

Fall 2002

The Extent of Protection of the Individual's Personality Against Commercial Use: Toward a New Property Right

George P. Smith II

The Catholic University of America School of Law

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

George P. Smith II, The Extent of Protection of the Individual's Personality Against Commercial Use: Toward a New Property Right, 54 S. C. L. Rev. 1 (2002).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

THE EXTENT OF PROTECTION OF THE INDIVIDUAL'S PERSONALITY AGAINST COMMERCIAL USE: TOWARD A NEW PROPERTY RIGHT

GEORGE P. SMITH, II*

I. INTRODUCTION	2
II. THE YEAR OF THE NOBLE BIRTH—1890: THE CREATIVE GENIUS OF WARREN AND BRANDEIS	4
A. <i>The Right of Privacy—A Simple Definition</i>	6
B. <i>Judicial v. Legislative Recognition</i>	7
III. PROSSER'S DELINEATION OF THE PRIMARY RIGHT	9
A. <i>The Classification—Its Problem</i>	9
IV. COMMERCIAL APPROPRIATION AND INVASIONS OF PRIVACY	11
A. <i>Acts of Appropriation</i>	11
B. <i>The Fact-fiction Differentiation</i>	12
C. <i>Public Figures and Their Loss of Privacy</i>	13
D. <i>Stage Names</i>	14
E. <i>Commercial Advertising</i>	15
F. <i>Animals, Decedents and Corporate Bodies</i>	16
G. <i>The Indiana Position</i>	16
H. <i>The California Judicial Approach</i>	18
V. THE CONSTITUTION AND THE RIGHT OF PRIVACY	18
A. <i>The Guarantee of Freedom of the Press and the Need for an "Informed" Citizenry Versus the Right to be Let Alone</i>	18
VI. WHAT OF THIS SO-CALLED "RIGHT OF PUBLICITY?"	20
A. <i>Recognizing a Right of Publicity</i>	20
B. <i>The Supreme Court Speaks</i>	21
VII. CASE PRECEDENTS	22

* B.S., J.D., Indiana University, LL.M. Columbia University, LL.D., Indiana University. Professor of Law, The Catholic University of America School of Law. Two former students, Brian P. Wyatt and Patricia Stolfi, provided valuable research assistance for the completion of this Article.

VIII. HAVE THE COURTS GONE TOO FAR IN PROTECTING THE RIGHT OF PUBLICITY?	27
A. <i>The Slippery Slope: No End in Sight for Things Protected</i>	27
B. <i>Parody and Satire—Valuable Weapons in Social Discourse</i>	28
IX. A FURTHER STEP: CALIFORNIA AND INDIANA RIGHT OF PUBLICITY	29
A. <i>Jurisdictional Statutes—Privacy Post-Mortem</i>	29
B. <i>Indiana Statutory Guidance</i>	30
C. <i>The California Privacy Protection Act of 1998</i>	30
D. <i>The Fourth Amendment Analogy</i>	33
E. <i>Another Theory—Commercial Speech and the Test</i>	34
F. <i>Human Autonomy Interest as a Property Right</i>	35
X. COMMON JUSTIFICATIONS FOR THE RIGHT OF PUBLICITY: OVERLOOKED OR OVEREMPHASIZED	37
A. <i>Celebrity: The Fruits of Whose Labor?</i>	37
B. <i>Protecting or Stifling Creativity?</i>	38
C. <i>An Element of Deception: The Forgotten Value of the Right of Publicity</i>	39
XI. CONCLUSIONS	41
A. <i>Reaffirming the Right of Publicity as Protection Against False Endorsements</i>	42
B. <i>More Emphatic Invocation of Free Speech Protection</i>	42
C. <i>Idea v. Expression</i>	43
D. <i>The Right of Performance</i>	44

I. INTRODUCTION

“Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
Who steals my purse steals trash; ‘tis something, nothing;
‘Twas mine, ‘tis his, and has been slave to thousands.
But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.”¹

The scope and extent of the right of privacy, as a recognized legal right, is still shrouded in part by a veil of ignorance. At one point there may have been

1. WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3, lines 160-66, in *THE NORTON SHAKESPEARE* 2135 (Stephen Greenblatt et al. eds., 1997).

a “cultural understanding that life contained public and private spheres and that even celebrities and powerful public officials deserved some semblance of private lives.”² However, that understanding has yielded to societal and market-oriented demands for personal information and use of celebrity images.³ Stories about celebrities’ and, most recently, ordinary people’s private lives have increased in quantity, intensity, and degree of intrusion over the last decade.⁴ As evidenced by the growth in what is now referred to as “reality television,” which includes programs such as *Big Brother*, *Survivor* and *Jerry Springer*, the public has become intrigued with viewing what goes on behind closed doors.

In addition, privacy rights have gained increasing exposure because of technological innovation and the unprecedented ability to intrude and appropriate a person’s identity, image, and private space without consent through the use of advanced technological equipment.⁵ As more information about us is easily attainable by the public, “societal concerns over personal privacy inevitably intensify.”⁶ “[T]he modern media have become more aggressive in gathering potentially embarrassing information about private individuals.”⁷ However, “public demand for personal information is unrelenting.”⁸ These concerns and intrusive practices have led lawmakers to propose higher accountability for the invasion of an individual’s privacy interest.⁹

As a result, all branches of government have begun to focus attention on expanding and protecting an individual’s right to privacy.¹⁰ A trend has emerged, which signals an increasingly expansive view of the right of privacy by the courts, in particular with respect to the right of publicity.

2. Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097, 1098 (1999).

3. Anita L. Allen, *Privacy and the Public Official: Talking About Sex as a Dilemma for Democracy*, 67 GEO. WASH. L. REV. 1165, 1165 (1999) (citing Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 728-30 (1999)).

4. Smolla, *supra* note 2, at 1098.

5. *Id.* (“What was once the high-tech exotica of spy movies is now readily available to the upscale mail-order customer: cameras that can fit within a pair of eyeglasses, microphones that hear through walls from afar to pick up the sighs and whispers of the bedroom, and telephone taps that can make anyone a fully-equipped Linda Tripp.”).

6. C. Thomas Dienes, *Protecting Investigative Journalism*, 67 GEO. WASH. L. REV. 1139, 1139 (1999).

7. Robert M. O’Neill, *Privacy and Press Freedom: Paparazzi and Other Intruders*, 1999 U. ILL. L. REV. 703, 703.

8. Allen, *supra* note 3, at 1165.

9. O’Neill, *supra* note 7, at 703.

10. Approximately twenty states recognize the right of publicity. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 132 (1993) (citing THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 6.1[B] (1992)). See also ROCHELLE COOPER DREYFUSS & ROBERTA ROSENTHALL K WALL, *INTELLECTUAL PROPERTY: CASES AND MATERIALS ON TRADEMARK, COPYRIGHT AND PATENT LAW* 547 (1996) (determining that over half of the states have recognized publicity rights by statute or common law).

Although, as will be seen throughout this Article, Congress and state legislatures have begun to develop statutory guidelines, the major area of expansion comes as a result of a “judicially activist” understanding of the right of privacy. *Stare decisis*, that “hobgoblin of little minds,”¹¹ even though often times adhered to rigidly, will on other occasions—if “justice” demands—be disregarded completely. The almost complete unpredictability of the courts in certain areas regarding the right of privacy, in particular the right of publicity, has been much to the chagrin of legal scholars and commentators.

The trend in the Ninth Circuit¹² may tempt courts to widen the scope of the right of publicity to an extent that might impinge on core values protected by free expression. Similarly, state legislatures are beginning to expand protection of privacy and publicity rights.

The purpose of this Article is to explore the extent of an individual’s right of privacy vis-à-vis the concepts of commercial use and appropriations, which compromise rights of publicity. The deceptively simple, yet complex, conclusion to be drawn from this analysis is that a delicate balance of interests must be struck, either legislatively or judicially, between recognizing a full right of privacy and its permutations in the right of publicity with press and news media. A definitive balancing test may be elusive, but at a minimum, a framework for principled decision making must be attempted.

However, before plunging into this quagmire, it is vitally important that the *desiderata* of the right of privacy be considered in its complete historical and legal context. The countervailing influence of the Federal Constitution as well as this relatively new right of publicity must also be considered in relation to this basic privacy right. Included in the analysis will be the recent movement on the part of state governments, specifically California and Indiana, to protect individuals from the excessive intrusiveness of the media and the commercial appropriation of images while still balancing a right of publicity within the constitutional framework of the right to newsworthy information mandated by the First Amendment.

II. THE YEAR OF THE NOBLE BIRTH—1890: THE CREATIVE GENIUS OF WARREN AND BRANDEIS

In 1890, Samuel Warren and Louis Brandeis, who later was to become a United States Supreme Court Justice, published an article entitled simply, *The Right to Privacy*.¹³ This famous article was written in a period of history when “yellow” journalism was just emerging and may be thought of as the legal seed

11. Ralph Waldo Emerson stated, “A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.” Ralph Waldo Emerson, *Self-Reliance*, in 1 MAJOR WRITERS OF AMERICA 510, 513 (Perry Miller et al. ed., 1962).

12. See *infra* notes 162-200 and accompanying text.

13. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

that later gave birth to what today is recognized by the law as a right of privacy.¹⁴ These men criticized the press for “overstepping in every direction the obvious bounds of propriety and of decency”¹⁵ and proposed a new tort for the violation of privacy rights.¹⁶ However, the seed took time to grow, and to some extent, it remains in a growth period a hundred years later.

Warren and Brandeis were hard-pressed for leading case precedents that would reinforce their argument for a privacy right. Nevertheless, early English cases were found and used as the basis for the major premise of their argument.¹⁷ From these cases it was argued that, since the common law granted a right of copyright to the artist in his paintings or etchings,¹⁸ to the author in his manuscript,¹⁹ and to the letter-writer in his letter,²⁰ in order to prevent their

14. The article stated:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Id. at 196. *Quaere*: Has the attitude of journalism changed noticeably from the 1890s?

15. *Id.*

16. *Id.* at 213-20.

17. *Id.* Among the English cases cited are the following: *Pollard v. Photographic Co.*, 40 L.T.R. 345 (Ch. App. 1888); *Prince Albert v. Strange*, 41 Eng. Rep. 1171 (1849), *aff'd* 64 Eng. Rep. 293 (1849); *Abernethy v. Hutchinson*, 47 Eng. Rep. 1313 (1825); *Yovatt v. Winyard*, 37 Eng. Rep. 425 (1820).

18. *Prince Albert v. Strange*, 64 Eng. Rep. 293 (1849). In *Prince Albert* the unauthorized reproduction of the etchings done by Queen Victoria and Prince Albert of members of the Royal Family, personal friends and some favorite dogs was prohibited. Privacy, in this case, was recognized as a kind of property right. The court stated that “every man has a right to keep his own sentiments if he pleases; he has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends.” *Id.* at 302.

19. *Yovatt v. Winyard*, 37 Eng. Rep. 425 (1820). The *Yovatt* court ordered that the defendant stop using medical formulae and secret medicines which he had obtained “surreptitiously” and “clandestinely” from the plaintiff when he was employed as his journeyman. *Id.* at 426. Here was a theft of ideas, not things. However, the court based its order on the reasoning that the defendant had breached the *trust and confidence* of his former relationship with the plaintiff. *Id.*

20. It was determined in both *Gee v. Pritchard*, 36 Eng. Rep. 670 (1818), and *Woolsey v. Judd*, 11 How. Pr. 49 (N.Y. Sup. Ct. 1855), that equitable relief would be granted for invasion of a property right. More specifically, in *Gee*, it was held that defendant, a bookseller who had obtained copies of personal letters written both to and from the plaintiff and was printing and about to publish them, would be enjoined from publishing those letters written by the plaintiff, but not as to those written to him. Simply put, the court found the author of a letter has a property

products from being made public, *ergo*, every individual should have a similar right not to have his personality invaded or published. It was also noted that since the Roman law awarded damages for mental suffering when one's honor was assailed wrongly, this was all the more reason why the American courts should recognize a right of privacy.²¹

A. *The Right of Privacy—A Simple Definition*

The right of privacy, defined in its simplest terms, is the “right to be let alone.”²² However, the Indiana courts have structured further the basic definition to include the right to live without undue interference by the public about matters with which the public is not necessarily concerned.²³

interest in his own words. Thus, the right of publication remains in the sender of the letter. *Gee*, 36 Eng. Rep. at 678. In *Woolsey* the court held that should a receiver of a letter endeavor to publish it or parts thereof from a writer, against the original author's wishes and not in vindication of an unjust claim regarding the receiver's conduct, equity will recognize a breach of the writer's exclusive property rights in the letters he wrote. *Woolsey*, 11 How. Pr. at 78-79. See generally W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 117 (5th ed. 1984) (describing the development of a right to privacy).

In a more contemporary case heard by the U.S. Court of Appeals for the Second Circuit in 1987, it was held that a biographer seeking to quote and paraphrase various copyrighted letters of J.D. Salinger written by Salinger to a number of individuals, which in turn had been placed in the libraries of Harvard, Princeton, and the University of Texas and subject to library copyright permissions for use, could not use these writings in a biography of Salinger being written. *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987). Accordingly, a claim of fair use under ordinary circumstances of the heretofore unpublished writings was denied—it being determined that Salinger had “a right to protect the expressive content of his unpublished writings for the term of his copyright.” *Id.* at 100.

21. Warren & Brandeis, *supra* note 13, at 197-98.

22. JOHN LEWIS, 1 COOLEY ON TORTS 360-64 (3d ed. 1906) (discussing the right to be let alone and noting that it is a personal, rather than property, right).

23. *Cont'l Optical Co. v. Reed*, 86 N.E.2d 306, 308 (Ind. Ct. App. 1949).

