IMAGE AS PERSONAL PROPERTY: HOW PRIVACY LAW HAS INFLUENCED THE RIGHT OF PUBLICITY

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"No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."

Judge Cooper, *Christoff v. Nestle USA, June 29, 2007*[1]

I. PROLOGUE: A RECENT EXAMPLE

On June 26, 2007, the California Court of Appeals issued a noteworthy opinion testing the boundaries of the law known as the right of publicity. In *Christoff v. Nestle USA*,[2] Russell Christoff, a relatively unknown professional model, appeared for a photography session for a new advertising campaign for Nestle's instant coffee brand, Taster's Choice. Christoff was paid for his time and told that if Nestle selected his image for the advertisements, he would be contacted. However, without his permission and without contacting him, Nestle prominently used Christoff's image as the "taster" for its Taster's Choice instant coffee product. The image of Christoff that was used depicted him gazing at a cup of coffee as if he enjoyed the aroma. This picture appeared on every Taster's Choice coffee can label and advertisement in Canada and Mexico. Thirty years later, Christoff discovered the unauthorized use and filed suit for the invasion of his right of publicity.[3]

The California Court of Appeals in *Christoff v. Nestle USA*[4] denied Christoff recovery of monetary damages, but for curious reasons. The court remanded the decision for applying the incorrect statute of limitations standard. A California statute sought to limit the perpetual tolling of the statute of limitations for certain causes of action which, otherwise, would extend the life of a claim by each publication, television ad, or other use. This statute, known as the "Single Publication Rule," only listed "appropriation" torts related to the invasion of privacy as falling within its scope.[5] The right of publicity was not included within the scope of the rule's protection. However, the Court of Appeals held that, while the statute covering the right of publicity had been called a different name at an earlier time, the "Single Publication Rule" now also applied to the right of publicity. The Court reasoned that the "publicity" tort emerged from the "invasion of privacy" tort. This was true regardless of the right of publicity's "initial classification"

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[1] Christoff v. Nestle USA, Inc., 62 Cal. Rptr. 3d 122 (June 29, 2007) (quoting Zacchini v. Scripps-Howard Broadcasting Co. 433 U.S. 562, 576 (1977)).

[2] *Christoff*, 62 Cal. Rptr. 3d (2007).

[3] *Id.* at 127.

[4] *Id.* at 143.

[5] Cal. Civ Code § 3344.1 (2007).

as a personal privacy right.[6] The Court then remanded the decision to determine how the statute of limitations applied.

This result is curious, because the right of publicity has recently undergone a fundamental change from its "initial classification" as a privacy-based tort. The right of publicity is now recognized as a purely economic property tort, completely divorced from the personal qualities it once protected. Thus, it would seem to follow that an earlier application of the "appropriation" statute should not be applicable to a modern right of publicity claim. However, the California Court of Appeals disagreed. Such a result is representative of how far the right of publicity has drifted from its moorings. According to the *Christoff* court, the right of publicity is neither strictly property- nor privacy-based, but rather some combination of the two. While perhaps reasonable, such a result illustrates how the right of publicity's original principles (based in privacy) are currently used in modern applications of the law (which are property-based).

II. INTRODUCTION

The law known as the right of publicity gives people the right to control the use of their names and likenesses for commercial purposes.[7] For years, courts struggled to define the nature of publicity because of its dual influences—privacy and property.[8] Publicity's roots stem from its introduction as a personal right prohibiting the misappropriation of identity. "Like Eve from Adam's rib the right of publicity was carved out of the general right of privacy."[9] Over time, practical and economic concerns resulted in recognizing publicity as a separate tort, which transformed it into an interest in property rather than privacy. The critical difference is that a property right focuses on the injury to the pocketbook, whereas an invasion of appropriation privacy focuses on the injury to a person's feelings.[10]

The disconnection of the right of publicity from the person or individual gave the right real value. As property, the right of publicity can be sold, devised or bequeathed to heirs or assignees. However, if the right remained a personal one, the right of publicity could not be sold in the same manner, and it would cease to exist with the right owner's

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[6] *Id.* at 132. .

[7] *See* Stacey L. Dogan & Mark A. Lemley, *What The Right of Publicity Can Learn From Trademark Law*, 58 STAN. L. REV. 1161, 1162-72 (2006).

[8] J. Thomas McCarthy, 1 THE RIGHTS OF PUBLICITY AND PRIVACY § 5:65 (2d ed. 2007) [hereinafter, "*McCarthy*"].

[9] *McCarthy*, § 5:61.

[10] *McCarthy*, § 5:63.

death.[11] Classifying the right of publicity as property gave celebrities the ability to effectively sell and trade in their name in the form of fees or endorsements.

When the right of publicity shifted to a property-based theory, it became disconnected from its original theoretical justifications. By dehumanizing the appropriation tort, the application of the right of publicity to invasion of personal privacy principles began to lack all persuasiveness. Nevertheless, the main theories for the right of publicity remained, including the theory that a person is entitled to the right to control the use of his or her image or likeness purely because it is *theirs*.

This entitlement justification conflicts with the model of publicity law as property, which rejects any reference to the actual person. Because the feelings of the person whose rights were invaded were rendered irrelevant when the right became property-based, giving someone rights simply because they are entitled to them now lacks any theoretical foundation. Particularly, property in the form of a person's name, face or identity should be free for others to use according to America's revered freedom of speech interests. A return to the right of publicity of the earlier era represents the injection of privacy theory to justify the property-based publicity tort.[12] Use of privacy law also gave the right of publicity legitimacy, and it increased its theoretical strength.

At the same time, the use of privacy theory also prevented the right of publicity from trampling on other intellectual property rights such as copyrights. Though fundamentally different from copyright, if the right of publicity too closely resembled the protections of copyright law, it could be invalidated by preemption principles under the Constitution's Supremacy Clause.[13] An expansion of the right of publicity to protect a name, likeness, or anything else that is associated with a person that invokes the likeness of the person creates an inevitable conflict with copyright law. The courts' solution was to infuse privacy rationale, thereby creating a separate theoretical justification for enforcing the right of publicity. Thus, although called "property," the right of publicity has become a version of property-like protection that was less than property, thus avoiding conflict with copyright protections. In this way,

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[11] *Id.*

[12] *See* Timothy P. Terrell & Jane S. Smith, *Publicity, Liberty, and Intellectual Property: A Conceptual And Economic Analysis Of The Inheritability Issue,* 34 EMORY L.J. 1 (1985) (arguing that the influence of "liberty" changes the nature of the right of publicity from being able to be considered property in the way it is conventionally understood).

