

The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis[†]

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INTRODUCTION

The right of publicity is a legal theory which enables individuals to protect themselves from unauthorized, commercial appropriations of their personas. It first received explicit recognition in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,¹ which was decided in 1953. Today, the right of publicity is approaching middle age. In many respects, the right of publicity has fared well in terms of acceptance.² Still, both the judiciary and the scholarly commentary in this area have been unable to resolve the operation of this doctrine in cases presenting appropriations that may potentially be justified by the First Amendment.

The constitutional command embodied in the First Amendment safeguards freedom of expression in our society. Traditional First Amendment jurisprudence dictates that political, informational, and entertainment works receive substantial protection, and seeks to maximize public access to these works. On the other hand, right of publicity jurisprudence recognizes the property right that stems from the value of an individual's persona. What then should be the result when a user appropriates an individual's persona³ in a medium that is traditionally protected by the First Amendment?

Currently, courts lack a principled and consistent method of resolving the conflict between the right of publicity and the First Amendment. Part of the difficulty courts have experienced in this area stems from the vast array of potential types of appropriations. Illustrations of the inherent tension between the right of publicity and the First Amendment abound. Consider the following examples from case law of uses which occurred without permission. A company included three photographs of Babe Ruth in its baseball calendar,

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1. 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953).

2. See *infra* notes 26-33 and accompanying text.

3. In this Article, the term "persona" is used as an umbrella term and encompasses any attribute protected under the right of publicity. For a discussion of the extent to which various attributes are protected, see *infra* notes 27, 30 and accompanying text.

one of which appeared on the cover.⁴ Another company marketed a commercial poster with a photograph of a mock presidential candidate stating "FOR PRESIDENT" at the bottom.⁵ A group produced a play using true incidents from the plaintiff's life but without identifying him by name.⁶ Another play featured performers simulating the Marx Brothers' unique style, appearance, and mannerisms.⁷ A foundation sought to erect a bronze statue of Elvis Presley in Memphis and to distribute pewter replicas of the proposed statue to individuals who donated twenty-five dollars or more to help finance the project.⁸ A baseball table game manufacturer used baseball players' names and playing statistics in a board game.⁹ Indeed, the number of possible scenarios presenting a conflict between the right of publicity and the First Amendment makes the development of an analytical framework within which to treat this conflict an enormous challenge.

This Article has three overall objectives. First, it exposes the massive confusion surrounding the conflict between the right of publicity and the First Amendment. Second, it makes a case for resolving this conflict by applying a property and liability rule framework such as that found in other areas of the law. Third, it develops a specific mode of analysis within which this framework can be applied and thus supplies the organization that has so far eluded this difficult area.

The overall inquiry of this Article is geared toward resolving those situations in which, but for the First Amendment, there would be a right-of-publicity violation. In such instances, courts must confront the impact of the First Amendment upon what would otherwise be an actionable invasion of property rights. One premise of this Article is that integral to the resolution of this conflict is the application of a combination of property and liability rule principles. Thus, the approach taken here necessitates a choice between three possible resolutions in any given situation: property rule protection (under which the appropriate remedy is an injunction and concomitant damages), liability rule protection (which disallows an injunction but requires the defendant to pay damages), and no protection for a right-of-publicity plaintiff.¹⁰ A second premise of this Article is that, in any given case, the

4. *Pirone v. MacMillan, Inc.*, 894 F.2d 579 (2d Cir. 1990); see *infra* notes 313-20 and accompanying text.

5. *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501 (N.Y. Sup. Ct. 1968) (holding that the right of publicity is not applicable to the use of one's name or likeness in connection with a matter of public interest).

6. *Hampton v. Guare*, 22 U.S.P.Q.2d 1713 (N.Y. Sup. Ct. 1992); see *infra* notes 321-27 and accompanying text.

7. *Groucho Marx Prods., Inc. v. Day and Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982); see *infra* notes 262-64 and accompanying text.

8. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.) (approving the Foundation's use on the ground that the right of publicity is not descendible), *cert. denied*, 449 U.S. 953 (1980).

9. *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970); see *infra* notes 186-91 and accompanying text.

10. This Article frequently uses the term "publicity plaintiff," although it should be recognized at the outset that where the owner of the persona is dead, the plaintiffs will be the relatives and/or assignees of the deceased. See *infra* part II.B.3.

determination of appropriate relief should be made by balancing the relevant harms triggered by allowing unauthorized uses of publicity rights against the benefits that society derives from such uses.¹¹

Part I of this Article addresses the preliminary issue of why it is necessary to develop an independent framework that is uniquely suited to resolving the conflict between the right of publicity and the First Amendment. Part II delineates the proposal for a truce between the right of publicity and the First Amendment. Part II.A examines the First Amendment interests at stake and evaluates the benefits to society that flow from a recognition of these entitlements. Part II.B discusses the potential harms that can result from forcing individuals to tolerate unauthorized uses of their personas. Part II.C develops a balancing approach under which the benefits that derive from allowing the forced use of an individual's persona are measured against the relevant harms.

The proposal set forth in this Article differs from the existing jurisprudence and commentary in three significant respects. First, it incorporates the possibility of liability rule protection for a right-of-publicity plaintiff. No court has yet applied a liability rule approach in a case involving a conflict between the right of publicity and the First Amendment, notwithstanding the prevalence of this approach in other areas of the law.¹²

Second, the proposal provides a detailed examination of the types of harms that occur when unauthorized uses are tolerated, and explicitly incorporates these harms into the analysis. In these situations, the relevant harms include economic and moral injuries to the plaintiff stemming from the defendant's use, the potential for consumer deception, the potential for decreased incentives, injuries to the relatives of the individual whose persona has been appropriated, and the potential for unjust enrichment. A matrix which capsulizes the relationship of these harms to the remedial choice ("Matrix #1") can be found in Appendix A. The Property Rule Protection column of Matrix #1 details the circumstances relating to these harms which suggest the propriety of a property rule approach. The Liability Rule Protection column indicates the relevant factors to be considered in granting mandatory damages to a right-of-publicity plaintiff. The No Protection column details those circumstances relevant to denying a plaintiff any relief whatsoever. Neither the courts nor the commentators have isolated these significant harms and

In First Amendment parlance, "no protection" means, of course, that the activity in question does not receive First Amendment protection and thus may be prohibited more readily. In contrast, "no protection" in the context used in this Article will result in sustaining the user's activity.

11. In this Article, the terms "harms" and "benefits" are used in their conventional respective meanings of positive and negative consequences, notwithstanding a recognition that the meaning of these concepts can be influenced by a preliminary baseline choice regarding a level of welfare impairment or improvement. See Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 161 n.40 (1992) [hereinafter Gordon, *On Owning Information*]; Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449 (1992).

12. See *infra* notes 74-77 and accompanying text.

tested their application to the conflict between the right of publicity and the First Amendment.

In evaluating the nature of the harm to the plaintiff, this Article asserts that economic harms are typically far less onerous than nonmonetizable harms which derive from uses the plaintiff would never have condoned. These nonmonetizable, or morally based, harms can include reputational damage, distasteful associations, or uses which advance a substantive argument the plaintiff finds objectionable.¹³ In addition, the potential for consumer deception is particularly strong where the use is one to which the plaintiff would never have consented.¹⁴

The potential for decreased incentives must include a consideration of the extent to which a "no protection" or liability rule resolution will impact negatively on the plaintiff's desire to create.¹⁵ Such a negative impact is unlikely to occur with de minimis uses by the defendant. In addition, the extent to which society in general and users in particular will be harmed by decreased incentives on the part of users under a liability rule approach must be considered. This diminished incentives inquiry involves two questions. First, is the end product in which the persona is used likely to reap an economic benefit for the user that will exceed the cost of using the persona? Second, will the value of the user's work be derived largely from the persona?¹⁶ With respect to harms to relatives (and assignees) of deceased personas, this Article argues that the degree of harm diminishes as the number of years since the persona's death increases. This Article adopts a framework for dealing with this issue which endorses a minimum fixed period of time following the persona's death to protect these interests.¹⁷ Finally, it contends that the potential for unjust enrichment, which is related to the significance of the user's contribution, also must be evaluated in connection with any use.¹⁸

This Article asserts that in determining the appropriate relief, the relevant harms must be measured against society's entitlements deriving from particular types of uses. A second matrix ("Matrix #2") illustrates the operation of the relevant balancing process in determining the relationship between society's entitlements and the remedial choice. This matrix can be found in Appendix B. The invocation of a balancing approach represents the third break with existing doctrine in this area. Typically, courts and commentators have urged a basic categorization approach under which the exclusive focus is the medium of the defendant's use. The result of such an application has been the approval of informational and entertainment usages, and the invalidation of commercial usages.¹⁹ The application of such a

13. See *infra* notes 111-19 and accompanying text.

14. See *infra* part II.B.2.a.

15. See *infra* text accompanying notes 151-52.

16. See *infra* notes 153-54 and accompanying text.

17. See *infra* notes 173-75 and accompanying text.

18. See *infra* part II.B.4.

19. See *infra* notes 46-48 and accompanying text.

framework, however, has resulted in legal applications of questionable soundness. For example, one court invalidated the use of baseball players' names and statistics in a board game while suggesting that an opposite result would be appropriate if the same subject matter had been used in a book.²⁰

This Article does not suggest that all informational and entertainment uses should be approved automatically, and that all commercial uses should be enjoined automatically. Under the proposed analysis, informational uses typically should not be enjoined or subject to a liability rule approach due to society's strong entitlement to information. Moreover, this Article argues that a publicity plaintiff lacks a true property right in pure information about herself, regardless of the particular medium in which the information is used.²¹ This analysis suggests that the use of athletes' playing statistics should be completely approved when they appear in either books or board games.

A different analysis is required, however, for visual depictions which convey information. This Article asserts that publicity plaintiffs have a true property right in their likenesses which subjects uncondoned uses to any of the three potential resolutions, depending on the outcome of the balancing analysis developed herein. Thus, in the context of visual depictions, this Article argues that the balancing analysis must weigh all of the relevant harms created by the particular use against society's general informational interest and the cultural value of the specific visual depiction at issue.²² It should be noted, however, that property rule protection for visual depictions conveying information should be invoked only in very exceptional circumstances due to the strong societal entitlements in the area of informational uses generally.

With respect to uses of an entertainment nature, the balancing analysis developed herein may result in no protection, liability rule protection, or in exceptional circumstances, property rule protection. Again, society's entitlements in the realm of entertainment uses are strong and they must be carefully weighed against the magnitude of the relevant harms in a particular case. Thus, the producers of a successful show which consists exclusively of the simulation of a living performer, may be required to pay mandatory damages under a liability rule approach if the use depicts the performer in a particularly unflattering light and a large degree of consumer deception exists regarding the persona's sponsorship of, or connection to, the show. In addition, there is a high potential for unjust enrichment in such situations, as the show's appeal is primarily derived from the performer's appeal. Moreover, the user will most likely prefer to pay for the right to use the persona rather than forgo the production of an economically successful show.²³ In contrast, where the particular entertainment use is a pure fictionalization, this Article

20. *Uhlender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970); see also *infra* notes 186-91 and accompanying text.

21. See *infra* notes 198-205 and accompanying text.

22. See *infra* part II.C.2.

23. See *infra* notes 246-71 and accompanying text.

contends that the relevant harms are typically so minimal that no protection is warranted.²⁴

Finally, primarily commercial uses of an individual's persona are usually subject to injunctive relief because they do not involve as strong a set of societal entitlements as do less obvious commercial uses. In addition, primarily commercial uses generally involve a high potential for consumer deception and unjust enrichment. In contrast, this Article argues that hybrid commercial uses that have informational or entertainment elements, or that are combined with strong expressive needs or substantial creative contributions on the part of the user, can be resolved by any of the three approaches, depending on the outcome of the proposed balancing analysis.²⁵

In short, the proposal developed in this Article calls for the invocation of a more flexible remedial approach in cases involving the appropriate degree of public access to publicity rights. It also supplies the framework within which the judiciary can exercise this much needed flexibility. Before delineating this proposal for change, however, it may be helpful to briefly explore and critique the more established approaches to resolving the conflict between the right of publicity and the First Amendment.

I. OVERVIEW

Today, the right of publicity is a well-recognized and frequently invoked legal doctrine. About half of the states have recognized the right of publicity, and in at least fifteen of these states, legislation exists that governs this area either partially or completely.²⁶ Some disagreement still exists with respect to questions such as what attributes are protected by the right,²⁷ whether the

24. See *infra* notes 276-79 and accompanying text.

25. See *infra* notes 301-12 and accompanying text.

26. See, e.g., CAL. CIV. CODE §§ 990, 3344 (West Supp. 1994); FLA. STAT. ANN. § 540.08 (West 1988); IND. CODE § 32-13 (1994); KY. REV. STAT. ANN. § 391.170 (Michie/Bobbs-Merrill 1984); MASS. ANN. LAWS ch. 214, § 3A (Law Co-op. 1986); NEB. REV. STAT. § 20-202 (1991); NEV. REV. STAT. ANN. §§ 597.770-810 (Michie 1994); OKLA. STAT. ANN. tit. 21, §§ 839.1-2 (West 1993), tit. 12, §§ 1448-1449 (West 1993); R.I. GEN. LAWS § 9-1-28 (1985); TENN. CODE ANN. §§ 47-25-1101 to -1108 (1988 & Supp. 1993); TEX. PROP. CODE ANN. §§ 26.001-.015 (West Supp. 1994); UTAH CODE ANN. §§ 45-3-1 to -6 (1993); VA. CODE ANN. § 8.01-40 (Michie 1992); WIS. STAT. ANN. § 895.50 (West 1983 & Supp. 1993).

In addition, the New York privacy statute addresses some aspects of the right of publicity. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1992 & Supp. 1994). Courts in that state have held that this statute precludes the existence of a common law right-of-publicity protection. See, e.g., *Pyrene v. MacMillan, Inc.*, 894 F.2d 579, 585 (2d Cir. 1990); *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984). Currently, there is a movement underway to codify the right of publicity in New York through the proposed Celebrity Rights Act. See Barbara A. Burnett, *The Property Right of Publicity and the First Amendment: Popular Culture and the Commercial Persona*, 3 HOFSTRA PROP. L.J. 171, 186-88 (1990).

As of 1993, the American Law Institute explicitly recognized the right of publicity in the RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (Tentative Draft No. 4, 1993).

27. Compare *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (holding that Vanna White's right-of-publicity claim against a consumer electronics company which used, in its television commercials, a robot that was dressed and acted like her could not be dismissed on summary judgment), *amended*, 1992 U.S. App. LEXIS 19253 (9th Cir. Aug. 19, 1992), *reh'g en banc denied*, 989 F.2d 1512 (9th Cir. 1993), *cert. denied*, 113 S. Ct. 2443 (1993) and *Midler v. Ford Motor Co.*, 849 F.2d

right is preempted by § 301(a) of the copyright statute,²⁸ and whether the right is descendible.²⁹ Although a uniform resolution of these issues certainly would be desirable, the absence of complete uniformity on these points does not threaten the very fabric of the doctrine. Part of the reason why the existence of the right of publicity is not especially threatened by these unresolved issues is that, with respect to questions involving the scope of the right and preemption, courts have a relatively uniform way of analyzing these questions, even if the outcomes of particular cases are somewhat inconsistent. For example, the degree to which the particular attribute in question is distinctive or recognizable is always the focus in cases involving the right's extension to less traditional attributes.³⁰ The analytical framework of copyright preemption cases also is fairly consistent.³¹ Although the issue of descendibility once was particularly controversial,³² the majority of jurisdictions that recognize the right of publicity now agree that the right should be descendible, although no uniformity exists with respect to the duration of the right following an individual's death.³³

460 (9th Cir. 1988) (holding that the use of a sound-alike of a famous and distinctive voice violated plaintiff's right of publicity), *cert. denied*, 112 S. Ct. 1513 (1992) and *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (finding that use of the phrase "Here's Johnny," which is associated with the celebrity Johnny Carson, is protected by the right of publicity even though the phrase is not a name or likeness) with *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826 (S.D.N.Y. 1990) (holding that the New York privacy statute does not extend to use of sound-alikes) and *Rogers v. Grimaldi*, 695 F. Supp. 112 (S.D.N.Y. 1988) (holding that right-of-publicity claim arising from use of actress' first name in film title was precluded by First Amendment protection of artistic speech), *aff'd*, 875 F.2d 994 (2d Cir. 1989).

28. 17 U.S.C. § 301(a) (1988). *Compare* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (holding that an action based on right of publicity in voice was not preempted by copyright statute), *cert. denied*, 113 S. Ct. 1047 (1993) and *Midler*, 849 F.2d 460 (finding that since a voice is not copyrightable, the right of publicity in a voice is not preempted by copyright law), and *Apigram Publishing Co. v. Factors Etc., Inc.*, No. C 78-525, 1980 WL 2047 (N.D. Ohio July 30, 1980) (observing that the legislative history shows § 301 of the copyright statute was not meant to preempt the common law right of publicity) with *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986) (holding that baseball players' right of publicity was preempted by § 301(a) since on-field performances are embodied in copyrighted telecasts), *cert. denied*, 480 U.S. 941 (1987). See generally David E. Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673 (1981) (detailing the development of the law on copyright preemption of the right of publicity).

29. See *infra* notes 32-33 and accompanying text.

30. See, e.g., *Midler*, 849 F.2d 460 (observing the distinctive familiarity of Bette Midler's voice in allowing right-of-publicity cause of action against a sound-alike); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (unique and distinctive decorations on race car protected by right of publicity).

31. See Shipley, *supra* note 28, at 702 (arguing that § 301(a) of copyright statute provides that state law is preempted if it creates rights equivalent to the copyright statute and the work comes within the subject matter of copyright). For cases using this framework, see *Midler*, 849 F.2d 460 (holding that since one's voice is not "fixed," it is not within the subject matter of copyright and is not preempted); and *Baltimore Orioles*, 805 F.2d 663 (finding that state law was preempted because performances were within the subject matter of copyright and equivalency was shown since no additional elements were required by state law).

32. See Roberta Rosenthal Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 207-28 (1983) (detailing various approaches courts have adopted to determine whether the right of publicity is descendible).

33. Many of the statutes listed in note 26 also recognize that the right against commercial exploitation of an individual's name or likeness is descendible. In California, Nevada, and Texas

Although some commentators have questioned the very existence of the right of publicity as a matter of social and economic policy, this Article proceeds from the assumption that the right of publicity deserves the widespread recognition it has received. The case law involving the right of publicity demonstrates a concern for the following social interests: fostering creativity,³⁴ safeguarding the individual's enjoyment of the fruits of her labors,³⁵ preventing consumer deception,³⁶ and preventing unjust enrichment.³⁷ This Author holds the view that the right of publicity successfully

statutory protection is granted for 50 years following a person's death. See CAL. CIV. CODE § 990(g); NEV. REV. STAT. ANN. § 597.790; TEX. PROP. CODE ANN. § 26.012. Kentucky also provides for 50 years of protection following death, but only for public figures. KY. REV. STAT. ANN. § 391.170(2). Florida allows protection for 40 years after a person's death. FLA. STAT. ANN. § 540.08(4). The Virginia statute allows for 20 years of protection following death. VA. CODE ANN. § 8.01-40(B). The Tennessee statute provides protection for 10 years after death. TENN. CODE ANN. § 47-25-1104(a). Oklahoma's statute apparently grants protection for 100 years following a person's death, OKLA. STAT. ANN. tit. 12, § 1448(G), as does the Indiana statute, which is the most recently enacted state statute. IND. CODE § 32-13-1-8.

The right of publicity has been held to be descendible as a matter of common law in some jurisdictions. See, e.g., *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 694 F.2d 674, 682 (11th Cir. 1983) (holding that under Georgia common law, the right of publicity survives the death of the owner and is devisable and inheritable); *Nature's Way Prods., Inc. v. Nature-Pharma, Inc.*, 736 F. Supp. 245, 252 (D. Utah 1990) (following the "modern trend," the common law right of publicity survives death in Utah if its holder exploited her right of publicity while living); *Sinkler v. Goldsmith*, 623 F. Supp. 727, 733 (D. Ariz. 1985) (finding that under Arizona law, the right of publicity survives death if the holder of the right exploited it during his lifetime); *State ex rel. Elvis Presley Int'l Memorial Found. v. Crowell*, 733 S.W.2d 89, 99 (Tenn. Ct. App. 1987) (holding that a celebrity's right of publicity is descendible under Tennessee common law).

Some jurisdictions make the unauthorized appropriation of protected attributes actionable under a statutory right of privacy. Nebraska, New York, Virginia, and Wisconsin take this approach. See NEB. REV. STAT. § 20-202; N.Y. CIV. RIGHTS LAW §§ 50-51; VA. CODE ANN. § 8.01-40; WIS. STAT. ANN. § 895.50. The Virginia privacy statute specifically provides relief to the relatives of a decedent whose name or likeness is appropriated for commercial purposes. VA. CODE ANN. § 8.01-40. The Nebraska privacy statute also allows an action for the unauthorized exploitation of a person's name or likeness to survive that person's death. NEB. REV. STAT. §§ 20-202 to -208. In contrast, the New York courts have limited the reach of the state privacy statute to living individuals. See, e.g., *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 585 (2d Cir. 1990) (finding that daughters and licensees of Babe Ruth were precluded from bringing an action under the statute based on the defendant's use of photographs of Ruth in a baseball calendar); *James v. Delilah Films, Inc.*, 544 N.Y.S.2d 447, 451 (N.Y. Sup. Ct. 1989) (holding that successors-in-interest of deceased performers could not recover for unauthorized film showings since the rights created by the statute terminated when the performers died); *Antonetty v. Cuomo*, 502 N.Y.S.2d 902, 906 (N.Y. Sup. Ct. 1986) (holding that the father and son of a deceased woman could not use the statute to prevent a park from being named after the deceased woman because the statutory rights terminated at her death). Similarly, the Wisconsin privacy statute specifically limits the ability to recover for the unauthorized commercial use of protected attributes to "living" people. WIS. STAT. ANN. § 895.50(2)(b). In Ohio, the right of publicity is not descendible as a matter of common law. See *Reeves v. United Artists Corp.*, 765 F.2d 79, 80 (6th Cir. 1985).

Given the varying lengths of protection for descendible publicity rights, problems are created for lawyers whose clients want national protection for the publicity rights of deceased personas. As will be discussed later, the descendibility issue also impacts upon the conflict between the First Amendment and the right of publicity. See *infra* part II.B.3.

34. See *infra* notes 55-56, 151-52 and accompanying text.

35. This interest is related to that fostering creativity. See *infra* notes 55-56, 151-52 and accompanying text.

36. See *infra* part II.B.2.a.

37. See *infra* notes 67-69, part II.B.4. This Author has argued elsewhere that once an individual dies, the unjust enrichment rationale warrants continued protection for the right of publicity so as to avoid an enterprise obtaining a windfall by exploiting the decedent's persona at the expense of the

vindicates these important social interests. Critics of the right of publicity argue that the labor and unjust enrichment justifications for publicity rights overlook the roles of the media, the audience, and our cultural fabric in creating celebrity personas. These critics claim that the right of publicity overstates the contribution of the individual whose rights are being protected and ignores the efforts and contributions of many others whose combined efforts molded that individual into a persona with marketable appeal.³⁸ The people responsible for this molding process can include those who are currently working with a celebrity to develop her persona,³⁹ as well as earlier celebrities and cultural reference points that have influenced the publicity plaintiff's artistry.⁴⁰ From an economic standpoint, it also has been argued that the increased creativity which society enjoys as a result of the right of publicity is too speculative to justify protection for the right, and that recognition of publicity rights decreases economic efficiency.⁴¹ The consumer protection rationale for the right of publicity has been attacked on the ground that it is overinclusive because the right applies even absent a danger that consumers will be misled into believing that there is an association of, or endorsement by, the publicity plaintiff of a particular product.⁴²

As stated earlier, it is not the purpose of this Article to make a case for the right of publicity.⁴³ This Article embraces its existence, and seeks to resolve the most troublesome issue in its application. This Author believes that the right of publicity has the potential for safeguarding from unauthorized use any marketable and publicly recognizable attribute of any individual, regardless

deceased's heirs, legatees, and assignees. See Kwall, *supra* note 32, at 229. The consumer protection justification for the right of publicity is also applicable to the descendibility issue since the use of a deceased individual's persona to market products can, in certain contexts, give the impression that, while alive, the deceased endorsed the product. See *infra* notes 160-62 and accompanying text. Another justification for a descendible right of publicity emphasizes society's interest in encouraging creativity, which arguably can be accomplished when celebrities strive to maximize the assets they can bequeath after death. Since many individuals are motivated to achieve fame for reasons entirely divorced from providing for their heirs, this rationale for a descendible right of publicity is clearly the weakest. See Kwall, *supra* note 32, at 212.

38. See *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1517 (9th Cir.) (Kozinski, J. dissenting), *denying reh'g en banc* to 971 F.2d 1395 (9th Cir. 1992), *as amended by* 1992 U.S. App. LEXIS 19253 (9th Cir. Aug. 19, 1992), *cert. denied*, 113 S. Ct. 2443 (1993); Rosemary J. Coombe, *Authorizing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARD. ARTS & ENT. L.J. 365, 368-76 (1992); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 179-205 (1993).

39. Examples of individuals in this category include agents, publicists, fashion advisers, lawyers, body trainers, voice coaches, and the like.

40. See Madow, *supra* note 38, at 197 (noting several examples of celebrities borrowing from the existing cultural fabric).

41. *Id.* at 205-28.

