called to mind game show hostess); see also MCCARTHY, *supra* note 2, § 4:45 (arguing that persona should be understood as signifying the "cluster of commercial values embodied in personal identity as well as to signify that human identity 'identifiable' from [its] usage").

30. *Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001) (finding artist's charcoal sketch of the Three Stooges violated the actors' rights of publicity when printed on t-shirts or otherwise sold commercially).

31. *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003) (reversing grant of summary judgment in favor of band OutKast and allowing Rosa Parks to pursue a claim for use of her name as the title of a song).

32. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 372-74 (Mo. 2003) (en banc), *cert. denied*, 540 U.S. 1106 (2004) (recognizing right of publicity claim by former hockey player Tony Twist against use of a character called Anthony "Tony Twist" Twistelli in a comic book series). That case adopted a test that weighs the expressive quality of a use of an individual's identity against its commercial purpose and would preclude a First Amendment defense where individual literary devices have little literary value, considered in isolation, compared to its commercial value. To those concerned about traditionally protected forms of speech, the case, like the *Parks* case, is startling. But the cases should not be surprising. A claim grounded in nothing more than economic value has no self-limiting mechanism. Speech, just as competitive use, unquestionably can impact value. Without a more thorough theory of identity protection, one must hope for a much more vigorous First Amendment defense than courts have allowed. *But see* *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) (denying Tiger Woods's right of publicity claim under Ohio law, and finding that defendant's limited edition prints featuring Woods were protected by the First Amendment); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996) (recognizing parody defense to right of publicity claim under Oklahoma law).

A. *Publicity's Progenitor—The Right of Privacy*

The right of privacy claim is widely attributed to Samuel Warren and Louis Brandeis and their groundbreaking article *The Right to Privacy*.<sup>33</sup> Concerned that the law offered no remedy against publications of private facts or photographs, Warren and Brandeis attempted to make the case for a claim against those abuses that was based explicitly on an individual's right of privacy. Famously, the authors claimed that the proposed right was aimed at protecting "the right to enjoy life—the right to be let alone."<sup>34</sup> Concerned that their proposal might appear radical, Warren and Brandeis attempted to portray this new right as a mere extension of existing law. Specifically, they claimed that a number of cases purportedly decided on other grounds, such as breach of trust or common-law copyright, really represented efforts to protect an author's expressions of her thoughts and feelings—elements of her personality that Warren and Brandeis believed should be recognized separately and protected directly.

Warren and Brandeis focused most of their attention on the protection afforded unpublished works of authorship. At common law, courts granted an author the right to control the conditions under which her work would be published, if it was published at all, ostensibly as a property right justified by the labor expended by the creator of a work.<sup>35</sup> That justification was plausible enough with regard to deliberate literary works such as novels or plays, but it offered little support for protection of casual letters or diaries.<sup>36</sup> Yet those types of works often were the beneficiaries of protection against unauthorized publication, despite the fact that they entailed only "trifling" amounts of labor,<sup>37</sup> particularly as compared to the amount of effort it took to lead a good life. Warren and Brandeis argued:

If the amount of labor involved be adopted as the test, we might well find that the effort to conduct one's self properly in business and in domestic relations had been far greater

---

33. See Warren & Brandeis, *supra* note 12 and accompanying text.

34. *Id.* at 193-95.

35. See EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 1-53 (1879); Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 659 (1991).

36. Post, *supra* note 35, at 659.

37. See *id.* (citing *Baker v. Libbie*, 97 N.E. 109, 111 (Mass. 1912)).

than that involved in painting a picture or writing a book; one would find that it was far easier to express lofty sentiments in a diary than in the conduct of a noble life.<sup>38</sup>

Indeed, confronted with the weakness of the labor theory as a justification for protection of unpublished works, the common law was unable to identify the exact nature of the labor involved in intellectual production and tended to “speak instead of ‘originality’ as the true grounds of ‘the title of the property.’”<sup>39</sup> Moreover, “the common law was prepared to concede that originality was less a matter of intellectual effort than of expressing ‘the mind of a creator or originator.’”<sup>40</sup> Since personal appearance, sayings, acts, and personal relations are similar expressions of personality, Warren and Brandeis suggested that the law should protect those as well.<sup>41</sup> This general right to be let alone, when considered with all of its applications, “is in reality not the principle of private property, but that of an inviolate personality.”<sup>42</sup>

Unfortunately, Warren and Brandeis felt compelled to spin their new claim out of old cloth. By arguing that the privacy rationale was implicit in existing case law, the authors may have made the new claim more palatable to contemporaries, but they failed to lay a normative foundation for the claim. The independent privacy principle they touted was not an inevitable extension of the cases upon which they relied. To be sure, those cases fit their conventional justifications rather poorly. With respect to common-law copyright protection in particular, Warren and Brandeis had indeed exposed “the disparity between the accepted justification . . . of the claim and the actual shape of the law.”<sup>43</sup> Yet, establishing that particular cases could not be explained by their traditional justifications falls short of affirmatively demonstrating the normative premises on which those decisions were actually based.

Ultimately, Warren and Brandeis conflated the distinct issues of whether the law ought to protect personality and how the law should protect it (i.e., as property or as a personal privacy claim).<sup>44</sup> Even if the prevailing justification

38. Warren & Brandeis, *supra* note 12, at 207.

39. See Post, *supra* note 35, at 660.

40. *Id.*

41. Warren & Brandeis, *supra* note 12, at 204-06 (“If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.”).

42. *Id.* at 205.

43. Post, *supra* note 35, at 660.

44. *Id.* at 662 (“Warren and Brandeis evidently believed that once common law copyright was forced to recognize its roots in personality, it would necessarily shift its foundation from property to privacy.”).

for treating unpublished works as property seemed untenable, it did not necessarily follow that personality theory was the only viable alternative, or, even if it was, that such a personality interest could not be protected as "property."<sup>45</sup> Rather than seeking to vindicate some personality interest, common-law copyright protection could just as plausibly have been intended to secure for the author the right of first publication so that she could be certain to capture the economic value of her work. No such certainty would be possible unless the author retained exclusive rights in the unpublished work.

Even the fact that the common law afforded protection to works that the author had no expectation of ever publishing did not render obvious a personality theory of common-law copyright protection. Very often an author does not know when or if she will publish a particular work, and the law might well reserve those decisions to the author at a later time. With respect to writings like diaries, the types of works we might most reliably conclude were never intended to be published, Landes and Posner have suggested that copyright protection still acts instrumentally to induce production of valuable works.<sup>46</sup> According to their theory, the law should encourage production of diaries and private memoirs because they may have value to biographers and historians. Unless an author has confidence that the law will prevent others from publishing the works if the works fall out of her physical control, she might not produce the work at all.<sup>47</sup> Those who produce despite the risk of publication might take inefficient defensive steps to prevent publication.<sup>48</sup>

These alternative justifications for common-law copyright are not necessarily more persuasive than the personality theory. They are, however, possibilities that Warren and Brandeis failed to discount sufficiently. Instead, Warren and Brandeis simply asserted that no instrumental economic theory could support a property claim: "To deprive a man of the potential profits to be realized by publishing a catalogue of his gems cannot *per se* be a wrong to him. The possibility of future profits is not a right of property which the law ordinarily recognizes . . . ."<sup>49</sup> Whether that statement was descriptively accurate at the time Warren and Brandeis wrote, it was normatively empty. The authors offered no reason why the possibility of profits might not be the

---

45. As Post noted, the choice of the mode of protection is not one inherent in "personality" itself. See *id.* at 662-63.

46. See LANDES & POSNER, *supra* note 22, at 131-35.

47. *Id.*

48. *Id.*

49. Warren & Brandeis, *supra* note 12, at 204.

basis of a property claim, and modern experience suggests that claims very often are based on the possibility of future profits. Most jurisdictions, for example, now recognize claims for tortious interference with prospective business relations, which, whether or not they can be characterized as property claims, essentially protect an interest in the possibility of future profits.<sup>50</sup> Likewise, modern copyright law in many ways seeks to protect the possibility of earning future profits, both by securing to the author the exclusive right to make derivative works and by denying a fair use defense to individuals whose uses might have an effect on the market for hypothetical future derivative works made by the author of the original work.<sup>51</sup>

Warren and Brandeis's failure to make a thorough normative case for the privacy claim stems in large part from their struggle to accommodate the formalist tradition of their time. As previously noted, protection for unpublished writings traditionally had been regarded as a property-based protection. At the time Warren and Brandeis were writing, the characterization of the claim as "property" was particularly significant because the remedies available for a claim depended on its classification. For property and contract claims, only pecuniary injuries were compensable.<sup>52</sup> If the claim they proposed really was akin to common-law copyright protection for unpublished works, then unless common-law copyright claims could be reclassified as something other than property claims, the authors' new claim could well have been seen as a property claim for which only pecuniary injuries were compensable. This would have been a disaster, because Warren and Brandeis recognized that most of the individuals who would assert these privacy claims would suffer only emotional, and not economic, harm from violations of their privacy.

Notably, Warren and Brandeis did not intend simply to offer a claim for "hurt feelings." The claim they espoused was aimed at a particular set of harms whose victims were unlikely to suffer damages that could be measured in terms of lost profits or other economic costs. Constrained by existing forms, their only option was a "personal" claim. Thus, more than attempting

50. See RESTATEMENT (SECOND) OF TORTS § 774A (1977) (tortious interference with prospective contractual relations).

51. See 17 U.S.C. § 106(2) (2000); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (noting that, in assessing fair use, courts are to "consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original. The enquiry 'must take account not only of harm to the original but also of harm to the market for derivative works.'") (internal citations omitted).

52. DRONE, *supra* note 35, at 107, 114-15, 486, 535; Post, *supra* note 35, at 665.

to restrict the privacy claim to cases in which the victims suffered emotional damages, Warren and Brandeis simply recognized that many of the prospective plaintiffs in the privacy actions they advocated would not be able to identify economic damages.<sup>53</sup> The claim could not hinge on economic damages then, or it would be worthless to most of the individuals they imagined would suffer the types of injury about which they were concerned. Nevertheless, the belief that privacy claims necessarily were limited to claimants who suffered hurt feelings has haunted the development of identity appropriation claims since those claims were first recognized.

Finally, because Warren and Brandeis's main task was to draw parallels between the expressions of personality protected by existing law and those manifested in the actions for which Warren and Brandeis sought protection the authors' explanation of the way in which publication of private pictures or written descriptions of private facts violated a personality interest left much to be desired. Though the article includes abundant rhetoric about how such publications shocked and dismayed their subjects,<sup>54</sup> it is strikingly superficial in its explanation of why those transgressions are so harmful. That omission was unfortunate, because the claim they proposed seems to have encompassed a variety of different interests. According to Ruth Gavison, the "privacy" Warren and Brandeis sought to protect was comprised of at least "three independent components": "secrecy, anonymity, and solitude."<sup>55</sup> Time has not brought greater clarity: "Privacy" has become one of the broadest concepts in the law, used to denote the interest at stake in such wide-ranging contexts as abortion,<sup>56</sup> improper search and seizure,<sup>57</sup> confidentiality of medical information,<sup>58</sup> and even third-party use of personally identifying information.<sup>59</sup> As this wide array suggests, courts generally have failed to

---

53. See Warren & Brandeis, *supra* note 12, at 219 ("An action of tort for damages in all cases. Even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.") (internal footnote omitted).

54. *Id.* at 196.

55. Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 428 (1980).

56. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

57. *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) ("The long-prevailing standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the community's protection.'").

58. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (setting national standards for privacy re individually identifiable health information); Department of Health and Human Services, Subchapter C, 45 C.F.R. pts. 160 and 164.

59. Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501-06 (2000) (prohibiting collection of certain personal information from children).

define with any greater particularity the harms they sought to prevent under the privacy rubric, and scholars have not approached any consensus as to the meaning of “privacy” as a legal concept.<sup>60</sup>

Despite confusion about the relatedness of the various actions called invasions of privacy, it is relatively easy to identify the interest Warren and Brandeis sought to protect. They were concerned about publication of private facts or private photographs because those uses exposed information about an individual. Individuals are harmed by newspaper accounts of their exploits, regardless of how the information was collected,<sup>61</sup> because such accounts expose aspects of the individual’s personality to the world, allowing others to peer into that person’s soul.<sup>62</sup> In Gavison’s terms, public disclosure of private information destroys “secrecy, anonymity, and solitude.”<sup>63</sup> Publication of

60. Jeremy Waldron uses Wittgenstein’s “family resemblance” concept in describing the nature of “property.” JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 49-50 (Clarendon Press 1988). According to Waldron, the term “property” refers to a number of conceptions of an abstract idea with no necessary components. Thus, various things that might be referred to as property share enough common traits that they can be recognized as having a “family resemblance,” but each also has distinct characteristics. *Id.* The same might be said about notions of “privacy,” except that, if the objects of property may be thought of as siblings, the various conceptions of privacy are only like cousins, sometimes distant ones. See Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1093-1124 (2002) (cataloging unsuccessful attempts to create a workable definition of privacy and evoking the family resemblance concept of privacy).

61. Warren and Brandeis believed that many disclosures were doubly harmful in that the information disclosed often “can only be procured by intrusion upon the domestic circle.” Warren & Brandeis, *supra* note 12, at 196. Because claims based on physical intrusions do not implicate First Amendment concerns as severely as other forms of privacy claims, today it is those intrusions that generally give rise to any privacy claims that celebrities have. See MCCARTHY, *supra* note 2, § 5:100.

62. The interest I describe corresponds loosely to what Post refers to as “descriptive privacy,” one of the two different types of privacy he finds in the Warren and Brandeis article. According to Post, descriptive privacy aims to surround the person with “a buffering space of ‘solitude and privacy’ to insulate emotions and sensations from the world.” Post, *supra* note 35, at 650-51. Privacy is lost “as others obtain information about an individual, pay attention to him, or gain access to him.” *Id.* at 651. Normative privacy, by contrast, refers not to an objective physical space of secrecy, solitude or anonymity, but rather to the forms of respect that we owe each other as members of a common community. *Id.* Post argues that the intrusion and public disclosure branches of the privacy tort identified by Prosser came to depend entirely upon normative rather than descriptive conceptions of privacy because the types of intrusions or disclosures the law would sanction depended on normative judgments of the reasonable person. *Id.* at 653. I do not adopt Post’s formulation because I am not sure that “descriptive” and “normative” privacy can be neatly separated. It may be true that whether the law allows a remedy for certain invasions has come to depend on assessments of reasonableness in that the law asks whether the reasonable person would be offended by a particular use. But that is a question of whether there is a remedy, not whether the claimant suffered harm. Disclosure of private facts does not cause harm because of community norms; the exposure itself is a violation, even if some are willing to tolerate it. Whether a particular disclosure causes a harm for which the law will provide a remedy is a separate question.

63. Gavison, *supra* note 55, at 428.



private photographs causes similar harms; it destroys anonymity, and it might expose aspects of one's personality by capturing some of that person's activities, thereby destroying secrecy and solitude.<sup>64</sup>

By failing to identify how publication of private facts or photographs violated an individual's interests, Warren and Brandeis's article left courts without a normative lodestar against which to measure other alleged invasions, including identity appropriation. Without such guidance, courts were unable to resist the gravitational pull of formalism as they viewed identity appropriation through the privacy lens.

### *B. Privacy and Non-Celebrity Identity Appropriation Claims*

While courts initially were somewhat reluctant to recognize a stand-alone right to privacy,<sup>65</sup> the claim found its greatest early acceptance in the context of commercial use of a private citizen's identity.<sup>66</sup> In *Pavesich v. New England Life Insurance Co.*,<sup>67</sup> for example, the court recognized a general right to prevent uses of one's likeness in connection with commercial advertising.<sup>68</sup> The defendant in that case used Pavesich's picture in an

64. This description of the harm caused by the invasions Warren and Brandeis targeted should not be misunderstood as a blanket endorsement of their claim. Indeed, it is far from clear that exposure of one's personality is, in all circumstances, something the law should prevent. In addition to the obvious value of public knowledge of the true personalities of certain individuals, a value even Warren and Brandeis implicitly acknowledged in creating an exception for public figures, truthful exposure may have positive incentive effects. Specifically, the chance that one's character might be exposed may influence individuals to behave better. Cf. LANDES & POSNER, *supra* note 22, at 141 ("Knowing in advance that copyright protection for [unpublished works] was weak might induce him to behave better, thus raising social welfare. . . . This is one of the reasons for doubting that privacy is always a social good."). Moreover, even if privacy is a social good, to the extent it seeks to preserve "secrecy" of information, it seems incompatible with the First Amendment in at least some of the situations in which it is most likely to be invoked.

65. See, e.g., *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (N.Y. 1902) (rejecting plaintiff's privacy claim based on defendant's use of plaintiff's likeness in lithographic print containing advertisements. The court states that

[a]n examination of the authorities [including those on which Warren and Brandeis relied] leads us to the conclusion that the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided.

*Id.*

66. Ironically, given the ease with which courts and commentators accommodated identity appropriation claims within the privacy rationale, Warren and Brandeis did not mention commercial use of one's identity as one of the harms to which they were responding.

67. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

68. Commentators regularly have identified *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), as the first case to recognize the right of publicity as a distinct cause of action. That is misleading. *Haelan Laboratories, Inc.*, was the first case to recognize a property-based identity

advertisement for insurance services together with a statement suggesting that Pavesich had secured insurance with the company.<sup>69</sup> That use violated Pavesich's privacy because "[t]he form and features of [Pavesich] are his own. . . . Nothing appears from which it is to be inferred that [he] has waived his right to determine for himself where his picture should be displayed in favor of the advertising right of the defendants."<sup>70</sup> The court was concerned that Pavesich's sensibilities would be shocked if he saw "his picture displayed in places where he would never go to be gazed upon, at times when and under circumstances where, if he were personally present, the sensibilities of his nature would be severely shocked."<sup>71</sup>

Echoing Warren and Brandeis, the *Pavesich* court claimed that protection against advertising uses belonged to the same class of rights as protection for literary compositions.<sup>72</sup> The defendant's use of Pavesich's identity violated Pavesich's privacy because it infringed on his right to be let alone, leaving him with "wounded feelings."<sup>73</sup> Specifically, the court thought that the root of the violation was the plaintiff's loss of control over the extent to which he remained a private person, stating that "[o]ne who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze."<sup>74</sup> Like the actions targeted by Warren and Brandeis, commercial use of Pavesich's image caused a harm of exposure. His ability to live in seclusion, or at least his ability to control the degree to which he lived in seclusion, was taken from him. As a private citizen, commercial use of his identity destroyed his anonymity and solitude.<sup>75</sup>

Despite its conclusion that the defendant's advertising use simply was analogous to other violations of privacy, the court's discussion reflects its recognition of a unique harm to Pavesich. In addition to the harm of exposure, commercial use of Pavesich's identity associated Pavesich with the defendant

appropriation cause of action explicitly for celebrities, who found themselves without a remedy for the same types of uses of their identities for which private citizens could assert privacy claims. It was not, however, the first case to recognize a claim based on unauthorized commercial use of identity. As the *Pavesich* case demonstrates, cases recognizing claims by private citizens against such uses were decided much earlier.

