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Finding Reality in the Right of Publicity

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FINDING REALITY IN THE RIGHT OF PUBLICITY

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TABLE OF CONTENTS

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INTRODUCTION

In 2007, the reality television star and Hilton hotel heiress Paris Hilton sued Hallmark Cards for violating her right of publicity under California statutory and common law. Hilton claimed that when Hallmark used her image and catchphrase "that's hot"[1] on a humorous birthday card without her permission, they violated her exclusive right under California law to exploit her identity for commercial purposes.[2] The card ridiculed a scene from an episode of the reality television show *The Simple Life*, which featured Hilton working as a fast-food waitress.[3] The litigation spanned over three years at the district court and appellate levels before the parties finally settled.[4]

The right of publicity protects an individual's identity—generally her name, photograph, or likeness—from commercial appropriation by

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[1] THAT'S HOT, U.S. Registration No. 3,209,488, Class 25; THAT'S HOT, U.S. Trademark Application Serial No. 85/156,230, Class 41 (filed Oct. 19, 2010); THAT'S HOT, U.S. Trademark Application Serial No. 85/901,443, Class 33 (filed Apr. 11, 2013).

[2] *See* Hilton v. Hallmark Cards, 580 F.3d 874 (9th Cir. 2009), *amended and superseded*, 599 F.3d 894 (9th Cir. 2010).

[3] For a picture of the card, see *Paris Sues over Hallmark Card*, THE SMOKING GUN (Sept. 7, 2007), http://www.thesmokinggun.com/documents/celebrity/paris-hilton-sues-over-hallmark-card.

[4] The parties settled for an undisclosed amount, however, Hilton sought $500,000 in damages in the lawsuit. *See Hallmark Settles with Paris Hilton over "That's Hot" Card*, N.Y. POST, Sept. 27, 2010, http://www.nypost.com/p/news/national/hallmark_settles_with_paris_hilton_PWZPgl5p0pjtpOZb01HAWL.

others without her consent.[5] The right is fully transferable and functions as both a positive and negative right.[6] As a positive right, the right of publicity grants the rights owner (which can be the individual or an assignee)[7] with the exclusive right to license the use of the protected identity for commercial purposes; as a negative right, it empowers the rights owner to prevent others from commercially exploiting the protected identity without the owner's consent.[8]

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[5] *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) ("One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49."); *see, e.g.*, N.Y. CIV. RIGHTS LAW § 50 (McKinney 2013).

[6] *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (noting that one's right of publicity in a photograph, for example, is the "right to grant the exclusive privilege of publishing [the photograph], and that such a grant may validly be made 'in gross'").

[7] Ownership of publicity rights may be held by someone other than the individual whose identity the right protects. And the question of who owns one's publicity rights is distinct from the question of who owns intellectual property rights in that individual's output. For example, in *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), the court concluded that Bette Midler retained the publicity rights associated with the use of her distinct voice and sound as an identifier, even though the copyright over a song she performed belonged to someone else and was properly licensed for commercial use by an advertiser. The *Midler* case involved the use of a Bette Midler sound-alike to perform a slightly edited version of the licensed song *Do You Want To Dance*. The court acknowledged the valid license, but concluded "[w]e need not and do not go so far as to hold that every imitation of a voice to advertise merchandise is actionable. We hold only that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California." *Id.* at 463. *See infra* note 163 for further discussion of the case.

The state-based right of publicity often runs in conflict with federal intellectual property laws, particularly copyright law. When the right of publicity claimant seeks to protect an element of "identity" that is already protected under federal copyright law, the publicity claim is expressly preempted under Section 301 of the Copyright Act. 17 U.S.C. § 301 (2012); *see infra* note 163 and discussion therein. For example, as the *Midler* court explained, "[i]f Midler were . . . seeking to prevent the defendants from using that song [which they properly purchased a license to use], she would fail [ ]. But that is not this case. Midler does not seek damages for Ford's use of 'Do You Want To Dance,' and thus her claim is not preempted by federal copyright law. Copyright protects 'original works of authorship fixed in any tangible medium of expression.' 17 U.S.C. § 102(a). A voice is not copyrightable. The sounds are not 'fixed.' What is put forward as protectible here is more personal than any work of authorship." *Id.* at 462. In effect, this means there is an implied limitation on even properly licensed copyrights: while the copyright licensee may have the right to use the original recording, they do not have the right to use a sound-alike to perform a slightly altered cover, let alone an entirely new song. *See infra* Part III.B for continued discussion of the conflicts between copyright law and the right of publicity.

[8] There is a split as to whether the right of publicity is a property-based or natural (personal or dignitary) right. The classification distinction is important because it affects the calculation of damages and assignability of the right. Personal rights are typically not assignable or descendible, while property rights may be transferred, assigned, or inherited. Further, the damages computation for an invasion of a personal right, such as privacy, is focused on compensating for personal loss and emotional distress, while compensation for the violation of a property-based right is concerned primarily with economic damage. *See infra* Part II.B.2.

Generally, common law jurisdictions, like the United States, adopt the property approach, while civil law jurisdictions treat publicity as a personal right. GILLIAN BLACK, PUBLICITY RIGHTS AND IMAGE 12–19 (2011). The right of publicity statutes in Illinois, Indiana, Kentucky,

Generally, all individuals are entitled to the publicity rights over their identities.[9] Yet, due to the high costs of litigation and the comparatively low damages that a private individual can collect if successful in a right of publicity suit,[10] cases involving non-celebrities are rare.[11] Nonetheless, as the reality television industry expands in the United States,[12] so too does the number of right of publicity cases filed by reality television stars.[13]

Oklahoma, and Washington all expressly state that publicity is a property right. *Id.* at 14 n.25. However, Professor McCarthy seems to take a natural rights approach. *See* J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1.3 (2d ed. 2009) (defining the right of publicity as "the inherent right of every human being to control the commercial use of his or her identity"). Other American scholars maintain that the right of publicity is a property right. *See, e.g.*, David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 73 n.3, 78 n.26 (2005); George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443, 452 (1991). In contrast, some countries simply do not recognize publicity rights. *See generally* HUW BEVERLY-SMITH ET AL., PRIVACY, PROPERTY AND PERSONALITY: CIVIL LAW PERSPECTIVES ON COMMERCIAL APPROPRIATION (2005). For example, the United Kingdom protects celebrities' ability to control their images with privacy and breach of confidence laws, *not* publicity laws. BLACK, *supra* at 25–27; *cf.* Douglas v. Hello! Ltd., [2007] UKHL 21; [2008] 1 A.C. (H.L.) 1.

9 MCCARTHY, *supra* note 8, § 4.13; *see infra* Part II.

10 MCCARTHY, *supra* note 8, § 4.3 ("That most reported . . . [right of publicity cases] have involved widely known 'celebrities' is to be expected. For it is their identities which have the greatest commercial value and hence are the most likely to be used for advertising and the most likely to justify the expense of litigation and appeal.").

11 Some jurisdictions require a noncelebrity plaintiff to prove first that her name, image, or likeness had commercial value prior to the defendant's use. *See, e.g.*, Pesina v. Midway Mfg. Co., 948 F. Supp. 40, 42 (N.D. Ill. 1996). However, the Restatement notes that even unknown persons' identities may have commercial value. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46(b), cmt. d (1995); *see also id.* § 49, cmt. d (1995) ("Private persons may also recover damages measured by the value of the use by establishing the market price that the defendant would have been required to pay in order to secure similar services from other private persons or from professional models.").

12 Gary Levin, *'Simple Economics': More Reality TV*, USA TODAY, May 9, 2007, at 1D (noting the growth of reality television programming for reasons including low production costs and viewer demand for such programs).

13 *See, e.g.*, John Devenanzio v. Home Box Office, Inc., No. 11111261/2011 (N.Y. Sup. Ct. dismissed Apr. 19, 2012) (dismissing for failure to state a claim Devenanzio's complaint of alleged right of publicity violation by scripted television series' use of a cartoon character named "Bananas," which also happened to be the nickname of the former *Real World* reality show participant); Complaint and Demand for Jury Trial, Kardashian v. The Gap, Inc., Case No. 2:11-cv-05960 (C.D. Cal. July 20, 2011) (claiming broadcast advertisement used a look-alike of the reality television star, thereby invoking her identity without her consent; settled Aug. 28, 2012); Hilton v. Hallmark Cards, 580 F.3d 874 (9th Cir. 2009), *amended and superseded*, 599 F.3d 894 (9th Cir. 2010) (claiming humorous card with reality television star's image violated her right of publicity); Daly v. Viacom, Inc., 238 F. Supp. 2d 1118 (N.D. Cal 2002) (dismissing on First Amendment grounds *Bands on the Run* reality show participant-plaintiff's claim of right of publicity violation when the producer and distributor used her image from show footage to advertise the show content); *see also* Best v. Berard, 776 F. Supp. 2d 752 (N.D. Ill. 2011) (dismissing on First Amendment grounds arrestee-plaintiff's claim that inclusion of footage of her arrest on reality television show *Female Forces* violated her right of publicity); Ingerson v. Twentieth Century Fox Films Corp., Nos. B152689, B153595, 2003 WL 147771 (Cal. Ct. App. Jan. 21, 2003), *cert. denied*, 540 U.S. 826 (2003) (affirming summary judgment under a "public affairs" exception to deny plaintiff's claim that the use of his unaltered voice on *Cops* reality

Reality television stars, however, are different from talent-based celebrities (actors, musicians, athletes, etc.). Reality television stars are famous for performing as "themselves,"[14] while, talent-based celebrities' fame exists in part as a result of cultivated talents that they choose to share with the public. For example, actors are famous for skills that enable them to convincingly portray other characters, and musicians and athletes are famous for performances that display their musical talents or athletic abilities.[15] Reality television stars generally lack these foundational skill sets.[16] Instead, their fame is based on the exploitation of persona on broadcast television shows, which provide viewers with a window into what purports to be the participants' "private lives."[17]

When fame (and monetization of that fame) is built primarily upon the exploitation of *persona*—namely performance and publication of the purported private[18]—a difficult question arises as to when the performance ends. In the case of the legal rights of reality television stars, a crucial question is where to locate reality. When the rules of the game require performing as "oneself," the boundary lines between life and performance blur dangerously close to indistinction. And when fame is based on the exploitation of persona, it also necessarily calls

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television show violated his right of publicity); Verified Complaint, Page v. Bravo Network, No. 2009-L-010125 (Cir. Ct. Ill. Aug. 26, 2009) (claiming right of publicity violated because participant in speed dating event did not consent to the footage appearing on *Real Housewives* reality television show).

[14] CBS Broad. Inc., v. ABC, Inc., No. 02 Civ. 8813, 2003 U.S. Dist. LEXIS 20258, at *32 (S.D.N.Y Jan. 13, 2003) ("As to the characters or the contestants, both [reality] shows use multiple, real people playing themselves."); Thom Klohn, *Does Being on a Reality TV Show Hurt or Help Aspiring Actors?*, BACKSTAGE, Dec. 29, 2010, 7:25 pm, http://www.backstage.com/advice-for-actors/professional-tips/does-being-on-a-reality-tv-show-hurt-or-help-aspiring-actors/ (quoting Jodi Collins of Jodi Collins Casting and Productions, New York) ("Reality stars, for the most part, are people who are famous for being famous. It's more personality-driven. It's less about the quality of work that somebody's bringing and more about a personality."); *cf.* Johnny Devenanzio, IMDB, http://www.imdb.com/name/nm2604856/ (last visited Aug. 28, 2013) (listing all roles as "Himself"); Nicole Richie, IMDB, http://www.imdb.com/name/nm1421588/?ref_=sr_1 (last visited Aug. 28, 2013) (listing the majority of roles as "Herself"); Paris Hilton, IMDB, http://www.imdb.com/name/nm0385296/?ref_=fn_al_nm_1 (last visited Aug. 28, 2013) (listing the majority of roles as "Herself").

