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Private Ownership of Public Image: Popular Culture and Publicity Rights

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Michael Madow

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Private Ownership of Public Image: Popular Culture and Publicity Rights

Michael Madow†

The "right of publicity" gives famous people an assignable and descendible right in the commercial value of their names, likenesses, and other identifying characteristics. In this Article, Professor Madow challenges the standard arguments that are made in favor of this right, and suggests some significant disadvantages of existing legal doctrine. Writing from a "Cultural Studies" perspective, Professor Madow argues that private, centralized ownership and control of celebrity images poses a more serious threat to cultural pluralism and self-determination than is sometimes realized. The author traces the origins and development of the right of publicity, suggesting that its emergence reflects a fundamental change in the way fame is understood and valued in our society. Finally, Professor Madow criticizes the moral, economic, and consumer protection arguments commonly made in support of the right of publicity, and raises the possibility that the right creates socially undesirable incentives and promotes, rather than prevents, unjust enrichment. While the Article finds the existing case for the right of publicity unconvincing, it does not call for immediate abolition. Instead, it offers a theoretical and evaluative framework for future research and discussion.

INTRODUCTION

I don't know why this has happened to me. I work hard and I'm dedicated, but overall I'm totally surprised. What did I do to deserve this?

—Vanna White¹

The celebrity is a person who is known for his well-knownness. . . .

† Copyright 1993 Michael Madow. Assistant Professor of Law, Brooklyn Law School. B.A. 1971, Amherst College; M.A. 1978, Harvard University; J.D. 1982, Columbia University. I owe special thanks to C. Edwin Baker and Susan Herman for their unflagging encouragement and wise counsel. My colleague Gary Minda read an early draft of this Article and made many helpful suggestions. I also had the benefit of comments from Beryl Jones, Neil Cohen, Paul Finkleman, Benjamin Kaplan, Craig McNeer, Samuel Murumba, Norman Poser, and David Trager. Robert Dashow, Karen Bennett, and Teresa Matushaj provided valuable research assistance. The generous financial support of the Brooklyn Law School Summer Research Fund is gratefully acknowledged.

1. Dan Hurley, *The End of Celebrity*, PSYCHOL. TODAY, Dec. 1988, at 50, 55 (quoting Vanna White).

He is neither good nor bad, great nor petty. He is the human pseudo-event.

—Daniel Boorstin²

Entertainment and sports celebrities are the leading players in our Public Drania. We tell tales, both tall and cautionary, about them. We monitor their comings and goings, their missteps and heartbreaks. We copy their mannerisms, their styles, their modes of conversation and of consumption. Whether or not celebrities are "the chief agents of moral change in the United States,"³ they certainly are widely used—far more than are institutionally anchored elites—to *symbolize* individual aspirations, group identities, and cultural values.⁴ Their images are thus important expressive and communicative resources: the peculiar, yet familiar idiom in which we conduct a fair portion of our cultural business and everyday conversation. In December 1990, for example, shortly before the outbreak of the Gulf War, a story circulated in Washington that President Bush had boasted to a congressional delegation that Saddam Hussein was "going to get his ass kicked."⁵ When reporters pressed Bush to confirm the statement, he did not answer directly. Instead, he hitched up his pants in the manner of John Wayne. Everyone got the point.⁶

The fact that celebrities haul so much semiotic freight in our culture has a number of important consequences. One such consequence—one with which American law, in my view, has been unduly impressed—is that star images enhance the commercial value of commodities with which they are associated. Most obviously, celebrity sells cultural commodities: movies, records, videos, and so on. Since the early years of this century, when the Hollywood "star system" first took hold,⁷ celebrity has been a vital factor of production in what Adorno and

2. DANIEL J. BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* 57 (1961).

3. RICHARD SCHICKEL, *INTIMATE STRANGERS: THE CULTURE OF CELEBRITY* 29 (1985).

4. See *id.* at viii (characterizing celebrity as a principal "source of motive power in putting across ideas of every kind—social, political, aesthetic, moral. Famous people are used as symbols for these ideas, or become famous for being symbols of them."); JOHN B. THOMPSON, *IDEOLOGY AND MODERN CULTURE: CRITICAL SOCIAL THEORY IN THE ERA OF MASS COMMUNICATION* 163 (1990) (celebrities are "common points of reference for millions of individuals who may never interact with one another, but who share, by virtue of their participation in a mediated culture, a common experience and a collective memory"); Marshall McLuhan, *Sight, Sound, and the Fury*, in *MASS CULTURE: THE POPULAR ARTS IN AMERICA* 489, 495 (Bernard Rosenberg & David M. White eds., 1957) (characterizing celebrities as "points of collective awareness and communication").

5. See Don Williamson, *At Home and Abroad—A Word About Kicking Butts*, *SEATTLE TIMES*, Jan. 6, 1991, at A17.

6. Eleven months later, when Clarence Thomas was about to be sworn in as an Associate Justice of the Supreme Court, administration officials cast about for a way to put across the idea that the new Justice was a "little guy" who had bravely and doggedly overcome long odds. What did they do? They invited Sylvester (Rocky) Stallone to the White House swearing-in ceremony. See Ann Devroy, *"There is Joy," Thomas Tells Crowd*, *WASH. POST*, Oct. 19, 1991, at A8.

7. See *infra* text accompanying notes 165-79.

Horkheimer christened the "culture industry."⁸ Beyond this, however, we can distinguish three central ways in which celebrity generates economic value. First, there is intense demand for information about the lives and doings of celebrities—for news stories, gossip items, biographies, interviews, docudramas.⁹ Second, there is a large and increasingly lucrative market for merchandise (T-shirts, posters, greeting cards, buttons, party favors, coffee mugs, school notebooks, dolls, and so on) bearing the names, faces, or other identifying characteristics of celebrities, living and dead.¹⁰ Third, as contemporary advertising practice amply attests, celebrity enhances the marketability of a wide array of collateral products and services.¹¹

8. Theodore Adorno & Max Horkheimer, *The Culture Industry: Enlightenment as Mass Deception*, in *MASS COMMUNICATION AND SOCIETY* 349 (James Curran et al. eds., 1977). Adorno and Horkheimer used the term "culture industry" to refer to the entertainment industries that emerged in the late 19th and early 20th centuries. Their basic claim was that the emergence of these industries as capitalist enterprises led to the standardization and rationalization of cultural forms, and that this in turn robbed art of its traditional autonomy and critical power. The culture industries, in their view, used stars to lend a false appearance of "individuality" to cultural products that were actually made in accordance with rationalized procedures and standardized formulas. For a recent, systematic analysis of the way in which entertainment corporations create and deploy stars in order to stabilize and predict demand for their products (movies, records, etc.), see BILL RYAN, *MAKING CAPITAL FROM CULTURE: THE CORPORATE FORM OF CAPITALIST CULTURAL PRODUCTION* 184-227 (1992).

9. Circulation figures for gossip-driven magazines provide a rough measure of the magnitude of the demand for information about celebrities. As of August 1990, the weekly circulation of *People* was 3.2 million; of the *National Enquirer*, 4 million; and of *Us*, 1.3 million. *Consumer Magazine Circulation*, *ADVERTISING AGE*, Aug. 20, 1990, at 42.

10. A recent article in *The New York Times* provides a rough sense of the market size for such merchandise. It reports that annual revenues from "music merchandising"—the sale of paraphernalia bearing the names, faces, or logos of popular musical performers and groups—alone exceed a half-billion dollars. Once the province of "hippie entrepreneurs," the music merchandising industry is now dominated by large entertainment conglomerates like MCA, Inc., and Time-Warner. Sales distribution has begun to move from concert sites to mainstream retail outlets like Sears. See Larry Rohter, *Pop-Music Fashion Becomes a Sales Hit*, *N.Y. TIMES*, Jan. 8, 1991, at D1.

11. Advertisers pay celebrities handsomely for product endorsements, or "tie-ups," on the theory that their credibility, good will, or glamor will rub off on the product and thus motivate purchase decisions, or simply in the more modest hope that their presence will attract attention and thus lift the advertising message out of the general "clutter." In 1984, for example, PepsiCo paid Michael Jackson a reported \$5.5 million to perform a hit song in a television commercial and to permit the company to "sponsor" his national "Victory Tour." Judann Dagnoli, *Pepsi, Jackson Start "Relationship"*, *ADVERTISING AGE*, May 12, 1986, at 6. Jackson, who apparently drinks only fruit juices, was not required to endorse, drink, or even handle the cola during the commercial. Richard Harrington, *Pepsi & the Pop Star: Michael Jackson's \$15 Million Cola Deal*, *WASH. POST*, May 6, 1986, at C2. Two years later, PepsiCo's chief executive officer, Roger Enrico, announced that the company had re-signed Jackson, this time to a three-year contract worth \$15 million. Citing figures that showed a significant rise in Pepsi sales after the first Jackson campaign, Enrico insisted that "[i]nvestments like this do indeed pay off." Dagnoli, *supra*, at 6. Jackson's mere presence in a television commercial, he explained, renders it "zap-proof." *Id.*

PepsiCo is not alone in the view that celebrity endorsements or appearances are worth their hefty price tags. In 1986, Dole Food Company announced a multiyear, \$17 million contract with the singer Kenny Rogers. *Last Minute News*, *ADVERTISING AGE*, Dec. 15, 1986, at 1, 8. In 1990, L.A. Gear reportedly signed up Michael Jackson for \$20 million. Cindy LaFavre Yorks, *Shoe Business' Star-Studded Sneaker Wars*, *L.A. TIMES*, June 13, 1990, at E1, E4. For additional

Conceivably, a legal order could assign *all* of these economic values in the same direction, either to the individual celebrity herself or to the public domain. Our legal order, however, has not adopted either of these polar approaches. Instead, it has divvied up the economic values associated with modern celebrity, enabling celebrities to capture (and monopolize) some, but not all, of them. Thus, on the one hand, celebrity personas may be freely appropriated for what are deemed to be primarily "informational" and "entertainment" purposes. Except in unusual circumstances, permission need not be obtained, nor payment made, for use of a celebrity's name or likeness in a news report, novel, play, film, or biography. Under current law, the "life stories" of celebrities are, for all intents and purposes, common property—available to be told and retold at the pleasure, and for the profit, of the teller.¹²

The merchandising and advertising values that attach to star images, in contrast, are privately held. By virtue of what is now widely known as the "right of publicity,"¹³ the "commercial" value of a celebrity's name, likeness, and other identifying characteristics is her private property, which she may enjoy and exploit, transfer and bequeath, as she alone thinks best.¹⁴

endorsement figures paid to various celebrities, see Jay S. Kogan, *Celebrity Endorsement: Recognition of a Duty*, 21 J. MARSHALL L. REV. 47, 52 (1987).

12. In theory, of course, a celebrity has a legally enforceable "right of privacy"—a right, like the rest of us, to be free from public disclosure of her most intimate affairs. In practice, however, the "newsworthiness privilege"—which Harry Kalven predicted some years ago would ultimately swallow up the entire public disclosure tort, see Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 335-36 (1966)—operates to protect even the most intrusive and trivial celebrity gossip. See, e.g., *Ann-Margret v. High Soc'y Magazine, Inc.*, 498 F. Supp. 401, 405 (S.D.N.Y. 1980) (recognizing newsworthiness as a countervailing consideration to the privacy interests of a film actress). Thus, whereas private citizen plaintiffs occasionally win a favorable judgment in right-to-privacy actions, see, e.g., *Hawkins v. Multimedia, Inc.*, 344 S.E.2d 145 (S.C.), cert. denied, 479 U.S. 1012 (1986), recoveries by *public figures* are virtually nonexistent. The comments to the Restatement provision caution that "[t]here may be some intimate details of [a famous actress's] life, such as sexual relations, which even [she] is entitled to keep to herself." RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977). The gossip columnist Kitty Kelley, however, more accurately characterizes the *operative* law in these matters: "The life of a public figure," Kelley proclaimed on the day when Frank Sinatra dropped a lawsuit against her unauthorized biography, "belongs to us, the average American citizen." Sherryl Connelly, *Kitty Kelley's Battle with Sinatra*, N.Y. DAILY NEWS, Sept. 25, 1984, at 33.

13. The right of publicity has been variously defined. See, e.g., *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985) (Posner, J.) ("the right to prevent others from using one's name or picture for commercial purposes without consent"), cert. denied, 475 U.S. 1094 (1986); J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* at vii (1992) ("the inherent right of every human being to control the commercial use of his or her identity"); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954) ("the right of each person to control and profit from the publicity values which he has created or purchased").

14. The right of publicity essentially gives a celebrity a legal entitlement to the commercial value of her identity, thus enabling her to control the extent, manner, and timing of its commercial exploitation. The judicial decision first expressly recognizing such a right declined to bestow a "property" label upon it. See *Haelan Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d. Cir.), cert. denied, 346 U.S. 816 (1953). Courts and commentators, however, have since come to

Thus, for example, *The National Enquirer* is free to run a cover story on Johnny Carson's marital discords and parenting failures without obtaining his permission or making him payment, because the "newsworthiness" of the story will easily trump any claim Carson might assert for invasion of privacy or infringement of his right of publicity. Carson, however, can invoke his right of publicity to stop a small-time manufacturer from marketing a line of "Here's Johnny" portable toilets.¹⁵ Similarly, the tabloids are free to profit by keeping the world abreast of Bette Midler's struggles to control her weight, but an automobile maker may not make unauthorized use of a Midler "sound-alike" in a television commercial.¹⁶ The family of Dr. Martin Luther King, Jr., has no legal remedy against the revelation that the slain civil rights leader "engaged in extramarital sexual encounters on the last night of his life."¹⁷ But King's family, having inherited his right of publicity, can stop the marketing of an inexpensive plastic bust.¹⁸ Likewise, "pathographers"¹⁹ of Elvis Presley can ply their trade without fear of liability, but Elvis imper-

regard it as a full-blooded property right. See, e.g., *Cepeda v. Swift & Co.*, 415 F.2d 1205, 1206 (8th Cir. 1969); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1355 (D.N.J. 1981); *Uhlaender v. Henrickson*, 316 F. Supp. 1277, 1282 (D. Minn. 1970); STEPHEN R. MUNZER, A THEORY OF PROPERTY 52-53 (1990). Thus, the right of publicity is transferable, by license or assignment. McCARTHY, *supra* note 13, §§ 10.3-4. Injunctive, as well as monetary, relief is available in the event of its infringement or misappropriation. *Id.* §§ 11.6-8. And in many jurisdictions the right is descendible. *Id.* § 9.5 (12 states recognize a postmortem right of publicity); see also *infra* note 27.

15. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

16. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). A subsequent award of \$400,000 in damages was upheld on appeal. *Midler v. Young & Rubicam, Inc.*, Nos. 90-55027, 90-55028, 1991 U.S. App. LEXIS 22641 (9th Cir. Sept. 20, 1991) (mem.), *cert. denied*, 112 S. Ct. 1513 (1992). The *Midler* decision has generated a substantial amount of commentary. See, e.g., Melissa M. Davis, Note, *Voicing Concern: An Overview of the Current Law Protecting Singers' Voices*, 40 SYRACUSE L. REV. 1255 (1989); Elaine Windholz, Comment, *Whose Voice Is It Anyway?*, 8 CARDOZO ARTS & ENT. L.J. 201 (1989); Leonard A. Wohl, Note, *The Right of Publicity and Vocal Larceny: Sounding Off on Sound-Alikes*, 57 FORDHAM L. REV. 445 (1988).

A number of other musical performers have brought similar "sound-alike" suits against advertisers. See John P. Cortez, *Sound-Alikes Get Court Win*, ADVERTISING AGE, Nov. 19, 1990, at 51. In one such case, the Ninth Circuit recently affirmed a \$2.5 million verdict in favor of the singer Tom Waits. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993).

17. Peter Appleboine, *Rights Leaders Denouncing New Book by Ex-King Aide*, N.Y. TIMES, Oct. 13, 1989, at A14.

18. *Martin Luther King, Jr., Ctr. for Social Change, Inc. v. American Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982).

19. "Pathography" is the term coined by Joyce Carol Oates for a biography whose central "motifs are dysfunction and disaster, illnesses and pratfalls, failed marriages and failed careers, alcoholism and breakdowns and outrageous conduct." Joyce C. Oates, *Adventures in Abandonment*, N.Y. TIMES, Aug. 28, 1988, § 7 (Book Review), at 3. It is "biography's diminished and often prurient twin." *Id.* Albert Goldman's book on Elvis Presley, which portrays him as man who spent the better part of his adult waking life indulging in drugs and sexual fetishes, is a good example of this newly popular genre. See ALBERT GOLDMAN, ELVIS (1981).

sonators²⁰ and marketers of Elvis paraphernalia²¹ must reckon with the assignees of Presley's right of publicity.

Unlike the right of privacy, which has always had more than its share of skeptics and critics,²² the right of publicity has been embraced enthusiastically by courts and commentators. Twenty-odd states²³ and several foreign jurisdictions²⁴ now recognize the right of publicity, and inclusion of the right in the Third Restatement on Unfair Competition may be in the offing.²⁵ To be sure, reservations have been occasionally

20. See, e.g., *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981) (enjoining a live stage production). For an interesting account of the growing and varied army of Elvis impersonators, see I AM ELVIS: A GUIDE TO ELVIS IMPERSONATORS (Marie Cahill ed., 1991).

21. See, e.g., *Estate of Presley*, 513 F. Supp. at 1380-81 (pendants); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977) (posters), *aff'd sub nom. Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

22. The so-called "public disclosure" branch of the right of privacy—the right to be free from public dissemination of intimate and embarrassing facts about oneself—can boast both an illustrious pedigree, see Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890), and forceful contemporary defenders, see, e.g., Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 977-84 (1964); Ruth Gavison, *Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech*, 43 S.C. L. REV. 437 (1992). It has been formally recognized in thirty-odd states, see Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 365-67 (1983) (collecting authorities), and has been codified in the Restatement, see RESTATEMENT (SECOND) OF TORTS § 652D (1977). Nevertheless, it remains on the defensive in the courts and law reviews. Within the last several years alone, one state high court has expressly rejected this branch of the privacy tort, see *Hall v. Post*, 372 S.E.2d 711 (N.C. 1988), prominent academic commentators have urged its abolition, see, e.g., Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CALIF. L. REV. 1133 (1992); Zimmerman, *supra*, at 365, and the Supreme Court has cast a measure of doubt on its constitutional viability, see *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (holding that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order"); see also Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1223 (1990) (arguing that in light of *Florida Star*, "it is difficult to imagine a plaintiff that the Court would allow to recover").

23. See MCCARTHY, *supra* note 13, § 6.1[B]. According to McCarthy, the right of publicity has been recognized as a matter of common law in 14 states, of which 4 also have statutory provisions that protect the right. Another 9 states, including New York, have statutes that are denominated "privacy" statutes but are worded in such a way as to protect the economic interests of celebrities in certain aspects of their identities. Only in 2 states, Nebraska and New York, have courts "expressly rejected the concept and held that a common law Right of Publicity does not exist." *Id.* For a description of New York law in this area, see *infra* note 76.

24. See, e.g., *Pacific Dunlop Ltd. v. Hogan*, 87 A.L.R. 14, 25 (Fed. Ct. of Austl., Gen. Div. 1989); *Athans v. Canadian Adventure Camps Ltd.*, 17 O.R.2d 425, 434-38 (1977) (Ont., Can.); *Judgment of June 29, 1976 (Mark Lester v. Tokyo Daiichi Film)*, Chisai [Dist. Ct.] (Tokyo), discussed in Teruo Doi, *Character Merchandising in Japan: Protection of Fictional Characters and Well-Known Personalities as the Basis for Merchandising Activities*, in 1978 ANNUAL OF INDUSTRIAL PROPERTY LAW 283, 301-05 (John Warden ed., 1979).

25. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (Preliminary Draft No. 6, 1992). Section 46, which is entitled "Misappropriation of the Commercial Value of Personal Identity: The Right of Publicity," subjects to liability "[o]ne who misappropriates the commercial value of another's identity by using without consent and for purposes of trade the other's name, likeness, or other indicia of identity." It must be emphasized, however, that this provision is part of a preliminary draft. While it has been submitted to the Advisors and the Members Consultative

voiced on one score or another,²⁶ and disagreement exists about a variety of subsidiary doctrinal matters.²⁷ But there is a solid, indeed an overwhelming, consensus within the American legal community that the right of publicity is a good thing.²⁸ Thomas McCarthy, the chief expositor and promoter of the right of publicity, fairly describes the current

Group for their consideration, it has not been considered or adopted either by the Council or the full membership of the American Law Institute.

26. See, e.g., David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 165 (1981) (expressing concern about undue encroachment on the "public domain"); Kipp Rogers, *The Right of Publicity: Resurgence of Legal Formalism and Judicial Disregard of Policy Issues*, 16 BEVERLY HILLS B. ASS'N J. 65 (1982) (expressing concern about excessive judicial "formalism"); Todd F. Simon, *Right of Publicity Reified: Fame as a Business Asset*, 30 N.Y.L. SCH. L. REV. 699 (1985) (expressing concern about a lack of "orderly" doctrinal development).

27. The chief dispute is whether the right of publicity should be descendible. Compare *Martin Luther King, Jr., Ctr. for Social Change, Inc. v. American Heritage Prods., Inc.*, 296 S.E.2d 697, 704-05 (Ga. 1982) (holding it descendible) and *Andrew B. Sims, Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453 (1981) (favoring descendibility) with *Lugosi v. Universal Pictures*, 603 P.2d 425, 430-31 (Cal. 1979) (holding it not descendible); and *Simon, supra* note 26 (opposing descendibility). Among the proponents of descendibility, there is disagreement on two basic questions: first, whether lifetime exploitation should be required as a condition, and second, what the appropriate duration of the right should be. On the first issue, compare *Hicks v. Casablanca Records, Inc.*, 464 F. Supp. 426, 429 (S.D.N.Y. 1978) (lifetime exploitation required) and *Peter L. Felcher & Edward L. Rubin, Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1618-20 (1979) [hereinafter *Felcher & Rubin, Privacy*] (same) with *Martin Luther King, Jr., Ctr. for Social Change*, 296 S.E.2d at 705-06 (lifetime exploitation not required) and *Roberta R. Kwall, Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 217-26 (1983) (same). For discussions of the second issue, see *Peter L. Felcher & Edward L. Rubin, The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1131 (1980) [hereinafter *Felcher & Rubin, Descendibility*] (50 years as appropriate duration of the right); *Kwall, supra*, at 252 (no fixed duration, but a 20-year minimum); *Sims, supra*, at 498-99 (5 to 10 years).

There is also continuing disagreement about how best to reconcile the right of publicity with the demands of the First Amendment, compare *Kwall, supra*, at 229-53 (proposing adaptation of copyright "fair use" doctrine to reduce the conflict between the right of publicity and the First Amendment) with *Felcher & Rubin, Privacy, supra* (proposing incorporation of First Amendment principles into the state law definition of the right of publicity), and with the federal copyright regime, see, e.g., *David E. Shipley, Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673 (1981) (noting that certain aspects of the law of publicity are threatened with federal preemption under federal copyright law); *Barbara Singer, The Right of Publicity: Star Vehicle or Shooting Star?*, 10 CARDOZO ARTS & ENT. L.J. 1, 37-46 (1991) (same).

28. Some doubts on this score have begun to be voiced by writers outside the American legal community. For example, Jane Gaines, a Duke University English professor, has published a fascinating and provocative book that brings semiotics and critical cultural studies to bear on a wide range of intellectual property issues. While Gaines stops short of rejecting the right of publicity, she expresses serious concerns about the impact of that right on the production of culture and meaning. See JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* (1991). Similar concerns have been forcefully stated by Rosemary Coombe, a law professor at the University of Toronto. See *Rosemary J. Coombe, Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991). In this respect, both Gaines and Coombe owe much to David Lange's splendid article, *Recognizing the Public Domain*. Lange, *supra* note 26. My own intellectual debt to Lange will be clear throughout this Article. Less apparent, but equally important, is my debt to Coombe, whose presentation on intellectual property that Professor Coombe gave at a Critical Legal Studies Conference several years ago in Washington, D.C., greatly influenced my thinking on a number of issues addressed here.

state of judicial thinking this way: "[T]he initial phase of questioning what the Right of Publicity is, and whether it should exist at all, has passed into history. Most courts accept the existence of the right and concern themselves with polishing its contours as they apply it to a diversity of factual settings."²⁹

My purpose in this Article is to rain hard on this parade. I shall argue that this "initial phase of questioning" was brought to a close much too hastily, without a systematic, theoretically persuasive case ever having been made for recognition of an independent property-like right of publicity. To that end, I will try to show that the main arguments advanced in support of publicity rights are significantly less persuasive than is commonly believed, and that publicity rights exact a higher cost in important competing values (notably, free expression and cultural pluralism) than has generally been appreciated. I hope thereby to reopen the question of whether the right of publicity should exist at all, and to recast that question to take proper account of the possible impact of publicity rights on the distribution of cultural power in contemporary society.

The argument of the Article is organized as follows. In Part I, I attempt to situate the "right of publicity" issue in the context of a wider academic debate about contemporary popular culture. Proponents of publicity rights often talk as if all that is at stake here is money—fairly big money, perhaps, but still "only money." For them, the controlling question is simply, "Who will benefit financially from a celebrity's publicity values—the celebrity who created them or some freeloading stranger?"³⁰ As I see it, however, the stakes are both higher and more complicated. Publicity rights are about meaning as well as money. The question "Who owns 'Madonna'?" is not just a question about who gets to capture the immense economic values that attach to her persona. The question is also, even chiefly, about who gets to decide what "Madonna" will *mean* in our culture: what meaning(s) her image will be used to generate and circulate, and what meaning(s) she will have for us. By centralizing this 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. This is perhaps not reason enough to reject the right of publicity *tout court*. But it does place a heavy burden of justification on the proponents of the right.

In Part II, I examine the forces and interests that brought forth the right of publicity. The question I address in this Part is why the right of

29. MCCARTHY, *supra* note 13, § 1.10[C].

30. The inheritability question is frequently framed in similar terms. For many, the controlling question is simply, "Who will benefit from the publicity values of a deceased celebrity—his heirs or assignees, on the one hand, or some parasitic interloper on the other?"

publicity did not emerge as a separate and distinct right until fairly recently. My central claim is that the commercial exploitation of famous persons is not, contrary to standard accounts, a new phenomenon. Large-scale commercial exploitation of famous persons goes back as far as the eighteenth century. What is new to our time is not the existence of so-called "publicity" or "associative" values, nor even their systematic commercial exploitation, but rather the magnitude of these values, the specific cultural and institutional mechanisms by which they are generated, and (above all) the widespread belief that famous persons ought to be able to capture these socially created values for themselves. The emergence of a right of publicity reflects, I shall argue, the triumph of a market-oriented, instrumentalist, individualistic understanding of fame over an older, more communitarian conception.

In Part III, I examine and evaluate the main justifications that courts and commentators have advanced in support of the right of publicity. These fall basically into three categories. There are, first of all, "moral" arguments, based on the supposed right of persons to "reap the fruits of their labors," and the correlative injustice of permitting others to "reap where they have not sown." Next, there are "economic" arguments, the most popular version of which is that the right of publicity, like copyright protection, provides needed economic incentives to creative effort and achievement. A related line of argument, advanced by Judge Posner and others, justifies the right of publicity as a mechanism for promoting allocative efficiency. Finally, some courts and writers argue for the right of publicity in terms of consumer protection. On this view, the right of publicity, like the law of trademark, promotes the flow of useful information about goods and services to consumers and protects them from deception and related marketplace harms. My ultimate conclusion is that these arguments, individually and cumulatively, are not nearly as compelling as is commonly supposed, nor as compelling as we have reason to demand. It may be possible to make a coherent and convincing case for the right of publicity. But that case has yet to be made.

I

PUBLICITY RIGHTS AND THE POPULAR CULTURE DEBATE

They're talking dollars. As Jack Benny would say, dollars.

—New York State Senator Emanuel Gold, referring to
proponents of a proposed publicity rights law.³¹

31. *Hearing to Discuss the Celebrity Rights Act Before the N.Y. State Senate* 8 (Feb. 25, 1988) (Upstate Reporting Serv.) (transcript on file with author) [hereinafter *1988 Hearing*]. State Senator Gold is the sponsor of a bill that would create a broad and descensible right of publicity in New York. See S. 6843, 1988-1989 N.Y. Reg. Sess. For an account of the background of this bill, see *infra* note 76.

Contemporary proponents of the right of publicity have, in the main, exhibited surprisingly little interest in the basic question of justification.³² The predominant tone in both the case law and the academic writing in this regard is impatient, even at times bullying—as if only a fool or a prig would insist on an elaborate or arduous demonstration. Some seem content to rest upon an unanalyzed intuitive sense that a celebrity's persona simply *is* her "property," that if there is a "natural right" to *any* property, then *this* must surely be it. In a similar vein, Professor McCarthy, the author of the standard treatise on the subject, characterizes the right of publicity as "a self-evident legal right, needing little intellectual rationalization to justify its existence."³³ That celebrities should have exclusive control of the commercial use of their identities, McCarthy says, is simply "commonsensical."³⁴ "[O]ne wonders what all the fuss is about."³⁵

The nonchalance of this appeal to "common sense" is rather astonishing. "Common sense," after all, is not a faculty by which we can learn how matters are, much less how they *should* be. All we can learn through common sense, as Stuart Hall reminds us, is where something *fits into* "the existing scheme of things."³⁶ What appears to be "common sense" may be nothing but the particular view of a matter that most strongly supports and expresses the interests of powerful social groups, or that fits most snugly with other deeply rooted and unexamined beliefs.³⁷

That aside, there are good reasons to demand a full and persuasive justification for publicity rights. The first is the fact that the right of

32. A notable exception is Tim Frazer, *Appropriation of Personality—A New Tort?*, 99 LAW Q. REV. 281 (1983). Lawrence Becker makes a useful distinction among three different kinds or levels of justification of property rights. See LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 22-23 (1977). A "general justification of property rights gives an answer to the question of why there ought to be any property rights—of any sort—at all." *Id.* at 23. A "specific justification" provides an answer to the question "why there ought to be a specific *sort* of property right," such as copyright or "full, liberal" ownership of land. *Id.* A "particular justification" is one which "gives an answer to the question of why a particular person ought to have a particular property right in a particular thing." *Id.* This Article is concerned only with the second kind of justification.

33. MCCARTHY, *supra* note 13, § 1.1[B][2], at 1-5.

34. *Id.* § 1.11[C], at 1-46.

35. *Id.*; see also *id.* § 2.1[B] ("The advocate of a Right of Publicity, when called upon to explain why such a right should exist at all, is not being illogical in simply challenging: 'Why not?'"). To be fair, McCarthy devotes the second chapter of his treatise to the "policy reasons" advanced by courts and commentators in support of a right of publicity. But the impression is unmistakable that he regards such argument as essentially supererogatory.

36. Stuart Hall, *Culture, the Media, and the "Ideological Effect"* (1977), quoted in DICK HEDDIGE, SUBCULTURE: THE MEANING OF STYLE 11 (1979).

37. Indeed, it is likely that the right of publicity seems "obvious" or "commonsensical" to McCarthy and others largely because the dominant folklore of celebrity—from which the publicity right draws its primary rhetorical force and moral appeal—is part of a larger cultural mythology about the possibilities for, and rewards of, originality and individual achievement in our society. See *infra* text accompanying notes 339-49.

publicity redistributes wealth *upwards*. Whether or not the “principal danger to a just society today” is, as Richard Delgado tentatively suggests, the “purposeful enrichment” by the government of those “at the top,”³⁸ governmental actions that make the rich richer surely demand very compelling justification. Why, we may properly ask, should the law confer a source of *additional* wealth on athletes and entertainers who are already very handsomely compensated for the primary activities to which they owe their fame?³⁹ The actor Arnold Schwarzenegger, for example, reportedly collected \$10 million for his role in the movie *Total Recall*.⁴⁰ Ryne Sandberg recently signed a multiyear contract with the Chicago Cubs that pays him an average annual salary of \$7.1 million.⁴¹ Is that not enough, or even too much? Why should the law give entertainers and athletes a legal right that funnels still more money their way? Why not instead treat a famous person’s name and face “as a common asset to be shared, an economic opportunity available in the free market system”?⁴² There may well be a satisfactory answer to these questions, but if so, its name is certainly not “common sense.”

But that is not all. There is still another—and, to my mind, far

38. Richard Delgado, *Inequality “from the Top”: Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100, 118 (1984) (urging revitalization of the Antinobility Clauses of the Constitution as a way of dealing with governmental actions that concentrate wealth, privilege, and power in small and select groups).

39. Strictly speaking, everyone, obscure as well as famous, “has” a right of publicity—a property right in the economic value of her identity. See MCCARTHY, *supra* note 13, § 4.3[G] (arguing that since line-drawing is impractical, every person should have a right of publicity); Nimmer, *supra* note 13, at 217 (same). But see authorities cited in MCCARTHY, *supra* note 13, § 4.3[B], at 4-13 n.1 (supporting minority view that noncelebrities have no publicity right). As a practical matter, however, as Nimmer himself conceded, the right of publicity “usually becomes important only when the plaintiff (or potential plaintiff) has achieved in some degree a celebrated status.” Nimmer, *supra* note 13, at 216. This is because the damages recoverable for infringement of the right depend on the commercial value of the publicity that has been appropriated, and thus on the plaintiff’s “degree of fame.” *Id.* at 217. Very rarely will the economic value of a noncelebrity’s identity be sufficient to support a lawsuit for infringement. (If what the noncelebrity seeks is injunctive relief, then he will not need to invoke his right of publicity; his right of privacy should suffice.) Moreover, as we shall see below, the right of publicity was consciously devised by courts and commentators to meet what were perceived as the special needs of celebrities. See *infra* text accompanying notes 208-40. In short, while universal in form, the right of publicity is in reality a special celebrity right. Any attempt to justify the right of publicity must reckon with that fact—and with the fact that while fame may be somewhat more democratic and evanescent nowadays than it used to be, some people are much more famous than others, and some people just aren’t famous at all. As Michael Walzer writes:

No simple equality of recognition is possible; the idea is a bad joke. In the society of the future, Andy Warhol once said, “everyone will be world-famous for fifteen minutes.” In fact, of course, in the future as in the past, some people will be more famous than others, and some people won’t be famous at all.

MICHAEL WALZER, *SPHERES OF JUSTICE* 255 (1983).

40. Geraldine Fabrikant, *The Hole in Hollywood’s Pocket*, N.Y. TIMES, Dec. 10, 1990, at D1.

41. See Murray Chass, *Sandberg Becomes Highest-Paid Player, for Now*, N.Y. TIMES, Mar. 3, 1992, at B11.

42. Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 960 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

more important—reason why an appeal to “common sense” will not suffice here: publicity rights facilitate private censorship of popular culture. In order to see how this is so, and to appreciate why it is cause for serious concern, we need first to place the “right of publicity” issue in the context of a wider academic debate about the nature and distribution of cultural power in contemporary American society. Only then will we be in a position to see why “we’re talking” much more than “dollars” here.

Since the early part of this century, when the entertainment industries emerged as large-scale capitalist enterprises, cultural power—the power to make and circulate meanings, values, and symbolic forms—has been steadily commercialized and centralized.⁴³ Popular culture is no longer, if it ever was, “a spontaneous, autochthonous expression of the people,”⁴⁴ shaped out of their own material and discursive resources to suit their own needs and interests. The dominance of global entertainment and media conglomerates has instead made popular cultural practice predominantly a matter of *consumption*.⁴⁵ These developments have generated a lively and fascinating contemporary debate between “cultural pessimists” and “cultural populists” about the nature and distribution of cultural power in contemporary society.⁴⁶

“Cultural pessimists,” who owe much to the seminal work of the Frankfurt School theorists,⁴⁷ see mass-mediated popular culture as a field in which dominant, repressive (in other words, consumerist, patriarchal,

43. See Stuart Hall, *Notes on Deconstructing “The Popular,”* in *PEOPLE’S HISTORY AND SOCIALIST THEORY* 227, 233 (Raphael Samuel ed., 1981) (arguing that the process of cultural production and distribution is now concentrated “in the heads of the few”).

44. Dwight MacDonald, *A Theory of Mass Culture*, in *MASS CULTURE: THE POPULAR ARTS IN AMERICA*, *supra* note 4, at 59, 60.

45. Judith Williamson has put this point nicely:

The conscious, chosen meaning in most people’s lives comes much more from what they consume than what they produce. Clothes, interiors, furniture, records, knick-knacks, all the things that we buy involve decisions and the exercise of our own judgment, choice, “taste.” Obviously we don’t choose what is available for us to choose between in the first place. Consuming seems to offer a certain scope for creativity, rather like a toy where all the parts are pre-chosen but the combinations are multiple.

JUDITH WILLIAMSON, *CONSUMING PASSIONS: THE DYNAMICS OF POPULAR CULTURE* 230 (1985); see also STUART EWEN, *ALL CONSUMING IMAGES: THE POLITICS OF STYLE IN CONTEMPORARY CULTURE* (1988); STUART EWEN & ELIZABETH EWEN, *CHANNELS OF DESIRE: MASS IMAGES AND THE SHAPING OF AMERICAN CONSCIOUSNESS* (1982).

46. For a judicious discussion, see John Clarke, *Pessimism Versus Populism: The Problematic Politics of Popular Culture*, in *FOR FUN AND PROFIT: THE TRANSFORMATION OF LEISURE INTO CONSUMPTION* 28, 28-44 (Richard Butsch ed., 1990). The terms I use in the text to identify the rival positions—“cultural pessimism” and “cultural populism”—are borrowed from Clarke. *Id.* at 30, 34.

47. See, e.g., Adorno & Horkheimer, *supra* note 8. The central claim of this very influential essay is that the commodification of culture brought about by the rise of the entertainment industries has divested art of its traditional autonomy and critical power. According to Adorno and Horkheimer, the standardized mass entertainment products of the culture industries operate to distract people from the alienation and drudgery of capitalist work relations and to implant meanings that reinforce the dominant ideology.

etc.) meanings are systematically reproduced and reinforced.⁴⁸ In their view, commodities produced and distributed by the culture industries dissolve, or at least conceal, social difference and conflict. "Cultural populists,"⁴⁹ in contrast, generally view popular culture as contested terrain in which individuals and groups (racial, ethnic, gender, class, etc.) struggle, albeit on unequal terms, to make and establish their own meanings and identities. As the populists see things, the consumers of cultural commodities (movies, songs, fashions, television programs, etc.) neither uniformly receive nor uncritically accept the "preferred meanings"⁵⁰ that are generated and circulated by the culture industry. To varying degrees, depending on their social location and sophistication, consumers "resist" or even subvert these meanings. They "recode" cultural and even industrial commodities in ways that better serve their particular needs and interests, and "rework" them to express meanings different from the ones intended or preferred by their producers.

A full assessment of these rival positions is beyond the scope of this Article. The "populists" seem right to me, however, on several points that bear directly on the "right of publicity" issue. First, despite the dominance of global entertainment conglomerates, popular culture is not

48. For an example of this position, see EWEN & EWEN, *supra* note 45; see also EWEN, *supra* note 45; HERBERT I. SCHILLER, *CULTURE, INC.: THE CORPORATE TAKEOVER OF PUBLIC EXPRESSION* (1989).

49. The leading exponents of this view are writers associated with or influenced by the British "cultural studies" movement. See, e.g., IAIN CHAMBERS, *POPULAR CULTURE: THE METROPOLITAN EXPERIENCE* (1986); JOHN FISKE, *READING THE POPULAR* (1989) [hereinafter FISKE, *READING THE POPULAR*]; JOHN FISKE, *TELEVISION CULTURE* (1987) [hereinafter FISKE, *TELEVISION CULTURE*]; JOHN FISKE, *UNDERSTANDING POPULAR CULTURE* (1989) [hereinafter FISKE, *UNDERSTANDING POPULAR CULTURE*]; HEBDIGE, *supra* note 36; ANDREW ROSS, *NO RESPECT: INTELLECTUALS AND POPULAR CULTURE* (1989); PAUL WILLIS ET AL., *COMMON CULTURE: SYMBOLIC WORK AT PLAY IN THE EVERYDAY CULTURES OF THE YOUNG* (1990). A good brief introduction to the main themes of this movement is John Fiske, *British Cultural Studies and Television*, in *CHANNELS OF DISCOURSE: TELEVISION AND CONTEMPORARY CRITICISM* 254 (Robert C. Allen ed., 1987) [hereinafter Fiske, *British Cultural Studies*]. For a comprehensive critical appraisal of the cultural studies movement, see JIM MCGUIGAN, *CULTURAL POPULISM* (1992).