69. *Pavesich*, 50 S.E. at 79.

70. *Id.*

71. *Id.* at 80.

72. *Id.* at 79-80.

73. *Id.* at 76.

74. *Id.* at 70. The plaintiff in *Pavesich* was an artist but "in no sense a public character." *Id.* at 79.

The court anticipated that a different, less absolute right might be thought appropriate in the case of public characters, but even then was disinclined to deny protection on that basis.

75. Gavison, *supra* note 55, at 428.

and the defendant's services, likely in ways that Pavesich would not have wanted. The court focused on the fact that the defendant's use of Pavesich's identity would be "displayed in places where [Pavesich] would never go to be gazed upon."<sup>76</sup> The use

contain[ed] a likeness of [Pavesich] that his friends and acquaintances would readily recognize as his, and the words of the publication printed under the likeness were put into the mouth of him whose likeness was published. It was, so far as his friends and acquaintances were concerned, the same as if his name had been signed to the printed words.<sup>77</sup>

Thus, the court recognized that the harm caused by commercial uses of identity overlaps with, but is distinct from, the harm caused by traditional invasions of privacy. Identity appropriation, unlike publication of photographs, can create associations between an individual and the commercial user of her identity that might impact the way the individual is perceived. That harm is very similar to the reputational harms that traditionally have given rise to defamation and libel claims,<sup>78</sup> but it was dramatically underappreciated by later courts and commentators, virtually all of which focused exclusively on the "hurt feelings" caused by the loss of "secrecy, anonymity, and solitude."<sup>79</sup>

### C. Privacy's Inadequacy for Celebrity Identity Appropriation Claims

Despite the fact that Warren and Brandeis never intended to restrict privacy claims to those who suffered only "hurt feelings," as opposed to economic harm, courts came to accept as a matter of black letter law that hurt

---

76. *Pavesich*, 50 S.E. at 80.

77. *Id.* at 81.

78. The Court in *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902), while rejecting a right of privacy claim against use of an individual's picture in advertisements, allowed for the possibility that such uses might support a libel claim. "The law protects the person and the purse. The person includes the reputation. The body, reputation, and property of the citizen are not to be invaded without responsibility in damages to the sufferer." *Id.* at 446. The defendant's use in *Roberson* did not qualify as libelous, and advertising uses infrequently will. First, advertising uses generally contain only implicit suggestions about the individual rather than explicit statements. Thus, it may be difficult to describe them as "false," as they must be to trigger defamation liability. RESTATEMENT (SECOND) OF TORTS §§ 558 (elements of defamation) and 581A (discussing falsity requirement and when statements are deemed false). Second, advertising uses may or may not "tend to harm the reputation of [the one whose identity is used] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* § 559.

79. Gavison, *supra* note 55, at 428.

feelings of a very particular kind were a critical element of privacy claims, including those claims based on commercial use of a private individual's identity. Under that view of privacy, courts were unable to offer remedies to celebrities when they began bringing claims for commercial uses of their identities, as their feelings generally were not hurt by the exposure.<sup>80</sup>

In *O'Brien v. Pabst Sales Co.*,<sup>81</sup> the court rejected Davey O'Brien's privacy claim, which was based on the defendant beer producer's use of O'Brien's photograph on a promotional calendar.<sup>82</sup> Because the court believed that a privacy claim was a personal one for which "hurt feelings" were a necessary element, it did not believe that O'Brien's privacy was violated.<sup>83</sup> O'Brien was a well-known college football player who had actively sought media attention for his football ability through his college's publicity office.<sup>84</sup> As a result, the court believed that he was accustomed to publicity and could not have suffered hurt feelings as a result of the beer company's use of his photograph.<sup>85</sup> Notably, the court believed that "hurt feelings" was an all-or-nothing proposition. It did not consider the possibility that O'Brien's feelings might have been hurt by the defendant's particular use of his identity rather than the fact of additional publicity generally.<sup>86</sup>

Unfortunately, rather than rejecting the simplistic approach of cases like *O'Brien* and identifying more precisely the harm caused by identity appropriation, courts and commentators viewed those cases as examples of why the right of privacy was ill-fitting for claims by famous people accustomed to receiving attention.<sup>87</sup> Commentators generally have continued

80. See, e.g., *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 489 (N.Y. 1952) (rejecting a privacy claim made by a football player against a league that televised his games because, as a celebrity, he did not generally seek solitude and privacy; indeed, the concurrence noted, it was the one thing celebrities do "not want, or need").

81. *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941).

82. *Id.* at 170.

83. *Id.*

84. *Id.* at 169.

85. *Id.* at 170.

86. It was not the only court with such a narrow view of the potential harm of exposure. See *Paramount Pictures, Inc. v. Leader Press, Inc.*, 24 F. Supp. 1004, 1007 (W.D. Okla. 1938), *rev'd on other grounds*, 106 F.2d 229 (10th Cir. 1939) (holding that movie stars employed by plaintiff had waived their right to privacy); *Martin v. F.I.Y. Theatre Co.*, 10 Ohio Op. 338 (1938) (holding that plaintiff, an actress, had surrendered her right of privacy). In other cases, courts have avoided making broad statements about waivers of privacy and have limited a waiver to, for example, greater distribution of a performance to which there was originally consent. See *Chavez v. Hollywood American Legion Post No. 43*, 16 U.S.L.W. 2362 (U.S. Feb. 3, 1948) (holding that boxer who participated in public boxing match waived his right of privacy as to that fight), *cited in Nimmer, supra* note 15, at 206.

87. See *Nimmer, supra* note 15, at 204-05.

to accept this view of privacy. As one stated more recently, “[t]here is sharp internal contradiction in the position of a plaintiff who alienates and objectifies her image and simultaneously claims that it is integral to her very identity in the manner presupposed by the tort of appropriation.”<sup>88</sup>

The status of identity appropriation claims as personal claims constrained courts’ ability to use privacy doctrine to redress commercial uses of celebrities’ identities in other contexts as well. In *Haelan Laboratories, Inc. v. Topps Chewing Gum Inc.*, a baseball card producer brought a claim against Topps, a competitor that was making cards depicting the same players that Haelan depicted on its cards.<sup>89</sup> The players had granted Haelan the exclusive right to use their images, but then violated the agreement by allowing Topps also to use their images on cards.<sup>90</sup> Haelan wanted to prevent Topps from using the players’ images, but privacy offered no recourse. The right to privacy was a personal right incapable of assignment, and the players’ agreement with Haelan therefore amounted to nothing more than a waiver of their rights of privacy as against Haelan.<sup>91</sup> Haelan had no interest in the identities themselves. As a result, without a new property-based right, Haelan would not have been able to enforce against Topps the rights it believed it had acquired from the players.<sup>92</sup> The court’s recognition of the right of publicity as an independent property-based claim in that case can be explained at least in part as a matter of perceived necessity, driven by unnecessary formal restraints.<sup>93</sup>

Once the new claim was unmoored from its privacy roots, courts and commentators were forced to search for an independent normative premise for the new right of publicity. As I have noted, many of the courts that have recognized an independent right of publicity have done so with little or no discussion of the claim’s theoretical premise, often simply asserting that the claim is a property claim or making bare unjust enrichment claims. To the

---

88. Post, *supra* note 35, at 677.

89. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868-69 (2d Cir. 1953).

90. *Id.* at 867.

91. *Id.* at 869.

92. *Id.* One might legitimately question whether such a result could have been avoided merely by declaring the exclusivity clause enforceable, notwithstanding the personal nature of the privacy claim. Of course, that might not have been an entirely satisfactory result; even if the clause was enforceable as a matter of contract law, it might not have enabled the card company to secure an injunction against its rival.

93. Here is an example of why some legal realists have referred to formalist arguments disparagingly. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (referring to formalism as “transcendental nonsense”); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 443 (1930) (charging that formalist reasoning “is in terms of words; it centers on words; it has the utmost difficulty getting beyond words”).

extent they have attempted to justify the claim, courts overwhelmingly have relied on a labor or incentive-based theory of property rights endorsed by the majority of commentators. More recently, other commentators have offered alternative justifications of the right of publicity, including ones based on Kantian property theory<sup>94</sup> and allocative efficiency.<sup>95</sup> The next section briefly outlines the various arguments made in support of the right of publicity and exposes each of those arguments as unable to explain current law and, ultimately, as normatively inadequate.

## II. BUILDING AN “INDEPENDENT” CLAIM: NORMATIVE & QUASI-NORMATIVE APPROACHES

### A. *The Property Shortcut*

Cases like *Haelan Laboratories, Inc.* reflect courts’ struggles to find a vehicle through which to provide a remedy to celebrities for commercial uses of their identities. Since they were unable to rely on privacy rationales, courts embraced a property theory, believing that was the only alternative to the personal privacy claims they rejected.<sup>96</sup> Unfortunately, calling the new claim “property” has not led to clarity. To say that, due to formalist constraints, celebrity identity must be protected as a property right if it is to be protected at all only begs the question: Should a celebrity have a right to prevent uses of her identity? As Wendy Gordon stated in a somewhat different context, “[i]t may be clear that others have a prima facie duty not to take what is yours for their own benefit, but it is still necessary to decide what is yours and what is theirs.”<sup>97</sup> That threshold question is not resolved simply by calling identity “property”; the label merely represents a legal conclusion as to the nature of the rights that should be afforded to certain interests (e.g., the right to use, to exclude, and to transfer). There is nothing inherent in the notion of property that logically requires that all of the constitutive rights in the bundle be

94. See Haemmerli, *supra* note 18.

95. See LANDES & POSNER, *supra* note 22; Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97 (1994).

96. See MCCARTHY, *supra* note 2, § 10:7 (citing cases from California, Georgia, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, Washington, and Wisconsin). In that regard, the right of publicity has come full circle, as it has “generally assumed the very characteristics of common law copyright from which Warren and Brandeis sought to differentiate the personal right of privacy.” Post, *supra* note 35, at 667.

97. Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1546 (1993).

marshaled in favor of identity, and the law could easily provide only some, and even entirely different, protections.<sup>98</sup>

In this respect, Prosser is correct when he says that “[i]t seems quite pointless to dispute over whether such a right is to be classified as ‘property.’ If it is not, it is at least, once it is protected by the law, a right of value upon which the plaintiff can capitalize by selling licenses.”<sup>99</sup> Identity appropriation claims were categorized as property claims only as a consequence of historical formal constraints, and Prosser correctly notes the “property” label itself is not a justification for protection, nor does it say anything about the scope of the right. But refusing to engage those who claim that identity is property cedes too much ground. The property label has proven quite powerful, so much so that courts, and even some commentators, have short-circuited analysis of the appropriateness and/or scope of protection and offered no more of a justification for the claim than that identity is “property.”<sup>100</sup>

---

98. I realize that this statement implicitly accepts the modern, disaggregated view of property that has been the subject of some recent criticism. Adam Mossoff, for example, argues for an “integrated” theory that regards certain rights attendant to property not as arbitrary but essential to a coherent notion of property. See Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003). The integrated theory, however, derives from natural rights theories of property. Where, as here, natural law cannot justify exclusive appropriation of the object to which rights are claimed, property rights of any form are inappropriate. See *infra* Section II.C. Thus, my view of the nature of property is largely immaterial to this discussion.

99. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 406 (1960) (footnote omitted).

100. In his treatise, McCarthy collects a number of cases and statutes classifying the right of publicity as a property right. See MCCARTHY, *supra* note 2, § 10:7. But, as he makes clear in an earlier passage, the thinking about the right of publicity remains shrouded in uncertainty and designed to achieve particular results.

The right of publicity is properly seen as a species within the genus of “unfair competition” law. The right of publicity is also correctly viewed as a form of “property”—and more particularly, as a form of “intellectual property.” In addition, infringement of the property right of the right of publicity is a commercial “tort.” To complete the closure of the semantic circle, it is that commercial tort which is named “unfair competition.” Thus, the right of publicity shares aspects of both the law of property and the law of torts. It all depends upon one’s point of view. If one looks at it from the point of view of plaintiff’s right, the right of publicity is clearly “property” capable of being licensed and of being “trespassed” upon. If one looks at it from the point of view of the defendant’s “wrong,” invasion or infringement of the right of publicity is clearly a “tort of” unfair competition.

See *id.* § 3:1. In other words, we call the right property only because we want to allow transfer, and “property” is the right label to achieve that result.

The property label has also played an important rhetorical role.<sup>101</sup> Calling identity “property” has allowed courts to dodge not only the question of whether identity deserves protection at all, but also difficult issues regarding the proper scope of identity appropriation claims, as they apparently believed that the label was dispositive of the scope of protection identity should be afforded.<sup>102</sup> Even Professor McCarthy, despite quoting Justice Cardozo’s warning to beware of the “tyranny of labels” and cautioning that the “property” label not be used as a substitute for thought,<sup>103</sup> falls prey to the very formalism that has made the law incomprehensible: “[t]he fact that the law bestows upon the right of publicity the label ‘property’ has *obvious implications* as to its ability to be transferred and sued upon by the transferee.”<sup>104</sup>

It might be true that identity is sufficiently similar to other objects the law regards as property and therefore deserves at least some of the sticks in the traditional bundle of property rights. But far too few courts and commentators have offered a theory as to why any of the traditional property justifications lead to that conclusion. Such approaches are reflective of the general imprecision that has plagued the right of publicity.

### B. Unjust Enrichment

Since remedies for property claims historically focused on redressing economic harm and not emotional harm, some commentators have suggested that the basis for property-based protection is to prevent unjust enrichment. According to supporters of this theory, the focus is not as much on the

101. Supporters of broad rights of publicity are no different from other intellectual property claimants in relying on the rhetorical power of “property.” In fact, as a historical matter, the property label’s connotation of legitimacy played a large part in the transformation of the public debate regarding intellectual property. See Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, in COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 46 (Adam Thierer & Wayne Crews eds., 2002) (quoting Fritz Machlup & Edith Penrose, *The Patent Controversy in the Nineteenth Century*, J. ECON. HIST. 10, No. 1, 16 (May 1950) (“[T]hose who started using the word property in connection with inventions had a very definite purpose in mind: they wanted to substitute a word with a respectable connotation, ‘property,’ for a word that had an unpleasant ring, ‘privilege.’”)).

102. See, e.g., *Herman Miller, Inc. v. Palazzetti Imports and Exports, Inc.*, 270 F.3d 298, 325 (6th Cir. 2001) (“We believe that the weight of authority indicates that the right of publicity is more properly analyzed as a property right and, therefore, is descendible.”); *Estate of Elvis Presley v. Russen*, 513 F. Supp 1339, 1361 (D.N.J. 1981) (holding the estate had an economic interest in future ability to generate income from property rights associated with deceased singer).

103. MCCARTHY, *supra* note 2, § 10:8 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934)).

104. *Id.* (emphasis added).



plaintiff as on the defendant's "free riding." This approach adds little to mere assertions that identity is property. Unjust enrichment is an empty concept; it assumes an entitlement on behalf of the plaintiff to prove such an entitlement should exist. A defendant is only "free riding" (and his enrichment therefore "unjust") if one assumes that the value of identity belongs to the plaintiff in the first instance. The assumption of initial ownership must itself be supported by some theory.<sup>105</sup>

Thus, statements like "[n]o social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay,"<sup>106</sup> offer little guidance other than to reflect an implicit assumption about entitlement to the value.<sup>107</sup> Whether some object will have market value for which someone else would normally pay depends entirely on whether the law protects the object. Absent legal protection for identity, an advertiser normally would not pay to use it. Thus, we cannot conclude that there is no social purpose in allowing a defendant to make use of an identity freely without determining why we should allocate all of the value of that identity to the individual.<sup>108</sup> If no compelling theory calls for such an initial allocation, then protecting identity would only allow celebrities to earn an undeserved profit by charging others to use their identity.

Precisely for this reason, intellectual property disciplines generally recognize a strong default rule in favor of copying,<sup>109</sup> making it incumbent on

---

105. Cf. Dreyfuss, *supra* note 17, at 124 ("To my mind, courts are too quick to equate value with right; to leap from recognizing that consumers attach value to trademarks to concluding that trademark holders ought to have the right to capture that value for themselves.")

106. Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966), quoted in *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

107. Cf. *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512, 1517 (9th Cir. 1993) (Kozinski, J., dissenting) ("Saying Samsung 'appropriated' something of White's begs the question: *Should* White have the exclusive right to something as broad and amorphous as her 'identity?'"

108. Cf. Dreyfuss, *supra* note 17, at 144 ("But there is an element of circularity in relying on commercial morality as the basis for creating exclusivity. After all, where there is a right to copy, so-called piracy is not immoral. It is only *after* it is determined that the norm is exclusivity that copying will appear to be wrongful.")

109. See *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (2001) ("In general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying."); *Epic Metals Corp. v. Souliere*, 99 F.3d 1034, 1042 n.20 (11th Cir. 1996) ("However, public policy favors competition by all fair means, and that encompasses the right to copy, very broadly interpreted, except where copying is lawfully prevented by a copyright or patent. . . .") (citing *In re Deister Concentrator Co.*, 289 F.2d 496, 503-06 (C.C.P.A. 1961)); see also *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964).

What Sears did was to copy Stiffel's design and to sell lamps almost identical to those sold by Stiffel. This it had every right to do under the federal patent laws. That Stiffel originated the pole

the one who would claim property rights to justify exclusivity.<sup>110</sup> Supporters of the “value” and “unjust enrichment” theories offer no such justification but instead turn the default rule on its head and seek to shift the burden to the user of an individual’s identity to demonstrate why its use should be allowed. Sheldon Halpern, for example, argues that questions about whether a celebrity deserves to capture all of the economic value of her identity, and even discussion of whether there is any public benefit from commercial exploitation of celebrity, are entirely irrelevant.<sup>111</sup> The law, Halpern argues, should focus only on the fact that the identity has value and should prevent “scavengers” from using it: “The question is not whether the celebrity ‘deserves’ the benefits of celebrity. The real question to ask one who connects the persona of another with a commercial undertaking is ‘why are you doing it?’”<sup>112</sup> But Halpern’s only explanation for why the third-party users are “scavengers” less entitled to use the identity is that, as between two undeserving parties, the celebrity is the only one with a “colorable connection” to the identity.<sup>113</sup>

lamp and made it popular is immaterial. Sharing in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested.

*Sears, Roebuck & Co.*, 376 U.S. at 231 (internal citations omitted).

110. Dreyfuss, *supra* note 17, at 142-43 (“The more fundamental problem, however, is that there is no normative principle that equates value and private right. To the contrary, black letter law is that everyone is free to copy . . . [D]epartures [from the general rule] occur for instrumental reasons.”). Dreyfuss is correct that the general rule is that everyone has a right to copy and that, in other areas of intellectual property, departures from that general rule can be explained as necessary instrumental measures designed to enhance social welfare. That is not to say that departures from the general rule could not be justified on other grounds, for example, a “just desert” moral argument, only that departures must be justified on *some* ground. To date, no such ground has been adequately presented for celebrity identity appropriation claims.