42. See also *infra* notes 124-26.

43. In the course of delineating the proposal for reconciling the right of publicity and the First Amendment, this Author does in fact address the countervailing arguments summarized in the text. See *infra* part II.B.2.a in general and notes 124-26 and accompanying text in particular (discussing the consumer deception rationale); part II.B.2.b (addressing decreased incentives for creativity on the part of the publicity plaintiff); notes 90-94, 286, 302-06 and accompanying text (discussing society's need for ongoing interpretation of its cultural icons); and notes 291-99 and accompanying text (analyzing the economic efficiency argument).

of whether that person is a celebrity.⁴⁴ Moreover, whatever the means through which an individual's persona comes to have value, that value should be attributable to the persona of the publicity plaintiff who has a right to participate in decisions about how her persona is utilized by others. This is the overall objective which the right of publicity tries to fulfill. Thus, even if others help mold a celebrity's image, the celebrity herself is still responsible for the vast majority of the profit potential of her persona. Those who assist the plaintiff in creating a marketable persona typically are paid for their time and efforts.⁴⁵ Further, when a celebrity borrows from the cultural fabric in creating her persona, it is still the unique combination of the past and the persona's original contributions that give the persona its present appeal.

One prominent approach to the conflict between the First Amendment and the right of publicity draws upon a *Yale Law Journal* article published in 1979 that advocates resolving the tension between the right of publicity and the First Amendment by classifying the uses in which the plaintiff's persona appears.⁴⁶ Specifically, the article recommends as a "starting point" the recognition of the following three purposes of media portrayals of individuals: informational, entertainment, and commercial uses.⁴⁷ The piece elaborates upon the different treatment accorded these types of uses, with commercial uses clearly receiving a lower level of First Amendment protection than the other two.⁴⁸ Although this approach represents a useful starting point, a more developed methodology is needed. To begin, the categorization process itself can be difficult in that many uses defy separability into these three discrete categories.⁴⁹ For example, is a docudrama informational or entertainment? Is a baseball version of the game Trivial Pursuit an informative, entertainment, or commercial use? Secondly, an approach which considers the type of use as its focal point ignores the fact that the nature of the appropriation is

44. Kwall, *supra* note 32, at 206 ("At a minimum, such a standard would protect from commercial exploitation the names and likenesses of all individuals because every person is publicly identified by these two attributes. This standard also would protect additional personal attributes of celebrities and other public figures when such attributes trigger public recognition.").

45. Indeed, how would we even attempt to assess what portion of a particular celebrity's success is due to the celebrity's actual efforts and talent, as opposed to the suggestions, talent, and efforts of others?

46. Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577 (1979).

47. *Id.* at 1597.

48. Felcher & Rubin also proposed looking to the nature of the "identifiable harm" caused by the defendant's conduct. Thus, portrayals that are exploitative in nature should be actionable if they also cause "identifiable harm" of "an economic or a dignitary nature." *Id.* at 1616, 1622. In contrast, due to First Amendment concerns, a portrayal that serves an informative or cultural function will be beyond reach, even if identifiable harm is present. *Id.* at 1622.

49. This difficulty is even recognized by Felcher & Rubin, who write: "To be sure, these three purposes will often tend to merge, so that they may be regarded as representing portions of a continuum, rather than as discrete and mutually exclusive elements." *Id.* at 1597. See also *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1520 (9th Cir. 1993) (Kozinski, J., dissenting) ("In our pop culture, where salesmanship must be entertaining and entertainment must sell, the line between commercial and noncommercial has not merely blurred; it has disappeared."), *denying reh'g en banc* to 971 F.2d 1395 (9th Cir. 1992), *as amended* by 1992 U.S. App. LEXIS 19253 (9th Cir. Aug. 19, 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

the same regardless of the particular use a defendant is making of a plaintiff's persona. Recall the example mentioned in the Introduction regarding the use of baseball players' names and playing statistics in a board game as opposed to a book.⁵⁰ Most importantly, however, a pure categorization approach leaves unaddressed the competing interests at stake in cases involving a conflict between the First Amendment and the right of publicity. Specifically, an approach which resolves the conflict by simply categorizing the defendant's use fails to consider the application of the relevant harms in its analysis.

Another popular avenue for purporting to resolve the conflict between the right of publicity and the First Amendment is the invocation of copyright law's fair use doctrine.⁵¹ The fair use doctrine is one of the major means through which copyright law accommodates First Amendment principles in its analytical framework.⁵² As codified at § 107 of the 1976 Copyright Act, the fair use doctrine considers four primary factors—the purpose of the defendant's use, the nature of the plaintiff's work, the degree of the appropriation, and the effect of the defendant's use upon the marketability of the plaintiff's work—in mediating the balance between compensated uses of copyrighted works and uncompensated access to these works.⁵³

50. See *supra* text accompanying note 20. See also *infra* notes 186-91 and accompanying text.

51. See *infra* note 54.

52. The other way in which copyright law accommodates the First Amendment is by protecting expression rather than ideas. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) ("[C]opyright's idea-expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'") (quoting the lower court's decision at 723 F.2d 195, 203 (2d Cir. 1983)); *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 795 (9th Cir. 1992) ("Copyright law incorporates First Amendment goals by ensuring that copyright protection extends only to the forms in which ideas and information are expressed and not to the ideas and information themselves."); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) ("The 'marketplace of ideas' is not limited by copyright because copyright is limited to protection of expression."). Underlying what has come to be known as the idea-expression dichotomy is the notion that our societal interest in fostering creativity demands that ideas remain freely available to all. See *Eichel v. Marcin*, 241 F. 404, 408 (S.D.N.Y. 1913) ("If an author, by originating a new arrangement and form of expression of certain *ideas or conceptions*, could withdraw these ideas or conceptions from the stock of materials to be used by other authors, each copyright would narrow the field of thought open for development and exploitation, and science, poetry, narrative, and dramatic fiction and other branches of literature would be hindered by copyright, instead of being promoted.") (emphasis added).

In contrast, an author's expression of her ideas can be safeguarded by copyright law. Thus, the idea-expression dichotomy "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." *Harper & Row Publishers*, 471 U.S. at 556. The idea-expression dichotomy has been the subject of extensive criticism because it is difficult to distinguish an idea from its expression. For a discussion of this criticism, see Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 208-10 n.127 (1990). See also Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 323 n.3 (1989); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393 (1989).

53. 17 U.S.C. § 107 (1988 & Supp. V 1993). Specifically, the Act provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement

This Author believes that the automatic invocation of the copyright fair use framework in cases presenting a conflict between the First Amendment and the right of publicity is inappropriate. Copyright law and the right of publicity, while in some ways analogous, are nonetheless significantly different in both their theoretical underpinnings and objectives. Thus, the incorporation of a copyright law doctrine as the springboard for analysis in the First Amendment/right of publicity dilemma will result in the adoption of an imprecise analytical framework and potentially inappropriate outcomes.⁵⁴

Before discussing the salient differences between copyright law and the right of publicity, a few words about their similarities are in order. The purpose of both the right of publicity and copyright law is the provision of economic incentives for people to devote themselves to creative activities that will be beneficial from a societal standpoint.⁵⁵ Furthermore, both doctrines are concerned with preventing the unauthorized appropriation of valuable property rights. Both doctrines attempt to accomplish these objectives by

of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id. All of these factors were widely used under the previously existing common law as well, resulting in a similarity of analysis in pre- and post-Act opinions. *See, e.g., Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). Courts typically balance these four factors in determining whether a particular use of a work constitutes a fair use, although other factors such as equitable considerations often come into play in a fair use analysis. In fact, the legislative history to § 107 emphasizes that these factors are not to be considered definitive or determinative. H.R. REP. NO. 553, 94th Cong., 2d Sess. 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679.

54. I must confess that several years ago, I was among those commentators who suggested resorting to copyright law's fair use doctrine as an appropriate means by which courts could balance the competing interests of the right of publicity and the First Amendment. *See Kwall, supra* note 32, at 232. Although other scholars and at least one court also have embraced the fair use analogy to resolve the tension between the right of publicity and the First Amendment, my work in this area over the past 10 years has convinced me that the copyright analogy is less than satisfactory. *See generally Apple Corps. Ltd. v. Leber*, 229 U.S.P.Q. (BNA) 1015 (Cal. App. Dep't Super. Ct. 1986) (holding that the defendants' conduct in producing a live, on-stage performance featuring individuals who looked and sounded like the Beatles violated §§ 50 & 51 of the New York Civil Rights Law and that such conduct could not be excused under a fair use analysis); Richard Ausness, *The Right of Publicity: A "Haystack in a Hurricane"*, 55 TEMPLE L.Q. 977, 1048 (1982); Randall T.E. Coyne, *Toward a Modified Fair Use Defense in Right of Publicity Cases*, 29 WM. & MARY L. REV. 781, 817 (1988); Steven J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y 111, 140 (1980); Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TULANE L. REV. 836, 915 (1983). *See also infra* notes 247-56, 266-71 and accompanying text for a discussion of *Leber*.

55. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977) ("Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright law long enforced by this Court.").

restricting forms of expression which infringe on these respective rights.⁵⁶ Notwithstanding these similarities, however, important differences exist between these doctrines which bear upon this discussion.

Although copyright theory is compatible with recognition of a creator's personality rights,⁵⁷ copyright law in this country is inordinately preoccupied with pecuniary, as opposed to personal, interests.⁵⁸ Clearly, the unauthorized

56. See Kwall, *supra* note 32, at 230-31.

57. Protection for an individual's authorial presence was not the original, primary focus of copyright law. In the 18th and 19th centuries, copyrightable authorship was defined by the labor invested in a particular work rather than the embodiment of a creator's heart and soul. Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1873-81 (1990). This view of copyright law is consistent with the labor-desert theory of property espoused initially by John Locke. According to this theory, an individual's property interest stems from the combination of that person's labor with a natural resource so as to make that resource more productive for society. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 294-96 (Peter Laslett ed., student ed. 1988) (3d ed., 1698). According to this theory, each person has a right to the product of her own labor with minimal outside interference. See RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 340-41 (1985); see also Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993) (discussing how Locke's theory of property can be applied to resolve competing claims between the original creators of intellectual property and those who wish to make subsequent use of these original creations); *infra* notes 90-92 and accompanying text.

By the beginning of the 20th century, however, two distinct rationales for copyright protection had emerged: copyright was viewed as protecting against "both the authorial personality present within a work and the labor and resources invested in it." Ginsburg, *supra*, at 1890. The view of copyright protection as a means of safeguarding a creator's personality or identity is attributable to the work of the German philosopher Hegel, and was also espoused by Immanuel Kant. See IMMANUEL KANT, *Of the Injustice in Counterfeiting Books*, in 1 ESSAYS AND TREATISES ON MORAL, POLITICAL, AND VARIOUS PHILOSOPHICAL SUBJECTS 225, 229-30 (1798); see also Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330 (1988); Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1539, 1541.

In addition to these two views of copyright ownership, Professor Lacey posits a third view which sees copyright as "an artificial right created by the legislature and the judiciary." Lacey, *supra*, at 1539. See also Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827, 829 n.8 (1992) (citing Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) for the proposition that the Supreme Court has adopted this last theory of copyright protection).

58. Section 201(d) of the 1976 Copyright Act provides that the copyright owner can transfer any or all of the following exclusive rights safeguarded by the 1976 Act: the rights to reproduce and distribute the original work, to prepare derivative works, and to perform and display publicly certain types of copyrighted works. 17 U.S.C. §§ 106, 201(d) (1988). As this list of rights suggests, the 1976 Act manifests the United States' tradition of protecting only the pecuniary interests of a copyright owner. Since the 1976 Act generally does not purport to protect the creator, but rather the copyright owner, if the original creator of a work assigns all of her rights under the statute to another party, traditionally the creator no longer retains any rights with respect to her work. *But see id.* § 203(a)(3) (1988) (allowing a creator to terminate transfers and licenses during a 5-year period beginning 35 years after the execution of the grant). Following such an assignment, the copyright proprietor has a purely monetary interest in safeguarding the work, and thus will not share the creator's personal loss when the work is used without authorization. In this respect, then, copyright law recognizes the copyright proprietor's monetary interest, rather than the creator's personal rights.

Perhaps one of the clearest illustrations of this economic preoccupation is the dearth of moral rights protections currently available in this country. In contrast to the United States, many European and Third World nations have well-developed moral right doctrines. See generally Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?* 38 VAND. L. REV. 1 (1985). The moral rights doctrine essentially includes three major components: the right of disclosure, the right of attribution, and the right of integrity. Underlying the right of disclosure is the idea that the creator, as the sole judge of when a work is ready for public dissemination, is the only one who can possess any rights in an uncompleted work. The right of attribution, as its name suggests, safeguards a creator's right

appropriation of copyrighted property will almost always entail a high degree of subjective loss on the part of the creator of the copyrighted property.⁵⁹ Nevertheless, the framework of our copyright law is such that economic compensation for the copyright proprietor, who may or may not be the creator of the work, is exalted over compensation for the personal rights of creators in their works.

A compelling argument can be made that forcing the use of an individual's persona in a way to which the person would not have consented is even less justified than forcing the unauthorized use of copyrighted property.⁶⁰ If copyrighted property can be said to represent the embodiment of a creator's heart, mind, and soul, this is even more true for attributes such as an individual's name and likeness that are protected by the right of publicity. Thus, a strong argument can be advanced that uses of an individual's persona strike at the heart of one's personhood even more than appropriations of an individual's expression.⁶¹ In *Midler v. Ford Motor Company*,⁶² wherein the court concluded that the unauthorized appropriation of singer Bette Midler's voice for commercial purposes constitutes a tort in California, the court observed that although her voice is not copyrightable, "[w]hat is put forward

to compel recognition for her work and to prevent others from naming anyone else as the creator. The right of attribution also protects a creator's negative rights of anonymity and pseudonymity. The right of integrity lies at the heart of the moral rights doctrine, as it prohibits any alterations of a creator's work that will destroy the spirit and character of the author's work. *Id.* at 5-16.

In 1990, Congress added § 106A to the copyright statute, which safeguards for creators of "visual art," as that term is defined in § 101 of the statute, relatively limited rights of attribution and integrity when modifications to their works are made that will prejudice their honor or reputation. Section 106A applies only to a very narrow category of visual art, which includes "a painting, drawing, print, or sculpture, [or] 'a still photographic image produced for exhibition purposes only' existing in a single copy, [or] in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author." The definition of a "work of visual art" is contained in 17 U.S.C. § 101 (Supp. V. 1993). Section 106A also fails to define or provide any guidance with respect to how a determination of "prejudice" should be made. Moreover, the right of integrity provided in § 106A is limited to intentional modifications and fails to include rights in reproductions of the protected work. In addition, the right of attribution in § 106A, while limited to intentional alterations, does not include the negative rights of anonymity or pseudonymity. See Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 958-60 (1990).

Section 106A was added to the copyright statute in the wake of our accession in 1988 to the Berne Convention for the Protection of Literary and Artistic Works, the oldest multilateral treaty governing copyright protection. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853. With the exception of this relatively recent, and very narrowly crafted moral rights provision, our copyright statute reflects very little concern with protection for the personal rights of creators. The 1976 Copyright Act contains only one other provision that explicitly recognizes, in a limited context, an aspect of the moral rights doctrine. See 17 U.S.C. § 115(a)(2) (1988) (allowing the reproduction of a previously reproduced musical composition upon payment of a specified royalty as long as the arrangement does not "change the basic melody or fundamental character of the work").

59. See Roberta Rosenthal Kwall, *Governmental Use of Copyrighted Property: The Sovereign's Prerogative*, 67 TEX. L. REV. 685, 716 (1989) ("Because such property is the embodiment of the creator's mind, heart, and soul, its appropriation may engender a greater sense of loss than the appropriation of forms of tangible property."). This recognition is consistent with the view of copyright protection that emphasizes "authorial personality." See *supra* note 57 and accompanying text.

60. See *infra* notes 109-19 and accompanying text.

61. The concept of "personhood" is explored by Professor Margaret Jane Radin in her seminal work, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

62. 849 F.2d 460 (9th Cir. 1988), *cert. denied*, 112 S. Ct. 1513 (1992).

as protectible here is more personal than any work of authorship.”⁶³ Other courts have also emphasized this distinction between the right of publicity and copyright law.⁶⁴

In addition, the right of publicity differs from copyright law in that it is concerned with a type of societal harm that is essentially unrelated to copyright's protections. Specifically, the right of publicity carries strong consumer protection overtones and is recognized, in part, to assure that consumers receive accurate information about the sponsorship, approval, and certification of goods and services.⁶⁵ This concern recognizes the danger that if advertisers were free to use anyone's right of publicity without authorization, the manufacturers of poor quality or even dangerous products would be able to manipulate consumers through such unauthorized exploitations.⁶⁶ In contrast, copyright law in general, and the fair use doctrine in particular, is not intended to promote consumer protection and has not developed any type of analytical framework that takes this policy into consideration.

There is another interesting difference between the theoretical underpinnings of copyright law and the right of publicity that militates against the automatic invocation of the fair use doctrine as a mechanism for resolving conflicts between the right of publicity and the First Amendment. Specifically, the unjust enrichment rationale so prominent in publicity theory appears to be on the wane with respect to copyright theory.⁶⁷ This difference in emphasis on

63. *Id.* at 462. The court also noted that “[a] voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested.” *Id.* at 463.

64. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1100 (9th Cir. 1992) (noting that rights protected by the right of publicity are more personal than those protected by copyright and thus not subject to copyright preemption), *cert. denied*, 113 S. Ct. 1047 (1993); *Apigram Publishing Co. v. Factors Etc., Inc.*, No. C 78-525, 1980 WL 2047, at *2 (N.D. Ohio July 30, 1980) (“A cause of action based on the right of publicity involves elements, such as the invasion of personal privacy rights, which are not present in the law of copyright.”).

This distinction between that which is protected by the right of publicity and by copyright law becomes even more manifest when the copyrighted work at issue is a “low authorship” work featuring informational components, as opposed to the more creative types of authorship such as books, plays, pictures, and songs. See Ginsburg, *supra* note 57; Jane C. Ginsburg, *No “Sweat”? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338 (1992). In these pieces, Professor Ginsburg explores the appropriate degree of copyright protection for “low authorship” works.

65. See *State ex rel. Elvis Presley Int'l Memorial Found. v. Crowell*, 733 S.W.2d 89, 99 (Tenn. Ct. App. 1987).

66. See Madow, *supra* note 38, at 228, 237-39 (disputing all rationales underlying the right of publicity and questioning the soundness of the right's very existence).

67. In *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), the Supreme Court held that white pages from a telephone directory did not manifest the requisite degree of originality for copyright protection. Significant for purposes of this discussion are the great lengths to which the Court went to discredit the “sweat of the brow” theory of copyright protection that had been developed and invoked in prior judicial decisions. *Id.* at 352-56; see, e.g., Rochelle Cooper Dreyfuss, *A “Wiseguy’s” Approach to Information Products: Muscling Copyright and Patent into a Unitary Theory of Intellectual Property*, 1992 SUP. CT. REV. 195; Ginsburg, *supra* note 64, at 341; Dennis S. Karjala, *Copyright and Misappropriation*, 17 UNIV. DAYTON L. REV. 885 (1992).

Prior to *Feist*, courts had been much more inclined to prohibit as copyright infringement activity that more resembled misappropriation. See Ginsburg, *supra* note 57, at 1880. Professor Ginsburg has observed that *Feist* “appears to enshrine a policy of free-riding in the Constitution.” Ginsburg, *supra* note 64, at 349.

unjust enrichment suggests that in copyright law, the extent to which a defendant is unjustly enriched by a free use of the plaintiff's work is a consideration secondary to the main goal of promoting creativity for the benefit of society. In other words, copyright law will sanction an uncompensated and unauthorized use of the copyrighted work where such use is deemed beneficial to society and unlikely to impair the incentives for creation.⁶⁸ In contrast, the need to prevent unjust enrichment is one of the fundamental rationales underlying the right of publicity. Therefore, the presence of this factor in any given situation should weigh more heavily in a publicity analysis than it does under current copyright theory.⁶⁹

The conclusion suggested by the above discussion is that a model which focuses on the codified copyright fair use factors is an unsatisfactory method by which to resolve the conflict between the right of publicity and the First Amendment. The four codified factors are doctrinally geared to determine the appropriate degree of uncompensated access to copyrighted works. Copyright law, while in some ways analogous to the right of publicity, nonetheless manifests significant differences such as the ones explored above.⁷⁰

Rather than resorting to the automatic invocation of a ready-made framework borrowed from copyright law, the difficult issues surrounding the conflict between the First Amendment and the right of publicity should be addressed in the context of a specially developed analytical framework that is tailored to addressing these critical issues.⁷¹ This Article suggests an

68. See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1614 (1982). After *Feist*, the presence of unjust enrichment seems to be largely irrelevant to this analysis.

69. Paradoxically, *Feist*'s endorsement of intellectual creativity at some "minimal level" for copyright protection, *Feist*, 499 U.S. at 358, is reminiscent of copyright's concern with "authorial presence." See *supra* note 57. Thus, the opinion can have the effect of more directly equating copyright with the right of publicity in light of the more personal attributes protected by the right of publicity—attributes which lend themselves to the establishment of "authorial presence." Still, the opinion's de-emphasis of unjust enrichment is inconsistent with right-of-publicity theory, which is very much concerned with the ability of an individual to enjoy "the fruits of his own industry free from unjustified interference," and with "preventing unjust enrichment by those appropriating another's identity without consent for commercial advantage." See Kwall, *supra* note 32, at 198 (quoting *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970)); see also *Carson v. Here's Johnny Portable Toilets*, 698 F.2d 831, 838 (6th Cir. 1983) (noting that prevention of unjust enrichment is one purpose of right-of-publicity law); *Factors Etc., Inc. v. ProArts, Inc.*, 579 F.2d 215, 221 (2d Cir. 1978) (noting role of unjust enrichment prevention in right-of-publicity theory), *cert. denied*, 440 U.S. 908 (1979); *State ex. rel. Elvis Presley*, 733 S.W.2d at 98 (recognizing unjust enrichment as a basic premise of right-of-publicity protection); *infra* part II.B.4.

70. See H. Lee Hetherington, *Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity*, 17 COLUM.-VLA J.L. & ARTS 1, 29 (1992) (providing examples of how the various fair use factors can be inapplicable in a right of publicity/First Amendment analysis).

71. A few other alternatives have been offered in addition to copyright's fair use analysis to resolve the tension between the First Amendment and the right of publicity. Some courts have avoided the conflict entirely by narrowly construing the scope of the statutory or common law at issue. See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY*, § 8.6[B], at 8-34 (8th ed. 1992); *Burnett*, *supra* note 26, at 204; see, e.g., *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1197 (9th Cir. 1989) (construing the New York privacy statute narrowly to encompass only commercial uses of an individual's name or likeness), *cert. denied*, 493 U.S. 812 (1989); *Valentine v. C.B.S., Inc.*, 698 F.2d 430, 433 (11th Cir. 1983) (holding that the use of plaintiff's name in a musical work did not violate the Florida statute and construing the statute by stating "an interpretation that the statute absolutely bars the

inquiry that is much broader than that invoked in fair use. Specifically, the focus should be on the consequences to both society as a whole and to publicity plaintiffs in particular of allowing both uncompensated and compensated forced uses of an individual's persona. In determining both the need for and type of relief, the benefits of allowing unauthorized uses of an individual's persona must be balanced against the harms created by forcing such unauthorized uses.⁷² With the exception of the application of the fourth fair use factor—the extent to which the defendant's work has affected the market value of the plaintiff's work—the fair use doctrine fails to explicitly incorporate a consideration of the relevant harms engendered by the doctrine's application. Additionally, the fair use doctrine differs from this analysis in that it fails to provide explicit liability rule protection for a plaintiff in appropriate instances.⁷³

II. A PROPOSED FRAMEWORK

The approach advocated in this Article examines the nature of the competing interests at stake and invokes an analytical framework that lends itself to resolving these interests in the most equitable manner. Integral to the resolution of the conflict between the right of publicity and the First

use of an individual's name without consent for any purpose would raise grave questions as to constitutionality.”). Obviously, this approach simply begs the question.

Alternatively, First Amendment principles can be directly incorporated into a state law conception of the right of publicity. Burnett, *supra* note 26, at 204. State statutes which circumscribe the right of publicity when it conflicts with the First Amendment include the following: CAL. CIV. CODE § 3344(d)-(f) (providing exceptions to consent requirement for use of personality in connection with news, public affairs, sports broadcasts, or political campaigns); FLA. STAT. ANN. § 540.08(3)(a) (excepting from right-of-publicity liability those uses for news reports having legitimate public interest and not used for advertising purposes); IND. CODE § 32-13-1-1 (exempting uses in literary, theatrical, and musical works, film, radio, television programs, fine art, material with political or newsworthy value, advertisements for all such uses, and reports on topics of general or public interest); NEB. REV. STAT. §§ 20-202(1) (allowing a use as part of a bona fide news report having current or historical public interest and not used for commercial advertising purposes); NEV. REV. STAT. § 597.790(2)(a)-(e) (providing that there is no violation of the right of publicity where name or likeness is used in connection with news or art, is an impersonation in a live performance, or is without relation to commercial sponsorship); TENN. CODE ANN. § 47-25-1107 (exempting uses in connection with news); TEX. PROP. CODE ANN. § 26.012 (requiring no consent for use in connection with news); and WIS. STAT. ANN. § 895.50(3) (providing defense for the maintenance of freedom of communication). The statutes in California, Nevada, and Tennessee provide that it should be a question of fact whether a defendant's use of a plaintiff's protected attribute was sufficiently directly connected with commercial sponsorship so as to constitute a prohibited use. Nevertheless, in general the statutory formulations tend to be insufficiently flexible to solve the problem. See generally MCCARTHY, *supra*, § 8.6[E], at 8-38 (In speaking of conflicts with the First Amendment where there is “media use of human identity,” the author states that “[t]here is no neatly packaged general rule that can be waved like a magic wand to make the solution any easier. The balance must be laboriously hacked out case by case.”).

72. For an example of this type of comparative approach in the context of the policies underlying the First Amendment and the Lanham Act, see *Morgan Creek Prods. Inc. v. Capital Cities/ABC Inc.*, 22 U.S.P.Q.2d (BNA) 1881 (C.D. Cal. 1991). In *Morgan Creek*, which involved a television program title that allegedly infringed a motion picture title, the court emphasized that it must determine how “the conflict between consumer protection and freedom of expression balance[s] out in this particular scenario.” *Id.* at 1884.