50. This term has its origin in a seminal essay by the British writer Stuart Hall. See Stuart Hall, *Encoding/Decoding*, in *CULTURE, MEDIA, LANGUAGE* 128, 134-39 (Stuart Hall et al. eds., 1980). Hall starts from the post-structuralist premise that "meaning" is not an inherent property of a cultural text or object. Television programs, for example, do not have a single meaning; they are relatively open texts, capable of being "read" in different ways by different people. According to Hall, however, television programs (and other cultural products) generally *do* "prefer" a set of meanings that serves to strengthen the "dominant" ideologies. Viewers whose social location, particularly their class location, aligns them with the dominant ideology, will—Hall argues—tend to accept the "preferred" meaning. But some viewers, whose social position sets them in direct opposition to the dominant ideology, will resist the program's preferred meaning and instead produce what Hall calls an "oppositional" reading. They will "inflect" or "recode" the program in such a way that it serves their own particular needs and interests. Throughout this Article I use "preferred" and "oppositional" meaning/reading in roughly this manner, without intending thereby to endorse Hall's view that class location is the primary determinant of how cultural products are "read."

simply something that is "fabricated by technicians hired by businessmen"⁵¹ and then imposed from above upon a passive, atomized, and uncritical populace. As Stuart Hall put it, the consumers of cultural commodities are not all "cultural dopes."⁵² Their participation is not "limited to the choice between buying and not buying."⁵³ Instead, the consumption of cultural commodities can be, and often is, an active, creative practice, in which the "consumer" appropriates the product by investing it with (new) meaning. There is, as Paul Willis has shown, a "realm of living common culture" in which individuals and groups use cultural and industrial commodities creatively to do "symbolic work" and thereby "establish their presence, identity, and meaning."⁵⁴

To be sure, there are significant constraints on this popular meaning-making. Individuals and groups must do this symbolic work with centrally produced and distributed commodities. They must make their culture out of these commodities, for there are no other material or discursive resources available to them.⁵⁵ What is more, the instability or volatility of meaning must not be overstated.⁵⁶ The products or "texts" of the culture industries (films, television programs, music, fashion, stars, etc.) *do* generally come with "preferred" meanings already structured into them, meanings that often serve or reflect the interests of dominant groups. Against-the-grain readings of such texts may be very difficult to mount or sustain. The economic and ideological dominance of the culture industries thus significantly "limits the spaces and forms available for alternative or oppositional cultural practice."⁵⁷ But within these con-

51. MacDonald, *supra* note 44, at 60.

52. Hall, *supra* note 43, at 232.

53. MacDonald, *supra* note 44, at 60.

54. WILLIS ET AL., *supra* note 49, at 1; *see also* CHAMBERS, *supra* note 49, at 53-54 (showing how urban street "style" is achieved through the creative bricolage of ordinary commodities); HEBDIDGE, *supra* note 36, at 2-4, 18 (examining how British youth subcultures—mods and rockers, skinheads and punks—appropriate ordinary commodities and invest them with meanings that express, in a kind of private subcultural code, their "resistance" to the dominant order of things). Lawrence Grossberg has coined the useful term "excorporation"—the antithesis of the Frankfurt School's "incorporation"—to identify the way in which subordinate groups take the products of the culture industries, turn them against their producers, and use them in a resisting discourse. *See* Lawrence Grossberg, *Another Boring Day in Paradise: Rock and Roll and the Empowerment of Everyday Life*, 4 *POPULAR MUSIC* 225, 232 (1984).

55. *See* FISKE, *UNDERSTANDING POPULAR CULTURE*, *supra* note 49, at 15.

56. It is crucial, I think, not to exaggerate the volatility of meaning or the "effectivity" of audience resistance. Some "cultural populists," John Fiske among them, manage to find traces of "subversion" almost everywhere they look—in street style and soap operas, in video game arcades and window shopping at the mall. For criticism on this score, *see* SCHILLER, *supra* note 48, at 148-56; Clarke, *supra* note 46, at 41-42 (arguing that the material and ideological dominance of the culture industries limits the space available for alternative and oppositional cultural practice). *Cf.* Jennifer Wicke, *Postmodern Identity and the Legal Subject*, 62 *U. COLO. L. REV.* 455, 471 (1991) (criticizing what she calls "resistance postmodernism" for its "overinvestment in discursive gestures" and for "the often fatuous assumption that . . . the decentering of a discourse in some purely symbolic way sends shock waves to the heart of social domination").

57. Clarke, *supra* note 46, at 41.

straints, individuals and groups do participate actively in the process of generating and circulating meanings that constitutes "culture." While our culture is far from a perfect democracy, it is more participatory and open-textured than the bleakest contemporary followers of Adorno and Horkheimer allow.⁵⁸

The "populists" also get the better of the argument on another important point: the so-called "national audience" for mainstream cultural products is in reality composed of a large number of overlapping subgroups and subcultures structured along racial, ethnic, gender, generational, occupational, and other lines. These groups have their own histories, experiences, interests, and cultural competencies, which they bring to bear in the consumption (that is, the reception and appropriation) of cultural commodities.⁵⁹ For this reason, popular culture remains what it long has been: a struggle for, and over, meaning. It is a contest in which dominant groups try to naturalize the meanings that best serve their interests into the "common sense" and "taste" of society as a whole, while subordinate and marginalized groups resist this process with varying degrees of effort and success.⁶⁰ The contest is one in which the culture industries hold most of the cards, but in which there is *some* space for even relatively powerless groups and subcultures to generate or negotiate meanings that relate to their own experiences and positions and that serve their own interests better than does the dominant ideology.

It is impossible, I think, for the law to remain neutral in this contest. The law can strengthen the already potent grip of the culture industries over the production and circulation of meaning, or it can facilitate popu-

58. A fundamental problem with Adorno and Horkheimer's work on mass culture is that it not infrequently lapses into what John Thompson has called the "the fallacy of internalism." THOMPSON, *supra* note 4, at 105 (emphasis omitted). That is, Adorno and Horkheimer make the mistake of thinking that the effects cultural products have on people can simply be "read off" the products themselves. As Thompson argues, this ignores the fact that "[t]he reception and appropriation of cultural products is a complex social process which involves an ongoing activity of interpretation and the assimilation of meaningful content to the socially structured background characteristics of particular individuals and groups." *Id.* It follows that the only way to determine what effects these cultural products have on their audiences is to examine those effects empirically. For some recent research efforts along these lines with respect to television programming, see sources cited *infra* note 59.

59. This has been borne out by a substantial body of empirical and ethnographic literature showing that different social and national groups produce different meanings from the same television programs. See, e.g., IEN ANG, WATCHING DALLAS: SOAP OPERA AND THE MELODRAMATIC IMAGINATION (Della Couling trans., 1985) (1982) (studying Dutch viewers of the television series *Dallas*); DAVID MORLEY, THE "NATIONWIDE" AUDIENCE: STRUCTURE AND DECODING 137-47 (British Film Inst. Television Monograph No. 11, 1980) (using an open interview approach to demonstrate a wide range of audience responses to a single television program); Elihu Katz & Tamar Liebes, *Once upon a Time in Dallas*, INTERMEDIA, May 1984, at 28 (study of ethnic audiences of *Dallas*). This literature is summarized in FISKE, TELEVISION CULTURE, *supra* note 49, at 62-83. See also SONIA M. LIVINGSTONE, MAKING SENSE OF TELEVISION 43-49 (International Series in Experimental Social Psychology Vol. 18, 1990).

60. See Fiske, *British Cultural Studies*, *supra* note 49, at 255; Hall, *supra* note 43, at 227-28.

lar participation, including participation by subordinate and marginalized groups, in the processes by which meaning is made and communicated. The law can accelerate the already powerful trend toward centralized, top-down management of popular culture, or it can fight a rearguard (and perhaps futile) action on the side of a more decentralized, open, democratic cultural practice. Whether self-consciously or not, contemporary American intellectual property law has tended to throw its weight on the side of centralized cultural production.

In recent decades, as David Lange⁶¹ and a few other writers⁶² have observed, 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. Consider, for example, the way in which antidilution doctrine is increasingly being used to enable corporations to manage their public personas and immunize them from oppositional recoding.⁶³ Or consider the recent "Gay Olympics" case,⁶⁴ in which the United States Supreme Court upheld the right of the United States Olympic Committee to prohibit a nonprofit gay rights organization from using the word "Olympic" to designate its own athletic competition, even in the absence of any likelihood of consumer confusion or deception.⁶⁵

The same centralizing process has been at work in the right of publicity area. The judicial and academic rhetoric on publicity rights makes reference to "economic incentives," "natural rights," and "unjust enrichment." The subtext, however, is *control over the production and circulation of meaning* in our society. This is so because star images are widely used in contemporary American culture to create and communicate meaning and identity. The fact that the culture and advertising industries routinely and systematically use celebrity images in this way should be obvious enough. Indeed, it is only because celebrity images carry and provoke meaning that they can enhance the marketability of the commodities with which they are associated.⁶⁶ Their "associative" or "pub-

61. See Lange, *supra* note 26, at 171 (expressing concern that contemporary intellectual property law is choking off access to the "public domain").

62. See GAINES, *supra* note 28, at 232-39 (arguing that current intellectual property law may be curtailing popular cultural production); Coombe, *supra* note 28, at 1855 (arguing that in the current climate, "intellectual property laws stifle dialogic practices—preventing us from using the most powerful, prevalent, and accessible cultural forms to express identity, community, and difference"); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149, 156-57 (1992) (observing that the recent judicial trend toward recognizing new intellectual property rights "sometimes may interfere impermissibly with the autonomy of others and with efforts by individuals to achieve cultural self-determination").

63. See Coombe, *supra* note 28, at 1869-77.

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

65. *Id.* at 535-41. For insightful criticism, see Robert N. Kravitz, *Trademarks, Speech, and the Gay Olympics Case*, 69 B.U. L. REV. 131, 166-84 (1989) (criticizing the decision for undervaluing interests in free expression).

66. See *infra* text accompanying notes 279-84.

licity" value derives from their semiotic power. What is somewhat less obvious is that individuals and groups also use star signs in their everyday lives to communicate *meanings of their own making*. They make active and creative use of celebrity images to construct themselves and their social relations, to identify themselves as individuals and as members of subcultural groups, and to express and communicate their sense of themselves and their particular experience of the world. Indeed, celebrity images are among the basic semiotic and symbolic raw materials out of which individuals and groups "establish their presence, identity and meaning."⁶⁷

This is especially clear in the case of groups that are outside the cultural mainstream. Richard Dyer has observed that particularly intense audience-star relationships occur among groups such as adolescents, women, and gays, who experience extreme "role/identity conflict and pressure, and an (albeit partial) exclusion from the dominant articulacy of, respectively, adult, male, heterosexual culture."⁶⁸ Dyer shows, for instance, how urban gay men in the 1950s seized on the image of Judy Garland as a powerful means of speaking to each other about themselves.⁶⁹ Along the same lines, Rosemary Coombe has drawn our attention to the way in which "celebrity images provide the cultural resources which those in marginalized groups use to construct alternative gender identities."⁷⁰ She notes, by way of example, that James Dean provides contemporary lesbians "with an icon which may embody a challenge to dominant understandings of the causal connections between biology, anatomy, desire, and sexual practice."⁷¹

It is not just the members of marginalized groups, however, who draw on the celebrity image bank to define and identify themselves, or to express their sense of themselves and their particular experience of the world. Everyone from the President on down⁷² does it to some extent, often through the consumption and display of celebrity paraphernalia: T-shirts, posters, greeting cards, etc. When we buy, exchange, and display cultural commodities of this kind, we "are actively contributing to the social circulation" of meanings about the celebrity.⁷³ "The choice of which Madonna T-shirt to buy," as John Fiske has noted, "is a choice about which meanings of Madonna to circulate."⁷⁴ It is a consumption decision in the first instance, yet it is also something more.

67. WILLIS ET AL., *supra* note 49, at 1.

68. Richard Dyer, *Charisma*, in *STARDOM: INDUSTRY OF DESIRE* 57, 59 (Christine Gledhill ed., 1991).

69. See RICHARD DYER, *HEAVENLY BODIES: FILM STARS AND SOCIETY* 141-94 (1986).

70. Coombe, *supra* note 28, at 1876.

71. *Id.* at 1877.

72. See *supra* text accompanying note 6.

73. FISKE, *UNDERSTANDING POPULAR CULTURE*, *supra* note 49, at 174.

74. *Id.*

An example may help to sharpen the point.⁷⁵ A few years ago, a bill was introduced in the New York Legislature to create a broad and descendible right of publicity.⁷⁶ During hearings on the bill, some of the testimony referred to a greeting card, said to be sold chiefly in gay bookstores. The card bears a picture of John Wayne, wearing cowboy hat and bright red lipstick, above the caption, "It's such a bitch being butch."⁷⁷ Wayne's children, among others, objected to the card not only on the ground that its sellers were making money from The Duke's image—money that should go to them, or, in this case, to the charity of their choosing.⁷⁸ They objected also, indeed primarily, because in their view the card was "tasteless" and demeaned their father's (hard-earned) conservative macho image.⁷⁹ To his children, as to most of his fans, "John

75. While the specific example I have chosen involves a deceased celebrity, nothing of consequence turns on that fact.

76. See S. 5053-A, A. 8050-A, 1989-1990 N.Y. Reg. Sess. The impetus for this legislative proposal was the decision of the New York Court of Appeals in *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580 (N.Y. 1984). There, the court held that, contrary to a line of federal court decisions in diversity cases going back to 1953, no common law right of publicity exists in New York. Celebrities seeking relief against unauthorized commercial appropriation of their personalities must proceed under the state's privacy statute, which is codified as §§ 50, 51 of the New York Civil Rights Law. *Id.* at 584. The protection that these provisions grant to celebrities, however, is narrower than the common law right of publicity in several respects. First, §§ 50, 51 reach only unauthorized advertising or trade use of a "name, portrait, or picture," N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1992), whereas the common law right of publicity encompasses a variety of other identifying characteristics, see *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826, 837-38 (S.D.N.Y. 1990) (use of a sound-alike does not violate §§ 50, 51); *Allen v. National Video, Inc.*, 610 F. Supp. 612, 624 (S.D.N.Y. 1985) (use of a look-alike does not violate §§ 50, 51 unless "most persons who could identify an actual photograph of [the celebrity] would be likely to think that this was actually his picture"); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 396 N.Y.S.2d 661, 664-65 (App. Div. 1977) (bandleader's public personality as "Mr. New Year's Eve" is protected by the common law right of publicity but not by §§ 50, 51).

Second, the privacy right secured by §§ 50, 51 is a nonassignable personal right. See, e.g., *Lombardo*, 396 N.Y.S.2d at 664; *Rosemont Enters., Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122, 129 (Sup. Ct. 1968), *aff'd*, 301 N.Y.S.2d 948 (App. Div. 1969). In this sense, it is unlike the common law right of publicity. See *Haelan Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). Third, although a cryptic footnote in *Stephano* appeared to leave the question open, 474 N.E.2d at 584 n.2, courts have since held that the statutory right created by §§ 50, 51 is not inheritable. See *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 585 (2d Cir. 1990); *Smitli v. Long Island Jewish-Hillside Medical Ctr.*, 499 N.Y.S.2d 167, 168 (App. Div. 1986); *James v. Delilah Films, Inc.*, 544 N.Y.S.2d 447, 451 (Sup. Ct. 1989).

The bill mentioned above is primarily designed to undo the impact of the *Stephano* decision on New York law. Accordingly, the bill defines the right of publicity as "a property right that every natural person, *living or deceased*, has in his identity," and provides that the right is "descendible and . . . freely transferable." S. 5053-A, A. 8050-A, *supra*, sec. 1, § 58.1 (emphasis added). The bill would create a civil action, for damages and injunctive relief, for unauthorized advertising or trade use of "name, voice, signature, photograph, or visual image." *Id.* sec. 1, § 58.2.

77. See Daniel B. Moskowitz, *Celebrities' Ghosts Are Hanging over Advertisers*, BUS. WK., June 3, 1985, at 108. A copy of the card is on file with the author.

78. Wayne Enterprises, a family-owned partnership which purchased from John Wayne the exclusive right to use his identity, donates net profits from its licensing agreements to the John Wayne Cancer Clinic at UCLA. Statement of Michael Wayne Before the N.Y. State Senate in Support of the Celebrity Rights Act 3 (May 15, 1989) (transcript on file with author).

79. See *id.*; see also Moskowitz, *supra* note 77 (quoting Wayne's son as complaining that the

Wayne" epitomizes traditional America's mythic and idealized view of itself, its history, and its national character. What Wayne stands for—what his image means in the mainstream cultural grammar—is rugged individualism, can-do confidence, physical courage, and untroubled masculinity. That is the "preferred meaning"⁸⁰ of "John Wayne." It was on this preferred meaning that President Bush drew easily and effectively in communicating his military plans in the Gulf.⁸¹ It is on that meaning, too, that Wayne Enterprises drew when it licensed the Franklin Mint to sell (for \$395) a "serially numbered, non-firing" replica of the .45-caliber automatic pistol that Wayne "carried in so many great military films."⁸²

Nevertheless, against-the-grain readings of John Wayne are also possible. For instance, in a course on how to survive as a prisoner of war, the U.S. Navy uses the term "John Wayning it" to mean trying foolishly to hold out against brutal torture. The particular greeting card that Wayne's children and others objected to so strenuously represents an even more subversive inflection of Wayne's image. The card uses his image to interrogate and challenge mainstream conceptions of masculinity and heterosexuality. It recodes Wayne's image so as to make it carry a cultural meaning that presumably works for gay men, among others, but which Wayne's children (and no doubt many of his fans) find deeply offensive. If the New York Legislature were to make John Wayne's right of publicity descendible, however, it would confer on Wayne Enterprises⁸³ the power to determine that this particular appropriation of the John Wayne image is "illegitimate," and to enforce that determination by denying a license to the greeting card maker. Wayne Enterprises would henceforth have the power to fix, or at least try to fix, the meaning that "John Wayne" has in our culture: his meaning *for us*.

What it comes down to, then, is that the power to license is the power to suppress. When the law gives a celebrity a right of publicity, it does more than funnel additional income her way. It gives her (or her assignee) a substantial measure of power over the production and circulation of meaning and identity in our society: power, if she so chooses, to suppress readings or appropriations of her persona that depart from, challenge, or subvert the meaning she prefers; power to deny to others the use of her persona in the construction and communication of alterna-

card "denigrates his image"). Another "abuse" cited at the New York legislative hearing was a greeting card that pictured Clark Gable standing before the main staircase at Tara holding a scantily clad young man in his arms. The caption on the card was, "Frankly, my dear, I *do* give a damn." Gable's son, John, testified that he and his family were greatly distressed and offended by the card, and asked the Legislature to "help me preserve the image of my father." See *1988 Hearing, supra* note 31, at 34 (statement of John Clark Gable).

80. For the meaning of this term, see *supra* note 50.

81. See *supra* text accompanying note 6.

82. Advertisement, *LIFE*, July 1989, at 95.

83. See *supra* note 78.

tive or oppositional identities and social relations; power, ultimately, to limit the expressive and communicative opportunities of the rest of us. The result is a potentially significant narrowing of the space available for alternative cultural and dialogic practice. Publicity rights, in other words, move us even further away from what John Fiske has called a "semiotic democracy"⁸⁴—a society in which all persons are free and able to participate actively, if not equally, in the generation and circulation of meanings and values.

The censorial potential inherent in the right of publicity is perhaps not reason enough to reject it *tout court*. After all, it is possible that this power will be used very sparingly—although what evidence there is on this score provides little reason for optimism.⁸⁵ It is also possible that the law does not bite very hard or deep here, that while the existence of publicity rights deters or stifles some popular cultural production and prevents some representational practices, "social semiosis continues in spite of it."⁸⁶ It should, however, be up to the proponents of publicity rights to demonstrate that this is so. Absent such a demonstration, the risk of censorship and, perhaps more importantly, of self-censorship makes the burden of justification a substantial one. It falls to the proponents of publicity rights to explain why the risk is worth running. Appeals to "common sense" will not suffice here, nor will vague assurances that the First Amendment can be relied on to safeguard legitimate interests in expression.⁸⁷ Proponents of the right of publicity should be

84. FISKE, *TELEVISION CULTURE*, *supra* note 49 at 236, 239.

85. Many of the witnesses who testified in favor of the New York publicity rights bill were candid about their intention to *suppress* appropriations whose *substantive content* they find tasteless or offensive. The sons of John Wayne and Clark Gable, for example, would certainly deny licenses to the sellers of the greeting cards described above. See *supra* note 79 and accompanying text. Their objection to these cards was not that they were being sold without payment to the Wayne and Gable estates, but that they were being sold *at all*. Interestingly, a great many of the "abuses" (in other words, unauthorized appropriations) cited at the hearings were articles directed at a gay market. See, e.g., 1988 *Hearing*, *supra* note 31, at 19-21 (Roger Richman complaining, *inter alia*, about male impersonators of Marilyn Monroe and about Oscar Wilde Beer—"bottled beer with an extra-long neck on it"). Roger Richman, who heads the exclusive licensing and enforcement agency for numerous living and deceased celebrities, urged adoption of a publicity rights law to curb this "denigration of our national treasures." *Id.* at 16. One person's "denigration," of course, is just another's recoding.

The property management agent of the Martin Luther King, Jr., Center for Social Change estimates that half the requests that are made each year for use of Dr. King's image are denied. Telephone Interview with Isaac Farris, Property Management Agent, Martin Luther King, Jr., Center for Social Change (Sept. 18, 1990). Mr. Farris stated that licensing decisions are made on a "case-by-case basis," and that products are evaluated on three criteria: their quality, their integrity and character, and their degree of likeness to Dr. King. *Id.* He declined to estimate how many of the denials rest on considerations of taste, value, viewpoint, and the like. He did state, however, that three recent proposals (a floor mat for a car, a perfume, and a pocketknife) had been rejected under the "integrity and character" criterion. *Id.*

86. See GAINES, *supra* note 28, at 239.

87. David Lange noted some time ago that the First Amendment is too "broad-gauged" a tool for this purpose, see Lange, *supra* note 26, at 165 n.74, and subsequent developments have certainly

required to make a clear and convincing showing that important interests will be served by recognizing a property right in a celebrity's identity. In Part III, we shall see that no such showing has yet been made. First, however, we need to understand the forces, material and ideological, that have brought forth the right of publicity.

II

THE EMERGENCE OF A RIGHT OF PUBLICITY

[A]lthough the concept of privacy which Brandeis and Warren evolved fulfilled the demands of Beacon Street in 1890, it may seriously be doubted that the application of this concept satisfactorily meets the needs of Broadway and Hollywood in 1954.

—Melville Nimmer⁸⁸

Famous persons have not long had or even long laid claim to a property right in their identities. Despite intimations in earlier cases,⁸⁹ the right of publicity was recognized for the first time only forty years ago.⁹⁰

proved him right. The courts have reserved First Amendment protection for image-appropriating forms that are viewed as having primarily cultural or informational purposes (plays, songs, books, news, movies). Attempts to defend the sale of celebrity merchandise (posters, T-shirts, greeting cards, games, etc.) on First Amendment grounds have been uniformly rejected. *Compare* *Rosemont Enters. v. Random House, Inc.*, 294 N.Y.S.2d 122, 128 (Sup. Ct. 1968) (First Amendment protection accorded to a Howard Hughes biography), *aff'd*, 301 N.Y.S.2d 948 (App. Div. 1969) with *Rosemont Enters. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144, 146-47 (Sup. Ct.) (First Amendment defense rejected for a Howard Hughes board game), *modified on other grounds*, 345 N.Y.S.2d 17 (App. Div. 1973) and *Rosemont Enters. v. Choppy Prods.*, 347 N.Y.S.2d 83, 85 (Sup. Ct. 1972) (First Amendment defense rejected for a Howard Hughes T-shirt bearing a satirical comment). Courts generally do not discern any constitutionally protectible "speech" in these articles, despite their communicative and culture-building functions. The common judicial reaction is to dismiss posters, games, greeting cards, and the like as "mere merchandise." Chief Justice Bird's statement in the *Lugosi* case is typical:

[E]nforcement of the right of publicity may conflict with freedom of expression in some cases. However, such a conflict is not presented in this case. Plaintiffs challenged Universal's licensing of Lugosi's likeness in his portrayal of Count Dracula in connection with the sale of such objects as plastic toy pencil sharpeners, soap products, target games, candy dispensers and beverage stirring rods. Such conduct hardly implicates the First Amendment.

Lugosi v. Universal Pictures, 603 P.2d 425, 449 (Cal. 1979) (Bird, C.J., dissenting); *see also* *Winterland Concessions Co. v. Sileo*, 528 F. Supp. 1201, 1214 (N.D. Ill. 1981) (distinguishing T-shirts from newspapers), *aff'd*, 830 F.2d 195 (7th Cir. 1987); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 285 (S.D.N.Y. 1977) (no First Amendment protection for the sale of "posters of Elvis Presley as Elvis Presley"); *Sims, supra* note 27, at 493 ("Courts have peremptorily rejected the idea that posters, games, or other celebrity memorabilia convey speech of constitutional significance . . .").

88. Nimmer, *supra* note 13, at 203.

89. *See, e.g., Updorp Co. v. NBC*, 8 F. Supp. 358, 361 (D. Mass. 1934) (commercial value of a celebrity's name for advertising purposes can create rights of a pecuniary nature), *modified*, 81 F.2d 373 (1st Cir.), *cert. denied*, 298 U.S. 670 (1936); *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917) (enforcing an agency for the marketing of a celebrity's endorsements).

90. *See Haelan Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

Why did it not emerge sooner? The standard answers—that “nothing in our experience before the early 1900’s . . . made such a right necessary,”⁹¹ and that the “[c]ommercialization of personality only recently has invaded our daily lives”⁹²—will not do. The right of publicity is *not* a new right for a new wrong. As will be seen below, large-scale commercial exploitation of famous persons goes back at least to the eighteenth century. It continued throughout the nineteenth century as well, all the while engendering little in the way of private complaint or social disapproval. Indeed, the practice seems to have been supported by a widely shared conception of famous persons as a kind of communal property, freely available for commercial as well as cultural exploitation. In this Part, I examine how and why this traditional common property conception was ultimately displaced by one more suited to what Melville Nimmer, in his seminal 1954 article on the right of publicity, unashamedly called “the needs of Broadway and Hollywood.”⁹³

A. *Commodification Ascendant: From Fame to “Celebrity”*

As Leo Braudy has shown, the marketing of the images of famous persons became big business in the second half of the eighteenth century.⁹⁴ In 1774, for example, Josiah Wedgwood introduced a series of small portrait medallions of “Illustrious Moderns” that was an immediate hit with consumers and became a regular part of his factory’s output.⁹⁵ Wedgwood followed up with “[p]lates, figurines, earthenware pitchers, flatware—a multitude of household objects featur[ing] the faces of the new generation of great men.”⁹⁶ By 1779, Wedgwood’s medallions “were outselling the tea services through which [he] had first made his fortune.”⁹⁷ Other entrepreneurs, in England and elsewhere, were quick to grasp the commercial possibilities and began to market large quanti-

91. Note, *An Assessment of the Commercial Exploitation Requirement as a Limit on the Right of Publicity*, 96 HARV. L. REV. 1703, 1713 (1983).

92. Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1210 (1986).

93. Nimmer, *supra* note 13, at 203.

94. See LEO BRAUDY, *THE FRENZY OF RENOWN: FAME & ITS HISTORY* 452 (1986). Braudy identifies the mid-18th century as the period in which new methods of mass publicity, “the rapid diffusion of books and pamphlets, portraits and caricatures,” brought forth “a new quality of psychic connection between those who watch and those who . . . perform on the public stage.” *Id.* at 380. For the first time, famous people such as Voltaire and Rousseau became tourist attractions, “way stations for the ambitious to visit, like natural wonders or historical monuments.” *Id.* In the 1760s, which Braudy identifies as “the seedtime of modern visual celebrity,” the engraving and printing trades expanded greatly and “a major part of their output was the reproduction of portraits of such men.” *Id.* at 452.

95. See CHARLES C. SELLERS, *BENJAMIN FRANKLIN IN PORTRAITURE* 72-73 (1962); see also BRAUDY, *supra* note 94, at 452 (noting that the series was designed for “less prosperous homes”).

96. BRAUDY, *supra* note 94, at 452 (citation omitted).

97. *Id.* at 452 n.1.

ties of what some would now derisively call "celebrity paraphernalia."⁹⁸ This was probably lucrative business, yet Braudy makes no mention of any financially motivated complaint having been registered by or on behalf of the "great men" whose faces were appropriated, or of any social disapproval having been voiced.⁹⁹

Benjamin Franklin's experience while ambassador to France is quite instructive in this regard. Shortly after his arrival in France in 1776, Franklin's likeness began to appear "on medallions, snuffboxes, rings, clocks, vases, handkerchiefs, and pocket knives."¹⁰⁰ Louis XVI found this iconization of Franklin so excessive that he presented one of Franklin's devoted female admirers with a "chamber pot adorned with [Franklin's] picture."¹⁰¹ Franklin recorded his reaction to these developments in a revealing letter to his daughter:

The clay medallion of me you say you gave to Mr. Hopkinson was the first of the kind made in France. A variety of others have been made since of different sizes; some to be set in lids of snuff boxes, and some so small as to be worn in rings; and the numbers sold are incredible. These, with the pictures, busts, and prints, (of which copies upon copies are spread every where) have made your father's face as well known as that of the moon, so that he durst not do any thing that would oblige him to run away, as his phiz would discover him wherever he should venture to show it. It is said by learned etymologists that the name *Doll*, for the images children play with, is derived from the word *IDOL*; from the number of *dolls* now made of him, he may truly be said, *in that sense*, to be *i-doll-ized* in this country.¹⁰²

Franklin's half-joking lament about the price in freedom and privacy exacted by fame anticipates a common complaint of modern celebrities. For our purposes, however, the interesting thing about this letter is that there is no hint in it of moral outrage or resentment. Judging by this letter, Franklin did not begrudge these entrepreneurs the profits they were deriving from his image, nor did he resent their failure to seek his consent.

Why is it that Franklin—a man not blind to commercial opportunities—did not feel offended, wronged, or cheated by this commercial appropriation of his face and fame? Why is it that other members of the

98. See *id.* at 452-54.

99. See *id.* at 452-55, 460-61.

100. RALPH L. KETCHAM, BENJAMIN FRANKLIN 143 (1966); see also BRAUDY, *supra* note 94, at 13 (noting that, during Franklin's stay in Paris, his face appeared on "fans, perfume bottles, and a hundred other items of fashion").

101. KETCHAM, *supra* note 100, at 143.

102. Letter from Benjamin Franklin to Sarah Bache (June 3, 1779), in MR. FRANKLIN: A SELECTION FROM HIS PERSONAL LETTERS 45, 45-46 (Leonard W. Labaree & Whitfield J. Bell, Jr. eds., 1956).

founding generation such as Washington, Adams, and Jefferson likewise suffered commercialization of their personas without apparent complaint? Braudy points us toward a possible answer. The Founders, he says, believed that broad dissemination of their images would advance the interests of the nascent American republic. They viewed their images as a kind of common republican property, appropriately deployed in any way that would further the cause of independence and nation building:

Franklin, like Washington, Jefferson, and even the more artistically puritanical John Adams, appreciated the propaganda value of such images of an exemplary civic virtue, especially in France, the country to which the most elaborate appeals for support against England were being made. But it was even more effective in America, where the images of the new heroes served to help create a spirit of unity paralleled by the evolution of more abstract national symbols. America was organizing a culture from the ground up, and in that organization the unifying and crystalizing function of faces was of prime importance.¹⁰³

For these reasons, Braudy continues, the Founders grudgingly sat for portraitists and sculptors as a matter of "patriotic duty," notwithstanding their strong distrust of the aristocratic visual arts. This same sense of civic duty may also account in part for the Founders' tolerant attitude toward the more mundane sorts of commercial exploitation described above. Portraits and busts, after all, could be purchased by only a few of their fellow citizens, and would not be seen by many more. But mass-marketed household artifacts and decorative objects (plates, medallions, clocks, rings, and the like) helped to establish a genuinely democratic national iconography.¹⁰⁴

This is not to say that the members of the founding generation were indifferent to fame. On the contrary, the lust for fame was perhaps their "ruling passion."¹⁰⁵ Moreover, a central theme of their political thinking was that "[f]ame should be freely sought and freely given" as the "only proper reward" for civic virtue and heroism.¹⁰⁶ But "fame" for them was not mass notice or great popularity, not mere "well-knownness." It

103. BRAUDY, *supra* note 94, at 452-53.

104. *See id.* at 454-55.

105. DOUGLASS ADAIR, *FAME AND THE FOUNDING FATHERS* 7-8 (Trevor Colbourn ed., 1974); *see also* THE SPUR OF FAME: DIALOGUES OF JOHN ADAMS AND BENJAMIN RUSH, 1805-1813, at 1-19 (John A. Schutz & Douglass Adair eds., 1966); Bruce Miroff, *John Adams: Merit, Fame, and Political Leadership*, 48 J. POL. 116 (1986). Hamilton himself called the love of fame "the ruling passion of the noblest minds." THE FEDERALIST NO. 72, at 464 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

106. GARRY WILLS, CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT 128-29 (1984) (discussing fame as a social glue, a structural element, for the early American republic and for all those called to its service); *see also* Miroff, *supra* note 105, at 118, 122-26 (noting that John Adams sought to attract the most talented individuals into public service by means of symbolic public honors that would gratify their desire for fame).

was rather the respect and esteem of those amongst their contemporaries (and posterity) who could "discriminate between virtue and vice."¹⁰⁷

Nor was "fame" for them an instrumental good, something to be sought and valued because it enabled one to get more of whatever else (money, power, sex) one wanted. It was rather an intrinsic or "final" good, sought and valued for its own sake, as a crown of achievement and reward for disinterested civic virtue. In the Founders' view, as Garry Wills has observed, "[t]he purity of a perfect heroism was its willingness to be rewarded *only* in fame."¹⁰⁸ Steeped in the classical republican tradition¹⁰⁹ and uncorrupted by modern economics,¹¹⁰ they did not and perhaps could not conceive of fame as a business "asset," a means to material income, a mere commodity.¹¹¹ Indeed, the modern "economic" conception of fame (upon which, as we will see, the right of publicity is based)¹¹² was alien to Franklin's generation. It is hardly surprising, therefore, that they did not feel that entrepreneurs who commercially exploited their images were "cheating" them of the "fruits" of fame. Fame, as they understood it, was itself the sweetest "fruit" of all.¹¹³

A century later we can again find manufacturers and merchants making widespread use of the names and faces of famous and prominent persons. For example, after John Brown was hanged by the State of Virginia for his role in the raid on Harper's Ferry, entrepreneurs marketed lithographs, prints, busts, and photographs of him.¹¹⁴ During

107. ADAIR, *supra* note 105, at 11.

108. WILLS, *supra* note 106, at 128.

109. On the classical republicanism of the founding generation, see generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969). Even the petty bourgeois Franklin was apparently much influenced by this tradition. See KETCHAM, *supra* note 100, at 13-17 (detailing how Franklin's early exposure to Plutarch's *Lives* shaped his views of civic virtue and political leadership).

110. See David M. Levy, *The Market for Fame and Fortune*, 20 HIST. POL. ECON. 615 (1988) (contrasting the modern economic interpretation of fame as an instrument for obtaining material income with the classical Greek view of fame as a good in itself).

111. Even if Franklin and the others had been able and inclined to view fame in these instrumental terms, the then-prevailing Blackstonian conception of property might have made it very difficult for them to conceive of a "property" right in the pecuniary value attaching to a name or image. See generally Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980) (arguing that the 18th century conception of property was "physicalist," requiring some external "thing" as the object of property rights).

112. See *infra* text accompanying notes 224-41.

113. This neoclassical conception of fame apparently did not last much beyond the founding period. In the mid-19th century de Tocqueville noted that in "democratic" societies like America even the "most ambitious men . . . care much more for success than for fame." 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 281 (Phillips Bradley ed. & Henry Reeve trans., Vintage Books 1990) (1840). Americans, de Tocqueville discovered to his dismay, were largely indifferent to glory, preeminence, and universal and posthumous renown. Instead, "the passion for physical gratification and the exclusive love of the present predominate in the [democratic] heart." *Id.*

114. See Paul Finkelman, *Manufacturing Martyrdom: The Antislavery Response to the John*

Sarah Bernhardt's 1880 American tour, manufacturers and merchants "cashed in with Sarah Bernhardt perfume, candy, cigars, and eye-glasses."¹¹⁵ Two years later, when Oscar Wilde visited the United States on a much-publicized and controversial lecture tour, advertisers put his image on trade cards for such products as Marie Fontaine's Moth and Freckle Cure.¹¹⁶ Even famous fictional characters were sometimes appropriated for commercial purposes. The appearance of George du Maurier's novel *Trilby* in 1894, for instance, touched off a "bohemianism" craze.¹¹⁷ Along with massive book sales and theatrical productions came the marketing of what we (in the age of *Dick Tracy* and *Batman*) would call "peripherals": "Trilby shoes and foot accessories, bathing suits, cigars, cigarettes."¹¹⁸

These are by no means isolated examples. According to the social historian Neil Harris, commercial exploitation of famous persons—living and dead, political and theatrical, fictional and real—was common throughout the nineteenth century: "From Jenny Lind to Georges du Maurier's Trilbymania, from Louis Kossuth to Lillian Russell, celebrities stood at the center of temporary epidemics. Hats, dolls, canes, bicycles, theaters, toys, dinnerware, furniture, cigars, liquors bore the likenesses, names, or special symbols of various personalities."¹¹⁹ Yet, as earlier, this widespread commercial exploitation appears not to have generated much public outcry or private litigation. In Harris' view, "[s]oine unspoken assumption made famous people . . . a species of common property whose commodity exploitation required little control."¹²⁰

In the final two decades of the nineteenth century, however, this "unspoken assumption" began to be directly challenged both in the courts and in society at large. The shift is evident in an unsigned 1895 editorial in *Case & Comment*, entitled "Advertising Brigands," which scathingly criticized the commercial exploitation of famous persons:

"Any likeness of anything that is in Heaven above" we may

Brown Raid, in *HIS SOUL GOES MARCHING ON: RESPONSES TO THE JOHN BROWN RAID* (Paul Finkelman ed., forthcoming 1993) (manuscript at 19-23, on file with author). According to Finkelman, many of these entrepreneurs were motivated by a desire to create and disseminate a "myth" helpful to the abolitionist cause, and others sought to obtain funds for Brown's widow and family. But there were those—like Currier & Ives, which sold a colored lithograph of Brown kissing a slave child on his way to the gallows—who seemed to be interested only in turning a profit. *Id.*

115. BENJAMIN MCARTHUR, *ACTORS AND AMERICAN CULTURE, 1880-1920*, at 137-38 (1984).

116. ROBERT JAY, *THE TRADE CARD IN NINETEENTH-CENTURY AMERICA* 61, 63 (1987). Wilde was consistently portrayed on these trade cards as a "flowery, effeminate *poseur*, a caricature over which [he] obviously had no more control than he had over his appearance on trade cards in the first place." *Id.* at 61.

117. See MCARTHUR, *supra* note 115, at 162.

118. *Id.*

119. Neil Harris, *Who Owns Our Myths? Heroism and Copyright in an Age of Mass Culture*, 52 SOC. RES. 241, 251 (1985).

120. *Id.* (emphasis added).

expect to see in these days on city walls, slabsided rocks, or country barn doors, as the sign or trade-mark of some quack medicine or shoddy merchandise. If the "likeness" crammed into our vision by a persistent advertiser happens to be his own, we may as well resolve to "suffer and be strong." But when some immortal face that the nation loves is taken by a vulgar smart Aleck and degraded to an advertisement of eye salve, liver pills, or a cure for piles, we ought to be strong enough to make him do the suffering.¹²¹

The editorial cited such specific "abuses" as cigars named for President Arthur and the English social philosopher Herbert Spencer, and a tea named for President Garfield.¹²² Highly moralistic in tone, the editorial worried that before long "the sad, sublime face of Abraham Lincoln [would] be posted up everywhere to advertise 'Bloater's Bitters,' or 'Smart Cuss's Corn Cure[.]'" and that mannequins of Martha Washington and Mrs. Grover Cleveland would be used "to display perfect fitting corsets or seamless suits of underwear."¹²³

Roughly contemporaneous with this editorial are the first reported lawsuits by prominent persons objecting to the unauthorized commercial appropriation of their names and likenesses.¹²⁴ In 1890, for example, Marion Manola, a comic opera star appearing in a New York City production of *Castles in the Air*, refused to allow herself to be photographed in costume (tights) for a poster advertising the show. When the production manager, disregarding her wishes, had a photographer snap a picture of Manola during a performance, she sought and obtained an *ex parte* injunction against its advertising use.¹²⁵

A year later Sir Morrell Mackenzie, a prominent English physician specializing in diseases of the throat, brought suit in New York against an American manufacturer for the unauthorized use of a spurious testimonial, complete with a facsimile of his signature, in connection with the sale of "Soden Mineral Pastilles." He complained of "damage to his professional standing and income as a physician," as well as "infringement

121. *Advertising Brigands*, CASE & COM., Dec. 1895, at 3.

122. *Id.* at 3-4. The practice of naming cigars for American presidents and presidential candidates continued well into this century. See *Prest v. Stein*, 265 N.W. 85 (Wis. 1936) (involving a dispute between rival cigar makers, each of whom marketed a "Franklin D. Roosevelt" cigar); TONY HYMAN, *HANDBOOK OF AMERICAN CIGAR BOXES* 122-24 (1979).

123. *Advertising Brigands*, *supra* note 121, at 3-4.

124. Ordinary persons as well began to complain of unauthorized appropriation for commercial purposes at roughly the same time. See *infra* text accompanying notes 206-07.

125. See *Photographed in Tights: Marion Manola Caught on the Stage by a Camera*, N.Y. TIMES, June 15, 1890, at 2; *Manola Gets an Injunction*, N.Y. TIMES, June 18, 1890, at 3; *Miss Manola Seeks an Injunction*, N.Y. TIMES, June 21, 1890, at 2. For an interesting account of the circumstances of Manola's court case, see Dorothy Glancy, *Privacy and the Other Miss M*, 10 N. ILL. U. L. REV. 401, 402-19 (1990).

of his right to the sole use of his own name."¹²⁶ Although Mackenzie would probably have been reined in had these events occurred in his native England,¹²⁷ the New York court, without citing any precedent or giving any explanation, entered a preliminary injunction.