[15] *See* David Leichtman et al., *Transformative Use Comes of Age in Right of Publicity Litigation*, LANDSLIDE, Sept./Oct. 2011, at 28, 36 ("'Famous for being famous,' reality stars, for the most part, lack the foundational skill set of celebrity musicians, actors, or athletes.").

[16] *Id.*

[17] *See* Charles B. Slocum, *The Real History of Reality TV, or, How Alan Funt Won the Cold War*, WRITERS GUILD OF AMERICA, WEST, *available at* http://www.wga.org/organizesub.aspx?id=1099 (last visited Aug. 28, 2013); *infra* Part II.

[18] Private may include documentary-style reality show productions, but may also simply encompass performance as self, as opposed to a distinct and separate character. A broad definition of the purported private will cover most performances on reality television if we consider the self to be what is private and not traditionally displayed on standard scripted television programs.

into question the reality television star's purpose and motive behind every other public act or statement made outside a reality show—including the use of right of publicity claims in lawsuits.

More troubling, in many cases, the reality television star's performed self is more adequately labeled as a *constructed persona*—in effect, a *character*. In these instances, the reality star alleging a right of publicity violation improperly asks the court to extend state-based publicity law to protect a character, which properly falls under the exclusive domain of federal copyright law.[19] In this sense, broad publicity rights for reality stars may lead to unjust enrichment—granting the reality star with more protection and opportunity to control the monetization of their performances than copyright law affords to traditional celebrities. In addition to providing reality television stars with a form of unjust enrichment, broad right of publicity protection for reality television stars also denies the public fair access to reference these stars' identities when commenting on the modern societal phenomenon of reality television fame.[20]

This Note takes a critical look at the right of publicity in the context of the growth of the reality television industry and, for strong policy reasons,[21] proposes a broad fair use defense to limit reality television stars' right of publicity claims. Part I traces the formulation of the right to privacy at common law and the development of the right of publicity as a right distinct from privacy. Part II discusses whom the right of publicity protects, what reality television is, and how reality television stars are different from talent-based celebrities. Part III examines how broad publicity protection can conflict with copyright law, and the specific copyright preemption issues that arise when reality television stars are granted broad publicity rights; it also analyzes the justifications for the right of publicity and questions their application to reality television stars' claims. Part IV outlines the First Amendment defense to right of publicity claims, the public's interest in accessing celebrity identity for communicative purposes, and the inadequacy of

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19 *See infra* Part III.B.

20 *See infra* Part IV.

21 These policy reasons include the protection of First Amendment interests, as well as the reduction of social costs associated with expansive right of publicity laws. Even strong proponents of the right of publicity have cautioned that there may be policy reasons to check publicity rights. *See* SHELDON W. HALPERN, THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND "MORAL RIGHTS" 515 (1988) ("The phenomenon of celebrity generates commercial value. A celebrity's persona confers an associative value, or economic enhancement, upon the marketability of product. Whether we like commercialization of personality or not, the economic reality persists—the marketplace recognizes an associative economic value. As a matter of policy, the courts determine the extent to which one must compensate the person who has generated that value and the limits of the celebrity's control over the exploitation of his or her personality."); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954) ("[E]very person is entitled to the fruit of his labors unless there are important countervailing public policy considerations."); *see also infra* Parts III.A, III.C, IV.

the First Amendment tests currently adopted by the courts. Part V proposes a broad fair use defense to limit reality television stars' publicity rights in order to prevent unjust enrichment and to grant the public with the unencumbered ability to participate in the construction of meaning in reality star and celebrity culture.[22]

I. BACKGROUND ON PRIVACY AND PUBLICITY LAWS

A. *Overview of the Right of Publicity*

The right of publicity developed in the United States during the twentieth century as an offshoot of the right to privacy,[23] which itself developed at common law around the turn of the nineteenth century.[24] Originally covered as an appropriation tort in privacy law,[25] the right of publicity now exists in many states as a separate right recognized by state statute, common law, or both.[26]

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[22] Although there are many reasons to abolish the right of publicity, see *infra* Parts III, IV, and notes 75–79, this Note does not argue for its abolition. The strongest cases for the right of publicity are instances of appropriations of a performer's entire act, as in *Zacchini v. Scripps-Howard Broadcasting Co*., 433 U.S. 562 (1977), and those where a celebrity objects to an appropriation because she denied or would have denied permission for the use, as in *Waits v. Frito-Lay, Inc*., 978 F.2d 1093 (9th Cir. 1992). In *Waits*, a chips advertisement featured a sound-alike of musician Tom Waits—well known for his position against licensing his music for advertisements—despite his express refusal to lend his voice for the advertisement. Notably though, both Zacchini and Waits could have likely prevailed without the right of publicity on unfair competition or false endorsement grounds. *See infra* notes 61–64, 213, and Part II.C. Nevertheless, the narrow issue this Note addresses is the extent of right of publicity protection for reality television stars.

[23] For the first judicial mention and coinage of the phrase "right of publicity," see *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953). The Second Restatement of Torts originally classified the right of publicity as an appropriation tort under privacy law. RESTATEMENT (SECOND) OF TORTS § 652A(2) (1977) (emphasis added) ("The right of privacy is invaded by: (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or (b) *appropriation of the other's name or likeness*, as stated in § 652C; or (c) unreasonable publicity given to the other's private life, as stated in § 652D; or (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.").

[24] For the first formulation of the right to privacy, see Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[25] For an argument that privacy actually consists of four distinct torts, including an appropriation tort that is now referred to as the right of publicity, see William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). *See also supra* notes 23–24 and accompanying text; *infra* Parts I.C–D.

[26] For an early article arguing for recognition of the right of publicity as separate from the right to privacy, see Nimmer, *supra* note 21. California, for example, maintains both a common law and statutory right of publicity, thus providing greater protection for individuals seeking to protect their publicity rights. *See* CAL. CIV. CODE § 3344 (West 2010), *limited as noted by* Jules Jordan Video, Inc. v. 144942 Canada Inc., 617 F.3d 1146 (9th Cir. 2010) (preempting right of publicity claim over the unauthorized reproduction and distribution of DVDs by federal copyright law because the asserted right of publicity claim was equivalent to the also asserted federal copyright infringement claim); Wendt v. Host Int'l, Inc., 125 F.3d 806, 811 (9th Cir. 1997) ("We

The right of publicity, however, does not grant owners with an absolute right over the use of an identity for commercial purposes.[27] One limit is that the right of publicity only protects an individual's actual identity; characters and performances, in contrast, are protected under copyright law.[28] Furthermore, publicity rights generally privatize only commercial advertising and merchandizing uses of persona, whereas informational and educational uses are left in the public domain.[29] The First Amendment also serves as an important limitation on publicity rights, as parody, transformative, incidental, and newsworthy uses of another person's identity are generally deemed privileged and thus immune from right of publicity liability.[30]

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have held that this common-law right of publicity protects more than the knowing use of a plaintiff's name or likeness for commercial purposes that is protected by Cal. Civ.[ ]Code § 3344."); Polydoros v. Twentieth Century Fox Film Corp., 79 Cal. Rptr. 2d 207, 209 n.2 (Ct. App. 1997) ("The difference between the common law and the statutory actions is that section 3344 requires a knowing use of the plaintiff's name or likeness, whereas mistake and inadvertence are not a defense against commercial appropriation at common law."). For "[a] rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth." White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1993). New York, in contrast, only recognizes the statutory right of publicity, which remains labeled under the privacy statute as an appropriation tort. *See* N.Y. CIV. RIGHTS LAW § 50 (McKinney 2013); Stephano v. News Grp. Publ'ns, 470 N.Y.S.2d 377 (App. Div. 1984), *rev'd*, 474 N.E.2d 580 (N.Y. 1984).

27 For example, some commercial uses, even if for profit, are privileged. Vincent M. de Grandpré, *Understanding the Market for Celebrity: An Economic Analysis of the Right of Publicity*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 73, 82–83 (2001) ("Not all unauthorized uses of a person's likeness amount to right of publicity infringement, however: subject to the applicable statutes, only advertisement and commercial uses trigger liability. Advertisement is generally defined as the solicitation of patronage 'intended to promote the sale of some collateral commodity or service,' and may include not-for-profit ads. By contrast, commercial use is a more elusive concept. At its simplest, it implies a use for profit, but the concept has evolved to mean uses not privileged in the interest of the public. Thus, publishers or broadcasters are generally sheltered from liability even though they too are profit-making entities.").

28 BLACK, *supra* note 8, at 142.

29 *See* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 129–35 (1993) (noting that in our legal system the ownership of celebrity rights is split, as the educational and informational uses of personas belong to the public domain, while advertising and merchandising rights are privately held by the individual or her assigns; also explaining that merchandizing uses include t-shirts or figurines, and informational uses include news reporting); de Grandpré, *supra* note 27, at 82–83. Merchandising generally is a field that "looks to the value in using image as a marketing tool." BLACK, *supra* note 8, at 28.

30 *See infra* Part IV; U.S. CONST. amend. I. For an example of a statutory exception, see 765 ILL. COMP. STAT. ANN. § 1075/35(b)(2) (West 2011) ("This Act does not apply to the . . . use of an individual's identity for non-commercial purposes, including any news, public affairs, or sports broadcast or account, or any political campaign."). For judicial carve-outs, see *New Kids on the Block v. News Am. Publ'g*, 745 F. Supp. 1540 (C.D. Cal. 1990), *aff'd*, 971 F.2d 302 (9th Cir. 1992) (finding use of persona was protected by the First Amendment when the use was related to a newsgathering purpose—there a newspaper reader contest) and *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790 (Ct. App. 1993) (finding newsworthy privilege as a defense to right of publicity claim brought by surfer against documentary filmmaker). Fictionalized accounts are also generally insulated from right of publicity liability under the First Amendment, but false

B. *The Development of the Right to Privacy at Common Law*

The right to privacy was first formulated in 1890 in an article entitled *The Right to Privacy* by Samuel D. Warren and Louis D. Brandeis.[31] Warren and Brandeis wrote their article in response to what they believed were urgent new threats that the media, photography, and sound recording devices posed to individuals' privacy.[32] For the authors, the media's offensive invasions into individual's private lives demanded that privacy be recognized as a separate common law right to protect personal, rather than commercial, interests.[33] While existing laws protected individuals' property interests in their names, reputations, and work,[34] Warren and Brandeis posited that underlying these property interests was the individual's right to an "inviolate personality,"[35] which, along with the right "to be let alone," formed the basis of privacy.[36] The authors were careful though to note that the right to privacy was not absolute. Valid defenses would include consent and the right to publish matters of public concern.[37] As an individual's right to be free from unwanted invasion, the right to privacy was only available to individuals who chose to live outside of the public

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accounts are not protected. *Compare* Hicks v. Casablanca Records, 464 F. Supp. 426, 433 (S.D.N.Y. 1978) (holding the fictionalized account of Agatha Christie's life was protected under the First Amendment, and noting it would be obvious to the public that the account was not meant to be factual), *with* Eastwood v. Superior Court, 198 Cal. Rptr. 342 (Ct. App. 1983) (finding the false report of a love affair was not protected under the First Amendment, the court was in part persuaded by its finding that the publication appropriated Eastwood's persona and published the false facts in order to increase its circulation), *superseded by statute on other grounds*, CAL. CIV. CODE § 3344 (West 2010) (preempted by federal copyright law, see *supra* note 26), *as recognized in* KNB Enters. v. Matthews, 92 Cal. Rptr. 2d 713, 717 n.5 (Ct. App. 2000) ("[T]he statute no longer requires that the unauthorized use occur in a product advertisement or endorsement or other such solicitation of purchase. Cases decided under the pre-1984 version of section 3344, such as *Eastwood* . . . must be read with this change in mind."). For an example of the parody defense, see *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996) (holding humorous cartoon playing cards were sufficiently transformative and that, as parodies, they were insulated by the First Amendment). *Contra* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992) (finding the use of a robot in a blond wig in front of a game board was an unauthorized appropriation of Vanna White's identity, and not a protected parody).