[13] U.S. Const. art. VI, cl. 2.

the right of publicity could further its own interests of alienation and exclusion. And for the same reason, publicity has thus far not been preempted for conflict with federal copyright laws.

This article argues that the right of publicity cannot be considered exclusively property or privacy, but instead a combination of the two. A modern court's use of privacy rationale builds a quasi publicity/property theory for the right of publicity by looking to the early form of the right of publicity law and its privacy-based influences. Such a result solves both practical and theoretical considerations. Giving publicity a property label gives the advantages of a property right with the legitimacy of a privacy tort. This approach also illustrates the middle ground chosen by modern courts as a practical solution to changing times. Courts had no other choice and could not explicitly explain the right of publicity completely as either property or privacy because the right would be invalidated if it was characterized to either extreme.

This article proposes that a fresh perspective will aid in interpretation of modern right of publicity case law by looking to the middle ground chosen by contemporary courts as a practical solution to changing times. Part III explains why the inclusion of privacy rationale in right of publicity cases both implicitly and explicitly helped justify and legitimize that right, even after publicity had been called a purely economic-based interest. Part IV describes the problems a return to privacy-based reasoning caused and explains why courts did not choose a purely property-based rationale for the right of publicity, regardless of the property label it had been given. Doing so would also risk conflicting with federal intellectual property laws. But by including privacy rationale, modern courts provided an alternate and independent justification for enforcing the right of publicity. Part V proposes a synthesis to interpret future right of publicity cases, arguing that the infusion of privacy-based rationale helps explain modern publicity case law. While modern cases mostly have reached the correct results, their results can more easily be seen as a consequence of the practical considerations of catering to privacy law. Such an ideological distinction is not a fundamental change, since it has already been used widely and has simply never been given a proper name. Modern courts are mature enough today to overcome confusing labels and recognize that the right of publicity has become an entirely new right that has grown far beyond its origins.

III. A Return to Privacy Influences

Two general phases in publicity law best explain its development: the early period and its modern form. The two periods reflect practical

responses to changing times. In the early period, privacy law was created as an answer to the rapid technological and informational developments in America during the late nineteenth century. America was entering into an uncharted modern age where technological developments threatened to encroach on personal privacy like never before in history.[14] The law called the "invasion of privacy" was encouraged and adopted by courts and commentators to erect at least some protection against the embarrassing mental distress that could affect individuals.[15]

Cases during this early period involved the courts' recognition, for the first time, of the right of individuals to limit the use of their names or likenesses by commercial actors.[16] These cases showed that individuals could avoid the magnifying glass of the press or society by keeping some aspects of their life hidden from public scrutiny.[17] For celebrities, however, courts refused to award damages for the use of their personal identities because, as it was reasoned, they voluntarily accepted being cast into the public light and as a result were thought to have waived their personal privacy.[18] When a celebrity's image or likeness was used without his or her permission, it was considered a personal harm, and courts could not see how celebrity plaintiffs could suffer mental distress or wounded feelings from this additional publicity even when it was done for unauthorized commercial purposes.[19]

Fifty years later, courts and legislatures began to recognize a broader right of publicity, and celebrities were increasingly able to prevent unauthorized commercial uses of their identities without regard as to whether the celebrity "sought out the spotlight" or not.[20] Over time, celebrity status began to be regarded as more of a commodity when movie, television and sports personalities were given increased media attention and fame during the mid-1900s.[21] Courts and legislatures changed the nature of the right of publicity during this time period. The right of publicity underwent a fundamental shift away from pro-

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[14] *See* Dogan & Lemley, *supra* note 7, at 3.

[15] *See McCarthy,* § 5:65.

[16] *See* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 148-52 (1993) (describing the rampant commercial exploitation of celebrity personae throughout the late 1800s) (hereafter referred to as, *Madow, Private Ownership of Public Image*)

[17] *Id.* at 149-52.

[18] *Id.*

[19] *See* Samuel v. Curtis Publishing Co., 122 F.Supp. 327, 328 (N.D.Cal. 1954); Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir. 1940); Namath v. Sports Illustrated, 371 N.Y.S.2d 10, 11(N.Y. App. Div. 1975).

[20] *See* Dogan & Lemley, *supra* note 7, at 1163-64.

[21] Lee Goldman, *Elvis Is Alive, But He Shouldn't Be: The Right Of Publicity Revisited*, 1992 B.Y.U.L. REV. 597, 600 (1992).

tecting the person and the integrity of the individual to protecting the dehumanized economic value that could be derived from the person's identity.[22]

A. *Expansion of the Right of Publicity*

The roots of the right of publicity can be traced to privacy law.[23] It was the theory that an individual had a "right to be left alone" which was first introduced in a seminal article authored by Samuel Warren and Louis Brandeis.[24] Warren and Brandeis championed the idea of limiting an individual's exposure to the public eye when a person desired to keep aspects of his or her life private. The authors claimed that a preexisting independent right had been well established that permitted individuals to keep works from the public eye. The authors analogized to the then-existing system of common law copyright, which permitted an author to prevent the publication of unpublished manuscripts, thus allowing him or her to prevent those works from entering the public domain.

Warren and Brandeis argued that an author had the innate and inherent right to prevent the publication of his works. This right carried its own value to the author, namely "the peace of mind or the relief afforded by the ability to prevent any publication at all."[25] It did not matter what the work was, or even if it ended up being unprotectable by copyright, but rather that the inalienable right to be left alone permitted a person to prevent private creations from public disclosure.

