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## **"IMAGE IS EVERYTHING" . . . BUT NOT WHEN IT COMES TO A RIGHT OF PUBLICITY INFRINGEMENT\***

HOLLY M. LEVINSON\*\*

. . . The arena is packed. Screams and chants blot out the sound of the ball bouncing on the court. Only seven seconds left to play in overtime. A bald-headed African-American player wearing a red, number twenty three jersey has the ball. . . down by one point. He pauses for a moment, chews his wad of gum a few times, and with a few lightning-quick moves he fakes out the double team and darts toward the hoop. As precious seconds tick away he jumps with all his might and flies endlessly through the air, palming the ball in his right hand. His mouth is open, his tongue hanging freely, ready to taste victory at its inception. As the buzzer sounds he slams the ball down through the net. Victory. . . or is it? Did he beat the buzzer? Twenty thousand pairs of eyes shift to the referee. . . who finally motions that the basket was good. Champions once again! Time to celebrate! But wait. . . before our star rejoices with his team, he darts to the sidelines and grabs. . . a six pack of XXX beer. Just then he turns to the camera, cracks open a can of beer and says, "now this is what I call the sweet taste of victory." He wipes the sweat from his brow, takes a huge swig of beer, and smiles radiantly.

. . . *The screen fades out. . . Now back to live action. . .*<sup>1</sup>

As the real star, clearly identifiable as Michael Jordan, sits at home with his family and watches this television commercial, what is he to think? Certainly, *he* knows that he never gave permission for his identity to be used in a beer ad. Had he even been

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\* Tennis ace Andre Agassi made the "image is everything" slogan notorious in his endorsement of Canon cameras.

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1. This hypothetical advertisement is intended to exaggerate the need for courts to recognize the emotional harm that right of publicity infringements cause.

approached about doing such an ad, he would have immediately declined the offer. The name and image of Michael Jordan goes hand-in-hand with mom and apple pie, not with alcohol and the like. He is a superstar athlete, a family man, and a nice guy; this image which Jordan has crafted would undoubtedly be destroyed by such an alcohol advertisement. Yet, beyond a muddled image and the resulting economic harm lies the very real emotional harm Jordan would suffer from the unauthorized use of his image for an alcohol advertisement.<sup>2</sup> Courts have consistently disregarded this emotional harm in right of publicity cases by focusing exclusively on economic injuries. Consequently, it is this emotional harm which now deserves the spotlight.<sup>3</sup>

The right of publicity has come a long way since Judge Frank first coined the term more than forty years ago.<sup>4</sup> Defined as "the right to own, protect, and profit from the commercial value of one's name, likeness, activities, or identity,"<sup>5</sup> the right of publicity has been invoked to address everything from voice imitations and celebrity look-alikes to human cannonball acts and caricatures of nude athletes.<sup>6</sup> However, despite the right of publicity's headway, an ongoing debate remains whether the tort should be classified as a privacy right or as a property right. This paper suggests that the tort classification is not of central importance so long as the remedy is appropriate. To that end, this paper contends that courts must recognize that celebrities and athletes are not merely larger than life, money-making icons who turn in their human qualities when stardom strikes. As such, damages must be awarded for *noneconomic* as well as economic harm. Additionally, punitive damages must be imposed on a regular basis.

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2. A right of publicity infringement is only one claim the star would have in the example provided. While the fact pattern may raise additional issues, this paper focuses on the right of publicity to the exclusion of other intellectual property rights.

3. This comment will discuss how the unauthorized use of an individual's name, likeness, or performance for commercial purposes subjects the victim to mental anguish deserving of compensation. It further argues that the offensiveness of such an advertisement or product multiplies the victim's emotional injury and should therefore go to the extent of damages recovered.

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

5. Kenneth E. Spahn, *The Right of Publicity: A Matter of Privacy, Property, or Public Domain?* 19 NOVA L. REV. 1013, 1014 (1995).

6. See *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), cert. denied, 112 S.Ct. 1513 (1992), (voice imitation) *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), (voice imitation), *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254 aff'd 488 N.Y.S. 2d 843 (N.Y. App. Div. 1985) (celebrity look-alike); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (human cannonball act) *Ali v. Playgirl, Inc.*, 447 F.Supp. 723 (S.D.N.Y. 1978) (caricature of nude athlete).

Part I of this paper looks at the right of privacy, the right from which the right of publicity derives. It also focuses on the distinctions courts have made between a private plaintiff and a celebrity plaintiff and explains why privacy law and the celebrity have been deemed inherently incompatible. Part II examines the development of the right of publicity and the debate surrounding its classification as either a property right or a personal right of privacy. Part III explores the contours of the right of publicity and what the right protects. Part IV sets forth the justifications for recognizing the right of publicity and illustrates how the present status of the tort fails to live up to its justifications. Part V proposes that the right of publicity be seen as a proprietary right where noneconomic as well as economic concerns are addressed and where punitive damages are imposed. Finally, Part VI closely examines *Waits v. Frito-Lay, Inc.*,<sup>7</sup> and contends that the case should serve as a springboard for future publicity cases.

#### I. THE BIRTH OF A "CLOSE COUSIN":<sup>8</sup> THE RIGHT OF PRIVACY

In 1890, two young lawyers, Samuel D. Warren and Louis D. Brandeis, gave birth to the right of privacy in a landmark *Harvard Law Review* article.<sup>9</sup> Warren and Brandeis argued that each individual should be entitled to a "quiet zone" away from the curious eye or the interested ear.<sup>10</sup> Whether an individual is in the public life or not, Warren and Brandeis opined that there are "[s]ome things all men alike are entitled to keep from popular curiosity."<sup>11</sup> Just as a physical assault can bruise the skin, an intrusion into one's "quiet zone" can bruise one's feelings.<sup>12</sup> One scholar recently added, however, that it is not the intrusion of one's objective physical space<sup>13</sup> that causes bruised feelings, but rather "the transgression of respect owed to individuals in the

7. 978 F.2d 1093 (9th Cir. 1992).

8. Barbara Singer, *The Right of Publicity: Star Vehicle or Shooting Star*, 10 CARDOZO ARTS & ENT. L.J. 1, 6 (1991).

9. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). See also J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY & PRIVACY*, 1-8.1 [hereinafter "MCCARTHY"].

10. MCCARTHY at 1-11, *supra* note 9, at 1-11.

11. *Id.* (quoting Warren and Brandeis, *supra* note 9, at 215-216).

12. *Id.*

13. Gavison suggests that privacy can be broken down into secrecy, anonymity, and solitude. She also states that privacy is lost "as others obtain information about an individual, pay attention to him, or gain access to him." See Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 428 (1980). See also Robert C. Post, *Rereading Warren & Brandeis: Privacy, Property and Appropriation*, 41 CASE W. RES. L. REV. 647, 651 (1991).

community.”<sup>14</sup> However the intrusion may be regarded by legal scholars, one thing is certain: Warren and Brandeis urged courts to award damages for emotional harm.<sup>15</sup>

Initially, Warren and Brandeis’ article was not well received. In 1902, the Court of Appeals of New York, in *Roberson v. Rochester Folding Box Co.*,<sup>16</sup> explicitly rejected the thesis of the “‘clever article’”<sup>17</sup> and refused to recognize the right of privacy.<sup>18</sup> In that case, the defendant flour mill used a photograph of the plaintiff in advertisements for its flour without her permission.<sup>19</sup> The ads were widely displayed, and the plaintiff claimed she was humiliated, suffering nervous shock and serious physical illness as a result.<sup>20</sup> The court, however, refused to grant an injunction and to award damages. Evidently, Chief Justice Alton B. Parker was reluctant to part from precedent to adopt the right of privacy, fearing both an entanglement with First Amendment freedoms and the absurd amount of litigation that he predicted would result.<sup>21</sup>

Despite sharing these same concerns, a few years later the Georgia Supreme Court, in *Pavesich v. New England Life Insurance Co.*,<sup>22</sup> embraced Warren and Brandeis’ “novel thesis.”<sup>23</sup> In this case, the plaintiff, Pavesich, sued the defendant for its life insurance advertisement which featured plaintiff’s healthy looking photo beside a “disheveled and sickly” man’s photo.<sup>24</sup> The ad conveyed a message that unlike the healthy man, the sickly man had not taken out an insurance policy with New England Life and now regretted it.<sup>25</sup> Pavesich, “an artist known only by a handful

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14. Post, *supra* note 13, at 647.

15. Legal scholars note that the press’ prying into Warren’s private life led Warren and Brandeis to write their landmark article. See MCCARTHY, *supra* note 9, at 1-14.

16. 64 N.E. 442 (N.Y. 1902).