On this whole area of privacy, see generally the following: RESTATEMENT OF TORTS § 867 (1939); WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE 87-165 (1980); MORRIS L. ERNST & ALAN U. SCHWARTZ, PRIVACY: THE RIGHT TO BE LET ALONE (1962); MILTON R. KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE: RELIGION, SPEECH, PRESS, ASSEMBLY 128-56 (1957); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS ch. 20 (2d ed. 1955) [hereinafter PROSSER, HANDBOOK]; SAMUEL SPRING, RISKS & RIGHTS IN PUBLISHING, TELEVISION, RADIO, MOTION PICTURES, ADVERTISING, AND THE THEATER (2d ed. 1956); WILLIAM ZELERMYER, INVASION OF PRIVACY (1959); William M. Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212; Wilfred Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713 (1948); Peter A. Fields, *What's in a Stage Name?*, 35 S. CAL. L. REV. 149 (1962); Louis Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526 (1941); Marion D. Patterson, Jr., *Privacy: A Summary of the Past and Present*, 35 PA. BAR ASSOC. Q. 52 (1963); Roscoe Pound, *The Fourteenth Amendment and the Right of Privacy*, 13 CASE W. RES. L. REV. 34 (1961); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960) [hereinafter Prosser, *Privacy*]; Henry J. Reed, *Privacy: A Brief Commentary*, 1962 INS. L.J. 618; Leon R. Yanwick, *The Right of Privacy: Its Development, Scope and Limitations*, 27 NOTRE DAME LAW. 499 (1952); Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722 (1963)

Warren and Brandeis formulated broad guidelines for development of the privacy right. They argued that (1) the right should not be used to restrict or prohibit publication of matters which were of a public or general interest; (2) the right ceased, as such, upon the publication of the facts by the individual or with his consent, actual or implied; (3) the truth of the matter published should not be an adequate defense; (4) absence of malice on the part of the publisher himself should, further, be of no adequate defense to an invasion action; (5) in the absence of special damages, the law should not, in all probability, grant any redress for an invasion of privacy by a mere oral publication; and (6) the common remedies available to an aggrieved party should be recognized as an action for damages sounding in tort and, if the occasion warranted, use of the injunctive process.²⁴ Interestingly, the courts have followed generally these guidelines and have both expanded and restricted their application according to a case-by-case interpretation.

The fundamental qualification to right of privacy protection is "to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn."²⁵

B. Judicial v. Legislative Recognition

The progressive state of New York took the lead in 1903 in recognizing privacy rights after its judiciary decided in *Roberson v. Rochester Folding Box Company*²⁶ that, if positive action was to be taken within the general area of privacy, the legislature, rather than the courts, should do so.²⁷ However, the courts, for the most part, have achieved marked advances and success in recognizing the need for a general right of privacy.²⁸

[hereinafter *Defense of Newsworthiness*]; Jerome D. Elbaum, Note, 48 CORNELL L.Q. 360 (1963); Note, *Right of Privacy vs. Free Press: Suggested Resolution of Conflicting Values*, 28 IND. L. J. 179 (1953) [hereinafter Note, *Right of Privacy*].

24. Warren & Brandeis, *supra* note 13, at 214-19.

25. *Id.* at 215.

26. 64 N.E. 442, 443-44 (N.Y. 1902). See generally Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 803, 811-12 (2001) (discussing *Roberson*).

27. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1903). Section 50 provides: "A person, firm or corporation that uses for advertising purposes, or for the purpose of trade, the name, the portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his parents or guardian, is guilty of a misdemeanor." *Id.* § 50.

Section 51 provides that for violations of the preceding section, an aggrieved party may obtain an injunction to prevent and restrain the illegal action, as well as recover an award of damages. *Id.* § 51.

28. Protection of the right of privacy has received judicial approval in numerous jurisdictions. See *Reeves v. United Artists*, 572 F. Supp. 1231 (N.D. Ohio 1983) (discussing the right of privacy and the right of publicity under Ohio law); *Hazlitt v. Fawcett Publ'ns Inc.*, 116 F. Supp. 538 (D. Conn. 1953) (applying Oklahoma law); *Peay v. Curtis Publ'g Co.*, 78 F. Supp. 305 (D.D.C. 1948); *Smith v. Doss*, 37 So. 2d 118 (Ala. 1948); *Reed v. Real Detective Publ'g Co.*, 162 P.2d 133 (Ariz. 1945);

Startling though it may be, today England recognizes no legal right of privacy.²⁹ Instead, when cases arise that are concerned with privacy rights, the courts will endeavor to stretch the law of unfair competition, defamation, or copyright law to justify a compensatory award to the complainant, assuming he wins on the merits.³⁰

Dunlap v. McCarty, 678 S.W.2d 361 (Ark. 1984); Melvin v. Reid, 297 P. 91 (Cal. Dist. Ct. App. 1931) (recognizing right to pursue happiness without improper infringement by others); Korn v. Rennison, 156 A.2d 476 (Conn. Super. Ct. 1959); Barbieri v. News-Journal Co., 189 A.2d 773 (Del. 1963); Cason v. Baskin, 20 So. 2d 243 (Fla. 1944); Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905); Fergerstrom v. Hawaiian Ocean View Estates, 441 P.2d 141 (Haw. 1968); Baker v. Burlington N., Inc., 587 P.2d 829 (Idaho 1978); Eick v. Perk Dog Food Co., 106 N.E.2d 742 (Ill. App. Ct. 1952); Cont'l Optical Co. v. Reed, 86 N.E.2d 306 (Ind. App. 1949); Kunz v. Allen, 172 P. 532 (Kan. 1918); Brents v. Morgan, 299 S.W. 967 (Ky. 1927); Souder v. Pendleton Detectives, Inc., 88 So. 2d 716 (La. Ct. App. 1956); Estate of Berthiaume v. Pratt, 365 A.2d 792 (Me. 1976); Beane v. McMullen, 291 A.2d 37 (Md. 1972); Pallas v. Crowley, Milner & Co., 33 N.W.2d 911 (Mich. 1948); Young v. Jackson, 572 So. 2d 378 (Miss. 1990); Munden v. Harris, 134 S.W. 1076 (Mo. Ct. App. 1911); Sistok v. Northwestern Tel. Sys., Inc., 615 P.2d 176 (Mont. 1980); Norman v. City of Las Vegas, 177 P.2d 442 (Nev. 1947); Frey v. Dixon, 58 A.2d 86 (N.J. Ch. 1948); Blount v. T D Publ'g Corp., 423 P.2d 421 (N.M. 1966); Brown v. Boney, 255 S.E.2d 784 (N.C. Ct. App. 1979); Munley v. ISC Fin. House, Inc., 584 P.2d 1336 (Okla. 1978); Hinich v. Meier & Frank Co., 113 P.2d 438 (Or. 1941); Clayman v. Bernstein, 38 Pa. D. & C. 543 (1940); Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956); Truxes v. Kenco Enter., Inc., 119 N.W.2d 914 (S.D. 1963); State *ex rel.* Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89 (Tenn. Ct. App. 1987) (discussing the right of privacy and its cousin, the right of publicity); Nat'l Bonding Agency v. Demeson, 648 S.W.2d 748 (Tex. App. 1983); Donahue v. Warner Bros. Pictures Distrib. Corp., 272 P.2d 177 (Utah 1954); Staruski v. Cont'l Tel. Co. of Vt., 581 A.2d 266 (Vt. 1990); Roach v. Harper, 105 S.E.2d 564 (W. Va. 1958).

The question of a right of privacy has been left open in the following jurisdictions:

Smith v. Suratt, 7 Alaska 416 (1926); *McCreery v. Miller's Groceteria Co.*, 64 P.2d 803 (Colo. 1936); *Kelley v. Post Publ'g Co.*, 98 N.E.2d 286 (Mass. 1951).

See generally DAN B. DOBBS, *THE LAW OF TORTS* § 424-28 (2000) (describing the right of privacy); KEETON ET AL., *supra* note 20, ch. 20 (same).

29. ERNST & SCHWARTZ, *supra* note 23, at 228.

30. *Id.* In the United Kingdom, a Press Complaints Commission is charged with administering a Code of Practice, first published in 1991 and formulated by the newspaper and magazine industries, which seeks to guide and shape issues of privacy in media coverage. See Press Complaints Commission, *Code of Practice*, at <http://www.pcc.org.uk/cop/cop.asp> (last visited Sept. 26, 2002). The Code is not a legal document.

Under the section of the Code entitled "Privacy," an acknowledgment is made that "[e]veryone is entitled to respect for his or her privacy and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's life without consent." *Id.* Further, "[t]he use of long lens photography to take pictures of people in private places without their consent is unacceptable." *Id.* Private places "are public or private property where there is a reasonable expectation of privacy." *Id.* Journalists and photographers are admonished not to seek information "through intimidation, harassment or persistent pursuit." *Id.* Further, they are forbidden from photographing individuals in private places without consent and "must not persist in telephoning, questioning, pursuing or photographing individuals after having been asked to desist" "nor remain on their property after having been asked to leave and must not follow them." *Id.*

Michael Douglas and Catherine Zeta-Jones sought injunctive relief to prevent publication of their wedding pictures in the British tabloid *Hello!*. *Douglas v. Hello! Ltd.*, 2 All E.R. 289 (C.A. 2000). Plaintiffs asserted that an unknown guest, employee, or intruder had taken pictures of their wedding, the exclusive rights to which the couple had previously sold to a competing

III. PROSSER'S DELINEATION OF THE PRIMARY RIGHT

A. *The Classification—Its Problem*

Dean Prosser has made a truly admirable attempt to classify the right of privacy into four distinct torts.³¹ He classifies the Right of Privacy as follows: intrusion upon the seclusion or solitude of another, public disclosure of private facts, publicity that places another in a false light, and appropriation of another's name or likeness for one's own advantage.³² Within the first group are those cases in which the plaintiff's seclusion, solitude, or basic privacy has been invaded wrongfully. The paradigmatic case in this group is *De May v. Roberts*,³³ where a young man intruded upon a woman while she gave birth.³⁴

The second group is comprised of situations where embarrassing private facts are publicly disclosed. *Melvin v. Reid*,³⁵ which may be the landmark case in this area and as a commercial appropriations case, involved the production of a movie about a former prostitute's life of sin, shame, and excitement.³⁶

magazine, *OK!*. The Court of Appeal denied the claim for relief thereby allowing *Hello!* to publish the photographs. *Id.* at 316.

Lord Justice Brooke opined that any newspaper flouting section three of the Press Code was very likely to have its claim to freedom of expression trumped by privacy considerations. *Id.* at 314. Lord Justice Sedley concluded that "[t]he law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy." *Id.* at 320. *See also* Mark Elliott, *Privacy, Confidentiality and Horizontality: The Case of the Celebrity Wedding Photographs*, 60 CAMBRIDGE L.J. 231 (2001) (concluding that English recognition of concept of privacy is a welcome development).

31. *See* PROSSER, HANDBOOK, *supra* note 23, § 97.

32. *Id.*

33. 9 N.W. 146 (Mich. 1881).

34. *Id.* (allowing plaintiff to recover). Other examples of intrusion cases are *Bednarik v. Bednarik*, 16 A.2d 80 (N.J. Ch. 1940) (addressing illegal compulsory blood test); *Sutherland v. Kroger Co.*, 110 S.E.2d 716 (W. Va. 1959) (considering illegal search of a woman's shopping bag in a store); and *Rhodes v. Graham*, 37 S.W.2d 46 (1931) (involving wiretapping of private conversations).

35. 297 P. 91 (Cal. Dist. Ct. App. 1931) (allowing plaintiff to recover). In *Melvin* the court states:

Where a person has by his own efforts rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame and crime. Even the thief on the cross was permitted to repent during the hours of his final agony.

Id. at 93.

The courts have recognized an invasion of the privacy right under this grouping where a party's tardiness regarding his financial obligations have been published in a newspaper, *Trammell v. Citizen News Co.*, 148 S.W.2d 708 (Ky. 1941), or posted in a window on a public street by one of his creditors, *Brents v. Morgan*, 299 S.W. 967 (Ky. 1927). *But see* *Patton v. Jacobs*, 78 N.E.2d 789, 792 (Ind. Ct. App. 1948) (holding it was no invasion of privacy to communicate plaintiff's indebtedness to his employer).

36. *Melvin*, 297 P. at 91.

Since her “formative” years, the prostitute had reformed and led a life of respectability and sobriety as a housewife and a mother. When the movie was produced, the most embarrassing and sordid incidents of her early life were exposed for all to view.³⁷ In cases of this nature, the aggrieved party must demonstrate that the facts disclosed to the public were of a private nature rather than of a public nature and, further, that they were offensive and objectionable to a person of reasonable sensibilities.³⁸

Publicity that tends to place the complainant in a false and negative light in the public eye is the third tort of the right of privacy. For example, the use of another’s pictures,³⁹ or even his voice,⁴⁰ to illustrate a book, article, cartoon, or advertisement with which he has no reasonable or valid connection has been recognized as an unwarranted invasion of privacy.

The fourth and final classification, and the one with which this Article is primarily concerned, is comprised of cases where there has been commercial appropriation or unauthorized use of another’s name or picture for profit. Cases of this nature fall under the general subheading of the right of publicity. *Continental Optical Co. v. Reed*,⁴¹ a leading case typical of this area, involved the unauthorized use of the plaintiff’s picture in an advertising campaign which the defendant promoted.⁴²

Often, two or more—and quite conceivably all four—forms of invasion may be found in the same case. For example, in a good number of the commercial appropriation cases, the tort of putting one in a false light is definitely at work. And many times when one is put in a false light, he is also embarrassed about private facts disclosed in a false or fictitious manner.

The great majority of courts will only recognize a violation of the right of privacy and not attempt to classify the offense into one of Prosser’s four groups.⁴³ Dean Prosser suggests this is the “crux” of the whole problem in the general area of privacy.⁴⁴ While no one can doubt the eminence of Prosser in the field of torts and his genuineness of purpose in formulating the privacy classification, the cold fact remains that since the classification lacks stability and certainty, particularly as to its divisional lines, one should be more satisfied if a court sees fit to recognize a privacy invasion and not demand further categorical precision.

37. *Id.*

38. Prosser, *Privacy*, *supra* note 23, at 394-97.

39. *Peay v. Curtis Publ’g Co.*, 78 F. Supp. 305 (D.D.C. 1948) (plaintiff’s photograph used to illustrate magazine article).

40. *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962).

41. 86 N.E.2d 306 (Ind. App. 1949).

42. *Id.* at 307. See discussion *infra* Part IV.

43. For a general discussion of these four groups or subclassifications, see PROSSER, *HANDBOOK*, *supra* note 23, at 637-40; Prosser, *Privacy*, *supra* note 23.