Years later, Professor William Prosser developed Warren and Brandeis's theory of privacy further by categorizing it into four distinct types of invasion of privacy. One type included the "appropriation, for the defendant's advantage, of the plaintiff's name or likeness," which later became known as the right of publicity.[26] Prosser specifically described this appropriation tort to be an invasion of an individual's per-

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[22] *See, e.g., McCarthy* § 5:65; State ex rel. Elvis Presley Intern. Memorial Foundation v. Crowell, 733 S.W.2d 89, 95 (Tenn. Ct. App. 1987) ("Now, courts in other jurisdictions uniformly hold that the right of publicity should be considered as a free standing right independent from the right of privacy."); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 834 (6th Cir. 1983).

[23] *McCarthy*, § 5:65.

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

[25] *Id.* at 200. Warren and Brandeis relate copyright's "right to control publication" to illustrate that in a property scheme an individual's right to control his works transcends the type of work. Robert Post, however, argues that copyright law never protected such inviolate personality rights and instead only protected the authors' property interest in the production of products alone. *See also* Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property and Appropriation*, 41 CASE W. RES. L. REV. 647, 654-58 (1991).

[26] *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

sonal privacy rights. His reasoning was that an individual's "human dignity" and "personality" were directly affected by the appropriation of a person's identity.[27] According to Prosser, the tort of appropriation was directly related to a person's privacy interest, because it was *that person's* unique individual qualities which were being appropriated.[28]

1. Early Cases

The courts that first interpreted the "appropriation" claims cast a broad brush over the type of appropriation that occurred. They suggested more property-like rights were invoked when there was an unauthorized use of a person's person image or likeness. The landmark case of *Pavesich v. New England Life Ins. Co.* demonstrated the importance of protecting an individual's personal identity from appropriation.[29] The *Pavesich* court found there was an invasion of the plaintiff's privacy from the use of the plaintiff's photograph in a life insurance advertisement that included false statements about his relationship with the insurance company.[30] The court held that a person can recover mental distress damages for the unauthorized use of one's picture in an advertisement.

Explicit in the court's opinion was that a person's entitlement to control the use of his own image stems out of a natural right. The court stated, "If a man's name be his own property . . . it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it."[31] Commentators have noted that according to the *Pavesich* court, the prohibited commercial use of one's own name is simply a "refined form of theft."[32] The *Pavesich* court defended the right to control the commercial use of one's own identity on the basis of a self-evident right in every human being.[33] This was true in light of the fact that the appro-

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[27] Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser,* 39 N.Y.U. L. REV. 962, 971, 974, 1000-01 (1964). Other courts have also recognized the tort of invasion of privacy as being "an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close." Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998).

[28] *McCarthy,* § 5:61.

[29] Pavesich v. New England Life Ins. Co., 50 S.E. 68, 69 (1905); *see also, Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902).

[30] *Pavesich,* 50 S.E. at 69.

[31] *Id.*

[32] Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455, 462 (1978).

[33] *Id.*

priation that occurred in *Pavesich* was commercial in nature in the form of an advertisement.[34]

2. Problems with Early Privacy Law

During the first few decades of deciding right of privacy or appropriation cases, courts rarely permitted celebrities to succeed with their invasion of privacy claims.[35] This was largely due to the fact that courts recognized the need to protect personal privacy only for "private" persons. When celebrities brought causes of action, they were often denied recovery because they were considered to have sought out their fame and thus could not be offended by further exposure.[36] Damages were limited to personal injuries suffered, rather than economic value derived from the unauthorized use.[37] It was believed that because privacy rights were personal, they could not be transferred or sold and could only be waived by individuals they emanated from.[38] For this reason, celebrities were unable to endorse products and realize the full value of their identities until they were given another right that was different from the right of privacy. Publicity needed to be fully alienable and transferable for celebrities to finally secure real economic value from their identities. Celebrities' wishes were answered by the creation of a new cause of action in the form of the right of publicity, which was characterized as a purely property interest. When courts were able to disconnect a celebrity's personal feelings from his or her economic interests in endorsing products, courts could then justifiably grant celebrities the economic protection they desired.

B. *A Better System Than Privacy: Publicity Emerges*

Creation of a new cause of action called the right of publicity definitively separated a person's personal privacy interests from his or her economic interests. This separation is said to have occurred around the time of the 1953 decision of *Haelan Laboratories, Inc. v. Topps Chewing Gum.*[39] In *Haelan*, the Second Circuit held that a person had an

[34] *Pavesich*, 50 S.E. at 69.

[35] *McCarthy*, § 2:2.

[36] *Madow*, *supra* note 16, at 184, 188.

[37] *Madow*, *supra* note 16, at 148-52 (describing widespread commercial exploitation of celebrity images through the late 1800s).

[38] *Id.*

[39] Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953); *see also* Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 840-43 (S.D.N.Y. 1975) (characterizing publicity rights as property for merchandise control over a comedy group); Grant v. Esquire, Inc., 367 F. Supp. 876, 880-84 (S.D.N.Y. 1973) (characterizing publicity rights as property regarding a person's appearance in a clothing advertisement); Uhlaender v. Hen-

independent cause of action to protect his publicity—a separate and distinct cause of action from the protection of his or her privacy interests.[40] The *Haelan* court distinguished publicity from privacy by emphasizing the commercial value of publicity. The court stated, "[F]ar from having their feelings bruised through public exposure of their likenesses, [prominent persons] would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances displayed in newspapers, magazines, busses, trains and subways."[41] As a result, the right of publicity as an independent cause of action became quite different from the appropriation violations in the past. The emphasis was now on the loss of commercial opportunity, not upon the invasion of personal autonomy or integrity.[42]

Twenty years after *Haelan*, the right of publicity had shifted entirely from its foundations in protecting privacy to protect economic concerns. By the 1970s, the right of publicity had become widely accepted by courts and legislatures as a separate cause of action.[43] A celebrity's right to protect his or her publicity now had real economic value as it acquired qualities that made it fully alienable. This meant it could be assigned to and inherited by third parties in many cases. Damages were also now calculated in terms of actual damages (or endorsement fees) or profits derived from the revenues of the advertisement(s) instead of being calculated based upon the amount of mental distress the plaintiff incurred.[44] The recognition of publicity as another economic asset meant it was often referred to as "property."[45] This fundamentally distinguished it from the "privacy" interests the "appropriation" right of publicity protected prior to this point in time.[46]

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ricksen, 316 F. Supp. 1277, 1279-81 (D. Minn. 1970) (property characterization for the use of the unauthorized endorsement by a baseball player for a baseball board game).