17. MCCARTHY, *supra* note 9, at 1-15 (quoting *Roberson v. Rochester Folding Box Co.*, 64 N.E. at 442, 444 (N.Y. 1902)).

18. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

19. MCCARTHY, *supra* note 9, at 1-15.

20. *Id.*

21. *Id.* Professor McCarthy remarks in his treatise that Chief Justice Parker’s opinion left the door open for the New York legislature to pass a statute to prevent the unpermitted use of a name or picture for advertising purposes. Indeed, within a year following the decision in *Roberson*, the New York Legislature passed a law (1903 N.Y. Laws 132) giving a right of action in advertising and trade situations. *Id.*

22. 50 S.E. 68 (1905).

23. See generally MCCARTHY, *supra* note 9, 1-14 - 1-18. Both *Roberson* and *Pavesich* involved so-called private or non-celebrity plaintiffs whose photographs were used without permission in advertisements.

24. MCCARTHY, *supra* note 9, at 1-17.

25. *Id.*

of admirers," claimed that the use of his picture without consent invaded his privacy by subjecting him to ridicule.<sup>26</sup> The court agreed, at least to the extent that it reinstated Pavesich's invasion of privacy claim which had been dismissed below for failure to state a cause of action.<sup>27</sup> Accordingly, the court remanded the case and its invasion of privacy issue to the lower court for a jury trial.

In a nutshell, *Roberson* and *Pavesich* foreshadowed the split in authority that was to follow regarding the recognition of the right of privacy.<sup>28</sup> In fact, Professor McCarthy indicates<sup>29</sup> that it was not until the 1940s that "the tide had turned in favor of the right of privacy."<sup>30</sup> Moreover, in 1960, William Prosser launched a curveball when he divided the right of privacy into four distinct torts: (1) intrusion into seclusion; (2) public disclosure of private facts; (3) publicity that places someone in a false light; and (4) misappropriation.<sup>31</sup> The fourth category, misappropriation, is closely related to the right of publicity.<sup>32</sup> While most courts and legal scholars have regarded misappropriation as a "close cousin"<sup>33</sup> or forerunner of the right of publicity, some have gone so far as to confuse it with the right of publicity itself.<sup>34</sup>

The misappropriation tort, by definition, attempts to compensate the victim for the mental anguish inflicted when his identity is used without permission to promote the sale of commercial products.<sup>35</sup> Since the gravamen of the offense is the damage done "to [the] individual's self-respect in being made a public spectacle,"

26. *Id.*

27. In addition to the invasion of privacy claim, the court also upheld a libel claim. In its view, the false association with defendant insurance company would make Pavesich out to be a liar and thus "contemptible" in the eyes of his friends who knew . . . that he did not own a New England Life Insurance policy." See MCCARTHY, *supra* note 9, at 1-17.

28. See generally *id.* at 1-18.

29. It must be noted that those courts that recognized the right of privacy uniformly perceived it as a "personal tort" where damages were recoverable solely for "mental anguish." See MCCARTHY, *supra* note 9, at 1-18.

30. *Id.* at 1-18.

31. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

32. MCCARTHY, *supra* note 9, at 1-24. *Roberson* and *Pavesich* both fall into Prosser's fourth category, misappropriation.

33. Barbara Singer, *The Right of Publicity: Star Vehicle or Shooting Star*, 10 CARDOZO ARTS & ENT. L.J. 1,6 (1991).

34. See John W. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 833 (6th Cir. 1983). See also Christopher Pesce, Note, *The Likeness Monster: Should the Right of Publicity Protect Against Imitation?*, 65 N.Y.U. L. REV. 782, 791 (1990).

35. MCCARTHY, *supra* note 9, at 1-28. See also *Roberson*, *supra* note 16, and *Pavesich*, *infra* note 35.

it is said that the tort applies only to the "private" or "relatively unknown" person.<sup>36</sup> The private person is made to suffer the "double indignity" of (1) "having his name or picture broadcast throughout the advertising media," and (2) "being forced against [his] will to help someone sell a product."<sup>37</sup> Conceivably, the victim may suffer a third indignity if he personally finds the product offensive or distasteful.<sup>38</sup> Further, if those who know the victim find the product offensive, a fourth indignity is likely, as now the victim has become associated with their perception of the product.<sup>39</sup> To reiterate, then, it is the public "commercialization of personality" without consent that causes injury.<sup>40</sup> That the public, the victim, or both find the product detestable adds insult to the injury.<sup>41</sup>

It must be noted, however, that a mere showing that the victim's personality has been commercialized without his consent does not, in and of itself, state a cause of action for misappropriation. The Louisiana Court of Appeals made this clear in *Slocum v. Sears Roebuck Company*,<sup>42</sup> in which it ruled that even though the display of a child's photo as advertisement was technically an invasion of the child's privacy, the child could not recover since she suffered no injury. In that case, Sears had taken a photo of a three and a half month old child in its studio and later displayed the photo as an advertisement without parental consent.<sup>43</sup> The court pointed to the child's age, her beauty, and the fine quality of the photo, and concluded that there was hardly a "serious interfer-

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36. *Id.* (citing Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 38 N.Y.U. L. REV. 962, 981 (1964)).

37. MCCARTHY, *supra* note 9, at 1-28. See also Pavesich, 50 S.E. at 80 (1905). ("...his liberty has been taken away from him, as long as the advertiser uses him for these purposes, . . . he is for the time . . . under the control of another, . . . no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master. . ."). *Id.*

38. It must be noted that the victim's personal distaste for the product may stem from society's regard for the product. For instance, if the individual's picture is used to advertise cigarettes, he may find the product offensive based on society's regard for cigarettes, even though he personally may feel neutrally about the product. In that regard, it is society's opinion of the product and his association with it that causes injury. Conversely, he may suffer if he personally finds the product offensive, even though it is not so perceived by society.

39. The implication is that the victim will be treated differently based on the unfavorable association with the product.

40. Bloustein, *supra* note 34, at 987.

41. See Pesce, *supra* note 32 for a detailed discussion of the "commercialization of personality" notion.

42. 542 So.2d 777 (La. Ct. App. 1989).

43. The photo was displayed in the studio, on an advertising bulletin board in the Sears credit department, and at a Sears in another city. *Id.* at 777.

ence with the child's privacy interest," and that the child suffered no injury.<sup>44</sup> Its ruling hinged on the premise that a child so young could not have suffered any injury. In sum, *Slocum* serves as a reminder that an injury is required for the finding of a tort and subsequent damages.<sup>45</sup>

#### A. *Privacy Law and the Celebrity: Inherently Incompatible*

Whether the star is a big-name Hollywood actor who frequents the Academy Awards or an athlete who competes each July on the grass of Wimbledon, he leads his life in the public spotlight and is considered a celebrity in the eyes of others. No longer can he walk down the street in broad daylight and go unnoticed. Whatever means have thrustured him into the public spotlight and have kept him there, one thing is certain: he has fame, fortune, and is living a life of stardom—a life where ordinary privacy is hard to find.

The argument thus follows that privacy law and celebrity status are inherently incompatible, particularly when it comes to claims for misappropriation. A celebrity cannot claim an insult to his dignity or hurt feelings when his identity is used publicly without permission to sell a product.<sup>46</sup> Since a celebrity thrives in the limelight, the extra time in the spotlight is thought to enhance the celebrity's notoriety, not cause the mental anguish associated with an invasion of privacy. Unlike the private citizen, the celebrity has been conditioned to living a life where people are curiously seeking information about private matters and where his identity is exposed for commercial purposes. It is for these reasons that traditional privacy principles have held that a "celebrity's fame and public presence constitut[e] a waiver of the celebrity's right to privacy in his or her picture or name."<sup>47</sup> As the following case illustrates, however, the waiver doctrine may erroneously condone actions that in fact cause the celebrity emotional harm.

In *O'Brien v. Pabst Sales Co.*,<sup>48</sup> the plaintiff was a famous sports figure who sued Pabst Beer Company for its unauthorized

44. *Id.* at 779.

45. The court's emphasis on the beauty of the child and the fine quality of the photos is misplaced and irrelevant. Stated simply, an individual can be injured even though she is attractive and the pictures taken of her are of fine quality. The deciding factor in *Slocum*, which may have been lost in the opinion, was that no injury had been shown. A better claim would have been that Sears owed the child the reasonable amount of her picture used in the advertisements (a right of publicity claim).