73. Some copyright decisions have, however, endorsed a liability rule analysis. See *infra* note 75 and accompanying text.

Amendment is the recognition that certain situations will be most effectively resolved by a liability rule approach in which a successful right-of-publicity plaintiff is awarded damages rather than injunctive relief. This approach is consistent with constitutional doctrine which holds that prior restraints of speech are particularly offensive to First Amendment values. It is, therefore, almost always preferable to penalize speech after publication rather than by prior restraint.⁷⁴ Support for this type of remedial approach has grown in recent years in copyright law as courts and commentators have emphasized the need for considering the public interest when determining whether injunctive relief is appropriate in a successful copyright infringement action. Last term, the Supreme Court explicitly acknowledged "that the goals of copyright law . . . are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use."⁷⁵ The discretionary nature of injunctive relief is also well established in other areas of the law such as nuisance⁷⁶ and torts.⁷⁷

74. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.") (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)); *Near v. Minnesota*, 283 U.S. 697, 719 (1931) (noting the "general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints"). Injunctions are considered the classic prior restraint. See, e.g., *Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993) (noting that "[t]emporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints").

75. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1171 n.10 (1994). Moreover, in *Abend v. MCA, Inc.*, the Ninth Circuit held that under the 1909 Copyright Act, the defendants' exploitation of the movie *Rear Window* without the plaintiff's consent violated Abend's renewal copyright in the underlying story, *It Had to Be Murder*. 863 F.2d 1465 (9th Cir. 1988), *aff'd sub nom. Stewart v. Abend*, 495 U.S. 207 (1990). The United States Supreme Court affirmed the Ninth Circuit's ruling that the continued distribution of the movie by the defendants without the plaintiff's permission constituted copyright infringement. *Stewart*, 495 U.S. at 236. What is particularly significant about the case for purposes of this discussion, however, is the Ninth Circuit's recognition of the contributions of the movie's director and actors, and the public's interest in viewing the movie, and its conclusion that these "compelling equitable considerations" militate against the plaintiff's request for injunctive relief. *Abend*, 863 F.2d at 1478. Thus, the Ninth Circuit concluded that "Abend can be compensated adequately for the infringement by monetary compensation." *Id.* at 1479. The Supreme Court's affirmation of *Abend* specifically stated that it did not grant certiorari on the issue of relief, and the Court did not discuss the Ninth Circuit's ruling in this respect. Subsequently, the Supreme Court quoted this portion of the Ninth Circuit's opinion in the footnote of *Acuff-Rose* discussed in the text. *Acuff-Rose*, 114 S. Ct. at 1171 n.10.

Other courts and commentators have similarly emphasized the public interest consideration in determining the propriety of injunctive relief in successful copyright actions. See, e.g., *New Era Publications Int'l ApS v. Henry Holt, Co.*, 884 F.2d 659, 661, 664 (2d Cir. 1989) (concurring and dissenting opinions), *denying reh'g en banc* to 873 F.2d 567 (2d Cir. 1988); Gordon, *supra* note 68, at 1614; James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 HOFSTRA L. REV. 983, 997 (1990); Note, *Remedies for Copyright Infringement: Respecting the First Amendment*, 89 COLUM. L. REV. 1940, 1956-57 (1989). In making injunctive relief discretionary rather than mandatory, the 1976 Copyright Act provides further support for this view. See 17 U.S.C. § 502(a) (1988).

76. The seminal article on property and liability rules explored their application in the context of pollution control. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); see also Edward H. Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299 (1977). For an insightful exploration of these rules in the context of contract law, see Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1 (1993).

77. *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986) (In an action for tortious interference with the business of a competitor, the court recognized the discretion given judges

In light of the substantial support for the imposition of a liability rule approach in other areas of the law, it is surprising that this approach has never been invoked in the context of adjudicating conflicts between the right of publicity and the First Amendment. Indeed, resolution of this conflict is particularly suited to the imposition of a liability rule system since many situations will arise in which the defendant's use is in the public interest, but the plaintiff and defendant will be unable to negotiate privately an agreement permitting such use. The failure of these negotiations may be attributable to factors such as the plaintiff's adamant refusal to sell her persona, or the ability of the plaintiff to extract economic rents from the buyer due to the relative uniqueness of the desired commodity. In such instances, the adoption of a liability rule approach yields the most economically efficient result.⁷⁸ Still, courts will be faced with determining whether a particular conflict is best resolved by flatly denying the plaintiff any relief, by awarding the plaintiff damages alone under a liability rule approach, or by awarding the plaintiff injunctive relief and concomitant damages under a property rule approach. The framework developed in the following analysis facilitates a resolution of these questions by demonstrating that the appropriate remedy in any particular case will be dictated by a careful balancing of the relevant benefits and harms. It begins with a consideration of the benefits side of the balance.

A. Society's Entitlements Deriving From the First Amendment

At the outset, the rationales supporting the First Amendment must be weighed against the justifications supporting the right of publicity discussed earlier.⁷⁹ The underpinnings of the First Amendment have been treated extensively elsewhere,⁸⁰ and for purposes of this discussion they will be

in issuing injunctions, and noted the following factors to be used in a balancing approach: the "nature and degree of the plaintiff's injury, the likelihood of prevailing at trial, the possible injury to the defendant if the injunction is granted, and the wild card that is the 'public interest.'")

At least one court has also used this balancing approach in granting an injunction where free speech was involved. *See Fort Wayne Journal-Gazette v. Baker*, 788 F. Supp. 379, 387 (N.D. Ind. 1992). In that case, a newspaper sought a preliminary injunction to overcome a protective order which barred publication of information a reporter learned in a court proceeding. In deciding to grant the injunction, the court recognized factors which must be taken into consideration, including whether there was an adequate remedy at law, the likelihood of irreparable harm, the likelihood of success on the merits, and the public interest. *Id.* at 387-88. In *Baker*, however, granting the injunction had the effect of allowing the information to be published. *Id.* at 388.

78. *Cf.* Kwall, *supra* note 59, at 739 (noting that similar justifications support the exercise of eminent domain).

79. *See supra* text accompanying notes 34-37.

80. *See* THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1970) (identifying four premises upon which freedom of expression rests: individual self-fulfillment, participation in decision-making by society, advancing truth and knowledge, and maintaining stability in the community); FREDERICK F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 86 (1982) (adopting a "governmental incompetence" rationale for freedom of expression which posits that the freedom is justified because the government is not good at regulating speech); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990-91 (1978) (noting four First Amendment values: self-fulfillment, societal participation in decision-making, advancement of truth and knowledge,

addressed briefly. The most frequently cited justifications for the free speech guarantees of the First Amendment are that (1) they advance knowledge and the search for truth by fostering a "free marketplace of ideas" and thus are necessary for a democratic society;⁸¹ (2) they fulfill the human need for self-expression;⁸² and (3) they guard against violent societal eruptions by providing people with other meaningful vehicles of expression.⁸³ Although the political underpinnings embodied in the third rationale for First Amendment protection may not be particularly significant for the right of publicity,⁸⁴ the first two rationales clearly have the potential to pit the importance of First Amendment values against the protections embodied in the right of publicity.

The importance of the First Amendment for a democratic society emphasizes the enlightenment function of that doctrine. To achieve this function, not only news subjects but also entertainment must be protected.⁸⁵ In rejecting the argument that constitutional protection for a free press only applies to the expounding of ideas, the Supreme Court has stated: "The line between the informing and the entertaining is too elusive for the protection of that basic

and achievement of stability in the community); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 23 (1975) (identifying informed choice, search for truth, and self-actualization as purposes underlying First Amendment free speech); Kwall, *supra* note 32, at 230 (noting that free speech is necessary in a democratic society because it fulfills the need to self-express and it guards against societal eruptions by providing an outlet through expression); Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 651, 729 (1987) (supporting a tolerance theory of freedom of expression).

81. See EMERSON, *supra* note 80, at 6 ("An individual who seeks knowledge and truth must hear all sides of the question, consider all alternatives, test his judgment by exposing it to opposition, and make full use of different minds."); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 6 ("Classic marketplace theory assumes truth is discovered through competition with falsehood."); see also Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 942 (1992) (identifying "the importance of speech on matters of public concern in a democratic society" as the primary justification for protecting public employee speech); Donald E. Lively, *The First Amendment at its Third Century: Reckoning With the Ravages of Time*, 18 HASTINGS CONST. L.Q. 259, 275 (1991) (noting that alternate rationales for the First Amendment are acceptable insofar as they support "democratic robustness"); Kim M. Watterson, Note, *The Power of Words: The Power of Advocacy Challenging the Power of Hate Speech*, 52 U. PITT. L. REV. 955, 973 (1991) (stating that the "polestar justification" for First Amendment free speech is its contribution to the democratic process).

82. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 804, 807 (1978) (White, J., dissenting) (noting that a principal justification for freedom of speech is individual self-expression); Ronald K. L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 733 (1992) (recognizing that individual self-expression is the primary justification for freedom of speech); Helene Bryks, Note, *A Lesson in School Censorship: Hazelwood v. Kuhlmeier*, 55 BROOK. L. REV. 291, 310 (1989) (noting that individual self-expression is a major justification for freedom of speech).

83. See Marc A. Franklin, *Libel and Letters to the Editor: Toward an Open Forum*, 57 U. COLO. L. REV. 651, 675-76 (1986) (identifying the "safety-valve" justification to freedom of speech as giving "a fair chance to persuade"); Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 219 (1991) (noting that hate speech is justified because it defuses hostility and avoids physical violence); Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 653 (1975) (citing *Whitney v. California*, 274 U.S. 357 (1927), as the source of three justifications for freedom of speech: individual self-expression, a necessity for democratic society, and a safety-valve justification).

84. See Burnett, *supra* note 26, at 191.

85. *Id.* at 190.

right. . . . What is one man's amusement, teaches another's doctrine."⁸⁶ The self-expression function nurtures the human spirit.⁸⁷ Again, the Supreme Court has explicitly recognized that all different art forms embodying human expression are entitled to protection by observing that the "teacher as well as the public speaker" and "[t]he actor on stage or screen, the artist whose creation is in oil or clay or marble, the poet whose reading public may be practically nonexistent, the musician and his musical scores . . . are beneficiaries of freedom of expression."⁸⁸

Most courts have attempted to resolve the inherent conflict between the right of publicity and the First Amendment simply by categorizing the defendant's use, with entertainment and informational uses receiving greater protection than commercial uses.⁸⁹ This Article maintains that categorization, in and of itself, is far too simplistic and that the competing interests on each side of the equation must be thoroughly examined. The first step in this inquiry is to ask what type of entitlements the First Amendment affords society. Professor Wendy J. Gordon recently attempted to use Lockean theory to explicate the appropriate balance between free speech and the public domain in the context of intellectual property. She explains Lockean theory as requiring that initial creators of any aspect of culture cannot maintain the exclusive right to use that cultural component if depriving the public will result in a "devalued common."⁹⁰ The following example is illustrative. Baby boomers who were teenagers in the 1960's grew up with the Beatles phenomenon. Persons who are slightly older may have experienced a similar phenomenon with Elvis Presley. To what extent and for how long should Paul McCartney, George Harrison, Ringo Starr, and even the legatees of John Lennon's and Elvis Presley's estates have the power to determine the meaning of these cultural icons?⁹¹ Do the former members of the audience suffer a

86. *Winters v. New York*, 333 U.S. 507, 510 (1948) (invalidating a New York law which prohibited the distribution of magazines primarily composed of material concerning criminal news or stories of bloodshed or lust).

87. See Burnett, *supra* note 26, at 190.

88. *Poe v. Ullman*, 367 U.S. 497, 514 (1961); see also Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 257 (noting that art can have a political content and thus may be composed of exactly the kind of speech the First Amendment is directed to protect).

89. See *supra* notes 46-48 and accompanying text. Cf. MCCARTHY, *supra* note 71, § 8-11[C], at 8-83 (advocating an analysis focusing on the "primary purpose" of the usage to determine its "primary impact").

90. See Gordon, *supra* note 57, at 1570. Professor Gordon actually takes Lockean theory a step further by arguing that "a later arrival on the cultural scene should be at liberty to use an existing creation if prohibiting his own use would make him worse off *individually* than he would have been if the predecessor creator had not created the intangible at issue." *Id.* (emphasis in original). Professor Gordon notes, however, that "[t]his is a somewhat controversial interpretive step to take" since "[m]any commentators have interpreted Locke's proviso as imposing only an 'aggregate' condition." *Id.* See also Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 969 (1990) ("When individual authors claim that they are entitled to incentives that would impoverish the milieu in which other authors must also work, we must guard against protecting authors at the expense of the enterprise of authorship.").

91. See Madow, *supra* note 38, at 145 (In commenting on a bill before the New York Legislature that would make the right of publicity descendible in that state, the author notes that if the New York Legislature were to make John Wayne's right of publicity descendible, it would confer on Wayne's assignee "the power to fix, or at least try to fix, the meaning that 'John Wayne' has in our culture: his meaning for us.") (emphasis in original).

serious harm if unable to invoke these personas for purposes of self-expression and to determine their ongoing cultural meaning?⁹²

As a society, we must have the ability not only to write about, but also to interpret, the thought processes of illustrious individuals who have shaped our society. Some postmodernists argue that intellectual property laws in general have the capacity to deprive society "of possibilities for dialogic interaction with the cultural reality" by safeguarding the rights in cultural texts and images which have come to be viewed as commodities.⁹³ In the context of the right of publicity specifically, it has been argued that recognition of publicity rights allows "celebrities, their assignees, and their estates to control the meaning of the celebrity image in a fashion that deprives us of access to our collective cultural heritage and the ability to reflect upon the historical significance of the celebrity aura."⁹⁴

Society's entitlement to invoke the personas of our cultural icons is substantially diminished in the context of patently commercial appropriations. Commercial speech is afforded a degree of constitutional protection,⁹⁵ but to a lesser extent than political speech and entertainment speech.⁹⁶ Although the protection of commercial speech is warranted to foster accurate product and price data,⁹⁷ these objectives are not served by allowing unauthorized uses of an individual's persona in a primarily commercial context. Moreover, as explored in Part II.B, allowing these uses can promote consumer deception and thereby harm society.⁹⁸

Of course, one of the major difficulties in this area is formulating a strategy for determining whether a particular use is primarily commercial. This issue is explored in more depth in Part II.C, which argues that a degree of judicial latitude is necessary in making these determinations.⁹⁹ That portion of the Article also discusses the possibility that some traditionally commercial uses of an individual's persona can still involve a high degree of societal entitlement based on the expressive needs and additional creative effort of the

92. See Gordon, *supra* note 57, at 1569 (suggesting that if "former audience members . . . [are] not able to play with the symbols that formed their mental vocabulary, they may be worse off than if they had initially not been exposed to them").

93. Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1861 (1991); see also *id.* at 1866 ("By objectifying and reifying cultural forms—freezing the connotations of signs and symbols and fencing off fields of cultural meaning with 'no trespassing' signs—intellectual property laws may enable certain forms of political practice and constrain others.").

94. *Id.* at 1876.

95. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (holding that even speech which is wholly commercial is afforded some First Amendment protection).

96. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978) (noting that although commercial speech is now given protection, it is different than the protection afforded other forms of speech and is subject to more regulation).

97. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980) ("Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."); see also Burnett, *supra* note 26, at 204.

98. See *infra* part II.B.2.a.

99. See *infra* part II.C.4.

unauthorized user.¹⁰⁰ One such example is the use of celebrity photographs on T-shirts with creative or double entendre slogans. Such examples similarly illustrate the argument that as a society, we must have the ability to re-establish the meaning of cultural icons.

As the foregoing discussion illustrates, the inquiry regarding entitlements is also intertwined with the descendibility component of the right of publicity.¹⁰¹ In many instances, the individual whose publicity rights have been appropriated is no longer alive, and the claim for relief is being brought by the relatives or assignees of the deceased. We need to address the appropriate length of time personas can be monopolized by the heirs, legatees, and assignees of deceased individuals, after which point society obtains the right to benefit from unauthorized uses of deceased personas. These issues will be considered more specifically in Part II.B.3.¹⁰²

The importance of the concerns raised in this section, when considered in conjunction with the constitutional mandate underlying them, might suggest that the First Amendment should always trump the right of publicity, which lacks a comparable constitutional predicate. As the following section demonstrates, however, allowing unauthorized uses of an individual's persona does trigger significant harms that must be factored into the remedial equation.

B. Harms Resulting From Allowing Forced Uses

This section examines the potential harms both to specific parties and to society as a whole that can result from allowing the unauthorized use of an individual's persona. The specific parties whose interests can be affected by an unauthorized use include not only the right-of-publicity plaintiff, but also relatives and assignees of the person whose publicity rights have been appropriated and even prospective users of publicity rights. The following discussion illustrates that although some harms will occur only in conjunction with a "no protection" system, certain harms also exist under a liability rule approach.

1. Harms to Right-of-Publicity Plaintiffs

Any avid student of right-of-publicity litigation will notice that some right-of-publicity plaintiffs are concerned exclusively with redressing the unauthorized commercial exploitation of their personas, while others seem to complain about injured feelings, mental anguish, or a violation of their right

100. See *infra* notes 302-10 and accompanying text.

101. See Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 717 (1992) (noting that the descendibility issue presents one of the right of publicity's "chief problems under the First Amendment").

102. See *infra* notes 172-75 and accompanying text.

to be "left alone."¹⁰³ It is entirely appropriate for the right of publicity to redress both economic and emotional injuries that stem from an unauthorized appropriation of an individual's persona.¹⁰⁴ In some states, such as New York, the right of publicity is encompassed within the statutory right of privacy.¹⁰⁵ Moreover, some courts have combined elements of defamation¹⁰⁶ and false light invasion of privacy actions into their discussions. This analysis generates an overall confusion regarding the application of these respective theories.¹⁰⁷ Such confusion might be avoided if the right of publicity were explicitly acknowledged to include emotional as well as economic harms.

Allowing the unauthorized use of an individual's persona potentially poses the maximum harm to the plaintiff when the persona is being appropriated in an objectionable context or for an objectionable purpose. In those cases where the plaintiff is primarily objecting to the defendant's failure to provide compensation for an unauthorized use of the plaintiff's persona, a court can easily grant the plaintiff her desired remedy once it finds a violation of the plaintiff's publicity rights. In contrast, in those instances involving a use which the plaintiff deems objectionable, neither an award of injunctive relief nor monetary damages will erase the damage which the plaintiff perceives as having already been inflicted by virtue of the defendant's prior unauthorized

103. See *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 792 (Cal. Ct. App. 1993) (discussing these two aspects of "appropriation").

104. See MCCARTHY, *supra* note 71, § 1.11[C], at 1-47 (advocating a unification of the right of privacy against appropriation and publicity into a "right of identity" that would cover both emotional distress and pecuniary loss).

105. Nebraska, Virginia, and Wisconsin also take this approach. See *supra* note 33.

Dean Prosser's renowned article on privacy posited the following four distinct torts comprising the law of privacy:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). This Author has previously argued that "a careful reading of Prosser's article suggests that had the right of publicity been an established legal doctrine at the time of his writing, he might have been inclined to separate the appropriation tort from the other privacy torts." Kwall, *supra* note 32, at 193.

106. The law regarding defamation has become exceedingly complex. The constitutional standard for defamation contains various standards of proof depending upon the status of the plaintiff. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756, 763 (1985) (finding that, in a case involving a private figure and a matter of private concern, presumed and punitive damages are available absent proof of actual malice, but the case is unclear as to whether the general liability standard differs from private figure/public matter situation); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334, 343-47 (1974) (holding that where a libelous statement is made concerning a private figure on a matter of public concern, proof of at least negligence on the part of the defendant is still required and thus affords more First Amendment protection than the traditional common law strict liability theory of libel and that actual malice is also required to recover punitive and presumed damages); *New York Times Co. v. Sullivan*, 376 U.S. 254, 256, 279-80 (1964) (establishing an "actual malice" standard, which requires knowledge of falsity as to the libelous statement or reckless disregard as to its truth, in cases involving statements made about a public official concerning official conduct).

107. One such case is *Eastwood v. Superior Ct.*, 198 Cal. Rptr. 342 (Cal. Ct. App. 1983). See *infra* note 234 for a discussion of this case; see also SHELDON W. HALPERN, *THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND "MORAL RIGHTS"* 592 (2d ed. 1993).

appropriation. No judicially mandated relief can eliminate the prior effects of the defendant's objectionable public exposure of the plaintiff's persona.¹⁰⁸ These are situations involving what this Author calls morally based, as opposed to economically based, objections to the defendant's use.¹⁰⁹

108. See Hetherington, *supra* note 70, at 17 ("The right of publicity should not only encompass commercial usage of identity but also the right to deter others from unflattering usages that would dilute the public esteem, good will and commercial potential for endorsements that one has built over a lifetime.").

109. Although the right of publicity does, and should, redress morally based objections to the defendant's use, First Amendment jurisprudence demonstrates that speech causing emotional harm to particular individuals can be regulated in some contexts but not others. First Amendment law on this point is complex and inconsistent. As a general matter, "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Nevertheless, abusive language aimed directly at a particular individual rather than society in general and which is "inherently likely to provoke violent reaction" can be prohibited by the states under the "fighting words" doctrine. *Cohen v. California*, 403 U.S. 15, 20 (1971) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

The Supreme Court's recent pronouncements on the application of the "fighting words" doctrine reveal a state of uncertainty as to its perimeters. In *R.A.V. v. City of St. Paul*, the Court issued a 5-4 opinion invalidating a city ordinance prohibiting expressions constituting "fighting words" based on "race, color, creed, religion or gender" because the ordinance, by prohibiting only those "fighting words" emphasizing "bias-motivated" hatred, resulted in content-based discrimination and inhibited the expression of particular ideas. 112 S. Ct. 2538, 2547-49 (1992). The clear implication of the opinion is that five members of the Court believe that hateful speech can be regulated under a more inclusive, broadly worded statute, rather than the one at issue which targeted only certain kinds of fighting words. Moreover, Justice White's concurrence champions the "fighting words" doctrine and laments the majority's emphasis on the statute's underinclusiveness. Two other Justices joined this portion of his concurrence. Nevertheless, Justice White, in a portion of his opinion in which three other Justices joined, also asserted that the statute was unconstitutionally overbroad in that it "ma[de] criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment." *Id.* at 2560. Under this approach, "fighting words" can be regulated under a more narrowly-drawn statute.

Subsequently, in *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2201 (1993), the Court unanimously held that a state penalty enhancement statute that penalized bias-motivated crimes more severely than crimes which are not similarly motivated did not infringe a criminal defendant's First Amendment rights. The Court reasoned that the statute was aimed at unprotected conduct rather than speech and such conduct is more likely to inflict greater individual emotional harm, as well as overall societal harm. Although the Court emphasized that the statute differed from the one at issue in *R.A.V.*, in that it prohibited conduct rather than expression, the fact remains that the Court upheld a statute that increases penalties solely on the basis of a defendant's thoughts and beliefs. *See id.* at 2199. Thus viewed, the decision supports the view that a state can regulate particularly hurtful expression in certain contexts.

Thus, the extent to which states can regulate speech causing emotional harm to particular individuals is a complicated area of First Amendment law. The position advocated in this Article regarding the incorporation of a standard emphasizing morally based harms is not necessarily inconsistent with First Amendment jurisprudence. Of course, even if First Amendment doctrine refuses to prohibit speech that is morally offensive to a particular individual in certain instances, this does not mean that the right-of-publicity doctrine should fail to consider the morally offensive nature of an unauthorized use. In *Hustler Magazine, Inc. v. Falwell*, the Court held that the First Amendment protects against liability for a publication that is patently offensive and intended to inflict emotional injury to a public figure when such publication does not contain a false statement of fact made with "actual malice." 485 U.S. 46 (1988). In *Hustler Magazine*, however, the Court observed that in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), it had ruled that the "actual malice" standard does not apply to unauthorized appropriations of the right of publicity. *Hustler Magazine*, 485 U.S. at 52. The Court in *Zacchini* was not faced with a morally based objection to the defendant's appropriation and therefore its discussion emphasized the economic aspects of the right of publicity. Still, *Zacchini* does not preclude a consideration of morally based objections to a given unauthorized appropriation.

This Author recognizes that the "no protection" and liability rule approaches developed herein entail an element of compulsion for the owner of the persona, just as the property and liability rule approaches engender compulsion for the user. Under a property rule approach, the user is compelled to engage in private negotiations with the persona owner or to refrain from using the desired commodity. Under a liability rule approach, the user is compelled to pay damages and the persona owner is compelled to tolerate certain uses of her persona. Under a "no protection" approach, the persona owner is compelled to tolerate not only objectionable uses of her persona, but also a denial of profits. It has been argued that the compulsion under a "no protection" system is not comparable to that under a property rule system because the inability to collect profits by the property owner is not as harmful as the inability of the user to engage in certain activity.¹¹⁰ Underlying this Article's distinction of moral versus economic objections, however, is the notion that forced uses which mandate an objectionable use of the plaintiff's persona are more onerous than coerced uses which result only in economic harm.

Additionally, morally based objections can take different forms, and the degree of the harm can differ accordingly. For example, an individual can object to the use of her persona in connection with the advertisement of a product which she personally dislikes. In such cases, the individual's credibility is compromised even though the world at large may not realize that the individual feels the way she does about the product, and even though her unauthorized association with the product may not negatively affect her reputation. An even more problematic situation occurs when a celebrity's persona is used in connection with a product that the celebrity does not use and with which she would not want to be associated. An example of such a case is a diet program's appropriation of the persona of an actress who is naturally slender and has never used the program. Such an appropriation not only compromises her credibility but also gives her a reputation for having a tendency to be overweight, which may be both personally and professionally damaging. A more extreme example of this situation is when a company invokes an individual's persona in connection with a product that is either inherently or potentially dangerous. The unauthorized use of a celebrity's persona in a commercial for beer is one such example.¹¹¹ Such unauthorized uses can obviously adversely affect the individual's personal and professional reputation. In addition, situations can occur where the plaintiff is not objecting to the particular context or content of the use itself, but rather to the

110. For an exploration of these themes in the copyright context, see Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1430-35 (1989).