111. Halpern, *supra* note 19, at 872.

112. *Id.*

113. *Id.* Actually, Halpern offers this argument as a fallback position. His first argument is that, in the context of the right of publicity, the contest is not between two equally deserving parties since the would-be user simply intends to profit from its use.

In short, whether or not there is some moral or public benefit from commercial exploitation of celebrity, we are not asked to choose between the rights of the public at large and a fortuitously placed individual; the choice is between the individual to whom that associative value attaches and a stranger to the process who would make money out of it.

*Id.* The contention that the latter is somehow less deserving simply because it would use the identity to make money is not compelling. After all, given the conventional justification for the right of publicity as protecting the celebrity’s commercial interests, it seems clear that the parties are often simply fighting over which one of them should exploit the identity commercially. See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (“For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.”). Halpern’s argument that the law should allocate the value to the one with some connection to the identity

Widespread recognition of the rule for which Halpern argues would undo a number of basic intellectual property rules including, for example, the rule that laws of nature and abstract ideas cannot be patented.<sup>114</sup> If the law assigned value to the one with a “colorable connection” to it, Einstein would have been able to patent the theory of relativity, which undoubtedly would have had commercial value if it was patented.<sup>115</sup> Indeed, in analyzing the theory’s patentability, the only relevant question for Halpern would have been why the commercial user wanted to use the formula. The answer, of course, would be that the formula is valuable and useful. Fortunately for inventors throughout the world, patent law rejects that simplistic approach.<sup>116</sup> “Value” is not allocated simply to one with a colorable connection to it; it is allocated according to a more robust theory of allocation.

### C. Labor’s Indeterminacy

Those who have attempted to articulate a more thorough normative basis for allocating the value of identity predominantly have focused on an individual’s expenditure of labor in relation to her identity.<sup>117</sup> Labor argues for ownership of identity on two related theories, both of which harken back to the central Lockean premise that an individual’s labor gives rise to her claim of exclusive property rights,<sup>118</sup> and advocates of a labor theory tend to alternate imprecisely between them. On one account, ownership of identity

---

is intended to carry the day even if he concedes that neither is “deserving” of the value in a strong sense. He argues that, “[e]ven if, at its lowest level, the choice is that between two sets of scavengers trading on the ephemera of fame, logic and fairness would seem to compel favoring the scavenger who has at least some colorable connection to the phenomenon.” Halpern, *supra* note 19, at 872 (internal citations omitted).

114. See *Diamond v. Chakrabarty*, 447 U.S. 303 (1980) (holding that laws of nature, physical phenomena, and abstract ideas are not patentable).

115. In truth, the theory of relativity, just like celebrity identity, has significant value regardless of whether one party has exclusive rights to it. That value is simply shared by all the users rather than concentrated in one owner. I set aside, for the moment, the argument that the total value is diminished or destroyed (or at least not maximized) in the long run absent some form of property rights. See *infra* Section II.D.

116. Copyright law does as well. See *Feist Publ’n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (rejecting the “sweet of the brow” doctrine and denying copyright protection to unoriginal compilations of facts); see also Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 280 (2004) (“Databases lacking this originality remain economically valuable, but as a result of *Feist*, they probably cannot be granted protection pursuant to the copyright power.”).

117. Nimmer, one of the most influential commentators in the right of publicity’s infancy, espoused a labor theory in support of an independent claim. See Nimmer, *supra* note 15, at 216.

118. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 27, at 288 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

is based on an individual's moral claim to "the fruits of his own industry free from unjustified interference."<sup>119</sup> Supporters of this version conceive of the celebrity's identity (or at least its value) as a product of the celebrity's labor, which is the moral source of the celebrity's claim. One commentator described this policy consideration as "the very *raison d'être* for the existence of the right of publicity as distinct from the right of privacy."<sup>120</sup>

The other account is instrumentalist. It suggests that one is justified in claiming property rights in the fruits of her labor not solely (or maybe not at all) because she has some moral claim, but rather because recognizing the right to exclude others encourages individuals to expend labor productively and ultimately enhances social welfare.<sup>121</sup> This instrumental theory of protection traditionally is articulated as a basis for patent and copyright protection, and the Supreme Court seemingly endorsed it in the context of the right of publicity in its only decision involving the claim; *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>122</sup>

It is important, however, that labor fit into some larger justification of property rights because labor is not self-evidently significant. Indeed, as former-Professor and now Supreme Court Justice Breyer argued in his well-known article *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, few individuals in a capitalist society capture the entire economic value of their labor.<sup>123</sup> That is not necessarily immoral because the difference can be passed along to consumers

119. Steven J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y 111, 116 (1980) (quoting *Palmer v. Schonhorn Enter., Inc.*, 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967)).

120. *Id.*

121. Tom Palmer suggests that natural rights arguments and utilitarian arguments in favor of property rights are not entirely distinct because, while utilitarian arguments are explicitly consequentialist, natural rights theories tend to contain "buried assumptions" regarding human flourishing or attainment of man's natural end that, depending on one's definition of human flourishing, tend to mirror utilitarian goals. Palmer, *supra* note 101, at 80 n.5. That may be true, but there are unique objections to each version in the context of identity.

122. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977). That case offers little guidance as to the appropriate scope of the right of publicity. First, the Court failed to appreciate the difference between the value of Zacchini's performance and the value of his identity apart from the performance. To the extent the Court was concerned with protecting Zacchini's creative investment in his performance, the case could have and should have been resolved on copyright grounds. Second, the Court distorted its own precedent on the question of commercial use. By relying on the fact that the defendant showed Zacchini's entire performance, the Court inverted the commercial use test by focusing on the economic interests of the plaintiff rather than the nature of the defendant's use. Finally, the Court's belief that the defendant's use of the entire performance in a newscast would adversely affect the market for that performance seems as empirically questionable, if unlikely to recur.

123. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 285-86 (1970).

in the form of lower prices.<sup>124</sup> Even in the case of commercial use of identity, allowing third parties to use celebrity identities in advertising without having to compensate the celebrity might reduce the costs of advertising and lead to lower prices for consumers. Thus, labor is significant only if identity ownership is compatible with a moral or instrumental theory.

Ultimately, however, both versions of the labor theory overstate an individual's role in the creation of any economic value in her public persona. Each version is also subject to particular objections. First, Lockean labor theory, construed non-consequentially, does not support a moral claim to ownership of intangible property. Second, the instrumental labor theory is inadequate because the existence of property rights in identity creates little or no marginal incentive to do anything. Finally, neither version of the labor theory fits tightly with the doctrine that has developed.

### *1. Labor Theories Overstate the Individual's Role in Value Creation*

Both accounts of labor's relevance to a right to prevent unauthorized use of identity claims assume that individuals create the value of their identity and therefore attribute to the individual all of the value of a particular persona. That assumption is, at best, a gross oversimplification.

Fame is complex and paradoxical, a phenomenon for which labor is neither a necessary nor sufficient condition. In some instances, an individual with a public persona has indeed worked to create that persona, making professional and lifestyle choices aimed at developing a particular look or image. But that is certainly not true of every celebrity. For every Tiger Woods, who not only has worked hard at perfecting his golf game but also at cultivating a marketable public image, there is a Kato Kaelin, whose celebrity has more to do with the particular time and circumstances in which he has found himself than with any intentional act on his part.<sup>125</sup> Many others become famous simply because of their position in the world,<sup>126</sup> either by accident of birth or through other familial relations.<sup>127</sup> Moreover, even for

124. *Id.* at 286. For that reason, I do not accept the suggestion that individuals have some moral claim to property rights in intangible property simply because they create social value. See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 305 (1988) (articulating a "value-added" labor theory of desert).

125. Langvardt uses Kato Kaelin, O.J. Simpson's former houseguest, as a prime example of the accidental celebrity. Langvardt, *supra* note 21, at 445.

126. Members of the British Royal Family, particularly Princess Diana's two sons, William and Harry, come to mind as prototypical examples of those famous by accident of birth.

127. I have in mind here previously private individuals who marry celebrities or those who become

those who do expend time and resources on developing a persona, the truly unique image is rare.<sup>128</sup> Virtually every celebrity owes at least part of her persona to people and cultural images that have gone before her, elements of which she relies on to build public recognition and appreciation.<sup>129</sup> Thus, even for those celebrities who consciously attempt to create an image, persona bears the marks of incremental creation.<sup>130</sup>

More specifically, even if individuals have some responsibility for creating their personas, they are much less directly responsible for creating the value of those personas. While a celebrity may have some control over the particular image she projects, the value of her persona depends on a complex array of social dynamics involving elements of the celebrity's own work and the public's reaction.<sup>131</sup> For this reason, many well-known athletes and actors have been unable to parlay their success in their native fields into valuable

celebrities.

128. See *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc) ("Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture."); Gordon, *supra* note 97, at 1556-57.

129. Dreyfuss's Madonna reference may have been drawn from Rosemary Coombe, who discusses Madonna and also notes Prince's debt to Jimi Hendrix and Elvis Costello's to Buddy Holly. Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 371 (1992).

130. See LANDES & POSNER, *supra* note 22, at 4 (arguing that labor theory is inadequate as a general theory of property in intangibles because all intellectual products are the result of incremental creation).

131. Dreyfuss, *supra* note 17, at 142 (arguing that purveyors and audience are co-creators of personas). Some courts have recognized this dynamic, as has the Restatement. See, e.g., *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979) ("The so-called right of publicity means in essence that *the reaction of the public to name and likeness* . . . endows the name and likeness of the person involved with commercially exploitable opportunities.") (emphasis added). The drafters of the Restatement recognized that celebrities do not deserve all of the credit for the value of their identities.

The rationales underlying recognition of a right of publicity are generally less compelling than those that justify rights in trademarks or trade secrets. The commercial value of a person's identity often results from success in endeavors such as entertainment or sports that offer their own substantial rewards. Any additional incentive attributable to the right of publicity may have only marginal significance. In other cases the commercial value acquired by a person's identity is largely fortuitous or otherwise unrelated to any investment made by the individual, thus diminishing the weight of the property and unjust enrichment rationales for protection. In addition, the public interest in avoiding false suggestions of endorsement or sponsorship can be pursued through the cause of action for deceptive marketing. Thus, courts may be properly reluctant to adopt a broad construction of the publicity right.

RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 46 cmt. c (1995). The recognition has mostly been lip service, however, as, with the exception of a few recent cases implicating the First Amendment, it has generally not dissuaded courts from awarding all of the value to the celebrity.

commercial endorsements.<sup>132</sup> Unlike physical objects, which have utility apart from what others will pay for them, the value of identity is almost entirely contextual. That is, the value of a particular identity consists of “market value” as opposed to “use value.” That distinction is important because, even if one accepts Locke’s controversial assumption that labor makes up a large portion of use value,<sup>133</sup> market value is determined externally and has little relationship to the amount of labor an individual has expended. Even for those celebrities closest to the Tiger Woods end of the spectrum, a significant portion of the market value of their identities is attributable to factors other than their labor. Indeed, in determining the constituent parts of an identity’s value, the particular combination of the celebrity’s labor, on the one hand, and the public reaction, on the other, is likely impossible to measure. Nevertheless, the law allocates to her the entire value of her persona. Perhaps there is a good reason for such an allocation (maybe it is needed to induce effort, even if it is no guarantee of success), but the reason cannot be simply that the celebrity expended some labor.<sup>134</sup>

## 2. Lockean Property Theory Offers No Support for a Moral Claim Against Identity Appropriation

The need for an institution of private property, for Locke, derives from humans’ need for sustenance and self-preservation. “[H]uman sustenance,” as Jeremy Waldron says, “is the *raison d’être* of property.”<sup>135</sup> It was for our preservation, according to Locke, that God created the abundance of the Earth and made it susceptible to satisfying human needs. The Earth’s plenty, of course, cannot serve its purpose if individuals cannot make use of it, and the nature of physical resources precludes simultaneous use by multiple people. Thus, for humans to make productive use of the physical materials God

---

132. Madow quotes Jack Nicholson’s line: “Only that audience out there makes a star. It’s up to them. You can’t do anything about it . . . Stars would all be Louis B. Mayer’s cousins if you could make ‘em up.” Madow, *supra* note 11, at 178.

133. LOCKE, *supra* note 118, § 40, at 296, § 43, at 298.

134. 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, 162-63 (2001) [hereinafter *Preserving Personality*]. Kwall notes that, even “when a celebrity borrows from the cultural fabric in creating her persona [which, in my view, is virtually always], it is still the unique combination of the past and the celebrity’s original contributions that give the persona its present appeal.” *Id.* Encouragement of that unique contribution could be a rational basis for protection, if protection of identity was necessary to induce creation. But, for the reasons discussed below, I do not believe protection is necessary.

135. WALDRON, *supra* note 60, at 216.

provided, individuals must appropriate the materials exclusively.<sup>136</sup> A system of private property was necessary in order to determine how to allocate rivalrous objects in the face of conflicting claims.<sup>137</sup> Labor, according to Locke, was the solution; it was the morally significant act that made exclusive ownership acceptable and made clear who should prevail in the case of conflicting claims.<sup>138</sup>

According to Locke's well-known explanation of the justification of private property:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other Men. For this Labour being the unquestionable property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.<sup>139</sup>

---

136. LOCKE, *supra* note 118, § 26, at 286-87, § 28, at 288-89; WALDRON, *supra* note 60, at 168. Actually, Locke is somewhat mysterious about why appropriation must necessarily be *exclusive*. With respect to certain objects, like food and clothing, the need for exclusivity is obvious. But for other resources, like land, exclusivity is less obviously necessary. Clearly no two people may physically occupy or farm the same piece of land at the same time, but that does not necessarily mean that many shepherds could not keep their sheep on the same twenty acres or that some number of people may not occupy the same house. Indeed, all of the examples Locke uses to show that appropriation and cultivation increase value and human flourishing contrast cultivated and uncultivated land. None of those examples compare exclusively and collectively cultivated resources. One must engraft onto Locke's theory something analogous to the "tragedy of the commons" concept in order to complete the case for exclusive appropriation of objects like land or shelter.

137. Since, according to Locke, God initially gave the Earth's plenty to man in common, however one conceives of that state, the claim of the individual who seeks to appropriate an object conflicts with those of other would-be appropriators.

138. A common problem for all natural law property theories was the difficulty in justifying exclusive appropriation of objects in a way that bound third parties even though the claim was based on unilateral action. Pufendorf, like Grotius, claimed that such a binding effect was the result of implicit consent of those in civil society. STEPHEN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY* 92-94 (1991). Locke rejected the idea of consent and argued that it was labor that allowed an individual to claim as her own objects those that another might want or need, thereby avoiding violating the foundational principle that one is under a natural obligation not to harm others' ability to preserve themselves. See RUTH W. GRANT, *JOHN LOCKE'S LIBERALISM* 67-71, 91 (1987) (explaining Locke's theory of natural rights as including the right to self-preservation and the duty to respect the rights of one's equals); JAMES TULLY, *A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES* 47 (1980); Hughes, "Recoding," *supra* note 23, at 968.

139. LOCKE, *supra* note 118, § 27, at 287-88 (emphasis omitted). Note that Locke's conception of the "person" is not strictly corporeal. Rather, a person is more broadly defined according to a continuing



It is labor, which we own and mix with those resources given to man in common for his sustenance and flourishing, that allows us to remove an object from the common into our private ownership. Clearly then, the moral foundation of Locke's theory of private property depends on scarcity and rivalrousness; absent scarcity, there is no allocation problem to solve,<sup>140</sup> and no system of property is necessary.<sup>141</sup> As Waldron put it:

Scarcity, as philosophers from Hume to Rawls have pointed out, is a presupposition of all sensible talk about property. If this assumption were ever to fail (as Marx believed it some day would) then the traditional problem of the nature and justification of rival types of property systems would probably disappear.<sup>142</sup>

Since identity is nonrivalrous and therefore not scarce, it need not be appropriated exclusively, and Lockean property theory offers little moral support for property rights in identity.<sup>143</sup>

---

consciousness of past and present actions that make up "who you are." "Personality," as Waldron says, "is constituted by the creative activity of a free and conscious agent." WALDRON, *supra* note 60, at 179. As a result, Locke's premise that every person has a property in himself is more than a bare first principle—it is a logical imperative. Our bodies are not self-evidently our own; they could be owned by the king or someone who could force our actions. But personality is inseparable from ourselves and cannot be practically taken from us. Palmer, *supra* note 101, at 72-73. So defining our "person" makes Locke's second step, that we own our labor, less obvious. If we own our bodies, then we more clearly own what we do with them. If our bodies and our person are distinct, however, our labor arguably is more closely related to our bodies than our person, as defined by Locke. Thus, we are compelled to conclude, if we are to believe Locke, that our natural capacity to control the actions of our bodies (which is effectively inalienable) means that we naturally own our bodies as well as our person.

140. For the scarcity condition to be met, the resources must be rivalrous. Nonrivalrous resources can be used by many without depletion, and thus, even if there are few of those resources, no allocation is necessary.

141. This is not to say that there might not be other reasons why private property, as a social institution, would be justified, only that Locke's theory, upon which contemporary labor arguments are (at least loosely) based, depends on those conditions.

142. WALDRON, *supra* note 60, at 31-32.

143. Even if the individual's labor gives her a moral right against noncreative copyists whose sole motivation is commercial, that moral right is subject to Locke's "enough, and as good" proviso. LOCKE, *supra* note 118, § 27, at 287-88, § 33, at 291; Gordon, *supra* note 97, at 1562. That qualification may call for a greater right to copy than the law currently recognizes. In order to contribute to culture, one needs to use the tools of that culture. Thus, even if identities are newly created and never before existed, private control might not leave "enough and as good" for others. Gordon's application of the "enough and as good" qualification to other forms of intellectual property leads her to the conclusion that the law should allow copying whenever granting exclusive rights to the creator would put subsequent creators in a worse position than they would have been if the original creator had never made her contribution. Gordon, *supra* note 97, at 1570.

Despite the seeming inapplicability of Lockean property theory, some have argued that the argument for property rights in intangible goods is even stronger than that for physical goods. Supporters of that position make two points. First, Locke's theory was intended to justify individuals taking resources *out* of the common and appropriating them for private use. Ownership of intangibles, on the other hand, does not require such a justification because the creator is not physically *removing* something from the common stock and thereby making others worse off. Instead, the creator arguably is *adding to* the stock of resources.<sup>144</sup> Second, the value of intangible objects is, in a sense, more clearly a result of the labor that was expended to create them than the value of a physical object that existed prior to appropriation. In other words, intangible objects are a stronger case because, while Locke struggles to justify allocation of the full value of a physical object to an individual based upon the individual's labor,<sup>145</sup> the case for property rights in incorporeal property does not depend on controversial assumptions about relative responsibility for value. Since identity does not exist prior to being created by someone, it has no pre-existing use value.

But these arguments move too fast. First and foremost, they ignore the incremental and collective nature of identity (and particularly identity-value) creation. Second, they are divorced from the premise of Lockean property. For Locke, the institution of private property fundamentally is about using scarce resources made available by God. Outside the realm of those resources, Locke's theory offers no moral argument for any institution of private property since there is no allocation problem. It would be disingenuous to ignore such a foundational principle yet claim that ideal objects that do not share the characteristics that make Locke's system necessary can nevertheless claim the same moral legitimacy as those things central to the institution's purpose.

