

Fame[†]

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INTRODUCTION

*Fame. I'm gonna live forever. I'm gonna learn how to fly.
I feel it comin' together. People will see me and cry.*¹

No country in the world is so driven by personality as is the United States.² Fame is used to persuade, inspire, and inform Americans in nearly every aspect of their lives. As a group, Americans are fascinated not only with the concept of fame, but also with those who embody its essence. This fascination, while not uncommon in other countries, has reached epic proportions in the United States. Its impact on the legal system has spawned a legal doctrine, the right of publicity, whose primary function is to prevent the unauthorized commercial exploitation of celebrity personas.³ Since 1953, when the right of publicity first received explicit legal recognition,⁴ courts, legislatures, and academicians have become increasingly interested in the doctrine's application and scope. Indeed, the number of cases involving the right of publicity has increased dramatically over

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1. IRENE CARA, *Fame*, on SOUNDTRACK TO THE MOVIE FAME (Polydor Records 1980). By Michael Gore and Dean Pitchford. © 1980 Metro Goldwyn Mayer, Inc. All Rights Assigned to EMI Catalog Partnership. All Rights Controlled and Administered by EMI Affiliated Catalog, Inc. (BMI). All Rights Reserved. International Copyright Secured. Used By Permission. The song *Fame* was used as the theme for a 1980 movie and a television show airing from 1982 to 1983. Both focused on the lives of several young high school students at the High School for the Performing Arts in New York City.

2. According to media studies professor Jib Fowles, "[t]he prominence of the star role has been one of the most defining features of American culture as distinct from other cultures." JIB FOWLES, *STARSTRUCK* 261 (1992); see also *infra* notes 99-194 and accompanying text.

3. The right of publicity had its genesis in the right-of-privacy doctrine. See *infra* note 150. Although the right of publicity arguably applies to all individuals and not just celebrities, in practice, it is typically invoked in cases involving celebrities seeking to vindicate unwanted commercial exploitation. See Roberta Rosenthal Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 200 (1983).

4. See *Haelan Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

the past twenty years.⁵ Noticeably absent from virtually all of the judicial opinions and the volume of legal commentary on the right of publicity, however, is any consideration of the sociological and cultural influences that have prompted the doctrine's initial recognition and increasing application.

When students taking intellectual property courses are introduced to the right of publicity, they frequently ask why the doctrine is needed given the more generalized and previously existing misappropriation doctrine that attempts to protect against the usurpation of producers' monetary and intellectual investments in their products.⁶ In fact, the right of publicity can be viewed as a more specialized application of misappropriation in that it too protects against attempts to utilize another's investment—this time the investment in a person's individual characteristics such as name, likeness, and other recognizable attributes. It is not surprising that our obsession with fame and our reverence for celebrities have given rise to a unique doctrine designed to protect against unauthorized attempts to utilize famous personas. Still, the doctrine presents something of an irony in that it provides increased economic protection for those who already are at this country's top income level.⁷

5. A Westlaw key number search of all of the right-of-publicity litigation by year since 1953 not only reveals this marked increase, but also indicates that a broad variety exists in the geographic locations in which right-of-publicity issues are being litigated. Between 1953 and 1974, there was an average of between four and five right-of-publicity cases decided each year. Between 1975 and 1996, the average was about 14 cases per year. *See* Search of Westlaw, ALLSTATES-HN Database, Key Number 379K8.5(6) (Oct. 21, 1997).

Several issues have cropped up regarding the application and scope of the right of publicity. These include which attributes of a persona should be protected, whether the right is descendible and therefore may be exercised by a persona's heirs and licensees, how long the right should last, and how the right should be exercised in light of the competing concerns of the First Amendment. For an overview of these issues, see ROCHELLE COOPER DREYFUSS & ROBERTA ROSENTHAL KWALL, *INTELLECTUAL PROPERTY* 547-50 (1996). This source also contains a comprehensive list of recent law review articles on the right of publicity. *See id.* at 550-51. Currently, about half of the states have recognized the right of publicity, and in at least 15 of these states, legislation exists that governs this area either partially or completely. *See id.* at 547.

6. The doctrine of misappropriation was first recognized by the Supreme Court in *International News Service v. Associated Press*, 248 U.S. 215 (1918) (enjoining INS from copying news stories from bulletin boards of AP members and transmitting the news contained in those bulletin boards to its own members). Essentially, misappropriation protects producers' investments of time, effort, money, and expertise in their products "against those who would reap where they had not sown." DREYFUSS & KWALL, *supra* note 5, at 519. In short, misappropriation is the intellectual property version of unjust enrichment.

7. Oprah Winfrey reportedly is the highest paid woman in show business, with annual earnings of around \$40 million. *See* Celeb Site (visited Sept. 4, 1997) <<http://www.celebsite.com/people/oprahwinfrey/index.html>>. In the summer days preceding Michael Jordan's 1996 contract negotiations, the news stations in Chicago conducted endless speculation as to the ultimate figure Jordan would obtain. When his contract finally was announced in mid-July, the deal was reportedly for more than \$30 million, making Jordan the highest-paid player in the history of competitive team sports. *See* Terry Armour, *Looking Beyond the Jordan Era*, CHI. TRIB., July 14, 1996, § 3, at 1. Jordan's 1997 deal was for \$33.14 million. *See* Irv Kupcinet, *The Truth About Michael Jordan*, CHI. SUN-TIMES, Aug. 29, 1997, at 48. Demi Moore, Hollywood's highest paid actress, received a record-breaking \$12.5 million

More significantly, the right of publicity has come under attack recently on the ground that it eliminates important semiotic material from the public domain. Critics of the right of publicity charge that allowing celebrities to control the meanings of their constructed personas deprives us all of the ability to “recode” or reinterpret these texts for our own personal expression. Their argument can be illustrated by the urban gay community’s adoption of Judy Garland’s image as a powerful means of self-expression in the 1950s. Opponents of the right of publicity allege that the doctrine harms society by thwarting the public’s ability to invoke cultural icons such as Judy Garland for purposes of self-expression and to determine their ongoing cultural meaning.⁸

This Article contends that once the historical, sociological, and cultural influences are duly considered, the right-of-publicity’s place in our legal system becomes more defensible, both theoretically and practically. On the whole, relatively little research exists on the underlying causes of the fame phenomenon in the United States.⁹ Moreover, none of the existing works has attempted to illuminate the right of publicity in light of the complex explanations underlying our fascination with fame. This Article undertakes such an examination and demonstrates that the right of publicity is consistent not only with our cultural fabric and history, but also with our legal conceptions of property. In addition, this Article explores the socially based criticisms of the right of publicity, and

for her role in the 1996 movie, *Striptease*. See Dan Ruck, *Daring Demi* (visited Oct. 23, 1997) <http://mmnewsstand.com/static/Lotto/lotto_demi.html>. Jim Carrey earned a record-breaking \$20 million for his role in *The Cable Guy*, also released in 1996. See Mark Caro, *Changing a Screen Image Is a Risky Business*, CHI. TRIB., July 14, 1996, § 7, at 1. Michael Jackson reportedly earned \$70 million from the sales of his *Thriller* album. When actress Jane Wyman was playing the matriarch of a wine-making family in the nighttime soap opera series *Falcon Crest* and earning \$1.6 million per year, her ex-husband, former president Ronald Reagan, was earning \$200,000 as the leader of our nation. See FOWLES, *supra* note 2, at 187-88.

Even if media reports of celebrity earnings are somewhat exaggerated, more reliable information can be gathered when celebrities’ incomes become a matter of public record through the judicial process. In 1987, litigation revealed that actress Joan Collins earned a total of \$5.2 million during the 13 months she had been married to Peter Holm, who was suing her for divorce. A breach of contract action against Eddie Murphy by an ex-manager revealed that the performer’s total salary for the six-year period in question was \$120 million. See *id.* at 188-89.

Although these ranges clearly represent the upper end of the spectrum even among celebrity earnings, the income of more moderately compensated celebrities in this country also is extremely high as compared to the population at large. See *id.* at 186-89. For example, soap opera regulars earn anywhere from \$700 to \$5000 per episode, and appear in an average of two shows a week. See Margalit Fox, *The Small Town on East 44th Street*, NEWSDAY, May 22, 1994, § Fanfare, at 8, available in 1994 WL 7435102. In addition to what they earn plying their trade, celebrities have numerous opportunities for lucrative endorsements and receive an untold number of valuable gifts and “freebies.” See FOWLES, *supra* note 2, at 189; IRVING REIN ET AL., HIGH VISIBILITY 333 (1987).

8. See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 194-95 (1993) (discussing the Judy Garland phenomenon); see also sources cited *infra* notes 69-72 and accompanying text.

9. See FOWLES, *supra* note 2, at x; JOSHUA GAMSON, CLAIMS TO FAME 6 (1994).

finds them insufficient to negate the well-deserved status of the right of publicity as a property right.

Part I of this Article provides a historical overview of fame in this country by drawing from works of history, the social sciences, and media studies. Part II explores the interdisciplinary underpinnings of the fame phenomenon more specifically in the context of the right of publicity. It demonstrates that the development and application of the right of publicity is a natural outgrowth of a multitude of influences in our society. This Part also argues that its treatment as a property right is completely justified in light of our conceptual notions of property, and that treating the right of publicity as such does not engender any social harms that cannot be handled with a thoughtful application of the doctrine.

I. THE FAME PHENOMENON: A HISTORICAL OVERVIEW

The documented origins of fame date back to the ancient Greeks, when Alexander the Great imprinted his image on coins circulated throughout the lands he conquered.¹⁰ Still, until the seventeenth century, only aristocrats and heroes typically had fame. Their fame, however, was unlike the fame with which we are familiar today in that it was not the result of media attention but instead was established over time through word of mouth. Fame in these earlier centuries focused on reports of deeds and virtues. In *The Frenzy of Renown*, a comprehensive chronicle of the origin of fame, Professor Leo Braudy suggests that the concept of individual fame arose with Oliver Cromwell's overthrow of Charles I in England and his subsequent rule over England in the seventeenth century. The ruling of England by a "private man" rather than a descendant of kings opened Europe's eyes to the potential for individual greatness and achievement,¹¹ and consequently reduced the stature of the royals from gods to humans.¹²

10. See Robert S. Cathcart, *From Hero to Celebrity: The Media Connection*, in *AMERICAN HEROES IN A MEDIA AGE* 36, 36-37 (Susan J. Drucker & Robert S. Cathcart eds., 1994). In his essay, Cathcart states that "[p]erhaps no civilization other than our modern electronic one has exceeded the Romans in their ability to fill cities with the images of their hero/celebrities." *Id.* at 37; see also LEO BRAUDY, *THE FRENZY OF RENOWN* 32, 42-43 (1986).

11. Cromwell, "the 'private' man who had ruled without the sky falling in, left the growing impression that human aspiration need not depend on the monarch's approval to define its goals or its achievement." BRAUDY, *supra* note 10, at 344. Shortly after Cromwell reestablished English military power in Europe, he requested that his portrait be done, "warts and all." According to Braudy, this phrase "not only announces a face that would be unprettified by aristocratic fictions of appearance," but also "makes that look a worthy subject of painting." *Id.* at 338. Thus, "the possibility that rule was not only hereditary, but also had something to do with abilities that might be found outside the royal family, and even outside the aristocratic classes, was firmly fixed in the national experience." *Id.*

12. Fame was relatively unimportant in the religious centuries when everyone, from the king down to the peasants, believed in the soul's immortality. The commoners of France were allowed to wander around Versailles and watch the king at his banquet table. He ate in public so that all could see, not the king himself, but rather "God's representative on earth." Florence King, *House of Fame*, *NAT'L REV.*, June 8, 1992, at 64, 64; see also *infra* text accompanying notes 275-78.

Moreover, by the seventeenth century, the new technologies of printing and copper engraving allowed for a greater dissemination of visual images, and “the pursuit of fame was clearly becoming democratized” as a greater number of people occupied the public stage.¹³ The eighteenth century’s growing engagement with the issues of individual, political, and economic freedom, which provided an impetus for the American and French revolutions, created “a potent free market of fame, in which the use of media—writing, painting, and engraving” became “a lever to power.”¹⁴ This new market culture helped to develop the notion of a “new, theatrical, other-oriented sense of self”; a manipulable front to put on display and sell in the marketplace.¹⁵ Attempts to satisfy the market led to increased individuation of images.¹⁶

Professor Braudy has observed that America, as the “newest nation . . . had been founded in fame.”¹⁷ America’s relative youth has given rise to qualities that have contributed to our obsession with fame. Canadian-born network news anchor Peter Jennings has noted that our country’s celebratory nature derives from the fact that we are too young to be skeptical or cynical.¹⁸ As a nation with comparatively little history to celebrate, Americans celebrate the present. Thus, in a nation with no history, being *remembered* has no meaning, whereas being *known* not only has meaning, but also practical rewards.¹⁹

This shift in focus from the ruling class to the individual was even reflected in the works of the scientists and philosophers of the time. See BRAUDY, *supra* note 10, at 345 (contrasting the human-centered rational views of Descartes, Galileo, Hobbes, Locke, and other seventeenth century philosophers with Aquinas and the other medieval theologians whose sense of order depended on divine conceptions).

13. GAMSON, *supra* note 9, at 17-18.

14. BRAUDY, *supra* note 10, at 393.

15. GAMSON, *supra* note 9, at 18.

16. See *id.* Braudy also notes that the eighteenth century “marks a diffusion of the image of the famous into places, social as well as geographical, it had never gone before.” BRAUDY, *supra* note 10, at 377.

17. BRAUDY, *supra* note 10, at 393.

18. See David Shaw, *Hunger for Heroes, Villains Rooted in American Psyche*, L.A. TIMES, Feb. 17, 1994, at A1.

19. The technologies of the twentieth century have intensified our preoccupation with the present.

In the world of immediate communication, fame particularly celebrates the fame of the moment, the fame of nature and instinct, of the individual making himself into something unparalleled and unprecedented. While European fame still maintains some connections with the model of the king and the aristocrat, American fame is the unveiling of a self that is its own world, recognizing no other time.

BRAUDY, *supra* note 10, at 540.

This emphasis on the present perhaps explains the importance which media scholars as well as performers attribute to consistency of performance on the part of celebrities. Research has shown that members of the public intuit a performer’s essence via a repeated series of consistent performances. See RICHARD DYER, *STARS* 110 (1979); FOWLES, *supra* note 2, at 166. Fowles also writes that actress Bette Davis once remarked, “I firmly believe that the public must know 75 percent of what to expect from an actor.” *Id.*; see also Caro, *supra* note 7, § 7, at 1 (noting that “the risks of stars’ straying from familiar form is higher than ever”). If this continuity in performance is lacking, the celebrity in a present-centered society arguably is

Along with the organization of a new culture came new mediums in which the culture could be disseminated.²⁰ In the early eighteenth century, visual images served as one of the primary mechanisms of unification for the young nation.²¹ Visibility was linked with the highly prized qualities of freedom, democracy, and leisure.²² From the beginning, our leaders such as Benjamin Franklin understood the power and utility of these images in coalescing support for their causes.²³ Franklin's career became a model for American fame in that it espoused the notion that individuals and their careers are the product of their own making rather than the outcome of divine selection.²⁴ Franklin's "self-monitored career" served as a guide for others, and soon the notion that one's public image could be "fashioned and sold" heightened the growing sentiments of self-determination and individualism.²⁵ In addition, the increasing visual displays of those in the public arena brought about by new technology fostered the creation of a sense of "inner mystery," the creation of an "aura of personal withdrawal," on the part of public personas.²⁶ Thus, there arose "the notion of a gap between the public and private self that can be bridged only by digging into the self's 'interior.'"²⁷ The application of this concept can be traced at least back to George Washington,²⁸ and it foreshadowed the twentieth-century practice of providing information about one's domestic sphere to create an image of public accessibility.²⁹

placed at a disadvantage. Moreover, a society which focuses on the present rather than the past also needs constant reminders about a performer's essence, or else the sought-after continuity will be defeated. The need for these reminders helps explain the deluge of attention performers receive in various forms of media, most of which is delicately crafted so as to further cement a celebrity's designated popular image. The cultivation of a celebrity's image is amply treated in FOWLES, *supra* note 2, GAMSON, *supra* note 9, and REIN ET AL., *supra* note 7. See also *infra* notes 171-88 and accompanying text (discussing the role of the media in creating celebrities' personas).

20. See *infra* note 141 and accompanying text.

21. The "personalization" of America that resulted from increasing visual depictions of our political leaders "established a language of psychological connection to the country that ran deeply beneath religious or political obligations." BRAUDY, *supra* note 10, at 453.

22. See *id.* On seeing the portrait of Hiram Revels, the first black senator, nineteenth-century black activist Frederick Douglass wrote: "Pictures come not with slavery and oppression but with liberty, fair play, leisure, and refinement." *Id.*; see also *infra* text accompanying notes 275-78 (discussing the virtually spiritual quality taken on by America's visible spirit).

23. See BRAUDY, *supra* note 10, at 454. Ironically, Benjamin Franklin was probably the first person to document the limitations on personal freedom which came with the territory of public visual dissemination. In a letter to his daughter, he wrote that with all of the pictures, busts, and prints of his person spread throughout the land, "he durst not do anything that would oblige him to run away, as his phiz would discover him wherever he should venture to show it." *Id.* (quoting letter from Benjamin Franklin to his daughter (1779)).

24. See *id.* at 370.

25. *Id.* at 370-71.

26. *Id.* at 460-61.

27. GAMSON, *supra* note 9, at 19.

28. See *id.*

29. See BRAUDY, *supra* note 10, at 461.

By the middle of the nineteenth century, the vast expansion of technology and the media marked the beginning of a new era of communication that still influences our attitudes toward public personas.³⁰ Even our modern use of the word “celebrity” to indicate a famous personality originated at this time, the beginning of the Graphic Revolution.³¹ Modern society’s view of “celebrities,” emphasizing “the commercial value of high visibility,”³² can indeed be traced to this period as well. The nineteenth century individual who perhaps best captured the publicity value that was possible from the new forms of technology was the master showman-publicist, P.T. Barnum, whose well-publicized displays of bizarre and unique performers captured the hearts of Americans across the country.³³

The American public’s fascination with Barnum denoted the beginning of a gradual shift in the types of individuals society is most willing to acclaim publicly, a shift that has become even more pronounced in the latter half of the twentieth century. In the early nineteenth century, President Andrew Jackson was the epitome of a popular idol in an era prior to the birth of the star-performer role.³⁴ Although public interest in the president and other national leaders never completely died, by the end of the nineteenth century, entertainers began to occupy center stage in the celebrity arena with an increasing degree of frequency. A 1942 study by sociologist Leo Lowenthal of biographies printed in popular magazines revealed that from the beginning of the twentieth century until 1940, the percentage of biographies of entertainers more than doubled, while political biographies dropped from forty-six percent of the total to twenty-five percent.³⁵

30. *See id.* at 450, 476.

31. *See* DANIEL BOORSTIN, *THE IMAGE 57* (Atheneum 1987) (1961). The word “celebrity” is derived from the Latin terms *celebritas* for “multitude” or “fame” and *celeber* for “frequented” or “famous.” Originally, the term “celebrity” meant a condition rather than an individual, a use that dates back to at least the early seventeenth century. *See id.* Interestingly, the use of the term “star” to indicate featured performers who could draw large crowds also surfaced around 1830. *See* FOWLES, *supra* note 2, at 10.

32. REIN ET AL., *supra* note 7, at 14.

33. *See* BRAUDY, *supra* note 10, at 498-500; GAMSON, *supra* note 9, at 20-22. According to Gamson, Barnum “became an international figure for the way he focused attention to create fame and illusion.” *Id.* at 22 (emphasis in original). Braudy makes a similar observation: “Barnum was a prime product of the new age because he became world famous not for anything that he did himself so much as for the way he focused attention on the talents, the peculiarities, and the unique nature of animals, objects, and other people.” BRAUDY, *supra* note 10, at 500; *see also infra* note 261.

34. *See* FOWLES, *supra* note 2, at 10-11.

35. *See* LEO LOWENTHAL, *LITERATURE, POPULAR CULTURE, AND SOCIETY* 109-18 (Pacific Books 1968) (1961); *see also* BOORSTIN, *supra* note 31, at 59-61; FOWLES, *supra* note 2, at 11-12; GAMSON, *supra* note 9, at 28.

