

WHOSE WHO? THE CASE FOR A KANTIAN RIGHT OF PUBLICITY

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ABSTRACT

Rapidly developing technological opportunities for unauthorized uses of identity—from “virtual kidnapping” to digitalcasting—coincide with growing demand for a preemptive federal right of publicity that can replace the existing welter of inconsistent state laws. Progress is impeded, however, by intractable doctrinal confusion and academic hostility to the right as allegedly inimical to society’s cultural need to manipulate celebrity images. Because the right of publicity is traditionally based on Lockean labor theory and analogized to intellectual property in created works, it is vulnerable to such attacks; to date, no serious attempt has been made to elaborate an alternative philosophical justification that can withstand them.

In this Article, Dean Haemmerli uses Kantian philosophy to justify an autonomy-based right of publicity. In doing so, she challenges both the traditional approach to the right of publicity and its postmodernist critiques. First, the Article’s proposed reconception of the right of publicity rejects the existing doctrinal bifurcation of publicity and privacy rights and explicitly embraces both the economic and moral facets of the individual’s need to control the use of his identity. Second,

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by grounding the right in personal autonomy rather than purely pecuniary interests, the Article gives it greater weight in the balance against competing First Amendment considerations. At the same time, in order to contain potential abuses of a more expansive right, the Article considers First Amendment, fair use, and first sale doctrine limitations and incorporates various elements of these limitations into proposed legislative language establishing a preemptive federal right of publicity.

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INTRODUCTION

“It’s not mysterious,” said the famous professor. “Suppose that a car company, intent on emphasizing celebrities in its advertisements, discovers that Eddie Murphy drives one of its models. It publishes ads with pictures of Murphy in his car. Since the ads are truthful and capture Murphy behind the wheel of the car—which is a fact—it is hard to imagine any real issue other than an economic one; Murphy wants to charge for such exposures.”

Although the professor’s view of publicity rights is widespread,¹ it is misguided. The right of publicity can also be viewed as a property right grounded in human autonomy.² As such, it belongs to all—including celebrities who commodify their images³—and it embraces

1. See *infra* notes 26-31, 84-96, 101 and accompanying text.

2. See *infra* Part II.A.1-2. That is, it is the right of “inviolate personality” articulated in Charles D. Warren and Louis D. Brandeis’s seminal article, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), discussed *infra* note 83. As Part II will show, this right is reconcilable with a right to compensation for advertisements for taco chips, televisions, and portable toilets. See *infra* text accompanying notes 166-70, 186-88.

3. See *infra* Part I.C.

noneconomic objections to the commercial exploitation of identity.⁴ Eddie Murphy might take issue with the use of his image in the ad for many reasons. He might intend to change car brands; he might dislike the advertisements; or he simply might not wish to appear in them. The point is that the use of his image should be his choice, and that his choice is ultimately justified by his humanity. Whether his objection is economic or moral, he should have a right to voice it.⁵ This Article presents the case for an expansive right of publicity, an autonomy-based property right that breaks with the traditional view of the right of publicity as a solely pecuniary interest in the exploitation of identity.⁶ In several respects, this Article is countercultural: not only

4. See *infra* text accompanying notes 26-31 (defining the right of publicity as the right to exploit the commercial value of personal identity), and text accompanying notes 163-70 (defining the right to one's image as an innate right based on idealist personality theory).

5. This is not to say that Murphy's objection will necessarily result in suppression of the ad. My quarrel with the professor, rather, is with his characterization of Murphy's objection as exclusively economic. Whether the ad can survive the objection is a question of balancing the right of publicity against First Amendment considerations. See Theodore F. Haas, *Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising*, 19 U.C. DAVIS L. REV. 539 (1986). Haas makes a cogent argument as to why, in the final analysis, "an advertiser should be able to use a person's name or likeness without consent as part of a truthful statement about a legitimate product." *Id.* at 572. I treat this argument in greater detail later. See *infra* text accompanying notes 294-96.

6. That is, I propose doctrinal recognition of a right of publicity that allows its owner to object to commercial exploitation of her identity on both moral and economic grounds, rather than having to choose between economics (publicity) and feelings (privacy). Although positive law may recognize both aspects of the right to object to such exploitation, see *infra* text accompanying notes 80-82, doctrine does not tend to do so. The idea of a unitary publicity right, or of publicity rights as comprising both economic and "personal" rights, is not entirely novel, but it has been overwhelmed by the dominant concept of publicity rights as solely economic. The notion of a unitary economic and moral right was expressed, for example, in Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964). Bloustein believed that Dean Prosser was wrong in saying that there was no unique privacy tort. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) (setting forth the fourth prong of the privacy group of torts as "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness," violating the latter's proprietary interests). Bloustein contended that Prosser misconstrued Warren and Brandeis. See Bloustein, *supra*, at 971. According to Bloustein, the right of privacy is one of "inviolate personality" that "defines man's essence as a unique and self-determining being." *Id.* Although Bloustein viewed the right of publicity as merely a "right . . . to command a commercial price for abandoning privacy," as opposed to a free-standing entitlement, he saw the underlying privacy right as one against exploitation because "it would be demeaning to human dignity to fail to enforce such a right," *id.* at 989, and the interest protected, whether speaking of privacy or publicity, was that of independence, dignity, and integrity, see *id.* at 971. The idea of a unitary right has also been expressed in 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1.11[C] (1998) [hereinafter MCCARTHY, *RIGHTS OF PUBLICITY*]; in Oliver R. Goodenough, *Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity*, 47 S.C. L. REV. 709, 736, 766-67 (1996); and in Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A*

does it question the traditional doctrinal assertion that the publicity rights claimant cares only about compensation,⁷ but it also rejects the nontraditional, postmodernist⁸ contention that the right of publicity has been overextended.⁹ Instead, this Article argues that the right of publicity, far from being overindulged, has been theoretically short-changed, and that as a property right based on human autonomy, it merits respect and nurturing, rather than the diminution urged upon the courts by critical and postmodernist theoreticians.¹⁰

Property and Liability Rule Analysis, 70 IND. L.J. 47, 70 (1994) [hereinafter Kwall, *Right of Publicity*] (“It is entirely appropriate for the right of publicity to redress both economic and emotional injuries that stem from an unauthorized appropriation of an individual’s persona.”). As McCarthy and Goodenough put it, however, the elaboration of a unitary right has been left to others. See MCCARTHY, RIGHTS OF PUBLICITY, *supra*, § 1.11[C], at 1-50; Goodenough, *supra*, at 767. So far, those others have not materialized. What has been missing, and what this Article seeks to supply, is a publicity right that is a property right, but one with a broader and deeper basis than that enjoyed by the right under traditional doctrine. See *infra* Part II.

7. See, e.g., Haas, *supra* note 5, at 543 n.18 (“Courts have come to use the term ‘right of publicity’ to refer to name-or-likeness cases in which the loss complained of is financial rather than dignitary.”); Richard S. Robinson, *Preemption, the Right of Publicity, and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183, 203 (1998) (“[E]motional distress cannot form the basis for damages. The right of public identity, while based on the identity of a real person, is primarily a property right. The harm caused by infringement of that property right is economic in nature.”).

8. This term is used to cover the movement of deconstructionist and postconstructionist criticism. See Keith Aoki, *Adrift in the Intertext: Authorship and Audience “Recoding” Rights—Comment on Robert H. Rotstein*, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 805, 807 n.7 (1993) (book review) (citing Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1862 (1991) [hereinafter Coombe, *Objects of Property*]).

9. See, e.g., Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity “Wheel” Spun out of Control*, 45 U. KAN. L. REV. 329 (1996); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993); Steven C. Clay, Note, *Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts*, 79 MINN. L. REV. 485 (1994); William M. Heberer III, Comment, *The Overprotection of Celebrity: A Comment on White v. Samsung Electronics America, Inc.*, 22 HOFSTRA L. REV. 729 (1994); Todd J. Rahimi, Comment, *The Power to Control Identity: Limiting a Celebrity’s Right to Publicity*, 35 SANTA CLARA L. REV. 725 (1995); Sudakshina Sen, Comment, *Fluency of the Flesh: Perils of an Expanding Right of Publicity*, 59 ALB. L. REV. 739 (1995); Linda J. Stack, Note, *White v. Samsung Electronics America, Inc.’s Expansion of the Right of Publicity: Enriching Celebrities at the Expense of Free Speech*, 89 NW. U. L. REV. 1189 (1995); Fred M. Weiler, Note, *The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT. L.J. 223 (1994).

Of all of these, Professor Madow’s article is the most substantial, and can indeed be viewed as a seminal work to which I shall refer frequently. I do not address all of Professor Madow’s arguments against the right of publicity; for example, he raises a number of objections to economic justifications of the right. Because I do not propose an economic argument for the right, this Article does not address that part of Professor Madow’s critique. The same is true of his arguments regarding consumer protection justifications of the right of publicity.

10. See Rosemary Coombe, *Authorizing the Celebrity: Publicity Rights, Postmodern Poli-*

Both proponents and critics of the right of publicity generally perceive it as a property claim grounded in Lockean labor theory.¹¹ Although other rationales are occasionally propounded,¹² no serious attempt has been made to elaborate an alternative philosophical justification for the right. Yet, without that effort, the right of publicity is condemned to suffer from several fatal flaws. First, as nothing more than a claim to an objectified commodity, it cannot be theoretically reconciled with noneconomic personal interests such as those protected by privacy. The resultant (and often convoluted) bifurcation of publicity and privacy interests has engendered intractable doctrinal confusion.¹³ Second, in encouraging analogies between human personality and created works,¹⁴ a Lockean-based approach encourages attacks by postmodernist critics, who contend that because public identity is a social construct, society is entitled to unfettered access to that identity.¹⁵ Third, and related to both of the preceding problems, the Lockean justification of the right of publicity radically skews the effort to balance the right with competing First Amendment¹⁶ principles. That balance appears very different depending

tics, and Unauthorized Genders, 10 CARDOZO ARTS & ENT. L.J. 365 (1992) [hereinafter Coombe, *Author/izing*]; Madow, *supra* note 9. As will be seen, much of the debate—particularly in the context of the cultural and semiotic function of image—is really about celebrity icons. Although statutory and common law publicity rights generally apply to all, publicity rights, as a practical matter, usually concern celebrities.

11. See, e.g., Madow, *supra* note 9, at 175 n.239. Put briefly, the idea (as presented by most commentators) is that Locke's theory of property bases the entitlement to property in the labor that a person has expended on the object in question, whether land or, in this case, image. See JOHN LOCKE, *Second Treatise of Government* ¶ 27 (1690), reprinted in 4 THE WORKS OF JOHN LOCKE 353-54 (photo. reprint 1997) (1794) [hereinafter WORKS OF LOCKE]. Of course, this is an oversimplification. Nevertheless, I do not attempt any explication of Locke's theory of property here; for that, the reader may wish to turn to JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 157-62 (1988), or to Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1544-72 (1993).

12. See JULIUS C.S. PINCKAERS, *FROM PRIVACY TOWARD A NEW INTELLECTUAL PROPERTY RIGHT IN PERSONA* 242-43 (1997); Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 38-40 (1997) [hereinafter Kwall, *Fame*]; *infra* text accompanying notes 111-15. It should be noted, however, that Kwall uses Locke to justify the treatment of the right of publicity as a property right and emphasizes the creative effort and labor of the property holder. See Kwall, *Fame, supra*, at 38-40.

13. See *infra* Part I.D.

14. See *infra* Part I.B (criticizing the Supreme Court's decision in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), for suggesting this analogy); *infra* text accompanying notes 163-65 (pointing out that creation and labor are not relevant if the right proceeds directly from personality).

15. See *infra* Part III.

16. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of

upon whether one views the right of publicity as a claim to advertising royalties or as a property right based on personal freedom.

The timing is propitious for an overhaul of the right of publicity. Existing doctrine remains in a state of disarray that leaves room for wrongs without remedies, despite its characterization as a field of “settled” law,¹⁷ with a “self-evident” philosophical basis.¹⁸ Existing practice is equally confused, with fifty state regimes protecting differing aspects of identity, for varied terms, and with disparate remedies.¹⁹ As the right has become more important in economic terms,²⁰ the need to reassess it, reformulate it, and legislate it at the federal level has become concomitantly more pressing.²¹

speech, or of the press . . .”).

17. Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 869 (1995); see also 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, 124-25 (1996) (“[T]he law giving individuals control over their images has now fully emerged.”).

18. MCCARTHY, RIGHTS OF PUBLICITY, *supra* note 6, § 1.1[B][2], at 1-5 to 1-6; see also *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 868 F. Supp. 1266 (1994) (citing MCCARTHY, RIGHTS OF PUBLICITY, *supra* note 6), *aff’d*, 95 F.3d 959 (10th Cir. 1996).

19. See MCCARTHY, RIGHTS OF PUBLICITY, *supra* note 6, § 6.3[A], at 6-13 to 6-15. Of 15 state statutes, some protect only name and likeness, while others protect name, likeness, and voice; some deny post mortem coverage, while others extend it for terms of 10, 20, 40, 50, or 100 years; and some provide for injunctions while others do not.

20. According to the *Cardtoons* district court decision, the trading card market was worth over \$2 billion in 1992. See *Cardtoons*, 868 F. Supp. at 1274 n.6. In its June 1999 issue, the *American Bar Association Journal* reported Michael Jordan’s commercial endorsements to be worth \$47 million, and Tiger Woods’s \$24 million. See John Gibeaut, *Image Conscious*, A.B.A. J., June 1999, at 46, 47.

21. See, e.g., Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. 227 (1999). In May 1998, the President of the International Trademark Association testified before Congress that INTA endorsed a “single national law rather than the present patchwork.” *Protection Against Artistic “Knock-Offs”*: *Hearings on H.R. 3891 and H.R. 3119 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 11 (1998) (statement of Frederick Mostert, President, International Trademark Association); see also *infra* Part VI. In addition to extreme variegation in state law, and correspondingly high transaction costs, technology’s ability to outpace the law is (as usual) dramatic. According to *Wired News*, “[v]irtual kidnapping” is now a “hot issue” involving the purloining of individuals’ likenesses with the possibility of their appearing on the Internet, “performing lewd or violent acts.” Susan Kuchinskas, *Image Is Everything*, WIRED NEWS (June 18, 1998) <<http://wired.com/news/news/email/other/culture/story/13075.html>>. The concern that an individual might be made to appear in fictitious acts is a real one. See John Voland, *Cameo Crisis on Contact*, DAILY VARIETY, July 15, 1997, at 1 (describing White House objections to the insertion of newsreel footage of President Clinton into the movie *Contact*). One can readily imagine a public figure “appearing” in a fake infomercial on the Internet, or a secretly homophobic actor being made to host a gay men’s health telethon. Despite the potentially informative or charitable nature of such uses, they would still amount to “virtual kidnapping.”

Part I of the Article lays the groundwork by explaining why the right of publicity as currently conceived is at once complicated and inadequate to protect even a narrow, purely economic claim to control the use of identity. In Part II, I propose an idealist philosophical justification of the right of publicity based on human autonomy and a first-occupancy property right in objectified identity. In particular, I attempt to show why a reorientation of the right of publicity along Kantian lines is not only possible but desirable. Such reorientation is desirable specifically because it permits recognition of the right's moral, as well as economic, facet, and it is desirable generally because the Kantian emphasis on inherent human value resonates strongly with our political culture.

Viewing the right of publicity as an extension of human worth and autonomy,²² rather than as a purely economic interest, also changes the nature of the exercise that balances the right against competing societal claims. In Part III, I explain why achieving that balance is more complicated than commonly supposed by postmodernist critics who assert that the right of publicity must always be subordinated to the needs of popular culture.²³ Part III concludes that—whatever the merits of postmodernism—once we define the right of publicity as a property right proceeding from human autonomy, the increase in its specific gravity requires a more thoughtful balancing effort than is ordinarily attempted. In this sense, a Kantian grounding is preferable to a Lockean justification not only because a Kantian foundation forces the realization that the balancing challenge is complex, but because it more accurately reflects the value of the human being behind the persona at issue.

Part IV inquires into the nature of the conflicting criteria in the balancing effort, in particular First Amendment imperatives. Do mugs and T-shirts constitute “expression” that insulates their producers from a right of publicity claim? If not, why not? What about products that partake of the commercial marketplace, such as films, but that are clearly expressive—are their First Amendment protections absolute? Part IV of the Article departs from most analyses by

22. I use the concept of autonomy as a more fundamental notion than that of privacy, which relates only to the degree to which an individual is exposed to the world. Autonomy relates to individuality itself. Also, the term “autonomy” is not fraught with doctrinal meaning, whereas “privacy” carries a heavy load of tort baggage.

23. See, e.g., Coombe, *Objects of Property*, *supra* note 8, at 1880.

proposing full First Amendment protection for even the most blatantly “commercial”²⁴ non-advertising uses of identity.

Part V suggests some criteria for identity, First Amendment, fair use, and first sale tests that can be applied to a reconceived and expanded right of publicity. Finally, Part VI suggests an appropriate formulation of federal legislation (in the form of amendments to the Lanham Act²⁵) that takes account of society’s cultural and expressive needs, while preserving both the personal autonomy and economic characteristics of the individual’s right of publicity.

24. Because the right of publicity relates to the “commercial” exploitation of identity, this Article focuses on uses in connection with goods and services marketed to members of the public, that is, uses in “commerce,” as that term is employed by the federal trademark statute, the Lanham Act. (“The word ‘commerce’ means all commerce which may lawfully be regulated by Congress.” 15 U.S.C. § 1127 (1994).). In the right of publicity literature, however, “commercial” often acquires a normative patina, whereby some uses are suspect—and deemed less worthy of a First Amendment defense—because they are “commercial” rather than culturally valuable. As this Article discusses later, I reject this normative use of the term “commercial,” largely because I believe it is futile to apply such distinctions in an *a priori* fashion. *See infra* text accompanying notes 241-50. At the same time as I reject normative uses of the term “commercial,” however, I exclude from the definition of “commercial exploitation” or “commercial use” those uses that are not intended for sale to more than one or a few members of the public. This is admittedly a rather arbitrary distinction: if an artist uses a person’s image in a painting and sells it for \$300,000, is that less “commercial” than selling 300,000 pencil sharpeners with the same image for one dollar each? Without saying that the distinction is one between “art” and “mass-marketed objects” (*see infra* note 243 on the difficulty of defining “art”), I would say that where the number of products is very small, the potential for a right of publicity claim is probably small as well—even if the right of publicity is defined as broadly as I suggest in this Article. The fact is that such limited products—two paintings or 100 lithos—will almost inevitably gain immediate recognition as expressive works, thereby providing a high level of First Amendment immunity to a right of publicity claim. While this may not justify a tautological definition of such objects as noncommercial, it does say that, despite the fact that such works are sold for profit, they are unlikely to be regarded as “commercial” in the ordinary sense of the term. Therefore, when I discuss the likely outcome for artists who use images or identity in producing their works, I acknowledge this belief. *See infra* text accompanying notes 208-10.

My distinction is similar to that drawn by the Copyright Act between artistic works that merit moral rights protection and more commercial artistic products, which do not. Section 106A of the Copyright Act protects works of visual art, defined as single works or limited editions of 200 or fewer copies. *See* 17 U.S.C. §§ 101, 106A (1994). The Act excludes mass-marketed works from the definition of “work of visual art.” *Id.* § 101; *accord* *Comedy III Prods., Inc. v. Saderup*, 80 Cal. Rptr. 2d 464, 470 (Ct. App. 1998), *review granted*, 973 P.2d 512 (Cal. 1999). The California Court of Appeals cited *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996), in which a municipal law requiring permits for street vending of goods was held unconstitutional as applied to painters, sculptors, and photographers. For these reasons, I do not include, for the purposes of this Article, singular or limited series of works as those involved in “commercial exploitation,” even when those works are sold for profit.

25. 15 U.S.C. §§ 1051-1127 (1994).

I. A RIGHT RIPE FOR REFORM

The right of publicity is traditionally formulated as the right to exploit the commercial value of personal identity.²⁶ The tale of how we arrived at that formulation has been told by many others in overwhelming detail²⁷ and will not be repeated here. Despite continuing doctrinal confusion,²⁸ scholars and courts have generally treated the right of publicity as an economic property right with two variants. The first, which has been termed the “associative value” of persona,²⁹ relates to the use of a person’s identity for purposes of selling or advertising goods or services; it also applies to the use of identity as constitutive of goods (e.g., a face on a T-shirt).³⁰ The second variant of the right of publicity has been termed the “performance-value” right, or the right against appropriation of one’s identity in performance. Cases involving this right are relatively sparse in comparison to cases involving appropriation of celebrity images for advertising purposes.³¹ Nevertheless, it is useful to focus briefly on the performance-

26. See J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 130 (1995) [hereinafter McCarthy, *The Human Persona*]. For a classical formulation of the right of publicity as an economic property right, see Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

27. See *supra* note 9 and *infra* note 95. For a guide to articles on this subject, see Frank G. Houdek, *Researching the Right of Publicity: A Revised and Comprehensive Bibliography of Law Related Materials*, 16 HASTINGS COMM. & ENT. L.J. 385 (1994).

28. See *infra* Part I.D.

29. See Halpern, *supra* note 17, at 856. As mentioned earlier, although the right of publicity, defined as the right to control the commercial exploitation of identity, applies to all human beings, it is obviously of greatest importance in connection with celebrities. A premise of this Article is that there is no forfeiture or diminution of rights by public figures by virtue of their voluntary exposure to the public, as may occur in the defamation or privacy contexts. See *infra* Part IV.A.3.

30. See Halpern, *supra* note 17, at 859-60.

31. See McCarthy, *The Human Persona*, *supra* note 26, at 133. Some commentators, such as Professor Madow, assert that performance-value rights are not rights of publicity at all and that abolition of the right would therefore leave “entirely unimpaired” a celebrity’s ability to earn her living from the activities that generated her fame. Madow, *supra* note 9, at 208-10. In view of the Supreme Court’s inclusion of performance value within the right of publicity, and for reasons explained further below, Madow’s argument is not persuasive. Moreover, in a discussion of why free riding is not always frowned upon by the law, Madow himself states that it may be appropriate “to impose liability on ‘unjust enrichment’ grounds when a free riding threatens not simply to divert profits from the plaintiff but . . . to destroy the plaintiff’s livelihood or the marketability of his product and thereby remove his incentive to undertake or continue his productive activity.” *Id.* at 203; see also *id.* at 204 n.377 (discussing unjust-enrichment liability for eliminating the profits of a product). That is precisely the situation addressed by the performance-value right of publicity. Yet, Madow excludes performance value simply because it refers to performance rather than image, see *id.* at 209, ignoring the fact that in the case of celebrities, the public’s desire to see a performance often begins with an attraction to an image.

value right for three reasons. First, it illustrates the conceptual problems that arise when the courts grapple with what precisely constitutes “commercial” exploitation. Second, it allows us to take a brief *tour d’horizon* of publicity rights case law (both advertising and performance value) and of the only Supreme Court right of publicity decision, *Zacchini v. Scripps-Howard Broadcasting Co.*³² Finally, it highlights a serious gap in the law, one that may have increasing relevance as technology creates unprecedented opportunities for unconsented use of celebrity identities in both the associative and performance contexts.

A. State Law Lacunae

Suppose that Tom Cruise awoke one day to find an unauthorized “Cruise2” cyberactor³³ cast as a cocky but courageous pilot in a new

32. 433 U.S. 562 (1977).

33. Cyberactors or “synthespians” have been heralded for some time. *See, e.g.*, Thomas Glenn Martin, Jr., *Rebirth and Rejuvenation in a Digital Hollywood: The Challenge Computer-Simulated Celebrities Present for California’s Antiquated Right of Publicity*, 4 UCLA ENT. L. REV. 99 (1996); Jerome E. Weinstein, *Abbott and Costello Meet Frankenstein, Dracula and the Wolfman in the Year 2000 or the Birth of the Synthespian*, 32 BEVERLY HILLS B. ASS’N J. 32 (1997); Erin Giacoppo, Note, *Avoiding the Tragedy of Frankenstein: The Application of the Right of Publicity to the Use of Digitally Reproduced Actors in Film*, 48 HASTINGS L.J. 601 (1997); Nicholas Hellen, *Hollywood’s Cyberstars Stage a Comeback from the Grave*, TIMES (London), Mar. 31, 1996, at 1-3; Harley Jebens, *Illusions of Movie Grandeur: New Digital Scanning Process Creates Flesh and Blood Images from Cyberscans*, AUSTIN AM.-STATESMAN, Apr. 30, 1996, at E1. Digital-scanning and motion-recapture technology enable special effects experts to recreate existing actors or to revivify aging or deceased stars. *See* Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers—A 21st Century Challenge for Intellectual Property Law*, 41 J. COPYRIGHT SOC’Y OF THE U.S. 19 (1993); Steve Gray & Darnell Williams, *So You Want to Do Motion Capture?*, COMPUTER GRAPHICS WORLD, Nov. 1, 1996, at 11. According to the *Times*, Marlon Brando has been scanned, and the estate of Steve McQueen has expressed interest. *See* Hellen, *supra*, at 1-3. Jebens reports that Sean Connery will star as a man in his 30s in a space movie. *See* Jebens, *supra*, at E1. When an actor has not consented to scanning, it can be accomplished by using two-dimensional sources such as existing films. Some warn against expecting too much from computer-generated imagery (“CGI”) because it is limited by its expense relative to other special effects options such as animatronic puppetry. CGI is also limited by the volume of computation needed to portray an actor’s entire body and movements. If computing volume is a key constraint, however, consider that a uni-molecular magnet may one day allow for storage of data “thousands or millions of times more densely than today’s memory and storage systems” permit. John Markoff, *Quantum Shift in Computers? Tiny Magnet Could Pack Data Thousands or Millions of Times More Densely Than Today’s Memory and Stronger Systems*, ORANGE COUNTY REG., Jan. 27, 1997, at A11; *see also* *Molecule-Sized Microscopic Magnet Could Yield Computing Breakthrough*, EDP WKLY., Feb. 3, 1997, at 1.

In fact, computer-synthesized actors are a reality. In December 1998, *People* magazine reported on a “Cyber-Bruce Willis” video game, in which Willis will “run, jump or fire a flame-thrower at your command” on a video screen as a “digitized star” in the Sony PlayStation game

action thriller. It would intuitively appear that there must be some recourse against such an appropriation of his identity. But is there?³⁴

In the absence of a federal right, Cruise would be limited to state law publicity rights claims.³⁵ In California,³⁶ he could sue under Civil Code section 3344³⁷ for injury to his feelings or for economic damage based on the commercial value of his likeness.³⁸ Because section 3344

Apocalypse. People reports that technicians “scanned Willis’ body and voice into a computer” to create the character. Willis was reportedly compensated with a “multimillion-dollar package.” *Scoop*, PEOPLE, Dec. 21, 1998, at 18. More recently, the *Star Wars: Episode One* character of Jar Jar Binks has demonstrated the capability of CGI to produce an entirely realistic (if not replicating the image of a human) digital actor. See STAR WARS: EPISODE ONE—THE PHANTOM MENACE (20th Century Fox, 1999).

34. The issue of CGI actors has been explored in several articles to date. The first addresses the issues of creating and exploiting synthetic replicas of deceased actors. See Beard, *supra* note 33. Because of its focus on resurrection rather than synthetic cloning of live actors, it is only partially relevant to this Article. The second makes an excellent start at describing the potentials of CGI and sounding the alert as to a gap in the law, particularly publicity rights law. See Pamela Lynn Kunath, Note, *Lights, Camera, Animate! The Right of Publicity’s Effect on Computer-Animated Celebrities*, 29 LOY. L.A. L. REV. 863, 877-82 (1996). Kunath proposes compulsory licensing, *see id.* at 903; for reasons that will become apparent, I believe this is an unsatisfactory solution, as it reduces to a form of virtual specific performance of personal services. The third is informative (and supportive of the right of publicity), *see* Giacoppo, *supra* note 33, at 626-28, but it does not really address the serious difficulties involved in trying to enforce publicity rights under state law. See *infra* note 63; *see also infra* Part I.B. The fourth is largely practical in nature. See Weinstein, *supra* note 33. Finally, Martin, *supra* note 33, applies California law to hypothetical digital actors.

35. At this juncture, we can distinguish Cruise’s situation from cases in which performers’ publicity right claims have been preempted by federal copyright law. See *Baltimore Orioles, Inc. v. Major League Baseball Players’ Ass’n*, 805 F.2d 663, 674-75 (7th Cir. 1986) (holding that the players’ publicity rights claims in their performances were preempted under the Copyright Act, 17 U.S.C. § 301(a), because their performances were fixed in telecasts owned by a ball club); *Ahn v. Midway Mfg. Co.*, 965 F. Supp. 1135, 1138 (N.D. Ill. 1997) (holding that performers who agreed to have their images videotaped to form the basis of characters in *Mortal Kombat* video games were precluded by the Copyright Act from asserting a right of publicity claim based on allegedly unauthorized use of their personas). In both of these cases, the plaintiffs were viewed as having consented to the use of their personas in performance in a copyrightable, fixed work of authorship. See *Baltimore Orioles*, 805 F.2d at 676 & n.22; *Ahn*, 965 F. Supp. at 1138. In contrast, in the Cruise hypothetical, there is no such consent to the use of a persona in a fixed work, nor any performance by the plaintiff.

36. I use California and, later, New York law as examples because these states are both entertainment industry centers and their laws present a broad array of issues involved in right of publicity claims: the relationship between the right and “identity,” the relationship between it and privacy, questions of newsworthiness, and the elusive quality of “trade” or “commercial use.”

37. See CAL. CIV. CODE § 3344 (West 1997).

38. See *infra* text accompanying notes 80-83 (noting that some state law does accommodate both economic and moral claims). California Civil Code section 3344 reads: “(a) Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior

relates solely to uses on or in products or goods, or for advertising or the solicitation of purchases, however, this claim might fail.³⁹ A com-

consent, . . . shall be liable . . .” CAL. CIV. CODE § 3344(a). Until October 1999, section 990, addressing the use of deceased persons’ identities, read in relevant part:

(a) Any person who uses . . . a deceased personality’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof. . . .

. . . .

(n) This section shall not apply to the use of a deceased personality’s name, voice, signature, photograph, or likeness, in any of the following instances:

(1) A play, book, magazine, newspaper, musical composition, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph (4).

(2) Material that is of political or newsworthy value.

(3) Single and original works of fine art.

(4) An advertisement or commercial announcement for a use permitted by paragraph (1), (2), or (3).

Id. § 990 (West Supp. 1999).

In 1997, the Ninth Circuit decided that the use of film clips of Fred Astaire as a preface to a licensed dance instruction video was exempt from liability under both section 990(n)(1) and section 990(n)(4). *See Astaire v. Best Film & Video Corp.*, 116 F.3d 1297, 1302 (9th Cir. 1997), *opinion amended*, 136 F.3d 1208 (9th Cir.), *and cert. denied*, 119 S. Ct. 161 (1998).

In October 1999, the Governor of California approved Senate Bill 209, “Deceased Personalities,” which amended and renumbered (as section 3344.1) section 990 of the Civil Code. As amended, section 3344.1 provides at subsection (a)(1) for liability for the use of a deceased personality’s name, voice, etc., in terms identical to those of former section 990, discussed *supra*. Section 3344.1 also provides for an exemption for a variety of works:

(a)(2) For purposes of this subdivision, a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, shall not be considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.

CAL. CIVIL CODE § 3344.1 (West, WESTLAW through 1999 portion of 1999-2000 Reg. Sess.).

39. *See Page v. Something Weird Video*, 960 F. Supp. 1438, 1443 (C.D. Cal. 1996) (holding that the use of plaintiff’s photograph in a catalogue advertising its films was not a publicity rights violation because the likeness was not used to sell the catalogues and because promotional speech may be nonpromotional and protected by the First Amendment if it advertises, and is incidental to, an activity (such as a film) protected by the First Amendment); *see also* Sean Elliott, Note, *Something’s Weird in the State of California: How the Right of Publicity Wronged Bettie Page*, 72 NOTRE DAME L. REV. 593, 613 (1997). As explained *infra* notes 46-48 and accompanying text, dramatic works are often exempted from categorization as mere “goods” for publicity rights purposes in the Ninth Circuit and elsewhere. Although section 3344 contains exemptions for news, political uses, and sports broadcasts, it does not exempt entertainment or media uses. *See* CAL. CIV. CODE § 3344(d). This omission was obviously intentional, in view of the exemption included in former section 990, *supra* note 38, and it implies that section 3344 would therefore prohibit an unauthorized use of identity in a film *qua* goods. Nevertheless, in view of interpretations of California law holding that “films generally enjoy

mon law claim might fare better, as it requires only the unauthorized use of identity to defendant's advantage and plaintiff's injury.⁴⁰ If Cruise were in a federal court applying California law, he might have some cause for optimism; ever since it enabled Vanna White to seek relief for an advertisement depicting a robot in a blond wig and slinky dress, the Ninth Circuit has been maligned for its alleged excesses in this area.⁴¹ But recent Ninth Circuit decisions have generally involved advertising uses of celebrity identity.⁴² This case, in contrast, involves

the same First Amendment protection as traditional news media," *Page*, 960 F. Supp. at 1445, I believe that section 3344 leaves room for entertainment uses to escape coverage if they are viewed primarily as art, rather than "goods." See *infra* note 46 (discussing the New York cases); *infra* text accompanying notes 242-47 (arguing that it is equally inappropriate to label certain uses categorically as art and exempt them from all regulation); *infra* Part VI. For a contrary view, see Martin, *supra* note 33, at 126 (arguing that the section 990 exemption of uses in film implies that otherwise, a film would have been classified as "goods"; hence, a film is "goods" for purposes of that statute and, by analogy, for purposes of section 3344).

The recent amendment of section 990, see discussion *supra* note 38, may lend additional force to Martin's reasoning, as the state legislature evinced no desire to provide a similar exemption for films from the definition of goods or merchandise in the section 3344 context. Nevertheless, First Amendment arguments are potent, and could conceivably prevail over negative inferences from the failure to amend section 3344.

40. This is a contraction of the four-pronged test enunciated by the California Court of Appeals: (1) defendant's use of plaintiff's identity; (2) appropriation of plaintiff's name or likeness to defendant's advantage; (3) lack of consent to the use; (4) resultant injury to plaintiff. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992) (citing *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 417 (Ct. App. 1983)), *cert. denied*, 508 U.S. 951 (1993). At issue in *White* was whether the second prong of this test literally required appropriation of likeness. The Ninth Circuit said no: "[T]he common law right of publicity is not so confined." *Id.* The court emphasized that there are many ways of appropriating identity, citing *Midler v. Ford Motor Co.*, 849 F.2d 460, 463-64 (9th Cir. 1988), and *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835-37 (6th Cir. 1983). See *White*, 971 F.2d at 1398. The dissent in *White* argued that the California cases require appropriation of a name or likeness. See *id.* at 1402 (Alarcon, J., dissenting). Because we are in fact dealing with likeness here, this issue is not material. For a review of California law, see Elliott, *supra* note 39, at 599-601.

41. See sources cited *supra* note 9. In January 1999, movie star Dustin Hoffman won a lawsuit against *Los Angeles* magazine, which had used computer-altered movie stills of famous stars, including a computer-generated photograph of Hoffman, in a fashion spread titled "Grand Illusions." See *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867 (C.D. Cal. 1999). The magazine placed Hoffman's face as it appeared in the movie *Tootsie* on a body clothed in a Richard Tyler dress and Ralph Lauren shoes. The clothing was listed elsewhere with prices. See *id.* at 870. Hoffman claimed right of publicity violations. See *id.* at 871. U.S. District Court Judge Dickran Tevrizian held in Hoffman's favor, ordering the defendant magazine to pay \$1.5 million in actual damages, as well as punitive damages, see *id.* at 875, and fees, see *id.* at 876. The judge declared that Hoffman and the other celebrities featured in "Grand Illusions" were "commercially exploited and . . . robbed of their dignity, professionalism, and talent" and "violated by technology." *Id.* at 873.

42. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1096 (9th Cir. 1992) (awarding damages for the use of a sound-alike in a taco chip commercial), *cert. denied*, 506 U.S. 1080 (1993); *White*, 971 F.2d at 1399 (holding that the use of a robot wearing a long gown and a blonde wig and appearing to be a game show hostess could constitute an appropriation of Vanna White's iden-

a purported work of art. It is therefore not entirely clear that relief would be available under California law. Although the elements of a common law claim unquestionably exist, the context of a creative work in a communicative medium makes the outcome problematic.⁴³

Meanwhile, if Cruise sued in New York, he would be limited to a statutory privacy claim.⁴⁴ New York law prohibits the unconsented use of a person's name, likeness, or voice for advertising or for purposes of trade.⁴⁵ It is doubtful, however, that the use of "Cruise2" would be viewed as a use for advertising or purposes of trade. Uses of identity in for-profit communicative media have often been immunized from publicity/privacy objections unless the use was no more than an advertisement in disguise.⁴⁶ In fact, it is often assumed that

Midler v. Ford Motor Co., 849 F.2d 460, 463-64 (9th Cir. 1988) (holding that the use of a sound-alike in an automobile commercial is actionable under the common law as an appropriation of identity), *cert. denied*, 503 U.S. 951 (1992). A comparable Sixth Circuit case is *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983), which ruled that the use of the "Here's Johnny" slogan to sell portable toilets impermissibly appropriated plaintiff's identity. *See id.* at 836-37; *see also infra* note 47 (discussing appropriation of identity in the context of dramatic works).

43. *See infra* note 49 (citing performance-value cases where lack of creativity on the defendants' part was critical to the holding for plaintiffs). Here, the film in question would clearly be a work with independent creative value. *See* Martin, *supra* note 33, at 123 and *infra* note 47 (discussing dramatic works).

44. *See* N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992); *id.* § 51 (Supp. 1999). I discuss the relationship between publicity and privacy at *infra* Part I.D. In New York, where the right of publicity originated with the case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953), there existed for many years both a statutory privacy right and a common law publicity right, the latter relied on regularly by the Second Circuit. *See id.* at 868. In *Brinkley v. Casablancas*, 80 A.D.2d 428 (N.Y. App. Div. 1981), however, the Appellate Division held that §§ 50 and 51 subsumed the "so-called right of publicity," whether the harm was "injury to one's feelings or to [a] . . . 'property' interest." *Id.* at 439-40. *But see infra* note 81 (noting that, in the past, New York courts focused almost exclusively on injured feelings as a prerequisite for a damages award). Then, in 1984, the New York Court of Appeals held that there was no independent right of publicity in New York and that all such claims must be brought under §§ 50 and 51. *See* *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984). Because Civil Rights Law §§ 50 and 51 constitute a privacy statute, this means that there is no descendibility in New York. *See* *Pirone v. Macmillan, Inc.*, 894 F.2d 579, 585-86 (2d Cir. 1990). Although the law may take account of both pecuniary and emotional damage, that does not mean that it characterizes the privacy right as a transferable property/economic right rather than a personal one.

45. *See* N.Y. CIV. RIGHTS LAW §§ 50, 51. The two sections are not perfectly congruent, as § 50 specifies that "living" persons are the subject of the statute and omits reference to voice. Thus, § 50 is narrower than § 51.

46. *See, e.g., Stephano*, 474 N.E.2d at 585; *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828, 829 (App. Div. 1980) (permitting an unauthorized biography of Marilyn Monroe, even though it was sold commercially, because "the book is a literary work and not simply a disguised commercial advertisement for the sale of goods or services").

Similarly, in *Marcinkus v. NAL Publishing, Inc.*, 522 N.Y.S.2d 1009 (Sup. Ct. 1987), the

dramatic works are not vulnerable to publicity rights claims.⁴⁷ The results might or might not be different in other states.⁴⁸ It is also doubt-

court refused to enjoin the defendant from using plaintiff's name for a character with fictional actions and motivations to provide, defendant claimed, "a sense of historical accuracy" in a book which was neither held out to be true nor obviously fictitious, *id.* at 1013, and which featured plaintiff's name on the cover flap and in advertisements for the book. Defendants argued that the novel "disseminat[e] information and foster[ed] public discussion about Vatican activities," *id.* at 1010, and reasoned that they did not intend to continue the advertising, *see id.* at 1011.

Such statements find support in United States Supreme Court decisions: "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); *see also Goodenough, supra* note 6, at 749; Christopher Pesce, Note, *The Likeness Monster: Should the Right of Publicity Protect Against Imitation?* 65 N.Y.U. L. REV. 782, 806-09 (1990) (noting that a right of publicity claim arising from a commercial setting may be barred by the First Amendment). The *Restatement (Third) of Unfair Competition*, published in 1995, provides in § 46 that "[o]ne who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability . . ." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995), at 528 [hereinafter RESTATEMENT]. Under § 47 of the *Restatement*, "for purposes of trade" does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction . . ." *Id.* § 47, at 547.

47. Thus, for example, in *Midler v. Ford Motor Co.*, the court said that "[i]f the purpose is 'informative or cultural' the work is immune . . ." *Midler*, 849 F.2d at 462 (quoting Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1596 (1979) [hereinafter Felcher & Rubin, *Privacy, Publicity*]). For further discussion of this point, see *infra* text accompanying notes 238-47. Similarly, commentators point out that "[g]enerally, . . . courts refuse to find the right of publicity violated when the plaintiff's name or likeness is used in a dramatic performance . . ." Seth E. Bloom, *Preventing the Misappropriation of Identity: Beyond the "Right of Publicity"*, 13 HASTINGS COMM. & ENT. L.J. 489, 501 n.62 (1991). Bloom also points out, in an analysis of *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254 (Sup. Ct. 1984), *aff'd mem.*, 488 N.Y.S.2d 943 (App. Div. 1985), that an impersonator of Jacqueline Kennedy Onassis who was enjoined from appearing as her in an advertisement remained "free to appear as Onassis in dramatic performances." Bloom, *supra*, at 509.

48. *See* Bruce P. Keller & David H. Bernstein, *The Right of Publicity: Towards a Federal Statute*, in ADVERTISING LAW IN THE NEW MEDIA AGE 61, 66 n.12, 80 n.54 (PLI Corp. Law & Practice Course Handbook Series No. B-1076, 1998). The high degree of variegation among state laws makes this "an area of law marred by inconsistent and often conflicting determinations among sister states." Randall T.E. Coyne, *Toward a Modified Fair Use Defense in Right of Publicity Cases*, 29 WM. & MARY L. REV. 781, 814 (1988). Many comments and articles contain catalogues of state statutory and common law regimes. *See, e.g.,* Kwall, *Right of Publicity, supra* note 6, at 52 n.26, 53 n.33; Pesce, *supra* note 46, at 785-86 nn.25-26, 793-94 nn.76-81. Most rely on MCCARTHY, RIGHTS OF PUBLICITY, *supra* note 6, § 6.1[B] (common law regimes); *id.* § 6.2 (statutory regimes). Put briefly, 16 states have statutes creating rights of privacy, publicity, or aspects of both, *see id.* at § 6.3[A] (1999), and 17 recognize a common law right of publicity, *see id.* at § 6.1[B]. It is worth noting that many state statutes contain explicit exemptions for entertainment uses. *See* RESTATEMENT, *supra* note 46, § 47, cmt. c and reporters' note (1995) (citing NEV. REV. STAT. § 598.984(2)(d) (now codified at NEV. REV. STAT. § 597.790(2)(d) (1999)), OKLA. STAT. tit. 12, § 1448 (N)(1), and TEX. PROP. CODE ANN. § 26.012(a)).

ful that the case law on appropriation of performance or performance style would lead to a different conclusion; relief has been granted where an entertainment product (such as a play or musical act) was deemed by the courts to lack “its own creative component.”⁴⁹ By negative implication, a dramatic film with an original script would distinguish our case from such authority. Finally, the film’s producer might claim that his cyberclone was newsworthy or a matter of public interest; although such a defense would constitute rather obvious bootstrapping, it might prove effective.⁵⁰

Could Cruise turn to trademark law? Both state and federal trademark and unfair competition law proscribe the use of a mark confusingly similar to another that enjoys priority of use.⁵¹ Cruise’s likeness has certainly achieved trademark status,⁵² and (as other ce-

49. *Groucho Marx Prods., Inc. v. Day & Night Co.*, 523 F. Supp. 485, 493 (S.D.N.Y. 1981) (holding that a play imitating the Marx Brothers’ act was merely duplicative and therefore not protected by the First Amendment) (quoting *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1359, 1379 (D.N.J. 1981)). The *Russen* court used the analytical framework suggested by Felcher & Rubin, *Privacy, Publicity*, *supra* note 47, at 1596-99, under which a use is protected by the First Amendment if it is informational or constitutes entertainment, but not if it is primarily exploitative. *See Russen*, 513 F. Supp. at 1356-61. The *Russen* court decided that, although the show had elements of entertainment and information, it was primarily exploitative. *See id.* at 1359. The court ultimately based its grant of a preliminary injunction on other grounds, because the Plaintiff failed to prove that the show would cause irreparable commercial harm. *See id.* at 1379-81. For further discussion of these and other schematic categories for First Amendment analysis and in relation to concepts of fair use, see *infra* Parts IV, VI.

50. *See Ann-Margret v. High Soc’y Magazine, Inc.*, 498 F. Supp. 401, 405 (S.D.N.Y. 1980) (denying relief for the publication of seminude movie still photographs in a magazine because the unclad performance in the film was a “newsworthy event”). In *Page v. Something Weird Video*, the district court noted that the reemergence of the films in the case was newsworthy, providing an additional rationale for the First Amendment protection of the use of the plaintiff’s likeness in advertising the videos. *See Page v. Something Weird Video*, 960 F. Supp. 1438, 1445 (C.D. Cal. 1996). It is possible that the release of a dramatic film using a synthetic actor would be deemed equally newsworthy. For an analysis of the inconsistent application of newsworthiness justifications for overriding the right of publicity, see Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836, 858-65 (1983); *see also infra* Part IV.A.3 (discussing newsworthiness as a plaintiff characteristic or affirmative defense in the First Amendment context).

51. *See, e.g., Lanham Act* § 2, 15 U.S.C. § 1052 (1994):

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . (d) [c]onsists of or comprises a mark which so resembles a mark [already] registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive . . .

See also N.Y. GEN. BUS. LAW § 360-a(f) (McKinney 1999) (including virtually identical wording as applied to state-registered trademarks).

52. That is, it is a well-recognized indicator of the source and quality of his services as an

lebrities such as Woody Allen have done)⁵³ he could enjoin another's confusing use under trademark law. But if there were a highly visible disclaimer on the film, it might negate the likelihood of confusion.⁵⁴

What about trademark dilution? Recently enacted at the federal level⁵⁵ to parallel existing state antidilution statutes,⁵⁶ trademark dilution, which does not require confusion, may entail either "blurring," where other uses of a mark diminish its unique association with its owner,⁵⁷ or "tarnishment," which occurs when a mark is used in connection with a repugnant or inferior product.⁵⁸ Cruise may have no dilution claim in either respect. While he could assert tarnishment if his clone were playing a pornographic role, the role in our hypothetical is precisely the sort that has made Tom Cruise so popular. Nor would there be any blurring: there is no use of a mark on dissimilar goods here, and the public would continue to associate Tom Cruise's likeness with Tom Cruise. Thus, relief by means of a dilution claim would be improbable.

actor.

53. See *Allen v. National Video, Inc.*, 610 F. Supp. 612, 625-31 (S.D.N.Y. 1985) (granting an injunction against the use of a look-alike in an advertisement).

54. See *Consumers Union of the United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1053 (2d Cir. 1983) ("Disclaimers are a favored way of alleviating consumer confusion as to source or sponsorship. Absolute prohibitions of speech . . . are improper where there is any possibility that an explanation or disclaimer will suffice.") (citations omitted). *But cf.* *Gilliam v. American Broad. Cos.*, 538 F.2d 14, 25 n.13 (2d Cir. 1976) ("We are doubtful that a few words could erase the indelible impression that is made by a television broadcast . . ."). All this means is that it depends on the effectiveness of the disclaimer; a large-text title card preceding the film would undoubtedly be more effective than a small-text disclaimer buried in the closing credit crawl.

55. Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified at 15 U.S.C. § 1125(c)).

56. See, e.g., N.Y. GEN. BUS. LAW § 368-d (McKinney 1996).

57. This is "the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon non-competing goods." Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 825 (1927); see also *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 43 (2d Cir. 1994) (describing dilution by blurring as the decreasing of a mark's ability to identify a product uniquely).

58. See, e.g., *Deere*, 41 F.3d at 43 ("'Tarnishment' generally arises when the plaintiff's trademark is linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context . . ."). For a proposal that a federal publicity right against tarnishment be enacted, see Edgar Sargent, *Right of Publicity Tarnishment and the First Amendment*, 73 WASH. L. REV. 223 (1998). Because tarnishment requires some degradation of the persona, I believe it provides insufficient protection against unconsented use.

B. Zacchini's Inadequacy

Ironically, the possibility of a wrong without a remedy occurs in the shadow of the only Supreme Court case affirming the right of publicity, *Zacchini v. Scripps-Howard Broadcasting Co.*,⁵⁹ in which the Court held that the television broadcast of a performer's entire human cannonball act infringed his right of publicity and was not immunized against a publicity rights claim by First Amendment privilege.⁶⁰ Although *Zacchini* allowed the right of publicity to prevail over a First Amendment defense, the decision is both unreliable as precedent and flawed in its reasoning. As precedent, *Zacchini* is only as useful to a prospective plaintiff as the state law upon which it rests. It happens that the interpretation of Ohio common law by that state's supreme court was extraordinarily broad in *Zacchini*, enjoining all uses of an individual's identity regardless of whether the use was a commercial one.⁶¹ If we compare this approach to those which prevail in New York and California,⁶² it is clear that *Zacchini* does not guarantee that a state law claim will provide relief.⁶³

As for *Zacchini*'s reasoning, its primary flaw lies in its misreading of Ohio state law (as enunciated by the Ohio Supreme Court) and its focus on the performer's act,⁶⁴ rather than the use of his identity. The Court, intent on differentiating the right of publicity from false-light privacy claims,⁶⁵ analogized to copyright and patent law, stating that the right of publicity was one "focusing on the right of the individual to reap the reward of his endeavors"⁶⁶ This enabled the Court to use an incentive-to-creation argument for support in up-

59. 433 U.S. 562 (1977) [hereinafter *Zacchini II*].

60. *See id.* at 575.

61. *See id.* at 565; *see also* *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 458 (Ohio 1976) [hereinafter *Zacchini I*] ("The interest which the law protects is that of each individual to the exclusive use of his own identity, and that interest is entitled to protection from misuse whether the misuse is for commercial purposes or otherwise."). Here, the Ohio Supreme Court was discussing the right of privacy, but later in its opinion it characterized the right to control the use of likeness and identity as a right of publicity. *See id.* at 459.

62. *See supra* text accompanying notes 38, 44-45.

63. It is therefore a mistake to assert that "appropriation of a performer's entire act, if not already reduced to a tangible medium of expression [and thus preempted by federal copyright law], will certainly be actionable under *Zacchini*." Coyne, *supra* note 48, at 808.

64. *See Zacchini II*, 433 U.S. at 573.

65. *See id.* at 571 ("*Time, Inc. v. Hill* . . . involved an entirely different tort from the 'right of publicity' [I]n *Time*, . . . the Court was steeped in the literature of privacy law").

66. *Id.* at 573. For an analysis of *Zacchini*'s rejection of the privacy-First Amendment paradigm in the right of publicity context, see Samuelson, *supra* note 50, at 867-68.

holding the right of publicity against a First Amendment defense.⁶⁷ Unfortunately, it also obscured the Ohio Supreme Court's opinion that "a right of publicity inheres in a performer,"⁶⁸ as well as the court's defense of an individual's right to the exclusive use of his own identity and its reference to an individual's name or likeness, not his act.⁶⁹ The Supreme Court did refer to the Ohio high court's holding that "petitioner had a 'right of publicity' that gave him 'personal control over commercial display and exploitation of his personality and the exercise of his talents'"⁷⁰; but, intent on drawing an analogy to copyright and patent law, it lost sight of the essence of the claim, namely the sustained unconsented use of the performer's identity while in the course of performing his act.⁷¹

Despite its affirmation of the right of publicity, then, *Zacchini*'s distortion of state law and its fixation on act rather than identity has had a profound, and negative, effect on publicity rights doctrine. First, as elaborated below,⁷² the appropriate focus of the right of pub-

67. See *Zacchini II*, 433 U.S. at 573. Copyright is regularly described in these incentive terms. See, e.g., *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985) ("[C]opyright supplies the economic incentive to create and disseminate ideas."); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (explaining that copyright is "intended to motivate the creative activity of authors . . . and to allow the public access to the products of their genius after the limited period of exclusive control has expired"). The fact that publicity rights do not have a limited term is only one of several reasons why the analogy to copyright is inapposite; the greater reason, as explained here, is that the right of publicity arises not from a created work (no matter how imbued with authorial presence), but, as discussed *infra* Part II, from human autonomy. It is for this reason that analogizing from copyright law is conceptually questionable and that analyses such as Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125 (1980) [hereinafter Felcher & Rubin, *Descendibility*], are misguided. Felcher and Rubin, like the Court in *Zacchini*, turn to copyright in an effort to distinguish the right of publicity from the privacy and defamation paradigms. See *id.* at 1129. In fact, however, the right of publicity is equally unsuited to the copyright model.

68. *Zacchini I*, 351 N.E.2d 454, 460 (Ohio 1976).

69. See *Zacchini I*, 351 N.E.2d at 459-60; *supra* note 61. The state court explicitly rejected the notion that the plaintiff's act approximated a copyrightable work. See *id.* at 457.

70. *Zacchini II*, 433 U.S. at 569 (quoting *Zacchini I*, 351 N.E.2d at 459).

71. For a different reading of *Zacchini* criticizing the Supreme Court's emphasis on performance, see Gregory S. Donat, Note, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363, 1372-74 (1997). But see Samuelson, *supra* note 50, at 920 ("In *Zacchini*, the protected matter was the act . . . Had the protected act been only the name, or the name and likeness, of the plaintiff, there would have been less at stake as a consequence of the defendant's appropriation."); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 732 (1992) (identifying *Zacchini* as involving work product, not use of persona).

72. See *infra* Part II.

licity is the human being, the person—not her work product. *Zacchini* detracts from that focus. Second, in relying on work product, *Zacchini* contributes to a view of publicity rights that is essentially Lockean and in which property rights are grounded in labor, rather than persona. Finally, although the Court's emphasis on the economic aspect of the right of publicity does not preclude the existence of other facets of the right,⁷³ *Zacchini*'s narrow, economic-incentive approach to the right of publicity has helped to perpetuate a fixation on the right as exclusively pecuniary. Taken as a whole, therefore, *Zacchini* is of only limited doctrinal value. And, even in this one area of publicity rights explicitly upheld by the Supreme Court, relief may be unavailable to most plaintiffs.

C. Compensation and Commodification

Two questions arise at this point, each of which must be addressed before proceeding further. First, even assuming that a right of publicity can be justified, why should we care if it is infringed? If Tom Cruise loses a role to a clone, but manages to eke out a living on another one or two \$20-million roles a year,⁷⁴ why should it matter? After all, he is already handsomely compensated.⁷⁵ Although a performance-value appropriation is central to an actor's livelihood (which would not be the case in the advertising-use context), celebrities already make enough—or too much—money; the law should hardly care about remedies in such cases. Of course, posing the argument in such bald terms reveals that it is specious. If law is to be formulated only for those who elicit our sympathy, much of our legal system would have to be scrapped. Should the law protect the wealthy against robbers? Should giant corporations be permitted to assert rights against their employees?

Second, akin to the overcompensation argument, and just as questionable, is the notion that a celebrity has necessarily sacrificed all noneconomic claims against unauthorized uses of his identity because he has engaged in commodification of his persona.⁷⁶ The obvi-

73. See Kwall, *Right of Publicity*, *supra* note 6, at 71.

74. See Arlene Vigoda, *DiCaprio Could Be a \$25 Million Man*, USA TODAY, Apr. 7, 1998, at 8D (“[H]eavyweights like . . . Tom Cruise . . . are said to be members of the \$20 million club.”).

75. See *infra* Part IV.B. The Tenth Circuit adopted this line of reasoning in *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 974 (10th Cir. 1996).

76. For example, in his discussion of the foundational right of publicity case *Haelen Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953), dis-

ous response to this argument is, why? Does 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? There are real issues to be confronted in the commodification inquiry, whether with regard to the relationship between the self and commodified image, or to that between commodities and expression, and they are addressed later in this Article.⁷⁷ As the questions just posed suggest, however, compensation- and commodification-based objections to the right of publicity appear to be emotional, rather than analytical. It may well be lamentable that our society overpays celebrities, but this is not, as a general matter, a legal issue.⁷⁸ It may well be difficult to believe that a celebrity who has commodified her image takes issue morally, as well as economically, with an unconsented commercial use of that image, but it is certainly possible. The question is whether the law should recognize that possibility or rule it out *a priori*. Granted, even should such a right be recognized for those who have commodified their images, it may ultimately be outweighed by competing considerations such as freedom of expression;⁷⁹ but that is very different from denying the existence and availability of the right in the first instance.

D. Doctrinal Muddles

In fact, many jurisdictions acknowledge that even celebrities who have commodified their images may object to the unauthorized use of their images on moral (i.e., personal autonomy) as well as economic grounds.⁸⁰ In New York, when supermodel Christie Brinkley sued under the privacy statute, the court held it applicable to both

cussed *supra* note 44 and *infra* text accompanying notes 86-88, Madow seems to criticize the court for its lack of "uneasiness" at the commodification of personality, reducing personality to the level of a "garden variety" commodity. Madow, *supra* note 9, at 174. Commodification is viewed as at once an implicitly terrible fate and a self-inflicted wound. But commodification can also be seen as a choice that an autonomous person may make as long as it does not vitiate his humanity. Once the choice is made, the next question is whether it necessarily entails a relinquishment of morally, as opposed to economically, motivated objections to unauthorized uses. As the rhetorical questions here suggest, I believe the answer to this question is a resounding no.

77. See *infra* Parts II-III.

78. As a matter of what forms of property provide which incentives, such compensation is, of course, a legal issue. I refer here to the general valuation of celebrities by our society.

79. See *infra* Parts III-IV.

80. See, e.g., N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1992) (allowing recovery for economic loss as well as injury to feelings); see also RESTATEMENT, *supra* note 46, § 46 cmt. b (1995).

injury to feelings and property interests.⁸¹ In California, singer Tom Waits successfully obtained damages for the use of a sound-alike in taco chip advertisements, based on his moral objections to having what appeared to be “his” voice used in commercials.⁸² The point is that positive law recognizes the possibility of a publicity right with both personal and economic attributes. Much like common law copyright, which “implicate[d] not only [a] personal interest in creative control but [a] property interest in exploitation of prepublication rights,”⁸³ the right of publicity is in fact sometimes viewed as having a double function.

Even while state law is sufficiently expansive in practice, however, doctrine persists in forcing personal and economic rights into a binary mode, with the unsatisfactory results alluded to earlier.⁸⁴ As a

81. See *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004, 1012 (App. Div. 1981). But note that in the past, New York courts focused exclusively on injured feelings, refusing to award damages where the plaintiff did not suffer in this manner, even though the commercial value of his image was clearly appropriated. See *Nimmer*, *supra* note 26, at 207-08.

82. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992). The court noted that infringement of the right of publicity “may induce humiliation, embarrassment, and mental distress,” all of which are compensable. *Id.* at 1103; accord *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996) (accepting plaintiff’s claim of emotional injury resulting from an unauthorized use of his name).

83. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 555 (1985). The dual role of common law copyright in protecting both creative and economic interests was a source of inspiration for Warren and Brandeis in their article, *The Right of Privacy*, *supra* note 2. In fact, when Warren and Brandeis wrote their article, they were trying to present a right of inviolate personality that transcended the property framework of common law copyright, while at the same time reflecting that right’s protection of privacy interests. See Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1883 (1990):

[C]opyright and privacy should both be seen “as a part of the more general right to the immunity of the person—the right to one’s personality.” For Warren and Brandeis, the “right to one’s personality” both transcends property, and . . . is embraced within the “right of property in its widest sense.”

(footnotes omitted). On this point, see also *Bloustein*, *supra* note 6, at 969.

84. “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 . . .” Halpern, *supra* note 17, at 853. According to Halpern, publicity rights’ commingling with privacy torts “has been the source of much confusion,” *id.* at 855, and he draws a clear line between the law protecting economic interests on the one hand and personal, emotional ones on the other, blaming Prosser’s uneasy combination of the two types of rights for much of the confusion, *see id.* at 855 n.14.

I believe that Halpern’s approach reflects the dominant mode of thought on publicity rights. He is correct in saying that the linkage to privacy has caused confusion, but this need not mean that a wall must be erected between economic interests on the one hand and personal ones on the other. What I am trying to do here is to revive—or to help keep alive—the idea that the “unmooring” from privacy, insofar as it entails a separation from a basis in personal

result, there is intense theoretical dissension regarding the nature of identity, the scope of its protection, and how far a right of publicity should extend (in breadth and in temporal terms), the latter question playing out at the practical level as disagreements over whether the right is descendible and assignable.⁸⁵ All of these matters—philosophical justification, legitimacy, scope, and content—are contentious issues, despite forty-six years of doctrinal consolidation.

It is worth asking why we are here, why the doctrinal confusion is so extreme. One reason is that the doctrine may have taken a wrong turn forty-six years ago, when Second Circuit Judge Jerome Frank severed the right of publicity from the right of privacy.⁸⁶ Judge

autonomy, has distorted the publicity right's proper development and is ultimately pernicious. The right of publicity can be conceptually distinguished from privacy, but this should not occur at the expense of its personal facet. The privacy/publicity relationship, however, is usually presented as dichotomous:

The law can commodify personality as property, or it can *instead* protect emotional integrity through tort actions analogous to those of defamation: The choice depends upon reasons of policy, not upon the intrinsic nature of personality itself. The fundamental issue, therefore, is not whether the law ought to protect personality, but rather how the law ought to conceptualize personality for purposes of legal protection.

Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 662-63 (1991) (emphasis added). Although Post says that it is not the "intrinsic nature of personality" that creates the bifurcation between property and emotional integrity, he seems resigned to that split. *Id.* Unlike Post, I do not view these aspects of personality as necessitating a choice. A right of publicity that is founded upon human freedom can fulfill both functions. Interestingly, Professor Madow initially agrees that, despite the fact that "[p]roponents of publicity rights often talk as if all that is at stake here is money . . . the stakes are both higher and more complicated." Madow, *supra* note 9, at 134. But although he acknowledges that the right of publicity implicates more than money, he means that it involves questions of who gets to assign meanings to popular images, not that the right itself should have both an economic and an autonomy function. *See id.* He rejects the "autonomy" justification of the right of publicity in a footnote, claiming that autonomy can "at most . . . justify a *personal* right" that can be adequately protected under false advertising, defamation, and privacy law. *Id.* at 181 n.271. Clearly, this is not true if the disputed use of persona is not an advertisement, is not defamatory, or involves both autonomy and economic interests that are to be transferable or descendible.

85. Again, these practical questions proceed from the prior inquiry as to whether publicity rights are personal or proprietary. I argue that, as property rights with a basis in autonomy, they are both.

86. The right of privacy was institutionalized in doctrine following the publication of the article on that right by Warren and Brandeis. Judge Frank's decision in *Haelen Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953), declared:

[I]n addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, *i. e.*, the right to grant the exclusive privilege of publishing his picture Whether it be labeled a "property" right is immaterial

This right might be called a "right of publicity."

Frank did this for a sound functional reason, because privacy law would not accommodate a property claim based on the plaintiff's contract to use a celebrity baseball player's likeness in connection with its chewing gum.⁸⁷ Frank accordingly articulated a right of publicity that could be exclusively licensed (and thus infringed by a subsequent exploitation of the player's likeness). Publicity rights thereafter came to be viewed as property rights protecting exclusively economic interests, as opposed to "personal" privacy rights, where the relevant damage is to feelings and human dignity.⁸⁸ In fact, at the same time as the Supreme Court bestowed its imprimatur on publicity rights in *Zacchini*, it repeated the old saw about such rights' having "little to do with . . . feeling or reputation."⁸⁹ As a means of distinguishing them from privacy false-light tort claims, this might have been an effective tactic,⁹⁰ but it widened the existing schism between "personal" privacy and "commercial" publicity rights. Concurrent with this dichotomization, however, publicity-type rights remained part of tort law, as the fourth prong of the quadripartite privacy right elaborated by Dean Prosser in 1960.⁹¹ The doctrine therefore developed in a schizoid manner: publicity rights were purely economic property rights, as distinct from "personal" privacy rights (thereby enabling publicity rights to become transferable⁹² and descendible⁹³);

87. See *id.* Privacy law did not allow for an assignable right "in gross" because it provided for objections only by the person involved, on the grounds that his feelings would be hurt by publication. Respondent Topps argued that the agreement on which Haelen Labs relied was merely a release under state privacy law, not a property interest. See *id.* at 867.

88. See McCarthy, *The Human Persona*, *supra* note 26, at 134. Nimmer drew an equally sharp line between the two in his 1954 article because—like Frank—he sought to articulate a property-type basis for recovery that exceeded the scope of available privacy and unfair competition remedies, and that recognized the right's commercial transferability. See Nimmer, *supra* note 26, at 204-14.

89. *Zacchini II*, 433 U.S. 562, 573 (1977).

90. See *supra* text accompanying note 65. The discussion of *Time, Inc. v. Hill*, 385 U.S. 374 (1967), and false light privacy was prompted by the state court's reliance on that case in finding a First Amendment privilege. See *Zacchini II*, 433 U.S. at 566-67.

91. See *supra* note 6.

92. See, e.g., *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1354 (D.N.J. 1981) ("[T]his right, having been characterized by New Jersey courts as a property right, rather than as a right personal to and attached to the individual, is capable of being disassociated from the individual and transferred by him for commercial purposes.").

93. See, e.g., *id.* at 1355 ("In deciding whether this right of publicity survived Presley's death, we are persuaded by the approach of other courts which have found the right of publicity to be a property right. . . . [It] should descend at the death of the individual 'like any other intangible property right.'" (citation omitted)). On descendibility generally, see Felcher & Rubin, *Descendibility*, *supra* note 67.

tive of, personal autonomy. Again, this is not to say that no one has recognized the potential for a right protecting autonomy as well as economic interests;⁹⁶ rather, no such right has been proposed as a real-world candidate for legislation. Today, given the combination of theoretical disorder, high economic stakes, and technologically driven potential for abuse,⁹⁷ the need to do so has become urgent.

E. Preemptive Legislation

As pressure mounts for enactment of a federal right of publicity, so does the risk that Congress will pass the wrong law, based on the doctrinal dichotomy that has emerged between the right of publicity and privacy values.⁹⁸ Moreover, there is some probability that a federally legislated right of publicity will ignore the performance-value problem altogether. Draft legislation has already proved to be focused exclusively on advertising and product use.⁹⁹

Should Congress enact a federal right of publicity, it is likely to have preemptive effect¹⁰⁰ in order to resolve the extreme variegation

96. See *supra* note 6. As one commentator has remarked:

Preserving the tort model . . . [for privacy] kept the legal formulations directed at mental distress models. . . . Those looking at the economic aspect of a taking of identity, on the other hand, were drawn to the property-publicity approach. Such a hurt-based split, however, was not really necessary baggage of a property/tort distinction—each of these regimes can deal both with economic loss and with the impact of mental distress. . . . With uses of the persona, *both* kinds of harm can exist, and both kinds of interests, personal and pecuniary, can be damaged.

Goodenough, *supra* note 6, at 736. Goodenough criticizes McCarthy's statement in *The Human Persona*, *supra* note 26, as backsliding into "repeating the tired old mental distress-commercial injury differences between privacy and publicity." *Id.* at 768 n.269. Goodenough also sharply criticizes the *Restatement (Third) of Unfair Competition* for perpetuating this stale dichotomy. See *id.* at 769-70. "The comments to section 46 undercut their case for maintaining a distinction between privacy and publicity by recognizing the largely common attributes of the two supposedly distinct rights." *Id.* at 770. But, "[a]wkward and artificial though it may be, the privacy-publicity split remains in the Restatement . . ." *Id.* at 770. Indeed, in his treatise on privacy and publicity, McCarthy has stated that "the law today would be more coherent . . . if it had developed such that courts would recognize a *sui generis* legal right labeled something like a 'right of identity' with damages measured by *both* mental distress and commercial loss." MCCARTHY, RIGHTS OF PUBLICITY, *supra* note 6, § 1.11[C], at 1-49; see also Kwall, *Right of Publicity*, *supra* note 6, at 70 ("[C]onfusion might be avoided if the right of publicity were explicitly acknowledged to include emotional as well as economic harms.").

97. See *supra* notes 21, 33 (discussing virtual kidnapping and CGI).

98. See, e.g., Robinson, *supra* note 7, at 184-85.

99. See *infra* Part VI.

100. In 1998, the International Trademark Association issued a policy statement calling for the enactment of a preemptive federal right of publicity to address the "patchwork of different and inconsistent provisions which create uncertainty for trademark owners and national advertisers." *Board Adopts Right of Publicity Resolution*, INTA BULL., Mar. 15, 1998, at 6, 6.

in state law approaches to the subject. If so, then to the extent that a right of publicity has a purely economic thrust, the likely result will be preemption of duplicative state law economic claims, and allowance of morally based state law claims not covered by the federal right.¹⁰¹ This would be analogous to copyright- or patent-related claims that would otherwise be preempted by the federal statute¹⁰² but for the existence of an extra element in the cause of action.¹⁰³ At first blush, this may appear satisfactory, or even advisable, in order to avoid post-*Lopez*¹⁰⁴ objections that a noneconomic federal right does not address interests of a commercial nature. It must be recalled, however, that the harm complained of here—even if the plaintiff's objection is moral, rather than economic—is an act of commercial exploitation. Moreover, housing the right of publicity in the federal trademark statute, the Lanham Act, by definition requires it to involve commercial uses of identity in commerce.¹⁰⁵ Finally, it bears noting that the Lanham Act has already been used on occasion to vindicate moral rights.¹⁰⁶

Therefore, although the case for federal law is intuitively strongest with regard to the economic side of the right of publicity—because uniformity would decrease transaction costs caused by divergent state regimes—the utility of limiting federal law to the pecuniary sphere, leaving intact a dual system with extreme heterogeneity at

101. See Robinson, *supra* note 7, at 203 (“Residual damage to the psyche of the person whose identity has been appropriated can best be addressed by privacy laws.”).

102. See, e.g., 17 U.S.C. § 301 (1994) (providing a unitary and preemptive system of federal statutory copyright); 28 U.S.C. § 1338(a) (1994) (granting to the federal courts exclusive jurisdiction of patent and copyright claims).

103. See, e.g., National Basketball Ass'n v. Motorola, 105 F.3d 841, 852 (2d Cir. 1997); Harper & Row, Publishers v. Nation Enters., 723 F.2d 195, 200 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539, 570 (1985). For a recent patent case in this area, see *Dow Chemical Co. v. Exxon Corp.*, 139 F.3d 1470 (Fed. Cir. 1998) (holding that a state law tort claim was not preempted by federal patent law, provided that it included additional elements not found in a federal patent law cause of action), *reh'g and reh'g en banc denied*, 144 F.3d 1478, 1479 (Fed. Cir. 1998), *cert. denied*, 119 S. Ct. 1026 (1999).

104. *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding that the Gun-Free School Zones Act exceeded Congress's Commerce Clause authority because possession of a gun in a local school zone was not economic activity that might substantially affect interstate commerce).