Thus, to whatever extent it would be relevant that creation of intangible property does not depend on removing pre-existing objects from the world, it could only be in relation to an instrumental version of the labor theory.<sup>146</sup>

144. See Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1222 (1998) (noting that the creation of intellectual property is "more plainly and completely the product of the author's labor").

145. Locke must deal with an objection that a physical object has use value prior to and independent of the labor added to it and granting the laborer exclusive rights therefore overcompensates her. He answers this criticism by acknowledging that some portion of use value is not created by an individual, but asserting that the vast majority (9/10, 99/100, or even 999/1000) of the value is the result of labor. LOCKE, *supra* note 118, § 40, at 296, § 43, at 298; WALDRON, *supra* note 60, at 191.

146. Curiously, in her otherwise thorough application of Lockean labor theory to intellectual property

Such a theory might recognize that labor plays some role in creating intangible objects, even if not a dispositive one, and choose to reward creators with property rights because it is the best way to induce the requisite labor. Under that theory, the fact that the laborer does not physically remove anything might bear on the costs of creating the incentive. There are, however, other objections to such an instrumental theory, which are discussed below.

### *3. Instrumental Labor Theory Does Not Support a Property Right in Identity*

While Locke's moral philosophy does not itself provide a normative foundation for ownership of identity, it may nevertheless be necessary to award property rights in identity in order to encourage socially useful investment.<sup>147</sup> That supporters of the right of publicity might rely on an instrumental labor theory should come as no surprise, as that theory is very often the first line of defense in justifying intellectual property protection.<sup>148</sup> Indeed, an instrumental labor theory is generally regarded as the foundation of both patent and copyright law.<sup>149</sup>

---

protection, Wendy Gordon lapses into endorsing an instrumental version of Lockean theory in regard to the protection of intangibles, even though she insists that Locke's theory was moral. *See* Gordon, *supra* note 97, at 1548. She argues that copying intangible property "harm[s] important interests, even if it does not deprive the creator of physical use of her creation," because it harms the author financially. *Id.* Her argument goes only to harm, however, which begs the initial question of entitlement. On Locke's account, scarcity and rivalry are essential preconditions of the laborer's moral claim to ownership; without those conditions, there is no moral claim, and the laborer is not "harmed" in any moral sense.

147. Some accounts would place a "deserts" theory somewhere in between Locke's pure moral justification and the purely utilitarian view. I do not believe "deserts" is really a separate theory because such theories ultimately lack substance without a reason why an individual "deserves" a reward. *See* WALDRON, *supra* note 60, at 203. With respect to identity appropriation claims, I treat "deserts" as a species of the instrumental theory because, to the extent supporters speak of individuals "deserving" to own their identities, the reasons tend to be instrumental: We reward A in order to encourage him and others to act in a similar way in the future, or we reward A because labor is unpleasant and we nonetheless want to encourage it to be done because it is both virtuous and utility-enhancing for society as a whole. *See* Hughes, *supra* note 124, at 296.

148. *Cf.* Gordon, *supra* note 97, at 1540 ("Locke's labor theory of property and allied approaches have been used so frequently as a justification for creators' ownership rights that Locke's *Two Treatises* have been erroneously credited with having developed an explicit defense of intellectual property.") (footnotes omitted).

149. *See* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (stating that the interest protected by the right of publicity "is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation"). Interestingly, although the instrumental theory appears to be consistent with other areas of intellectual property law, even in those areas where the instrumental calculus seems more settled the law recognizes a greater right to copy through fair use doctrines and other restrictions on the subject

The instrumental labor justification could be understood in two possible ways. First, property rights in identity encourage individuals to work harder to become successful actors, athletes, or other public citizens. Under that rationale, the commercial benefits of achieving celebrity status create incentives for individuals to invest in their native field (e.g., art or sports). Second, and alternatively, protecting the value of an identity's commercial use might encourage individuals to invest specifically in developing a persona, an image to which consumers are attracted. The two types of incentives, although at some level related, are clearly distinct. It is possible that someone would work extremely hard to become the world's best golfer, thereby creating demand to see that individual golf, but still fail to create a public persona that draws people to purchase products.<sup>150</sup> The inverse is also true: While many of the most marketable athletes are at the top of their sports, some commercially marketable people are decidedly not. For example, despite her lack of athletic success, tennis player Anna Kournikova has been among the most well-known and marketable female athletes.<sup>151</sup> Evidently it is not necessarily the same characteristics that lead to success both within one's native field and within the market for commercial endorsements.

Consequently, a full account of an instrumental labor theory necessitates analysis of the effect of identity ownership on investment both in the native fields of right of publicity claimants and in producing valuable personae. In evaluating the incentives, however, we must focus on the marginal benefit of

matter of protection. *See, e.g.,* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding that 2 Live Crew's remake of Roy Orbison's *Pretty Woman* qualified as fair use despite extensive borrowing); *Feist Publ'n, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991) (holding that copyright protection extends only to works with at least minimal creativity, regardless of how much effort was expended to create a work).

150. Some of the very best and highest paid players in *Sports Illustrated's* recent list of the fifty highest paid athletes earned very little additional income from endorsements, in comparison with their salaries and the endorsement income of some of their contemporaries. Jonah Freedman, *The Fortunate 50*, *SPORTS ILLUSTRATED*, May 17, 2004, at 64-65. Barry Bonds, for example, who is often considered the best baseball player in the game today (if not ever), earned \$15,000,000 in salary compared to \$4,000,000 in endorsement income. *Id.* at 65. Others were much more extreme, including Manny Ramirez, star outfielder for the Boston Red Sox and the second highest earning baseball player, who earned \$23,700,000 in salary and only \$250,000 in endorsement income. *Id.* at 64.

151. According to the October 27, 2003, *AdAge Special Report on Sports Marketing*, Anna Kournikova has earned between \$10 and \$15 million annually for endorsing Adidas, Berlie's Multiway sports bra, and Xbox, among other products. *AdAge Special Report on Sports Marketing: Payoff Pitches*, *ADVERTISING AGE 5-6* (Oct. 27, 2003), available at [http://www.knowledgenetworks.com/info/press/news/2003/102703\\_adage\\_charts.pdf](http://www.knowledgenetworks.com/info/press/news/2003/102703_adage_charts.pdf) (last visited May 25, 2005). This marketing success was not the result of overwhelming on-court success. *Id.* ("Tennis trophies have eluded the 22-year-old, but endorsement deals haven't."); *see also* The Official Site of Anna Kournikova, <http://www.kournikova.com/facts/results.php> (listing two tournament wins in 122 tournaments played between 1995 and 2002).

the right of publicity beyond other existing claims. Even in a world with no right of publicity at all, individuals have significant power to prevent commercial uses of their identity. Under current law, any uses that falsely suggest that the individual endorsed or approved of the company using his or her image, or that company's product or service, gives rise to an unfair competition claim under § 43(a) of the Lanham Act<sup>152</sup> and/or state statutory or common law.<sup>153</sup> The incentives produced by the right of publicity then relate to those uses of identity that the right of publicity would sanction but that would otherwise escape liability under unfair competition claims: uses of an individual's name, likeness, or other aspects of identity that are commercial in nature but that do not suggest sponsorship or endorsement.<sup>154</sup>

Viewed in that light, the right of publicity seems remarkably unnecessary. With respect to incentives to invest in one's native field, it is highly questionable whether Michael Jordan worked hard to become a good basketball player because he wanted to control commercial uses of his image. Undoubtedly he was happy to have been able to parlay his success into commercial endorsements, but it seems unlikely that the long hours he spent practicing his jump shot as a child were driven by the chance to be featured on a box of Wheaties. To the extent he was motivated by the chance to make a lot of money, the potential salaries of professional athletes would seem to provide sufficient incentive to invest in becoming a good basketball player.<sup>155</sup>

---

152. 15 U.S.C. § 1125(a) (2000).

153. See, e.g., *Parks v. LaFace Records*, 329 F.3d 437, 445 (6th Cir. 2003); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1108-10 (9th Cir. 1992); 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:15 (4th ed. 2004).

154. The court in *ETW Corp. v. Jireh Publishing, Inc.* claimed that "[t]he elements of a Lanham Act false endorsement claim are similar to the elements of a right of publicity claim under Ohio law" and even cited one legal scholar for the proposition that "a Lanham Act false endorsement claim is the federal equivalent of the right of publicity." *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (citing Bruce P. Keller, *The Right of Publicity: Past, Present, and Future*, 1207 PLI CORP. LAW AND PRAC. HANDBOOK 159, 170 (Oct. 2000)). Whether or not the court's citation is accurate, the contention that § 43(a) claims are equivalent to right of publicity claims is plainly wrong. In contrast to claims under the Lanham Act, the right of publicity does not require any proof of a likelihood of confusion. In fact, the requirement of confusion under the Lanham Act was one of the primary reasons Nimmer called for an independent right of publicity; he believed that the requirement that claimants prove a likelihood of confusion to sustain unfair competition claims prevented celebrities from reaching conduct he believed needed a remedy. See Nimmer, *supra* note 15, at 212-13.

155. According to *Sports Illustrated's* recent list of the fifty highest paid athletes in the United States, only 9 of the 50 made more money from endorsement or appearance fees than they did in salary or winnings. See Freedman, *supra* note 150, at 64-65. By contrast, 36 of the 50 made more than twice as much in salary or earnings as from endorsements or appearance fees, and those 36 averaged 24.8 times as much from salary and winnings (in some cases 50 to 100 times more). See *id.* Moreover, for all of these athletes, the vast majority of what is counted as "endorsement contracts and appearance fees" is money they

That incentive structure is also not unique to athletes; actors (the other major constituency of the right of publicity) are similarly well compensated for their work even apart from commercial endorsements.<sup>156</sup>

And that is to say nothing of the substantial non-commercial incentives to invest in one's native skill. Highly successful people in any field tend to be intensely competitive and strongly desire recognition among the elite in their particular field.<sup>157</sup> As one commentator noted in arguing against a requirement that a celebrity exploit her image during her lifetime in order for the right to be descendible, "[t]here is little evidence that public figures who have a particular talent or expertise will fail to exercise it in the absence of a requirement that they market their image."<sup>158</sup> Similarly, there is little evidence to suggest that public figures with particular talents or expertise will fail to exercise them absent a property right in their image.<sup>159</sup>

Moreover, just as there are sufficient incentives to induce individuals to invest in their native fields even without legal protection of their images, there

would earn even without any right of publicity. See *id.* at 65. Much of their endorsement income comes from wearing certain shoes or apparel, using certain equipment, and/or personally appearing in advertising for those companies. All of that income would be protected even in a world where their only protection for use of their image was against uses that suggested endorsement under § 43(a) of the Lanham Act and/or common law unfair competition claims.

156. Richard Natale, *The Stars Are Making Lots More Than You Think*, E!ONLINE (June 9, 2000) (describing pay structure of film stars and listing approximate compensation of top grossing stars for movies in 2000, including 12 actors who earned at least \$20 million for movies that year), available at <http://www.eonline.com/Features/Features/Salaries/> (last visited May 25, 2005).

157. For those celebrities whose native fields do not yield the type of financial rewards mentioned above, such as politicians or activists like Martin Luther King, Jr., the non-economic incentives presumably are paramount. It is hard to believe that Martin Luther King, Jr., would not have engaged in his important civil rights advocacy absent a property right in his image. Indeed, we have good empirical evidence that he was not motivated by the chance to commodify his image since the right of publicity was not yet widely accepted during his lifetime. In addition, notwithstanding Arnold Schwarzenegger's recent suit, many politicians and other public citizens seem sufficiently unconcerned with commercial uses of their identities that most have not complained about bobblehead dolls bearing their images. See O.D.M., Inc. <http://www.bosleybobbers.com> (offering bobbleheads in the image of political figures including Tom Daschle; Laura, Barbara, George H.W. and George W. Bush; Jesse Jackson; John Kerry; Rudy Giuliani; and Hillary Clinton, not to mention several other political figures who are no longer living). More importantly, even if we discovered that some people are motivated to become activists or politicians because of the right of publicity, would we want to encourage those people?

158. Note, *An Assessment of the Commercial Exploitation Requirement as a Limit on the Right of Publicity*, 96 HARV. L. REV. 1703, 1714 (1983).

159. Madow makes an interesting point that, considered in all of its manifestations, the "fame" phenomenon may lead to over-investment in celebrity-producing endeavors (including sports) as many unrealistically seek the rewards as a potential way out of a life of poverty. See Madow, *supra* note 11, at 216. That type of over-investment may well be a result of our celebrity culture, but the right of publicity is probably not significantly to blame for it given the magnitude of the financial rewards available even without a right of publicity.

are significant extra-legal incentives to invest specifically in developing a persona.<sup>160</sup> An actor's visibility and "star power" enhances her ability to attract customers to the box office, thereby allowing her to command higher compensation for her appearance in a movie. Indeed, the impact of a headlining star on a movie's box office revenue is so much a part of Hollywood's economic model that an actor's compensation is often explicitly tied to the movie's gross box office receipts, at least for those stars capable of driving those receipts.<sup>161</sup> Likewise, a well-known athlete makes more money when more fans want to see him play. Tiger Woods's presence on the PGA Tour has increased viewership and attendance and has driven the value of tournament purses to record highs.<sup>162</sup> As a result, failing to prevent third parties from using Tiger Woods's image to sell soda, for example, may prevent Tiger from capturing all of the value of the "Tiger Woods persona," but he has an incentive to invest substantially in that persona even absent any protection against the commercial use of his identity.<sup>163</sup>

---

160. The right of publicity is a relatively new development in the law. Nevertheless, there was no apparent shortage of great authors, actors or athletes prior to its adoption. Indeed, one would be hard-pressed to make a compelling argument that the quality of production has significantly improved since Shakespeare wrote his many plays. Moreover, although the conventional history claims that the right of publicity did not become necessary until the commercialization of the 1900s, there does not appear to be a shortage of aspiring stars in modern-day England, which has yet to embrace an analogous claim.

161. Richard Natale's *E!Online* article describes A-list movie stars' "gross-participation deal[s]," and states that "the bigger the star, the bigger the cut." Natale, *supra* note 156, at 1-2. He reports that Tom Cruise earned fifteen percent of every penny made by *JERRY MAGUIRE*. *Id.* at 2.

162. See *Outside The Lines—Can Golf Manage the Tiger Effect?* (Aug. 13, 2000) (noting 127 percent increase in PGA Tour purses since Tiger Woods turned professional), at <http://espn.go.com/page2/tvlistings/show21transcript.html>; *1996 PGA Tour Career Money Leaders*, at <http://www.pgatour.com/stats/leaders/r/1996/110>.

[Woods is] not cheap. The going rate has soared to about \$2 million in appearance money for Woods to play overseas. But as rich as Woods has become, he has made everyone around him wealthy. He was largely responsible for two television contracts that have allowed PGA Tour purses to triple since he turned pro. Television ratings for golf are at an all-time high. They double whenever Woods plays.

*Five Years of Brilliance: Woods Setting Standards Since Becoming Pro* (Aug. 27, 2001), at [http://sports.illustrated.cnn.com/golf/news/2001/08/27/woods\\_anniversary\\_ap/](http://sports.illustrated.cnn.com/golf/news/2001/08/27/woods_anniversary_ap/). According to the PGA's official all-time money lists, as recently as 1996, the last year before Tiger Woods joined the Tour as a professional, the highest total career winnings was just under \$10.5 million. In 2004, Woods topped the list with over \$45.1 million in winnings. See *2004 PGA Tour Career Money Leaders*, at <http://www.pgatour.com/stats/leaders/r/2004/110>. That number is even more staggering when one considers that Woods amassed all of his total winnings between 1997 and 2004, whereas the leader in 1996, Greg Norman, took almost 20 years to reach his 1996 total, having turned professional in 1976. See *Greg Norman—Biographical Information*, at <http://www.pgatour.com/players/bio/132080>.

163. See Dreyfuss, *supra* note 17, at 144-45 ("[t]he costs of creating a persona are recaptured through the activity with which the purveyor is primarily associated. The costs of creating the Vanna White persona were, for example, covered by fees paid by the producers of *Wheel of Fortune*.").

More to the point, even assuming, *arguendo*, that the chance for commercial endorsements plays some role in encouraging individuals to develop their native skills or to invest in their personas, the right of publicity plays virtually no role in creating that incentive. The vast majority of any such incentive would come from the chance to earn endorsement income, not from payments for other non-endorsement commercial uses, since endorsement uses provide the greatest income opportunities.<sup>164</sup> Without a right of publicity, celebrities would retain much of their ability to earn endorsement income because uses that suggested endorsement would still be subject to unfair competition claims. Thus, even if the right of publicity was eliminated, celebrities still could earn money from personally appearing in advertisements and for making statements about products. They could also still sell the rights to uses designated as “officially licensed,” and they could wear and/or use the endorsed product.<sup>165</sup> Taken together, it is clear that individuals retain substantial income-earning capacity relative to the associative value of their identity even in a world with no separate identity right.<sup>166</sup> To whatever extent potential income encourages investment in one’s skills, or even in one’s persona,<sup>167</sup> it is primarily unfair competition claims that serve as the instrument.

#### 4. *Labor Theory Does Not Ground Current Law*

Ironically, given its overwhelming support, positive law actually bears only a loose relationship to the labor-based justification courts and commentators tend to assert (whether construed as a moral or instrumental theory).<sup>168</sup> For example, though the right of publicity depends on a

---

164. Even in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, Judge Frank recognized that celebrities are primarily concerned with endorsement income, *see supra* note 113 and accompanying text. Of course, the fact that they would feel sorely deprived of possible income is not a compelling reason to give them the right to that income.

165. I address the argument that inability to control non-endorsement commercial uses of identity would destroy the market for endorsement uses in the context of the allocative efficiency argument for identity rights. *See infra* Section II.D.

166. *See* LANDES & POSNER, *supra* note 22, at 223 (stating that the right of publicity creates minimal incremental encouragement).

167. As noted above, there are a number of extra-legal incentives to invest in persona, to the extent effort in developing a persona has to do with the value of that persona. Protection afforded to endorsement uses enhances those incentives since investments in persona may make the celebrity a more valuable commercial endorser.

168. That is, of course, when courts bother to identify a theory at all.

In fact, the decisions [regarding the right of publicity] do not tend to include justifications for



repudiation of privacy in the context of celebrity identity appropriation and is justified solely by reference to economic value,<sup>169</sup> most versions of the right of publicity now allow non-celebrities to assert a claim,<sup>170</sup> notwithstanding the fact that their identities generally lack economic value.<sup>171</sup> Even if non-celebrity identities have some economic value, that value is not the result of labor; private individuals have expended virtually no effort developing a persona. Moreover, since non-celebrities have not expended effort developing

---

placing what is, after all, called a *public* image, within the plenary control of private individuals. Rather, the courts tend to assume that, if someone hones an image, that person generally has the right to capture the benefit of all its uses.