According to Professor Braudy, only those business leaders who are either clearly self-made or whose wealth has reached astronomical proportions are truly considered famous celebrities. *See* BRAUDY, *supra* note 10, at 591. The growing fascination with college dropout Bill Gates, the CEO of Microsoft who is one of the wealthiest people in the world with a net worth of \$18 billion, supports this observation. *See* Graham Button, *The Superrich*, *FORBES*, July 15, 1996, at 124, 124. Still, the desire to become famous for the sake of fame, rather than money, is now emerging even among business leaders. To achieve this end, executives will have to “step on

The study also showed a decline in the number of biographies of business leaders during this period.³⁶

Notwithstanding the growing interest in celebrities over the course of the twentieth century, the celebrity epidemic did not begin to emerge until the early 1960s. One study revealed that the use of the term "celebrity" in titles of magazine articles began a visible escalation in the early 1960s.³⁷ Dick Stoley, the original managing editor of *People* magazine, which was first published in 1974, attributed the publication's enormous success to the fact that "the country was in the need for a celebration of the individual. We caught the wave."³⁸ Between 1946 and 1950, the first five years of the Gallup Poll's existence, singer Kate Smith was the only person listed among the top ten individuals most admired by Americans who was not a political, religious, or military leader.³⁹ In contrast, recent "most admired" lists published by the Gallup Poll are overwhelmingly populated by television and movie personalities, athletes, and other entertainers.⁴⁰ In 1959, Vice President Richard Nixon participated in the presentations of the Eleventh Annual Emmy Awards. Today, audiences turn on the Emmies and the Oscars to see famous entertainers bedecked in jewels and the latest fashions.⁴¹

center stage and be a performer" rather than operate "behind the scenes." Leo Brady, *In America, Fame is an Open Door*, U.S. NEWS & WORLD REP., Oct. 6, 1986, at 66, 66.

36. See LOWENTHAL, *supra* note 35, at 109-18.

37. See REIN ET AL., *supra* note 7, at 7-8. According to a study discussed in Rein's work, the number of times the word "celebrity" appeared in magazine article titles jumps up in the early 1960s, coinciding with President Kennedy's assassination and the British rock invasion. The figure then drops again, but by the early 1970s, it is at a level theretofore unprecedented. The increase steadily climbs up through 1980, at which point the study terminates. *See id.* Prior to the early 1960s, a smaller peak period also occurred around 1930, coinciding with the introduction of talking motion pictures. *See id.*

38. FOWLES, *supra* note 2, at 123 (quoting Dick Stoley). *US Magazine*, a publication similar to *People*, first appeared in 1977. The magazine format has even penetrated television, with shows such as *Entertainment Tonight* (which premiered in 1981) featuring informational segments on celebrities. Interviews with celebrities also appear regularly on morning and evening news shows and are a staple for many talk shows. *See infra* note 168 and accompanying text.

39. See Shaw, *supra* note 18, at A1.

40. In the five years preceding 1994, the Gallup "most admired" lists have included Cher, Bill Cosby, Rush Limbaugh, Donald Trump (twice), Princess Di (three times), Michael Jordan (three times), Elizabeth Taylor (four times), and Oprah Winfrey (five times). *See id.* Similarly, a survey of the top ten public figures most admired by teenagers published in 1986 in *The World Almanac* showed nine performers and one ex-performer (former president Ronald Reagan). *See FOWLES, supra* note 2, at 165. In 1992, *The World Almanac* survey among teenagers contained seven celebrity figures in addition to General H. Norman Schwarzkopf (#1), then-president George Bush (#3), Barbara Bush (#5), and U.S. Supreme Court Justice Sandra Day O'Connor (tying with Paula Abdul for #10). *See THE WORLD ALMANAC AND BOOK OF FACTS 1992*, at 32 (Mark S. Hoffman ed., 1991).

41. In 1950, Nobel Peace Prize recipient and Division Head of Department of State Ralph Bunche presented the award for Best Picture at the Oscars. In 1938, politician James Roosevelt, son of Franklin, also participated in the Oscars. *See Telephone Interview with the Reference Librarian of the Academy of Motion Picture Arts and Sciences* (July 11, 1996). Media studies professor Jib Fowles sees the Oscars as the largest representation of the "celebratory passion." FOWLES, *supra* note 2, at 196. Except for the Super Bowl, the Academy Awards generally

Although the public's interest in political leaders does not compare with its interest in performers, a liaison between political leaders and entertainers has become more apparent since our interest in celebrities has swelled. The link between performers and politicians can be traced at least to the period of World War I. During the war, the stars of the emerging film medium used their talents and energies to sell war bonds, thereby convincing the American public of the war's validity and necessity.⁴² Beginning with the Kennedy administration, however, this link became even more apparent. Kennedy's association with celebrities such as Frank Sinatra and Sammy Davis, Jr., both of whom used their influence in the campaign process, is well known.⁴³ As one observer wrote about the period beginning with the Kennedy administration: "For a long time we had been given the impression that a president could get a movie star on the phone when he needed him. Now, it seemed, certain movie stars could get a president on the phone when they had needs."⁴⁴ Ronald Reagan, a former actor, and President Clinton, both have visible ties to the entertainment industry.⁴⁵ President Clinton even played the saxophone on the *Arsenio Hall Show*.⁴⁶ We live in an age in which presidents are entertained at the White House by celebrities at festive,

attracts the largest number of American viewers for the year. See *id.* at 196-98 for a history of, and commentary on, the Oscars.

42. See BRAUDY, *supra* note 10, at 556-57. These efforts were undertaken by major performers of the era such as Douglas Fairbanks, Jr., Charlie Chaplin, and Mary Pickford. See *id.*

43. See, e.g., SAMMY DAVIS, JR. ET AL., YES I CAN 548-49 (1965); KITTY KELLEY, HIS WAY: THE UNAUTHORIZED BIOGRAPHY OF FRANK SINATRA 276-94 (1986); see also BRAUDY, *supra* note 10, at 567 (noting Kennedy's association with people in show business).

44. RICHARD SCHICKEL, INTIMATE STRANGERS 169 (1985). Schickel also concludes: "In the past, it was understood that it was the performer who had everything to gain from these connections with the politically mighty. In this brave new world it was clear that the politicians had much to gain as well." *Id.*

45. See generally MICHAEL PAUL ROGIN, RONALD REAGAN, THE MOVIE (1987) (discussing the political and theatrical careers of Ronald Reagan).

Celebrities who contributed heavily to Clinton's campaign include Sharon Stone, Barbra Streisand, and Michael Douglas. See *Stars Back Clinton with Cash*, EVENING STANDARD, May 1, 1996, at 19. The Clinton video for the Democratic National Convention was produced by television comedy-show producers Harry Thomason and Linda Bloodworth-Thomason. See GAMSON, *supra* note 9, at 187. According to one source, "Clinton's lifelong fascination with the entertainment industry has grown since he became president." Kenneth T. Walsh, *The President and Tinseltown*, U.S. NEWS & WORLD REP., May 9, 1994, at 46, 46. He is a regular viewer of contemporary movies that some would consider "low brow" (e.g., *The Terminator*, *The Naked Gun*, *Four Weddings and a Funeral*), as well as television shows such as *American Gladiators*, *Evening Shade*, and *Seinfeld*. See *id.* at 47.

Schickel's commentary quoted in the text on the accessibility of presidents to movie stars by telephone, see *supra* text accompanying note 44, was given new life in a 1994 article that reported that Barbra Streisand "has a special hot-line number to reach [President Clinton] any time of the day." Allan Hall, *Home Alone . . . With Mr. President. Barbra—the Riddle of Her Nights at the White House . . . And the Love She Cannot Find*, DAILY MIRROR, Apr. 11, 1994, at 22.

46. President Clinton wore shades and performed *Heartbreak Hotel* with the band on the *Arsenio Hall Show* on June 3, 1992. See Dennis Moore, *Arsenio Quits After Losing Late-Night War*, USA TODAY, Apr. 19, 1994, at 1D.

nationally televised galas, and celebrities entertain at the national conventions of our political parties.⁴⁷ More significantly, American politicians now employ the same public relations strategies used by entertainers.⁴⁸

The performers themselves also are becoming more political as a group. Big names such as Christopher Reeve, Cybill Shephard, Oprah Winfrey, and Robert Redford have testified at congressional hearings to champion their causes.⁴⁹ Some people in the entertainment business have formed a group called "The Creative Coalition," whose purpose is to educate and inform the public about important political issues. In a television interview on August 28, 1996, Coalition member and actor Ron Silver observed that, because celebrities "have a power conferred on them," the public will pay attention to the messages they impart.⁵⁰ Politics has

47. See, e.g., David M. Alpern et al., *A People Party*, NEWSWEEK, Jan. 31, 1977, at 24, 24 (Jimmy Carter's preinauguration gala); John Corry, *The Inauguration of President Reagan, An American Pageant*, N.Y. TIMES, Jan. 23, 1985, at C22 (Ronald Reagan's inauguration); Andy Edelstein, *The Baby Boomers' Big Bash*, NEWSDAY, Jan. 7, 1993, § News, at 17 (President Clinton's preinauguration gala); Joseph McLellan, *Stars and Austerity at Ford's Theatre Gala; a Night with the Sleek & Powerful; Frivolity for Funds*, WASH. POST, Mar. 23, 1981, at C1 (fundraiser for performing arts); John Rockwell, *Pop (as in Populism) Go the Festivities*, N.Y. TIMES, Jan. 20, 1989, at A13 (George Bush's inaugural ball). Nationally renowned soul singer Aretha Franklin made headlines by performing at the 1996 Democratic National Convention. See Stephanie Zimmermann, *Franklin Gets City Residents into Spirit of Convention*, CHI. SUN-TIMES, Aug. 24, 1996, at 5.

48. See GAMSON, *supra* note 9, at 189 ("The production setting in which political figures come to public attention mimics, and sometimes borrows techniques directly from, entertainment celebrity."). The conclusion in Gamson's book is entitled, "Celebrity, Democracy, Power, and Play," and it provides an interesting look at the similarities of process noted in the text. See *id.* at 186-96. With respect to the Clinton video mentioned *supra* note 45, Gamson calls it "a *People* story set to sentimental music." *Id.* at 187; see also Christi Parsons, *Behind Every Good Candidate is an Eye-Catching, Made-for-Media Backdrop*, CHI. TRIB., Sept. 15, 1996, § 2, at 1 (discussing the staging underlying the public appearances of politicians).

As early as 1956, C. Wright Mills observed that "on national levels, [politicians] are carefully groomed and coached for the TV camera, and, like other performers, the more important of them are subject to review by entertainment critics." C. WRIGHT MILLS, *THE POWER ELITE* 75 (1956).

49. See *Reauthorization of the National Foundation for the Arts and Humanities Act of 1965: Hearings Before the Subcomm. on Educ., Arts, and Humanities of the Senate Comm. on Labor and Human Resources*, 104th Cong. 7-29 (1995) (statement of Christopher Reeve, copresident of The Creative Coalition); *Effect of Federal Ban of RU 486 on Medical Research, New Drug Development, and Pharmaceutical Manufacturer: Hearing Before the Subcomm. on Regulation, Bus. Opportunities, and Energy of the House Comm. on Small Bus.*, 102d Cong. 7-12 (1992) (statement of Cybill Shephard, women's health advocate); *Protecting Children in Day Care: Building a National Background Check System: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong. 9-34, 77-176 (1991) (statement of Oprah Winfrey, TV talk show hostess); *Global Warming and its Implications for California: Hearing Before the Senate Comm. on Energy and Natural Resources*, 101st Cong. 162-69 (1989) (statement of Robert Redford, representing the Institute for Resource Management).

50. *WLS Eyewitness News* (local ABC television affiliate broadcast, Chicago, Ill., Aug. 28, 1996). The Creative Coalition, which maintained a presence at both parties' 1996 political conventions, is founded on the concept that important political issues are made even more significant to the American public when they are championed by celebrities.

even proven to be an attractive second career for a number of famous performers and athletes, the most notable of whom is Ronald Reagan.⁵¹

As we head into the twenty-first century, our notions of fame will be refined even further. Professor Braudy suggests that, although the dominant definitions of fame have centered around "an upper-class . . . white male Western culture," the past twenty years in the United States have been marked by significant black, ethnic, and female influences that are currently struggling with the older definitions of fame.⁵² The notion that stars typify specified social types in America was initially developed by sociologist Orrin Klapp, who also pioneered a study of these social types.⁵³ Klapp's typology has been criticized on the ground that it features a white, heterosexual, male model, into which women fit precariously⁵⁴ and blacks, other ethnic groups, and homosexuals do not fit at all.⁵⁵ Interestingly, although some works subsequently have explored female and

According to a 1979 study by political scientist Wayne Ault of 500 randomly selected adults, the majority of respondents considered celebrities to be fair and reliable sources of information, and one-third admitted that they had become "more concerned or interested in a public issue" as a result of celebrity activity. FOWLES, *supra* note 2, at 181-82; *see also infra* Part II.C.1.

51. *See* FOWLES, *supra* note 2, at 230. Other celebrities who made this career switch include the following entertainers and athletes: football player Jack Kemp was the 1996 Republican vice presidential candidate, *see* Jenni Carlson, *On Bowl Days . . . Ask Any Politician*, KAN. CITY STAR, Aug. 24, 1997, at L14; actor Clint Eastwood became the mayor of Carmel, California, *see* Lewis Grizzard, *Carmel's Not Tough Enough for Eastwood*, ATLANTA J. & CONST., Feb. 10, 1986, at E01; rock star Sonny Bono became the mayor of Palm Springs, California, *see* Adam Woong, *Sonny Bono Didn't Change, But His Job Title Did*, SEATTLE TIMES, June 30, 1988, at D1; basketball star Bill Bradley was elected a U.S. senator, *see* Elliot Pinsley, *N.J. Senator's Old Jersey Rescued in Knick of Time*, RECORD (Northern New Jersey), July 9, 1992, at A07; actor Fred Thompson became a U.S. senator, *see* Marc Lacey, *As Theater, Hearings Have Slow 1st Act Senate: Thompson Investigation Has Yet to Engage the Public, But History Shows It's Far Too Soon*, L.A. TIMES, July 27, 1997, at A32; and baseball player Jim Bunning became a U.S. congressman, *see* Patrick Crowley, *Helms Boosts House Candidate Ex-Red Backing Kidney in Run for Congress*, CINCINNATI ENQUIRER, Sept. 6, 1997, at B03. Conversely, some politicians such as former presidential candidate Jesse Jackson, *see* Monica Collins, *"World" Grows Up with Class*, USA TODAY, Mar. 29, 1989, at 3D; the late Speaker of the House Tip O'Neill, *see* Carolyn Barta, *Crossover Performers: Boundaries Separating Politics, News-Media Entertainment Blur*, DALLAS MORNING NEWS, May 12, 1996, at 1J; and former New York City mayor Ed Koch, *see* Blaine Harden, *Hizzoner to Your Honor, Brash Ed Koch Lays Down the Law on 'People's Court'*, WASH. POST, Sept. 22, 1997, at B01, have become part-time actors by playing themselves on television comedies.

52. *See* BRAUDY, *supra* note 10, at 596-97.

53. *See* ORRIN E. KLAPP, *HEROES, VILLAINS AND FOOLS* (Acgis Publ'g Co. 1972) (1962).

54. Other works support the idea that the majority of celebrities are male. In Professor Jib Fowles's study of 100 "stars," 67% were men. *See* FOWLES, *supra* note 2, at 55. He noted that this is not surprising since nearly all starring athletes are men, along with the majority of comedians and the greater proportion of screen performers. *See id.* A 1978 study of people who had been the subject of a biography or autobiography between 1962 and 1977 revealed that 74% of the 317 people included in the study were men. *See id.* at 58-59.

55. *See* DYER, *supra* note 19, at 54.

homosexual social types,⁵⁶ virtually no literature has explored racial social types or has concentrated on questions involving racial and ethnic influences on fame.⁵⁷ As influences other than those of the dominant culture continue to impact upon traditional notions of fame and celebrity, more research on minority social types undoubtedly will emerge, along with a greater visible impact of these models on our conceptions of fame.⁵⁸

There can be no doubt that the interest in personality and celebrity seems to be “woven deeply into the fabric of our social structure as well as our national character.”⁵⁹ In our society, fame clearly is something that is highly prized. Writing in 1956, sociologist C. Wright Mills observed that the celebrities of the mass media lack any sort of stable power or influence.⁶⁰ While this statement may have been true three decades ago, the influence of those in the media spotlight has grown considerably in both our culture and our politics.⁶¹ Those who are well known in our society, particularly in the areas of entertainment and sports, possess a magical charm that captivates the hearts and souls of most Americans.

56. See *id.* at 54-68 (discussing female and homosexual models); FOWLES, *supra* note 2, at 67 (examining the constituents of “Star Village,” which the author defines as “a mythic community composed of the different types of people whom the American public wants to observe”); GAYS AND FILMS (Richard Dyer ed., 1980).

57. Even Fowles’s 1992 treatment of “Star Village,” see *infra* notes 299-303 and accompanying text, contains almost no discussion of race as a factor in the composition of the mythic star community. Fowles also does not discuss homosexuality, although he does examine female role models. See also DYER, *supra* note 19, at 37 n.6 (claiming no knowledge of research examining the differences in the star-audience relationship according to race); John Fiske, *The Cultural Economy of Fandom*, in *THE ADORING AUDIENCE* 30, 32 (Lisa A. Lewis ed., 1992) (noting the dearth of studies on ethnic and racial fandom).

58. Professor Braudy optimistically believes that “we are gradually leaving an era in which social role, profession, sexuality, and ethnic origin were the prime determinants of public ‘character’ and entering one in which the commonality of shared desires is more compelling than their distinctions.” BRAUDY, *supra* note 10, at 597. There are indications that things are already changing, especially in the movie industry. More females are receiving directing and producing opportunities and are opening their own production companies. For example, Penny Marshall and Barbra Streisand have produced several movies, and Oprah Winfrey and Mary Tyler Moore have participated in their own production studios. Actresses such as Sharon Stone, Michelle Pfeiffer, Whoopi Goldberg, Julia Roberts, and Demi Moore are making inroads into the motion picture salary structure that historically has favored men. See Andrew Hindes, *H’wood Finally Opening Vault to Female Stars*, *DAILY VARIETY*, Dec. 5, 1995, at 7; Michael Kilian, *British Rule: They’re Better Actors, So Why Aren’t They Bigger Stars?*, *CHI. TRIB.*, Apr. 28, 1996, § 7, at 1. Still, a salary differential between male and female stars clearly exists. See Hindes, *supra*, at 7 (noting that while the highest paid actresses are now breaking \$10 million per picture, their male counterparts are approaching \$20 million); see also *supra* note 7.

The 1996 Academy Awards were hosted by Whoopi Goldberg and produced by Quincy Jones. Oprah Winfrey also was there to greet guests. Still, the fact that only one nomination out of 166 went to an African American actor caused Reverend Jesse Jackson and his Rainbow Coalition to protest the event. See Beth Pinsker, *Blacks at Crossroads in Hollywood*, *NEWS & REC.*, May 19, 1996, at D10; *Protests and Surprise Guests Mark Final Pre-Oscar Hours*, *CHI. TRIB.*, Mar. 25, 1996, at C2.

59. Shaw, *supra* note 18, at A19.

60. See MILLS, *supra* note 48, at 90-91.

61. See *supra* notes 43-48 and accompanying text.

That the famous in our society have power is obvious; that it is the American people in the aggregate who are largely responsible for conferring this power is equally true, although perhaps somewhat less obvious.⁶²

Disagreement exists about whether our society's intense fascination with fame is a positive sociological force. Many scholars deride our country's obsession with fame. For example, historian Daniel Boorstin cynically laments the decline of real heroes in our society and our substituted admiration for those who are simply known for their "well-knownness."⁶³ In contrast, media studies professor Jib Fowles believes that our obsession with stars serves important social functions that help preserve our vitality as a nation.⁶⁴ Other commentators maintain a relatively neutral stance toward our fascination with fame.⁶⁵ As will be discussed more fully in Part II, the value that society places upon celebrities derives from a complex set of explanations. Still, the extent of this value evidences the central role that celebrity personas play in our society. Opponents and proponents of the celebrity phenomenon may disagree regarding whether this role is a positive or negative one, but few can dispute the simple truth that the celebrity culture exists because of certain needs in our society. The right of publicity, a legal doctrine that plays a critical role in the lives of our nation's celebrities, exists in this country largely as a response to these societal needs. The next part of this Article examines the connection between the right of publicity and the celebrity phenomenon more closely.

II. THE RIGHT OF PUBLICITY IN PERSPECTIVE

In much the same way as our fascination with fame has triggered controversy among scholars of our culture,⁶⁶ the right of publicity has engendered controversy among the legal profession. Although criticism of the right of publicity has become more vociferous in recent years,⁶⁷ many within the American legal

62. See *infra* notes 260-69 and accompanying text.

63. BOORSTIN, *supra* note 31, at 57-61. Other critics include MILLS, *supra* note 48, at 71-93; IAN I. MITROFF & WARREN BENNIS, *THE UNREALITY INDUSTRY* 49-51 (1989); SCHICKEL, *supra* note 44. See also REIN ET AL., *supra* note 7, at 224-29 (summarizing and discussing attacks on the celebrity phenomenon).

64. See FOWLES, *supra* note 2, at 262-63. These important functions include providing a substitution for traditional communities and institutions and are discussed more fully *infra* notes 290-314 and accompanying text. Fowles also strongly believes that our obsession with stars will continue well into the twenty-first century. See *id.*; see also REIN ET AL., *supra* note 7, at 29 (observing that celebrity worship is "not necessarily destructive or damaging," but rather "often valuable and certainly worth understanding").

65. Braudy's massive work appears largely neutral in scope, although at the end of book he tips his hand with the following observation: "By understanding the history of fame we will be better able to escape the urges it incites and the sense of emptiness that supposedly only fame can fill." BRAUDY, *supra* note 10, at 598.