[40] *Haelan*, 202 F.2d at 868. (reasoning that "a man has a right in the publicity value of his photograph," a right that is "to grant the exclusive privilege of publishing his picture.").

[41] *Id.* at 868.

[42] Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 46 (1997).

[43] *But see* N.Y. CIV. RIGHTS Law §§ 50, 51 (2002). This New York law was passed in response to the New York Court of Appeals' refusal to recognize the privacy right as a matter of common law. *See also* Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 263 (N.Y. App. Div. 1984) (using the term "privacy" to ensure the publicity claim fell within the New York right of "privacy" statute).

[44] *McCarthy*, § 5:65.

[45] *See* Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc., 694 F.2d 674, 694 (11th Cir. 1983); J. Thomas McCarthy, *The Rights of Publicity and Privacy* (2000); Sheldon W. Halpern, *The Right of Publicity: Maturation of an independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853 (1995).

[46] *See* Groucho Marx Productions, Inc. v. Day and Night Co., Inc., 523 F. Supp. 485, 487 (S.D.N.Y. 1981), *judgment rev'd*, 689 F.2d 317 (2d Cir. 1982) ("Although the right of publicity developed as an offshoot of the law of privacy, the right differs in that it protects the

C. *The Modern View—Fame as Property*

As property, the right of publicity's economic value can be sold, transferred and exploited by its holder, and in many states, even after the death of the original person who held the right. But naming the right of publicity "property" essentially only assigns the right of publicity a label that gives it little meaning. Publicity's new label only served to distinguish it from the right of privacy it replaced. This occurred for practical reasons. If the right of publicity was labeled "property," then the right could survive the death of the individual who created it, but if it was labeled a "personal" right, then the rights would terminate earlier or upon the death of the right owner. Thus, the property label gave the right of publicity the advantages it could not achieve under the privacy categorization.

The meaning of the right of publicity as property is unclear. Arguments over the nature of the property right typically arise in postmortem cases or cases where the parties are disputing whether the right of publicity is inheritable. *Bela Lugosi v. Universal Pictures* delved into the nature of the right of publicity's property attributes and was one of the first cases to address the issue of a postmortem right of publicity.[47] After extensive review of the historical differences between the personal rights of privacy and the property interests associated with the right of publicity, the majority concluded that the plaintiff Bela Lugosi's identity as an actor who played Count Dracula was a personal right which terminated at Lugosi's death and could not be transferred to his heirs.[48] The court explained that "a rule of nondescendibility is justified by the personal nature of the right, coupled with the difficulty in judicially selecting an appropriate durational limitation were it held descendible to one's heirs."[49]

The *Lugosi* court struggled with the definitions of the terms "property" and "privacy" and their application to the right of publicity.[50] The court concluded that the "debate over the issue is pointless" and that the "real question" is "whether this right [of publicity] is or ought to be personal."[51] Concluding that the right was a personal interest, the

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plaintiff's commercial interests rather than noneconomic interests such as freedom from public embarrassment or scorn.").

[47] *See also* Factors Etc., Inc. v. Pro Arts, Inc. 579 F.2d 215, 220-22 (2d Cir. 1978) (rejecting property label); *But see* Price v. Hal Roach Studios, Inc. 400 F. Supp. 836 (S.D.N.Y. 1975) (stating that the right of publicity had adopted property attributes).

[48] Lugosi v. Universal Pictures, 25 Cal. 3d 813, 824 (1979).

[49] *Lugosi,* 25 Cal. 3d at 823 n.8.

[50] *See also* Memphis Dev. Foundation v. Factors, Etc. Inc.616 F.2d 956, 958 (6th Cir. 1980) (rejecting the label of property for invasion of personality rights).

[51] *Lugosi,* 25 Cal. 3d at 824-25.

court determined it could not be inherited.[52] Other courts have similarly agreed that publicity should not continue after death because of its personal nature and historical privacy influences.[53] However, most jurisdictions today have enacted statutes or recognize a postmortem right of publicity by common law, including California, whose legislature overruled the *Lugosi* opinion by amending its right of publicity statute in 1985 as a direct response to the outcome of that case.[54]

Most courts and critics assume that at some point in time a distinct shift occurred which transformed the right of publicity from a personal privacy right into a property right. But in reality, the label of "property" served only to distinguish the right of publicity from the separate tort of the invasion of privacy.

IV. The Problems with Modernizing Publicity

As the right of publicity shifted in meaning from a personal privacy right to a purely economic interest, it underwent a transformation into something that hardly resembled what it once was. The earlier era's justifications for the right became disconnected from the new meanings of publicity as a purely economic interest. When looking at publicity in its original form as a reference for interpreting the modern right of publicity, one should proceed carefully and with an eye towards how the influences of personal privacy directly altered the outcomes of those opinions.

Several problems have arisen in attempting to define the meaning of the new right of publicity. First, calling the right of publicity "property" provides little guidance and does not express much meaning besides defining publicity as "not privacy." Similarly, after attaching the "property" label, the privacy-based rationale for the right of publicity appears to no longer be persuasive when it is disconnected from its personal protections it once served.

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[52] *Id.*

[53] *See* Stephano v. News Group Publications, Inc., 64 N.Y.2d 174 (1984) (holding that there was no common-law publicity right and was enveloped within the New York privacy statute). It was not clear however, until an 1986 opinion if in New York the rights of publicity ended at death. *See* Antonetty v. Cuomo, 502 N.Y.S.2d 902, 906 (N.Y. Sup. Ct. 1986).

[54] Cal. Civ Code § 3344.1 (2007). *See also* Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 844 (S.D.N.Y. 1975); State ex rel. Elvis Presley Intern. Memorial Foundation v. Crowell, 733 S.W.2d 89 (Tenn. Ct. App. 1987) (stating that the right of publicity "is a species of intangible personal property," which gives it a postmortem duration).