31 Warren & Brandeis, *supra* note 24.

32 *Id.* at 195–96 ("For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons and the evil of the invasion of privacy by the newspapers . . . . The press is overstepping in every direction the obvious bounds of propriety and of decency.").

33 *Id.* at 196, 213.

34 *Id.* at 197–206, 210–14 (citing slander, libel, intellectual property, implied contract and trust, and trade secrets as available laws).

35 *Id.* at 196, 211.

36 *Id.* at 195 (quoting THOMAS MCINTYRE COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT (Chicago, Callaghan & Co., 2d ed. 1888)).

37 *Id.* at 214, 218.

spotlight.[38]

Although courts were slow to adopt the new right to privacy espoused by Warren and Brandeis,[39] some state legislatures responded by enacting laws to protect privacy.[40] In 1939 the First Restatement of Torts recognized a right to be free from "interference with privacy."[41] And by the 1950s, the right to privacy was firmly established, with over three hundred cases filed.[42] Within a decade, twenty-eight states courts recognized the right to privacy,[43] yet the legal standard and available remedies were somewhat unclear and chaotic.[44]

C. *Publicity Emerges*

The individual's right to the *commercial* value of her image, distinct from the right to privacy, was first judicially recognized and named as the "right of publicity" in 1953 in *Haelan Laboratories v.*

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[38] *Id.* at 214–15.

[39] *See* Prosser, *supra* note 25, at 384, 386. Courts that denied the common law right to privacy followed *Roberson v. Rochester Folding Box Co*., 64 N.E. 442 (N.Y. 1902). "An examination of the authorities [Blackstone, Kent, and English cases] leads us to the conclusion that the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided." *Id.* at 447. For a discussion of the case, see *infra* note 40. Courts that allowed privacy claims followed *Pavesich v. New England Life Insurance Co*., 50 S.E. 68 (Ga. 1905), a case involving a similar appropriation as in *Roberson*, but the court instead recognizing a common law right to privacy. For a selection of other relevant cases, see *Corliss v. E. W. Walker Co.*, 64 F. 280, 282 (D. Mass. 1894) (denying injunction against publication of plaintiff's portrait in a biographical sketch because she was a public figure); *Schuyler v. Curtis*, 42 N.E. 22, 26 (N.Y. 1895) (reversing a grant of injunction to bar display of statue of deceased woman), *rev'g* 24 N.Y.S. 509 (Sup. Ct. 1893); *Mackenzie v. Soden Mineral Springs Co*., 18 N.Y.S. 240 (Sup. Ct. 1891) (enjoining defendant from using physician's name without his consent to advertise its medicine, but denying damages).

[40] In New York, the state legislature adopted a statute in response to public outrage surrounding the *Roberson* case, where the Court of Appeals refused to acknowledge the common law right to privacy and dismissed a young woman's lawsuit against a company that used her image to advertise its flour without her consent. *Roberson*, 64 N.E. 442. For criticism of the *Roberson* decision, see Editorial, *The Right of Privacy*, N.Y. TIMES, July 3, 1902, at 8; *The Right of Privacy*, N.Y. TIMES, Aug. 23, 1902, at 8; *German View of Privacy*, N.Y. TIMES, Oct. 26, 1902, at 5. A New York Court of Appeals judge who concurred in the *Roberson* decision wrote an article to explain and defend the decision. Denis O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902).

[41] RESTATEMENT OF TORTS (FIRST) § 867 (1939) ("A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable.").

[42] Prosser, *supra* note 25, at 389.

[43] For a list of the cases, see *id.* at 386–87 nn.17–43.

[44] *See id.* at 388–89; *see also* Ettore v. Philco Television Broad. Corp., 229 F.2d 481, 485 (3d Cir. 1956), *rev'g* 126 F. Supp. 143 (E.D. Pa. 1954) ("The state of the law [of privacy] is still that of a haystack in a hurricane."). For a discussion of the problems, see Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553, 554 (1961).

Topps Chewing Gum.[45] *Haelan* set the stage for the emergence of publicity as a commercial, fully assignable and transferable,[46] property right to protect an individual's commercial interest in the exploitation of her identity, rather than a personal right to privacy, which merely protected the individual's feelings and "right to an inviolate personality."[47]

A year later, Melville B. Nimmer provided support for the development of a separate commercial right of publicity in a now-famous article, *The Right of Publicity*.[48] Nimmer at the time was counsel to Paramount Pictures,[49] and he argued that the development of a separate right of publicity was the "natural" evolution of privacy to meet the particular needs of Broadway and Hollywood in the mid-twentieth century.[50] This move was important for entertainers because modern advertising, motion picture, television, and radio industries created new demands on privacy interests that Warren and Brandeis' formulation failed to meet—notably, celebrities and famous individuals were often denied relief for privacy violations, as courts found they waived the right to privacy by becoming public figures.[51] Thus, Nimmer argued for the recognition of the right of publicity as a distinct, assignable, property right to protect the commercial interests in identity without the requisite showing of emotional injury or personal harm that privacy demanded.[52] Implicit in Nimmer's article was an acceptance of

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45 Haelan Labs. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

46 The court found the commercial rights must be transferable to have effect. *Id.*

47 Warren & Brandeis, *supra* note 24, at 211.

> For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

Haelan Labs., Inc., 202 F.2d at 868. While the court did not expressly label the right of publicity as a property right in this case, the Second Circuit has since clarified that the right of publicity is a property right, other jurisdictions do so by statute. *See* Topps Chewing Gum, Inc. v. Fleer Corp., 799 F.2d 851, 852 (2d Cir. 1986); *see also supra* note 8 and accompanying text. For a political discussion of why publicity emerged as a separate right, see Madow, *supra* note 29.

48 Nimmer, *supra* note 21.

49 Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 967 (10th Cir. 1996).

50 Nimmer, *supra* note 21, at 203. To Nimmer's mind, Warren and Brandeis' privacy, which was developed to protect the Boston Brahmins' private lives from the invasion of the press, "clearly" could and should be "naturally" expanded to protect celebrities' commercial interests outside of their feelings. *Id.*

51 *Id.* at 203, 215. Nimmer did not categorically exclude non-celebrities, but noted that the right of publicity usually only becomes important once the individual has achieved some level of fame. *Id.* at 216.

52 *Id.* at 215. "The substance of the right of publicity must be largely determined by two considerations: first, the economic reality of pecuniary values inherent in publicity and, second,

a system where celebrities' publicity rights can be owned and commercialized exclusively by the individual and her assignees.[53]

D. *Privacy in Chaos: Prosser Reins Things In*

While the right of publicity was in its infancy, privacy was becoming established in the American legal system and courts struggled to define the relation between the two claims. Some courts recognized the right of publicity as a distinct right,[54] others defined the right of publicity as part of the right to privacy, and still others continued to deny the right of publicity in its entirety.[55]

In response to the legal uncertainty, Dean Prosser clarified in his article *Privacy* that the right to privacy actually consisted of four distinct torts, or invasions, which had little in common except for their protection of the individual's right to be left alone.[56] The fourth tort, appropriation of the plaintiff's name or likeness, is what we now refer to as the right of publicity.[57] While the first three privacy torts protected the individual's feelings or reputation, the forth appropriation tort was distinct in that it alone protected the individual's commercial interest in the exclusive use of her "name and likeness as an aspect of [her] identity."[58] By the end of the 1960s, despite some criticism of Prosser's categorical approach to privacy,[59] this approach ultimately took

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the inadequacy of traditional legal theories in protecting such publicity values." *Id.*

53 Madow criticizes Nimmer's article for discounting "community needs" to access and use celebrity-identity for personal expression and states that "the article can perhaps best be read as a high-class form of special-interest pleading for the star image industry." Madow, *supra* note 29, at 174, 174–78.

54 *See, e.g.*, Manger v. Kree Inst. of Electrolysis, Inc., 233 F.2d 5, 10 n.5 (2d Cir. 1956); Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953); Hogan v. A.S. Barnes & Co., 114 U.S.P.Q. (BNA) 314, 316 (Pa. Ct. C.P. 1957).

55 *See* Prosser, *supra* note 25, at 421; *see, e.g.*, Strickler v. Nat'l Broad. Co., 167 F. Supp. 68, 70 (S.D. Cal. 1958) (rejecting the right of publicity).

56 The four torts are "1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; 2. Public disclosure of embarrassing private facts about the plaintiff; 3. Publicity which places the plaintiff in a false light in the public eye; 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness." Prosser, *supra* note 25, at 389. For a discussion of Prosser's categories as uniquely workable for the American courts, see Paul M. Schwartz & Karl-Nikolaus Peifer, *Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?*, 98 CALIF. L. REV. 1925, 1929 (2010).

57 Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 799 n.2 (Cal. 2001).

58 Prosser, *supra* note 25, at 406; *see also* MCCARTHY, *supra* note 8, § 5:61 ("[T]he right of publicity is infringed by an injury to the pocketbook, [not] by an injury to the psyche.").

59 For a critique of Prosser's approach, see Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 964–66 (1964) (arguing for a rejection of Prosser's categories and a return to privacy as a single tort that protects human dignity because the categories neglected seventy-five years of common law and perverted Warren and Brandeis' conception of privacy to protect human dignity). *But see* Harry Kalvan, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966) (arguing Prosser's categories cut privacy law free from Warren and Brandeis' formulation and the

hold[60]—paving the way for publicity to become a mainstay in the American legal system either as an appropriation tort under privacy law or under a distinct designation of its own.

In 1977, the Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.* decided its only right of publicity case to date.[61] In distinguishing the right of publicity from other privacy rights, the Court noted, "in 'right of publicity' cases the only question is who gets to do the publishing."[62] The Court paid heed to countervailing First Amendment interests, but ultimately found for the plaintiff in that case because the unauthorized news broadcast appropriated the performer's *entire act* and thus posed a substantial threat to the value of his performance in the market.[63] The Court cautioned in dicta that if the unauthorized broadcast in fact increased the value of the performance by stimulating public interest and increasing attendance, then the plaintiff would be unable to prove damages or recover in a right of publicity case.[64]

That same year, the newly issued Third Restatement of Unfair Competition featured the right of publicity as a separate right from the set of four privacy torts.[65] These developments solidly placed the right of publicity outside of the realm of a unitary privacy tort.[66] This distinction remains important because privacy's goal is to protect the individual's personal interests, while publicity protects one's right to capture commercial value.[67]

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confused case law that followed, but stating that the root of privacy is the protection of human dignity and that privacy law as developed as a tort is petty and does not adequately protect human dignity).