111. See *Tin Pan Apple, Inc. v. Miller Brewing Co.*, in which a rap group that emphasized avoidance of drugs and alcohol to its youthful listeners brought an action under the New York privacy statute against a beer company that used a look-alike/sound-alike group in a beer commercial after the original group had declined to appear in the commercial. 737 F. Supp. 826, 839-40 (S.D.N.Y. 1990). The court declined the defendants' motion to dismiss the cause of action based on the look-alikes, but held that the state law does not extend to the use of sound-alikes.

unauthorized use as a general matter. For example, some celebrities eschew all forms of endorsements¹¹² and some individuals shy away from any type of publicity that would place them in the public eye.¹¹³

A good example of this situation is *Waits v. Frito-Lay, Inc.*,¹¹⁴ in which singer Tom Waits sued Frito-Lay and its advertising agency for using a sound-alike who imitated Waits' distinctive voice in a commercial for Doritos. Waits has a firm public policy against doing commercials because he believes that commercials undermine the artistic integrity of musicians.¹¹⁵ The jury awarded damages to Waits not only for the economic value of his voice, but also for injury to his mental well-being and professional reputation. The Ninth Circuit affirmed the propriety of the entire damage award and specifically noted that a violation of a plaintiff's right of publicity can induce humiliation and embarrassment.¹¹⁶ In this case, Waits' feelings of anger and embarrassment were particularly pronounced given his strong public stand against doing any type of commercial endorsements.¹¹⁷ In this type of situation, then, the harm to the plaintiff goes beyond a lack of compensation.

Of course, morally based objections can also occur in conjunction with less patently commercial appropriations. As the discussion in Part II.C demonstrates, these are often the most difficult controversies to resolve due to the strong countervailing First Amendment interests at stake. As is the case with more traditional commercial appropriations, there is a continuum of harm in this category. For example, if an individual's persona is appropriated in an objectionable fashion in an informational and truthful context, or in conjunction with a work that is clearly understood to be fiction, that person's credibility and reputation are not compromised to the same extent as in a situation where her persona is used by or associated with a group the individual finds objectionable or distasteful,¹¹⁸ or for the purpose of making substantive arguments with which the individual disagrees.¹¹⁹

112. Actor Cary Grant is one example of a celebrity who avoided any commercial exploitation of his publicity rights during his lifetime. See *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 880 (S.D.N.Y. 1973) (stating that Grant had asserted that he did not want himself or others "to profit by the publicity value of his name and reputation").

113. See, e.g., *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 793 (Cal. Ct. App. 1993) (noting that a legendary California surfer who was included in a documentary about the early days at Malibu against his will "spent a good deal of energy avoiding the limelight"); *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254, 257 (N.Y. Sup. Ct. 1984) (arguing that the defendants hired a look-alike because they "knew there was little or no likelihood that [Jacqueline Kennedy] Onassis would ever consent to be depicted in this kind of advertising campaign"), *aff'd*, 488 N.Y.S.2d 943 (N.Y. App. Div. 1985).

114. 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993).

115. *Id.* at 1097. See also *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988) (noting that Bette Midler rejected offers to use her voice in a commercial context), *cert. denied*, 113 S. Ct. 1047 (1993).

116. *Waits*, 978 F.2d at 1104.

117. *Id.* at 1105.

118. See *Clark v. Celeb Publishing, Inc.*, 530 F. Supp. 979, 983 (S.D.N.Y. 1981) (involving pictures published in explicit pornographic magazine which were objectionable to plaintiff, who suffered personal and professional damages as a result).

119. *Cf. Maxtone-Graham v. Burtchaeil*, 803 F.2d 1253, 1255 (2d Cir. 1986) (allowing defendant, under fair use rubric, to quote a large amount of material contained in a book supporting pro-choice to

In contrast, many right-of-publicity cases involve uses by the defendant that are not objectionable per se to the plaintiff. Instead, the plaintiff is distressed by her failure to obtain a share of the economic benefits her persona is providing for the defendant. Such cases tend to reflect a high concern with the potential for unjust enrichment. These themes are evident in *Hirsch v. S.C. Johnson & Son*,¹²⁰ in which a prominent athlete sued a company for commercial misappropriation of his nickname "Crazylegs" on a shaving gel. Near the conclusion of the Wisconsin Supreme Court's opinion, the court observed that upon retrial, Hirsch must prove that "he has suffered damages based either on his loss or Johnson's unjust enrichment."¹²¹ Thus, the overall thrust of the *Hirsch* opinion is the protection of the plaintiff's economic interests rather than the vindication of a morally based objection. Not surprisingly, economic loss is emphasized in many right-of-publicity cases.¹²²

It is important to recognize that the moral and economic objections discussed in this section can be asserted by an assignee of the individual whose publicity rights have been appropriated. Although an assignee's economic interest in safeguarding the individual's persona from unauthorized appropriations is sufficiently clear, it should be kept in mind that uses which negatively affect the persona's reputation can diminish the value of existing and future assignments. Nevertheless, for purposes of assessing the impact of both economic and morally based objections against the First Amendment interests at stake, objections on the part of a living persona can be treated the same as objections on the part of her assignees. As will be discussed below, where the persona is no longer alive, the harms to the persona's assignees can be considered in conjunction with the harms to the persona's relatives.¹²³

2. Harms to Society

As a society, we can suffer two general types of harms from the toleration of unauthorized uses of an individual's persona. One type of harm focuses on the increased potential for consumer deception, and the other focuses on the increased potential for diminished incentives. Each of these harms will be explored below.

bolster his analysis in an anti-abortion book), *cert. denied*, 481 U.S. 1059 (1987).

120. 280 N.W.2d 129 (Wis. 1979).

121. *Id.* at 140.

122. *See, e.g., Allen v. National Video, Inc.*, 610 F. Supp. 612, 621 (S.D.N.Y. 1985) (noting that the plaintiff was primarily seeking to vindicate his economic interests).

123. *See infra* part II.B.3.

a. Potential for Consumer Deception

Several courts have recognized that one objective of the right of publicity is to "further the public's interest in being free from deception with regard to the sponsorship, approval or certification of goods and services."¹²⁴ Unauthorized uses of a purely commercial nature pose the greatest degree of potential harm in this respect. Although the First Amendment affords protection to commercial speech for the purpose of promoting the dissemination of accurate information,¹²⁵ this goal is undermined when an unauthorized appropriation of an individual's persona for strictly commercial purposes gives rise to consumer deception regarding a particular product.¹²⁶ In fact, false or misleading commercial speech receives no First Amendment protection whatsoever.¹²⁷ Thus, when advertisers appropriate an individual's

124. *State ex rel. Elvis Presley Int'l Memorial Found. v. Crowell*, 733 S.W.2d 89, 99 (Tenn. Ct. App. 1987). See also *BCL Finance, Ltd. v. Waddolf*, No. 92 Civ.1645, 1992 WL 200033, at *1 (D.D.C. July 28, 1992) (noting that the violation of a musical groups' right of publicity was likely to cause consumer confusion as to sponsorship). In contrast, one commentator has argued that to the extent that the right of publicity does prevent consumer deception in the marketplace, such relief parallels that of federal or state unfair competition law and thus is unnecessary. Madow, *supra* note 38, at 228-36. Even though there may be some overlap in objectives between the right of publicity and the Lanham Act or other state law analogues, the right of publicity also protects against other types of harms which are irrelevant to the framework of trademark law and unfair competition.

125. See *supra* notes 80-81 and accompanying text.

126. But see Madow, *supra* note 38. Madow posits that whether or not the right of publicity makes purchasing decisions more rational depends upon whether the "celebrity endorsers actually do the 'homework' consumers impute to them." *Id.* at 231. He also questions whether many celebrities actually attempt to assure themselves of the quality of the products they endorse in light of the "huge fees dangled before their eyes and the slim chance that they will be held liable in tort if something goes amiss." *Id.* (footnotes omitted). One would hope, however, that most celebrity endorsers have more integrity than Madow suggests. Moreover, in the footnote accompanying these observations, Madow cites a recent bankruptcy court decision, *In re Diamond Mortgage Corp.*, 118 B.R. 588 (Bankr. N.D. Ill. 1989), which held that celebrity endorsers must obtain reliable and independent information regarding the products or services they endorse, and admits that this decision "may well induce more caution." Madow, *supra* note 38, at 231 n.485.

127. *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980); *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 949 (3d Cir. 1993).

In *Central Hudson*, the Supreme Court developed the following four-part test for determining the regulation of commercial speech under the First Amendment:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566. By the Court's admission, however, misleading commercial speech is not protected and thus, to the extent that a defendant's unauthorized use of a plaintiff's persona can be viewed as misleading, the *Central Hudson* test would be inapplicable. See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (noting that "there is no constitutional value in false statements of fact"). But see *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1520 (9th Cir.) (Kozinski, J., dissenting) (criticizing the panel majority opinion for failing to apply the *Central Hudson* test), *denying reh'g en banc* to 971 F.2d 1395 (9th Cir. 1992), *as amended by*, 1992 U.S. App. LEXIS 19253 (9th Cir. Aug. 19, 1992), *cert. denied*, 113 S. Ct. 2443 (1993). For a discussion of *White*, see *infra* notes 129-34, 307-12 and accompanying text.

right of publicity in an explicitly false endorsement, consumers are misled and society as a whole suffers.

Several cases have involved the application of section 43(a) of the Lanham Act¹²⁸ to commercial advertisements invoking an individual's persona absent an explicit false endorsement. Recently, the Ninth Circuit contemplated the possibility of consumer deception in a right-of-publicity and Lanham Act case in which the defendant appropriated the plaintiff's persona by suggesting her image in a commercial advertisement, rather than by using her name, likeness, or even hiring a look-alike. In *White v. Samsung Electronics America, Inc.*,¹²⁹ the appellate court reversed the district court's grant of summary judgment to the defendant in an action brought by Vanna White against an electronics company for using, in an advertisement for videocassette recorders ("VCR's"), a robot which was dressed in a wig, gown, and jewelry suggestive of White and posed next to a Wheel of Fortune game board. The caption underneath the ad read: "Longest-running game show. 2012 A.D."¹³⁰ The ad was part of a series of humorous advertisements with a twenty-first-century theme which were intended to convey the message that the company's products would still be in use at that time. Unlike the other celebrities who were also depicted in the defendant's advertisements, White did not consent to the use and was not paid.

The *White* court held that Vanna White had alleged facts showing that the defendant had appropriated her identity for commercial purposes and thus the district court had erred in granting the defendant summary judgment on this ground.¹³¹ The decision leaves open the door for finding consumer deception based on a wide variety of unauthorized uses of an individual's persona,¹³² even if a typical false endorsement situation is not present.¹³³ *White* also illustrates that a strong possibility for consumer deception exists in situations

128. 15 U.S.C. § 1125(a) (Supp. V 1993).

129. 971 F.2d 1395 (9th Cir. 1992), *amended*, 1992 U.S. App. LEXIS 19253 (9th Cir. Aug. 19, 1992), *reh'g en banc denied*, 989 F.2d 1512 (9th Cir.), *cert. denied*, 113 S. Ct. 2443 (1993).

130. *Id.* at 1396.

131. The court concluded that White raised a genuine issue of material fact with regard to a likelihood of confusion regarding her endorsement, and noted that "[l]ooking at the series of advertisements as a whole, a jury could reasonably conclude that beneath the surface humor of the series lay an intent to persuade consumers that celebrity Vanna White . . . was endorsing Samsung products." *Id.* at 1401. The court did, however, qualify its holding by adding that whether White should actually succeed in her Lanham Act claim is "a matter for the jury." *Id.* The dissenting opinion vigorously disputed the majority's conclusion, stating that "no reasonable consumer could confuse the robot with Vanna White or believe that, because the robot appeared in the advertisement, Vanna White endorsed Samsung's product." *Id.* at 1408 (Alarcon, J., concurring in part and dissenting in part).

132. The court did say, however, that its conclusion was rendered "in light of the peculiar facts of this case." *Id.* at 1401. Specifically, "the robot ad identifies White and was part of a series of ads in which other celebrities participated and were paid for their endorsement of Samsung's products." *Id.*

133. The dissent in the *White* panel opinion and the dissent in the opinion denying the petition for rehearing explored in depth the First Amendment implications of the majority's opinion. *See infra* notes 307-12 and accompanying text. *Cf.* *Apple Corps Ltd. v. A.D.P.R., Inc.*, 843 F. Supp. 342 (M.D. Tenn. 1993) (in a case involving the use of the Beatles' names and likenesses in a stage-show performance and accompanying advertisements, the court declined the plaintiff's summary judgment motion on the § 43(a) count since a genuine dispute existed regarding the likelihood of public confusion); *see also infra* notes 247-56 and accompanying text.

involving the unauthorized appropriation of various facets of an individual's persona when that appropriation is done in a commercial context.¹³⁴

The case law also illustrates that this same potential for consumer deception exists in situations involving less of a pure commercial component. For example, in *Estate of Presley v. Russen*,¹³⁵ the defendant produced "THE BIG EL SHOW," which featured a performer impersonating the late Elvis Presley by dressing, singing, and performing generally in Presley's unique style.¹³⁶ One of the claims alleged by Presley's estate was common law trademark and service mark infringement. The court concluded that the case involved a "likelihood of confusion or deception as to source."¹³⁷

134. Another interesting case is *Allen v. National Video, Inc.*, where the defendant hired a Woody Allen look-alike to pose in an advertisement for its national video rental chain. The advertisement featured the look-alike in a context which was suggestive of Allen's persona. 610 F. Supp. 612 (S.D.N.Y. 1985). Not only were the physical features and pose of the look-alike characteristic of Allen, but the advertisement also made use of videotape cassettes of movies that were either made by or associated with Allen. *Id.* at 618. A disclaimer with small print appeared in some of the advertisements indicating that the advertisement contained a celebrity look-alike. *Id.*

Allen's action was based on violation of §§ 50 and 51 of the New York Civil Rights Act and § 43(a) of the Lanham Act. The court refused to grant Allen's motion for summary judgment on the state statutory claim since the New York privacy statute requires the use of a person's "name, portrait or picture." N.Y. CIV. RIGHTS LAW §§ 50-51. Allen obtained a summary judgment on his § 43(a) claim in light of the court's conclusion that the defendant's action had "recklessly skirt[ed] the edges of misrepresentation" and created "a likelihood of consumer confusion over plaintiff's endorsement or involvement." *Allen*, 610 F. Supp. at 628-30. *Allen* thus also demonstrates the potential harm to society, in the form of consumer deception, that can be triggered even by unauthorized appropriations that do not involve an express false endorsement. In *Allen*, it was the implication of sponsorship that the court found especially persuasive. The court observed that "even if the public does not believe that plaintiff actually appeared in the photograph, it may be led to believe by the intentional reference to plaintiff that he is somehow involved in or approves of their product." *Id.* at 628-29.

135. 513 F. Supp. 1339 (D.N.J. 1981).

136. *Id.* at 1348. See also *infra* notes 257-61 and accompanying text.

137. *Russen*, 513 F. Supp. at 1366. The court concluded that "the ordinary purchaser generally familiar with plaintiff's marks is likely to believe that defendant's show is somehow related to, associated with, or sponsored by the same people or entity that provides the actual Elvis Presley entertainment services identified by its own marks." *Id.* at 1371. The court also noted that it is not necessary that the "public be led to believe that defendant's show is composed of actual Elvis Presley performances or is produced by the plaintiff." *Id.*

In *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), the Second Circuit evaluated the potential for consumer deception in artistic works. *Rogers* involved the use of the film title *Ginger and Fred* in a movie by Fellini about two fictional Italian performers who imitated the well-known American dancers Fred Astaire and Ginger Rogers and became known in Italy as "Ginger and Fred." *Id.* at 996-97. The defendants described their film "as the bittersweet story of these two fictional dancers and as a satire of contemporary television variety shows." *Id.* at 997. The Second Circuit affirmed the district court's grant of summary judgment to the defendants on both the plaintiffs' Lanham Act and state law right-of-publicity claims. *Id.* at 1001-02.

The *Rogers* court recognized that both titles, as well as "the artistic works they identify, are of a hybrid nature, combining artistic expression and commercial promotion." *Id.* at 998. The court articulated a standard governing these types of cases which requires that the Lanham Act should "apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression." *Id.* at 999. The court opined that when an allegedly misleading title uses a celebrity's name, the Lanham Act typically will not apply unless the title is not artistically relevant to the underlying work, or, if it is so relevant, the title is explicitly misleading as to the work's source or content. *Id.* Applying this standard, the court held that "the interests in artistic expression" preclude application of the Lanham Act with respect to *Rogers'* claim that the title of the defendants' film implies an endorsement or involvement by the plaintiff, and misleads people into believing that the film is about her and Astaire. *Id.* at 1001. Still, the decision does not eliminate completely the possibility that

Another case involving an entertainment use with the potential for consumer deception is *Marcinkus v. NAL Publishing Inc.*,¹³⁸ where the defendants published and distributed a work of fiction that used the plaintiff's name to provide "a sense of historical accuracy."¹³⁹ The plaintiff was an archbishop in the Roman Catholic Church who had been accused by authorities in Milan of contributing to the 1982 collapse of Banco Ambrosiano.¹⁴⁰ According to the facts of the case, the theme of the fictional work in question revolved around a plan hatched by three Vatican officials, including the plaintiff, to assassinate Yuri Andropov, the former Soviet Premier, to prevent attempted assassinations of the Pope.¹⁴¹ The plaintiff's character is especially prominent since it is his character who initially came up with the plan. In a prefatory note, the publisher clarified that the book is fiction and that any resemblance of the characters contained in it to actual persons is "entirely coincidental."¹⁴² Even more specifically, the preface states: "Some real people such as . . . Paul Marcinkus . . . appear as characters in the book to give a sense of historical accuracy. However, their actions and motivations are entirely fictitious and should not be considered real or factual."¹⁴³ In addition to the content of the book, the plaintiff objected to the use of his name in newspaper advertisements for the book and in the book's dust jacket.¹⁴⁴

The plaintiff sought injunctive and other relief under the New York privacy statute.¹⁴⁵ The court's disposition is revealing. Initially, the court refused to dismiss the plaintiff's complaint for two reasons. First, it did not think that as a matter of law, readers of the book would necessarily think the book was complete fiction and that there was "no connection between the Archbishop in the book and plaintiff."¹⁴⁶ In support of this view, the court pointed to the inside flap of the cover which stated that the book is "set on the cutting edge between documented fact and masterfully crafted fiction."¹⁴⁷ Second, the court sustained the complaint because the defendants used the plaintiff's

consumer deception can arise even with respect to unauthorized appropriations in an entertainment context.

138. 522 N.Y.S.2d 1009 (N.Y. App. Div. 1987).

139. *Id.* at 1009.

140. *Id.* at 1009-10.

141. *Id.* at 1010.

142. *Id.*

143. *Id.*

144. According to the court, "both an advertisement in the New York Times and the inside dust jacket contain, in prominent places, the following language: 'Archbishop Paul Marcinkus leaned forward, lowered his voice, and said . . . [.]'" *Id.*

145. N.Y. CIV. RIGHTS LAW §§ 50-51. The defendants argued that their use of the plaintiff's name is not a use for advertising or trade within the meaning of the statute, and that resorting to the statute to enjoin a "clearly labeled work of fiction . . . would have a devastating effect on the publishing world." *Marcinkus*, 522 N.Y.S.2d at 1010. Further, the defendants argued that even if the state privacy statute did apply, its activities should be exempt under the First Amendment since "the novel disseminates information and fosters public discussion about Vatican activities." *Id.*; see *infra* note 235 (discussing newsworthy exemption under New York law).

146. *Marcinkus*, 522 N.Y.S.2d at 1013.

147. *Id.*

name on the inside flap of the cover and in other advertising for the book.¹⁴⁸ Thus, the court's concern with the misrepresentation potential in this case is readily apparent.¹⁴⁹ Nevertheless, the court still declined to issue a preliminary injunction to recall all copies of the novel, in part because it obviously was disturbed by the First Amendment implications of so doing.¹⁵⁰

b. Potential for Decreased Incentives

Allowing the unauthorized use of an individual's persona can also harm society by diminishing the incentives for creation. This discussion entails two separate inquiries. First, is there a risk that right-of-publicity plaintiffs will be less inclined to maximize their creative potential for the betterment of society if they know that unauthorized uses of their personas will be tolerated under either a liability rule or a "no protection" approach? Second, to what extent will society experience decreased incentives stemming from users under a liability approach? This second inquiry considers both the potential for harm to prospective users as well as the potential negative impact on society as a whole if users decide not to pay and to refrain from any utilization or creation.

The Supreme Court has explicitly endorsed the right of publicity as an "economic incentive" for individuals to invest whatever time is necessary to produce performances with public appeal.¹⁵¹ Still, it is very difficult to evaluate the potential for diminished incentives stemming from the reduced desire of right-of-publicity plaintiffs to maximize their creative potential as a result of widespread tolerance of unauthorized appropriations. For some celebrities, the psychological and financial rewards of stardom undoubtedly would compensate for the ability of others to freely appropriate their personas. For other celebrities, however, the potential for widespread unauthorized appropriation may be sufficient to dissuade them from pursuing a career in the limelight. Recall, for example, singer Tom Waits' firm policy against appearing in commercials.¹⁵² Perhaps the more committed a particular

148. *Id.* In so holding, the court observed:

Here, however, it cannot be said as a matter of law that the use of plaintiff's name in the book, on the cover and in the advertising does not violate the statute and therefore does not state a cause of action. Even if the underlying use was found not to violate the statute, the placing of plaintiff's name in a prominent place and the quoting of statements from the book uttered by the character with plaintiff's name and office raises the question as to whether or not defendants commercially appropriated his name. This is especially so in the print advertising where it cannot be immediately discerned that the quotation was not actually uttered by the plaintiff.

Id. at 1014.

149. *Cf. Hicks v. Casablanca Records*, 464 F. Supp. 426, 433 (S.D.N.Y. 1978) (in an action by the heirs and assignees of Agatha Christie to enjoin movie producers and a publisher from distributing a movie and a book fictionalizing an incident in Christie's life, the court emphasized that it was obvious to the public that the events depicted in the novel and movie were fictitious). See *infra* notes 166-69, 276-79, and accompanying text for a discussion of this case.

150. *Marcinkus*, 522 N.Y.S.2d at 1014-15. See *infra* notes 282-84 and accompanying text.

151. *Zacehim v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977).

152. See *supra* text accompanying notes 114-17.

celebrity is to a certain moral philosophy, the more likely that individual would be to refrain from maximizing creativity and striving for stardom if unauthorized appropriations were routinely allowed.

A discussion of diminished incentives must also consider the potential for diminished incentives on the part of the user. As a society, we clearly benefit from the creation process of those who use others' personas just as much as we do from the creation process of those whose rights are appropriated. One argument advanced in this Article is that in certain situations, users should have the right to appropriate another's persona, but only if they pay for this right. Although a discussion of how this determination should be made is considered more fully in Part II.C, at this point it is worth exploring whether a liability rule approach can negatively impact upon users' interests to the point where society as a whole will be adversely affected.

Although it can be argued that this inquiry regarding diminished incentives, like the one involving publicity plaintiffs, must of necessity be extremely ad hoc and dependent upon the whims of a particular user, a few general observations can still be made. Whether a particular user will want to utilize a publicity plaintiff's persona for a price is not dependent upon the nature of the product or creation that is involved, but rather upon whether the end product for which the persona is used is likely to reap an economic benefit for the user that will exceed the cost of using the persona. Creators of works that are likely to result in an economic benefit which can be used to offset any mandatory payments are probably more likely to engage in the utilization or creation process upon payment of a fee to the plaintiff rather than forego the opportunity to create.¹⁵³ This is likely to be especially true where the economic benefit of the work will be derived, in whole or in large part, from the persona of the publicity plaintiff. Where such is the case, the potential for unjust enrichment also is extremely high. Assuming this is how creators of economically profitable works will operate, at least two conclusions can be drawn. First, society is unlikely to suffer significantly from diminished incentives on the part of users of potentially profitable creations even if these users are forced to pay for a desired use. Second, it may be appropriate for the law to recognize this assumption regarding users' behavior in fashioning the appropriate relief in such situations.¹⁵⁴

In contrast, where the benefits of use are internalized, a creator is more likely to be creating for the sheer pleasure that the creation process offers, without immediate or primary concern for monetary compensation. One such example is a painter who paints for pure enjoyment, without any expectation of profit. Although a few such creators may be likely to create even if forced to pay for certain uses of a plaintiff's persona, most others arguably will not be able to afford this luxury, absent the potential for a commercial benefit from their works that will offset the required payment. In these situations,

153. Cf. Gordon, *supra* note 57, at 1575 (suggesting that a liability rule approach will be viable only with respect to commercial users who can obtain a monetary benefit from their use).

154. See also *infra* text accompanying note 271.

then, there is much more of a risk of diminished incentives, with concomitant negative consequences for society. Again, in fashioning relief, courts should consider that as a society we should especially encourage artistic expression that is not economically motivated.

The most difficult situations to resolve, however, occur when a user creates for both pleasure and profit, but the profit potential is uncertain, or perhaps secondary to the creation process itself. The determination as to whether a particular user in this situation would prefer to pay and to preserve the creation option, or to simply abandon his efforts, is speculative. Thus, evaluating the harm to society as a result of these diminished incentives is also difficult. This speculation further complicates the selection of an appropriate remedy. Still, explicitly recognizing this as a gray area in the societal harms calculus can at least help clarify the issues and focus the analysis.