66. See *supra* notes 63-65 and accompanying text.

67. Recent commentaries that are critical of the right of publicity include: Stephen R. Barnett, *First Amendment Limits on the Right of Publicity*, 30 *TORT & INS. L.J.* 635 (1995); Rosemary J. Coombe, *Authorizing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 *CARDOZO ARTS & ENT. L.J.* 365 (1992) [hereinafter Coombe,

community still feel that the doctrine deserves the recognition it has attained.⁶⁸ Much of the controversy centers around the soundness of privatizing ownership of the texts of celebrity personas rather than allowing them to remain in the public domain. As will be discussed shortly, these personas essentially are social constructs whose meanings derive not only from the efforts of the respective celebrities but also from a combination of others' efforts and societal needs. Divergent views exist regarding whether celebrities as individuals have a sufficient relationship to their constructs to enable them to reap the economic benefits from the cachets of these constructs.

Critics of the right of publicity start with the premise that fame is a story people impose on public personas. As such, celebrity images are "basic semiotic and symbolic raw materials" of interpersonal communication.⁶⁹ The right of publicity, by safeguarding a "preferred meaning" for these personas, promotes the centralized "control over the production and circulation of meaning in our society."⁷⁰ This centralized control deprives the public in general of the ability to "recode" these celebrity texts for purposes of self-definition and expression.⁷¹ Moreover, such control is particularly detrimental to marginalized groups whose

Authorizing the Celebrity]; Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991) [hereinafter Coombe, *Democratic Dialogue*]; Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent?: Deconstructing the Lanham Act and Right of Publicity*, 20 COLUM.-VLA J.L. & ARTS 123 (1996); Madow, *supra* note 8, at 127; David S. Welkowitz, *Catching Smoke, Nailing Jell-O to a Wall: The "Vanna White" Case and the Limits of Celebrity Rights*, 3 J. INTEL. PROP. L. 67 (1995). See also David Lange, *Recognizing the Public Domain*, LAW & CONTEMP. PROBS., Autumn 1981, at 147, for an earlier critical perspective.

Judge Alex Kozinski also strongly criticizes the right-of-publicity's extension in his renowned dissent from the denial of rehearing en banc in *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1517 (9th Cir. 1993) (Kozinski, J., dissenting). See also *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 973-76 (10th Cir. 1996); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1407-08 (9th Cir. 1992) (Alarcon, J., concurring in part and dissenting in part) (criticizing the majority for broad reading of the Lanham Act). For a discussion of the *Cardtoons* case, see *infra* note 336. A summary of criticisms that have been leveled against the right of publicity appears in Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 55 (1994).

68. See Madow, *supra* note 8, at 133. In addition to numerous commentators, judicial opinions, and statutes that have embraced the right of publicity, the American Law Institute has taken a favorable position toward the right of publicity in its RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (1995).

69. Madow, *supra* note 8, at 143; see also Coombe, *Democratic Dialogue*, *supra* note 67, at 1863 (stating that images permeate lives and shape cultures); Welkowitz, *supra* note 67, at 84 (explaining that a celebrity's image represents public perceptions).

70. Madow, *supra* note 8, at 139, 142.

71. See Coombe, *Democratic Dialogue*, *supra* note 67, at 1863-64, 1866; see also Dreyfuss, *supra* note 67, at 129-30; Madow, *supra* note 8, at 139, 145-46.

political practices necessitate reliance on celebrity images as a means of self-expression.⁷²

This Article rejects these views and instead contends that a property-based conception for publicity rights is the natural outgrowth of our cultural norms as well as our theoretical conceptions of property. At any given point in time, our society's laws are reflective of the values upon which we place a premium.⁷³ For reasons which will be developed more fully in the following Part, one value Americans prize is fame. That the United States is the leading proponent of publicity rights and that we accord the right of publicity the status of a property right is no accident in light of our culture's captivation with celebrity. Moreover, those who oppose protection for publicity rights have not made a persuasive case of the harms engendered by the right of publicity to justify departing from our society's inclination to treat the right of publicity as a property right.⁷⁴

Part A demonstrates that characterizing the right of publicity as property is consistent with our history, our national character and culture, and our conceptions of celebrity. This argument is illustrated by briefly comparing the treatment of the right of publicity in the United States with its treatment abroad and by performing a similar comparison for moral rights—another legal doctrine that, like the right of publicity, is concerned with protecting the integrity of certain types of texts. Our expansive protection for publicity rights then is explained in light of the unique forces that have shaped our culture. Next, Part B demonstrates that the right of publicity is sufficiently analogous to other types of property to justify the current practice of allowing the economic benefits flowing from the cachet of fame to be considered the property of the celebrity persona. Part C examines the socially based criticisms of the right of publicity and concludes that they fail to undermine a property-based conception of publicity rights. It argues that the criticisms leveled against the right of publicity have neglected to take into account the salutary impact of the fame phenomenon in this country. Moreover, it contends that as a property right, the right of publicity is like any other type of property in that it is subject to limitations that balance the rights of the property owner and society in general. These limitations circumscribe the application of the right of publicity in appropriate instances, and therefore adequately address the concerns expressed by the critics.

72. See JANE M. GAINES, *CONTESTED CULTURE* 202-03 (1991); Coombe, *Democratic Dialogue*, *supra* note 67, at 1866, 1876-77 (discussing this phenomenon generally and in the context of gay men and lesbians specifically); Madow, *supra* note 8, at 143.

73. See *infra* notes 95-96 and accompanying text.

74. Cf. Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 *HASTINGS L.J.* 853, 873 (1995) (“[T]he paucity of hard analysis demonstrating true societal detriment and the reliance on conjectural extrapolation rather than on examination of the right’s core paradigm leaves the burden still on those who would undo the work of the past forty years.”).

A. Cultural Underpinnings of the Right of Publicity

The United States stands in the forefront among nations regarding the development and implementation of a legal doctrine that protects celebrities against unwanted commercial exploitation. The United States also appears to be relatively unique in its recognition of the right of publicity as a species of property.⁷⁵ As a property right, the right of publicity can be assigned and licensed,⁷⁶ and, in most jurisdictions, it is descendible to the heirs and assignees of a decedent.⁷⁷ Perhaps this is not surprising given that the fame phenomenon is far more pervasive in the United States than in foreign nations. In fact, most Europeans will freely admit that it is American celebrities rather than local ones who attract most of the attention and interest in Europe.⁷⁸ Some countries such as

75. See W. Van Caenegem, *Different Approaches to the Protection of Celebrities Against Unauthorised Use of Their Image in Advertising in Australia, the United States and the Federal Republic of Germany*, 12 EUR. INTELL. PROP. REV. 452, 458 (1990). Canada and Japan apparently also treat the interests protected by the right of publicity as a property right. See *infra* notes 81-82 and accompanying text.

76. See Madow, *supra* note 8, at 130 n.14 (noting that the weight of authority treats the right of publicity as a "full-blooded property right").

77. The right of publicity is descendible by statute in some jurisdictions and by common law in others. See DREYFUSS & KWALL, *supra* note 5, at 547 (stating that approximately half of the states recognize the right of publicity, and that legislation exists in at least 15 of these states). Ohio is the only state in which the right of publicity is not descendible as a matter of common law. See *Reeves v. United Artists*, 572 F. Supp. 1231, 1235 (N.D. Ohio 1983).

78. As a general matter, the "Americanization" of Europe's culture has been a major source of concern among members of the European Community. This concern prompted the issuance of the "Television Without Frontiers" Directive on October 3, 1989. The "Television Without Frontiers" Directive required its members to dedicate a majority of their television air time to European-made programs. See Council Directive 89/552 of 3 October 1989 on Coordination of Certain Provisions Laid Down by Law, Regulation, or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, art. 4, 1989 O.J. (L 298) 23, 26 (EEC); see also Stephen R. Konigsberg, *Think Globally, Act Locally: North American Free Trade, Canadian Cultural Industry Exemption, and the Liberalization of the Broadcast Ownership Laws*, 12 CARDOZO ARTS & ENT. L.J. 281, 302 (1994) (discussing the general feelings of the community members).

Italy,⁷⁹ Germany,⁸⁰ Canada,⁸¹ and Japan⁸² have followed America's lead and are in the process of developing and defining a right of publicity or a similar right. Other jurisdictions like Quebec,⁸³ France,⁸⁴ and Australia⁸⁵ have more restrictive

79. The right of image is codified in Italy and it protects against the commercial misappropriation of a person's identity through the use of name or likeness. See Silvio Martuccelli, *An Up-and-Coming Right—The Right of Publicity: Its Birth in Italy and Its Consideration in the United States*, 4 ENT. L. REV. 109, 111 (1993). In Italy, the right of publicity was initially recognized in 1984 when the court applied the established right of image in a context transcending the codified right's exclusive application to name and likeness, and thus protected a celebrity against the misappropriation of his identifying characteristics of small, round glasses and a woollen cap. See *id.* at 110-11 (discussing Pretura di Roma, 18 apr. 1984, Giur. It. 1985, I, 2, 453). Since this decision, other courts in Italy have invoked a similar approach and thus confirmed the concept of the right of publicity, but its development has been in the "wake of the U.S." *Id.* at 115.

80. By statute, Germany protects certain aspects of personality such as name and likeness, see Van Caenegem, *supra* note 75, at 456 (discussing Section 12 BGB and 22 KUG, respectively), but by judicial decision these sections have been extended to apply to other aspects of a celebrity's image. See *id.* at 457 (discussing the *Erhard* decision of the Federal Supreme Court, GRUR 1989, 666). Still, these sections traditionally were construed as protecting personal rather than commercial interests and the possibility of damages can only be obtained through a provision on unjust enrichment that sanctions an award consisting exclusively of a fictitious licensing fee. See *id.* at 456 (discussing 812 BGB).

81. Since 1973, the common law of Canada has recognized that an individual has an exclusive, proprietary right to market his personality, image, and name. See *Krouse v. Chrysler Canada Ltd.* [1973] 1 O.R.2d 225, 237-38 (Ont. Ct. App.). Some of the provinces also have statutes that prohibit the unauthorized use of a person's name or likeness in advertising. See I J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 6.23 (1994) (stating that Canada explicitly recognizes a right of publicity protecting the property right in a person's identity as against unpermitted use in advertising).

82. In the wake of the emergence of the merchandising industry in Japan, a Japanese court in 1976 recognized the commercial value of celebrities' names and likenesses as a property right. See Teruo Doi, *Character Merchandising in Japan: Protection of Fictional Characters and Well-Known Personalities as the Basis for Merchandising Activities*, 1978 ANN. INDUS. PROP. L. 283, 301-05 (discussing *Lester v. Tokyo Daiichi Film*, 817 HANREI JIHŌ 23, 47 (Tokyo Dist. Ct., June 29, 1976)). The decision has been somewhat criticized on the ground that, in recognizing the plaintiff's interest, the court still used the Japanese term corresponding to "right to privacy" rather than the one corresponding to "right to publicity." See *id.* at 304. This has been the only reported case in Japan on this topic. See I MCCARTHY, *supra* note 81, § 6.24.

83. Quebec's legal system is different from the rest of Canada in that Quebec is governed by the civil law system in its "private law" issues. See Catherine Valcke, *Quebec Civil Law and Canadian Federalism*, 21 YALE J. INT'L L. 67, 70 (1996). Quebec's version of the right of publicity is known as the "right to image" and it is only minimally developed in Quebec. This right has been applied to unauthorized uses of photographs for commercial purposes, but there has been judicial reluctance to extend this doctrine to other identifying aspects of an individual's persona. A 1983 case presented the possibility of broadening the right in Quebec, but the court refrained from so doing. In *Thériault c. Association montréalaise d'action récréative et culturelle* [1984] C.S. 946 (Que.), the plaintiff comedians sued for an injunction that would preclude the radio broadcast of a commercial that used their characteristic expressions without their permission. Rather than invoke a right-of-publicity analysis in this situation, the court characterized the case as one involving "passing off," and denied relief on this ground because confusion was unlikely. See Susan H. Abramovitch, *Public Exploitation*

forms of protection. Still other countries such as Great Britain have almost no protection for the interests protected in the United States by the right of publicity.⁸⁶

That the United States is a leader among nations in protecting publicity rights is somewhat curious in light of our far less progressive stance with respect to the protection of another personality interest, moral rights.⁸⁷ Moral rights laws are concerned with preserving the artistic integrity of a creator's work and compelling appropriate authorship recognition, thus offering protection for a creator's personal, as opposed to economic, interests. The right of integrity, which "prohibits any alterations of a creator's work that will destroy the spirit and character" of that work, "lies at the heart of the moral rights doctrine."⁸⁸ Moral

of Celebrities: Protection of a Star's Style in Quebec Civil Law, 32 LES CAHIERS DE DROIT 301, 323, 332-35 (juin 1991) (approving the American version of the right of publicity and advocating the categorization of a celebrity's style as an intellectual "proprietary" right).

84. Contemporary French law characterizes the right to one's style as a right of personality, which is not susceptible to pecuniary evaluation and cannot be separated from the subject of the right. This right under French law is not alienable and does not descend at death. *See Abramovitch, supra* note 83, at 312-13, 323-24. Thus, although French law allows relief for the unauthorized appropriation of a person's identity in advertising, *see* Stephen R. Barnett, *The Unauthorized Use of Celebrity Names, Likenesses, and "Identities" in Advertising: America's "Right of Publicity" in a Comparative Perspective*, in *Proceedings of the Annual Conference of the International Association for the Advancement of Teaching and Research in Intellectual Property* 40, 56-57 (1994), this right is much more limited than the right of publicity as it is applied in America.

In addition to the relatively more minor role that the celebrity phenomenon plays in foreign cultures, the comparative underdevelopment of the right of publicity in civil law jurisdictions can perhaps be explained in light of certain differences between the American legal system and the civil law tradition, where certain conceptual difficulties exist with regard to characterizing a celebrity's right to style as a property right. First, there is a view among the Christian and Roman traditions that the ownership and alienation of inherent characteristics of people are contrary to public order and morality. *See Abramovitch, supra* note 83, at 319. In addition, the civil law tradition is uncomfortable with ownership of incorporeal things. *See id.* at 320. The concept of "intellectual rights" therefore is a more recent development that deals with "abstract things, products of intelligence and human creation." *Id.* at 321; *see also id.* at 329-30, 333.

85. In Australia, the commercial value of a celebrity's persona is protected both by statute, as well as the common law tort of passing off. *See Van Caenegem, supra* note 75, at 453 (discussing Section 52 of the Trade Practices Act, 1974). Still, the applicable case law is restrictive because it requires that the celebrity appear to have approved the use in question before a claim will be recognized. *See id.* at 454.

86. *See Madow, supra* note 8, at 154 n.127. In England, the advertising industry has developed some nonenforceable guiding standards governing the use of a celebrity's name and likeness for promotional purposes. *See Catherine Louis Buchanan, A Comparative Analysis of Name and Likeness Rights in the United States and England*, 18 GOLDEN GATE U. L. REV. 301, 365-68 (1988). These guidelines appear in The British Code of Advertising Practice and The IBA Code of Advertising Standards and Practice. *See* INDEPENDENT BROAD. AUTH., THE IBA CODE OF ADVERTISING STANDARDS AND PRACTICE 4 (reprint 1987) (1981) (Rule 13).

87. *See infra* notes 90-93 and accompanying text.

88. DREYFUSS & KWALL, *supra* note 5, at 319. Other moral rights protections include the right of disclosure, which protects a creator's right to decide when to publicly disseminate her work, and the right of attribution, which "safeguards a creator's right to compel recognition for her work and to prevent others from naming anyone else as the creator." *Id.*

rights protections are analogous to publicity rights in at least two ways. First, although moral rights are thought to protect a creator's personal interests and the right of publicity generally is viewed as an economic right, a careful look at right-of-publicity litigation reveals that many decisions actually are more concerned with redressing the injured feelings and mental anguish of celebrity publicity-plaintiffs.⁸⁹ Second, and more importantly for purposes of this analysis, both doctrines seek to protect the integrity of texts by rejecting fluidity of textual interpretation by the public in favor of the author's interpretation. On a theoretical level, the right of publicity is opposed to the view that the public has the unconditional right to interpret personas according to its own cultural needs, for it presupposes that the cachet attached to fame belongs, at least absent any countervailing forces, to the individual whose persona is at issue. Just as the right of publicity safeguards the right-of-celebrity personas to control the commercial contexts in which their images are used and allows them to decide how their images are presented to the public, moral rights allow creators of artistic works a comparable measure of control regarding the substantive presentation of their works.

Many European and Third World nations have extensive moral rights laws,⁹⁰ but in the United States, the only explicit moral rights protection exists by virtue of the 1990 enactment of § 106A as an amendment to the 1976 Copyright Act.⁹¹ This provision affords only creators of certain types of "visual art" limited protection against unauthorized modifications to their works that are prejudicial to their honor and reputation.⁹² Absent the provisions of this statute, creators in

89. See Kwall, *supra* note 67, at 69-74, for a full treatment of situations involving morally based objections to a defendant's use of a celebrity's persona. See also 1 MCCARTHY, *supra* note 81, § 1.11[C] (advocating that the right of publicity be extended explicitly to cover both emotional distress and economic loss); *infra* notes 206-16 and accompanying text.

90. See INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY 120-40 (Anthony D'Amato & Doris Estelle Long eds., 1996) [hereinafter INTERNATIONAL ANTHOLOGY]; Adolf Dietz, *The Artist's Right of Integrity Under Copyright Law—A Comparative Approach*, 25 INT'L REV. INDUS. PROP. & COPYRIGHT L. 177 (1994); Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 97 (1985) (containing an appendix detailing the moral rights protections in 35 countries). The right of paternity and a limited right of integrity are recognized in Article 6b of the Berne Convention for the Protection of Literary and Artistic Works, the oldest multilateral treaty governing copyright protection. See *id.* at 10 & n.38. The Berne Convention contemplates that the specific legislation of its respective members will govern the substantive application of these rights. Some signatories to the Berne Convention are far more protective of a creator's moral rights than others. Several countries that do not belong to the Berne Convention provide extensive moral rights protection as part of their copyright laws. See *id.* at 11-12.

91. Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (1994). This provision was enacted following our adherence to the Berne Convention, see *supra* note 90, in 1988. It provides extremely limited moral rights protection, and numerous problems exist regarding its scope and implementation. See generally DREYFUSS & KWALL, *supra* note 5, at 321, 360-61 (providing a more complete discussion of these limitations).

92. See 17 U.S.C. § 106A(a).

the United States are unable to invoke explicit moral rights protections.⁹³ Why the difference between our treatment of publicity rights and moral rights, given the parallels between these doctrines? The answer probably lies in the relative value our society places on celebrity texts as opposed to other artistic texts. In general, any system of ownership rights encourages people to devote time to the things that are most valued by society.⁹⁴ Regarding intellectual property specifically, “[t]he history behind the recognition (or non-recognition) of protection afforded a particular form of intellectual property often reflects the philosophical and cultural role that form of intellectual property plays in a country’s heritage.”⁹⁵ In France, for example, where moral rights protections are among the strongest, a cultural tradition exists in which artists are elevated as a special class of laborers who possess almost spiritual qualities, and their works are treated as a special category of property. As a result, artists’ rights often are protected against other parties’ contract or property interests. In contrast, American artists possess a far lower social status than do their French counterparts, and the law essentially protects their works in the same manner as it does any other commercial object, thereby weighing the rights of creators against the rights of exploiters and users.⁹⁶ Our reluctance to recognize moral rights undoubtedly also stems from the vast oppositional force of the entertainment and publishing industries⁹⁷ whose

93. Some states also have specific statutory moral rights protections for visual art, but a question exists as to the preemptive effect of § 106A with respect to these statutes. See DREYFUSS & KWALL, *supra* note 5, at 320-21, 361. In addition, American creators can obtain some degree of moral rights protection through a patchwork of other legal doctrines, including copyright law. For a complete discussion of the application of these substitute doctrines, see Kwall, *supra* note 90.

94. See Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907, 912 (1993).

95. INTERNATIONAL ANTHOLOGY, *supra* note 90, at 70.

96. See Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists’ Rights in France and the United States*, 28 BULL. COPYRIGHT SOC’Y I, 53-54 (1980). This difference in perspective also is reflected in the respective copyright laws of France and the United States. Whereas the predicate of French copyright law is author-centered, American copyright law “is inordinately preoccupied with pecuniary, as opposed to personal, interests.” Kwall, *supra* note 67, at 59. Moreover, the underlying force of American copyright law is that it serves as an economic incentive to production, which will in turn impact favorably on society. See *infra* notes 195-205 and accompanying text.

97. The Committee for America’s Copyright Community, which represents numerous copyright industries such as publishers and producers of software, sound recordings, and motion pictures, opposed the enactment of moral rights with respect to a broad range of copyrightable works because it believed that “such proposals could threaten the constitutional goals of promoting the production and dissemination of copyrighted works and the traditional practices and relationships that are fundamental to the daily operation of copyright-intensive industries in the U.S.” REGISTER OF COPYRIGHTS, WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS 120 (1996) (quoting Comment Letter from the Committee for America’s Copyright Community to Dorothy Schrader, General Counsel, U.S. Copyright Office I (1992)); see also Kwall, *supra* note 90, at 28; Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827, 830, 834 n.34 (1992) (discussing opposition of the entertainment and publishing industries to the adoption of moral rights provisions in conjunction with the Berne Convention).

exploitative abilities would be severely curtailed by a comprehensive moral rights scheme.⁹⁸

Conversely, our inclination to protect publicity rights expansively probably can be explained by the convergence of a number of influences. As a society, we revere fame. As discussed below, this obsession derives in part from our democratic tradition, the “American Dream,” our capitalist and commercial proclivities, as well as the influence of our burgeoning media.