In 1899, the widow of Colonel John Atkinson, described as a "well-known lawyer and politician," sued to prevent the marketing of a "John Atkinson Cigar," bearing her late husband's likeness on its label.¹²⁸ Although the Michigan Supreme Court declined to recognize a right of privacy and dismissed her claim, it characterized the defendant's conduct as "impertinen[t]."¹²⁹

126. *Mackenzie v. Soden Mineral Springs Co.*, 18 N.Y.S. 240, 249 (Sup. Ct. 1891).

127. *See Dockrell v. Dougall*, 80 L.T.R. 556 (Eng. C.A. 1899) (finding no cause of action for a physician whose name was used without his permission to sell medicine); *Clark v. Freeman*, 11 Beav. 112 (M.R. 1848) (refusing to issue an injunction to prevent defendant from selling ineffective medications advertised under a name similar to that of eminent physician). Except where commercial appropriation of a person's name or face amounted to libel or unfair competition, English law at the time denied relief. The notion that a famous person's name or face should be protected as his private property was firmly rejected. *See Dockrell*, 80 L.T.R. at 558. Although English judges did not conceal their distaste for unscrupulous and deceptive instances of unauthorized commercial appropriation, they viewed it as something prominent persons should and must bear without complaint. In *Clark*, for example, where the defendant had used an eminent physician's name in a spurious testimonial for a quack medicine, Lord Langdale characterized the defendant's conduct as "disgraceful," but nevertheless concluded that commercial exploitation of this sort "is one of the taxes to which persons in [the plaintiff's] station become subjected, by the very eminence they have acquired in the world." *Clark*, 11 Beav. at 118-19. Even 80 years later, in *Tolley v. J.S. Fry & Sons, Ltd.*, 1 K.B. 467 (1930), *aff'd*, [1931] App. Cas. 333, where a candy manufacturer had used a well-known amateur golfer's picture in an advertisement for chocolate, Lord Justice Greer rejected the notion of tort liability for commercial appropriation of personality, explaining: "Some men and women voluntarily enter professions which by their nature invite publicity, and public approval or disapproval. It is not unreasonable in their case that they should submit without complaint to their names and occupations and reputations being treated . . . *almost as public property*." *Id.* at 47 (emphasis added). In the House of Lords, which likewise rejected Tolley's appropriation claim, Lord Blanesburgh characterized the advertisement as "only another instance of the toll levied on distinction for the delectation of vulgarity." *Tolley v. J.S. Fry & Sons, Ltd.*, [1931] App. Cas. 333, 347 (appeal taken from Eng.).

In England this set of attitudes—that famous persons are a kind of public property whose commercial exploitation, while sometimes deplorable, should not be subject to legal control; that prominent persons ought to shrug off unauthorized appropriation with a kind of aristocratic contemptuousness—still predominates. For this reason English law has no counterpart to the right of publicity recognized in this country. *See, e.g., Lyngstad v. Anabas Prods. Ltd.* [1977] Fleet St. Pat. L.R. 62 (Ch.) (finding no English authority by which to justify plaintiff's claim to injunctive relief based on commercial misappropriation of personality). *See generally* Catherine L. Buchanan, *A Comparative Analysis of Name and Likeness Rights in the United States and England*, 18 GOLDEN GATE U. L. REV. 301 (1988) (comparing American and English legal approaches to appropriation and rights of publicity and privacy); Frazer, *supra* note 32 (examining the present state of English law with regard to appropriation of personality and proposing a statutory tort of appropriation of personality).

128. *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285 (Mich. 1899).

129. *Id.* at 289; *see also Von Thodorovich v. Franz Josef Beneficial Ass'n*, 154 F. 911 (C.C.E.D. Pa. 1907) (enjoining a company from using Emperor Franz Josef's name or picture in connection with its sale of life insurance); *Foster-Milburn Co. v. Chinn*, 120 S.W. 364 (Ky. 1909) (allowing a prominent politician and horseman to sue makers of Doan's Kidney Pills for damages for unauthorized use in an advertising catalogue of a spurious testimonial containing his name and

These developments suggest that an important shift in attitude toward the commercial exploitation of famous persons was already underway around the turn of the century. Neither courts nor litigants were certain as yet, however, about what exactly was "wrong" with the unauthorized commercial use of a famous name or face to promote the sale of a product or service.¹³⁰ Some of these early celebrity litigants seemed primarily concerned about embarrassment¹³¹ or reputational injury.¹³² In two of the cases, what seemed to trouble the courts most was the risk that gullible consumers would rely to their detriment on a false suggestion of endorsement of a product (medicine)¹³³ or service (life insurance)¹³⁴ that vitally affected health or well-being. One editorialist expressed outrage at the "dishonor[]" being done to "the memory of our great Americans."¹³⁵ A New Jersey court, however, explained its decision to enjoin the unauthorized use of Thomas Edison's name and pic-

picture); *Edison v. Edison Polyform Mfg.*, 67 A. 392 (N.J. Ch. 1907) (enjoining a patent medicine manufacturer from using Thomas Edison's name in its corporate title or his name and picture on the label of its medicine, despite the fact that the medicine's formula had in fact been devised by Edison and purchased from him); *Marks v. Jaffa*, 26 N.Y.S. 908 (Super. Ct. 1893) (granting an injunction to an actor whose photograph was used by a New York City newspaper conducting a popularity contest).

130. It should be noted that all of these turn-of-the-century cases involved unauthorized appropriation of a famous name or likeness for *advertising* or *promotional* purposes. Not one involved the *merchandising* use of a famous person—the marketing of her image in prints or engravings, or on decorative or utilitarian objects. That prominent people objected first to advertising uses is not surprising, inasmuch as unauthorized advertising poses not only greater risk of consumer deception but also greater likelihood of reputational and economic injury, especially where the advertised product is tawdry or shoddy. In addition, advertising appropriations do not implicate expressive and communicative interests to the same extent as do merchandising appropriations. Although the manufacturer of a plate with Edison's face on it may be motivated solely by profit, the consumer who buys the plate does so because she wants to *have* or *display* his image. She may wish to manifest her admiration for the great man, express her gratitude for the gifts he has bestowed on humanity, motivate her children to emulate his achievements, or concretize her membership in a community of Edison "fans" or "worshippers." In contrast, a person who chooses a bottle of medicine with Edison's picture on it may do so only (or at least largely) because she expects medicine made or endorsed by him to be better medicine. For these reasons, among others to be considered later, it may be easier to justify the legal regulation of unauthorized appropriation in advertising than merchandising.

131. See *supra* note 125 and accompanying text. A *New York Times* account attributed Manola's refusal to be photographed in tights for an advertising poster to her modesty. See *Photographed in Tights: Marion Manola Caught on the Stage by a Camera*, *supra* note 125. Professor Glancy, however, has argued that "modesty does not quite capture the reason" for Manola's refusal. Glancy, *supra* note 125, at 414. According to Glancy, Manola "had not been shy about exposing her legs to public view" and "did not object to performing in tights on stage." *Id.* at 415. What impelled Manola to sue, Glancy surmises, was her embarrassment at the prospect of her convent-educated nine-year-old daughter seeing the advertising poster displayed about New York City. *Id.* at 414-15.

132. See *Mackenzie v. Soden Mineral Springs Co.*, 18 N.Y.S. 240, 241-42 (Sup. Ct. 1891) (pleading injury to professional standing and reputation, loss of esteem and practice).

133. *Id.*

134. See *Von Thodorovich v. Franz Josef Beneficial Ass'n*, 154 F. 911, 913 (C.C.E.D. Pa. 1907).

135. *Advertising Brigands*, *supra* note 121, at 3.

ture on a medicine label not in terms of "privacy" or "dignity" but in the language of *property*:

If a man's name be his own property, as no less an authority than the United States Supreme Court says it is[,] it is difficult to understand why the peculiar cast of one's features is not also one's *property*, and why its *pecuniary value*, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it.¹³⁶

This is perhaps the earliest judicial statement of the view that the interest infringed by unauthorized commercial appropriation of a *public figure's* identity is *economic*. The New Jersey court viewed Edison's persona as a thing of value, a *commodity* of which Edison should be deemed the owner and disposer. Unauthorized use of Edison's persona injured him by depriving him of the opportunity to market the commodity himself. As we will see below,¹³⁷ it took quite some time for litigants, courts, and commentators to come around to this view of the matter.

Before we follow up these doctrinal developments, however, we must try to understand why commercial exploitation of famous persons began to generate both public opposition and private litigation at this particular time. Had the images of famous persons become more valuable to advertisers and merchandisers in the 1890s? If so, why? Had the specific unauthorized uses to which these images were being put become more offensive? If so, how? Had "republican" and communitarian values and modes of thinking come under general pressure? It is not easy to give a confident answer to these questions. It is likely, however, that a set of related changes in journalism and advertising in the late nineteenth century are at least partly responsible for the new demand for protection against commercial appropriation.

Consider, first, the changes in advertising. Between the end of the Civil War and 1900, total expenditures on advertising soared, multiplying tenfold¹³⁸ and transforming the American landscape in the process. In urban centers, "every available building and public conveyance was plastered with some sort of commercial message," while "enterprising advertisers easily convinced rural inhabitants to have the same thing done to their roadside farm buildings."¹³⁹ More important for present

136. *Edison v. Edison Polyform Mfg.*, 67 A. 392, 394 (N.J. Ch. 1907) (emphasis added) (citation omitted).

137. See *infra* Section II.B.

138. See STEPHEN FOX, *THE MIRROR MAKERS: A HISTORY OF AMERICAN ADVERTISING AND ITS CREATORS* 39 (1984) (documenting an increase in the total volume of advertising expenditures from \$50 to \$500 million, and from 0.7% to 3.2% of the gross national product).

139. JAY, *supra* note 116, at 34. Advertisers "covered rocks and cliffs and trees with their announcements. Niagara Falls and Yellowstone became backdrops to patent medicine advertisements painted directly on the rock formations." MICHAEL SCHUDSON, *ADVERTISING, THE UNEASY PERSUASION: ITS DUBIOUS IMPACT ON AMERICAN SOCIETY* 274 n.30 (1984). Editorialists

purposes, there was a marked change in advertising *content*. Previously, advertising had mostly been *word-based*, usually presenting consumers with a "reason why" they should select the particular product.¹⁴⁰ In the late nineteenth century, however, the perfection of chromolithography¹⁴¹ made possible a new kind of *visual* (i.e., image-based) advertising. Advertisers went on a binge of image appropriation, ransacking Greek mythology, the history of the Republic, the animal kingdom, and myriad other sources for visual images to attract attention to, and create favorable *associations* for, their products.¹⁴² Illustrious persons, both living and dead, were among the most popular of the images that found their way onto trade cards, posters, and product labels in this period. Late-nineteenth-century cigar boxes, for example, bore the names and faces of scores of famous and prominent persons—writers, artists, philosophers, politicians, military figures, royalty, and conquerors.¹⁴³ Likewise, when cigarettes began to be mass marketed, the names and faces of famous persons were affixed to their packs. "Buffalo Bill Cody" and "Robert Fulton" cigarettes were marketed in 1890. Ten years later, smokers could choose between "Thomas Jefferson 'Chums'" and "Tolstoi 'Russian Cigarettes.'"¹⁴⁴

The closing decades of the nineteenth century also brought several related changes in popular journalism. Daily newspaper circulation jumped from 2.6 million in 1870 to 8.4 million in 1890.¹⁴⁵ Important changes in journalistic practice accompanied the rising circulation. The "sensationalism" for which the journalism of this period is generally known was "less substance than style."¹⁴⁶ The emphasis on crime and

voiced concern about aesthetic blight, and several state legislatures imposed limitations to protect natural scenery from sign painters. See JAY, *supra* note 116, at 34.

140. See NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS* 59-60 (1985) ("As late as 1890, advertising, still understood to consist of words, was regarded as an essentially serious and rational enterprise whose purpose was to convey information and make claims in propositional form.").

141. See generally PETER C. MARZIO, *THE DEMOCRATIC ART: CHROMOLITHOGRAPHY 1840-1900, PICTURES FOR A 19TH-CENTURY AMERICA* (1979).

142. For a representative sample of trade cards, see JAY, *supra* note 116.

143. See HYMAN, *supra* note 122, at 106. A splendid collection of cigar box labels can be found in the Rare Books and Manuscripts Section of the 42nd Street Branch of the New York City Public Library (Arents Collection). The "Westfall Collection Box" contains labels bearing the names and likenesses of such figures as Peter Schuyler, Shakespeare, Lincoln, Robert Bacon, and Addison. A second box, denominated "Cigar Box Labels—Late Nineteenth and Early Twentieth Century," includes Tolstoi, the actress Lillian Russell, and General Custer.

144. See generally 1 Patrick O'Neil-Dunne, *Smoke, Smoke, Smoke that Cigarette: An Illustrated History of Cigarette Advertising in the U.S.A.* (1979) (unpublished and unpaginated manuscript, on file in the Arents Collection of the 42nd Street Branch of the New York City Public Library).

145. DON R. PEMBER, *PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT* 11 (1972).

146. MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* 95 (1978).

police news, on "human interest stories" and High Society gossip, simply continued the tradition of the antebellum "penny press."¹⁴⁷ Where the tabloid newspapers of the 1880s and 1890s (like Hearst's *New York Journal* and Pulitzer's *New York World*) broke new ground was in format and layout.¹⁴⁸ In order to attract readers in the growing urban centers, newspapers radically transformed their "look." Large print and small page size were introduced to make newspapers easier for commuters to read on the bus.¹⁴⁹ Editors used screeching headlines, exclusive features, and illustrations "to attract the eye and small change of readers."¹⁵⁰ The development of new engraving techniques, particularly the "halftone" process, enabled newspapers and magazines for the first time to reproduce instantaneous photographs of people and events.¹⁵¹ The result was the emergence of a genuinely pictorial or illustrated "personalities" journalism.¹⁵²

These parallel developments in journalism and advertising generated considerable anxiety, at least among certain elements of the "talking classes," and led to urgent demands for legal protection of "privacy." In 1890, Warren and Brandeis, expressing concern about the trivializing effects of gossip and the dangers of instantaneous photography, proposed recognition of a legal right of privacy.¹⁵³ In 1896, John Gilmer Speed warned that without a legally enforceable right of privacy "civilization must deteriorate, and modesty and refinement be crushed by brutality and vulgar indecency."¹⁵⁴ Speed, who was particularly distressed by the publication of surreptitiously taken photographs, insisted that even an actor has the "right to be let alone" when the curtain falls.¹⁵⁵ An editorialist in a legal magazine went so far as to urge adoption of a statute *criminalizing* the unauthorized use in advertising of the "portrait, likeness, or caricature of any other person, living or dead."¹⁵⁶

In sum, then, the turn-of-the-century appropriation cases described

147. See *id.* at 22-31, 95.

148. See *id.* at 95-106.

149. *Id.* at 103.

150. *Id.* at 95.

151. See NEIL HARRIS, *Iconography and Intellectual History: The Halftone Effect*, in *CULTURAL EXCURSIONS: MARKETING APPETITES AND CULTURAL TASTES IN MODERN AMERICA* 304, 313-16 (1990).

152. See *id.*; Schudson, *supra* note 146, at 95-98.

153. See Warren & Brandeis, *supra* note 22.

154. John G. Speed, *The Right of Privacy*, 163 N. AM. REV. 64, 64 (1896).

155. *Id.* at 68. Complaining that newspapers were routinely invading the privacy of actors and other prominent persons, Speed noted:

[I]t is a well-known fact that at least one of the newspapers of New York keeps a photographer busy in the streets of the metropolis taking "snap shots" at every person who appears to be of consequence. These are used at once, or filed away for use when occasion arises.

Id. at 73.

156. *Advertising Brigands*, *supra* note 121, at 4.

above are perhaps best understood as part of a larger cultural crisis occasioned by the shift from a word-based to an image-based society.¹⁵⁷ Prior to the late nineteenth century, even the most prominent Americans were known largely through their words or their deeds, rather than through their images. While the faces of Franklin, Washington, and perhaps a few others were widely known, "[i]t is quite likely," Neil Postman suggests, "that most of the first fifteen presidents of the United States would not have been recognized had they passed the average citizen in the street. This would have been the case as well of the great lawyers, ministers and scientists of that era."¹⁵⁸ In the closing decades of the nineteenth century, however, new technologies for the representation and dissemination of images—instantaneous photography, chronolithography, the halftone process—transformed advertising and journalistic practice, divesting elites of their facelessness. Suddenly, in greater numbers than ever before, prominent people found their names and images disseminated far and wide, not only in newspapers and magazines, but also on product labels, advertising posters, and trade cards. Some of them, especially in the metropolitan centers of the northeast, did not respond with the same equanimity and good humor that Ben Franklin displayed when French merchants made his face "as well known as that of the moon."¹⁵⁹ They were distressed, alarmed, and incensed, and they turned to the courts (and legislatures) for help.¹⁶⁰

157. According to Harris, the generation of Americans living between 1885 and 1910 "went through an experience of visual reorientation" that rivalled even the Gutenberg Revolution. HARRIS, *supra* note 151, at 307.

158. POSTMAN, *supra* note 140, at 60.

159. Letter from Benjamin Franklin to Sarah Bachie (June 3, 1779), *supra* note 102, at 45.

160. The question remains, however, just *why* this was the case. Why, in other words, didn't prominent persons at this time react the way Franklin had—and simply shrug off the unauthorized commercial appropriation of their identities? Why instead did they become angry and distressed when their faces were affixed to cigar box labels or trade cards? The historian Warren Susman's account of the turn-of-the-century shift from a "culture of character" to a "culture of personality" suggests the beginning of an answer. See WARREN I. SUSMAN, *CULTURE AS HISTORY: THE TRANSFORMATION OF AMERICAN SOCIETY IN THE TWENTIETH CENTURY* 271-85 (1984).

Nineteenth-century American culture, Susman says, was built around the notion of "character," a group of traits (self-discipline, devotion to duty, and manliness prominent among them) that were widely believed both to provide a method for the mastery and moral development of the self and to be essential for the maintenance of the social order. See *id.* at 272-75. At the close of the 19th century, however, a new social order (mass consumer society) began to emerge, and with it, a new and different "vision of the self." *Id.* at 276. "The vision of self-sacrifice," which had dominated the 19th century, "began to yield to that of self-realization." *Id.* at 276. Manuals and guides for self-improvement now stressed the importance of developing a distinctive and unusual "personality"—one that would "stand out" and set one apart from "the crowd." See *id.* at 277-78. "While the term is never used," Susman says, "the question is clearly one of life in a mass society." *Id.* at 277.

And whereas the older culture of character held that one achieved selfhood through obedience to law and ideals of honor and integrity, the new "culture of personality" invited people to develop and express their individuality and sense of self in performance—in dress and fashion, speech and gesture, and consumption. See *id.* at 277-80. According to Susman, the key to this expression of the self was *the face*. Even before D.W. Griffith introduced the "closeup," Susman notes, the face had

In the opening decades of this century, the pace of this "Graphic Revolution"¹⁶¹ quickened, with the introduction first of motion pictures and later of radio broadcasting.¹⁶² Together these communication technologies constituted a powerful new "machinery of glory"¹⁶³ that swiftly transformed both the social physics and the economics of fame. Before this time, as Daniel Boorstin has said, people generally became famous the way Edison had—by accomplishing something "great" in the world:

A man's name was not apt to become a household word unless he exemplified greatness in some way or other. He might be a Napoleon, great in power, a J.P. Morgan, great in wealth, a St. Francis, great in virtue, or a Bluebeard, great in evil. To become known to a whole people a man usually had to be something of a hero: as the dictionary tells us, a man "admired for his courage, nobility, or exploits."¹⁶⁴

Motion pictures and radio, however, abruptly uncoupled fame from greatness of achievement. Now people could become famous without doing anything particularly remarkable or admirable, simply by virtue of a magnetic "personality" or "some physical idiosyncrasy or personal mannerism which could become a nationally advertised trademark."¹⁶⁵ The result was an altogether new form of human eminence—the "celeb-

already come to be seen as the truest expression of identity or personhood—the most authentic marker of the "self." *Id.* at 282. Susman frankly concedes the speculative character of his thinking, yet if he is right about this, we may have the beginning of an answer to the question I posed above. In a "culture of character," it is one's reputation, one's good name, that is "the immediate jewel of [the] soul[.]" WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3, l. 156 (Charles Praetorius 1885). In a "culture of personality," however, it is not the person that "filches from me my good name," but rather he who filches my *face*, who "makes me poor indeed." *Id.* ll. 159-61. For in "filching" my face, he symbolically steals my very self, my innermost being. That is not something that can be shrugged off lightly.

161. The "Graphic Revolution" is Daniel Boorstin's term for the series of technological developments, beginning with the mid-19th-century invention of photography, that greatly increased man's power to "make, preserve, transmit, and disseminate precise images—images of print, of men and landscapes and events, of the voices of men and mobs." BOORSTIN, *supra* note 2, at 13.

162. Motion pictures were introduced shortly after 1900 and became hugely popular in the years immediately preceding World War I. *See generally* BOORSTIN, *supra* note 2; SCHICKEL, *supra* note 3, at 34-35. Large-scale commercial radio broadcasting began in the early 1920s. *See* LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 54 (1987).

163. EWEN, *supra* note 45, at 92.

164. BOORSTIN, *supra* note 2, at 46.

165. *Id.* at 156; *see also* Thomas Harris, *The Building of Popular Images, in* STARDOM: INDUSTRY OF DESIRE, *supra* note 68, at 40 (noting that the Hollywood star system is based on the premise that "a star is accepted by the public in terms of a certain set of personality traits which permeate all of his or her film roles," and that "[t]he successful stars have been those whose appeal can be catalogued into a series of such traits, associations and mannerisms"); Irving Howe, *Notes on Mass Culture, in* MASS CULTURE: THE POPULAR ARTS IN AMERICA, *supra* note 4, at 500 (suggesting that the most dependable means of gaining lasting movie stardom is to become identified in the public mind with one "personality strand" or "emotional characteristic" which "serves the audience as an identifying sign"). McArthur has shown that this phenomenon had its roots in the turn-of-the-century theater. With the rise of "personality" acting, he notes, the requirements for stage stardom changed, "becoming a function not so much of an accomplished technique as of a

riety"¹⁶⁶—the “person who is known for his well-knownness.”¹⁶⁷ Richard Schickel describes the sea change this way:

What happened in this period [1915-1925] was that the public ceased to insist that there be an obvious correlation between achievement and fame. It was no longer absolutely necessary for its favorites to perform a real-life heroic act, to invent a boon for mankind, to create a mighty business enterprise Beginning with the rise of the star system in Hollywood it was possible to achieve “celebrity” through attainments in the realms of play—spectator sports, acting—and almost immediately thereafter it became possible to become a celebrity (a new coinage describing a new phenomenon) simply by becoming . . . a celebrity¹⁶⁸

And whereas in earlier times great men or women “came into a nation’s consciousness only slowly” through processes that “were as mysterious as those by which God ruled,”¹⁶⁹ now fame was something that could be purposefully *fabricated*, even overnight, by the masters of the new “machinery of glory.”¹⁷⁰ Although the owners of this new technology did not immediately appreciate how useful and lucrative the mass production of celebrity would ultimately be, a “star system” took root in Hollywood as early as 1910.¹⁷¹

magnetic personality.” MCARTHUR, *supra* note 115, at 183. Actors now “needed an identifiable characteristic . . . some spontaneous charm, a trick of voice or manner.” *Id.*

166. The word “celebrity” derives from the Latin *celebritas* for “multitude” or “fame” and *celeber* meaning “frequented,” “crowded,” or “famous.” See CASSELL’S LATIN DICTIONARY 97 (5th ed. 1968). Originally, it meant not a particular kind of person but a condition, “[t]he condition of being much extolled or talked about; famousness, notoriety.” THE OXFORD ENGLISH DICTIONARY 1019 (2d ed. 1989). The word was used in this sense as early as 1600 by Hooker in his *Ecclesiastical Polity*. See *id.* The usage of “celebrity” to designate a particular kind of person—“a famous or well-publicized person,” as Webster’s defines it, WEBSTER’S NEW WORLD DICTIONARY 228 (2d ed. 1980)—appears for the first time in the mid-19th century. The first such usage cited by the Oxford English Dictionary is in 1849. THE OXFORD ENGLISH DICTIONARY, *supra*, at 1019. Cleveland Amory, however, has unearthed a slightly earlier use. In 1836, the *American Quarterly Review* said of John Jacob Astor that “[f]rom an obscure stranger he has made himself one of the ‘celebrities’ of the country.” CLEVELAND AMORY, WHO KILLED SOCIETY? 113 (1960). Twenty years later, Emerson used the term without inverted commas, referring to “the celebrities of wealth and fashion.” RALPH W. EMERSON, ENGLISH TRAITS 148 (Boston, Houghton, Mifflin 1884). The first such usage in an American judicial opinion that I have been able to locate is from 1893. See *Falk v. Gast Lithograph & Engraving Co.*, 54 F. 890, 892 (2d Cir. 1893) (“celebrity photographs”).

167. BOORSTIN, *supra* note 2, at 57.

168. RICHARD SCHICKEL, HIS PICTURE IN THE PAPERS 7 (1973).

169. BOORSTIN, *supra* note 2, at 46.

170. *Id.* at 47.

171. See RICHARD GRIFFITH & ARTHUR MAYER, THE MOVIES 46-47 (1957). Why the star system emerged when it did is a question that has generated much academic dispute. The standard account goes like this: In its very early years, the movie industry was dominated by General Film, a consortium of production companies popularly known as the “Trust,” which neither advertised nor even identified the individual players who appeared in its films. See *id.* The Trust adopted this policy “partly because it wished to standardize the business of film manufacture” and “partly because it rightly feared that players grown famous would also be players grown costly.” *Id.* at 46. The moviegoing public, however, was not satisfied with anonymous idols and bombarded the studios

Of course, even before the advent of motion pictures there had been stage "stars" who enjoyed great popular acclaim and renown.¹⁷² But the relationship of nineteenth-century stage stars to their publics was much less intimate and intense than the relationship of the new movie stars to their "fans." Even those stage actors "who spent most of their lives on tour did not reach more than a tiny portion of their potential public in the course of a year."¹⁷³ People would get to see them perform once, maybe a few times, in a lifetime.

Moviegoers, in contrast, got to see their favorites regularly—and, most importantly, they got to see them in close-ups. This fostered an illusion of intimacy and generated widespread curiosity about the stars' private lives and doings. The first fan magazine appeared in 1911,¹⁷⁴ and syndicated gossip columns, which reported on the careers and private lives of the stars, proliferated.¹⁷⁵

with letters (which went unanswered) requesting the names and backgrounds of their favorite players. *Id.* at 46-47. Enterprising independent movie producers, sensing a possible competitive advantage, began to publicize their own actors and to lure away from General Film actors who were eager for more publicity and more money. In short order the Trust threw in the towel, and the "star system" was put in place. *Id.*; see also BOORSTIN, *supra* note 2, at 156-60 (discussing the emergence of the star system); DAVID A. COOK, *A HISTORY OF NARRATIVE FILM* 39-40 (1981) (same).

Movie historians have recently begun to challenge this account, however, on a number of grounds. Janet Staiger, for example, argues that the opposition between the Trust and the independents had little to do with the emergence of the star system. She points out that certain members of the Trust—Edison and Vitagraph, for example—were very active in "star promotion" from the beginning. See Janet Staiger, *Seeing Stars*, 20 *VELVET LIGHT TRAP* 10, 10-14 (1983). Another revisionist account criticizes the standard histories for reducing the forces that put the star system in place to "the play of personal initiative on the one hand and a reified notion of the public desire on the other." Richard deCordova, *The Emergence of the Star System in America*, *WIDE ANGLE*, vol. 6, no. 4, at 4, 5 (1985). In deCordova's view, the emergence of the star system is best understood—in Foucauldian terms—as the emergence of a new "discourse on acting," which placed human labor (rather than the mechanical apparatus of the camera) at the center of film production. *Id.*; see also Cathy Klaprat, *The Star as Market Strategy: Bette Davis in Another Light*, in *THE AMERICAN FILM INDUSTRY* 351 (Tino Balio ed., 1985) (arguing that early film producers instituted the star system to "differentiate" their various films, generate and predict audience demand for them, and thus "stabilize" rental prices). This last explanation was anticipated nearly a half century ago by Adorno and Horkheimer, who contended that film stars were used by the Hollywood studios to lend a (false) sense of "individuality" to their standardized products. See Adorno & Horkheimer, *supra* note 8.

For my purposes, it is unnecessary to choose among these competing accounts. It is interesting, however, to note a somewhat parallel development in the radio industry. In radio's early days, "broadcasting stations generally tried to keep their announcers anonymous, although some stations allowed an announcer to sign off with his cryptic code initials." DANIEL J. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 471 (1973). Only in the mid-20s, in response to pressure from listeners, did this policy begin to change. See *id.*

172. Indeed, a rudimentary "star system" was apparently well established as early as the Jacksonian period. See Bruce A. McConachie, *Pacifying American Theatrical Audiences, 1820-1900*, in *FOR FUN AND PROFIT: THE TRANSFORMATION OF LEISURE INTO CONSUMPTION*, *supra* note 46, at 47, 53-60.

173. SCHICKEL, *supra* note 3, at 25.

174. See MCARTHUR, *supra* note 115, at 195; Staiger, *supra* note 171, at 10.

175. According to Richard deCordova, the emergence of the "movie star," properly called, can be dated to 1914, when the question of the player's existence *outside* her films entered general

At the turn of the century, biographical articles in popular middle-brow magazines like *Collier's* and *The Saturday Evening Post* generally took as their subjects political leaders, businessmen, financiers, scientists, and inventors—what Leo Lowenthal calls “idols of production.”¹⁷⁶ But by 1920 these same magazines had already shifted attention to “idols of consumption”: film actors, entertainers, athletes, and the like, people who excelled in the world of play.¹⁷⁷ Moreover, magazine biographies in the latter period focused not on the “public” accomplishments of this new recreational elite, but rather on their “private” lives: their relations with family and friends, their hobbies, amusements, and food preferences, their styles of dress and home decoration.¹⁷⁸ Readers of these magazine articles, it is crucial to note, were more than idly curious about “the lifestyles of the rich and famous.” During these years, ordinary Americans increasingly began to look to the movies and to celebrities for cues about what they should buy and how they should live. Stuart Ewen writes:

The systematic link between celebrity and consumption was established, in the United States, during the 1920s and 1930s. The fan magazines and newspaper columns that covered Hollywood dovetailed with the movies to offer a seamless tableau of fashions, hairstyles, favorite foods, personal habits, reading interests, decorating ideas, and recreational interests, not to mention sexual proclivities, all of which were visible, many of which offered appealing alternatives to the stuffy residues of Victorianism, or the greenhorn habits of immigrant parents.

By 1939, Margaret Farrand Thorp . . . noted that the consumption patterns of Hollywood (on and off screen) had become a “standard of reference” for popular consumption, “making it possible for the housewife in Vermont or Oregon to explain to her hairdresser, her dressmaker, or her decorator, the ideal that she is striving to realize.”¹⁷⁹

discourse. Prior to that time there were “picture personalities”—players who were recognized and identified from film to film. The film “star,” in contrast, became “the subject of a narrative which [was] quite separable from his/her work in any particular film.” deCordova, *supra* note 171, at 11. Whereas the “picture personality” was constituted by the audience’s *intertextual* knowledge of the various films in which she had appeared, movie “stardom” emerged only when the audience sought and obtained a different kind of “knowledge” about her—namely, knowledge of her “private” life and doings. See *id.* at 9-11.

176. See LEO LOWENTHAL, *The Triumph of Mass Idols, in LITERATURE, POPULAR CULTURE, AND SOCIETY* 109, 109-14 (1961).

177. See *id.* at 114-18.

178. See *id.* at 118-23.

179. EWEN, *supra* note 45, at 98 (quoting MARGARET F. THORP, *AMERICA AT THE MOVIES* 113 (1939)); see also JIB FOWLES, *STARSTRUCK: CELEBRITY PERFORMERS AND THE AMERICAN PUBLIC* 169 (1992) (contending that Americans began after 1910 to look to movie stars for lessons in consumption and display). The linkage between celebrity lifestyles and popular consumption was

The commercial implications of these developments were not lost on either the movie studios or the advertising agencies. In the 1920s and 1930s, Hollywood and Madison Avenue joined forces in aggressively exploiting the newly immense power of movies and movie stars to inspire emulation and thus generate consumption demand. Two developments in this connection are especially noteworthy. The first is the widespread practice of "product placement" in the Hollywood movies of this period. The film studios routinely made their movies available to manufacturers and merchandisers as showcases for fashions, furnishings, accessories, cosmetics, and other consumer goods, in exchange for direct money payments, supplies of props, or free advertising for their own ventures.¹⁸⁰

A second and related development was the widespread use of celebrity names and faces in advertising tie-ins and product testimonials. Although the testimonial endorsement dates back at least to the seventeenth century,¹⁸¹ the technique had fallen into some disrepute around the turn of this century because of its association with patent medicines.¹⁸² During the 1920s, the J. Walter Thompson firm ("JWT") led the way in reviving the testimonial endorsement.¹⁸³ Stanley Resor, JWT's president, promoted the idea that "advertising messages should be 'personified' to take advantage of three basic tendencies in mass society: curiosity about others, the spirit of emulation, and the search for authority."¹⁸⁴ In democratic societies, Resor thought, these tendencies lead people to revere whoever most closely fills the role of "aristocracy."¹⁸⁵

Although socially prominent persons in America had long believed it to be beneath their dignity to lend their names for commercial purposes, in the early 1920s Resor's firm somehow managed to persuade a series of fashionable "great ladies" to endorse products in exchange for

further exploited by fan magazines, which ran regular features on the clothing, furniture, and foods favored by movie stars. See EWEN, *supra* note 45, at 98-99.

180. See Charles Eckert, *The Carol Lombard in Macy's Window*, in STARDOM: INDUSTRY OF DESIRE, *supra* note 68, at 30, 38-39. This business practice apparently had a significant impact on movie content:

Hollywood developed a preference for "modern films," because of the opportunities they offered for product display and tie-ins. In many instances storylines were reshaped, to provide more shooting in locales suitable for tie-ins. Movies were made in fashion salons, department stores, beauty parlours, middle and upper-class homes with modern kitchens and bathrooms, large living rooms and so forth.

Id. at 38.

181. See GEORGE B. HOTCHKISS, AN OUTLINE OF ADVERTISING 25-26 (1933) (providing examples of testimonials from the 17th century).

182. See FOX, *supra* note 138, at 88 (noting the testimonial's "lingering unsavory association with patent medicines").

183. See Stanley Resor, *Personalities and the Public: Some Aspects of Testimonial Advertising*, J. WALTER THOMPSON NEWS BULL., Apr. 1929, at 2, 5 (explaining why advertising messages should be presented "through people to whom the public will listen with interest and respect").

184. GAINES, *supra* note 28, at 159.

185. See ROLAND MARCHAND, ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY, 1920-1940, at 96 (1985).

donations to charity. According to one advertising historian, the "break-through came in 1924 when Mrs. O.H.P. Belmont, the doyenne of New York society and a prominent feminist as well," permitted JWT to use her name in an endorsement of Pond's cold cream.¹⁸⁶ Mrs. Reginald Vanderbilt, Queen Marie of Rumania, and the Duchess de Richeheu—a group of whom Proust might be proud—quickly followed suit, each vouchsafing the virtues of Pond's.¹⁸⁷ These "great lady" endorsements probably legitimated and thus paved the way for product endorsements by people, including members of the new Hollywood "aristocracy," whose motives were somewhat less philanthropic. In any event, JWT and other advertising agencies were soon using the names and faces of movie stars and professional athletes to sell soap,¹⁸⁸ cigarettes,¹⁸⁹ sporting equipment,¹⁹⁰ cosmetics,¹⁹¹ and other consumer goods.¹⁹²

186. Fox, *supra* note 138, at 89.

187. *Id.*

188. According to Fox, a JWT representative acting on behalf of Lux Soap operated this way: "He signed up starlets when they were unknowns, getting their names in exchange for a crateful of Lux. Then, if they made it, he put them in Lux ads for no further expense." *Id.*

189. Lucky Strikes, for example, which was locked in intense competition with its rivals for market share, relied heavily on celebrity endorsements. See MARCHAND, *supra* note 185, at 96 ("A roster of prominent Americans who did *not* appear in Lucky Strike testimonial ads would be a select list indeed."); CHRIS MULLEN, CIGARETTE PACK ART 94 (1979). Opera stars testified to the "beneficial effect Luckies had on their singing." Fox, *supra* note 138, at 116. Actresses and athletes recommended smoking Luckies as an alternative to eating fattening candy. See *id.* (citing the advertising slogan, "Reach for a Lucky Instead of a Sweet"). Even the aviator Amelia Earhart endorsed Luckies as the cigarette carried on board when she crossed the Atlantic. See 2 O'Neil-Dunne, *supra* note 144 (noting a 1928 ad that quoted Earhart saying, "I think nothing else helped so much to lessen the strain on us all").

190. A common practice in the late 1920s was for makers of sporting equipment to furnish prominent athletes with supplies of their products (bats, gloves, etc.) in return for testimonial endorsements—a practice upon which the Federal Trade Commission frowned. See *Sports Goods Makers to Talk Testimonials*, N.Y. TIMES, Apr. 20, 1930, § 2, at 7.

191. See Eckert, *supra* note 180, at 35.

192. Some celebrities—athletes like Babe Ruth, for example—were free to strike endorsement deals on their own. But Hollywood stars, for the most part, were stuck with whatever "tie-in" or "tie-up" arrangements their studio employers authorized. Gaines explains why:

In the early contracts, term players, with very few exceptions, had no right to withhold the use of their images from these *indirect* commercial arrangements—especially if the motion picture was mentioned in the advertisement. An actress might be shocked to see her image reproduced in conjunction with products as diverse as Auto-Lite car batteries or Serta mattresses and box springs, but there was little she could do about it.

GAINES, *supra* note 28, at 160.

In the 1940s, stars who had exceptional bargaining power with the studios began to try to obtain control over the commercial exploitation of their images. See *id.* at 161-64. For example, some Hollywood stars tried to require in their contracts that commercial use of their names be confined to motion picture promotional campaigns. *Id.* at 161. While a genuine desire for privacy and contempt for commercialism motivated some, others simply were eager to exploit their publicity values themselves. *Id.* Very few succeeded in wresting this control from the studios. *Id.* Only with the decline of the studio system in the 1950s did Hollywood stars begin to gain control over their own image capital. See *id.* at 164.

The movie studios' control of star images in the 1930s and 1940s accounts for one otherwise puzzling fact: that there are virtually no reported lawsuits in this period in which a famous movie star complained of unauthorized commercial appropriation. Until the 1950s and 1960s—when

By the 1930s, then, new "joint consumption" communications technologies (motion pictures, radio) had transformed not only the mechanisms by which fame was generated, but its commercial significance as well. The most obvious change was that celebrity itself had become a source of immense economic value. The "publicity values" of movie and sports stars could now be exploited profitably in a wide range of collateral endeavors.¹⁹³ Even more important is the fact that certain key economic actors had already begun to behave *as if* celebrity images were garden variety "commodities." Movie studios were routinely licensing the images of their players to advertisers and merchandisers in exchange for money payments, favorable publicity for their own ventures,¹⁹⁴ or free supplies of props. A number of licensing companies were even formed for the specific and sole purpose of marketing the names and faces of famous persons.¹⁹⁵

The law, however, had not yet caught up with these new commercial practices. In unusual cases unauthorized commercial appropriation of a celebrity's name or persona might be actionable as defamation,¹⁹⁶

Hollywood movie stars were finally cut loose from the studio system and freed to become their own image entrepreneurs—the only celebrity plaintiffs in a good position to institute such litigation were athletes, stage actors, dancers, rodeo performers, and the like. *See, e.g., O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941) (professional football player complaining of a beer company's use of his picture on a football calendar), *cert. denied*, 315 U.S. 823 (1942); *Fisher v. Murray M. Rosenberg, Inc.* 23 N.Y.S.2d 677 (Sup. Ct. 1940) (professional dancer complaining of the use of his photograph in a shoe advertisement); *Martin v. F.I.Y. Theatre Co.*, 10 Ohio Op. 338 (C.P. Ct. 1938) (stage actress objecting to the use of her picture on theater poster).

The movie studios, of course, could and sometimes did threaten or initiate lawsuits to protect their star image capital from unauthorized commercial use. *See, e.g., Paramount Pictures, Inc. v. Leader Press*, 24 F. Supp. 1004 (W.D. Okla. 1938) (movie studio complaining of unauthorized advertising posters), *rev'd*, 106 F.2d 229 (10th Cir. 1939); GAINES, *supra* note 28, at 160-61 (noting that Warner Brothers threatened to take legal action against a Detroit dentist for the unauthorized use of actress Kay Francis' image on an advertising circular).

193. Babe Ruth's agent, for example, drummed up movie roles and product endorsements for him, organized off-season barnstorming tours, and even booked him on the vaudeville circuit. In 1926 Ruth "played" 12 weeks in vaudeville at \$8000 per week—"in effect, just appearing on stage so that fans in dozens of small towns could see their hero close up." SUSMAN, *supra* note 160, at 147.