60 The approach was subsequently adopted by the Restatement. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

61 433 U.S. 562, 573–76 (1977).

62 *Id.* at 573.

63 "[I]n this case, Ohio has recognized what may be the strongest case for a 'right of publicity' involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place." *Id.* at 575–76.

64 *Id.* at 576 n.12.

65 RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46–49 (1995).

66 For a critical discussion of the solidification of the right of publicity since the early 1970s, see David Lange, *Recognizing the Public Domain*, 44 LAW & COMTEMP. PROBS. 147, 153 (1982). Lange states that

> coinciding roughly with the appearance of the trial court's opinion in *Lugosi v. Universal Pictures Company, Inc*. in 1972, the law seemed suddenly to metastasize. Since then, I would argue, it has developed too rapidly and in too many ill-defined directions, with the consequence that in numerous instances exclusive rights have been recognized in contenders who simply have not demonstrated a legitimate claim.

Id.

67 *See supra* note 47 and *infra* notes 83–87 and accompanying text.

E. *The Modern Statutory Bases of the Right of Publicity*

Today the right of publicity is accepted by twenty-eight states at common law and nineteen states by statute.[68] In general, all the statutes protect individuals from the commercial appropriation of their identities by others without consent—although they vary in the formulations of identity protected.[69] For example, New York grants protection over a "name, portrait or picture"[70] while Illinois—having one of the broadest publicity statutes[71]—protects "any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener, including but not limited to (i) name, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice."[72] Notably, some states like California continue to recognize both a common law and statutory right of publicity.[73]

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[68] Jonathan D. Reichman, *United States*, *in* RIGHT OF PUBLICITY 79 (Jonathan D. Reichman ed., 2011).

[69] *See, e.g.*, KY. REV. STAT. ANN. § 391.170 (West 2013); OHIO REV. CODE ANN. § 2741.01(a) (West 2013). Other differences between the states include descendibility, damages, and defenses. *See* Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMM. LAWYER 14, 15–17 (2011). *See generally* Michael Madow, *Personality as Property: The Uneasy Case for Publicity Rights*, *in* INTELLECTUAL PROPERTY AND INFORMATION WEALTH 349–52 (Peter Yu ed., 2007).

[70] N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2013), *held constitutional in* Rhodes v. Sperry & Hutchinson Co., 85 N.E. 1097 (N.Y. 1908), *aff'd*, 220 U.S. 502 (1911). Technically labeled as an appropriation tort, New York's publicity statute is treated as a bar to common law right of publicity. *See* Stephano v. News Grp. Publ'ns, Inc., 474 N.E.2d 580 (N.Y. 1984).

[71] Illinois is generally considered to have the most plaintiff-friendly right of publicity laws. This is attributed, in part, to the fact that Mark Roesler, the CEO of a large Illinois-based celebrity image management company, was the main author of Illinois' statute. *See Biography*, MARK ROESLER, http://www.markroesler.com/about/biography.html (last visited Aug. 28, 2013) ("CEO Mark Roesler is the exclusive business agent to over 300 celebrities and estates. In 1994, he was the driving force behind the creation of Indiana's Right of Publicity Statute, which is one of the most expansive publicity statutes in the world."); *How Celebs Make a Living After Death*, CBSNEWS (Jan. 10, 2011), http://www.cbsnews.com/stories/2011/01/06/60minutes/main7219333.shtml?tag=mncol;lst;4 (noting that Roesler saw an opportunity to represent deceased celebrities' estates in the 1980s and actively sought to create post-mortem right of publicity extensions in state legislatures and through the courts; also noting that marketing and licensing of dead celebrities images is an $800 million dollar per year industry, on path for future growth as new technologies emerge). Roesler had much to gain from a statutory recognition of post-mortem publicity rights given that his fees start at one-third of the profits, while standard agent's fees are only ten percent. Nancy Hass, *I Seek Dead People*, N.Y. TIMES, Oct. 12, 2003, § 6 (Magazine), at 38.

[72] 765 ILL. COMP. STAT. ANN. 1075 (West 2013) (Right of Publicity Act).

[73] CAL. CIV. CODE § 3344 (West 2013) (protecting "name, voice, signature, photograph, or likeness"), *limited as noted by* Jules Jordan Video, Inc. v. 144942 Canada Inc., 617 F.3d 1146 (9th Cir. 2010) (preempting right of publicity claim by federal copyright law); *see supra* note 26 and accompanying text. Jurisdictions that recognize both the common law and statutory right of publicity are generally more plaintiff-friendly than those where the right is based solely on statutory law because the common law definition of identity is often broader than the statutory definition. *Compare* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992), *reh'g en banc denied*, 989 F.2d 1512 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en

II. MODERN PUBLICITY LAW AND THE EMERGENCE OF REALITY TELEVISION

A. *Overview*

Although the right of publicity expanded and became entrenched in many states in the second half of the twentieth century,[74] the right of publicity is not without critics.[75] In response to the expansion, several courts and scholars have questioned the theoretical and legal bases for the right of publicity.[76] Such criticism often expresses concern for the First Amendment implications[77] of right of publicity laws and the detrimental effect that broad right of publicity protection has on a lively public domain.[78] Even some scholars who support the right of publicity express caution at any further expansion of the right.[79]

The late twentieth century also saw the rise of reality television: a new form of television programming, which generally is "something constructed to resemble reality, where a camera crew follows people around while they do something."[80] With the growth of the reality

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banc) (finding defendant's robot with a blond wig in front of a Wheel of Fortune-like game board violated Vanna White's right of publicity at common law, even though the California publicity statute did not list "robots" as a protectable category of identity), *with* Burck v. Mars, Inc., 571 F. Supp. 2d 446, 448–49 (S.D.N.Y. 2008) (finding Mars' use of a "naked cowboy" M&M cartoon in an advertisement did not violate the real "Naked Cowboy" Times Square street performer's right of publicity because the "New York statute protects the name, portrait, or picture of a 'living person,' not a character created or a role performed by a living person").

74 *See supra* Parts I.C–D.

75 *See, e.g.*, Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365 (1992); David Tan, *Political Recoding of the Contemporary Celebrity and the First Amendment*, 2 HARV. J. SPORTS & ENT. L. 1 (2011); de Grandpré, *supra* note 27; Madow, *supra* note 29.

76 *See supra* notes 30, 75 and accompanying text. The expansion of the right of publicity is also questionable given the economic benefit that some advocates for expanded publicity rights, like Mark Roeser, have received as a result of the expansion. *See supra* note 71.

77 *See, e.g.*, Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003) (arguing that the right of publicity is unconstitutional).

78 *See, e.g.*, Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 969, 972–73 (10th Cir. 1996); Lange, *supra* note 66, at 160–78.

79 *See* MCCARTHY, *supra* note 8, § 4.38 ("[T]he right of publicity should be kept as close as possible to its basic rationale of a natural right of every human being to control commercial uses of human identity and persona. To stretch the right of publicity beyond its basic reason for existence is to blindly follow superficial semantic analogies."); *id.* §4.45 (stating the right should not be extended to protect the identity of businesses or institutions); *id.* at § 4.37; *infra* note 83.

80 James Frey, *Forward* to REALITY MATTERS: 19 WRITERS COME CLEAN ABOUT THE SHOWS WE CAN'T STOP WATCHING xi (Anna David ed., 2010). *See also* ANNETTE HILL, REALITY TV: AUDIENCES AND POPULAR FACTUAL TELEVISION 2 (2005). One reason for the rise of reality television programming is the high profit margin to producers. *See The Real Deal on Reality TV*, CBSNEWS, (Sept. 5, 2010), *available at* http://www.cbsnews.com/stories/2010/02/07/sunday/main6183037.shtml ("[A]n hour of reality can cost a few hundred thousand dollars, compared to the one to three million for a scripted drama."). For a discussion of the economics of reality television, see Kimberlianne Podlas,

television industry came the reality television star, or "nonebrity"[81]—a new form of entertainment star. As this industry expands, so do the number of right of publicity lawsuits filed by reality television stars.[82] In order to understand why reality television stars' right of publicity claims should be treated differently than traditional celebrities' claims, one must first explore whom the right of publicity protects, what exactly reality television is, and how reality television stars are different from traditional entertainment celebrities.

B. *Whose Right Is It Anyway?*

The right of publicity protects the commercial value of an individual's identity from use in trade without her consent.[83] The main difference between the right of publicity and privacy are the different interests they protect: the right of publicity protects commercial interests, while the right to privacy protects personal interests.[84] The distinction between the interests that privacy and publicity protect is key because it reflects the United States' approach to publicity as a property right, rather than an inherent dignitary interest, like privacy.[85] As a property-based right, publicity rights are transferable and, in some states, descendible.[86] Privacy rights, in contrast, are vested with the individual and cannot be transferred or inherited.[87]

Courts split over whether the right of publicity protects all individuals or only those who have achieved a certain level of fame.

Primetime Crimes: Are Reality Television Programs "Illegal Contests" in Violation of Federal Law, 25 CARDOZO ARTS & ENT. L.J. 141, 145–48 (2007).

[81] *Nonebrity*, URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=nonebrity (last visited Aug. 28, 2013) ("Somebody who manages to maintain celebrity status despite having done nothing to merit it."); Shandra Clark, *The Era of the "Nonebrity"*, YAHOO! VOICES (Dec. 31, 2009), http://http://voices.yahoo.com/the-era-nonebrity-5171271.html.

[82] *See supra* note 13 and accompanying text.

[83] The right of publicity protects natural persons, not corporations or institutions. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46(d) (1995) ("The interest in personal dignity and autonomy that underlies both publicity and privacy rights limits application of the right of publicity to natural persons. The protection available against the unauthorized use of corporate or institutional identities is determined by the rules governing trademarks and trade names."). An open and largely unlitigated question is whether animals should be entitled to publicity rights. *See* MCCARTHY, *supra* note 8, § 4.37 ("Some [scholars] have proposed that animals, from household pets to animal celebrities, have a right of publicity in their identity. The logical difficulty is that this stretches the right of publicity beyond its rationale of a natural right in human identity.").

[84] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46(a), (b) (1995); *supra* note 8 and accompanying text.

[85] *See supra* notes 8, 47 and the discussions therein.

[86] J. Thomas McCarthy, *Public Personas and Private Property: The Commercialization of Human Identity*, 79 TRADEMARK REP. 681, 687 (1989).

[87] BLACK, *supra* note 8, at 17–18.

The majority of courts and scholars hold that the right of publicity protects all individuals,[88] and fame only affects the calculation of damages.[89] A minority of courts, however, hold that only celebrities are entitled to the right of publicity.[90] Under the minority approach, a private individual's claim is denied when she cannot prove her celebrity status to demonstrate that her identity had commercial value prior to the defendant's use.[91] However, even in jurisdictions that allow private individuals' right of publicity claims, these cases are rare because recovery is limited to the market price for the use of a private individual's identity[92]—generally quite low, and far less than a plaintiff's attorney's fees.[93] Thus, private individuals are generally better off pursuing claims under privacy law, where damages cover personal injuries, as well as emotional harm.[94]

Private individuals also rarely win right of publicity cases in the event of media appropriations, because media defendants are insulated under the First Amendment and most state statutes permit unauthorized appropriations that cover matters of public interest or concern.[95]

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[88] MCCARTHY, *supra* note 8, § 4.13.