1. America’s Democratic Tradition

Our democratic heritage has had an impact on the fame phenomenon in a number of ways. Scholars generally attribute much significance to this factor in explaining our obsession with fame.⁹⁹ The most obvious connection between our tradition of democracy and our conception of fame is that, in America, “fame has been democratized.”¹⁰⁰ The prospect of being famous is now open to everyone, rather than reserved for a select, elite few.¹⁰¹ The American democratization of fame essentially continues the process begun when Oliver Cromwell’s rule over England awakened the notion in Europe that individual achievement was possible, regardless of royal or divine intervention.¹⁰² The prospect of anyone achieving fame has resulted in many celebrities maintaining an “ordinary, everyday” persona that serves as a visible reminder that for everyone, fame truly is a possibility. Even our greatest political leaders such as Franklin, Washington, and Lincoln all allegedly possessed a remarkably ordinary quality that reflected the virtues of the general populace.¹⁰³ That our leaders historically have possessed a

98. See Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 421, 429 (1990) (“Moral rights legislation will also create conflicts with the variety of individually and collectively negotiated contracts that permeate the film, broadcasting, and magazine, newspaper and book publishing industries.”).

99. Two commentators have accurately interpreted Braudy’s explanation of the fame phenomenon as “an inevitable result of egalitarianism and the desire to replace elitism with individual recognition,” and Gamson’s explanation as “a conflict between the democratic and aristocratic.” Susan J. Drucker & Robert S. Cathcart, *The Celebrity and the Fan: A Media Relationship*, in AMERICAN HEROES IN A MEDIA AGE, *supra* note 10, at 260, 260.

100. Braudy, *supra* note 35, at 66.

101. See *id.* In his book, Braudy makes the following pertinent observation:

[D]emocracy is also characterized by greater and greater disagreement over what constitutes worthy activity. . . . If fame in a monarchical and absolutist state resembles a pyramid, fame in a representational and democratic society looks more like the silhouette of a mountain range, with a multitude of peaks, none necessarily higher than the others.

BRAUDY, *supra* note 10, at 588.

102. See *supra* notes 11-12 and accompanying text; see also BRAUDY, *supra* note 10, at 586.

103. See BOORSTIN, *supra* note 31, at 49-50. Boorstin also notes that “[b]elief in the power of the common people to govern themselves . . . has carried a distrust, or at least a suspicion of individual heroic greatness” and therefore “[a] democratic people are understandably wary of finding too much virtue in their leaders.” *Id.* at 49.

“common person” appeal also derives from democratic America’s absence of a royal family to fill the dual roles of hero and celebrity.¹⁰⁴

2. The American Dream—Anybody Can Be Anything/The “I Can Do It Too” Mentality

The American Dream is strongly tied to our democratic tradition. Scholars believe that Americans need to invest celebrities with ordinary qualities so that differences are minimized between those who achieve greatness and all others.¹⁰⁵ In this way, the American Dream is preserved, along with its message that anyone can make it to the top, no matter how humble his or her beginnings.¹⁰⁶

Historically, the American Dream embodied a political element (anyone can grow up to be president), but the development of motion pictures and other modern media provided another context for the American success story.¹⁰⁷ By attributing ordinariness to media celebrities, people nurture the hope that

104. “It was the ‘common man’ of America who had to be made into a hero reflecting the democratic values of individualism and success.” Cathcart, *supra* note 10, at 39; *see also* Shaw, *supra* note 18, at A19 (discussing the American fascination with ordinary people who do extraordinary things).

Some observers have labeled Hollywood stars as America’s “uncrowned royalty.” *See id.* (quoting Linda Ellman, co-executive producer of the television show *Hard Copy*). *Los Angeles Times* sports columnist Jim Murray observed that America substitutes “point guards, quarterbacks, cleanup hitters and pugilists for archdukes, earls, barons and counts.” *Id.*; *see also* BOORSTIN, *supra* note 31, at 57 (arguing that “celebrity” is the “new eminence” in America).

America’s lack of bona fide royalty certainly has not precluded us from adopting the royalty of other countries. *See supra* note 40 (noting that Princess Diana was on the Gallup Poll’s “most admired” list at least three times in recent years). Princess Diana’s visit to Chicago in June, 1996 was the featured story of local evening news every night of her visit, and she received far more extensive coverage than President Clinton when he visited Chicago the following month (not to mention her June 17, 1996 cover on *People* magazine). Sadly, the outpouring of emotion by the American public upon her death was the ultimate indication of our country’s adoption of Princess Diana. Even prior to her death, America’s adoption of Princess Diana was explained as our “one chance” to say that we have a monarchy of our own. *See Shaw, supra* note 18, at A19 (quoting Steve Dunleavy, reporter for the television program *A Current Affair*). It is also possible that Americans have taken their cues regarding Princess Diana from the British media circus that continually plagues the House of Windsor. Other cultures, in contrast, are far more protective of their royal families. In Japan, for example, speculation regarding the inability of Crown Prince Naruhito and his wife Masako Owada to produce a son and heir to the Chrysanthemum Throne is being handled with a voluntary news blackout, an accession by a respectful press that “rarely defies imperial wishes.” Michael A. Lev, *For a Royal Contrast, Look to Japan’s Throne*, CHI. TRIB., July 14, 1996, at 1.

105. *See, e.g.*, DYER, *supra* note 19, at 49-50; FOWLES, *supra* note 2, at 12; GAMSON, *supra* note 9, at 18-19, 29, 168-69, 195; SCHICKEL, *supra* note 44, at 267-68.

106. *See* DYER, *supra* note 19, at 48.

107. Boorstin writes: “The film-star legend of the accidentally discovered soda-fountain girl who was quickly elevated to stardom soon took its place alongside the log-cabin-to-White-House legend as a leitmotif of American democratic folk-lore.” BOORSTIN, *supra* note 31, at 156-57.

someday they too will be visible to the world at large.¹⁰⁸ Thus, the image of stardom and its emphasis on “consumption, success and ordinariness” fits perfectly within the contours of the American Dream.¹⁰⁹

The American public enjoys identifying with its celebrities. People like viewing celebrities as mirror images of themselves.¹¹⁰ Studies have shown that “people’s favourite stars tend to be of the same sex as themselves.”¹¹¹ Just as people enjoy watching characters who embody their fantasies,¹¹² people also like watching television and movie characters who manifest characteristics reflective of themselves, even if these characteristics have a somewhat negative societal connotation.¹¹³ For example, television shows that feature likeable losers often have mass appeal. Actor David Schwimmer, one of the stars of the popular television program *Friends*, which explores the lives of six “Generation X’ers” living in New York City, explained the show’s appeal in these terms: “The initial charm of the show is that these are six losers. The more the public perceives that these actors are all really successful, young, hot movie . . . stars—the less charming the six characters are.”¹¹⁴ Similarly, some might argue that the show *Roseanne* was at its best when it typified the daily struggles of blue-collar life, and that the show lost some of its original grounding when Roseanne became more physically glamorous, began a new career as a television commentator, and won the lottery.

108. As one commentator has observed: “[T]he ongoing message of the celebrity system is that through its channels the ‘underlying population’ can achieve the status of ‘those at the top.’” STUART EWEN, *ALL CONSUMING IMAGES* 94 (1988). Ewen also writes: “In celebrities, people find not only a piece of themselves, but also a piece of what they strive for.” *Id.* at 96.

109. DYER, *supra* note 19, at 39. Joshua Gamson’s comprehensive study of 16 celebrity-watching focus groups (with a total of 73 participants) revealed belief by some people in a celebrity success-model that typifies the Horatio Alger dream of obsessive hard work and heightened drive. See GAMSON, *supra* note 9, at 166-69.

110. See, e.g., BOORSTIN, *supra* note 31, at 61, 74 (criticizing this tendency toward self-identification).

111. DYER, *supra* note 19, at 19; see FOWLES, *supra* note 2, at 157; LEO HANDEL, *HOLLYWOOD LOOKS AT ITS AUDIENCE* 145 (1976) (citing “self-identification” as the reason movie patrons prefer performers of their own sex).

112. See FOWLES, *supra* note 2, at 164:

When performers play members of the affluent class, like Fred Astaire in *The Gay Divorcee* or Larry Hagman in “Dallas,” they are enabling the audience to mentally step into that role too, and to briefly indulge a desire for achievement and status. Spectators are taken on an imaginative flight to the kingdom of rampant success.

113. See DYER, *supra* note 19, at 32-33 (discussing the theory that stars can compensate people for qualities which they lack).

114. Bruce Fretts & Dan Snierson, *Geek Love*, ENT. WKLY., Apr. 26, 1996, at 20, 22 (omission in original) (quoting actor David Schwimmer).

3. Capitalism and Consumerism

Another critical reason underlying America's fascination with celebrities is the role they play in our consumer culture. Our capitalist tradition and the notion of the American Dream¹¹⁵ have fostered the development of a vast American middle class possessing more economic resources and leisure time than was ever possible in past centuries.¹¹⁶ The connection between capitalism and consumption has been noted by renowned economists who believe that our capitalist society in the twentieth century has shifted from an "economy based on production to one based on consumption."¹¹⁷ This shift is mirrored in the connection between conspicuous consumption and celebrities, "the idols of consumption,"¹¹⁸ which was established back in the 1920s and 1930s,¹¹⁹ but has continued with increasing vigor as a result of the new media technologies that have publicized this consumption.¹²⁰ As Professor Fowles has observed: "The rapid rise of this consumer culture has created a need for prototypical consumers who can model appropriate purchasing decisions."¹²¹ This modeling role is consistent with the American view of celebrities, who are the "acmes of consumerism."¹²² One commentator has noted that, "for the vast majority of people in advanced capitalist societies," the fan

115. See *supra* notes 105-14 and accompanying text.

116. See FOWLES, *supra* note 2, at 24, 168-69; GAMSON, *supra* note 9, at 23; see also Fiske, *supra* note 57, at 47-48 (noting the relationship between capitalism and popular culture).

Economist Herbert Stein observed that the American Dream has become "the expectation of being enriched largely by the efforts of others" in lieu of the noble aspiration for something that is "lofty [and] worth striving for." Herbert Stein, *The American Dream*, WALL ST. J., Dec. 24, 1996, at A8. He contends that the American Dream now is measured in terms of "increasing per capita income." *Id.*

Schickel reported that during the 1970s and 1980s, the number of Americans living below the poverty line consistently stayed at 12.8%. See SCHICKEL, *supra* note 44, at 152. More recent statistics indicate that the number is 14.2%. See Peter McWilliams, *Ain't Nobody's Business*, CHI. TRIB., Oct. 17, 1993, § 10 (Magazine), at 12.

117. DYER, *supra* note 19, at 45. Dyer also noted that "the 'problem' for capitalism is not how to produce enough for the market but how to sell the amount produced in excess of immediate market demand." *Id.*

118. *Id.*

119. See EWEN, *supra* note 108, at 98; see also FOWLES, *supra* note 2, at 168 (discussing the growth of the U.S. beauty industry since 1920 and the link between this growth and movie stars). Braudy traces the birth of modern fashion to the beginning of the Industrial Revolution, when it became possible for the lower classes to imitate the fashion of the upper class both quickly and cheaply. See BRAUDY, *supra* note 10, at 479-81.

120. Even back in 1956, sociologist C. Wright Mills wrote that all around us "are all the expensive commodities, to which the rich seem appendages . . . money talking in its husky, silky voice of cash, power, celebrity." MILLS, *supra* note 48, at 92. Mills also observed that celebrity is "the crowning result of the star system in a society that makes a fetish of competition." *Id.* at 74.

121. FOWLES, *supra* note 2, at 169.

122. *Id.* at 178; see also EWEN, *supra* note 108, at 98 (discussing a study which noted that by 1939, "the consumption patterns of Hollywood (on and off screen) had become a 'standard of reference' for popular consumption") (quoting MARGARET FARRAND THORP, *AMERICA AT THE MOVIES* 113 (1939)).

relationship primarily occurs “on the terrain of commercial popular culture.”¹²³ Accordingly, it is not difficult for celebrities to influence buying decisions. That they are compensated handsomely for advertising products does not detract from the effectiveness of their efforts. The visibility of celebrities and the public’s need to know about products lead consumers to listen closely to celebrity endorsements.¹²⁴ In a sense, then, celebrity endorsements function in much the same way as trademarks do—to communicate information about the product.¹²⁵ Celebrity in America, thus, is proof of the American Dream of money and power, and our capitalist culture ensures that the benefits of this American Dream accrue not only to the celebrities themselves, but also to the businesses and causes the celebrities endorse.¹²⁶

Celebrities do not have to pitch anything to fulfill this societal role. One of the defining characteristics of the famous is their ability to consume, their buying power. Americans love to follow celebrities’ buying patterns even more than their pitch. Celebrities may spend more money than the average person, but they nonetheless can be imitated on a smaller scale.¹²⁷ Moreover, Americans love to imitate their buying patterns to get a feeling of “what it would be like if money were no object.”¹²⁸ The enjoyment provided by this sense of self-indulgence also can serve as a temporary means of escape from reality.¹²⁹ Our society, more than most others, possesses the economic means to indulge such consumption-based fetishes.

Interestingly, aspects of our history also are consistent with the commodification of celebrities themselves. For example, the star system, which is discussed in greater detail in the following section on the media, represented the ultimate treatment of celebrities as commodities.¹³⁰ Another example of such commodification was the baseball reserve system prior to the adoption of free agency, under which the club that had a particular ballplayer under contract

123. Lawrence Grossberg, *Is There a Fan in the House?: The Affective Sensibility of Fandom*, in *THE ADORING AUDIENCE*, *supra* note 57, at 50, 63. Grossberg also writes: “[F]or the vast majority of people in advanced capitalist societies, [commercial popular culture] is increasingly the only space where the fan relationship can take shape. It is in consumer culture that the transition from consumer to fan is accomplished.” *Id.*

124. *See* FOWLES, *supra* note 2, at 178.

125. *See* DREYFUSS & KWALL, *supra* note 5, at 24 (noting that trademarks function as unambiguous signals about a product’s attributes such as its nature, source, and quality, and therefore only trademarks that communicate such signals are protected); *cf.* GAMSON, *supra* note 9, at 66-75 (discussing the creation by publicists and the media of “brand-name” celebrities for consumption).

126. *See* FOWLES, *supra* note 2, at 176-77 (describing the charitable efforts of celebrities); REINET AL., *supra* note 7, at 11 (noting how celebrity also means power and money not just for the celebrities themselves, but also for businesses, charities, political parties, etc.).

127. *See* DYER, *supra* note 19, at 45.

128. EWEN, *supra* note 108, at 99.

129. *See* Grossberg, *supra* note 123, at 55 (discussing the pleasures relating to consumption and noting the “temporary and artificial” sensations of release and escapism it provides); *see also infra* Part II.C.2.

130. *See* GAINES, *supra* note 72, at 160-64 (discussing celebrity exploitation under the star system); *see also infra* notes 155-56, 244-46 and accompanying text.

possessed virtually unlimited discretion over that player's career.¹³¹ Although players of most team sports currently enjoy a high degree of free agency, the historical practice of competitive team sports was characterized by a marked restrictiveness regarding the players' ability to move freely.¹³² Our capitalist tradition and the powerful influence of the entertainment and sports industries undoubtedly helps to explain the initial commodification of team athletes and stars.

The influences of democracy,¹³³ the American Dream, capitalism, and consumerism help to explain our gravitation toward a legal doctrine that safeguards the proprietary interests of celebrities. A legal system that allows people to keep the economic rewards of fame makes sense in this country because our culture holds out the promise that anyone is capable of achieving greatness. Allowing people to own the economic benefits flowing from the cachet of fame thus serves as a measure of security and comfort for all Americans.¹³⁴

Of course, all of the cultural messages conveyed by celebrities would be impossible to communicate without the technological mediums of communication. The communication industries derive enormous economic benefits from the celebrity phenomenon in this country.¹³⁵ As discussed below,

131. See *Flood v. Kuhn*, 407 U.S. 258 (1972) (holding that Congress, rather than the Supreme Court, must remedy the long-standing exemption of baseball's reserve system from federal antitrust law).

132. See JOHN C. WEISTART & CYM H. LOWELL, *THE LAW OF SPORTS* 500-24 (1979) (discussing free agency rights of professional sports players).

133. Critics of the right of publicity point to our democratic tradition as a reason for refusing to recognize the right, since they believe that publicity rights inhibit active, democratic participation in the creation and circulation of meanings and values. See Madow, *supra* note 8, at 140-41, 146. This argument, however, presupposes that no property right is at issue regarding publicity rights. See *infra* Part II.B (defending the right of publicity as a property right). In a democracy, people's private property is not freely usable by others just because such a system is more participatory. On the contrary, a system of private property ownership in which people have secure ownership expectations has been recognized as a means of facilitating democracy. According to Cass Sunstein, "[p]ersonal security and personal independence from the government are guaranteed in a system in which rights of ownership are protected through public institutions." Sunstein, *supra* note 94, at 914; see also STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 79-80, 83-84 (1990) (commenting on the connection between stability and property rights that "generate expectations" and noting the sizable literature on the psychological aspects of property ownership). The salutary effect of this independence is that people will be free to participate in governmental processes without fear that the government will, out of retaliation for perceived challenges, arbitrarily take away its citizens' private property. See Sunstein, *supra* note 94, at 914-15.

134. The economic orientation of these influences also probably explains why a conception of the right of publicity that protects not only economic interests but also morally based interests has been slow to develop. See *supra* note 89 and accompanying text.

135. As early as 1954, Professor Nimmer observed that the right of privacy is inadequate to meet the demands of the "advertising, motion picture, television, and radio industries," and thus called for recognition of the right of publicity. Melville B. Nimmer, *The Right of Publicity*, 19 *LAW & CONTEMP. PROBS.* 203, 203 (1954). Ironically, these industries are the same ones that would be harmed by extensive moral rights legislation. See *supra* note 97 and accompanying text.

they have used their influence to promote the celebrity culture, which in turn has impacted upon the law's direction.

4. The Media Connection

Daniel Boorstin has observed that “[t]oday every American, child or adult, encounters a vastly larger number of names, faces, and voices than at any earlier period.”¹³⁶ The means through which these encounters are accomplished are the various branches of the mass media, whose development is closely tied to the growth of the fame phenomenon in this country.¹³⁷ Our society's view of fame was most influenced at the outset by print, and then was completely revolutionized in the wake of the birth of film and broadcasting.¹³⁸ The power of the media in our times cannot be overstated. Some observers would go so far as to say that our society, although seeming to idolize the individuals personified in the media, actually idolizes the media itself.¹³⁹

a. Print

In early times, the media of fame were art, sculpture, and painting, which required the time and talent of an artist.¹⁴⁰ With the rise of the Industrial Revolution and the moveable-type printing press came the capability to produce these images for private consumption. In the early nineteenth century, the steam-powered cylinder press gave rise to newspapers. By the middle of that century, the telegraph, the rotary press, the growth of inexpensive “penny press” papers, and the beginning of newswire services meant that for the first time, “encounters with the names and activities of many people one didn't know became a daily experience.”¹⁴¹

The regular publication of newspapers necessitated the ongoing creation of “news.” Moreover, stories of human greatness are what sold the news, and the need for such heroes and heroic acts outstripped their supply in the real world. Thus, it fell on the journalists to supply new ones. As one commentator in this

136. BOORSTIN, *supra* note 31, at 53. Boorstin's observation is even more true today than when his book was first published in 1961. *See also* Cathcart, *supra* note 10, at 45 (noting that no American can escape the influence of fame and celebrity on twentieth-century American life); *supra* text accompanying note 65. Cathcart's observation, while certainly true regarding the majority of Americans, can be qualified somewhat in light of the existence of certain segregated religious cultures in our society whose precepts prohibit owning televisions or watching movies. For example, the celebrity phenomenon is likely to have virtually no impact in either Amish or certain Orthodox Jewish communities.

137. *See, e.g.*, FOWLES, *supra* note 2, at 28; SCHICKEL, *supra* note 44, at 28; James Monaco, *Celebration*, in *CELEBRITY* 3 (James Monaco ed., 1978).

138. *See* Monaco, *supra* note 137, at 6.

139. *See* Drucker & Cathcart, *supra* note 99, at 269.

140. *See generally supra* text accompanying note 13.