194. A good example is a 1931 Lucky Strike ad featuring an endorsement by the actress Dorothy Mackail. The ad stated that "not one cent was paid to Miss Mackail to make the above statement. Miss Mackail has been a smoker of Lucky Strike cigarettes for six years." But the ad also urged people to "[w]atch for Dorothy in her next First National Picture *Safe in Hell*." *See MULLEN, supra* note 189, at 94. Here the celebrity's "associative value" had apparently been traded, presumably by her employer, First National, in return for free publicity for one of its own ventures.

195. In 1926, John Ditzell, the head of a Chicago-based company, Famous Names, Inc., defended the sale of celebrity names and faces for product endorsements as an "ethical" business. Replying to sharp criticism from the American Medical Association, he asserted that the "stars do not endorse any patent medicines or any quack wares," and that "[n]o star endorses any product that he or she does not use." He also proudly noted that national advertising "brings some stars as high as \$5,000 for each endorsement"—a sum much greater than the American Medical Association had reported. *Defends Sale of Names*, N.Y. TIMES, Nov. 10, 1926, at 20; *see also Says Movie Stars Sell Use of Names*, N.Y. TIMES, Nov. 9, 1926, at 15.

196. There were several circumstances under which the unauthorized commercial appropriation

unfair competition,¹⁹⁷ or trademark infringement.¹⁹⁸ And in some jurisdictions, a celebrity could invoke her "right of privacy" to prevent others from using her name or face for commercial purposes.¹⁹⁹ But these legal doctrines, for reasons that will be examined next, did not establish a framework in which either celebrities or their assignees could maximize the return on their image capital.

B. Commodification Triumphant—From Privacy to Property

As Thomas McCarthy tells the story, the right of publicity was "carved out of the general right of privacy"—"like Eve from Adam's rib."²⁰⁰ In my view, this simile is doubly misleading. The right of publicity was created not so much from the right of privacy as from frustration with it. Moreover, as we will see, the whole matter was negotiated by courts and commentators with something less than divine ease and grace.

The right of privacy, first proposed by Warren and Brandeis primarily as an antidote to journalistic intrusiveness,²⁰¹ received its initial legal recognition instead in connection with the unauthorized advertising use of names and likenesses. In 1903, the New York Legislature, acting swiftly to reverse the Court of Appeals' decision in the notorious *Roberson* case,²⁰² adopted a statute establishing both criminal and civil

of a famous person's name, picture, or other identifying characteristics might amount to libel. See, e.g., *Burton v. Crowell Pub. Co.*, 82 F.2d 154 (2d Cir. 1936) (content of a photograph published in an advertisement subjected plaintiff to great ridicule); *Tolley v. J.S. Fry & Sons Ltd.*, 1 K.B. 467 (1930) (extrinsic circumstances gave rise to defamatory innuendo), *aff'd*, [1931] App. Cas. 333. Such cases, however, were quite rare, if only because it was seldom in the interests of the commercial user to display the celebrity in a defamatory or even offensive light.

197. Generally speaking, the principles of unfair competition prohibited use of a name or other identifying characteristic only if, and to the extent that, such use might confuse or deceive the consuming public and thus divert business from one person to his competitor. See, e.g., *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169 (1896). See generally *Nimmer*, *supra* note 13, at 210-14 (arguing that the traditional unfair competition action provided little protection for the celebrity's publicity values).

198. See, e.g., *Société Anonyme du Filtre Chamberland Systeme Pasteur v. Pasteur Chamberland Filter Co.*, 8 Trade-Mark Rep. 298 (S.D. Ohio 1918).

199. See *infra* note 212.

200. MCCARTHY, *supra* note 13, § 5.8[B], at 5-66.

201. See Warren & Brandeis, *supra* note 22. The concerns of Warren and Brandeis went beyond newspaper gossip. As their reference to the *Manola* case indicates, they were also concerned about the ability of even famous persons to control the commercial use and circulation of their photographs. *Id.* at 195-96 & n.7.

202. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (1902) (holding that there is no common law right of privacy). The unsuccessful plaintiff in *Roberson* was a minor whose photograph had been used without her consent on a widely distributed advertising poster for flour. For a useful historical account of *Roberson* and the origins of the New York privacy statute, see Lawrence E. Savell, *Right of Privacy—Appropriation of a Person's Name, Portrait, or Picture for Advertising or Trade Purposes Without Prior Written Consent: History and Scope in New York*, 48 ALB. L. REV. 1, 3-14 (1983).

One interesting fact Savell omits is that the *Roberson* case occurred during a period of widespread public concern about child labor and agitation for protective legislation. The New York

liability for the unauthorized use of "the name, portrait or picture of any living person" for "advertising purposes, or for the purposes of trade."²⁰³ Two years later, in *Pavesich v. New England Life Insurance Co.*, the Georgia Supreme Court held the unauthorized use of a person's photograph in a testimonial advertisement actionable as an invasion of privacy.²⁰⁴ In the ensuing years, more through judicial decision²⁰⁵ than legislation, protection from unauthorized commercial use of name and likeness became a widely recognized aspect of the right of privacy.

The plaintiffs in *Roberson* and *Pavesich* asserted claims that fit comfortably within the basic conception of privacy as a "right to be let alone."²⁰⁶ In both cases the plaintiffs had been plucked from obscurity and rudely exposed to widespread and unwanted publicity. They could plausibly claim keen embarrassment or distress at having their faces spread before all the world.²⁰⁷ Claims of such emotional injury were not nearly as convincing when they came from celebrities, however. After all, how could a movie star or professional athlete, who had deliberately and energetically sought the limelight, complain of embarrassment or hurt feelings when an advertiser or merchandiser simply gave his face

Child Labor Committee, a propaganda and lobbying group composed of social workers, reformers, and academics, was formed in 1902, the very same year as the Court of Appeals decision. The Committee's efforts resulted in the enactment of legislation "that effected more significant changes in New York's child labor laws than had occurred in the preceding century." WALTER I. TRATTNER, *CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA* 56-57 (1970). My hunch is that one reason for the intensity of the public outrage at the conduct of the *Roberson* defendants was that Abigail Roberson was a *minor*. In placing the young Abigail Roberson's face on their advertising posters, the defendants had symbolically violated an emergent norm against *child labor*.

203. 1903 N.Y. Laws ch. 132, §§ 1-2 (codified as amended at N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1990)).

204. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905). The plaintiff in this case was an artist of no great renown whose photograph was used without permission in a testimonial advertisement for life insurance.

205. See, e.g., *Kunz v. Allen*, 172 P. 532 (Kan. 1918) (unauthorized use of likeness); *Foster-Milburn Co. v. Chinn*, 120 S.W. 364 (Ky. 1909) (unauthorized use of name and likeness); *Flake v. Greensboro News Co.*, 195 S.E. 55, 63-64 (N.C. 1938) (unauthorized use of likeness).

206. Robert C. Denicola, *Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols*, 62 N.C. L. REV. 603, 621 (1984).

207. This is not to say that selective anonymity was the *only* interest at stake in these early privacy cases. Take the plaintiff in *Pavesich*, for example. Quite possibly he would have been every bit as upset if his picture had appeared on the front page of the local newspaper, illustrating a story, say, about spring fashions. Yet perhaps what upset him was not (or not only) the unwanted publicity but the commercialization of his personality. He may have felt it an affront to his dignity as an autonomous individual to be conscripted to serve another's purely commercial purposes. See generally Bloustein, *supra* note 22 (arguing that all privacy cases share the interest of preserving human dignity).

Additionally, *Pavesich* may have been upset that the advertisement put him in a false light by implying that he had *chosen* to appear there. Thus, early privacy cases like *Roberson* and *Pavesich* may be read as involving, in addition to selective anonymity, a kind of autonomy interest and a kind of reputational interest. Celebrities share both these latter interests, unlike the interest in anonymity, and can to some extent legitimately expect the law to protect them. This protection, however, can be afforded without resorting to a property-like right of publicity. See *infra* note 271.

some *additional* publicity? How could someone like Babe Ruth, who had performed before thousands, posed for photographs, granted interviews, made paid public appearances, and endorsed products,²⁰⁸ complain of distress or humiliation when his picture was used without his consent on a baseball card or in a cereal advertisement? His gripe was not that his name or likeness had been *used*, but rather that the user had not *paid* him for the privilege.²⁰⁹ His grievance was uncompensated rather than unwanted publicity, and it was by no means easy to see what *that* had to do with privacy.

Understandably, then, when celebrity plaintiffs first came to the courts in the 1920s and 1930s seeking relief from unauthorized commercial appropriation on privacy grounds, the reception was generally cool or uncomprehending. A number of courts held simply that celebrities had waived their rights of privacy, not only as to news coverage and comment but as to commercial appropriation as well, by assuming positions of prominence and visibility.²¹⁰ In other jurisdictions, the rule that publicity is actionable only if "offensive" effectively barred celebrities from recovery for garden variety commercial appropriation.²¹¹ And even where courts did not impose these obstacles, recoverable damages in privacy actions were limited to compensation for hurt feelings. Thus, the few privacy actions in which celebrity plaintiffs managed to prevail resulted in damage awards that were small or nominal.²¹²

In another respect as well, privacy theory proved a less than perfect vehicle for celebrities eager to extract the maximum possible benefit from

208. See *supra* note 193.

209. James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 641 (1973); cf. Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 677 (1991) ("There is sharp internal contradiction in the position of a plaintiff who alienates and objectifies her image and simultaneously claims that it is integral to her very identity in the manner presupposed by the tort of appropriation.").

210. In the best known of these cases the Fifth Circuit held that an "all-American" college football player, whose on-field exploits had been widely covered by the national media and who had "repeatedly posed for photographs for use in publicizing himself and [his] team," had surrendered, in part at least, his right of privacy. *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 169 (5th Cir. 1941), *cert. denied*, 315 U.S. 823 (1942). In rejecting the player's complaint against a beer company that used his photograph—purchased from the college publicity department—on a football calendar, the court exhibited little sympathy: "[T]he publicity he got," the court concluded, "was only that which he had been constantly seeking and receiving . . ." *Id.* at 170; see also *Paramount Pictures, Inc. v. Leader Press, Inc.*, 24 F. Supp. 1004 (W.D. Okla. 1938) (posters of movie stars), *rev'd on other grounds*, 106 F.2d 229 (10th Cir. 1939); *Martin v. F.I.Y. Theatre Co.*, 10 Ohio Op. 338 (C.P. Ct. 1938) (theater poster of actress).

211. See *Nimmer, supra* note 13, at 207.

212. See, e.g., *Miller v. Madison Square Garden Corp.*, 28 N.Y.S.2d 811 (Sup. Ct. 1941) (well-known performer, who acknowledged that defendant's use of his photograph on the cover of an official program for a sporting event had not caused him any humiliation, awarded six cents in damages); *Fisher v. Murray M. Rosenberg, Inc.*, 23 N.Y.S.2d 677 (Sup. Ct. 1940) (compensatory damages recoverable for invasion of privacy limited to "injured feelings"; \$300 award for use of a famous dancer's photograph in a shoe advertisement).

their publicity values. A right of privacy, as a purely "personal" right, was neither descendible²¹³ nor assignable.²¹⁴ Possessed of a right of privacy, Babe Ruth could license a manufacturer to use his name in connection with the sale of baseball bats, but this would really amount only to a "release": an enforceable promise not to sue the bat manufacturer for invasion of privacy. Ruth could also grant an "exclusive" license, yet this would amount only to an enforceable promise not to license anyone else to use his name in a similar connection. Either promise might well be worth *something* to a bat manufacturer. Yet what the bat manufacturer would have preferred to purchase from Ruth, and what it would have been willing to pay *more* money for, was the right to proceed directly against any *third party* competitor who made unauthorized use of Ruth's name in connection with the sale of bats.²¹⁵ Yet this right was not one that Ruth, possessed only of a nonassignable right of privacy, could confer.

By the 1930s, then, it was already evident that if a celebrity had only a right of privacy against unauthorized commercial use of her identity she would not be able to realize *maximum* benefit from her publicity values. Only if the law were to "propertize" these values, so that a celebrity could not only exclude others from using them but also transfer them for value in return, would she be able to enjoy their full benefit. Only then, too, could a fully functioning market in these values take hold.

This property paradigm, which had received some early support in *Edison*²¹⁶ and a handful of other lower state court decisions,²¹⁷ made its (unsuccessful) major league debut in 1935 in *Hanna Manufacturing Co. v. Hillerich & Bradsby Co.*²¹⁸ The plaintiff there ("Hillerich") had contracted with certain famous baseball players for the "exclusive right" to use their names, autographs, and photographs in connection with the sale and advertising of baseball bats. It then manufactured and sold bats

213. See *Wyatt v. Hall's Portrait Studio*, 128 N.Y.S. 247 (Sup. Ct. 1911).

214. See *Von Thodorovich v. Franz Josef Beneficial Ass'n*, 154 F. 911, 912 (C.C.E.D. Pa. 1907).

215. In 1930 a group of sporting goods manufacturers, meeting at the behest of the FTC, adopted a voluntary code of trade practice to compensate for the law's deficiencies in this respect. According to a *New York Times* report, one practice banned by this code was the use of an athlete's name on a product (ball, bat, glove, etc.) "when a competitor has bona fide, and with the consent of the athlete, previously acquired the exclusive property right or goodwill in [the] name." *Ban Misleading Ads of Sporting Goods*, N.Y. TIMES, May 8, 1930, at 15.

216. *Edison v. Polyform Mfg. Co.*, 67 A. 392, 394 (N.J. Ch. 1907); see *supra* text accompanying note 136.

217. See, e.g., *Munden v. Harris*, 134 S.W. 1076, 1078 (Mo. 1911) ("If there is value in [a person's appearance], sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?"); *Roberson v. Rochester Folding Box Co.*, 32 Misc. 344, 349 (N.Y. Sup. Ct. 1900) ("If [a woman's] lithographic likeness, owing to its beauty, is of great value as a trade-mark or an advertising medium, it is a property right which belongs to her."), *aff'd*, 71 N.Y.S. 876 (App. Div. 1901), *rev'd*, 64 N.E. 442 (1902).

218. 78 F.2d 763 (5th Cir., *cert. denied*, 296 U.S. 645 (1935)).

of the styles and shapes preferred by the various players, marking them with the players' autographs. Hanna, a competing bat manufacturer, had no agreements with the players, but nonetheless made bats in the styles they favored and stamped their surnames in block letters on them.²¹⁹ Both companies' bats were marked conspicuously with their respective trademarks. Hillerich sued to enjoin Hanna's use of the players' names on two grounds: first, that Hillerich had a property right in the names; second, that Hanna's use of the names, by falsely implying that the players endorsed its bats, constituted unfair competition. The federal district court held for Hillerich on both grounds, enjoining Hanna from using on its bats the name of any player under contract with Hillerich, or from representing that any such player used or endorsed its bats. On appeal, the Fifth Circuit, while allowing a modified injunction on the unfair competition ground,²²⁰ reversed the decision on the property ground. In the court of appeals' view, whether the right of the players to prevent unauthorized use of their names was a "personal" or a "property" right did not much matter. For in either event, the right was "not vendible in gross so as to pass from purchaser to purchaser unconnected with any trade or business."²²¹ In a passage that bespeaks coolness to the growing professionalism of sports and, more importantly, resistance to the commodification of fame, Judge Sibley explained: "*Fame is not merchandise.* It would help neither sportsmanship nor business to uphold the sale of a famous name to the highest bidder as property."²²² Accordingly, the court held that Hillerich's contracts with the players operated only to prevent the players from objecting to its own use of their names. Hillerich's rights against third parties were to be determined solely by the law of trademark and unfair competition.²²³

The decision in *Hanna Manufacturing* was very unfavorably received by commentators.²²⁴ This reaction is due in part, I suspect, to the growing strength within the legal community of a modern economic conception of fame. The older understanding, on which Judge Sibley's opinion in *Hanna Manufacturing* rested, was that a famous name, like a

219. Hanna's conduct was in direct violation of the voluntary code adopted by leading sporting good manufacturers in 1930. See *supra* note 215. I do not know whether Hanna participated in the 1930 conference, or whether it agreed to abide by the code adopted there.

220. As modified, the injunction permitted the defendant to continue to stamp the players' names on the bats, on condition that the word "style" or "shape" was added—as in "Ruth style," or "Gehrig shape." See *Hanna Mfg.*, 78 F.2d at 768. This condition, the court reasoned, would correct any false impression that the players used or endorsed the defendant's bats or authorized their names to be used on them. Moreover, the court determined that the defendant must be permitted to advertise that players under contract with the plaintiff use defendant's bats if in fact they do use them: "Appellant may advertise what is true." *Id.*

221. *Id.* at 766.

222. *Id.* (emphasis added).

223. *Id.* at 767.

224. See, e.g., Decision, 36 COLUM. L. REV. 502 (1936); Note, 45 YALE L.J. 520, 523 (1936); Recent Case, 49 HARV. L. REV. 496 (1936).

"good" name, is not something one can put up for sale in the marketplace. Fame, like reputation, is inalienable. It is something from which others may benefit, but which they cannot buy or own. As we have seen, however, in the opening decades of this century new communications media and new advertising practices had transformed both the cultural meaning and the commercial reality of fame, leading to the formation of an active, growing market in celebrity names and faces. In conjunction with these developments, some people began to conceive of fame as an instrumental good, a business asset like "good will," a commodity to be produced and exchanged like any other. As this alternative conception of fame grew in power, Judge Sibley's insistence on the "market-inalienability"²²⁵ of fame increasingly came to seem naive, romantic, and obstructionist.²²⁶

The decisive legal breakthrough for this new economic conception of fame came in 1953, in a case with facts similar to those in *Hanna Manufacturing*. The Second Circuit, per Judge Jerome Frank, held in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*²²⁷ that people, especially prominent ones, "in addition to and independent of" their right of privacy, have "a right in the publicity value of [their] photograph[s]." This right could be licensed or assigned, and the licensee or assignee could enforce it against third parties:

This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through

225. See Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV 1849, 1852-55 (1987).

226. Twenty years after *Hanna Manufacturing*, for example, the author of an entertainment law treatise expressed keen dissatisfaction with "the strange reluctance of modern courts to recognize publicity as property":

Why shouldn't publicity created by mental labor be viewed as property? Today favorable created publicity may have great and definite financial value. The publicity value of "puffing" of a ware by a successful stage or screen actor, by a singer, ball player, pugilist, or other performer enjoying the public's favor, is tremendous. . . . Such publicity is not accidental. It is created by skill and labor. . . .

. . . .

. . . [T]hough a human being is not property and can not be bought and sold, the personality of living persons is bought and sold in the market place. The pictured face or figure of a pin-up, a living beautiful girl, is dealt in as property. The public interest is not contravened thereby.

SAMUEL SPRING, *RISKS AND RIGHTS IN PUBLISHING, TELEVISION, RADIO, MOTION PICTURES, ADVERTISING, AND THE THEATER* 244-45 (2d rev. ed. 1956).

227. 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953). The relevant facts of the case were as follows: Plaintiff, a chewing gum manufacturer, had contracted with certain well-known baseball players for the exclusive right to use their photographs in connection with the sale of its products. Subsequently, Russell Publishing Company, acting independently, obtained like grants from the same players. Russell then assigned its rights to the defendant, also a chewing gum manufacturer, which used the players' photographs in promoting its product. Plaintiff sought an injunction on the ground that defendant's conduct violated its right of exclusive use. Defendant countered that the players possessed no legal interest in their photographs other than the right of privacy, which was personal and hence nonassignable. *Id.* at 867.

public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses [sic], trains and subways.²²⁸

Judge Frank impatiently dismissed as "immaterial" whether this "right of publicity" should be labeled a "property" right: "[H]ere, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth."²²⁹

Although Judge Frank cited a few earlier decisions, he made no sustained effort to demonstrate, in the manner of Warren and Brandeis, that the right of publicity had already been implicitly recognized by the courts. Instead, he simply asserted, almost in passing, that unless celebrities were able to grant a licensee protection against third parties, the publicity values of their photographs would "usually yield them *no* money."²³⁰ He made no attempt, however, to explain *why* this should be cause for judicial concern. Indeed, he offered no rationale whatsoever for the new right beyond the fact that, without it, celebrities would be denied image revenues and thus "feel sorely deprived."²³¹ Nor did he consider

228. *Id.* at 868.

229. *Id.* More than taxonomical squeamishness was involved here. By withholding the "property" label, the court was able to leave open the question whether a third party would be liable to an assignee even absent knowledge of the assignee's contractual rights. *See id.* at 869 n.5. More generally, the court may have been concerned that a "property" label would appear to predetermine the resolution of such issues as whether the right of publicity is inheritable, whether it is to be taken into account in a divorce settlement, how its sale should be treated for tax purposes, and so on. Subsequent developments have justified the *Haelan* court's caution in this regard. The fact that the right of publicity was placed in the "property" box by courts and commentators after *Haelan* has had a significant effect on the scope of the right. Having categorized the right as property, some courts seem to think that they have little or no choice but to recognize its survivability. After all, an assignable interest that dies with its assignor is a very queer kind of property. *See, e.g.,* Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221 (2d. Cir. 1978) ("The identification of this exclusive right . . . as a transferable property right *compels the conclusion* that the right survives [the celebrity-assignor's] death.") (emphasis added), *cert. denied*, 440 U.S. 908 (1979).

230. *Haelan Lab.*, 202 F.2d at 868 (emphasis added). This clearly was an overstatement. It is certainly true that a celebrity can command a *higher* price for the right to use her name or picture in advertising or merchandising if she can confer a right that is enforceable against third parties. But even if all she has is a nonassignable right of privacy, a license to use her name or picture (which will operate as a release from liability for invasion of privacy) will be worth *something* (in other words, its market value will be greater than zero). More important, even in a "free use" regime, a celebrity can derive some, perhaps substantial, income from her publicity value—by making paid appearances, by doing testimonial product endorsements, etc. *See infra* text accompanying notes 406-09.

231. *Haelan Lab.*, 202 F.2d at 868. The fact that celebrities will make more money from the publicity values of their pictures if they have an assignable legal right to control their exploitation is obviously not reason enough to grant them such a right. It might be reason enough if recognition of the new right were "Pareto-superior" to the status quo, that is, if no one else suffered any "losses" by virtue of the move away from a no-ownership regime. For it is hard (though not impossible) to object to a policy that makes some people (subjectively) better off without making anyone else (subjectively) worse off. But clearly there *will* be losers in the shift, among them users or intending users of celebrity pictures who now are unable to obtain the required permission or make the required payment. To be sure, it is *possible* that the losses incurred would be outweighed by the gains, so that the winners could compensate the losers to the point of indifference and still be better

the offsetting costs of recognizing such a right. Most importantly, the *Haelan Laboratories* opinion contained not a trace of moral or conceptual uneasiness about the commodification of personality. It seemed natural and obvious to the court that celebrity personas should be treated as garden variety commodities, to be bought and sold in the market like any other. After all, a thriving market in these "commodities" had been in existence for some time. The court was simply giving legal form (and protection) to a preexisting commercial practice.²³² With *Haelan Laboratories*, the market-alienability of celebrity images was well on its way to being naturalized as Professor McCarthy's "common sense."²³³

A year after *Haelan Laboratories*, the nascent "right of publicity" received its first systematic exposition in a seminal article by Melville Nimmer.²³⁴ Self-consciously patterned on the great Warren-Brandeis privacy essay, Nimmer's article rehearsed the inadequacy of available legal theories to protect the commercial interests of celebrities in their identities, urged as a solution recognition of an independent right of publicity (now unequivocally described as a property right), and briefly outlined a cause of action for its infringement.²³⁵ Although Nimmer made passing references to "community needs,"²³⁶ it was what he candidly called "the needs of Broadway and Hollywood"²³⁷ that seemed chiefly to concern him. Indeed, the article can perhaps best be read as a high-class form of special-interest pleading for the star image industry.²³⁸ Nimmer,

off. In such a case the shift would be "efficient" on a Kaldor-Hicks standard. But it is by no means obvious that this will be so, much less that Kaldor-Hicks is the appropriate standard for choosing between a no-ownership rule and a private property rule with respect to celebrity personas. See generally Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980) (evaluating efficiency standards as foundations for legal rules).

None of this is to deny that the consideration cited by the *Haelan* court in support of a right of publicity is relevant to the issue of justification. It is only to say that if a right of publicity is to be adequately justified, some reason must be given for its adoption beyond the mere fact that it will make the right-bearers wealthier (and hence happier). Furthermore, some account must be taken of possible offsetting costs.

232. As Gaines sees it, *Haelan Laboratories* provides powerful confirmation for E.B. Pashukanis' "commodity exchange" theory of property rights. GAINES, *supra* note 28, at 18-21, 192-93. According to Gaines, in *Haelan Laboratories* Judge Frank "encoded an economic practice as a legal form—a right." *Id.* at 189. He recognized a property right in publicity values because these values were already being exchanged in the market. The legal form, Gaines suggests, followed the commodity form—and not the other way around. For a similar argument, see George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443 (1991).

233. See *supra* text accompanying notes 33-35.

234. Nimmer, *supra* note 13.

235. Nimmer's most important proposals in this respect, all of which have subsequently been adopted by the courts, were: that unauthorized use of identity be actionable whether or not it is "offensive"; that damages for unauthorized use be measured "in terms of the value of the publicity appropriated by defendant rather than, as in privacy, in terms of the injury sustained by the plaintiff"; and that the defense of "public interest" be available. *Id.* at 216.

236. *Id.* at 223.

237. *Id.* at 203.

238. At the time Nimmer wrote this article, he was legal counsel to Paramount Pictures. In this connection it is interesting to note the way in which Nimmer defines the right of publicity: "the

however, was shrewd enough to see that the proposed commodification of celebrity personas would be more acceptable to courts and legislatures, as well as the general public, if it was grounded in moral principle. And so John Locke²³⁹ goes to Hollywood:

It is an unquestioned fact that the use of a prominent person's name, photograph or likeness (*i.e.*, his publicity values) in advertising a product or in attracting an audience is of great pecuniary value. . . . It is also unquestionably true that in most instances a person achieves publicity values of substantial pecuniary worth only after he has expended considerable time, effort, skill, and even money. It would seem to be *a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors* unless there are important countervailing public policy considerations. Yet, because of the inadequacy of traditional legal theories . . . persons who have long and laboriously nurtured the fruit of pub-

right of each person to control and profit from the publicity values which he has created *or purchased*." *Id.* at 216 (emphasis added). This formulation reveals the extent to which the celebrity is in good part a "placeholder" for image-industry capital.

239. It was John Locke who first elaborated a philosophical argument for private property based on individual "labor." He purported to derive the right of private property from logically prior property rights in one's body and its labor. Simplifying somewhat, Locke's argument was this: Everyone has a "property [right] in his own person" and hence in the "labor of his body"—a right, that is, to exclude others from the possession of his body and to control the disposition of his labor. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 17 (Thomas P. Peardon ed., Bobbs-Merrill Co. 1952) (1690). When a person "mixe[s]" his labor with a thing in its natural (that is unowned) state, he "join[s] to it something that is his own" and "thereby makes it his property"—at least where there is "enough and as good left in common for others" and where what he appropriates is no more than he can use. *Id.* at 17, 19.

One much-noted problem with Locke's version of the labor argument is that it is far from clear why "mixing" one's labor with an unowned thing gives one a property right in it. As Nozick famously puts it: "[W]hy isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea . . . do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?" ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 174-75 (1974). Locke himself seemed to anticipate this objection, setting forth a variant of the original argument in which the laborer's claim to the thing labored on is based on his having transformed it by giving it *value*. See, e.g., LOCKE, *supra*, at 26 ("It is labor . . . which puts the greatest part of the value upon land . . ."). The difficulty with this reformulation is that, at most, it would seem to entitle the laborer only to the *value* his labor *adds* to the thing labored on and not to the thing itself. NOZICK, *supra*, at 175. Moreover, the revised argument leads to difficult problems of measurement. In civil society, where labor is commonly a social activity, and where what an individual can produce with his labor depends substantially on the availability of techniques, skills, ideas, and tools that he has not devised himself, it is a formidable task to determine *how much* of a product's value is attributable to an individual's labor. See, e.g., JAMES O. GRUNEBAUM, *PRIVATE OWNERSHIP* 15 (1987); DAVID MILLER, *SOCIAL JUSTICE* 104-05 (1976). These measurement problems are particularly acute with respect to intellectual property, where the "laborer" (the author, inventor, etc.) inevitably draws on and builds upon the ideas of many who have preceded him. See Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 38 (1989). But see Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296-330 (1988) (arguing that the Lockean labor theory is especially persuasive with respect to intellectual property).

licity values may be deprived of them, unless judicial recognition is given to what is here referred to as the right of publicity . . .²⁴⁰

Later in this Article I will examine and criticize this rationale for publicity rights at some length.²⁴¹ For now, I only note that Nimmer's appeal to celebrity "labor" recalls a larger public relations effort mounted by Hollywood in the preceding decades to persuade the American public that film stars owed their fame and fortune to old-fashioned hard work. Concerned to put the scandals and excesses of the 1920s behind them, Hollywood's image-makers in the 1930s and 1940s undertook what Richard Schickel calls "a massive effort . . . to reeducate the public," to convince them that movie stars, though extraordinary in talent, beauty, and income, were "entirely like their audience in basic values and desires."²⁴² This "myth of ordinariness" was reinforced, Schickel says, by "a myth of hard and . . . anxious work."²⁴³ "[W]hatever the stars had," the public was constantly assured in these years, "they earned. However luxuriously they might disport themselves in the Sunday rotogravure, however carefree they might look in the snaps from *Ciro's* and the *Mocambo* . . . it was constantly put about that . . . the stars worked farmers' hours in factorylike conditions."²⁴⁴ Consciously or not, Nimmer deftly deployed this "myth of hard and anxious work" in defense of a right of publicity. As we will see below, even today the right of publicity draws its chief moral and rhetorical support from this same source.²⁴⁵

Although *Haelan Laboratories* and Nimmer's proposal received favorable early notices in the law reviews,²⁴⁶ the courts were initially reluctant to embrace the new right.²⁴⁷ Whether this is attributable in any part to the lingering influence of the traditional noneconomic conception

240. Nimmer, *supra* note 13, at 215-16 (emphasis added).

241. See *infra* Section III.A.

242. SCHICKEL, *supra* note 3, at 99-100. But cf. Francesco Alberoni, *The Powerless "Elite": Theory and Sociological Research on the Phenomenon of the Stars*, in *SOCIOLOGY OF MASS COMMUNICATIONS* 75, 93 (Denis McQuail ed., 1972) ("The star system has never . . . sought to legitimate the position of the stars on any other basis than their personality, their private life, their friends, their intimate tragedies and their eccentricities.").

243. SCHICKEL, *supra* note 3, at 103.

244. *Id.*

245. See *infra* text accompanying notes 268-77.

246. See, e.g., Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553 (1960) (praising the growing judicial recognition of distinct commercial or proprietary interests in personality); Note, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123 (1953) (approving *Haelan's* recognition of a right of publicity because the right of privacy gives inadequate protection to commercial interests).

247. Some courts declined to "blaze the trail" on their own. See, e.g., *Strickler v. NBC*, 167 F. Supp. 68, 70 (S.D. Cal. 1958). Others, while expressing general approval of the right and its rationale, chose to base their decision on some more familiar ground. See, e.g., *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458 (N.J. Super. Ct. 1967) (granting relief on privacy grounds, though noting that "[i]t is unfair that one should be permitted to commercialize or exploit or capitalize upon another's name, reputation or accomplishments merely because the owner's accomplishments have

of fame is hard to say.²⁴⁸ In any event, the right of publicity, helped along by some kind words from Professor Kalven²⁴⁹ and later from the Supreme Court,²⁵⁰ gradually began to win widespread judicial²⁵¹ and scholarly²⁵² acceptance. In the last decade or two, as the "celebrity industry"²⁵³ has grown in power, organization, and sophistication, and as the costs involved in celebrity production have soared, the pressure for legal commodification of personas has intensified. This is pressure that would-be appropriators (and consumers who might share their interests in free use) have had neither the cohesion, lawyering skill, nor lobbying muscle to counter this pressure effectively. The result has been a steady stream of judicial decisions and statutes recognizing a property-like right of publicity²⁵⁴ and expanding its scope.²⁵⁵ This has come about, as will

been highly publicized"); *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. (BNA) 314, 320 (Pa. C.P. 1957) (right of publicity only "another way of applying the doctrine of unfair competition").

248. Although the economic conception of fame has dominated recent scholarly and judicial discussion, the older noneconomic notions resurface from time to time. See, for example, the much-criticized opinion of the Sixth Circuit in *Memphis Development Foundation v. Factors Etc., Inc.*, 616 F.2d 956, 959 (6th Cir.) ("Fame falls in the same category as reputation; it is an attribute from which others may benefit but may not own."), *cert. denied*, 449 U.S. 953 (1980).

249. Kalven, *supra* note 12, at 331 n.37 (identifying its rationale as the prevention of unjust enrichment). For a critical examination of this unjust enrichment rationale, see *infra* Section III.A.2.

250. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977) (identifying its rationale as the creation of an "economic incentive" to investment in cultural endeavors). For a critical examination of the "incentive" rationale, see *infra* Sections III.B.1-3.

251. See, e.g., *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 135 (Wis. 1979).

252. See, e.g., *McCarthy*, *supra* note 13; *Gordon*, *supra* note 246; *Halpern*, *supra* note 92.

253. "[T]he celebrity industry consists of specialists who take unknown and well-known people, design and manufacture their images, supervise their distribution, and manage their rise to high visibility." IRVING J. REIN ET AL., *HIGH VISIBILITY* 33 (1987). See generally *id.* at 32-63 (tracing the historical evolution of the celebrity industry and identifying its component parts—the entertainment industry, the representation industry, the publicity industry, the coaching industry, the endorsement industry, and so on).

254. *Haelan Laboratories* initially declined to bestow the "property" label on the right of publicity. *Haelan Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). Nonetheless, most courts and commentators have now come to regard it as a full-blooded property right. See, e.g., *Cepeda*, 415 F.2d at 1206; *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1355 (D.N.J. 1981); *Uhlaender*, 316 F. Supp. at 1282; *MUNZER*, *supra* note 14, at 52-53. But see Timothy P. Terrell & Jane S. Smith, *Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue*, 34 EMORY L.J. 1 (1985) (arguing that the right of publicity is a liberty interest and should not be inheritable). The *Haelan Laboratories* case established that publicity rights are transferable by license and assignment. 202 F.2d at 868; see also *McCarthy*, *supra* note 13, §§ 10.1-16. More recent statutes and decisions have held that the right is descendible as well. See *id.* § 9.5[A] (12 states recognize a post mortem right of publicity). Moreover, although only a few courts have so far decided the issue, the majority have held that the increase in value of a spouse's celebrity status is marital property subject to equitable distribution. See *Piscopo v. Piscopo*, 557 A.2d 1040 (N.J. Super.), *cert. denied*, 564 A.2d 875 (N.J. 1989); *Elkus v. Elkus*, 572 N.Y.S.2d 901 (App. Div. 1991), *appeal dismissed*, 588 N.E.2d 99 (N.Y. 1992); *Golub v. Golub*, 527 N.Y.S.2d 946 (Sup. Ct. 1988). But see *Getz v. Getz*, N.Y.L.J., Mar. 2, 1989, at 28 (Sup. Ct.) (Colabella, J.).

255. Some statutes limit the right of publicity to appropriations of name and likeness. See, e.g.,

be seen next, despite the fact that the rationales most commonly advanced in support of the right of publicity nowadays are no more compelling than those put forward by Judge Frank and Melville Nimmer in the early 1950s.

III

A CRITIQUE OF THE STANDARD ARGUMENTS FOR A RIGHT OF PUBLICITY

I am my own commodity. I am my own industry.

—Elizabeth Taylor, objecting to an
ABC docudrama based on her life²⁵⁶

*Only that audience out there makes a star. It's up to them.
You can't do anything about it . . . Stars would all be Louis B.
Mayer's cousins if you could make 'em up.*

—Jack Nicholson²⁵⁷

The main justifications advanced in support of publicity rights fall basically into three categories. There are, first of all, "moral" arguments, based on the supposed right of persons to "reap the fruits of their labors," or the injustice of permitting others to "reap where they have not sown." Next, there are "economic" arguments, the most popular version of which is that the right of publicity, like copyright, provides needed incentives to stimulate creative effort and achievement. A related line of argument, advanced by Posner and others, justifies the right of publicity as a mechanism for promoting allocative efficiency. Finally, some courts and writers argue for the right of publicity in terms of consumer protection. On this view, the right of publicity, like the law of trademark, promotes the flow of useful information about goods and

KY. REV. STAT. ANN. § 391.170 (Michie/Bobbs-Merrill 1984) (name and likeness); TENN. CODE ANN. §§ 47-25-1101 to -1108 (1984) (name, photograph, and likeness). The clear drift of the law, however, is to extend coverage to any aspect of a celebrity's persona—voice, mannerism, performance style, and so on—that evokes and capitalizes on her identity. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (sound-alike of singer Tom Waits), *cert. denied*, 113 S. Ct. 1047 (1993); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (robot dressed and posed like gameshow hostess Vanna White), *amended*, 1992 U.S. App. LEXIS 19253 (9th Cir. Aug. 19, 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (sound-alike); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (phrase associated with entertainer); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (professional racing driver's distinctively decorated car); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 396 N.Y.S.2d 661 (App. Div. 1977) (bandleader's public personality as "Mr. New Year's Eve"); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979) (nickname); see also Halpern, *supra* note 92, at 1242-45 (arguing that use of a celebrity look-alike or sound-alike infringes right of publicity, even when accompanied by a disclaimer, if celebrity's identity is "evoked" and her "associative value" thereby appropriated).

256. Tamar Lewin, *Whose Life Is It, Anyway? Legally, It's Hard to Tell*, N.Y. TIMES, Nov. 21, 1982, § 2, at 1.

257. FOWLES, *supra* note 179, at 84.

services to consumers and protects them from deception and related marketplace harms. In the discussion that follows, I examine and evaluate these various arguments in turn. For the most part, my critique in this Part is *internal*: I take each argument on its own terms and attempt to show either that it fails, or that it relies upon empirical or normative premises, usually unstated, that are controversial, dubious, or clearly erroneous. My ultimate conclusion is that these arguments, individually and cumulatively, are not nearly as compelling as is commonly supposed, nor as compelling as we have reason to demand.

A. *Moral Arguments for Publicity Rights*

I have heard it said, with seeming seriousness, that a property right in identity is something a celebrity "deserves" simply for becoming famous. The suggestion is a very curious one. Fame, after all, is "no sure test of merit."²⁵⁸ Whatever may once have been the case, plenty of people become famous nowadays through sheer luck, through involvement in public scandal, or through criminal or grossly immoral conduct. More to the point, even commercially marketable fame can be achieved in this fashion. Douna Rice, for example, landed an advertising contract with "No Excuses" Jeans after her relationship with Senator (and presidential candidate) Gary Hart was made public.²⁵⁹ Britain's Great Train Robber, Ronald Biggs, while living as a fugitive in Brazil, "appeared in an ad touting a good cup of coffee 'when you're on the run, like me.'"²⁶⁰ More recently, the successful marketing of "trading cards" of serial killers and other famous criminals—Jeffrey Dahmer, Richard Speck, etc.—has attracted legislative attention.²⁶¹

To be sure, advertisers generally prefer to use the persona of a celebrity whose fame is not ill-gotten—someone whose glamor, credibility, or popularity may rub off on the advertised product or service. But not always. Often enough, an advertiser wants a celebrity image simply to attract attention—to lift its commercial message out of the general "clutter."²⁶² Photographs of the villain elite—national enemies, mob leaders,

258. A NEW DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES FROM ANCIENT AND MODERN SOURCES 384 (H.L. Mencken ed., 1942) (quoting Thomas Carlyle).

259. See Phyllis Furman, *New Retail's Cole Is a Savvy Young Soul; He Built New Jeans Brand with Strong Ads*, CRAIN'S N.Y. BUS., Dec. 18, 1989, at 6.

260. JOHN LAHR, AUTOMATIC VAUDEVILLE 220 (1984).

261. See "True Crime" Cards Thriving Despite Outrage, N.Y. TIMES, Dec. 6, 1992, at 44. In response to protests by victims' rights groups and others, a bill has been introduced in the New York Legislature that would make the sale of such trading cards to minors a misdemeanor. See S. 7691-A, 1991-1992 N.Y. Reg. Sess.

262. One recently developed Madison Avenue tactic is to design advertisements in such a way as to trigger public controversy and thereby obtain free news coverage. This tactic, initiated by political consultants in the 1980s, has now "become a standard act in the repertoire of product and service marketers." See Randall Rothenberg, *Commercials Become News, and the Air Time Is Free*, N.Y. TIMES, Jan. 8, 1990, at D1. Here are a few examples involving public figures. In a February

people involved in notorious sex or political scandals—can be very useful to advertisers for this purpose. For example, shortly after Panamanian General Manuel Noriega was deposed and flown to Miami, the British airline Virgin Atlantic ran an ad with his mug shot and this headline: "Only one person can fly into the USA for less than [90 pounds]." ²⁶³ In the weeks after the Iraqi invasion of Kuwait, advertisers put Saddam Hussein's picture to similar use. ²⁶⁴ Advertising of this kind raises an interesting question about the scope of the right of publicity. ²⁶⁵ But that issue aside, the key point for now is simply that being famous, by itself,

1988 speech, President Reagan, while urging congressional support for the Contras in Nicaragua, compared Nicaraguan President Daniel Ortega to "that fellow in the Isuzu commercial"—Joe Isuzu—who is always making false or exaggerated claims. When Ortega makes promises, the President quipped, "there should be subtitles under [him] telling the real story." Isuzu's ad agency quickly moved to capitalize. It made a television commercial including Reagan's remarks and some film footage of Ortega delivering a speech in Spanish, with subtitles providing fictitious translation: "Hey, Joe Isuzu. Could you cut me a deal on an Impulse Turbo? I hear the Impulse is faster than a speeding bullet. I could use that in a car." All three major networks refused to run the ad—but their refusal received substantial news coverage. See *No Lie: Networks Reject Isuzu Ad Using Ortega*, L.A. TIMES, Feb. 19, 1988, at D5.