[89] Even unknown persons' identities may have commercial value. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46(b), cmt. d (1995); *cf.* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 n.11 (9th Cir. 1974) ("[T]he appropriation of the identity of a relatively unknown person may result in economic injury or may itself create economic value in what was previously valueless."); Dora v Frontline Video Inc., 18 Cal. Rptr. 2d 790, 792 n.2 (Ct. App. 1993) ("Appellant [a surfing legend] is not a celebrity in terms of the general public, but the evidence in this case establishes that he achieved a certain celebrity among those members of the surfing sub-culture to whom the program would be of interest. It is therefore safe to say that under any standard his name and likeness were commercially exploitable to some extent.").

[90] *See* Uhlig LLC v. Shirley, C.A. No. 6:08–cv–01208–JMC, 2011 WL 1119548 (D.S.C. Mar. 25, 2011) (holding that under South Carolina law only celebrities can allege right of publicity claims and granting summary judgment in favor of the defendant because the plaintiff, a well-regarded salesman, was not a celebrity); House v. Sports Films & Talents, Inc., 351 N.W.2d 684, 685 (Minn. Ct. App. 1984) ("An action for appropriation [in Minnesota] has not been extended beyond the protection of celebrities because a 'celebrity's property interest in his name and likeness is unique.'" (quoting Uhlaender v. Henricksen, 316 F. Supp. 1277, 1283 (D. Minn. 1970))).

[91] Vassiliades v. Garfinckel's, Brooks Bros., 492 A.2d 580, 592 (D.C. 1985) (finding that a noncelebrity plaintiff could not prove there was "value" in her photograph).

[92] *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49, cmt. d (1995) ("Private persons many also recover damages measured by the value of the use by establishing the market price that the defendant would have been required to pay in order to secure similar services from other private persons or from professional models.").

[93] MCCARTHY, *supra* note 8, § 4.3 ("That most reported appellate opinions on the right of publicity have involved widely known 'celebrities' is to be expected. For it is their identities which have the greatest commercial value and hence are the most likely to be used for advertising and the most likely to justify the expense of litigation.").

[94] *See, e.g.*, Moore v. Big Picture Co., 828 F.2d 270, 275–77 (5th Cir. 1987) (finding defendant liable for invasion of privacy for misappropriating plaintiff's name).

[95] *See* Best v. Berard, 776 F. Supp. 2d 752 (N.D. Ill. 2011) (holding that the First Amendment shielded television production companies from civil liability under the Illinois Right of Publicity Act when they publicized plaintiff's arrest on reality television show *Female Forces* because the commercial use of the plaintiff's identity implicated a matter of public concern, namely truthful

In some instances, the right of publicity may be reserved or denied for a specific group of people. In Arizona, for example, a special criminal right of publicity statute was enacted to protect the publicity rights of soldiers.[96] In contrast, politicians' rights of publicity are limited[97] because the appropriation of a politician's identity is often protected under the First Amendment as political speech.[98]

C. *A Close Cousin: Section 1125(a) of the Lanham Act*

State-based right of publicity claims are often pled in conjunction with federal false endorsement claims under Section 1125(a) of the Lanham Act,[99] which prohibits the use of false or misleading

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footage of an arrest); Ingerson v. Twentieth Century Fox Film Corp., Nos. B152689, B153595, 2003 WL 147771 (Cal. Ct. App. Jan. 21, 2003) (finding appropriation of identity on *Cops* reality television show did not violate an individual's right of publicity because the show covered police enforcement, which is a matter of public concern); *cf.* Shulman v. Grp. W Prods., Inc., 955 P.2d 469 (Cal. 1998) (denying plaintiff's privacy claim for disclosure of private facts when production company included images of plaintiff's rescue on a reality television show that covered rescue workers because the rescue and medical treatment of accident victims, coverage of critical services that members of the public may someday need, and challenges facing emergency workers dealing with serious accidents were all matters of legitimate public concern). Public concern is usually defined broadly to include matters related to a "political, social, or other concern to the community," as well as items of legitimate news interest. Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011).

96 For example, Arizona and Oklahoma enacted criminal right of publicity statutes, which make violating the right of publicity of current or former members of the armed services a misdemeanor. AZ. REV. STAT. ANN. § 13-3726 (West 2007); OKLA. STAT. ANN. tit. 21, § 839.1A (West 2006).

97 Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697 (Ga. 1982). In privacy actions, politicians' claims are also generally denied because they are found to have waived their right to privacy by becoming public figures. *See* N.Y. Magazine v. Metro. Transit Auth., 987 F. Supp. 254, 256–57 (S.D.N.Y. 1997) (holding that Giuliani chose to be a public figure by becoming mayor and therefore could not avoid unwanted publicity).

98 *See generally* Tyler T. Ochoa, *The Schwarzenegger Bobblehead Case: Introduction and Statement of Facts*, 45 SANTA CLARA L. REV. 547 (2005) (discussing constitutional limitations on politicians' right of publicity claims). *Cf.* MCCARTHY, *supra* note 8, § 4.23 (noting that politicians waive their privacy claims and that political speech is protected under the First Amendment, arguing however that politicians' right of publicity claims should be allowed when political speech is not implicated).

99 15 U.S.C. § 1125 (2012). Section 1125(a)(1) of the Lanham Act, "False designations of origin, false descriptions, and dilution forbidden" states

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or

designations of origin, descriptions, and representations in the advertising and sale of goods and services.[100] Section 1125(a) functions primarily to protect consumers from confusion as to the source or endorsement of goods.[101] While the right of publicity protects against unauthorized appropriations of identity, Section 1125(a) only protects against deceptive appropriations that create a likelihood of confusion in consumers as to source or endorsement.[102] Yet, a finding that both Section 1125(a) of the Lanham Act and the right of publicity were violated does not necessarily result in a larger award of damages, as the damages may be limited to avoid duplicative awards.[103]

D. *What Am I Watching?*

Reality television is a form of entertainment programming that involves real people and is designed to create an illusion of reality.[104] The field is quite broad and covers a range of genres including life dramas, competitions, game shows, and surveillance shows.[105] The first reality shows were televised in the mid-twentieth century, usually in either quiz show format or one involving staged scenes with hidden cameras.[106] Examples of early reality television shows include *Candid Camera* and *What's My Line*.[107] In 1973, PBS was ahead of its time when it aired *An American Family*—a novel show covering a real family that over the course of the season televised the parents' divorce

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commercial activities,
shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

100 Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1106 (9th Cir. 1992).

101 White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1399–1400 (9th Cir. 1992). See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983) for an example of a case where the Section 1125 claim was denied because the court found no likelihood of confusion. Despite that, the court ultimately found Carson's right of publicity was violated under state law. *Id.* at 835–36.

102 *White*, 971 F.2d at 1399. If a celebrity's identity is appropriated but there is no confusion in consumers as to source or endorsement, then the Section 1125(a) claim will be dismissed. *See* Rogers v. Grimaldi, 875 F.2d 994, 997–1001 (2d Cir. 1989).

103 *See Waits*, 978 F.2d at 1112 ("The jury's verdict on each claim is supported by substantial evidence, as are its damage awards. Its award of damages on Waits' Lanham Act claim, however, is duplicative of damages awarded for voice misappropriation; accordingly we vacate it.").

104 Frey, *supra* note 80, at xi.

105 DR. MELISSA CAUDLE, THE REALITY OF REALITY TV WORKBOOK 6–7 (2011) (describing the main genres as documentary, game show, life drama, celebrity, professional, paranormal, dating show, makeover, competition, surveillance shows, and talk show). The possible purposes of a reality television show include to induce one to tell a story, teach something, entertain, cover a social issue, display someone winning, change a life, set people up, cover political issues, and to turn an unknown person into a "realebrity." *Id.* at 7.

106 Slocum, *supra* note 17; Podlas, *supra* note 80, at 144.

107 Slocum, *supra* note 17.

and the homosexual son's "coming out" moment.[108] In response to TV Guide listing *An American Family* as a documentary, famed anthropologist Margaret Mead wrote an article contesting the categorization.[109] In the article, Mead expressed strong support for the format as a possible "new way to help people understand themselves," but noted that a new category of classification was needed to describe the genre.[110]

An American Family though was a forerunner for narrative reality show series,[111] as the majority of reality shows in the 1970s and 80s reflected the development of portable video cameras and consisted primarily of ordinary people caught on film in interesting situations or humorous moments.[112] The major milestone in the reality television genre was MTV's creation of the *Real World* series. This series employed various production techniques such as staging, casting, interviewing, and advanced editing to construct characters and storylines for the episodes.[113] The *Real World* series set the stage for the highly-produced reality programs that are now typical of the genre in the early twenty-first century.[114]

Far from simply recording reality, modern reality television shows are engaged in character and reality construction that occurs in various manners during the pre-production, filming, and post-production stages.[115] The pre-production construction includes the selection of participants, show setting, and general show plot or theme. During filming, writers and producers play a large role[116] by writing episode storylines, developing show characters, and, at times, providing lines to the reality stars.[117] Construction is at its height during post-production, as editors splice and combine footage to create a dramatic storyline

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108 *Id.* For a detailed discussion of the show, see Jeffrey Ruoff, *"Can a Documentary Be Made of Real Life?"*, *in* THE CONSTRUCTION OF THE VIEWER: MEDIA ETHNOGRAPHY AND THE ANTHROPOLOGY OF AUDIENCES 270–96 (Peter Ian Crawford & Sigurjón Baldur Hafsteinsson, eds., 1996), *available at* http://www.dartmouth.edu/~jruoff/Articles/RealLife.htm.

109 Margaret Mead, *As Significant as the Invention of Drama or the Novel*, TV GUIDE, Jan. 6, 1973, at A61–63.

110 *Id.*

111 Kelefa Sanneh, *The Reality Principle*, NEW YORKER, May 9, 2011, at 72.

112 Slocum, *supra* note 17.

113 *Id.*

114 "[I]n contemporary terms, reality television encompasses programs in which real people are thrust into situations or given tasks and compete for a prize." Podlas, *supra* note 80, at 145.

115 *Id.*

116 The large role of writers in the production of reality television shows led the Writers Guild of America to strongly advocate for the inclusion of reality television show writers under their union contracts, to insure that—among other things—the writers receive fair and accurate writing credits for their work on the shows, and that their financial interests are protected. *Reality & Game Show Writers*, WRITERS GUILD OF AMERICA, WEST, *available at* http://www.wga.org/content/default.aspx?id=2630 (last visited Aug. 24, 2013).

117 James Poniewozik, *How Reality TV Fakes It*, TIME MAGAZINE, Jan. 29, 2006, at 60–62 (noting that Paris Hilton was fed lines by staff on her reality television show *The Simple Life*).

from reams of mundane footage.[118]

Over the years, criticism of the reality television industry has grown—especially for mistreatment of show writers[119] and abusive practices towards cast members, such as placing cast members in unsafe and unhealthful environments for the sake of entertainment.[120] These questionably exploitative practices include depriving participants of sleep, placing participants at risk of seemingly imminent bodily harm, or pressuring them to over-consume substances in order to push them to the "edge" for the entertainment value of their subsequent behaviors.[121] Generally, these shows avoid directly liability from show participants by requiring that they sign lengthy waivers.[122]

Despite criticism of the reality television industries' exploitative practices,[123] others find social and economic value in reality television. Such economic value includes the high profit margin of reality television shows—a result of the relatively low costs of casting and production compared to scripted shows.[124] On the social side, scholars

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118 *Id.*

119 *See supra* note 116 and accompanying text.