3. Harms to Relatives and Assignees of Deceased Individuals

Preventing the unauthorized appropriation of an individual's persona also safeguards the interests of relatives and assignees of deceased individuals.¹⁵⁵ The right of publicity's development as an offshoot of the right of privacy¹⁵⁶ initially clouded the judiciary's determinations with respect to whether the right of publicity should be descendible. Given the personal nature of the right of privacy, many courts have held that a decedent's relatives could not recover for invasion of their privacy rights resulting from the defendant's appropriation of the decedent's persona, unless the defendant simultaneously invaded the relative's own privacy.¹⁵⁷ In contrast, other courts have allowed recovery by the relatives of a decedent in invasion-of-privacy actions where the defendant appropriated the decedent's persona for commercial purposes.¹⁵⁸ Nevertheless, in theory, right-of-publicity actions by relatives of a decedent should not suffer from this confusion because the right of publicity, unlike the right of privacy, is capable of being assigned or licensed during the persona's lifetime and made the subject of an express or implied contract.¹⁵⁹

155. For a brief discussion of the interests of assignees of living personas, see *supra* text accompanying note 123.

156. See Kwall, *supra* note 32, at 192.

157. *Id.* at 208-09 (discussing invasion-of-privacy suits brought by relatives of the deceased).

158. See *Bazemore v. Savannah Hospital*, 155 S.E. 194, 196 (Ga. 1930) (noting that the suit was based on injury to surviving relatives and not on injury to the decedent). According to *Loft v. Fuller*, "The rationale behind . . . [such] decisions is that the relatives of the deceased have their own privacy interest in protecting their rights in the character and memory of the deceased as well as the right to recover for their own humiliation and wounded feelings caused by the publication." 408 So. 2d 619, 624 (Fla. Dist. Ct. App. 1981). Further, some states have enacted statutes which allow relief to the personal representatives and relatives of a decedent whose name or likeness is appropriated for commercial purposes. See *supra* note 33 and accompanying text.

159. See Kwall, *supra* note 32, at 210. "In fact, the act of assigning or licensing one's publicity rights is the embodiment of the important distinction between the personal right of privacy and the severable right of publicity." *Id.* The right of publicity's characterization as a property right that is capable of assignment or licensing facilitates the argument that recovery for publicity violations by the relatives and assignees of the deceased should include compensation for emotional harms triggered by

Many jurisdictions now recognize a descendible right of publicity.¹⁶⁰ One case which explicitly held that the right of publicity is descendible and enforceable by the celebrity's estate and those holding licenses from the estate is *State ex rel. Elvis Presley International Memorial Foundation v. Crowell*.¹⁶¹ In *Crowell*, the court articulated several justifications for a descendible right of publicity. Specifically, the court observed that recognizing a descendible right of publicity (1) promotes an individual's right of testamentary distribution, (2) prevents unjust enrichment, (3) promotes a celebrity's expectation that she is creating something of value to pass on to her heirs and assigns after her death, (4) promotes the expectations of any licensees with whom the celebrity might have contracted, and (5) furthers the public interest in truthful representations regarding sponsorship of goods.¹⁶²

The justifications for a descendible right of publicity recognized in *Crowell* underscore the relevant harms to relatives and assignees of an individual when unauthorized appropriations are countenanced. The financial interest of a decedent's relatives in her publicity rights "deserves no less recognition and protection" than their financial interest in the decedent's "other tangible assets."¹⁶³ To the extent an individual's persona possesses commercial value, that individual's heirs and legatees are entitled to benefit economically from any commercial use, given their personal relationship to the decedent.¹⁶⁴ The court in *Crowell* also explicitly recognized the interest of assignees who have contracted with a celebrity to use that individual's persona.¹⁶⁵

In addition to the potential economic harm that relatives of a decedent can suffer by virtue of unauthorized appropriations of the decedent's persona, there is also the potential for emotional damage resulting from a use which

the defendant's unauthorized appropriation. Although allowing compensation for emotional harms suffered by relatives is contrary to the practice of limiting claims to the life of the victim in privacy law, this limitation need not constrain recoveries for violations of the property-based right of publicity.

160. See *supra* notes 32-33 and accompanying text.

161. 733 S.W.2d 89 (Tenn. Ct. App. 1987). In *Crowell*, the plaintiff not-for-profit corporation filed an unfair competition action to dissolve another not-for-profit corporation and to prevent it from using Elvis Presley's name. *Id.* at 91. Presley's estate intervened on behalf of the defendant corporation, asserting that it had given the defendant corporation permission to use Presley's name. *Id.* The defendants moved for summary judgment and counterclaimed for statutory and common law violations of Presley's right of publicity.

The trial court granted the defendant's motion for summary judgment dismissing the complaint, ruling that the right of publicity is descendible and that Presley's estate has the right to control the commercial exploitation of Presley's name and likeness. *Id.* The appellate court agreed that the right of publicity is descendible under Tennessee law, but vacated the summary judgment and remanded the case because of genuine issues of material fact regarding the merits of plaintiff's laches defense to defendant's counterclaim. *Id.* at 101-02.

162. *Id.* at 97-99.

163. *Id.* at 98.

164. See Kwall, *supra* note 32, at 213. "In essence, this rationale for a descendible right of publicity is an extension of the unjust enrichment rationale justifying the existence of the right of publicity. Both of these rationales are predicated on the theory that if someone appropriates something of value, she must pay the rightful owner the value of that which is appropriated." *Id.* (footnote omitted).

165. *Crowell*, 733 S.W.2d at 98. Of course, these assignees can be adversely affected by unauthorized appropriations regardless of whether the celebrity in question is dead or alive, because such uses always weaken the value of prior legitimate endorsements. See *supra* note 122 and accompanying text.

the relatives find objectionable, or which they believe the decedent would have found unacceptable. One case which presents this situation is *Hicks v. Casablanca Records*,¹⁶⁶ in which the heirs and assignees of Agatha Christie sought to enjoin movie producers and a publisher from distributing a movie and book fictionalizing an actual eleven-day disappearance in the mystery writer's life. The works in question portrayed Christie "as an emotionally unstable woman, who, during her eleven-day disappearance, engages in a sinister plot to murder her husband's mistress, in an attempt to regain the alienated affections of her husband."¹⁶⁷ Although the court in *Hicks* refused to enjoin the defendants' works on First Amendment grounds,¹⁶⁸ the facts of the case clearly illustrate that relatives of a decedent can be harmed in non-economic ways by unauthorized uses of a decedent's persona.¹⁶⁹

Moreover, sometimes the relatives of a decedent will want to protect the reputational interests of the persona. The assignees of a decedent may also have an interest in protecting the decedent's reputation since such damage might negatively impact upon the value of their assignment. After the death of Leonard Bernstein, his children began to license an array of merchandise such as coffee mugs, umbrellas, stationery, address books, T-shirts, and other items.¹⁷⁰ In addition to generating money for one of Bernstein's pet projects, the merchandising efforts were intended to protect the commercial use of his persona and to provide a "preemptive strike" against competing items that would cheapen his image.¹⁷¹ The need to protect such interests on the part of Bernstein's relatives is especially compelling since now is the time when the historical value of Bernstein's musical contribution will be determined. If his persona is allowed to be cheapened and overexposed, it may be many generations before his work will be reexamined within the classical tradition.

In the context of evaluating the harms to relatives and assignees of a decedent, some consideration also must be given to the appropriate duration of a descendible right of publicity. In some states where the right of publicity is descendible, its duration is statutorily specified.¹⁷² Nevertheless, even in these instances, it is relevant to ask whether, in a conflict between the First Amendment and the right of publicity, the interests of more distant relatives should be considered on a different par from the interests of the individual whose publicity rights have been appropriated as well as the interests of closer relatives. Although an individual's children, grandchildren, and even great-grandchildren arguably have a right to benefit financially from her efforts and possessions, this right is less compelling when it is asserted by more remote

166. 464 F. Supp. 426 (S.D.N.Y. 1978).

167. *Id.* at 429.

168. See *infra* notes 276-79 and accompanying text.

169. These nonmonetizable harms also can be more objectionable to the relatives of a decedent than economic harms. See *supra* part II.B.1.

170. Phoebe Hoban, *The Bernstein Bonanza*, NEW YORK MAG., Aug. 30, 1993, at 126, 129-30.

171. One of Bernstein's children explains that soon after Bernstein died, "there was an ad in the back of a magazine for a bust of Leonard Bernstein you could send away for. It was made of some awful cheap, shiny ceramic stuff, and it made him look like Mickey Mouse." *Id.* at 130.

172. See *supra* note 33.

descendants. The Leonard Bernstein situation discussed above amply illustrates that the relatives and assignees of a decedent should be entitled to some space after that person's death to establish the worth of her contribution, free from insensitive exploitation. Still, after society has had enough opportunities to view the persona on display in what the relatives and assignees consider to be the most appropriate setting, the guardians of the persona should be required to relinquish their claim and allow people to make whatever they wish of the icon.

Thus, after a certain point, the descendants of the person originally protected should have no greater claim to the publicity rights of the principal than should a totally unrelated party.¹⁷³ This Author believes that the longer the period of time the principal has been dead, the less likely the right of publicity should prevail over the First Amendment, even if the right of publicity is still otherwise protected by statute in a particular jurisdiction. In other words, because the First Amendment's interest in free speech remains constant, a presumption in favor of the First Amendment should arise after a certain point in time and should prevail over the rationales justifying a descendible right of publicity once they are sufficiently diminished.¹⁷⁴ Until such time as this presumption arises, however, in a conflict between the right of publicity and First Amendment, the interests of the relatives and assignees of a deceased persona should be evaluated in much the same way as the interests of the persona while alive.

The question remains, of course, as to when this presumption favoring the First Amendment should arise. This Author believes that this determination should be a matter for judicial discretion, but would adopt a caveat that for a minimum fixed period of time following an individual's death, an individual's descendible right of publicity should be protected from unauthorized exploitation in the same way as if the subject were still alive. This Article suggests a minimum period of twenty years following the persona's death as a reasonable amount of time for affording the relatives and assignees of a decedent an exclusive period of protection, given that the value of an individual's publicity rights will typically decline with the number of years following the individual's death.¹⁷⁵ This period would also allow the value of the individual's societal contribution to be established free from exploitative treatments. After the expiration of twenty years, courts should have the

173. See Kwall, *supra* note 32, at 251. In discussing the interests at stake with respect to imitative stage performances where the subject of the performance is deceased, Professor McCarthy suggests balancing

(1) the estate's economic interest in the exclusive right to stage imitative performances; (2) the unauthorized imitator's right to pursue a livelihood; [and] (3) the public's right to enjoy imitative performances. . . . [I] would view the estate's economic interest as of less weight than the other two factors simply because even unauthorized imitations will inspire greater public interest in seeing or hearing recordings of the deceased's original performances and in buying celebrity memorabilia.

MCCARTHY, *supra* note 71, §8.16[B][6], at 8-110.

174. See Kwall, *supra* note 32, at 251.

175. See *id.* at 252-53.

discretion to tilt the scales in favor of the First Amendment, even if the right of publicity is still otherwise protected by statute or common law.

4. Unjust Enrichment

The Supreme Court has recognized the prevention of unjust enrichment as "[t]he rationale for [protecting the right of publicity]."¹⁷⁶ The relevance of unjust enrichment deriving from a user's unauthorized appropriation of an individual's persona has been noted in the foregoing discussion of harms, but because its relevance is so pervasive to this analysis, a separate capsulization of this concept is warranted.

It is perhaps easiest to see the harm that the presence of unjust enrichment engenders for the publicity plaintiff, and her relatives and assignees, since they are being denied the value of the defendant's gain by virtue of the unauthorized appropriation. Somewhat less obvious is the harm suffered by society, and even the user, in situations with a high potential for unjust enrichment. As a society, we value and respect individual property rights. As discussed earlier, when unauthorized, uncompensated uses are sanctioned, there is a risk that publicity plaintiffs will refrain from engaging in creative endeavors. Although this inquiry is admittedly speculative, its relevance cannot be ignored.¹⁷⁷ Moreover, society may suffer the potential for diminished creativity on the part of users if the legal system sanctions resort to the unauthorized appropriation of desired commodities in lieu of reliance on original creativity.¹⁷⁸ If we further assume that users benefit psychologically and financially from the creation of their best possible work product, it is arguable that the users themselves are being disserved by a system that fails to promote the achievement of the highest possible level of creativity.

The fact that our legal system does respect property rights is the predicate for our abhorrence of unjust enrichment. Still, some would argue that it is imprudent to classify the potential for unjust enrichment as a harm. This view recognizes that the constriction of private property rights can benefit society by stimulating creativity among users in ways that otherwise would not be possible absent liberal use privileges. Under this view, users are disserved by a system which is hostile to use privileges because they are prevented from drawing on elements necessary to realize their creative potential.¹⁷⁹ Thus, situations can and do exist in which the rights of property owners must be considered secondary to a greater societal good. For these reasons, the impact of all of the harms discussed in Part II.B of this Article must be evaluated in

176. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977) (second alteration in original) (quoting Harry Kalven Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 *LAW & CONTEMP. PROBS.* 326, 331 (1966)).

177. See *supra* notes 151-52 and accompanying text.

178. See Kalven, *supra* note 176, at 331 ("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.").

179. See Gordon, *On Owning Information*, *supra* note 11, for a detailed exploration of these themes.

conjunction with an examination of the benefits that society receives in different contexts from allowing unauthorized appropriations of an individual's persona. This theme will be explored in Part II.C, which develops a framework in which such determinations can be made with respect to the right-of-publicity and First Amendment conflict.

*C. Measuring the Benefits Against the Harms
in Search of a Remedy*

The preceding discussion of harms suggests several important points that are relevant at the outset to this discussion of remedies. First, the nature of the harm asserted by the plaintiff can animate the choice of a remedial approach. When a plaintiff's objection to the defendant's use is economic in nature and the defendant's use is purely commercial, a property rule approach will be the most appropriate resolution. In contrast, economic objections to uses of a less pure commercial nature are subject to the balancing analysis developed herein and can result in property rule, liability rule, or "no protection" resolutions. These points will be developed more fully below. Moreover, since it is more problematic under the First Amendment to enjoin uses that are not purely commercial, the existence of a moral objection to the defendant's use is a critical factor in determining the propriety of injunctive relief under a property rule approach.¹⁸⁰ In assessing a morally based harm, the nature of the plaintiff's moral objection should be carefully considered. It should be emphasized, however, that although plaintiffs with morally based objections are especially interested in injunctive relief, sometimes the award of injunctive relief is not a viable option. For example, Tom Waits did not seek injunctive relief since the commercial had already run and Frito-Lay stopped airing it at about the time the complaint was filed.¹⁸¹ Waits did, however, receive a hefty damage award even though the theory of his case was not based on economic deprivation but rather on the defendants' use of his persona in a manner that Waits found distasteful. Nevertheless, a reading of the opinion strongly suggests that Waits would have preferred no use of his

180. An economic argument with normative implications has been advanced that the award of an injunction under a property rule approach must consider the "wealth" effects in instances where an owner refuses to consent to a use on the ground that such use will damage her reputation. These "wealth" effects represent "the impact on one's . . . change brought about by being given, or being denied, an entitlement." Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1043 n.124 (1990). Specifically, if the plaintiff has the legal entitlement, she will not sell the right to use her persona in a damaging way at any price. On the other hand, if the plaintiff has no legal entitlement to prevent the use at issue, her ability to do so is limited by her financial resources which may be insufficient to allow her to purchase the right to prevent the use. Under these circumstances, the outcome of a transaction between the buyer and seller does not necessarily reflect any "independent information about 'value'" for purposes of determining whether an injunction will maximize the economic value of the property. *Id.* at 1042-43. Thus, a court faced with this situation cannot rely on economics as the basis for its remedial choice, but must instead invoke other norms in determining the appropriate outcome. The proposal put forth in this Article facilitates such an analysis.

181. Telephone Interview with Tom Waits' legal counsel (Aug. 11, 1993); see *supra* notes 114-17 and accompanying text.

persona by the defendants as opposed to receiving a profit from the defendants' use.

Second, the potential for consumer deception is clearly a factor which a court must consider in fashioning an appropriate remedy. A general argument can be made that the greater the potential for consumer deception attributable to a defendant's unauthorized use, the stronger the case for a property rule approach. The likelihood of consumer deception increases in those instances where a plaintiff would not have endorsed a particular product, or approved of any connection with a particular product, for any price. As discussed earlier, even less traditionally commercial uses can present the potential for consumer deception.¹⁸²

Where a plaintiff makes a very strong showing with respect to both the moral objection *and* the potential for consumer deception, a court should have the discretion to consider awarding injunctive relief, notwithstanding the First Amendment interests on the other side. The case for injunctive relief in such instances is further strengthened if a strong risk exists that a failure to enjoin the defendant's use will deter the plaintiff from continued creation, if the persona is still alive or has been dead for less than twenty years, and if the case involves a high potential for unjust enrichment. Admittedly, this argument is raised somewhat tentatively, especially regarding cases lacking a pure commercial use, since the constitutional command should override all but the most unusual showings in these situations.¹⁸³ Still, the door should be left open to the possibility that a court should retain the discretion to award injunctive relief in exceptional situations, rather than being constricted by the notion that such a remedy is automatically forbidden.

Even if a court decides not to award a plaintiff injunctive relief, the magnitude of harms as defined by all of the above factors should be considered in connection with whether mandatory damages should be awarded under a liability rule approach. In addition, the propriety of mandatory damages should be evaluated in terms of the potential for decreased incentives on the part of the user. In this respect, it has been argued that creators of works with a high potential for profit are more likely to continue the utilization or creation process upon payment of a fee to the plaintiff rather than forgo the opportunity to create. This is especially true where the profit will be derived, in whole or in large part, from the individual whose persona is being appropriated.

182. See *supra* notes 135-50 and accompanying text.

183. Such unusual showings apparently were not met in the *Marcinkus*, *Presley*, and *Rogers* cases discussed previously in part II.B. For example, in *Marcinkus*, the plaintiff archbishop had a strong moral objection to being implicated in an assassination conspiracy, yet the court refused to grant injunctive relief. *Marcinkus*, 522 N.Y.S.2d 1009, 1010 (N.Y. Sup. Ct. 1987). In *Presley*, the court specifically noted the potential for consumer deception concerning sponsorship of goods and services but did not grant the plaintiff a preliminary injunction. *Presley*, 733 S.W.2d 89, 99 (Tenn. Ct. App. 1987). Finally, the court in *Rogers* also discussed the potential consumer deception caused by the film title but still granted the defendant summary judgment. *Rogers*, 875 F.2d 994, 999 (2d Cir. 1989). For a more complete discussion of *Rogers*, see *supra* note 137.

In contrast, the First Amendment is likely to trump completely a plaintiff's right-of-publicity claim in certain situations. Some of the factors relevant to this determination have already been discussed. The prior discussion of harms suggests that the "no protection" approach may be appropriate in situations with little or no risk of consumer deception, a low potential for unjust enrichment, and where the plaintiff has been dead for more than twenty years. The following discussion will highlight additional factors that are applicable to the "no protection" approach. These include the lack of a true property interest on the plaintiff's part that is implicated by the defendant's use, and situations where the defendant's expressive needs or creative contributions are especially strong.

The framework that this Article proposes for resolving conflicts between the right of publicity and the First Amendment relies on a balancing process under which the benefits that society receives from allowing the use of unauthorized appropriations in particular contexts are measured against the harms discussed in the foregoing parts of this Article. Although, as stated earlier, this proposal does not endorse a pure categorization approach to resolving right-of-publicity and First Amendment conflicts, the following discussion will be more focused if it is organized according to particular types of uses. Therefore, this analysis separately explores informational, entertainment, and commercial uses. This discussion will show that informational uses typically fall into the "no protection" category given the lack of a true property interest on the plaintiff's part with respect to the information used. This holds true even if the information is used in a commercial commodity. If, however, the defendant attempts to convey information through a visual depiction of the plaintiff, the plaintiff has a stronger property right which requires an application of the balancing analysis developed herein. The outcome of such an analysis can result in the application of a "no protection" or liability rule approach, or possibly in a property rule approach in exceptional situations.

Entertainment uses are also subject to the balancing analysis and can result in "no protection" or liability rule protection. In exceptional circumstances, property rule protection is also possible. Uses of a commercial nature that contain informational and entertainment elements, or that involve expressive needs or substantial creativity on the part of the user, can fall into any of the three categories, depending on the outcome of the proposed balancing analysis. In contrast, primarily commercial uses are readily subject to a property rule approach without violating First Amendment principles.

1. Informational Uses

Many uses of a primarily informational nature will involve the appropriation of information or statistics about a publicity plaintiff, often in uses that are afforded First Amendment protection. In these instances, the protected nature of the defendant's work is typically the main focus. Of course, the analysis is problem-free when the informational use at issue results in a work in which

the product is the information itself. When the information at issue is being used in a work that is clearly protected by the First Amendment, such as a book or article, the analysis is simple—the First Amendment must prevail over the right of publicity. This principle was explicitly recognized in *Rosemont Enterprises v. Random House, Inc.*,¹⁸⁴ where the court stated that the right of publicity “can have no application to the publication of factual material which is constitutionally protected.”¹⁸⁵

What should happen, however, when informational uses are put into a separate commercial product that lacks the traditional First Amendment protection of literary uses? In *Uhlaender v. Henricksen*,¹⁸⁶ the court held that a baseball table game manufacturer violated baseball players’ rights of publicity by the unauthorized appropriation of their names and playing statistics for use in a board game.¹⁸⁷ The court stated that the players’ identities, as “embodied” in their names and statistics, are “the fruit[s] of [their] labors and [are] a type of property.”¹⁸⁸ Conspicuously absent from the court’s opinion, however, is any consideration for the First Amendment implications of classifying statistical information as property. Moreover, the court failed to appreciate the apparent inconsistency created by its holding. Specifically, if these same statistics had been used in a book about baseball rather than in a board game, it is quite possible that this court would have reached the opposite conclusion.¹⁸⁹ The difficulty of the *Uhlaender* court’s position is apparent. Who is to say that a game does not disseminate information? Furthermore, are not books, magazines, and even newspapers commercial to a considerable degree?¹⁹⁰ Although board games may not

184. 294 N.Y.S.2d 122 (N.Y. Sup. Ct. 1968) (holding that a corporation formed to prevent the publication of certain biographical material about Howard Hughes could not maintain an action against the publisher and author of a biography about Hughes), *aff’d*, 301 N.Y.S.2d 948 (N.Y. App. Div. 1969).

185. *Id.* at 129.

186. 316 F. Supp. 1277 (D. Minn. 1970).

187. *Id.* at 1283.

188. *Id.* at 1282. Further, in response to the defendant’s argument that it should be able to use the data on the players because such data has already appeared in newspapers and magazine articles, the court observed that prior disclosure is irrelevant in a publicity action because such disclosure is precisely what makes the appropriated information valuable. *Id.* at 1282-83.

189. The court relied on language from a prior decision, stating that “although the publication of biographical data of a well-known figure does not per se constitute an invasion of privacy, the use of that same data for the purpose of capitalizing upon the name by using it in connection with a commercial project other than the dissemination of news or articles or biographies does.” *Id.* at 1282 (quoting *Palmer v. Schonhorn Enterprises*, 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967)). *Palmer* was an action by professional golfers against the manufacturer of a game incorporating golfers’ professional profiles.

190. As one court perceptively noted:

Our system relies for freedom of information, ideas, and entertainment, high or low, primarily on privately owned media of communication, operating at private cost and seeking private profit. Books, newspapers, films, and broadcasts are produced and distributed at private cost and for private profit, that is to say, “commercially,” and the use of materials from the lives of living persons in such publications can enrich authors, photographers, and publishers just as their use in advertisements . . .

Anderson v. Fisher Broadcasting Cos., 712 P.2d 803, 812 (Or. 1986) (holding that “[p]ublication of an accident victim’s photograph is not appropriation for commercial use simply because the medium itself is operated for profit”).

manifest the same authorial presence as fine literature, society as a whole is likely to enjoy and be enriched by both types of works.¹⁹¹

The problem here is typified in *Nature's Way Products, Inc. v. Nature-Pharma, Inc.*,¹⁹² where both the plaintiff and the defendant sold herbal formulas developed by a renowned author on herbal medicines. The author had originally sold his retail herb store to the defendant, and subsequently formed a new corporation.¹⁹³ The plaintiff claimed that it had purchased from the author the exclusive rights to use his endorsement and name in connection with selling its herbal products.¹⁹⁴ In the defendant's advertising, the defendant stated that the author was a founder of its business and that its products were based on formulas that he developed. The defendant argued that this advertising did not violate the author's right of publicity that had been assigned to the plaintiff because "the right of publicity does not protect dissemination of historical information."¹⁹⁵ The court, however, disagreed with the defendant's argument that the historical exception should apply to the facts of the case because the defendant was using historical information to market a product completely different from the historical information itself.¹⁹⁶ In this respect, therefore, the court viewed this case as distinguishable from those in which the defendants used historical information in books, articles, and other works entitled to First Amendment protection.

The analysis in *Nature's Way* is unsound. The use of the information which was at issue in that case should not give rise to liability for violating the right of publicity. To the extent the plaintiff was objecting that the defendant had advertised that the author was a founder of its business and that its products were based on formulas that he developed, no liability is warranted. This is simply factual information about the product and its history which the defendant is entitled to use in a truthful manner. The court's emphasis on the separate commercial nature of the defendant's product is erroneous. Indeed, what if the work in which the information was used were a calendar or some other commodity through which information can be conveyed, although not in as traditional a format as a book or article? The real problem with the court's analysis is that it stems from a desire to categorize the type of use and

191. Cf. Ginsburg, *supra* note 57, at 1924-36 (discussing, in a pre-*Feist* article, high authorship and low authorship copyrightable works and calling for copyright protection of both, with low authorship works such as maps, directories, computer databases, and other informational compilations being subject to protection by compulsory licensing). But see Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 462 (1991) (In explicating the hierarchy implicit in the Romantic "authorship" construct, the author notes that "art contains greater value if it results from true imagination rather than mere application, particularly if its creator draws inspiration directly from nature.").