46. See MCCARTHY, *supra* note 9, at § 1.6, at 1-28.

47. *Id.*

48. 124 F.2d 167 (5th Cir. 1941).



use of his photograph in the company's promotional calendar.<sup>49</sup> At the time of suit, O'Brien was a two year veteran with the Philadelphia Eagles, a professional football team, and had previously earned a national reputation as a collegiate All-American.<sup>50</sup> O'Brien argued that the beer company had invaded his privacy by subjecting him to embarrassment and humiliation. He pointed to his membership in the Allied Youth of America, a group that dissuaded alcohol use among young people, as proof of his public stance against alcohol.<sup>51</sup> Further, he testified that he had had many "opportunities to sell his endorsement for beer and alcoholic beverages but had *refused* to do so."<sup>52</sup> As a result of defendant's calendar, O'Brien's face and name had involuntarily become associated with publicity for the sale of beer.

Despite O'Brien's effort, the court ruled against him. The Fifth Circuit Court of Appeals affirmed the district court's holding that O'Brien had no cause of action under traditional privacy theory.<sup>53</sup> The court reasoned that O'Brien was not the "private person" which privacy law intended to protect.<sup>54</sup> He was an outstanding athlete who had "completely publicized" his name and his pictures, and had therefore "waived his right of privacy."<sup>55</sup> Thus, the court concluded that ". . . the publicity he [O'Brien] got was only that which he had been constantly seeking and receiving."<sup>56</sup> However, the court's view was overly broad, since O'Brien clearly had not been seeking the kind of publicity involved in this case. In effect, the court declared that O'Brien had traded in his human qualities upon attaining celebrity status; that is, he had shed his ability to suffer the indignity caused by the offensive advertisements.

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49. See Steven T. Margolin, *From Imitation to Litigation: Expanded Protection for Commercial Property Rights in Identity*, 96 DICK. L. REV. 491, 493 (1992).

50. O'Brien, 124 F.2d at 168. (Defendant had obtained O'Brien's photo from the University's publicity department).

51. *Id.* at 168-69.

52. *Id.* at 168 (emphasis added).

53. *Id.* at 170.

54. *Id.* See also MCCARTHY, *supra* note 9, at 1-29.

55. Peter L. Fletcher and Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1586 (1979). Fletcher and Rubin note that the waiver is not to be taken literally, since a waiver is generally defined as "an intentional relinquishment or abandonment of a known right of privilege." Rather, they see a waiver in this context as a "constructive waiver"—merely "a way of restating the conclusion that public figures have no right of privacy due to the countervailing and more powerful commands of the First Amendment." *Id.*

56. O'Brien, 124 F.2d at 170. See also MCCARTHY, *supra* note 9, at 1-29.

### B. Celebrities Need A New Tort

As an increasing number of celebrity plaintiffs appeared in court, it soon became clear that *O'Brien* was a unique case, in that celebrities typically did not assert that their feelings had been hurt by the use of their identity without permission to promote the sale of commercial products.<sup>57</sup> Rather, the main grievance among celebrities was that they were not compensated for the reasonable value of their identity—the very identity which the “new strides in communications, advertising and entertainment” had given “unfathomed pecuniary value.”<sup>58</sup> Many celebrities pointed out that they had previously signed contracts and had been paid for the use of their identity to endorse commercial products. However, under the present status of the law, celebrities were left departing courtrooms with wrinkled brows and empty pockets, disbelieving that they were denied recovery under privacy theory.<sup>59</sup>

## II. THE RIGHT OF PUBLICITY IS BORN

In 1953, Judge Jerome Frank's ruling in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>60</sup> paved the way for a celebrity to recover the value of his identity when it was used without consent to promote the sale of commercial products. The controversy involved two chewing-gum sellers who were competing to obtain the right to use professional baseball players' pictures on chewing-gum cards.<sup>61</sup> The plaintiff argued that it had made exclusive agreements with the ballplayers to use their pictures and that defendant thereafter had “knowingly induced” the ballplayers to sign contracts with the defendant.<sup>62</sup> In addition, the defendant had also obtained some grants from the ballplayers through an independent agent and had even used some players' pictures without their consent.<sup>63</sup> Although the ballplayers themselves did not assert any right to compensation for the unauthorized use of their

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57. See MCCARTHY, *supra* note 9, 1-35 (discussing Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203, 204 (1954)).

58. Christopher Pesce, *Note, The Likeness Monster: Should the Right of Publicity Protect Against Imitation?*, 65 N.Y.U. L. REV. 782 (1990). See also MCCARTHY, *supra* note 9, at 1-35 (quoting Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203, 204 (1954)).

59. MCCARTHY, *supra* note 9, at § 5.8, 5-68.

60. 202 F.2d 866 (2nd Cir. 1953).

61. *Id.* at 867.

62. *Id.* See also MCCARTHY, *supra* note 9, at § 1.7, 1-32.

63. See MCCARTHY, *supra* note 9, at § 1.7, 1-32.

identities, the plaintiff argued that it held the exclusive right of property in the ballplayers' identities as the "exclusive licensee."<sup>64</sup>

The court approached the problem by dispersing with defendant's argument that the contract with the ballplayers was merely a waiver of the right to sue for an invasion of privacy.<sup>65</sup> In so doing, the court explicitly rejected *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*,<sup>66</sup> wherein the Fifth Circuit indicated that there was no such thing as an exclusive license of name and likeness, only a waiver of privacy.<sup>67</sup> Ultimately, the *Haelan* court held that apart from the right of privacy, there exists an independent right of publicity in which a "man has a right in the publicity value of his photograph," including the right to grant the exclusive privilege of publishing his picture.<sup>68</sup> Interestingly, Judge Frank avoided saying whether the right of publicity is a property right or a personal right, essentially deeming the classification inconsequential.<sup>69</sup> The door was thus left open for courts and legal scholars to debate the aforesaid issue among themselves.

Since *Haelan*, the majority of courts and legal scholars have perceived the right of publicity as a property right juxtaposed to the personal right of privacy.<sup>70</sup> Whereas invasions of privacy have been thought to involve "injury to feelings, sensibilities, or reputation," publicity infringements have been seen as an "appropriation of rights in the nature of property rights for commercial exploitation."<sup>71</sup> Under this view, the right of publicity is seen merely as a tool that grants the individual exclusive control over his identity.<sup>72</sup> As such, the celebrity, in addition to signing endorsement contracts, is able to assign rights in his identity to others, as was the case in *Haelan*. Moreover, in some jurisdictions, the property

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64. *Id.* at 1-33.

65. *Haelan*, 202 F.2d at 868.

66. 78 F.2d 763, 767 (5th Cir. 1935). The court stated that "[f]ame is not merchandise" and that "[i]t would help neither sportsmanship nor business to uphold that sale of a famous name to the highest bidder as property." *Id.*

67. *Id.* at 767.

68. MCCARTHY, *supra* note 9, at 1-32 (discussing *Haelan Laboratories, Inc. v. Topps Chewing Gum Co.*, 202 F.2d 866, 868 (2d Cir. 1953)).

69. *Id.* at 1-33.

70. See generally Barbara A. Burnett, *The Property Right of Publicity and the First Amendment: Popular Culture and the Commercial Persona*, 3 HOFSTRA PROP. L.J. 171 (1990).

71. MCCARTHY, *supra* note 9, at 1-33.

72. See *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (holding that Midler's vocal style was property and that it was misappropriated).

classification has even enabled a celebrity's heirs to profit from a celebrity's identity after the celebrity's death.<sup>73</sup>

In contrast, the minority view perceives the right of publicity as a privacy right.<sup>74</sup> For example, in *Palmer v. Schonhorn Enterprises, Inc.*,<sup>75</sup> the court held that the right of privacy allows a person relief when his name has been used without his consent, either to advertise a product or to enhance the sale of that product. In that 1967 case, Arnold Palmer and several other well-known professional golfers sought an injunction and damages for privacy invasions resulting from the use of their names as part of a board game without consent.<sup>76</sup> The plaintiffs argued that the use of their names "reduce[d] their ability to obtain satisfactory commercial affiliation by licensing agreements," while it increased the marketability of the board game for the defendant.<sup>77</sup>

Ultimately, the court held that the plaintiffs' privacy rights were invaded. First, it noted that all of the golfers may not have wanted to capitalize upon their names in the commercial field, apart from the golf course.<sup>78</sup> Second, the court implied that even if the golfers wanted to commercialize their identity, the golfers themselves should have been entitled to "enjoy the fruits of [their] own industry free from unjustified interference."<sup>79</sup> In that regard, defendant's conduct was likened to mere theft, but what was stolen clearly went beyond the golfers' identities. In short, the defendant stole from the plaintiff golfers their power of choice to control the use of their identities and to decide whether to partake in defendant's commercial endeavor. As it turned out, the golfers were forced into endorsing a product which they had not chosen to endorse.

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73. See *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.*, 694 F.2d 674 (11th Cir. 1983).