105. For a more detailed discussion of this point, see *infra* Part VI.

106. See, e.g., *Stephen King v. Innovation Books*, 976 F.2d 824, 833 (2d Cir. 1992) (affirming the grant of an injunction against the use of the possessory phrase “Stephen King's” in conjunction with a movie title); *Gilliam v. American Broad. Cos.*, 538 F.2d 14, 24-25 (2d Cir. 1976) (holding that a bowdlerized and shortened version of *Monty Python's Flying Circus* was actionable under Lanham Act § 43(a)).

the state level, seems questionable. Hence, an argument can certainly be made for including noneconomic harm as a cause of action under a federal right of publicity.¹⁰⁷ For all of these reasons, then, and before Congress acts, it is worth asking whether it would be preferable to legislate an expansive right of publicity that covers morally based, as well as economic, claims and that also incorporates First Amendment, fair use, and other limitations on the right's exercise.¹⁰⁸ Before this can even be considered, however, we need a coherent theory of the right of publicity that explains why it should cover more than economic considerations and how it can survive the postmodernist attacks that have become so prevalent in the academic literature.¹⁰⁹

II. THE RIGHT OF PUBLICITY AS AN AUTONOMY-BASED PROPERTY RIGHT

A. *Philosophical Underpinnings: The Right of Publicity and Immanuel Kant*

Given the state of the doctrine, it is clear that there is little consistent theoretical support for a right of publicity at the federal—or perhaps any—level. It therefore appears timely to suggest a conceptual reorientation that sheds doctrinal restraints and returns to the basic question of how (and why) a right of publicity can: (1) be philosophically justified; (2) accommodate moral objections to commercial exploitations of identity; and (3) withstand the onslaught of the postmodernist critique.

In his important treatment of the right of publicity, Professor Michael Madow asserts that its advocates have evinced a cavalier attitude toward its philosophical rationale: “Contemporary proponents of the right of publicity have, in the main, exhibited surprisingly little interest in the basic question of justification.”¹¹⁰ In fact, although

107. See *infra* Part II (articulating a philosophical justification for noneconomic characteristics of the right), Part VI (providing a legislative proposal including a right with economic and noneconomic aspects).

108. See *infra* Part V.B (discussing fair use and first sale doctrine limitations on the right of publicity), Part VI.B (proposing legislative language incorporating these limitations and First Amendment criteria).

109. See *supra* note 9 (citing postmodernist critiques of the right of publicity).

110. Madow, *supra* note 9, at 136; see also *id.* at 134 (asserting that the initial phase of questioning the desirability and nature of the right of publicity ended too soon, “without a systematic, theoretically persuasive case ever having been made for recognition of an independent property-like right of publicity”). Madow cites McCarthy’s characterization of the right of publicity as “a self-evident legal right, needing little intellectual rationalization to justify its exist-

there are analyses that posit philosophical underpinnings for intellectual property rights,¹¹¹ they do not center on publicity rights. Rather, they seek to provide broad justifications for intellectual property rights;¹¹² therefore, whether using a labor theory¹¹³ or a “personality” theory,¹¹⁴ their focus is on property, understood as something external to the individual,¹¹⁵ or on intellectual property in general.¹¹⁶ To the extent that commentators specifically address publicity rights, they tend to do so within this property context, and to use Lockean labor theories of property to explain the assertion of a property right in identity or persona.¹¹⁷

tence.” MCCARTHY, RIGHTS OF PUBLICITY, *supra* note 6, § 1.1 [B][2], at 1-5, *quoted in* Madow, *supra* note 9, at 136. Madow terms “[t]he nonchalance of this appeal to ‘common sense’ . . . rather astonishing.” Madow, *supra* note 9, at 136. Madow does not address the rest of McCarthy’s arguments, presented more fully in § 2.1. In fairness, however, although McCarthy marshals some compelling policy arguments, they do not provide the kind of philosophical justification Madow calls for, relying instead on an intuitive rationale. *See also* Nimmer, *supra* note 26, at 216 (using phrases like “axiom” and “first principle” to describe his Lockean (“fruit of his labor”) basis for publicity rights); Sen, *supra* note 9, at 741 (discussing academics’ wariness of “the legitimacy of a celebrity’s proprietary interest in the self”) (citing Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 37-40 (1989), and David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 155-58 (1981)); Weiler, *supra* note 9, at 272 (“Legal recognition of the celebrity’s identity as private property, however justified . . . by . . . social realities, rests upon a shaky theoretical foundation.”).

111. *See, e.g.*, Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (addressing the labor and personality theories of property as mutually supportive underpinnings of intellectual property). For an extensive treatment of Locke’s philosophy, with particular reference to intellectual property, see Gordon, *supra* note 11.

112. *See* Hughes, *supra* note 111, at 296-97, 330-31.

113. *See id.* at 300-14.

114. *See id.* at 331-50.

115. Margaret Jane Radin, in *Property and Personhood*, 34 STAN. L. REV. 957, 958 (1982), characterizes property as relating to resources in the external environment. Although Radin discusses property in one’s person, and the body as property for personhood, she also says that the idea of property implies “something in the outside world, separate from oneself.” *Id.* at 966.

116. *See* Hughes, *supra* note 111, at 290-96.

117. *See, e.g.*, Kwall, *Fame*, *supra* note 12, at 40-41; Madow, *supra* note 9, at 175 n.239 (criticizing Locke’s labor theory of property and describing Nimmer as using Locke to justify a form of special-interest pleading for film stars, saying “John Locke goes to Hollywood”); Nimmer, *supra* note 26, at 216. Other publicity rights commentators focusing on Locke (often parroting Madow) include Clay, *supra* note 9, at 491-93; Elliott, *supra* note 39, at 605-12; Rahimi, *supra* note 9, at 731-32; Weiler, *supra* note 9, at 240-43; Douglas J. Ellis, Comment, *The Right of Publicity and the First Amendment: A Comment on Why Celebrity Parodies Are Fair Game for Fair Use*, 64 U. CIN. L. REV. 575, 583 n.47 (1996). Labor-derived property rights support an action of unjust enrichment; thus, many of these commentators also criticize the “prevention of unjust enrichment” as a policy rationale. If unjust enrichment is intended to prevent reaping where others have sown, and the celebrity has not sown (or has sown no more than others, such as the media or the public), then prevention of unjust enrichment is clearly a rather weak rationale for publicity rights. *Cf.* Hughes, *supra* note 111, at 340. Hughes does mention persona rights as “the ideal property for the personality justification,” but does not elaborate on this

A labor-based approach is too limited to explain why publicity rights are possible and normatively desirable.¹¹⁸ A concept of autonomy taken from idealist philosophy, however, can provide a rationale for a property interest in individual identity—and it can do so without having to resort to a labor justification.¹¹⁹ In the absence of a labor theory, many of the most strident criticisms of publicity rights lose their foundation, for they are based on the idea that persons other than celebrities are responsible for the creation of public image (thus concluding that celebrities are not entitled to be the sole beneficiaries of that image).¹²⁰ In addition, idealism shifts the focus of the debate away from a monocular obsession with economic rights to a more balanced focus on the moral, as well as economic, dimensions of personhood and property. It views the individual as an autonomous being preceding the creation of property, a notion that resonates fairly strongly with our cultural mores.

While German idealism has hardly enjoyed great popularity in mainstream American political thought, the fact is that many of its fundamental principles are congruent with deeply embedded beliefs in this country. Grounding morality and freedom in the uniquely human quality of rationality,¹²¹ Kant's system is based on the conviction that the rational human being has absolute worth as an end in himself,¹²² and that “only humans have a dignity beyond price. . . .”¹²³ This

“obvious” type of personality right. *Id.* Hughes further states that persona is “the one type of potential intellectual property which is generally thought of as *not* being a result of labor.” *Id.* Given the academic literature cited *supra*, this appears inaccurate.

118. It is too limited because, first, there are good reasons why a labor theory is ineffective—some of Madow's objections being well taken—and second, because whereas labor relates to a fact of human activity, autonomy relates to human essence. *See infra* Part II.A.1-2.

119. *See infra* Part II.A. It must be noted at this juncture that idealism is not the only possible alternative non-Lockean philosophical grounding for a unitary right of publicity. For example, utilitarianism could arguably support such a right, based on minimizing the pain inflicted by unconsented uses of identity. *See, e.g.,* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, ch. IV, ¶¶ 5-6, at 36-7 (J.H. Burns & H.L.A. Hart eds., University of London: Athelone Press 1970) (1789). When the right of publicity has to be balanced against competing societal claims, however, it is far more vulnerable to defeat in a utilitarian context emphasizing the greatest good of the greatest number than it is if it is based on human autonomy.

120. *See* Madow, *supra* note 9, at 177 n.253, 184-88, 195-96.

121. As George Fletcher has put it, human beings “have this worth beyond price because they are capable of acting out of the necessity dictated by reason. We must be treated as ends in ourselves because, as beings endowed with reason, we are capable of moral action.” George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 541 (1987) [hereinafter Fletcher, *Law and Morality*].

122. *See* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 52 (Robert Paul Wolff ed., Lewis White Beck trans., Bobbs-Merrill Co., 1969) (1785) [hereinafter KANT,

emphasis on reason, human value, and self-worth is entirely consistent with liberal political philosophy; indeed, in many ways it is a core concept of such philosophy.¹²⁴ Thus, although the relationship between American culture and German idealism may not be obvious, it is real.¹²⁵

1. *Kant's Philosophy.* The fundamental nature of the individual as an autonomous and moral being is articulated by Kant in his treatment of human will and freedom. Freedom is an innate right, the "one sole and original right that belongs to every human being by virtue of his humanity,"¹²⁶ and it comprises "the attribute of a human being's being his own master"¹²⁷—again, a notion of control and self-determination.

Freedom appears in two guises in Kant's moral philosophy. Negative freedom is freedom of the will in the sense of independence

FOUNDATIONS], cited in Fletcher, *Law and Morality*, *supra* note 121, at 541. As another commentator has eloquently stated, "The key to Kant's moral and political philosophy is his conception of the dignity of the individual. This dignity gives man an intrinsic worth, a value *sui generis* that is 'above all price and admits of no equivalent.'" John Ladd, *Introduction to IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE* ix, ix (John Ladd trans. and ed., Library of Liberal Arts 1965) (1797) [hereinafter Ladd, *Introduction to KANT, METAPHYSICAL ELEMENTS*] (quoting KANT, FOUNDATIONS, *supra*, at 60).

123. Fletcher, *Law and Morality*, *supra* note 121, at 541 (citing KANT, FOUNDATIONS, *supra* note 122, at 36).

124. See *infra* note 135.

125. See Fletcher, *Law and Morality*, *supra* note 121, at 534 ("Legal theorists looking for alternatives to utilitarianism turn vaguely to Kant's categorical imperative for inspiration."). An explicitly idealistic perspective seems to be increasingly attractive in the academic literature. See, e.g., George P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U. W. ONTARIO L. REV. 171, 171 (1984) [hereinafter Fletcher, *Human Dignity*] ("The last few decades have witnessed a revival of Kantian legal thinking."); Radin, *supra* note 115, at 971-78; Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 187-95 (1997). Perhaps this reflects a desire to focus on the individual as more than an economic animal; for whatever reason, it appears timely to apply a Kantian perspective to the right of publicity.

126. IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 44 (John Ladd trans. and ed., Library of Liberal Arts 1965) (1797) [hereinafter KANT, *METAPHYSICAL ELEMENTS*]. This citation is from *The Metaphysical Elements of Justice's* sections on legal philosophy, rather than from *The Metaphysics of Morals*, and it therefore bears noting that freedom is viewed differently in these two contexts. In the moral sphere, freedom is relevant internally—as the internal determination of action by reason, or moral action—whereas in the legal sphere, freedom is the external non-determination of one's will by others, and liberty to act insofar as it does not interfere with others' freedom. See *id.* Nevertheless, Kant's statement in *The Metaphysical Elements of Justice* expresses the primordial notion, common to law and morals alike, that freedom begins as an innate right of the human being.

127. *Id.* at 44.

from determination by sensible impulses.¹²⁸ Negative freedom is a necessary precondition of positive freedom, because the will must be free of animalistic inclinations before it can be determined by reason. Positive freedom, as that determination, is “the capacity of pure reason to be of itself practical,”¹²⁹ i.e., the capacity of the will to be determined by reason alone and, in doing so, to self-legislate moral action consonant with reason. When the will is determined by reason and constitutes the practical exercise of reason, freedom “proves its reality”¹³⁰ and “the existence in us of a pure Will in which moral concepts and laws have their origin.”¹³¹

In its expression of positive freedom, then, the Will¹³² acts as a self-generated source of moral law, and it is this which constitutes the “property of autonomy[,] . . . mak[ing man] a moral being and giv[ing] him dignity.”¹³³ It is worth noting here that “positive freedom” has been defined in other ways by other philosophers.¹³⁴ My

128. *See id.* at 13.

129. *Id.* This is practical reason, or “pure reason as expressed in human action.” Fletcher, *Law and Morality*, *supra* note 121, at 537.

130. KANT, METAPHYSICAL ELEMENTS, *supra* note 126, at 22.

131. *Id.*

132. *See id.* at 12 for the distinction between the “will,” as the exercise of choice, and the “Will,” which, having been determined by reason, acts as the source of self-legislated moral law.

133. Ladd, *Introduction to KANT, METAPHYSICAL ELEMENTS*, *supra* note 122, at xi. In the exercise of positive freedom, as reason determines the will and becomes practical, it imposes a requirement that the maxim of any action taken (irrespective of its specific ends) be capable of being cast as a universal law, or as universally necessary. *See KANT, METAPHYSICAL ELEMENTS*, *supra* note 126, at 23. The maxim of an action is its subjectively experienced motivation. *See id.* at 26-27. That is, we are enjoined to “act according to a maxim that can at the same time be valid as a universal law.” *Id.* at 26. This is the categorical imperative. *See id.* And, as Ladd puts it, “[u]nderlying the categorical imperative is the idea that every man gives the moral law to himself The very conception of morality involves the notion of moral autonomy.” Ladd, *Introduction to KANT, METAPHYSICAL ELEMENTS*, *supra* note 122, at x. Thus, “freedom alone explains moral autonomy.” *Id.* This reflects the notion that “[t]here is, in Western thought, a long and venerable association between freedom and morality.” WALDRON, *supra* note 11, at 307. In following the categorical imperative and determining action by universal reason, human beings fulfill the positive concept of freedom. *See Ladd, Introduction to KANT, METAPHYSICAL ELEMENTS*, *supra* note 122, at xi.

134. For example, in the philosophy of Fichte, human freedom is described as self-actualization through conformance of the rational/moral will with the dictates of Reason. Although occurring within the framework of an idealist construct wherein the ideal ethical state’s positive laws are congruent with Reason, and individual “consciences” are congruent with both, the ultimate rationale for such a construct is human self-actualization. *See JOHANN GOTTLIEB FICHTE, THE VOCATION OF MAN 41-42* (Peter Preuss trans., Hackett Pub. Co. 1987) (1800); BASIL BLACKWELL, *THE POLITICAL THOUGHT OF THE GERMAN ROMANTICS 1793-1815*, at 12-13 (H.S. Reiss ed., 1955).

point is that, whatever the definition of positive freedom, negative freedom and the ability to determine one's will in accordance with reason is a common denominator in many such systems.¹³⁵

In Kant's system, then, the exercise of human capacity for reason¹³⁶ is an assertion of human freedom. Reason, freedom, and human autonomy are intertwined in Kant's moral philosophy,¹³⁷ and the notion of individual control and self-determination is fundamental. The central concept of autonomy in Kantian philosophy could lend itself to a philosophical justification of a right of publicity. Autonomy implies 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).¹³⁸ Of course, the notion of "use" of one's person may, at first blush, appear inconsistent with another of Kant's well-known injunctions—that a person should be an "end," not merely a "means;"¹³⁹ but here, we should note that the injunction says, "Do not make yourself into a mere means for others, but be at the same time an end for them."¹⁴⁰ Thus, we can contemplate an individual's right to control the use of her own person without contradicting that duty.¹⁴¹

135. This includes Locke's as well. See LOCKE, *Second Treatise of Government* ¶¶ 4, 17, 23, reprinted in 4 WORKS OF LOCKE, *supra* note 11, at 339-40, 347-48, 351-52; see also *id.* ¶ 61, reprinted in 4 WORKS OF LOCKE, *supra* note 11, at 372 ("[W]e are born Free, as we are born Rational . . ."). Locke also articulates a notion of positive freedom. See *id.* ¶ 57, reprinted in 4 WORKS OF LOCKE, *supra* note 11, at 370 ("[L]aw, in its true Notion, is . . . the direction of a free and Intelligent Agent to his proper interest . . .").

136. Again, reason is the principle used by Kant to express the notion of self-mastery, or the idea of a higher self; others may use different concepts of a higher good—if not reason, then morality, or God—although most of them relate in some way to human beings' ability to function in the intelligible world as opposed to the merely sensory. As mentioned *supra* text accompanying notes 134-35, and as Waldron points out, there is more than one way to express "a chosen conception of the good." WALDRON, *supra* note 11, at 308.

137. "Freedom must be presupposed as the property of the will of all rational beings." Ladd, *Introduction to KANT, METAPHYSICAL ELEMENTS*, *supra* note 122, at x (quoting KANT, *FOUNDATIONS*, *supra* note 122, at 75).

138. See KANT, *METAPHYSICAL ELEMENTS*, *supra* note 126, at 44; see also *supra* note 126. I refer here to freedom in the juridical sense of independence from constraint by others' wills, rather than conformance with reason.

139. See KANT, *METAPHYSICAL ELEMENTS*, *supra* note 126, at 42 (discussing generally the first duty of justice); see also Fletcher, *Law and Morality*, *supra* note 121, at 540-42 (considering the relationship between rationality and human worth).

140. KANT, *METAPHYSICAL ELEMENTS*, *supra* note 126, at 42. Kant says that this duty is an obligation resulting from the right of humanity in our own person. See Fletcher, *Law and Morality*, *supra* note 121, at 542.

141. That is, I do not here suggest that it is acceptable for a person to use, or to allow the

The question becomes somewhat more complicated if we ask whether the autonomy right to control the use of one's own person extends to control over images or other objectifications of the self. The right of publicity, after all, relates to uses of objectifications, not to manipulation of the person himself. Does the autonomy right embrace those uses, or is more needed to provide control over them?

2. *Kantian Property.* A look at Kant's theory of property quickly establishes the intrinsic link between personal autonomy and a property right in objectified identity. In Kant's system, property is an outgrowth of human freedom. All things can be owned and used; were there things outside our power (or our capacity to make use of them), this would conflict with freedom, because it would deprive freedom of the use of its will in relation to such things. Therefore, "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."¹⁴² Following on this assumption, Kant's "juridical postulate of practical reason" asserts that "it is possible to have any and every external object of my will as my property."¹⁴³ Freedom is also implicated in the act of possession,

use of, his own person as a means if to do so would vitiate his humanity. On the contrary, the moral duty to recognize and respect humanity applies to one's own humanity as well as others'. Thus, I would say that a person has a duty to treat human beings as ends in themselves, i.e., as rational, autonomous beings endowed with dignity, and that because this duty is a moral one, the individual owes it to himself as well. See Fletcher, *Human Dignity*, *supra* note 125, at 175 ("Kant completes his exposition of his moral theory by imagining a Kingdom of Ends, a moral heaven on earth in which all individuals will act exclusively out of duty and treat humanity, in themselves as well as in others, as an end in itself."). Taking this duty in conjunction with the property right in persona suggested *infra* Part II.A.2, it would imply that at least in the purely moral sphere, the individual would be expected to object to uses of persona that rob him of his dignity or human autonomy.

142. KANT, METAPHYSICAL ELEMENTS, *supra* note 126, at 53. Note that the prior assumption here is that *res nullius* is an absurdity; this would be based on Kant's teleological worldview: "[E]verything in nature must have been originally designed for some useful purpose." IMMANUEL KANT, THE PHILOSOPHY OF KANT: IMMANUEL KANT'S MORAL AND POLITICAL WRITINGS 107 (C.J. Friedrich trans. and ed., 1949).

143. KANT, METAPHYSICAL ELEMENTS, *supra* note 126, at 52. Kant's property right is a right to "use" a thing, not to "have" it. Thus, "[a]n object of my will is a thing that I have the physical power to use." *Id.* (emphasis added). Kant offers a "nominal definition" of this concept:

A thing is externally mine if it is something outside me which is such that any interference with my *using* it as I please would constitute an injury to me (a violation of my freedom, a freedom that can coexist with the freedom of everyone in accordance with a universal law).

Id. at 55 (emphasis added). One's own person, of course, is not an object; interference with one's person is a direct interference and violation of freedom, without necessitating a property

because an object “is mine *de jure* (*meum juris*) if I am so bound to it that anyone else who uses it without my consent thereby injures me.”¹⁴⁴ That is, if I possess¹⁴⁵ an object, then “anyone who touches it without my consent . . . affects and diminishes that which is internally mine (my freedom).”¹⁴⁶ There is thus an intrinsic connection in Kant’s philosophy between property and freedom—that sole innate right that “belongs to every human being” and constitutes the “attribute of a human being’s being his own master.”¹⁴⁷

This means that, in a Kantian system, property is inseparably associated with one’s “personhood” because property grows out of freedom and freedom is essential to personhood. As to whether a person should be able to claim a property right in the use of her objectified identity,¹⁴⁸ there is no logical reason why she should not and every reason why she should: if one’s own image, for example, is treated as an object capable of “being yours or mine,” why should it not be claimed by the person who is its natural source? To the extent it is available as some person’s property—and if viewed as an object, it must be so available—its source would seem to have the strongest claim. That claim would also necessarily be prior to others’ in both temporal and qualitative terms. The connection between a person and her physical characteristics is innate.¹⁴⁹ It therefore logically precedes that of any particular physical manifestation of the image or any manipulation of it by others. This is essentially a first-occupancy argument, based on the idea that a person is first to “arrive” at his own persona and thus at objectifications of it. Some scholars criticize first occupancy as an inadequate justification of private property,

claim. Moreover, one’s self does not have the objective possibility of being “yours or mine.” It would seem, however, that if a property interest can be asserted in the use of an external object on the basis of innate freedom, then *a fortiori* such an interest can be asserted in the use of one’s own person.

144. *Id.* at 51.

145. Possession is empirical, provisory property, depending entirely on physical contact. Again, it is because this type of property is so obviously inadequate that the “third juridical duty” tells us to enter civil society, where *de jure*, intelligible (noumenal) property is possible.

146. KANT, METAPHYSICAL ELEMENTS, *supra* note 126, at 57.

147. *Id.* at 44.

148. This may be a visual image, a recording of voice, or other objectified manifestation of identity. For purposes of the present discussion, identity can be limited to attributes of the natural person. For a discussion of “trappings” and props and their relationship to identity, see *infra* Part V.A.

149. The same would apply with equal force to the connection between a person and her voice. In an effort to avoid verbal clutter, I occasionally refer to “persona” to embrace any physical characteristics that act as indicia of identity.

viewing it rather as a way of resolving disputes over property once it has been established that private property should exist.¹⁵⁰ Clearly, using it as suggested here is indeed to use it as a means of determining priority rather than justifying the existence of the property. To the extent that it is a first-occupancy approach, however, it is not troubled by problems such as defining “occupancy,” since occupancy of one’s self would seem to need little elaboration. In other words, once we accept the notion of property in an objectification of personality (such as image), first occupancy tells us who ought to be the proprietor. With this sufficient ground for an assertion of a property right to the use of objectified identity, unconsented interference with it will infringe the owner’s innate right of freedom.¹⁵¹

At this point, it may be objected that because we are ultimately concerned with identity in the world, rather than in the abstract, one must distinguish between the “moral personality” described in Kant’s moral philosophy and civil personality in Kant’s system. How does the outside world affect the autonomy so central to Kant’s moral

150. See WALDRON, *supra* note 11, at 285.

151. Here, it is necessary to go a step further than the right to use something, *see supra* note 143, and to say that a property interest requires that the right be exclusive. The concept of exclusivity, while not inconsistent with what Kant says about possessory interests and property, does extend what he says in order to account for intangible property rights. In Kant’s example, if I assert a possessory interest in an apple, then I hold it physically, and another’s interference with its use constitutes interference with my freedom. See KANT, *METAPHYSICAL ELEMENTS*, *supra* note 126, at 54. If de jure property is made possible by the establishment of the civil state, then I can prevent interference with the apple even if I am not in physical possession of it. *See id.* at 66.

It is difficult to make precisely the same statements with respect to intangible things, because, first, one does not physically possess them even in the pre-civil state, and, second, a stranger’s use of my intangible property (in either the pre- or post-civil state) would not interfere with my use of it in the same sense that it would interfere with my enjoyment of the apple. Theoretically, the stranger and I (and hundreds of others) could all use my intangible property simultaneously without exhausting it. This is not to say that I would not be harmed, however—e.g., if royalties from the use of the property were my livelihood. *See Gordon, supra* note 11, at 1549. Thus, when it comes to intangible property, a property right must be exclusive in order to be meaningful. And in fact, intellectual property law does carefully distinguish between exclusive rights, which constitute ownership or property interests, and non-exclusive rights, which entail the right to use the copyrighted material but not the right to exclude others from using it. *See, e.g.,* 17 U.S.C. § 101 (1994) (including, for Copyright Act purposes, “exclusive licenses” in the definition of “transfer of copyright ownership,” but rejecting “non-exclusive licenses” in the same definition); *see also* Alice Haemmerli, *Commentary: Tasini v. New York Times Co.*, 22 *COLUM.-VLA J.L. & ARTS* 129, 133-35 (1998) (explaining the “exclusive”/“non-exclusive” dichotomy).

Thus, in the case of persona, an intangible, I would extend the Kantian notion to say that the right to use is an exclusive right to use. As such, infringement of the exclusive right to use constitutes interference with innate freedom, which remains the basis of the property claim.

philosophy? If “moral personality is nothing but the freedom of a rational being under moral laws,”¹⁵² civil personality is a creature of external laws. In that latter realm (which comprises both natural and positive laws), human beings are no longer viewed solely from the standpoint of their essential and “supersensible” humanity, independently of empirical determinations, but as affected by such determinations.¹⁵³ Thus, the individual must be viewed in that social context, as well as from the standpoint of the person as an end in himself. It seems, however, that for Kant, despite the fact that public law is not concerned with moral motivation or maxim,¹⁵⁴ but only with external acts, “[p]ublic Law [law of the civil state] does not involve any additional or different duties among men than can be thought of under private Law; the matter . . . of private law is exactly the same in both.”¹⁵⁵ This implies that, despite the distinction between the internal moral sphere and the external legal one,¹⁵⁶ human personality and innate freedom remain constant. As such, it is not plausible to believe that once the innate right of freedom has triggered the transition to civil society, it is any less relevant to personality than it was before. Indeed, even those who might not possess civil personality in Kant’s system¹⁵⁷ remain entitled to assert the demand that they be treated in accordance with the laws of natural freedom and equality.¹⁵⁸ In short, the existence of the state obviously means that we are in the field of external law, rather than ethics;¹⁵⁹ but within that field, the focus re-

152. KANT, METAPHYSICAL ELEMENTS, *supra* note 126, at 24.

153. *Id.* at 46.

154. *See supra* note 126. Professor Fletcher has analyzed the distinctions between the moral and legal spheres in Kantian philosophy and the possible modes of interaction between the two arenas. *See* Fletcher, *Law and Morality*, *supra* note 121, *passim*. My interest here is primarily in the area of moral philosophy and, more particularly, the derivation of property in a pre-civil state. Nonetheless, I do posit that civil society, and ultimately legal rules, are supposed to protect property acquired in the hypothetical pre-civil state. This does not mean that the state protects only moral action, or compels it; the state has no force *in foro interno* in the real world. Rather, it means that the state ought to make secure the ability of individuals to act rationally (including making property claims) in accordance with others’ ability to do so. *See id.* at 556-57 (discussing Feuerbach and other theorists who view legal rules as existing to permit moral action).

155. KANT, METAPHYSICAL ELEMENTS, *supra* note 126, at 71.

156. Jurisprudence constitutes the body of laws susceptible of external legislation. *See id.* at 34.

157. Kant includes servants, minors, and women in this group, revealing a culturally determined aspect of his universal philosophy. *See id.* at 79.

158. *See id.* at 79-80.

159. *See id.* at 34. For an extensive and elegant treatment of this subject, see Fletcher, *Law and Morality*, *supra* note 121, at 542-57.

mains on relationships between wills “insofar as they are regarded as free,”¹⁶⁰ and even persons who are not citizens, or who have lost their civil personality, retain their innate personality and rights as persons.¹⁶¹

For this reason, despite the distinction between moral personality and civil personality, the bedrock principle of human autonomy, and of the innate right of freedom, remains constant. Moreover, the property claim to objectified image, beginning as a form of possessory property, is solidified, rather than compromised, by the establishment of civil society. If the need to make noumenal property possible leads to the establishment of a civil society,¹⁶² such property is now secured. Consequently, it would seem that a person should be able to assert a property right in objectified image that the law can, and arguably ought to, protect.¹⁶³

Note that there is no “Lockean” notion here of property rights acquired through labor.¹⁶⁴ The right to control the use of one’s image or other objectification of identity is a property right based directly on freedom, autonomy, or personality. In fact, Kant explicitly rejects a labor theory, stating that cultivation of land, for example, is not essential to the acquisition of property rights in it. Kant says that the modification of a thing by labor “forms nothing more than an external sign of the fact that it has been taken into possession.”¹⁶⁵

In summary, an innate right to one’s persona, and an accompanying property right in the uses and control of the objectification of that persona, can be grounded in idealist philosophy (keeping in mind that image-as-object may also be qualified as having a subjective, personal, inward aspect and that it is not a “thing” like any other).¹⁶⁶ Like intellectual property, image can be viewed as unique, a

160. KANT, *METAPHYSICAL ELEMENTS*, *supra* note 126, at 34.

161. *See id.* at 100.

162. *See id.* at 65, 71; *see also supra* note 145.

163. *See supra* note 143.

164. *See* LOCKE, *Second Treatise of Government* ¶¶ 40-46, *reprinted in* 4 *WORKS OF LOCKE*, *supra* note 11, at 361-65.

165. IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 92 (W. Hastie trans., T. & T. Clark 1887) (1796). Thus, he who has labored on ground not already his has wasted his efforts. *See id.*

166. Post’s assertions that “[c]ommodified personality is separate from the person” in the sense of severance, and that since “[p]ersonality can . . . be legally embodied by either property or privacy rights,” the law must support “one aspect of the self or the other,” are excessively binary. Post, *supra* note 84, at 669-70. Although at first Post acknowledges the dual nature of personality as having a detachable, commodified aspect and an embedded, personal one, he later claims that one cannot justify liability in terms of property and simultaneously recognize

product of the peculiar mix of mental, psychological, and physical attributes that make the progenitor the individual she is. If copyright doctrine eschews labor¹⁶⁷ and seeks to identify a uniquely personal contribution to a work,¹⁶⁸ publicity rights doctrine can certainly do likewise with respect to the objectification of identity.¹⁶⁹ Even more broadly, this philosophical orientation permits us to reconceive the right of publicity as a freedom-based property right with both moral and economic characteristics, rather than being forced to make a dichotomous choice between a privacy right concerned with moral injury on the one hand, or a purely pecuniary publicity right on the other.¹⁷⁰

pain and suffering in the absence of harm to the property without “run[ning] a serious risk of internal incoherence.” *Id.* at 674. A right with two facets may be complex without being incoherent, however. Nor is it true, as Post argues, that a person who commodifies her image necessarily sacrifices all moral claims over that image. *See id.* at 677. In fact, Post concedes that a synthetic dualism is not inconceivable, but he says that anyone asserting it would have to explain how “name or image can simultaneously be both external to identity and yet integral to it.” *Id.* at 677 n.151. It is this explanation that has been attempted here. For further analysis of this subject, see JANE M. GAINES, *CONTESTED CULTURE* 178-86 (1991).

167. *See, e.g.,* *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349, 354 (1992) (“The primary objective of copyright is not to reward the labor of authors, but ‘to Promote the progress of Science and useful Arts.’ . . . Without a doubt, the ‘sweat of the brow’ doctrine flout[s] basic copyright principles.” (citations omitted)).

168. *See* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (Holmes, J., writing for the Court) (“Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright . . .”); *see also* *Feist*, 499 U.S. at 345-47 (discussing originality, “the *sine qua non* of copyright law”). On authorial personality, see Ginsburg, *supra* note 83, at 1890. For a critique of the “Romantic author” concept, see Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 *DUKE L.J.* 455, 496-500 (1991); and *infra* text accompanying notes 179-85, 194-96.

169. *See* Kwall, *Right of Publicity*, *supra* note 6, at 60:

If copyrighted property can be said to represent the embodiment of a creator’s heart, mind, and soul, this is even more true for attributes such as an individual’s name and likeness that are protected by the right of publicity. Thus, a strong argument can be advanced that uses of an individual’s persona strike at the heart of one’s personhood even more than appropriations of an individual’s expression.

In fact, early cases advancing the concept of authorial personality as a basis for copyright used an analogy to physiognomy: “The order of each man’s words is as singular as his countenance . . .” Ginsburg, *supra* note 83, at 1882 (citing *Jefferys v. Boosey*, 4 H.L.C. 815, 869, 10 Eng. Rep. 681, 703 (H.L. 1854)). Coming full circle, some modern cases analogize unauthorized reproduction of a person’s image to “the violation ‘of a sort of natural copyright possessed by every person of his or her own features.’” Post, *supra* note 84, at 673 (quoting *Continental Optical Co. v. Reed*, 86 N.E.2d 306, 309 (Ind. 1949)).

170. An identification between liberty and privacy has been asserted in the case law. A key case in the development of privacy law found that the right of privacy was recognized by the U.S. and Georgia constitutions in their due process clauses. While the court recognized that “[i]t may be said that to establish a liberty of privacy would involve in numerous cases the perplexing question to determine where this liberty ended, and the rights of others and the public

3. *Idealism and Property.* The approach outlined here is consistent with that suggested in other theoretical works on property. The objectification of one's self may be viewed not as a purely external, objective thing, but as something more. An interesting suggestion in this area proposes a property theory that focuses on "personal embodiment or self-constitution in terms of 'things,'"¹⁷¹ using a Hegelian personality theory¹⁷² of property. It describes objects that are "closely bound up with personhood because they are part of the way we constitute ourselves,"¹⁷³ and it uses the bond resulting from this "property for personhood" to justify giving the owner "broad liberty with respect to control" over the object in question.¹⁷⁴

began," it concluded that that difficulty was "no reason for not recognizing the liberty of privacy . . ." *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 71-72 (Ga. 1905). The court therefore granted relief on privacy and defamation grounds to an individual whose photograph was used without consent in an advertisement for life insurance. *See id.* at 71-72. Such statements were made without elaborate philosophical justification; apparently, it seemed obvious that the right they were articulating was a liberty interest. *See* Bloustein, *supra* note 6, at 1002. While I do not go so far as to suggest that the right of publicity should be viewed as a substantive due process "liberty" right, statements such as that in *Pavesich* are suggestive, and they lend support to the notion that the right of publicity ought to be recharacterized as a property right with a foundation in personal autonomy. As such, it should carry greater weight than it does as a property right based only on labor.

171. Radin, *supra* note 115, at 958.

172. *See infra* notes 177-78. Jeremy Waldron extensively analyzes Hegel's theory of property. *See* WALDRON, *supra* note 11, at 343-89. In Hegel's philosophy, abstraction of the will from the particular and its non-determination by impulse is the first step toward self-actualization. *See* HEGEL'S PHILOSOPHY OF RIGHT ¶ 5, at 21-22 (T. M. Knox trans., Oxford Univ. Press, 6th ed. 1967) (1821) [hereinafter HEGEL]. Waldron views Hegel's argument for private property as a general right-based argument, i.e., one positing rights not as arising out of particular transactions or events, but possessed innately or independently by the rights-bearer. Waldron, like others, also emphasizes that Hegel's theory is developmental, and that private property ownership is integral to the growth of the individual as a "stage in a process of individual and social development." WALDRON, *supra* note 11, at 348. Property is essential to the process of relating back to the concrete; this allows a person to "establish his will as an objective feature of the world." *Id.* at 356.

173. Radin, *supra* note 115, at 959. Such "personal property" is distinguished from "fungible property." Hegel interestingly poses the question whether mental attainments and talents can be property: "[W]hile possession of these [attainments, etc.] may be the subject of business dealings and contracts, as if they were things, there is also something inward and mental about it . . ." HEGEL, *supra* note 172, ¶ 43, at 41. Although Hegel then proceeds to an exposition of intellectual property, he does not provide further insight into the publicity rights question of image as property. Nevertheless, the duality of personal attributes as inward and intrinsic to personality on the one hand, and alienable property on the other, is certainly relevant to our discussion. Hegel is talking about products of the mind, or intellectual property. The idea seems to be that intellectual property embodies its producer, as a unique product of the person's mind; thus, although it can be objectified, it remains intensely personal. This conclusion supports Radin's analysis.