*Cf.* Dreyfuss, *supra* note 17, at 127-28. Dreyfuss is right that courts have assumed that individuals should capture all of the value of their identity, but she glosses over a more fundamental assumption courts typically make: that the individual creates or "hones" the image. Courts undertake virtually no effort to determine the extent to which that assumption is valid. *But see* *Cartoons L.C. v. Major League Baseball Players Ass'n*, 335 F.3d 1161 (10th Cir. 2003) (questioning that assumption).

169. *See* *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 624 (6th Cir. 2000) ("The right of publicity is designed to reserve to a celebrity the personal right to exploit the commercial value of his own identity."); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) (noting that the right was meant to protect famous celebrities). A few commentators have recognized that commercial use of identity does not solely cause economic harm. Roberta Rosenthal Kwall, for example, has stated that: [i]n evaluating the nature of the harm to the plaintiff . . . economic harms are typically far less onerous than nonmonetizable harms which derive from uses the plaintiff would never have condoned. These nonmonetizable, or morally based, harms can include reputational damage, distasteful associations, or uses which advance a substantive argument the plaintiff finds objectionable.

Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 50 (1994). That observation, however, has had very little impact at the theoretical level, as supporters continue to embrace a labor-based theory of identity. Haemmerli's article, which offers a Kantian theory of a "unified" right of publicity, is a notable exception. *See* Haemmerli, *supra* note 18, at 386 n.6. This article argues that identity appropriation implicates one's ability to autonomously define herself, inflicting harms somewhat similar to those Kwall identified. For the reasons discussed below, however, I do not believe the autonomy interest I describe is derived from Kantian property theory as Haemmerli argues.

170. As a result, where third parties make unauthorized uses of their identities, private citizens frequently may pursue both privacy and publicity claims, even though, on the traditional account, the two claims are incompatible.

171. McCarthy claims that there is no one whose identity lacks commercial value and that the fact of the defendant's use is itself proof of value. MCCARTHY, *supra* note 153, § 4:17. His argument is inconsistent with his own description of why celebrities' identities are commercially valuable. *Id.* § 4:8. Celebrities, he argues, catch consumers' eyes and give an advertisement a "look at me!" effect. *Id.* In addition, buying the product or service with which the celebrity is associated allows a consumer to vicariously associate with that celebrity. *Id.* Neither argument applies in the case of non-celebrities; indeed non-celebrities are largely fungible. Advertisers surely choose one person to use rather than another because, in some small way, that person better fits the image the advertiser seeks to portray, at least as compared to the other available options. An advertiser is looking for an "All-American" male, or perhaps someone who fits the "rebel" image they seek to portray. But they do not seek a particular person because of that person's unique identity, as the features for which they are looking may not even be unique.

a persona and are unlikely to do so in the future, publicity rights neither reward non-celebrities for their labor nor provide them any incentive to invest in their persona in the future. Despite this disconnection, the majority of jurisdictions allow private citizens a right of publicity claim,<sup>172</sup> and commentators regularly evoke the notion of a laboriously constructed image in defending the claim.<sup>173</sup>

Additionally, to the extent any versions of the right of publicity do require that the claimant's identity have economic value,<sup>174</sup> none of the extant formulations would require a plaintiff to demonstrate that she has expended even an ounce of effort cultivating that value.<sup>175</sup> Indeed, the stated law of at least some jurisdictions allows a celebrity to bring a right of publicity claim when the "identity" she seeks to protect is entirely fortuitous, and even when it is at least in part the result of the labor of others. The disjoint with the supposed theory of the right of publicity was exemplified by the Ninth Circuit in *White*:

Television and other media create marketable celebrity identity value. Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit. The law protects the celebrity's sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof.<sup>176</sup>

Notably, the idea that an individual might acquire property rights in an identity developed through "dumb luck" is directly contrary to Locke's notion of morally significant labor. Locke did not consider aimless effort labor at all. To be morally justified in claiming property rights, an individual must have

172. See *id.* § 4.14 ("But the better view as espoused by the vast majority of commentators and courts is that *everyone* has a right of publicity."). Of course, the private individual need not use a right of publicity since the very same invasion would likely give the private person a right of privacy claim.

173. See, e.g., *Preserving Personality*, *supra* note 134, at 162 ("Constructed personas are indeed original works of authorship. Celebrities themselves laboriously construct their personas, and they enlist the cooperation of the media and other entities to package and promote their personas as images.") (internal citations omitted).

174. See *Landham*, 227 F.3d at 624 ("Landham correctly argues that he need not be a national celebrity to prevail. But in order to assert the right of publicity, a plaintiff must demonstrate that there is value in associating an item of commerce with his identity."); *Cheatham v. Paisano Publ'n, Inc.*, 891 F. Supp. 381, 386-87 (W.D. Ky. 1995) (rejecting plaintiff's right of publicity claim under Kentucky law since the plaintiff failed to show that his identity had significant "commercial value," even though absolute celebrity is not required).

175. See, e.g., *MCCARTHY*, *supra* note 153, § 1.3 ("Today it is possible to state with clarity that the right of publicity is simply this: it is the inherent right of every human being to control the commercial use of his or her identity.")

176. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992).

purposely directed her effort to achieve an intended result.<sup>177</sup> The only “effort” contemplated by the *White* court was effort in *exploiting* the value of her identity. It was not effort purposely directed at creating the identity—the value of an identity, the court conceded, largely was the result of other factors. Thus, according to the court, the fact that a celebrity might work hard to exploit an identity, the value of which she was entirely without responsibility for creating, somehow gives her the exclusive right to exploit it. That is a remarkably unpersuasive reason for assigning property rights—any rational actor would seek to exploit a valuable asset to which the law had given her the rights. And the argument fares no better if the right of publicity is regarded as purely instrumental. A rule that grants property rights without regard to whether an individual has acted purposively cannot give a celebrity any incentive; how can the law incentivize “dumb luck”?

Beyond the fact that these developments cannot be explained by Lockean theory, some aspects of the current right of publicity might actually violate Lockean principles. As the *White* court alluded, some right of publicity cases have allowed a celebrity to control uses of her identity even though the value of that identity was largely the result of someone else’s labor. For example, courts have routinely protected an actor’s right of publicity when the “identity” in question was intimately intertwined with a character the actor played (if not simply the character).<sup>178</sup> In those cases, one might plausibly argue that the identity the actor sought to protect was *solely* the result of another’s labor. That result cannot be rationalized by a theory founded on the moral primacy of an individual’s labor. Nor can awarding the rights to someone not primarily responsible for creating a persona provide incentives to create personas.<sup>179</sup>

---

177. See LOCKE, *supra* note 118, § 32, at 290-91

Aimless effort is not labor. . . . Most important from the perspective of the laborer’s claim . . . is the laborer’s purposiveness. A stranger’s taking of another’s labored-on objects is likely to merit legal intervention only if the taking interferes with a goal or project to which the laborer has purposely directed her effort.

Gordon, *supra* note 97, at 1547.

178. See *Wendt v. Host Int’l, Inc.*, 125 F.3d 806 (9th Cir. 1997) (addressing actors’ right of publicity claims against an airport bar’s licensed use of animatic robots based on the actors’ characters on the *Cheers* TV show); *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994) (noting that the plaintiff, the actor who portrayed “Spanky” character in the *Our Gang* series, was challenging the use of the “Spanky McFarland” name for a restaurant and the use of his image as it appeared on the show); *White*, 971 F.2d at 1395 (describing use of a robot next to a game show board, similar to the position in which Vanna White stands in her role on *Wheel of Fortune*).

179. There are, of course, other incentives for those other creators, be they the writers of *Cheers* or the creators of *Wheel of Fortune*. Roberta Kwall is correct when she notes that “[t]hose who assist the

Lockean property theory also provides no support for publicity rights for those who have not made productive commercial use of their identity. Nevertheless, most formulations of the right of publicity have done away with any requirement that an individual have made previous commercial use of her identity in order to claim a right of publicity.<sup>180</sup> Lockean property rights arise and persist only through productive use.<sup>181</sup> Mere inclosure is not enough to justify property rights.<sup>182</sup> Thus, one who simply seeks to prevent others from making use of her identity, without making use herself, has no claim to Lockean property.<sup>183</sup>

The instrumental labor theory also offers little support for modern developments regarding the duration of the right of publicity. For example, a variety of state statutes contain reach-back provisions that extend the post-mortem right of publicity for a period of time prior to the enactment of the statute to cover individuals who died many years before the applicable statute was passed.<sup>184</sup> Even aside from the question of whether post-mortem rights ever create any incentives given their likely remoteness in time,<sup>185</sup> rights that did not exist during an individual's lifetime clearly could not have provided any incentive whatsoever.

Finally, the prevailing theory of the right of publicity as exclusively addressing an economic interest relies on the assumption that what is bothersome to the celebrity about particular uses is not that the uses were

celebrity in creating a marketable image typically are paid handsomely for their time and efforts." *Preserving Personality*, *supra* note 134, at 162. But the same could be said with respect to many of the efforts made by the celebrities themselves—the effort it takes to create a persona is often incidental to another endeavor, for which the celebrity is likely to be paid handsomely. Her argument then only demonstrates that the right of publicity probably provides very little incentive to anyone.

180. See *Martin Luther King, Jr. Ctr. for Social Change Inc. v. Am. Heritage Prods., Inc.*, 694 F.2d 674, 683 (11th Cir. 1983). *But cf.* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097 (9th Cir. 1992) (adopting implicitly a rule that the plaintiff need not have commercially exploited his image since *Waits's* complaint was that he would not have agreed to the use).

181. LOCKE, *supra* note 118, § 29, at 289.

182. *Id.*

183. WALDRON, *supra* note 60, at 20.

184. See CAL. CIV. CODE § 3344.1(g) (2005) (reaching back 70 years); TEX. PROP. CODE ANN. § 26.003 (1999) (reaching back 50 years); and WASH. REV. CODE § 63.60.040 (2000) (reaching back 10 years to cover individuals whose identities lacked commercial value at the time of death, and 75 years for those whose identities did have value). Though it does not precisely address the issue, Indiana's statute may reach back as much as 100 years. IND. CODE § 32-36-1-8(a) (2002) ("A person may not use an aspect of a personality's right of publicity for a commercial purpose during the personality's lifetime or for one hundred (100) years after the personality's death without having obtained previous written consent . . .").

185. *Eldred v. Ashcroft*, 537 U.S. 186, 254-55 (2003) (Breyer, J., dissenting) (arguing based on figures provided in amicus brief filed by group of economists that the 1 percent chance of earning \$100 per year in royalties after 75 years, when discounted to present value, is worth approximately seven cents).

made, but that she was not paid for the uses.<sup>186</sup> But if lack of payment was the only harm, then a liability rule requiring the defendant to pay for unauthorized uses, perhaps slightly increased to encourage voluntary exchanges, would be sufficient. Of course, the current system incorporates a property rule allowing injunctions against unauthorized uses.<sup>187</sup> That reality probably reflects a recognition that economic interests are not all that is at stake—some celebrities care quite a bit about which uses are made, precisely because they want to control their reputation, and courts have been willing to take those subject concerns into account.<sup>188</sup> That is perfectly defensible, but it is inconsistent with the prevailing theory of right of publicity claims.

Of course, the fact that the law does not reflect real reliance on a labor-based theory need not lead to the conclusion that identity claims are unsupported on a labor theory. One might alternatively conclude that the positive law ought to change to better reflect the theoretical foundation of the claim.<sup>189</sup> The significant weaknesses of any labor-based theory, however, should caution us against that route. Indeed, courts' recognition of the problems with those theories might partly explain the doctrinal divergence.

#### *D. The Inconclusiveness of Allocative Efficiency Arguments*

Some law and economics scholars have offered an alternative argument for property rights in identity.<sup>190</sup> Their argument is a variation on the familiar "tragedy of the commons" justification for private property and assumes that persona is a scarce resource that, absent property rights, would be destroyed through overuse. As Landes and Posner have stated: "The motive [to provide stronger publicity rights] is not to encourage greater investment in becoming a celebrity (the incremental encouragement would doubtless be minimal), but

---

186. See, e.g., *supra* note 113, and accompanying text.

187. See MCCARTHY, *supra* note 2, § 11:22; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 48 cmt. b (1995).

188. See *Waits v. Frito-Lay*, 978 F.2d 1093, 1097 (9th Cir. 1992) (noting that plaintiff had never commercially exploited his identity and did not want to develop a reputation as someone who did).

189. The changes that would be necessary to achieve such congruence, however, are unlikely to be popular with supporters of the right of publicity. Perhaps their reluctance could be understood as a recognition that there is some other interest at stake besides the bare economic interest supposed by the traditional account. In fact, I agree that there is another interest at stake, a personal autonomy interest, but I suggest that the autonomy interest described below is the only legitimate interest that the law should protect. As a result, I would not be satisfied with a claim that more closely fit the labor justification either. The claim should more closely reflect its legitimate justification based on personal autonomy. See *infra* Section III.

190. See LANDES & POSNER, *supra* note 22; Grady, *supra* note 95, at 97, 103-04.

to prevent the premature exhaustion of the commercial value of the celebrity's name or likeness."<sup>191</sup> The analogy to the classic overgrazing argument, Landes and Posner argue, is close.

Overgrazing causes crowding in the short run, with a resulting reduction in weight gain [by the animals' grazing], and depletion of the pasture in the long run with similar, though possibly more drastic, results. Similarly, overexposure of a celebrity may turn people off in the short run and truncate the period in which his name or likeness retains commercial value.<sup>192</sup>

Thus, according to supporters of this argument, the law should grant an individual exclusive rights in her identity so that she can control uses of the identity and maximize its advertising value.<sup>193</sup>

To date, courts have paid relatively little attention to this allocative efficiency argument, at least as compared with the labor justification,<sup>194</sup> and there are good reasons to caution against further acceptance.<sup>195</sup> First, there are important dissimilarities between identities and physical commodities like pastures that are subject to "overgrazing." Pastures are rivalrous and exhaustible; identities are neither. Whereas each grazing of a pasture physically removes something and threatens to reduce the pasture's utility in the long run, additional uses of identity neither prevent anyone else's use of that identity nor use up any of the resource in a physical sense. Thus, identity is subject to "overgrazing" only in an abstract economic sense.<sup>196</sup>

Landes and Posner argue that overgrazing on identity leads to "face wearout," a reduction in the value of one's persona due to declining interest

191. LANDES & POSNER, *supra* note 22, at 223 (footnote omitted).

192. *Id.*

193. *Id.*; see also Grady, *supra* note 95, at 103-04 (analogizing the right of publicity to fishing licenses intended to protect against over-fishing). Mark Lemley refers to this theory as an "ex post" justification of the right of publicity. See Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 130 (2004).

194. *But see* *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994). The court stated:

If the appropriation of an individual's goodwill were left untrammled, it soon would be overused, as each user will not consider the externality effect his use will have on others. Each use of the celebrity's name or face will reduce the value that other users can derive from it. The use of a name or face, therefore, is analogous to the overuse of a public highway: In deciding whether to use the road, each user does not consider the increased congestion that his use will inflict on others.

*Id.* at 438 n.2.

195. Some of the problems have been previously noted by other commentators. See Lemley, *supra* note 193, at 136-38; Madow, *supra* note 11, at 220-25.

196. The meaning of an identity is also rivalrous, in a sense, and that form of rivalry provides a much surer basis on which to confer rights in one's identity. See *infra* Section III. Landes and Posner's argument, however, focuses exclusively on economic rivalry.

in the person as her persona is increasingly used.<sup>197</sup> Their argument is at odds with the well-known maxim that “all publicity is good publicity,” though both sentiments are oversimplifications of the phenomenon of fame. Publicity tends to feed off of itself and, as a result, many uses actually increase the value of a celebrity’s identity, whatever the character of those uses.<sup>198</sup> But additional publicity will increase the value of an individual’s identity only until a certain point, after which interest may wane, along with the value of that identity. In other words, early additional uses may create “network effects” that increase the value of an identity, but at some point the number of uses will lead consumers to tire of the identity and it no longer will capture their attention.<sup>199</sup>

In most cases, consumers lose interest in particular cultural objects simply because something has come along that better defines them at that point in time.<sup>200</sup> The point of tedium, however, may be accelerated, at least in terms of chronological time, as a result of overexposure. Some celebrities have more enduring cultural significance than others and, as a result, almost every aspect of an identity’s long-term value will vary from individual to individual: the rate at which value is added by early uses, the point at which additional uses begin to erode value and the value of the persona at that point, and the rate at which the value will decline beyond the wearout point.

These are only generalizations; decentralized control of identity may not even lead to wearout in all cases. As Landes and Posner concede, certain cultural symbols have enduring economic value despite a lack of exclusivity,

---

197. LANDES & POSNER, *supra* note 22, at 223 n.24, 224.

198. *Cf.* Madow, *supra* note 11, at 222 (“A Madonna T-shirt may be worth *more*, not less, to consumers precisely because millions of her fans are already wearing them. The value of the T-shirt may be greater just because ‘everybody’s got one.’”). Madow’s example contrasts the merchandising context with advertising and suggests that the “everybody’s got one” dynamic is more pronounced with respect to merchandise. *Id.* at 223-24. I have no reason to disagree with that conclusion, except to say that, to some degree the general point is still applicable to advertising uses.

199. Both of these effects are well-recognized in the cognitive psychology literature, even with respect to cultural products. See Guy Pessach, *Copyright Law as a Silencing Restriction on Noninfringing Materials*, 76 CAL. L. REV. 1067, 1085 (2003) (describing cultural network effects); Laura R. Bradford, *Parody and Perception: An Alternative Approach to Secondary Use in Copyright*, 46 B.C. L. REV. (forthcoming 2005), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=728604#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=728604#PaperDownload) (describing consumer research showing that people spend more time on and have greater memory for advertising messages that use familiar elements in unfamiliar, unexpected ways, but also citing research demonstrating that, after a certain level of unvaried exposure, tedium sets in and consumers will begin to feel negatively toward the message or brand).

200. See Hughes, “*Recoding*,” *supra* note 23, at 957 (“For all these cultural objects, most Americans do not seek to recode; they just switch products or pop icons when they will get more utility from consuming and expressing themselves from other sources.”).

including Santa Claus and many of the fictional characters upon which Disney has built its considerable empire.<sup>201</sup> Fictional characters are not unique in that respect—several well-known human beings and their works continue to captivate audiences despite seeming ubiquity. For example, William Shakespeare and his works remain cultural icons,<sup>202</sup> as does Elvis Presley, of whom there is a cottage industry of impersonators, notwithstanding uncertainty over the extent to which his heirs have the right to control uses that exploit the value of his identity.<sup>203</sup> Perhaps the number of uses it would take to reach the wearout point for those objects is so great that, as a practical matter, it is unlikely ever to be reached. Or perhaps the point was reached, but the value of those identities decreases in such small amounts with each successive use that the value remains very high even after many years. In either case, it can hardly be said that “overgrazing” has destroyed the value of the identities.