44. Prosser, *Privacy*, *supra* note 23, at 407.

As one scholar surmises, "Second Circuit Judge Jerome Frank severed the right of publicity from the right of privacy,"⁴⁵ which the Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*⁴⁶ followed. Thus, "Publicity rights thereafter came to be viewed as property rights protecting exclusively economic interests, as opposed to 'personal' privacy rights, where the relevant damage is to feelings and human dignity."⁴⁷ Concurrent with this judicial truncation, the publicity right was still tied to Prosser's fourth group of privacy law.⁴⁸ Here is where the dilemma and uncertainty among policymakers commences and considers whether the right to publicity is solely an economic interest or one that incorporates the protection of personal autonomy. As will be seen, California and Indiana have come the closest to walking the tightrope between both views.⁴⁹

IV. COMMERCIAL APPROPRIATION AND INVASIONS OF PRIVACY

"For Warren and Brandeis, privacy meant some degree of control, recognized by tort law, over the dissemination of personal information to the public by the press."⁵⁰ The Indiana Court of Appeals has adopted the general rule⁵¹ that an invasion of privacy consists of either

[t]he unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibility.⁵²

A. Acts of Appropriation

The commercial appropriation cases present a fairly unique situation because their holdings have created for every individual something analogous

45. Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 406 (1999).

46. 433 U.S. 562 (1977). See discussion *infra* notes 137-44 and accompanying text.

47. Haemmerli, *supra* note 45, at 407.

48. *Id.*

49. See discussion *infra* Part IX.

50. Note, *Privacy, Photography, and the Press*, 111 HARV. L. REV. 1086, 1087 (1998).

51. See R.T. Kimbrough, Annotation, *Right of Privacy*, 138 A.L.R. 22, 25 (1942).

52. *Cont'l Optical Co. v. Reed*, 86 N.E.2d 306, 308 (Ind. App. 1949) (quoting Kimbrough, *supra* note 51, at 25); see also RESTATEMENT OF TORTS § 867 ("A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."). Comment (d) states that "liability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues." *Id.* § 867 cmt. d.

to a common law trademark in his own likeness or a “copyright” in his name or image.⁵³ The cases clearly indicate that courts will recognize a commercial appropriation when a publication, which purports to disseminate news or information, becomes either fictionalized or overdramatized.⁵⁴ An article becomes fictionalized when it does more than merely report the event or news item in question in a straightforward, factual manner.⁵⁵ Quite naturally, if one uses an element of another’s character or personality to gain an economic advantage or value for his product, this too is held to be a commercial appropriation.⁵⁶

Celebrity personas may be appropriated freely for what are deemed to be primarily “informational” and “entertainment” purposes.⁵⁷ Except in rare 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,”⁵⁸ as these are considered newsworthy information to which the public should have free access. On the other hand, the commercial and advertising values associated with celebrities are privately held.⁵⁹ “By virtue of what is now widely known as the ‘right of publicity,’ 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.”⁶⁰

Congress, in a bill not yet passed into law, and the State of California define “‘for commercial purposes’ [as:] with the expectation of sale, financial gain, or other consideration.”⁶¹

B. *The Fact-fiction Differentiation*

The fact-fiction differentiation, which is brought into play in commercial appropriation cases, does not mean the factual material will be privileged. Instead, what the differentiation merely suggests is, if the questioned material

53. Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2391 (1996).

54. *Leverton v. Curtis Publ’g Co.*, 192 F.2d 974, 977 (3d Cir. 1951); *Hazlitt v. Fawcett Publ’ns*, 116 F. Supp. 538, 545 (D. Conn. 1953); *Reed v. Real Detective Publ’g Co.*, 162 P.2d 133 (Ariz. 1945); *Gill v. Curtis Publ’g Co.*, 239 P.2d 630, 635 (Cal. 1952).

55. *Hazlitt*, 116 F. Supp. at 545; Note, *Right of Privacy*, *supra* note 23, at 184.

56. See *Fairfield v. Am. Photocopy Equip. Co.*, 291 P.2d 194 (Cal. Dist. Ct. App. 1955); *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 81 (Ga. 1905) (finding that publication of someone’s picture without his consent, for mere advertising or pecuniary purposes, is an invasion of the right of privacy); *Cont’l Optical Co.*, 86 N.E.2d at 309; *Hinish v. Meier & Frank Co.*, 113 P.2d 438, 448 (Or. 1941).

57. Madow, *supra* note 10, at 130.

58. *Id.*

59. *Id.*

60. *Id.*

61. S. 2103, 105th Cong. § 1822(a)(1)(A) (1998); CAL. CIV. CODE § 1708.8(j) (West Supp. 2002).

is factual, its newsworthy value as a publication will be weighed against the harm incurred by the person whom the writing concerns. However, if the question matter is fictional, the possibility of balancing is foreclosed.⁶² Thus, a newspaper can report on the divorce of Tom Cruise and Nicole Kidman as a factual matter without incurring a lawsuit because the newsworthiness outweighs the privacy interest.⁶³ In a recent case exemplifying this balancing test, a federal judge dismissed Tommy and Pamela Anderson Lee's lawsuit against Penthouse.⁶⁴ The "stars" sued for invasion of privacy and commercial gain because the magazine printed pictures of the couple partially clothed.⁶⁵ The judge dismissed the case, saying the intimate photos were accompanied by a "newsworthy" article and had been published earlier in other magazines, making them no longer private.⁶⁶

C. Public Figures and Their Loss of Privacy

Warren and Brandeis stated that a celebrity became a public figure, and thus waived his privacy, only as to those matters already public and to those which directly bore upon him.⁶⁷ Unfortunately, the law today is not quite so narrow. A public figure is defined usually as "[a] person who, by his accomplishments, fame, or mode of life, or by adopting a profession or calling . . . gives the public a legitimate interest" in his affairs and character.⁶⁸ An individual who meets the above definition waives his right to privacy, not only because he sought publicity and either consented actually or impliedly to it, but also because his actions allowed his personality to become "public."⁶⁹ Equally important is the fact that the press has a guaranteed privilege to inform the public on all matters of public interest.⁷⁰ This broad concept of "public figure" has been held to include not only those individuals who have sought the public eye, but also those who, through no effort of their own, are catapulted involuntarily into the limelight by a newsworthy event.⁷¹

62. Note, *Right of Privacy*, *supra* note 23, at 184.

63. However, a divorce lawyer using the two celebrities images in an advertisement for his services would face an action for infringement of publicity rights.

64. *Judge Rules Lee Photos Are No Longer Private*, BALTIMORE SUN, Mar. 22, 1997, at 2D; *Lees Lose Out*, WASH. POST, Mar. 22, 1997, at B3.

65. *Lees Lose Out*, *supra* note 64.

66. *Id.*

67. Warren & Brandeis, *supra* note 13, at 214-16.

68. *Cason v. Baskin*, 20 So. 2d 243, 251 (Fla. 1944) (quoting 41 AM. JUR. *Privacy* § 18 (1942)).

69. *Id.* at 251.

70. *Id.* In *Corliss v. E.W. Walker Co.*, 64 F. 280, 282 (C.C.D. Mass. 1894), the court stated "[a] statesman, author, artist, or inventor, who asks for and desires public recognition, may be said to have surrendered this right to the public."

71. *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940); *Cason*, 20 So. 2d at 251. See Reed, *supra* note 23, at 619.

Whether a lapse of time extinguishes the actual or implied consent given by a public figure, and the press' corresponding privilege of reporting "newsworthy" items, is a most crucial question. The rule is that a lapse of time will not necessarily destroy the newsworthy nature of a public figure or a public matter.⁷² In essence then, once someone becomes a public figure, he will remain one. The 1963 case of *Barbieri v. New Journal Company*⁷³ states clearly the law as "[a] lapse of time, in itself, [neither] recreates [nor] reinstates, a plaintiff's prior right of privacy, because the right of the press to republish the unpleasant facts still exists if those facts are 'newsworthy', i.e., if they still are of legitimate public concern."⁷⁴

*Sidis v. F-R Publishing Corp.*⁷⁵ is the leading case in the area of time lapse. The court held that the publication of an article entitled "*Where are they now?*," which described in great detail the present and rather pathetic life of a former child genius who graduated from Harvard at the age of sixteen but who since that time had abandoned his widely publicized academic pursuits and fallen into obscurity, was *not* an invasion of privacy.⁷⁶ Thus, twenty-seven years after his graduation from college, Sidis remained a newsworthy public figure.⁷⁷

D. Stage Names

In construing the New York privacy statute,⁷⁸ it has been held that the statute protects only real or genuine names from commercial appropriation, not merely professional names.⁷⁹ However, this distinction is a most unjust refusal by the court to allow an individual protection of his professional name under

72. *Wagner v. Fawcett Publ'ns*, 307 F.2d 409 (7th Cir. 1962); *Carlisle v. Fawcett Publ'ns, Inc.*, 20 Cal. Rptr. 405, 414 (Cal. Dist. Ct. App. 1962); *Barbieri v. News-Journal Co.*, 189 A.2d 773, 775 (Del. 1963).

73. 189 A.2d 773 (Del. 1963).

74. *Id.* at 775 (citation omitted). *See also Wagner*, 307 F.2d at 411 (holding that the publication of stories of the rape-murder of plaintiff's daughter two months after the crime occurred was current, and thus of "news value," on the sole basis that the evidence showed on rehearing that legal proceedings were taking place against the accused at the time of the publication).

75. 113 F.2d 806 (2d Cir. 1940).

76. *Id. But cf. McAndrews v. Roy*, 131 So. 2d 256, 259 (La. Ct. App. 1961) (holding that the plaintiff's right of privacy was invaded because ten years was too much of a lapse of time between the date of original authorization for use of his picture and the date of publication).

77. *Sidis*, 113 F.2d at 809.

78. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1992).

79. *Davis v. R.K.O. Radio Pictures, Inc.*, 16 F. Supp. 195, 196 (S.D.N.Y. 1936). In this leading case, the plaintiff was a psychic who had adopted and used the stage name of "Cassandra" in her capacity as both a fortune-teller and an author-lecturer. *Id.* at 195. She complained that the defendant's production of a movie entitled "Countess Cassandra" portrayed the fictitious countess as a "doubledealing" fortune teller and, as such, invaded her privacy and appropriated her name for commercial use. *Id.* at 196. *Accord West v. Lind*, 9 Cal. Rptr. 288, 292 (Cal. Dist. Ct. App. 1960) (doubting that the actress Mae West had a "property right" in the stage name "Diamond Lil"). *But see Chaplin v. Amador*, 269 P. 544 (Cal. Dist. Ct. App. 1928) (holding Charlie Chaplin's name, as well as his dress and pantomime techniques, is protected).

a privacy theory. The courts have seemingly overlooked the fact that stage names often become so identified with a particular individual as to become an aspect of his true identity and personality. However, where the personal name is the real name of the complaining party, there is no question today that the name will be protected if sufficient invasion is shown.⁸⁰

E. Commercial Advertising

Advertising campaigns are always fertile ground for privacy invasions. In the advance publicity campaign for one of its new movies, a defendant motion picture studio published fictitious letters by the leading actress of the forthcoming production.⁸¹ The letter was rather "suggestive," and, as the fates would have it, the actress who signed the letter had the same name as the plaintiff.⁸² Although the defendant had no intent whatsoever to refer in his letters to the plaintiff—and further did not even know of her existence—the court found that the plaintiff's privacy had been invaded, stating, "The question is not so much who was aimed at as who was hit."⁸³

Reenactments in the movies of heroism and the daring of law enforcement agents and others,⁸⁴ as well as expositions of athletic prowess, such as Babe Ruth's home-run techniques,⁸⁵ have been allowed under a privilege of reporting and commenting on "news matters." The radio and television networks may

80. Fields, *supra* note 23, at 149. See also Dawn H. Dawson, Note, *The Final Frontier: Right of Publicity in Fictional Characters*, 2001 U. ILL. L. REV. 635, 662-68 (arguing for a federal statute which would grant to an actor portraying a fictional character a right of publicity in the character to the extent the actor's own character's use evokes the very identity of the actor himself).

81. Kerby v. Hal Roach Studios, Inc., 127 P.2d 577, 578 (Cal. Dist. Ct. App. 1942).

82. *Id.* at 579. The letter read:

Dearest:

Don't breath it to a soul, but I'm back in Los Angeles and more curious than ever to see you. Remember how I cut up about a year ago? Well, I'm raring to go again, and believe me I'm in the mood for fun.

Let's renew our acquaintanceship and I promise you an evening you won't forget. Meet me in front of Warners Downtown Theater at 7th and Hill on Thursday. Just look for a girl with a gleam in her eye, and a smile on her lips and mischief on her mind!

Fondly,

Your ectoplasmic playmate,

Marion Kerby

Id. at 579.

83. *Id.* at 581 (quoting Corrigan v. Bobbs-Merrill Co., 126 NE. 260, 262 (N.Y. 1920). *But cf.* O'Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir. 1941) (holding plaintiff waived his right of privacy in part because he was the most publicized football player of 1938 and 1939 and therefore could receive no injunction or damages for use of his picture in full uniform for advertising purposes by Pabst Blue Ribbon Beer Sales Company).

84. Humiston v. Universal Film Mfg. Co., 178 N.Y.S. 752 (N.Y. App. Div. 1919).

85. Ruth v. Educ. Films, Inc., 184 N.Y.S. 948 (1920).

also comment about news events or “public figures” and further dramatize these events if in the public interest.⁸⁶

F. *Animals, Decedents and Corporate Bodies*

An individual’s legal right is a *personal* right and does not extend, for example, to members of his own family unless their individual right of privacy is also invaded.⁸⁷ Further, the right is neither assignable⁸⁸ nor does it survive after death⁸⁹ unless statutes so provide. Thus, when the questionable publication concerns a deceased person, the members of his immediate family have no right of action for invasion of their privacy unless they themselves were substantially featured in the article, notwithstanding any embarrassment, shame, or humiliation they may have suffered.⁹⁰

Of interest is the fact that animals⁹¹ and corporate bodies⁹² are not protected by the right of privacy. As stated in *Rosenwasser v. Ogoglia*,⁹³ the privacy right of an individual must be limited to natural beings simply because the main purpose of the right to privacy is to enhance and ensure human peace and happiness.⁹⁴ However, corporations are adequately protected against misuse of their names under the law of trademarks and unfair competition.

G. *The Indiana Position*

A significant Indiana case on invasion of privacy through commercial appropriations is *Continental Optical Company v. Reed*.⁹⁵ Here, the plaintiff,

86. *Ettore v. Philco Television Broad. Corp.*, 126 F. Supp. 143, 151 (E.D. Pa. 1954); *Cohen v. Marx*, 211 P.2d 320, 321 (Cal. Dist. Ct. App. 1949); ZELERMYER, *supra* note 23, at 125-37.