If such a theory holds true for objects like wedding rings or houses (or indeed any other object through which self-determination is expressed),¹⁷⁵ it should apply *a fortiori* when the “object” in question is a person’s own image or external manifestation of her identity (by definition connected to the person it represents). Most people—and, many will agree, celebrities in particular—experience a special, even unique, attachment to their own images or other objectified attributes, and feel that those things are inextricably associated with their identities.¹⁷⁶

This is intuitively attractive. It is also theoretically defensible. Professor Margaret Jane Radin, for example, invokes Hegel’s notion that “the person becomes a real self only by engaging in a property relationship with something external.”¹⁷⁷ Property in this view is an extension of the personality and is essential to the actualization of the person.¹⁷⁸ With this approach, the link between individual freedom and property is firmly drawn. Whether borrowing from Kant or

174. Radin, *supra* note 115, at 960; see also Karl Olivecrona, *Locke’s Theory of Appropriation*, 24 PHIL. Q. 220, 224 (1974), cited in WALDRON, *supra* note 11, at 195: “We can have a feeling of things being so intimately connected with ourselves that they are part of our very selves. Being deprived of such objects represents something more than an economic loss. It is experienced as an attack on the personality itself.”

Waldron criticizes the subjectivity of the “identification” approach to establishing private property rights, finding that the expectation of continued use underlying identification presupposes a principle of entitlement. An expectation to continue using one’s self or one’s own identity indefinitely, however, would appear objectively sustainable even before a system of entitlements has arisen. Moreover, there is no subjectivity problem with this particular identification; the identification of a person with his own image or other indicia of identity is entirely predictable and reliable, rather than “subjective” in the sense of being capricious. See WALDRON, *supra* note 11, at 195.

175. See Radin, *supra* note 115, at 959.

176. See Madow, *supra* note 9, at 196 n.338. Madow notes that others, such as Justin Hughes, have made similar points, particularly in regard to an individual’s own persona. See *id.* (citing Hughes, *supra* note 111, at 340). Madow finds the personality theory unconvincing because a persona is more than just an individual’s personality. See *id.* Again, however, the Kantian approach does not rely heavily on the notion of a personality’s self-realization through ownership; rather, the focus is on freedom as an innate right of the human individual.

177. Radin, *supra* note 115, at 972-73. This is because property involves the objectification of the will and is thus the “first embodiment of freedom.” HEGEL, *supra* note 172, ¶ 45, at 42. In Hegel’s system, this is part of the notion of self-actualization through particularization in the concrete, in dialectical opposition to abstraction of the will from the particular. See *id.* at ¶¶ 4-7, at 20-23. Radin describes Hegelian “personality theory” as involving increasingly complex property relationships as the scheme of progress (from individual, to groups, to family, and to the state) advances. See Radin, *supra* note 115, at 972. The approach is termed a “personality theory” because “property is the *embodiment* of personality.” *Id.* at 973 n.57 (quoting HEGEL, *supra* note 172, ¶ 51, at 45).

178. See HEGEL, *supra* note 172, ¶ 51, at 45; see also Gordon, *supra* note 11, at 1545 n.68 (commenting on Karl Olivecrona’s treatment of Locke).

Hegel, then, idealist philosophy provides a persuasive alternative to Locke as a philosophical justification for the right of publicity.

To all the foregoing, a critic might respond that although the theoretical justification for a property interest in image is plausible, it ultimately depends upon a massive assumption, i.e., that the self that asserts and precedes the property interest is coherent and stable. For those attracted to the Kantian notion of self-worth, but who also recognize that his philosophy is culturally determined and teleological, this is an inevitable problem.¹⁷⁹ Might the “self” be, not a Kantian essential self, but rather a series of shifting meanings depending upon who views or interacts with it?¹⁸⁰ In this sense, the image is not the

179. See RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989), particularly ch.2, “The Contingency of Selfhood,” 23-43. Rorty posits as alternatives the Kantian/Hegelian model that “persist[s] in seeing mind, spirit, the depths of the human self, as having an intrinsic nature,” *id.* at 4, and the Nietzschean/Heideggerian model of self-creation in an ultimately contingent world, repudiating the idea that anything has an intrinsic or essential nature that can be discovered and viewing the self as an ongoing act of self-creation, *see id.* at 28-30.

180. To put the question this way is to raise other questions that are beyond the scope of this Article. The question is deliberately cast in terms of the self’s being exclusively a function of its perceivers. How consistent is this with a Nietzschean view of individual self-creation? See RORTY, *supra* note 179, at 27-30. What about post-Nietzschean writing that rejects purely autonomous self-creation, *see id.* at 40-43, or the “ironic novelist” (Proust’s desire to be more than a product of others’ perceptions achieved by redescribing those others as fellow contingencies), *see id.* at 102? For now, it suffices to note that the nonessentialist approach to image in the publicity rights context reflects that adopted in other settings.

As later discussed, *see infra* text accompanying notes 197-203, the postmodernist critique of the right of publicity emphasizes audience-generated meaning; the anti-authorial movement in copyright has a similar thrust. See Jaszi, *supra* note 168, at 458 n.9. For literary postmodernism, critical sources are Nietzsche, Heidegger, and Derrida. See, e.g., Richard H. Weisberg, *Text into Theory: A Literary Approach to the Constitution*, 20 GA. L. REV. 939, 946 (1986) (“At the source of ultramodernist literary theory lies *Being and Time* . . .”). But see RORTY, *supra* note 179, at 106-10 (criticizing Nietzsche for abandoning his attack on self as substance and Heidegger for slipping into a transcendent perspective in his early writings). According to Weisberg, a refusal to accord any essence whatsoever to text actually exceeds Heidegger’s approach, because both Heidegger and his expositors, such as Paul de Man, endorse the notion of the “objective potential within a text,” *id.* at 948, not in the sense of truly understanding a text’s preexisting meaning, but of “ma[king] ourselves alive to the *yearning for understanding* within the text,” *id.* at 979, and arriving at an ideal interpretive strategy. The result is a moderate postmodernism that allows for the existence of at least potential underlying meaning in text, with the caveat mentioned above.

One might ask whether this version of postmodernism in the publicity rights context would leave open the possibility of a self that underlies image and possesses similar “objective” potential. That is, the idea of some underlying identity appears defensible in the moderate postmodernism espoused by Weisberg, although that “objective” potential identity may not exist independent of a perceptor and may be comprehensible more as an invitation to interpretation than as an authoritatively defined meaning. In contrast, it would be impossible to maintain even this much attachment to underlying identity in what Weisberg terms the more extremely subjective American “reader-response” school represented by writers like Stanley

form or manifestation of an essential underlying identity, but rather is itself that identity.¹⁸¹ The question then arises, who should have a property right in that manifestation of identity? To the extent that constructed identity is not a solo act, a case can be made that exclusive property rights in it are improperly attributed to the individual subject of the image.¹⁸² At the same time, while some critics assert that the constructed external image is indistinguishable from the identity of a publicity rights claimant, and that such identity therefore is no longer the claimant's sole property,¹⁸³ others complain that publicity rights claimants confuse the external image with the underlying person.¹⁸⁴ Thus, under the first critique, there is no claim to a publicity

Fish. *See id.* at 951. In their emphasis on objectified identity as socially constructed, postmodern critics of publicity rights seem more closely to approach this latter school, at least to the extent that it is inclined to discount the objective existence of text. Under this approach, image is completely unmoored from underlying self; in fact, any purported underlying self is either non-existent or irrelevant. For purposes of the present discussion, it is sufficient to note that the idea of the unmoored, constructed self is an alternative model that must be understood if the post-modernist critique of the right of publicity is to be treated with the respect it deserves.

181. *See* Jeffrey Malkan, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 TEX. L. REV. 779, 781 (1997). Malkan distinguishes between what he calls the "essentialist" view, which posits both identity (substance) and personality (form), and the "constructed identity," or postmodernist, perspective. From the latter standpoint, says Malkan, the signifier—the image, or photograph, for example—is not a medium through which the underlying signifier is perceived, but rather a "detached object that does not elicit a deeper meaning, but instead refers to other signifiers on the same plane of reference. Although this is obviously an oversimplification[,] . . . th[is] . . . version—where depth is supplanted by the opaque surfaces of discourses, practices, and textual play—typifies postmodernism." *Id.* at 782. Malkan identifies the right of privacy with the essentialist view, and the right of publicity with the postmodernist approach, because the latter right concerns itself not with what is revealed about the underlying self, but with the material object, the signifier: "The issue in a publicity claim is not whether the picture unfairly exposes its subject to public view, but rather who will profit from its sale." *Id.* at 794. I would say that this statement describes the dominant mode of conceptualizing the right of publicity, rather than describing the right itself.

182. *See* Madow, *supra* note 9, at 239; Malkan, *supra* note 181, at 795 ("The creative and financial contributions of the parties involved in the image's production . . . gives these parties a plausible argument that their investment in the image merits a share of its profits.").

183. *See* Malkan, *supra* note 181, at 828 (arguing that the postmodern theory of publicity rights would hold that "the picture, indeed, *is* the person—that there is no difference between appearance and reality because identity goes no deeper than the surface of the skin"). Under the circumstances, those who contribute to the picture have a greater claim to its proceeds than the subject.

184. *See id.* at 788 ("Legal actions against appropriators and infringers almost always involve a common "mistake" in reading signs, one that treats the representational image as though it were the referent.") (quoting GAINES, *supra* note 166, at 229). In fact, in these cases, all that is appropriated is the reference, the commodity. *See id.* at 788-89. Elsewhere, Gaines states that the right of publicity more generally depends upon "an unexamined assumption that the unauthorized use of a photograph is an appropriation of the identity of the person photographed." GAINES, *supra* note 166, at 86. What I have attempted to do here is to provide the examination that Gaines finds lacking.

right because the constructed image overtakes and subsumes underlying identity, belonging to those who have constructed, rather than to an original, essential subject; under the second critique, there is no claim to a publicity right because the commodified image or reference is distinct from the subject, who is not affected by exploitation of the constructed image.

In either case, whatever personal identity is in question has been completely commodified; thus, there can be no intrusion into what would constitute the realm of a moral or noneconomic right of publicity—no infringement on essential identity in the sense that it occurs under privacy law. The apparent paradox of simultaneously asserting the separateness of commodified image and referent, and denying the existence of underlying personality altogether, can be resolved by focusing on the artificiality of the image. That is, if we assume that image is a construct, and a construct by persons other than the right of publicity claimant, then there is obviously a discontinuity between image and the physical person who is the putative claimant to it. At the same time, if the image is all there is to a commodified identity, then the original subject of it—the claimant—is rendered irrelevant. Either way, the original subject of the image is disconnected from the image, which can then be dedicated to public use.¹⁸⁵

As long as one agrees that objectified or commodified image is a construct that may be severed from, or that overcomes, personal identity, this model works. One could, however, equally well (and more consistently with existing societal and legal norms) choose the Kantian model, and assert that there is an underlying self; that while there is a difference between the self and objectification (or commodification) of self, the latter does not negate the former (indeed, it derives from the former); that a property right which provides for control over objectification of identity is not logically opposed to an autonomy right that protects the self; and that the two can, in fact, be viewed as two facets of freedom.¹⁸⁶ What this means in reality is that

185. See *infra* Part III (examining postmodernist criticisms of the right to publicity).

186. But see GAINES, *supra* note 166, at 181. Gaines asserts that this is impossible, arguing that publicity and privacy rights are contradictory and attacking those who have described them as complementary or otherwise integrally related. See *id.* Gaines characterizes the rights, rather, as a structural contradiction in the law, describing the common law's "grafting" process of "creating the illusion of legal consistency." *Id.* at 183. Gaines thus sees doctrinal development of the right of publicity as having achieved "careful legal grafting that effectively denies logical inconsistency. In any other scheme of things, privacy and publicity would have nothing to do with each other and could go their separate ways. But in legal discourse . . . they are bound together, their differences minimized, and the rift between them reconciled." *Id.* This is

even in the presence of commodification, a viable claim can be made to control the commercial exploitation of identity on both moral and economic grounds.

Looking at the right of publicity as a metaphysical question, we would begin by asking whether it is possible. To the extent that one accepts Kantian premises, the answer is clearly yes. As to why we should accept those premises, we might appeal to history, or to the fact that the view of human personality articulated by Kant is largely consonant with that underlying our social and political system, or at least with our values of individual autonomy.¹⁸⁷ In other words, identifying Kantian philosophy as one option among other possible frameworks for the right, one might prefer Kant not because his is the only, transcendent truth, but because what he says resonates with our culture and common values. As Rawls has said,

What justifies a conception of justice is not its being true to an order antecedent and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us.¹⁸⁸

As a normative matter, then, there is much to recommend this approach to the right of publicity: it places primary emphasis on human worth and self-determination.

B. Implications of an Autonomy-Based Right of Publicity

Where does this leave us? Obviously, future debates in Congress over the right of publicity are unlikely to revolve around disquisitions

simply not the case. In legal discourse, the rights have been dichotomized and the differences between them emphasized. As explained here, however, viewing privacy and publicity rights as autonomy rights is not necessarily logically inconsistent. Gaines returns to the theme of the impossibility of coexisting privacy and publicity rights in Jane M. Gaines, *The Absurdity of Property in the Person*, 10 *YALE J.L. & HUMAN.* 537, 545 (1998), where she does acknowledge the legal premise of the right to property in the person.

187. See, e.g., Martin H. Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591 (1982). As Redish points out, political democracy can be viewed as a means to the broader end of individual self-realization. See *id.* at 601; see also David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 *U. PA. L. REV.* 45, 61-62 (1974) (“Consider, for example, the liberties of thought and expression, in speech, the press, religion or association. . . . The value placed on this cluster of ideas derives from the notion of self-respect that comes from a mature person’s full and untrammled exercise of capacities central to human rationality.” (footnote omitted)). Richards describes other liberties in similar terms as confirmatory of individual autonomy. See *id.* at 63.

188. John Rawls, *Kantian Constructivism in Moral Theory*, 77 *J. PHIL.* 515, 519 (1980), quoted in RORTY, *supra* note 179, at 58.

on the relative virtues of Locke or Kant. Rather, the point of the exercise here is to respond to Professor Madow's criticism that the right of publicity lacks a philosophical justification.¹⁸⁹ Having addressed that complaint, we can proceed to inquire how the postmodernist critique fares when the right of publicity has a Kantian, rather than a Lockean, basis.

Perhaps it is because there is so much intuitive force to the notion of control over the use of one's own identity that commentators like Professor McCarthy have asserted that the right of publicity is "self-evident."¹⁹⁰ In any event, if the right of publicity is reconceptualized as a property right based on human freedom,¹⁹¹ it implies a different question from the one that is traditionally posed in balancing publicity rights with competing societal interests. Much of the debate so far has pitted a celebrity's right to advertising royalties against society's right to use celebrities' images for purposes of constructing social and cultural meaning,¹⁹² the latter activity being viewed as protected expression under the First Amendment. This characterization means, first of all, that only economic harm is relevant to the right of publicity. As we have seen, however, the property right is based on autonomy, implying that assertions of the right to control the commercial exploitation of identity may also be based on noneconomic, or moral, factors. Second, and linked to the first implication, limiting the right of publicity to a purely pecuniary interest rather obviously places a heavy thumb on the scale in favor of public entitlements to expression. In asking about the proper relationship

189. See Madow, *supra* note 9, at 134-36.

190. See *supra* note 110. For a blistering attack on this "conclusion," see *Cartoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 975 (10th Cir. 1996), discussed *infra* Part IV.B; see also Kwall, *Right of Publicity*, *supra* note 6, at 92: "One's face and body represent the embodiment of an individual's presentation of herself to the world and thus . . . [cases in which a plaintiff sues over an unauthorized visual depiction] can be said to involve the quintessential property right." While I obviously agree, it must be noted that Kwall, who states early in her article that she is not making a case for the right of publicity, but assuming its existence, *see id.* at 54, offers no theoretical support for the right, nor does she distinguish between an individual's physical being and objectifications of that being.

191. Support for the right of publicity as a right of personal autonomy is offered by PINCKAERS, *supra* note 12, at 242-43. Although the argument is somewhat abbreviated, the point is well made that "[f]rom the principle of personal autonomy it follows that every human being should have the right to develop his own identity and to decide how and what aspects of this personal identity will be shown to the rest of the world." *Id.* at 242. Yet Pinckaers (somewhat inconsistently, in my view) then proceeds to divorce publicity from privacy, asserting that "moral interests are protected by the right of privacy, not the right of publicity." *Id.* at 321.

192. See *infra* Part III.B.

between the right of publicity on the one hand and societal and First Amendment needs on the other, however, it is important to remember that it is an autonomy interest, and not just a matter of cash for celebrity endorsements, that must be weighed in the balance.

III. THE KANTIAN RIGHT AND THE POSTMODERNIST¹⁹³ CHALLENGE

A. *Celebrity Image and Fame*

Publicity rights, as protectors of celebrity image, have been subjected to attack on the dual grounds that the public is entitled to share in the fruits of such images, as the co-creator of celebrity; and that the public needs to be able to manipulate such images in order to create meaning (rather than having meaning imposed on it). First, critics assert that it is the public, rather than the celebrity, that is really responsible for the creation of a celebrity image.¹⁹⁴ Thus, “fame is a ‘relational’ phenomenon, something . . . conferred by others,”¹⁹⁵ and it has as much to do with the audience as with the celebrity. Now, if the audience or the public invests as much work in the creation of a celebrity image as does the celebrity, it is obvious that under a Lockean “deserts” theory of property, the public will be as deserving as the star. Thus, to the extent that the right of publicity is a Lockean property right, it is certainly open to attack on this basis. In fact, some critics go so far as to assert that since the media and public taste are determinative of stardom, “[a]ny rights created through this pro-

193. See *supra* note 8 (defining postmodernist).

194. See, e.g., Madow, *supra* note 9, at 181-82 (“My central contention is that there is a good deal more to the generation of a commercially marketable public image than the ‘labor’ of the star herself.”).

195. *Id.* at 188; see also Clay, *supra* note 9, at 502 (“The public’s role in the image-making process is woefully underemphasized by courts. In the end, it is the public that determines a celebrity’s role and image in our popular culture . . .”); Rahimi, *supra* note 9, at 731 (quoting Madow extensively to support a public-perception model of celebrity creation). In addition, Professor Gordon argues that

with standard intellectual products, the active role of the producer and the comparatively passive role of the public makes it easier to assign the resulting value primarily to the laborer. By contrast, with products such as popularity and “commercial magnetism,” the chain of causality and responsibility is much harder to trace.

Gordon, *supra* note 11, at 1588 n.277.

For a discussion of the phenomenon of fame itself, see Kwall, *Fame*, *supra* note 12, at 4-13. Kwall points out that even where extensive media packaging has occurred, that effort “represents an intellectual, emotional, and physical effort on the part of the celebrity.” *Id.* at 41. In other words, from the non-postmodernist standpoint, the crucial point is that there is still a person involved.

cess should thus belong to the public, at least in proportion to their contribution, and a complete privatization of these rights is actually an infringement upon the public's moral rights."¹⁹⁶

As we have seen, however, it is not necessary to ground the right of publicity in a Lockean notion of labor-created property. In the absence of that premise, much of the postmodernist critique fails. The public (or audience's) investment or participation in the creation of a celebrity's fame does not necessarily imply an entitlement to use of the celebrity's identity. Identity remains something intrinsic to the individual, subject to individual control as an autonomy-based property right, no matter what or who has affected its level of fame. Therefore, the Kantian right of publicity is able to hold its own with this aspect of postmodernist criticism, even if one concedes the important role of the public in generating celebrity. As far as fame is concerned, choosing a Kantian rather than Lockean model effectively neutralizes the postmodernist attack.

B. Cultural Recoding

Other aspects of the postmodernist critique of publicity rights,¹⁹⁷ however, do not depend on the public's having contributed to a celebrity's fame. Rather, they take as their starting point the idea that the public, or segments of the public, create and derive meaning from celebrity images, and therefore must have free rein in manipulating or "recoding" those images in order to remain culturally viable.¹⁹⁸ The

196. Clay, *supra* note 9, at 502. Compare this with Gordon's assertion (based on her reading of Lockean philosophy, the avoidance of harm, and the proviso that private property claims must leave "enough and as good" to the common) that an overbroad injunction protecting private property rights is an infringement of the public's property right in an unimpaired common. See Gordon, *supra* note 11, at 1594 n.315; *infra* notes 226-27.

197. See Coombe, *Author/izing*, *supra* note 10; Madow, *supra* note 9. Most postmodernist criticism is directed at copyright, rather than publicity rights. See Aoki, *supra* note 8, at 807 n.7 (collecting articles by James Boyle, Rosemary J. Coombe, Rochelle Dreyfuss, Wendy J. Gordon, Peter Jaszi, David Lange, and others).

198. More fundamentally, this argument posits that because celebrity selling power depends on semiotic power, i.e., the strength of a celebrity image as a bearer of meaning, one must look to the source of that semiotic power. Thus, the public not only invests the celebrity with fame, but the celebrity image with its meaning. See Madow, *supra* note 9, at 185, 191. It is in this sense that the public is said to own the image and to be entitled to exploit it. One problem here is that it is difficult to establish boundaries. As Madow points out, supermarket tabloids also construct image and meaning. See *id.* at 193 n.327. Does this mean that the media conglomerates publishing those papers should also own the image? Surely not, if the "public" needs to own it in order to subvert media-directed meanings. See *id.* at 193. Yet, why is there not an equally strong claim on the part of the media? I would submit that the public will have

postmodernist premise is that an intellectual or artistic product (or in this case, an image) must be viewed as a dynamic “text” in the process of creation through interaction with its audience, rather than as a static “work” with a fixed meaning determined by the author.¹⁹⁹ In the case of celebrity images, such manipulation may take the form of investing the images with new and often oppositional significance.²⁰⁰

The process whereby the audience or public can recode or reconstruct texts and images is one of *bricolage*—that is, appropriating materials at hand to create something new.²⁰¹ This process is particularly important to viewers who, for cultural, social, or sexual reasons, are not aligned with the dominant social ideology and who resist texts’ and images’ “preferred” meanings (i.e., those intended by their producers or owners).²⁰² The recoding process, say the postmodernist critics, is impeded when images’ meanings are fixed, and private property interests therein are attributed to their owners:

Liberal notions of freedom of expression fail to grasp the nature of contemporary cultural politics of postmodernism . . . because they are held hostage by the philosophical conceits of the Enlightenment. . . . I propose that we situate . . . practices [of popular reworking of images] in an enlarged vision of contemporary democ-

an easier time gaining access to celebrity personas under a right of publicity regime than under one permitting the media to assert ownership in celebrity images. But if authorship of meaning leads to ownership claims, the media are as well placed as the “public” to make them.

199. See Aoki, *supra* note 8, at 806 & n.2. This, of course, evokes the discussion of image and identity as a series of shifting perceptions. See *supra* text accompanying notes 179-85.

200. See Coombe, *Author/izing*, *supra* note 10, at 366. A lucid account of the deconstructionist and postmodernist approach to oppositional meaning is presented by Professor Amy Adler in *What’s Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1504 (1996). Adler describes deconstruction as a characteristic of postmodern art that works from within a system (of words, of art, of culture) to reveal its inner contradictions, to subvert its supposedly given meaning, or to challenge its assumptions. See *id.* at 1518-19.

201. See Aoki, *supra* note 8, at 814 n.62 (citing JACQUES DERRIDA, *Structure, Sign & Play in the Discourse of the Human Sciences*, in WRITING AND DIFFERENCE 196, 285 (Alan Bass trans., 1978)); Madow, *supra* note 9, at 140 n.54. Derrida derived the term “*bricolage*” from Claude Levi-Strauss’s *The Savage Mind*. Although this term is somewhat derogatory in French, it is not so in its postmodernist sense. Rather, the idea is that materials that have traditional or given meanings may be appropriated and given multiple and contradictory signification. See Adler, *supra* note 200, at 1541.

202. See Coombe, *Author/izing*, *supra* note 10, at 366 (addressing gay male appropriation of female movie stars, lesbian “reworkings” of James Dean, and middle-class female “fanzine” members’ manipulation of Star Trek characters); Madow, *supra* note 9, at 139 & nn.49-50, 143 (explaining that recoding is generalized and not limited to subgroups). As Adler says, “In deconstructed practice, intent . . . becomes not only impossible to discover, but also irrelevant to what a text may ‘mean.’” Adler, *supra* note 200, at 1555 (footnote omitted).

racy that recognizes—as political practice—dialogic cultural activities of articulating the social world and authoring politically salient forms of difference.²⁰³

From this perspective, “[b]y centralizing [the] meaning-making power in the celebrity herself or her assignees, the right of publicity facilitates top-down management of popular culture and constricts the space available for alternative and oppositional cultural practice.”²⁰⁴ Thus, publicity rights “facilitate private censorship of popular culture.”²⁰⁵ Clearly, this is where the clash between a Kantian right of publicity and postmodernism emerges in starkest relief: if the individual, as a function of her Kantian autonomy, has a property right in her objectified image, she may make the claim that only authorized commercial exploitations of that image are permissible. Indeed, with a freedom-based right capable of general application, she could theoretically object to any unauthorized use. The result is an acute conflict with claims of public entitlement to free access to, and use of, that image. Here again, though, it is of critical importance to recall what the publicity rights conversation is about. We are concerned *not* with all uses of identity that might offend a person’s autonomy as such, but—by definition—with commercial exploitation²⁰⁶ of that identity. It is within that framework that our analysis must proceed. As noted earlier,²⁰⁷ the limitation to “commercial” exploitation hardly makes for an easy question. Nevertheless, it does at least eliminate from consideration those uses of identity that are noncommercial, such as individual or group “recodings” that are not offered for sale to the general public.

203. Coombe, *Author/izing*, *supra* note 10, at 366. As the reader may have discerned, and as I freely confess, I do not think the Enlightenment was a bad thing.

204. Madow, *supra* note 9, at 134.

205. *Id.* at 138; *see also* Coombe, *Author/izing*, *supra* note 10, at 372, 386-87 (arguing that the law allows a celebrity to “appropriate” certain identities and prevent any other uses); Clay, *supra* note 9, at 503-04 (decrying the “‘privatization’ of popular culture”); *id.* at 504 n.95 (describing the “freezing” of an identity’s development); *id.* at 506-07 (claiming that publicity rights “stifle real cultural growth” and contradict “traditional intellectual property law”).

206. *See supra* note 24 (defining “commercial exploitation” of identity).

207. *See supra* text accompanying notes 46-47.

C. *Demystifying Postmodernism: Self-Expression and Celebrity Merchandise*

The postmodernist accusation that fixed or “preferred” meanings stifle popular culture is superficially persuasive; after all, once making changes in meaning is posited as the relevant public activity, anything that insists on a fixed meaning will rather obviously threaten it. At the same time, though, not all recordings are the objects of *commercial* activity, and these criticisms lose much of their persuasiveness in the details, where ideology bumps up against reality. Professor Coombe proclaims, for example:

[I]f we grant Madonna exclusive property rights in her image, we simultaneously make it difficult for others to appropriate those same resources for new ends, and we freeze the Madonna constellation itself. Future artists, writers, and performers will be unable to draw creatively upon the cultural and historical significance of the Madonna montage without seeking the consent of the celebrity²⁰⁸

This is poignant, but it is also hyperbolic. Why and how would future artists and writers necessarily be constrained? Would the inability to profit financially from a “recoding” interfere with the creation of new works, either physically or artistically?

Clearly, to the extent that an artist is deprived of an economic reward for his work, he both will be less able to continue functioning as an independent artist and will experience less of an incentive to try. Artistically, he may suffer a loss if crucial raw materials are declared off limits. But once again, we must ask whether this archetypal artist is really at risk in the right of publicity scenario. As discussed earlier, the relevant context here is one of *commercial exploitation*. The statutes and common law of publicity rights clearly aim at advertising and commercial uses of celebrity images, not at what would generally be considered noncommercial or purely artistic ones.²⁰⁹ As a general matter, future artists and writers may paint all the pictures and write all the critiques they like, as far as the right of publicity is

208. Coombe, *Author/izing*, *supra* note 10, at 372; *see also* GAINES, *supra* note 166, at 202 (asserting that enforcement of publicity rights interferes with uses of signs that are easiest to manufacture and to use and implying that it also impedes “celebrity send-ups”). Gaines’s point is simply not true, given the broad scope of expression extended to parody in this country. *See infra* text accompanying notes 327-50.

209. Again, I do not mean to suggest that it is easy to identify the “purely artistic.” *See infra* note 243; *see also supra* note 24 (distinguishing between commercial and noncommercial uses for purposes of this analysis).

concerned.²¹⁰ They can talk about, take apart, reassemble, and discuss to death Madonna's image. As for performers, even cases that have granted relief to publicity rights holders have made it clear that a modicum of creative content could well have changed the analysis.²¹¹ Thus, Professor Coombe's portentous statement seems more than a little exaggerated. So does the assertion of a likelihood that Elvis Presley's estate could successfully challenge a documentary film about the impact of Presley on people in Tennessee.²¹²

As for statements that "[e]nabling celebrities . . . to exercise absolute rights to authorize the circulation of the celebrity image may have adverse consequences, both for the preservation of our collective cultural heritage and for our future cultural development,"²¹³ one must ask how this is likely to be true. Aside from the fact that no one advocates "absolute" rights, artists and writers—and everyone else, for that matter—can say pretty much what they want about celebrities (within the bounds of other legal constraints such as defamation law), parody them, imitate them outside the advertising (and, to some extent, the performance) context, and draw mustaches on them. It is therefore legitimate to ask how much recoding is really enjoined by the assertion of publicity rights, which apply only to commercial exploitation. To use Professor Coombe's examples, gay males' use of glamorous female movie stars' images as symbols of artifice and

210. See McCarthy, *The Human Persona*, *supra* note 26, at 140 & n.38.

211. See, e.g., *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1358-59 & n.21 (D.N.J. 1981) (applying fair use concepts to determine that a literal copy without "its own creative component" did "not have a significant value as pure entertainment"). Notably, the *Russen* court did not enjoin the show. See *id.* at 1379.

212. See Coombe, *Author/izing*, *supra* note 10, at 372. Coombe admits that she has "no idea" whether the estate sought to enjoin the film; she was concerned only with the possibility that it might do so. See *id.* at 372 n.22. In view of privacy and publicity statutes' exceptions for newsworthiness, see *supra* text accompanying note 50 and *infra* text accompanying notes 297-301, this seems very much a straw man. In fact, it recalls a criticism leveled at Madow by Goodenough, who says that there is a certain "if pigs could fly" counterfactual to Madow's critique. See Goodenough, *supra* note 6, at 717 n.28. I think Madow deserves a great deal more credit than that, but Coombe's arguments cited here have that type of character. Surely, if publicity rights could stymie a documentary film, they would be dangerous, but they cannot. Interestingly, Coombe's contentions are faithfully recited by Kwall in *Right of Publicity*, *supra* note 6, at 67-68, but they are not challenged; nor is Gordon's assertion that we must be able to "play with the symbols" that form our mental vocabulary. Kwall, *supra* note 6, at 68 n.92. The question is, what does this mean? It can mean many, many things that are not in the least constrained by the existence of publicity rights. A similar point is made by Kwall in *Fame*, *supra* note 12, at 55: "Although the rhetoric of the critics has become very fashionable of late, their arguments are predicated on little more than speculation and generalizations."

213. Coombe, *Author/izing*, *supra* note 10, at 373.

communicative devices was not, and is not, threatened by publicity rights. Nor do publicity rights threaten the identification of lesbians with James Dean or the urges of fanzine members to create *Star Trek* episodes along lines never dreamt of by the show's creators.²¹⁴

In short, Professor Coombe's practical examples do not bear out her assertions of publicity rights' destructive impact on the public's ability to manipulate celebrity images' meaning.²¹⁵ They certainly do not tell us why publicity rights need to be eliminated in order to allow for societal self-expression. If we recall the case law,²¹⁶ it is apparent that, in fact, not all uses of celebrity images are proscribed, or even hampered, by publicity rights. Rather, it is commercial uses that are impeded.

At the same time, it is clear that there is a problem when we encounter works that are at once expressive and commercial. As we have seen, and as discussed later in the First Amendment context,²¹⁷ uses may be made of celebrity images that, despite their commercial nature, purport to express social or artistic content. What then? John Wayne's family objected to a greeting card showing him wearing lipstick, and made it clear that they were reacting to a broadly conceived affront to his persona.²¹⁸ Meanwhile, the members of the public who enjoyed the lipsticked image wanted to have it available as a recoding. The question here is whose claims should predominate. Arguably, the public could have painted pictures of John Wayne, exhibited them, marked up photographs, traded and compared renditions; they could, in other words, have recoded to their hearts' content. The activity that was challenged was selling mass-produced cards with Wayne's image, not recoding at the personal or even group level.²¹⁹

214. See *id.* at 381-85. The *Star Trek* recoding, in fact, seems to have virtually nothing to do with publicity rights, if a great deal to do with trademark and copyright.

215. Madow argues that the burden is on right-of-publicity proponents to show that the right does not overly deter representational practices and that "social semiosis continues in spite of it." Madow, *supra* note 9, at 146 (citing GAINES, *supra* note 166, at 239). That burden, however, might just as reasonably be placed on those who wish to prove that the right does cut into "social semiosis." Arguments of censorship are not persuasive if they use inapposite or speculative examples, or if they ignore the fact that noncommercial means of producing "social semiosis" remain freely available. Madow's and Coombe's arguments rest on an assumption of a high risk of censorship that they have not proven exists.

216. See New York cases cited *supra* note 46.

217. See *infra* Part IV.

218. See Madow, *supra* note 9, at 144-45. This was in addition to, not instead of, the economic issue.

219. In fact, even with mass-produced cards, a persuasive argument could be made that they are parodic and entitled to a fair use privilege despite their infringement on the right of

On the other hand, it could be maintained that the very fact of the greeting cards' being mass-produced was itself a statement²²⁰ and that noncommercial, individual coding would have missed the point. In addition, of course, the revised image clearly made an expressive statement. Thus, the real question is how to resolve conflicts between the right of publicity and the right of the public to make commercial uses of celebrity images in a way that carries expressive meaning. Must such conflicts inevitably be resolved in favor of public access because any other outcome would represent unacceptable censorship? It appears that, in an oddly self-contradictory way for a theory whose hallmark should be flexibility, the postmodernist response is invariably yes. But Professor Coombe's arguments and examples do not persuade; the arguments are conclusory, the examples inapposite, and the predictions of cultural doom consequently unconvincing.²²¹

Professor Madow comes a little closer in his discussion of the entrepreneurs who market those celebrity T-shirts or greeting cards. According to Professor Madow, unauthorized commercial appropriators often add something of their own—some wittiness or creativity—to products using celebrity images.²²² Further, he asserts that members of the public need celebrity paraphernalia in order to express themselves.²²³

publicity. *See infra* Part V.B.1. This is not the same, however, as saying that they do not infringe because there is no valid claim on the plaintiff's part *ab initio*.

220. That is, it was a statement of widespread rejection of what Wayne symbolizes, or an oppositional statement that there is another great public composed of individuals who prefer him with lipstick.

221. The use of the fanzine members, for example, falls wide of the mark. *See* Coombe, *Authorizing*, *supra* note 10, at 383-86. There is an incantatory tendency to postmodernist arguments that leaves one still wondering about the activities that constitute redefinition, recoding, and reconstructing, and why and how they necessarily conflict with the right of publicity. At the other end of the spectrum, some commentators (even those who believe the right of publicity has been overextended) make it sound as though commercial objects by definition preclude a public access argument. For example, Weiler declares:

The argument that enforcing the right of publicity may conflict with artistic expression and the communication of ideas is least persuasive in cases involving merchandising uses of celebrity identity. After all, plastic pencil sharpeners, bubble gum cards, and board games are hardly vehicles through which ideas and opinions are traditionally disseminated. In terms of information or entertainment value, a Howard Hughes T-shirt and a fictionalized autobiography of Hughes are quite distinguishable.