120 Criticism often revolves around shows placing participants in unsafe and unhealthful living and working conditions. *See* Jeremy W. Peters, *When Reality TV Gets Too Real*, N.Y. TIMES, Oct. 8, 2007, at C1; *see also* Jennifer L. Blair, *Surviving Reality TV: The Ultimate Challenge for Reality Show Contestants*, 31 LOYOLA L.A. ENT. L. REV. 1, 6–15 (2010). For arguments that there should be greater protection for children who appear on reality television programs, see Dayna B. Royal, *Jon & Kate Plus the State: Why Congress Should Protect Children in Reality Programming*, 43 AKRON L. REV. 435 (2010); Katherine Neifeld, Note, *A Minor Inconvenience: The Case for Heightened Protection for Children Appearing on Reality Television*, 32 HASTINGS COMM. & ENT. L.J. 447 (2010). Reality television shows have also been accused of violating federal rigging laws and defrauding the contestants and the general public. For a discussion of the various lawsuits and an argument for FCC regulation of reality television shows, see Tara Brenner, Note, *A "Quizzical" Look Into The Need For Reality Television Show Regulation*, 22 CARDOZO ARTS & ENT. L.J. 873 (2005). For a discussion of whether reality television producers' 'interference with the "reality" of the show is a violation of the "Quiz Show Statute," 47 U.S.C. §509, see Podlas, *supra* note 80.

121 Edward Wyatt, *TV Contestants: Tired, Tipsy and Pushed to the Brink*, N.Y. TIMES, Aug. 2, 2009, at A1. *See also* Blair, *supra* note 120 (examining the legal ramifications of the mental toll reality television takes on its participants; noting that contracts and waivers are used to insulate producers from liability, that reality show participants are not treated as employees, and, therefore, participation in a show does not give rise to an employer-employee relationship for liability).

122 For a contract from CBS's reality television show *Survivor*, see Andy Dehnart, *Survivor contestant contract: the waivers, agreements that cast members, families sign*, REALITY BLURRED (May 31, 2010, 7:00pm), http://www.realityblurred.com/realitytv/archives/survivor/2010_May_31_contestant_agreements. *See also* Blair, *supra* note 120, at 18–25.

123 Reality dating shows are also criticized by feminist scholars, who argue that these shows resurrect social biases and stereotypes. *See, e.g.*, JENNIFER L. POZNER, REALITY BITES BACK: THE TROUBLING TRUTH ABOUT GUILTY PLEASURE TV (2010). "Reality TV isn't simply *reflecting* anachronistic social biases, it's resurrecting them. This genre has done what most ardent fundamentalists have never been able to achieve: They've created a universe in which women not only *have* no real choices, they don't even *want* any." *Id.* at 25.

124 *See supra* note 80 and accompanying text; *infra* note 130 and accompanying text; *see also* Michelle Conlin, *America's Reality-TV Addiction*, BUSINESS WEEK, Jan. 29, 2003,

note that part of the "thrill" of watching reality television is the possibility that the ordinary viewer too could be catapulted to national fame.[125] This fantasy may also serve as a form of revenge,[126] allowing the general public to recover from the "slight" of being cast as outsiders from Hollywood society.[127] Some cultural theorists have gone so far as to argue that reality television is an essential part of the democratic process because it "teaches viewers to monitor, motivate, improve, transform, and protect themselves in the name of freedom, enterprise, and personal responsibility."[128] In this sense, reality television serves both informative and educational purposes; it supplies viewers with information and then empowers them to sift through and select what to take away from a program. The democratic potential of reality television may also include the promise to grant ordinary people with access to media and symbolic participation in the production of goods and services.[129] Yet, this potential democratic power of access is also criticized for functioning as an exploitative offer that entices normal people to sell their life stories for the ultimate financial benefit of the show producers.[130]

Reality television also normalizes and idealizes the notion of

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http://www.businessweek.com/stories/2003-01-29/americas-reality-tv-addiction.

125 Steven Reiss et al., *Why America Loves Reality TV*, PSYCHOLOGY TODAY, Sept.–Oct. 2001, at 52 ("The message of reality television is that ordinary people can become so important that millions will watch them. And the secret thrill of many of those viewers is the thought that perhaps next time, the new celebrities might be them.").

126 In the psychoanalytic sense, revenge often operates within the individual as a form of fantasy, whereby the individual uses the revenge fantasy to unconsciously work through feelings of jealously, anger, and envy. MARY SHERRILL DURHAM, THE THERAPIST'S ENCOUNTERS WITH REVENGE AND FORGIVENESS 8–9 (2000) (discussing Sigmund Freud and Melanie Klein's important work on revenge fantasies).

127 Conlin, *supra* note 124 ("By vaulting nobodies into overnight celebrities, these shows appeal to the flip side of American's fascination with stardom: people's secret resentment at being shut out of Hollywood's second-carat system. Reality TV is revenge for the regular Jane and Joe.").

128 *Product Description: Better Living Through Reality TV*, AMAZON.COM, http://www.amazon.com/Better-Living-through-Realityebook/dp/B002M78KXS/ref=dp_kinw_strp_1 (last visited Aug. 28, 2013). *See* LAURIE OUELLETTE ET AL., BETTER LIVING THROUGH REALITY TV 1–31 (2008). Presumably the authors' position is directed more toward the game show and competition formats than the surveillance show format of reality television.

129 MARK ANDREJEVIC, REALITY TV: THE WORK OF BEING WATCHED 2–3, 6 (2004).

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> Reality TV . . . offers a . . . cynical version of democratization, one whereby producers can deploy the offer of participation as a means of enticing viewers to share in the production of a relatively inexpensive and profitable entertainment product. In this respect, reality TV anticipates the exploitation of what this book describes as the work of being watched, a form of production wherein consumers are invited to sell access to their personal lives in a way not dissimilar to that in which they sell their labor power . . . . [W]e find ourselves caught between the promise of an empowering form of interactivity and the potential of an increasingly exploitative one.

Id. at 6–7.

perpetual surveillance[131]—a controversial concept that may have positive and negative results for society. On the positive end, perpetual surveillance provides advertisers and producers with unique data that makes the production of individualized goods, services, and advertisements possible. On the negative end, perpetual surveillance is in effect the formal end to privacy.

E. *Who Are These People?*

Reality television stars are individuals who participate in reality television programs. By participating in these shows, reality stars publicize their personalities and consent to some level of invasion in their private lives in a manner that other celebrities often do not.[132] Yet the "bird's eye view" presentation of the lives of "ordinary people" on reality shows is often little more than an illusion.[133] Due to sophisticated production techniques, as well as the participant's own exaggerations, the final product is much more a documentation of constructed personas than snapshots into individuals' private lives.

Incentives for participating in reality television shows vary. For previously unknown individuals, reality television serves as a platform to capture the public's attention;[134] it can be quite lucrative as well.[135]

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131 *Id.* at 2–7.

132 Jennifer R. Scharf, *Shooting for the Stars: A Call for Federal Legislation to Protect Celebrities' Privacy Rights*, 3 BUFF. INTELL. PROP. L.J. 164, 168 (2005).

133 While this applies to some extent to all reality television show formats, it is most applicable to the surveillance style shows, as well as those that involve character interviews. The authorship of each act or statement of a reality show participant is debatable. An act or statement may be the natural behavior of the participant, a construction of that participant, or a performance of—or response to—direction from the shows' crew, writers, or producers. In some instances, it may even be the reading of a scripted line. *See supra* note 117 and accompanying text.

134 Reality television brings to life Andy Warhol's statement that "in the future everyone will be famous for fifteen minutes." Gene Swenson, *What is Pop Art?*, ARTNEWS, Nov. 1963, at 60.

135 Libby Chase, *How Much Does Reality TV Pay?*, YOUNGMONEY.COM (Mar. 8, 2011), http://finance.youngmoney.com/careers/how-much-does-reality-tv-pay/v (noting relatively unknown reality television star participants can make up to $5,000/month, while known stars on popular shows like MTV's California-based reality television show *The Hills* can make as much as $100,000/episode). In 2009, after the show was on-air for several seasons, salaries for *The Hills* stars were reportedly as high as $125,000 per episode, totaling $2.5 million dollars per year. Nicole LaPorte, *Hills Salaries Exposed*, DAILY BEAST (Sept. 27, 2009), http://www.thedailybeast.com/articles/2009/09/27/these-hills-are-paved-in-gold.print.html. Yet, during the first season of MTV's *Jersey Shore*, the cast combined made only $25,000 for the entire season. Brian Stelter, *With New Stars, Reality Shows See Costs Rise*, N.Y. TIMES, July 27, 2010, at B1. At one point TLC paid Jon and Kate Gosselin $22,500 per episode for their reality television show *Jon & Kate Plus 8*. *Id.* In rare cases, performance on a reality television show may lead to scripted acting opportunities on other shows. *See* Tracie Egan Morrissey, *Snooki & JWoww Get Dumbed Down and Scripted for Spin-Off*, JEZEBEL (Jan. 26, 2011), http://jezebel.com/5743880/snooki—jwoww-get-dumbed-down-and-scripted-for-spin+off. Rarely however do these spin-off opportunities lead to successful acting careers. Tim Conroy, *When Reality Stars Attack . . . Scripted Drama*, AOLTV.COM (Nov. 6, 2009),

While, for individuals with prior public statuses, performing on a reality television program can provide an opportunity to revive a fading or extinguished career in entertainment.[136]

Reality television stars monetize their fame in different ways. Some individuals participate in a show, but do not financially exploit their newfound national prominence through endorsement and advertising deals.[137] Others take advantage of the national prominence by either entering endorsement and advertising deals—where they can further exploit their personas as brand spokespersons—or, by using their fame to promote personal business ventures.

One example of a star who functions as a brand ambassador, while promoting her own business ventures along the way is Kim Kardashian, a star and co-producer of the reality television show *Keeping Up With The Kardashians*.[138] In 2011, Ms. Kardashian sued The Gap and Old Navy for violating her right of publicity and privacy by featuring a model who looked like her in a broadcast advertisement.[139] In her complaint, Ms. Kardashian alleged that the gravitas of her injury was damage to her ability to earn income from her product endorsement ventures, which include various fashion and beauty products.[140]

An example of a reality star who used her reality show fame to draw attention to personal business ventures is Bethenny Frankel, star of Bravo! reality shows including *The Real Housewives of New York* and founder of the health brand *Skinnygirl*. Ms. Frankel recently sold her *Skinnygirl* cocktail line to Fortune Brands' Beam Global and stated that she went on the Bravo! reality show exclusively to promote her

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http://www.aoltv.com/2009/11/06/when-reality-tv-stars-attack-scripted -drama/.

136 *See* ANDREJEVIC, *supra* note 129, at 3 ("[R]ecently, faded celebrities are attempting to use reality shows to launch a comeback, or at least to pay the bills."); Jo Piazza, *Celebenomics: Why 'Dancing With the Stars' Is Like a Federal Bailout for Hollywood Careers*, POPEATER (Mar. 8, 2010), http://www.popeater.com/2010/03/08/celebenomics-why-dancing-with-the-stars-is-like-a-federal-bai/; *William Baldwin Helped Wife Chynna Phillips Get on 'Dancing With The Stars'*, STARPULSE (Sept. 24, 2011), http://www.starpulse.com/news/index.php/2011/09/24/william_baldwin_helped_wife_chynna_phi (quoting William Baldwin) ("20 years later, if you're trying to re-brand, re-franchise and make yourself relevant in the entertainment industry again, what better way to do it than in front of 20-some-odd-million people every week?").