87. *Rozhon v. Triangle Publ’ns, Inc.*, 230 F.2d 359 (7th Cir. 1956); *Coverstone v. Davies*, 239 P.2d 876, 881 (Cal. 1952).

88. *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*, 78 F.2d 763, 766 (5th Cir. 1935).

89. *Rozhon*, 230 F.2d at 359; *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285, 285 (Mich. 1899). *But see* *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1354-55 (D.N.J. 1981).

90. *Runyon v. United States*, 281 F.2d 590, 592 (5th Cir. 1960); *Bradley v. Cowles Magazines, Inc.*, 168 N.E.2d 64, 66 (Ill. App. Ct. 1960). *But see* *Bazemore v. Savannah Hosp.*, 155 S.E. 194, 197 (Ga. 1930) (allowing recovery to the parents whose deformed child was photographed, without their permission, while in the hospital for treatment). The *Bazemore* court stressed that it was recognizing a right of privacy in the living, the parents in this case, rather than in the dead. *Id.* at 197.

91. *Cf. Gautier v. Pro-Football, Inc.*, 106 N.Y.S. 2d 553, 560 (N.Y. App. Div. 1951) (holding that New York’s privacy law was inapplicable to animal trainer’s act).

92. *Vassar Coll. v. Loose-Wiles Biscuit Co.*, 197 F. 982, 985 (W.D. Mo. 1912).

93. 158 N.Y.S. 56 (N.Y. App. Div. 1916).

94. *Id.* at 57.

95. 86 N.E.2d 306 (Ind. App. 1949). In fact, only three other cases were found within the whole general area of privacy: *State ex rel. Mavity v. Tyndall*, 74 N.E.2d 914 (Ind. 1947), *Voelker v. Tyndall*, 75 N.E.2d 549 (Ind. 1947) and *Patton v. Jacobs*, 78 N.E.2d 789 (Ind. Ct. App. 1948). Both *Mavity* and *Voelker* held that, although a citizen may have a right in his fingerprints as well as his photograph, the need for the state to establish and maintain an efficient and coordinated system of identification in its law enforcement activities gives it the privilege

an optical lens grinder by trade, brought this action claiming that the defendant optical company used his photographic likeness for advertising purposes without first receiving his authorization.⁹⁶ The trial court awarded the plaintiff \$20,000 in damages.⁹⁷ However, on appeal a remittur was ordered of \$19,000.⁹⁸

While plaintiff was serving in the army during World War II with a mobile optical unit near the frontlines in France, his photograph was taken by the army in an attempt to bolster the home-front morale.⁹⁹ Subsequently, the picture appeared in many United States publications, and the defendant proceeded to appropriate it as part of its advertising layout. Plaintiff claimed his picture, by innuendo, represented falsely to the public that he endorsed the defendant's products; that his privacy was invaded; and that, because of the picture, he himself could not advertise effectively in his own private business as an optician.¹⁰⁰

The appellate court held that although the plaintiff became a "public person" when he entered the service, thereby waiving his privacy as to his service activities, he had not given an unrestricted license to private business for use of the photograph in merchandising and advertising.¹⁰¹

In retrospect, then, it is seen that the truth,¹⁰² mistake,¹⁰³ absence of malice,¹⁰⁴ nor lack of special damages is a defense to a privacy action.¹⁰⁵ In fact, substantial damages may even be awarded for presumed mental distress inflicted and other probable harm without proof of actual damages.¹⁰⁶ Consent, either real or implied, and the privilege of reporting and commenting about newsworthy matters are the only real defenses available in this area of discussion.¹⁰⁷

of taking pictures and fingerprints of all individuals who violate the law and who are arrested, irrespective of whether such individuals are later acquitted. *Mavity*, 74 N.E.2d at 917; *Voelker*, 75 N.E.2d at 550-51. Because of this state privilege there can be no valid claim for invasion of privacy on the part of a citizen involved in a similar situation in Indiana.

96. *Cont'l Optical*, 86 N.E.2d at 307-10.

97. *Id.* at 307.

98. *Id.* at 310.

99. *Id.* at 308.

100. *Id.*

101. *Id.* at 308-10.

102. *Brents v. Morgan*, 299 S.W. 967, 970 (Ky. 1927). One possible exception to this rule is found in cases where the plaintiff is put in a "false light" before the public. *Prosser, Privacy*, *supra* note 23, at 419.

103. *Barber v. Time, Inc.*, 159 S.W.2d 291, 295 (Mo. 1942).

104. *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806, 809-10 (2d Cir. 1940); *Kerby v. Hal Roach Studios, Inc.*, 127 P.2d 577, 581 (Cal. Dist. Ct. App. 1942).

105. *Reed v. Real Detective Publ'g Co.*, 162 P.2d 133, 139 (Ariz. 1945) (citations omitted).

106. *Sutherland v. Kroger Co.*, 110 S.E.2d 716, 724 (W. Va. 1959).

107. *Prosser, Privacy*, *supra* note 23, at 419-21.

H. *The California Judicial Approach*

In contrast, the Supreme Court of California in *Polydoras v. Twentieth Century Fox Film Corp.*¹⁰⁸ examined a case in which a man's name and likeness were copied allegedly for the main character in the movie "The Sandlot."¹⁰⁹ The court ruled that filmmakers could base fictional characters on real people, even using their names and likenesses, without violating the right to privacy as long as they did not defame the person or intrude on the person's private life.¹¹⁰

The appellant did not establish a direct connection between the use of his name or likeness and a commercial purpose.¹¹¹ "As a matter of law, mere similarity or even identity of names is insufficient to establish a work of fiction is of and concerning a real person."¹¹² The court also went on to observe that "[f]ilm is a 'significant medium for the communication of ideas' and, whether exhibited in theaters or on television, is protected by constitutional guarantees of free expression."¹¹³

V. THE CONSTITUTION AND THE RIGHT OF PRIVACY

A. *The Guarantee of Freedom of the Press and the Need for an "Informed" Citizenry Versus the Right to be Let Alone*

It has been said that publicity rights force us away from "[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."¹¹⁴ In a democracy, preservation of individual liberties is of prime importance. However, equally important to the stability of democracy is the ever-vigilant press—whose express duty it is to engender and, indeed, create a forum of ideas, and to provide information upon which rational self-rule may be based.

It would seem that the freedom of the press must include two inseparable elements: the publisher's right to publish and the people's right to an adequate press.¹¹⁵ While the First Amendment ensures that no law will be made which abridges freedom of speech or the press,¹¹⁶ this very basic constitutional

108. 79 Cal. Rptr. 2d 207 (Cal. Ct. App. 1997).

109. *Id.* at 208.

110. *Id.* at 212.

111. *Id.* at 210.

112. *Id.* at 209 (quoting *Aguilar v. Universal City Studios, Inc.*, 219 Cal. Rptr. 891, 892 (Ct. App. 1997)).

113. *Id.* at 210 (citations omitted).

114. Madow, *supra* note 10, at 146. See generally Thomas Glenn Martin, Jr., *Rebirth and Rejuvenation in a Digital Hollywood: The Challenge Computer-Simulated Celebrities Present for California's Antiquated Right of Publicity*, 4 UCLA ENT. L. REV. 99 (1996) (discussing harmonizing the right of publicity with the use of computer-simulated celebrities).

115. Note, *Right of Privacy*, *supra* note 23, at 181.

116. U.S. CONST. amend. I.

principle comes into direct conflict with the legal right of privacy.¹¹⁷ To give one is to deprive the other.¹¹⁸ Therefore, a thin line of demarcation must be drawn carefully on a case-by-case analysis.

Justice Brandeis, in a dissenting opinion in *Olmstead v. United States*,¹¹⁹ stated that "the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men."¹²⁰ He added, "To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."¹²¹ In *Wolf v. Colorado*¹²² Justice Frankfurter took the position that the right of due process guaranteed under the Fourteenth Amendment could always be used to enforce basic rights (i.e., the right of privacy) inherent in a free society.¹²³

In 1952, the Supreme Court held in *Joseph Burstyn, Inc. v. Wilson*¹²⁴ that not only was a motion picture to be considered part of the press, but that all forms of communication were to be recognized as fulfilling an important role in furnishing an adequate press.¹²⁵

Names are News. This is a primary tenet of the modern journalist. News generally includes all events and items of information out of the ordinary humdrum routine of daily life which have that "indefinable quality of interest, which attracts public attention."¹²⁶ Therefore, news would include the birth of a child to a twelve-year-old girl,¹²⁷ as well as a suicide.¹²⁸ For the most part, courts have been quite liberal in interpreting almost any article which appears in a newspaper as news, regardless of whether it is printed in news columns, feature pages, or magazine sections.¹²⁹

So far as the First Amendment is concerned, the basic test of limitation is that "the right of the press in disseminating news is paramount to an individual's right of privacy" when such news is of general interest to the community.¹³⁰ Thus, the chief question posited by every privacy problem is

117. See generally KONVITZ, *supra* note 23, at 131 (discussing the "clash" between the right to be let alone and the right to print the truth); Pound, *supra* note 23, at 43 (noting that the freedom of the press is a "competing right"); *Defense of Newsworthiness*, *supra* note 23, at 723 (noting possible collision with freedom of expression); Note, *Right of Privacy*, *supra* note 23 (noting that the right of privacy and the freedom of the press clash repeatedly).

118. Patterson, *supra* note 23, at 52-54.

119. 277 U.S. 438 (1928).

120. *Id.* at 478 (Brandeis, J., dissenting).

121. *Id.*

122. 338 U.S. 25 (1949).

123. *Id.* at 27-28.

124. 343 U.S. 495 (1952).

125. *Id.* at 499-502.

126. *Sweeek v. Pathe News, Inc.*, 16 F. Supp. 746, 747 (E.D.N.Y. 1936) (quoting *Associated Press v. Int'l News Serv.*, 245 F. 244, 248 (2d Cir. 1917)).

127. *Meetze v. Associated Press*, 230 S.C. 330, 333, 95 S.E.2d 606, 607 (1956).

128. *Samuel v. Curtis Publ'g Co.*, 122 F. Supp. 327, 329 (N.D. Cal. 1954).

129. *Defense of Newsworthiness*, *supra* note 23, at 731 n.28.

130. Patterson, *supra* note 23, at 54.

whether the educational and news value of a movie, drama, or written publication, weighed in relation to the ever-present commercial factor, and in respect to the individual's harm, is sufficient to permit publication without liability.

VI. WHAT OF THIS SO-CALLED "RIGHT OF PUBLICITY?"

As a preliminary matter, right of publicity protection does not require the plaintiff to have celebrity status. If the cases that best illustrate the current state of the law often involve celebrities, it is because the more widely known the plaintiff, the greater the commercial value of his identity, and the more likely the advertiser will engage in conduct leading to litigation with respect to that identity.¹³¹ The right of publicity, in its simplest form, is the right to control the commercial use of one's persona.¹³²

A. Recognizing a Right of Publicity

*Uproar Co. v. NBC*¹³³ is regarded as the first reported case where the courts inferred that they would recognize a right of publicity.¹³⁴ Judge Jerome Frank, twenty-three years later, firmly enunciated the legal status of this new right.¹³⁵ Today, the right of publicity is based largely upon the realization that even though a complaining party may have waived some or all of his privacy rights, his very name or picture may have such a monetary or otherwise commercial value that the defendant, by use thereof, would gain an unfair economic

131. See Alexander C. Giftos, *The Common Law Right of Publicity and Commercial Appropriation of Celebrity Identity: "A Whole New Wardrobe for Vanna,"* 38 ST. LOUIS U. L.J. 983, 985 (1994) (listing celebrity plaintiffs who have been involved in right of publicity actions).

132. Jonathan L. Faber, *Indiana: A Celebrity-friendly Jurisdiction*, RES GESTAE, Mar. 2000, at 24.

133. 8 F. Supp. 358 (D. Mass. 1934).

134. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 219 (1954).

135. *Haelan Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). Judge Frank stated:

[I]n addition to and independent of that right of privacy . . . , a man has a right in the publicity value of his photograph

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 public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

Id. at 868.

advantage or profit when the benefits belong rightfully to the complainant himself.¹³⁶

B. *The Supreme Court Speaks*

The Supreme Court formally recognized in *Zacchini v. Scripps-Howard Broadcasting Co.*¹³⁷ that the right of publicity is a valid cause of action.¹³⁸ *Zacchini* involved the plaintiff's human cannonball act performed at a county fair.¹³⁹ Apparently, a local news program had taped the plaintiff's act and subsequently broadcast the act in its entirety on the evening news.¹⁴⁰ In overturning the Ohio Supreme Court's ruling, the United States Supreme Court held that the television station was not shielded by the First Amendment.¹⁴¹ It viewed the unauthorized telecast of the plaintiff's human cannonball act as a threat to the economic value of his act.¹⁴² The Court noted that free access to the entirety of the plaintiff's act would deter paid attendance by a public otherwise willing to pay the cost of admission.¹⁴³ It stated that "[n]o social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and [for] which [the defendant] would normally pay."¹⁴⁴ While the *Zacchini* case does not concern the use of the plaintiff's act to advertise a particular product, it does stand for the proposition that misuse of a particular attribute of a right of publicity might impair the future economic value of the attribute. The Court "focus[ed] on the right of the individual to reap the reward of his endeavors."¹⁴⁵ Public broadcast of the plaintiff's act was seen to have the potential to sate the public's appetite for daring deeds, enough to conjure up the old adage: "Why buy the cow if you're getting the milk for free?"

136. Fields, *supra* note 23, at 157; *see also* Nimmer, *supra* note 134, at 205 (noting that the right of privacy is inadequate because it does not protect celebrities from the appropriation by others of the valuable use of his name or portrait).

137. 433 U.S. 562 (1977).

138. *Id.*

139. *Id.* at 563.

140. *Id.* at 563-64.

141. *Id.* at 579.

142. *Id.* at 575.

143. *Zacchini*, 433 U.S. at 575.

144. *Id.* at 576 (quoting Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966)).

145. Haemmerli, *supra* note 45, at 401 (quoting *Zacchini*, 433 U.S. at 573). *See also* Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836, 858-65 (1983) (discussing *Zacchini* and noting that the case requires some assessment of the extent to which the plaintiff's property interest was impaired by the defendant's action).