Weiler, *supra* note 9, at 261 (footnotes omitted). The implication that the T-shirt is *ipso facto* unprotectable is unacceptably broad, and it confuses the medium in which expression occurs with the value of the expression. *See infra* Part IV.A.

222. *See* Madow, *supra* note 9, at 204-05. One could certainly make this argument with regard to the John Wayne cards. *See also* Kwall, *Right of Publicity*, *supra* note 6, at 110.

223. *See id.* at 143.

A question comes to mind here. Assuming arguendo that people do express themselves by deciding which Madonna T-shirt to buy,²²⁴ and that entrepreneurs do add creativity to the celebrity images they use on their goods, is the desirability of that creativity, and the public self-expression gained through buying and wearing those celebrity T-shirts, outcome-determinative, or is it something to be weighed against other factors? Again, one might think that there are two possible answers to that question. Professor Madow makes his claims, however, as though the fact that there might be some cultural contribution (to creativity, to public expression) in the production of celebrity products inevitably justifies such production.²²⁵

To say as much is to oversimplify, ignoring the need to weigh the possibly limited societal benefits of such production against the costs of violating an individual right; in other words, we must balance the individual claim to private property against that of society to the public domain. As Professor Wendy Gordon seems to concede in an article making the case for a vibrant public domain, the public's claim is not by definition an absolute one.²²⁶ The unquestioned right of soci-

224. *See id.*

225. Professor Madow makes this claim in the context of his analysis of unjust enrichment, emphasizing that the producers of such goods have done some "sowing" that justifies their "reaping." *See id.* at 205. As an argument against an unjust enrichment-based right of publicity, this may have some validity. But an absence of unjust enrichment is not enough to justify an infringing use if the right of publicity is predicated on grounds other than unjust enrichment.

226. *See* Gordon, *supra* note 11, at 1560-61 (maintaining that "[t]he two claims [of the laborer and the public] are in apparent stalemate"). Gordon does, however, proceed to conclude that "no natural right to property could exist where a laborer's claims would conflict with the public's claim in the common." *Id.* at 1562. To her, the relevant question is whether a private property claim can be made without a depletion of the common, which in the case of intellectual and intangible property is the public domain. *See id.* at 1562-63. According to Gordon, this reflects Locke's "proviso" that "[f]or 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." Gordon, *supra* note 11, at 1561 n.158 (quoting JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ¶ 27, at 288 (Peter Laslett ed., 2d ed. 1967) (3d ed. 1698) (second emphasis added by Gordon)). Gordon's theory of intellectual property in this article is built on a purportedly conservative reading of the proviso and an insistence that nothing be taken out of the public domain if it implies that that domain is left not "as good" as before the property was taken. Gordon concedes that applying this idea to creations *added to* the common—in essence, telling a creator that by changing the common she has made it impossible to assert private control over the aspect she has added if to do so would make later arrivals on the cultural scene worse off than they were before, *see id.* at 1574—is taking Locke a "somewhat controversial interpretive step" further, *id.* at 1570. Nevertheless, it is her claim that in cases of conflict, the proviso demands resolution in favor of the public and against a property claim. *See* Gordon, *supra* note 11, at 1600; *see also* Hughes, *supra* note 111, at 319-20 (providing a treatment of the "ideas" common that attempts to reconcile private property rights in ideas (or some ideas) with a rich common). For a critique of interpretations of Locke's proviso as a

ety to free expression and the crucial role of free speech in fostering a marketplace of ideas may be axiomatic, but this does not necessarily mean that the First Amendment must always prevail over the right of publicity.²²⁷

Jane Gaines makes a similar point to Professor Madow's, although with a very different objective. She argues that "[t]he right to speak, to manufacture in bulk, to represent in popular forms should be understood as a struggle between two rights-holding parties, each of which maintains that it has preeminent entitlement."²²⁸ So far, so good, even if manufacturing in bulk seems to stretch the basic right of self-expression somewhat. Gaines continues: "If we cast this contest only in terms of the First Amendment we make the mistake of pitting historically flimsy speech rights against the solidity of property rights."²²⁹

Gaines's characterization²³⁰ of publicity rights versus free speech is politically understandable but off the mark. The ill-favor with

"Sufficiency Limitation," see WALDRON, *supra* note 11, at 210-18.

227. See Kwall, *Right of Publicity*, *supra* note 6, at 69. In other words, absolutism is not the answer. See generally GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 1031-32 (13th ed. 1997) (surveying the debate in the 1960s Supreme Court First Amendment jurisprudence over whether the First Amendment is absolute or subject to balancing with competing interests); see also *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972) (requiring that a balance be sought between the First Amendment right of free speech and the Fifth and Fourteenth Amendments' safeguards of private property); Redish, *supra* note 187, at 624 ("[A]ny general rule of first amendment interpretation that chooses not to afford absolute protection to speech because of competing social concerns is, in reality, a form of balancing."). In fact, however, some theorists proceed as though absolutism were appropriate. For example, Gordon interprets Locke's "proviso" as saying that where conflict exists, no person can assert property claims over an element of the common because to do so would harm others, contrary to the law of nature in Locke's theory, which requires that all persons refrain from doing harm. Therefore, she says, "in cases of conflict, the public's liberty right in the common prevails." Gordon, *supra* note 11, at 1562.

228. GAINES, *supra* note 166, at 203.

229. *Id.*; see also Gordon, *supra* note 11, at 1536 ("Because copyright falls under the rubric of 'property,' courts seem willing to overlook the most basic canons of the law of free expression."); Post, *supra* note 84, at 664-65 n.94 (remarking that the Supreme Court has been hostile to restrictions on speech affecting privacy but more sympathetic to restrictions on speech affecting personality conceptualized as property). Of course, casting the issue in First Amendment terms need hardly guarantee victory to the publicity-right holder. See *infra* Part IV.A.

230. The characterization of a contest, as of a case, has a profound effect on its outcome. If a court views a case as one about property rights, it will ask whether free speech concerns are so serious as to justify an infringement; if the case is seen as a free speech problem, on the other hand, the question will be whether private property rights ought to be allowed to interfere with a public entitlement. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 79-80 (1981) (Stevens, J., concurring) (explaining that the burden of proof would differ if the case were approached as a property dispute rather than a First Amendment issue); Zimmerman, *supra* note 71, at 668-69 (suggesting that the classification of a dispute as one of free speech or property

which commercial items such as T-shirts and ashtrays are often regarded by courts and commentators²³¹ derives not from the flimsiness of the First Amendment or the solidity of property rights, but from the (possibly erroneous) conviction that such objects are purely commercial uses of identity rather than forms of self-expression. For the commentator or judge not steeped in semiotics, a T-shirt with a picture on it and nothing more may not seem to express anything.²³² True, this attitude may give insufficient credence to commercial merchandise's potential for self-expression; but Gaines's assertion that bulk-manufactured goods like T-shirts are "the cheapest to manufacture and the easiest for people's movements to use"²³³ is, without more, insufficient to demonstrate that such potential is inevitably realized. Herein lies the problem. When an entrepreneur "cheaply" uses a celebrity image on an item like a T-shirt or a mug, it might be "easily" used by "the people," but it is not always easy to see how the object qualifies as self-expression.²³⁴ If more material is added—if there is creative input, as in Madow's example—then a case may be made for expressive use. To say so, however, does not resolve the issue; it still requires analysis. Gaines is correct in stating that we need to regard the conflict as a "struggle between two rights-holding parties,"²³⁵ and we do need principles for deciding which party should prevail in a given instance of that struggle. As we have seen, one may endorse an autonomy-based, Kantian notion of a property right in objectified identity and allow that it is a right that (1) should be limited to the sphere of commercial exploitation,²³⁶ and (2) may have to

rights will likely determine its outcome).

231. See GAINES, *supra* note 166, at 201.

232. See *infra* text accompanying notes 247-51 for further discussion of this point. As the reader may infer, I do not believe that one can make categorical decisions as to this possibility in the abstract. See *infra* note 238.

233. GAINES, *supra* note 162, at 202. As noted *supra* note 219 and accompanying text, the very fact of mass-production may be part of the statement. The paradox of mass-production as a means of contesting preferred meaning, however, does not receive too much attention. If protest is mass-produced and successfully mass-marketed, it quickly becomes mainstream and is co-opted by the dominant culture. Using bulk manufacture as a weapon of contested meaning would seem to hasten whatever dialectical process is ordinarily inherent in countercultural efforts.

234. Again, this is not to say it could not occur. It is possible that a controversial person's image (e.g., Che Guevara) might make a political statement without further adornment; the same might be true of cultural statements using cultural celebrities' images. In that case, the balance will be affected in favor of the user, no matter how banal or "commercial" the medium. I am not arguing here for a prohibition of use, but a balancing of interests.

235. GAINES, *supra* note 166, at 203.

236. See *supra* note 24 and text accompanying notes 206-14.

cede to other entitlements in achieving the proper balance between individual property rights and public expression. At the same time, however, those other entitlements need to make a credible claim that they constitute expression and that, as such, they merit First Amendment protection. Moreover, even if they do so, it is not foreordained that speech claims must prevail.²³⁷ The potency of First Amendment protection will differ depending upon the type of speech at issue and other analytical factors.

IV. THE RIGHT OF PUBLICITY AND THE FIRST AMENDMENT

A. Analytical Factors

1. *Commercialism and Commercial Speech.* In this part, the Article attempts to strike an appropriate balance between the right of publicity as an autonomy-based property right and First Amendment values of freedom of expression. For our purposes, the question of precisely what constitutes “expression” is not an easy one. Does “expression” embrace images on plastic pencil sharpeners? Even if it does, is there a hierarchy of expression that assigns a lower value to such objects than to newspaper editorials on the political process? If the pencil sharpener is speech, is it speech that merits a lower level of protection as “commercial speech”?

Although the intuitive response to these questions might be to exclude commercial objects from the realm of expression,²³⁸ or—to

237. That is, speech interests may or may not present a claim as strong as the property right represented by the right of publicity. They certainly will not automatically dominate on the grounds that they represent a superior value; to the extent that the right of publicity is autonomy-based, it protects the same values of “individual self-realization,” Redish, *supra* note 187, at 593, and “autonomous self-determination,” Richards, *supra* note 187, at 62, as the First Amendment protects. Indeed, Kantian autonomy has been proposed as an interpretive principle in the First Amendment context, see Wells, *supra* note 125, at 165-70, just as it has been proposed here as the fundamental principle underlying the right of publicity. In a struggle between two manifestations of the same value, that value obviously cannot determine the outcome. See Michael Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 140 (1997) (“The abstract concept of equality cannot by itself decide between [two] competing, somewhat less abstract conceptions of equality.”). *But cf.* Felcher & Rubin, *Privacy, Publicity*, *supra* note 47, at 1588 (“[T]he First Amendment necessarily takes precedence over any competing, non-constitutional policy.”).

238. As an example, see Felcher & Rubin, *Privacy, Publicity*, *supra* note 47, at 1606, suggesting that “icon” uses of identity do not merit First Amendment protection:

Placing a picture of a person’s face on a T-shirt . . . has little informative or cultural value; the appeal of such a product depends primarily on the appeal of the person portrayed. It is this dependence on the person and the absence of socially valued

the extent they are considered speech—to ascribe a lower value to them,²³⁹ in fact it makes more sense to resist those impulses. For one thing, it is very difficult to make *a priori* categorical judgments that allow us to distinguish at the threshold between uses of identity that

purposes in First Amendment terms, rather than the commercial use per se, that renders portrayals in this area more vulnerable to liability. The unauthorized use of a person's attributes to create or sell a product, therefore, will typically lie outside the scope of First Amendment protection

This is overbroad and conclusory. A key question here is whether a work expresses “socially valued” content in First Amendment terms—which is not always self-evident. Nor is it helpful to conflate uses of identity that constitute (i.e., “create”) products with those used merely to sell them. *See infra* note 252 on the definition of commercial speech; *see also* Darren Farrington, *Should the First Amendment Protect Against Right of Publicity Infringement Actions Where the Media Is Merchandiser? Say It Ain't So, Joe*, 7 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 779, 800-01 (1997). Farrington states that an “entire item may be categorized as commercial speech,” but fails to specify that this would occur only if the item were solely an advertisement. *Id.* at 801. On commercial speech and advertising, *see* cases cited *infra* note 252. Because Farrington's statement is made in the context of a discussion of commercial objects as opposed to literary and entertainment uses of identity, it too is overbroad.

239. If the value of free speech is viewed as primarily political in its contribution to a forceful and well-informed public debate, it may lead to a relative devaluation of other forms of speech. *See Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976) (plurality) (“[I]t is manifest that society's interest in protecting this type of expression [i.e., erotic movies] is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate”); GERALD GUNTHER, *CONSTITUTIONAL LAW* 1001 (12th ed. 1991) (“[A]n emphasis on speech as an essential of representative government tends to reserve the highest protection for political speech and raises questions about the appropriateness of protecting such arguably ‘nonpolitical’ areas as literary and artistic expression and commercial speech.”); GUNTHER & SULLIVAN, *supra* note 227, at 1027 (restating Alexander Meiklejohn's argument that whereas “public” speech affecting self-government should be completely privileged, “private” speech may be entitled to less complete protection) (citing ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 99 (1948)); *id.* at 1159 (noting Justice Stevens's plurality opinion in *Young*, quoted *supra*); *see also* *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (stating that “this Court has ‘long recognized that not all speech is of equal First Amendment importance.’” (citation omitted)); William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 *CAL. L. REV.* 107, 141 & n.57 (1982) (suggesting that the Supreme Court has developed a “rank-ordering of speech” ranging from the most protected “political” to the less protected “aesthetic” and “commercial” to the least-protected “obscene” and “criminal”). *But see* Kwall, *Right of Publicity*, *supra* note 6, at 67 n.88 (citing Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 *SUP. CT. REV.* 245, 257, for the proposition that art may be political and thus precisely the type of speech the First Amendment is designed to protect); *supra* note 46 (citing cases protecting entertainment products such as books under the First Amendment).

Despite statements as to hierarchical values in comments, and the occasional identification in some decisions of certain types of expression as being more or less lowly, however, it seems more prudent to avoid pronouncements that certain forms of speech, with the possible exception of commercial speech, are necessarily of a lower value. Because the focus here is on commercial uses of identity, this Article does not consider other forms of speech deemed to merit less (or no) First Amendment protection, such as obscenity, *see Miller v. California*, 413 U.S. 15 (1973), or speech inciting violence, *see Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

are purely “commercial” and those that rise to the level of expression, particularly if we give some credit to the postmodernist view of bulk-manufactured goods as forms of political or cultural speech.²⁴⁰ As we have seen,²⁴¹ and as others point out,²⁴² in a relentlessly commercial society such as our own, “commercial” and “noncommercial” are supremely inexact terms. Advertisements have creative elements; books are sold in supermarkets.²⁴³ The Second Circuit put it well in the trademark case *Rogers v. Grimaldi*,²⁴⁴ holding that even works of art cannot be categorically immunized by the First Amendment from government (in that case, trademark) regulation: “Movies, plays, books, and songs are all indisputably works of artistic expression and deserve protection. Nonetheless, they are also sold in the commercial marketplace like other more utilitarian products, making the danger of consumer deception a legitimate concern that warrants some government regulation.”²⁴⁵ The Second Circuit therefore took issue with

240. See *supra* text accompanying notes 228-33.

241. See *supra* note 46 (discussing the purposes of trade).

242. See Goodenough, *supra* note 6, at 720 (expressing the need to qualify and explain the term “commercial”); *id.* at 766 (suggesting that the law often distorts a term’s common meaning); Kwall, *Right of Publicity*, *supra* note 6, at 56-57 (criticizing Felcher and Rubin’s informational, entertainment, and commercial scheme insofar as it fails to recognize that many works will straddle them, and attempts to assign liability based on characterization rather than balancing of relevant harms). In fact, Felcher and Rubin acknowledge that their three purposes “will often tend to merge,” forming “a continuum, rather than . . . discrete and mutually exclusive elements.” Felcher & Rubin, *Privacy, Publicity*, *supra* note 47, at 1597.

243. Here, of course, it is worth noting that an effort to predefine “art” or “artistic” uses would be equally futile. See Adler, *supra* note 200, at 1548-49 (“[A] great deal of contemporary political art challenges its own categorization as ‘art.’”); *id.* at 1507 n.28 (“Ultimately, . . . the word ‘art’ defies definition because ‘art’ may be that which contests the meaning of ‘art.’”).

244. 875 F.2d 994 (2d Cir. 1989). The case involved actress Ginger Rogers’s objection to the title *Ginger and Fred* as the title of a movie about two fictional cabaret performers who in their youth imitated Ginger Rogers and Fred Astaire and became known in Italy as “Ginger and Fred.” The Second Circuit held that although the movie’s title was susceptible to trademark law regulation, the Lanham Act should be applied to “artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.” *Id.* at 999. The court therefore dismissed plaintiff’s claims on summary judgment. See *id.* at 1001-02. The court disposed of the right of publicity claim on the grounds that the use of Rogers’s name in the title should be permitted unless it was wholly unrelated to the movie or merely a disguised commercial advertisement, neither of which was the case. See *id.* at 1004-05.

245. *Id.* at 997 (citation omitted). Again, this is not to classify commercial items as commercial speech, see *infra* text accompanying notes 255-57; it is, rather, to point out that many expressive works have a commercial aspect. This is simply the converse of statements cited *supra* note 46, to the effect that books, etc., may be commercial goods but still expressive works. Acknowledging the hybrid nature of many products avoids the analytical pitfall of focusing on medium. See Kwall, *Right of Publicity*, *supra* note 6, at 89-90; *id.* at 95 (stating that a medium-based analysis “would lead to the incongruous result of approving the drawing of a ballplayer in a book about baseball, but prohibiting the use of that same drawing in a calendar” (citing

the district court's finding that federal trademark law was per se inapplicable to the title of a film if the title fell "within the realm of artistic expression."²⁴⁶ That same resistance to categorically based immunities should prevail within the right of publicity arena.

Unfortunately, however, efforts are often made to characterize the use of identity, with unhelpful results such as suggestions that if a work "serves an informative or cultural function, it will be immune from liability," whereas if it "merely exploits the individual portrayed, immunity will not be granted."²⁴⁷ Even some of the more refined "spectrum" approaches to types of use are unworkable if the focus shifts from the descriptive to the normative. For example, one proposal would establish five types of use of celebrity image: informational, creative, advertising, icon, and performance²⁴⁸—a useful set of descriptive categories. It would be highly misleading, however, to use them as a basis for hierarchical use categories or to suggest that they represent a descending order of First Amendment protection;²⁴⁹ conceivably, a commercial, iconic use might qualify for protection where an informational use would not.²⁵⁰

Pirone v. Macmillan Inc., 894 F.2d 579, 584-85 (2d Cir. 1989)); see also *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 969 (10th Cir. 1996) ("MLBPA contends that Cardtoons' speech receives less protection because it fails to use a traditional medium of expression. The protections afforded by the First Amendment, however, have never been limited to newspapers and books."). Commentators do persist in differentiating by medium, however. See, e.g., Weiler, *supra* note 9, at 261. For a judicial decision that does so, see *Hicks v. Casablanca Records*, 464 F. Supp. 426, 430 (S.D.N.Y. 1978) ("[M]ore so than posters, bubble gum cards, or some other such 'merchandise', books and movies are vehicles through which ideas and opinions are disseminated and, as such, have enjoyed certain constitutional protections, not generally accorded 'merchandise.'").

246. *Rogers v. Grimaldi*, 695 F. Supp. 112, 120 (S.D.N.Y. 1988).

247. *Felcher & Rubin, Privacy, Publicity, supra* note 47, at 1596. As mentioned *supra* note 242, Felcher and Rubin agree that it is almost impossible to isolate these qualities; in reality, it is a matter of degrees, not hard and fast categories.

248. See Goodenough, *supra* note 6, at 719-20. This is a helpful refinement of Kwall's categories (informational, entertainment, and commercial use, see Kwall, *Right of Publicity, supra* note 6, at 88), as icon and advertising uses are both commercial, but quite distinct. In fact, of course, both can be "creative," depending on one's point of view. See, e.g., Coyne, *supra* note 48, at 797 (identifying four types of use, namely advertising, icon, appropriation of style, and appropriation of performance); Spahn, *supra* note 95, at 1014-19 (proposing the same four types of use). Still, Kwall herself agrees that it is exceedingly difficult to predefine primarily commercial use. See Kwall, *Right of Publicity, supra* note 6, at 107.

249. It might also simply be wrong if there is insufficient doctrinal support in the decisions for establishing such a hierarchy. It is for this reason that I have eschewed any effort at such gradation and limited my analysis to speech being either commercial or not commercial in the sense of advertising or not advertising.

250. Recall that *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1972), a "performance" publicity rights case, initially involved an allegedly informational use, and that a

It therefore seems untenable to establish categories of commercial versus expressive uses or to assert that commercial objects by definition cannot constitute expression. Although First Amendment jurisprudence is replete with references to the necessity of ensuring the flow of information to the public in order to enable citizens to make intelligent, informed choices in the political²⁵¹ and economic²⁵² marketplaces, and although it is not immediately apparent how celebrity merchandise contributes to this picture,²⁵³ one could—and I

highly creative iconic use, such as the parodic baseball cards in *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996), discussed *infra* Part IV.B, has been held to be fully protected. The difficulties described here constitute a powerful argument against “definitional” balancing, or First Amendment balancing based on categorizations. For example, films are clearly “media” uses. But what about the situation where a film is really a vehicle for related merchandising? As Dreyfuss relates, there are movies “created principally for their merchandising tie-ins.” Dreyfuss, *supra* note 17, at 146. *The Lion King* generated an estimated \$1.5 billion in retail sales of licensed products. See *Disney: Still King of the Hill, but Maintaining Market Share, Shelf Space Is Getting Tougher*, LICENSING LETTER, Sept. 1, 1997, available in 1997 WL 9041386. Attempts to predefine categories of use become so convoluted as to sacrifice the clarity that is the greatest benefit of a definitional approach. See, e.g., PINCKAERS, *supra* note 12, at 340-49 (illustrating the complexity of determining whether various products and services fall into particular media, nonmedia, or hybrid categories).

251. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), Chief Justice Rehnquist wrote:

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. '[T]he freedom to speak one's mind is not only an aspect of individual liberty . . . but also is essential to the common quest for truth and the vitality of society as a whole.'

Id. at 50-51 (quoting *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485, 503-04 (1984)).

252. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (“[T]he free flow of commercial information is indispensable.”); see also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (discussing the development of the law’s protection of commercial speech). The provision of accurate information is the primary value of commercial speech or advertising.

253. Indeed, in *Comedy III Productions, Inc. v. Saderup*, 80 Cal. Rptr. 2d 464 (Ct. App. 1998), *review granted*, 973 P.2d 512 (Cal. 1999), the court rejected that possibility. The court distinguished T-shirts with the likeness of the Three Stooges from T-shirts that have been found to constitute protectible expression on the grounds that the latter carried some form of “message.” In contrast, the T-shirts at issue in *Saderup* were held to be non-informational commercial materials. See *id.* at 468-69. Moreover, the court held that the likenesses on the T-shirts did not qualify as “art” either, citing the defendants’ “multiple reproductions.” *Id.* at 470-71. (This is reminiscent of the distinction between single or limited works and mass-produced ones discussed *supra* note 24.) Similarly, Kwall states that while “the protection of commercial speech is warranted to foster accurate product and price data, these objectives are not served by allowing unauthorized uses of an individual’s persona in a primarily commercial context.” Kwall, *Right of Publicity*, *supra* note 6, at 68 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 561-62 (1980)). This implies that such speech is or should be unprotected, or protected less strongly than non-misleading advertising. See *id.* (Compare this view to Haas’s analysis, discussed *infra* note 256, which suggests that such commercial speech might actually receive more protection, not less.) Kwall’s conclusion is not supported by the Supreme Court’s distinction between commercial speech and other forms of expression, which places

do—argue that in case of doubt, it is preferable to err on the side of expression, extending First Amendment protection to objects that make “iconic” use of celebrity identities, whether Professor Madow’s Madonna T-shirts, Jane Gaines’s bulk-manufactured items, Elvis mugs, or other *bricolage*.²⁵⁴

The question remains, however, whether that protection ought to be full-fledged or somehow limited. In particular, should commercial objects be relegated to the inferior status of “commercial speech”? As a term of art in First Amendment parlance, commercial speech refers to advertising that “does ‘no more than propose a commercial transaction.’”²⁵⁵ While this is also not as simple as it sounds,²⁵⁶ it does at least provide a relatively clear distinction between

advertising at a lower level but does not speak to allegedly “commercial” uses that are non-advertising in nature. Indeed, if anything, the Court has indicated otherwise in its statements concerning mixed aesthetic/commercial items: “Speech . . . is protected even though it is carried in a form that is ‘sold’ for profit.” *Virginia State Bd. of Pharmacy*, 425 U.S. at 761 (citing cases relating to books and motion pictures); *accord* *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (“That the Times was paid for publishing the advertisement is as immaterial . . . as is the fact that newspapers and books are sold.”). On this basis, there is little support for deciding that commercial products that arguably assert some expressive value are to receive *less*, rather than more, protection than commercial speech. For further discussion of this point, see *infra* note 256.

254. The Tenth Circuit adopted this approach in *Cardtoons*. See *infra* Part IV.B.

255. *Virginia State Bd. of Pharmacy*, 425 U.S. at 771-72 n.24 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)). Broader definitions of commercial speech, such as “expression related . . . to the economic interests of the speaker,” *Central Hudson*, 447 U.S. at 561, have been sharply criticized. See *id.* at 579-80 (Stevens, J., concurring). But see *44 Liquormart*, 517 U.S. at 501 (plurality opinion of Stevens, Ginsburg, and Kennedy, JJ.) (stating that not all commercial speech is the same, and that not all commercial-speech regulations are subject to similar constitutional review). Commercial speech was for some time not protected at all; following the ruling in *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942), it was viewed as falling outside the ambit of the First Amendment. *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975), restored that protection, albeit at a lower level. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-65 (1983) (acknowledging “that the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression”). For the *Central Hudson* test of permissible regulation of commercial speech, see *infra* note 306.

256. See, e.g., *Bolger*, 463 U.S. 60, in which commercial advertising of prophylactics was accompanied by informational pamphlets on sexuality and venereal disease. The Court acknowledged that “[t]he mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech.” *Id.* at 66 (citations omitted). However, the fact that the pamphlets were advertisements, referred to products, and were economically motivated did cumulatively support their classification as commercial speech. See *id.* at 67. Although the pamphlets discussed important public issues, the Court reiterated that the linkage of product advertising to public debate is insufficient to entitle the advertising to full First Amendment protection. See *id.* at 67-68. But see *44 Liquormart*, 517 U.S. at 522-23 (Thomas, J., concurring) (questioning the distinction between commercial and

uses of identity that are integral to goods and uses that sell goods. Thus, for our purposes, commercial speech should be considered as synonymous with advertising, rather than as extending to the sphere of commercial objects themselves. If a persona is used in an advertisement, that use will generally be evaluated in a commercial speech context;²⁵⁷ if, on the other hand, our concern is with expressive works or commercial objects (whether films or T-shirts) that do not constitute advertisements, we may assume that they are entitled to full First Amendment protection.

Again, however, this does not mean that such protection is absolute. As Professor Gunther points out, even those jurists who have adopted a rather “absolutist” approach to the First Amendment²⁵⁸ have, in the final analysis, agreed that balancing of competing interests is necessary.²⁵⁹ The question, then, is not whether to balance free-speech values against others, but how to do so.

other speech on historical and logical grounds and asserting that “commercial” speech should be fully protected).

Professor Haas presents a very interesting and thoughtful discussion of the commercial-speech doctrine and its applicability to “name and likeness” claims. He distinguishes between uses of name or likeness in an informational (versus rhetorical) sense, and explains that while the government interest in the former is fairly obvious (ensuring that consumers receive accurate information), the status of rhetorical uses is less clear. On the one hand, since such uses do not contribute to the provision of information, they might not benefit from the protection afforded commercial speech. On the other hand, the rhetorical use could be viewed as pure speech, because it is not integral to the proposition of a commercial transaction—in which case it would receive *more*, i.e., full, First Amendment protection. See Haas, *supra* note 5, at 550-51. This discussion illustrates the difficulty of characterizing even a single advertisement as solely “commercial speech” in the narrow sense, and perhaps explains one of the causes of the doctrine’s murkiness. It also supports a broad extension of First Amendment protection to non-informational uses of persona, as suggested *supra* note 238 and text accompanying notes 239-54.

257. I say “generally” because in certain cases, it is clearly possible that creative or parodic content might outweigh the commercial aspects of the speech and entitle the speech to greater protection. See *supra* note 256 on *Bolger* and Professor Haas.

258. For example, Justice Black, whose dissent in *Konigsberg v. State Bar*, 366 U.S. 36 (1961), is presented by Gunther and Sullivan as representative of this position. See GUNTHER & SULLIVAN, *supra* note 227, at 1031. For another example, see the concurrence by Justices Black and Douglas in *Time, Inc. v. Hill*, 385 U.S. 374 (1967):

[I]t would be difficult, if not impossible, . . . to sustain a judgment against *Time* in this case without using the recently popularized weighing and balancing formula. . . . First Amendment freedoms could not possibly live with the adoption of that Constitution-ignoring-and-destroying technique, when there are, as here, palpable penalties imposed on speech or press specifically because of the views that are spoken or printed. . . . The “weighing” doctrine plainly encourages and actually invites judges to choose for themselves between conflicting values, even where, as in the First Amendment, the Founders made a choice of values, one of which is a free press.

Id. at 399 (Black, J., concurring) (citations omitted).

259. See GUNTHER & SULLIVAN, *supra* note 227, at 1032 (“Justice Black . . . did not sup-

2. *Alternative Avenues of Expression.* Another consideration, and one perhaps given inadequate attention in the postmodernist analysis of publicity rights versus free speech, is the availability of viable alternative means of expression. In First Amendment jurisprudence, the question of alternative avenues arises where speech clashes directly with private property rights, such as in the “shopping center” cases involving speech on the premises of privately owned facilities. In *Lloyd Corp. v. Tanner*,²⁶⁰ for example, the Supreme Court explicitly justified the property owner’s right to exclude others by reference to the existence of “alternative avenues of communication” available to the speaker.²⁶¹ Similarly, in *Hudgens v. NLRB*,²⁶² the Court held that labor picketers did not have a First Amendment right to picket within a private shopping center.²⁶³ By implication, where other reasonable avenues of communication exist, speech is less threatened by restrictions relating to particular venues.

These cases can be profitably applied to the analysis at hand. Granted, there are conceptual distinctions between loci of communications, as in the shopping center cases, and avenues of communication in the sense of different media, types of use, or means of delivering messages (e.g., articles and speeches as opposed to mugs and T-shirts; authorized versus unauthorized uses).²⁶⁴ Still, the availability of multiple modes of expression is relevant. As noted earlier, the right of publicity does not threaten expression as a general matter; only commercially exploitative uses of identity are prohibited, and claims to protection within the framework of those uses can be carefully limited.²⁶⁵ It is true that courts have occasionally referred to the “alternative avenue” standard with disapproval in the intellectual property arena,²⁶⁶ but this tends to occur when the standard is likely to

port every freedom of expression claim.”); see also *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567-70 (1972) (seeking a balance between the First Amendment right of free speech and Fifth and Fourteenth Amendments’ safeguards of private property).

260. 407 U.S. 551 (1972).

261. *Id.* at 566-67. Even the dissent in *Lloyd* emphasized the absence of other means of communication as a key decisional factor. See *id.* at 581 (Marshall, J., dissenting).

262. 424 U.S. 507 (1976).

263. See *id.* at 520-21. Again, the dissenting Justices (Marshall and Brennan) stated that for certain speakers, a retail store may be “the only reasonable avenue for effective communication with the public.” *Id.* at 543 (Marshall, J., dissenting).

264. See *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989) (noting that “a restriction on the location of a speech is different from a restriction on the words the speaker may use”).

265. See *infra* Part V on a threshold identity appropriation test, fair use and first sale doctrine, and First Amendment standards to be applied to right of publicity claims.

266. See *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 971 (10th

suppress ideas in the process of forbidding a specific form of expression,²⁶⁷ or when a court is intent on asserting that the First Amendment remains relevant even where other avenues of expression are available.²⁶⁸

In fact, as the Second Circuit has noted, the First Amendment “alternative avenues” factor has been explicitly applied by several courts in intellectual property cases.²⁶⁹ It also bears noting at this point that the concept underlying the “alternative avenues” test is well established in other forms in intellectual property law. For example, an aversion to monopoly ownership of terms necessary to expression underlies the doctrine of genericness in trademark law. A mark that is generic—for example, “Shredded Wheat” to describe a shredded wheat cereal—cannot be protected.²⁷⁰ If a mark is not generic, however—that is, if it does not prevent others from describing

Cir. 1996) (citing *Rogers* and strongly rejecting the “alternative avenue” reasoning in the context of intellectual property); *Rogers*, 875 F.2d at 999 (asserting that, “[i]n the context of titles, this ‘no alternative’ standard provides insufficient leeway for literary expression”). It is worth noting at this point that the mere possibility of suppressing content through the prohibition of expression is not fatal; copyright laws also proscribe content in forbidding the use of protected expression. Moreover, as the Supreme Court has pointed out, content does on occasion trigger governmental regulation or classification for regulatory purposes. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 68-70 (1976) (plurality). The point here is that criteria such as “alternative avenue” are not to be applied in a vacuum, nor are they dispositive. They are simply factors that ought to receive some attention in a balancing analysis. Obviously, the nature of the works or products in question will influence the “alternative avenue” analysis. For negative commentary on alternative avenue reasoning, see PINCKAERS, *supra* note 12, at 311-15. For a more favorable view, see Sargent, *supra* note 58, at 240-45.

267. See *Rogers*, 875 F.2d at 999-1000.

268. See *id.* at 998-99.

269. See *id.* at 998 (citing trademark cases including *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 402 (8th Cir. 1987), *cert. denied*, 488 U.S. 933 (1988); *Reddy Communications, Inc. v. Environmental Action Found.*, 199 U.S.P.Q. (BNA) 630, 634 (D.D.C. 1977)); see also *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir. 1979) (ruling that the film *Debbie Does Dallas* could comment on “sexuality in athletics” without utilizing the plaintiff’s trademarked cheerleading uniform); *American Dairy Queen Corp. v. New Line Prods., Inc.*, 35 F. Supp. 2d 727, 734-35 (D. Minn. 1998) (enjoining the use of the film title *Dairy Queens* because the movie producer had adequate alternative avenues to convey the idea behind the film, and unlike the situation in *Rogers*, the title in this case was not intended to evoke the artistic concept behind the name). Samuelson describes *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1171 (9th Cir. 1977), as basing its decision against McDonald’s on the fact that McDonald’s “could have chosen any number of other ways to express its idea . . . [and, therefore,] its right to free expression was not infringed.” Samuelson, *supra* note 50, at 882.

270. See *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 116 (1938); see also *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976) (noting that “no matter how much money and effort the user of a generic term has poured into promoting the sale of its merchandise and what success it has achieved in securing public identification, it cannot deprive competing manufacturers . . . of the right to call an article by its name”).

their goods by employing alternative terms—it may be protectable. Similarly, in copyright law, the idea/expression merger doctrine holds that copyright protection is unavailable to expression when that expression represents the only way to communicate an idea.²⁷¹ Where the idea can be expressed in other ways, however, then copyright protection is potentially available. It therefore appears defensible to apply the “alternative avenue” standard to the right of publicity.

At this juncture, it is necessary to respond to the dissent’s arguments in the “Gay Olympics” case,²⁷² in which the Supreme Court decided that the petitioner, San Francisco Arts & Athletics (“SFAA”), could not use the term “Olympic” in conjunction with its planned gay athletic competition because such use contravened section 110 of the Amateur Sports Act of 1978.²⁷³ SFAA claimed that section 110 extended beyond commercial speech and suppressed political speech,²⁷⁴ and the dissent argued, *inter alia*, that section 110’s proscription of use of the term “Olympic” was tantamount to suppression of SFAA’s message because no adequate substitute for “Olympic” existed.²⁷⁵ The majority countered with reasoning designed to show that section 110 acted only as a restriction of the “manner in which the SFAA [could] convey its message” rather than a restriction of the message itself.²⁷⁶ The majority’s arguments in support of this contention were not very

271. See *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir. 1971) (holding that a naturalistic jeweled “bee pin” was not protectable because the artistic expression merged with the idea).

272. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987).

273. See *id.* at 526. The Amateur Sports Act, 36 U.S.C. § 380 (1994), grants the United States Olympic Committee (“USOC”) the right to prohibit certain commercial and promotional uses of the word “Olympic” and various Olympic symbols, specifically uses for “the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition” *San Francisco Arts & Athletics*, 483 U.S. at 526 n.4 (quoting 36 U.S.C. § 380).

274. See *San Francisco Arts & Athletics*, 483 U.S. at 535.

275. See *id.* at 569-70 (Brennan, J., dissenting). Professor Madow uses the Gay Olympics case as an example of how the law has “moved more and more of our culture’s basic semiotic and symbolic resources out of the public domain and into private hands.” Madow, *supra* note 9, at 142. Again, I believe this is overstated. The statute in question pertains only to certain *commercial* uses of the term “Olympic.”

276. *San Francisco Arts & Athletics*, 483 U.S. at 536. Note that this statement is made without reference to whether the speech in question was commercial speech. At this point, the majority had already acknowledged that § 110 concededly applied to more than commercial speech because some promotional uses might “go beyond the ‘strictly business’ context.” *Id.* at 535. It is therefore inaccurate to assert, as does PINCKAERS, *supra* note 12, at 327, that the Court applied the “alternative avenue” argument solely to commercial speech in this case.

strong. The Court offered various rationales for protecting USOC's interests (incentive, dilution, anti-free riding),²⁷⁷ but it failed to address directly the "no alternative avenue" point. Except for a footnote mentioning a case holding that use of Olympic symbols for a noncommercial political protest did not violate section 110,²⁷⁸ the majority's discussion did not explain why section 110 allowed SFAA to deliver its message unimpeded. It is important to probe this point, however, because it relates to how a right of publicity claim can be honored without necessarily suppressing the public's ability to express itself.

Even without a majority explanation of why the dissent's contention was unconvincing, it is readily apparent that the dissent was relying on an argument similar to that which underlies copyright's idea/expression doctrine, or trademark genericness: when the only way to express an idea requires a particular form of expression or a given term, it must remain available.²⁷⁹ In the case at bar, however, the SFAA could communicate the idea of "Gay Games" without using "Olympic" (and in fact, had successfully done so in the past).²⁸⁰ SFAA failed to prove that its buttons and bumper stickers had to say "Olympic" in order to express its message; it appeared that SFAA wanted to use the term "Olympic," as the majority said, in order to capitalize on that term's commercial allure, rather than because it provided the sole means of communicating the plaintiff's ideas.²⁸¹

277. See *San Francisco Arts & Athletics*, 483 U.S. at 537-41.

278. See *id.* at 536 n.14 (citing *Stop the Olympic Prison v. United States Olympic Comm.*, 489 F. Supp. 1112, 1118-21 (S.D.N.Y. 1980) (holding that the use of the Olympic logo and torch on a poster protesting the conversion of an Olympic Village into a prison is not prohibited)). The Court did point out, however, that "purely expressive" uses of the term "Olympic" may be permissible under § 110. *Id.* at 536.

279. See, e.g., 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12:2, at 12-5 to 12-6 (4th ed. 1996) [hereinafter MCCARTHY, TRADEMARKS]:

Generic names are regarded by the law as free for all to use. They are in the public domain. . . . To grant an exclusive right to one firm of use of the generic name of a product would be equivalent to creating a monopoly in that particular product, something that the trademark laws were never intended to accomplish.

See also 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[B][3], at 13-67 (1999) ("In some circumstances, . . . there is a 'merger' of idea and expression, such that a given idea is inseparably tied to a particular expression. In such instances, rigorously protecting the expression would confer a monopoly over the idea itself, in contravention of the statutory command.").

280. See *San Francisco Arts & Athletics*, 483 U.S. at 536.

281. See *id.* at 539. For a contrary reading of this case, see Gordon, *supra* note 11, at 1587-1591 (concluding that the proprietization of the term "Olympic" depleted the common). Gordon argues that, under a Lockean analysis, if the use did not harm the USOC, then the lib-

Thus, although the majority failed to provide a fully articulated response to the dissent's "no alternative avenue" point, one can infer from *San Francisco Arts* that "alternative avenue of expression" remains a viable concept in the intellectual property field, and one that can be adapted to the publicity rights context as well. If there is no way to express a message aside from the allegedly infringing expression, that use should be excused. To assert that there are "no alternative avenues," however, requires that there in fact be no plausible alternative means—not just less-attractive or commercially powerful ones.²⁸² This is not to say that the presence of alternative avenues inevitably means that a particular use will be condemned, but only that the availability of alternative, non-infringing means of expressing a message should be taken into account.

3. *Status of Plaintiff.* Finally,²⁸³ the question arises whether the plaintiff's status should be a criterion in the First Amendment

erty interest of SFAA should have prevailed; and if the use did harm the USOC, then a conflict existed which had to be resolved in favor of the public, denying propretization of the term. *See id.* The dissent also complained that the USOC's broad property rights in the term "Olympic" (which did not require a likelihood of confusion before being triggered) should at least have been limited by doctrines such as fair use or permissive descriptive use. *See San Francisco Arts & Athletics*, 483 U.S. at 565-66 (Brennan, J., dissenting). Trademark law allows for the use by other parties of a mark if such use is nominative or descriptive, rather than a use that indicates source or quality (i.e., performs a trademark function). *See* 15 U.S.C. § 1115(b)(4) (1994). As discussed later, it is indeed essential to curtail possible excesses in favor of intellectual property owners by providing for fair use exceptions to infringement liability. *See infra* Part V.B. Because SFAA's use was arguably essentially commercial, drawing on the selling power of the "Olympic" term to market its goods and promote its services, it is quite likely that it would not have qualified as fair use.

282. As the Ninth Circuit said in *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979), a parodist is not necessarily entitled to borrow what is needed for the "best" parody, but only for an effective one. *See id.* at 758. The extensive body of precedent in parody cases (involving both copyright and trademark rights) suggests that courts are familiar, and comfortable, with having to render judgment as to whether a purported artist or producer needs less than he has taken in creating a new work. The same type of analysis is applicable here. *See infra* Part V.B.

283. Although not a factor of analysis, an additional consideration is the magnitude of the burden that will be imposed on speech, and on other speakers, if relief is granted to a plaintiff. *See Kwall, Right of Publicity, supra* note 6, at 49-50. It is certainly necessary to keep in mind the relative impact on speech both of a liability-oriented balancing of interests and a remedially oriented approach, although it hardly simplifies matters to do so. Indeed, it may in its complexity (as in Kwall's perceptive but numerous permutations of harms, types of use, and rules providing injunctive relief, damages, or no protection) create the same unease as that expressed by Gunther with regard to First Amendment balancing: "Does the [post-*New York Times*] attempt to evolve standards through multiple variables, from standards of liability to scope of relief, risk developing into such fine-tuned balancing that the rules become ultimately unmanageable by judges and juries?" GUNTHER, *supra* note 239, at 1084.

analysis. Although *Zacchini* made it unambiguously clear that privacy/First Amendment analysis was inappropriate in the right of publicity setting,²⁸⁴ the plaintiff's claim in that case was characterized as an economic one. This Article's argument for an expansive right of publicity comprising an individual's moral as well as economic objections to a commercial exploitation of identity may well appear to reopen the question of whether privacy/First Amendment criteria should remain out of bounds, or whether the "public figure" status of celebrities ought to count in the equation, as it does in other emotional injury cases.

a. Public figures, truth, and actual malice. Public figures outraged by a purported misrepresentation in the media may bring, and have brought, claims on several grounds.²⁸⁵ Among these are defamation, false-light privacy, and intentional infliction of emotional distress. In at least the first two types of claim, truth is an absolute defense.²⁸⁶ But when a newsworthy person or event is involved, false or misleading information may also be protected, as long as it has not been published with knowledge or reckless disregard of its falsity.²⁸⁷

A review of such cases, whether *Hustler Magazine, Inc. v. Falwell*,²⁸⁸ in which the Supreme Court applied a defamation-style actual malice standard to an intentional infliction of emotional distress claim,²⁸⁹ or other non-defamation claims in which an actual malice standard has been applied (most conspicuously, *Time Inc. v. Hill*,²⁹⁰ a

284. See *supra* text accompanying notes 65-67.

285. For example, Clint Eastwood twice brought suit against the *National Enquirer* for false-light privacy invasion, complaining that stories published about him were untrue. See *infra* note 292. Jerry Falwell alleged intentional infliction of emotional distress in connection with parodic Campari advertisements published by *Hustler*. See *infra* note 291.

286. With regard to defamation, see *New York Times Co. v. Sullivan*, 376 U.S. 254, 267, 272 (1964) (holding that under the state libel law at issue, truth is a defense, but false and erroneous statements also need protection). With respect to false light privacy, see *Time, Inc. v. Hill*, 385 U.S. 374, 383 (1967) ("[T]ruth is a complete defense in actions under the statute based upon reports of newsworthy people or events.").

287. This is the "actual malice" standard developed in *Sullivan*, which is aimed at providing First Amendment protection against defamation claims not only for truthful statements, but for false and erroneous ideas as well, provided that they are not made with knowledge that they are false or with reckless disregard of whether they are false. See *Sullivan*, 376 U.S. at 280. In *Sullivan*, the plaintiff was a public official who brought a libel claim against the *New York Times* for an advertisement that allegedly attributed misconduct to him in his public capacity. See *id.* at 256-57.

288. 485 U.S. 46 (1988).

289. See *id.* at 52, 56.

290. 385 U.S. 374 (1967); see also *id.* at 387-88 (finding that where press reports of a news-

privacy case), shows that they involved an issue of falsity.²⁹¹ In contrast, the actual malice standard is a non sequitur in the publicity rights context, which is generally not concerned with falsehood.²⁹²

worthy family that had been held hostage presented the plaintiffs in a false—even if not unflattering—light, liability could be imposed for the fictionalized account if the publication was made “with knowledge of its falsity or in reckless disregard of the truth”). The Court held that the New York privacy statute could not be applied otherwise in the case of false statements relating to matters of public interest. *See id.*

291. *Hill* is described *supra* notes 286 and 290. In *Hustler*, Jerry Falwell objected to a parody spoofing a Campari Liqueur advertising campaign in which celebrities discussed their “first times.” *See Hustler*, 485 U.S. at 48. The parody depicted Falwell recounting a “first time” during a drunken incestuous encounter with his mother in an outhouse. *See id.* Falwell objected that the spoof was so outrageous as to cause emotional distress, clearly implying that he objected to it as a falsehood (i.e., he was concerned with what he perceived as the misleading nature of the parody and its impact on his reputation—the same interest involved in defamation cases—rather than with a use of his name or likeness for commercial purposes). *See id.* at 48-49. The jury in the trial found against Falwell on his libel claim because the advertisement parody could not “reasonably be understood as describing actual facts about [him].” *Id.* at 49. The Supreme Court subsequently held for *Hustler* magazine, on the grounds that for a public figure to recover for intentional infliction of emotional distress by reason of a publication such as the one in this case, he must show that the publication contains a false statement of fact made with actual malice. *See id.* at 56.

292. Two right of publicity cases involving the actor Clint Eastwood have involved falsehood and have therefore considered his public figure/public interest status, but in both cases, the falsehood claim was an additional element to the publicity claim. *See Eastwood v. National Enquirer*, 123 F.3d 1249 (9th Cir. 1997) [hereinafter *Eastwood II*]; *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983) [hereinafter *Eastwood I*]. In his first suit against the *National Enquirer*, tried in California state court, Eastwood asserted two causes of action: one for false light privacy invasion and the other for commercial appropriation/invasion of privacy and right of publicity under common law and section 3344 of the Civil Code. *See Eastwood I*, 198 Cal. Rptr. at 344. Although he alleged actual malice with regard to the first, he did not do so with regard to the second. *See id.* at 352. The court of appeal issued a mandamus to permit Eastwood to amend the second claim to allege actual malice. *See id.* The court held that because the defendant claimed First Amendment privilege as a defense to the publicity rights claim, and because the story was false, the court had to determine whether the First Amendment privilege should prevail; as Eastwood was a public figure and the matter one of public interest, the actual malice standard had to be employed. *See id.* Fourteen years later, Eastwood again sued the *Enquirer*, this time in federal court, again including a common law and section 3344 right of publicity claim and again alleging that the publication was false. *See Eastwood II*, 123 F.3d at 1250. The Ninth Circuit affirmed the jury verdict below, finding that Eastwood had shown falsehood and actual malice. *See id.* at 1256-57. In both cases, it is apparent that what impelled the consideration of the plaintiff's status was not the mere fact of a publicity rights claim, but the allegation of falsity, calling into question the defendant's invocation of the First Amendment privilege or the exemption for news reporting included in section 3344. There was no organic relationship between the right of publicity claim and the consideration of Eastwood's status; that factor was part of the analysis only because of the element of falsity.

Similarly, in New York, in *Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840 (N.Y. 1967), the Court of Appeals held, in light of *Time, Inc. v. Hill*, that a public figure could obtain recovery under civil rights law §§ 50 and 51 for an unauthorized biography only if, in addition to other statutory requirements, he could prove that the biography was false and that it was published with knowledge of the falsification or with reckless disregard for the truth. Again, however, the

Even in a situation where a moral objection is raised to a use of identity, such as the greeting cards depicting John Wayne with lipstick, the issue is not whether the implication of the image is true or false, but whether the cards constitute an unauthorized and infringing commercial use of identity.²⁹³ Thus, in contrast to defamation and false-light privacy, a right of publicity case does not at the outset tend to involve questions of truth or falsity. There are situations, however, where truthfulness is relevant. In the case of an advertisement featuring a photograph of a movie star behind the wheel of the car he has actually bought, truth is a powerful defense, because the use of the likeness may be characterized as factual reporting that provides accurate information (i.e., the star's choice of automobile) to the consumer. As such, and to the extent that commercial speech is protected because it provides information to the purchasing public,²⁹⁴ this type of advertisement may merit greater First Amendment protection than one which merely uses a celebrity in a loosely "rhetorical" or associative (and non-informational) way.²⁹⁵ Still, however, the advertisement's First Amendment value would have to be balanced against the economic or moral injury asserted by the plaintiff.²⁹⁶

b. Newsworthiness. In contrast to cases involving defamation or privacy, the status of a publicity rights plaintiff as a public or "newsworthy" figure²⁹⁷ should not constitute an analytical factor. In

plaintiff's objection in this case was to the falsification, rather than to commercial exploitation per se. *See id.* at 842.

293. Recall, in this connection, the nature of property rights as exclusive rights to use. *See supra* note 143.

294. *See supra* note 252.

295. *See Haas, supra* note 5, at 568.

296. *See id.* at 550-68 (using the *Central Hudson* test for lawful commercial speech restriction, discussed *infra* note 306). Haas suggests looking at the truth and lawfulness of the advertisement, the weight of the government interest in regulating it (i.e., allowing the right of publicity claim), the degree to which that regulation advances the government's interest, and whether the regulation is sufficiently narrow. He then concludes that advertisements containing such truthful information should generally be protected under the First Amendment because the fact of the celebrity's choice is significant to consumers making choices among products. *See id.* at 568. I would agree that such truthful factual use of persona has a superior claim to First Amendment protection, although I believe that Haas may undervalue the injury to a plaintiff in such facts being used for advertising purposes. Again, the validity of the right of publicity claim does not guarantee it will prevail; but the specifics of the case (e.g., is the celebrity negotiating for an advertising contract with a competing manufacturer and planning to sell his car?) should count for a great deal.

297. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964), the relevant status was that of a public official; in *Time, Inc. v. Hill*, 385 U.S. 374, 386 (1966), which involved a private individual, it was that of a "newsworthy person" involved in a matter of public interest.

cases utilizing an actual malice standard—whether defamation, privacy, or emotional distress—the plaintiff’s status has been relevant as a trigger for the deployment of that standard, in order to permit a broader range of permissible expression where truth and falsity are at issue, and erroneous or even defamatory statements honestly made are inevitable.²⁹⁸ In the publicity rights context, where falsity and the actual malice standard are irrelevant, using the plaintiff’s status would presumably have a more direct impact, somehow limiting the relief available to a party because she is a public figure or a newsworthy person. The right of publicity, however, is obviously of greatest practical importance to celebrities. In this case, using a public figure standard would effectively eviscerate the cause of action.²⁹⁹ If a right of publicity is to exist at all, it is logically inconsistent to limit the scope of relief provided by it on the basis of the plaintiff’s status.³⁰⁰

4. *Summary.* In short, the balancing exercise between First Amendment imperatives and the right of publicity should distinguish at the threshold between commercial advertising (narrowly construed) and other forms of speech, and—without attempting *a priori* categorizations— inquire whether the use in question is commercial speech or other expression, even if commercially motivated; consider the availability of alternative means of expression; and disregard the nature of the plaintiff as a public figure.

298. See *Sullivan*, 376 U.S. at 270 (identifying a “profound national commitment to the principle that debate on public issues should be uninhibited”).

299. In *Comedy III Productions, Inc. v. Saderup*, 80 Cal. Rptr. 2d 464, 468 (Ct. App. 1998), the court pointed out that the exemption to California Civil Code section 990 (discussed *supra* note 38) is one for newsworthy material or events, not newsworthy individuals. If the exemption applied to individuals, the court said, celebrities’ successors’ rights under the statute would be vitiated. See *Saderup*, 80 Cal. Rptr. 2d at 468.

300. In the first half of this century, when objections to unauthorized commercial use of persona were forced into a tort paradigm by having to be made as privacy claims, courts did precisely this, disallowing or limiting claims made by celebrities on the grounds that they had waived their rights. See Goodenough, *supra* note 6, at 730 & n.89 (collecting cases where public-figure plaintiffs were denied relief); Nimmer, *supra* note 26, at 204-06 (discussing the waiver by celebrities of privacy protection against unauthorized use of name or likeness); Pesce, *supra* note 46, at 784 n.12 (recognizing that celebrities only enjoy privacy protection for those parts of their lives which they have not exposed to the public). It is worth noting that limiting relief as a function of plaintiff status would also be inconsistent with a right of publicity conceptualized as proceeding from human autonomy.

B. Applying the First Amendment to the Right of Publicity

In recent practice, the courts' approaches to the right of publicity/First Amendment conflict have varied widely (and wildly), from the Ninth Circuit's decision that the right of publicity might prohibit the advertising use of a robot coifed and dressed like Vanna White³⁰¹ to the Tenth Circuit's holding in *Cardtoons, L.C. v. Major League Baseball Players Ass'n*³⁰² that parodic baseball cards merited full First Amendment protection³⁰³ and that the right of publicity was generally suspect.³⁰⁴ Although the *White* court did not ignore the First Amendment altogether,³⁰⁵ it did neglect to apply the *Central Hudson* test for

301. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993).

302. 95 F.3d 959 (10th Cir. 1996).

303. See *id.* at 970 (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (plurality opinion)).

304. The Tenth Circuit stated that the right of publicity was justified either in economic terms (incentive to create, efficient allocation of resources, and protection against consumer deception) or noneconomic ones (natural rights, fruits of labor, avoidance of unjust enrichment, and prevention of emotional distress). See *id.* at 973. The court proceeded to examine each one of these, finding on all fronts that the right of publicity was only weakly justified. See *id.* at 974-75. In elaborating its opinion, the court adopted whole cloth all of Professor Madow's arguments against the right of publicity, rejecting the notion of publicity rights as incentives to creation, as promoting the efficient allocation of resources, as proceeding from natural rights, as protecting against unjust enrichment, or as having any relevance to emotional injury. See *id.* at 973-76. At virtually every juncture of its decision, the court cited Professor Madow's article and rejected the right of publicity's validity. See, e.g., *id.* at 975 (accepting Madow's view that the value of a celebrity's likeness might increase due to frequent appearance on a T-shirt or coffee mug). Because it relied so heavily on Madow's approach, the court was even led to focus on the status of the publicity rights plaintiff as a celebrity who is "already handsomely compensated" and who does not need the "extra income" generated by the licensed use of identity. *Id.* at 974. As we have seen in Part I.C, *supra*, the compensation argument is specious; nor should the status of the plaintiff be considered in the First Amendment/publicity rights context. See *supra* Part IV.A.3. The court's rejection of the right of publicity as one based on "blind appeals to first principles," *Cardtoons*, 95 F.3d at 975, however, might have been justified, in view of the dearth of alternative, non-Lockean philosophical justifications for the right of publicity.

305. The court referred to *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), and determined that its First Amendment doctrine did not bar a right of publicity claim. See *White*, 971 F.2d at 1401 n.3. The court also rejected the defendant's attempt to characterize its advertisement as a parody meriting full First Amendment protection. See *id.* at 1401.

For the dissenters' responses, see *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1519 (9th Cir. 1993) (Kozinski, J., dissenting from the denial of rehearing en banc) ("[The *White* majority's holding is] a speech restriction unparalleled in First Amendment law."); *White*, 971 F.2d at 1407 (Alarcon, J., dissenting) ("The [*White*] majority gives Samsung's First Amendment defense short shrift . . ."). Another critic of *White* writes, "The Ninth Circuit . . . has not seen the right of publicity as calling for examination under the Supreme Court's doctrine of commercial speech. But since the right of publicity deals with advertising, which surely is commer-

commercial speech.³⁰⁶ Nevertheless, it is quite possible that the outcome in *White* would have been identical even if the court had applied *Central Hudson*. *Central Hudson* allows for restrictions on commercial speech that is “false, deceptive, or misleading,”³⁰⁷ but permits the restriction of non-misleading speech only if the “State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest.”³⁰⁸ The issue with regard to non-misleading speech, then, is whether a right of publicity claim can be viewed as directly advancing a substantial state interest and whether the restriction in question is sufficiently narrow in scope.

If one defines the right of publicity as an individual property right ultimately grounded in personal autonomy, one can argue that it is worthy of advancement as a “substantial state interest”; the state is expected to protect personal self-determination and to enforce property rights.³⁰⁹ As for the scope of the restriction, it was highly particularized: enforcing *White*’s right of publicity left Samsung free to produce an advertisement that did not identify a particular individual without her consent.³¹⁰ Therefore, even if the Ninth Circuit had ap-

cial speech, the Supreme Court could well find application of that doctrine appropriate.” Stephen R. Barnett, *The Right of Publicity Versus Free Speech in Advertising: Some Counter-Points to Professor McCarthy*, 18 HASTINGS COMM. & ENT. L.J. 593, 600 (1996).

306. *Central Hudson* established a four-part test for the regulation of commercial speech: (1) the speech in question must be lawful and not misleading, and (2) the asserted government interest must be substantial; if these first two elements are satisfied, then in order for the regulation to be upheld, (3) the regulation must directly advance the asserted governmental interest, and (4) the regulation must not be more extensive than necessary to serve that interest. See *Central Hudson*, 447 U.S. at 566.

307. *Ibanez v. Florida Dep’t of Bus. & Prof’l Regulations*, 512 U.S. 136, 142 (1994).

308. *Id.*; accord 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (rejecting the contention that a ban on advertising the price of alcohol significantly advances the state’s interest in promoting temperance); *Central Hudson*, 447 U.S. at 566 (requiring substantial governmental interest as part two of the four-part test).

309. *Central Hudson* and its progenitors are aimed at state regulations that limit speech, such as bans on advertising, not individual property rights that may conflict with free-speech values. The context in *Virginia Board of Pharmacy* and *Central Hudson*, therefore, dictated a focus on whether state regulations that limit speech serve to directly and materially advance a substantial state interest such as the avoidance of consumer confusion. See also 44 *Liquormart*, 517 U.S. at 502 (reasoning that commercial-speech regulation is justified by the governmental interest in protecting consumers from commercial harm). It is certainly arguable that in the commercial speech context not involving such regulation, but rather a conflict with legally recognized property interests, it is also persuasive to allude to the state’s traditional role in ensuring the stability and security of property. See Haas, *supra* note 5, at 552-53, 558-59.

310. This is not to say that the Ninth Circuit was correct in its determination that the identifying factors belonged to *White* and thus supported a right of publicity claim. For a discussion of what properly constitutes an appropriation of identity, see *infra* Part V.A. It is only to say

plied *Central Hudson* more extensively, the right of publicity might well have prevailed if an appropriation of recognizable identity had occurred. The real problem in *White* was not so much a failure to apply the First Amendment as an overextension of the scope of “identity” supporting the publicity rights claim.

V. A BALANCED RIGHT OF PUBLICITY

A. A Threshold Test: Taming Identity

Although it might have been permissible to assert that the right of publicity involves use of “identity,” as opposed to name, likeness, or other attributes specified by statute,³¹¹ *White*’s extension of liability to factors that merely evoke a celebrity’s image is troublesome.³¹² As one commentator has remarked, cases in this area evince a widening schism between the right of publicity claimant and the objectified identity the use of which precipitates the claim.³¹³ In a typical case, a photograph of the plaintiff would be at issue. At a greater remove, as in *Onassis v. Christian Dior-New York, Inc.*,³¹⁴ the photograph is not actually of the plaintiff, but of someone who looks so much like her that her persona has in effect been depicted:

Suppose that, just as personality is the form of personal identity, a person’s physical appearance is the form of his or her personality. In *Loftus*³¹⁵ and *Onassis*, the courts approved a trial separation between

that Samsung still had almost unlimited scope for humorous futuristic advertisements with blondes and/or game-show types.

311. In fact, Stack, *supra* note 9, at 1203-04, criticizes the Ninth Circuit for doing so. Stack says that the court overemphasized one aspect of *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Ct. App. 1983) (implying that extrastatutory attributes could form the grounds of a claim), and that it was mistaken in its further reliance on three federal cases—*Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1102 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988); and *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836 (6th Cir. 1983).

312. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (“Viewed separately, the individual aspects of the advertisement . . . say little. Viewed together, they leave little doubt about the celebrity the ad is meant to depict.”). The “aspects” in question included the robot’s wig, clothing, jewelry, the *Wheel of Fortune* letter board, and the game-show set. See *id.* On this score, Judge Alarcon’s dissent makes some very good points. See *id.* at 1404-05 (Alarcon, J., dissenting).

313. See Malkan, *supra* note 181, at 810.

314. 472 N.Y.S.2d 254 (Sup. Ct. 1984), *aff’d mem.* 488 N.Y.S.2d 943 (App. Div. 1985), discussed *supra* note 47.

315. *Loftus v. Greenwich Lithographing Co.*, 182 N.Y.S. 428 (App. Div. 1920). The case involved Loftus, a young Ziegfeld actress who was photographed in a distinctive “rose” costume; the photograph was widely publicized. See *id.* at 428-29. Some time later, the defendant

form and substance, finding that personality had been appropriated even though the plaintiff's physical likeness had not been directly depicted. In *White v. Samsung Electronics of America*, the court finalized the divorce between likeness and personality³¹⁶

Put another way, by the time we arrive at *White*, a divorce has occurred between the Kantian subject and what purports to be an objectification of his identity—in which case the claim to possess that objectification as property is attenuated, and the first-occupancy rationale for ownership greatly weakened. Many commentators have noted this problem (even if not in Kantian terms) and attempted to address it, with varying degrees of success. It is not overly useful, for example, to assert that only personal characteristics should be protected while “trappings” should not.³¹⁷ It might depend on the circumstances. One need only think of Harpo Marx to recognize that “trappings” can constitute unique identifiers, which, taken as a set, may be as original to the person (and thus subject to a first-occupancy argument) as his natural characteristics.³¹⁸ More helpful, perhaps, is the suggestion that a challenged use of identifying indicia must *unequivocally, uniquely, and directly* identify the plaintiff.³¹⁹ This helps, but it is still insufficient, because it begs the question of what constitutes unequivocal identification. Here, it might be useful to require that the

printed posters advertising a movie, *Shame*, featuring a female figure in an identical costume. See *id.* at 429. Although the artist drew different features on the figure, the court held that the poster referred to Loftus. See *id.* at 431.

316. Malkan, *supra* note 181, at 810 (footnote omitted).

317. See Clay, *supra* note 9, at 497-98.

318. That such a construct functions as a unique identifier for a personality like Harpo seems fairly uncontroversial. I would submit that such a set of identifying indicia can rise to the level of a “captured ‘take’ on the world” that can be “propertized” without threatening the “raw materials of communication.” Zimmerman, *supra* note 71, at 734-35. Protecting Harpo's overall set in connection with a person physically resembling him does nothing to inhibit the use of the individual materials—wig, hat, coat, horn—involved. And, to be on the safe side, more could be required before even the set as a whole could be “propertized.” See also RESTATEMENT, *supra* note 46, § 46 cmt. d (noting that the identifiers must be closely and uniquely identified with the person); *infra* Part V.B (discussing the application of fair use doctrines to the right of publicity).

319. See Halpern, *supra* note 17, at 863-64 (contrasting *Midler*, *Waits*, and *Carson*, where the attributes of the plaintiffs were identifiable, with *White*, where the attributes of the show, rather than of the plaintiff, were identifiable); see also Ellis, *supra* note 117, at 613 n.315 (discussing Halpern's criticism of *White*). But see Heberer, *supra* note 9, at 746-47 (arguing that both *White* and *Carson* were wrongly decided because they focused on attributes merely associated with the celebrity plaintiffs and not unequivocally distinctive of them). In fact, the slogan “Here's Johnny” is arguably unequivocally distinctive of Johnny Carson; the problem is different in his case. See *infra* text accompanying note 322. For a discussion of *Carson*, see Bloom, *supra* note 47, at 492-99.

use of identity be not only direct but *immediate*. That is, the use must evoke the reaction that “this is X” rather than “this reminds me of X” or “this sounds/looks like X.” An “evocation” of identity may be actionable, but only if it is immediate and not merely suggestive of a connection.³²⁰

This requirement is consonant with a Kantian approach to the right of publicity. The first-occupancy justification assumes congruence between the person asserting a property right in objectified identity and that identity; it is only on this basis that one can say that an individual is first on the scene with respect to the objectification. There must, then, exist the impression that the individual is actually present in the objectification. To the extent that this is not the case, and that the relationship between the objectification and inhabiting subject is tenuous or indirect, uses of the objectification will not evoke the response that the subject is actually present. Thus, for example, even if the objectification of Harpo Marx’s identity could be said to include certain trappings, the use of those trappings in the absence of a human being who closely resembles, or is, Harpo would fail to trigger the direct, immediate “this is X” response. In that case, no use of “identity” per se could be asserted; the use would be merely suggestive or evocative.

320. This “immediacy” test is not dissimilar to McCarthy’s requirement that a celebrity be subject to “unaided identification.” MCCARTHY, RIGHTS OF PUBLICITY, *supra* note 6, § 3.4[B], at 3-18; *see also* RESTATEMENT, *supra* note 46, § 46 cmt. d (1995) (“The right of publicity is not infringed unless the plaintiff is identified by the defendant’s use.”). The concept of “immediacy” is also found in trademark cases dealing with § 2(a) of the Lanham Act. *See, e.g.*, University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., 703 F.2d 1372, 1376-77 (Fed. Cir. 1983) (holding that § 2(a) does protect interest in identity; in such a case, “the initial and critical requirement is that the name . . . claimed to be appropriated by another must be unmistakably associated with a particular personality or ‘persona’”). An approach requiring that the plaintiff be perceived as present in the use of identity is consistent with cases decided in New York that have asked whether the use of a look-alike has in fact given the public the impression that a celebrity is in the photograph. *See Onassis v. Christian Dior–New York, Inc.*, 472 N.Y.S.2d 254, 261 (Sup. Ct. 1984), *aff’d mem.* 488 N.Y.S.2d 943 (1985); *see also* Bloom, *supra* note 47, at 515. *But see* Allen v. National Video, Inc., 610 F. Supp. 612, 624 (S.D.N.Y. 1985) (contrasting the facts in *Allen* with those in *Onassis*, and emphasizing that the ad in *Onassis* gave the impression that *Onassis* was in the ad). For a general discussion of this issue, *see* Stack, *supra* note 9, at 1206-09, 1224-25 (arguing that a right of publicity claim requires that people think the image or attribute they perceive is the plaintiff). What I suggest is that the immediacy of perception is important—that the plaintiff “be” there without any intermediation. An “immediacy” test for publicity rights makes sense. It is also consistent with the Ninth Circuit’s approval in *Waits* of jury instructions making it clear to the jury that it would not be enough for listeners to be reminded of the plaintiff. *See* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1100-02 (9th Cir. 1992). As Heberer maintains, the Ninth Circuit got it right that time, but did not adhere to its own admonition later in deciding *White*. *See* Heberer, *supra* note 9, at 741-42.

On this analysis, *Carson v. Here's Johnny Portable Toilets, Inc.*³²¹ would have been decided differently, because although the slogan "Here's Johnny" may act as a strong trademark,³²² the natural reaction to its use is only that there is a connection to Johnny Carson, not that he is somehow actually there.³²³ The slogan is suggestive; therefore, the evocation is rarefied, rather than robust and immediate. Similarly, in *White*, the use of the robot was suggestive; all agree that Vanna White herself was not perceived to be there. Indeed, the point of the advertisement was that she no longer was.³²⁴ Thus, *White* would

321. 698 F.2d 831 (6th Cir. 1983).

322. The slogan is distinctive and uniquely associated in the public mind with Johnny Carson; as the case relates, it was used in connection with certain licensed goods. The use of the slogan for portable toilets would also seem to present an excellent case for a dilution claim as well as trademark-infringement and unfair-competition claims. The Sixth Circuit affirmed the district court's denial of trademark relief on the grounds that the mark was not very strong and that the plaintiff had not established a likelihood of confusion. The Court was reviewing the decision on a "clearly erroneous" standard; its review was cursory and failed to give any weight to the lower court's excessive reliance on actual confusion as an indicator of likelihood of confusion. *See id.* at 833.

323. The *Carson* majority reasoned that the case was indistinguishable from *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974), in which the Ninth Circuit held that a television commercial showing what appeared to be the highly distinctive racing car of a famous driver supported a claim for misappropriation of identity despite his face not being visible. *See Carson*, 698 F.2d at 827. In *Motschenbacher*, however, the advertisement strongly supported an inference of the driver's physical presence in the car (and therefore in the advertisement). *See Motschenbacher*, 498 F.2d at 827. The "Here's Johnny" slogan did nothing of the sort.