74. See also *Carson v. National Bank of Commerce Trust and Savings*, 501 F.2d 1082 (1974). Carson sued for the unauthorized use of his name in an advertisement for one of defendant's subsidiary companies. Carson's complaint did not allege a privacy invasion, yet the court applied pure privacy standards and denied relief to Carson for his failure to show mental anguish. See also J. Joseph Bodine, Jr., *A Picture is Worth \$775.00: The Right of Publicity, An Analysis and Proposed Test*, 17 CAP. U. L. REV. 411, 416 (1988).

75. 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).

76. *Id.* at 459.

77. *Id.*

78. *Id.* at 462.

79. *Id.*

### III. THE CONTOURS OF THE RIGHT OF PUBLICITY

What exactly the right of publicity protects, how far it extends, and who holds a right of publicity are the three issues most heavily debated behind the privacy/property debate previously mentioned. Generally speaking, the right of publicity is defined as "the right to own, protect, and profit from the commercial value of one's name, likeness, activities, or identity."<sup>80</sup> Every person has a right to control and profit from the value of his identity or performance, although the right of publicity claims are most readily identifiable with celebrities or athletes.<sup>81</sup> Moreover, in terms of defining the outer limits of one's identity which the right protects, case law indicates that the extent to which courts are willing to characterize something as one's identity varies among the nation's jurisdictions. The present trend among courts, however, is to view one's identity broadly and thus accord the celebrity a great deal of protection from commercial exploitation.<sup>82</sup>

#### A. Protection for Items Associated with a Celebrity

In 1974, the Ninth Circuit Court of Appeals, in *Motschenbacher v. R.J. Reynolds Tobacco Company*, expanded protection of a celebrity's identity beyond his "name or likeness."<sup>83</sup> In that case, the plaintiff, Motschenbacher, was a professional race car driver who derived part of his income from commercial endorsements.<sup>84</sup> The plaintiff's personal "trademark" was his car, which he "individualized" to set it apart from those of other drivers and to make it "more readily identifiable" as his own.<sup>85</sup> The plaintiff sued defendant tobacco company for its television commercial, which depicted plaintiff's car in the foreground on a race-track and which conveyed a message that the plaintiff's car was sponsored by Winston Cigarettes.<sup>86</sup> In addition to the images

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80. Kenneth E. Spahn, *The Right of Publicity: A Matter of Privacy, Property, or Public Domain?*, 19 NOVA L. REV. 1013 (1995). (quoting *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978)).

81. McCARTHY, *supra* note 9, at § 4.3, 4-19.

82. See also *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512 (9th Cir. 1993). It should be noted that many states have created their own right of publicity/privacy statutes. See N.Y. CIV. RIGHTS § 50-51 (McKinney 1976 & Supp. 1989).

83. 498 F.2d 821 (9th Cir. 1974). Initially, the right of publicity was limited to protection of one's name and likeness. *Id.* at 824.

84. *Id.* at 822.

85. SHELDON S. HALPERN, *THE LAW OF DEFAMATION, PRIVACY, PUBLICITY, AND MORAL RIGHTS* 494 (2d. ed 1993) (citing *Motschenbacher*, 498 F.2d at 821).

86. The court noted that the driver of the car, which bore resemblance to plaintiff's distinctive car, was unrecognizable. See HALPERN, *supra* note 85, at 494.

from the racetrack, the ad contained written messages as to the "good taste" of Winston cigarettes.<sup>87</sup>

Motschenbacher alleged that he was due a reasonable amount for the unauthorized use of his identity (a right of publicity claim). Interestingly, he did not allege that the association with cigarettes injured his feelings or insulted his dignity (a right of privacy claim).<sup>88</sup> One logical inference from Motschenbacher's pleading was that he was purely concerned with his not having been paid to endorse the product. In making its ruling, the court first noted that Motschenbacher was identifiable in the commercial, since the car used in the commercial caused people to think that it was Motschenbacher's car and to infer that the driver was in fact Motschenbacher.<sup>89</sup> In the court's view, it was enough that the car, though altered slightly, evoked the plaintiff's identity. Thereafter, the court ruled that Motschenbacher was owed the reasonable value for the unauthorized use of his identity.

### B. Protection for Performances

In 1977 the Supreme Court, in *Zacchini v. Scripps-Howard Broadcasting Co.*, addressed First Amendment issues pertaining to the right of publicity.<sup>90</sup> In *Zacchini*, the petitioner was an entertainer whose entire performance, a human cannonball act lasting fifteen seconds, was shown on a newsclip without his consent.<sup>91</sup> The defendant argued that its broadcast of the performance was protected by the First Amendment as newsworthy information.<sup>92</sup> The Court disagreed, noting that the broadcast of the entire act posed a "substantial threat to the economic value of that performance" and thus went beyond the newsworthy excep-

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87. *Id.*

88. Motschenbacher, 498 F.2d at 824. The court made the distinction emphasized earlier in this paper: an injury suffered from an appropriation of one's identity may be "mental and subjective" in the nature of humiliation and embarrassment (and thus amount to an invasion of privacy). However, where the identity appropriated has a commercial value, the injury may be economic in nature. After making this distinction, however, the court refused to say whether the protection of plaintiff's identity would fall "under the rubric of 'privacy,' 'property,' or 'publicity.'" Instead, the court stated that it only needed to determine whether California would recognize one's interest in identity and protect it. *Id.*

89. *Id.* at 827.

90. 433 U.S. 562 (1977).

91. *Id.* at 564. The Supreme Court highlighted the fact that petitioner asked respondent *not* to film the performance. However, the next day, respondent returned, videotaped the entire act, and aired it on respondent's news show, together with favorable commentary. *Id.*

92. *Id.*

tion protected by the First Amendment.<sup>93</sup> The Supreme Court agreed with the Ohio Supreme Court that the economic value of the act emanated from the "right of exclusive control over the publicity given to his performance."<sup>94</sup> Consequently, the broadcast violated petitioner's right of publicity because the broadcast "was similar to preventing petitioner from charging an admission fee."<sup>95</sup>

### C. *Protection for Celebrity Caricatures Based on Picture, Context, and Slogan*<sup>96</sup>

In 1978, in *Ali v. Playgirl, Inc.*,<sup>97</sup> boxing champ Muhammad Ali sued *Playgirl Magazine* for its depiction of a nude black man seated in a corner of a boxing ring underneath captions that read: "Mystery Man" and "The Greatest."<sup>98</sup> Ali sought a preliminary injunction and damages for a common law right of publicity infringement as well as for a violation of New York's privacy law.<sup>99</sup> He did not claim injury to his feelings or insult to his dignity, but rather, damage to his public reputation and the economic consequences thereof.<sup>100</sup> He premised his argument on the fact that he had spent a great deal of time and effort throughout his career establishing a commercially valuable proprietary interest in his likeness and reputation.<sup>101</sup>

In granting a preliminary injunction, the court ruled that plaintiff had established probable success for his claim that the

93. *Id.* at 562. Moreover, the Court later emphasized that petitioner's human cannonball act was the "product of petitioner's talents and energy, the end result of much time, effort, and expense." *Id.* at 575.

94. *Id.* at 576. Given the free public broadcast, there was less of an incentive for the public to pay money to go see the performance live.

95. That the entire performance was appropriated seems significant and leaves open the possibility that the First Amendment would have protected anything less than the appropriation of the entire performance. The Court in *Zacchini* stated that "neither the public nor the performer will be deprived of the benefit of petitioner's [entire] performance as long as his commercial stake in his act is appropriately recognized." *Id.* at 578.

96. McCARTHY, *supra* note 9, at § 4.9, 4-49.

97. 447 F. Supp. 723, 728 (S.D.N.Y. 1978).

98. *Id.* at 726. It must further be noted that the phrase "The Greatest" had for a long time been associated with Ali. As the caricature also resembled Ali, the Court found no real difficulty in concluding that Ali's identity was in fact depicted in the magazine. *Id.* at 726-27. See also McCARTHY, *supra* note 9, at 4-62.

99. Ali sued under New York's right of privacy statute which prohibits the unauthorized use of an individual's portrait or picture for trade purposes. N.Y. Civ. RIGHTS § 50-51 (McKinney 1976 & Supp. 1989).

100. Ali, 447 F.Supp. at 729.

101. *Id.*

defendant had violated New York's privacy statute and infringed upon Ali's common law right of publicity.<sup>102</sup> It found that the defendant appeared not only "to be usurping plaintiff's valuable right of publicity for [itself to sell magazines,] but [it also] may well be inflicting damage upon [h]is marketable reputation."<sup>103</sup> The Court pointed to the fact that the caricature was a full frontal nude drawing and not simply a sketch of Ali as he appears in the public eye.<sup>104</sup> Hence, even though Ali did not argue that he was insulted or horrified by the nature of the sketch, the court implied that his fans and the readers of *Playgirl Magazine* may have been offended, thus harming Ali's reputation. The uninformed reader may have perceived Ali in a negative light for having posed for such an offensive sketch, or for having allowed *Playgirl Magazine* to depict him in that manner.