141. GAMSON, *supra* note 9, at 19-20. James Monaco observed that in the mid- to late nineteenth century, with the invention of the telegraph and the rotary press, it became possible to cheaply disseminate “printed matter for the newly literate middle classes.” Monaco, *supra* note 137, at 6.

field has observed: “The newspapers and magazines, by their incessant highlighting of individuals and events to sell papers, and their tendency to translate every situation into terms of personal will and conflict, were instrumental in creating the signs by which modern fame would be recognized.”¹⁴² This emphasis on personalizing the story continues today. Although other countries publish gossip sheets and tabloids, the mainstream media of most other countries does not engage in “personality journalism” to nearly the same extent as the American press.¹⁴³ Moreover, the increasing convergence of journalism and public relations techniques over the past several decades has also resulted in our news becoming more dependent on entertainment in general and celebrities in particular.¹⁴⁴

Print also gave rise to an American journalistic invention which has played a pivotal role in the creation of our modern conception of fame: the interview. The origin of the interview dates back to newspapers in the mid-nineteenth century and was “an early indication of America’s fascination with personality.”¹⁴⁵ Today, the interview is “enshrined in our culture,” satisfying Americans’ desire to “know what their favorite personalities have to say.”¹⁴⁶

b. Photography

The photograph, the ultimate image medium, was critical to the growth of celebrity worship.¹⁴⁷ The photograph made it possible to capture every nuance of

142. Cathcart, *supra* note 10, at 38; *see also* BRAUDY, *supra* note 10, at 508; Drucker & Cathcart, *supra* note 99, at 263; David Shaw, *Obsessed with Flash and Trash*, L.A. TIMES, Feb. 16, 1994, at A1.

143. *See* Shaw, *supra* note 18, at A19.

Despite some recent shifts toward a more American approach, especially in Italy, the news media in most countries are considerably more stratified—and the societies more hierarchical—than they are here. Personality stories fill the gossip sheets abroad, but they don’t routinely enter the mainstream media . . . as they do here.

Id.

Although the modern tabloid was brought to the United States by Australian Rupert Murdoch in the mid-1970s, the birth of “yellow” journalism dates back to the beginning of the twentieth century “when the circulation war between Pulitzer’s *World* and William Randolph Hearst’s *Evening Journal* made suffering and tragedy a cottage industry and established the sensationalized, personalized approach to news in this country.” Shaw, *supra* note 142, at A1 (newspaper names not italicized in original); *see also* GAMSON, *supra* note 9, at 106 (suggesting that while tabloids are in one sense better equipped than conventional publications to reveal the truth because they are not dependent on the goodwill of publicists, their reputation for lying comes from the fact that they are “commercially bound to amuse through inside information rather than to reveal through it”); SCHICKEL, *supra* note 44, at 57.

144. *See* GAMSON, *supra* note 9, at 42 (citing the prevalence of press releases and noting that public relations practitioners have increasingly served as news sources over the years).

145. Shaw, *supra* note 18, at A1. Before this time, much reporting consisted of publishing official documents and public speeches. *See id.*

146. *Id.*

147. This medium was the culmination of Alexander the Great’s imprimatur of his image on Greek coins. *See* Cathcart, *supra* note 10, at 38; *see also supra* note 10 and accompanying text.

a person's visage. While Abraham Lincoln made good use of telegraphy and the print medium, it was the *carte de visite*, a calling card with photograph and signature, that popularized Lincoln as a celebrity-hero.¹⁴⁸ Photography thus not only satisfied the public's need for mass dissemination of a noted person's image,¹⁴⁹ but also made it possible to establish an individual as a "person of notoriety" by furnishing the public with hundreds of "realistic" images.¹⁵⁰

c. Motion Pictures

The invention of motion pictures constituted an unprecedented leap in the history of fame because it facilitated exposure to a compelling combination: photography's rapid distribution of images and the theater's presentation of stars in actual performance.¹⁵¹ The motion picture, like the photograph, delivered a new level of realism, only it was superior to photographs in that it transcended the provision of stars' images and allowed audiences to observe stars' behaviors and mannerisms. Moreover, motion pictures created an intimacy with the audience greater than could be known in the theatre and even in many social settings. The role of the close-up camera shot is cited by many scholars as the most significant factor in the creation of this new intimacy.¹⁵² "[T]he close-up reveals the unmediated personality of the individual, and this *belief* in the 'capturing' of the 'unique' 'person' of a performer is probably central to the star phenomenon."¹⁵³ Thus, the close-up made "'face' the significant attribute of celebrityhood."¹⁵⁴

The advent of sound motion pictures in the 1920s further enhanced audience familiarity with performers since viewers now could study performers' voices as

148. See Cathcart, *supra* note 10, at 38; see also GAMSON, *supra* note 9, at 20 (noting that Lincoln said that he partially "owed his election . . . to the *carte de visite* made of him by photographer Mathew Brady").

149. See FOWLES, *supra* note 2, at 30.

150. Cathcart, *supra* note 10, at 38 (noting also that "our coins and paper money still carry the portraits of our founding fathers and Civil War heroes").

Significantly, it was the unauthorized use of a private person's photograph that prompted those right-of-privacy decisions in the beginning of this century that are now viewed as the genesis of the right-of-publicity doctrine. See, e.g., *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905). See generally Kwall, *supra* note 3, at 192-96 (discussing this and other decisions regarding the right of publicity).

151. See FOWLES, *supra* note 2, at 30. Beginning in the late nineteenth century with touring companies and vaudeville, see *id.* at 18-22, and then around the turn of the twentieth century when urban elites started to discover the pleasures of cabaret life on the other side of the tracks, see EWEN, *supra* note 108, at 92, Americans became increasingly fascinated with entertainers between the period of 1870 and 1920. This fascination paved the way for the enormous success of motion pictures. See FOWLES, *supra* note 2, at 18-22.

Interestingly, motion pictures did not catch on as quickly in Great Britain, where the tradition of stage show performances was so much more ingrained than in the United States. See SCHICKEL, *supra* note 44, at 89-90. Thus, the British were "much less easily swept away by movie stardom than their American counterparts." *Id.*

152. See DYER, *supra* note 19, at 16-17; EWEN, *supra* note 108, at 93; FOWLES, *supra* note 2, at 31; SCHICKEL, *supra* note 44, at 35-36; Cathcart, *supra* note 10, at 43.

153. DYER, *supra* note 19, at 17 (emphasis in original).

154. Cathcart, *supra* note 10, at 43.

well as their images. The production of sound movies was twice as costly as that of silent films, and the nation's overall economic situation was worsening with the onset of the Great Depression. Ticket sales were plummeting and radio provided a convenient, and cheaper, alternative to weekly theater visits. The "star system" was born around this time, as the new breed of movie executives realized that the performers had to be carefully controlled if profits were to be maintained.¹⁵⁵ Under this system, the development of stars and their presentation to the public was regulated carefully by the major film studios. It was not until the late 1940s and early 1950s that the structure of the film industry shifted so as to allow performers to take more control over their own working conditions and images.¹⁵⁶ This independence worked to the advantage of the best movie stars, who now not only could command a greater salary per movie than they had received for a multiple-year contract, but also could exercise a greater degree of creative control over their chosen projects. Moreover, they were free of the personal, behavioral constraints imposed by the old contracts in an era that was becoming increasingly liberal with respect to morals.¹⁵⁷ As film critic Richard Schickel observed: "[P]eople quickly became eager to hear any confession any prominent person cared to make about any aspect of his life—and pay good money for it too."¹⁵⁸

d. Radio and Television

Radio, while lacking the visual aspect of film, created a new level of intimacy by bringing the performer to the listener "live." This intimacy allowed people to feel there was very little separating them from the celebrity. The radio voice came to people in their living rooms, at the same level at which they conversed with their friends and families.¹⁵⁹ Radio also had the capability to transform the storyteller into the celebrity.¹⁶⁰ This is still the case, as is evidenced by the large

155. See FOWLES, *supra* note 2, at 32-33 ("By regularizing the process of star selection and use, studios diligently worked to stabilize themselves in turbulent times.").

156. A major reason for this shift was the antitrust decision of *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), in which the Supreme Court enjoined the "Big Five" movie studios from price-fixing practices as well as the practice of block-booking of films. Block-booking of films involved entering into licenses in which the right to exhibit one feature was conditioned upon the licensee's also accepting one or more other films. See *id.* at 156-59. In addition, the advent of television at this time made inroads into the movie market. These changes had a major impact on the working lives of the movie stars. Whereas seven-year contracts were standard throughout the movie industry under the star system, see FOWLES, *supra* note 2, at 33, the shake-up of this system resulted in studios contracting with performers on a per-picture basis rather than for long periods of time. See GAMSON, *supra* note 9, at 41. This decrease in control by the studios paved the way for the increased involvement of talent agents and publicists. See *id.*; see also *infra* notes 244-46 and accompanying text.

157. See SCHICKEL, *supra* note 44, at 97.

158. *Id.*

159. See Cathcart, *supra* note 10, at 44.

160. Early radio celebrities included Arthur Godfrey and Edward R. Murrow of CBS Radio News. Other radio personalities such as Bob Hope and Bing Crosby went on to become movie stars. See *id.* at 44-45.

share of attention modern “shock jock” Howard Stern and his conservative nemesis Rush Limbaugh have garnered in recent years.¹⁶¹

The ultimate broadcast medium, however, is television, which reduced significantly the mystique of its featured performers. Living rooms and bedrooms are comfortable and familiar unlike the movie theater’s majestic “halls of dark enchantment”; performers’ television images are smaller and more like the way they would appear in real life; audiences view television performers at eye level, rather than looking up at them;¹⁶² and, while movie performers rarely look directly at the viewer, television performers very often do, giving the impression that they are talking directly to the viewer.¹⁶³ The net effect of all of these differences is the creation of the greatest degree of intimacy and familiarity between performers and their audiences. This closeness “creates an immediate ‘reality’ that makes viewers feel they know television personalities better than they do their friends and neighbors.”¹⁶⁴

Due to its hundreds of hours of programming time to fill, television has come to rely on personalities. In order to attract and hold large audiences, television turns “everyday events into celebrated performances.”¹⁶⁵ Thus, a certain synergy is created. Television requires famous persons to fill its hours, and these individuals need television to create and maintain their fame. Television’s celebrity outreach encompasses not just actors and actresses, but also comedians, rock stars, and other musicians,¹⁶⁶ as well as professional athletes who, through television, can transcend “mere stardom based on excellence in their specialties to become ‘personalities’ recognizable even by those people who do not follow their sport.”¹⁶⁷ Moreover, television’s reliance on, and preoccupation with, celebrities has increased over the past twenty-five years with the proliferation of “tabloid TV,” a distinctively American phenomenon.¹⁶⁸ The growth of such “infotainment” has also contributed to the phenomenon of making temporary celebrities out of “ordinary folks,”¹⁶⁹ thus helping to effectuate Andy Warhol’s

161. See, e.g., Kurt Andersen, *Big Mouths (Rush Limbaugh and Howard Stern)*, TIME, Nov. 1, 1993, at 60; Shaw, *supra* note 142, at A1 (calling Rush Limbaugh a “paragon” of “self-promotion” in that “his callers and the issues he discusses are mere props for his egregiously . . . egocentric brand of talk radio”).

162. See FOWLES, *supra* note 2, at 34-35; see also GAMSON, *supra* note 9, at 43-44.

163. See BRAUDY, *supra* note 10, at 578 n.48.

164. Drucker & Cathcart, *supra* note 99, at 267; see also BRAUDY, *supra* note 10, at 584; SCHICKEL, *supra* note 44, at 9-11.

165. Cathcart, *supra* note 10, at 46.

166. See FOWLES, *supra* note 2, at 37 (noting the impact of rock videos and cable television).

167. SCHICKEL, *supra* note 44, at 249-50; see also FOWLES, *supra* note 2, at 36-37 (noting the impact of professional athletes as stars).

168. See Shaw, *supra* note 18, at A19 (“[T]he proliferation of tabloid TV and the adoption of many of its topics and tactics by the mainstream media is almost exclusively an American phenomenon.”); Shaw, *supra* note 142, at A1 (noting that the people who own many of the top broadcast news organizations also own many of the local stations that carry the syndicated tabloid shows); see also *supra* note 38.

169. See Shaw, *supra* note 142, at A1. In addition to tabloid television, the number of television talk shows has grown dramatically. Some cable stations feature only talk shows all day long. Court TV, which premiered in 1991 on cable, is the newest in this television genre.

famous prediction in 1968 that “in the future everyone will be world famous for fifteen minutes.”¹⁷⁰

e. Media Packaging of the Celebrity Persona

One of the most integral factors fueling our society’s fascination with fame is the multifaceted process of presenting celebrities to the public. This complex celebrity packaging is engaged in by virtually all branches of the modern mass media and its accumulative effect is what gives celebrity status its current impact.¹⁷¹ Today, “visibility-building” not only is a process, but also a big business. One commentator has observed in this regard that “we have moved from [a] ‘discovery model’ to a breeding model,” which amounts to a system for “transforming unknown aspirants into high visibles in much the same way that Sumo wrestlers are grown in Japan, or ballerinas built in the Soviet Union.”¹⁷² Today, the manner in which celebrities are packaged takes the form of a complete media construction package, in which their individual achievements are processed in the context of both their prior works as well as their media image.¹⁷³ The “hype” surrounding their achievements essentially establishes a trademark of attributes by which the celebrity is known and recognized.¹⁷⁴

This strong emphasis on the packaging of the celebrity product may be of relatively recent origins, but the first well-known example of the deliberate manufacturing of a celebrity’s image occurred back in 1910. Movie producer Carl Laemmle, who later established Universal Pictures, hired Florence Lawrence, known by the American audience as the “Biograph Girl,” and planted in a St. Louis newspaper a story about her tragic, premature death in a trolley car accident. Subsequently, he announced that the story was a lie and had her make a tremendously publicized appearance in St. Louis, all with the objective of giving his independent production company an edge over the Motion Picture Patents Company, the industry leader at that time.¹⁷⁵ Today, such efforts are far more abundant, although no less calculated.

The celebrity-packaging strategies established near the turn of the century remained widely in use until the early 1950s, and some of these techniques are

See Marla Hart, *You, the Jury: Court TV Brings the Courtroom Home*, CHI. TRIB., Aug. 4, 1996, § 11, at 5.

170. GAMSON, *supra* note 9, at 15.

171. See Cathcart, *supra* note 10, at 45.

172. REIN ET AL., *supra* note 7, at 23. Rein continues this train of thought: “All over this country, from *Fame*-type high school talent banks in New York City to ice-skating schools in Denver and gymnastics camps in California, we are breeding the highly visible instead of discovering them.” *Id.*

173. See Drucker & Cathcart, *supra* note 99, at 266.

174. The success of the packaging process is supported by the study of the celebrity-fan relationship conducted by Drucker & Cathcart, which revealed that celebrities were often identified by more than one attribute. See *id.* These authors conclude that “[t]he celebrity appeal and answering role of the fan appears to stem, in part, from media packaging.” *Id.*

175. See DYER, *supra* note 19, at 9-10; GAMSON, *supra* note 9, at 24; SCHICKEL, *supra* note 44, at 37.

even used today.¹⁷⁶ Still, the presentation to the public of celebrities such as Elvis, the Beatles, and JFK had a much more innocent feel than the promotions of current celebrities.¹⁷⁷ Moreover, as the foregoing discussion has demonstrated, the technologies have evolved considerably, and public perceptions and reactions have kept pace with these changes. One source observes that “mass media use is now the third-ranked activity after work and sleep” and that “the content of these media has come to occupy the greater part of Americans’ recreational time.”¹⁷⁸ The content that the majority of Americans seem to insist upon in these media encounters is celebrities.¹⁷⁹ The growing popularity of the Internet undoubtedly will yield even more ways of packaging celebrities and exploiting the celebrity phenomenon.¹⁸⁰

The amount of work, thought, and planning that goes into controlling and planting star information is extremely surprising to those who have never given the matter much thought.¹⁸¹ One of the most interesting and comprehensive studies of this topic is the work of sociologist Joshua Gamson, *Claims to Fame*.¹⁸² Gamson probes the fabric of the celebrity packaging process by exploring not only what the texts are saying about celebrities but also by researching the celebrity production process and studying audience reaction through focus groups and firsthand observations of celebrity events.¹⁸³ Among other things, his work documents how celebrity stories are planted by publicists in accordance with certain patterns and themes and typically consist of semifictional events;¹⁸⁴ how the management process typically results in a tug-of-war between the celebrities, their publicists, and the media organizations;¹⁸⁵ and how insignificant the consumer audience essentially is to the entire process.¹⁸⁶ The reader of Gamson’s

176. See GAMSON, *supra* note 9, at 25-26.

177. According to Meyrowitz, although these early “media-induced bonds” were somewhat calculated, they still “were among the first of their kind, and the nature and scope of such media friendships were unanticipated by the performers, their handlers, and the public.” Joshua Meyrowitz, *The Life and Death of Media Friends: New Genres of Intimacy and Mourning*, in AMERICAN HEROES IN A MEDIA AGE, *supra* note 10, at 62, 72.

178. FOWLES, *supra* note 2, at 263.

179. See *id.*

180. See Shaw, *supra* note 142, at A1 (discussing the role of the mass media in the exploitation of celebrities during the modern electronic age).

181. See generally FOWLES, *supra* note 2, at 123-30 (providing a brief overview of this topic).

182. GAMSON, *supra* note 9.

183. See *supra* note 109.

184. See GAMSON, *supra* note 9, at 75-78 (noting that fiction “frees up the celebrity producer to be competitive” whereas “truth makes the selling job easier, especially if the product is genuinely outstanding or in demand”).

185. See *id.* at 79-107.

186. See *id.* at 115-20 (suggesting that celebrity teams cater just to the media rather than to the ultimate audience). One of Gamson’s most telling chapters concerns his experience as a member of the audience for a segment of the television show, *AM Los Angeles*. This chapter illustrates how studio audiences for such local programs are nothing more than production elements who are given massive attention by the producers for only one reason: so that they can make the guest celebrities and the program itself look good to viewers at home. This function is best captured by the “clapping” technique Gamson learned on the set of the show

work will find herself pondering whether the media's celebrity packaging processes are simply a response to society's needs for celebrities or whether society's needs are in part being defined by the media's activities. Either way, the link between the media's processes and celebrity is manifest.

It should be emphasized that the American experience with fame has given rise to interesting paradoxes. Although fame is generally viewed as the hallmark of individualism in the United States,¹⁸⁷ scholars have noted that the artificial celebrity production and packaging processes actually make those who are its subjects somewhat less like individuals and more like representations of artificial stereotypes.¹⁸⁸ Moreover, the democratic and egalitarian influences characteristic of the American mind-set has resulted in a "paradoxical uniqueness" consisting of "a compromise between an aristocracy of the personally distinguished and an egalitarian democracy in which all are deserving."¹⁸⁹ The "common person" appeal that is so characteristic of our leaders and celebrities¹⁹⁰ also stems from this paradox. Although many celebrities are admired because they are unique, their uniqueness has appeal precisely because of qualities that could potentially be found in any individual.¹⁹¹

Our societal need for surrogate communities and conformity presents yet another strange juxtaposition with our heightened respect for individualism.¹⁹² These influences will be examined more fully in Part II.C, but here it is worth noting that, considered separately, celebrities personify uniqueness and individualism, whereas as a group, they appear to embody a close-knit, cohesive community.¹⁹³ As a society, we prize the individualism reflected in each celebrity persona, but we also derive a vicarious feeling of belonging when we reflect upon what we perceive as their well-established social enclave.¹⁹⁴

As the foregoing discussion demonstrates, the right of publicity is consistent with our democratic and capitalist character and our media culture. It reflects values such as hard work and equal opportunity that we endorse in our society. Even so, the doctrine never would have taken root unless its underlying legal theory was consistent with our notion of property rights. The following Part therefore examines the right-of-publicity's status as a property right.

which enabled him to "clap the sound of three people." *Id.* at 108-13.

187. "Entertainers . . . are best qualified to become celebrities because they are skilled in the marginal differentiation of their personalities. They succeed by skillfully distinguishing themselves from others essentially like them." BOORSTIN, *supra* note 31, at 65; *see also* REIN ET AL., *supra* note 7, at 332 (discussing the rewards of celebrity).

188. *See* Leo Braudy, *The Fame Game: Why Nick Daniloff Snubbed Mickey Mouse*, NEW REPUBLIC, Dec. 8, 1986, at 14, 14-15. Orrin Klapp's work on the typology of stars, which has been used as a basis for further exploitation by other scholars, supports the personification of stars as stereotypes rather than individuals. *See* KLAPP, *supra* note 53; *see also supra* notes 54-57 and accompanying text; *infra* notes 299-303 and accompanying text.

189. GAMSON, *supra* note 9, at 18-19; *see also id.* at 195.

190. *See supra* notes 102-04 and accompanying text.

191. *See* BRAUDY, *supra* note 10, at 579; GAMSON, *supra* note 9, at 18-19, 195.

192. *See* EDWARD T. HALL & MILDRED REED HALL, UNDERSTANDING CULTURAL DIFFERENCES 151-52 (1990) (noting that foreigners find this paradox puzzling).

193. *See* FOWLES, *supra* note 2, at 170-71.