137 Some may be satisfied with the salary and experience. ANDREJEVIC, *supra* note 129, at 145 (noting *Big Brother* participants valued the experience of being on the show over $50,000).

138 In 2010, the Kardashian family together made $65 million in endorsement deals and commercial projects, while *Jersey Shore's* Mike Sorrentino made $5 million in 2010 from his endorsement deals. *Id.* For a discussion of the available endorsement opportunities, including payment for product mentions on celebrities' Twitter and Facebook pages, see Leah W. Feinman, Note, *Celebrity Endorsements in Non-Traditional Advertising: How the FTC Regulations Fail to Keep Up With The Kardashians*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 98–117 (2011).

139 Complaint and Demand for Jury Trial, Kardashian v. The Gap, Inc., Case No. 2:11-cv-05960 (C.D. Cal. July 20, 2011). The case settled on August 28, 2012.

140 *Id.* at 2–5.

business.[141]

F. *What's Different?*

Generally, a celebrity is an individual who has achieved a level of fame that garners media attention.[142] Broad categories of celebrities are sports figures, politicians, and entertainers.[143] A celebrities' fame exists on multiple levels, which cultural theorist Richard Dyer broke down into three main categories using the example of film stars:

> A film star's image is not just his or her films but the promotion of those films and of the star through pin-ups, public appearances, studio hand-outs and so on, as well as interviews, biographies and coverage in the press of the star's doings and "private" life. Further, a star's image is also what people say or write about him or her, as critics or commentators, the way the image is used in other contexts such as advertisements, novels, pop songs, and finally the way the star can become part of the coinage of everyday speech.[144]

One of the differences between reality television stars and traditional celebrities is the greater level of access reality stars offer the public into their private lives. As Dyer notes, traditional celebrities have a divide between public image and private life.[145] Part of their allure is a function of this public-private divide, which evokes in the viewer a desire to know more about who the star "really is" in her private life.[146] Reality television stars, in contrast, attract public attention specifically because they invite the public in to observe what appears to be their private lives and inner worlds.[147] In this sense, reality television stars provide the public with an access that traditional celebrities often deny. Psychologists and sociologists argue the popularity of reality television and its stars is largely attributable to this grant of access to the

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141 Leslie Bruce, *How Bethenny Frankel used reality TV to earn $120 million*, MSNBC.COM (Apr. 21, 2011), http://today.msnbc.msn.com/id/42708868/ns/today-entertainment/t/how-bethenny-frankel-used-reality-tv-earn-million/ ("I went on 'Housewives' single-handedly and exclusively for business,' Bravo star says.").

142 MCCARTHY, *supra* note 8, § 4.2 ("Often, celebrity status is created and maintained by the media. The news media generally are directed at the largest audience possible in order to maximize circulation. Media stars or celebrities are usually those whom we see most often mentioned in newspapers, magazines and on television. They usually fall into the category of sports figures, politicians and entertainers. The nature of their professions keeps them constantly in the public eye. Hence, they are the ones that most people intuitively think of as 'celebrities.'").

143 *Id.*

144 RICHARD DYER, HEAVENLY BODIES 2–3 (1986).

145 *Id.* at 9–11.

146 *Id.*

147 Scharf, *supra* note 132, at 167. Ellen Goodman, *Like a Peeping Tom at a Strip Show*, NAT'L POST, July 8, 2000, at A17.

"private."[148]

Another difference between traditional celebrities and reality stars is the underlying reasons for the star's fame. The basis of a traditional celebrity's fame is a cultivated talent or skill that is shared with the public through performances. Her labor is the cultivation of the underlying talent and the subsequent public performances, which are expressly separate from the star's private self. In contrast, a reality television star's fame is based on a public exploitation of her *own persona* in media performances, where she invites the public viewer to observe a filmed version of her allegedly private life.[149] The labor of the reality star, then, is the sale of her privacy and the construction of the persona she will perform on the show.[150] And, the reality television star's fame depends both on how well the public responds to that construction and how the reality star fits into the overall show.[151]

III. THE PROBLEMS WITH, AND JUSTIFICATIONS FOR, THE RIGHT OF PUBLICITY

A. *Overview*

As the right of publicity expands in the United States, so too have the critics. Scholars question the justifications behind the right of publicity and criticize the right as "a massive exercise of question begging."[152] Courts have placed judicial limits on the right of publicity and developed various tests in order to protect conflicting First Amendment interests.[153] Judges warn that expansive state-based publicity rights are on a collision course with federal copyright law.[154] Practitioners criticize the inconsistency among state publicity laws and call for uniform federal regulation or an abolition of the right of publicity.[155] Recently, a broad choice of law provision in one state's

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148 *See* Steven Reiss et al., *supra* note 125.

149 *See supra* notes 15–17 and Part II.F.

150 ANDREJEVIC, *supra* note 129, at 1–13.

151 *Supra* notes 115–118 and accompanying text.

152 Coombe, *supra* note 75, at 368.

153 *See infra* Part IV.

154 *See, e.g.*, Wendt v. Host Int'l Inc., 197 F.3d 1284, 1285 (9th Cir. 1999) (Kozinski, J., dissenting).

155 *See* INTERNATIONAL TRADEMARK ASSOCIATION, DRAFT PUBLICITY RIGHTS LEGISLATION (Proposal to Amend the Trademark (Lanham) Act of 1946, Sept. 30, 1996) (draft withdrawn); Symposium, *Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress*, 16 CARDOZO ARTS & ENT. L.J. 209 (1998) (discussing lack of uniformity among state right of publicity recognition and arguing for a national uniform right of publicity code); Richard S. Robinson, *Preemption, The Right of Publicity, and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183 (1998); J. Eugene Salomon, Jr., Note, *The Right of Publicity Run Riot: The Case For a Federal Statute*, 60 S. CAL. L. REV. 1179, 1179–91 (1987) (discussing the problems of the

right of publicity statute was even invalidated as an unconstitutional violation of the Due Process Clause, the Full Faith and Credit Clause, and the Dormant Commerce Clause.[156] Meanwhile, the expansion of the right of publicity is tied to private interest groups, who have much to gain from expansive, descendible publicity rights.[157]

The basis for the right of publicity—as a product of the twentieth century, owing much of its growth and expansion to the efforts of private lobbyists—is often called into question by these critics.[158] Yet, the application of broad publicity rights for reality stars is even more questionable. Broad publicity rights for reality television stars are particularly problematic because the line between a reality star's identity and constructed persona or character is unclear—what is presented as *self* is often a *construction*.[159] The right of publicity only grants protection over identity; characters and constructed personas are protected by federal copyright law, which expressly preempts overlapping state laws.[160] Thus, the application of broad publicity protection for reality television stars risks impermissible intrusion into the domain of federal copyright law by protecting what in effect is the reality star's constructed persona or character. Furthermore, the justifications for the right of publicity fall short when applied to reality television stars. An examination of these issues makes clear that the courts have a special duty to carve out space in right of publicity law for a fair use exception to allow the public access to reference and *re*-present reality television stars' constructed personas.

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state-based right of publicity regime in terms of fairness to the parties, impact on incentives for famous people to create new works, tension with federal copyright law, and unfairness to individuals who chose to not commercialize their identities while alive); BLACK, *supra* note 8, at 105 ("The current . . . US approach[] . . . [relies] on a wide range of state legislation, case law, federal jurisprudence, tort and unfair competition restatements—are certainly not an ideal coherent whole. The protection for publicity rights in the United States is not necessarily to be envied or emulated.").

156 Experience Hendrix, LLC v. Hendrixlicensing.com, Ltd., 766 F. Supp. 2d 1122, 1138–43 (W.D. Wash. 2011) (invalidating "Property right—Use of name, voice, signature, photograph, or likeness," WASH. REV. CODE § 63.60.010 (2008)). The Washington statute was previously amended to create a broad choice of law forum in response to *Experience Hendrix LLC v. James Marshall Hendrix Foundation*, 240 Fed. Appx. 739 (9th Cir. 2007), where the court applied New York law to determine that Hendrix's publicity rights extinguished at death. *See* Wash. S. Judiciary Comm. Rep., H.B. 2727, 60th Leg., 2d Sess. (Feb. 29, 2008).

157 *See supra* notes 53, 71. Michael Gormley, *Bill Pushed by Pacino, Ono, Others Would Protect Dead Celebrities*, ASSOCIATED PRESS, June 11, 2007. To get a sense of the amount of money at stake for dead celebrities' estates, see Forbes' annual list *The Top-Earning Dead Celebrities,* FORBES, Oct. 25, 2010, http://www.forbes.com/2010/10/22/top-earning-dead-celebrities-business-entertainment-dead-celebs-10_land.html?boxes=listschannelinsidelists (listing Michael Jackson in first place with $275 million in gross earnings for the year).

158 *See supra* notes 75–79, 152–157 and accompanying texts.

159 *See supra* notes 14–17 and Parts II.E–F.

160 *See supra* note 28 and *infra* note 163.

B. *Copyright Preemption and the Identity-Character Divide*

Generally, a talent-based celebrity's ability to sue for a violation of the right of publicity is limited to the appropriation of her own identity, as ownership rights for characters and performances often belong to someone other than the star. An actor, for example, may not have grounds to sue for the appropriation of a character she played, as the copyright in the character and story line usually belongs to the writer or producer.[161] Likewise, athletes do not own the copyrights to their performances on broadcast television, and, under industry standards, they are required by contract to transfer image and performance rights to their team and league.[162]

Broad publicity rights for reality television stars are problematic because, while these stars appear as "themselves" on reality television shows, the broadcasted personas are much closer to constructed characters. The line between character and identity is particularly important because the right of publicity protects identities, not characters; claims based on the appropriation of a character or performance are generally preempted by federal copyright law.[163] In fact, courts already have trouble distinguishing between a character and

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[161] *See, e.g.*, Wendt v. Host Int'l Inc., 125 F.3d 806, 810–12 (9th Cir. 1997) (right of publicity claims turning on whether robot characters resembled actors' likenesses, as the actors did not have claim over the identifiable outfits worn by the robots because the outfits identified the television show characters, and not the actors' personas).

[162] Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663 (7th Cir. 1986) (finding that the telecasts of the baseball players' performances were owned by the baseball clubs and thus holding that the baseball players' right of publicity claims over the telecasts of their images were preempted under Section 301 of the Copyright Act).

[163] Copyright protects creative expression fixed in a tangible medium of expression. 17 U.S.C. § 102 (2012). The Copyright Act preempts equivalent common law and statutory rights. 17 U.S.C. § 301 (2012). State-based right of publicity "[c]laims are not preempted by the federal copyright statute so long as they contain elements, such as the invasion of personal rights . . . that are different in kind from copyright infringement." Wendt v. Host, Nos. 93-56318, 93-56510, 1995 WL 115571, at *1 (9th Cir. Mar. 16, 1995) (omission in original) (internal citations omitted). *See* Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 289 (2d Cir. 1981) (Mansfield, J., dissenting), *cert. denied*, 456 U.S. 927 (1982); Bi-Rite Enters., Inc. v. Button Master, 555 F. Supp. 1188, 1201 (S.D.N.Y. 1983); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 850 (1979) (Bird, C.J., dissenting). However, the fact that the Copyright Act does not expressly preempt the right of publicity does not mean that the right of publicity and copyright law are never in conflict. For example, when a creator uses an image of an individual without that individual's consent, then the right of publicity may in effect destroy the creator's exclusive rights under Section 106 of the Copyright Act. *See* Salomon, Jr., *supra* note 155, at 1188; Marc J. Anfelbaum, Note, *Copyright and the Right of Publicity: One Pea in Two Pods?*, 71 GEO. L.J. 1567, 1580 (1983); *see also* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (holding that the automobile company and advertising agency violated the singer's right of publicity by using a sound-alike in a commercial that included plaintiff-singer's song, and finding that by using a sound-alike the defendants had improperly appropriated the singer's identity—namely her distinctive voice—without her consent, even though the defendants secured a license with the copyright owner to legally perform the song).

an identity when dealing with certain right of publicity claims brought by traditional celebrities.[164] The difficulty only grows in the context of reality television stars, who are famous, in large part, for blurring the lines between public and private, and between character and identity.