#### *D. Protection for Nicknames*

In 1979 the Wisconsin Supreme Court, in *Hirsch v. S.C. Johnson & Son, Inc.*,<sup>105</sup> agreed to extend protection of a celebrity's identity to include a nickname which had been appropriated without the celebrity's permission to sell a commercial product. The case involved Elroy Hirsch, a sports figure who had achieved "national prominence" from his remarkable athletic career, as well as a notorious nickname, "Crazylegs," from his unique running style.<sup>106</sup> At trial, Hirsch added that he had received honors for his outstanding character trait in addition to his athletic achievements, and had thus become very "protective of his name and what type of product it was connected with."<sup>107</sup> Hirsch sued a lady's shaving gel manufacturer for the unauthorized use of his nickname on its product. To value the aforesaid use, Hirsch produced two witnesses at trial who were experts in the field of product endorsements.<sup>108</sup>

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102. *Id.* It should be noted that at the time Ali was decided, New York recognized a common law right of publicity.

103. *Id.*

104. *Id.*

105. 280 N.W. 2d 129 (Wis. 1979).

106. *Id.* at 131. Hirsch was the first athlete to earn four varsity letters in one year at the University of Michigan. Thereafter, Hirsch played professional football and professional basketball and won numerous awards. He was nicknamed "Crazylegs" for his unique running style. *Id.*

107. *Id.* at 132. Hirsch had done advertisements in the past in which he had been identified only as "Crazylegs." He also noted that he refused to do cigarette ads and, once he had been hired to coach college football, he refused to do alcohol ads as well. McCARTHY, *supra* note 9, at 4-57.

108. *Id.*



In ruling on defendant's motion for a demurrer, the court concluded that Hirsch had a valid cause of action as a matter of law under the common law right of publicity.<sup>109</sup> It emphasized that Hirsch had appeared in a number of commercials identified only by his nickname.<sup>110</sup> Moreover, on remand, the court stated that Hirsch might present sufficient evidence upon which a jury could find that the nickname identified him and that the use of that name had a commercial value to the defendant.<sup>111</sup> Accordingly, the court remanded the case in order for Hirsch to prove that (1) the name, "Crazylegs," in fact identifie[d] him, and that (2) he "ha[d] suffered damages based either on his loss or on Johnson's unjust enrichment."<sup>112</sup>

### *E. Protection for Phrases Associated with a Celebrity*

In 1982, in *Carson v. Here's Johnny Portable Toilets, Inc.*, Johnny Carson, the famous host of the Tonight Show, sued a corporation that rented and sold "Here's Johnny" portable toilets, alleging a right of publicity infringement.<sup>113</sup> While the phrase "Here's Johnny" was neither Carson's actual name nor his nickname, he claimed that the aforesaid phrase of nightly introduction had become intertwined with his identity and was entitled to protection.<sup>114</sup> The court found support for Carson's argument from Dean Prosser, who noted that "a stage or other fictitious name can be so identified with the plaintiff so that he is entitled to protection against its use."<sup>115</sup> The court pointed to the fact that the defendant knew that the phrase "Here's Johnny" evoked Johnny Carson's image and that it purposely linked the phrase to its corporate name and product to grab public attention.<sup>116</sup> Consequently, the court ruled in favor of Carson, characterizing the defendant's conduct as similar to theft.

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109. The court added that Hirsch also would have had a cause of action under a Wisconsin statute, but it had been enacted after Johnson's "Crazylegs" product was taken off the market. WIS. STAT. § 895.50 (2)(b) (1977).

110. *Id.*

111. Hirsch, 280 N.W.2d at 140. *See also* Geisel v. Poynter Prods., Inc., 295 F.Supp. 331 (S.D.N.Y. 1968)(protecting the pen name Dr. Seuss).

112. *Id.*

113. 698 F.2d 831 (6th Cir. 1983).

114. *Id.* at 836.

115. *Id.*

116. *Id.*

### F. Protection for Celebrities "Inextricably Identified"<sup>117</sup> as a Film Character

Within the Third Circuit, 1994 marked another breakthrough in publicity protection rights for celebrities. In *McFarland v. Miller*,<sup>118</sup> the so-called Spanky McFarland case, George McFarland's widow continued a lawsuit that began during the actor's lifetime against the Spanky McFarland restaurant. For eleven years during his childhood, McFarland was a leading child actor nicknamed "Spanky" in the popular "Our Gang" movie and television series.<sup>119</sup> As it turned out, "Spanky" was McFarland's actual nickname. The nickname was initially picked up by the film producer, and later used in the television series. It was his nickname, McFarland argued, which the defendant was using without McFarland's consent to promote defendant's restaurant.

In ruling on the plaintiff's right of publicity claim, the Third Circuit determined that a triable issue of fact existed as to whether McFarland's character had become "so closely identified with him that it [had] becom[e] inseparable from the actor's own public image."<sup>120</sup> The court held that if McFarland had indeed become so "inextricably identified" with the character "Spanky," then he would have a right of publicity in the "Spanky" character.<sup>121</sup> However, the court did not have to decide whether McFarland and the character he portrayed were but one character. The court was merely deciding if plaintiff could go forward to try to prove to a jury that McFarland had a right to control and profit from the use of the "Spanky" nickname. Thereafter, a jury would have to decide if the defendant in fact infringed on plaintiff's right of publicity.

## IV. JUSTIFICATIONS FOR THE RIGHT OF PUBLICITY

The primary justification for recognizing the right of publicity is based upon the maxim that people should not take what does not belong to them. Given the vast amount of time and effort a celebrity devotes to crafting an image, it follows that the celebrity

117. MCCARTHY, *supra* note 9, at § 4.13 [D], 4-79.

118. 14 F.3d 912 (3d Cir. 1994).

119. *Id.* at 914.

120. MCCARTHY, *supra* note 9, at 4-80 (discussing McFarland, 14 F.3d at 921).

121. If McFarland were to be inextricably identifiable as "Spanky" from "Our Gang," another issue that would need to be examined is whether McFarland had contractually transferred or licensed another party who would be the only one entitled to sue this defendant for a right of publicity infringement. See MCCARTHY, *supra* note 9, § 4.13 [D], 4-80.

is entitled to profit from such devotion.<sup>122</sup> As such, the right of publicity tort is intended to safeguard the celebrity's identity, and prevent the wrongdoer from being unjustly enriched. In furtherance of this goal, courts typically have awarded compensatory damages for a right of publicity infringement.<sup>123</sup>

### A. *The Shortcomings of the Unjust Enrichment Rationale*

Awarding compensatory damages for a right of publicity infringement undermines the 'unjust enrichment' rationale. Despite the fact that the wrongdoer is required to pay compensatory damages, the wrongdoer is nevertheless unjustly enriched by the mere fact that he or she has forced the celebrity into a contract. Simply stated, the wrongdoer has intentionally thrust the celebrity into promoting a product which the celebrity did not choose to endorse. Hence, although the celebrity is eventually compensated for the unauthorized use of his identity, the wrongdoer is nevertheless unjustly enriched. Such enrichment is gained via increased notoriety and sales resulting from the forced endorsement.<sup>124</sup> Thus, the celebrity is left with compensatory damages, while the wrongdoer retains the difference between the increased sales and the aforesaid damages combined with attorney fees. As such, the decision to infringe on a celebrity's right of publicity amounts to a mere utilitarian calculus.<sup>125</sup>

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122. Vicki Gerl Neumeyer, *The Right of Publicity and its Descendibility*, 7 U. MIAMI ENT. & SPORTS L. REV. 287 (1990), (quoting Harvard Law Review Association, Note, *An Assessment of the Commercial Exploitation Requirement as a Limit on the Right to Publicity*, 96 HARV. L. REV. 1703, n. 14 at 1705 (1983)). Some courts and legal scholars have analogized the right of publicity to a "commercial entity's right to profit from the 'goodwill' it has built up in its name." *Id.*

123. These damages were based upon the amount the celebrity would have received had he authorized the use of his identity for the project at issue.

124. Moreover, the wrongdoer is unjustly enriched by ignoring the celebrity's power to choose whether to participate in the project. The fact that the celebrity is awarded compensatory damages does not make up for the fact that he had no say in the matter, or if he did, that his position was ignored.