194. *See id.*

*B. The Case for Treating the Right of Publicity as a
Property Right*

1. The Copyright Analogy and the Provision of Incentives

The right-of-publicity's status as a property right is readily understandable when it is compared with other forms of intellectual property that also are accorded this status. Proponents of the right of publicity often rely on a copyright law analogy and argue that publicity rights are needed to spur incentives to creation just as copyright law exists, by constitutional command,¹⁹⁵ to enhance economic incentives for the betterment of society. Even the Supreme Court has recognized this rationale for publicity rights protection.¹⁹⁶

In evaluating this incentive-based theory as it applies to the right of publicity, it is instructive to consider the disadvantages of celebrity status. Arguably, for some individuals, these drawbacks might be sufficient to outweigh the benefits absent the right-of-publicity's provision of additional economic incentives beyond compensation for actual performances.¹⁹⁷ Some of the costs entailed by celebrity status, such as the invasion of privacy experienced by celebrities as well as the restrictions on their personal freedom, are obvious.¹⁹⁸ Typical of the celebrity experience is the story reported by prominent Chicago art dealer Billy Hork, who took Oprah Winfrey to the Chicago Art Expo several years ago. Mr. Hork remembered that, once Winfrey was discovered by her fans, her time at the Art Expo was terminated as she no longer had the freedom to shop and reflect upon the art.¹⁹⁹

Celebrities must cope with other drawbacks to their status. Many celebrities experience uncertainty as to whom they can trust and as to whether particular

195. See U.S. CONST. art 1, § 8, cl. 8.

196. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (holding that the First and Fourteenth Amendments do not immunize the news media from damages for infringements of a performer's state-law right of publicity).

197. Additionally, the high compensation received by many celebrities has been cited as a reason against an incentive rationale for protecting publicity rights. See Madow, *supra* note 8, at 209-13. This argument, however, is flawed in that it depends upon the conclusion that publicity rights do not represent property rights. Our society does not deprive the superrich of any of their lawfully achieved economic gains just because they already have a great deal of wealth. If the right of publicity does indeed represent a property right, no reason can justify treating the economic value deriving from the right differently from any other type of property.

198. See generally FOWLES, *supra* note 2, at 105-53 (discussing the personal costs of celebrity status); REINET AL., *supra* note 7, at 328-32 (same).

The year Michael Jordan temporarily retired from the Bulls he was spotted by the author at a suburban ice rink with his family while his children took private skating lessons. Surprisingly, he traveled without his security entourage and on the two occasions he was observed, all of the patrons of the ice rink, even the younger children, respected his personal space. Most celebrities, however, are not able to enjoy private time in public places.

199. See Interview with Billy Hork, owner of Billy Hork Galleries, in Chicago, Ill. (July 18, 1996).

friends are really interested in them for their own sake rather than for the sake of their celebrity.²⁰⁰ Moreover, the physical demands of their jobs are far more extensive than most and are typically characterized by alternating extremes of too little versus too much free time.²⁰¹ Another significant disadvantage derives from the law of defamation, under which celebrities enjoy less protection than other citizens. Defendants in defamation actions involving public officials and public figures must meet the higher, "actual malice" standard of liability that requires knowledge of falsity as to the libelous statement or reckless disregard as to its truth.²⁰² Some courts also hold that celebrities cannot maintain right-of-privacy actions,²⁰³ although this view is not universal.²⁰⁴ Opponents of the right of publicity argue that, taken together, the cumulative impact of these disadvantages to fame do not result in diminished incentives on the part of celebrities. Although it may be true that many celebrities still desire fame despite the negative aspects of celebrity status, any such evaluation of this impact admittedly is speculative and in any given instance is most likely to depend upon the particular personality of the individual celebrity.²⁰⁵

More significantly, the right of publicity protects another type of incentive, one that focuses on moral rather than economic concerns. For most celebrities, the cachet of fame is attributed to an image that the publicity plaintiff has a reputational interest in controlling. The author has argued elsewhere that "the unauthorized use of an individual's persona potentially poses the maximum harm to [that individual] when the persona is being appropriated in an objectionable context or for an objectionable purpose."²⁰⁶ Although some celebrities still might want to pursue the limelight even if the law sanctioned such unauthorized appropriations, other celebrities, particularly those with strong moral

200. See REIN ET AL., *supra* note 7, at 330.

201. See *id.* at 330-31; see also *infra* notes 238-47 and accompanying text (discussing the labors of the celebrity in creating the celebrity construct).

202. This standard was initially applied by the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to cases involving statements made about a public official concerning official conduct, but it has since been extended to cases involving public figures. See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1975). Well-known celebrities who "have knowingly relinquished their anonymity in return for fame, fortune, or influence" and are "so famous that they 'may be able to transfer their recognition and influence from one field to another'" can reasonably be considered general-purpose public figures. *Tavoulaareas v. Piro*, 817 F.2d 762, 772-73 (D.C. Cir. 1987) (quoting *Waldburn v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1294 n.15 (D.C. Cir. 1980)); see also SHELDON W. HALPERN, *THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND MORAL RIGHTS* 296-97 (2d ed. 1993) ("With the equation of 'public figure' and 'public official,' the predicate was established for the recognition of imposition of the 'constitutional malice' standard upon the movie star plaintiff . . .").

203. See *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983).

204. See Kwall, *supra* note 67, at 70; see also 1 MCCARTHY, *supra* note 81, § 4.2 (discussing celebrities' right to recover for invasion of privacy).

205. See Kwall, *supra* note 67, at 79-80.

206. *Id.* at 70; see also *id.* at 70-73.

philosophies, might not.²⁰⁷ The impact of the decisions regarding the use of a celebrity's persona are felt most directly by the celebrity since it is the celebrity, rather than anyone in the celebrity's entourage, whose reputation is at stake.

The right of publicity provides celebrities with a vehicle for maintaining control over how their constructs are presented to the public. It has been argued that the right of publicity is unnecessary to protect this critical interest because it can otherwise be safeguarded through unfair competition laws such as the Lanham Act and the law of intentional infliction of emotional distress.²⁰⁸ This argument is fundamentally flawed, however, in that it fails to recognize that these other doctrines require the satisfaction of certain elements that frequently make them unsuitable substitutes for the right of publicity. The primary objective of state unfair competition law and its federal counterpart, § 43(a) of the Lanham Act,²⁰⁹ is to prevent confusion in the marketplace.²¹⁰ Therefore, a successful plaintiff will prevail under these theories only if she can demonstrate likelihood of consumer confusion.²¹¹ The right of publicity safeguards interests in addition to preventing consumer confusion,²¹² such as preventing harm to a celebrity's reputational interest, that can be damaged even when no consumer confusion or deception is present.²¹³

207. *See id.* at 79-80 (discussing the lawsuit of singer Tom Waits, who has a firm policy against appearing in commercials, to enforce his publicity rights against Frito-Lay and its advertising agency, *see Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), for using a sound-alike imitating Waits's distinctive voice in a commercial for Doritos).

208. *See Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 976 (10th Cir. 1996); *see also Madow*, *supra* note 8, at 228-36.

209. 15 U.S.C. § 1125(a) (1994).

210. *See DREYFUSS & KWALL*, *supra* note 5, at 74-75.

211. *See id.*; *see also* 15 U.S.C. § 1125(a) (prohibiting the use of material that "is likely to cause confusion, or to cause mistake, or to deceive").

212. Right-of-publicity case law also manifests a concern for the following social interests: fostering creativity, safeguarding the individual's enjoyment of the fruits of her labors, and preventing unjust enrichment. *See generally Kwall*, *supra* note 3, at 197-200 (discussing these rationales).

213. The *Cardtoons* court furnished an example of the operation of the right of publicity that also illustrates how reputational damage can occur even absent consumer deception. The court hypothesized:

Suppose, for example, that a company, Mitchell Fruit, wanted to use pop singer Madonna in an advertising campaign to sell bananas, but Madonna never ate its fruit and would not agree to endorse its products. If Mitchell Fruit posted a billboard featuring a picture of Madonna and the phrase, "Madonna may have ten platinum albums, but she's never had a Mitchell banana," Madonna would . . . have a publicity rights claim, because Mitchell Fruit misappropriated her name and likeness for commercial purposes.

Cardtoons, 95 F.3d at 967-68.

In a case such as this, there is no potential for consumer deception that Madonna is endorsing the company's bananas. If the product in this example were something with which Madonna would not want her persona associated, reputational damage could occur. However, because there is no likelihood of consumer confusion, neither unfair competition laws nor the Lanham Act would provide Madonna with any protection in these circumstances.

Moreover, the law concerning intentional infliction of emotional distress will have very limited utility in redressing right-of-publicity violations because it entails stringent requirements, most notably that the defendant's conduct be extreme and outrageous.²¹⁴ Especially significant is the Supreme Court's ruling in *Hustler Magazine v. Falwell*²¹⁵ that public figures and officials may not recover for intentional infliction of emotional distress caused by the publication of an offensive ad parody absent an additional showing that the publication "contains a false statement of fact which was made with 'actual malice.'"²¹⁶ This ruling makes the application of the law of intentional infliction of emotional distress even more restrictive for celebrities. The right of publicity thus stands alone in its ability to spur incentives to create by affording protection for the moral value of celebrities' reputational interests.

2. Private Property Analogies Based on Natural Law and Personality Theories

An incentive-based rationale for protecting publicity rights is, as discussed earlier, analogous to the constitutional predicate for protecting copyrights. The argument has been made that copyright law is a creation of positive law, justified not so much from the author's act of creation but from "a constitutionally recognized social purpose."²¹⁷ As such, any further protection of the author beyond copyright must also reflect society's needs, and the ultimate result must represent a balance between the needs of the author and the competing interests of the public as well as private parties.²¹⁸ Such an analysis could justify the right of publicity in light of our prevailing notions of property generally. In addition to the justification for private property that mirrors the constitutional predicate for copyright protection in that it views property ownership as a necessary spur

214. See, e.g., *Nelson v. Monroe Reg'l Med. Ctr.*, 925 F.2d 1555, 1559 (7th Cir. 1991) (noting that the following four factors must be established under Wisconsin law: "(1) the conduct was intended to cause emotional distress; (2) the conduct was extreme and outrageous; (3) the conduct was the cause of the person's emotional distress; and (4) the emotional distress must be extreme and disabling") (quoting *Stoll v. Adriansen*, 362 N.W.2d 182, 189 (Wis. Ct. App. 1984)). Wisconsin law requires that the defendant's conduct be so egregious that "the average member of the community" would regard the acts forming the basis for the claim "as being a complete denial of the plaintiff's dignity as a person." *Nelson*, 925 F.2d at 1559 (quoting *Alsteen v. Gehl*, 124 N.W.2d 312, 318 (Wis. 1963)). Although worded somewhat differently, the Virginia law that was applied in *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 n.3 (1988), essentially covered the same elements. See *infra* notes 215-16 and accompanying text.

215. 485 U.S. 46.

216. *Id.* at 56; see also *supra* note 202 and accompanying text.

217. DaSilva, *supra* note 96, at 55.

218. See *id.*

to production,²¹⁹ other theoretical justifications exist for both private property generally as well as intellectual property.²²⁰

Specifically, justifications for private property that are based on concepts of natural law and justice also pertain to intellectual property. In fact, much evidence suggests that early English copyright law, upon which our copyright system was based, contained many influences from natural law.²²¹ One philosophical view of property maintains that property rights are rewards for the effort expended in creating the thing to be protected. In other words, one's private property can be viewed as the reification of one's past efforts, and therefore, one deserves to keep what one has produced. This view draws from John Locke's labor-desert theory of property according to which an individual's property interest stems from the mixing of that person's labor with a natural resource so as to make that resource more productive for society.²²² A Lockean conception of private property can also be applied to intellectual property²²³ and, as will be discussed more fully below, can justify treating the right of publicity as a property right.²²⁴

Another view of private property is as an extension of human personality, and therefore, as essential to human dignity. This view derives from the work of the German philosopher Hegel, who viewed "personality" as "moral and political personhood."²²⁵ Stephen Munzer observes that property is conducive to personality as Hegel defined it because property rights are "an independent

219. See, e.g., Frank Michaelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1211-12 (1967).

220. Another economically based argument justifying private property centers around the concept that private property facilitates exchanges and markets, thus efficiently allocating and rationing resources. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 29-33 (3d ed. 1986). Property thus can be viewed as a system for allocating to producers and distributing to consumers a basic resource necessary for satisfying human needs. See generally LAWRENCE BECKER, *PROPERTY RIGHTS* 69-74 (1977); Stephen R. Munzer, *The Acquisition of Property Rights*, 66 NOTRE DAME L. REV. 661 (1991). Professor Madow has argued that celebrity personas are "public goods" and therefore, from an economic standpoint, the unrestricted use of publicity rights may result in greater efficiency. See Madow, *supra* note 8, at 220-25. This argument will not be treated in detail here since the author of this Article has responded to Madow's position in this regard elsewhere. See Kwall, *supra* note 67, at 108-09.

221. See generally INTERNATIONAL ANTHOLOGY, *supra* note 90, at 118, 142-44 (providing a discussion of these influences and their impact on American copyright law).

222. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 288-96 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Lockean theory would not allow the initial creators of any aspect of culture to maintain the exclusive right to use if so depriving the public would result in a "devalued common." See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1570 (1993). Part II.C addresses whether sanctioning the right of publicity entails such social costs.

223. See Gordon, *supra* note 222 (applying Lockean theory to resolve competing claims between the original creators of intellectual property and those wishing to make subsequent use of the original creations).

224. See *infra* notes 233-58 and accompanying text.

225. See MUNZER, *supra* note 133, at 81.

component of moral and political personhood.²²⁶ The effectuation of changes in the world by creating something and claiming it as one's own presupposes that the creator is an entity with moral and political rights.²²⁷ Hegel's conception of property, by emphasizing it as a vehicle through which an individual could express a personal, singular will, is consistent with intellectual property protection as a means of safeguarding a creator's personality or identity.²²⁸

To advance either of these justifications for private property in support of protection for the right of publicity, it must be established generally that celebrities as individuals are intertwined with their constructed images to the point where their images manifestly reflect their personalities and embody their creative efforts. If such is the case, celebrities can make a compelling argument that they have a property right in the economic value derived from their constructed images.

Opponents of the right of publicity would argue that neither of these justifications for private property should be used to justify protection for publicity rights because the constructed images in question are not the exclusive creations of the individuals who are claiming protection for their personas. The opponents' objections essentially can be grouped into three categories. First, the process of creating the state of fame is largely the result of the labors and creative endeavors of those other than the famous individuals.²²⁹ Second, even when celebrities do engage in creative efforts to develop their personas, these efforts lack originality because celebrities borrow from the personas of other celebrities composing the existing cultural fabric.²³⁰ Third, the state of being famous is conferred by the public in general, largely in response to the efforts of those other than the celebrity.²³¹ For these reasons, then, celebrities are not the sole authors of what their images mean for others.²³² It therefore follows that celebrities do not have the right to decide how their images should be utilized by others and to profit exclusively from the cachet generated by their fame. The following discussion explores each of these objections and concludes that although they may have some initial appeal, they are not ultimately persuasive.

226. *Id.* at 81-82.

227. *See id.* at 82.

228. *See* David Hurlbut, *Fixing the Biodiversity Convention: Toward a Special Protocol for Related Intellectual Property*, 34 NAT. RESOURCES J. 379, 383 (1994); *see also* MUNZER, *supra* note 133, at 80 (suggesting that Hegel's tradition believes that "expectations relating to property stem from human agency").

229. *See, e.g.*, *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1517 (9th Cir. 1993) (Kozinski, J., dissenting); Coombe, *Authorizing the Celebrity*, *supra* note 67, at 368-76; Madow, *supra* note 8, at 179-205.

230. *See* Madow, *supra* note 8, at 197.

231. *See id.* at 184-96; Welkowitz, *supra* note 67, at 84.

232. *See* Madow, *supra* note 8, at 195.

a. Celebrities Maintain the Most Direct
Connection to Their Personas Despite the
Efforts of Other Parties

Under a Lockean conception of property, when a creator appropriates objects from the common, or public domain, and intermixes her labor with these objects, the creator is harmed if someone takes the objects to which the creator's labor is attached without the creator's permission.²³³ Yet, labor, in and of itself, is not property, and so it is necessary to ask whether the Lockean labor that is invested in an object constitutes an interest capable of protection under precepts of property law. Even Locke offered no exact definition of the type of labor that would support a property claim.²³⁴ This issue is especially important in the context of publicity rights because the celebrity is not the only person whose labor is intermixed with the ultimate text for which protection is being sought.

From a Lockean perspective, the law should intercede if someone appropriates another's labored-on object if such a taking "interferes with a goal or project to which the laborer has purposely directed her effort."²³⁵ According to this perspective, copying intellectual products would not be any more sanctioned than appropriating tangible objects. In order to justify harming the creator of any type of object, the public's need must have some "particular moral weight."²³⁶ The question regarding publicity rights, then, is whether they should be treated differently from ownership of other forms of intangible property because publicity rights involve the labor of people in addition to that of the person seeking ownership of the right.

The discussion of media packaging in Part II.A.4.e²³⁷ suggests that a person's fame is a construction that is somewhat different from the "real" life of that person. Still, the effort in constructing the celebrity persona represents an intellectual, emotional, and physical effort on the part of the celebrity that requires protection.²³⁸ The need for developing the celebrity construct is largely related to our society's fascination with those who are somehow different. Rewarding these efforts at differentiation is entirely consistent with America's

233. See Gordon, *supra* note 222, at 1544-45.

234. See *id.* at 1547.

235. *Id.*

236. *Id.* at 1549 ("Nothing in a natural-rights framework gives the public the *per se* entitlement to cheap access to what the laborer has produced."); see also *infra* notes 327-36 and accompanying text.

237. See *supra* notes 171-86 and accompanying text.

238. See GAINES, *supra* note 72, at 191 (positing whether publicity that is created by mental labor should be viewed as property).

Professor Halpern emphasized that protection for the right of publicity does not involve a choice "between the rights of the public at large and a fortuitously placed individual; the choice is between the individual to whom that associative value attaches and a stranger to the process who would make money out of it." Halpern, *supra* note 74, at 872. Thus, even if the choice must be made at the lowest level between "two sets of scavengers trading on the ephemera of fame, logic and fairness would seem to compel favoring the scavenger who has at least some colorable connection to the phenomenon." *Id.*

long-standing respect for individualism.²³⁹ As a society, we value hard work,²⁴⁰ and we encourage people making their mark by developing a persona that somehow stands out from the crowd.²⁴¹ The drive for success and the need for establishing a distinguishing yet appealing personality has become especially important for those seeking the limelight.²⁴² As Boorstin wrote, “[t]o be known for your personality actually proves you a celebrity.”²⁴³

When the studios were exclusively responsible for effectuating this construct, the result was that stars were stereotyped into certain roles, and this standardization brought them steady work and longer careers. Most stars in this period, therefore, automatically accepted the studio control.²⁴⁴ Once the star system broke down,²⁴⁵ the celebrity had to take more control over the direction of her career.²⁴⁶ Regardless of the input from others, celebrities still remain the vehicles through which their images are conveyed to the public. As discussed

239. From the outset, Americans have prized independence, and concomitantly, have displayed a healthy respect for individualism. *See FOWLES, supra* note 2, at 25. Although the beginnings of modern political philosophy that feature the individual “as the carrier of a personal continuity” can be traced back to Thomas Hobbes and John Locke, BRAUDY, *supra* note 10, at 343-44, our Founding Fathers can be credited for heartily advocating a belief in a rugged individualism that bowed to no external power. *See FOWLES, supra* note 2, at 25. Fowles also notes the observations of French nobleman Alexis de Tocqueville, Ralph Waldo Emerson, and Walt Whitman regarding this emerging sense of individualism. *See id.* at 25-26. In addition, our heterogeneous society, lacking a common cultural heritage, contributes to an environment in which the individual who stands out is likely to be extolled.

240. “In other countries the social imperatives may be for the individual to fit in well and to fulfill an ascribed role perfectly, but in the United States ambition is stimulated and achievement rewarded.” FOWLES, *supra* note 2, at 164.

241. Compare the different cultural attitudes exemplified by the following two folk sayings. Americans, from at least the mid-nineteenth century, have been fond of saying, “The wheel that squeaks the loudest is the one that gets the grease,” while the Japanese have a saying which translates to, “The nail that protrudes gets hammered down.” *See Shaw, supra* note 18, at A1. According to writer David Shaw, “[t]he difference in these aphorisms goes a long way toward explaining the strange fascination with personality and celebrity in American society and in the American media compared not only with Japan but with the rest of the world.” *Id.*

242. According to vaudeville expert Albert McLean, success as “an accessible right” was the underlying lesson of vaudeville for America’s urban audiences. *See ALBERT F. MCLEAN, JR., AMERICAN VAUDEVILLE AS RITUAL* 7-12 (1965). Athletes typify the message of winning and success even more visibly.

243. BOORSTIN, *supra* note 31, at 65. Scholars have traced our personality fetish back to the increasing industrialization characteristic of our culture since the latter part of the nineteenth century. Feeling displaced and in need of more communal ties, urban dwellers were encouraged initially to bolster their characters by resorting to self-help. *See FOWLES, supra* note 2, at 26. Gradually, however, this emphasis on individual resolve gave rise to an emphasis on development of personal charm as a coping mechanism. *See WARREN I. SUSMAN, CULTURE AS HISTORY* 280 (1984) (containing a scholarly scrutiny of “self-help” manuals in the early twentieth century).