Moreover, the risk of tedium relates primarily to additional uses of an individual’s identity in the same or similar context as the individual exploits or would exploit her identity commercially. There is an entire other class of

201. LANDES & POSNER, *supra* note 22, at 227. Landes and Posner attribute some of Santa Claus’s enduring significance to its seasonal usage. *Id.* That explanation may have some resonance with respect to Santa Claus, but it does not explain the continued use of historical figures like Abraham Lincoln, George Washington, and Ben Franklin, whose identities are regularly invoked to “hawk mundane commercial goods,” apparently without destroying the value of those identities. See Hughes, “Recoding,” *supra* note 23, at 961.

202. Landes and Posner argue that the wearout phenomenon is also relevant with respect to works of authorship, which makes the Shakespeare counter-example even more poignant. See LANDES & POSNER, *supra* note 22, at 222.

203. See *Factors Etc., Inc. v. Pro Arts, Inc.*, 701 F.2d 11 (2d Cir. 1983) (agreeing with the Sixth Circuit’s conclusion that the right of publicity under Tennessee law is not descendible); *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980) (holding that the right of publicity under Tennessee law is not descendible in light of “[t]he intangible and shifting nature of fame and celebrity status, the presence of widespread public and press participation in its creation, the unusual psychic rewards and income that often flow from it during life and the fact that it may be created by bad as well as good conduct . . .”); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981) (holding that right of publicity under New Jersey law is descendible and finding that assignees of Elvis Presley’s publicity rights demonstrated likelihood of success on claim against defendant’s impersonation of Elvis in stage act). *But see* *Elvis Presley Int’l Mem’l Found. v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987) (disagreeing with the Second and Sixth Circuits and holding that right of publicity under Tennessee law is descendible). With respect to Tennessee law, the issue of post-mortem rights of publicity appears to have been settled with the passage of TENN. CODE ANN. §§ 47-25-1101 to -1108 (1984), which established a statutory right of publicity that is descendible and lasts at least 10 years after death, or if used continuously in commerce, in perpetuity. There are still some states, however, where identity rights are not descendible because the available rights cover only living persons. See N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1992); WIS. STAT. § 895.50 (1996); *Heinz v. Frank Lloyd Wright Found.*, 229 U.S.P.Q. 201, 206 (W.D. Wis. 1986) (applying Wisconsin statute).



uses of celebrity identities that run afoul of the right of publicity but that obtain their value by standing in contrast to the types of uses the individual might make—those that recode the identity to fit a different purpose, and very likely fit in a different commercial niche. Those uses might complicate the meaning of the original, but they are unlikely to destroy the value of the individual's identity. Recoders, often parodists in this context, depend on the salience of their intended targets in order to draw attention to their work. After all, there are very few parodies of culturally inconsequential people. As a result, it would be decidedly against their own interests for recoders to destroy interest in the original interpretation.

Even conceding that dissipation of value is a concern with respect to at least some identities, however, a right of publicity is not necessarily needed to prevent the dissipation. Individuals would have significant control over uses of their identities, through unfair competition claims for example, even if the right of publicity had never been recognized. For the allocative efficiency argument to justify a right of publicity claim, one must believe that third parties would make so many uses of an individual's identity that could not be remedied by unfair competition or other claims that the identity would lose its value for endorsements. It is hard to believe that the cases captured on the margin by the right of publicity would have that effect, particularly since the right of publicity would leave unaffected uses that are most likely to lead to overexposure. Under current law, the right of publicity is limited (ostensibly) to commercial uses of identity, predominantly in connection with the sale of products or services. It does not offer a remedy against the large and growing celebrity press industry, including the many magazines and television shows devoted almost entirely to detailing celebrity lives.<sup>204</sup> At the end of the day, when considered in light of the large variety of ways in which celebrities are exposed to the public, uses in connection with products and services seem comparatively harmless.

Additionally, even to the extent that overexposure does lead to wearout, it is not necessarily clear that the wearout would be "premature." Landes and Posner seem to mean that the value of an identity declines more quickly (in terms of chronological time, though probably not in terms of total number of uses) than it would if exclusive rights were granted to a particular individual. The Fifth Circuit sated it this way: "[w]ithout the artificial scarcity created

---

204. An industry of which Hollywood has at least tacitly approved, notwithstanding the fact that such publications clearly exploit the value of celebrities. Their acceptance may reflect their belief that (most) all publicity is good publicity.

by the protection of one's likeness, that likeness would be exploited commercially until the marginal value of its use is zero."<sup>205</sup> That prediction might turn out to be true—it ultimately is an empirical question—but calling the process one of “premature exhaustion” is odd; normally we rejoice when competitive markets lead to production at the marginal cost. As Mark Lemley noted:

Economists have a term for markets in which different providers keep selling goods with less and less value until the point is reached where it would cost more to produce a good than the public is willing to pay for it. We call such a market “perfectly competitive,” and we have thought for at least three centuries (since Adam Smith) that it is a good thing.<sup>206</sup>

Thus, even if we could reliably conclude that, absent a right of publicity, third parties would overuse an identity and cause face wearout, the only consequential “loss” would be a private loss to the individual who would otherwise monopolize control over uses of her identity. Since the cost of preventing that private loss falls on consumers in the form of higher prices, absent a compelling incentive-based story, it is not a “loss” with which the law ordinarily is, or should be, concerned.<sup>207</sup>

The tragedy of the commons metaphor is misplaced for another important reason. The concern about destroying physical assets is that they are scarce and nonrenewable. There are a limited number of pastures, for example, and when one is destroyed, there is a net social loss. Celebrity identities, on the other hand, are not scarce resources. To the contrary, there appears to be an endless pool of potential celebrities, or at least a pool so large it is unlikely to be exhausted as a practical matter. One need only look to the spate of new reality television shows to see the extent to which people seek fame. The fact

205. *Matthews v. Wozencraft*, 15 F.3d 432, 437, 438 n.2 (5th Cir. 1994) (analogizing use of a name or face to overuse of a public highway and claiming that individual users fail to consider the externality effect their use will have on others).

206. Lemley, *supra* note 193, at 144 (arguing that the analogy of intellectual property to real property in the tragedy of the commons argument is misplaced).

207. As Mark Lemley correctly noted:

It is true that if we gave only one person control over a particular type of information, that person would restrict the flow of information, raise its price, and make more money than providers do in a competitive market. But society as a whole would be worse off, since buyers who could afford to pay more than what it costs to provide the information still wouldn't receive it.

*Id.* In other words, exclusive rights holders prevent “exhaustion” by acting like monopolists, complete with the requisite supracompetitive prices. “But that supracompetitive return is not found money; it comes directly out of consumer surplus. And basic economics teaches us that what the owner gains from exclusive control is less than what consumers lose.” *Id.* at 145.

that many of the participants in those shows are not even paid reflects their willingness to actively pursue fame solely for fame's sake.<sup>208</sup> In such a society, even if the value of a particular celebrity's image is destroyed through overuse, there are plenty of potential replacements. In that case, value dissipation may constitute a loss to that particular celebrity, but there is no real social loss, and the instinct to preserve the value of the asset is misplaced.<sup>209</sup>

Finally, even if one accepted the premise of the allocative efficiency argument despite its theoretical shortcomings, the argument does not necessarily support a celebrity's ownership of her own identity. The theory offers, at best, a general justification for centralized control of identity. It offers no guidance whatsoever as to the allocation of that control. Landes and Posner assume that control should be allocated to the celebrity in order to maximize advertising value, but there is no reason why any rational individual who stood to profit from use of identity could not control its use to maximize return. In fact, taking their economic argument to its logical conclusion would suggest that the law should allocate ownership to the most efficient manager of identity. It is not at all clear that this would lead to allocation to the individual to whom the identity refers.<sup>210</sup> Creators are often terrible managers

---

208. See, e.g., Leonard Pitts, *Famous? Notorious? Who Knows The Difference?*, THE SUN HERALD (Miss.), July 2, 2004.

The difference between that era and this one is that then, you usually became famous for something you did—acting, for instance. But these days, you're just as likely to become famous for something you "allow," for your willingness to let a TV camera poke, with proctoscopic invasiveness, into the most intimate regions of your life . . . . What is apparent is our Pavlovian relationship with the television camera. You sense this sometimes in watching people outside the "Today" show studio squeal on cue when the light goes on. Some of us seem to think being seen on TV somehow validates us, makes us matter more than we otherwise would. It's as if getting on camera were so important that the "how" of it hardly matters. . . . Small wonder modern pop culture is shot through with counterfeit celebrities, nobodies who became somebodies through their sheer, desperate willingness to open themselves wide.

*Id.* available at <http://www.sunherald.com/mld/thesunherald/news/editorial/9061688.htm> (last visited Mar. 14, 2005).

209. Cf. Madow, *supra* note 11, at 224.

210. For those who think property rights perform important coordination functions, one possible justification for allocating the right to the individual might be the ease with which he or she could be identified. See F. Scott Kieff, *The Case Against Copyright: A Comparative Institutional Analysis of Intellectual Property Regimes* 83-86 (Stanford Law School, Working Paper No. 297; Washington University School of Law, Working Paper No. 04-10-01, 2004), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=600802#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=600802#PaperDownload) (describing commercialization theory and coordination benefits from property rights). That justification relies on two assumptions I question here. First, it is not clear that ownership needs to be allocated at all; unlike inventions subject to patent protection, there may not be an important reason for users to coordinate and bring identities to market. Second, there may be good reason to doubt that the market would correct inefficient allocations made on this basis. Allocation of rights in identity seems likely to be particularly subject to endowment effects. Daniel Kahneman et al.,

interested in short-term profit-taking.<sup>211</sup> Consequently, absent some reason to believe that a celebrity will do a better job of maintaining and exploiting value than some third party would, the allocative efficiency argument probably better supports Nike's exclusive ownership of Michael Jordan's identity than Michael Jordan's own self-ownership.<sup>212</sup>

### *E. The Inapplicability of Kantian Property Theory*

Responding to the serious shortcomings of the dominant labor-based theories, Alice Haemmerli recently advocated an identity appropriation claim founded on Kantian property theory. Haemmerli's formulation recognizes that use of another's identity implicates emotional as well as economic interests,<sup>213</sup> and it opened the door to a thorough re-examination of the claim. Kantian property theory, however, ultimately does not support an identity appropriation claim because it cannot convincingly justify a right of exclusion in the context of identity.

For Kant, the individual must be viewed as an autonomous and moral being. Freedom is an innate right, the "one sole and original right that belongs to every human being by virtue of his humanity."<sup>214</sup> Freedom comprises "the attribute of a human being's being his own master."<sup>215</sup> In its expression of positive freedom, the will acts as a self-generated source of moral law, which

*Experimental Tests of the Endowment Effect and the Coase Theorem*, in BEHAVIORAL LAW & ECON. 211 (Cass R. Sunstein ed., 2000) (describing the problem of endowment effects where rights holders tend to value the right more when they have it than they would pay to acquire it if they were not allocated the right, and noting its particular salience when the rights holder believes she is legally entitled to the right).

211. See Lemley, *supra* note 193, at 147 ("[E]ven if we believed that granting exclusive rights would yield efficient distribution of information, there is no reason to believe that the subject of the information is best positioned to manage that distribution. Indeed, there are good reasons to believe otherwise.").

212. It is also worth noting that the allocative efficiency argument, even if taken at face value, offers little support for recognizing a right for non-celebrities. The theory is about maximizing long-term value of an identity, yet private citizens do not appear to have any such value to preserve.

213. Haemmerli tentatively suggests that identity appropriation should not have been removed from the realm of privacy because doing so confused the discussion of the harm of commercial use of identity and prevented the law from recognizing any subjective component of that harm. See Haemmerli, *supra* note 18, at 398-99. I believe that the reason the law came to regard the right of publicity as addressing a purely economic harm (or at least claiming to do so) is more complex than Haemmerli gives it credit for. Nevertheless, she rightly notes that the attempts to give theoretical substance to a right based solely on economic harm have been unsuccessful.

214. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 44 (John Ladd trans., Library of Liberal Arts 1965) (1791). For an excellent explanation of the Kantian rationale, see Haemmerli, *supra* note 18.

215. KANT, *supra* note 214, at 44.

makes man a moral being and gives him dignity.<sup>216</sup> Thus, reason, freedom and autonomy are inextricable, and Haemmerli argues that interference with one's person is a direct infringement of the "individual's right to control the use of her own person, since interference with one's person is a direct infringement of the innate right of freedom (which takes concrete form in social life as liberty or freedom from compulsion by others)."<sup>217</sup>

Property, for Kant, is an outgrowth of this human freedom. Once I possess<sup>218</sup> an object, "anyone who touches it without my consent . . . affects and diminishes that which is internally mine (my freedom).' . . . This means that . . . property is inseparably associated with one's 'personhood' because property grows out of freedom and freedom is essential to personhood."<sup>219</sup> Consequently, all things can be owned and used, and if there were things outside our power (or our capacity to make use of them), that would conflict with human freedom because it would deprive freedom of the use of its will in relation to such things.<sup>220</sup> Thus, "it is an *a priori* assumption of practical reason that any and every object of my will be viewed and treated as something that has the objective possibility of being yours or mine."<sup>221</sup> It is possible to have any and every external object of my will as my property.<sup>222</sup>

Haemmerli extrapolates from this premise and argues that objectified personality should be considered just like any other object of one's will—having the objective possibility of being yours or mine. By virtue of being the first to arrive at the physical characteristics associated with the identity, Haemmerli argues, the individual to whom those characteristics belong has priority among claims to the property. Haemmerli asks, "[I]f one's own image, for example, is treated as an object capable of 'being yours or

216. Haemmerli, *supra* note 18, at 415; John Ladd, *Introduction to KANT, METAPHYSICAL ELEMENTS*, *supra* note 214, at xi.

217. Haemmerli, *supra* note 18, at 416. Like all non-consequentialist philosophy, much of the soundness of Kant's theory rests on acceptance of his original premise—that the most basic and important goal is actualization of unfettered autonomy. Kant's entire justification for private property is an outgrowth of his belief that autonomy is the highest goal of ordered society.

218. I use "possession" conceptually but not literally. I do not mean to imply that the theory requires physical possession in order to claim ownership. In fact, for Kant, the ability to be secure in one's ownership without physically having to hold on to property at every moment is an important reason for individuals to enter into civil society. By "possession" I refer (as Kant does) to the initial stage of ownership that gives rise to one's rights, where an individual claims an object as her own by expressing her will upon it.

219. Haemmerli, *supra* note 18, at 418.

220. KANT, *supra* note 214, at 52.

221. *Id.* at 53.

222. *Id.*

mine,' why should it not be claimed by the person who is its natural source?"<sup>223</sup>

Despite its facial attractiveness, Kantian property theory cannot resolve ownership of objectified identity. Kant's theory, like Locke's, makes the most sense in the context of physical objects. Kantian theory is concerned with uses of an object that interfere with an individual's freedom. With respect to physical objects, once I have claimed something as my property, any use by third parties is necessarily harmful. Physical objects are rivalrous; only one person can possess or use that object at any given time. Where I have claimed an object as my own, another's use or touching of the object affects my freedom because it prevents me from using the property according to my will during the period in which the other person is using the object. Identity, by contrast, is nonrivalrous, nonexcludable and inexhaustible. An unlimited number of parties can use any given identity, even at the same time, and no person's use will physically interfere with another's. Another's use of my identity does not interfere with my freedom because I can still do what I want with the same identity, even contemporaneously.<sup>224</sup>

Haemmerli recognizes a theoretical possibility of nonrivalrous use, but suggests that the use would still interfere with one's freedom and that the right must be exclusive to be meaningful.<sup>225</sup> She argues that even if hundreds of others could all use my intangible property without exhausting it, I would still be harmed by your use if I made my living from royalties.<sup>226</sup> Yet the moral basis for recognizing property rights, according to Kant, is that without them, others' use of a particular object would prevent me from using the property according to my will. If others might simultaneously use the property without preventing me from using it and without exhausting it, then any "interference" is purely abstract.<sup>227</sup>

223. Haemmerli, *supra* note 18, at 418. Here, Haemmerli's argument falls prey to many of the same arguments marshaled against the Lockean theory, as it relies on the assumption that the individual is the "natural source" of identity. Surely the individual is the source of the physical attributes, but it is not clear that the individual is the source of any semiotic meaning (or economic value) attendant thereto. Much of that is created by forces external to the individual. Perhaps the individual is the first to lay claim to the commoditized identity, but perhaps not.

224. To the extent Haemmerli's argument can be interpreted to suggest that the meaning of one's identity may have rivalrous characteristics (your use of my identity may not prevent me from using it, but it may prevent me from defining myself precisely as I want), her theory would be similar to the one I describe below. See *infra* Section III. That theory, however, is only reminiscent of Kantian property theory.

225. Haemmerli, *supra* note 18, at 419 n.151.

226. *Id.*

227. Perhaps Kantian theory can be interpreted to call for property rights in situations where the only interference is that the individual loses the right to use the property as only she wants (irrespective of

Haemmerli claims that third-party use of an identity might negatively impact the economic value of that identity as a result of overuse. In that sense, an individual cannot truly exercise her will freely because, although she is free to use her identity herself, she may be unable to sell the right to use her identity as she had hoped. The economic interference theory appears to suggest perpetual rights in the first user of any economic asset with rivalrous economic value. This concern for potential royalties resembles Landes and Posner's economic efficiency argument and can be criticized for many of the same reasons as that theory.<sup>228</sup> In particular, to the extent interference with the use of one's identity is a consequence of rivalrous commercial value, any such interference would largely be avoided by a rule that prevented only uses that suggested sponsorship or endorsement, since those are the uses from which most of the commercial value derives.<sup>229</sup> It is not clear then that Kantian property theory calls for a separate right of publicity.

Moreover, like the allocative efficiency argument, this reading of Kantian theory does not clearly suggest ownership by the individual to whom an identity refers. Kant's theory is one of first possession, constrained by use of an object, which is the way the will expresses itself.<sup>230</sup> The first person to express her will on an object is deemed to have taken possession of the object, even if she has not picked it up.<sup>231</sup> Haemmerli relies on her contention that an individual is the natural source of a commercial identity as a possible marker of an expression of will. Yet for Kant's theory of property to tell us anything about ownership of identity, commercial identity must be conceptualized as something external to and distinct from the person—as an object with which individuals can interact.<sup>232</sup> If identity can be so conceived, then being the source of an identity's physical attributes tells us little because initial formation of Kantian property rights requires use.<sup>233</sup> It is use of an object that marks it off as someone's property and reflects that person's continuing

---

whether it harms the person in any more concrete way). Even if that is a fair interpretation, I question whether it is a theory on which we should rely. Recognizing property rights has costs—it restricts the autonomy of others and should only be done when there is a relatively compelling reason. That third-party use would interfere with one's subjective desire does not strike me as sufficiently compelling.