VII. CASE PRECEDENTS

In *Lombardo v. Doyle, Dane & Bernbach, Inc.*¹⁴⁶ the court dealt with a common law claim of right of publicity.¹⁴⁷ The court held that entertainer Guy Lombardo had an actionable claim for violation of his right of publicity.¹⁴⁸ In *Lombardo* the defendant ran a television advertisement where an actor, bearing no resemblance to the plaintiff, depicted a bandleader “with the same gestures, musical beat and choice of music . . . with which plaintiff had been associated in the public’s mind for several decades.”¹⁴⁹ Notwithstanding the lack of resemblance, the court viewed the defendant’s actions as an appropriation of the plaintiff’s identity in which he “had invested 40 years”¹⁵⁰ and which had “some marketable status.”¹⁵¹ The court called the use of Lombardo’s identity “deceptive” without elaboration.¹⁵²

*Lahr v. Abell Chemical Co.*¹⁵³ illustrates clearly the problem that this new, emerging right of publicity encounters in the courts. In *Lahr*, Bert Lahr, a professional actor and entertainer well-known for his distinctive style of “vocal comic delivery” involving an “original combination of pitch, inflection, accent and comic sounds,” maintained an action against the defendant company alleging invasion of privacy, defamation, and unfair competition.¹⁵⁴ The defendant, advertising the detergent “Lestoil,” produced a filmed commercial that featured an animated cartoon of a talking duck whose voice simulated and mimicked Lahr’s.¹⁵⁵ Although the lower court dismissed the complaint for failure to state a cause of action,¹⁵⁶ the appellate court reversed, stating that although Lahr had no cause of action for invasion of privacy under either Massachusetts or New York law, the allegations were sufficient to sustain the complaint on grounds of defamation and unfair competition.¹⁵⁷

It is important to note that defamation is designed as a remedy to compensate for injury to reputation.¹⁵⁸ This being so, it is a rather ineffectual basis for recovery of the value of any commercial appropriations. However, the right of privacy is much broader than defamation because it is designed as a remedy for invasion of an individual’s feelings or right to be left alone.¹⁵⁹

146. 396 N.Y.S.2d 661 (N.Y. App. Div. 1977).

147. *Id.* at 663.

148. *Id.* at 665.

149. *Id.* at 665 (Titone, J., concurring).

150. *Id.* at 664.

151. *Id.*

152. *Lombardo*, 396 N.Y.S.2d at 665.

153. 300 F.2d 256 (1st Cir. 1962).

154. *Id.* at 257.

155. *Id.*

156. *Lahr v. Adell Chem. Co.*, 195 F. Supp. 702, 704 (D. Mass. 1961).

157. *Lahr*, 300 F.2d at 258-59.

158. PROSSER, HANDBOOK, *supra* note 23, § 92.

159. See KONVITZ, *supra* note 23, at 128-36 (discussing Brandeis and Warren’s foundation for the right of privacy).

Stated otherwise, an action for commercial appropriation is chiefly designed to protect a commercial interest, whereas an action for defamation is primarily designed to safeguard a dignitary interest of an aggrieved party.¹⁶⁰ Moreover, special damages in publicity actions do not have to be alleged and proved, as in defamation.¹⁶¹

*Motschenbacher v. R.J. Reynolds Tobacco Co.*¹⁶² involved a plaintiff who was a well-known race car driver.¹⁶³ The plaintiff alleged that the use of a color photograph of his race car in defendant's television advertisement misappropriated his name, likeness, personality, and endorsement.¹⁶⁴ The defendant had changed the numbers on all race cars in the background and on the plaintiff's car in the foreground of the advertisement.¹⁶⁵ Additionally, the defendant added a "spoiler" to the plaintiff's car.¹⁶⁶ The defendant had also removed and changed advertisements on the plaintiff's car to reflect an endorsement of the defendant's product.¹⁶⁷ Other than these three minor alterations, the defendants did nothing else to alter the appearance of the plaintiff's car.¹⁶⁸ Plaintiff contended that the design and decoration of his race car was so distinctive and individualized that, despite defendant's alteration, the car was instantly recognizable as his.¹⁶⁹ While his name and likeness were not used at any point in the advertisement, the court held that the facts supported a triable issue for a jury.¹⁷⁰ The court determined that an individual not only has a proprietary interest in his image, name, and likeness, but he also has a proprietary interest in his "identity."¹⁷¹ Conceivably, a jury could have found that the defendant's actions misled the public into believing that the plaintiff endorsed defendant's product.

160. Fred M. Weiler, *The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT. L.J. 223, 228 (1994). Weiler is quick to cite examples showing that the harm incurred by the celebrity whose right to publicity has been violated will not always be exclusively monetary. For instance, he suggests that the celebrity may find the very act of celebrity endorsements to be repugnant. And even the celebrity for whom compensated advertising is an option may have cause for concern that his image and reputation are being linked with a product which is in his estimation of inferior quality. Lastly, Weiler suggests that the injured celebrity may be subject to ridicule among his colleagues, unaware of the unauthorized nature of the advertising, for selling out. *Id.* at 228 n.41. (referring to *Lugosi v. Universal Pictures*, 603 P.2d 425, 439 n.11 (Cal. 1979)).

161. *See Reed v. Real Detective Publ'g Co.*, 162 P.2d 133, 139 (Ariz. 1945) (citations omitted); *Sutherland v. Kroger Co.*, 110 S.E.2d 716, 724 (W. Va. 1959).

162. 498 F.2d 821 (9th Cir. 1974).

163. *Id.* at 822.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Motschenbacher v. R.J. Reynolds Co.*, 498 F.2d 821, 822 (9th Cir. 1974).

169. *Id.*

170. *Id.* at 827.

171. *Id.* at 825.

In *Midler v. Ford Motor Co.*¹⁷² the Ninth Circuit had occasion to review the claim of singer/actress Bette Midler for invasion of her right of publicity.¹⁷³ Contrary to *Lahr*,¹⁷⁴ the right addressed by the court in *Midler* was derived from the common law right of privacy,¹⁷⁵ not the common law defamation action. Similar to *Lahr*, *Midler* involved the use of a celebrity sound-alike by a company for several of its advertisements.¹⁷⁶

The defendant, Ford Motor Company, aired television spots featuring a rendition of the song “Do You Want To Dance?,”¹⁷⁷ which Bette Midler had recorded in 1973.¹⁷⁸ The court noted that Ford had hired a former background singer from Midler’s band after attempts to hire Midler had failed.¹⁷⁹ The hired singer was told to sound as much like Midler as possible. Although neither Midler’s name nor picture appeared anywhere in the advertisement, many people who saw it were convinced that the voice in the commercial was Midler’s.¹⁸⁰ Finding in favor of Midler, the court said “the defendants here used an imitation to convey the impression that Midler was singing for them.”¹⁸¹ The court declared the defendant’s conduct was an appropriation of the attributes of the plaintiff’s identity.¹⁸² “A voice,” the court said, “is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested. We are all aware that a friend is at once known by a few words on the phone.”¹⁸³

The Ninth Circuit next dealt with the “voice misappropriation” issue in *Waits v. Frito-Lay, Inc.*¹⁸⁴ In this case, singer/songwriter Tom Waits alleged that the defendant misappropriated his voice by hiring an impersonator to sing a version of his 1976 song “Step Right Up”¹⁸⁵ for one of its line of snack-foods.¹⁸⁶ Invoking *Midler* the Ninth Circuit found that, when a “voice is a sufficient indicia of a celebrity’s identity, the right of publicity protects against its imitation for commercial purposes without the celebrity’s consent.”¹⁸⁷ Finding that the advertisement used Waits distinctive singing style coupled

172. 849 F.2d 460 (1988).

173. *Id.*

174. See discussion *supra* notes 153-57 and accompanying text.

175. *Midler*, 849 F.2d at 463.

176. *Id.* at 461.

177. BETTE MIDLER, *Do You Want to Dance?*, on THE DEVINE MISS M. (Atlantic Records 1972).

178. *Midler*, 849 F.2d at 461.

179. *Id.*

180. *Id.* at 461-62.

181. *Id.* at 463.

182. *Id.* at 463-64.

183. *Id.* at 463.

184. 978 F.2d 1093 (9th Cir. 1992).

185. TOM WAITS, *Step Right Up*, on SMALL CHANGE (Asylum Records 1976).

186. *Waits*, 978 F.2d at 1097. “Ironically, this song is a jazzy parody of commercial hucksterism, and consists of a succession of humorous advertising pitches.” *Id.*

187. *Id.* at 1098.

with the actual use of one of his songs, the court upheld the jury's verdict for Waits.¹⁸⁸ The plaintiff's consistent complaint seems to have been that the advertisement conveyed the impression that he had endorsed the product.¹⁸⁹

The Ninth Circuit further expanded the right of publicity in *White v. Samsung Electronics America, Inc.*¹⁹⁰ In this case, which involved television game show personality Vanna White, the Ninth Circuit found that the plaintiff had alleged facts sufficient to show that the defendant, a VCR manufacturer, misappropriated her identity.¹⁹¹ The defendant had run a series of advertisements depicting a robot dressed in a blond wig, evening gown, and jewelry standing in front of a game-show letter board similar to the one used on *Wheel of Fortune*.¹⁹² The advertisement attempted to suggest that defendant's products would be in good working order long enough to see a robot take White's place on *Wheel of Fortune*.¹⁹³ Despite the fact that the robot itself bore no physical resemblance to Vanna White, the court held that it was sufficient that the robot and its background evoked her image.¹⁹⁴

The court noted that in order to satisfy a claim of right of publicity, a plaintiff *may* allege the following: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."¹⁹⁵ Because the wording of previous case law appeared to be permissive rather than restrictive, the court viewed a claim for right of publicity expansively.¹⁹⁶ Therefore, the concern was not whether the defendant used the name or likeness of White, for it was clear that her name was not used and that the robot was not her likeness.¹⁹⁷ Rather, the court focused on whether the plaintiff's identity was appropriated at all and that determination was not limited to the use of the plaintiff's name or likeness.¹⁹⁸ Samsung also argued without success that their advertisements consisted of protected speech, because the advertisements were parodies of Vanna White and *Wheel of Fortune*.¹⁹⁹ The court dismissed quickly this defense, suggesting that a parody

188. *Id.* at 1112.

189. *Id.* at 1103.

190. 971 F.2d 1395 (9th Cir. 1992).

191. *Id.* at 1399.

192. *Id.* at 1396.

193. *Id.*

194. *Id.* at 1399.

195. *Id.* at 1397 (citing *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983)).

196. *White*, 971 F.2d at 1397.

197. *Id.* at 1398-99.

198. *Id.* at 1398.

199. *Id.* at 1401. The defendants cited *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), and *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir. 1987), for the proposition that parodies are protected speech. These cases involved parodies of advertisements run for the purpose of poking fun at evangelist Jerry Falwell and outdoor outfitter L.L. Bean. *White*, F.2d at 1401.

claim would be better suited to “non-commercial parodies,”²⁰⁰ and went on to say that a parody must be for its own sake and not for the sake of advancing sales of a particular product to be protected.²⁰¹ “The difference between a ‘parody’ and a ‘knock-off’ is the difference between fun and profit.”²⁰²

More recently in *Hoffman v. Capital Cities/ABC, Inc.*,²⁰³ *Los Angeles Magazine* created a photo spread using digitally altered celebrity images from famous movie still shots without their authorization.²⁰⁴ The magazine digitally manipulated the images to appear as if the celebrities were wearing modern designer clothes.²⁰⁵ Dustin Hoffman asserted his right of publicity against the magazine publisher for use of the infamous photo of his character “Tootsie.”²⁰⁶ The magazine had dressed Tootsie in a Richard Tyler gown and Ralph Lauren heels.²⁰⁷ Despite the fact that there was no suggestion that Hoffman endorsed the article or the designers, the court awarded Hoffman over three million dollars for violation of his publicity rights, which included compensatory, punitive damages, and attorney fees.²⁰⁸

The verdicts in these decisions, supporting the right of publicity, reveal two basic policy themes. The manipulation of an individual’s image, especially that of a celebrity or public figure, has been a trend to hype products and increase revenues. The courts have moved to ensure at least that the profits derived from these valuable personas are more equitably channeled. Additionally, the judiciary, as evidenced by the holdings in the preceding cases, has maintained that a person should have the right to control how his image is commercialized, or if it will be used at all.²⁰⁹ Thus, proponents of the right to publicity argue that the “ability to control commercialization in the first place is as much a policy objective of the Right of Publicity as is providing revenue streams for the rightful recipient.”²¹⁰ Others maintain that the direction these cases have taken toward the protection of individuals who have stepped consciously into the limelight creates a slippery slope that may infringe upon First Amendment rights and the creation of a popular or contemporary culture.²¹¹

200. *White*, F.2d at 1401.

201. *Id.*

202. *Id.*

203. *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867 (C.D. Cal. 1999).

204. *Id.* at 870.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 875-76.

209. *Faber*, *supra* note 132, at 28.

210. *Id.*

211. *Madow*, *supra* note 10, at 138 (“[P]ublicity rights facilitate private censorship of popular culture.”). *Madow* goes on to state:

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

VIII. HAVE THE COURTS GONE TOO FAR IN PROTECTING THE RIGHT OF PUBLICITY?

A. *The Slippery Slope: No End in Sight for Things Protected*

Case law indicates that the right of publicity not only protects against the misappropriation of a name, face, voice, likeness, and identity, but that it protects the mere evocation of a celebrity's image.²¹² The evocation of identity has the effect of creating a publicity right violation where a defendant has merely employed advertising techniques that remind the public of a particular performer.²¹³ Such a test does not insist on a showing a realistic rendering of the plaintiff; it merely requires a showing that the questioned conduct reminds the audience of the celebrity.²¹⁴

Critics suggest that the absurdity of the result in *White* can be best illustrated by the logical extreme of its application.²¹⁵ For instance, any song previously popularized by a particular celebrity that is used in an advertisement could conceivably be viewed as a violation of that celebrity's right of publicity, because it might conjure up in the public's mind's eye that celebrity's identity.²¹⁶ For example, it is well known that Frank Sinatra's signature song is "My Way." Suppose that an advertiser secures a license from the copyright holder of the song to use it in a commercial. If, in the advertisement, "My Way"²¹⁷ is sung in a manner not even remotely resembling Sinatra's rendition, its use would still not stand because, arguably, the song's association with Sinatra would evoke the identity of Frank Sinatra. Such a test ensures virtually

contemporary American culture to create and communicate meaning and identity 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.

Id. at 142. See also JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* (1991) (arguing current intellectual property law may be curtailing popular cultural production); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1855 (1991) (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 Restitutionary Impulse*, 78 VA. L. REV. 149, 157 (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").