125. The utilitarian calculus is the weighing of options and choosing the option that brings the most happiness, insofar as that happiness outweighs the unhappiness that results from the aforesaid choice. In the right of publicity context, then, a defendant merely has to predict the worth of a celebrity's identity and balance that value against projected sales increases resulting from the infringement. Thus, a defendant will knowingly infringe if projected sales outweigh the legal costs. In *Onassis v. Christian Dior*, the court ruled that the advertisement containing a Jacqueline Kennedy Onassis look-alike, having been already published, was not subject to recall. While plaintiff was thus assured against any future publication with the granting of a preliminary injunction, the defendant was left with the skyrocketing sales resulting from the advertisement. 472 N.Y.S. 2d 254, 263 (N.Y. 1984).

Moreover, the unjust enrichment rationale simply does not hold up when the forced endorsement results after the celebrity expressly refuses to sign a contract. In such a scenario, the defendant has not foregone asking the celebrity for permission to use his identity; rather, the defendant has made the effort but was turned down. Consequently, a defendant who ignores the celebrity's wishes is unjustly enriched because nothing can blot out the celebrity's express refusal to serve as a badge of approval for the commercial product.<sup>126</sup> The following case highlights the shortcomings of the unjust enrichment rationale where the plaintiff has expressly refused to sign a contract.

In 1977, in *Lombardo v. Doyle, Dane, & Bernach, Inc.*, Guy Lombardo, the famous band leader, sued an advertiser who wanted Lombardo to appear in a commercial for a new car model.<sup>127</sup> Initially, defendant began to negotiate a contract with Lombardo, but when the terms did not satisfy Lombardo, he refused to appear in the commercial.<sup>128</sup> Nevertheless, defendant shot the commercial anyway, using an actor who perfectly imitated Lombardo's infamous gestures and musical style, as well as Lombardo's theme song, "Auld Lang Syne."<sup>129</sup> Lombardo sued for damages for a right of publicity infringement as well as for a violation of New York's privacy statute. Although he prevailed on his publicity claim, with the court factoring in the defendant's clear intention to infringe, the court *only* awarded Lombardo compensatory damages.<sup>130</sup> The fact that the defendant used Lombardo's identity after Lombardo had expressly denied permission to do so was but a slap in the face to Lombardo, an added insult to the injury inflicted.

### *B. The Right of Publicity Is Not "The" Driving Force Behind An Athlete's Or Celebrity's Performance*

A second justification frequently cited for recognizing the right of publicity tort is to encourage creative endeavors and per-

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126. *Id.*

127. 396 N.Y.S.2d 661 (N.Y. App. Div. 1977). The defendant was interested in portraying a New Year's Eve theme in the commercial — a theme for which Lombardo had become famous. *Id.* at 664.

128. *Id.* at 665.

129. *Id.* See also Margolin, *supra* note 49, at 500. Margolin notes that Lombardo was known for his specific directing technique and the resulting musical style he evoked from his band.

130. The defendant's clear intention to infringe also played a role in deciding the main issue in the case — whether the right of publicity should protect the style and mannerisms associated with Lombardo. See Margolin, *supra* note 49, at 501.

formances. This justification, however, also falls short. The threat of an injunction and/or the imposition of compensatory damages can only go so far to encourage entertainers to perform and athletes to compete. In reality, it is difficult to imagine that Michael Jordan is motivated to play for the Chicago Bulls solely because he knows that his right of publicity is protected and he will receive compensatory damages if it is infringed. The focus of this rationale is misplaced, for the focus should be on the advertisers and producers of the commercial products. The right of publicity should serve as reassurance to the celebrity or athlete that the law recognizes the value of his/her identity by warning potential infringers that the consequences of a publicity infringement are more serious than they otherwise had thought. Only by increasing the stake of the infringement—punishment—will the creative endeavor rationale stand its ground and serve its purpose.<sup>131</sup>

## V. THE RIGHT OF PUBLICITY AS A PROPRIETARY INTEREST

### A. *Image Is Everything to the Athlete or Celebrity*

The first step in revamping the right of publicity tort is to identify the interests the tort must protect to conform to modernization in the late 1990s. To do so, one must recognize the extent to which advances in technology, advertisements, and even science have affected the sports and entertainment world. These advances have brought to the forefront the cliché made famous by tennis ace, Andre Agassi, that “image is everything” to the athlete or celebrity.<sup>132</sup> In today’s world, athletes and celebrities have agents, managers, coaches, and private trainers to guide them in crafting an image they want to convey to society.<sup>133</sup> For instance, whereas Andre Agassi has crafted a rock n’ roll rebel image with his flashy clothes, gaudy sneakers, and infamous hairdos,<sup>134</sup> Michael Jordan has crafted an image of a superstar athlete who is a family man and a nice guy. Dennis “The Worm” Rodman has

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131. To take the theft analogy even further, consider what happens when a thief is caught with stolen goods. Not only are the goods returned to the proper owner, but the thief is also punished for his conduct — namely, by the imposition of a jail sentence or a heavy fine. Hence, punishment must be imposed on right of publicity infringers, which in turn, will deter similar conduct in the future.

132. See *supra* note 2.

133. Part of constructing that image involves making conscious choices as to the commercial endorsements in which one will partake.

134. Agassi has also maintained a respectable image as a world-class athlete dedicated to charitable organizations, particularly those organizations devoted to helping children.

also come into the limelight and capitalized on his bad boy image. These are just a few examples underscoring the fact that crafting an image is a deliberate and calculated process.<sup>135</sup>

### B. *Crafting An Image: Modern-Day Considerations*

One modern-day consideration bearing on one's image is the fitness craze and its effect on athletes foremost, and also on celebrities. In recent years, the world has come to know the extent to which athletes devote themselves to intense cross-training and weight-lifting exercises outside of their usual on court/on field training. Besides the obvious advantage physical fitness has when the athlete is competing in his respective sport, the appearance of being fit can also have a positive impact on the athlete's image as a dedicated and hardworking professional worthy of commercial endorsements. Pete Sampras and Chris Evert are two such athletes, both having trained diligently off the court to improve their tennis games, and in the process, they have also reaped the benefits in lucrative commercial endorsements.<sup>136</sup> In the entertainment world, the fitness craze clearly has affected actresses such as Demi Moore, who bears everything in front of the camera for millions. Moore lives and dies by her sculpted body because that is the image she has crafted and has worked diligently to maintain.

Along with the fitness craze of the 1990s, one must consider the effect that drugs, alcohol, and cigarettes have on the way in which the celebrity crafts and maintains his image. With the advances in science over the past few decades, it has become clear that cigarettes are harmful, cancer-causing toxins. In today's world, an athlete or celebrity therefore may choose to steer clear of an affiliation with cigarettes based on the harsh effect it would have on his image. The situation of "Crazylegs" Elroy Hirsch exemplifies this point.<sup>137</sup> Hirsch refused to do cigarette advertisements because the association would not suit the image Hirsch had crafted of himself as a star athlete who had won honors for his upstanding character.

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135. Madonna serves as a good example in the entertainment world. She has crafted an image of a rebellious and flirtatious woman who shocks the conscience but appears not to care what the public thinks of her.

136. The volleyball star Gabrielle Reece also serves as a good example here. In addition to her athletic career, she has taken up modeling. Thus, her athletic training thus has bolstered her career as a model, depicting a strong yet beautiful woman.

137. See *supra* note 104.

Alcohol has taken on a similar stigma in the eyes of many professional athletes, a stigma which ultimately could destroy an athlete's image. The *O'Brien* case discussed earlier serves as a glowing example.<sup>138</sup> At trial, O'Brien emphasized the fact that he was very protective of his image and had made conscious choices to preserve his image as a football star fully devoted to his career. To that end, O'Brien had refused endorsement contracts for alcohol advertisements and had even joined a group aimed at dissuading youths from using alcohol.<sup>139</sup> Hence, his association with alcohol had a detrimental effect on his image, especially since only he and those who knew him were aware that the association was in fact involuntary. The introductory commercial with the Michael Jordan look-alike is intended to illustrate just how harmful a muddled image can be to an athlete's image, to future marketability, and to his feelings.<sup>140</sup>

*C. A Right of Publicity Infringement Harms More than One's Image*

In light of the crucial role an image plays to the athlete or celebrity in the 1990s, courts must realize that the harm caused by a right of publicity infringement goes beyond the economic harm resulting therefrom. Celebrities and athletes are not merely larger than life, money-making icons who turn in their human qualities when stardom strikes. To the contrary, they are human beings whose images have become so intertwined with their feelings and their efforts to preserve their images that the images themselves have become part of their personalities. As such, one can logically conclude that a celebrity's feelings in fact are hurt by the unauthorized use of his image for commercial purposes. That the celebrity may also find the product offensive and/or has expressly refused to promote the product merely adds insult to the injury already inflicted.<sup>141</sup>

Given the vast amount of time and effort a celebrity devotes to crafting and maintaining an image, it is only natural for a celebrity to feel violated and outraged when his image is used without permission to sell commercial products. In actuality, the celebrity has been victimized; he has been robbed, cheated, and perhaps

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138. See *supra* note 48.