228. See *supra* Section II.D.

229. See *supra* Section II.C.3.

230. KANT, *supra* note 214, at 57.

231. *Id.*

232. Property rights, for Kant, are fundamentally about an individual's interaction with objects external to herself. *Id.*

233. Recall also that the current right of publicity is not limited to aspects of an individual's identity for which the individual is the natural source. Haemmerli's theory would seem to exclude uses of features created by writers or others.

expression of her will on an object. Thus, according to a true Kantian theory, individuals would have no claim where they have no intention of making commercial use of their identity.<sup>234</sup> The theory might conceivably support divesting an individual who ceased using her identity of ownership, as she may have ceased to express her will on it.<sup>235</sup>

Nevertheless, although Kantian property theory is itself an insufficient justification for the ownership of identity, Haemmerli's analysis offers an opportunity to re-examine the harm of identity appropriation with a renewed emphasis on individual autonomy and the emotional harms caused by the commercial use of one's identity. The following section builds on a variation of that notion of autonomy and offers a new framework for identity appropriation.

### III. IDENTITY APPROPRIATION AND A RIGHT OF AUTONOMOUS SELF-DEFINITION

All of the efforts to date to justify an independent right of publicity have assumed that identity appropriation claims for private citizens are a species of privacy claims aimed at protecting the individual's "right to be let alone." Yet, as we have seen, claims by private citizens were folded too uncritically into the privacy rubric. Although unauthorized commercial use of a private citizen's identity, like publication of private facts, threatens the private citizen's anonymity,<sup>236</sup> it also implicates a very different interest in autonomous self-definition. Specifically, because an individual bears uniquely any costs attendant to the meaning of her identity, she has an important interest in controlling uses of her identity that affect her ability to author that meaning. Notably, the interest in autonomous self-definition is equally relevant for celebrities,<sup>237</sup> even if they do not share private citizens'

234. Such a rule would preclude recovery by plaintiffs like Tom Waits, who was awarded over \$2 million in damages for his right of publicity claim in large part because Waits had a policy of not doing any commercials, which he believed diminished singers' artistic integrity. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1105-06 (9th Cir. 1992).

235. Lockean property theory would support that result as well, as Locke requires productive use of property. LOCKE, *supra* note 118, § 29, at 289.

236. Commercial use of identity may also implicate the "solitude" component of privacy Gavison identified, through probably not "secrecy." Gavison, *supra* note 55, at 428-29. The secrecy sought by Warren and Brandeis was secrecy of facts about an individual's life, particularly facts that were potentially embarrassing. *See generally* Warren & Brandeis, *supra* note 12. That concern is generally not implicated by most commercial uses.

237. Because of this additional aspect of harm, commentators were on the right track when they implied that appropriation might be better thought of as a separate claim from privacy claims.



interest in anonymity.<sup>238</sup> Thus, while it makes some sense to conceptualize a right to prevent unauthorized uses of one's identity as "independent" of the right to privacy, a better distinction would have been between all identity appropriation claims, whether by celebrities or private citizens, on the one hand, and traditional privacy claims on the other hand. Although there would be some overlap between the private citizens' identity appropriation claims and privacy claims, there is greater theoretical overlap between identity appropriation claims by private citizens and those by celebrities.

### *A. The Interest in Self-Definition*

Joe, an 82-year-old man, recently was sitting on his couch enjoying a baseball game with his wife of 55 years. He started to get up to go to the kitchen between innings when he was stopped in his tracks. Joe watched in stunned silence as the network broadcast an advertisement for a new drug used to treat erectile dysfunction. The ad showed an older couple walking through the park, hand in hand, while a narrator talked of the couple's recently rediscovered romantic life. Much to Joe's surprise, the couple depicted in the advertisement was he and his wife.<sup>239</sup> Joe was shocked, and quite angry, to see his picture in the advertisement, but not for the reasons the conventional accounts of the rights of privacy and publicity predict. Joe was not concerned because the advertisement made him known or recognizable, nor was he particularly upset about the fact that the couple's images were being used commercially. Indeed, he would have had no problem with being depicted in an advertisement for Dell computers. Joe was upset because his picture was being used in a commercial for a drug used to treat impotence. In Joe's mind, use of his picture in the ad suggested that he suffered from erectile dysfunction and needed the drug. He was deeply embarrassed by the suggestion.

Joe's reaction to the advertisement probably resonates with many of us because we recognize what the dominant theories of privacy and publicity have long failed to grasp: the devil is in the details. Joe was upset because he believed his presence in the drug advertisement offered information about him. He recognized the choices we make—what shoes to wear, what music

---

238. This is not to concede that celebrities have no interest in secrecy or solitude, the other components of privacy Gavison identified. Gavison, *supra* note 55, at 428. Those interests, however, are not typically implicated by the types of commercial uses with which the right of publicity is concerned.

239. This example is based on a true story, told to me by one of my colleagues about his grandparents. I am withholding any identifying information to avoid contributing to Joe's outrage.

to listen to, what companies to associate with—reveal information about us and our values. As Albus Dumbledore, Headmaster of the Hogwarts School, explained to a young Harry Potter, “[i]t is our choices . . . that show what we truly are, far more than our abilities.”<sup>240</sup> While some decisions say more than others, the choices we make with respect to the cultural objects and images we incorporate into our lives play an important role in reflecting our personalities. Those objects “represent how their utilizers see themselves (or wish to have themselves seen) politically and culturally.”<sup>241</sup> As Justin Hughes noted, “[p]eople achieve recognition of their individual personalities wearing a designer label, ordering a particular dish, driving a well-known automobile, or . . . reading a particular book.”<sup>242</sup>

Because we appreciate the significance of others’ choices as indicators of their values, we use the information we glean from someone’s choices. Just as we can glean information about an individual’s concern for the environment from her car choice, we can draw conclusions from one’s decision only to buy clothes “made in America.” Likewise for those who commercialize their identities, choices with respect to the companies with which they associate reveal information about their values. One can assume from Reba McEntire’s appearance in a Whirlpool commercial that details her and the company’s involvement with Habitat for Humanity that she supports Habitat’s mission.<sup>243</sup> Similarly, when John Elway appeared in advertisements for Coors beer, one reasonably could conclude that, at the very least, he does not find alcohol morally objectionable.<sup>244</sup> When Tiger Woods endorses Nike, many will conclude that he is unconcerned about the company’s child labor practices.<sup>245</sup>

240. J.K. ROWLING, *HARRY POTTER AND THE CHAMBER OF SECRETS* 333 (1999).

241. Dreyfuss, *supra* note 17, at 124. Dreyfuss argues that this reliance on cultural images suggests that celebrities should have less control over their identities so that others can make use of those identities. But as Justin Hughes points out, many non-owners merely want to incorporate the images rather than recoding them. See Hughes, “Recoding,” *supra* note 23, at 957 (“Focusing on a few people who want to conscientiously want to redefine cultural objects overlooks this vast majority—people who want the images to redefine them.”). There is substantial room for individuals to incorporate celebrity images for their own private use even with a robust right of publicity.

242. Hughes, “Recoding,” *supra* note 23, at 956 (internal citations omitted).

243. “Whirlpool Home Appliances and Reba Deepen Commitment to Habitat for Humanity with 2005 Tour,” at <http://www.reba.com/rebanews/newsarticle.asp?idnewsarticle=453> (Feb. 28, 2005).

244. The National Football League was concerned about a potential association with alcohol and therefore adopted a rule that prohibits active players from endorsing alcoholic beverages. See *Elway’s Ads for Coors Violate NFL Rules*, at [www.sportslawnews.com/archive/articles%201999/CoorsElway.htm](http://www.sportslawnews.com/archive/articles%201999/CoorsElway.htm) (Sept. 20, 1999).

245. Steve Boggan, “We Blew It”: Nike Admits to Mistakes Over Child Labor, COMMON DREAMS NEWS CTR. (admitting having employed children to manufacture products in Asia, although claiming such uses were accidental and suggesting that they may be extremely difficult to prevent), available at

Importantly, the message relayed by a particular choice is only one data point in the overall image, the full content of which includes not only the symbols an individual incorporates, but also those which she excludes. Tom Waits, for example, refused to commodify his identity because he believed that commercialization undermined an artist's integrity.<sup>246</sup> Chris Webber walked away from an endorsement deal with Nike in part because he did not want to be associated with a company whose products were too expensive for underprivileged children to afford.<sup>247</sup> After years of serving as the spokesperson for Dairy Queen, Casey Kasem decided not to continue in that capacity after he became a vegetarian, and many celebrities have refused to do cigarette advertisements.<sup>248</sup> All of these people understood that avoiding particular associations was important to the integrity of their identities.

If the overall picture of an individual's character is made up of the messages conveyed by her associational decisions, then unauthorized use of her identity interferes with her autonomy because the third party takes at least partial control over the meaning associated with her. The individual, of course, will uniquely bear any costs attendant to the altered meaning of her identity. Thus, while Madow worries that the right of publicity gives Madonna "veto power" over uses that do not match her preferred meaning,<sup>249</sup> it is precisely the risk that others would create a different meaning (but not share the costs of that meaning) that I suggest ought to give her a claim.

<http://www.commondreams.org/headlines01/1020-01.htm> (Oct. 20, 2001); Tim Connor, *Still Waiting For Nike To Do It: Nike's Labor Practices in the Three Years Since CEO Phil Knight's Speech to the National Press Club*, GLOBAL EXCH. (detailing allegations of labor abuses by Nike and Nike Chairman's previous responses), available at <http://www.globalexchange.org/campaigns/sweatshops/nike/stillwaiting.html> (May 2001).

246. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1105-06 (9th Cir. 1992). Bette Midler and Dustin Hoffman also apparently refuse to do commercials. See Charles-Edward Anderson, *Soundalike Suit*, A.B.A. J., Jan. 1990, at 24; Howard Kurtz, *Dustin Hoffman Wins Suit*, WASH. POST, Jan. 23, 1999, at C2.

247.

But Webber has other, self-imposed pressures on him, to be a good role model for children growing up in Washington, to be a positive influence in the community. For that reason, Webber took the unusual step of refusing to renew his shoe contract with Nike. For one thing, it was virtually impossible for most inner-city kids to afford the Chris Webber model, which sold for \$140. "Also, a lot of my friends own stores in the Detroit area, and Nike doesn't sell to black vendors in the inner city," Webber said. "You won't find Nikes being sold to small vendors—which mostly happen to be minorities, whether they be black or Arabic. A lot of pressure was put on me by my friends and I took upon myself to step up and show them that I mean what I say."

David Ginsburg, *Webber Trying to Make a Difference*, SOUTH COAST TODAY, available at <http://www.s-t.com/daily/12-96/12-02-96/c06sp204.htm> (last visited June 30, 2004).

248. See Hughes, "Recoding," *supra* note 23, at 953 (citing interviews with Casey Kasem and Nicholas Coster, a soap opera actor).

249. See Madow, *supra* note 11, at 195 n.334.

Focusing on the importance of control and the potential effect of particular uses, as opposed to the more general question of whether an image will be objectified at all, reveals the deep flaw inherent in the notion of an “independent” right of publicity. Claims that “[t]here is sharp internal contradiction in the position of a plaintiff who alienates and objectifies her image and simultaneously claims that it is integral to her very identity in the manner presupposed by the tort of appropriation”<sup>250</sup> are based on a failure to appreciate the full range of potential harms caused by commercial use of identity. The celebrity’s complaint is not that objectification of her image is itself harmful, but rather that she has lost control over *which* uses are made.<sup>251</sup>

This autonomy-based rationale over one’s identity does not depend on an individual’s responsibility for the value of her identity; she will bear the costs of her identity even if she has not labored to create it and is utterly without any responsibility for any of its value.<sup>252</sup> Nor does this rationale depend on whether the identity an individual seeks to project is entirely unique, or whether it is even a reflection of her “true” character.<sup>253</sup> Even if it is not, she will have to live with that meaning and with what it says about her, and she will bear the costs of that meaning.

Recognition of this interest in autonomous self-definition may seem to be a drastic re-conceptualization of the right of publicity, but courts recognized this interest early on. In *Pavesich*, the court noted that the plaintiff’s sensibilities might be shocked if he saw “his picture displayed in places where he would never go to be gazed upon, at times when and under circumstances

250. Post, *supra* note 35, at 677.

251. Haemmerli exposed the important difference when she asked, rhetorically, “[d]oes the fact that a prostitute has commodified her body mean that she can be raped with impunity, or that the rape should be viewed solely in terms of economic impact?” Haemmerli, *supra* note 18, at 404.

252. The individual’s role in creating meaning can be disentangled conceptually from her role in creating value. I have argued above that value is a market phenomenon for which the individual is, at best, only partly responsible. I depart from the post-modernists, however, on the question of an individual’s role in creating meaning. Though I acknowledge that certain groups might “recode” images to suit their needs, I think Madow and others point to relatively rare examples in an attempt to disprove the rule. The meaning of Madonna is predominantly the result of the choices Madonna has made, many and varied as they have been. She has plenty of incentives to invest in that meaning even without an identity appropriation claim, and she certainly borrows from existing images to do so, but her efforts to define herself may be less effective if she is forced to compete with alternative meanings.

253. Thus, the right I propose should not depend on whether one conceptualizes identity according to the modern or post-modern view—whether the public image is truly a window to the individual’s “real” personality or is a disconnected entity with its own self-contained meaning. For a different view, see Jeffrey Malkan, *Stolen Photographs, Personality, Publicity, and Privacy*, 75 TEX. L. REV. 779, 783, 794 (1997) (arguing that the rights of privacy and publicity can be understood as proceeding from two different understandings of personality—the former based on a modern view, and the latter on the postmodern view).

where if he were personally present the sensibilities of his nature would be severely shocked.”<sup>254</sup> Presumably Pavesich avoided the types of uses about which he was complaining because of his concern about what those uses said about him. When Pavesich saw his picture displayed “in places where he would never go to be gazed upon,” he realized that he had lost control over the text presented to others, as the advertiser was able to put words in his mouth.<sup>255</sup>

In fact, closer examination reveals that the harms suffered by the private plaintiff in *Pavesich* and the public plaintiff in *O'Brien* were quite similar. While Pavesich was made to appear as though he was speaking on behalf of an insurance company, O'Brien was concerned that use of his image on a beer promotion suggested his acceptance of beer. Even if such an association might have been acceptable to the majority of people,<sup>256</sup> it was contrary to the point of view O'Brien had publicly expressed; he had taken a stance against consumption of alcohol and feared that the use of his photograph in association with beer products would undermine his public legitimacy on that issue.

Had the court focused on O'Brien's autonomy interest in defining his own values, the determinative issue would not have been whether O'Brien's feelings were hurt by publicity in general, but whether his loss of control over the particular contexts in which his identity would be used might create associations between him and products or services with which he might not choose to associate. Likewise, the court's naïve belief that O'Brien's picture in a beer calendar did not in any way reflect on him undoubtedly influenced its belief that the use did not suggest sponsorship or approval. Perhaps the use

---

254. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 80 (Ga. 1905).

The knowledge that one's features and form are being used for such a purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that liberty has been taken away from him; and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master; and if a man of true instincts, or even of ordinary sensibilities, no one can be more conscious of his enthrallment than he is.

*Id.*

255. *See id.*

256. The court went out of its way to cite the lower court's finding that the business of making and selling beer is a legitimate and eminently respectable business and people of all walks and views in life, without injury to or reflection upon themselves, drink it, and that any association of O'Brien's picture with a glass of beer could not possibly disgrace or reflect upon or cause him damage.

*O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 169-70 (5th Cir. 1941).

did not indicate O'Brien's endorsement of Pabst beer in particular, but the use could have suggested, at least to some, acceptance of beer. It clearly suggested as much to O'Brien. Viewed in that light, O'Brien's complaint was very similar to Pavesich's.

Though courts and commentators failed to recognize and articulate this interest in autonomous self-definition as they developed the "independent" right of publicity, latent appreciation of that interest may explain why some courts have been concerned about uses of the identities of individuals who have not made commercial use of their identities. It might also explain why the courts have been uncomfortable denying relief to individuals whose identities have no commercial value even though preservation of value is the stated purpose of the right of publicity.<sup>257</sup>

### *B. Violations of the Right of Autonomous Self-Definition*

Since all individuals share the interest in autonomous self-definition, every individual should be able to control uses of her identity that interfere with her ability to define her own public character. This interest is implicated primarily when another's use suggests an individual's sponsorship or endorsement, for those uses are most likely to impact third-parties' perceptions. But even uses that do not suggest endorsement may disrupt the message an individual seeks to portray by competing with meaning the individual has tried to project.<sup>258</sup> Claims by private citizens might go even further because non-celebrities have a broader range of interests at stake.

---

257. Roberta Rosenthal Kwall argues that moral rights provisions should be construed to grant protection for constructed personas and cites *Waits v. Frito-Lay* to support her claim that "many decisions actually are more concerned with redressing rights of integrity over the images of the celebrity." *Preserving Personality*, *supra* note 134, at 158. I disagree with Kwall that a persona should be considered a "writing" subject to copyright protection. In addition, while Kwall is right that courts have at times shown some concern for celebrities' rights to control the integrity of their image, they have done so much less frequently than she implies, and often to the ridicule of commentators who suggested that those courts confused the rights of publicity and privacy. In fact, though the moral rights concept of integrity is a useful analogy to the type of right for which I argue above, recognition of the right of integrity is quite at odds with the conventional justification of the right of publicity, which has always attempted to distance itself from any type of emotional or moral component. For that reason, I cannot agree that the right of publicity, like moral rights, "seek[s] to protect the integrity of texts by rejecting fluidity of interpretation by the public in favor of the author's interpretation." *Id.* The law *should* prevent re-creation of identity by the public, though not necessarily fluidity of interpretation *per se*, as long as the individual is the source of that fluidity. Madonna should be free to reinvent herself as many times as she wishes.

258. Because autonomous self-definition is not adequately protected by a claim limited to uses that suggest endorsement, I disagree with commentators who argue that trademark law is sufficient to protect celebrities' legitimate interests.

Specifically, identity appropriation claims by private citizens can also encompass uses that violate anonymity, secrecy, or solitude. This part attempts to sketch out the rough parameters of an identity appropriation claim aimed at protecting celebrities' and non-celebrities' respective interests in the right of autonomous self-definition.<sup>259</sup>

### 1. *Implied Endorsement*

First, an individual should be able to prevent uses that suggest her sponsorship or endorsement. Such uses are akin to compelled speech,<sup>260</sup> a problem that is well-recognized in the First Amendment context.<sup>261</sup>

Compelling a person to express a message herself presents a particular sort of threat to her freedom of belief: It threatens her ability to control what she tells the world about who she is and what she holds important forms of expression that can trigger the First Amendment because they are essential to realizing certain deeply held beliefs.<sup>262</sup>

While freedom of belief is most directly impinged when one is forced to actually do the expressive act herself, a closely analogous interest is violated when someone else does the expressive act, and yet the individual appears to have endorsed that expression. Evidence from modern cognitive psychology helps explain why; it teaches that users process information differently

---

259. I am concerned here with rights in a *prima facie* sense, but I would endorse a significant First Amendment defense. There are serious First Amendment interests at stake in many right of publicity cases, though those interests are probably not as significant in the context of uses of private citizens' identities. Non-celebrity identity appropriation claims are unlikely seriously to interfere with cultural dialogue because, unlike their celebrity counterparts, non-celebrity identities do not typically carry any "rich set of cultural connotations."