192. 736 F. Supp. 245 (D. Utah 1990).

193. *Id.* at 247. The author placed all of his trademarks, formulas, and trade names in this new company, which appeared as one of the plaintiffs in the case.

194. *Id.*

195. *Id.* at 253.

196. *Id.*

to make a determination of liability follow immediately from this categorization.¹⁹⁷

Right-of-publicity plaintiffs do not have a property interest in information about themselves. The appropriation by a defendant of playing statistics and other facts in the public domain is very different from the appropriation of an individual's name, likeness, or other attributes protected by the right of publicity.¹⁹⁸ Balanced against a publicity plaintiff's virtually nonexistent property interest in such information is society's substantial interest in public dissemination of information. This societal interest is equally compelling regardless of the particular vehicle in which the information is disseminated. Moreover, these situations lack the element of unjust enrichment because the users are not appropriating something to which they have no right.¹⁹⁹ In light of these considerations, right-of-publicity plaintiffs should not be able to obtain injunctive relief under a property rule approach against defendants using information about the plaintiffs. Nor should they be able to compel users to pay for the ability to use this information under a liability rule approach. If a user chooses not to pay and to forgo the opportunity to create, the cost to society in these circumstances would be far too high.

What outcome is appropriate when informational uses involve a moral objection? In general, informational uses are not likely to result in morally based objections, although in certain situations they can. Suppose a celebrity objects to the publication of an unauthorized biography which depicts her in an unflattering light?²⁰⁰ A useful example is furnished by *Loft v. Fuller*,²⁰¹ in which the wife and son of a pilot killed in a well-publicized plane crash brought an action based on a work of nonfiction that referred to the decedent

197. The case of *Sinkler v. Goldsmith* also involved an informational use of an individual's persona. 623 F. Supp. 727 (D. Ariz. 1985). In *Sinkler*, the widow of a spiritual leader sued one of her husband's former students and collaborators for using the name and "preeminence of her husband" in the defendant's classes and lectures about the spiritual movement. *Id.* at 733. The court concluded that the plaintiff should lose on this count of her complaint because the leader's right of publicity was not descendible since he failed to exploit it during his lifetime. *Id.* at 733-34. Although the court reached the correct result with respect to whether the defendant should be able to use the deceased leader's name and preeminence, its reliance on the descendibility issue was both erroneous and unnecessary. See Kwall, *supra* note 32, at 217-26 (advocating a freely descendible right of publicity without an application of the commercial exploitation standard). Under the analysis proposed herein, the defendant would have a right to any truthful information about the deceased spiritual leader in conducting her classes based on his spiritual movement.

198. *Cf. Vinci v. American Can Co.*, 591 N.E.2d 793, 794 (Ohio Ct. App. 1990) (holding that the use of athletes' names and accomplishments on a series of promotional disposable drinking cups did not invade the athletes' privacy by appropriating their names and likenesses, given that the "[r]eference to the athletes' names, likenesses, and identities was merely incidental, historical information").

199. See, e.g., *New Kids on the Block v. News America Publishing, Inc.*, 745 F. Supp. 1540, 1546 (C.D. Cal. 1990) (validating defendant magazines' use of a 900 number service in their publications to conduct a poll pertaining to the plaintiffs, a popular music group, because the defendants' use of the plaintiffs' name "was descriptive and related to the constitutionally protected activity of news gathering and dissemination and not merely commercial exploitation"), *aff'd*, 971 F.2d 302 (9th Cir. 1992).

200. *Cf. New Era Publications International, ApS v. Carol Publishing Group*, 904 F.2d 152 (2d Cir. 1990) (concluding that an unauthorized biographer's use of quotations from copyrighted works by L. Ron Hubbard, the founder of the Church of Scientology, was fair use).

201. 408 So. 2d 619 (Fla. Dist. Ct. App. 1981).

as a "reappearing ghost."²⁰² The court denied their cause of action under the relevant state statute prohibiting the unauthorized publication of someone's name or likeness for commercial or advertising purposes²⁰³ because the language of the statute specifically provides that it "does not apply in the case of any book which is published as part of a bona fide news report or presentation having a current and legitimate public interest."²⁰⁴ As *Loft* demonstrates, the analysis regarding the appropriate result in situations involving morally based objections would not differ from those situations involving only economically based objections. Society's interest in the dissemination of information should outweigh the plaintiff's interest in these circumstances. Of course, this analysis assumes that the defendant is not knowingly fictionalizing the information about the plaintiff and representing this information as truthful.²⁰⁵

2. Visual Depictions Conveying Information

Sometimes, information is conveyed through visual depictions of the publicity plaintiff. One's face and body represent the embodiment of an individual's presentation of herself to the world and thus these cases can be said to involve the quintessential property right.²⁰⁶ In *Edison v. Edison Polyform Mfg. Co.*,²⁰⁷ the court observed: "[I]t 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

202. *Id.* at 620. The plaintiffs' objection to the depiction of their husband and father in this fashion qualifies in the morally based category, since referring to him as a "reappearing ghost" could be interpreted as casting an aspersion on his good name.

203. FLA. STAT. ANN. § 540.08.

204. *Loft*, 408 So. 2d at 621. Interestingly, the court also denied the plaintiffs' action based on common law invasion of privacy, since relatives of a decedent cannot maintain this type of action. *Id.* at 621. See *supra* notes 157-58 and accompanying text.

205. See *Eastwood v. Superior Ct.*, 198 Cal. Rptr. 342, 352 (Cal. Ct. App. 1983) (holding that the "news" exemption to the California right-of-publicity statute does not exempt from liability knowing or reckless falsehoods). For further amplification of *Eastwood*, see the discussion *infra* at note 234. But cf. MCCARTHY, *supra* note 71, § 8.10, at 8-74.1 (criticizing the line of cases treating falsity as a sufficient rebuttal to a First Amendment defense against a right-of-publicity claim, and observing that "[f]alsity should be relevant only to claims of defamation, false light invasion of privacy, or false advertising").

206. The assertion that one's appearance is the quintessential property right can, of course, be debated. Cf. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990) (rejecting the argument of an ownership interest in extracorporeal body parts), *cert. denied*, 113 S. Ct. 1388 (1991). Although a detailed analysis of the body-parts debate is beyond the scope of this Article, it is worth noting that the property right in one's visage arguably is even greater than that in excised human tissue since the latter may have a value which stems solely from the fact that it is extracorporeal. In contrast, the value of an individual's visage is derived from its attachment to the persona involved and embodies an individual's self-presentation. The same cannot be said of any other bodily organ. Many commentators have argued in favor of recognizing a property interest in extracorporeal body parts. See generally Sharon N. Perley, Note, *From Control Over One's Body To Control Over One's Body Parts: Extending the Doctrine of Informed Consent*, 67 N.Y.U. L. REV. 335, 337 n.13 (1992) (citing the scholarly commentary on both sides of the body-parts debate).

207. 67 A. 392 (N.J. Ch. 1907).

person seeking to make an unauthorized use of it."²⁰⁸ Thus, in these situations the plaintiff's property right is stronger than it is where information alone is being appropriated, and consequently, there is more of an opportunity for unjust enrichment. Balanced against this stronger property right, however, is society's compelling interest in the dissemination of information. Moreover, as the following discussion will show, society's interest in using photographs for informational purposes may vary, depending on the relative fame of the photograph at issue.²⁰⁹

One can consider the problem of visual depictions in connection with right-of-publicity claims where the complaint is primarily economic in nature. In *Stephano v. News Group Publications, Inc.*,²¹⁰ a professional model brought an action against the publishers of a magazine for using a picture of him modeling a jacket in a weekly column containing information about new local products and services.²¹¹ The column offered information about the jacket and stated where it could be purchased.²¹² In grappling with the question of whether the defendant's use of the plaintiff's picture was one for trade or advertising purposes,²¹³ the court emphasized the newsworthiness of the jacket's availability and focused on the context of the article rather than on whether the defendant had the commercial motivation of increasing its magazine's circulation.²¹⁴ Thus, a picture illustrating a public interest article will not violate the statute unless it does not have a true relationship to the article or the article "is an advertisement in disguise."²¹⁵

*Zacchini v. Scripps-Howard Broadcasting Co.*²¹⁶ also involved a visual depiction in a constitutionally protected medium. In that case, the Supreme Court explicitly considered the interplay between the right of publicity and the First Amendment. *Zacchini* involved a television station's broadcast of the plaintiff's entire human cannonball act, without consent, on its nighttime

208. *Id.* at 394. In *Edison*, the court enjoined the defendant from using Thomas A. Edison's name and picture in connection with the manufacture and sale of a medicinal preparation. *See also* *Munden v. Harris*, 134 S.W. 1076, 1078 (Mo. App. 1911) (establishing a person's property right in his picture).

209. *See infra* text following note 230.

210. 474 N.E.2d 580 (N.Y. 1984).

211. *Id.* at 581-82.

212. *Id.* at 582. The plaintiff had taken part in a photographic session and apparently had agreed that the defendant could use the photographs taken during the session to illustrate a particular article published in a different edition of *New York Magazine*. *Id.*

213. The case was brought under New York's privacy statute, N.Y. CIV. RIGHTS LAW §§ 50-51.

214. *Stephano*, 474 N.E.2d at 585. Professor McCarthy questioned the reasoning in *Stephano* on the ground that the identity of the person wearing the clothes cannot be considered newsworthy, and therefore constitutionally protected, even though the clothes themselves can be regarded as of interest to the public. MCCARTHY, *supra* note 71, § 8.12[B], at 8-90.1.

215. *Stephano*, 474 N.E.2d at 585. The court rejected the plaintiff's argument that the article was "an advertisement in disguise." *Id.* at 586. The *Stephano* court also noted that a result contrary to the one it had reached "would unreasonably and unrealistically limit the [newsworthiness] exception [to the state privacy statute] to nonprofit or purely altruistic organizations which are not the only, or even the primary, source of information concerning newsworthy events and matters of public interest." *Id.* at 585. *See also* *Anderson v. Strong Memorial Hosp.*, 531 N.Y.S.2d 735 (N.Y. Sup. Ct. 1988) (holding that the use of an HIV patient's silhouette picture in a newspaper article about a hospital's AIDS research did not constitute an advertisement in disguise), *aff'd in part*, 542 N.Y.S.2d 96 (N.Y. App. Div. 1989).

216. 433 U.S. 562 (1977).

newscast. The Court in *Zacchini* observed that had the television station "merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television, we would have a very different case."²¹⁷ But the defendant's filming and display of the plaintiff's circus act went well beyond the reporting of a newsworthy event. As such, the defendant's use was not in keeping with a purely informational purpose, and this situation resulted in a great degree of unjust enrichment. Of course, the challenge remains of determining where "the line in particular situations is to be drawn between media reports that are protected and those that are not."²¹⁸

Other courts adjudicating right-of-publicity actions based on visual depictions have had difficulty determining the extent to which the problematic use is informational. For example, in *Mendonsa v. Time Inc.*,²¹⁹ the defendant publisher published and publicly distributed a picture of a sailor kissing a nurse on V-J Day. The photograph was published initially by the defendant in 1945, and had since been republished both by the defendant and other publications.²²⁰ In 1987, the defendant offered for sale copies of the photograph for \$1600.²²¹ The sailor depicted in the photograph then brought an action against the publisher for "misappropriation of likeness."²²² Clearly, the offer for sale was a commercial use, and the court therefore denied the defendant's motion to dismiss. Interestingly, however, the court also concluded that it could not determine whether all other publications of the photograph that occurred subsequent to the original publication were commercial in nature.²²³

Although *Mendonsa* is an easy case because the patently commercial use can easily be severed from any other uses that may be constitutionally protected,²²⁴ one can think of much harder cases in this category. For example, in *Beverley v. Choices Women's Medical Center Inc.*,²²⁵ the court held actionable the inclusion of a photograph of a doctor taken at a conference in a calendar advertising the medical services of the defendant medical center. The calendar depicted people and events the defendant considered important

217. *Id.* at 569.

218. *Id.* at 574-75. See MCCARTHY, *supra* note 71, § 8.4[B][3], at 8-24 to 8-25 (observing that most authorities have found *Zacchini* unsatisfying due to its narrow scope and observing that the decision has nothing to do with the typical right-of-publicity decision in which a plaintiff's identity, rather than performance, has been appropriated).

219. 678 F. Supp. 967 (D.R.I. 1988).

220. *Id.* at 968.

221. *Id.*

222. *Id.* The action was brought under the Rhode Island statute prohibiting the use of an individual's likeness for "purposes of trade." R.I. GEN. LAWS § 9-1-28.

223. The court stated that whether these subsequent uses "served some other protected public interest is a matter that will have to be decided after a full development of the facts." *Mendonsa*, 678 F. Supp. at 972.

224. *Cf. Marcinkus v. NAL Publishing Inc.*, 522 N.Y.S.2d 1009 (N.Y. App. Div. 1987) (sustaining the plaintiff's complaint because the defendant had used the plaintiff's name on the inside flap cover of a book of fiction and in other advertisements for the book). See *supra* notes 138-50 and accompanying text.

225. 587 N.E.2d 275 (N.Y. 1991).

in the women's movement. In addition, an explanatory caption appeared under the plaintiff's photograph.²²⁶ The court held that the defendant's use of the plaintiff's photograph was for advertising purposes within the meaning of the state statute,²²⁷ notwithstanding the public interest message of the calendar, and noted that the defendant is not a "media enterprise."²²⁸ In essence, the court concluded that the commercial nature of the defendant's use clearly outweighed whatever informational overtones the calendar possessed.

Courts should not decide these types of cases based on the medium in which the defendant's use appears. Such an analysis would lead to the incongruous result of approving the drawing of a ballplayer in a book about baseball, but prohibiting the use of that same drawing in a calendar.²²⁹ Instead, courts should craft a remedy by balancing society's high degree of entitlement in the area of informational uses against the type of harm being suffered by the plaintiff, the potential for consumer deception resulting from the defendant's unauthorized use, the profit potential of the defendant, whether the subject of the photograph is deceased, and if so, for how long, and the potential for unjust enrichment.

This analysis suggests that where the plaintiff's picture is being used in an informational setting, and the use is in keeping with its informational purpose and is not in any way false or deceptive, society's entitlement generally should preclude injunctive relief. As discussed earlier, however, this Article would like to allow theoretically for the possibility of applying a property rule approach in these situations if exceptional circumstances are present.²³⁰ Additionally, the above factors are relevant with respect to whether mandatory damages should be granted under a liability rule approach. In evaluating society's interests, the nature of the photograph itself should be considered. What if the defendant in *Mendonsa* were using the photograph in a way that lacked a strong commercial component and contained more political or entertainment overtones? Could not an argument be made that a famous photograph such as the one at issue in *Mendonsa* has taken on a life of its own and thus has become one of the cultural icons society needs to use? If so, it may well be appropriate to weigh society's interests in a free use much more heavily under these circumstances. Under the analysis proposed herein, this result is even more compelling if the subject of the photograph has been dead for over twenty years.

On the other hand, in some informational settings the inclusion of a plaintiff's likeness may significantly enhance the defendant's profit potential. Where such is the case, the potential for unjust enrichment is heightened. In

226. *Id.* at 277.

227. The action was brought under New York's privacy statute, N.Y. CIV. RIGHTS LAW § 51.

228. *Beverley*, 587 N.E.2d at 279. The court stated that the defendant "may not unilaterally neutralize or override the long-standing and significant statutory privacy protection by wrapping its advertising message in the cloak of public interest, however commendable the educational and informational value." *Id.*

229. *E.g.*, *Pirone v. MacMillan, Inc.*, 894 F.2d 579 (2d Cir. 1990); see *infra* notes 313-20 and accompanying text; cf. *supra* notes 186-91 and accompanying text.

230. See *supra* note 183 and accompanying text.

these instances, a court should consider awarding the plaintiff damages in an amount equal to that which she would have charged for the use of her likeness, plus a measure of the defendant's profits to which the plaintiff is entitled.²³¹ Of course, the inclusion of likenesses that are de minimis or merely incidental would not merit an award of damages.²³² Thus, even when a defendant's overall creation is likely to yield a profit potential that may enable him to pay for the use of the plaintiff's likeness, and where the defendant may very well choose to pay this amount rather than forgo the option to create, such payment still should not be required if the defendant's use of the plaintiff's likeness is de minimis as opposed to a contributing factor in the defendant's profit potential.²³³ Many fact-specific issues would need to be considered by a court in determining whether a particular use is de minimis.

Application of the foregoing analysis to the cases discussed in this section suggests that *Zacchini* would be decided the same way because the defendant exceeded the scope of informational purposes. The same is true with respect to *Mendonsa* because the use with which the court was concerned was not informational but rather strictly commercial. In *Beverley*, this analysis would place more emphasis upon the informational value of the calendar than did the court. Additionally, it would focus on whether the defendant's use of the plaintiff's picture was de minimis, or whether its inclusion significantly contributed to the defendant's profit potential. If the use was not de minimis, the case would present a higher potential for unjust enrichment. One way in which a court might make this determination is to consider how many other photographs of comparable physicians or prominent women were included in the defendant's calendar. This same analysis could be invoked in *Stephano*. Specifically, the court could have considered whether the article in question was one of many in the magazine that would be of interest to the general readership, and whether the model's stature was such that people could be expected to buy the magazine just to see his picture.

A greater dilemma is presented by cases involving visual depictions where the plaintiff's objection is primarily moral or contextual. The easier cases in this category involve a false or misleading use, which clearly militates in

231. Of course, the relative fame of an individual can affect the amount of damages awarded in such instances.

In the case of a celebrity, fame, skill, and prior marketability must be taken into account in establishing the fair market value of the plaintiff's name or likeness. In contrast, one measure of the fair market value of a private citizen's name and likeness is the amount which a professional would charge to pose for a picture possessing equal audience appeal.

Kwall, *supra* note 32, at 204.

232. See *supra* note 198.

233. Cf. *Brown v. Twentieth Century Fox Film Corp.*, 799 F. Supp. 166, 172 (D.D.C. 1992) (holding that a 27-second clip of a 1965 television performance by James Brown was lawfully used in the movie *The Commitments*, because the clip had been lawfully acquired and the mere use of the name "James Brown" in the movie did not "constitute the type of wholesale appropriation" necessary to prove a right-of-publicity claim), *aff'd*, 15 F.3d 1159 (D.C. Cir. 1994).

favor of the plaintiff.²³⁴ Absent the element of falsification, however, the public's entitlement frequently prevails, even where the plaintiffs are raising morally based objections.²³⁵

234. In *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Cal. Ct. App. 1983), the court held that the *National Enquirer's* use of actor Clint Eastwood's name and photograph in connection with the publication of a nondefamatory article, which was false but presented as true, constituted actionable infringement of Eastwood's right of publicity under the California common law and the relevant state statute. See CAL. CIV. CODE § 3344(a).

Eastwood alleged that the *Enquirer* used his name and photograph on the cover of the publication containing an article about a love-triangle between Eastwood and two female celebrities and also sponsored a telecast advertisement featuring Eastwood's name and photograph in connection with the article. These uses, according to Eastwood, were intended to promote the sales of the publication. *Eastwood*, 198 Cal. Rptr. at 344-45. Eastwood had alleged that the news account in question was false and a subterfuge for the commercial exploitation of his name and likeness, and thus the court felt obligated to entertain a discussion of the constitutional issue of publisher fault which typically is at issue in defamation and privacy actions. The court determined that the *Enquirer's* conduct constituted commercial exploitation and was not privileged by constitutional considerations or as a news account under the terms of the California statute. See CAL. CIV. CODE § 3344(d). In light of the morally based objection by Eastwood and the high potential for consumer deception, the result in *Eastwood* clearly is justified.

235. In *Baugh v. C.B.S., Inc.*, 828 F. Supp. 745 (W.D. Cal. 1993), a mother and daughter brought an action under the California right-of-publicity statute against CBS arising out of the following circumstances. An episode of the CBS program "Street Stories" featured a film of the Mobile Crisis Intervention Team attempting to provide assistance to the plaintiffs, who were victims of domestic violence. The broadcast presented a version of the facts in which the team was providing support and encouragement to the plaintiffs. *Id.* at 750. According to the mother, she was never told that the film that was being made of them would be used on a CBS program or for any other commercial purpose. The plaintiff also alleged that she had agreed to the filming as long as she was not going to appear on television, and that she was told the film was for the district attorney's office. *Id.* at 751. The plaintiff made it very clear in advance of the program's broadcast that she vehemently objected to the airing of her personal story on television. *Id.* at 752.

Initially, the court noted that the California statute safeguards against appropriation in two circumstances: those involving "commercially exploitable opportunities" and those involving appropriations which injure the feelings of the plaintiff. *Id.* at 753. Noting that this case involved the second category, which essentially involves a morally based objection on the part of the plaintiff, the court concluded that because the broadcast was not false (unlike *Eastwood*), the "news" or "public interest" nature of the defendant's activity rendered it protected. The court observed that the California statute's news and public affairs exemption, CAL. CIV. CODE § 3344(d), clarifies "that when news or public affairs publications are involved, the balance must be drawn strongly in favor of dissemination." *Id.* at 754. The court thus dismissed the plaintiffs' claim for commercial appropriation under the California statute. In contrast, the court denied the defendant's motion to dismiss the plaintiffs' privacy complaint for disclosure of private facts since it was not "convinced that Plaintiffs' [sic] personal involvement in an incident of domestic violence is newsworthy as a matter of law." *Id.* at 755.

In a similar case, *Dora v. Frontline Video, Inc.*, the court considered a documentary about legendary surfers in the early days of Malibu which included footage of the plaintiff surfer while he was surfing at that beach, as well as an audio interview and photographs. 18 Cal. Rptr. 2d 790 (Cal. Ct. App. 1993). The plaintiff maintained that he was never interviewed or photographed by the defendant and that he never consented to the use of his name, photograph, likeness, or voice in the documentary. *Id.* at 791. Again, the court classified the plaintiff's common law complaint as one involving injury to feelings since the plaintiff had declared: "I just wish to be left alone." *Id.* at 792. The plaintiff had apparently devoted much energy to avoiding the limelight and had been out of the country for twenty years. Nevertheless, in light of the public interest nature of the documentary, the court held that under the common law, the defendant was not required to obtain the plaintiff's consent for the use of his attributes appearing in the film. *Id.* at 793-94. In addition, the court concluded that the public affairs exemption contained in the California statute also exempted the defendant from liability. *Id.* at 795.

New York courts have interpreted the "public interest/newsworthy" exemption to liability under N.Y. CIV. RIGHTS LAW §§ 50-51, in a similarly expansive manner. See, e.g., *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 405 (S.D.N.Y. 1980) (denying the plaintiff relief in an action under

Notwithstanding the public's entitlement, the remedial dilemma in cases involving a moral objection to a visual depiction is suggested by the facts in *Tellado v. Time-Life Books, Inc.*²³⁶ That case involved the unauthorized use of a photograph taken of the plaintiff while he was serving in Vietnam. The defendant used this photograph of the plaintiff in various promotional materials for its series of books about the Vietnam War.²³⁷ The plaintiff discovered one of the defendant's brochures while he was emptying a trash can in his capacity as a company janitor.²³⁸ Seeing the photograph triggered all of the horrid memories that he had been attempting to suppress for almost twenty years and caused the plaintiff great emotional trauma.²³⁹ It was undisputed that the photograph was not used in any of the actual books in the defendant's series. The court denied the defendant's motion for summary judgment, holding that the defendant's use of the photograph was commercial and not "privileged as a matter of law."²⁴⁰ Moreover, the court rejected the defendant's contention "that its use of the photograph is privileged under the First Amendment . . . because the photograph was taken in a public place during a war and, although it was not used in the book, it could have been so used."²⁴¹ The court discussed the Supreme Court precedents establishing that reasonable regulations of commercial speech are acceptable, and observed that it is reasonable to require the defendant to compensate the plaintiff for the use of his likeness. In the court's view, this requirement would curtail the defendant's freedom of speech "only insofar as it is required to share some of its profits with the individual whose likeness is helping to stimulate those profits."²⁴² Significantly, the court observed that had the defendant simply used the plaintiff's picture in a book to depict the history of the Vietnam War, the use would have been privileged by the First Amendment, regardless of the profit motive underlying the book.²⁴³

Tellado is an especially difficult case because the photograph itself arguably involved a newsworthy event, even though it was not used in a medium that

the state privacy statute based on the magazine's publication of photographs taken from a movie in which the plaintiff had appeared partially nude because her partially nude performance was "of great interest to many people" and thus "constitutes a newsworthy event"); *Creel v. Crown Publishers, Inc.*, 496 N.Y.S.2d 219 (N.Y. App. Div. 1985) (holding that the inclusion of a nude photograph of non-celebrity plaintiffs in a guide book to nude beaches is not actionable under the state privacy statute). See generally *Mendonsa v. Time Inc.*, 678 F. Supp. 967, 971 (D.R.I. 1988) ("The scope of the subject matter which may be considered of 'public interest' or 'newsworthy' has been defined in most liberal and far-reaching terms.").

236. 643 F. Supp. 904 (D.N.J. 1986).

237. *Id.* at 905-06.

238. *Id.* at 906.

239. *Id.*

240. *Id.* at 911.

241. *Id.*

242. *Id.* at 913.

243. *Id.* at 914. Cf. *Berkos v. National Broadcasting Co.*, 515 N.E.2d 668, 679-80 (Ill. App. Ct. 1987) (holding that the defendant broadcasting station was not liable for unauthorized commercial appropriation based on its use of a photograph and references in a news report on a federal criminal investigation which the plaintiff felt to be libelous, and that the network's use of "teasers" to increase viewer share was also protected since they pertained to the news reports).

is typically afforded the highest degree of First Amendment protection. The plaintiff in *Tellado* probably would have been equally traumatized regardless of whether the defendant had used the photograph in promotional literature or in the actual books. Both types of unauthorized uses would have triggered the memories he had tried so hard to suppress. Nevertheless, the court took the position that although he would be unable to prevent the use of his photograph in the actual books, he could recover for a similar use in advertising literature. This analysis simply misses the mark because granting the plaintiff damages for the defendant's unauthorized appropriation is, theoretically, not what the plaintiff wanted, although after publication of the brochure it may have been the only available alternative. Given the deep moral objection to the defendant's use, the court should have stressed the availability of injunctive relief with respect to future advertisements, with damages being awarded concomitantly. Such an approach would also provide future deterrence in similar situations.