A. *The Problem of Labels*

The right of publicity emanated from the classic right of privacy, making the two rights clearly separable. This is because the former protects purely commercial concerns, while the latter protects purely emotional or dignitary concerns.[55] The protection from appropriation of some element of an individual's personality for commercial use and the protection upon an intrusion upon an individual's privacy are different in theory and scope.[56] However, what publicity means when it is called "property" is not self-evident.[57] One court has recognized this labeling issue as "the quagmire of combining considerations of 'right of privacy' [and the] 'right of publicity'. . ."[58]

Another court has defined the right of publicity as having a property label, but that label only gives it a temporary meaning. In deciding whether publicity is property for income tax purposes, Judge Goldberg noted that the true meaning of property changes with time:

> The attempt to define "property" is an elusive task. There is no cosmic synoptic definiteness that can encompass its range. The word is at times more cognizable than recognizable. It is not capable of anatomical or lexicographic definition or proof. It devolves upon the court to fill in the definitional vacuum with the substance of the economics of our time. . . ."Property" evolves over time. It can be described as the bundle of rights attached to things conferred by law or custom, or as everything of value which a person owns that is or may be the subject of sale or exchange.[59]

Once free from the constraints and restrictions courts placed upon personal privacy, courts were free to define the scope of the new publicity rights with any attributes.[60] Yet courts were without a theoretical foundation to define the scope of the right of publicity as the right became one of property, uprooted from privacy law.[61] Courts were required to look to other sources to define the right of publicity's protections. The original format of the right of publicity seemed an obvious first choice, but its theoretical basis in privacy law conflicted with the nature of the rights granted through an interest in "property."

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[55] *McCarthy*, § 9:10.

[56] *Lugosi*, 25 Cal. 3d at 839.

[57] *McCarthy*, § 9:5.

[58] Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc., 250 Ga. 135 (1982) (Weltner J., concurring); *see also* Factors Etc., Inc. v. Creative Card Co., 444 F. Supp. 279 (S.D.N.Y. 1977), *aff'd*, 579 F.2d 215 (2d Cir. 1978).

[59] First Victoria Nat. Bank v. U.S., 620 F.2d 1096, 1102–03 (5th Cir. 1980).

[60] *McCarthy*, § 9:5.

[61] Alisa M. Weisman, *Publicity as an Aspect of Privacy and Personal Autonomy*, 55 S. Cal. L. Rev. 727 (1982).

B. *Problems with the Theory of Entitlement*

The theory of entitlement reflects the popular notions that "you should not take what is not yours," "what I create is mine," and "you should not reap where you have not sown."[62] According to this theory, there is nothing more personal than one's identity. A person is entitled to control what is innately his, including and especially, his own identity. It follows that a person should be inherently able to make *any* use of his identity, including any commercial use.[63]

Warren and Brandeis's seminal 1890 article bases the right of privacy on "the notion that one owned one's self, one's ideas and one's self-image as a property right worthy of legal protection," and one could thereby control commercial uses of his or her image.[64] Yet in 1890, celebrity status did not exist as it does today: Warren and Brandeis only envisioned a person's *privacy* interests being protected. Hence, Warren and Brandeis stood for the adoption of a different solution to a different problem at a different time.

1. A Legal Theory, Misplaced

When the legal theory underlying the right of publicity is divorced from its original privacy context and used to justify the entitlement to property, it begins to crumble. The theory is more reminiscent of moral rights justifications for property, a justification that has had little support in America's intellectual property history.[65] When this natural rights theory is used to explain the right of publicity as property, it appears overly simplistic. The theory has been likened to making the statement, "[E]xcuse me, but you are taking something that belongs to me" just like the plaintiff who asserts that the right of publicity effectively says to the defendant, "[E]xcuse me, but you are using my identity to draw attention to your commercial advertisement. That belongs to me."[66] Citation to an individual's personal rights evokes the personal interests which were supposed to be left behind when the shift in the goals of publicity occurred, turning it into a purely economic property interest.

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[62] *McCarthy*, § 2:5.

[63] *McCarthy*, § 2:2.

[64] Dorothy Glancy, *Privacy and the Other Miss M*, 10 N. ILL. U. L. REV. 401, 418 (1990).

[65] 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, 152 (noting parallels between moral rights and right of publicity) [hereinafter "*Kwall*"].

[66] *McCarthy*, § 2:2; *But see Kwall*, at 152 (arguing that "the right of publicity is entirely consistent with our history and the very essence of our cultural fabric" and is "justifiably treated as a property right in our society.").

Contemporary cases refer to the individual. These references are reminiscent of the privacy-based interests that the right of publicity used to protect, instead of purely commercial interests. The Ninth Circuit has considered the singer/actress Bette Midler's voice "more personal than any work of authorship. . . .[a] voice is as distinctive and personal as a face."[67] According to the *Midler* court, the performer's voice was so personal to her that it could not be denied protection. Similarly, other courts have recognized the right of publicity protecting the broader interests over a "plaintiff's personal feelings."[68] One court has held that a plaintiff has a natural right to control his own likeness, even when the harm is not entirely economic.[69] Still other courts have given a celebrity plaintiff's right of publicity value because of the personal pride he had developed in the use of his name.[70]

As courts focus on the individual, they should take heed to view how far the rights and interests have departed from their original interpretations. The law of publicity places an importance on the individual and on maintaining a person's rights because they are so intimate and personal.[71] This justification is far removed from the primarily economic interests protected historically.

C. *Further Complications with Property*

Labeling the right of publicity "property" created a separate cause of action and endowed the right with various advantages over the right of privacy from which it emerged. But the label also began to encroach upon the already existing field of intellectual property. If a conflict were to occur with the property rights already enacted by Congress, such as that of copyrights, the state-created laws would be invalidated under the federalism principle of preemption. As the right of publicity

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[67] Midler v. Ford Motor Co., 849 F.2d 460, 460-63 (9th Cir. 1988).

[68] Motschenbacher v. R. J. Reynolds Tobacco Co., 498 F.2d 821, 825-26 (9th Cir. 1974) ("we conclude that the California appellate courts would, in a case such as this one, afford legal protection to an individual's proprietary interest in his own identity. We need not decide whether they would do so under the rubric of "privacy," "property," or "publicity;" we only determine that they would recognize such an interest and protect it.") (footnotes omitted).