212. Sudakshina Sen, Comment, *Fluency of the Flesh: Perils of an Expanding Right of Publicity*, 59 ALB. L. REV. 739, 751 (1995).

213. Weiler, *supra* note 160, at 258.

214. Steven C. Clay, Note, *Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts*, 79 MINN. L. REV. 485, 497-98 (1994).

215. Sen, *supra* note 212, at 751-52 (citing Weiler, *supra* note 160, at 258).

216. *Id.* at 751.

217. FRANK SINATRA, *My Way*, on MY WAY (Warner Brothers 1987).

that unauthorized commercial use of anything remotely associated with a particular celebrity will violate that celebrity's right of publicity.²¹⁸ Perhaps the result in *Midler* would have been the same under *White* even if the singer had been male and sounded nothing like Bette Midler.²¹⁹ The dissent in *White* enumerates the effect of applying the majority's view.²²⁰ In a classic slippery-slope argument the dissent suggests: "Gene Autry could have brought an action against all other singing cowboys. Clint Eastwood would be able to sue anyone who plays a tall, soft-spoken cowboy, unless, of course, Jimmy Stewart had not previously enjoined Clint Eastwood."²²¹

B. Parody and Satire—Valuable Weapons in Social Discourse

Expansion of the protection the right of publicity affords may limit the public's ability to conduct a fruitful discourse on the very meaning and value associated with celebrity.²²² An expansive understanding of the right will leave it difficult for the general public to penetrate the "clique of celebrity personality" and a variety of other societal conditions, thus depriving society the meaningful multiplicity of ideas which would further a constructive dialogue.²²³

Commercials have the capacity to inform social commentary as well as entertain.²²⁴ Assisting in that dialogue is the art of parody and satire. In *White* the court rejected Samsung's claim of parody noting that, while parody at some level insists on an evocation of the identity of the celebrity, commercial parody is subservient to the purpose of selling the product for which the parody is conducted.²²⁵ The majority ignored the dissent's observation that the parodist, in a supposedly non-commercial context, indulges in comic technique for the purpose of marketing himself or whatever is the vehicle for the parody in question.²²⁶ In other words, the dissent observed that all parody implicates a commercial evocation of celebrity. A later dissent from a denial of rehearing stated: "Is the Samsung parody any different from a parody on *Saturday Night Live* or in *Spy Magazine*? Both are equally profit-motivated. Both use a celebrity's identity to sell things—one to sell VCRs, the other to sell advertising."²²⁷

218. Sen, *supra* note 212, at 752.

219. Weiler, *supra* note 160, at 259.

220. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1407-08 (9th Cir. 1992) (Alarcon, J., dissenting).

221. *Id.* at 1407.

222. Sen, *supra* note 212, at 753.

223. *Id.*

224. *Id.* at 756 (citations omitted).

225. *White*, 971 F.2d at 1401.

226. *Id.* at 1407.

227. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1520 (9th Cir. 1993) (Kozinski, C.J. dissenting).

While the speech involved in *White* was commercial in nature, it is still entitled to some (albeit a lesser) degree of protection.²²⁸ In order for commercial speech to be restricted, it must either be found to be misleading or related to an unlawful activity. Absent both of these elements, the state must assert a substantial interest achieved by the restriction on the speech.²²⁹ Even in the event of a substantial state interest, the judiciary must also inquire if the interest would be better served by less restrictive means.²³⁰ The dissent to the denial for rehearing in *White* points out that the majority at no time attempted to apply the requisite balancing that commercial speech claims demand.²³¹ Moreover, the only reference to constitutional protection afforded commercial speech was the majority's insistence that commercial speech is entitled to less protection.²³²

IX. A FURTHER STEP: CALIFORNIA AND INDIANA RIGHT OF PUBLICITY

A. Jurisdictional Statutes—Privacy Post-Mortem

Currently, sixteen states recognize the right of publicity through statutory enactment.²³³ Furthermore, the "majority view is that the right exists by common law in every state that has not defined" a statutory position.²³⁴ This Article focuses on two of the most recent and far-reaching right of publicity statutes and their implications. As observed, the reason for growth in publicity privacy statutes is due to the rapid advancement of digital manipulation

228. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980).

229. *Id.* at 564.

230. *Id.*

231. *White*, 989 F.2d at 1520.

232. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1401 n.3 (9th Cir. 1992).

233. *Faber*, *supra* note 132, at 28 (citing CAL. CIV. CODE § 3344 (Deering 1995)); FLA. STAT. ANN. § 540.08 (West 1997); IND. CODE ANN. 32-36-13-1 to -20 (Michie 1995); KY. REV. STAT. ANN. § 391.170 (Banks-Baldwin 1984); MASS. GEN. LAWS ANN. ch. 214, § 3A (West 1994); NEB. REV. STAT. §§ 20-201 to -211 (1979); NEV. REV. STAT. ANN. 597.810(1)(b) (Michie 1993); OKLA. STAT. ANN. tit. 12, § 1449 (West 1986); R.I. GEN. LAWS § 9-1-28 (1956); TENN. CODE ANN. § 47-25-1104 (1984); UTAH CODE ANN. § 45-3-1 (1981); VA. CODE ANN. §§ 8.01-.40 (Michie 1977); WASH. REV. CODE ANN. §§ 63.50.040-.040.070 (West 1998); WIS. STAT. ANN. § 895.50 (West 1977)).

234. *Faber*, *supra* note 132, at 28. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995) (stating "[t]he identity of even an unknown person may possess commercial value"). *See also* *Waits v. Frito-Lay, Inc.* 978 F.2d 1093, 1102 (9th Cir. 1992) (stating differences in levels of celebrity concern damages, not liability, in right of publicity actions); *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.2d 254, 260 (N.Y. Sup. Ct. 1984) ("[A]ll persons, of whatever station in life, from the relatively unknown to the world famous, are to be secured against rapacious commercial exploitation."); DREYFUSS & KWALL, *supra* note 10, at 547 ("[I]n at least 15 of these states, legislation exists that governs this area either partially or completely."). *But see* Alicia M. Hunt, Comment, *Everyone Wants to be a Star: Extensive Publicity Rights for Noncelebrities Unduly Restrict Commercial Speech*, 95 NW. U.L. REV. 1605 (2001) (arguing against efforts to federalize the right of publicity by statutes and suggesting that this right should not be extended to those who possess identities without some demonstrable commercial values associated with them).

technology. Right of publicity statutes include provisions to protect existing celebrity footage from being modified to create a different image because “[a]dvertisers can now create the impression that John Wayne actually drank Coors beer, that Fred Astaire developed his dancing technique with a Dirt Devil, that Lucille Ball shopped at Service Merchandise, and that Ed Sullivan spoke glowingly of the M-Class Mercedes.”²³⁵

B. Indiana Statutory Guidance

Under the Indiana Publicity Statute, the right of publicity refers to the property interests inherent in a personality’s name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms.²³⁶

Indiana has taken the approach that the right of publicity is a right that stems from property and estate law. The proprietary nature of the right is evidenced by section sixteen of the Indiana statute, recognizing that the rights of publicity are “property rights, freely transferable and descendible, in whole or in part.”²³⁷ “A person may not use an aspect of a personality’s right of publicity for commercial purpose during the personality’s lifetime or for one hundred (100) years after the date of the personality’s death”²³⁸ The Indiana statute has been the model for many other states and has led to the steps taken by California in 1998.²³⁹ Indiana’s statute also sets out exceptions which tackle First Amendment issues with the right of publicity—specifically, the scope of its application. Accordingly, the provision is not applicable to books, films, news reporting purposes, and single and original works of art.²⁴⁰ In addition to these exceptions, a newspaper publisher is not liable for publishing an advertisement by a third party containing an infringement of another’s rights of publicity.²⁴¹

C. The California Privacy Protection Act of 1998

In 1998, California passed the nation’s most far-reaching legislation designed to improve privacy protections. This law came in the wake of Princess Diana’s tragic death and at the behest of the Screen Actors Guild.²⁴² The statute provides that

235. Faber, *supra* note 132, at 30.

236. IND. CODE ANN. § 32-36-1-7 (LexisNexis 2002).

237. Faber, *supra* note 132, at 28.

238. § 32-36-1-8.

239. Faber, *supra* note 132, at 29.

240. § 32-36-1-1.

241. Faber, *supra* note 132, at 29.

242. See Erwin Chemerinsky, *Balancing the Rights of Privacy and the Press: A Reply to Professor Smolla*, 67 GEO. WASH. L. REV. 1152, 1153; Smolla, *supra* note 2, at 1107.

[a] person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another without permission or otherwise committed a trespass, in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.²⁴³

The statute “departs from the common law method of protecting privacy directly by defining it”²⁴⁴ in terms of Prosser’s four privacy torts. Rather, the statute protects privacy indirectly by improving the protections provided by non-legal forms of regulation.²⁴⁵ The statute attempts

to resurrect the privacy protection traditionally furnished by physical barriers by ‘redefining’ what is meant by physical space: the statute defines a person’s private ‘space’ not in terms of feet or yards, but instead in terms of what can be observed without the assistance of sensory-enhancing technology.²⁴⁶

Thus, the statute imposes liability under a theory of “constructive invasion of privacy” and prohibits “intrusions through the use of technical means that facilitate privacy invasions that otherwise could not be obtained without a trespass.”²⁴⁷ Constructive invasion of privacy protects “personal” and “familial” activities.²⁴⁸ These activities include those involving intimate details of the plaintiff’s personal life, the plaintiff’s family, and other private matters.²⁴⁹

243. CAL. CIV. CODE § 1708.8(a) (West Supp. 2002).

244. Note, *Privacy, Technology, and the California “Anti-Paparazzi” Statute*, 112 HARV. L. REV. 1367, 1377 (1999). See also *supra* note 30 for the current British position on this issue.

245. Note, *supra* note 244, at 1378.

246. *Id.*

247. Smolla, *supra* note 2, at 1107 (citing § 1708.8(b)). Section 1708.8(b) states:

A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

248. § 1708.8(b).

249. § 1708.8(k). Section 1708.8(k) states:

For purposes of this section, “personal and familial activity” includes, but is not limited to, intimate details of the plaintiff’s personal life, interactions with the plaintiff’s family or significant others, or other aspects of the

The statute provides for treble damages *as well as* punitive damages.²⁵⁰ Furthermore, the plaintiff is entitled to the disgorgement of the defendant's profit if the invasion of privacy was committed for a commercial purpose.²⁵¹ However, the California legislature included the "caveat that mere publication of material obtained in violation of the law does not itself qualify as a violation, although such a publication might be independently tortious as the publication of private facts."²⁵²

Since California enacted this law, many scholars have debated the constitutional limitations that may potentially impact this statute—specifically with respect to the potential balancing of the individual's privacy interest against the First Amendment freedom of the press.²⁵³

Most of the debate surrounds the constitutionality of the California publicity law that regulates an individual's privacy interest. Some assert that it is unconstitutional because it violates the First Amendment under two theories: it singles out one class of persons and the law is content-based, not content-neutral.²⁵⁴ Thus, the law arguably violates "current First Amendment principles that prohibit singling out a certain class of speakers or a certain form of media for specially disfavorable treatment."²⁵⁵ A law that is "on the cusp between a content-based and content-neutral law, pose[s] the kind of difficult problem of characterization that faced the Supreme Court in *City of Ladue v. Gilleo*."²⁵⁶ "In

plaintiff's private affairs or concerns. Personal and familial activity does not include illegal or otherwise criminal activity as delineated in subdivision (f). However, "personal and familial activity" shall include the activities of victims of crime in circumstances where either subdivision (a) or (b) or both, would apply.

250. CAL. CIV. CODE § 1708.8(c) (West Supp. 2002). The statute provides: A person who commits physical invasion of privacy or constructive invasion of privacy, or both, is liable for up to three times the amount of any general and special damages that are proximately caused by the violation of this section. This person may also be liable for punitive damages, subject to proof according to Section 3294. If the plaintiff proves that the invasion of privacy was committed for a commercial purpose, the defendant shall also be subject to disgorgement to the plaintiff of any proceeds or other consideration obtained as a result of the violation of this section.

Id.

251. *Id.* "Commercial purpose" is defined in section 1708.8(j) to mean "any act done with the expectation of a sale, financial gain, or other consideration."

252. Smolla, *supra* note 2, at 1108 (citing § 1708.8(e)). Section 1708.8(e) states: Sale, transmission, publication, broadcast, or use of any image or recording of the type, or under the circumstances, described in this section shall not itself constitute a violation of this section, nor shall this section be construed to limit all other right or remedies of plaintiff in law or equity, including, but not limited to, the publication of private facts.

253. See Chemerinsky, *supra* note 242, at 1153-58; Smolla, *supra* note 2, at 1106-16; *supra* notes 114-30 and accompanying text.

254. Smolla, *supra* note 2, at 1114.

255. *Id.* at 1110 (citations omitted).

256. 512 U.S. 43 (1994).

Ladue the Court in effect finally said that whether the law was content-based or content-neutral did not matter, the impact on expressive interests was too severe to be sustained.²⁵⁷ Moreover, content-based laws are presumptively unconstitutional.²⁵⁸ The California law is content-based because it contains “as a predicate element the perpetrator’s intent to sell or transfer communicative material.”²⁵⁹

Others disagree and maintain the statute is applied equally to all who engage in particular, specifically-defined behavior—those who “obtain[] through technological enhancement equipment images” or sound “of personal or family activity, where there is a reasonable expectation of privacy and where the images could not otherwise have been obtained except by a physical trespass.”²⁶⁰ Because application of the law is done in an equal manner, it does not rise to a violation of First Amendment rights.²⁶¹

D. The Fourth Amendment Analogy

The California statute creates boundaries analogous to Fourth Amendment search and seizure boundaries. While it is beyond the scope of this Article to undertake a complete analysis of Fourth Amendment jurisprudence, it suffices to acknowledge that California’s legislative approach hinges on the point in time where the acquisition of information becomes a trespass.²⁶² If one obtained the photograph or personal information without trespassing, there would be no privacy violation.²⁶³ Ironically, this approach mirrors that of the Supreme Court in its early cases dealing with the Fourth Amendment. In *United States v. Knotts*²⁶⁴ the police used a radio transmitter to track the movement of a suspect along public streets.²⁶⁵ “[T]he Court held that the police could observe movements in public without any Fourth Amendment justification, because any member of the public might have observed the same thing.”²⁶⁶ This concept is known as the “plain view” doctrine.