The more difficult issue, however, is whether a plaintiff such as *Tellado* should be able to obtain any sort of relief if the photograph in question had appeared in one of the books in the defendant's series, rather than in just the promotional materials. Application of the analysis suggested herein would begin by noting that society has a very high degree of entitlement with respect to books in general, and especially regarding books about such an important phase in our history. Still, it is necessary to factor into the analysis the considerations that emerged from the earlier discussion of the relevant harms in determining whether injunctive relief is appropriate. The plaintiff's objection was clearly morally based and the defendant's use caused the plaintiff a severe degree of emotional trauma. Nevertheless, the nature of the harm to the plaintiff was not reputational in nature and the case, as altered in the hypothetical, presents no potential for consumer deception. These factors, when considered in conjunction with the constitutional command underlying the First Amendment, compel the conclusion that injunctive relief should not be granted in this situation. This Author would so conclude, despite the fact that the plaintiff in *Tellado* was alive, even if not well.

A court grappling with such a case must also consider the propriety of mandatory damages, even if it declines to award the plaintiff injunctive relief. First, based on the facts recounted by the actual opinion in *Tellado*,²⁴⁴ it would not seem as though the photograph could be considered a cultural icon whose use must be preserved at all costs. Second, as pointed out above, the plaintiff in *Tellado* was alive, and this factor favors the plaintiff. Third, the profit potential of the defendant's use could weigh in the plaintiff's favor given that book sales can generate significant income. In this regard, however, it is necessary to consider whether the use of the plaintiff's photograph was de minimis, or a factor contributing to the defendant's profit potential. Of course, the degree of unjust enrichment present in this case also relates to this inquiry. In making this determination, a court could consider whether the

244. *Tellado*, 643 F. Supp. 904.

photograph essentially captured the mood of the era the book was trying to depict. In addition, a court could consider whether this particular defendant, or a similarly situated defendant, would simply refrain from creating if it were forced to compensate the plaintiff for the market value of the photograph as well as for a share of its profits. Although predicting how any particular defendant would react in these circumstances is a bit speculative, it is plausible to argue that a defendant such as the one in *Tellado* would either pay the plaintiff or find another picture with similar, if not identical, appeal, rather than forgo the entire project. After all, use of *Tellado's* photograph by the defendant was not essential to the completion of its project.²⁴⁵

If a court, based on the foregoing considerations, were persuaded that the plaintiff's interests deserved vindication, it should consider awarding the plaintiff damages. Of course, an award of damages absent injunctive relief would not really give the plaintiff the type of relief he is seeking, given that the plaintiff's objection is primarily morally, rather than economically, based. Still, this remedy could provide a particular plaintiff with some measure of compensation while simultaneously sending out a message to other potential users that, in certain instances, mandatory damages may be appropriate. In addition, the imposition of mandatory damages could make the defendant stop and think about the harms its use has caused the plaintiff, and thus send a message to other potential users that these harms should be considered in the future. Moreover, the imposition of mandatory damages could force potential users to employ the persona's visual depiction only to the extent necessary to make their artistic point.

3. Entertainment Uses

An endless number of uses can be grouped into the entertainment category. As the following discussion demonstrates, however, uses that furnish entertainment can frequently be informative and/or can contain commercial elements. Regardless of the components of a particular entertainment use, as a society we place a high premium upon entertainment and these uses are considered especially beneficial.²⁴⁶ Thus, entertainment uses involve a high degree of societal entitlement.

As with all of the uses discussed previously, a right-of-publicity plaintiff can raise an objection that is either primarily economic or moral to a particular use of her persona in an entertainment medium. This discussion will begin with those entertainment uses in which the plaintiff's primary objection is economic. One important group of such cases involves stage shows consisting of the impersonation of a famous performer or group of performers. In *Apple Corps Ltd. v. Leber*,²⁴⁷ the court was required to determine whether

245. *But see* *Baugh v. C.B.S., Inc.*, 828 F. Supp. 745, 754 (N.D. Cal. 1993) (rejecting the plaintiffs' argument that the public interest defense is not applicable when there is no need to use the plaintiffs' likenesses).

246. *See supra* note 86 and accompanying text.

247. 229 U.S.P.Q. 1015 (Cal. Super. Ct. 1986).

the stage show "Beatlemania" violated that group's publicity rights.²⁴⁸ The court described the show as "consist[ing] of Beatles look-alike, sound-alike, imitators performing live on stage twenty-nine of the more popular Lennon-McCartney songs, to a mixed media background and foreground of slides and movies which depicted a whole variety of subjects, many of which related to events occurring during the 1960's."²⁴⁹ The court, by its own admission, was "faced with the dilemma and conflict posed by the interaction of the First Amendment and plaintiffs' publicity rights."²⁵⁰ Noting the lack of clarity surrounding this area,²⁵¹ the court recommended a balancing analysis in the form of copyright law's fair use doctrine to treat "this new and gradually evolving area of law."²⁵² Applying this test, the court found in favor of the plaintiffs based on the defendants' "massive appropriation of the Beatles persona [sic]."²⁵³ What seemed to be the most important factor in the court's determination was the extent to which the show had been performed nationally, resulting in the defendants' accumulation of forty-five million dollars.²⁵⁴ The court granted both injunctive relief against further performances of the show²⁵⁵ and damages based on the fair market value of the defendants' use.²⁵⁶

A different decision respecting the appropriate remedy was reached in *Estate of Presley v. Russen*,²⁵⁷ where the court was faced with a motion for a preliminary injunction with respect to the defendant's production of a show in which a performer impersonated the late Elvis Presley.²⁵⁸ The court concluded that although the show both informed and entertained, it "serve[d] primarily to commercially exploit the likeness of Elvis Presley without contributing anything of substantial value to society."²⁵⁹ Nevertheless, the

248. See also *Brockum Co. v. Blaylock*, 729 F. Supp. 438, 446 (E.D. Pa. 1990) (stating that "[a] musical group, as well as an individual performer, has a protectable right of publicity").

249. *Leber*, 229 U.S.P.Q. at 1016.

250. *Id.*

251. The case was brought under the New York privacy statute. N.Y. CIV. RIGHTS LAW §§ 50-51.

252. *Leber*, 229 U.S.P.Q. at 1017.

253. *Id.*

254. *Id.* In noting the number of people who saw the show and the amount of money the defendants received, the court recognized the defendants' actions as a "massive appropriation" stating "this case was not just one photograph among many in a newspaper or magazine." *Id.*

255. *Id.* at 1016.

256. *Id.* at 1018. In assessing damages, the court made the following findings:

Based upon the uncontradicted evidence in the record, the public demand for and popularity of the Beatles was so great during the mid-70's that plaintiff could have named its own price for the exercise of the right to license a production such as *Beatlemania*. Consequently the Court accepts the figure of a royalty rate of 12½% of gross as the fair market value of the right taken by the stage performance, and \$2,000,000 for the right taken by the movie.

Id.

257. 513 F. Supp. 1339 (D.N.J. 1981).

258. See *supra* notes 135-37 and accompanying text.

259. *Russen*, 513 F. Supp. at 1359. *Russen* distinguished the defendant's use from a pure commercial use of Presley's picture to advertise a product in that the defendant's use constituted a form of entertainment and provided information by illustrating the performance of a legendary star. *Id.* at 1359-60. Nevertheless, in the court's view, the entertainment lacked its own creative component and the information which the performance provided about Presley was of limited value as compared with a biographical film or play about Presley. *Id.*

court observed that "the close relationship . . . between the right of publicity and the societal considerations of free expression" required the plaintiff to demonstrate "an identifiable economic harm."²⁶⁰ Ultimately, the court refused to issue a preliminary injunction against the show because the plaintiff failed to demonstrate adequately a connection between the defendant's activity and the plaintiff's diminished ability to profit from the use of Elvis Presley's name or likeness.²⁶¹ Of course, the possibility of damages was not discussed in *Russen* since the court's only concern there was the propriety of a preliminary injunction.

In *Groucho Marx Productions, Inc. v. Day and Night Co.*,²⁶² the district court relied on the *Russen* decision in concluding that the defendant's production of a play featuring performers simulating the Marx Brothers' unique style, appearance, and mannerisms was not protected expression.²⁶³ Although the Second Circuit Court of Appeals subsequently reversed on the choice of law issue, the appellate court suggested that it might otherwise have been inclined to reverse the district court's First Amendment ruling.²⁶⁴ Thus, *Groucho Marx* and *Russen* indicate that there is some room for disagreement

260. *Id.* at 1378-79.

261. *Id.* at 1379. The court continued:

[T]here is insufficient evidence that plaintiff's (or its licensees') ability to enter into agreements licensing the use of Presley's name or likeness in connection with consumer products is seriously jeopardized by defendant's activity. As a matter of fact, it is even possible that defendant's production has stimulated the public's interest in buying Elvis Presley merchandise or in seeing films or hearing records embodying actual Elvis Presley performances.

Id. (footnote omitted). The court went on to note "that the plaintiff has not claimed that defendant's production is so false or of such a poor quality that the reputation, and the resulting commercial viability, and marketability, associated with the name and likeness of Elvis Presley has been or will be adversely affected." *Id.* at 1379 n.49. This statement underscores the economically based objection on the part of the plaintiff in that case.

In contrast, the court granted a preliminary injunction with respect to the defendant's sale of Elvis Presley pendants and records, in light of the plaintiff's ongoing sale of these items. *Id.* at 1382-83. The court also preliminarily enjoined the defendant from using certain marks and logos that were associated with Presley during his lifetime, and from advertising the show in such a way that was likely to confuse the public into believing that the defendant's show was in any way connected with Presley's estate. *Id.*

Recently, another stage show impersonation of the Beatles was litigated, this time under the Tennessee right-of-publicity statute. See Tennessee Personal Rights Protection Act, TENN. CODE ANN. § 47-25-1105(a). In *Apple Corps Ltd. v. A.D.P.R., Inc.*, 843 F. Supp. 342 (M.D. Tenn. 1993), the plaintiff alleged that the defendants' use of the name "The Beatles" and the combination of the individual names of the famous foursome in both their performances and the publicity materials for their performances violated the state statute. *Id.* at 345. Relying on *Russen*, the court rejected the defendants' argument that they were entitled to First Amendment protection for their use of the Beatles' names and likenesses. *Id.* at 347. The court held, however, that although the state statute does not prohibit the use of such names in a performance, the statute allows liability for the defendants' use of the names in their advertising and promotional materials. *Id.* Accordingly, the defendants were permanently enjoined from such conduct. In addition, the court enjoined the defendants from using look-alikes of the Beatles in advertising and promotional materials. *Id.* at 349-50.

262. 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982).

263. *Id.* at 494. The court did not believe the play qualified as a parody because it simply duplicated the original, rather than building upon it by adding its own creative elements. *Id.* at 493.

264. The court indicated in a footnote that if it had to rule on the soundness of the district court's interpretation of the federal constitutional law, it "would have to examine closely defendants' substantial argument that their play is protected expression as a literary work, especially in light of the broad scope permitted parody in First Amendment law." *Id.* at 319 n.2.

on the constitutional issue involved in these cases. The *Leber* opinion recognized the need to devise an analytical method for treating these types of cases, although the court there did a superficial balancing analysis that merely focused on the amount of money the defendants made from the show.

Under the analysis proposed herein, several factors are relevant. First, these cases involve a high societal entitlement. Society cannot be deprived of viewing impersonations of legendary figures such as the Beatles and Elvis Presley who had a major impact on our culture. Eliminating the ability of individuals to establish the current meanings of these cultural icons in our society would, in essence, cause a grievous harm to society.²⁶⁵ This analysis suggests that *Leber* reached the wrong result by ordering injunctive relief.²⁶⁶ Of course, this conclusion assumes that the defendant's project does not involve any false sense of sponsorship or other type of consumer deception.²⁶⁷

Regarding the propriety of mandatory damages, the situation in *Leber* is somewhat complicated by the fact that one of the Beatles was dead at the time of the lawsuit. Still, John Lennon had not been dead for more than twenty years and the other Beatles were very much alive.²⁶⁸ Clearly, this factor favored the plaintiffs.²⁶⁹ Moreover, *Leber* involved a high profit potential, and the plaintiff's primary grievance was economic.²⁷⁰ Additionally, much of the defendant's profit was directly attributable to the appeal of the Beatles' persona, and thus the use cannot be considered de minimis. Thus, this case involved an enormous degree of unjust enrichment.

The argument for mandatory damages is drastically diminished, however, where a comedian impersonates a celebrity during the course of his monologue, since in most instances, the comedian's act is not relying upon the appeal of the celebrity to a great extent. An intermediate situation is a show in which the plaintiff is one individual among several who are being impersonated. Although hard-and-fast rules cannot be fashioned to cover all potential situations, the extent to which the defendant's profit is directly attributable to the appeal of the publicity plaintiff should be considered by the court. In this regard, a court adjudicating this type of action should question whether the defendants, if forced to pay for the fair market value of the

265. See Gordon, *supra* note 57, at 1568-69; see also *supra* notes 90-94 and accompanying text.

266. See *supra* text accompanying note 255.

267. See *Russen*, 513 F. Supp. at 1370-71 (noting use of certain marks may confuse consumer as to sponsorship of show).

268. John Lennon died in 1980 at the age of 40. THE CONCISE COLUMBIA ENCYCLOPEDIA 73 (2d ed. 1989).

269. This case suggests the possibility that my presumption favoring the First Amendment when the decedent has been dead for over 20 years may become somewhat complicated when the persona is that of a group composed of various individuals. In this Author's view, this presumption should not be invoked at all unless all of the members of the group are dead. When such is the case, however, a court ought to have some leeway to invoke this presumption even if all of the members of the group have not been dead for at least 20 years. The constitutional command of the First Amendment supports greater flexibility in this situation, since otherwise society may have to wait an inordinately long time to reestablish the meaning of cultural icons.

270. This was also the situation in *Russen*. See discussion *supra* note 261.

plaintiff's persona, would rather pay or forgo the creation option. Undoubtedly, the defendant in *Leber* would choose to pay as attested by the fact that even after the court's imposition of damages, the defendant still retained a handsome profit.²⁷¹ These factors suggest the propriety of a mandatory damage award in a case such as *Leber*.

How should the analysis in this area proceed when the plaintiff is raising a morally based objection to the use of her persona in an entertainment medium? The validity of the plaintiff's moral objection may be more likely to be an issue with respect to entertainment, as opposed to informational, uses since creators in the entertainment area generally can invoke a plaintiff's persona in a greater variety of ways than is the case with informationally oriented works. For example, in *Valentine v. C.B.S., Inc.*,²⁷² the plaintiff sued the writers and distributors of a popular song about a murder trial in which the plaintiff was a witness.²⁷³ The plaintiff claimed that the song defamed her because it implied that she participated in the conspiracy of a crime and that the defendants failed to check the veracity of the lyrics.²⁷⁴ The court held, however, that the plaintiff's interpretation of the song was unreasonable.²⁷⁵

Invalid moral objections aside, this Author believes that where it is obvious that the defendant's work is fiction, the First Amendment argument should generally outweigh whatever contextual or moral objections a plaintiff may raise. With respect to pure fictionalizations clearly marketed as such, there is virtually no chance of public deception. Thus, the basis for the plaintiff's moral objection is diminished. These factors strongly militate against the award of injunctive relief. In addition, the other factors of the analysis also militate against awarding mandatory damages. With respect to fictionalized works, an argument can be made that they generally do not derive their appeal from the persona of the publicity plaintiff so much as from the independent contribution of the work's creator. This consideration also suggests a reduced potential for unjust enrichment. Moreover, there would be a tremendous chilling of incentives if writers were forced to compensate someone every time they created a character who resembled or was derived from a real individual. These points are illustrated in *Hicks v. Casablanca Records*,²⁷⁶ in which the heirs and assignees of Agatha Christie sought to enjoin movie producers and a publisher from distributing a movie and book fictionalizing an incident in Christie's life in a manner that was extremely unflattering to the deceased. The court clearly recognized that it was faced with a "novel and

271. See *supra* note 256 and accompanying text.

272. 698 F.2d 430 (11th Cir. 1983).

273. *Id.* at 431.

274. *Id.* The plaintiff's action was based on defamation, invasion of privacy, and unauthorized publication of her name.

275. *Id.* at 432. Moreover, in specifically discussing the plaintiff's complaint for unauthorized use of her name in violation of the state statute, the court resorted to the typical analysis that no commercial exploitation occurred because the defendants did not use the plaintiff's name "to directly promote a product or service." *Id.* at 433.

276. 464 F. Supp. 426 (S.D.N.Y. 1978). See *supra* text accompanying notes 166-69.

rather complex question" since "books and movies are vehicles through which ideas and opinions are disseminated and, as such, have enjoyed certain constitutional protections, not generally accorded 'merchandise.'"²⁷⁷ The court also emphasized the lack of other cases presenting this constitutional question in the context of the right of publicity.²⁷⁸ Finally, the court found that the book in question was fiction and held that free speech interests must prevail over those of the right of publicity.²⁷⁹

The situation is far more complicated, however, when the defendant's use is a combination of fiction and fact. According to literary critic Michiko Kakutani, we are being besieged with "books, movies and television docudramas that hopscotch back and forth between the realms of history and fiction, reality and virtual reality, with impunity."²⁸⁰ Kakutani is especially critical of such works because "they do not even announce themselves as works of fiction, but instead masquerade as the truth," and "unabashedly play both to people's hunger for information and relevance, and to their appetite for entertainment."²⁸¹ Recall *Marcinkus v. NAL Publishing Inc.*,²⁸² which involved the archbishop who sued the defendants for publishing and distributing a work of fiction that used his name, in an unflattering manner, to provide a sense of history. In that case, the court refused to enjoin the book's publication and emphasized that "whatever [the] literary merit or ultimate social value" of the book, it "is entitled to at least some degree of first amendment protection."²⁸³ From a remedial standpoint, however, *Marcinkus* presents a relatively easy case because, although the book itself could not be enjoined, the court could have enjoined the objectionable advertisements and awarded damages to the plaintiff in connection with just

277. *Hicks*, 464 F. Supp. at 430.

278. *Id.*

279. *Id.* at 433. In so holding, the court also emphasized that this case did not involve any "deliberate falsifications or an attempt by a defendant to present the disputed events as true." *Id.* See also *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (holding that state law protection against misappropriation of one's name and likeness does not extend to use of facts from an individual's life in a work of fiction).

280. Michiko Kakutani, *Is it Fiction? Is it Nonfiction? And Why Doesn't Anybody Care?*, N.Y. TIMES, July 27, 1993, at C13.

281. *Id.* Although no right-of-publicity case involving docudramas has ever gone to trial, Elizabeth Taylor once brought a misappropriation and common law right-of-publicity action against ABC for developing a biographical docudrama of Taylor's life. *Taylor v. American Broadcasting Co.*, No. 82 Civ. 6977 (S.D.N.Y. 1982). The initiation of the lawsuit killed the project and the suit was ultimately dropped. See Jacqui Gold Grunfeld, *Docudramas: The Legality of Producing Fact-Based Dramas—What Every Producer's Attorney Should Know*, 14 HASTINGS COMM. & ENT. L.J. 483, 509-11 (1992). Most authorities have concluded that docudramas are a privileged First Amendment use. *Id.* at 511; see also MCCARTHY, *supra* note 71, § 8.9[F], at 8-70.

282. 522 N.Y.S.2d 1009 (N.Y. Sup. Ct. 1987). See *supra* notes 138-50 and accompanying text.

283. *Id.* at 1014-15. In balancing the equities, the court also noted that the book contained an express disclaimer and that the defendants contended that they would suffer much financial loss if forced to recall. *Id.* at 1015.

that use.²⁸⁴ Thus, the commercial elements of that case were readily separable from the non-commercial elements.²⁸⁵

In situations involving uses that may not be subject to such an easy resolution, the analysis herein can prove fruitful. As *Marcinkus* recognized, society has a high entitlement to works such as semi-fictional books, movies, and television programs. These are legitimate vehicles of free expression and deserve constitutional protection. Moreover, an argument can be made that as a society, we must have the ability not only to write about, but also to interpret, the thought-processes of individuals who are the subjects of these entertainment works.²⁸⁶

Despite society's high entitlement in this area, there are important harms to consider when allowing the unauthorized appropriation of an individual's persona in these media. In the first place, when an individual's persona is used without permission in a semi-factual, semi-fictional medium, there is a high potential for meritorious moral objections to the content or context of the use. In fact, societal sanctioning of this type of use could cause some individuals to refrain from pursuing a career in the limelight. Second, these types of works present a high potential for consumer deception to the extent they masquerade as completely factual accounts.²⁸⁷ A particularly strong showing on both of these factors might persuade a court to grant injunctive relief in certain instances, particularly where the potential for consumer deception is overpowering. Although such a result would be extremely rare in light of the substantial First Amendment interests at stake, current courts

284. *Marcinkus* was decided in the context of a preliminary injunction and thus the issue of damages was not discussed. Toward the end of the opinion, the court added that it was denying the plaintiff's request for an injunction with respect to the dust cover and the use of the plaintiff's name in print advertising. The court stated that "the dust jacket labels the book a novel, and is attached to the book and the disclaimer contained therein, and thus it should follow the denial of injunctive relief for the book." With respect to the print advertising, the defendants apparently had no intention of continuing its use. *Marcinkus*, 522 N.Y.S.2d at 1015; see also *supra* notes 145-50 and accompanying text..

285. Cf. MCCARTHY, *supra* note 71, § 8-11[C], at 8-83 (advocating an analysis focusing on the "primary purpose" of the usage to determine its "primary impact").

286. This emphasis on interpretation of the subject at the expense of the individuality of the subject has a parallel among radical deconstructionists in literary circles whose theory "reduces the creative individual of romantic theory into little more than a factory worker assembling images, words, and ideas that are the common property of the culture and embedded in the language." ALVIN B. KERNAN, *THE DEATH OF LITERATURE* 113 (1990). According to the critic David Lehman, acceptance of this view of writing necessitates the elimination of plagiarism since de-emphasizing the author's role means that "the text enters the academic equivalent of the public domain." DAVID LEHMAN, *SIGNS OF THE TIMES* 59 (1991). See also Litman, *supra* note 90, at 1011 (observing that "authorship is the product of astigmatic repackaging of others' expression" and that the "legal concept of originality" cannot be taken seriously because it would be difficult to determine what aspects of an author's work were actually original). According to David Lehman, "[f]or the hard-line deconstructionists, not only is literature self-referential; its meanings are undecidable, as 'indeterminate' as the velocity and location of a moving electron." LEHMAN, *supra*, at 57. Not surprisingly, this post-modernist phenomenon also has resulted in the prevalent practice of quoting earlier works of art in subsequent art forms in both high and popular culture. See Kakutani, *supra* note 280, at C16.

287. See *supra* notes 280-81 and accompanying text.

seem to assume automatically that injunctive relief is never warranted, even when a plaintiff makes these showings.²⁸⁸

Even if a court adjudicating such a use is not inclined to grant injunctive relief, a consideration of the plaintiff's moral objection and the potential for consumer deception should weigh heavily in its decision regarding an award of mandatory damages. In addition, courts should consider that these types of uses typically involve a high profit potential that is directly attributable, in large part, to the appeal of the persona whose publicity rights have been appropriated. Where this is the case, a great potential for unjust enrichment exists as a result of the defendant's unauthorized use. Moreover, given this high profit potential, if the creators of these entertainment media were given the option of paying for the use of the plaintiff's persona or forgoing the ability to create the work, many undoubtedly would choose to pay. Therefore, mandating compensation to the subjects of these works probably would not chill the user's incentives to create in a majority of instances.

4. Primarily Commercial Uses

The final category of uses this Article considers are those that are primarily commercial in nature. As mentioned earlier, it is often difficult to make a determination as to whether a particular use is primarily commercial. For example, suppose an artist paints a picture of supermodel Cindy Crawford without her permission. In light of our desire to encourage artistic expression divorced from commercial ventures, this type of situation should not give rise to either injunctive relief or damages.²⁸⁹ Now suppose, however, the same artist subsequently sells the painting for a handsome profit. Should the subsequent sale convert this previously sanctioned use into a primarily commercial use? What if the artist had intended to sell the finished product the entire time he had been painting?

As the foregoing example illustrates, the definition of a primarily commercial use can be problematic. As previously discussed, many types of informational and entertainment uses can have strong commercial overtones.²⁹⁰ Moreover, it is not possible to invoke a definition of commercial use that depends upon the primary motive of the creator, because such a definition will be subject to manipulation by the interested parties. Notwithstanding these difficulties, the categorization of a particular use as primarily commercial is critical because primarily commercial uses trigger a different analytical methodology from the other types of uses which have been

288. See *Marcinkus*, 522 N.Y.S.2d at 1014 (in refusing injunctive relief where plaintiff showed both moral harm and potential consumer confusion, the court noted that the plaintiff's privacy right must be balanced against the First Amendment freedoms, and since there was not a clear right to injunctive relief based on the "moving papers," the court refused to grant injunctive relief); see also *supra* notes 138-50 and accompanying text.

289. See *supra* text following note 154; notes 186-96 and accompanying text; text following note 245.

290. See *supra* notes 186-205, 247-85 and accompanying text.

explored. Rather than offer a hard-and-fast definition for primarily commercial uses, this Author would prefer to see courts exercise a degree of discretion in making these determinations. In many cases, primarily commercial uses will involve the sale of merchandise that is severable from the objectionable right-of-publicity use. Moreover, media such as the painting of Cindy Crawford which are typically afforded a substantial degree of First Amendment protection will usually not be categorized as primarily commercial in nature. Still, it is impossible to conceive of a set of rules that will cover all potential uses, and therefore, courts need to be flexible in this area.