244. *See FOWLES, supra* note 2, at 33.

245. *See supra* notes 155-56 and accompanying text.

246. Of course, the current celebrity construction process also can result in the creation of celebrity stereotypes rather than the individuals whose distinguishing characteristics we prize. *See supra* note 188 and accompanying text.

above, these vehicles are subject to tremendous limitations regarding their personal freedom, limitations that are not shared by their well-paid promoters, press agents, and publicists. To the extent a particular celebrity is in demand, it is the celebrity herself whose life is most directly affected by that demand. Moreover, the impact of decisions regarding the use of a celebrity's persona are felt most directly by the celebrity rather than by anyone in the celebrity's entourage.²⁴⁷

A consideration of other people's efforts in constructing a celebrity's persona is perhaps most compelling when a celebrity's likeness is appropriated as a fictional character the celebrity has played in movies or television. In these instances, it could be argued that the character is as much the creation of the individual playing the character as the author of the script and the show's producer. The Third Circuit recently considered this issue in a suit brought by George McFarland, who played the character "Spanky" in the movie and television versions of *Our Gang* and *Little Rascals*, against a restaurant that had misappropriated his name and likeness. Applying New Jersey law, the court reversed the district court's ruling that an actor such as "Spanky" McFarland could not have a proprietary interest in the exploitation of his name or image.²⁴⁸ The *McFarland* court viewed the concept of "associative value" as the heart of the issue.²⁴⁹ To the extent the character has become "so associated" with the actor "that it becomes inseparable from the actor's own public image, the actor obtains an interest in the image" that enables him to prevent misappropriations.²⁵⁰ This

247. See *supra* notes 206-16 and accompanying text.

248. See *McFarland v. Miller*, 14 F.3d 912, 919 (3d Cir. 1994). During the pendency of the suit, McFarland died, and the court ruled that, under New Jersey law, his personal representative could assert his rights in the character. See *id.* at 918.

Other right-of-publicity cases have involved character portrayals. In *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979), the relatives of actor Bela Lugosi brought a right-of-publicity action against Universal Pictures for authorizing its licensees to use the deceased actor's likeness from the film *Dracula* on various commercial products. Although the case was decided on the ground that the right to exploit one's name and likeness is personal to the individual and thus can be exercised only by that person during her lifetime, see *id.* at 431, an interesting debate occurred between concurring Justice Mosk and dissenting Chief Justice Bird. Justice Mosk disputed that a proprietary right could exist in that case because Lugosi played a dramatic character that was created by a novelist in a film produced by a motion picture company under license from the novelist's successor. See *id.* at 432-34 (Mosk, J., concurring). Although he did not go so far as to say that an actor can never possess a proprietary interest in a characterization, those situations would be limited to when "[a]n original creation of a fictional figure" is played "exclusively by its creator." *Id.* at 432 (Mosk, J., concurring). Justice Mosk gave as examples Groucho Marx, Red Skelton, Abbott and Costello, and Laurel and Hardy. See *id.* (Mosk, J., concurring). In contrast, Chief Justice Bird believed that the right of publicity should extend to actors' portrayals of fictional characters because to the extent the focus of their professional labors had been on developing one or more such characters, protection for their likenesses in their portrayals could be "considerably more important than protection for the individual's 'natural' appearance." *Id.* at 445 (Bird, C.J., dissenting).

249. See *McFarland*, 14 F.3d at 919.

250. *Id.* at 920. The court thus remanded on the ground that there exists "a triable issue of fact as to whether McFarland had become so inextricably identified with Spanky McFarland that McFarland's own identity would be invoked by the name Spanky." *Id.* at 921.

view recognizes that the actor playing the character is the most direct link to the character in the public's mind in those instances where the "associative value" is high, even though others may be involved in the character's presentation to the public. Therefore, when the cachet of the character's identity has become "entwined in the public mind with the name of [the actor],"²⁵¹ treating this cachet as a proprietary right of the actor is justified.

Other types of property are subject to individual ownership despite the existence of multiple influences in its creation. Items of cultural property, for example, are objects "that are the product of a particular group or community and embody some expression of that group's identity."²⁵² This type of property, which includes both submerged archaeological finds as well as land finds, typically is subject to individual ownership by either the object's finder or the owner of the real property in which it is embedded.²⁵³ Recent proposals have recognized, however, that group ownership of cultural property is more appropriate.²⁵⁴ Even so, a significant difference exists between cultural property and the right of publicity in that allowing group ownership of cultural property simply recognizes that "the rights of the finder and the real property owner have always been regarded as provisional, subject to the claim of the original owner of the property."²⁵⁵ These individual owners assert their claims based on default, and they have not enjoyed any type of historical connection to the production of the object whose ownership is in question. In contrast, the celebrity whose constructed image is at issue in a right-of-publicity action bears a strong relationship to that persona, even if others also have contributed to the creation of the construct.

Trademark law is perhaps an even stronger analogy to the right of publicity. As one commentator has observed, "the celebrity's public style" is "an intellectual creation which, like a trademark, is susceptible to ownership."²⁵⁶ Publicity rights are analogous to trademarks in that the ownership of both constitutes a right to a signal, or control over an information-filled message that flows from the owner to the public.²⁵⁷ The content of a trademark's signal often is derived from advertising, and therefore, its meaning typically is a function of the efforts not only of the owner, but more importantly, of the advertising agencies who devise the clever advertising techniques that help to establish the meaning of a particular mark. Yet, no question exists that the producer of the good to which the

251. *Id.* at 922.

252. Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 569 (1995).

253. *See id.* at 646. Professor Gerstenblith's article provides a complete treatment of the current status of ownership of cultural property in the United States.

254. *See* INTERNATIONAL ANTHOLOGY, *supra* note 90, at 107-09 (discussing the 1993 conference in Bellagio whose participants recommended that cultural property be granted special consideration given that its nonauthorial producers have not been adequately regarded under the current authorship regime); Gerstenblith, *supra* note 252, at 646-55 (calling for the invocation of the public trust doctrine to protect the rights of a cultural group in its cultural property).

255. Gerstenblith, *supra* note 252, at 655.

256. Abramovitch, *supra* note 83, at 319.

257. *See* DREYFUSS & KWALL, *supra* note 5, at 24.

trademark is attached is the owner of the mark.²⁵⁸ Similarly, that the signal of a particular individual's constructed image derives from the efforts of individuals in addition to the celebrity should not impact on the ownership of the value flowing from this construct.

b. All Creators Borrow from the Cultural
Fabric, and the Value of Other Texts Derive
from Audience Perception

It may also be the case that celebrities borrow from the cultural fabric in creating their constructed images, but this makes them no different from the authors of any other texts that are protected by intellectual property regimes. No creator begins the creation process on a blank slate—all creators stand upon the shoulders of prior creators.²⁵⁹ Moreover, when a celebrity borrows from the cultural fabric in creating her text, it is still the unique combination of the celebrity's original contributions in conjunction with both the past and the public's current temperament that gives the celebrity text its present appeal. An important corollary of our democratic tradition is that the audience, the receptacle of fame, long ago ceased to be the servant of the elite, and instead became an "equal partner" in the creation of fame.²⁶⁰ Braudy noted that the eighteenth century's crucial contribution to the concept of fame was the appearance of an audience that took an active role in defining its idols: "an audience that is willing to be manipulated but eager to convey how that ought to be done more expertly."²⁶¹ Today, the audience not only enjoys an interactive relationship with the performer, but it also enjoys an invitation into the celebrity production process.²⁶² The visibility of the process offers the audience "the position of

258. Of course, the advertising agencies would own the copyrights in the scripts of any commercials they create.

Trademarks differ from publicity rights in that a trademark is affixed to goods that are physically separate from the trademark and therefore identify the source of something other than the trademark itself. In contrast, a celebrity's image is attached to the individual in a way that is not capable of physical separation. This distinction is irrelevant to the argument made in the text, however, because both trademarks and publicity rights allow their owners to control a particular signal to the public whose meaning is based in part on the efforts of others.

259. Sir Isaac Newton once stated that if he has "seen further, it is by standing on [the] sho[u]lders of giants." ROBERT K. MERTON, *ON THE SHOULDERS OF GIANTS* 9 (1965) (alterations added). For a discussion of this borrowing concept in the context of visual art, see ADELHEID M. GEALT, *LOOKING AT ART* 436, 443 (1983).

260. See BRAUDY, *supra* note 10, at 461.

261. *Id.* at 381. P.T. Barnum's success in the nineteenth century can largely be attributed to his brilliant exploitation of a democratic audience that desired an interactive entertainment experience as much as a participatory political process. See *id.* at 500 (noting Barnum's revelation of his tricks so as to satisfy his audience's desire to be knowledgeable about his processes of illusion); see also *supra* note 33 and accompanying text. Gamson also discussed the role of the audience as the final arbiter of celebrity status in the early half of the twentieth century. See GAMSON, *supra* note 9, at 34-35.

262. See GAMSON, *supra* note 9, at 49, 52, 54. Stories about the publicity system's role in manufacturing celebrities have been popular since the 1950s, but they have become even more common in the 1970s and 1980s with the growth of "infotainment." See *id.* at 49; see also

control”²⁶³: a manufactured image is irrelevant if it is still the public that is deciding (even with the help of the media-moderated images) who are the real recipients of fame.²⁶⁴

Although critics of the right of publicity also claim that it should not be regarded as a property right because the status of fame is conferred by others, they overlook the fact that the same is true with other intellectual property creations. For example, the “fame” of particular trademarks exists in response to advertising and audience appeal. With the enactment of the recent federal antidilution statute granting protection only to famous trademarks,²⁶⁵ the question of a mark’s “fame” will undoubtedly spawn much future litigation. Similarly, the extent to which works of art or literature are valued often derives from their popularity. As Samuel Johnson wrote in his *Preface to Shakespeare*: “the end of poetry is to instruct by pleasing.”²⁶⁶ Cultural interests largely drive the relationship between an artist and her work, and “whether a work is valued, in and of itself, is a matter that varies from time to time and society to society.”²⁶⁷ Although a romantic conception of visual art views its value as inherent, stemming from the genius of the creator, an alternate view sees such value as a social construct, the product of forces operating independently of the artist.²⁶⁸ In other words, such value is the result of other art world players such as critics, museums, collectors, dealers, and auction houses.²⁶⁹ We do not deprive the owners of famous trademarks or the copyright owners of popular works of art or literature of their rights just because the public has played some role in placing a value on these works. Therefore, right-of-publicity critics must justify why the

supra notes 171-86 and accompanying text.

263. GAMSON, *supra* note 9, at 52.

264. *See id.* at 38-39, 52-54.

265. *See* 15 U.S.C.A. § 1125(c) (West Supp. 1997) (allowing owners of “famous” marks injunctive relief against another’s commercial use of a mark that will cause dilution of the distinctive quality of the plaintiff’s mark). Some of the relevant factors in determining a mark’s fame include the duration and extent of its use on goods and in advertising, the size of the trading area and channels of trade in which it is used, and the degree to which the owner’s and the user’s marks are recognized. *See id.* These factors underscore the public’s role in determining whether a given trademark is “famous” for purposes of obtaining federal protection against dilution.

266. Samuel Johnson, *Preface to Shakespeare*, in JOHNSON ON SHAKESPEARE 9, 16 (Oxford Univ. Press 1949) (1908).

267. Elliott C. Alderman, *Resale Royalties in the United States for Fine Visual Artists: An Alien Concept*, 40 J. COPYRIGHT SOC’Y U.S.A. 265, 270 (1992).

268. *See* John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103, 111-12 (1993). The alternate view discussed in the text 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 idcas that are the common property of the culture and embedded in the language.” ALVIN B. KERNAN, *THE DEATH OF LITERATURE* 113 (1990). According to David Lehman, “[f]or the hard-line deconstructionist[s], not only is literature self-referential; its meanings are undecidable, as ‘indeterminate’ as the velocity and location of a moving electron.” DAVID LEHMAN, *SIGNS OF THE TIMES* 57 (1991).

269. *See* Merryman, *supra* note 268.

cachet of a person's fame should be treated differently. The following subpart examines some of the proffered justifications.

C. Consideration of the Social Issues

The foregoing section argues that recognizing the right of publicity as a property right is consistent with our theoretical conceptions of property in this country. Still, if recognizing the right of publicity entails harms to society that outweigh the costs of its protection, the doctrine's validity will remain in jeopardy. One harm that opponents are fond of citing is that protecting the right of publicity plays a role in encouraging too much investment in celebrity culture. This overinvestment is wasteful not only because only a relatively small number of people will ever become celebrities, but also because of the shallowness and greed characteristic of the celebrity culture generally. Opponents of the right of publicity thus tend to be skeptical regarding the value of celebrity culture in our country.²⁷⁰

These criticisms overlook the fact that celebrity culture fills some critical needs in our society. As James Monaco writes: "If celebrities have taken over a large part of our personal universes . . . that may not necessarily be so bad. We've let them into our lives for good reasons."²⁷¹ To fully appreciate the positive role celebrities play in our culture, it is important to examine the strong need Americans have for both role models and surrogate communities, and the critical role these needs play in our society's fascination with those who have achieved fame.

1. Opponents of the Right of Publicity Ignore the Value of Celebrity Role Models

Paradoxically, although Americans revere individualism,²⁷² they also manifest a strong need for conformity.²⁷³ The prominent "self-help" and "how-to" traditions characteristic of American society have made "[the] emulation of public models . . . part of the national character."²⁷⁴ Perhaps our lack of a national religion, combined with an absence of religious leaders capable of unifying the country, also contributes to a void that often is filled by celebrity role models. Our Constitution's prohibition against an established religion reinforced the democratic ideal that fame could be realized by anyone. Even in colonial America, "[t]he power of the visible spirit . . . absorbed a religious sanction instead of competing with it, as was so often the case in both [Christian] France and England."²⁷⁵ Fame in our contemporary society does indeed possess a spiritual quality—"the spiritual glow conveyed by being recognized means finally

270. See Madow, *supra* note 8, at 160, 216-17.

271. Monaco, *supra* note 137, at 10.

272. See *supra* notes 187-91 and accompanying text.

273. See *supra* note 192 and accompanying text.

274. BRAUDY, *supra* note 10, at 589; see also *supra* notes 23-25 and accompanying text.

275. BRAUDY, *supra* note 10, at 453; see also *supra* note 22.

not having to say who you are."²⁷⁶ This spiritual quality is even further enhanced by the media, whose magnification and electronic distribution somehow invest "the everyday lives of formerly everyday people with a magical sense of value, a secularized imprint of the *sacred*."²⁷⁷

People in need of moral guidance may look to celebrities as symbolic icons of spirituality.²⁷⁸ For many Americans, however, the appeal of celebrities is that they know the secret to becoming rich and famous, and in our culture, fame equals power.²⁷⁹ In addition to providing guidance on how to achieve the path to fame and success,²⁸⁰ celebrities serve as role models in numerous other areas such as personality, love and marriage,²⁸¹ friendship,²⁸² and, of course, consumerism.²⁸³

The extent of our society's desire to look to celebrities for advice and guidance is indicated by the fact that advice has sometimes been sought from celebrities who play certain fictionalized roles regarding aspects of their fictionalized professions. For example, during Robert Young's five-year stint on television as Dr. Marcus Welby, he received nearly a quarter of a million letters, mostly requesting medical advice.²⁸⁴ Even lawyers are not immune from this amusement. In 1982, when actress Veronica Hamel played a prosecutor in the popular

276. BRAUDY, *supra* note 10, at 588.

277. EWEN, *supra* note 108, at 93 (emphasis in original).

278. Thus, Pat Boone may have been responsible for drawing some fans into fundamentalist Christianity and Muhammad Ali may have had the same effect for the Muslims. See FOWLES, *supra* note 2, at 180. Perhaps the appeal of the Church of Scientology also can be explained in part by the long list of celebrities who have been drawn to this cause. Celebrity followers of Scientology to varying degrees include Kirstie Alley, Anne Archer, Karen Black, Chick Corea, Tom Cruise, Isaac Hayes, Nicole Kidman, Priscilla Presley, Mimi Rogers, and John Travolta. Numerous other celebrities have been involved with Scientology in the past but are no longer associated with it. See *Scientology/Celebrities* (visited Nov. 4, 1997) <<http://www.snafu.de/~tilman/faq-you/celeb.txt>>.

That religions can derive financial benefits from visible personas clearly is illustrated by the tactics of celebrity evangelists such as Jerry Falwell. Falwell's media-based appeals have generated scores of contributions from his followers. Other recognizable evangelists have had similar success. See REINET AL., *supra* note 7, at 17-19; see also *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1156 (9th Cir. 1986) (documenting monetary responses to particular mailings sent out by the Moral Majority).

279. See GAMSON, *supra* note 9, at 186 ("[I]f fame is power, the capacity to achieve it is an even greater one.").

280. The 1996 commencement speaker at Northwestern University was not a famous doctor, lawyer, business leader, or philanthropist. Instead, actor David Schwimmer, star of the popular television series *Friends*, addressed the graduating seniors of his alma mater. See Bob Strauss, *Sink or Schwimmer Star of 'Friends,' 'Pallbearer' Shrewdly, Confidently Goes Where His On-Screen Personas Could Only Dream of*, L.A. DAILY NEWS, May 3, 1996, at L3, available in 1996 WL 6556919.

281. See FOWLES, *supra* note 2, at 175.

282. See *infra* note 304 and accompanying text.

283. See discussion *supra* notes 115-28 and accompanying text. The prevalence of celebrities serving as role models of consumption is especially prominent in our capitalistic society.

284. See Meyrowitz, *supra* note 177, at 72.

television series *Hill Street Blues*, she was invited to address the annual meeting of the criminal law section of the American Bar Association.²⁸⁵

Although clearly not all celebrities provide positive role models, the critics of the celebrity culture overlook the value of the celebrity role-modeling phenomenon, particularly for disadvantaged or marginalized groups. Millions of Americans were moved when actor Christopher Reeve addressed the 1996 Democratic National Convention, pleading for more economic support for research of diseases, and emphasizing the importance of rights for the disabled. Undoubtedly the same message could have been delivered by any disabled American, but the enormity of its impact clearly was derived from Reeve's celebrity status.²⁸⁶ Whereas Reeve's courage and determination may serve as a role model for the disabled community, as well as for Americans generally, superstar entertainer Oprah Winfrey arguably serves as a positive role model for African Americans and abused children. Winfrey, who was sexually abused at nine, ran away from home at thirteen, got pregnant at fourteen, and smoked crack at twenty-five, now is reportedly the highest paid woman in show business.²⁸⁷ Not only does Winfrey's success in overcoming extreme adversity provide inspiration for others, but also she has used her considerable economic resources in helping other families move out of poverty.²⁸⁸ Moreover, her attempts in this regard caught the nation's attention and made the subject of welfare reform fashionable for many who otherwise would not have given the matter much thought.²⁸⁹

285. See David Margolick, *A Reporter's Notebook: ABA Blends Inspiration and Adoration at Its Parley*, N.Y. TIMES, Aug. 14, 1982, § 1, at 9.

286. During the 1996 Democratic National Convention, immediately preceding the address by actor Christopher Reeve who was paralyzed in a horseback riding accident in 1995, the television announcer quoted one of Reeve's doctors as saying that "diseases need icons." Currently, Reeve makes speeches across the country, actively lobbies on behalf of spinal injury research in Washington, D.C., has resumed his acting career and has a book due out in 1998 detailing his personal experience. Taken together, these activities have raised our national consciousness about disabled Americans. See Bob Condor, *'Without Pity' Delivers Profiles of Determination*, CHI. TRIB., Oct. 6, 1996, § 11, at 3. Similarly, actress Elizabeth Taylor embraced AIDS research and forced greater public attention on it at a time when many people still viewed the disease as one afflicting only homosexuals. See Louise Kiernan, *It Takes a Star to Raise a Buck*, CHI. TRIB., Sept. 15, 1996, § 2, at 1.

287. See *Mr. Showbiz: A World of Entertainment from ABC NEWS* (visited Sept. 23, 1997) <<http://www.celebsite.com/people/oprahwinfrey/index.html>>.

288. A few years ago Winfrey initiated an attempt, which unfortunately has proven largely unsuccessful, to help 100 families out of poverty. She devoted her own economic resources to this program, which "ostensibly freed this experiment from the bureaucratic constraints that bind government-sponsored reform efforts." Kiernan, *supra* note 286, § 2, at 1.

289. See *id.* At least one commentator has questioned recognizing the right of publicity in part on the ground that "the cult of celebrity, which the right of publicity arguably both reflects and fosters" may negatively impact more on already disadvantaged groups by contributing to their "economic and political 'underdevelopment.'" Madow, *supra* note 8, at 219. This commentator also concedes, however, that the evidence he examines regarding the negative impact of professional sports on African American males "may overstate the extent to which the lure of sports stardom explains the present predicament of young African-American men." *Id.*

2. Opponents of the Right of Publicity Ignore the Value of the Celebrity Surrogate Community

The sociological literature reveals that the celebrity culture provides yet another significant social benefit for our society, namely, the means through which surrogate communities can be created. Our society's need for surrogate communities is an interesting phenomenon in and of itself. The late nineteenth and early twentieth centuries were characterized by our nation's increasing urbanization and industrialization. Scholars attribute a severe decline in the community as a critical by-product of this progress.²⁹⁰ Isolated urban dwellers required not only role models for personality and success, but also a surrogate community to ease the loneliness of city life.²⁹¹ At the turn of the twentieth century, when "everyday life was increasingly defined by feelings of insignificance and institutions of standardization," the famous "provided an accessible icon to the significance of the personal and the individual."²⁹² Especially during the Depression, people clamored for stars.²⁹³ Today, evolving technology such as the Internet ensures the continuation and growth of media-based communities, as opposed to the more traditional, interpersonal means of communication.²⁹⁴ Paralleling the growth of the mass media is the decline of the traditional American family,²⁹⁵ a combination that further strengthens our society's need for finding solace in surrogate communities.