324. See Judge Alarcon's dissent in *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1404 (9th Cir. 1992) (Alarcon, J., dissenting). The joke was that she was long gone and replaced by a robot. I agree with the dissent of Judge Kozinski that the real identifier in the advertisement was the *Wheel of Fortune* set, not the characteristics of the robot. *See White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1515 (9th Cir. 1993) (Kozinski, J., dissenting from a denial of rehearing en banc). Here, one might ask whether it would make sense to require that indicia of identity be inseparable from the person, or at least attached to it; such a criterion would allow Harpo, but not Vanna, to pursue a claim in the absence of a set or other free-standing props. Where I part company with Judge Kozinski and other critics is in their argument that White's claim was preempted by the Copyright Act. *See, e.g., id.* at 1518 (Kozinski, J., dissenting from a denial of rehearing en banc); Heberer, *supra* note 9, at 763-71. The Act preempts claims that involve the subject matter of the federal statute and rights granted by that statute. *See* 17 U.S.C. § 301 (1994). To fall within the subject matter of copyright requires that a work be fixed in tangible form. Heberer (and others), relying on Judge Kozinski, maintain that White's claim was preempted because the television show in which she acted was fixed. *See Heberer, supra* note 9, at 763. This ignores the fact that what was at issue in *White* was not a use of the television show (or of a fixed performance by White therein); thus, the fact that the show was fixed, and was owned by Merv Griffin Enterprises rather than by Vanna White, is irrelevant. The preemption argument illustrates nicely why it is important to focus on persona, rather than act or created work. With a focus on persona, no copyright preemption problem can be raised, as the Copyright Act applies only to created works.

also have had a different outcome under this test. In contrast, the outcome in cases such as *Groucho Marx* would remain unchanged, because the defendants' use of characters whose identities were inseparable from those of the plaintiff Marx Brothers—characters who were dressed and made up to look exactly like them—did immediately evoke those plaintiffs.³²⁵

Because the test suggested here requires that a specific individual be directly and immediately evoked by the presence of another person who precisely resembles him (possibly through the use of trappings), it cannot be fulfilled when that which is recalled is merely a reminder of the plaintiff. Nor is the test met by the evocation of a type or a role that is not unique to the plaintiff. Therefore, were Harpo's trappings placed on a faceless mannequin, there would be no immediate evocation; and were a bewigged and bejeweled robot to appear without the trappings of a particular show, it would not suggest any particular person, but rather an archetypal actress or model. There can be no property rights in a type or archetype; borrowing again from trademark law, generic terms are not subject to private appropriation.³²⁶ For this reason, it would be helpful to establish, as a threshold requirement for a right of publicity claim, not only that the use of identity be immediate, but that the defendant's use also be semiotically specific, depending on reference to a given individual for her own sake and for what she personally signifies. The use, in short,

325. See *Groucho Marx Prods. Inc. v. Day & Night Co.*, 523 F. Supp. 485, 491 (S.D.N.Y. 1981) (holding that a production of *A Day in Hollywood/A Night in the Ukraine* was a literal reproduction of Marx Brothers characters and thus a misappropriation not protected by the First Amendment), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982). This outcome also finds support in *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994). In that case, the Third Circuit held that "[w]here an actor's screen persona becomes so associated with him that it becomes inseparable from the actor's own public image, the actor obtains an interest in the image which gives him standing to prevent mere interlopers from using it without authority." *Id.* at 920. The question remains whether the production in *Groucho Marx* was devoid of its own creative content. This was hardly obvious; the court acknowledged that the script involved "a new situation with original lines," while finding that the performance itself was a "wholesale appropriation of the Marx Brothers characters." *Groucho Marx*, 523 F. Supp. at 493. The decision therefore appears to diverge somewhat from *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981), discussed *supra* note 49, which implies that if a show contains substantial original content, it might escape categorization as "exploitative," see *Russen*, 513 F. Supp. at 1359. If the duplicative nature of the show in *Groucho Marx* is based on the characters, rather than the script, then this decision may implicitly acknowledge the separability of persona from act or created work.

326. See *supra* text accompanying notes 270-71. This point is similarly made by Ellis, *supra* note 117, at 613-14 and Halpern, *supra* note 17, at 865. Samsung in fact contended that its robot was an archetype, but its argument was subverted by its use of the *Wheel of Fortune* stage set. See *White*, 971 F.2d at 1399.

must have an “it had to be you” nature, in addition to requiring that the plaintiff “be there,” rather than merely be evoked or suggested. Thus, as strongly as a Kantian right of publicity would protect a plaintiff who “is” there, it just as decidedly would not support one who is not personally present and personally invoked.

B. Copyright Applied to the Right of Publicity

Assuming that a right of publicity claim passes the threshold requirement of a direct and immediate appropriation of identity, it remains to consider the incorporation of other, self-limiting tests into the right itself—namely, copyright doctrines of fair use and first sale.

1. *Fair Use.*³²⁷ Several commentators advocate the employment of a fair use test.³²⁸ There are a number of reasons why, despite the

327. As a means of balancing the tension between providing monopoly ownership of copyrighted works and permitting others to build upon those works, copyright early developed the doctrine of fair use. The elements of the doctrine were articulated by Justice Story in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) as the “nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” *Id.* at 348. The definition of fair use was codified in section 107 of the 1976 Copyright Act, which provides:

[N]otwithstanding the provisions of sections 106 and 106A [exclusive rights and visual artists’ moral rights, respectively], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (1994).

As the text of § 107 makes clear, fair use does not involve bright-line rules, but equitable balancing of various factors (which, it should be observed, are not exhaustively expressed in the statute). Judicial decisions have continued to flesh out the fair use doctrine, and have tended to emphasize the doctrine’s flexibility and hostility to rigid rules.

The first factor, for example, relating to the purpose of the use, has misled some courts into holding that a commercial use acts as a per se bar to fair use. In *Campbell v. Acuff Rose Music, Inc.*, 510 U.S. 569 (1994), the Supreme Court definitively rejected that notion, clarifying that despite its holding in *Sony Corp. v. Universal Pictures, Inc.*, 464 U.S. 417, 451 (1984), that a “commercial use of copyrighted material is presumptively . . . unfair,” it did not mean to state a per se rule. Rather, a commercial use may tend to weigh in favor of the plaintiff, but must be considered along with other factors. See *Campbell*, 510 U.S. at 585. Thus, the nature of the use cannot be dispositive, and indeed, there are cases in which a commercial use is found to have a

fair use claim (such as the parody involved in *Campbell*), while a noncommercial use—such as wholesale copying of works for classroom use—would fail the overall fair use test. See H.R. REP. NO. 94-1476, at 68-69 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5682-83 (setting brevity guidelines for making multiple copies of a work for classroom use under the fair use provision). The nature of the new work is another critical element of the first factor, and here the courts focus on whether the new use is superseding—i.e., directly replacing the original work—or transformative, adding new creative value. See, e.g., *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 13 (S.D.N.Y. 1992) (holding that Texaco's copying was superseding, not transformative), *aff'd*, 60 F.3d 913 (2d Cir. 1994), *cert. denied*, 516 U.S. 1005 (1995). Again, this is only one factor, and even a finding that a use is superseding does not mean that fair use cannot be found. In *Sony*, for example, the tapes that consumers made on their Sony Betamax video tape recorders were direct, superseding copies of the television shows they taped, yet the use was found to be fair. See *Sony*, 464 U.S. at 454-55. Conversely, in *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), a brightly colored sculpture that transformed a black-and-white photograph was held not to be a fair use. See *id.* at 309.

The second factor, the nature of the copyrighted work, generally inquires whether the work that is used is an expressive work (e.g., a novel), or a fact-based work. Because copyright does not protect facts, use of the facts themselves in a new work cannot infringe; thus, there is a wider band of fair use potential in copying from a fact-based work. Another consideration subsumed by the second factor is whether the copied work is published or unpublished. This element reflects the critical importance of publication to the 1909 Copyright Act, which conferred statutory copyright on works that were published in conformance with statutory formalities, while unpublished works enjoyed perpetual common law copyright (a right akin to a privacy right, as noted *supra* note 83). Because of the importance to this scheme of the right of first publication—the decision to make a work public, and the economic benefit that flowed from the first release of a work—the question of whether a work was published was considered of paramount importance, and “the unpublished nature of a work . . . [a] key, though not necessarily determinative, factor’ tending to negate a defense of fair use.” *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 554 (1985) (quoting S. REP. NO. 94-473, at 64 (1975)). This factor was overused, however, to the point where the unpublished status of a work led some courts to a virtual *per se* rule that its use could not be fair. See, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90, 97-99 (2d Cir. 1987) (stating that the unpublished nature of a work was a “critical element,” and holding that a claim of fair use as to J.D. Salinger's unpublished letters failed). For this reason, § 107 was amended in 1992 to include its last sentence, stating that the unpublished nature of a work does not bar a finding of fair use. See Pub. L. No. 102-492, 106 Stat. 3145, 3145 (1992).

The third factor in § 107 relates to the substantiality of what is taken, and this can be quantitative or qualitative. As the Supreme Court held in *Harper & Row*, the use of 300 words of narrative from President Ford's memoirs in a much larger article (about a much larger book) was an infringement rather than a fair use because it took the “heart” of his work. *Harper & Row*, 471 U.S. at 565.

The fourth factor, impact on market, includes not only the impact on sales of the copyrighted work, but also the impact on the copyright owner's ability to license his work for derivative work uses. See *Campbell*, 510 U.S. at 593 (“[E]vidence of substantial harm to it [the derivative rap market for the song at issue in the case] would weigh against a finding of fair use, because the licensing of derivatives is an important economic incentive to the creation of originals.”); *Rogers*, 960 F.2d at 312 (“Even though [a movie adaptation of a book] may boost book sales, it is an unfair use because of the effect on the potential sale of adaptation rights.”). As can be gathered from this brief overview of the fair use doctrine, it is a case-by-case equitable doctrine that emphasizes flexibility, but that does have clear guidelines.

328. See, e.g., *Coyne*, *supra* note 48, at 815-20 (describing various approaches to the fair use doctrine in light of varying provisions); *Ellis*, *supra* note 117, at 612-15 (contending that a modi-

very real differences between copyright and publicity rights,³²⁹ this is a sound idea.³³⁰

Fair use is a balancing exercise that reconciles property rights with societal needs for scholarship, criticism, and parody. As such, it performs the function (strongly needed in the publicity rights/First Amendment context) of assessing the strength of those competing claims and arriving at an equitable answer. Although fair use is quintessentially ad hoc,³³¹ this does not mean that it suffers from the weaknesses attributed to “ad-hoc balancing” in the First Amendment

fied fair use standard allowing for protection of parody, but prohibiting simple imitation, should be adopted); Heberer, *supra* note 9, at 758-63 (analyzing various cases in the context of each of the fair use test's four prongs). *But see* H. Lee Hetherington, *Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity*, 17 COLUM.-VLA J.L. & ARTS 1, 28-29 (1992) (arguing that fair use is not practical in the right of publicity context involving entertainment concerns, celebrities, and news). Hetherington's argument is unconvincing, since, as was discussed *supra* note 327, fair use has already been used in entertainment cases involving large enterprises such as Sony, Harper & Row, Time, etc. For a variation on this criticism, see Kwall, *Right of Publicity*, *supra* note 6, at 62-63 & n.69 (maintaining that fair use is too narrow a framework for the analysis of First Amendment conflicts between the right of publicity and the right of society as a whole and that it should not be automatically applied). Kwall claims in part that copyright doctrine's recent deemphasis of unjust enrichment (based on free riding on others' work), as articulated in *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340, 349-50 (1991), is inconsistent with the right of publicity doctrine, which depends on unjust enrichment in its focus on the individual enjoying the “fruits of his own industry.” Roberta Rosenthal Kwall, *Is Independence Day Dawning for the Right to Publicity?*, 17 U.C. DAVIS L. REV. 191, 198 (1983) (quoting *Uhlaender v. Henrickson*, 316 F. Supp. 1277, 1282 (D. Minn. 1970)); *accord* *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 838 (6th Cir. 1983) (Kennedy, J., dissenting) (noting that prevention of unjust enrichment is a purpose of publicity rights law); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 221 (2d Cir. 1978) (holding that Elvis Presley's property rights must survive his death to avoid “a windfall in the form of profits from the use of Presley's name and likeness”), *cert. denied*, 440 U.S. 908 (1979). As discussed above, however, unjust enrichment based on a “fruit of labor” theory is not a necessary element of the right of publicity. Moreover, even assuming arguendo that the emphasis in *Feist* on authorial presence, and *Feist's* rejection of a “sweat of the brow” justification for copyright protection, *Feist*, 449 U.S. at 349-50, may weaken the link between copyright doctrine and unjust-enrichment rationales (note also that this would not be true to the extent a defendant misappropriates work that is the result of intellectually creative labor), this does not make the fair use test inappropriate in the publicity sphere. Simply because copyright and publicity rights diverge is not a reason to reject the application of a similar test. Still, Kwall has a point as to fair use not being all-inclusive. *See infra* text accompanying notes 343-60 (discussing a two-tiered approach).

329. *See supra* text accompanying notes 64-73 (discussing *Zacchini*).

330. The premise behind Samuelson's importation of fair use into the publicity rights arena is that publicity rights and copyright are extremely similar. *See* Samuelson, *supra* note 50, at 848-54. As noted *supra* note 67, they differ fundamentally. Samuelson does not really prove the point that publicity rights are property rights; rather, she shows that they are susceptible of the same treatment in certain circumstances as intellectual property rights.

331. *See, e.g., Campbell*, 510 U.S. at 577 (“The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”).

context.³³² On the contrary, its multi-pronged analytic framework has been consistently used while proving itself adaptable to a broad variety of situations. That the doctrine is so flexible as to permit a range of reasonable disagreement³³³ does not negate its basic coherence. It therefore seems perfectly appropriate to apply fair use to the publicity rights field, which so far has lacked a clear and consistent set of standards.³³⁴ The question is how to apply it in relation to First Amendment considerations. In essence, we must ask whether fair use and the First Amendment are coextensive, or whether they can be used in tandem.³³⁵

Some courts have evinced resistance to the notion that fair use and the First Amendment are separable,³³⁶ but in at least a few cases, fair use has not entirely accounted for a holding of non-infringement, or it has been applied distinctly from the First Amendment.³³⁷ For ex-

332. See GUNTHER, *supra* note 239, at 1006-07. Interestingly, an example of First Amendment ad hoc balancing mentioned by Gunther is one formulated by Judge Learned Hand. See *id.* at 1007 n.23. It is no coincidence that Judge Hand's eloquent statements about the ad hoc nature of copyright's idea-expression analysis remain the classical formulations in that field. See *Peter Pan Fabrics Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) ("Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc*."); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) ("Nobody has ever been able to fix that boundary, and nobody ever can."). For statements as to the difficulty and unsettled nature of fair use, see *Princeton Univ. Press v. Michigan Document Serv., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996).

333. See *Princeton Univ. Press*, 99 F.3d at 1392.

334. Samuelson makes this point, arguing that although *Zacchini* established that a publicity rights claim can survive a First Amendment challenge, the Court did not articulate a clear test "for determining how substantial the taking must be to constitute infringement." Samuelson, *supra* note 50, at 855-56.

335. Samuelson elaborates this notion in considerable detail. See *id.* at 881-913.

336. See, e.g., *Roy Export Co. v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1099 (2d Cir.), (emphasizing that "[n]o Circuit that has considered the question . . . has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the 'fair use' doctrine."), *cert. denied*, 459 U.S. 826 (1982).

337. At the time of the decision in *Roy Export*, although a district court had held that a contested use enjoyed a First Amendment privilege even though it was not a fair use, the circuit court's affirmance rested on a finding of fair use, and did not reach the First Amendment. See *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875, 881 (S.D. Fla. 1978), *aff'd on other grounds*, 626 F.2d 1171, 1178 (5th Cir. 1980); see also 1 NIMMER, *supra* note 279, § 1.10[B][2], at 1-79 to 1-80 (describing and contrasting the district court's decision with that of the court of appeals). Subsequent to *Roy Export*, in *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984), the owner of a television station brought a copyright infringement action against a service that taped the station's news broadcasts and sold the videos to the subjects of the broadcasts. See *id.* at 1493. The court concluded as a matter of law that the defendant's activities did not qualify as fair use; it then proceeded to evaluate whether the First Amendment protected the defendant's activity, and posed the question as a need to

ample, in *Time Inc. v. Bernard Geis Associates*,³³⁸ involving the use of copyrighted photographs of President Kennedy's assassination, the court found for the defendant on a cursory fair use analysis. Its rationale, however, appeared to be implicitly based less on fair use than on the First Amendment exigency of public access to the best, if not only, contemporaneous record of the President's assassination.³³⁹ As the Second Circuit has itself noted, some "find[] the fair use rationale [in *Geis*] unpersuasive on the facts of the case and see[] in it an unarticulated First Amendment holding."³⁴⁰

Interestingly, what has been seen as an inchoate First Amendment analysis in *Geis* is perhaps equally well accounted for by copyright fact-expression merger doctrine. That is, while copyright fair use does not adequately explain the result in *Geis*, copyright fact-expression merger doctrine does, as would a First Amendment alternative avenue theory.³⁴¹ One could say that the real problem in *Geis*

balance the right of public access (and the public interest in broadcast availability) against the plaintiff's copyright. *See id.* at 1499-1500. The First Amendment defense proved as unavailing as fair use.

338. 293 F. Supp. 130 (S.D.N.Y. 1968).

339. *See id.* at 146. Samuelson, *supra* note 50, at 910, notes that *Geis* has been criticized for having "missed [the] opportunity to make the first amendment a basis for the exemption it permitted" instead of attributing the privilege to fair use. She cites in particular an article by Melville Nimmer later incorporated in his copyright treatise. *See* 1 NIMMER, *supra* note 279, § 1.10. Nimmer's theory is that there may be cases, such as the Zapruder film of JFK's assassination or photographs of the My Lai massacre in Vietnam, that cannot be substituted for, and that make such an important contribution to political dialogue that public access is essential. *See id.* §1.10[C][2], at 1-85 to 1-92. This may be persuasive if the category of such materials is very narrowly drawn—Nimmer's suggested category of "news photography" appearing unduly broad—and if the economic blow is softened, possibly (as Nimmer suggests) by license fees generated by compulsory licenses. *See id.* § 1.10[C][2], at 1-88 to 1-89. However, I believe that merger doctrines are more effective than assessments of importance to political dialogue, and are consequently preferable as criteria. *See infra* text accompanying notes 341-42. *Roy Export*, 672 F.2d at 1099-1100, and other decisions—for example *Los Angeles News Service v. Tullo*, 973 F.2d 791 (9th Cir. 1992)—reject Nimmer's theory, reasoning that "denying copyright protection . . . [could] defeat the . . . First Amendment goal of greater public access to information by inhibiting or destroying the business of news photography." *Id.* at 796.

340. *Roy Export*, 672 F.2d at 1099 n.8 (citing 1 NIMMER, *supra* note 279, § 1.10[C][2], at 1-86 to 1-87); *accord* *Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1378 (2d Cir. 1993) (citing *New Era Publications Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576, 583 (2d Cir. 1989)).

341. Thus, as other opinions—such as *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 556 (1985)—suggest, while the First Amendment may be adequately accommodated by copyright, this is accomplished not only by fair use, but also by merger concepts. *See* *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) ("[T]he idea-expression line represents an acceptable definitional balance as between copyright and free speech interests." (quoting Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1192 (1970))).

was that the expression, the photographs, “were” in a sense the facts, because they were the only extant visual record of those facts. Under the circumstances, to protect the photographs would have meant providing to their copyright owner a monopoly over the facts—an unacceptable result. Similarly, one could say that a person wishing to provide a visual record of the facts to the public, for purposes of furthering public discussion of the assassination, would have no alternative avenue available to express the facts visually without using the photographs. Thus, copyright fact-expression merger and First Amendment alternative avenue concepts would converge to compel a decision for the defendant in this case. In fact, one could recall more broadly that “alternative means of expression” concepts underlie intellectual property doctrines in both the copyright and trademark arenas, where notions of merger or genericness operate to ensure that speech is not inhibited when alternative means of expression are unavailable.³⁴² In this sense, one could maintain that although the fair use doctrine may largely account for First Amendment interests, merger and alternative avenue analyses are conceptually distinguishable from fair use. Thus, it is conceivable that there might be situations where the public’s need to know, or need for access, might diverge from the results that would obtain using fair use alone. In the interest of erring on the side of free speech, it would seem advisable to use both fair use and First Amendment/merger criteria to evaluate a challenged use of identity.

The most effective test of a right of publicity claim therefore would begin with a fair use standard³⁴³—following the familiar copyright criteria³⁴⁴ of (1) the purpose and nature of the defendant’s use, including whether the primary purpose is to sell, the nature of the use as commercial or nonprofit, and whether the defendant’s work uses the plaintiff’s identity in a creative and “transformative” way or in a manner that simply substitutes for the plaintiff;³⁴⁵ (2) the nature of the publicity right affected, i.e., whether it is of the “associative” or “performance-value” type;³⁴⁶ (3) the substantiality of the use of the plain-

342. See *supra* text accompanying notes 269-71.

343. Again, it is assumed that the “identity” hurdle has been surmounted. See *supra* text accompanying notes 311-26.

344. See *supra* note 327.

345. This consideration strongly echoes the criterion of independent creative value suggested by Felcher & Rubin, *Privacy, Publicity*, *supra* note 47, at 1604-05, as an indicator that a work is not merely exploitative.

346. See *supra* text accompanying notes 29-31.

tiff's identity, i.e., whether there has been a "wholesale appropriation" of her identity;³⁴⁷ and (4) the impact on the market value of the plaintiff's identity, whether in primary or collateral activities.³⁴⁸

As in the copyright context, there is a strong relationship between the first and fourth factors.³⁴⁹ A truly transformative use of celebrity identity—for example, a parodic character in a satirical sketch, or even an extended parodic imitation—is highly unlikely to affect the market for a celebrity's services in the substitutional sense.³⁵⁰ A superseding use, however, which simply substitutes a clone or a look-alike for the original, is likely to undercut seriously the market for the celebrity.³⁵¹ It is self-evident that this impact would be especially severe in the case of substitutions for celebrities in performance-value cases, where the substitution occurs in the activity

347. Borrowing from copyright doctrine, substantiality can be qualitative or quantitative. *See, e.g.*, *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 564-65 (1985) (recognizing that the 300 words that had been used were of key importance to plaintiff's work); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1122 (1990) ("[T]he larger the volume (or the greater the importance) of what is taken, the greater the affront to the interests of the . . . owner, and the less likely that a taking will qualify as a fair use."). Thus, substantiality in this context could refer to a use of all of a person's identifying attributes, or a use of attributes that are few in number but are absolutely distinctive. It could also refer to the temporal extent of use in an audiovisual work (two seconds? two hours?).

348. "This last factor is undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. Also, the fourth factor must take into account the impact not only on direct, but also on derivative, uses of a work. *See id.* at 568. The overall application of fair use to publicity claims is similarly proposed by Samuelson, *supra* note 50, at 915.

349. *See, e.g.*, *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 591 (1994) ("[W]hen a commercial use amounts to mere duplication . . . , it serves as a market replacement for [the original.] . . . [whereas if] the second use is transformative, market substitution is at least less certain . . .").

350. Market injury caused by scathing criticism would not be actionable under publicity rights law. As in copyright, "parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically." *Campbell*, 510 U.S. at 592 (quoting BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 69 (1967)).

351. As to what must be proved in terms of market injury, see *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). *Sony* formulated a test in relation to noncommercial use, stating that "although every commercial use of copyrighted material is presumptively an unfair exploitation . . . [a] challenge to a noncommercial use . . . requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work." *Id.* at 451. In later years, as courts tended to rely too heavily on the presumption of unfairness articulated by *Sony*, the Court has taken care to clarify that it was not intended to act as a determinative factor in fair use analysis, even with regard to commercial uses. *See Campbell*, 510 U.S. at 584-85. If there is no dispositive presumption of unfairness in commercial use, it would seem that applying the standard for noncommercial use would ensure that a commercial use receives the broadest possible benefit of the doubt. For this reason, I would use a standard of actual harm or a *Sony*-type likelihood that the use, if it became widespread, would adversely affect the potential market.

constituting the celebrity's primary occupation, not merely in a collateral endeavor. For this reason, some commentators have singled out performance-value cases as requiring special attention.³⁵² While it is undeniable that the performance-value case raises the superseding-use problem in starkest relief, however, the issue is broader. A substitutional "associative" use of identity can also have a significant impact on the market for the original.

If fair use is not found on this test, the next step would be to ask whether, as Samuelson suggests, "access to the protected matter [is] . . . necessary to achieve the dissemination of information and public debate objectives which underlie the first amendment."³⁵³ We might broaden this question to ask whether access is necessary as a matter of artistic expression³⁵⁴ to permit individuals and groups to "play with" meaning and to come up with new ways of recoding cultural icons, or whether these needs can be satisfactorily fulfilled in alternative ways without invading conflicting property rights. Again, the question should be whether freedom to exploit commercially is necessary to expressive needs, in the sense of the defendant's need to use the Zapruder photographs in the *Geis* case;³⁵⁵ otherwise, there is no particular reason why societal or entrepreneurial urges or preferences should trump the right of publicity.³⁵⁶

352. See Clay, *supra* note 9, at 514-15. Clay proposes that only performance-value publicity rights be protectable under a "right of performance" providing a cause of action for use of a person's performance identity (i.e., look-alikes, sound-alikes) or performance without consent.

353. Samuelson, *supra* note 50, at 916. Samuelson cites Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 284 (1979), for support on this point. See Samuelson, *supra* note 50, at 916-17.

354. See Adler, *supra* note 200, at 1500 (identifying artistic expression as a measure of First Amendment value).

355. This means that even if it would be nice to be able to "play with" certain images, it might not be necessary to expression, and thus not justified, to override property rights in order to permit this to occur by means of sales of commercial objects. Here, the "alternative avenue of expression" criterion is especially important. As mentioned *supra* note 282, courts should be able to evaluate this need as effectively as they now evaluate appropriation needs in the copyright and trademark contexts.

356. As Samuelson says, "although the first amendment does extend to entertainment and merchandise as well as to artistic and political expression, the first amendment does not generally require the owner of a significant property interest to give it away for free." Samuelson, *supra* note 50, at 916; see also *id.* ("Esquire was 'in no different position than a painter who feels he needs certain pigments and oils to create a contemplated masterpiece . . . [N]obody would seriously contend that artistic need would authorize a painter to walk into a supply store and help himself to whatever he may require.'" (quoting *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 883 (S.D.N.Y. 1973) (alteration in original))).

What is the result if we apply the fair use test to our hypothetical Cruise clone from Part I? It is immediately apparent that the use of identity here is superseding, rather than transformative (factor (1)), and that it would have a devastating effect on the market for the original (factor (4)). A wholesale use of identity has been made (factor (3)). The only consideration that might operate in the defendant's favor is that the purpose of the film is presumably artistic as well as commercial. One must distinguish here, however, between the purpose of the work and the purpose of the use. While the film's purpose might be artistic, the casting decision—the use of the clone—is not necessarily an aesthetic one. In fact, such decisions are made as often as not on the basis of marketing power—who can “open” a film—rather than on artistic grounds. Thus, the purpose of the casting in this case may be deemed to be purely commercial. Even if we ignore this distinction and consider the work and the use of identity as one in terms of purpose, it is at best an artistic/commercial hybrid, which undeniably exhibits an exploitative element in its use of celebrity identity. As such, its artistic character is unlikely to overwhelm the other factors, which militate strongly in favor of relief. On the whole, the fair use test here rather clearly seems to favor the plaintiff.

Even a use that fails to pass muster as “fair,” however, must also be subjected to a First Amendment balancing test. Here, we would inquire as to type of speech, alternative means of expression, and relationship to First Amendment goals.

The “alternative means of expression” factor would weigh heavily in the plaintiff's favor. If the defendant was unwilling to pay the going rate for use of the identity in question,³⁵⁷ it could have used another actor. Whatever artistic message is carried by the appropriation of identity, in other words, could almost certainly have been conveyed by other, non-infringing means. As for the type of use in question, granting that the film is an expressive work and an entertainment use of persona, does that mean it is necessarily immunized by the First Amendment? Borrowing from *Zacchini*, the answer is no. If an informational use could be deemed infringing on the basis of its wholesale appropriation of identity,³⁵⁸ then clearly an entertainment use would be subject to the same analysis.

357. As the Supreme Court noted in *Harper & Row*, “The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 562 (1985).

358. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575-76 (1977).

But even if we assume *arguendo* that the work's cultural value is so significant as to leave this issue open, we would need to pose an expanded version of the necessity question urged by Professors Samuelson and Denicola:³⁵⁹ is the use necessary to achieve the public information, public discourse, or self-realization goals that underlie the First Amendment? The answer here again seems to be no. Unless a reason can be offered that this product is indispensable to such discourse or to individuals' self-realization, or, if not indispensable, so crucial to those needs that it should necessarily override other rights, there seems little reason to favor the defendant. In the case of merchandising items, the response in many cases is likely to be similar. Even if those goods can be viewed as possessing cultural value, this does not necessarily overcome the fact that they appropriate identity; that they might have used other means of conveying their message (with "other means" understood either as forms of expression with a greater transformative claim, such as parody, or as authorized, rather than unconsented, uses of identity); and that they are hardly so necessary to public discourse as to require that countervailing considerations be ignored. In short, when we weigh those competing claims and compare the loss to the rights claimant with the loss to society of a given product, the balance may favor the plaintiff. The point here is that this is a case-by-case determination. While it may not result in relief, neither is it preordained to favor the claim of society over that of the individual.³⁶⁰

2. *First Sale Doctrine*. Because the right of publicity often involves the sale of commercial articles, the discussion of concepts that can fruitfully be borrowed from copyright would be incomplete without mention of the first sale doctrine. In brief, this rule provides that once a protected work is sold or transferred under authority of the copyright owner, the transferee may dispose of the product by resale or other means without further control by that owner,³⁶¹ and

359. See *supra* text accompanying notes 353-55.

360. It is also worth noting that to weight the scales in favor of "society's" entitlement in every case is ultimately to reward appropriating entrepreneurs for their unwillingness to pay the going rate or to exercise sufficient creativity to produce transformative works. It is a nice question in this context whether it is the celebrities who reap the "windfalls," see, e.g., Kunath, *supra* note 34, at 905, or whether it is those who use their identities.

361. See, e.g., 17 U.S.C. § 109 (1994), which provides:

(a) Notwithstanding the provisions of section 106(3) [on the copyright owner's exclusive right to distribute a copyrighted work to the public], the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such

that the copyright owner's exclusive right to distribute the work to the public is exhausted. A recent case in the Eleventh Circuit, *Allison v. Vintage Sports Plaques*,³⁶² held that the first sale doctrine is applicable to the right of publicity. After describing the doctrine, and its application to copyrights, patents, and trademarks,³⁶³ the court decided that once the publicity-right holder licensed the use of his image on trading cards, those cards could subsequently be resold in mounted form on plaques, some of them with clocks.³⁶⁴ The court

owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord [subject to restrictions on lending of phonorecords and computer programs in subsection (b)]. . . .

. . . .

(c) Notwithstanding the provisions of section 106(5) [on the copyright owner's exclusive right to publicly display a copyrighted work], the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly

It is noteworthy that the first sale doctrine does not exhaust all of a copyright owner's rights, but only those of distribution and display. Recent litigation has posed the question whether a defendant can buy an artist's works and then mount them on tiles for sale to the public without infringing the artist's exclusive right to create derivative works of her original work. *See* 17 U.S.C. § 106(2) (1994) ("[T]he owner of the copyright . . . has the exclusive rights . . . to prepare [and to authorize preparation of] derivative works based upon the copyrighted work"). The issue has been decided differently in the Seventh and Ninth Circuits. In the Seventh Circuit, such mounting does not qualify as a derivative work on grounds, *inter alia*, of lack of originality and failure to transform the original work. *See Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1997). In the Ninth Circuit, the mounting on tiles of prints or images from a book constitutes a derivative work, and the defendant's mounted images have therefore been held to infringe the author's derivative work right. *See Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1344 (9th Cir. 1988). Since the first sale doctrine does not apply to the derivative work right, these cases do not apply to the exhaustion of authors' rights under that doctrine, to the extent they are concerned with derivative work rights. Nevertheless, the Seventh Circuit decision does raise the point that where the "derivative work" is identical to the original work, the author has already captured all of its economic value in the course of her first sale, *see Lee*, 125 F.3d at 581, and the cases do raise a question similar to that posed here with regard to altered versions of licensed images, *see infra* text accompanying notes 364-65.

362. 136 F.3d 1443 (11th Cir. 1998). The decision mentions another case, *Major League Baseball Players Ass'n v. Dad's Kid Corp.*, 806 F. Supp. 458 (S.D.N.Y. 1992), *transferred sub nom. In re Dad's Kid Corp.*, Nos. CV-92-04119-WJR (CTx), CV-93-2753-WJR (CTx), CV-92-4111-WJR (CTx), 1994 WL 794763 (C.D. Cal. June 30, 1994), in which first sale reasoning was applied. *See Allison*, 136 F.3d at 1449. For an argument that the *Allison* court should have treated the plaques as derivative works and refused to apply first sale doctrine to new products, *see Ivy Choderker, Note & Comment, The First Sale Doctrine Defense as a Limit on the Right of Publicity: Allison v. Vintage Sports Plaques*, 19 LOY. L.A. ENT. L.J. 413, 431-443 (1999).

363. *See Allison*, 136 F.3d at 1447-48 (citing *Intel Corp. v. ULSI Sys. Tech., Inc.*, 995 F.2d 1566, 1568 (Fed. Cir. 1993) for patents and *NEC Elec. v. CAL Circuit ABCO*, 810 F.2d 1506, 1509 (9th Cir. 1987) for trademarks).

364. *See id.* at 1450-51. After holding that the first sale doctrine applied to the cards, the court decided that the defendants were merely reselling the original cards in a new package, rather than making a new use of the plaintiff's identities. *See id.* at 1450. It thereupon affirmed the district court's summary judgment in favor of the defendants. *See id.* at 1451.

held that the plaintiff had already been compensated for the use of his likeness,³⁶⁵ and that the economic effects of upholding a post-sale right of publicity would be disastrous, given the extent of the trading card market.³⁶⁶ Despite the rather circular nature of the court's reasoning, the combination of the prior compensation and economic disruption factors does provide a strong rationale for applying first sale doctrine to the right of publicity. To do so without limitation, however, might facilitate uses of identity that are morally offensive to right-holders. For example, reverting to the earlier case of the John Wayne-with-lipstick greeting cards, if properly licensed cards with Wayne's unadorned likeness were purchased and then altered and resold, relief would be unavailable under the first sale doctrine. Assuming for the moment that his estate's moral objection to identical cards produced and distributed without any initial consent or remuneration is sustainable,³⁶⁷ this would lead to contrary results in two cases involving precisely the same image. The difference, of course, would be that in the first case, the owner of the image would be compensated for the initial use but unable to enjoin the alteration or to demand additional compensation for the re-use; while in the second case, assuming the plaintiff prevailed, either the altered image could be enjoined or damages would cover the use of the altered image, as well as compensate for the underlying use.

There is an obvious asymmetry when the same objectionable use yields such different results. On the one hand, and as the cases suggest, one could argue that this is justified because the alternative of extending the property right monopoly past the point of sale, and of monitoring and prohibiting post-sale uses, is so contrary to other strong public policies (e.g., against restraints on alienation) and so economically disruptive as to be untenable. On the other hand, one could maintain that if a sound case can be made against an initial unconsented use on moral grounds, that case is equally sound where a

365. *See id.* at 1449.

366. *See id.* As mentioned *supra* note 20, the trading card market was a \$2 billion industry by 1992. *See* *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 868 F. Supp. 1266, 1274 n.6 (N.D. Okla. 1994), *aff'd*, 95 F.3d 959 (10th Cir. 1996). The unworkability of post-sale liability also appears in the *A.R.T.* cases mentioned *supra* note 361. The monetary relief sought by the plaintiff can be analogized to an artist's *droit de suite*, or right to continue sharing in a percentage of the sales price of a work each time it is resold—a concept that has enjoyed very limited success in the United States.

367. As stated earlier, *supra* text accompanying notes 219-22, it is questionable whether it would be, as such cards could likely be defended as a parody of John Wayne's exaggerated masculinity and the idealization of such masculinity in American culture.

resale is involved. To deny this is to say that the licensor has waived the right to object to undesirable uses of persona simply by having agreed to desirable ones. One way of dealing with this issue would be to permit unlimited re-use of a licensed image as long as it is not materially altered; that is, one would apply the first sale doctrine to such uses, but treat uses involving material alteration of licensed images as though they were initial (unconsented) uses.³⁶⁸ To a limited extent, therefore, first sale appears to be of some use in preventing abuses under an expansive right of publicity.

To recapitulate—having traveled a fair distance since suggesting a right of publicity grounded in human freedom—the Kantian right is expansive in the sense that it theoretically accommodates both economic and moral objections to the unauthorized commercial exploitation of an individual's identity. At the same time, however, it is constrained in practice by the need to balance it against strong competing public needs and First Amendment concerns. The balance between this property right and speech interests is conditioned by the type of speech at issue and the availability of other means of delivering its message; both First Amendment and intellectual property doctrine suggest the latter consideration. Other intellectual property limiting factors, such as fair use and first sale doctrine, are also useful in fashioning controls capable of minimizing any dangers to societal self-expression posed by an expansive right of publicity. Thus, although we begin with a right that is somewhat broader and deeper than its Lockean cousin, it is, in the end, a right that is not only theoretically defensible, but also capable of being safely legislated.