At the end of December 1989, the Schering-Plough Corporation's ad agency submitted a commercial to the major television networks for the cold medication Drixoral. The ad used footage of Presidents Bush and Gorbachev smiling and shaking hands at the Malta summit, with the slogan: "In the New Year, may the only cold war in the world be the one we're fighting." (A full-page print version of the ad also appeared in newspapers. See N.Y. TIMES, Dec. 28, 1989, at A22.) Permission to use the presidential images was neither sought nor granted, and two television networks refused to run the ad. Their decision was in turn widely reported on many television news programs, which did include parts of the ad—much to the delight of the ad agency. Having originally budgeted \$100,000 to broadcast the spot, Schering received, in the words of an exuberant Drixoral ad executive, "millions and millions of dollars worth of free time." Rothenberg, *supra*, at D1, D8.

A more recent example of this tactic occurred shortly after the conclusion of the Gulf War. On the same day that General Norman Schwarzkopf received a "hero's welcome" from Congress, N.Y. TIMES, May 9, 1991, at A1, America West Airlines introduced an ad campaign featuring the actor Jonathan Winters dressed in army desert fatigues to resemble the general. In the print version of the ad, Winters is shown standing at a podium—as if at a press briefing—under the caption "Announcing Air Superiority for Civilians." See N.Y. TIMES, May 9, 1991, at B5. As America West doubtless hoped and expected, the ad received considerable news coverage. See, e.g., *Stormin' Jonathan's Mission Is to Rescue America West*, N.Y. TIMES, May 9, 1991, at D8.

263. See *Poster Boy*, PARADE MAG., Feb. 25, 1990, at 11.

264. See, e.g., UPPER W. SIDE RESIDENT, Oct. 1, 1990, at 2 (ad for Ultimate Car Care, Inc., which states, under Hussein's photograph, "He may be responsible for an increase in the price of gas, but, at Ultimate Car Care, we're happy to announce a decrease").

265. As best as I have been able to determine, the question of whether the right of publicity protects the infamous has not been squarely confronted by American courts. *But cf.* *Miller v. American Tobacco Co.*, 158 F. Supp. 48, 49 (S.D.N.Y. 1957) (holding that a bank robber, having no property right in his crime, may not recover damages for its television reenactment). It is likely, however, that monetary relief at least would be denied to an infamous right-of-publicity plaintiff on the basis of the ancient equitable maxim that a court will not assist a wrongdoer to profit from his wrongs. See *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889). Moreover, it is hard to see how any of the chief rationales for the right of publicity—incentive to achievement, labor-desert, or consumer protection—would be furthered by affording protection to people who owe their fame to criminal or grossly immoral conduct. On the other hand, if the purpose of the right of publicity is to vindicate a dignitary or autonomy interest, rather than an economic one, there is no apparent reason to deny protection to the infamous, at least by way of injunctive relief.

does not make a person deserving of all the fruits of her fame. If public figures are morally entitled to a property right in the commercial value of their identities, it must be on some basis other than their fame itself.²⁶⁶

The basis most frequently and confidently advanced by courts and commentators is the labor theory on which Nimmer originally relied. In his seminal 1954 article, Nimmer purported to derive the right of publicity from what he called an "axiom" of Anglo-American jurisprudence: "that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations."²⁶⁷ Nimmer contended that a person who has "long and laboriously nurtured the fruit of publicity values," who has expended "time, effort, skill, and even money" in their creation, is presumptively entitled to enjoy them himself.²⁶⁸ Numerous courts and writers have since justified the right of publicity in similar fashion: some emphasizing the celebrity's affirmative entitlement, as a matter of moral right or desert, to reap "the fruits of his labors" or to control what he has created;²⁶⁹ others stressing the supposed injustice of permitting strangers to "reap where they have not sown."²⁷⁰ In the next two Sections I examine and evaluate this cluster of moral arguments for the right of publicity.²⁷¹ My central contention is that there is a good

266. *But cf.* *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) ("The law protects the celebrity's sole right to exploit [her publicity] value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof."), *amended*, 1992 U.S. App. LEXIS 19253 (9th Cir. Aug. 19, 1992).

267. Nimmer, *supra* note 13, at 216.

268. *Id.*

269. *See, e.g.,* *McFarland v. E & K Corp.*, 18 U.S.P.Q.2d (BNA) 1246, 1247 (D. Minn. 1991) ("A celebrity's identity, embodied in his name, likeness, and other personal characteristics, is the 'fruit of his labor' and becomes a type of property entitled to legal protection.") (quoting *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970)); *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 462 (N.J. Super. Ct. 1967) ("[T]he basic and underlying theory is that a person has the right to enjoy the fruits of his own industry free from unjustified interference."); *Shipley, supra* note 27, at 677 ("If an individual has worked to develop in his name and likeness sufficient value to excite the desire of another to market them, then that person arguably deserves property rights in the interests and entitlement to control their resulting profitability.") (footnote omitted).

270. A number of cases have stated that the right of publicity prevents unjust enrichment. *E.g.,* *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 221 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1198 (S.D.N.Y.), *supplemental opinion*, 578 F. Supp. 59 (S.D.N.Y. 1983); *Lugosi v. Universal Pictres*, 603 P.2d 425, 438 (Cal. 1979) (Bird, C.J., dissenting); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 134-35 (Wis. 1979); *see also* SAMUEL K. MURUMBA, *COMMERCIAL EXPLOITATION OF PERSONALITY* 72 (1986) ("Proprietary justice demands that 'he who reaps shall sow.'"); *Kalven, supra* note 12, at 331 (rationale for the right of publicity is "the straightforward one of preventing unjust enrichment by the theft of good will"); *Shipley, supra* note 27, at 682, 686 (right of publicity, like the tort of misappropriation, prevents "[u]njust enrichment through the conversion of hard-earned and valuable intangible interests").

271. A somewhat different moral argument rests on the supposed offense to "dignity" or "autonomy" in having one's persona associated with commercial products or projects not of one's choosing or liking. I will not evaluate this line of argument in this Article because it can at most, I think, justify a *personal* right against certain kinds of unauthorized commercial appropriation. Even

deal more to the generation of a commercially marketable public image than the "labor" of the star herself. Once we appreciate what else is involved, a labor-based moral argument for the right of publicity loses much of its initial appeal.

1. *The Claims of "Labor" on the Fruits of Fame*

A labor-based moral argument for publicity rights presupposes that commercially marketable fame is no mere gift of the gods. For the argument to be plausible, a commercially marketable public image or persona must be viewed as the celebrity's own product, something that she herself makes or creates by her own individual labor. Most courts subscribe to some such view. Judicial opinions generally treat commercially valuable fame as a crown of individual achievement, the result of conscious and sustained effort in a chosen field of endeavor. Time and again, right-of-publicity plaintiffs are described by the courts as carefully "cultivating" their talents, slowly "building" their images, judiciously and patiently "nurturing" their publicity values—as working long and hard to make themselves famous, popular, respected, beloved. The bandleader Guy Lombardo, one court says, "invested 40 years" in "carefully and painstakingly" building "his public personality as Mr. New Year's Eve."²⁷² Elroy "Crazy Legs" Hirsch, another court assures us, devoted "much time and effort" to "assiduously cultivat[ing] a reputation not only for skill as an athlete, but as an exemplary person whose identity was associated with sportsmanship and high qualities of character."²⁷³ A much-cited federal district court opinion puts the general point this way: "A

if one were to agree that a celebrity should be protected from unwanted associations generally, or more plausibly, from those commercial appropriations of his identity that falsely suggest sponsorship or involvement on his part, that protection can be afforded without creating an assignable and descendible *property* right in identity. The existing law of false advertising, defamation, and "false light" privacy is largely adequate for these purposes.

To the extent this body of law is believed to provide insufficient protection to the celebrity's legitimate interests in autonomy and dignity, the appropriate response is to amend it, rather than to commodify celebrity personas. For example, it might be appropriate to reconsider the notion that celebrities, by assuming positions of prominence and visibility and/or by seeking news coverage, waive their right of *privacy* against any and all commercial appropriation. A celebrity who, on principle, has consistently refused to appear in advertisements or endorse products—known in the industry as an "advertising virgin"—may perhaps legitimately complain if an advertiser or merchandiser uses his persona without his consent in such a way that consumers will infer his voluntary association with the product. He has a substantial interest, one might think, in not having his persona used in a way that leads people to believe he has at last succumbed to temptation and decided to cash in on his fame. Indeed, even a celebrity who has previously done some advertisements or endorsements can perhaps legitimately complain if her identity is used in a way that suggests her endorsement of a particular product that she morally abhors or that is particularly tawdry or shoddy. But if relief is deemed appropriate in such circumstances, there is no need to invent a full-blown property right in identity. The harm or injury in such cases is not to the celebrity's pocketbook, but to her interest in not being *misrepresented* or cast in an offensive "false light." That interest can be protected through privacy law, false advertising law, or both.

272. See *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 396 N.Y.S.2d 661, 664 (App. Div. 1977).

273. *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 134-35 (Wis. 1979).

celebrity *must* be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics, and other personal characteristics, is the fruit of his labors and is a type of property."²⁷⁴

Law review writers, too, generally see a commercially valuable public image as something a star attains largely on her own, through some combination of talent, effort, intelligence, pluck, and grit. Professor Sims, for example, says that a celebrity usually creates "a positive or otherwise intriguing image in the public mind, with the concomitant ability to attract the public's patronage, consumption, or support of that with which his name or likeness is associated," in the same way a professional person or business creates "goodwill"—namely, through "the expenditure of considerable time, money, and effort."²⁷⁵ Professor McCarthy opines that "[w]hile one person may build a home, and another knit a sweater so also may a third create a valuable personality, and all three should be recognized by the law as 'property' protected against trespass and theft."²⁷⁶ A student commentator offers this analogy to drive home the point:

A carpenter begins with a virtually worthless piece of wood. Through a combination of hard work, time, and skill, he converts it into a beautiful chair. He now has a thing of value where none existed before. Similarly, a celebrity begins as an unknown. He has no publicity value. Through the investment of many years of hard work, he makes his name and face marketable. Like the carpenter, he has created a valuable asset where none existed before.²⁷⁷

This "moral" argument for publicity rights has a fair measure of intuitive appeal. The petit bourgeois heart that secretly beats in all our breasts cannot but swell at the thought that Madonna's claim to the commercial value of her public image is morally indistinguishable from a carpenter's claim on a chair that he has built from scratch. Closer examination, however, reveals a number of serious problems with this line of argument for the right of publicity.

The first problem, which plagues labor theories of property generally, is that it is by no means evident that *anyone*—carpenter or celebrity—has a natural or moral right to the full *market value* of the product

274. *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (emphasis added). Why celebrities "must" be considered to have done so is left unexplained.

275. Sims, *supra* note 27, at 459.

276. MCCARTHY, *supra* note 13, § 2.1[D], at 2-8.

277. Eileen R. Reilly, Note, *The Right of Publicity for Political Figures: Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products*, 46 U. PITT. L. REV. 1161, 1168 n.37 (1985).

of her labor.²⁷⁸ The second problem cuts deeper. The labor-desert rationale for publicity rights is based, I will argue, on a fundamental misconception of the processes by which fame is generated and public images are formed in contemporary society. When we look at these processes without ideological blinders, we find that celebrities generally do not create commercially marketable public images in anything like the way carpenters make chairs. The notion that a star's public image is nothing else than congealed star labor is just the folklore of celebrity, the bedtime story the celebrity industry prefers to tell us and, perhaps, itself.

In order to assess the strength of a labor-based moral argument for publicity rights, the first thing we need to know is how "publicity" or "associative" values come into being. More specifically, we need to know the extent to which it is the "labor" (time, money, effort) of the celebrity—or of persons whose labor can be imputed to her—that produces or ultimately underlies these economic values. The British semiotician Judith Williamson provides a useful starting point for our analysis. According to Williamson, a star persona can enhance the marketability of the commodities with which it is associated only if it already *means* something to the rest of us. Williamson makes this point very clearly in analyzing an advertisement for Chanel No. 5 perfume, which consisted of a close-up photograph of the French actress Catherine Deneuve juxtaposed with a photograph of a bottle of the perfume. As Williamson explains it, Chanel is using what Catherine Deneuve "means" to us already in order to establish a desired meaning for its perfume:

It is only because Catherine Deneuve has an "image", a significance in one sign system, that she can be used to create a new system of significance relating to perfumes. If she were not a film star and famous for her chic type of French beauty, if she did not *mean* something to us, the link made between her face and the perfume would be meaningless. So it is not her face as such, but its position in a system of signs where it signifies flawless French

278. Edwin Hettinger has argued that although a laborer may have a moral (or "natural") right to possess or use what she produces by her own labor, she is not entitled to the market value of the final product (or even of her own contribution to the final product) because this value is determined by market forces and institutional arrangements that are not of her making. According to Hettinger:

Market value is a socially created phenomenon, depending on the activity (or nonactivity) of other producers, the monetary demand of purchasers, and the kinds of property rights, contracts, and markets the state has established and enforced. The market value of the same fruits of labor will differ greatly with variations in these social factors.

Hettinger, *supra* note 239, at 38; see also John Christman, *Entrepreneurs, Profits and Market Shares*, 6 Soc. PHIL. & POL'Y 1, 12-14 (1988) (arguing that moral desert is inappropriate as a justification for market shares whenever supply and demand determine the magnitude of those shares). Whether, and to what extent, individual laborers should be permitted to receive the market value of their products is therefore, according to Hettinger, "a question of social policy; it is not solved by simply insisting on a moral right to the fruits of one's labor." Hettinger, *supra* note 239, at 39; cf. BECKER, *supra* note 32, at 45-53 (arguing that while laborers may deserve *some* reward for their labor, they do not always deserve *property rights* in the thing labored upon).

beauty, which makes it useful as a piece of linguistic currency to sell Chanel.²⁷⁹

This passage helps us see that it is only because star images are sources and bearers of *meaning* that they have the power to "sell" commodities with which they are associated. Their economic value (their "associative" or "publicity" value, to use the terms favored by Halpern and Nimmer, respectively) derives from their *semiotic* power—their power to carry and provoke meanings.²⁸⁰ But how is it that a star's face becomes a "sign"? How are these meanings generated and what part does star "labor" play in the signifying process?

Unfortunately, courts and commentators have shown little interest in these questions. Instead, the courts make general and often platitudinous assertions, unsupported by any empirical evidence, about how celebrities achieve fame and distinctive public images, and then the commentators cite judicial opinions as support for the same propositions.²⁸¹ This gets us nowhere. To evaluate the merits of a labor theory of publicity rights, we need to know what the mechanisms of renown in our society really are, not just what the folklore of celebrity says they are. We need to know how a person's face becomes a "sign," how it comes to have a specific meaning (or range of meanings) for others, and what role star "labor" plays in the overall process. And the best way, if not the only way, we can find this out is inductively, by looking at what John Rodden has called "reputation-histories."²⁸²

Consider, for starters, the case of Einstein. Why did he, alone among theoretical physicists in this century, achieve worldwide recognition and commercially marketable fame? Why has *his* name, rather than Bohr's or Schrodinger's, become virtually synonymous in our vernacular with "genius"? Why is it *his* face, rather than Heisenberg's or Pauli's, that today stares out at us from advertisements, T-shirts, posters, greeting cards, and even party favors?²⁸³ Why, in short, is his face a "sign," while theirs are not? Our first instinct may be to reject these questions as

279. JUDITH WILLIAMSON, *DECODING ADVERTISEMENTS: IDEOLOGY AND MEANING IN ADVERTISING* 25-26 (1984).

280. The sociologist John Thompson has coined the term "cross-valorization" to describe the use of "symbolic values" as a means of increasing (or decreasing) "economic values." He cites the use of celebrities in advertising as a primary example of this process. See THOMPSON, *supra* note 4, at 157.

281. See, e.g., Sims, *supra* note 27, at 459 n.32.

282. JOHN RODDEN, *THE POLITICS OF LITERARY REPUTATION: THE MAKING AND CLAIMING OF "ST. GEORGE" ORWELL* 7 (1989). Rodden makes the interesting point that the process through which reputation and prestige are generated, in the literary field and elsewhere, has attracted surprisingly little academic attention. *Id.* at 54.

283. For examples of recent advertisements and merchandise making unauthorized use of Einstein's name or picture, see appendix to Statement of Roger Richman Before the N.Y. State Senate in Support of the Celebrity Rights Act 3 (May 15, 1989) (transcript and appendix on file with author). The samples include: an Einstein blow-out party favor; an ad for a technical institute using a photograph of Einstein: "You don't have to be a genius to succeed in High Technology"; an ad for

somewhat foolish. Einstein, we may think, was a great scientist, probably the greatest scientist of the century, and a "great soul" to boot. Surely, neither his renown nor his cultural significance needs explanation: things could not have turned out otherwise.

Yet a recent article by the historian Marshall Missner casts doubt on this easy answer. Missner has marshalled impressive evidence that Einstein's fame, in America at least, was "by no means inevitable."²⁸⁴ The process by which Einstein became a celebrity in America in the years immediately after World War I was instead "a tale of serendipity—a publicity campaign run by an invisible hand."²⁸⁵ Although it is a long way from Einstein to Madonna and Vanilla Ice, and from the 1920s to the 1990s, Missner's study can teach us something about the mechanisms of renown and popular meaning-making in our society—about the ways in which fame is generated and specific public images are formed in an era of mass communications. For that reason, I will set out a brief summary of his findings.

Missner suggests that the first puzzle to be explained is why the theory of relativity itself attracted so much public attention. The theory, put forward by Einstein in 1905, "did not have any obvious technological consequences at the time."²⁸⁶ Nor did it conflict, in any obvious way at least, with religious dogma. True, it was a great theoretical achievement, but the achievements of Bohr and Heisenberg "were of at least similar magnitude" and yet "did not gain any public recognition at all."²⁸⁷ Why, then, did Einstein's theory cause a public sensation, both in Europe and America, while their work did not? The initial factor, Missner claims, was the dramatic way in which the theory was confirmed: by observation of the deflection of light during the solar eclipse of May 1919.²⁸⁸ This confirmation was announced, with great fanfare, at a scientific conference held in London in November of the same year.²⁸⁹ Subsequent newspaper and magazine accounts did much to fuel public interest in the theory, trumpeting it as a "revolutionary" discovery that upset common sense assumptions about time and space.²⁹⁰

a halogen protection system: "For The EINSTEIN in Your Life"; and an Einstein look-alike in a condominium ad.

284. Marshall Missner, *Why Einstein Became Famous in America*, 15 SOC. STUD. SCI. 267, 288 (1985).

285. *Id.*

286. *Id.* at 267.

287. *Id.* at 268.

288. See ABRAHAM PAIS, "SUBTLE IS THE LORD . . .": THE SCIENCE AND THE LIFE OF ALBERT EINSTEIN 309 (1982) (dating "the birth of the Einstein legend" to the London conference of November 1919); Missner, *supra* note 284, at 267; *id.* at 269 ("Usually, scientific theories are established through the slow accumulation of data; however, the theory of relativity was dramatically confirmed by one event.").

289. Missner, *supra* note 284, at 270.

290. *Id.*

According to Missner, however, the primary reason the theory aroused intense interest in the United States was its political and ideological resonance.²⁹¹ The period immediately after World War I was a time of intense xenophobia; there was widespread fear of social revolution and alien, antidemocratic conspiracies. The theory of relativity, at least as presented by the popular press, struck many Americans as elitist, sinister, and subversive.²⁹² Revealingly, a story somehow took hold after 1919 that only "twelve men" in the entire world (all foreigners, presumably) really understood Einstein's theory.²⁹³ Editorialists voiced concern that this elite might ultimately use their knowledge of the theory to alter basic aspects of reality—to "bend" space and time, to enter a "fourth dimension," and so on—and thereby achieve world dominion.²⁹⁴ Even the sober editors of *The New York Times* railed against the theory's antidemocratic implications.²⁹⁵

In April 1921, Einstein himself paid his first visit to this country as part of a Zionist delegation led by Chaim Weizmann. The American mainstream press misinterpreted the tumultuous welcome that New York City's Jews gave to the delegation, and to Weizmann in particular, as a "hero's welcome" for Einstein. The *Washington Post*, for example, headlined its account of the arrival: "Thousands at Pier to Greet Einstein."²⁹⁶ *The New York Times* misreported the event in similar fashion.²⁹⁷ These erroneous reports helped to generate keen curiosity about Einstein as a person. Reporters who sought him out for interviews were relieved to find that he was not a "haughty, aloof European looking down on boorish Americans,"²⁹⁸ but a modest, humorous, and informal man, who "smiled when his picture was taken, and produced amusing and quotable answers to their inane questions."²⁹⁹ The fact that Einstein wore rumpled, ill-fitting clothing, played the violin, and smoked a pipe seemed particularly reassuring. He simply did not look like "the 'frightening Dr[.] Einstein,' " the "destroyer of space and time."³⁰⁰

Before very long, the press coverage turned sharply in Einstein's favor, and less was heard about his theory's sinister implications. Einstein had come to America in April 1921, as the somewhat obscure originator of a frightening and "un-American" theory. He left, two months later, a person revered in the American Jewish community and

291. *Id.* at 277-81.

292. *Id.* at 278-81.

293. *Id.* at 275-76.

294. *Id.* at 276-77.

295. *Id.* at 275-81.

296. *Id.* at 285.

297. *Id.*

298. *Id.* at 281.

299. *Id.* at 282.

300. *Id.* at 281.

widely admired in the general populace, well on his way to secular sainthood and cultural iconization.³⁰¹

What can we learn from this about the processes by which fame is generated and public images are formed in our society? *First*, Missner's account underscores an elementary, but occasionally overlooked, sociological truth about fame: fame is a "relational"³⁰² phenomenon, something that is *conferred by others*. A person can, within the limits of his natural talents, *make himself* strong or swift or learned. But he cannot, in this same sense, make himself famous, any more than he can make himself loved. Furthermore, fame is often conferred or withheld, just as love is, for reasons and on grounds other than "merit." There is ample room for disagreement about just how wide the gap between fame and merit actually is, about just how contingent and morally arbitrary the mechanisms of renown really are.³⁰³ Still, Missner's account illustrates that the reason one person wins universal acclaim, and another does not, may have less to do with their intrinsic merits or accomplishments than with the needs, interests, and purposes of their audience.³⁰⁴ That Einstein became a celebrity, a cultural icon, while Bohr and Heisenberg did not, had less to do with the quality of his (and their) achievements than with *our* needs and preoccupations.³⁰⁵ And if Einstein's persona still has significant "publicity value" today, if advertisers and T-shirt makers are still eager to use his face, that is in good part because fame, however initially acquired, tends to "feed[] on itself."³⁰⁶

Second, and this is closely related to the previous point, Missner's account suggests that there is an important element of contingency in the process by which even indisputably great people become famous. The "canon of great names" may appear "like a canopy of fixed and shining stars."³⁰⁷ But the canon—literary, scientific, cultural, even athletic—is in fact a "socially constructed reality," not a "law of nature."³⁰⁸ While Einstein's fame may now seem to us latecomers to be natural or inevita-

301. *Id.* at 287.

302. RODDEN, *supra* note 282, at 51.

303. Compare GARY TAYLOR, *REINVENTING SHAKESPEARE* 4-6, 373-411 (1989) (emphasizing the radical contingency of literary reputations) with RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 58-73 (1990) (noting that while luck and politics play a role in the formation of reputation, so, too, do "merit" and "worth").

304. John Rodden impressively demonstrates this point in his fascinating case study of the making of George Orwell's reputation. See RODDEN, *supra* note 282.

305. The same has been shown to be true of other members of the 1920s pantheon—of Lindbergh, for instance, who was not the first but the 27th flyer to cross the Atlantic by air, and whose contributions to aviation were matched or exceeded by Admiral Byrd and others. See BRAUDY, *supra* note 94, at 19-25; ORRIN E. KLAPP, *SYMBOLIC LEADERS* 29-30 (1964).

306. POSNER, *supra* note 303, at 68; see also TODD GITLIN, *THE WHOLE WORLD IS WATCHING* 147 (1980) ("After a point, celebrity can be parlayed—by celebrity and by media—into more celebrity: it is like money or a credit rating.").

307. RODDEN, *supra* note 282, at ix.

308. *Id.*

ble, there was in fact no necessity to it. Things could well have turned out otherwise. Einstein's fame, as Missner shows, was "built on the contingent association of many different factors".³⁰⁹

The right kind of announcement of his theory's verification occurred; the right sort of phrases were used to describe the theory; the right chords in the public were touched; Einstein came [to America] at the right time, when interest in the theory was beginning to run its course; the right kind of mass demonstrations to attract attention were held (even if they were often directed toward others); Einstein said the right things and had the right kind of appearance and personality; and there was the right kind of group, the American Zionists and the Jewish community in general, to serve as a vanguard.³¹⁰

The point here is not to suggest that there is *nothing* to fame but luck, circumstance, and politics. Nor is it to suggest that there is no "objective" basis upon which Einstein can be judged a greater scientist than, say, the inventors of velcro and teflon.³¹¹ The point, rather, is that Fame does not play fair; it plays favorites. Very wide disparities in fame exist between people (like Einstein and Bohr) whose claims to our attention and esteem are roughly comparable. These wide and seemingly unjustified disparities in fame exist as well in the entertainment and athletic fields, and are usually accompanied there by equally great (and unjustified) disparities in income. "Superstar" athletes, musicians, and screen actors command huge incomes, while performers of only slightly less talent may barely eke out a living.³¹²

Whether or not the state should undertake, through tax policy or some other way, to redress or offset these disparities in fame and fortune is a large and difficult question. But however that issue is resolved, it seems to me that the state should neither actively compound these disparities nor appear to legitimize them. Yet that, in a way, is the practical effect of the right of publicity. Publicity rights operate to channel additional dollars to the very people—Einstein rather than Bohr, Vanilla Ice rather than Too Short—who happen to draw first-prize tickets in the fame lottery.

Third, Missner's account illustrates the crucial role of the news media in the creation of these unjustified disparities in fame. The mainstream press *selected* Einstein for celebrity, and it chose him in part

309. Missner, *supra* note 284, at 288.

310. *Id.*

311. For an illuminating discussion of the comparative merits of Einstein and Bohr as physicists, see Jeremy Bernstein, *King of the Quantum*, N.Y. REV. BOOKS, Sept. 26, 1991, at 61 (reviewing ABRAHAM PAIS, *NIELS BOHR'S TIMES, IN PHYSICS, PHILOSOPHY, AND POLITY* (1991)).

312. See Emanuel Levy, *The Democratic Elite: America's Movie Stars*, 12 QUALITATIVE SOC. 29, 31 (1989) (discussing the grossly uneven distribution of wealth among screen actors); Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845, 845-46 (1981).

because he served the media's own institutional interests: he granted interviews, spoke quotably, had the "right appearance." No doubt the media would have looked elsewhere for a symbol of "scientific genius" had Einstein been dour, taciturn, and unphotogenic.

A similar selection process routinely occurs not only in science and the arts, but also in politics and society, and even in entertainment. The media has its own powerful institutional need for a steady supply of recognizable personalities to enlist audience interest, put across ideas and information, and generate consumption demand for the wares of its advertisers.³¹³ In the "mass-mediated version of reality," Todd Gitlin observes, almost everything of importance—social and political movements, organizations, scientific breakthroughs—must be "reduced to personifications."³¹⁴ For the mainstream media, "news" consists of events that can be presented as "drama," and the drama "most easily packaged for everyday consumption" is "the drama of *recognizable* individuals"—of regulars, celebrities, stars.³¹⁵ The media thus has a "structured need" and "relentless hunger" for celebrities: it needs them, and *produces* them, in order to carry out its own institutional purposes.³¹⁶ Television especially, "with its compulsion to provide visual embodiment to abstraction," desperately needs personalities to "stand for" abstract ideas and developments; it therefore creates celebrities "where there were none."³¹⁷

Most importantly, the particular people the media chooses for this purpose tend to be those who best serve its own need to present the world in compellingly *dramatic* terms. Thus, as Gitlin brilliantly shows, media news coverage of the New Left in the 1960s centered on those of its "leaders" who "most closely matched prefabricated images of what an opposition leader should look and sound like: articulate, theatrical, bombastic."³¹⁸ These were people who "enjoyed performance, who knew how to flaunt some symbolic attribute, who spoke quotably."³¹⁹ The public actions of Jerry Rubin, Abbie Hoffman, Tom Hayden, Mark Rudd, and Stokely Carmichael made "good copy" because they "generated sensational pictures rich in symbolism."³²⁰

313. See Suzanne Keller, *Celebrities and Politics: A New Alliance*, 2 RES. POL. SOC. 145, 148 (1986) ("Television needs its daily ration of heroes great and small, genuine and contrived, both to enlist audience interest and to advertise the wares of the consumer society.").

314. GITLIN, *supra* note 306, at 146; see also Leon V. Sigal, *Sources Make the News*, in READING THE NEWS 9, 13-14 (Robert K. Manoff & Michael Schudson eds., 1986) (arguing that television needs celebrities to stand for political values and programs and thus "creates celebrities where there were none by re-presenting the same people again and again to represent social and political groups—Ted Kennedy to stand for liberals and Jesse Helms, the radical right; Gloria Steinem for and Phyllis Schlafly against the women's rights movement").

315. GITLIN, *supra* note 306, at 147.

316. *Id.* at 146, 154.

317. Sigal, *supra* note 314, at 13-14.

318. GITLIN, *supra* note 306, at 154.

319. *Id.* at 153.

320. *Id.* at 153-54, 176 (emphasis omitted).

The media, of course, did not *invent* these New Left leaders out of whole cloth, any more than the media invented Einstein. People like Rubin, Hoffman, and Hayden "were already *leaders* in some sense, or the media would not have noticed them."³²¹ But the media picked them out from a much larger pool of New Left leaders and then "promoted them *selectively*,"³²² just as the media did with Einstein (and did not do with Bohr and Heisenberg). And once the media had made these particular leaders well-known, it continued to cover them *because* they were well-known.

Fourth, and most importantly for present purposes, Missner's account helps us begin to see what is wrong with the radically individualistic picture of public image formation that dominates the case law and academic writing on the right of publicity. As Missner shows, the particular images of Einstein that were generated and circulated in the early 1920s had little to do with anything we might meaningfully call "labor," or even purposeful effort, on his part. It was the press and the public, working out their own anxieties and concerns, that first created the sinister "Dr. Einstein" and later replaced him with the smiling, violin-playing sage. The media and the public, in other words, first "read" Einstein one way, and then another, entirely for reasons of their own. They made "Einstein" *mean* what they needed or wanted him to mean. Einstein was certainly a participant of sorts in this signifying process—during his 1921 visit he clowning for American reporters, posed with his violin, and so on—but he was not the sole and sovereign author of his public image.

Nowadays, of course, much less is left to chance in these matters. Especially in the entertainment world, the production of fame and image has become more organized, centralized, methodical, even "scientific."³²³ The work of "fashioning the star out of the raw material of the person"³²⁴ is done not only by the star herself, but by an army of specialists—consultants, mentors, coaches, advisors, agents, photographers, and publicists. Much time and effort may be devoted to establishing and maintaining a distinct public image that the celebrity, or her handlers in the "celebrity industry," has chosen for its market appeal.³²⁵ Consider,

321. *Id.* at 152-53.

322. *Id.* at 153.

323. See generally REIN ET AL., *supra* note 253, at 64-88 (applying modern "marketing science" to the manufacture and marketing of celebrity). Rein and his colleagues take the position that virtually anyone can be made into a celebrity if the right methods are followed. For the contrary view—that the making and marketing of stars is more like guesswork than science—see KLAPP, *supra* note 305, at 26-32.

324. DYER, *supra* note 69, at 5.

325. A crucial aspect of this process is the systematic attempt to foster audience involvement with and interest in the celebrity through the design, manipulation, and promotion of dramatically compelling "storylines." See REIN ET AL., *supra* note 253, at 146 (arguing that "the conscious design, manipulation, and promotion" of dramatically compelling "storylines" so as to promote fan involvement and interest was "the celebrity industry's major breakthrough in the 1970s and 1980s").

for example, the testimony of actor Tony Roberts before the New York Legislature in support of a bill that would create a broad and descendible right of publicity:

How does an actor establish credibility—or shall we say an identity or an image or a persona by which people know him? The answer is, through a lifetime of correct decisions and choices, or incorrect decisions and choices. . . . [H]e attempts throughout his career to establish an image of himself which offers him the greatest opportunities for advancement in his chosen profession. . . . To this end, one hires personal managers at 15% to advise and screen out the wrong kinds of publicity, personal appearances and so on. Press agents, at great expense, arrange interviews with reputable publications, and arrange appearances on television talk shows, and at award ceremonies One chooses to endorse certain products, camps, hotels, diets, resorts, etc., or one doesn't. One chooses to be associated with certain causes, benefits, political ideologies or not.

And so, shouldn't this creation which is the result of a lifetime of careful nurturing, of scrupulous monitoring and shaping, be enough of a reality to be protected after one's death . . . ?³²⁶

There is no reason to doubt that many celebrities *attempt* to manage the process by which their images are formed in something like the way Roberts describes. The more important and more difficult questions are, first, how well they succeed, and, second, whether and to what extent the law should assist them in these efforts. On the first question, it seems plain to me that the image-formation process resists centralized capture or control more than celebrities would like. A public figure obviously cannot simply pick out a preferred image, like an off-the-rack coat, and make it stick. No matter how long and conscientiously he "labors" to create and maintain a preferred public image, and no matter how adept and shrewd his advisors and handlers are, he cannot make his persona "mean" precisely and solely what he wants it to mean. Richard Dyer explains why:

For clarity's sake, it is useful to draw a distinction, which courts and commentators are not careful to make, between two kinds of "labor" upon which a celebrity might attempt to base a moral claim to a property right in her identity. The first is the work that a celebrity does within her chosen field of endeavor—acting, entertainment, athletics, etc.—to achieve excellence and renown. The second is the "work" that a celebrity does directly on her "image"—the time, money, and effort she expends in selecting, establishing, and maintaining a specific public image, based either on aesthetic vision or market calculation. It is fairly obvious that many, perhaps most, of the people who attain commercially marketable fame in our society have performed labor of both these varieties. Whether the latter form of "labor" is one that the law *ought* to reward at all is an interesting—and seldom asked—question, but one which is largely beyond the scope of this Article.

326. See Statement of Tony Roberts Before the N.Y. Senate in Support of the Celebrity Rights Act 2-3 (May 15, 1989) (transcript on file with author).

A film star's image is not just his or her films, but the promotion of those films and of the star through pin-ups, public appearances, studio hand-outs and so on, as well as interviews, biographies and coverage in the press of the star's doings and "private" life. Further, a star's image is also what people say or write about him or her, as critics or commentators, the way the image is used in other contexts such as advertisements, novels, pop songs, and finally the way the star can become part of the coinage of everyday speech. Jean-Paul Belmondo imitating Humphrey Bogart in *A bout de souffle* is part of Bogart's image, just as anyone saying, in a mid-European accent, "I want to be alone" reproduces, extends and inflects Greta Garbo's image.³²⁷

However strenuously the star may fight the intertextuality of his image, however "scrupulously" he may try to "monitor" and "shape" it, the media and the public always play a substantial part in the image-making process.³²⁸ True, audiences "cannot make media images mean anything they want to," but they can (and do) "select from the complexity of the image the meanings and feelings, the variations, inflections and contradictions, that work for them."³²⁹ It is not just that the audience, by giving the public figure "cues" as to what it is it "wants" from him,

327. DYER, *supra* note 69, at 2-3; see also S. ELIZABETH BIRD, FOR ENQUIRING MINDS: A CULTURAL STUDY OF SUPERMARKET TABLOIDS 153 (1992) ("[T]he images of celebrities are constructed not only through their work but also through the many layers of narrative about their professional and personal lives—narratives constructed in the media and interpersonal gossip . . .").

328. Cf. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 959 (6th Cir.) (fame "always depends on the participation of the public in the creation of an image"), *cert. denied*, 449 U.S. 953 (1980). I do not mean to deny that a celebrity may try to enforce a fixed and determinate public image, and that she may have some success. But she can become widely popular, I suspect, only if she *fails* in this project. To attain what Dyer calls "star-sized currency and appeal," DYER, *supra* note 69, at 142, a performer's image must *provoke* more "meaning" than she herself can control or police. Cf. John Fiske, *Television: Polysemy and Popularity*, 3 CRITICAL STUD. MASS COMM. 391 (1986) (making a similar argument with respect to television programs). Her image must, to some extent, remain open or "polysemic": susceptible to being "read" in a number of different and even contradictory ways by diverse social groups. The biggest stars—Madonna, Michael Jackson, Bruce Springsteen—are supermarkets of meanings, from which their various audiences make their selections in accordance with their particular needs and interests and appetites. See, e.g., FISKE, *READING THE POPULAR*, *supra* note 49, at 95-113 (analyzing "Madonna" as a "site of semiotic struggle" between contradictory—patriarchal and feminist—conceptions of sexuality); Ian H. Angus & Sut Jhally, *Introduction*, in *CULTURAL POLITICS IN CONTEMPORARY AMERICA* 1, 1-2 (Ian H. Angus & Sut Jhally eds., 1989) (describing the contradictory ways in which Springsteen is "read" by his fans); Fiske, *British Cultural Studies*, *supra* note 49, at 271 (examining how the "gaps" or "spaces" in Madonna's image "allow her audiences to make meanings that connect with their social experience"); Lawrence Grossberg, *Putting the Pop Back into Postmodernism*, in *UNIVERSAL ABANDON? THE POLITICS OF POSTMODERNISM* 167, 183 (Andrew Ross ed., 1988) (discussing the wide range of interpretations placed on Springsteen and his work by critics and fans); see also Tessa Perkins, *The Politics of "Jane Fonda,"* in *STARDOM: INDUSTRY OF DESIRE*, *supra* note 68, at 237 (arguing that "Jane Fonda" is a "sign" whose meaning(s) have been the subject of continuous contestation since the late 1960s).

329. DYER, *supra* note 69, at 5.

helps to determine the particular image he seeks to create and project.³³⁰ After all, something of the same sort occurs with the design and marketing of many products. Even a carpenter, for example, will respond to hints and cues from the public as to what kind of chair they want. The crucial difference, however, is that the public participates directly and actively in the meaning-making process, as they do not in the chair-making process. Again, Dyer gets the matter about right:

[T]he agencies of fan magazines and clubs, as well as box office receipts and audience research, mean that the audience's ideas about a star can act back on the media producers of the star's image. This is not an equal to-and-fro—the audience is more disparate and fragmented, and does not itself produce centralised, massively available media images; but the audience is not wholly controlled by Hollywood and the media, either. In the case, for example, of feminist readings of Monroe (or of John Wayne) or gay male readings of Garland (or Montgomery Clift), what those particular audiences are making of those stars is tantamount to sabotage of what the media industries thought they were doing.³³¹

The example of Judy Garland, which Dyer develops at some length, is a useful one. In the mainstream culture of the 1940s and 1950s, Judy Garland was just “the girl next door.” What she meant for most Americans was normality and ordinariness. That, presumably, was just what MGM *wanted* “Judy Garland” to mean. (It may also have been, though this is less clear, the meaning that Garland sought for herself.) Dyer shows, however, that after Garland's firing by MGM and her suicide attempt, urban gay men found in Garland's image, particularly her androgyny and her fragile facade of normality, a powerful means of “speaking to each other about themselves.”³³² They reworked or recoded Garland in a way that served their own particular subcultural needs and interests. And, what is most important to see, this popular disruption and reorganization of meaning considerably *increased* the “publicity value” (market value) of Garland's image. The additional,

330. Typically, as Orrin Klapp has explained, the process by which a public figure's image or style is formed is one of “dialectical” interaction, in which the “performer” (actor, musician, politician) “finds himself” by using cues from audience responses and making himself into what people want.” KLAPP, *supra* note 305, at 32-37. Sometimes the process involves “painful trial and error” on the performer's part. In other cases, the performer simply “hits on” what the public wants from her quickly, or by accident. *Id.* at 32. Klapp gives this interesting example of such a lucky hit:

Betty Hutton, widely known for her explosive vocal style, began as an ordinary nightclub singer. One night she heard that she was about to be fired. In desperation, she grabbed the mike with a strangle hold and began to “belt out” songs in a rather unladylike manner. The audience reacted enthusiastically. Her contract was renewed; a major bandleader hired her.

Id. at 35.

331. DYER, *supra* note 69, at 5.

332. *Id.* at x.

alternative meanings that were popularly generated created whole new markets for Garland's image—for Judy Garland impersonators and Judy Garland merchandise—that would not otherwise have existed.

For instance, Dyer reports that "[i]n 1982, Rockshots, a gay greetings card company, issued a card depicting Garland as Dorothy, in gingham with Toto in a basket, in a gay bar, with her opening line in *Oz* as the message inside."³³³ It is difficult to see how Garland, or MGM for that matter, could assert a plausible moral claim to *these* particular merchandising values. If these values were the product of something that can be called "labor" at all—a point that is not free from doubt or difficulty—had not the relevant labor, the semiotic work, really been done by Garland's gay male "fans" rather than by Garland herself (or MGM)?