[69] *Id.*

[70] *See* John W. Carson v. Here's Johnny Portable Toilets, Inc., 690 F.2d 831, 837 (6th Cir. 1983); *see, e.g.*, Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 714-17 (9th Cir. 1970); Lahr v. Adell Chem. Co., 300 F.2d 256, 259 (1st Cir. 1962); Booth v. Colgate-Palmolive Co., 362 F.Supp. 343, 347-49 (S.D.N.Y. 1973); Sullivan v. Ed Sullivan Radio & T.V., Inc., 152 N.Y.S.2d 227, 228-29 (N.Y. App. Div. 1956).

[71] *See Madow*, *supra* note 16, at 167; Lawrence Edward Savell, *Right of Privacy - Appropriation of a Person's Name, Portrait, or Picture for Advertising or Trade Purposes Without Prior Written Consent: History and Scope in New York*, 48 ALB. L. REV. 1, 3-14 (1983).

began to take on more property-like characteristics, the interests it protected threatened to impede upon the rights protected by federal copyright laws. To avoid preemption, courts injected privacy rationale to their analysis to bolster the legitimacy of the right of publicity and to avoid invalidation of the state-created rights.

1. The Intersecting Universes of Copyright and Publicity

When states grant intellectual property rights to its citizens through its common law or statutes, such laws cannot conflict with federal laws concerning the same subject matter. If the state and federal laws conflict, the state directives will be invalidated under the principle of preemption by either the federal statute's provisions or by the Constitution's Supremacy Clause.

This interaction of state and federal powers in the field of intellectual property is premised on the principle that states have retained all power not expressly claimed by Congress.[72] Where Congress has not acted or has not expressly chosen to occupy the field, a state is free to act as no federal law stands in the way.[73] The Copyright Act can invalidate a conflicting state law by preempting it under 17 U.S.C. § 301, or a court can preempt a state law by finding that the law conflicts with copyright's purposes and objectives. This second, more general type of preemption occurs under the Constitution's Supremacy Clause and occurs when the "purposes" of the federal law are "frustrated."[74] Otherwise, the two bodies of law (state and federal) may coexist.

The right of publicity has been widely accepted to fall outside of the scope of copyright's protections. The right of publicity protects a person's "likeness," while copyright protects specific "works," which are permanent enough to be "fixed in a tangible medium of expression."[75] Therefore, protecting a person's likeness is not within the scope of Congress's legislation in the Copyright Act and therefore the laws do not conflict.

Such rights in copyright interests are uncertain however, as neither the legislative history nor the Copyright Act itself has defined the exact scope of the rights. To what extent Congress intended to "occupy the

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[72] *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 577 (1977) (Justice White's majority opinion in *Zacchini* states that the states are free to legislate unless Congress has *specifically chosen* to regulate that field).

[73] *See* Goldstein v. California, 412 U.S. 546, 561 (1973).

[74] *See* Hines v. Davidowitz, 312 U.S. 52 (1941). Preemption occurs when compliance with both is a physical impossibility or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67.

[75] 17 U.S.C. § 101 (2009).

field" of intellectual property is ambiguous.[76] The Supreme Court has only once helped define the scope of these rights. In 1977, the Supreme Court ruled on *Zacchini v. Scripps-Howard Broadcasting Co.*,[77] the only right of publicity case the Court has heard to date. The *Zacchini* Court determined that Ohio's right of publicity statute did not conflict with the objectives of the Copyright Act, and it was therefore not preempted.

Since 1977, arguably much has changed in terms of the right of publicity law. Its scope has been expanded to include any work that "evokes the personality" of a person.[78] A person has protection from the unauthorized uses of his name, signature, image, likeness, voice or identity in many states. With the expansion of the scope of the right of publicity since 1977, it is unclear if these rights will once again "frustrate the objectives" of Congress. In other words, if an artist creates a painting of Elvis Presley, for example, a broad right of publicity statute would prevent an artist from creating *any work* that "evokes" Elvis's personality, image or likeness.[79] At some point such a broad right of publicity would prevent the free expression of ideas and creation of works, the foundational principle of the Copyright Act. Such a conflict would conceivably result in the preemption the state right of publicity statute.

2. When Rights Conflict: Preemption

It is difficult to predict at what point of interference with the Copyright Act a conflict and the resulting preemption will occur. The Supreme Court's interpretation of the scope of Congress's powers to regulate intellectual property provides the most useful guidance on the subject. At present, the scope of the right of publicity has not been seen as trampling upon the rights of copyright holders. This is true

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[76] *Id.*

[77] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

[78] *See* White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir. 1992) (a fictional character of the *Wheel of Fortune* game show personality Vanna White had a right of publicity claim); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) (the use of plaintiff's identifiable racecar, that had been removed of distinctive features and did not depict plaintiff's face or body, had a right of publicity claim); Allen v. Nat'l Video, Inc., 610 F. Supp. 612, 624 (S.D.N.Y. 1985) (holding that advertisements for a video-rental store using a Woody Allen look-alike violated Allen's right of publicity); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (holding an actionable right of publicity claim existed for use of voice imitator hired to imitate singer Bette Midler's voice for a television advertisement).

[79] *See* Comedy III Prods. v. Gary Saderup, 106 Cal. Rptr. 2d 126, 142 (2001); *But see* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 922 (6th Cir. 2003) (a painting of Tiger Woods did not create an actionable right of publicity cause of action).

even when the right of publicity is recognized as a purely property interest. The most recent case interpreting these federal powers is *Bonito Boats v. Thunder Craft Boats*, decided in 1989. Justice O'Connor's majority opinion in *Bonito Boats* held that broad federal interests in regulating the field of intellectual property leave little, if any, room for states to supplement the field with additional laws. *Bonito Boats* concerned the issue of boat hull designs which could not be patented. The Court held that states could not enact statutes or laws that protected what Congress has deemed expressly unprotectable under the scheme of the federal patent system. This is because Congress's powers in the field of patents are "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[80] After *Bonito Boats,* state right of publicity statutes appeared doomed, yet it was unclear to what extent this patent decision applied to copyrights, a similar intellectual property interest.