368. This would utilize the distinction between the John Wayne case and *Allison*, in that no alteration of image occurred in *Allison*. See 136 F.3d at 1444. In *Allison*, there is continuity between the licensed image and the challenged use. In the John Wayne case, the initial use is authorized and the post-sale use is different and objectionable. To treat altered unconsented uses as though they are first uses, however (i.e., to refrain from applying first sale doctrine to them) is not to say that they will inevitably be enjoined. In view of the finality of injunctive relief and its impact on speech, and for the public policy reasons mentioned above, the objectionable use might still be permitted. The “material alteration” standard here could be borrowed from existing trademark doctrine on that subject, which focuses on the overall commercial impression of a mark. See Paul C. Van Slyke & Gregory M. Luck, *Modernization of a Trademark: Updating Techniques, Amending the Registration, and Designing for the Future*, 78 TRADEMARK REP. 615, 622 (1988) (noting that to avoid material alteration, a modernized mark “must contain . . . the ‘essence’ of the original mark and . . . must create the impression of being essentially the same mark”).

VI. LEGISLATING A VIABLE FEDERAL RIGHT OF PUBLICITY

There appears to be a general consensus that a uniform right of publicity is sorely needed.³⁶⁹ Given the economic value of publicity rights, it is obviously detrimental to their commercial exploitation to have to grapple with fifty different regimes, a situation that greatly increases inefficiencies and transaction costs.³⁷⁰ It also appears that most advocates of uniformity believe that preemptive federal law, rather than a uniform code or model state statutes, would more readily achieve that goal.³⁷¹ Aside from preemption, other issues identified as requiring consideration include transferability, descendibility, conditioning of the right on commercial exploitation within a person's lifetime, federal registration,³⁷² and fair use.

A. *The INTA Draft*

Although the International Trademark Association ("INTA") prepared draft publicity rights legislation in 1996,³⁷³ the organization's

369. See *supra* note 21 for a discussion of the May 1998 testimony of INTA President Frederick Mostert on the need for a federal right of publicity. Mr. Mostert reported that only a few months after INTA adopted its policy, the organization was in contact with the Motion Pictures Association of America ("MPAA"), the ABA's Intellectual Property Law Section, and the Screen Actor's Guild ("SAG"). As reported in *Wired News*, SAG president Richard Masur stated that "[f]or the first time ever, the US government, the major producers, and the performers [have] a unified position, that performers must have the right to protect their images against misappropriation by unauthorized third parties" Kuchinskas, *supra* note 21. SAG had participated in a meeting at the World Intellectual Property Organization ("WIPO") in Geneva. See *id.*; see also *supra* note 100.

370. On this point, see Hetherington, *supra* note 328, at 26-27.

371. This consensus was expressed at a symposium on the right of publicity held at Cardozo Law School on March 31, 1997. See Symposium, *Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress*, 16 CARDOZO ARTS & ENT. L.J. 209 (1998).

372. Transferability and descendibility flow directly from the property-right side of the right of publicity. Conditioning the right on commercial exploitation is contradicted by the right's genesis in autonomy, which dictates that the right exists irrespective of actual exploitation. Thus, the federal right should be transferable and descendible, but not conditioned on prior exploitation. As for federal registration of publicity rights, if such rights are provided for by federal law, a federal register is appropriate. Should such a register be established, however, it is important that it be able to function as a notice system arrayed by rights holder as well as (or instead of) a "tract" system arrayed by property (i.e., persona), which is the approach originally taken by the Copyright Office and Patent and Trademark Office records. As commercial interests, "persona" rights, see discussion *infra* Parts VI.A.2, VI.B, may serve as assets and collateral in secured transactions. It would be extremely helpful if the Federal Register were to function as do UCC filings, permitting notice of a debtor's outstanding security interests or assignments to be easily provided to prospective creditors. See generally Alice Haemmerli, *Insecurity Interests: Where Intellectual Property and Commercial Law Collide*, 96 COLUM. L. REV. 1645 (1996).

373. See INTERNATIONAL TRADEMARK ASSOCIATION DRAFT PUBLICITY RIGHTS

board of directors did not approve it, and the draft was withdrawn pending further research. The draft does not, therefore, represent INTA's official policy on the right of publicity. Nevertheless, it serves as a helpful beginning and basis for discussion.

Not surprisingly, the draft needs improvement before it can adequately protect the right of publicity outlined in this Article. It does not specify that the right of publicity may be invoked on noneconomic as well as economic grounds, nor does it recognize the performance-value publicity right. This is an understandable, if critical, shortcoming in a text with a trademark, and hence an advertising/marketing, focus. For the most part, however, the legislation of a federal right of publicity within the trademark context is feasible. While crucial differences exist between trademark and publicity rights doctrine,³⁷⁴ other doctrines differing from classical trademark law, such as dilution,³⁷⁵ have been legislated as part of the federal trademark statute. Assuming that certain Commerce Clause issues³⁷⁶ can be successfully addressed, it is practicable to enact a federal right of publicity as part of the Lanham Act.³⁷⁷

1. *The INTA Text.* The operative language developed by INTA in 1996 provides for an exclusive right to commercial use of one's "persona"³⁷⁸ "in commerce."³⁷⁹ Persona rights under this draft

LEGISLATION (Proposal to Amend the Trademark (Lanham) Act of 1946, Sept. 30, 1996) [hereinafter INTA DRAFT] (on file with the *Duke Law Journal*).

374. For example, the necessity of public confusion, or a likelihood thereof, in the trademarks context and its irrelevance to publicity rights, or the nature of the right of publicity as free-standing property, unlike a trademark.

375. See *supra* text accompanying notes 55-57; confusion is not necessary to a dilution claim.

376. For example, the meaning of "use in commerce." See *infra* text accompanying notes 397-404. The Lanham Act is grounded in the Commerce Clause of the Constitution. See U.S. CONST. art I, § 8 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]").

377. My proposed amendments to the Lanham Act enacting such a federal right, adapted from the INTA draft as discussed *infra* Part VI.A.2, B-C, are set forth in full in the Appendix.

378. The INTA draft reads:

Section 45. Persona. The term "persona" means the following or an imitation thereof: the legal name of any natural person or any other name by which a natural person is known to any material segment of the general public; signature; voice; image; distinctive characteristics or indicia by which a natural person is known to any material segment of the general public; or a character portrayed by the natural person on stage, in film or television or in live performances or other entertainment media, provided that the character has been created by the natural person and has become so associated with the natural person as to be indistinguishable from the natural person's public image.

INTA DRAFT, *supra* note 373, § 45. This last clause is consistent with case law holding that

legislation are freely transferable³⁸⁰ and may be licensed in whole or in part; they are also descendible.³⁸¹ Unlike trademark rights, persona rights may be assigned without any accompanying transfer of goodwill.³⁸² Finally, there is no mention in the INTA draft of any requirement that the persona rights must have been commercially exploited during the subject's lifetime before they can be asserted later on. This is consonant (as is their transferability and descendibil-

publicity rights may be claimed in a character to the extent that the character is indistinguishable from the person asserting the right. *See, e.g.,* *McFarland v. Miller*, 14 F.3d 912, 920 (3d Cir. 1994).

INTA's proposed revision of § 45 then defines "image" as follows:

The term "image" includes, but is not limited to, a picture, portrait, likeness, photograph or photographic reproduction, still or moving, or any videotape or live television transmission or audio/visual representation or any analog or digital representation or transmission or any other method of creating or reproducing a likeness, now known or hereafter created, such that the natural person is readily identifiable.

INTA DRAFT, *supra* note 373, § 45.

379. Under the INTA draft, a new § 52 of the Lanham Act would provide:

(a) Any person who makes a commercial use in commerce of a persona identifying a particular living or deceased natural person, in any manner, on or in connection with goods or services, or for purposes of commercial advertising or promotion of goods or services, without the prior consent of the natural person, or the persons specified in section 54 [transferees and devisees], shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Id. § 52.

380. *See id.* § 53.

381. *See id.* Some commentators who endorse descendibility recommend borrowing from copyright law and using a "life plus fifty years" standard as the term for the right of publicity. *See, e.g.,* Felcher & Rubin, *Descendibility*, *supra* note 67, at 1131 (citing *Lugosi v. Universal Pictures*, 603 P.2d 425, 446-47 (Cal. 1979) (Bird, C.J., dissenting)). It is appropriate to establish a period after a person's death during which his publicity rights continue to inure to heirs, transferees, or devisees. After a certain amount of time, however, it can be assumed that sensitivity to morally objectionable uses will atrophy; the iconic aspect of the persona will come to predominate over the truly personal. At that point, for the persona to be dedicated to the public domain is appropriate from a moral, as well as an economic, standpoint. *See* Kwall, *Right of Publicity*, *supra* note 6, at 84. The copyright term has recently been extended from "life plus fifty years" to "life plus seventy years." *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827 (1998) (codified in scattered subsections of 17 U.S.C. §§ 301-04). The California Civil Code also has recently been amended to provide for a term of "life plus seventy years" for deceased personalities' right of publicity. *See* CAL. CIV. CODE § 3344.1 (West, WESTLAW through 1999 portion of 1999-2000 Reg. Sess.).

382. *See* INTA DRAFT, *supra* note 373, § 53. Trademark law prohibits the transfer of trademarks without their accompanying goodwill.

[T]rademarks are not separate property rights. They are integral and inseparable elements of the goodwill of the business or services to which they pertain. . . . [A] mark may be transferred only in connection with the transfer of the goodwill of which it is a part. A naked transfer of the mark alone—known as a transfer in gross—is invalid.

Visa, U.S.A., Inc. v. Birmingham Trust Nat'l Bank, 696 F.2d 1371, 1375 (Fed. Cir. 1982), *cert. denied sub nom. South Trust Bank v. Visa, U.S.A., Inc.*, 464 U.S. 826 (1983).

ity) with the nature of the right of publicity as a property right grounded in personal autonomy.

2. *Comments on the INTA Text*

a. Persona, indicia, identifiability. The term “persona” has long been used to describe the facet of personality that is presented to the outside world. It is a useful and desirable term because it evokes human personality and, in turn, human freedom. As discussed in Part II, this Article proposes the Kantian person (i.e., the autonomous human being capable of rationality and morality) as the source of a moral and economic property right in objective indicia of personality. The term “persona” captures the set of such indicia quite nicely. In addition, “persona” avoids whatever confusion may now surround the term “identity” as a result of decisions in the Ninth Circuit.³⁸³

The inclusion of “imitations” of likeness and other indicia of persona in the INTA language is sufficiently expansive to embrace look-alikes, sound-alikes, etc. It therefore covers the use of objectified identity at one remove from a direct reproduction of a person’s attributes,³⁸⁴ but stops short of the “trappings”³⁸⁵ that have caused problems in the case law so far. However, the INTA language also refers to “distinctive characteristics or indicia by which a natural person is known to any material segment of the general public” as identifying factors.³⁸⁶ Here, the use of “indicia” raises the problem of trappings again. It is one thing if trappings contribute to an identity along with personal attributes (e.g., the face, the posture). It is another if the indicia alone are in question. The use of isolated indicia raises the Vanna White problem rather starkly: if such indicia suffice, then a prop or set not integrally related to a person’s identity could provide a context that makes the person recognizable even though no other aspect of her identity has been appropriated. This casts the net of identity too broadly. The phrase should therefore read “distinctive characteristics *and personal* indicia.” As for the phrase “by which a natural person is known,” it should be replaced by the words “by

383. See *supra* note 42 and accompanying text (discussing various cases), Part V.A (same).

384. See *supra* note 315 (discussing *Loftus*) and text accompanying notes 314-16.

385. See *supra* text accompanying notes 317-25.

386. INTA DRAFT, *supra* note 373, § 45, reproduced *supra* note 378.

which a natural person is *immediately identifiable*” in order to reflect the immediacy test of identity discussed earlier.³⁸⁷

b. Commercial use in commerce. The INTA draft’s section 52 provides for liability with regard to “[a]ny person who makes a commercial use in commerce of a persona . . . [without consent] on or in connection with goods or services, or for purposes of commercial advertising or promotion”³⁸⁸ Looking first at the phrase “goods and services,” we have seen that it is a concept that includes expressive works.³⁸⁹ There should, therefore, be no per se exemption in the statute for expressive works such as books or films.³⁹⁰ Another relatively simple amendment could separate the concepts of general commercial use and commercial advertising.³⁹¹

Perhaps more difficult is the question of “commercial use.” As discussed at some length earlier, the difficulties of predefining “commercial use”³⁹² necessitate deciding on a case-by-case basis whether a use is “commercial”; commercial use may occur in expres-

387. See *supra* text accompanying notes 319-25. As revised, the proposed amendment to § 45 would read as follows (changes underscored):

Section 45. Persona. The term “persona” means the following or an imitation thereof: the legal name of any natural person or any other name by which a natural person is known to any material segment of the general public; signature; voice; image; distinctive characteristics and personal indicia by which a natural person is immediately identifiable to any material segment of the general public; or a character portrayed by the natural person on stage, in film or television or in live performances or other entertainment media, provided that the character has been created by the natural person and has become so associated with the natural person as to be indistinguishable from the natural person’s public image.

The term “image” includes, but is not limited to, a picture, portrait, likeness, photograph or photographic reproduction, still or moving, or any videotape or live television transmission or audio/visual representation or any analog or digital representation or transmission or any other method of creating or reproducing a likeness, now known or hereafter created, such that the natural person is immediately identifiable.

388. INTA DRAFT, *supra* note 373, § 52(a), reproduced *supra* note 379.

389. See *Rogers v. Grimaldi*, 875 F.2d 994, 997 (2d Cir. 1989).

390. Such an exemption would cause unacceptable gaps in coverage; for example, the statute could not cover the hypothetical problem with respect to digital clones. It is preferable to include expressive works as “goods,” while providing them with full First Amendment and other protections.

391. The amendment would add “(i)” before the words “on or in connection with goods or services” and “(ii)” before “for purposes of commercial advertising or promotion.” Uses falling within clause (i) would receive full First Amendment protection, whereas those in clause (ii) would be considered commercial speech and receive less First Amendment protection. See *infra* note 405 (proposing new language on this dual right).

392. See *supra* Parts I.A., IV.A.1, notes 24, 46.

sive contexts,³⁹³ and expressive use may occur in the arena of the traditionally commercial.³⁹⁴ It remains only to add that the phrase “commercially exploitative use” may be superior to “commercial use,” because (1) it reflects the traditional definition of the right of publicity as relating to the commercial exploitation of identity, and (2) it connotes the idea that the exploitation of the persona is essential to the sale of the goods or services in question. This means that incidental or de minimis uses would not be captured, which would be a good outcome. Making the use of persona integral to the sale of the goods or services at issue as a criterion of commercial use is similar but not identical to the idea proposed by Professor Hetherington that there be a “right of direct commercial exploitation of identity,”³⁹⁵ reserved to the individual, and that restrictions should apply only to uses by others that are direct in nature and commercial in motivation, and for which the user would ordinarily be expected to pay in the open market. There are problems, however, in inquiring into motivation, and this test, like others, inevitably reduces to a fact-by-fact determination rather than a definitional exercise.³⁹⁶ Although it may be objected that a “commercially exploitative” standard is subjective, it is not really more so than the first fair use factor, commercial or non-commercial purpose of a use; and the breadth of a “commercially exploitative” standard in the statute would be tempered by the parallel inclusion of fair use and other protections.

393. On this score, see Farrington, *supra* note 238, at 782-83 (giving examples of posters of celebrity athletes and wrestlers produced by the news media).

394. One example would be a parodic message on a coffee mug.

395. Hetherington, *supra* note 328, at 30.

396. In Professor Hetherington's case, the discussion of “direct” and “commercial” strays from his stated purpose of providing a sharp bright line for the guidance of attorneys and clients. *See id.* at 30-31. For example, where the primary motivation is to entertain, the use would be permitted. *See id.* at 32. Later, Hetherington classifies uses as either commercial on the one hand or entertainment/informative on the other (reminiscent of Felcher and Rubin's scheme, *see Felcher & Rubin, Privacy, Publicity, supra* note 47, at 1596), and finds that within the entertainment category there are mixed uses that defy clear and simple categorization. *See Hetherington, supra* note 328, at 38-40. Thus, “dubious entertainment” of the sort at issue in *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981), and “product hybrids” that include books and movies, are admittedly not susceptible of bright-line categorization for publicity rights purposes. Hetherington, *supra* note 328, at 38-40. In fact, “in all such hybrid cases it would be up to the finder of fact to label the usage predominantly direct and commercial, rather than indirect and incidental.” *Id.* at 40. If so, it is difficult to see how this is much sharper and brighter than fair use analysis, which is rejected by Professor Hetherington as too clumsy and unpredictable for the fast-paced entertainment world. *See id.* at 49. In any event, the notion of directness in Hetherington's discussion is akin to what is proposed here, i.e., that the use of the persona be integral to the sale of goods or services in question.

We come now to the phrase “use in commerce,” which is a term of art in the trademark context. Proposed section 52 raises the question of how to address publicity right violations that occur within a state rather than on an interstate basis. Because the Lanham Act and federal regulation of trademarks are grounded in Congress’s Commerce Clause authority,³⁹⁷ the reference to “use in commerce” in section 52 (as in other Lanham Act provisions) is a reference to “commerce which may lawfully be regulated by Congress.”³⁹⁸ An unauthorized exploitation of identity that occurs solely in an intrastate setting might therefore appear to escape the strictures of the federal right of publicity.

Federal trademark law, however, has a history of dealing with acts of infringement that appear to be solely intrastate, but which may nevertheless be considered as occurring “in commerce”: “The general rule or proposition that Congress, by virtue of its power to regulate commerce among the several states, may regulate intrastate activities which exert a substantial effect on interstate commerce, has been widely applied in cases under the Lanham Trade-Mark Act”³⁹⁹

Generally, such “substantial effects” have been found where intrastate acts have adversely affected the plaintiff’s reputation on an interstate basis.⁴⁰⁰ The concern is that such use could “ultimately undermine the reputation” and goodwill that a plaintiff has developed across state lines.⁴⁰¹ Therefore, a federal right of publicity housed in the Lanham Act could reach acts that occur on an intrastate basis but that have substantial effects on plaintiffs who have developed interstate goodwill.

397. See *supra* note 376.

398. 15 U.S.C. § 1127 (1994). Section 1127, which defines “commerce,” is § 45 of the Lanham Act.

399. Joseph E. Edwards, Annotation, *What Constitutes “In Commerce” Within Meaning of § 32(1)(a) of Lanham Trade-Mark Act (15 USCS § 1114(1)) Giving Right of Action for Infringement of Trademark “In Commerce”*, 15 A.L.R. FED. 368, § 2a, at 372 (1973) [hereinafter Edwards, *What Constitutes “In Commerce”*].

400. See, e.g., *Coca Cola Co. v. Stewart*, 621 F.2d 287, 290 (8th Cir. 1980); *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117, 120 (9th Cir. 1968); *Golden Door, Inc. v. Odisho*, 437 F. Supp. 956, 962 (N.D. Cal. 1977), *aff’d*, 646 F.2d 347 (9th Cir. 1980); *Tiffany & Co. v. Boston Club, Inc.*, 231 F. Supp. 836, 841 (D. Mass. 1964); see also Edwards, *What Constitutes “In Commerce”*, *supra* note 399, § 9, at 387.

401. *World Carpets, Inc. v. Dick Littrell’s New World Carpets*, 438 F.2d 482, 488 (5th Cir. 1971).

This solves the problem to some extent, at least for celebrity plaintiffs, who, virtually by definition, will be able to point to such goodwill. It would leave the non-celebrity publicity rights plaintiff without a federal remedy, however, to the extent that his reputation is exclusively local. This difficulty could be largely addressed by making it easier to assert the existence of interstate goodwill. For example, if interstate advertising (traditional or Internet) were deemed to create interstate goodwill, it would broaden the potential scope of the federal right, because it would provide coverage even for individuals who do not actually operate at the interstate level as long as they advertise across state lines. To deem advertising a means of creating goodwill would require a departure from customary trademark standards; generally, in order to accrue goodwill in a mark, actual interstate use is required. Although the nature of that use does not necessitate physical operation across state lines,⁴⁰² mere advertising does not ordinarily suffice for such purposes.⁴⁰³ Because the nature of publicity rights means that advertisements themselves may constitute a use of persona, however, a different rule is justified in this case. Thus, the legislation should specify that, for purposes of “use in commerce,” a defendant’s intrastate use may create liability if it has effects on a plaintiff’s interstate goodwill, and that a plaintiff may create such goodwill by interstate advertising of her persona.⁴⁰⁴

402. Prior to 1964, in order to assert service-mark rights that could be registered under the Lanham Act, it was necessary actually to operate the service across state lines. See 3 MCCARTHY, TRADEMARKS, *supra* note 279, § 19:104, at 19-188 to 19-190. In 1964, the Civil Rights Act extended the reach of Congress’s commerce power to establishments that might be operating within a single state but that were deemed to affect interstate commerce because they served interstate travelers. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 241, 243 (codified at 42 U.S.C. § 2000a (1994)); 3 MCCARTHY, TRADEMARKS, *supra* note 279, § 19:105, at 19-190 to 19-191. The Supreme Court upheld the constitutionality of the Civil Rights Act, and this concept of interstate commerce, in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) and *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964). (In *Katzenbach*, there was no claim that interstate customers frequented the restaurant. Rather, the restaurant was found to have used food that had moved in interstate commerce. See *Katzenbach*, 379 U.S. at 298.) Concurrently with these decisions, this concept of “in commerce” was similarly applied to services under § 45 of the Lanham Act. See, e.g., *In re Federated Dep’t Stores, Inc.*, 137 U.S.P.Q. (BNA) 670, 670 (T.T.A.B. 1963).

403. See, e.g., *Linville v. Rivard*, 41 U.S.P.Q.2d (BNA) 1731, 1736 (T.T.A.B. 1997) (holding that a registrant’s advertising of services in the United States was insufficient to constitute use in commerce), *aff’d*, 133 F.3d 1446 (Fed. Cir. 1998).

404. “Use in commerce” has been liberally construed recently in a number of cases involving individuals who have registered famous trademarks as Internet domain names with the aim of ransoming the registration to the trademark’s owner. See, e.g., *Intermatic, Inc. v. Toeppen*, 947 F. Supp. 1227, 1239 (N.D. Ill. 1996). Some courts have deemed such “cybersquatters” to be using the mark in commerce by virtue of their use of the Internet in the attempted arbitrage of

Finally, to ensure that the dual nature of the right of publicity is recognized, the legislative language should contain a reference to that dual nature. Thus, the legislation should specifically state that a right of publicity claim may be brought on either moral or economic grounds, or both.⁴⁰⁵

B. Adding Performance Value, Fair Use, First Amendment, and First Sale

As mentioned, the INTA draft's most glaring omission is its failure to address performance-value publicity rights. Although this is understandable, the omission must be rectified if the draft legislation is fully to address its subject.⁴⁰⁶ In addition, it would be advisable to incorporate into the legislative language appropriate protections to be employed in the event of a conflict between identity-appropriating expression and individuals' persona rights. With these additions, the legislative text would reflect this Article's approach to the protection of the performance, as well as the associative, value of the right of publicity. While expanding the scope of the right to embrace both moral and economic claims and making it applicable to both performance and associative value, however, the proposed legislation

the domain name. *See, e.g., id.*

405. Subparagraph (a) of INTA's proposed § 52 (including the changes already suggested) would therefore read as follows (changes and additions underscored):

(a) Any person who makes a commercially exploitative use in commerce of a persona identifying a particular living or deceased natural person, in any manner, (i) on or in connection with goods and services, or (ii) for purposes of commercial advertising or promotion of goods or services, without the prior consent of the natural person, or the persons specified in section 54 [transferees and devisees], shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

A civil claim under this section may be based on economic damage or non-economic injury, or both. An intrastate use described in subparagraph (a) of this section shall constitute grounds for liability if it has substantial effects on the interstate goodwill of the person alleging damage. Any person who advertises his or her persona on an interstate basis, including on the Internet, shall be deemed to have acquired interstate goodwill in that persona. The fact that persona rights have not been exploited during the lifetime of the natural person who is the subject of such rights shall not affect liability under this section.

406. This additional provision (which could be codified as subparagraph (b) of § 52) would read:

(b) Any person who makes a performance use of a persona identifying a particular living or deceased natural person, in any manner, without the prior written consent of the natural person, or the persons specified in section 54, shall be liable in a civil action by the natural person or the persons specified in section 54. A "performance use" is defined as (i) a reproduction of a performance by the natural person that has not been fixed with his or her consent; or (ii) the use of a persona in performance in a play, film, video, or any other performance media.

would be carefully constrained. First, a fair use limitation, drawn from copyright doctrine, would ensure that where a claim can be made that an unauthorized use of persona is a form of social commentary, criticism, or parody, it would be permissible. Even if a use did not qualify as a fair use under this statute, it might still be immunized by a First Amendment privilege, whether in the context of commercial speech or the general protection of expressive works.⁴⁰⁷ Uses made “for purposes of commercial advertising or promotion of goods and services” would presumptively constitute commercial speech and would be treated as such. As we have seen, however, it is entirely possible that even advertisements may lay claim to full First Amendment protection;⁴⁰⁸ hence, the presumption would be rebuttable. Finally, the right of publicity would be limited by a variant of the first sale doctrine: once a use of persona has been authorized and used on products or goods, the owner’s right to compensation from, or ability to curtail, further use would be exhausted. Such exhaustion, however, would apply only to re-use made without material alteration from the original, authorized use.⁴⁰⁹ Furthermore, the re-use of persona on resold goods would also be privileged under fair use and the First Amendment.⁴¹⁰

407. Thus, new subparagraphs (c) and (d) of § 52 would read as follows:

(c) Notwithstanding the provisions of subparagraphs (a) and (b) of this section, the fair use of a persona for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of persona rights. In determining whether the use made of a persona in any particular case is a fair use, the factors to be considered shall include:

- (1) the purpose and character of the use, including whether the use is of a commercially exploitative nature and whether it is superseding or transformative;
- (2) the nature of the persona rights violation, i.e., whether of persona rights under subparagraph (a) or (b) of this paragraph;
- (3) the amount and substantiality of the appropriation of persona; and
- (4) the effect of the use upon the potential market for or value of the persona.

(d) In the event that a use of persona is found to be not a fair use under subparagraph (c) of this section, and notwithstanding the provisions of subparagraphs (a) and (b) of this section, the use of persona may be privileged under the First Amendment, provided that a use of persona under subparagraph (a) (ii) of this section shall be presumptively classified as commercial speech for such purposes. In determining whether the use of a persona in a particular case is privileged under this subparagraph, the factors to be considered shall include the availability to the user of alternative means of expression and the significance of the speech in question to First Amendment goals.

408. See *supra* notes 256, 296.

409. See *supra* text accompanying notes 367-68.

410. This provision would read as follows:

(e) Notwithstanding the provisions of subparagraphs (a) and (b) of this section, once the owner of a persona has authorized and consented to its use, the purchaser or

C. Federal Preemption

Finally, a codified federal right of publicity should provide for preemptive effect, curing the problem of extreme variegation in state law, while leaving room for state law coverage of exclusively intrastate uses of persona (with purely intrastate effects) and claims that are not equivalent to the right of publicity (e.g., false-light privacy or defamation claims).⁴¹¹

The legislative language proposed here (and set out in full in the Appendix) distills this Article's discussion of the right of publicity as an autonomy-based right that can be carefully balanced by controls built into the statute itself. Because the proposed legislation institutes a uniform approach to the right of publicity, it has the potential to increase the right's efficiency as economic property, while simultaneously rationalizing the extreme doctrinal confusion that now characterizes the field. At the same time, as a property right based on human autonomy, the reconceived right of publicity permits individuals to assert some control over commercially exploitative uses of their identity for personal, and not merely financial, reasons.

CONCLUSION

Critics of the right of publicity range from those who focus on the dangers of judicial excess to those who assail the legitimacy of the right itself. What many of them have in common is a conviction that the right of publicity poses an unacceptable threat to freedom of ex-

transferee of goods or products embodying the persona shall not be liable for reuse or resale of such goods or products, provided that the persona is used without material alteration from the original authorized use. Resale and reuse of goods embodying persona shall enjoy the same privileges under subparagraphs (c) and (d) of this section as shall uses described in subparagraph (a).

411. The preemption provision of my proposed § 52 would read as follows:

(f) On or after [the effective date of the amendments], all legal and equitable rights that are equivalent to the right of persona as specified by this section 52 shall be governed exclusively by this title. Thereafter, no person or entity shall be entitled to any such right or equivalent right in persona under the common law or statutes of any State. Nothing in this title, however, shall annul or limit any rights or remedies under the common law or statute of any State with respect to:

- (1) rights that do not come within the subject matter of persona rights as specified by this section 52, including but not limited to uses of persona that are exclusively intrastate in nature and that have exclusively intrastate effects on persona or goodwill therein; and
- (2) privacy rights that are not equivalent to the right of persona described herein.

Nothing in this section shall annul or limit any rights or remedies under any other section of this title or under any other Federal statute.

pression, and therefore a concomitantly unacceptable risk of cultural impoverishment. In addition, they tend to denigrate the right as a purely pecuniary one that cannot compete with the values embodied in our ideals of free speech.

As we have seen, however, a Kantian right of publicity can be more expansively conceptualized as a property right grounded in human freedom, yet also contained in a way that minimizes such risks. It is true that enforcing publicity rights represents a value judgment that objectifications of personal identity constitute private property. It is also true that viewing the right of publicity as one proceeding from personal autonomy implies that a commercial use of identity may be objected to on moral, as well as economic, grounds. To the extent that there are fewer restraints on such claims than are imposed on other moral complaints (e.g., the actual malice standard applied in the defamation, false-light privacy, and emotional distress contexts), this aspect of the right could perhaps be viewed as threatening. It is important to recall, however, that the fact of a right's existence does not necessarily translate into wanton or overbroad enforcement. Where other parties' or society's rights of self-expression are truly at stake, the federal right of publicity outlined here would have to clear some very high hurdles. The availability of a fair use privilege, the inclusion of that privilege and first sale limitations in the right itself, the extension of full First Amendment protection to all uses exclusive of purely transactional advertising, and the explicit reference in the right's legislated form to First Amendment goals would provide the broadest possible safeguards for those cases where the individual's right of publicity clashes with others' expressive entitlements.

The ideas and proposals voiced in this Article may be unpopular; to those with an aversion to "propertization," the notion of ownership of identity, or of objectifications of identity, may well be repugnant. I also freely concede that a belief in Enlightenment values, individual autonomy, and the institution of private property may be characterized as ideology by those who reject them. Nevertheless, those values underlie our culture as well as our Constitution; and they should be recognized as being at stake in the effort to legislate a philosophically justified, as well as commercially workable, right of publicity.

APPENDIX

The author's proposed language adding a preemptive federal right of publicity to the Trademark (Lanham) Act of 1946,⁴¹² discussed in Part VI, is set forth in full below. As noted in Part VI.A, much of the language is attributable to the efforts of the INTA—in particular, sections 45, 52(a), 53, and 54 (the last two of which are virtually unchanged from the INTA draft).⁴¹³

Section 45. Construction and Definitions.

* * *

Persona. The term “persona” means the following or an imitation thereof: the legal name of any natural person or any other name by which a natural person is known to any material segment of the general public; signature; voice; image; distinctive characteristics and personal indicia by which a natural person is immediately identifiable to any material segment of the general public; or a character portrayed by the natural person on stage, in film or television or in live performances or other entertainment media, provided that the character has been created by the natural person and has become so associated with the natural person as to be indistinguishable from the natural person's public image.

The term “image” includes, but is not limited to, a picture, portrait, likeness, photograph or photographic reproduction, still or moving, or any videotape or live television transmission or audio/visual representation or any analog or digital representation or transmission or any other method of creating or reproducing a likeness, now known or hereafter created, such that the natural person is immediately identifiable.

Section 52. Persona Rights.

(a) Any person who makes a commercially exploitative use in commerce of a persona identifying a particular living or deceased natural

412. 15 U.S.C. §§ 1051-1127 (1994). The proposal is in the form of an amendment to section 45 of the Lanham Act (15 U.S.C. § 1127) and new sections 52-54 of the Lanham Act (which the author proposes to be codified at 15 U.S.C. §§ 1128-30).

413. See INTA DRAFT, *supra* note 373.

person, in any manner, (i) on or in connection with goods and services, or (ii) for purposes of commercial advertising or promotion of goods or services, without the prior consent of the natural person, or the persons specified in section 54 [transferees and devisees], shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

A civil claim under this section may be based on economic damage or noneconomic injury, or both. An intrastate use described in subparagraph (a) of this section shall constitute grounds for liability if it has substantial effects on the interstate goodwill of the person alleging damage. Any person who advertises his or her persona on an interstate basis, including on the Internet, shall be deemed to have acquired interstate goodwill in that persona. The fact that persona rights have not been exploited during the lifetime of the natural person who is the subject of such rights shall not affect liability under this section.

(b) Any person who makes a performance use of a persona identifying a particular living or deceased natural person, in any manner, without the prior written consent of the natural person, or the persons specified in section 54, shall be liable in a civil action by the natural person or the persons specified in section 54. A “performance use” is defined as (i) a reproduction of a performance by the natural person that has not been fixed with his or her consent; or (ii) the use of a persona in performance in a play, film, video, or any other performance media.

(c) Notwithstanding the provisions of subparagraphs (a) and (b) of this section, the fair use of a persona for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of persona rights. In determining whether the use made of a persona in any particular case is a fair use, the factors to be considered shall include:

- (1) the purpose and character of the use, including whether the use is of a commercially exploitative nature and whether it is superseding or transformative;
- (2) the nature of the persona rights violation, i.e., whether of persona rights under subparagraph (a) or (b) of this paragraph;
- (3) the amount and substantiality of the appropriation of persona; and

(4) the effect of the use upon the potential market for or value of the persona.

(d) In the event that a use of persona is found to be not a fair use under subparagraph (c) of this section, and notwithstanding the provisions of subparagraphs (a) and (b) of this section, the use of persona may be privileged under the First Amendment, provided that a use of persona under subparagraph (a) (ii) of this section shall be presumptively classified as commercial speech for such purposes. In determining whether the use of a persona in a particular case is privileged under this subparagraph, the factors to be considered shall include the availability to the user of alternative means of expression and the significance of the speech in question to First Amendment goals.

(e) Notwithstanding the provisions of subparagraphs (a) and (b) of this section, once the owner of a persona has authorized and consented to its use, the purchaser or transferee of goods or products embodying the persona shall not be liable for reuse or resale of such goods or products, provided that the persona is used without material alteration from the original authorized use. Resale and reuse of goods embodying persona shall enjoy the same privileges under subparagraphs (c) and (d) of this section as shall uses described in subparagraph (a).

(f) On or after [the effective date of the amendments], all legal and equitable rights that are equivalent to the right of persona as specified by this section 52 shall be governed exclusively by this title. Thereafter, no person or entity shall be entitled to any such right or equivalent right in persona under the common law or statutes of any State. Nothing in this title, however, shall annul or limit any rights or remedies under the common law or statute of any State with respect to:

(1) rights that do not come within the subject matter of persona rights as specified by this section 52, including but not limited to uses of persona that are exclusively intrastate in nature and that have exclusively intrastate effects on persona or goodwill therein; and

(2) privacy rights that are not equivalent to the right of persona described herein.

Nothing in this section shall annul or limit any rights or remedies under any other section of this title or under any other Federal statute.

Section 53. Transferability and Descendibility of Persona Rights.

(a) The persona rights provided for herein shall be freely transferable in their entirety, and licensable in whole or in part, by contract or other inter vivos transfers, or by will or under the applicable laws of inheritance of the domicile of the deceased or the transferee of the deceased. In any assignment of persona rights, it shall not be necessary to include the goodwill connected with the use of and symbolized by the persona rights.

(b) Transfers of the ownership of persona rights, other than by operation of law, or grants of exclusive licenses of persona rights are not valid unless an instrument of conveyance, or a note or memorandum of the transfer or exclusive license, is in writing and signed by the owner of the rights conveyed or licensed or such owner's duly authorized agent.

(c) A separate record of assignments of, exclusive licenses in, and security interests in registered persona rights submitted for recording hereunder shall be maintained by the Patent and Trademark Office and arranged both by persona and by owner, assignor, licensor, or debtor.

Section 54. Consent.

The consent required by section 52 shall be exercisable by the living natural person or the person or persons to whom such right of consent has been transferred or has vested in accordance with section 53. If such person is a minor or other natural person who is legally incapable of granting consent, then such person's parent or legal guardian may grant such consent.