In contrast, in *United States v. Karo*²⁶⁷ the Court held that a tracking device used by the police to monitor the movement of several drums of illegal

257. Smolla, *supra* note 2, at 1107 n.38.

258. *Id.* at 1113 (citing *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991), for the proposition that, “[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.” (citations omitted)).

259. Smolla, *supra* note 2, at 1113.

260. See Chemerinsky, *supra* note 242, at 1156.

261. *Id.*

262. See CAL. CIV. CODE § 1708.8 (West Supp. 2002).

263. *Id.*

264. 460 U.S. 276 (1983).

265. *Id.* at 277.

266. William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1268 (1999) (citing *Knotts*, 460 U.S. at 281-85).

267. 468 U.S. 705 (1984).

chemicals within a house was a Fourth Amendment violation absent compliance with search and seizure rules.²⁶⁸ The Court reasoned that, because ordinary citizens could not observe the movements within the house, then neither could the police.²⁶⁹

These two cases are paradigms of numerous cases creating a demarcation between what a normal citizen can view without special permission and what constitutes a search under the Fourth Amendment.²⁷⁰ “All these results seem designed to take the privacy people have and use it to define the privacy that the police cannot invade without good cause.”²⁷¹ This concept is analogous to the right to privacy associated with this statute.²⁷² The California legislature placed the line of privacy at trespass, whether physically or with the use of technology. This is the same parameter used by the courts in most Fourth Amendment cases. Drawing on the rights created by the Fourth Amendment which hold the government to certain standards, a strong case is made for placing the same limit on the intrusion of privacy by the media and other individuals. “The things and places people keep secret from one another are surely more private, and hence their discovery more harmful to privacy, than the things and places people expose to the world.”²⁷³ Just as the police are able to observe actions that are open and visible to the public without justification, a member of the press can observe these actions without invading a celebrity’s privacy interest.

E. Another Theory—Commercial Speech and the Test

A second theory that many suggest is the appropriate measure of the right of publicity is to classify it as commercial speech and apply the *Central Hudson* test.²⁷⁴ The *Central Hudson* four-part test for the regulation of commercial speech is as follows:

- (1) [T]he speech in question must be lawful and not misleading, and (2) the asserted government interest must be substantial; if these first two elements are satisfied, then in

268. *Id.* at 713-18.

269. *Id.* at 716.

270. See *Florida v. Riley*, 488 U.S. 445 (1989) (viewing the same yard from an airplane is not a search); *California v. Ciraolo*, 476 U.S. 207 (1986) (same); 1 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2(a), at 402-03 (3d ed. 1996) (noting that overhearing a conversation on the streets is not a search); *id.* § 2.3(f), at 504-10 (finding jumping over a backyard fence to look around is a search). However, “[t]he law on this subject is complicated, but in general, trespassory entries into either homes or yards constitute a search; the chief exception is entry into areas where a visitor—for example, someone delivering a package—might naturally venture.” Stuntz, *supra* note 266, at 1269.

271. Stuntz, *supra* note 266, at 1269.

272. See CAL. CIV. CODE § 1708.8 (West Supp. 2002).

273. Stuntz, *supra* note 266, at 1270.

274. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

order for the regulation to be upheld, (3) the regulation must directly advance the asserted governmental interest, and (4) the regulation must not be more extensive than necessary to serve that interest.²⁷⁵

Others subscribe to the view that a compelling state interest justifies a state and possibly the federal government to step in and protect every individual's right to privacy or publicity.²⁷⁶ If the government is not allowed to intrude into one's privacy, then does not the government have a compelling interest in preventing others from invading that same privacy?²⁷⁷

It has been surmised that the Ninth Circuit in *White* ignored First Amendment protection by not applying the *Central Hudson* test for commercial speech.²⁷⁸ If publicity is advertising and, thus, is commercial speech, the *Central Hudson* doctrine seems to be appropriate.²⁷⁹

Ultimately, the issue is whether a right of publicity claim could be viewed as advancing directly a substantial state interest.²⁸⁰ The argument is, "If one defines the right of publicity as an individual property right ultimately grounded in personal autonomy, one can argue that it is worthy of advancement as a 'substantial state interest'; the state is expected to protect personal self-determination and to enforce property rights."²⁸¹

F. Human Autonomy Interest as a Property Right

These two concepts, the Fourth Amendment analogy and the application of the *Central Hudson* test, stem from the premise that "[t]he right of publicity can also be viewed as a property right grounded in human autonomy."²⁸² As postulated, "it belongs to all—including celebrities—who commodify their images—and it embraces noneconomic objections to the commercial exploitation of identity."²⁸³ It rests on the theory that the individual is an autonomous being that preceded the creation of property.²⁸⁴

275. Haemmerli, *supra* note 45, at 458 n.306.

276. See, e.g., Haemmerli, *supra* note 45, at 477-87 (suggesting federal legislation of the right of publicity).

277. *Id.*

278. Stephen R. Barnett, *The Right of Publicity Versus Free Speech in Advertising: Some Counter-Points to Professor McCarthy*, 18 HASTINGS COMM. & ENT. L.J. 593, 600 (1996).

279. *Id.*; Haemmerli, *supra* note 45, at 457-58.

280. Haemmerli, *supra* note 45, at 458.

281. *Id. Contra* 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, 572 (1986) ("[A]n advertiser should be able to use a person's names or likeness without consent as part of a truthful statement about a legitimate product.").

282. Haemmerli, *supra* note 45, at 385.

283. *Id.* at 385-86.

284. *Id.* at 413.

“Viewing the right of publicity as an extension of human worth and autonomy, rather than a purely economic interest, also changes the nature of the exercise and balances the right against competing societal claims.”²⁸⁵ Proponents of this theory argue that the *Zacchini* Court²⁸⁶ took the wrong approach when it focused on the individual’s act.²⁸⁷ Indeed, it has been argued that the “appropriate focus of the right of publicity is the human being, the person—not her work product.”²⁸⁸ Thus, by focusing on an economic-incentive approach, one creates a narrow right that is “exclusively pecuniary.”²⁸⁹

Haemmerli makes the point that “positive law recognizes the possibility of a publicity right with both personal and economic attributes.”²⁹⁰ “Autonomy implies the individual’s right to control the use of her own person, since interference with one’s person is a direct infringement of the innate right of freedom.”²⁹¹

[This] philosophical orientation permits us to reconceive the right of publicity as a freedom-based property right with both moral and economic characteristics, rather than being forced to make a dichotomous choice between a privacy right concerned with moral injury on the one hand, or a purely pecuniary publicity right on the other.²⁹²

It is the “notion of individual control and self-determination”²⁹³ which forms a property right. “[A] property right which provides for control over objectification of identity is not logically opposed to an autonomy right that protects the self; and the two can, in fact, be viewed as two facets of freedom.”²⁹⁴ “Identity remains something intrinsic to the individual, subject to individual control as an autonomy-based property right, no matter what or who has affected its level of fame.”²⁹⁵ The autonomous person theory posits that even if the public has played a role in creating a celebrity, the celebrity is entitled to his own identity.²⁹⁶

285. *Id.* at 403.

286. *See* discussion *supra* notes 136-44 and accompanying text.

287. Haemmerli, *supra* note 45, at 401.

288. *Id.* at 402-03.

289. *Id.* at 403.

290. *Id.* at 405.

291. *Id.* at 416.

292. *Id.* at 422.

293. Haemmerli, *supra* note 45, at 416.

294. *Id.* at 427.

295. *Id.* at 431.

296. *Id.*

X. COMMON JUSTIFICATIONS FOR THE RIGHT OF PUBLICITY: OVERLOOKED OR OVEREMPHASIZED

One commentator has observed that the sentiment embodied in the so-called right of publicity is best expressed in a recent series of television commercials featuring tennis great Andre Agassi.²⁹⁷ In a commercial for Canon cameras, Agassi asserts that “image is everything.”²⁹⁸ One’s image is the coin of the realm in the world of high stakes celebrity endorsements.

A. Celebrity: *The Fruits of Whose Labor?*

Typically, three justifications for the right of publicity have been advanced.²⁹⁹ First, it has been posited that everyone has a “property right in her own person” and therefore in “the labor of her body.”³⁰⁰ As a consequence, it is argued that individuals who have “long and laboriously nurtured the fruit of publicity values” should be the sole arbiter of how the commercial value of their image is exploited, if at all.³⁰¹ In so much as a persona is a creation of the celebrity, the individual should have control over it. In the event that the image of the celebrity is appropriated for the benefit of someone else, the celebrity should be compensated for the harm done.³⁰² As Vince Lombardi, Jr. has said: “Nothing anyone can do is going to enhance my father’s reputation, but they certainly can detract from it.”³⁰³

Others hold to the view that “however ‘scrupulously’ [a star] may try to monitor and shape [his image], the media and the public always play a substantial part in the imaging-making process.”³⁰⁴ Reality suggests that an individual’s celebrity is not a product of his own making.³⁰⁵ Notwithstanding the energies exerted by an entertainer to achieve some measure of renown, celebrity status, to a large extent, is a function of societal trends.³⁰⁶ Only with the blessing of the public will the performer achieve the level of fame that he so desires. The very fact that Tom Waits, Bette Midler, or Vanna White is a celebrity has a great deal to do with the way each has been received by the

297. Todd J. Rahimi, *The Power to Control Identity: Limiting a Celebrity's Right to Publicity*, 35 SANTA CLARA L. REV. 725 (1995). The commercial ran from Spring 1992 until Spring 1994. *Id.* at 725 n.1.

298. *Id.*

299. Sen, *supra* note 212, at 739 (citing Nimmer, *supra* note 134, at 215-16; Gordon, *supra* note 211, at 1540-50; Madow, *supra* note 10, at 178-238).

300. Sen, *supra* note 212, at 739-40 (citing JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 16-30 (Thomas P. Peardon ed., Bobbs-Merrill Co., 1952) (1690)).

301. *Id.* at 740 (quoting Nimmer, *supra* note 134, at 216).

302. *Id.* at 740.

303. Faber, *supra* note 132, at 28 (quoting Mark Hyman, *Dead Men Don't Screw Up Ad Campaigns*, BUS. WK., Mar. 10, 1997, at 115).

304. Madow, *supra* note 10, at 193.

305. Rahimi, *supra* note 297, at 731 (citing Madow, *supra* note 10, at 181-82).

306. *Id.* at 732.

public. Occasionally, a celebrity becomes well-known as the result of dumb luck, serendipitous happenstance, or even criminal conduct.³⁰⁷ Consider, for example, the oft-repeated Hollywood legend of the actor who was discovered by a talent scout in a dime store, only to be catapulted instantly into super stardom. Certainly, it could be argued that this person has done little if anything to cultivate his celebrity image. Many unknown entertainers expend far more energy than the so-called celebrities and are far more talented and yet never receive the sort of protection afforded the accidental celebrity.³⁰⁸ Perhaps, because celebrity status depends upon a number of variables, some access to it should belong to the public.³⁰⁹ It has been contended, “Any rights created through this process should thus belong to the public, at least in proportion to their contribution, and a complete privatization of these rights is actually an infringement upon the public’s moral rights.”³¹⁰

Further, still others hold to the idea that “the public, or segments of the public, create and derive meaning from celebrity images.”³¹¹ Therefore, the public “must have free rein in manipulating or ‘recording’ those images in order to remain culturally viable.”³¹² Technological advances allow the public to recode or reconstruct texts and images and thereby create something new.³¹³ Thus, the argument continues over the extent of the public’s right to know and maintain pop culture through free expression and the degree of individual celebrity control over his own photo and identity.

B. Protecting or Stifling Creativity?

One scholar suggests that guarding the celebrity’s economic interest in his image will foster creativity.³¹⁴ “[T]he advertiser who[] unauthorizedly appropriates a persona that the celebrity has constructed ‘reaps where another has sown’ by getting something for nothing.”³¹⁵ From this it is urged that without the necessary protection, a celebrity will be disinclined to do any work of lasting value for fear that the fruits of his labor will be squandered and exploited by one with little or no sweat-equity in the project being exploited. The resulting harm is also a loss to society, which is deprived of the performer’s talents.³¹⁶

307. Weiler, *supra* note 160, at 241.

308. Clay, *supra* note 214, at 502.

309. *Id.* at 502.

310. *Id.*

311. Haemmerli, *supra* note 45, at 431.

312. *Id.*

313. *Id.* at 432.

314. Sen, *supra* note 212, at 740 (citations omitted).

315. Weiler, *supra* note 160, at 242 (citations omitted).

316. Rahimi, *supra* note 297, at 747.

Contrariwise, this argument ignores that most every celebrity, to one extent or another, borrows from those who went before him.³¹⁷ Indeed, an overly restrictive interpretation of the right of publicity would not foster creativity; rather, it would stifle it because in most appropriation cases the offending conduct reveals some measure of creativity.³¹⁸ This is not to argue that blatant appropriations devoid of any level of originality should not be protected against.³¹⁹ The touchstone of analysis under this justification would call for a determination of how much the defendant has contributed to a new creation and how much the entertainer has appropriated from a previous creation of the plaintiff.³²⁰ From this it could be argued that Vanna White has benefitted from all the TV game show hostesses that went before her.³²¹ Perhaps she is no more than a “rip-off” of “Barker’s Beauties” on *The Price is Right*. More accurately, it should be concluded that, while White has built on the roles played by numerous others, there is something distinct about her role.³²²

To the extent that advertisers would be able to borrow from those who went before and evoke their image (without suggesting endorsement), the publicity rights of the celebrity should not be significantly impaired.³²³ “[T]he celebrity himself could still command substantial endorsement power,” as it is the value of a publicity right that is maximized by the celebrity’s actual participation.³²⁴

C. An Element of Deception: The Forgotten Value of the Right of Publicity

Lastly, the protection of the right of publicity is justified on the grounds that a “celebrity should have exclusive control of her right of publicity in order to protect consumers from possible misrepresentation, deception, and false advertising.”³²⁵ To the extent that the association with a celebrity tells the public anything about whatever is being advertised, this final justification is designed to prohibit advertisements which would mislead the public into believing that there has been an endorsement. In fact, it has been noted that “[t]he right of publicity was initially developed to provide redress for ‘an

317. *Id.* at 733 (citing Madow, *supra* note 10, at 196-97).

318. *Id.* (citing Madow, *supra* note 10, at 204).

319. *Id.*

320. *Id.*

321. *Id.* at 744.