In 1992, the Ninth Circuit had an opportunity to comment on the possibility of preemption of California's right of publicity statue, post-*Bonito Boats.* In *Waits v. Frito-Lay*, the Ninth Circuit rejected a preemption argument when presented with a case for the misappropriation of the plaintiff's voice. In *Waits,* the defendant created a song that sounded similar to the style used in one of the plaintiff's songs. The *Waits* court held that no federal objective was frustrated by California's right of publicity statute, even after *Bonito Boats.*[81] The *Waits* court also noted that the recent *Bonito Boats* Supreme Court decision did not suggest a return to the strong preemptive force once held to be the scope of Congress's powers in the earlier Supreme Court cases of *Sears* and *Compco.*[82] The court concluded its analysis by relying on the fact that the Supreme Court in *Zacchini* found that a right of publicity statute existed "in harmony with federal patent and copyright law."[83] After the *Waits* decision, it seems unlikely the right of publicity could be preempted by the Supremacy Clause because the right of publicity, at least for voice appropriation, is "different in kind"[84] than the copyright interest and therefore does not conflict with it. Despite the most recent Supreme Court decision suggesting the state-created right of publicity statutes should be limited under current interpretation of the Constitution's separation of state and federal powers, the *Waits* opinion suggests

[80] Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 145 (1989) (quoting, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[81] Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1099 (9th Cir. 1992).

[82] *Id.* at 1099 (citing Sears Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, 376 U.S. 234 (1964)).

[83] *Waits*, 978 F.2d at 1099.

[84] *Id.*

otherwise. The decision also suggests that the time is not ripe for a successful preemption argument via the Supremacy Clause to succeed.

Taking preemption as a whole, the current interpretation permits states to enact right of publicity statutes because the states have retained broad powers to do so under the Constitution. The curious aspect of the current interpretation of preemption is *why* state-created rights have not been preempted when on their face they appear to limit at least some rights given to authors under the Copyright Act. One possible answer can be found in the specific incentives states further through the right of publicity.

3. Incentives, Copyrights and Monopolies

As the right of publicity became increasingly property-oriented, there was also an increased need to differentiate publicity from other property interests, such as copyrights. One avenue for doing so was by differentiating the incentives created by the right of publicity. By relating the incentives to privacy interests, a state right of publicity statute could more easily avoid preemption. Demonstrating the personal or privacy-based interests underlying the right of publicity made it easier for courts to separate the goals of copyright and the right of publicity. In the end, however, the use of personal influences also demonstrate a return to privacy, even though publicity's modern form was now understood to be a property right.

The right of publicity and the Copyright Act protect entirely different interests and serve different goals. Where copyright's end goal is to benefit the public at large, publicity's goal is to monopolize attributes associated with a person to prevent unjust enrichment. The right of publicity is concerned with preventing depletion of one's commercial value through overexposure or uses inconsistent with one's image.[85] This focus on a personal interest has little regard for the contribution to society at large. This goal is consistent with publicity law's origins in personal privacy protection, which serves to benefit solely the individual.[86] The right of publicity also gives a person a security interest in the fruits of his or her labor.[87] In essence, the right of publicity rewards the individual simply because the individual has "worked hard" and has

[85] Richard A. Posner, *Misappropriation: A Dirge,* 40 HOUS. L. REV. 621, 634 (2003).

[86] Harry Kalven Jr., *Privacy in Tort Law - Were Warren and Brandeis Wrong?,* 31 LAW & CONTEMP. PROBS. 326, 331 (1966) ("The rationale for [protecting the right of publicity] is the straight forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay.").

[87] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575 (1977). As Richard Posner has said: It "is unlikely to invest less than he would otherwise do in becoming a

expended time, money or effort to create his or her image.[88] Arguably however, the celebrity or right of publicity claimant does not create incentives to expose his or her image to the public, and economic incentive is the reason for cultivating a celebrity image.

Alternatively, copyright law advances different goals than that of the right of publicity. Copyright law is concerned with providing authors an incentive to create and to ensure a fruitful public domain wherein others can build upon those works.[89] With copyrights, other authors eventually have an opportunity to build upon prior works. On the other hand, publicity law directly prohibits others from using a celebrity's personality or identity for commercial purposes. Copyright law has also rejected rewarding creators solely for the amount of effort they expended in the creation of a work. In *Feist Publications v. Rural Telephone Service Co., Inc.,* the Supreme Court abandoned this "sweat of the brow" rationale and refused to award copyrights to authors merely because of the great amount of labor they expended on the work.[90]

Right of publicity decisions often justify maintaining the right because of the underlying personal interests it protects.[91] The incentive theory of the right of publicity at its core protects a personal interest. By underscoring these personal interests, courts successfully distinguish publicity from copyrights to provide a separate reason to maintain a right of publicity claim when challenged by a preemption argument. In the process of distinguishing copyright's goals however, the privacy-based goals once again rise to the surface. Protecting the individual, creating incentives to cultivate a celebrity image, or protecting a celeb-

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movie star or other type of celebrity merely because he'll be unable to appropriate the entire income from the franchising of his name and likeness." *Posner*, 40 Hous. L. Rev. at 634.

[88] "[T]he appropriation of the very activity by which the entertainer acquired his reputation in the first place." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977); "The rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will." Kalven, supra note 86, at 331 (1966).

[89] *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 577 (1977) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"); *see also* Campbell v. Acuff-Rose Music, 510 U.S. 569, 575 (1994).

[90] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 353 (1991) ("It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. . . .[but] [t]he primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'" *Id.* at 530 (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975))).

[91] *E.g.,* Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 703 (Ga. 1982) ("the appropriation of another's name and likeness, whether such likeness be a photograph or sculpture, without consent and for the financial gain of the appropriator is a tort in Georgia.").

rity image from overexposure all in the end serve the individual. For these reasons, the individual has remained central to the right of publicity, even when property-based rhetoric began to be used in explaining the underlying rationale for the interest. Publicity has similarly not been preempted because of these differences maintained apart from copyright law.