A celebrity, in short, does not make her public image, her *meaning for others*, in anything like the way a carpenter makes a chair from a block of wood. She is not the sole and sovereign "author" of what she means for others. Contingency cannot be entirely erased. The creative (and autonomous) role of the media and the audience in the meaning-making process cannot be excised.³³⁴ To be sure, the precise distribution of semiotic power will vary from case to case, as will the part played by luck and politics. Sometimes, the celebrity herself or persons in her pay seem to perform the lion's share of the meaning-making work; at other times, the work is left to experts in the celebrity industry, for whom the celebrity is little more than "raw material" to be "mined and worked up into"³³⁵ a saleable commodity. Sometimes, the meaning the celebrity (or her sponsors) initially selects and circulates largely resists displacement; at other times, this "preferred meaning"³³⁶ is inflected, subverted, or inverted, either in the culture at large or in a particular subculture, as the celebrity's fans weave their own narratives and create their own fantasies about her. But despite these variations, a celebrity's public image is *always* the product of a complex *social*, if not fully democratic, process in which the "labor" (time, money, effort) of the celebrity herself (and of the celebrity industry, too) is but one ingredient, and not always the main one. The meanings a star image comes to have, and hence the "publicity values" that attach to it, are determined by what different groups and individuals, with different needs and interests, make of it and from it, as they use it to make sense of and construct themselves and the world.

333. *Id.* at 181-82. The line referred to is, of course, "Toto, I don't think we're in Kansas anymore."

334. Legal recognition of a right of publicity, of course, may restrict the audience's ability to participate in this process. Publicity rights give celebrities (or their assignees) an effective veto power over disfavored commercial appropriations or "readings" of star images. As I have suggested, it is the potential this veto power creates for private censorship of popular meaning-making that should make us hesitant about embracing the right of publicity. See *supra* text accompanying notes 84-87.

335. DYER, *supra* note 69, at 5.

336. See *supra* note 50 for an explanation of this term.

Contrary to the assertion of Professor McCarthy,³³⁷ then, a celebrity like Madonna cannot say of her public image what the carpenter can say of his chair: "I made it." And because she cannot say this of her public image, she cannot lay a convincing moral claim to the *exclusive* ownership or control of the economic values that attach to it.³³⁸

2. *The Prevention of Unjust Enrichment*

In judicial opinions and law reviews, right-of-publicity defendants are often described as "poachers," "parasites," "pirates," or "free riders." They are denounced for "misappropriating" values created by others, for "reaping" where others have "sown."³³⁹ In contrast, only seldom is a jaundiced eye turned on Madonna, or Bette Midler, or Johnny Carson. The "labor" and the "originality" of celebrity plaintiffs are simply taken for granted. The contest between the celebrity and the unauthorized appropriator of his image is thus framed starkly as *Sower v. Reaper*. The reality, however, is a good deal more complicated and morally ambiguous.

For one thing, it is a fairly safe bet that the celebrity plaintiff has done some "borrowing" himself. Just as the carpenter does not start from scratch in building a chair, but instead draws upon a pre-existing body of techniques, tools, and craft knowledge, so it is with artists, musicians, actors, and even athletes.³⁴⁰ Cultural production is *always* (and necessarily) a matter of reworking, recombining, and redeploying already-existing symbolic forms, sounds, narratives, and images. Once

337. See MCCARTHY, *supra* note 13, § 2.1[D], at 2-8.

338. It is occasionally suggested that publicity rights can be grounded in a "personality" theory of property. One writer, for example, suggests that the persona "is the ideal property for the personality justification," since the individual closely "identifies with his personal image." Hughes, *supra* note 239, at 340; see also MURUMBA, *supra* note 270, at 132 ("Whatever weaknesses there may be in the Hegelian theory of private property as an extension of *personality* . . . this is one instance in which it is probably vindicated."). In my view, a personality theory of publicity rights fails for much the same reason that the labor-desert theory fails. No doubt, celebrities are typically "bound up" very closely with their public images. No doubt, too, many subjectively experience their personas as something into which they have projected or sunk their very "selves." But as we have seen, there is a good deal more than "personality" in the persona. Interestingly, Hughes himself seems ultimately to give up on the personality theory. See Hughes, *supra* note 239, at 341 n.220 ("[I]t is difficult to fit personas into both the labor and personality theories of intellectual property" inasmuch as they are "quite often . . . creations of pure chance, perhaps the only 'intellectual property' without intentionality").

339. The district court judge in the recent Bette Midler "sound-alike" case, for example, characterized the defendants' conduct as that of "the average thief." *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988); see also *Onassis v. Christian Dior-N.Y., Inc.*, 472 N.Y.S.2d 254, 261 (Sup. Ct. 1984) ("Let the word go forth—there is no free ride. The commercial hitchhiker seeking to travel on the fame of another will have to learn to pay the fare or stand on his own two feet."), *aff'd without opinion*, 110 A.D.2d 1095 (N.Y. App. Div. 1985).

340. Yes, even athletes. Take a baseball player like Dwight Gooden. He could not have become a top-notch pitcher without borrowing from a common store of pitching art. After all, he did not *invent* the changeup, the slider, the curveball, the overhand delivery, the no-look pickoff move, and so on.

we trace out the influences and identify the borrowings—of which even the performer or artist may be unaware—how much is there left for him to claim as his own “original” contribution? Think, for example, of Elvis Presley (or the Rolling Stones) and black rhythm-and-blues. Or, closer to home, think of the white “faux-rapper” Vanilla Ice, 1991’s suburban teen idol. How much does he owe to black rappers like KRS-One or Public Enemy, whose music and lyrics are too threatening, raunchy, and militant for the mainstream (white) market?³⁴¹ How much does he owe to M.C. Hammer, who first made rap “wholesome” enough for mainstream consumption? How much does he owe to the lyrics of the Beach Boys? To the style of Elvis (“purlainment upon purlainment,” to use Peter Wollen’s apt phrase³⁴²)? Or take Madoima, whose entire persona, as John Fiske has observed, is an ironic reworking of the Hollywood myth of “the blonde.”³⁴³ How much does she owe to Marilyn Monroe?³⁴⁴ To the directors (Hawks, Huston, Mankiewicz, Wilder, etc.) who made the films in which Monroe appeared? To Andy Warhol and the Keimedy brothers, who helped elevate her to icon status? In short, to ask the question that David Lange asked about the Marx Brothers, how much has Madonna “invented” and how much has she “converted”?³⁴⁵

Again, this is not to suggest that popular artists and performers like Vanilla Ice and Madonna make *no* creative contribution of their own, that their work is nothing but “theft.” The point, rather, is that courts and commentators should approach claims of “originality” and “creativity” made by, or on behalf of, entertainers and popular artists with a healthy degree of skepticism. If, as seems plausible, the proper measure of a performer’s “moral desert” is the value of what she *adds* to what she starts with, and *not* the market value of the resulting product, then it becomes imperative, as Lange has noted,³⁴⁶ to assess the magnitude or value of her contribution. This sort of calculation was hard enough to make back when the line between “creativity” and “theft” was reasonably clear and steady—when there was a rough consensus about the dif-

341. See James Bernard, *Why the World Is After Vanilla Ice*, N.Y. TIMES, Feb. 3, 1991, § 2, at 1. Black rap musicians have somewhat less cause for complaint on this score than did the black rhythm-and-blues artists whom Elvis copied. For contemporary rappers themselves, aided by new digital sampling techniques, routinely and shamelessly lift lyrics and instrumental passages from the records of other musicians. See Jon Pareles, *In Pop, Whose Song Is It, Anyway?* N.Y. TIMES, Aug. 27, 1989, § 2, at 1 (Tone-Loc’s hit song “Wild Thing,” for example, took its title from the Troggs and lifted a key guitar riff from a Van Halen record.).

342. Peter Wollen, *Ways of Thinking About Music Video (and Post-Modernism)*, CRITICAL Q., Spring-Summer 1986, at 167, 169.

343. See FISKE, TELEVISION CULTURE, *supra* note 49, at 108.

344. Madonna’s hit music video “Material Girl,” for example, parodied Marilyn Monroe’s song and dance number “Diamonds Are a Girl’s Best Friend,” from the Howard Hawks movie *Gentleman Prefer Blondes*. *Id.*

345. Cf. Lange, *supra* note 26, at 161 (“[W]hen we examine the record of the Marx Brothers, it is difficult . . . to distinguish what they invented from what they converted.”).

346. See *id.* at 161-63.

ference between "homage," "allusion," "influence," or "parody" on the one hand, and "piracy" on the other. It is, however, even more difficult to assess the magnitude or value of a performing artist's "original contribution," and therefore of her moral desert, in a postmodern period that has collapsed the old "metaphysical separation" between "original and derivative."³⁴⁷ The whole "postmodern" movement in music and art, as in everyday life, is one in which pre-existing works and images are consciously and openly appropriated, reworked, and recycled. Repetition, pastiche, bricolage, even plagiarism, have become "typical forms of postmodern cultural production."³⁴⁸

Viewed against the background of these developments in cultural theory and practice, the "moral" case for the right of publicity seems a bit quaint. It is tied, normatively and conceptually, to a picture of individual creation and originality, and of self-authorship as well, that was always to some degree mythical, but that new technologies of reproduction (from photography to digital sampling) and new aesthetic practices have rendered otiose.³⁴⁹ When a quintessentially "postmodern" (that is, openly and unabashedly derivative) performer like Madonna complains

347. CHAMBERS, *supra* note 49, at 196.

348. Wollen, *supra* note 342, at 169; see HEBDIGE, *supra* note 49 (describing postmodern subcultures, with an emphasis on those, such as Punk, that are organized around music and dress); Wollen, *supra* note 342, at 168-69 (characterizing the "art of postmodernism" as "one whose typical forms are eclecticism and historicism. Its characteristic modes are those of appropriation, simulation and replication. . . . Reproduction, pastiche, and quotation, instead of being forms of textual parasitism, become constitutive of textuality. . . . Songs are made out of found music, images out of found footage.").

Mainstream commercial music video, for example, "plunders old films, newsreels, avant-garde art: it parodies romances, musicals, commercials." FISKE, *TELEVISION CULTURE*, *supra* note 49, at 254. Musicians, aided by new digital sampling techniques, routinely and openly "borrow" lyrics and instrumental passages from the records of other performers. See Pareles, *supra* note 341, at 1, 26.

"Appropriation" and self-conscious "intertextuality" are central as well to the work of contemporary visual artists. Barbara Kruger, for example, has taken photographs from newspapers and magazines, and blown them up as background for ironic or menacing lines of text. See Richard B. Woodward, *It's Art, but Is It Photography?*, N.Y. TIMES, Oct. 9, 1988, § 6 (Magazine), at 29, 30, 46. The photographer Sherrie Levine has "reshot" famous photographs by Walker Evans, Edward Weston, and other masters in order to challenge photography's standing as a fully "auratic" fine art and to "upset the foundation stones (authorship, originality, subjective expression) on which the integrity and supposed autonomy of the work of art is presumed to rest." Abigail Solomon-Godeau, *Living with Contradictions: Critical Practices in the Age of Supply-Side Aesthetics*, in UNIVERSAL ABANDON? THE POLITICS OF POSTMODERNISM, *supra* note 328, at 191, 194-95. Jeff Koons has used a copyrighted photo, which he found on a greeting card in an airport gift shop, as the model for a series of sculptures. See Constance L. Hays, *A Picture, a Sculpture and a Lawsuit*, N.Y. TIMES, Sept. 19, 1991, at B2; see also *Rogers v. Koons*, 751 F. Supp. 474 (S.D.N.Y. 1990) (holding that the reproduction of a copyrighted photograph in a sculpture was not fair use of the photograph), *aff'd*, 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

349. Cf. Barry King, *Articulating Stardom*, SCREEN, Sept.-Oct. 1985, at 27 (observing how the star-as-auteur, like the notion of the literary "author," works to deny inevitable intertextuality); Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990) (arguing that post-modernist theory and practice render obsolete the "serious artistic value" prong of the Supreme Court's obscenity standard).

of unauthorized appropriation of her image, she is seeking to have it both ways. Having drawn freely and shamelessly on our culture's image bank, she is trying to halt the free circulation of signs and meanings at just the point that suits her. She is seeking to enforce against others a moral norm that her own self-consciously appropriationist practice openly repudiates. The law need not be party to such contradiction.

But what about an actor or performer who has largely succeeded in the project that Tony Roberts described above, an actor who has carefully and wisely chosen which roles to accept and which associations to embrace and has thereby developed a distinct, relatively univocal, and commercially marketable public image? Consider, for example, that *least* postmodern of actors, Robert Young. For several years he appeared regularly in television ads as a spokesman for Sanka Coffee. Although these ads introduced him by his own name—"Robert Young for Sanka Coffee," if I remember rightly—Young did not really speak to us in these ads *as* Robert Young, natural person. Instead, as Michael Schudson has noted, he "played" the generalized Robert Young character.³⁵⁰ That character was cheerful, moderate, mature, and full of good sense, a combination of Young's role as the suburban paterfamilias Jim Anderson in the series *Father Knows Best* and his title role in the series *Marcus Welby, M.D.*³⁵¹ What Sanka was "buying" when it hired Young to pitch its coffee was not, then, the person Robert Young. After all, for all we know, *that* Robert Young is a self-destructive profligate. Nor was Sanka buying Young's acting ability; there were any number of unfamous actors who could have delivered the ad's lines with equal or greater ability. No, what Sanka was buying was the Robert Young *persona*, the public image, which in turn was largely the product of the *roles* Young had previously played on television.³⁵² Yet, and this is the crucial point, Young *played* those roles; he did not create them himself.

To be sure, Young may have wisely chosen to accept roles that exploited and reinforced this particular image. And he may have played those roles with consummate skill. But in assessing the strength of Young's moral claim to "his" publicity values, it is essential to see that

350. SCHUDSON, *supra* note 139, at 212-13. As Schudson points out, this is not unusual. "Television stars who do commercials, ostensibly in their own names, invariably present their television personalities, not their own." *Id.* at 213. For example, when American Express sought to emphasize the hazards of travelling with cash, they "'looked for a spokesman perceived by the public as an authority on crime.'" *Id.* To whom did they turn? The actor Karl Malden, "not because he is Karl Malden, but because he was once Lt. Mike Stone in [the television series] 'The Streets of San Francisco.'" *Id.*; see also Howard Rosenberg, *Celebrity Advocates: Is It Their Role?*, L.A. TIMES, Nov. 5, 1990, at F1 (describing the way television ads, for causes as well as products, merge the celebrity and his dramatic role).

351. See SCHUDSON, *supra* note 139, at 212-13.

352. As the creative director of Sanka's advertising agency explained, Young was selected as a spokesman for Sanka because he "represents deliberate, mature, seasoned advice." Nancy Yoshihara, *Advertising Success? It's in the Stars*, L.A. TIMES, Feb. 12, 1981, at D1, D18.

the roles he played—which generated the particular meaning “Robert Young” has come to have for us, and hence the value his name and face have for advertisers—were in good part created *for* him by screenwriters, directors, producers, and so on.³⁵³ I certainly do not mean to suggest that Young should therefore be barred from capitalizing on his television personality,³⁵⁴ or even that he should be forced to share his advertising income with the screenwriters and directors of the series in which he appeared. My point, rather, is that Young is already enjoying something of a windfall himself. That being the case, he cannot very convincingly cry foul when someone markets a T-shirt emblazoned with his smiling, benign face and the slogan “Father Knows Nothing”—provided, of course, it is clear to consumers that Young himself has neither approved nor sponsored the product.

A supporter of publicity rights might concede all that has been said to this point and still maintain that unauthorized appropriation of a celebrity's identity is an injustice that ought to be prevented. He might say that what is morally problematic about unauthorized commercial appropriation is not so much that the celebrity created her image all by herself and thus deserves to control it, but that the appropriator (the merchandiser, advertiser, impersonator) had no hand in its creation at all. On this view, the reason the law ought to give a celebrity a right of property in the commercial value of her persona is that society has a strong and independent moral interest in preventing people from free riding. Unless the law gives the celebrity a property right in her persona, complete strangers to the process by which her fame and public image were generated will be free to “reap without sowing,” to “get something for nothing.” One might deem such parasitism to be morally objectionable whether or not it injures the celebrity or violates her rights. On this view, prohibition of free riding “is justified to prevent *unjust gain* even when it is not necessary to prevent *unfair loss*.”³⁵⁵

There are a number of possible responses to this line of argument. The first is simply that a “free-floating evil” of this kind seems hardly serious enough, all by itself, to overcome “the standing case for liberty.”³⁵⁶ But that aside, the more important point is that in American law, free riding *simpliciter* is very seldom actionable,³⁵⁷ and for good rea-

353. Cf. *Lugosi v. Universal Pictures*, 603 P.2d 425, 432 (Cal. 1979) (Mosk, J., concurring) (“Bela Lugosi was a talented actor. But he was an actor, a practitioner of the thespian arts; he was not a playwright, an innovator, a creator or an entrepreneur. As an actor he memorized lines and portrayed roles written for him, albeit with consummate skill.”).

354. However, the risk involved in permitting “Marcus Welby” to pitch health-related products on television gives one pause.

355. 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* 212 (1988).

356. 4 *id.* at 214.

357. For a somewhat dated but still useful guide, see James A. Rahl, *The Right to “Appropriate” Trade Values*, 23 OHIO ST. L.J. 56 (1962).

son.³⁵⁸ True, litigants have sometimes sought to expand the "misappropriation" tort of the old *INS* case³⁵⁹ into a general "unjust enrichment" rule barring free-riding per se. But despite the renewed vigor of the so-called "misappropriation doctrine,"³⁶⁰ there is still no *general* common law prohibition against benefiting from the commercial efforts of others. The general American rule, admittedly under considerable pressure nowadays,³⁶¹ has long been that absent some special and compelling need for protection—such as the need to prevent consumer deception (passing off), or the need to provide adequate incentives for creation (copyright) and innovation (patent, trade secrets)—*intangible* products, once voluntarily placed in the market, are as "free as the air to common use."³⁶² The traditional presumption in favor of free appropriability of intangibles rests in part on the widespread sense that progress in all spheres of human activity—science, business, art—depends on innation, and thus requires that people be largely left free to "reap" where others have "sown."³⁶³ It also reflects the recognition that inasmuch as an intangible product—an idea, a style, a business method—is susceptible of "nonrivalous" use, its "appropriation" by others deprives the creator only of some of the profits that he might otherwise derive from its monopoly control.

358. See generally Gordon, *supra* note 62, at 166-70 (explaining why free riding is not intrinsically wrongful).

359. See *International News Serv. v. Associated Press*, 248 U.S. 215 (1918). The facts of that case were as follows: The International News Service (INS), having been barred by British censors from sending cables about the war in Europe to its member newspapers in the United States, copied (uncopyrighted) news stories from AP bulletin boards and early editions of AP-member newspapers on the east coast and sent them to its west coast newspapers. Inasmuch as certain INS newspapers on the west coast hit the stands before the AP newspapers in the same cities, INS newspapers sometimes reported war news even before those served by the AP. The Supreme Court held that INS's conduct amounted to "unfair competition": the AP had expended "labor, skill, and money" in gathering the news, and was thus entitled to have its news stories protected, as "quasi-property," from (mis)appropriation by a free-riding rival seeking to "reap where it ha[d] not sown." *Id.* at 238-40.

360. For insightful recent discussion and criticism of the *INS* case and the misappropriation doctrine, see Gordon, *supra* note 62 (arguing for a "slimmed-down" misappropriation tort based on a theory of corrective justice); Leo J. Raskind, *The Misappropriation Doctrine as a Competitive Norm of Intellectual Property Law*, 75 MINN. L. REV. 875 (1991) (arguing that the misappropriation doctrine should be restated in terms that are consistent with competitive market norms).

361. See Gordon, *supra* note 62, at 151-55.

362. *International News Serv.*, 248 U.S. at 250 (Brandeis, J., dissenting). Brandeis wrote:

The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it.

Id.

363. See BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT 2* (1967) ("[I]f man has any 'natural' rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown. Education, after all, proceeds from a kind of mimicry, and 'progress' . . . depends on generous indulgence of copying.").

It does not divest him of the *use* of what he has created by his labors.³⁶⁴

A few examples should suffice to show the extent to which the law tolerates, even smiles on, commercial free riding. Absent passing off or similar independent wrongdoing, there is generally no cause of action for imitating or copying a successful good or product, no matter how seriously sales are diverted.³⁶⁵ A different rule, as one commentator notes, "would have deprived the public of any alternatives in automobiles, ice cream cones, rubber tires and skyscrapers."³⁶⁶ Similarly, once a business idea or method has been published or put into practice, competitors are free to adopt it, "however novel, concrete, and valuable it may be."³⁶⁷ A different rule, as the same commentator observes, "might have prevented copying such ingenious methods as the supermarket, the drive-in bank, and the loose-leaf law service."³⁶⁸ In addition, the law generally permits one manufacturer to capitalize on an image (say, of exclusivity or quality) that is the product of another's efforts, provided there is no passing off or similar consumer deception. Thus, for example, the law does not prevent the Miller Brewing Company from referring to its product as "the champagne of bottled beers."³⁶⁹ Likewise, a business (Disney World, for instance) may draw millions of visitors to a particular geographical location (like Orlando), but it cannot stop others from capitalizing on its efforts by setting up shop in the vicinity.³⁷⁰

Examples could easily be multiplied.³⁷¹ Chief Judge Breyer stated the general point well, however, in a recent First Circuit case. The pro-

364. See Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 413 (1983).

365. See, e.g., *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929), *eert, denied*, 281 U.S. 728 (1930) (clothing maker may copy the best-selling designs of a competitor); *Societe Comptoir De L'Industrie Cotonniere v. Alexander's Dep't Stores, Inc.*, 190 F. Supp. 594 (S.D.N.Y. 1961) (holding that retail seller may copy couturier's fashion designs and even denominate its goods as copies thereof), *aff'd*, 299 F.2d 33 (2d Cir. 1962); PETER B. KUTNER & OSBORNE M. REYNOLDS, JR., *ADVANCED TORTS* 354 (1989) (collecting product imitation cases).

366. Rahl, *supra* note 357, at 68.

367. *Id.* at 68; see also *id.* at 68-69 (citing cases).

368. *Id.* at 68-69.

369. Cf. *H.P. Bulmer Ltd. v. J. Bollinger S.A.*, [1978] R.P.C. 79 (Eng. C.A.) (cider maker may market its beverage in champagne-style bottles with the name "Champagne Cider"). But cf. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) (upholding the right of the United States Olympic Committee to prohibit a nonprofit gay rights organization from making nonconfusing use of the word "Olympic" to designate its own athletic competition, on the ground that the word's "value" was the product of the labor, skill, and money of the USOC).

370. Cf. *International News Serv. v. Associated Press*, 248 U.S. 215, 259 (1918) (Brandeis, J., dissenting) ("He who makes a city known through his product, must submit to sharing the resultant trade with others who, perhaps for that reason, locate there later.").

371. See, e.g., *NFL v. Governor of Del.*, 435 F. Supp. 1372, 1378 (D. Del. 1977) (holding that Delaware may use NFL football scores in its state lottery, and stating: "It is true that Delaware is thus making profits it would not make but for the existence of the NFL, but I find this difficult to distinguish from the multitude of charter bus companies who generate profit from servicing those of plaintiffs' fans who want to go to the stadium or, indeed, the sidewalk popcorn salesman who services the crowd as it surges toward the gate.").

moter of the Boston Marathon and a local television station it licensed to broadcast the race had sued to enjoin another television station from broadcasting the event. In an opinion denying the injunction, Chief Judge Breyer pointedly observed that there is no general legal bar to free-riding on the investments of others:

As a general matter, the law *sometimes* protects investors from the "free riding" of others; and *sometimes* it does not. The law, for example, gives inventors a "property right" in certain inventions for a limited period of time; it provides copyright protection for authors; it offers certain protections to trade secrets. But, the man who clears a swamp, the developer of a neighborhood, the academic scientist, the school teacher, and millions of others, each day create "value" (over and above what they are paid) that the law permits others to receive without charge.³⁷²

Chief Judge Breyer also pointed out, quite rightly in my view, that "[j]ust how, when, and where the law should protect investments in 'intangible' benefits or goods" is not a matter of abstract "moral" principle; rather, it is a matter of "carefully weighing relevant competing interests."³⁷³ One of the relevant interests, I should think, is whether investment would fall off or even dry up if the law were to permit unrestricted appropriation. Thus, for example, it might be appropriate to impose liability on "unjust enrichment" grounds when a free riding threatens not simply to divert profits from the plaintiff but also to "kill the goose that lays the golden egg": to destroy the plaintiff's livelihood or the marketability of his product and thereby remove his incentive to undertake or continue his productive activity.³⁷⁴

For reasons identified below,³⁷⁵ unrestrained commercial appropriation of a celebrity's image would not have this drastic, incentive-destroying effect. Even in a world without publicity rights, celebrities would still be able to derive substantial income from their publicity values, to say nothing of the income they would continue to derive from the activities to which they owe their fame. Whether the Associated Press would have ceased to gather and publish news stories if its rivals had been left free to

372. *WCVB-TV v. Boston Athletic Ass'n*, 926 F.2d 42, 45 (1st Cir. 1991) (citations omitted); see also Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 285-86 (1970).

373. *WCVB-TV*, 926 F.2d at 45; cf. *International News Serv.*, 248 U.S. at 250, 259 (Brandeis, J., dissenting) (rejecting AP's property interest in its news bulletins on the grounds of the general rule that "incorporeal productions," once voluntarily communicated to others, are free for common use).

374. See CHARLES R. McMANIS, *UNFAIR TRADE PRACTICES IN A NUTSHELL* 293-94 (2d ed. 1988); Rahl, *supra* note 357, at 73 (contending that the appropriate role of the misappropriation doctrine is "to protect trade values against copying of a sort which will cause their destruction or their frustration"); Raskind, *supra* note 360, at 882 (arguing that the misappropriation doctrine "can serve as a barrier against competitive behavior that reduces the supply of a given product to the detriment of social welfare").

375. See *infra* text accompanying notes 394-409.

copy and sell them is subject to question.³⁷⁶ Actors and musicians, however, will certainly not cease making movies or record albums if their images are freely available for use on T-shirts and the like.³⁷⁷

There is one last way in which the standard *Sower v. Reaper* picture is inaccurate and misleading in the right-of-publicity context. Not only do celebrity plaintiffs typically "reap where others have sown," but on the other side of the moral ledger, unauthorized commercial appropriators usually do some "sowing" of their own. Granted, one needs little creativity or entrepreneurial ability to manufacture and market a Madonna T-shirt or concert poster. (It's the entrepreneurial equivalent of shooting fish in a barrel.) But not all unauthorized commercial appropriation is quite this risk free. (After all, as a waggish friend once asked me rhetorically, "What *do* you do with one million Tiny Tim T-shirts?")

More importantly, unauthorized commercial appropriators often-times *add* something of their own—some humor, artistry, or wit—to whatever they "take," and their products may service markets different from those that the celebrity herself (or her licensees) chooses to service. This is most evident when the star image is used to create or carry an oppositional meaning, as in the case of the John Wayne and Judy Garland greeting cards that I have already described.³⁷⁸ But there is some entrepreneurial verve and creativity at work even in more mainstream appropriations. For example, while Leona Helmsley was on trial for tax evasion, a company offered for sale a T-shirt showing a photograph of the self-proclaimed "hotel queen" above the caption, "Off With Her Head."³⁷⁹ Shortly after PeeWee Herman's arrest for indecent exposure, T-shirts appeared in stores with the double entendre slogan, "Keep Your Head Up, PeeWee." After the columnist Carl Rowan, a vocal gun control advocate, used his FBI agent son's gun to shoot a teenager who was trespassing in his backyard, a poster was marketed showing him in a "Rambo" pose, armed with a Chinese rocket launcher, and bearing these

376. See Denicola, *supra* note 206, at 629-30 (arguing that the Court's economic analysis may have been faulty).

377. It is for this reason that the *INS* case provides much less support for the right of publicity than is sometimes suggested. See, e.g., Shipley, *supra* note 27, at 686 (arguing that "[t]he rationale used in *INS* to protect the newsgathering efforts of the Associated Press closely resembles the rationale for protecting the right of publicity"). In my view, what Shipley fails to see is that the Court's decision in *INS* turned on its particularistic analysis of the *practical effect* of the defendant's conduct on the ability of the plaintiff to continue to gather and market the news. See *International News Serv.*, 248 U.S. at 241. It was only because permitting conduct of the kind engaged in by *INS* would, it was thought, render the plaintiff's publication "profitless, or so little profitable as in effect to cut off the service," that the Court found the defendant's enrichment to be actionably "unjust." *Id.* The decision did *not* endorse a general prohibition on "reaping where another has sown."

378. See *supra* text accompanying notes 77, 333.

379. See Georgia Dullea, *T-Shirts' New Mood Is Sarcastic*, N.Y. TIMES, Sept. 10, 1989, § 1, pt. 2, at 54.

words: "Warning, this home protected by Carl Rowan."³⁸⁰ In each of these examples the (presumably unauthorized) appropriator did something more than "reap where another has sown." The artistry or wit displayed may be paltry. But it is *his* wit or artistry—and it contributes in its own way to "building of the whole culture."³⁸¹

B. *Economic Arguments for Publicity Rights*

Generally speaking, "economic" arguments for private property rights are of two basic kinds. First, there are arguments that rely on what Posner calls the "dynamic" benefits of private property rights, the incentives they create for productive investment. On this account, people will farm land or write books only if they have some measure of assurance that they will be able to reap what they sow. The point of private property is to give them that assurance.³⁸² Second, there are arguments for private property that rely on what Posner terms its "static" benefits. On this view, private property is a mechanism that promotes efficient use of *pre-existing* scarce resources. The inexorable logic of common property, the argument goes, is overuse. Private property, in contrast, ensures that users of resources pay the full social cost of their activities.³⁸³ Arguments of both these sorts have been advanced in support of the right of publicity. Whatever one may think of these arguments as a general matter,³⁸⁴ neither is very compelling when applied to celebrity personas.

380. See *Columnist Pleads Not Guilty to Pistol Possession Charges*, N.Y. TIMES, Aug. 2, 1988, at A12.

381. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970). What is more, it is precisely creative uses of this kind that the right of publicity puts in most direct jeopardy. The average celebrity is happy to license the sale of admiring posters and T-shirts. But a celebrity is much less likely to be willing to license merchandise which heaps scorn or ridicule on him (the Helmsley T-shirt and the Rowan poster), or which threatens to destabilize the "preferred meaning" of his public image (the PeeWee Herman poster), or which makes his image carry a meaning that he (or his fans) finds deeply offensive (the John Wayne and Clark Gable greeting cards). Indeed, it seems safe to say that the more "creative" the merchandiser's intended use—the more critical, satiric, or subversive its bite—the less likely it is that the celebrity will grant a license for it. This strongly suggests the need for a "fair use" privilege to immunize from liability, at a minimum, celebrity merchandise whose *content* is such that a voluntary market transaction between the celebrity and the would-be appropriator is infeasible. Cf. Richard A. Posner, *When Is Parody Fair Use?*, 11 J. LEGAL STUD. 67 (1992) (proposing a similar fair use defense in copyright and trademark parody cases).

382. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 30 (3d ed. 1986).

383. *Id.* at 31.

384. See generally MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 153-67 (1987) (discussing economic arguments for private property); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980) (critiquing economic arguments in support of private property and free contract).

1. *The Incentives Argument: The Copyright Analogy*

It is frequently asserted that the purpose of the right of publicity, like that of copyright,³⁸⁵ is to provide an economic incentive for enterprise, creativity, and achievement. On this view—which receives considerable support in both the case law³⁸⁶ and the commentary³⁸⁷—the justification for the right of publicity is that it induces people to expend the time, effort, and resources necessary to develop talents and produce works that ultimately benefit society as a whole. We give celebrities a legal entitlement to the economic value of their identities not because they “deserve” it or have a moral “right” to it, but rather because we thereby encourage socially valuable activities and achievements. The following statement, by Chief Justice Bird in her dissent in *Lugosi v. Universal Pictures*,³⁸⁸ is representative:

[P]roviding legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition

385. The constitutional provision empowering Congress to grant copyrights and patents is framed in instrumental terms. See U.S. CONST. art. I, § 8, cl. 8 (empowering Congress to grant copyrights and patents in order “[t]o promote the Progress of Science and useful Arts”). The Supreme Court, taking its cue therefrom, has consistently described the purpose of copyright protection in broadly utilitarian or instrumental terms. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating that copyrights and patents are “intended to motivate the creative activity of authors and inventors”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (characterizing “the ultimate aim” of copyright as providing an “incentive” to “stimulate artistic creativity for the general public good”); *Goldstein v. California*, 412 U.S. 546, 555 (1973) (stating that the purpose of copyright protection is “to encourage people to devote themselves to intellectual and artistic creation”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (concluding that “[t]he economic philosophy” behind the Patents and Copyrights Clause is “the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare”); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors.”); see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545-46, 558 (1985).

386. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576-77 (1977); *Carson v. Here's Johnny Portable Toilets, Inc.* 698 F.2d 831, 837 (6th Cir. 1983); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 287 (2d. Cir. 1981) (Mansfield, J., dissenting); *Lugosi v. Universal Pictures*, 603 P.2d 425, 441 (Cal. 1979) (Bird, C.J., dissenting); *Martin Luther King, Jr., Ctr. for Social Change, Inc. v. American Heritage Prods., Inc.*, 296 S.E.2d 697, 705 (Ga. 1982).

387. See, e.g., *Felcher & Rubin, Descendibility*, *supra* note 27, at 1128 (“The social policy underlying the right of publicity is encouragement of individual enterprise and creativity by allowing people to profit from their own efforts.”); Steven J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y 111, 118 (1980) (“Like the copyright and patent regimes, the right of publicity may foster the production of intellectual and creative works by providing the financial incentive for individuals to expend the time and resources necessary to produce them.”); Shipley, *supra* note 27, at 681 (“Protecting the right of publicity provides incentive for performers to make the economic investments required to produce performances appealing to the public.”); D. Scott Gurney, Note, *Celebrities and the First Amendment: Broader Protection Against the Unauthorized Publication of Photographs*, 61 IND. L.J. 697, 707 (1986) (arguing that the right of publicity serves to “maximize incentive to develop and maintain skills and talents that society finds appealing”).

388. 603 P.2d 425 (Cal. 1979).

While the immediate beneficiaries are those who establish professions or identities which are commercially valuable, the products of their enterprise are often beneficial to society generally. Their performances, inventions and endeavors enrich our society . . .³⁸⁹

Nowhere in the cases or the law reviews, however, do adherents of this view provide evidence or argument to support the claim that the right of publicity in fact has this benign incentive effect. Perhaps they think the proposition too obviously true to require demonstration. I imagine, however, that proponents, if pressed, would say something like the following: in the fields that primarily generate commercially valuable fame (sports, music, acting, and the like) the odds on success are very, very long. Until they "make it," aspirants in these fields may earn incomes well below what they could earn in alternative endeavors.³⁹⁰ In addition, the "price" of success, and the fame it brings in its train, can be very high. Celebrities must endure media intrusion into their privacy³⁹¹ and the familiarities, entreaties, and fickleness of fans. As "public figures," they are all but defenseless against defamation.³⁹² They run the risk of unexpected animosity (and even the possibility of violence) from people whom they have neither harmed nor heard of.³⁹³ Given this "occupational profile"—substantial uncertainty of success at time of entry, foregone income during apprenticeship, psychic and dignitary costs of stardom—the "rate of return" must be very high to induce talented people, in sufficient number, to make the sacrifices, take the chances, and put in the time and effort to achieve prominence and success in these fields.

This, I suppose, is what proponents of the right of publicity must have in mind when, without any explanation, they invoke the need for "incentives" to creation and achievement. To evaluate this argument we need the answers to two questions. First, does the right of publicity in fact lead to an increase in effort, creativity, and achievement, and if so, how substantial an increase is it? Second, even if there is a marginal social benefit from the right of publicity, in the form of creations and performances that would not otherwise be forthcoming, how should we value it, and is it offset or even outweighed by costs of one kind or another? I will consider these questions in turn.

389. *Id.* at 441 (Bird, C.J., dissenting).

390. See Glenn M. MacDonald, *The Economics of Rising Stars*, 78 AM. ECON. REV. 155 (1988).

391. See *supra* note 12.

392. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974) (public figure may recover damages for libel only upon proof that the defendant published the statement with "actual malice").

393. See JOHN L. CAUGHEY, *IMAGINARY SOCIAL WORLDS: A CULTURAL APPROACH* 1-7 (1984).

a. *The Magnitude of the Incentive Effect*

Does the right of publicity lead to an increase in effort, creativity, and achievement in athletics, entertainment, and related fields, and if so, how substantial an increase? A question like this is hard to answer with any degree of assurance. It necessarily involves a fair amount of sociological guesswork, based in good part on one's views about human nature and human motivation.³⁹⁴ Nevertheless, there are a number of reasons to believe that the incentive effect of the right of publicity is in fact very slight, and consequently that its abolition would not appreciably (or even noticeably) diminish effort or achievement in the spheres that generate commercially valuable fame.

First, the analogy that courts and commentators regularly draw to the incentive effect of copyright protection on intellectual and artistic creation is fundamentally flawed. One reason for the inaptness of the analogy is that writing (like farming) is an activity almost wholly devoid of what I would call "performance value."³⁹⁵ People are not willing to

394. Nevertheless, the question posed here is a good deal less speculative than, say, the question of whether abolition of copyright protection would "seriously threaten book production." Breyer, *supra* note 372, at 291. It is less speculative simply because a world without the right of publicity, unlike a world without copyright, is *not* an "undiscover'd country" that "puzzles the will, / And makes us rather bear those ills we have / Than fly to others that we know not of." *Id.* at 322 (quoting WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 1). Our society was not radically or even noticeably lacking in aspiration, effort, and achievement in the fields of music, entertainment, and athletics before the right of publicity was recognized. This alone should make us initially skeptical of the incentive argument.

395. As has been already noted, the chief purpose of the right of publicity is to give celebrities exclusive control over the merchandising and advertising uses of their identities. Occasionally, however, courts have relied on the right of publicity to protect what may be called "performance values." One such case is *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). In that case, a local television news reporter filmed the plaintiff's "human cannonball" act at an Ohio county fair. Fifteen seconds of the film, which included the climactic moments in which Zacchini was shot from a cannon into a net some 200 feet away, were aired on defendant's evening news program. Zacchini sued for damages in state court, alleging wrongful appropriation of his professional property. The trial court granted defendant's motion for summary judgment, but the state court of appeals reversed, holding *sua sponte* that Zacchini had stated two causes of action: conversion and infringement of common law copyright. *Id.* at 564. (The federal copyright statute did not apply inasmuch as the performance appropriated was not a "fixed work.") The Ohio Supreme Court then held that the appropriate cause of action for Zacchini was neither conversion nor common law copyright infringement but rather misappropriation of his "'right to the publicity value of his performance.'" *Id.* at 565 (quoting *Zacchini v. Scripps-Howard Broadcasting Co.*, 351 N.E.2d 454, 455 (Ohio 1976), *rev'd*, 433 U.S. 562 (1977)). That court nevertheless ruled against Zacchini on the ground that the defendant's news report of the cannonball act was privileged under the First Amendment. *Id.* at 565-66.

The United States Supreme Court, in a narrowly worded 5-4 decision, held that the First Amendment did not give Scripps-Howard the right to broadcast Zacchini's "entire act." *Id.* at 574-75. Throughout its opinion, the Court, following the court below, used the phrase "right of publicity" to denote Zacchini's legally protectible interest in controlling the dissemination of his *performance*. The Court further expressed its view that legal protection of this interest has the same aim and rationale as patent and copyright protection, in that it "provides an economic incentive for [an entertainer] to make the investment required to produce a performance of interest to the public." *Id.* at 576. However, the Court took care to point out that the incentive rationale is much more

pay to *watch* Novelist Brown write a mystery, anymore than they are willing to pay to watch Farmer Brown plant and harvest his corn. What alone is valuable and marketable is what these activities produce: books, corn. But a commercially marketable public image is different. It is usually, though not always, a by-product of activities that have significant "performance value" and therefore generate income. Whereas copyright directly protects the primary, if not only, source of income of writers,³⁹⁶ the right of publicity protects only a *collateral* source of income for athletes, actors, and entertainers. Abolition of the right of publicity would leave entirely unimpaired a celebrity's ability to earn a living from the activities that have generated his commercially marketable fame.

Second, the particular activities in our society that generate commercially marketable fame are themselves, again with isolated exceptions,³⁹⁷ very handsomely compensated. Eddie Murphy, for example, collected \$10 million for his role in the movie *Coming to America*, and Michael Douglas received \$9 million for his role in *Fatal Attraction*.³⁹⁸ In 1992, 273 major league baseball players had annual salaries in excess

compelling when a performer's entire act has been appropriated than it is in the typical right-of-publicity case, which involves unauthorized advertising or merchandising use:

[T]he broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade . . . goes to the heart of petitioner's *ability to earn a living as an entertainer*. Thus, in this case, Ohio has recognized what may be *the strongest case* for a "right of publicity"—involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.

Id. (emphasis added).