290. See FOWLES, *supra* note 2, at 25, 75-76; Joli Jenson, *Fandom as Pathology: The Consequences of Characterization*, in THE ADORING AUDIENCE, *supra* note 57, at 9, 15.

291. See FOWLES, *supra* note 2, at 75-76. The decline of the community also left individuals in a susceptible and receptive state to the celebrity-based advertising and public relations campaigns made possible by the development of new media. See Jenson, *supra* note 290, at 14-15.

292. EWEN, *supra* note 108, at 92-93.

293. See FOWLES, *supra* note 2, at 33; see also *infra* note 323.

294. The 1995 movie, *The Net*, exemplifies the danger that overinvolvement in media relationships at the expense of more traditional human interaction presents. The movie starred Sandra Bullock as a lonely hacker who worked from her home computer. She had only one friend and her only family was her senile mother. By accident, she stumbled upon a diskette that would access extremely sensitive information with great damage potential. A software company owner who wanted to obtain this diskette from her instructed his entourage to erase her entire life and identity by computer, a task that was easy to perform in light of her relatively isolated existence. See THE NET (Columbia Pictures 1995).

295. See FOWLES, *supra* note 2, at 262-63 (noting that "[m]arriage rates have been dropping for three decades, while divorce rates have been rising"); SCHICKEL, *supra* note 44, at 264-65 (lamenting the decline of community and the increasing instability of the family); Jonathan Schell, *Double-Talk on the Politics of Divorce*, NEWSDAY, June 30, 1996, at A40 (discussing the increase in divorce rates since 1960).

The communal aspects of fandom are well documented in the literature.²⁹⁶ The surrogate communal functions served by the culture of fandom can be examined from the standpoint of both celebrities-versus-fans as well as fans-versus-fans.

a. The Celebrity-Fan Relationship

As early as 1956, commentators characterized the celebrity-fan relationship as a form of "para-social interaction."²⁹⁷ This terminology refers to the substitution of the friendly celebrity-fan relationship for more normal interpersonal relationships.²⁹⁸ Building upon this theory, Professor Fowles invoked the concept of "Star Village,"²⁹⁹ a mythic community of the most recognizable stars at a given time,³⁰⁰ as an explanation of our need for re-creating the intimacy of communal village life.³⁰¹ Fowles explained that only about 100 stars populate Star Village at any given time because this is the appropriate number to re-create the village existence that we have lost in our urbanized society.³⁰² Thus, the creation and population of Star Village provides a sense of stability currently lacking in our society, and "Americans have come to treat celebrity entertainers as they used to treat fellow villagers."³⁰³

296. See Drucker & Cathcart, *supra* note 99, at 264 ("Celebrities may be used to maintain a sense of belonging in a chaotic modern world in which concepts of place and community are no longer clear cut . . ."); Fiske, *supra* note 57, at 33 (noting that fans often "acquire an unofficial cultural capital that is a major source of self-esteem among the peer group").

297. See Donald Horton & R. Richard Wohl, *Mass Communication and Para-Social Interaction*, 19 *PSYCHIATRY* 215 (1956).

298. See *id.* at 222.

299. See *supra* notes 56-57.

300. See FOWLES, *supra* note 2, at 67-68 (defining the inhabitants of Star Village as "those performers recognized by 80 percent or more of the populace" in any given year). The number of annual inductees is usually much less than ten individuals. Fowles suggests that the "gate-keeper" of Star Village, who has the important job of welcoming new inhabitants and assisting them with village protocol, is the most prominent talk-show host of the time. In 1992, the year Fowles's work was published, this managing officer was Johnny Carson, and before that, Ed Sullivan. See *id.* Fowles would probably say this job currently is being handled by Jay Leno.

301. When President Thomas Jefferson gave his State of the Union addresses, he wrote the speeches himself but had a clerk read the speeches aloud. This scenario would be completely unacceptable today in our society which seems "to crave the intimacy of interaction more than the artistry of invention." Meyrowitz, *supra* note 177, at 70.

302. See FOWLES, *supra* note 2, at 68, 76. Fowles also notes that "to make this hamlet interesting, the public needs a certain variety, not a sameness, among its members." *Id.* at 76; see also *id.* at 67-70 (providing an overview of these types). The different personalities among the inhabitants of Star Village may also be reflective of the different personalities of former inhabitants of small villages.

303. *Id.* at 77. The role of gossip about the stars is an important illustration of this point.

Another interesting illustration of the phenomenon discussed in the text involves the marriage of two stars, in response to which the nation passionately fixates in a more intense version of the way inhabitants of a small village became absorbed in the marriage of two of its members. See *id.* at 171-76. Similarly, the dissolution of a union of two stars draws tremendous public attention. See *id.* at 174-75.

Stars also serve as role models of camaraderie. Consider the popularity of the television comedy *Seinfeld*, which even erudite law professors will admit to watching. Undoubtedly, a large part of the program's appeal is that viewers can become members of the *Seinfeld* gang temporarily, as they become "caught up in a net of sustaining human relations."³⁰⁴ In point of fact, however, celebrities usually do not maintain strong social ties with one another. Many celebrities, particularly in the entertainment field, have reported that they lack any true friends among their celebrity peers.³⁰⁵ Yet, the American public's belief in such a cohesive community among celebrities clearly persists, and is fueled by a press that memorializes and publicizes "those rare moments when stars do consort together."³⁰⁶

The intimacy engendered by the celebrity-fan bond can have a beneficial impact upon the lives of fans. Our fascination with the lives of celebrities can serve as a means of psychological escape, which, if not carried to excess, can release stress and provide a sense of rejuvenation. This need for a sense of release may stem in part from the reality that, in our culture, many individuals have the economic means and the leisure time to reflect more philosophically on their existence than in other cultures where mere physical survival requires more effort.³⁰⁷ Celebrities also provide a much-needed sense of community, thereby easing loneliness, which researchers say is a pervasive problem in our society.³⁰⁸ Celebrities also allow people to share their lives without imposing corresponding demands, thus affording fans an exhilarating sense of interpersonal freedom. The celebrity-fan relationship is not necessarily based on the level of fame the celebrity has achieved, but rather represents an empathic connection, a sense of

304. *Id.* at 161. This is also true of many other highly regarded television programs, both historically and currently. A few additional examples include *Mash*, *Friends*, *Mary Tyler Moore*, and *Frasier*.

305. *See id.* at 170-71 (quoting performers Charlie Chaplin and George Hamilton, and citing the work of anthropologist Hortense Powdermaker who studied the Hollywood community in the 1940s).

The dearth of genuine friendship and community spirit among the celebrity community is understandable when one considers that performers typically are competing for a limited number of slots for the American public's affection. *See id.* Richard Schickel wrote that what a gathering of well-known people reminds one most of is a business convention, an occasion of the wary gregariousness, the strained (not to say false) bonhomie of people who, having been thrust together for a time, strive to maintain civility, despite the fact that they spend the rest of the year competing for shares of the same market.

SCHICKEL, *supra* note 44, at 270.

306. FOWLES, *supra* note 2, at 171; *see also* SCHICKEL, *supra* note 44, at 259-60.

307. Americans' tendency to undergo professional counseling more so than in other cultures, *see* HALL & HALL, *supra* note 192, at 153, is yet another manifestation of a more leisurely and economically secure existence.

Social historian Peter Stearns, who teaches television trends at Carnegie Mellon University, views the proliferation of television talk shows as a response to a social desire for an escape hatch by a society which is "horrified to the point of narcosis" by frightening media images and "increasingly complicated domestic issues." Kenneth R. Clark, *New Crop of Talk Shows Engaged in War of Words*, CHI. TRIB., Aug. 28, 1994, § 11, at 5.

308. *See* Jeff Meer, *Loneliness*, PSYCHOL. TODAY, July 1985, at 28.

intimate knowledge.³⁰⁹ Many people often come to believe they know the celebrity-friend better than they know their real-life friends and neighbors,³¹⁰ a perceived intimacy that is fostered mainly by our modern media.³¹¹ Although celebrities do perform these important psychological functions for their fans, it must also be recognized that sometimes negative consequences can ensue from these relationships, just as is the case with all human interaction. The artificiality and one-sidedness of the celebrity-fan relationship can give rise both to discomfort on the part of the celebrity, when personal encounters with fans cannot be avoided,³¹² as well as disappointment on the part of the fan, when either a personal meeting or a particular media report reveals a different image of the celebrity.³¹³ Occasionally, the confrontations between fans and celebrities can have disastrous consequences, as the Hinckley/Foster/Reagan and Chapman/Lennon relationships so poignantly illustrate.³¹⁴

b. The Fan-Fan Relationship

Celebrities can also form the common bond of real-life friendships between fans,³¹⁵ and much literature exists on the interpersonal relationships among the

309. Joshua Meyrowitz wrote:

One feels a direct, one-to-one tie to a media friend that exists apart from, and almost in spite of, how widely known the person is. Further, as with real-life friends, one feels bound to the person not simply because of what they can do, but based on a more personal set of feelings about who they *are*—and how their “presence” makes one feel.

Meyrowitz, *supra* note 177, at 63 (emphasis in original).

310. *See id.* at 66.

311. *See* Drucker & Cathcart, *supra* note 99, at 266-67.

312. *See* REIN ET AL., *supra* note 7, at 328-30.

313. *See id.* at 26 (noting the contentiousness of celebrity-fan relationships).

314. *See id.* at 329; SCHICKEL, *supra* note 44, at 1-7, 21-22; Meyrowitz, *supra* note 177, at 64. Readers will recall that Mark David Chapman assassinated John Lennon in 1980, and John Hinckley, Jr. attempted an assassination of President Ronald Reagan in 1981 to gain the affections of actress Jodie Foster. Schickel also observed that, for the fan, celebrity status symbolizes the dreams of complete autonomy (in both leisure and work) and connection to glamour and authority. These are “dreams of power inevitably tinged by envy and resentment.” SCHICKEL, *supra* note 44, at 255-56. A less direct example of the downside of the celebrity-fan relationship is the tragic death of Princess Diana as a result of a car accident, apparently caused in part by an attempt to escape aggressive paparazzi. Sadly, her adoring public must bear some of the responsibility for her death since the paparazzi were responding, albeit inappropriately, to the public’s thirst for pictures and information about the Princess. Ray Recchi, *Public’s Fascination Helped Kill Diana*, SUN SENTINEL, Sept. 4, 1997, at 1E.

315. Celebrities can even have the effect of unifying an entire city. During the basketball season of 1996, Michael Jordan and the Chicago Bulls were the main topic of conversation among nearly all Chicago residents, providing a commonality among both good friends as well as strangers who might otherwise have little else to say to one another. *See also* FOWLES, *supra* note 2, at 183 (“[F]or a disparate U.S. populace, stars are among the few things held in common.”); JOHN B. THOMPSON, *IDEOLOGY AND MODERN CULTURE* 163 (1990) (discussing the commonality provided by celebrities).

fans themselves. One study of the cultural economy of fandom terms the interactive oral culture among fans as “enunciative productivity.”³¹⁶ Fan talk, “the generation and circulation of certain meanings of the object of fandom within a local community,”³¹⁷ has proven to be a strong means of unification and fans have reported choosing their objects of fandom based in part by the oral community they wished to join.³¹⁸ Another communal category of fandom, “textual productivity,” concerns the production and circulation among fans of texts pertinent to the objects of their fandom.³¹⁹ The well-known activities of the “Trekkies” who circulate original novels about *Star Trek* among themselves are one such example,³²⁰ although textual productivity can also include participation through the original texts themselves. For example, soap opera fans are known to share the lives of their favorite characters by “rewriting their narratives in talk and imagination.”³²¹ Currently the Internet offers more expansive opportunities for “textual productivity.”³²²

The existence of fan clubs are another familiar example of this communal spirit between fans.³²³ The same is true for concerts³²⁴ and sporting events. Joshua Gamson’s study of the tourist celebrity-watching circuit in Los Angeles illustrates that celebrity watching is a highly interactive, social endeavor he called “hunts and games,” an activity that is as much, if not more, about relationships between

316. Fiske, *supra* note 57, at 37-38.

317. *Id.* at 37.

318. *See id.* at 37-38. Fiske noted that “[i]f colleagues at work or at school are constantly talking about a particular program, band, team or performer, many people become drawn into fandom as a means of joining that particular social group.” *Id.* at 38. Enunciation productivity also can include nonverbal behavior such as clothing or other choices affecting visual appearance as a means of participating in a particular fan community. *See id.*

319. *See id.* at 39.

320. *See id.*

321. *Id.* at 41.

322. Fans of the *Mission: Impossible* television series were treated to Internet coverage of the party following the premier of the 1996 movie, as well as a World Wide Web adventure allowing participants to have an “online espionage experience.” In addition, fans could participate in a *Mission: Impossible* trivia competition on the Internet. *See Mission: Internet*, L.A. TIMES, May 20, 1996, at F2.

323. Organized fan clubs made their appearance in the 1930s, when difficult economic times made moviegoing a luxury. In 1934, there were at least 535 official clubs, whose combined membership totaled about 750,000. *See FOWLES, supra* note 2, at 34. These clubs provided fans with a less costly means of displaying their devotion. *See id.* Although fan clubs remain a strong element of our popular culture, at least one recent study of the celebrity-fan relationship based on a survey of 300 participants in an eastern metropolis in 1988 and in 1992 revealed that relationships with other admirers of the celebrity such as fan clubs are viewed negatively. *See Drucker & Cathcart, supra* note 99, at 265-67. Other sources also substantiate the individuality of the celebrity-watching experience. *See GAMSON, supra* note 9, at 230 n.3 (discussing the work of ANDREW TUDOR, *IMAGE AND INFLUENCE* (1974)). However, the observational data amply collected by Gamson makes a convincing argument to the contrary. *See infra* note 325 and accompanying text.

324. *See FOWLES, supra* note 2, at 183 (describing a Barry Manilow fan’s communal experience when she attended one of his concerts).

fans as it is between celebrities and fans.³²⁵ Through fan clubs, celebrity-watching activities, as well as imitation of celebrities' clothing or style, collecting memorabilia of favorite personalities, and even engaging in celebrity-related gossip with fellow fans, fans are able to assert their membership in a particular fan community, thereby creating strong bonds of commonality.³²⁶

3. Opponents of the Right of Publicity Have Not Adequately Demonstrated a Negative Impact on Communication

Although critics of the right of publicity express skepticism about the role of the celebrity culture in our society, their main charge is that the doctrine hampers semiotic exchange, both generally and specifically, with respect to certain marginalized groups. They argue that control over the meanings of celebrity constructs deprives us all of the ability to reestablish the meanings of these icons for ourselves, and to utilize them in our interpersonal communications.³²⁷ Marginalized groups such as racial minorities and gays are particularly vulnerable to such monopolization, since the "recoding" of cultural forms is a critical component of their political practices and intragroup communications.³²⁸

Although the rhetoric of the critics has become very fashionable of late, their arguments are predicated on little more than speculation and generalizations.³²⁹ One critic of the right of publicity illustrates her argument in the text of her piece with the observation that "[a] twelve year old boy was sued for producing Black Bart [Simpson] T-shirts," and footnotes that, although this is only a rumor, it is "a telling one."³³⁰ Professor Madow concludes his widely acclaimed article with the following admission:

There is no doubt that the right of publicity makes private censorship of popular meaning-making possible. It creates an opportunity for celebrities (or their assignees) to suppress disfavored meanings and messages. What we need to know, however, is how often, and in what circumstances, celebrities . . . in fact use their licensing power in this way, and how often would-be appropriators are chilled or deterred by the fear of litigation.³³¹

325. See GAMSON, *supra* note 9, at 132-37, 141.

326. As in other community settings, a premium is placed upon the accumulation of knowledge. In the culture of fandom, this knowledge revolves around the celebrity at the core of the community. Those who amass the most knowledge in this regard can wield the most power in the community. See Fiske, *supra* note 57, at 42-43.

327. See *supra* notes 69-72 and accompanying text.

328. See GAINES, *supra* note 72, at 202-03; Coombe, *Democratic Dialogue*, *supra* note 67, at 1864-66.

329. See also Halpern, *supra* note 74, at 870 ("[T]he attacks . . . rest on conjectural extrapolation and the conjuring up of hypothetical extensions of the right of publicity far removed from reality.").

330. See Coombe, *Democratic Dialogue*, *supra* note 67, at 1865 & n.71. The problem presented by parody is part of the larger question of how the right of publicity should be applied in cases presenting a conflict with the First Amendment. See *infra* notes 335-37 and accompanying text.

331. Madow, *supra* note 8, at 239 (emphasis in original).

These comments underscore that the possibility of censorship presented by the right of publicity exists only because the critics so allege. Their position is unsupported by any hard evidence of societal harm. If the right of publicity is preventing marginalized groups, or anyone else, from adequately communicating, the critics must make a much stronger showing on this score. To put the issue in Lockean terms, there has been no adequate demonstration of a "moral weight" supporting the public's right to harm the owners of publicity rights by removing these rights from the scope of legal protection.³³²

Moreover, in our legal system, property rights are not absolute. A fundamental issue pertinent to all forms of property ownership is what should be the appropriate degree of public access to private property. Even landowners do not possess an unqualified right to exclude others from their property.³³³ However, the right-versus-access tension is particularly pronounced for intellectual property regimes, which all maintain various mechanisms for accommodating the need for public dissemination and use, and the protection of proprietary interests.³³⁴ The right of publicity, like all forms of intellectual property, must make adequate accommodations for appropriate public access. Although scholars have begun to explore in depth how free speech issues can be reconciled with the right of publicity,³³⁵ the case law in this area still needs substantial clarification.³³⁶ Undoubtedly, the legal profession would benefit from more scholarship that

332. See *supra* notes 236-37 and accompanying text.

333. See, e.g., *State v. Shack*, 277 A.2d 369 (N.J. 1971) (upholding the right of a legal aid attorney and a social worker to visit the living quarters of workers in a private migrant labor camp over the objections of the landowner).

334. See generally DREYFUSS & KWALL, *supra* note 5, at 3 (discussing in general terms how copyright, patent, and trademark laws accommodate these competing interests).

335. See, e.g., Barnett, *supra* note 67, at 635; Stephen R. Barnett, *The Right of Publicity Versus Free Speech in Advertising: Some Counter-Points to Professor McCarthy*, 18 HASTINGS COMM. & ENT. L.J. 593 (1996); Kwall, *supra* note 67, at 47.

336. A recent case illustrating the difficulty courts face in this area is *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996). The court there was confronted with the question of whether unlicensed trading cards containing parodies of active major league baseball players violated the players' right of publicity or were protected by the First Amendment. The case was litigated under Oklahoma's right-of-publicity statute. See OKLA. STAT. ANN. tit. 12, § 1449(A) (West 1993). The district court held that a copyright fair-use analysis requires the recognition of a parody exception to the Oklahoma statute and issued a declaratory judgment that Cardtoons's cards do not violate the publicity rights of the players who had been assigned to the Major League Baseball Players Association. The Tenth Circuit did not specifically address whether the district court's invocation of a copyright fair-use framework was appropriate in a case about publicity rights. Instead, much of the appellate opinion focused on its disdain for the right of publicity generally, a view that the Oklahoma legislature already had rejected by enacting the right-of-publicity statute that the court was bound to apply. Rather than merely concluding that the policies underlying the right of publicity are not compelling, particularly in a celebrity parody case, the court could have taken the opportunity to advance the law in this area and provide greater guidance to future courts and litigants by developing an analytical framework specifically tailored to resolve First Amendment and right-of-publicity conflicts.

provides suggested approaches for applying the doctrine in cases presenting conflicts with the First Amendment.³³⁷

CONCLUSION

It is probably no surprise to the reader that the author of this Article is a fan of popular culture who believes that the fame phenomenon has some very positive effects on our society. This Article has explored the right of publicity from the standpoint of the fame phenomenon in order to better understand its place in our legal system. It has been shown that the right of publicity is entirely consistent with our history and the very essence of our cultural fabric. The right of publicity reflects values that, as a culture, we embrace. From a doctrinal as well as a sociological perspective, the right of publicity is justifiably treated as a property right in our society. The opponents of the right have not only failed to demonstrate any real societal harm resulting from the legal recognition of publicity rights, but they have also overlooked the beneficial role that the fame phenomenon plays in our culture.

337. Even Professor Madow conceded that “we need to consider carefully whether there are measures short of abolition . . . that can reduce the impact of the right of publicity on popular cultural practices.” Madow, *supra* note 8, at 240.