260. Dreyfuss, *supra* note 17, at 127 (referring to right of publicity as an adjunct to the First Amendment, giving individuals the right not to speak); Hughes, "Recoding," *supra* note 23, at 929 ("Copyright and the right of publicity should protect such a 'freedom not to speak publicly' for causes and groups in which one does not believe.").

261. Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1120-22 (2005) (identifying as the basis for the Supreme Court's growing concern about compelled speech a concern that a person will be associated with message she is required to carry); *see also* Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 12 (1986) ("*PruneYard* . . . does not undercut the proposition that forced associations that burden protected speech are impermissible"); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 99 (1980) (Powell, J., concurring) ("[S]peech interests are affected when listeners are likely to identify opinions expressed by members of the public on commercial property as the views of the owners.").

262. Klass, *supra* note 261, at 1116.

depending on source and may be able to contextualize reworkings of expressive texts if they have sufficient information about source.<sup>263</sup>

So understood, the interest in autonomous self-definition is quite similar to the interest Kant believed was implicated by the counterfeiting of books.<sup>264</sup> For Kant, a book, while clearly a corporeal product, also serves as an address from the author to the reader.<sup>265</sup> A pirate then, by printing the author's words, "speaks on behalf" of the author, though he was not authorized to do so.<sup>266</sup> The author, who bears the consequences of her words, is harmed because she has lost the right to determine when and how those words will be communicated. In the same way, unauthorized commercial uses of an individual's identity that suggest the individual's endorsement effectively "speak on behalf" of the individual, reflecting her values, though the user was not authorized to do so.<sup>267</sup>

The harm of having been forced to "speak on behalf" of something or someone else may not materialize immediately, yet the risk remains that compelled association will ultimately prove costly. Perhaps being associated with Enron would have been acceptable to most people in the mid-1990s, but those who had become associated with that company may have regretted that association in later years. Individuals who voluntarily associated themselves with Enron, however, were able to weigh the risks of their association. Someone whose identity was used without their consent and in a way that suggested endorsement, on the other hand, became associated with the company without any opportunity to evaluate the risks.<sup>268</sup> Because of this long-term risk, and because the right should preserve an individual's right to

263. Bradford, *supra* note 199, at 49-50.

264. See IMMANUEL KANT, *Of The Injustice of Counterfeiting Books*, in 1 IMMANUEL KANT, *ESSAYS AND TREATIES* (Thoemmes Press 1993); Palmer, *supra* note 101, at 60.

265. KANT, *supra* note 214, at 229. That Kant felt the need to articulate this argument against counterfeiting is further evidence that intangible works were not the type of objects to which he directed his property theory.

266. *Id.*

267. This conception also bears some similarity to Margaret Jane Radin's notion of property for personhood—the idea that ownership of certain types of property is necessary to proper moral development, and that the law can and should recognize the importance of those forms of property. See Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

268. The First Amendment analogy is not a perfect one since the First Amendment obviously provides protection against governmental compulsion, which is not implicated by commercial use of identity. Yet the free speech interest also reflects a social and cultural interest rooted in notions of autonomy. As the Supreme Court stated in *Turner Broadcasting System v. FCC*, "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and *cultural life* rest upon this ideal." 512 U.S. 622, 641 (1994) (emphasis added).



express her personality, individuals should have an absolute right to prevent uses that suggest her sponsorship or endorsement, without regard to whether the perceived endorsement would be objectionable to anyone else.

This right should also be somewhat broader than § 43(a) of the Lanham Act would protect. Lanham Act claims focus on whether the use at issue suggests sponsorship or endorsement of a particular producer or its products or services. While uses that suggested that narrow form of endorsement should be deemed to violate the identity appropriation right, so should uses that suggested broader endorsement of a type of product or service. Thus, whether or not John Elway appears to endorse Coors is only one relevant question; we should also ask whether he appears to endorse beer.

## 2. *Destabilization of Meaning*

Other uses that do not suggest an individual's endorsement nevertheless can interfere with autonomous self-definition by destabilizing the meaning of cultural identity. This destabilization might result from third-party uses that offer inconsistent or negative interpretations of an identity. Imagine, for example, that someone named John Rogers opened an adult entertainment establishment under the name "Mr. Rogers' Neighborhood," an obvious play on the famous children's television show that starred Fred Rogers.<sup>269</sup> Few would believe that Fred Rogers endorsed the particular establishment or even the type of entertainment. That use, however, would undoubtedly create new associations with the name Mr. Rogers that would come to mind for those who have encountered both types of uses. "Indeed it is hard to believe that anyone who had [encountered the strip club] could ever thereafter disassociate it from [Fred Rogers]."<sup>270</sup>

Research in the area of consumer psychology suggests that when a cultural product is associated with incompatible values or unpleasant images, consumers form negative perceptions of the original that are likely to persist for some time even in the face of attempts by the owner to provide countering information.<sup>271</sup> Not surprisingly, the risk of negative perception is higher when the consumer of the inconsistent message attributes the message to the

---

269. I am assuming in this example that the claim arose while Fred Rogers was still living, setting aside the question of whether his heirs should have a claim based on such uses after his death.

270. *Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979).

271. See Bradford, *supra* note 199, at 34 (citing JOHN O'SHAUGHNESSY & NICHOLAS JACKSON O'SHAUGHNESSY, PERSUASION IN ADVERTISING 59-60, 63 (2004) and Jennifer Aaker et al., *When Good Brands Do Bad*, 31 J. CONSUMER RESEARCH 1 (2004)).

source of the image, yet these “source effects” may not be sufficient to prevent consumers from developing negative perceptions even when they do not attribute the incompatible message to the owner.<sup>272</sup> Negative associations are particularly unlikely to be overridden when there is frequent exposure to the inconsistent interpretations.<sup>273</sup> The individual whose identity is used in such a way is positioned to bear the economic and non-economic consequences of those negative perceptions.<sup>274</sup>

This “destabilization of meaning” branch of the proposed identity appropriation claim has an obvious corollary in the concept of dilution in trademark law, particularly the tarnishment variety.<sup>275</sup> The principal focus of a tarnishment inquiry is on whether the defendant’s use creates negative or unwholesome associations with the plaintiff’s mark.<sup>276</sup> Some courts, however, have found tarnishment where the defendant’s use, though not inherently

272. See *id.* at 49-50 (collecting sources discussing “source effects”).

273. *Id.* at 50-51 (“In this way, frequent exposure may override the efficacy of other informational cues such as source and so confuse consumers as to authorized and illicit interpretations.”).

274. Justin Hughes has argued that the audience has important interests in stable meaning as well, suggesting that “there is good reason to think that the utility derived by passive non-owners from the stability of propertized cultural objects is greater than the utility that would accrue to non-owners who want to recode cultural objects so much that those non-owners need to be freed from existing legal constraints.” Hughes, “*Recoding*,” *supra* note 23, at 928. Indeed, Hughes argues that recoders themselves are sometimes benefited by restrictions on recoding. “Even [when a non-owner wants to express herself through recoding a cultural object], the non-owner usually needs a stable, well-known meaning from which her own meaning will arise and against which it will reverberate.” *Id.* at 941-42. My treatment differs from Hughes’s in that it focuses squarely on the autonomy of the individual to whom an identity refers. If, as Hughes suggests, we are to focus on overall audience interests, and if we were able to determine that the number of recoders who depend on reasonably stable meaning was significant, then there would be reason to doubt the need for law to impose restrictions. In those situations, recoders are unlikely to create works that substantially affect the predominant meanings of cultural works. I would not treat the issue so broadly. Even if relatively few recoders will affect meaning, we should target those particular uses because of the cost they will impose on the individual. For the same reason, I would not elevate audience interests in stability over the individual’s interest in recoding her own identity, which Hughes recognizes as a potential result of focusing on audience interests. See *id.* at 987-1009 (rejecting audience “reliance interests” on the ground that they would not work well).

275. See MCCARTHY, *supra* note 153, § 24:67 (“A weakening or reduction in the ability of a mark to clearly and unmistakably distinguish one source can occur in two different dimensions: ‘blurring’ and ‘tarnishment.’”); see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25 (1995) (discussing blurring and tarnishment varieties of dilution).

276. See *Hormel Foods Corp. v. Jim Henson Prods.*, 73 F.3d 497, 507 (2d Cir. 1996) (“The *sine qua non* of tarnishment is a finding that plaintiff’s mark will suffer negative associations through defendant’s use.”); *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 31 (1st Cir. 1987) (“The threat of tarnishment arises when the goodwill and reputation of a plaintiff’s trademark is linked to products which are of a shoddy quality or which conjure associations that clash with the associations generated by the owner’s lawful use of the mark.”).

unwholesome, is inconsistent with the plaintiff's image.<sup>277</sup> Unlike trademark owners, individuals' interests in maintaining the integrity of their identity are not entirely economic. Nevertheless, the research in cognitive psychology offers support for extending an identity appropriation claim to cover destabilization of the meaning of their identities through a process akin to tarnishment. If used widely enough and in ways that are inconsistent with an individual's proposed meaning, the meaning of an identity can be obscured. That destabilization can occur even if not all the uses suggest sponsorship or endorsement, and even if the unauthorized uses are not inherently negative.<sup>278</sup>

### C. *The Nature of the Damages*

It is important to note that while the autonomy interest implicated by commercial use of one's identity is shared by all, the damages that flow from those violations may vary widely. For some individuals, there will be economic damages. Advertisers seek endorsers who reflect the brand image they seek to create. Some individuals may not be able to effectively endorse family-oriented businesses like Disney if their perceived values diverge from those Disney seeks to portray. Use of a particular individual's identity in connection with less wholesome products such as tobacco or alcohol, therefore, could limit the range of her potential endorsements. Those economic damages are likely limited to celebrities, since non-celebrities rarely earn money from endorsements. It does not follow, however, that celebrities suffer only economic harm from appropriation of their identities. Every individual bears non-economic costs of having their values represented by others.<sup>279</sup> Non-economic costs may come in the form of shame or

---

277. See *Hormel Foods Corp.*, 73 F.3d at 507 ("tarnishment is not limited to seamy conduct"); see also MCCARTHY, *supra* note 153, § 24:106 ("Some cases indicate that 'tarnishment' may also include use in a context which, while not inherently 'unwholesome,' is out of keeping with plaintiff's high quality image.").

Customers or prospective customers will see the plaintiff's mark used by other persons to identify other sources on a plethora of different goods and services. The unique and distinctive significance of the mark to identify and distinguish one source may be diluted and weakened. But no confusion as to source, sponsorship, affiliation, or connection has occurred.

*Id.* § 24:68.

278. See Bradford, *supra* note 199, at 50-51.

279. In this important respect, the case for control over semiotic meaning is much stronger with respect to individual identities than it is for other intangible objects. Madonna's interest in control over the text of her identity is a direct function of her humanity. While the identity she projects may or may not reveal that true identity, she stands to bear the costs of whatever image she projects and what it says about her character. Since those costs will include non-economic, emotional costs, they are not amenable to

embarrassment, or simply discomfort at having been used for a purpose inconsistent with their values. With respect to these non-economic costs, it may not be important that the use objected to was commercial. While some will surely object to any commercialization, the harm for many others will be a function of the particular use that was made.

#### D. *The Claim's Limitations*

Not every third-party use of an individual's identity will suggest sponsorship or endorsement or attempt to rework the meaning of her identity. Many uses of an individual's identity are merely referential. Since celebrity personas are "packed with a rich set of connotations that are understood widely, they play a crucial role in the genesis and transmission of culture."<sup>280</sup> Some uses then may simply draw on the cultural meaning of their time in order to communicate, without risk of redefining that meaning.<sup>281</sup> Uses that simply reference the meaning without trying to redefine it or suggest endorsement do not violate an interest in autonomous self-definition because they do not create any new meaning, nor do they blur the meaning of the original. In fact, those uses are likely to reinforce the meaning an identity has already accrued. This is precisely the theory upon which the trademark defense of nominative fair use is based.<sup>282</sup> Ironically, by recognizing nominative fair use, trademark law, which protects symbols that in many instances derive their value from significantly more labor than celebrity

---

balancing against the benefits that accrue to others. The meaning associated with other works of authorship or trade symbols, by contrast, is entirely constructed. Any costs suffered by an author or creator whose symbol is re-coded are economic and therefore susceptible to balancing against non-owner interests.

280. Dreyfuss, *supra* note 17, at 129-30. Dreyfuss, like Madow, is right to note the communicative significance of identity, but she, again like Madow, goes too far in arguing that privatization of control over such resources "can disturb the dynamics that are crucial to democracy." *Id.* at 139-40.

281. See Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 (111) DUKE L.J. 1, 139-43 (2004) (noting that celebrity identities have symbolic meaning and many uses do not seek to exploit a celebrity to sell products but use an identity as a metaphorical hook).

282. *Hoffman v. Capital Cities ABC, Inc.*, 255 F.3d 1180, 1185-86 (9th Cir. 2001) (allowing magazine to use photograph of Dustin Hoffman as his character from the movie *Tootsie*); *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992) (recognizing nominative fair use defense where (1) the product or service in question is one not readily identifiable without use of the trademark; (2) the defendant uses only so much of the mark as is reasonably necessary to identify the product or service; and (3) the defendant does nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder). The nominative fair use defense also protects First Amendment interests. Thus, by defining the scope of identity appropriation claims to allow for certain kinds of uses, we can reduce, if not eliminate, the potential First Amendment conflict.

identities, tolerates much more copying than the right of publicity in its current form.<sup>283</sup>

The use at issue in *Abdul-Jabbar v. General Motors Corp.*<sup>284</sup> provides a good example of the type of referential uses that should be beyond the scope of the re-conceptualized claim. In that case, the defendant ran a television commercial during one of the broadcasts of the NCAA basketball tournament using the name by which Kareem Abdul-Jabbar was formerly known, Lew Alcindor. The court described the commercial as follows:

A disembodied voice asks, "How 'bout some trivia?" This question is followed by the appearance of a screen bearing the printed words, "You're Talking to the Champ." The voice then asks, "Who holds the record for being voted the most outstanding player of this tournament?" In the screen appear the printed words, "Lew Alcindor, UCLA, '67, '68, '69." Next, the voice asks, "Has any car made the 'Consumer Digest's Best Buy' list more than once? [and responds:] The Oldsmobile Eighty-Eight has." A seven-second film clip of the automobile, with its price, follows. During the clip, the voice says, "In fact, it [has] made that list three years in a row. And now you can get this Eighty-Eight special edition for just \$18,995." At the end of the clip, a message appears in print on the screen: "A Definite First Round Pick," accompanied by the voice saying, "it's your money." A final printed message appears: "Demand Better, 88 by Oldsmobile."<sup>285</sup>

The court found the use of Abdul-Jabbar's former name to violate his right of publicity even though it appears simply as a culturally communicative device. Indeed, the answer to the question "[w]ho holds the record for being voted the most outstanding player of this tournament?" seems irrelevant. Whatever the answer, the rest of the analogy follows.<sup>286</sup> Moreover, Abdul-Jabbar's only argument that the car company "reworked" his image is that they used the name by which he was known prior to converting to Islam.<sup>287</sup> It seems implausible that factual statements about his athletic career from before he changed his name in any way suggest anything about his current

---

283. See *Clark v. Am. Online, Inc.*, No. CV-98-5650, 2000 WL 33535712 (C.D. Cal. Nov. 30, 2000) (granting AOL's motion for summary judgment on Dick Clark's trademark claims based on AOL's use of Dick Clark's name on promotional mailings, finding that the use was nominative fair use, yet denying AOL's motion for summary judgment on Dick Clark's right of publicity claim based on the exact same use).

284. 85 F.3d 407 (9th Cir. 1996).

285. *Id.* at 409.

286. Consequently, there is a reasonable argument that the use should not have been sanctioned even under current law. If the answer to the question was not important, then perhaps it was not the value of Abdul-Jabbar's identity that General Motors was exploiting.

287. *Id.* at 416. Abdul-Jabbar claimed that, if people believed he endorsed the use, they would believe that he had rejected his Muslim name.

beliefs. At the very least, however, Abdul-Jabbar should have been required to prove that this use suggested his endorsement or somehow affected perception of him.<sup>288</sup>

There are also constraints in the formulation I propose that should caution against over extension of the claim against destabilizing uses. Implicit in my formulation is a sense of “other-ness.” The harm of identity appropriation is a result of an association between the individual and some “other”—a company, a product, or a service, for example. Assuming that the information contained in critical commentary or news reporting is true,<sup>289</sup> the reports are not creating meaning as much as revealing it. As a result, those reports do not prevent an individual from making the choices by which others evaluate them. Rather, news reports only shed light on the choices the individual has made. Uses that create an association with another company, or its products or services, on the other hand, do much more than reveal choices. Thus, there is an important distinction to be made between the commercial uses subject to the re-conceptualized identity appropriation claim I propose and traditional non-commercial uses.

Likewise, the “other-ness” constraint should pose serious difficulties to celebrities who bring claims against those who make or sell merchandise bearing their images. Merchandising uses, like the Arnold Schwarzenegger bobblehead dolls, treat the celebrity identity more or less the same as the product itself. In those cases, there arguably is no “other” with which the individual could be associated. Thus, to prevail, the individual would have to demonstrate that others incorrectly believed she was responsible for commercialization at all. For many celebrities, that will be a tall order, given the extent to which they already commercialize their identity.

These are only some of the natural limits of a claim based on an interest in autonomous self-definition. There may also be situations where other values, in particular First Amendment values, outweigh the individual’s autonomy interest. I recognize that likelihood and leave to others the job of determining how to resolve the conflicts. By re-orienting the claim as one intended to protect autonomy, however, one can recognize natural limits of the claim, which should result in less frequent conflicts.

---

288. Although Abdul-Jabbar claimed as much in the context of his trademark claim, the court did not require any proof, and its discussion is cursory at best. *See id.* at 416. Undoubtedly the court was motivated in part by the fact that current right of publicity law requires no such proof.

289. If the statement is not true, then the individual would have slander or libel claims available to her, subject to the restrictions of those claims and of the First Amendment.

#### IV. CONCLUSION

Legal protection against unauthorized uses of an individual's identity has grown significantly over the last fifty years as it has relentlessly pursued economic value. It has pursued value because a false distinction between the harms suffered by private citizens and celebrities seemingly left celebrities without a privacy claim for commercial use of their identities. But the normative case for awarding individuals the economic value of their identities has been based on an unpersuasive application of Lockean labor theory since celebrities do not need additional incentives to invest in either their native skills or in developing their personas. While the prevailing justification is inadequate, as are other theories offered by supporters, courts and commentators have long ignored an important interest implicated by commercial use of identity that is shared by every individual. Because the things with which individuals choose to associate reflect the way they wish to be perceived, unauthorized use of one's identity in connection with products or services threatens to define that individual to the world. There are costs to whatever meaning we project, and those costs are borne uniquely by the individual. It is that interest, and only that interest, that the law should seek to protect. Moving in that direction would not only lead to a coherent body of law, but it would provide natural limits for a claim that is currently limitless. This article is intended to move the law in that direction.