139. See *O'Brien*, 124 F.2d at 169.

140. The reality is that Jordan's perfect image, besides his superb athletic abilities, bring him many million dollar endorsement contracts.

141. See *supra* note 3.

deceived in the process. The fact that the thief is later forced to turn over the stolen goods via compensatory damages does not account for the feeling of loss and anger which the victim is made to suffer. The reason is that the celebrity's "sphere of decision-making"<sup>142</sup> has been intruded upon and his image and sense of control may never be the same again. As such, court-imposed compensatory damages become merely the fruits of a contract into which the victim was essentially forced.

Further, the emotional harm discussed above may indeed be worsened for reasons which were touched upon in *Palmer*—namely, that the celebrity or athlete may not want to commercialize his identity at all. One case which highlights this view is *Onassis v. Christian Dior*,<sup>143</sup> wherein Jacqueline Kennedy Onassis sued Dior for its commercial advertisement containing a picture of a "look-alike" model.<sup>144</sup> In that case, Dior did not even bother to approach Onassis to solicit an endorsement contract because it "knew that there was little or no likelihood that Mrs. Onassis would ever consent to be depicted in this kind of advertising campaign for Dior."<sup>145</sup> Mrs. Onassis had publicized the fact that she had never allowed her name or picture to be used in connection with the promotion of commercial products.

Jacqueline Kennedy Onassis was a public figure devoted to non-commercial endeavors. She had a carefully crafted image and only allowed her identity to be used "in connection with certain public services, civic, art and educational projects which she had supported." When all was said and done, however, Dior forced her into a spotlight to which she was clearly opposed, one that ultimately left Dior with sales that "went through the roof."<sup>146</sup> To say that Mrs. Onassis was not left emotionally harmed by Dior's act is absurd. The argument that Onassis' purpose in suing Dior was to be compensated for the reasonable value of her identity, an iden-

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142. Alisa M. Weisman, Note, *Publicity as an Aspect of Privacy and Personal Autonomy*, 55 S. CAL. L. REV. 727, 730 (1982). Weisman notes that "the insult that is caused by unauthorized publicity use is not the unauthorized communication itself, but the fact that the victim was not consulted regarding the use of his personality." *Id.* at 728-29.

143. 472 N.Y.S.2d at 254.

144. Onassis sued for violation of New York's privacy statute (N.Y. CIV. RIGHTS. § 50, 51) and for a common law right of publicity infringement. She was unable to recover under New York's privacy statute which limits recovery to a "portrait or picture."

145. *Id.* at 257.

146. *Id.*



tity which she had never before even attempted to sell, is equally as ludicrous.

In addition to public figures like Mrs. Onassis, one must consider the emotional harm commercial exploitation might inflict on the politician or on other public officials whose motivations for being in the public eye are non-monetary. Consider someone like Martin Luther King, Jr., who stepped into the limelight as a leader of the civil rights movement. His purpose was not to sell his image and to make money therefrom, but to promote equality and to reap the benefits of living in a society where everyone is equal. Since his motivations were non-monetary in the first place, King might have been emotionally damaged if his image were used during his lifetime without his consent to help sell a product.<sup>147</sup> A commercial appearance, one made voluntary or involuntary, arguably would have detracted from the message Martin Luther King, Jr. sought to convey to the public. Worse yet, perhaps commercial appearances would have led the public to question his motivations and his character, thus robbing him of respect and support.<sup>148</sup>

#### *D. Publicity As an "Aspect of Personal Autonomy"*<sup>149</sup>

To bring the right of publicity tort up to date with life in the 1990s first requires a change in the way courts view the interests which the right protects. As discussed above, "image is everything" to a celebrity or athlete, but the harm caused by a right of publicity infringement is not limited to pecuniary injuries stemming from a tarnished image.<sup>150</sup> Beyond a muddled image lies the

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147. See *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.*, 694 F.2d 674 (11th Cir. 1983). King's estate sued for the value of King's image depicted in plastic busts which were sold for profit. The main issues were the descendibility of the right of publicity and whether King's image had to be exploited during his life (which had not) for his estate to be compensated for the right of publicity infringement. There was no claim that his family's feelings were injured by the use of the deceased's image for commercial purposes without their consent. Even if there were such a claim, that would be a separate issue, since the claim of injured feelings would have been made by the family and not by King, who had died. In any event, my purpose here is to argue that if King's image were used for commercial purposes while he was alive and without his consent, it is reasonable to conclude that his feelings in fact would have been injured — especially in light of his non-monetary interests in being in the public spotlight. *Id.* at 676-80.

148. The fact that a commercial appearance would have been involuntary would not matter since the public would not know that he was forced into it. It is the public's perception of the appearance that is crucial.

149. See Weisman, *supra* note 142, at 727.

150. See *supra* note 2.

very real emotional harm a celebrity suffers when his image is used without permission to sell a product. In that regard, Alicia Weisman is directly on point when she likens the unauthorized publicity to "an invasion. . . that intrudes on the individual, imposing on him the decisions of others regarding the use of his personality."<sup>151</sup> In fact, it is this very "intrusion into the individual's sphere of decision-making" that causes the emotional harm traditionally associated with privacy law.<sup>152</sup>

Beyond the emotional harm that stems from the mere fact of the intrusion lies the additional indignities caused by the offensive nature of the advertisements or the product itself. Undoubtedly, a celebrity or athlete will suffer greater emotional trauma by a forced association with alcohol, cigarettes, or some other product which he finds repulsive. Hence, the offensive nature of the product should go to the extent of the emotional injury, which in turn, should affect the computation of damages awarded to the plaintiff. In determining the offensiveness of the product, courts should not only consider the plaintiff's subjective view, but they should also take a step back to look at the plaintiff's image and consider the choices he has made throughout his career to craft and maintain that image. Thereafter, the court should make a determination as to the reasonable extent of emotional and pecuniary damages the plaintiff suffered.

#### *E. The Role of Punitive Damages in Right of Publicity Cases*

Another factor to consider in shaping the tort to fit the present is the role punitive damages should play in right of publicity cases. When it comes to right of publicity cases, the issue of punitive damages has typically been skirted by courts and attorneys alike. Punitive damages in other areas of the law are imposed in cases where there is clear and convincing evidence of wanton, gross, malicious, or reckless conduct on the part of the defendant.<sup>153</sup> Moreover, where acts are willfully committed in reckless disregard of another's rights, most courts have held that malice may be inferred and punitive damages imposed thereafter.<sup>154</sup> Given the deterrent effect of punitive damages, their imposition is the springboard needed to make the publicity tort fit its justifica-

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151. Weisman, *supra* note 142, at 730.

152. *Id.*

153. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1104 (9th Cir. 1992).

154. *Id.*

tions and conform to life in the late 1990s. The fact that there is no cap on punitive damages, at least in theory, will in addition remove the utilitarian calculus aspect from a publicity infringement.<sup>155</sup>

## VI. *WAITS v. FRITO-LAY, INC.*<sup>156</sup> A SPRINGBOARD FOR THE FUTURE

In 1992, the Ninth Circuit Court of Appeals handed down a remarkable decision which should serve as a guide for future right of publicity cases nationwide. The case involved singer Tom Waits who sued Frito-Lay, Inc. for its unauthorized imitation of his unique voice in its radio commercials advertising its products. Waits sought damages for economic and noneconomic harm, arguing that the commercials damaged his artistic reputation. In making its ruling, not only did the court confirm that California law protects a singer's unique voice as part of his identity, but it also imposed a \$2 million punitive damages award to accompany the \$375,000 it awarded to compensate Waits for economic and noneconomic harm.<sup>157</sup> In so doing, the court sent a strong message to deter advertisers and others who may consider infringing on a celebrity's right of publicity in the future.<sup>158</sup>

The first issue the court decided on Waits' publicity claim was whether his voice had become part of his identity and was therefore protected by his right of publicity. As precedent, the court examined *Midler v. Ford Motor Co.*, another Ninth Circuit case, where the court ruled that a voice can indeed become part of a professional singer's identity when it is distinctive in nature and the singer is widely known.<sup>159</sup> Using *Midler* as a guide, the court confirmed that Waits' raspy voice was distinctive and that it in fact identified Waits.<sup>160</sup> Further, the court upheld the trial court's finding that Waits was a widely known singer. Thereafter, the court concluded that because Waits' voice was deliberately imitated in order to sell a product, and because Waits was subse-

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155. At present, the only cap on punitive damages is the standard for determining if the punitive damages imposed are excessive. The aforesaid standard is whether the amount imposed shocks the conscious of the judiciary.