322. Rahmi, *supra* note 297, at 744-45.

323. Clay, *supra* note 214, at 505.

324. *Id.*

325. Sen, *supra* noted 212, at 741.

unauthorized use of a person's name or picture in advertising that suggested the individual's endorsement of a product."³²⁶

The other side of this justification is that by creating the impression that the celebrity has endorsed the product, the misappropriator has impaired the ability of that celebrity to secure endorsement contracts with similar products.³²⁷ Therefore, affording a celebrity the right of publicity protects the value of the celebrity's identity and stems any unwanted association with a particular product line.³²⁸

After *White* it appears that the standard of liability in right of publicity claims is mere identifiability.³²⁹ There does not seem to be a required showing of likelihood of confusion.³³⁰ As with the *Lombardo* and *White* cases, the viewer of the commercial most assuredly would have known that he was not watching Vanna White or Guy Lombardo. Unfortunately, lack of confusion will not tip the scales in favor of a defendant in a situation similar to the *White* and *Lombardo* cases.³³¹ Where, in a right of publicity action, the questioned conduct gives the impression of false endorsement, the aggrieved party may seek relief under the Lanham Act.³³² It is urged that the common law right of publicity, with which this Article is concerned, incorporate a determination of whether the offending conduct is *likely* to mislead the consumer.

It is this final factor which likely could have been determinative in each of the cases that led up to the *White* decision. All of the appropriations of which plaintiffs complained utilized "identifying characteristics unique to the plaintiffs . . . which[] were the only information as to the identity of the individual."³³³ In *Midler*, *Waits*, and *Lahr* it was the plaintiffs' voices that identified them.³³⁴ However, in *Motschenbacher*,³³⁵ it was the plaintiff's race car that was unmistakably associated with the plaintiff and therefore "compelled the inference that Motschenbacher was the person sitting in the racing car."³³⁶ "[T]he advertisement affirmatively represented that the person

326. *Id.* at 742 (quoting Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 366-67 (1992)).

327. Weiler, *supra* note 160, at 244.

328. Sen, *supra* noted 212, at 752 (citing J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1.11(C) (1995)).

329. Weiler, *supra* note 160, at 244 (citations omitted).

330. *Id.* (citations omitted).

331. *Id.* at 244-45 (citing *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989); *Nimmer*, *supra* note 134, at 212). *Nimmer* writes: "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." *Nimmer*, *supra* note 134, at 212.

332. Weiler, *supra* note 160, at 245 (citing 15 U.S.C. § 1125(a) (1988)).

333. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1404 (9th Cir. 1992) (Alarcon, J., dissenting).

334. See *supra* notes 153-57, 172-88 and accompanying text.

335. See *supra* notes 153-57 and accompanying text.

336. *White*, 971 F.2d at 1403.

depicted therein was the plaintiff.”³³⁷ The public could reasonably arrive at the result the celebrity had endorsed the product.³³⁸ Arguably, no such deception was indulged in the *White* case. It is clear in *White* that the robot was not Vanna White. There was enough information in the Vanna White commercial to inform the audience that the advertisement was not meant to suggest an endorsement.

The dissent in *White* argued energetically that the identifying characteristics of the robot are not unique to Vanna White.³³⁹ It is urged that the evening gown, the blond hair, and jewelry are very commonplace in today's society and, moreover, are only attributes of the role that Vanna White plays.³⁴⁰ Furthermore, the game-show board behind the robot is an attribute that belongs to the producers of *Wheel of Fortune*, not Vanna White.³⁴¹ Perhaps the dissent placed too much emphasis on these facts in arriving at its conclusion. If the defendant in *White* had hired a look-alike who wore a blond wig, an evening gown, and jewelry, who posed in front of a *Wheel of Fortune* board, it would be difficult to suggest that no appropriation of the plaintiff's identity had occurred.

XI. CONCLUSIONS

It is imperative that an individual be able to protect the economic interest built up in his name. The wrongful appropriator ensures that the aggrieved celebrity cannot guarantee protection from infringement to a prospective licensee. “[P]urchasers of the right to use his [image] will not be inclined to pay as high a price for this right as they might have” if an exclusive guarantee were made.³⁴² Moreover, the celebrity himself is denied the economic benefit of the commercial value of his identity. There is also the risk of misleading the public into thinking that the celebrity whose persona has been appropriated approves of the product. As a result, the public may be deceived into buying a product of inferior quality. The celebrity in turn would have to bear the stigma of association with the inferior product. Effective protection of the right of publicity demands balancing it against whatever value society may derive from the so-called ‘appropriations’ negated under the *White* standard. What is called for is a test that properly evaluates the pertinent First Amendment concerns involved in right of publicity cases, and affords necessary protection against consumer deception and unauthorized association of the celebrity with the items being advertised.

337. *Id.*

338. Rahimi, *supra* note 297, at 740-41.

339. *White*, 971 F. 2d at 1404.

340. *Id.* at 1404-05.

341. *Id.* at 1405.

342. Elbaum, *supra* note 23, at 370 n.66.

A. Reaffirming the Right of Publicity as Protection Against False Endorsements

In determining whether an appropriation has occurred, it will always be necessary to answer what, for the *White* court, is the ultimate issue—was the identity evoked?³⁴³ But the inquiry must not end there, as the right of publicity affords protection primarily in those situations where there is a likelihood that the public will be deceived into thinking that there has been an endorsement. It has been suggested that judicial inquiry be limited to: (1) commercial uses of the celebrity's name, likeness, or identifying attributes whose only purpose is to trade on the name of the celebrity, such as t-shirts, posters, and the like; (2) commercial uses that imply a celebrity endorsement; and (3) commercial "uses that rely on the 'associative' value of a celebrity—that is, uses that transfer the feelings engendered in the public mind by the celebrity to the advertised product or service."³⁴⁴ In analyzing the right of publicity within these limited scenarios, perhaps the court should determine: (1) whether the identifying characteristic belongs to the plaintiff, and (2) whether the public is "under the impression that the plaintiff has personally endorsed the product."³⁴⁵ For instance, in *White* the identifying characteristics did not belong to Vanna White; rather, the game board belonged to *Wheel of Fortune*.

B. More Emphatic Invocation of Free Speech Protection

One commentator has noted that for a court to find any commercial speech in right of publicity cases is to virtually assure a failed First Amendment defense.³⁴⁶ And, as it is unlikely that any of the right of publicity cases will involve anything other than commercial speech, the lack of First Amendment protection is almost inevitable.³⁴⁷ In order to properly safeguard the commercial value of one's identity, while at the same time maximizing the enrichment of our cultural experience, a more suitable framework must be devised in right of publicity cases.

One possible analytical framework would involve distinguishing between uses of celebrity identity that foster public debate, thus embodying the First Amendment values, and uses that sell a product.³⁴⁸ "[I]f it serves an informative or cultural function, it will be immune from liability; if it serves no function but

343. Weiler, *supra* note 160, at 269.

344. *Id.* at 270 (citations omitted).

345. Rahimi, *supra* note 297, at 750.

346. Patricia B. Frank, Note, *White v. Samsung Electronics America, Inc.: The Right of Publicity Spins Its Wheels*, 55 OHIO ST. L.J. 1115, 1136 (1994).

347. *Id.* at 1136.

348. Weiler, *supra* note 160, at 262 (citing Peter Felcher & Edward Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1596-97 (1979)).

merely exploits the individual portrayed, immunity will not be granted.”³⁴⁹ *Estate of Presley v. Russen*³⁵⁰ illustrates this framework.³⁵¹

Presley involved an impersonator whose “shtick” was to re-create a live Elvis Presley show.³⁵² The Presley estate sued the impersonator for appropriating Presley’s identity.³⁵³ The court, in discussing what, if any, First Amendment protection should be afforded the impersonator, asked whether the primary purpose of the portrayal was for cultural enrichment or for cultural exploitation.³⁵⁴ The court concluded that while there was an element of cultural enrichment, the performance lacked any creative component and was therefore commercially exploitative.³⁵⁵ While disagreeing with the court’s determination in this case, scholars have maintained that the decision is valuable because it used the proper analytical approach.³⁵⁶ Applying the *Russen* analysis to the *White* case, one commentator observed that, generally speaking, Samsung evoked the identity of Vanna White for the purpose of selling its product.³⁵⁷ However, Samsung did not do so by suggesting gratuitously that Vanna White endorsed the product. Rather, it provided insight into the technological direction in which contemporary society is headed—that one day every task, even those of a game show host, will be performed by machines.³⁵⁸

C. *Idea v. Expression*

Alternatively, it has been suggested that right of publicity cases would benefit from an idea-expression analysis, which would demand only that the expression of a particular celebrity role be protected, while the appropriation of a particular class of roles (i.e., the idea behind the expression) would be privileged.³⁵⁹ As applied to the *White* case, this idea/expression dichotomy would not give Vanna White a commercial monopoly over future portrayals of game-show hostesses, but would protect anything unique about her own portrayal of the role.³⁶⁰ It does not appear that there was anything terribly unique about Vanna White’s game-show character—evening gown, blond hair, and jewelry—thus she would not be afforded protection.

349. *Id.* at 262. (quoting Felcher & Rubin, *supra* note 348, at 1596).

350. 513 F. Supp. 1339 (D.N.J. 1981).

351. Weiler, *supra* note 160, at 262-63.

352. 513 F. Supp. at 1348.

353. *Id.* at 1344.

354. *Id.* at 1359.

355. *Id.* at 1359-61.

356. Weiler, *supra* note 160, at 263 n.310 (citing Samuelson, *supra* note 145, at 873 (“To avid Elvis fans—and there are millions of them—no greater cultural achievement would be possible” than “a live ‘Elvis’ performance that could no longer be supplied by the originator of the style because of his death.”)).

357. *Id.* at 263.

358. *Id.*

359. Frank, *supra* note 346, at 1138.

360. *Id.* at 1138-39.

Valuable social commentary like parody and satire deserve protection. The purpose of the First Amendment is broader than just religion and politics.³⁶¹ Its purpose is to protect the forces that influence our culture and our society.³⁶² “The last thing that we need is . . . a law that lets public figures keep people from mocking them or evoking their images in the mind of the public.”³⁶³

D. The Right of Performance

It has been suggested that a “right of performance” replaces the right of publicity.³⁶⁴ This new right affords protection from conduct which attempts to “fulfill the demand for the celebrity’s performance value.”³⁶⁵ Such a test would cover both the unauthorized look-alike or sound-alike in commercials, and the appropriation of a celebrity’s videotaped performance.³⁶⁶ Imitations of style and evocations of identity would not be sufficient to afford protection. Vanna White would not have a cause of action under this formula because the commercial was not a performance opportunity for her.³⁶⁷ In fact, it is likely that the statement of the commercial—that Samsung products would be around when a robot replaced Vanna White—would have been ruined had White performed. Viewed from another perspective, if Bette Midler or Tom Waits had appeared in the advertisements about which each brought suit, the commercial would not have lost its message. If anything, the commercials would have connected to that small segment of sophisticated listeners who would otherwise be able to detect an imitation.

The right to privacy is one that every American inherently believes he holds unto himself.³⁶⁸ In actuality, it is a right composed of two strains: informational and intrusional.³⁶⁹ Accordingly, one has an interest in certain facts (e.g., personal or intimate) about himself which, “for the most part, [can]not be freely disseminated to others without our knowledge or

361. Weiler, *supra* note 160, at 266 (quoting *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1519 (9th Cir. 1993) (denial of rehearing)).

362. *Id.*

363. *Id.*

364. Clay, *supra* note 214, at 514.

365. *Id.*

366. *Id.*

367. *Id.* at 516. *But see* Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 4 (1988) (comparing the right of personality doctrine with moral rights concept as a way to expand the legal rights of creators over creations); Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151 (2001) (arguing the personal interests sought to be protected by publicity rights law would be better effected by the moral rights provisions of the copyright laws—for moral rights are understood conventionally as protecting a creator’s personal interests).

368. For an interesting comparative view of this issue, see Fred H. Cate, *The Changing Face of Privacy Protection in the European Union and the United States*, 33 IND. L. REV. 173 (1999).

369. JOHN CHRISTMAN, *THE MYTH OF PROPERTY* 140 (1994).

permission.”³⁷⁰ When information of this nature is made public, privacy is invaded. Similarly, privacy encompasses an interest in restricting certain physical areas of space to other people. Taken as a unit, then, the right of privacy “provides prima facie support for the institution of private property.”³⁷¹ By controlling access to information and space, the elements of ownership (e.g., exclusive use and control of possessory rights) are both established and validated through recognition of the rights of privacy and publicity.³⁷²

Whether one considers the privacy right from the viewpoint of a publicity interest based on economics or one in which each individual is autonomous, the California, Indiana and the Ninth Circuit approaches draw a line of demarcation that balances wisely both interests. However, when individuals step into the world of celebrity and hold themselves out to the public, they have made a conscious choice to diminish their own right to privacy. Two conceptions of fame exist. Fame is a choice between the market-oriented, individualistic version of publicity and the communitarian version that encompasses society’s role in creating the fame. The only way to balance these diametric views is through a right to publicity, which incorporates a defined property interest.³⁷³

370. *Id.* See generally JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 222-23 (2000) (arguing the need for private space in order to assure protection and avoid “being judged out of context in a world of fleeting attention spans”). See also Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1091-92, 1154 (2002) (stating efforts to locate a common denominator for privacy—especially in the age of cyberspace where relationships are more businesslike in nature than intimate and interpersonal—have not met with success and that what is needed today is to have challenges to privacy analyzed and tested from “bottom up” within a “common pool of similar elements”).

371. CHRISTMAN, *supra* note 369, at 140.

372. *Id.*

373. For an analysis of the subtleties in determining a “reasonable” judicial decision based upon anyone of three modes of balancing—fact, rule, and result—see George P. Smith, II, *Nuisance Law: The Morphogenesis of an Historical Revisionist Theory of Contemporary Economic Jurisprudence*, 74 NEB. L. REV. 658, 716-20 (1995). See also Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 891 (1988) (noting that the goal of the judge is a *reasonable* decision).

The right of publicity is a true property right. *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1354 (D.N.J. 1981). It is transferable, through license or assignment, and is descendible. *Id.* at 1354-55. See also *Martin Luther King, Jr., Center for Social Change, Inc. v. Am. Heritage Prods., Inc.* 296 S.E.2d 697, 704-05 (Ga. 1982) (recognizing that the right of publicity is assignable, inheritable and devisable).