Right of publicity decisions mixed other privacy-based influences into their reasoning in order to render the right of publicity less property-like despite being labeled "property." As a result, the right of publicity has mostly avoided preemption challenges by distinguishing itself from copyright's protections.[92]

V. Quasi-Property: A Proposed Synthesis

Taken together, the mountains of rights that are copyright and the right of privacy present a narrow passageway courts have followed to formulate the right of publicity as it is known today. At an earlier time, the theories of privacy and property seemingly could not co-exist, but that is exactly what has resulted. Property rejects identification with a person's feelings, while the natural rights of entitlement and incentive embrace a person and his or her feelings. This section will argue that contemporary courts' reference to publicity law rationale mixes privacy interests with the right of publicity reasoning to bolster publicity's analytical strength. This occurred even as publicity was claimed to protect entirely economic interests. As a result of incorporating the personal, courts injected privacy law into the right of publicity and it has shaped the nature of publicity law. The modern right of publicity that resulted was the natural and logical solution for courts faced with an impossible task: finding a middle ground between the aims of privacy and property without giving more weight to either. This section proposes a fresh approach to publicity law, one that takes into account the significant privacy interests.

A. *The Right of Privacy's Influences*

As the right of privacy developed over time, courts could not effectively separate the plaintiff's commercial concerns from his or her emotional concerns. As a solution, the right of publicity was deemed to protect only economic interests, and the right of privacy was devoted to

[92] *See* Facenda v. N.F.L. Films, Inc., 542 F.3d 1007 (3d Cir. 2008), *but see* Laws v. Sony Music Entm't, Inc., 448 F.3d 1134 (9th Cir. 2006) (finding preemption of plaintiff's "voice misappropriation" right of publicity claim by the Copyright Act for the unauthorized use of a sound recording)

protect the emotional claims of the plaintiff. The right of publicity thereby became recognized as protecting an interest that was separate and distinct from those protected by the right of privacy. The publicity right protected was in the form of endorsement fees that should have been paid to a celebrity for his authorized sponsorship or endorsement of a product or service.

To make the distinction between privacy and publicity simpler, many courts began to give the right of publicity a property label, and the right of privacy was given a privacy label. This effectively disconnected the person from the economic profits the person was entitled to by virtue of using the person's identity. While these labels helped to create a separate cause of action protecting economic interests, the label of "property" otherwise had little meaning.

Though the interests protected by the right of publicity had now changed from the personal to the economic, the theories used to justify publicity did not change. Publicity's theoretical justifications continued to be the same personal-based rationales, but were now just under a new name. The theories of natural rights or entitlement and incentive remained rooted in protecting the personal interests, though they were claimed by courts to be reserved only for right of *privacy* claims. As a result, the legitimacy of the right of publicity was bolstered by reference to the individual.

A return to publicity's privacy roots seemed not only logical but necessary. Empowering the individual with inalienable rights to his identity rendered the rights not only persuasive, but also undeniable. But such a characterization could not be stated expressly, because promoting property and privacy interests in the same right would appear to run counter to the conventionally understood theories regarding the nature of privacy and publicity. As courts tapped into the privacy language from the original case law from which the right of publicity arose to legitimize the right of publicity, publicity began to take on other qualities that changed its nature from a solely property interest.

At the same time, the characterization of the right of publicity as property risked conflicting with existing systems of intellectual property. Turning an eye to privacy interests once again served to ideologically separate the right of publicity from conventional property. In the process, the right of publicity championed differences that were all related to the personal and individual. The right of publicity provides the incentives for individual celebrities to cultivate their personas, and a right to be paid for sponsorship of products and services. These justifications return to the intrinsic value of personal rights once found in the

early form of the right of privacy and also serve to distinguish publicity from other forms of property.

As courts easily labeled the right of publicity "economic property" in response to practical and historical considerations, the true force behind the right has always been rooted in protecting personal interests. By basing itself in protecting personal rights, publicity was given theoretical force that also avoided conflicting with other property interests. At the same time, a right emerged that was unlike any form of property ever created.

B. *Lessons Learned*

The modern form of the right of publicity reflected historical and ideological responses to the needs of celebrities, who increasingly desired to protect their economic interests and profit from selling their identities. With the simple attachment of the term "property" to the right of publicity, a new right emerged. This modern version of the right of publicity however hardly resembled any property interest that had ever existed before. This new form of property resulted in a return by courts to the ideology of privacy law to justify the new form of property, a procedure that seemed reasonable and natural. But grafting the titles of "property" and "privacy" onto the right of publicity has resulted in confusing and inaccurate labels, and, as a result, in similarly confusing and inconsistent court opinions.

Today, after many years of confusion, the property and privacy labels have become unnecessary in light of the maturity of modern courts. Contemporary courts should make an attempt to recognize the true privacy interests that have influenced the right of publicity law. Such recognition would result in a clarification of the right of publicity law in light of its true influences and motivations, and may also result in more predictable results. Courts and legislatures have effectively created a separate right that is neither property nor privacy, but a hybrid of the two. Using unnecessary labels and conventional frameworks to help understand what the right of publicity has become is no longer necessary. The right of publicity has undergone common law and statutory changes that have caused it to drift quite far from its original moorings. Only when the privacy influences are openly recognized will the true nature of current publicity law finally become clear.

VI. Conclusion

Reflecting the practical and historical considerations of separating the personal from the economic, courts and legislatures created a sepa-

rate right of publicity interest. This right of publicity gave celebrities the right to realize the economic value of their identities. But while the new economic publicity right granted celebrities certain powers, it was adopted without much theoretical justification for its existence. Courts were required to look elsewhere to define the scope of the publicity rights. The natural choice was to use the personal interests that appeared in the early right of privacy cases because that was where the right of publicity first spawned. But directly stating these personal rights theories derived from privacy law was not possible. The two theories of personal privacy and economic rights mutually reject one another. When publicity was given a property title, it abandoned any connection to the underlying person and any harm to the person's feelings. The harm to personal dignity or reputational values was no longer relevant to publicity.

To resolve the quagmire, courts explicitly called the right of publicity a property interest to emphasize its economic attributes, and simultaneously used a personal privacy rationale to justify its legitimacy. This combination of action and reasoning resulted in a separate cause of action that appeared to be neither property nor privacy. In other words, the resulting right of publicity did not fit neatly into the categories of either property or privacy. As both property and privacy theories have been used throughout publicity law jurisprudence, the right of publicity has become a combination of a property interest with privacy attributes. In the future, the proper approach should be to consider the right of publicity as a separate right that has emerged from a combination of privacy and property, rather that resorting to unhelpful labels to describe the right of publicity. Once the true nature of the right of publicity is recognized, its independent force can finally be realized.