At least one commentator has argued that from an economic standpoint, the unrestricted use of publicity rights in a commercial context may result in greater efficiency. This argument analogizes celebrity personas to what the economists term "public goods" in the following ways. First, "[o]nce a celebrity has developed or acquired a commercially valuable identity, others can use or appropriate it at a cost that is close to zero."²⁹¹ Second, the use of a celebrity's persona is "nonrivalrous" in that the use of a celebrity's name or face on merchandise does not prevent the celebrity or anyone else from doing the same.²⁹² Third, a celebrity's persona is "nonexhaustible" in that it can be used repeatedly without becoming "used up."²⁹³ The argument continues that, to the extent the commercial use of a celebrity's persona shares these features of "public goods," there will of necessity be some social loss by virtue of forcing compensation for its use.²⁹⁴

This argument, however, fails on several fronts. Initially, even the commentator who advances it "freely concede[s]" its "speculative character."²⁹⁵ Secondly, the public goods character of celebrity personas is highly questionable, particularly with respect to the questions of whether the use of such personas can legitimately be viewed as "nonrivalrous" and "nonexhaustible." On the contrary, it is equally if not more plausible to assume that the more a particular celebrity's persona is used on various forms of merchandise, the less value that persona will have.²⁹⁶ Moreover, there is also the need to

291. See Madow, *supra* note 38, at 222 n.445.

292. *Id.*

293. *Id.*

294. Professor Madow provides the following example to illustrate his point:

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

Id. at 222-23 n.445 (citations omitted) (quoting Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 21 (1984)).

295. *Id.* at 222 n.445.

296. See *Matthews v. Wozencraft*, 15 F.3d 432, 438 (5th Cir. 1994) (noting that if a well-known public figure's picture could be used freely to endorse commercial products, the value of his likeness would disappear).

consider the importance of insuring exclusivity in the publicity context because if the individual whose publicity rights are being appropriated cannot "reap a profit from that product, then there is nothing upon which to base a source of pecuniary return."²⁹⁷ As Professor Rochelle Cooper Dreyfuss has noted, "[e]xclusivity is therefore necessary to assure the creator freedom from those who did not make the creative effort and thus would undercut the price at which the creator could profitably sell the work."²⁹⁸ Although it could be argued that a celebrity who continues to pursue her career would always be able to reap a return from her major avenue of success even if unauthorized commercial endorsements of her persona were allowed, it is equally possible that the unfettered use of a celebrity's persona in a merchandising context will adversely affect the marketability of the celebrity in her main area of expertise. This adverse impact can arise if the celebrity is so overused that she no longer is viewed by the public as embodying the essence of a unique spirit that once made her successful, or if the celebrity's persona is used in conjunction with unpopular, undesirable, or dangerous products. In addition, there is the high potential for consumer deception stemming from the unregulated commercial use of an individual's persona.²⁹⁹ For these reasons, damages with concomitant injunctive relief is the appropriate remedial choice for the majority of primarily commercial uses.

In most instances, awarding injunctive relief will not be problematic from a First Amendment standpoint when the defendant is using the plaintiff's persona in a primarily commercial context. People should not be forced to serve as marketing tools against their will.³⁰⁰ Still, in situations with a less commercially obvious element, or in situations in which a mixture of commercial and political, entertainment, or informational elements exists,³⁰¹ awarding injunctive relief may be problematic under the First Amendment. In addition, a property rule approach may be problematic for commercial uses which implicate expressive needs of the appropriator or involve significant

297. Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language In the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 408 (1990).

298. *Id.* Professor Dreyfuss sees the right of publicity and other types of intellectual property such as patents, copyrights, and misappropriation as different from trademark rights because the law in these other areas protects "the one and only product that the creator has for sale." *Id.* The situation is different with respect to the owner of a trademark:

[T]he owner of a trademark is really in the business of selling a *different* product The profit and the incentive to enhance quality comes from the marketing success of this other product, not the trademark. Exclusivity in the trademark is only needed to point consumers in the right direction, and that function is preserved by protecting the mark's signaling function.

Id. (emphasis in original). Professor Dreyfuss constructs a theory of expressive genericity under which courts faced with cases involving trademark uses that contain both expressive and signaling functions could prohibit trademark owners from suppressing the use by others of a trademark in a context in which the mark is "rhetorically unique." *Id.* at 418.

299. See *supra* part II.B.2.a.

300. But see *infra* notes 303-06 and accompanying text.

301. One commentator has distinguished those uses of an individual's name or likeness in an advertisement in which the plaintiff is actually advertised as part of the product being sold from those uses in which the plaintiff is "part of the rhetorical matter." See Theodore F. Haas, *Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising*, 19 U.C. DAVIS L. REV. 539, 542 (1986).

creative effort put forth by the unauthorized user. The use of celebrity photographs on T-shirts with creative or double entendre slogans typify the conflict between the celebrity's interest and that of the users in this context.³⁰² Such examples also raise the argument that as a society, we must have the ability to interpret and reestablish the meaning of cultural icons.

One rather interesting illustration of this argument is the adoption in the 1950's by the urban gay community of Judy Garland's image as a powerful means of self-expression.³⁰³ In 1982, a gay greeting card company issued a card which featured Garland as Dorothy in *The Wizard of Oz* in a gay bar, with the inside message, "Toto, I don't think we're in Kansas anymore."³⁰⁴ Should Garland's estate or her assignees have a right to object to such a merchandising effort?³⁰⁵

302. Professor Madow offers many such examples, including the sale of a T-shirt featuring a photograph of Leona Helmsley with the caption "Off With Her Head." See Madow, *supra* note 38, at 204-05. In the summer of 1994, T-shirts bearing pictures of Nicole and O.J. Simpson with various captions cropped up everywhere.

An interesting recent case illustrates the problem presented by these types of commercial uses. In *Cardtoons v. Major League Baseball Players Ass'n*, 838 F. Supp. 1501 (N.D. Okl. 1993), the court was confronted with the question of whether unlicensed trading cards containing parodies of active major league baseball players violated the players' right of publicity. The plaintiff in the case, the trading card company, was seeking a declaratory judgment that its actions were not violative of the players' right of publicity. The defendant, the Major League Baseball Players Association, was the assignee of the players' individual publicity rights. The issue presented was whether the plaintiff's parody trading cards were protected by the First Amendment. The case was litigated under the Oklahoma right-of-publicity statute. OKLA. STAT. ANN. tit. 12, § 1449(A).

According to the facts, the cards featured "caricatures of the players' faces and humorous commentary about their careers." *Id.* at 1507. Although their names were changed, a person reasonably familiar with baseball would be able to identify the players parodied on the cards.

The district court adopted the rather academic opinion of the U.S. magistrate. This opinion groped for a framework in which the issue could be resolved and looked to the parody defense in both trademark and copyright cases. Ultimately, the court found that the card company's profit motive was decisive. Interestingly, however, the opinion refused to grant the Association's request for a preliminary injunction because it failed to show that irreparable harm would occur if one did not issue. The opinion stated that the state statute's provision for damages was adequate to redress any harm to the Association. Thus, the case was set for trial, but as of this writing, no further action has been taken.

The analysis developed in this Article would have been of considerable assistance to the court in grappling with the First Amendment. Clearly this is a case involving a commercial use containing substantial creative contributions by the user. Rather than relying on trademark and copyright analogies, and focusing exclusively on the card company's commercial motive, the court should have evaluated the potential for decreased incentives, consumer deception, and unjust enrichment presented by the card company's use. In considering the decreased incentives inquiry, the court also should have evaluated whether the card company's use of any one player was de minimis. Moreover, the court's analysis should have emphasized that the Association was objecting to a harm of a primarily economic nature, and explicitly acknowledged the living status of all of the players depicted.

303. This phenomenon is discussed in Madow, *supra* note 38, at 194-95.

304. *Id.* at 195.

305. President and Mrs. Clinton now face a similar dilemma, as they have become the stars of a new line of political greeting cards by Recycled Paper Greetings that make fun of various aspects of the President's personality and past. The most popular card features a cartoon of the First Couple with the following inside inscription: "See—there are scarier things than growing older. Happy Birthday." When asked what the President thinks of this new venture, a White House spokesperson supposedly replied: "He would ask only one question: Does this profit-making enterprise balance its disservice to the community with community service somehow, somewhere, and summer jobs for youth?" As of the time this reply was issued, the President reportedly had not seen the new line of greeting cards. Candace Bushnell, *People Are Talking About: Birthday Bill*, VOGUE, Sept. 1994, at 167, 178.

This example is difficult because it juxtaposes a traditionally commercial use with a strong freedom of expression element. It also involves a potentially morally based objection by the interested parties. The approach suggested in this Article calls for a balancing of the societal benefits against the potential harms in fashioning a resolution. On the benefits side is a strong societal entitlement to the use of Garland's persona. On the harms side is the morally based objection to Garland's association with the gay movement, the diminished marketing value of Garland's image, and the potential for unjust enrichment on the part of the greeting card company. Nevertheless, if this Author were deciding the case, the scales would be tipped in favor of the greeting card company with respect to both injunctive relief and damages. On the issue of injunctive relief, Garland's moral objection is especially compelling because it is of the reputational variety. Still, the case presents a fairly low capacity for consumer deception. Moreover, Garland has been dead for more than twenty-five years,³⁰⁶ and therefore society's interest in being able to reestablish the meaning of her persona must be accorded special importance. As a society, we must be able to redefine the meaning of cultural icons, even if such articulations are likely to offend the sensibilities of those who currently are seeking to preserve the images of these icons.

With respect to an award of mandatory damages, the plaintiff's case is strengthened by the fact that this case contains elements of unjust enrichment and presents at least a fair probability that the defendant would pay to continue its use. However, the timing of Garland's death also furnishes a particularly strong reason for refusing to mandate compensation to Garland's estate since presumably her relatives and assignees have already had a substantial opportunity to capitalize on her publicity rights. In addition, it is unlikely that consumers will believe that Garland's estate authorized, or was in any way involved with, the marketing of the greeting cards.

The Judy Garland hypothetical can be compared with *White v. Samsung Electronics America, Inc.*,³⁰⁷ which also raised the conflict between the First Amendment and the right of publicity in a commercial setting. According to the majority panel opinion, the plaintiff raised a triable issue of fact regarding whether the defendant's use, in an advertisement, of a robot suggestive of White violated the plaintiff's right of publicity.³⁰⁸ The dissent lamented the majority's holding, and was clearly uncomfortable with the potential reach of the opinion: "The majority's position seems to allow any famous person or entity to bring suit based on any commercial advertisement that depicts a character or role performed by the plaintiff."³⁰⁹ This concern was shared by the dissent in the denial of the petition for a rehearing, who observed that the

306. Judy Garland died in 1969 at the age of 47. THE CONCISE COLUMBIA ENCYCLOPEDIA, *supra* note 268, at 308.

307. 971 F.2d 1395 (9th Cir. 1992), *amended*, 1992 U.S. App. LEXIS 19253 (9th Cir. Aug. 19, 1992), *reh'g en banc denied*, 989 F.2d 1512 (9th Cir.), *cert. denied*, 113 S. Ct. 2443 (1993). See *supra* notes 129-34 and accompanying text for a discussion of this case.

308. *White*, 971 F.2d at 1399.

309. *Id.* at 1407 (Alarcon, J., concurring in part and dissenting in part).

majority opinion gives White "an exclusive right not in what she looks like or who she is, but in what she does for a living."³¹⁰ These concerns raise the question as to whether the public derives a benefit from allowing White's persona—at least as it was appropriated in the context of this case—to remain free for use at the expense of White's publicity rights. Resolving this question requires a determination of the degree to which society will be enriched by being exposed to the clever use that Samsung made of White's persona, and whether this benefit to society outweighs the harms suffered by White and the public.

Notwithstanding the First Amendment concerns raised by the dissenters, both in the original *White* opinion and in the denial of rehearing, the case can initially be analyzed from the standpoint of whether the defendant did, in fact, appropriate sufficient attributes of White's persona to merit liability in the first place. Assuming this question is answered in the affirmative, a court could still reasonably conclude that society's entitlement to Samsung's use of White's persona in this context is not as great as was the gay greeting card company's use in the Judy Garland example. The card company was using Garland's persona to convey a message about what it means to be gay in our society. Samsung was using White's persona to sell VCR's. Moreover, in *White*, a stronger potential for consumer deception exists since people reasonably could assume some form of sponsorship on the part of White.³¹¹ Perhaps another way to approach this distinction is to conclude that the card company's use is not primarily commercial, notwithstanding the intent to sell greeting cards. If courts had the discretion to determine what types of uses are primarily commercial, this approach could be readily invoked.

In most instances involving unauthorized commercial appropriations, the free speech interests are not nearly as strong as in the Garland example and society's entitlements are significantly weaker. Moreover, as the foregoing discussion illustrates, circumscribing the free choice of an individual in commercial decisions regarding her persona entails a high degree of harm to publicity plaintiffs, creates a strong potential for consumer confusion, and results in a large potential for unjust enrichment on the part of the users. Unauthorized commercial uses of a deceased's persona also create the potential for significant harm to the deceased's relatives and assignees. These observations compel the conclusion that forced uses of an individual's persona typically should not be sanctioned when the use is primarily commercial in nature. Along with an award of injunctive relief, an award of damages compensating the plaintiff for the defendant's prior conduct should be granted.³¹²

310. *White*, 989 F.2d at 1515 (Kozinski, C.J., dissenting), *denying reh'g en banc* to 971 F.2d 1395 (9th Cir. 1992), *as amended* by 1992 U.S. App. LEXIS 19253 (9th Cir. Aug. 19, 1992).

311. See *supra* notes 129-34 and accompanying text.

312. It is important to add that even in a commercial setting, the nature of the injunctive relief can be tailored to allow for First Amendment freedoms. In *Allen v. National Video, Inc.*, for example, the court noted that "the scope of injunctions against misleading commercial speech should be limited to that necessary to avoid consumer confusion." 610 F. Supp. 612, 630 (S.D.N.Y. 1985). Thus, the court

CONCLUSION

This Article has developed a framework within which the conflict between the right of publicity and the First Amendment can be addressed. Although it is impossible to devise a methodology that will easily resolve this conflict in all situations, the approach suggested here focuses the inquiry by isolating both the relevant harms, as well as the societal benefits or entitlements that exist with respect to a particular use, and by measuring them against each other. Moreover, the balancing process discussed herein recognizes that the appropriate remedy in any given situation may vary according to the nature of the relevant harms and entitlements. Thus, in certain instances, publicity plaintiffs should be able to prevent any unauthorized use of their personas under a property rule approach, whereas in other situations, a forced but compensated use of an individual's persona should be allowed under a liability rule approach. Occasionally, no protection for the plaintiff is appropriate and the use should be allowed with no compensation forthcoming.

The balancing analysis developed in this Article suggests that publicity plaintiffs typically should not be accorded any protection against informational uses, regardless of the format in which the information is conveyed. The same result is warranted with respect to entertainment uses which constitute pure fictionalizations. Regarding other entertainment uses as well as visual depictions which convey information, the proposed balancing test can result in no protection or liability rule protection for the publicity plaintiff. In exceptional situations, property rule protection is also possible. Primarily commercial uses generally should be enjoined. Publicity plaintiffs who object to either hybrid commercial uses or commercial uses manifesting substantial creativity by, or expressive needs of, the user can receive no protection, liability rule protection, or property rule protection, depending on the outcome of the proposed balancing analysis.

The Introduction mentioned several fact patterns which illustrate the tension between the right of publicity and the First Amendment. This Article will conclude by applying the balancing approach developed herein to the two most recent of these cases. The first, *Pirone v. MacMillan, Inc.*,³¹³ involved the use of three photographs of Babe Ruth in the defendant's Baseball Engagement Calendar.³¹⁴ The right side of every page in the calendar consisted of a calendar for a particular week, supplemented by baseball trivia linked to a particular date. The left side of every page featured a photograph of a baseball player, ballfield, or other item of interest to baseball fans. Two of the photographs involving Ruth appeared as photographs accompanying

refused to enjoin Allen's look-alike from ever appearing as a Woody Allen look-alike "since that could interfere with his ability to make money and express himself in settings where there is no likelihood of consumer confusion." *Id.* Instead, the court enjoined the defendant look-alike from appearing in advertising in which a reasonable person might believe that the defendant was Allen or that Allen had approved of his appearance. *Id.*; see also *supra* note 134.

313. 894 F.2d 579 (2d Cir. 1990).

314. See *supra* note 4 and accompanying text.

particular weeks, and the third one appeared on the cover of the calendar.³¹⁵ The plaintiffs in *Pirone* were the daughters and licensees of Babe Ruth.³¹⁶

The *Pirone* case involved a visual depiction with strong informational overtones. Ruth's heirs have a greater property interest in his visual depiction than in statistics about Ruth's baseball career. On the other hand, the use of these photographs in a calendar such as the defendant's is informational in nature. The cover photograph showed Ruth helping a small boy with his grip; the photograph corresponding to the week of October 31 showed Ruth saluting General John Pershing; and the photograph illustrating the week of December 5 showed a baseball autographed by Ruth.³¹⁷ Had these photographs been included in a book about baseball, their use would have been privileged. It is difficult to articulate a rationale as to why a different result should obtain with respect to their inclusion in a calendar, which in this case possesses a strong informational component.³¹⁸ Notwithstanding the property interest in Ruth's likeness, the societal entitlements in this informational setting are strong.

A consideration of the relevant harms reveals that the plaintiffs in *Pirone* did not appear to assert a morally based objection to the inclusion of Ruth's photographs in the calendar. Instead, their grievance seemed to be based entirely on economics. Moreover, both the district court and the Second Circuit Court of Appeals concluded that the potential for consumer confusion as to sponsorship of the calendar was nonexistent.³¹⁹ The strong societal entitlement, the lack of a morally based objection, and the lack of possible consumer confusion compel the conclusion that injunctive relief is inappropriate in this case. On the other hand, if given a choice between forgoing the option of using Ruth's likeness and paying for the use, it is plausible to assume that the defendant would choose to pay. The inclusion of even three photographs of Ruth in a calendar containing more than fifty-two pictures probably should not be considered de minimis, given Ruth's stature and the inclusion of his photograph on the cover of the calendar. The publication of a baseball calendar probably would not be regarded as complete without some pictures of the legendary "Babe." Thus, forcing the defendant to pay most likely would not reduce the defendant's incentives to create in this particular

315. *Pirone*, 894 F.2d at 581.

316. The plaintiffs alleged trademark infringement, unfair competition, and violations of both the common law right of publicity and the New York privacy statute. See NEW YORK CIV. RIGHTS LAW §§ 50-51. The plaintiffs did not claim any particular ownership interests in the photographs in question. *Pirone*, 894 F.2d at 581. The court did not reach the conflict between the right of publicity and the First Amendment because it held that the plaintiffs were precluded from suing under the state privacy statute, and that no common law right of publicity exists in New York. *Id.* at 585; see also *supra* note 26.

317. *Pirone*, 894 F.2d at 581.

318. Cf. *Beverley v. Choices Women's Medical Center, Inc.*, 587 N.E.2d 275 (N.Y. 1991); see also *supra* notes 225-28 and accompanying text. *Beverley* is similar to *Pirone* in that both involve calendars with informational components.

319. *Pirone*, 894 F.2d at 585. The Second Circuit held that summary judgment for defendant was proper since the plaintiff had failed to present a material issue of fact on the likelihood-of-consumer-confusion issue in its federal and common law trademark infringement counts.

situation. The question then becomes whether, in light of the First Amendment interests at stake, the defendant nonetheless should be required to pay.

This Article suggests that the fact that Babe Ruth has been dead for more than forty-five years³²⁰ should tip the scales in favor of no mandated compensation in this particular case. Ruth's family and assignees have already had ample time to reap benefits from Ruth's publicity rights, and may continue to do so in those jurisdictions where Ruth's descendible right of publicity is still protected against commercial exploitation. Nevertheless, in a conflict between the right of publicity and the First Amendment, the length of time since Ruth's death should militate against forcing the defendant to pay for the use of Ruth's likeness under the facts of *Pirone*.

In another recent case, *Hampton v. Guare*,³²¹ the plaintiff sued the author and producers of the play *Six Degrees of Separation* for using incidents from his life without his permission. He also sued the publishers of the book version and the company that had purchased the film rights.³²² The plaintiff did not allege that the character in the play bore his name or even physically resembled him, but instead focused on the play's use of true facts. The plaintiff had masqueraded as the son of actor Sidney Poitier and had conned wealthy Manhattan families into providing him with food, lodging, and money. He stole property from all of the families with whom he had stayed. Eventually, he was arrested and pled guilty to attempted burglary in the second degree.³²³ In his complaint, the plaintiff alleged that he had created a unique character with unique characteristics that are his "sole and exclusive natural property."³²⁴ The plaintiff also asserted that "since the Play was mainly based on events of his life," the defendants had commercially exploited his unique property, thereby violating his exclusive rights.³²⁵

Under the balancing analysis set forth in this Article, *Hampton* becomes a relatively easy case. The plaintiff was asserting an economic objection to the defendants' use of truthful information that was in the public domain.³²⁶ Notwithstanding the plaintiff's allegations, he was essentially attempting to assert a property right over information. Balanced against the lack of the plaintiff's property interest is the strong creative contribution on the part of the respective defendants. Indeed, the success of the play undoubtedly was largely attributable to their efforts. Thus, this case does not involve a strong showing of unjust enrichment. Moreover, no potential for consumer confusion appears to be present in this case since no mention is made of the defendants'

320. Babe Ruth died in 1948 at the age of 53. THE CONCISE COLUMBIA ENCYCLOPEDIA, *supra* note 268, at 719.

321. 22 U.S.P.Q.2d 1713 (N.Y. Sup. Ct. 1992).

322. *Id.* at 1714.

323. *Id.* He received a sentence of between one to four years. *Id.*

324. *Id.* (quoting ¶ 8 of Complaint).

325. *Id.* As in *Pirone*, the *Hampton* court did not reach the First Amendment and right-of-publicity conflict because it found the defendants' conduct not actionable under New York's privacy statute since the plaintiff's name, portrait, or picture was not used. *Id.* at 1715.

326. The plaintiff in *Hampton* sought recovery of \$100,000,000 in compensatory and punitive damages. *Id.*

manipulation of the facts to impugn the plaintiff's integrity. Finally, this is a case involving a strong entitlement on the part of the public with respect to both the subject matter and the medium in which it was presented. Thus, an analysis of both the relevant harms and societal benefits strongly favors the defendants, who should be free to use this material concerning the plaintiff without providing any compensation.³²⁷

If the right of publicity is to accomplish its intended objectives in a meaningful fashion, it must come to terms with the First Amendment in an intellectually honest manner that is tailored to accommodate the needs of both doctrines. This Author's hope is that this proposal for a truce between these two warring factions is a step toward the implementation of such a framework.

327. From a factual standpoint, *Hampton* is similar to *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994). In *Matthews*, the court addressed the potential conflict between the First Amendment and an action for misappropriation of factual information in a fictionalized story. The court refused to hold the defendant liable for including the plaintiff's life story, absent the use of his real name, in her novel: "As there is no fear that any valuable information provided by the facts of one's life will be reduced by repeated use, the law does not forbid the 'appropriation' of this information." *Id.* at 439. The holding and rationale of *Matthews* are consistent with the thesis of this Article.

APPENDIX A
MATRIX #1: RELATIONSHIP OF RELEVANT
HARMS TO REMEDIAL CHOICE

Type of Harm	PROPERTY RULE PROTECTION	LIABILITY RULE PROTECTION	NO PROTECTION
Economic Harms to Plaintiff	Economic objections to primarily commercial uses: typically yes. Economic objections to hybrid uses: maybe yes.	Evaluate economic objection with respect to type of use.	Economic objections to informational uses: typically yes. Economic objections to hybrid uses: maybe yes.
Moral Harms to Plaintiff	Non-informational uses to which plaintiff would never consent: suggests yes.	Evaluate strength of plaintiff's moral objections.	Moral objections to informational uses: typically yes. Invalid moral objections: typically yes.
Consumer Deception	Uses to which plaintiff would never consent: suggests yes.	Evaluate degree of consumer deception.	Little or no risk: suggests yes.
Deceased Incentives	Strong risk that plaintiff will refrain from creating absent injunction: suggests yes.	Evaluate risk that plaintiff will refrain from creating absent protection. Evaluate risk that defendant will refrain from creating if forced to pay.	Little risk that plaintiff will refrain from creating absent protection: suggests yes. De minimis uses: typically yes.
Harms to Relatives	Plaintiff alive or dead for less than 20 years: suggests yes.	Evaluate use with respect to lifespan of persona.	Plaintiff dead for more than 20 years: suggests yes.
Unjust Enrichment	High potential: suggests yes.	Evaluate potential.	Low potential: suggests yes.

APPENDIX B
MATRIX #2: RELATIONSHIP OF SOCIETY'S
ENTITLEMENTS TO REMEDIAL CHOICE

Type of Use	Property Rule Protection	Liability Rule Protection	No Protection
Informational	Unlikely.	Visual Depictions conveying information: balance will result in liability rule protection or no protection; property rule protection possible in exceptional circumstances.	Typically.

Type of Use	Property Rule Protection	Liability Rule Protection	No Protection	
Entertainment	Yes in exceptional circumstances.	Yes depending on balance.	Yes depending on balance.	Pure fictionalizations: typically yes.

Type of Use	Property Rule Protection	Liability Rule Protection	No Protection
Commercial	Primarily commercial use: typically yes.	Hybrid use; commercial use with expressive needs of/or substantial creative contribution by user: property rule, liability rule, or no protection, depending on balance.	Primarily commercial use: unlikely.