156. 978 F.2d 1093 (9th Cir. 1992).

157. *Id.*

158. Waits, 978 F.2d at 1106. The Waits case also involved a claim under the Lanham Act.

159. 849 F.2d 460, 463 (9th Cir. 1988).

160. Waits, 978 F.2d at 1098-99.

quently injured, a tort was committed.<sup>161</sup> As such, California's broad protection for the celebrity was once again confirmed.

To gauge the extent of Waits' injuries, the court highlighted the following: (1) for at least ten years prior to the lawsuit, Tom Waits had maintained a strong policy against doing commercials and had rejected numerous lucrative offers to endorse major products; (2) Waits had made it known to the public in numerous magazine, radio, and newspaper interviews that he thought "musical artists should not do commercials because it detracts from their artistic integrity;" (3) the executive producer of the Frito-Lay's advertising campaign at issue had previously approached Waits to do a commercial and admitted that he had never "heard anybody say no so fast" as Tom Waits; (4) the ad's producer expressed his concern about possible legal ramifications of the voice imitation, after hearing it at rehearsal because it sounded almost identical to Waits' voice.<sup>162</sup>

In addition to the above findings, the court focused on Waits' reaction to the commercial once it was aired over the radio. It noted that: (1) Waits had heard it during an appearance on a Los Angeles radio program and was immediately shocked, angry, and embarrassed; (2) Waits knew at that point that whoever heard the commercial would presume that Tom Waits had agreed to do a commercial for Doritos, against his well-known policy against doing commercial advertisements; and that (3) Waits' feelings "grew and grew" over a few days because of the humiliation that resulted from making him an apparent hypocrite.<sup>163</sup> Based on all of these facts, the court ruled that Waits' artistic reputation had been damaged. It determined that his public opposition to commercials had become part of his character, personality, and artistic image.<sup>164</sup>

The court's examination of Waits' injuries and its approach to damages interpreted a law that had already been kind to celebrities even more generous. Since Waits was clearly opposed to doing commercials and had made his view known, the court agreed with the trial court that he may recover damages for the

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161. *Id.* at 1098.

162. *Id.* at 1097-98.

163. *Id.* at 1103.

164. *Id.* at 1104. Waits produced experts to value the harm done as well as the harmful effects on the future publicity value of Waits' image. Based on the testimony of Waits' expert witnesses, the appellate court agreed that a jury could have inferred that "if Waits ever wanted to do a commercial in the future, the fee he could command would be lowered by \$50,000 to \$150,000 because of the Doritos commercial." *Id.*

“shame, humiliation, embarrassment [and] anger” he suffered.<sup>165</sup> Moreover, the court allowed the imposition of two million dollars in punitive damages based on the fact that Waits proved by “clear and convincing evidence” that the defendant had been “guilty of oppression, fraud, or malice.”<sup>166</sup> The defendant knew that Waits was strongly opposed to doing commercials because of his many public interviews and the very fact that he had previously rejected an offer from the same agency to do a commercial. Hence, by ignoring Waits’ wishes and going ahead with the commercial, the court ruled that the defendant acted with “willful and conscious disregard” of Waits’ rights.<sup>167</sup>

From a legal stance, the imposition of punitive damages was appropriate and its implications are far-reaching. First, the court’s action made Frito-Lay learn a lesson the hard way—namely, that social conventions, “such as obtaining permission for publicizing a person’s identity or respecting that person’s refusal to permit such use” exist within the advertising world and must be respected.<sup>168</sup> Second, the imposition of punitive damages surprised Frito-Lay, who had earlier expressed its concern over possible legal action if it used the sound-alike, but presumably never imagined that punitive damages could be imposed. All in all, the court’s imposition of punitive damages sent a strong message to deter individuals from infringing on one’s right of publicity in the future, and thus helped the right of publicity tort measure up to its unjust enrichment rationale.<sup>169</sup>

The court’s assessment of damages for emotional injuries further helped to shape the right of publicity to fit the modern world. In short, the court’s regard for Waits’ emotional injuries amounted to an acceptance that his image had become part of his personality, and that his feelings indeed had been hurt from the infringement. While the aforesaid acceptance is admirable, the court’s

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165. *Id.* at 1103 (quoting *Young v. Bank of America*, 141 Cal. App. 3d 108, 114 (Cal. Ct. App. 1983)). Of the \$375,000 awarded in compensatory damages, \$100,000 was for the fair market value of his services, \$200,000 was for injury to his peace, happiness, and feelings (mental distress); and \$75,000 was for injury to his goodwill, professional standing, and future publicity value. *Id.*

166. CAL. CIV. CODE § 3294 (a) (West Supp. 1992). The statute defines malice as “despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.” *Id.*

167. *Id.*

168. Weisman, *supra* note 142, at 731.

169. Rather than being left with mere compensatory damages and feelings of outrage, the plaintiff ends up with punitive damages (in addition to compensatory damages).

position must nevertheless be qualified. The court only allowed damages for Waits' emotional injuries because it took into consideration Waits' widely known opposition to doing commercials. This paper, however, proposes that courts go even further in order to accept the view that it is the extent of that emotional harm which will vary from case to case, not the fact that the emotional harm resulted in the first place.<sup>170</sup> When a defendant intrudes into a person's sphere of autonomous "decision-making" and uses an image which has become inextricably intertwined with his personality, is it inevitable that emotional harm will result.<sup>171</sup> The fact that an individual has made it publicly known that he is opposed to doing commercials should thus go to the extent of the emotional harm suffered.

## VII. CONCLUSION

The right of publicity must adapt to life in the late 1990s, where image, to the athlete or celebrity, is indeed "everything." Given the vast amount of time and effort the celebrity/athlete devotes to crafting and maintaining a particular image, it is only logical to accept the fact that his image becomes part of his personality. As such, the right of publicity should be viewed as a proprietary right which grants the individual exclusive control over his identity and recognizes that damage from a right of publicity infringement will inevitably sink deeper than the harm done to one's image (i.e., economic harm). The infringement will invariably cause mental distress and hurt feelings. In that regard, the right of publicity might be better regarded, as one scholar has suggested, as a "right of identity"—a right where "elements of both mental distress and commercial loss [are included] in the measurement of damages."<sup>172</sup>

If courts recognize that emotional harm occurs by the mere fact that a celebrity or athlete's "sphere of decision-making" has been invaded, the attorney would then be left to argue the extent of those injuries.<sup>173</sup> To that end, the attorney would need to produce evidence showing that the victim's emotional injury was worsened because the product, or the advertisement depicting the product, was offensive or despicable. Moreover, if the victim is

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170. See generally Weisman, *supra* note 142, at 731.

171. *Id.* at 730.

172. Barbara A. Burnett, *The Property Right of Publicity and The First Amendment: Popular Culture and the Commercial Persona*, 3 HOFSTRA PROP. L.J. 171, 182-183, (1990) (quoting MCCARTHY, *supra* note 9, at § 1.11 [C], 1-47).

173. Weisman, *supra* note 142, at 730.

someone who, like Waits, had made it well-known that he is against endorsing commercial products, the attorney could then argue that his client's firm stance against product endorsements added to his client's emotional injuries. Likewise, the attorney could also argue that the manner in which the defendant went about infringing upon the plaintiff's right of publicity was intentional and malicious, thus warranting the imposition of punitive damages.

In sum, *Waits* should serve as a model and a springboard for future right of publicity cases nationwide. Because of *Waits*, a utilitarian calculus can no longer guide the acts of potential "infringers" in California. Punitive damages will always be waiting in the wings, ready to teach the infringer and others that stealing from anyone is wrong, including from the celebrity or athlete. When all is said and done, it is clear that only by following *Waits'* lead will the right of publicity tort serve to prevent unjust enrichment, deter bad behavior, and catch up to life in the late 1990s. Only then will the "image is everything" slogan become reality in the legal arena, for only then will stars like Michael Jordan be able to sit comfortably at home, watch television with his family, and know that the law is there to protect his image from being infringed upon and his feelings from being hurt.<sup>174</sup>

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174. As noted in footnote 3, this paper focuses only on the right of publicity tort and does not address copyright issues or other intellectual property rights which should be considered when faced with right of publicity claims. The analysis of the hypothetical commercial with the Michael Jordan look-alike is therefore premised on the notion that the state right of publicity claim would not be preempted by federal copyright law.