In my view, it is a very serious mistake to characterize the interest *Zacchini* sought to vindicate here as a "right of publicity." The "right of publicity" protects a celebrity's interest in the economic value of his *identity*. What *Zacchini* complained of was the appropriation of the economic value of his *performance*, not the marketable *public image* he had perhaps acquired through the success of that performance. Following Douglas Baird's suggestion, I would refer to the type of right involved in *Zacchini* as a "right of performance." See Douglas G. Baird, Note, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.*, 30 STAN. L. REV. 1185, 1186 n.7 (1978). I would reserve the term "right of publicity" for the commercial value of identity.

Clearly, as the *Zacchini* Court implicitly recognized, an *ex ante* economic incentive argument makes a good deal more sense for performance rights (and for copyright) than for publicity rights. Regrettably, however, courts and commentators have failed to make this distinction, and have repeatedly cited the Supreme Court's opinion in *Zacchini* as authority for the assertion that the right of publicity, like copyright, is justified as an economic incentive to creation and achievement.

396. A standard argument for copyright protection, which I have no need to challenge here, is that without such protection authors might be unable to recover the costs they incur in creating their works. See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989). On this view, an author is less likely to expend resources writing a book if others, who have not incurred "the costs of expression," can later copy the work and produce it at the same marginal cost as the author. Since competition will drive the book's price down to (or toward) marginal cost, the author will be unable to recoup his sunk costs of expression. But see Breyer, *supra* note 372, at 299-308 (arguing that market headstart, among other factors, may provide sufficient assurance of reward for authors). Whatever the merits of this argument for copyright, it has little force, for the reasons explained in the text, when applied to publicity rights.

397. Olympic medalists are one obvious example.

398. See Richard W. Stevenson, *The Magic of Hollywood Math*, N.Y. TIMES, Apr. 13, 1990, at D1.

of \$1 million.³⁹⁹ Michael Jackson collected an \$18 million advance against royalties for a record album under his last contract,⁴⁰⁰ and he recently negotiated a new record-and-film contract with the Sony Corporation that is even more lucrative.⁴⁰¹

These figures suggest that even without the right of publicity the rate of return to stardom in the entertainment and sports fields is probably high enough to bring forth a more than "adequate" supply of creative effort and achievement. As a result, whatever additional money celebrities in these fields earn from commercial exploitation of their merchandising and promotional values is simply economic rent,⁴⁰² "more like the proverbial icing on the cake than a necessary inducement."⁴⁰³ Farmer Brown might give up growing corn and turn to hunting if marauders were free to invade his land and steal his crop.⁴⁰⁴ Novelist Brown might give up writing mysteries and turn to investment banking if others were free to copy and sell his books.⁴⁰⁵ But will Quarterback Brown give up professional football and his multimillion dollar salary if others are free to use his picture on posters or T-shirts without paying him for the privilege? Not likely.⁴⁰⁶

399. See Murray Chass, *\$1 Million Men a Dime a Dozen*, N.Y. TIMES, Feb. 25, 1992, at B9.

400. See Randall Rothenberg, *Michael Jackson Gets Thriller of Deal to Stay with Sony*, N.Y. TIMES, Mar. 21, 1991, at C17. In the discussion that follows, I will refer to the money celebrities earn in the form of salaries, royalties, and the like as "direct" income or compensation, and to the money earned through licensing the commercial use of their identities as "collateral" income.

401. See *id.* Jackson's sister Janet is doing nicely too. She recently signed a multirecord contract with Virgin Records for a reported \$30 to \$50 million. *Id.*

402. The "economic rent" in a person's pay is the difference between what he actually receives and the amount that would suffice to prevent him from transferring to another job. Alternatively, "economic rent" can be viewed as compensation in excess of what is necessary to induce a worker to take a job. Economic rent is thus "that portion of a worker's pay which from a psychological standpoint does not act as an incentive to perform but is instead supererogatory." James C. Dick, *How to Justify a Distribution of Earnings*, 4 PHIL. & PUB. AFF. 248, 268 (1975).

403. Hoffman, *supra* note 387, at 120.

404. See POSNER, *supra* note 382, at 27. But see Kennedy & Michelman, *supra* note 384, at 717-19 (arguing that people might respond to the insecurity of a no-property regime by working and producing "more rather than less," in order to maintain the same level of welfare from consumption).

405. See Landes & Posner, *supra* note 396, at 328-29.

406. It is true enough, as Judge Easterbrook has admonished us, that economic incentives work on the margins. See Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 12-13 (1984); see also WARD S. BOWMAN, PATENT AND ANTITRUST LAW 34-38 (1973) (arguing that economic incentives must be evaluated using an incremental analysis). There may, therefore, be some celebrities (or aspirants) whose behavior would be altered by abolition of the right of publicity—some who would strive less hard, or even switch to another line of endeavor, if they were denied this source of additional income. This is most likely to be the case for those celebrities—their number is few, but apparently growing—who receive more money from merchandising and advertising than they do for their work. Certain top athletes, for example, reportedly can expect to earn about three times as much money from endorsements as from salary. See REIN ET AL., *supra* note 253, at 59 (quoting a former executive of ProServ, Inc.); Marilyn A. Harris, *The Smash Women Are Making in Tennis*, BUS. WK., Apr. 8, 1985, at 92 (top women tennis stars make more money from endorsements than from tournaments and exhibitions); see also Kogan, *supra* note 11, at 52 (discussing celebrity endorsement revenues, though without

Third, even in a world without a right of publicity celebrities would derive some, probably considerable, income from their publicity values. Suppose, for example, that sneaker makers were free to use Michael Jordan's picture in their advertisements. Even so, Jordan would still be able to command a price, maybe a hefty one, for wearing a particular brand of sneaker in the Big Game or for touting or demonstrating its virtues in a television commercial. Or suppose T-shirt makers were free to use Bruce Springsteen's picture without his permission. Some consumers would probably choose to purchase the T-shirt "officially authorized" by Springsteen—because they would expect him to monitor its quality, because they would want their money to go to him, or because they would derive a closer sense of identification with him in this way.⁴⁰⁷ Similarly, retailers might prefer to handle an "official" product line if Springsteen, or his licensee, established a reputation for quality control. Moreover, celebrity merchandise is frequently sold at sites that are under the control, or at least potential control, of the celebrities themselves—concert halls, sports arenas, and so on.⁴⁰⁸ Even in a free-use regime, Springsteen could contract with the owner of a concert site to ban sales of T-shirts other than those he had licensed.⁴⁰⁹ In short, stripping celebrities of their right of publicity would not divest them of *all* the income they now earn through endorsements and merchandising. They would still be able to capture a substantial chunk of the merchandising and promotional values attaching to their personas.

Suppose, however, I have underestimated the financial loss to celebrities that abolition of the right of publicity would entail. Suppose that the Bill Cosbys and Madonnas of this world stood to lose most, or even substantially all, of the income they currently earn from advertising and merchandising. What then? Would their incentive to perform, create, and achieve be reduced? Would they make fewer movies, write fewer (or inferior) jokes or songs, give fewer live performances? Or might they instead respond in precisely the opposite way—increasing their level of performance and creation (and hence direct income) in order to make up for the lost collateral income?

comparing them to salaries). It is entirely possible that for this category of performers the income generated by the right of publicity is not perceived as mere "icing on the cake" and has some non-negligible incremental incentive effect. But even if this is so, we would still need to know how many performers fit into this category, how substantial the marginal incentive effect is, and whether the beneficial effects of the added incentive are offset or outweighed by social costs of one kind or another. *See infra* Section III.B.1.b.

407. *Cf.* Breyer, *supra* note 372, at 301 (making a similar argument with respect to "authorized" editions of uncopyrighted works).

408. *See, e.g.,* Winterland Concessions Co. v. Sileo, 528 F. Supp. 1201, 1207 (N.D. Ill. 1981) (exclusive licensee of shirts bearing names of popular musical groups made 90% of its sales at concert sites), *aff'd in part and rev'd in part*, 735 F.2d 257 (7th Cir. 1984).

409. *Cf.* Denicola, *supra* note 206, at 636-37 (making similar arguments with respect to the merchandising of famous trade symbols).

Only a fool or a charlatan would claim to know for sure. But it is at least possible, if not likely, that in a world without a right of publicity entertainers would actually be *more*, not less, active and productive. In the present regime, after all, they can coast once they have established a commercially valuable persona: Robert Young and Karl Malden need never act in another movie or television program; they can live nicely on the income they make doing advertisements for Sanka Coffee and American Express, respectively. Top musical performers nowadays spend less of their time in concert before live audiences than they once did.⁴¹⁰ Part of the reason is obviously that other sources of direct income—from records, royalties, and music videos—have greatly increased. But the fact that their collateral income, especially from merchandising, has soared⁴¹¹ may also have something to do with it. If abolition of the right of publicity were to reduce this latter source of income, it might actually bring about more live performances. In any event, the important point, made in general form by Keunedy and Michelman, is that whether loss of collateral income from abolition of the right of publicity would increase or decrease creative effort and production is an empirical question—turning largely on the relation between income effects and substitution effects.⁴¹² It is not a question whose answer can be deduced from supposedly non-controversial assumptions about human nature.⁴¹³

Up to this point I have been considering the possible incentive effect of the right of publicity on persons who have already achieved some measure of renown and thereby established a commercially valuable persona. Although it is impossible to know precisely how much their incomes would fall if the right of publicity were abolished tomorrow, or precisely how much their effort and achievement would be altered at the margin, the foregoing considerations suggest that their motivational calculus is unlikely to be much affected, and that there would not be an appreciable, or even noticeable, loss of socially valuable activity or achievement.

410. See Rohter, *supra* note 10, at D9.

411. See *id.*

412. See Kennedy & Michelman, *supra* note 384, at 717-20.

413. See KELMAN, *supra* note 384, at 155-59 (criticizing the economic incentive arguments for private property). Moreover, what the right of publicity actually encourages and rewards is not "creativity" itself, but rather the development and maintenance of a commercially marketable public image. There is no obvious or necessary relationship between these two things. Indeed, often a performer can preserve his commercially valuable image only by *ceasing* to be venturesome or creative. Take the example of Robert Young again. Through his roles in two television series—*Father Knows Best* and *Marcus Welby, M.D.*—Young developed a well-defined public image as a person of sound judgment, practical wisdom, and uncommon integrity. See *supra* note 352. This made him valuable as an endorser of "good sense" products like decaffeinated coffee, which in turn created a strong incentive for him to eschew dramatic roles—villains, hotheads, rascals, liars—that might jeopardize his image. To some extent, then, the availability of large fees for product endorsements may, if anything, create a powerful disincentive to genuine creativity on the part of performers.

But what about the possible incentive effect of the right of publicity on persons contemplating or aspiring to a career in music, acting, or sports, or on persons who have already entered one of these fields but have yet to meet with much or any success: the Screen Actors Guild member who hasn't had a film role in a year,⁴¹⁴ the aspiring chanteuse who is performing on the streets for spare change, the baseball player who has languished in the minors for five years? Is the incentive argument any more persuasive with respect to them? For several reasons, the answer has to be "No."

First, unlike copyright, which to some extent protects the income of even struggling and second-tier writers, the right of publicity primarily benefits persons who are already established "stars" and have commensurately large direct incomes. It helps those who need help least. The vast majority of actors, musicians, and entertainers never make a dime's worth of income from licensing the commercial use of their names or pictures. Consequently, the right of publicity does nothing to help the struggling actress or singer scrape by in the early days of her career—during the period when her income is likely to be less than what she could earn in some other occupation and the temptation to call it quits is keenest. Moreover, it seems fanciful to suppose that the possibility of benefiting from the right of publicity once she has "made it" will persuade her to stay the course. If the prospect of a \$20 million movie or record contract is not enough to induce her to persist, it is hard to imagine that the prospect of still more millions from advertising and merchandising fees will do the trick.

The more basic point, however, is this: the distribution of both output and income in entertainment, sports, and related fields is very skewed. A handful of "superstars" command huge audiences and huge incomes, while everybody else—including persons only slightly less talented than the stars, or more talented and less lucky or ruthless—is "pushed into the background" and "underrewarded."⁴¹⁵ This "all or nothing" phenomenon is not confined to popular entertainment fields. It can be seen in chess, where Kasparov and Karpov play for millions, while grandmasters just a notch below barely eke out a living, and in classical music, where the number of full-time soloists is dwindling and slight differences in talent—differences most consumers would have difficulty discerning—generate huge income differentials.⁴¹⁶ Whatever the

414. Screen acting is a highly stratified profession with chronic, built-in unemployment and a large income gap between the top stars and everyone else. In 1983, for example, about 85% of the 54,000 members of the Screen Actors Guild experienced unemployment, and 81.9% earned less than \$5000 from screen acting. By contrast, popular stars receive several million dollars per movie, and much more if they are the producers or share in the film's profits. See Levy, *supra* note 312, at 31.

415. See RICHARD SENNETT, *THE FALL OF PUBLIC MAN* 288-93 (1977).

416. See Rosen, *supra* note 312, at 845 (1981).

reasons for this phenomenon,⁴¹⁷ the right of publicity does nothing at all to check or mitigate it. To the contrary, it only further widens the income gap between the "superstars" and the rest. If what is desired is some way of reducing the skewed distribution of income in these fields, so that truly talented people do not throw in the towel too soon, then we must look elsewhere.

A final reason for believing that the marginal incentive effect of the right of publicity is probably slight is the existence of uniquely powerful *noneconomic* motivations to excellence and achievement in fields like sports and entertainment.⁴¹⁸ There is, first of all, the desire for fame itself: for renown, for recognition, for glory, for "liberation from powerless anonymity."⁴¹⁹ There is the satisfaction of realizing and exercising one's talents, of developing and displaying proficiency at some difficult or complicated activity. There is the pleasure of winning people's applause, inspiring their love or awe, earning their respect or gratitude. Aside from these psychic rewards, which have long motivated people to excel, there are social and status rewards that are unique to modern celebrity—the opportunity for social intercourse with other stars;⁴²⁰ access to and deference from social and political elites; influence over public tastes, styles, and mores.⁴²¹

It is difficult, of course, to gauge with any precision the impact of

417. The economist Sherwin Rosen plausibly explains this phenomenon—"concentration of output among a few individuals, marked skewness in the associated distributions of income and very large rewards at the top"—in terms of two factors. *Id.* First, lesser talent in these fields is a poor substitute for greater talent. Second, and more important, the economy of scale made possible by "joint consumption technology" (radio, records, etc.) enables relatively few performers to service the entire market. *See id.* at 846-47; *see also* Moshe Adler, *Stardom and Talent*, 75 AM. ECON. REV. 208, 208 (1985) (arguing that "large differences in earnings could exist even where there are no differences in talent at all" inasmuch as consumers minimize the costs of searching for knowledgeable discussants by patronizing the most popular artists). Richard Sennett has called attention to the same general phenomenon, but stresses sociological and ideological factors. He sees the "star system" in the arts as an aspect of the "culture of personality" that emerged in the late 19th century. *See* SENNETT, *supra* note 415, at 288-93.

418. To my knowledge, only one court has given these noneconomic incentives their due. *See Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 958 (6th Cir.) ("The basic motivations [to fame and stardom] are the desire to achieve success or excellence in a chosen field, the desire to contribute to the happiness or improvement of one's fellows and the desire to receive the psychic and financial rewards of achievement."), *cert. denied*, 449 U.S. 953 (1980).

419. BRAUDY, *supra* note 94, at 7.

420. As early as the 1950s, C. Wright Mills noted the curious tendency of "stars" from diverse fields to gravitate toward, and mingle with, one another:

It does not seem to matter what the man is the very best at; so long as he has won out in competition over all others, he is celebrated. Then, a second feature of the star system begins to work: all the stars of any other sphere of endeavor or position are drawn toward the new star and he toward them.

C. WRIGHT MILLS, *THE POWER ELITE* 74 (1956). This tendency has intensified in recent years, giving rise to the common belief—carefully encouraged by the media and the celebrity industry—that there is an "intimate, almost familial connection among figures of glamour and authority." SCHICKEL, *supra* note 3, at 255.

421. *See generally* FOWLES, *supra* note 179; SCHICKEL, *supra* note 3.

such noneconomic rewards as power, status, access, and prestige on the calculations of persons who are contemplating or already embarked on careers in the entertainment and sports fields.⁴²² But when one adds these rewards to the very large incomes stars earn through their primary activities, the overall "rate of return" certainly seems more than sufficient to induce self-interested and ambitious talent-bearers to "reveal" and utilize their talents for the common good.⁴²³ Again, this is not to deny that the right of publicity may have some incentive effect on the margin. The point, rather, is that given the magnitude of the other economic and noneconomic incentives at work in the sports and entertainment fields, there is little reason to believe that the marginal effect in this context is at all significant.⁴²⁴

b. Some Overlooked Offsetting Costs

Suppose, however, that the right of publicity, by channeling additional dollars to celebrities (or the celebrity industry), *does* significantly increase the total level of investment in the fields that generate commercially marketable fame. As a result, society has some performances, athletic achievements, creative works, and "personalities" (henceforth "cultural output") that would not otherwise exist. If we assume further

422. The difficulty is by no means confined to these particular occupations. There is, for example, sharp disagreement with respect to the level of monetary compensation necessary to induce people to take corporate executive positions. On the one hand, Michael Walzer suggests that "one might well want to be a corporation executive . . . merely to make all those decisions." Michael Walzer, *In Defense of Equality*, DISSENT, Fall 1973, at 399, 406. His sociological hunch is that the noneconomic rewards (power, deference, status, prestige) are so great that there would be no lack of candidates "even if we paid [executives] no more than was paid to any other corporate employee." *Id.* at 407. In contrast, the economist Harold Lydall thinks that people in corporate leadership positions have more "worry" than other employees—and that worry is a cost for which they have to be compensated. In his view, "there is little doubt that, if posts of higher responsibility were not paid more highly, there would be a marked shortage of people to take them." HAROLD LYDALL, *THE STRUCTURE OF EARNINGS* 127 (1968).

423. On the problem of inducing talented people to "reveal" their talents, see Simon Green, *Taking Talents Seriously*, 2 CRITICAL REV. 202, 213 (1988) ("Economic and material or social and status rewards to talent must sufficiently satisfy the ambitions and desires of self-interested talent-bearers so as to induce them to reveal and utilize for the common good those talents which they command in their persons.").

424. Frazer, *supra* note 32, at 303 ("Although no evidence can be presented, it is suggested that a person's incentive to excel will not be substantially diminished by the absence of a legal right to exclusive control of their personality once fame is achieved."). A somewhat more plausible version of the incentive argument has been suggested to me by Professor C. Edwin Baker: Even if the right of publicity does not significantly alter the motivational calculus and behavior of celebrities themselves or of celebrity aspirants, it may still have a substantial effect on the "celebrity industry," the army of consultants, mentors, coaches, advisors, agents, stylists, publicists, and so on, who "take unknown and well-known people, design and manufacture their images, supervise their distribution, and manage their rise to high visibility." REIN ET AL., *supra* note 253, at 33. By increasing the market value of celebrity, the right of publicity may increase the resources that are drawn into this particular "industry"—and hence into the production of celebrity itself. Whether this additional investment is a good thing or not is another matter. See *infra* Section III.B.1.b.

that this additional cultural output is worth something to someone, then there is a *prima facie* social benefit to recognizing publicity rights.

Even on these assumptions, however, the right of publicity would be justified only if its recognition produced no outweighing social costs. Among the purely economic costs that one would need to take into account are the costs involved in administering the right of publicity—both transaction costs (would-be users of a celebrity's persona must contact him, bargain with him, and arrange for payment) and enforcement costs (costs involved in policing and litigating). Although neither of these costs is insignificant, I shall not attempt to estimate their magnitudes here. Instead, I want to identify several possible costs of recognizing the right of publicity that proponents of the incentive argument either overlook or understate.

i. "Overinvestment" in Celebrity-Production

According to the incentive argument, the right of publicity induces some people to enter into entertainment and sports careers and to work harder or better at them. Proponents of this view take it for granted that this is an unalloyed good thing because they focus on the gain in cultural output—the jokes and songs we would not otherwise hear, the slam dunks and dance moves we would not otherwise see. A question that they do not ask, much less answer, is what people, both those who attain stardom and those who do not, would *otherwise* have done if the right of publicity had not drawn their attention and talents to the task of achieving commercially marketable fame.⁴²⁵ Might the additional cultural output gained by virtue of the right of publicity be offset, or even outweighed, by the loss of *other* output? After all, it is not as if the people who are supposedly induced by the right of publicity to embark on, or persist in, entertainment and sports careers are otherwise unemployable. Is it not at least *possible* that society would be better off if some of the kids who are now devoting themselves to perfecting their jumpshots (or guitar riffs) in the usually vain hope of making it to the NBA (or the top of the charts) said "to hell with it," and started thinking of other ways of making a living? Maybe we would lose a Michael Jordan or two that way, but we might get a great many engineers or computer programmers in exchange. The questions we need to ask are whether the immense economic and status rewards of celebrity already draw *too much* aspiration and effort—too much "investment"—into fields in which only a very few persons ultimately succeed, and whether the right of publicity exacerbates the problem by further increasing those rewards.

I suspect that for some economists the notion that there is any way

425. Cf. Arnold Plant, *The Economic Theory Concerning Patents for Inventions*, 1 *ECONOMICA* (n.s.) 30, 40-41 (1934) (making a similar argument with respect to the patent system).

to second-guess the free market in these matters is misguided or incoherent. For them, the "optimal" amount of investment in the production of any commodity will occur if those who produce it are permitted to capture its full market value. There is no need to challenge the general validity of this proposition here. I do, however, want to suggest that there are special reasons to anticipate suboptimal (in this case, excessive) investment in the production and pursuit of celebrity.

First, the high visibility of sports and entertainment careers means that it is easier (and cheaper) for people to find out about these careers (to find out that they exist and what they are like) than it is for them to find out about many others. All else being equal, there will be overinvestment in careers with lower than average "search costs."

Second, sports and entertainment are fields in which narcissism, vanity, fantasy, and self-deception probably take more than their usual toll on rational decisionmaking. Aspirants in these fields are especially likely both to overestimate their talents (and their chances of "making it") and to underestimate the quality of their competition.⁴²⁶ To the extent this is so, socially wasteful investment will be the result.

Third, people considering careers in these fields do not have anything approaching perfect information about just how long the odds on success actually are. Part of the reason is that the mass media, for purposes of its own, shows us "only the winners in the scramble to the pinnacle."⁴²⁷ How many people who are considering a professional screen-acting career know, for instance, that over half the members of the Screen Actors Guild go year after year without landing even a single part?⁴²⁸ How many know that seventy-five percent of SAG members earn less than \$3000 annually from acting?⁴²⁹ Isn't it likely that fewer people know these facts than know that movie stars like Eddie Murphy and Arnold Schwarzenegger earn several million dollars per film? Given this informational asymmetry, there will tend to be overinvestment in the screen-acting field, however perfectly the market in careers functions in other respects.

A related problem is what economists call "market failure." Many people, I think, would prefer it if economic incentives figured *less* prominently in the motivational calculus of athletes, actors, musicians, and the like.⁴³⁰ Yet there is no way for the "market" to register these preferences

426. One writer has observed that to young people "it can seem almost easier to become a star than to become anything else." Whereas most other jobs "call for apprenticeships, for working one's way up a ladder on which youth and inexperience are liabilities," youth is an asset in sports and entertainment. FOWLES, *supra* note 179, at 45.

427. *Id.*

428. *Id.* at 53.

429. *Id.*

430. For example, the commercial ethos of the 1992 Olympic Games generated some dissatisfaction. Calvin Trillin captured this nicely in a two-line poem:

directly and effectively. There is no way for you and me to bring to bear in the market our preferences, say, for Olympic athletes whose only interest in "gold" is a medal. Similarly, we can whine our heads off about the "greed" of today's professional athletes, but the market does not effectively register our dissatisfaction on this score either. My heart sinks every time a million-dollar sneaker endorsement deal is announced. It sinks not because I am envious or resentful, or because my sense of distributive justice is offended, although I am and it is. My heart sinks because the lucrative endorsement contracts take some of the fun and innocence out of "the game" for me by reminding me that athletes are in the business of performing for money. Yet the market will not register this disutility unless and until I get sufficiently fed up with \$3 million sneaker deals to shift my attention elsewhere. For now, whatever additional income the right of publicity funnels the way of professional ball-players only makes me, and doubtless others, a bit unhappier. The standard economic analysis of publicity rights, however, takes no account of these externalities.

ii. Distributional Consequences

Proponents of the incentive argument seldom consider, much less evaluate, the *distributional* consequences of recognizing a right of publicity. Certain of these consequences have already been mentioned. First, the right of publicity raises the price of celebrity merchandise and of advertising in general, thereby shifting wealth away from the great mass of consumers to a very small group of persons who are already very handsomely compensated.⁴³¹ Second, the right of publicity widens the already immense income gap between "superstars" and others in the entertainment, sports, and related fields.⁴³² Third, for reasons that I will explain in the next Section, the legal protection of publicity rights probably works to the systematic advantage of large over small advertisers, thereby increasing corporate concentration in the general economy.

While views may differ as to how undesirable these distributional consequences are, or indeed whether they are undesirable at all, I will not attempt to resolve these issues here. I do, however, want to call attention to another possible distributional consequence of recognizing publicity rights: namely, the disparate impact the right of publicity may have on the motivations and career aspirations, and hence life-chances, of the members of certain minority groups.

The sociologist Harry Edwards, who has thought long and hard

*I liked it best in days of old,
Before they bought and sold the gold.*

Calvin Trillin, *On the Modern Olympics*, 255 NATION 197 (1992).

431. See *supra* text accompanying notes 38-41; *infra* note 446.

432. See *supra* text accompanying notes 308-12.

about the impact of professional sports on African-Americans, laments the fact that "young blacks are encouraged toward attempts at 'making it' through athletic participation, rather than through pursuit of other occupations that hold greater potential for meeting the real political and material needs of both themselves and their people."⁴³³ Sports, Edwards says, "stifle[] the pursuit of rational alternatives by black people."⁴³⁴ In his view, the "obsessive pursuit" of athletic success is a major cause of black "cultural and institutional underdevelopment" because black youths are drawn away from "other critically vital areas of occupational and career emphasis."⁴³⁵

Along the same lines, Jolin Gaston has asserted that professional sports are a "major contributor[] to the destruction of the current generation of black males" because sports are "perceived as being the shortcut to the pinnacle of American society. The professional athlete enjoys 'the long bread,' a 'bad new ride,' plus a high degree of social acceptance."⁴³⁶ These views may overstate the extent to which the lure of sports stardom explains the present predicament of young African-American men. In addition, given the limited educational and economic opportunities open to most poor minority youths, a long-shot bid for sports stardom may be less "irrational" than Edwards acknowledges.

Nevertheless, Edwards and Gaston implicitly raise an important and disturbing question: does the cult of celebrity, which the right of publicity arguably both reflects and fosters, have a greater hold on certain groups within our society than others? Is its impact thus to diminish further the life-chances of already disadvantaged groups? Does it even contribute to the economic and political "underdevelopment" of these groups? If so, is this something the law should take into account when a decision is made whether to recognize publicity rights? What we need to ask is not simply whether publicity rights "create added incentives" for effort, achievement, and excellence in such fields as music, acting, and sports. We also need to inquire *on whom* these added incentives operate, and with what results, both for their individual lives and for the welfare of the groups and communities of which they are members.

433. Harry Edwards, *The Black Athlete: 20th Century Gladiators for White America*, PSYCHOL. TODAY, Nov. 1973, at 43, 44.

434. *Id.*

435. Harry Edwards, "The Single-Minded Pursuit of Sports Fame and Fortune Is Approaching an Institutionalized Triple Tragedy in Black Society . . .," EBONY, Aug. 1988, at 138, 138.

436. John C. Gaston, *The Destruction of the Young Black Male*, 16 J. BLACK STUD. 369, 371, 376 (1986). Gaston offers a poem, entitled "I'm Going to the N.B.A.," that expresses what he considers the myopia and self-destructiveness of the myth of basketball stardom. The poem's opening stanza is:

Hey, I'm sorry Miss Teacher,
I don't have time to stay after school for no help today. I've got to go practice . . .
Cause I'm on my way to the NBA.

Id. at 377.

2. *Allocative Efficiency—The Tragedy of the Celebrity Commons?*

A familiar economic argument for the superiority of private property to common property is that it promotes more efficient use of existing scarce resources.⁴³⁷ The inefficiency of common property is often illustrated by reference to what has become known as "the tragedy of the commons."⁴³⁸ Imagine a community of rational, utility-maximizing herdsmen that holds a pasture in common. All of the herdsmen are free to graze their cows on the pasture without asking permission or making payment. Because they do not have to pay for grazing a cow, they can and will ignore the real (social) cost of doing so—the burden each additional cow of theirs imposes on all their fellow herdsmen. Conversely, if some other (rational, utility-maximizing) herdsman adds a cow, there will be less grass for all the cows to eat, but there is no way to stop him. In fact, the response of the other herdsmen will most likely be to add yet another cow, since they'll be better off with $n+1$ underfed cows than n underfed cows. When all these self-interested defensive efforts are aggregated, the common pasture will be "grazed to dust."⁴³⁹ "Freedom in a commons brings ruin to all."⁴⁴⁰

The familiar solution to the overexploitation problem is, of course, private property. If someone is given a property right in the pasture, a right to exclude users except on payment of a fee, then he will have an incentive to allow only the "optimal" number of cows to graze. The fee he charges for each cow will "include the cost he imposes on the other farmers by pasturing additional cows, because that cost reduces the value of the pasture to the other farmers and hence the price they are willing to pay the owner for the use of the pasture."⁴⁴¹

This argument for private property has been subjected to various criticisms.⁴⁴² I do not want to pursue these general objections here, however. My only concern is to consider whether something like the tragedy of the commons would befall us if celebrity personas were treated as

437. See, e.g., POSNER, *supra* note 382, at 29-33; Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 356 (1967).

438. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244-45 (1968). The seminal article is H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954).

439. ALAN RYAN, PROPERTY 105 (1987).

440. Hardin, *supra* note 438, at 1244.

441. POSNER, *supra* note 382, at 31.

442. First, it is not at all clear that the argument proves what it is supposed to prove—namely, that "private property" best promotes efficient use of scarce resources. At most it is an argument for placing a scarce resource in the control of *someone* who can charge the full economic price for its use. There is no apparent reason why that someone has to be an individual or private entity. It could just as well be a collective entity like the state. So even if the argument is read for all it is worth, it is a not an argument *for* private property so much as an argument *against* common property. See KELMAN, *supra* note 384, at 164-67. Second, the argument only works at all on the (unrealistic) assumption that *nonlegal* barriers to overuse—such as social disapproval or custom—are nonexistent or impotent. *Id.* at 167.

common (in other words, unowned) property. Judge Posner apparently thinks so. In his 1978 Sibley lecture on privacy, Posner suggested that the right of publicity prevents inefficient overexploitation of celebrity personas:

There is a perfectly good economic reason for assigning the property right in a photograph used for advertising purposes to the photographed individual: this assignment assures that the advertiser to whom the photograph is most valuable will purchase it. Making the photograph the communal property of advertisers would not achieve this goal. . . .

. . . Furthermore, the multiple use of the identical photograph to advertise different products would reduce its advertising value, perhaps to zero.⁴⁴³

Posner does not develop the point any further. But presumably he would contend that in a common property regime advertisers will disregard the costs they impose on others and hence overuse celebrity personas, just as the herdsmen overused the common pasture.

If, instead, a celebrity is given a property right in his persona, he will endeavor to maximize its advertising value. To this end, he will charge would-be advertisers the full costs involved in using his picture. If *X* proposes to him that he permit his photograph to be used in a magazine ad for Brand *X* Beer, he will balance the short-term return (the fee *X* has offered him) against the effect of *X*'s use on the long-term advertising value of his face. He will take into account the fact that the advertising impact of a name or face decreases the more often it is used. He will also take into account the fact that if *X*'s advertising campaign succeeds in associating him in the public mind with Brand *X* Beer, his face will be rendered less valuable to advertisers of competing products (Brand *Y* Beer) and incompatible products, say diet and health foods.⁴⁴⁴

There are, I think, several problems with this line of reasoning. Start with Posner's apparent premise that the value of a celebrity's photograph diminishes the more often it is used. This may well be the case in advertising, though the example of Bill Cosby suggests that it may

443. Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411 (1978). Posner makes the same point, in almost exactly the same words, in RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 255 (1981). More recently, in an article he coauthored with David Landes, Posner goes further and argues on like grounds that publicity rights should be inheritable:

Suppose an insurance company wants to use a picture of George Washington in its logo and an heir of George Washington appears and objects, claiming that the right of publicity is a descendible right. The heir could not argue that the recognition of such a right almost two hundred years after the death of a public figure is necessary to recoup the investment in becoming a public figure, but he could argue that, unless there is a property right in the public figure's name and likeness, there may be congestion, resulting in a loss of value. This is the economic insight behind the growing movement toward making publicity rights inheritable

Landes & Posner, *supra* note 396, at 362-63.

444. Frazer, *supra* note 32, at 303.

take quite some time before the onset of what the British call "face wear-out." But what about the use of famous faces in merchandising—say, on T-shirts or posters or coffee mugs? Here it is far from clear that the value of the celebrity's photograph will fall the more often it is used. Indeed, the opposite may sometimes be the case. A Madonna T-shirt may be worth *more*, not less, to consumers precisely because millions of her fans are already wearing them. The value of the T-shirt may be greater just because "everybody's got one."

Similarly, the marketing of Madonna T-shirts may actually increase the demand for other sorts of Madonna paraphernalia: posters, buttons, and so on. In the merchandising context, where faddism and emulation are important forces, sometimes it is "the more the merrier." If that is so, then the way to maximize economic value is to make the merchandise available to any and every one who is willing to pay the marginal cost of its production.⁴⁴⁵

445. If I am right on this score—and I freely concede the speculative character of these observations—then restricting access to celebrity personas may actually result in an allocative *loss*. Whether that is in fact the case will depend on the extent to which celebrity personas share the attributes of what economists call "public goods."

The example of intellectual property rights will help make the point. Intellectual creations are susceptible to "nonrivalrous consumption," in the sense that their possession or use by one person does not preclude others from possessing or using them as well. If Jones takes or borrows Smith's umbrella, neither Smith nor anyone else can use it. But if Jones takes or borrows Smith's dog-training trick, or his interior decorating style, or his Dan Quayle joke, that in no way precludes Smith or anyone else from using it. Second, intellectual creations are "nonexhaustible," in that they can be used again and again without being used up. However many times Smith's dog-training trick is used, it is still "there" to be used yet again. It is no less "valuable" to me because countless others have used it before. Third, once an intellectual creation is brought forth into the world, others can appropriate or use it at little or no cost. Because an intellectual creation has these various "public good" features, there will necessarily be *some* social loss whenever anyone is permitted to charge a fee for its use. See William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 267-68 (1987). Judge Easterbrook illustrates the point this way:

[I]f it costs \$10 to duplicate a computer program, and the author insists on receiving a royalty of \$10 per copy, the program must sell for \$20 or more. Some people value the program at more than \$10 and less than \$20. They will not buy it; yet because the program has been written it costs only \$10 to provide each one a copy. The prospective buyers lose the difference between the \$10 cost and the value they place on the program's use. Society would be better off if the program sold for \$10. Any price higher than \$10 creates the same sort of allocative efficiency loss as monopoly. The "overcharge" causes people to buy less and substitute something else that is less useful, takes more real resources to produce, or both.

Easterbrook, *supra* note 406, at 21; see also Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 110 (1990) (noting that intellectual property rights designed to induce and reward invention help create an allocative loss by boosting price in excess of marginal cost).

The situation with respect to commercial use of celebrity personas may be analogous. Celebrity personas clearly have *some* public good attributes. Once a celebrity has developed or acquired a commercially valuable identity, others can use or appropriate it at a cost that is close to zero. Use of the identity, moreover, is "nonrivalrous": if I use Madonna's name or face on a poster or T-shirt, that in no way prevents her (or anyone else) from doing likewise. And a celebrity persona is "nonexhaustible": Madonna's image can be used again and again—on T-shirt after T-shirt—without ever being used up. Given that personas have these "public good" features, there may be an

In the advertising context, too, Posner's argument runs into difficulty when proper account is taken of the transaction costs inherent in the operation of a private property scheme. Note Posner's claim that assigning to the celebrity a property right in his photograph assures that "the" advertiser to whom it is most valuable will purchase it. This reference to *one* advertiser is obviously loose talk. What Posner must be understood to mean is that the grant of a property right ensures that the photograph's advertising value will be maximized—that the celebrity will license its use in such a way as to maximize his total return from its advertising use. Sometimes this may mean an exclusive license agreement with a single advertiser. More often, the celebrity will do best by selling the right to use his photograph to several advertisers.

Take this simple example. Assume five national companies have expressed interest in buying the right to use Celebrity *A*'s photograph in their advertising. Each is willing to pay \$1 million for the exclusive right to use *A*'s photograph. But the price each is willing to pay drops with increases in the number of other advertisers who will have the same right: \$600,000 if there are two licensees; \$450,000 if there are three licensees; \$300,000 if there are four licensees; \$200,000 if all five are licensed. In these circumstances what will *A* do? Clearly, his total return is highest (\$1.35 million) if he licenses three advertisers at \$450,000 apiece.

Is this, however, the "optimal" number of advertising users? Maybe not. Suppose that in addition to the five large national advertisers interested in using *A*'s photograph, there are 15,000 small, geographically dispersed businesses—dry-cleaners, groceries, whatever—that would happily pay \$100 each to use *A*'s photograph in their advertising. The total value they place on *A*'s photograph (\$1.5 million) is greater than

allocative loss involved in granting a celebrity the right to charge a fee for use of her image. For example, suppose a T-shirt can be manufactured for \$5.00, and that Madonna's name can be emblazoned on it for an additional fifty cents. The T-shirt must sell for \$5.50 or more. If, however, Madonna insists on a payment of \$2.00 per T-shirt, it must sell for at least \$7.50. People who value the T-shirt at more than \$5.50 but less than \$7.50 will not purchase the T-shirt. This is inefficient, inasmuch as the value they place on the shirt exceeds its cost of production. As in Easterbrook's computer program example, "society would be better off" if the T-shirt sold for \$5.50. Easterbrook, *supra* note 406, at 21. Any price higher than that "creates the same sort of allocative efficiency loss as monopoly." *Id.* In short, the right of publicity, by enabling a celebrity to exact a fee for use of her name or face on merchandise, may result in underproduction and overpricing.

The higher the fee exacted, the greater will be the inefficiency. The magnitude of this allocative loss will depend on several factors. One is the elasticity of the demand for the merchandise. If the demand for celebrity T-shirts is sufficiently elastic, so that people will switch to Springsteen T-shirts, or to unadorned garments, once the price of the Madonna T-shirt gets much above \$5.00, then Madonna will probably have to content herself with a fee smaller than \$2.00. The greater the elasticity of demand, the smaller the fee exacted and the less the inefficiency. A second factor is the possibility of price discrimination among buyers. If Madonna can vary the price to each buyer, so that those who value the T-shirt at \$5.50 pay \$5.49, those who value it at \$7.00 pay \$6.99, and so on, inefficient exclusion will be reduced. Cf. Denicola, *supra* note 206, at 634-35 (making a similar point about merchandising trade symbols).

that placed on it by the three national advertisers. According to Posner's theory, it is they who should wind up with the right to use *A*'s photograph. But will they? Probably not, because the transaction costs (in locating them, negotiating with them, etc.) would almost certainly more than eat up the \$150,000 difference. In other words, once transaction costs are taken into account, it becomes an open empirical question whether the right to use the celebrity's photograph will in fact wind up in the hands of "the advertiser to whom the photograph is most valuable." More important, the existence of transaction costs will probably skew use toward a small number of very well-heeled advertisers. Small-fry advertisers will be left out in the cold, even in circumstances where the total advertising value to them of *A*'s photograph exceeds the value to the bigger outfits.⁴⁴⁶

Why not, then, let any advertiser who wants to use *A*'s photograph do so? Posner's answer is that this will "reduce its advertising value, perhaps to zero."⁴⁴⁷ Advertisers will use *A*'s photograph until it has been squeezed dry of advertising value. But so what if they do? We are not dealing here with a nonrenewable natural resource like land. Because celebrity is a social creation, "there will always be a certain supply of existing and newly-created personalities to exploit."⁴⁴⁸ Well before the advertising value of *A*'s photograph is driven down to zero, advertisers will replace him with a "fresh" face. As Frazer puts it, "[f]rom the viewpoint of the individual [celebrity] concerned, . . . over-use of his or her personality is costly; but from the viewpoint of the user and society at large, the cost is small since a fairly plentiful supply of alternative resources exists."⁴⁴⁹ After all, there would be no "tragedy" in the classic parable if the herdsman, after depleting their common pasture, could simply move on to another one.

But what if the appetite of advertisers for celebrities outstrips the supply, and advertisers at some point run out of celebrities? Would even this be cause for concern? Here again the analogy to land or to high seas fisheries⁴⁵⁰ is misleading. Land is a necessary factor of production: no land, no corn. Fish are a direct consumption good: no fish, no sushi.

446. In addition, the large sums expended by the large companies that can afford celebrity advertising may cancel out, with the result that consumers pay higher prices and resources are wasted in sterile competition. The recent Sneaker Wars and Cola Wars—in which celebrity advertising has been very prominent—are cases in point. Cf. Hoffman, *supra* note 387, at 120-21 (arguing that celebrity "endorsements lead to economically irrational product differentiation, influencing consumers to make decisions on grounds other than price and quality . . . and giving businesses large enough to afford to pay major celebrities an unfair advantage over their smaller but equally efficient competitors").

447. Posner, *supra* note 443, at 411.

448. Frazer, *supra* note 32, at 303.

449. *Id.* at 303-04.

450. Raymond H. Goetsch, Comment, *The Right of Publicity: Premature Burial for California Property Rights in the Wake of Lugosi*, 12 PAC. L.J. 987, 996 (1981).

But the promotional values attaching to celebrity personas are a very different kind of resource. They are a way of enhancing the marketability of *other* goods and services. If advertisers were to run out of celebrities, they would simply rely more on one or another of the myriad other techniques by which they currently attract attention to, and create favorable associations for, their products. Indeed, there are arrows aplenty in Madison Avenue's quiver.

There is one final point to make about Posner's argument. Although it has found occasional support among commentators,⁴⁵¹ no court, to my knowledge, has ever put this argument forward in support of the right of publicity. In part this may be because most judges and lawyers "are not used to thinking of legal rights in terms of maximizing allocative efficiency."⁴⁵² But I suspect the failure of Posner's argument to attract any judicial support also has something to do with the fact that an allocational efficiency analysis captures next to nothing of what most people—judges and lawyers, as well as laypersons—believe to be wrong with the unauthorized commercial appropriation of famous personalities.⁴⁵³

3. *The Limitations of Economic Analysis: Publicity Rights and the Culture of Celebrity*

To this point I have taken the economic arguments for publicity rights on their own terms and focused on their internal weaknesses. There is, however, a more fundamental and intractable problem with any purely economic argument for the right of publicity. An economic analysis takes people's existing preferences as given and does not question or evaluate them; it does not ask whether people *ought* to want the things they currently want, or whether people *ought* to aspire to be the kinds of people they currently aspire to be. Moreover, it does not ask what types of activities we should value and foster, or what types of motivations we should encourage and reward. For this reason, an economic analysis cannot help us very much whenever—as is the case with the publicity rights issue—"the choice of legal rules involves determining what kind of people we want to become."⁴⁵⁴ An economic analysis does not and cannot, for example, help us determine whether it would be better if athletes and performers in our society sought fame for its own sake, rather than for its commercial payoff. Nor, most importantly, can it help us to

451. *See id.* at 995.

452. MCCARTHY, *supra* note 13, § 2.3, at 2-14.

453. Cf. Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455, 459-63 (1978) (criticizing Posner's economic approach to privacy as inadequate, both because of its failure to incorporate the intuitive and moral "sense of justice" and because of dubious economic assumptions).

454. C. Edwin Baker, *Posner's Privacy Mystery and the Failure of Economic Analysis of Law*, 12 GA. L. REV. 475, 476 (1978).

resolve the broader question whether our culture attaches too much value or importance to celebrity itself and, if so, whether publicity rights contribute in any appreciable way to this collective overvaluation.

A century ago actors, entertainers, and athletes were still socially marginal and politically inconsequential. While a popular actor was among President Cleveland's favorite fishing companions, not even the most celebrated stage performers were welcome in polite society in the late nineteenth century.⁴⁵⁵ When Sarah Bernhardt toured this country in 1880, for example, the *haut monde* flocked to her performances but pointedly denied her admission to their homes.⁴⁵⁶ Thirteen years later, the actress Lillian Russell's appearance in the clubhouse at Chicago's Washington Park racetrack on Derby Day caused such alarm that she was required to move to the grandstand.⁴⁵⁷ In the decades immediately before World War I, however, the social standing of actors and entertainers began to improve. Among some younger socialites, rebelling against the decorousness and formality of their Victorian elders, "theater people" suddenly became coveted companions and prized dinner guests.⁴⁵⁸ About the same time, the popular press began to lavish great attention on their lives, doings, and views. Stage actors in particular became objects of popular fascination and widespread emulation, as the nineteenth century's "culture of character," which had stressed self-discipline and self-sacrifice, gave way to a culture that emphasized instead the importance of a distinctive "personality."⁴⁵⁹ Traditional social elites responded to this challenge not by closing ranks against theatrical celebrities but by visibly associating with them, hoping thereby to retain some of their former prestige and cultural authority.⁴⁶⁰

The process of "celebrity desegregation" accelerated sharply during World War I, as Washington officials called on Hollywood stars like Chaplin, Fairbanks, and Pickford to mobilize popular support, promote enlistment, and sell war bonds.⁴⁶¹ After the war ended, metropolitan socialites and institutional elites began to mingle regularly with entertainment and sports celebrities in the glittering "café society" of the 1920s.⁴⁶² By the 1950s, the "metropolitan 400s" had largely faded, and celebrities had achieved a kind of status parity with institutional elite groups. Writing in 1956, the sociologist C. Wright Mills remarked on the frequent and easy access that celebrities had to those in the "power elite." "In America," Mills observed with a mixture of alarm and

455. See MCARTHUR, *supra* note 115, at 137, 157.

456. *Id.* at 137-38.

457. *Id.* at 137.

458. *Id.* at 140.

459. See SUSMAN, *supra* note 160, at 273-75, 282-83.

460. See MCARTHUR, *supra* note 115, at 141.

461. See SCHICKEL, *supra* note 3, at 58-59.

462. See LEWIS A. ERENBERG, STEPPIN' OUT 244-46 (1981); MILLS, *supra* note 420, at 72-74.

amusement, "a man who can knock a small white ball into a series of holes in the ground with more efficiency and skill than anyone else thereby gains social access to the President of the United States," and "a chattering radio and television entertainer becomes the hunting chum of leading industrial executives, cabinet members, and the higher military."⁴⁶³ More remarkable still, Mills thought, was that institutionally anchored elites (politicians, industrialists, etc.) increasingly had to compete with celebrities for attention and acclaim, and even *borrow* prestige from them. "In part, [the celebrities] have stolen the show, for that is their business; in part, they have been given the show by the upper classes who have withdrawn and who have other business to accomplish."⁴⁶⁴

The tendencies Mills identified in the 1950s have greatly intensified in recent years. More than wealth, power, or descent, fame is now the chief fount of prestige and status in American society. No longer shunned, sports and entertainment celebrities are "sought after by rich and powerful individuals to assure the success of important ventures."⁴⁶⁵ Political candidates, in search of glamour and legitimacy, court them.⁴⁶⁶ Philanthropic and social cause groups vie for their blessings and support. They cross over to high political and business positions with ease and frequency. Their views on weighty and complex issues—everything from childrearing to nuclear proliferation—are taken seriously and reported widely by the media.⁴⁶⁷ When Gorbachev visited this country in 1990, Cher graciously offered to fly from Chicago to Minneapolis to meet with him.⁴⁶⁸ Gorbachev demurred, but the fact that Cher even made the suggestion—and that the media solemnly reported it—indicates how far the convergence of political and celebrity elites has progressed.

What are the implications of these developments for our polity and our culture? Can a democracy flourish, or even survive, when political leaders and candidates "must resort to the strategies of entertainers . . . to gain and retain public attention"?⁴⁶⁹ Or when, "in a curious reversal of rank," they "increasingly turn to celebrities for reflected status"?⁴⁷⁰ And what about the impact of the culture of celebrity on everyday life and experience? Cynthia Heimel, for example, laments that we have

463. MILLS, *supra* note 420, at 74.

464. *Id.* at 75.

465. Keller, *supra* note 313, at 146.

466. *Id.*

467. See, e.g., Suzanne Keller, *Celebrities as a National Elite*, in *POLITICAL ELITES AND SOCIAL CHANGE* 3, 6-8 (Moshe M. Czudnowski ed., 1983) (discussing the trend toward celebrities as "living-room pundit[s] and philosopher[s]"); Rosenberg, *supra* note 350 (discussing the appearance of television and movie celebrities in political ads).

468. See Maureen Dowd, *Gorbachev Passes up Stunts but Dazzles the Heartland*, *N.Y. TIMES*, June 4, 1990, at A1.

469. Keller, *supra* note 313, at 146.

470. *Id.*

come to believe that "unless you are a celebrity, you don't exist at all."⁴⁷¹ The cult of celebrity, she thinks, has the effect of radically devaluing private life and inner experience. "If you are not a celebrity, you are inert filler. If the media isn't flashbulbing your every gesture, it didn't happen. Private epiphanies, soul-wrenching despairs, so what, who cares? You are a tree falling alone in the forest."⁴⁷² Along somewhat the same lines, Christopher Lasch worries that the cult of celebrity has made Americans passive spectators of other people's lives and has intensified their "narcissistic dreams of fame and glory."⁴⁷³ The average American, Lasch thinks, is encouraged to "identify himself with the stars and to hate the 'herd,'" and so he finds it increasingly difficult to "accept the banality of everyday existence."⁴⁷⁴

It is entirely possible, of course, that Heibel and Lasch are mistaken. Identification with the famous may operate instead, as Roger Caillois claims, as a "compensatory mechanism."⁴⁷⁵ It may provide ordinary people with a vicarious liberation from anonymity and a temporary respite from routine, boredom, failure, and frustration. The cult of celebrity may actually be one of the chief means by which the old romance of individualism and the old dream of autonomy are kept alive in a bureaucratic mass society. But however that may be, the important point is that a purely economic analysis has nothing to offer when it comes to *evaluating* the central place that celebrity has come to occupy in our culture. It cannot help us decide whether to embrace this development warmly or resist it steadfastly. Consequently, it cannot tell us what we perhaps most need to know when we decide whether the law should grant celebrities a property right in their publicity values.

C. Consumer Protection Arguments for Publicity Rights

A different instrumental rationale sometimes advanced in support of the right of publicity is that it functions in effect as a private law mechanism for advertising regulation. The most common version of this argument focuses on the need to protect consumers from deceptive trade practices, especially false representations of endorsement or sponsorship. Another version emphasizes the undesirability of permitting advertisers of dangerous or shoddy products to manipulate consumers by exploiting powerful celebrity images.

471. Cynthia Heibel, *The Celebrity Decade*, VILLAGE VOICE, Jan. 2, 1990, at 38.

472. *Id.*

473. CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM* 21 (1978).

474. *Id.*

475. ROGER CAILLOIS, *MAN, PLAY, AND GAMES* 122 (Meyer Barash trans., 1979).

1. Preventing Deception in Advertising—The Trademark Analogy

According to Professor Treece, the right of publicity, by affording celebrities a private cause of action for unauthorized advertising use of their names and likenesses, operates to protect consumers from being “misled about the willingness of a celebrity to associate himself with a product or service.”⁴⁷⁶ Along the same lines, Douglas Baird, in his student Note, said that rights of publicity, like trademarks, help consumers make “rational economic choices”: They “promote the flow of useful information about commercial goods and services to the public by ensuring that the public is not confused by a false implication that a particular celebrity has endorsed a particular good.”⁴⁷⁷

Why, according to Treece, is it important that consumers not be confused or misled “about the willingness of a celebrity to associate himself with a product or service”? How, according to Baird, does the right of publicity help consumers make more “rational” purchase decisions? The following example illustrates what Treece and Baird apparently have in mind. Suppose a consumer, while flipping through a magazine, happens upon an ad for Brand *X* laundry detergent, which prominently features a picture of a star tennis player *Y* crushing a backhand on center court at Wimbledon. Under the picture is a caption comparing Brand *X*’s cleansing power to that of *Y*’s backhand. What “information” does this ad convey to the consumer? That *Y* personally uses and favors Brand *X*? Probably not. Recent surveys suggest that a significant majority of consumers harbor no illusions on this score.⁴⁷⁸ Nevertheless, the

476. Treece, *supra* note 209, at 647.

477. Baird, *supra* note 395, at 1187 n.7.

478. According to one recent survey, 64% of adult television viewers believe that celebrities appearing in ads are “just doing it for the money”—up from 50% in 1984. See *Celebrities in Commercials: The Glitter is Going, Going . . .*, COM. BREAK, July 1989, at 5. The survey found that the ability of celebrities to attract attention has been diminished by the sheer number of celebrity advertisements, and that their “credibility” has been damaged by the much-publicized admission of some celebrities that they do not use the products they are paid to endorse (e.g., Michael Jackson and Pepsi; Cybil Shepherd and The Beef Council). The survey also found that only 22% of viewers think that celebrity commercials are “more memorable” than other commercials—down sharply from 41% in 1984. *Id.* Moreover, consumers, aware of the huge fees collected by celebrity endorsers, are beginning to hold them partly responsible for the high prices of the goods they are promoting.

Together, these findings suggest that celebrity advertising may be losing some of its magic. In fact, the head of the research outfit that conducted the survey has predicted that “manufactured” celebrities—like Joe Isuzu, Ed and Frank for Bartles & Jaymes, and Spuds McKenzie—will increasingly displace “real” celebrities as marketers’ endorsers of choice in the 1990s. See Scott Donaton, *Celebs’ Star Sinking in Ads*, ADVERTISING AGE, Aug. 28, 1989, at 48. One reason is their greater “reliability”: advertisers needn’t worry that “Joe Isuzu” will develop an embarrassing drug problem, or get involved in a sexual scandal, or slip up and admit that he does not use or like the product. Similar considerations underlie the increasing reliance of advertisers on dead celebrities, like Babe Ruth, James Dean, Marilyn Monroe, and Humphrey Bogart. The reputations of such people are firmly established and less likely to change. (They also “work” a good deal more cheaply.) According to a recent article in a trade magazine, licensing fees for the use of dead celebrities increased by about 25% in 1990, with revenues exceeding \$100 million. See Frank

ad—by virtue of the right of publicity—does provide the consumer with some “information”: it tells him that the folks at Brand *X* bargained for and obtained *Y*’s authorization to use his picture in this connection. Moreover, this piece of information enables him to make a cheaper and better-informed product choice, for he can now reason as follows: “I don’t know one detergent from another, and I’m much too busy to find out which is best. Even though *Y* is in it just for the money, he is probably concerned enough about his credibility and public image not to associate himself with a product without first hiring experts to check the product out. So Brand *X* must be OK.”⁴⁷⁹

The first response to this example is that consumers may not respond to celebrity advertising in the manner implicitly assumed by Treece and Baird. Most consumers probably think little and care less about licensing arrangements between celebrities and advertisers. Celebrity advertising does not generate sales “by creating, or relying on, any specific conclusions”⁴⁸⁰ or by triggering “a logical train of thought”⁴⁸¹ in the minds of readers or viewers. Instead, association of a celebrity image with a product “proceeds more subtly to foster favourable inclination towards it, a good feeling about it, an emotional attachment to it.”⁴⁸²

Yet even if some consumers do in fact respond to celebrity advertising in the way hypothesized,⁴⁸³ it is not clear that the “rationality” of their consumer purchase decisions is thereby enhanced. For one thing, my hypothetical consumer has simply *assumed* that the star tennis player is worried enough about his image and credibility to “do his homework” before lending his name to a product. Perhaps some celebrities do proceed in this cautious manner—having the detergent tested or the insur-

Reagan, *Magic for Rent: The Licensing Boom Rolls on*, *PROMO: INT’L MAG. FOR PROMOTION MARKETING*, June 1991, at 10, 24.

479. Alternatively, the consumer’s reasoning might run something like this: “I don’t know one detergent from another and I’m much too busy to investigate the matter myself. But if Brand *X* can afford to pay a big star like *Y* to endorse its detergent, then it must be a very successful company with a pretty good product.”

480. *Hogan v. Koala Dundee Pty. Ltd.*, 83 A.L.R. 187, 195 (Fed. Ct. of Austl., Gen. Div. 1988).

481. *Pacific Dunlop Ltd. v. Hogan*, 87 A.L.R. 14, 45 (Fed. Ct. of Austl., Gen. Div. 1989).

482. *Id.*

483. The extent to which consumers make purchase decisions in this fashion is probably contingent on a number of factors. As a general matter, consumers are more dependent on second-hand evaluations with respect to “experience” goods than “search” goods. Second, consumers are more likely to rely on a celebrity when he endorses “tools of the trade.” For example, when John McEnroe vouches for the quality of a tennis racket (as against a detergent), consumers are more likely to think that he believes what he says and has knowledge sufficient to support that belief. A third factor is the informational and social location of the particular consumer. Some people—transients, highly immobile people—are cut off from other sources of information about products and services, and are therefore more dependent on advertising generally, and on second-hand evaluations in particular. See generally SCHUDSON, *supra* note 139, at 117-21 (stating that consumers who are less mobile are more vulnerable to advertising).

ance company's books examined.⁴⁸⁴ That many celebrities do not⁴⁸⁵ is not surprising in light of the huge fees dangled before their eyes⁴⁸⁶ and the slim chance that they will be held liable in tort if something goes amiss.⁴⁸⁷ A consumer who reasons in the fashion imagined above might *feel* as if his decision to buy Brand X detergent is more rational than an arbitrary selection would be, and this feeling might be a rather pleasant one.⁴⁸⁸ But the feeling could well be entirely illusory. Thus, whether consumers' purchase decisions are made more or less "rational" on the whole because of the right of publicity cannot be determined *a priori*. It depends on the extent to which celebrity endorsers actually do the "homework" consumers impute to them.

A more serious problem with the standard consumer deception argument is that the right of publicity enables celebrities to prevent commercial uses of their personas that are not in any way misleading or fraudulent. In other words, the right of publicity applies even where there is no danger that consumers will be misled into believing that the featured celebrity has endorsed or associated himself with the product.

484. See, e.g., Bruce Horowitz, *Stars Likely to Be More Careful in Ads After Lloyd Bridges Case*, L.A. TIMES, Feb. 8, 1990, at D1, D11 (noting Art Linkletter's claim of researching all products he endorses).

485. See, e.g., *Kramer v. Unitas*, 831 F.2d 994 (11th Cir. 1987) (involving football player Johnny Unitas' appearance in ad for a financial service company without investigating its advertising claims); *Ramson v. Layne*, 668 F. Supp. 1162 (N.D. Ill. 1987) (involving actor Lloyd Bridges' endorsement of an investment company subsequently found to be fraudulent); *In re Diamond Mortgage Corp.*, 118 B.R. 588 (Bankr. N.D. Ill. 1989) (involving actor George Hamilton's endorsement of a mortgage broker subsequently found to be fraudulent); *Cooga Mooga*, 92 F.T.C. 310 (1978), *modified*, 98 F.T.C. 814 (1981) (involving singer Pat Boone's endorsement of an acne medicine subsequently found to be ineffective). The bankruptcy court decision in the *Diamond Mortgage* case, however, which held that celebrity endorsers have a duty to obtain independent and reliable information about the product or service, may well induce more caution. See Horowitz, *supra* note 484.

486. See *supra* note 11.

487. See generally Jay S. Kogan, *Celebrity Endorsement: Recognition of a Duty*, 21 J. MARSHALL L. REV. 47 (1987). Kogan says that "no court has ever held a celebrity liable for making an endorsement which caused harm to a consumer." *Id.* at 56. He also notes that indemnification clauses are routinely included in endorsement contracts and that celebrities often require advertisers to take out insurance in their favor. *Id.* at 54. Yet the situation with respect to endorser tort liability has been clouded somewhat by a recent decision in a bankruptcy proceeding, which holds that celebrity endorsers must independently verify the statements they make in advertisements. See Joanne Lipman, *Celebrity Endorsers Are in Danger of Tripping on Advertiser's Word*, WALL ST. J., Jan. 31, 1990, at B4 (discussing suit brought by investors in a bankrupt mortgage company against celebrity endorsers Lloyd Bridges and George Hamilton; case settled after denial of celebrity defendants' summary judgment motion).

Significantly, a celebrity pictured in an ad may actually have *no* control whatsoever over the advertising use to which his photograph is put; he may have previously assigned his right of publicity to some business entity which, while concerned with protecting its investment, would likely be less interested in the celebrity's personal reputation. Where that is the case, consumer confidence that the specific celebrity featured in the ad has had the product checked out would be baseless.

488. Cf. STEFFAN B. LINDER, *THE HARRIED LEISURE CLASS* 70-74 (1970) (arguing that the object of much advertising is in fact to provide "ersatz information" so that consumers can feel that they are making "the right decision").

In one well-known case,⁴⁸⁹ for example, the defendant marketed portable toilets under the corporate name "Here's Johnny." The admitted intent and obvious effect was to bring to mind the entertainer Johnny Carson, who was regularly introduced as host of the *Tonight Show* with that same phrase. The company reinforced this association by advertising its product as "The World's Foremost Comedian."⁴⁹⁰

Carson, president of a men's apparel company that used the phrase "Here's Johnny" on its labels and in its advertising,⁴⁹¹ was not in the least amused by what the defendant described as an attempted "play on a phrase."⁴⁹² Carson brought suit on several grounds, including unfair competition under section 43(a) of the federal Lanham Act⁴⁹³ and Michigan common law, as well as infringement of his right of publicity. The Sixth Circuit dismissed the unfair competition claims, affirming a lower court finding that there was no "likelihood of confusion" on the part of consumers.⁴⁹⁴ Even though the defendant had intended to "capitalize on the phrase popularized by Carson," he had not intended to "deceive the public into believing Carson was connected with the product," and there was no evidence that the public had or would be misled.⁴⁹⁵ On the right-of-publicity claim, however, the court decided in Carson's favor, holding that the defendant had misappropriated Carson's "identity" to promote its product. With respect to this claim, the fact that consumers would not be misled into thinking that Carson was in any way connected with defendant's product was irrelevant. It sufficed that the defendant had evoked Carson in order to benefit from his fame and popularity.⁴⁹⁶

The precise reach of the *Carson* decision is uncertain. Would

489. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983).

490. *Id.* at 833.

491. Carson had also licensed use of the phrase to a restaurant chain and to a maker of men's toiletries. *Id.*

492. *Id.*

493. Section 43(a) of the Lanham Act, codified as 15 U.S.C. § 1125(a) (1988), currently provides as follows:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, 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.

494. *Carson*, 698 F.2d at 833.

495. *Id.* at 834.

496. *Id.* at 835.

"Make My Day" Vitamins infringe Clint Eastwood's right of publicity? What about "Read My Lips" Lipstick? Nevertheless, the case illustrates that the right of publicity is neither directed at, nor confined to, the prevention of consumer deception.⁴⁹⁷ The focus of the right of publicity is not the interest of the consuming *public* in freedom from deception but rather the *celebrity's* interest in controlling and benefiting from the economic value of his identity. The point can be sharpened by consideration of an increasingly common advertising practice—the use of celebrity "look-alikes" and "sound-alikes."

Sheldon Halpern, for example, puts the hypothetical case of an advertisement featuring a Woody Allen look-alike accompanied by the following conspicuous and unequivocal disclaimer of identity and endorsement: "This is not Woody Allen. Woody Allen doesn't know we are running this ad, and he doesn't like our product."⁴⁹⁸ Clearly, in a case of this sort there is no appreciable danger of consumer confusion or deception. Even the proverbial "moron in a hurry" should realize that Allen has nothing to do with the ad or the product.⁴⁹⁹ Yet, as Halpern persuasively argues, the ad nevertheless infringes Allen's right of publicity, for it evokes his identity in order to attract attention and promote sales.⁵⁰⁰ The upshot is this: although the right of publicity may in some circumstances protect consumers from being "misled about the willingness of a celebrity to associate himself with a product or service,"⁵⁰¹ it also applies in many cases where no such consumer protection function is served.⁵⁰²

More decisively, to the extent that the right of publicity *does* prevent consumer deception in advertising, it is largely redundant. In circumstances presenting a realistic danger that consumers will be deceived or confused about a celebrity's endorsement of or association with an advertised product or service, the celebrity can obtain appropriate relief under

497. See also *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989) (noting that "the right of publicity, unlike the Lanham Act, has no likelihood of confusion requirement" and is thus "potentially more expansive than the Lanham Act"); Nimmer, *supra* note 13, at 212 ("Publicity values of a person or firm may be profitably appropriated and exploited without the necessity of any imputation that such person or firm is connected with the exploitation undertaken by the appropriator.").

498. Halpern, *supra* note 92, at 1245.

499. Cf. *Newton-John v. Scholl Plough (Austl.) Ltd.*, 11 F.C.R. 233, 234 (N.S.W. Dist. Reg., Gen. Div. 1986) (cosmetics ad using a look-alike photo with the caption, "Olivia? No, Maybelline!" held not to amount to passing off or statutory unfair trading because the ad "tells even the most casual reader, at even the first glance, that in fact it is not Olivia Newton-John who is represented").

500. Halpern, *supra* note 92, at 1245.

501. Treece, *supra* note 209, at 647.

502. Risk of consumer confusion or deception is especially unlikely when unauthorized use occurs in a *comparative* advertisement. For example, an ad for Chatwell Hotels, which ran on New York City television not long ago, stated: "No need to pay Trumped-up prices in New York anymore."

the Lanham Act⁵⁰³ or a state law equivalent.⁵⁰⁴ In other words, if our sole or chief concern is that consumers not be deceived or confused about the willingness of a celebrity to endorse or associate himself with an advertised product or service, then legal mechanisms better tailored to that purpose already exist. A property-like right of publicity "must find [its] own justification."⁵⁰⁵ If there are gaps in the Lanham Act's coverage, then the appropriate response is to amend it, rather than to create a novel property right that is neither tied nor confined to deception or confusion.

Furthermore, the relation of the right of publicity to "truth-in-advertising" is not nearly as straightforward and unambiguous as the consumer protection argument suggests. Consider this example: Brand *X* Sneaker Co. runs an ad truthfully stating that Michael Jordan bought and wore its sneakers throughout his college basketball career and switched to Brand *Y* only upon turning pro and signing a fat endorsement contract with Brand *Y*'s company. The ad uses a picture of Jordan from his college days, but makes unequivocally clear that Jordan has not authorized this use of his name and likeness. Has Jordan's right of publicity been infringed? It is hard to see why not, for Jordan's name and "goodwill" have been appropriated by the advertiser to promote a product.⁵⁰⁶ It is possible, of course, that Brand *X* has a First Amendment right to publish this information that would trump Jordan's publicity

503. Recent cases involving celebrity look-alikes and sound-alikes bear this out. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (holding that use of a Tom Waits sound-alike in a radio ad for a food product violates the Lanham Act), *cert. denied*, 113 S. Ct. 1047 (1993); *Prudhomme v. Proctor & Gamble Co.*, 800 F. Supp. 390 (E.D. La. 1992) (involving a claim stated under the Lanham Act for use of a look-alike); *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360 (S.D.N.Y. 1988) (holding that use of a Woody Allen look-alike in an ad for a clothing store violates the Lanham Act unless accompanied by an effective disclaimer of any connection between Allen and the product; injunctive relief granted); *Allen v. National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985) (holding that use of an Allen look-alike in an ad violates the Lanham Act because it creates a likelihood of confusion as to his endorsement or involvement with the advertised product; injunctive relief granted).

The 1988 amendment of the Lanham Act should remove any lingering doubt that these decisions are an appropriate application of § 43(a). See Trademark Law Revision Act of 1988, Pub. L. No. 100-667, § 35, 102 Stat. 3935; S. REP. NO. 515, 100th Cong., 2d Sess. 40 (1986) (stating that § 43(a) has been revised "to codify the interpretation it has been given by the courts"). It should also be noted that while likelihood of confusion is necessary to establish a violation of § 43(a), proof of actual confusion (or of injury caused thereby) is not. *Web Printing Controls Co. v. Oxy-Dry Corp.*, 906 F.2d 1202 (7th Cir. 1990). A celebrity can thus obtain injunctive relief on a showing that the appropriation of his identity caused a likelihood of consumer confusion concerning his endorsement of or association with the product or service of another.

504. See, e.g., *National Bank v. Shaklee Corp.*, 503 F. Supp. 533 (W.D. Tex. 1980) (unfair competition); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 135 (Wis. 1979) (trade name infringement).

505. Denicola, *supra* note 206, at 624.

506. See *Nature's Way Prods., Inc. v. Nature-Pharma, Inc.*, 736 F. Supp. 245, 253 (D. Utah 1990) (rejecting the notion that the right of publicity is not infringed by the publication of "historical information" about plaintiff in a product ad). But cf. *Vinci v. American Can Co.*, 591 N.E.2d 793, 794 (Ohio Ct. App. 1990) (holding use on Dixie Cups of names and likenesses of Olympic stars, as

right.⁵⁰⁷ My point is only that the right of publicity itself can as easily thwart as promote "the flow of useful information about commercial goods and services to the public."⁵⁰⁸ As Professor Shiffrin notes, the right of publicity gives a public figure power "to control the dissemination of truth for his or her own profit."⁵⁰⁹

Finally, the consumer protection argument for the right of publicity necessarily involves a kind of bootstrapping. The argument begins from the premise that the average consumer who comes upon a magazine ad or T-shirt featuring Michael Jordan's picture assumes or infers that Jordan has given authorization for the use of his likeness. It is not at all clear, as an empirical matter, that today's average consumer assumes or infers any such thing—at least with respect to celebrity merchandise (such as posters, T-shirts, etc.).⁵¹⁰

But let that go. Let us suppose that many or most consumers of ordinary intelligence and sophistication do react this way. What is it that accounts for their reaction? After all, they do not draw any such inference when they see Michael Jordan's picture on the cover of *Sports Illustrated* or in the sports section of their daily newspaper. If they have a different reaction to ads and merchandise, it can only be because they have some vague background sense of what the law permits and how businesses operate in this area. They have some notion that the law, or business custom, or both, require advertisers and merchandisers (but not the news media) to obtain a celebrity's consent before using his picture.

Yet if the law (and business practice) were otherwise, would not their assumptions and inferences change? Presumably, consumers who purchased Ben Franklin clocks and snuff boxes in the 1770s, for example, did not believe that Franklin had licensed or otherwise authorized their

well as information about their accomplishments, not actionable because "there was no implication that the athletes used, supported, or promoted the product").

507. 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, 568 (1986) (arguing that the First Amendment protects advertisements' accurate statements that a celebrity not employed by a company uses the company's product); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1257 n.275 (1983) (in the absence of deception, advertisers should have the right to inform the public about which public figures buy their products).

508. Baird, *supra* note 395, at 1187 n.7.

509. Shiffrin, *supra* note 507, at 1258 n.275.

510. Cf. *International Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912, 918 (9th Cir. 1980) (stating that although consumers display emblems expressing an allegiance to a particular organization, most consumers probably do not believe that the product was sponsored by the organization), *cert. denied*, 452 U.S. 941 (1981); *Bi-Rite Enter., Inc. v. Button Master*, 555 F. Supp. 1188, 1195-96 (S.D.N.Y. 1983) (refusing to rely on a presumption of consumer confusion, and requiring the plaintiff to prove that the unauthorized use of logos would cause or was intended to cause confusion). Professor Simon, however, claims that purchasers of celebrity posters, T-shirts, and the like do in fact assume that the featured celebrity has authorized the use. See Simon, *supra* note 26, at 748. Yet Simon offers no evidence for this assertion, saying only that "[c]onsumers act on the basis of images." *Id.*

production.⁵¹¹ Consumers in the 1880s presumably realized that Oscar Wilde had not approved the use of his photograph on trade cards for Marie Fontaine's Moth and Freckle Cure.⁵¹² In short, the reaction of today's consumer to celebrity advertising and merchandise is neither "natural" nor inevitable. It reflects instead his understanding of what legal and customary norms currently require in these matters, and it thus cannot be used to *ground* those norms.

Suppose the law permitted free advertising and merchandising use of celebrity personas, but prohibited false claims of authorization. In other words, suppose anyone could market Michael Jordan T-shirts, but only Jordan's licensee could put "official version" on the label. Likewise, suppose anyone could use Jordan's picture or name in a commercial "tie-in," but no advertiser could run a spurious testimonial or falsely represent that it had Jordan's permission. If these were the legal rules, and if business practice came to reflect them, then consumer reactions to celebrity advertising and merchandise would change accordingly, and there would be no serious danger that consumers would be "misled about the willingness of a celebrity to associate himself with a product or service."⁵¹³ That being so, we have to look elsewhere for a justification of the right of publicity.

2. *Fostering Accountability in Advertising*

A somewhat different version of the consumer protection argument, outlined by Treece and recently developed by my colleague Samuel Murumba,⁵¹⁴ views the right of publicity not (or not only) as a means of protecting consumers from false information, but also as an indirect means of fostering restraint and social responsibility in the deployment of powerful celebrity images. This argument starts from the premise that the aim of much modern advertising is not to provide the consumer with "information" about the product, but rather to grab his attention and then set up some association, arouse some feeling or mood or anxiety, that will activate him to buy the product. Although some celebrity advertising involves straightforward testimonial endorsements, much of it "works" not by giving the consumer a *reason* to buy the product, but by affording him "an opportunity to associate himself with a public figure, however fleetingly and remotely."⁵¹⁵ No "logic" tells the consumer that sneakers are better because Michael Jordan wears them in a television ad, but "the [sneakers] *are* better in his eyes, worn by his idol."⁵¹⁶

511. See *supra* text accompanying notes 100-05.

512. See *supra* text accompanying note 116.

513. Treece, *supra* note 209, at 647.

514. Samuel Murumba, *Character Merchandising in Australia—Welcome Home Wanderer*, INTELL. PROP. F., Nov. 1990, at 10.

515. Treece, *supra* note 209, at 645.

516. *Pacific Dunlop Ltd. v. Hogan*, 87 A.L.R. 14, 45 (Fed. Ct. of Austl., Gen. Div. 1989).

Strictly speaking, such advertisements do not involve "deception" or "misrepresentation." Image advertising, as Murumba says, has no truth-value. It is largely nonpropositional: it "cannot be false because it cannot be true, and so it is meaningless to talk about misrepresentation in this context."⁵¹⁷ Michael Schudson makes the same point slightly differently, arguing that the messages conveyed in this sort of advertising are not deceptive because the entire audience *knows* them to be false.⁵¹⁸

If this is the nature of much or most celebrity advertising, what follows? According to Treece, "[S]ociety might decide that the 'emulating' behavior of consumers would channel itself more acceptably if the persons emulated had some control over the decision to link their names and likenesses with particular products."⁵¹⁹ Along somewhat the same lines, Murumba argues that if celebrities were given firm control over the use of their identities, "the worst abuses" of image advertising could be avoided. Celebrities would "select carefully which products or services they wish to be associated with" and would "weigh the attraction of the advertiser's fee against potential risk to their image."⁵²⁰ They would tend to eschew association of their images with "shoddy or dangerous merchandise."⁵²¹

The critical aspect of this version of the consumer protection argument is that the danger sought to be prevented by the right of publicity is not (as it was in the first version) that consumers will be misled into thinking that a celebrity has endorsed or associated himself with a product. Rather, the danger here is that advertisers of "bad" products will exploit powerful celebrity images to grab our attention or motivate us to buy. The spectre Treece and Murumba implicitly summon up is of a world in which gun merchants are free to use pictures of Clint Eastwood or Sylvester Stallone to promote the sale of attack weapons, and swindlers are free to use pictures of Robert Young and Karl Malden to drum up deposits for a savings and loan hovering on insolvency.

While this variant of the consumer protection argument for the right of publicity is more subtle and plausible than the first, it too relies on faulty assumptions. First, strictly as a factual matter, celebrities have not shown either the inclination or the ability to "channel" consumer behavior in socially desirable ways. Concern for their image or reputation

517. Murumba, *supra* note 514, at 20.

518. See SCHUDSON, *supra* note 139, at 11; RAYMOND WILLIAMS, *Advertising: The Magic System*, in PROBLEMS IN MATERIALISM AND CULTURE 170, 188-89 (1980) (modern advertising is a kind of "magic system": "[y]ou do not only buy an object: you buy social respect, discrimination, health, beauty, success, power to control your environment"); Postman, *supra* note 140, at 128 ("Today, on television commercials, propositions are as scarce as unattractive people. The truth or falsity of an advertiser's claim is simply not an issue.").

519. Treece, *supra* note 209, at 647.

520. Murumba, *supra* note 514, at 21.

521. *Id.* at 22.

doubtlessly leads some to avoid association with products which they realize are shoddy or fraudulent. But, as already mentioned, there are celebrities who endorse products that they do not themselves use,⁵²² and there are others who tout products whose effectiveness or soundness they have neither investigated nor verified.⁵²³ More importantly, ever since the advent of modern testimonial advertising in the 1920s,⁵²⁴ prominent entertainers and athletes have consistently lent their names and faces to the promotion of products with high individual and social costs.⁵²⁵ It is possible that the imposition of tort duties on endorsers would make celebrities somewhat more discriminating. Absent that development, however, celebrities cannot realistically be counted on to "channel" popular consumption to the extent envisioned by Murumba and Treece.

Another problem with the argument Murumba advances is that celebrity advertising, however potent it may be, is not uniquely powerful. It is only one of many techniques in the modern image advertiser's repertoire. Thus, even if celebrities can be expected to avoid association with dangerous or socially harmful products, the advertisers of these products will simply substitute some other proven advertising method. This substitution is unlikely either to undercut the effectiveness of the advertising pitch or to raise its cost significantly.

In any event, Murumba's argument applies only to the use of celebrity images in advertising. Celebrity merchandise—posters, T-shirts, greeting cards, etc.—may sometimes be shoddy or tawdry. But it is seldom, if ever, "dangerous" to its users or third parties. Thus, we must look elsewhere if we are to explain why celebrities should be given a property right in their *merchandising* values.

CONCLUSION

The discussion in Part III showed that the affirmative case for publicity rights is at best an uneasy one. Individually and cumulatively, the standard justifications are not nearly as compelling as is commonly supposed. This would not be terribly worrisome if nothing more were involved here than divvying up celebrity's spoils. But, as we have seen, the stakes are both higher and more complicated. For one thing, as Part II demonstrated, the decision whether or not to recognize a property

522. See *supra* note 478.

523. See *supra* note 485.

524. See *supra* text accompanying notes 181-92.

525. Cigarettes and alcohol are the most obvious and important examples of dangerous products that celebrities have routinely and widely endorsed. See *supra* note 189. An instructive recent example is celebrity advertising for expensive sneakers. Partly in response to effective advertising featuring celebrity endorsements, impressionable and status-craving teenagers from low-income families have reportedly run drugs, or even killed, in order to acquire a pair. See Tony Kornheiser, *The Insidious Sneaker*, WASH. POST, Mar. 28, 1990, at D1; John Leo, *The Well-Heeled Drug Runner*, U.S. NEWS & WORLD REP., Apr. 30, 1990, at 20.

right in a celebrity's publicity value involves a choice between two fundamentally different conceptions of fame, and of the relation of famous persons to society. It is a choice between a market-oriented, instrumental, individualistic conception on the one hand, and an older, more communitarian conception on the other. Putting the point most broadly, publicity rights belong to a view of the world in which social goods—wealth, prestige, fame—are seen as chiefly individual achievements, and in which almost anything that some people are willing to sell and others are willing to buy is protected as “private property.” Indeed, the question, “Who owns Madonna?” could arise only, I suspect, in a society already well down the path to what Margaret Radin calls “universal commodification.”⁵²⁶

But that is not all. The discussion in Part I suggested that the “right of publicity” issue requires us to make a fundamental choice as well about the allocation of cultural (meaning-making) power in contemporary society. Framed in its most general terms, that choice is between centralized, top-down management of popular culture on the one hand, and a more decentralized, open, “democratic” cultural practice on the other. For me at least, *this* particular choice is not a very difficult one: As a general matter, the law ought to align itself with cultural pluralism and popular cultural production. It ought to expand, not contract, the space in which “local” discourses and alternative cultural practices can develop. For this reason, property rights in our culture's basic linguistic, symbolic, and discursive raw materials should not be created unless a clear and convincing showing is made that very substantial social interests will thereby be served. As we have seen, no such showing has yet been made with respect to star images. The proponents of publicity rights still have work to do to persuade us why these images should not be treated as part of our cultural commons, freely available for use in the creation of new cultural meanings and social identities, as well as new economic values.

There is work to do on the other side of the question as well. A definitive argument for outright abolition of the right of publicity cannot be made on the present state of the record. For one thing, we lack adequate information about the extent to which publicity rights actually stifle or deter popular cultural practice. There is no doubt that the right of publicity makes private censorship of popular meaning-making *possible*. It creates an *opportunity* for celebrities (or their assignees) to suppress disfavored meanings and messages. What we need to know, however, is how often, and in what circumstances, celebrities (or their assignees) in fact *use* their licensing power in this way, and how often would-be appropriators are chilled or deterred by the fear of litigation. We also need to

526. Radin, *supra* note 225, at 1857.

know whether the suppressed meanings and messages find alternative means of expression. Finally, we need to consider carefully whether there are measures short of abolition (a compulsory licensing scheme, or a generous "fair use" privilege to protect social criticism and satire, for example) that can reduce the impact of the right of publicity on popular cultural practices.

Another reason for caution is that in a "free use" world, as Jane Gaines has noted,⁵²⁷ it is not only *popular* cultural practice that would be liberated. Large corporate actors would also be set free to "graze" on the celebrity commons. My concern in this connection is not for allocational efficiency. It is for the possible impact on our cultural condition. How would large corporations and advertisers react to a free-use rule? To what extent would they refrain from unauthorized use of celebrity personas as a matter of custom or prudential calculation? Would unrestrained corporate use dwarf or drown out popular and alternative cultural practice? What impact would unrestrained use have on the "cult of celebrity"—on the value that is attached in our culture to fame and visibility? And what spillover impact would unrestrained corporate use have on our respect for the values of dignity and autonomy? A final assessment of the right of publicity must await answers to these large and difficult questions. For now, though, the proper verdict on the right of publicity is the ancient Scottish one: "Not proven."

527. See GAINES, *supra* note 28, at 115.

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