Furthermore, current jurisprudence is in conflict over the threshold level of identity that must be appropriated in order for a violation of the right of publicity to occur.[165] For example, in New York, the right of publicity does not extend to constructed personas or characters, but may cover *certain* signifiers, if those features are found to remind the viewer of an individual's identity, as opposed to merely a character or persona the individual constructed or performed.[166] While the New York approach may reflect a reasonable effort to cabin right of publicity claims, the rule provides little guidance as to how courts should discern identity or identifiable features from constructed personas and characters.

California has attempted to avoid this line drawing by broadly construing the common law definition of identity to cover anything that reminds the viewer of an individual, even if the reference only borrows an element from a copyrighted performance.[167] However, California's broad construction of identity has evoked sharp dissents, as well as criticism from scholars who claim that broad definitions of identity violate the First Amendment and place the right of publicity on a collision course with the Copyright Act and the Copyright Clause of the Constitution.[168]

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164 This issue has split the Ninth Circuit on several occasions. *See* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992), *reh'g en banc denied*, 989 F.2d 1512 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc) (dissenting from the denial of rehearing en banc and disagreeing with the panel's finding that a robot with a wig standing in front of a Wheel of Fortune game board reminded viewers of Vanna White and therefore violated her common law right of publicity); Wendt v. Host Int'l Inc., 197 F.3d 1284 (9th Cir. 1999) (Kozinski, J., dissenting from denial of rehearing en banc). For a discussion of the limits of an actor's ability to claim a violation of the right of publicity when the defendant appropriated aspects of the character they performed, see *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 824–26 (1979) (Mosk, J., concurring) ("Bela Lugosi did not portray himself and did not create Dracula, he merely acted out a popular role that had been garnished with the patina of age, as had innumerable other thespians over the decades. His performance gave him no more claim on Dracula than that of countless actors on Hamlet who have portrayed the Dane in a unique manner.").

165 See *supra* note 164 and accompanying text.

166 Burck v. Mars, Inc., 571 F. Supp. 2d 446, 453 (S.D.N.Y. 2008) ("[The New York statute] does not extend to fictitious characters adopted or created by celebrities.").

167 For an example, see *White*, 971 F.2d 1395.

168 *See, e.g.*, *White*, 989 F.2d at 1514 (Kozinski, J., dissenting from denial of rehearing en banc) ("The panel's opinion is a classic case of overprotection. Concerned about what it sees as a wrong done to Vanna White, the panel majority erects a property right of remarkable and dangerous breadth: Under the majority's opinion, it's now a tort for advertisers to remind the public of a celebrity. Not to use a celebrity's name, voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity's image in the public's mind. This Orwellian notion withdraws far more from the public domain than prudence and common sense

As reality television shows grow more manufactured, and as production teams become more involved in participants' character construction,[169] the line between identity and character will be even more important for courts to determine in reality television star right of publicity cases. Yet, the line between what evokes a reality television star's true identity and what merely references elements of a constructed character that appears within the storyline of a copyrightable reality television episode remains far from clear.[170] Broad publicity rights for reality television stars leave courts with the burdensome task of drawing lines within the murky spectrum of references that appropriate the reality television star's actual identity versus those that merely reference a constructed character (protected by federal copyright law), or some generic element of a character that even copyright law does not protect.[171]

Meanwhile, the growth of the reality television industry has also sparked copyright litigation between networks and production companies over claimed infringement of entire shows.[172] In these cases, courts apply the substantial similarity test to determine whether infringement occurred.[173] Notably, one of the elements that the courts

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allow. It conflicts with the Copyright Act and the Copyright Clause. It raises serious First Amendment problems. It's bad law, and it deserves a long, hard second look.").

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> Reality TV formats have multiplied to the point that they have become self-conscious parodies of their original premise of access to the unscripted interactions of people who are not professional entertainers . . . . Rather, reality shows are becoming the latest and most self-conscious in a string of transparently staged spectacles, complete with their own formulas and increasingly reliant on a cast of demicelebrities culled from the pool of would-be actors who do the rounds of reality TV casting calls on the advice of agents.

ANDREJEVIC, *supra* note 129, at 3.

170 *See generally* J. Ryan Stradal, *Unscripted does not mean Unwritten*, WRITERS GUILD OF AMERICA, WEST, *available at* http://www.wga.org/organizesub.aspx?id=1096 (last visited Aug. 25, 2013) ("Unscripted storytelling is often about working backwards from the ending in the most interesting way possible, crafting an inevitable occurrence into an emotional, humorous, or provocative journey. Often, we also write the voice-over copy for our episodes, which for you old-timey bulwarks who don't consider the narrative construction of unscripted or documentary work 'writing,' certainly qualifies as such . . . . Reality certainly does not write itself.").

171 *See infra* note 245 and accompanying text.

172 For a review of the cases, see Daniel Fox, *Harsh Realities: Substantial Similarity in the Reality Television Context*, 13 UCLA ENT. L. REV. 223 (2006); J. Matthew Sharp, Note, *Reality Television: Understanding the Unique Nature of the Reality Genre in Copyright Infringement Cases*, 8 VAND. J. ENT. & TECH. L. 177, 186–93 (2005). *Contra* Jessica E. Bergman, *No More Format Disputes: Are Reality Television Formats the Proper Subject of Federal Copyright Protection?*, 4 J. BUS., ENTREPRENEURSHIP & L. 243 (2011) (discussing the recent cases and arguing that copyright law should not protect reality television show formats).

173 Mindy Farabee, *Can Reality Be Copyrighted?*, L.A. DAILY J., June 24, 2009 (noting the 2003 case *CBS Broad. Inc., v. ABC, Inc*. established that reality television is copyrightable and that the substantial similarity test is applied to compare reality television shows in order to determine copyright infringement).

compare is the similarity between the show's reality television stars, who are referred to by the courts in this context as "characters."[174] The treatment of reality television stars as characters in copyright infringement cases is in direct odds with their representation as individuals in right of publicity cases. This transmutable treatment of the reality television star is problematic for the courts, creates uncertainty for the public, and provides the reality television industry as a whole with two bites of the apple. To resolve these tensions, and in light of the multi-layered construction of characters depicted on reality television shows, the right of publicity should be narrowed.

C. *Justifications for the Right of Publicity and their Failure to Justify Broad Publicity Rights for Reality Television Stars*

The justifications for the right of publicity generally fall into three categories: moral rights, economic incentive, and consumer protection.[175] The failure of these justifications to explain reality television stars' publicity rights further demonstrates why a fair use test is needed.

1. Moral Rights Justification

The moral rights justification is based on the notion that individuals are entitled to the fruits of their labor.[176] The reasoning behind this justification is two-fold. First, the rationale relies on a theory of labor[177] that assumes an individual with a commercially valuable identity has cultivated a talent and expended considerable energy in

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[174] CBS Broad. Inc., v. ABC, Inc., No. 02 Civ. 8813, 2003 U.S. Dist. LEXIS 20258, at *32, 30–39 (S.D.N.Y Jan. 13, 2003) (defining the stars as characters because they are "real people playing themselves"); Zella v. EW Scripps Co., 529 F. Supp. 2d 1124, 1137 (C.D. Cal. 2007); Castorina v. Spike Cable Networks, Inc., 784 F. Supp. 2d 107, 112–13 (E.D.N.Y. 2011).

[175] *See* Madow, *supra* note 29, at 178–238 (criticizing these justifications); Stacey L. Dogan et al., *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1180 (2006) (listing the justifications as "the moral or natural rights story; the exhaustion or allocative-efficiency account; and the incentive-based rationale"). "The right is thought to further economic goals such as stimulating athletic and artistic achievement, promoting the efficient allocation of resources, and protecting consumers. In addition, the right of publicity is said to protect various noneconomic interests, such as safeguarding natural rights, securing the fruits of celebrity labors, preventing unjust enrichment, and averting emotional harm." Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 973 (10th Cir. 1996).

[176] *See* Nimmer, *supra* note 21, at 216; Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575–76 (1977); McFarland v. Miller, 14 F.3d 912, 918–22 (3d Cir. 1994); Palmer v. Schonhorn Enters., Inc., 232 A.2d 458, 462 (N.J. 1967).

[177] *See generally* J. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 25–36 (L. DeKoster ed., 1978) (discussing labor theory).

order to achieve that level of fame.[178] Due to this labor, the individual deserves the reward of the exclusive right to commercially exploit her identity. Second, the exclusive right of publicity must vest in the individual in order to prevent the unjust enrichment of others, who seek to free-ride off the famous individual's identity and commercially benefit from her cultivated fame.[179]

Yet, this theory of labor is based on a romantic notion of fame and authorship;[180] it fails to account for the fact that cultivation of talent and the creation of fame are not solitary activities in modern society.[181] Rather, the development of a successful celebrity persona is dependent on the labor of others—including talent coaches, stylists, agents, marketing teams, directors, business managers, and legal advisors—who all contribute in valuable ways to the star's resulting fame and professional success.[182] Given the extensive amount of outside labor that is involved in the construction of a star's persona and the development of the star's career, a reward for the fruits of one's labor theory provides an unsatisfactory explanation for why the law should grant celebrities with exclusive rights over the commercialization of their identities.[183] In fact, under a labor justification alone, broad publicity rights could amount to unjust enrichment by providing celebrities with the fruits of other people's labor, on top of their own.[184] Some courts have acknowledged the weakness of the labor justification by noting that the more involved an industry is with the development of the celebrity's fame, the less deserving the celebrity is of the right of

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178 "[Y]ears of labor may be required before one's skill, reputation, notoriety or virtues of sufficiently developed to permit an economic return through some medium of commercial promotion." Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 804–05 (Cal. 2001).

179 *See Zacchini*, 433 U.S. at 576; Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 837 (6th Cir. 1983); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 840 (1979) (Bird, C.J., dissenting); K.J. GREENE, PRACTICING LAW INSTITUTE: INTELLECTUAL PROPERTY COURSE HANDBOOK SERIES, PLI Order No. 29016, 282, 283 (Mar. 2011).

180 "[T]he 'moral' case for the right of publicity seems a bit quaint. It is tied, normatively and conceptually, to a picture of individual creation and originality, and of self-authorship as well, that was always to some degree mythical, but that new technologies of reproduction (from photography to digital sampling) and new aesthetic practices have rendered otiose." Madow, *supra* note 29, at 198.

181 *See* Coombe, *supra* note 75, at 369–70 ("Star images must be made, and, like other cultural products, their creation occurs in social contexts and draws upon other resources, institutions, and technologies. Star images are authored by studios, the mass media, public relations agencies, fan clubs, gossip columnists, photographers, hairdressers, body-building coaches, athletic trainers, teachers, screenwriters, ghostwriters, directors, lawyers, and doctors. Even if we only consider the production and dissemination of the star image, and see its value as solely the result of human labor, this value cannot be entirely attributed to the efforts of a single author.").

182 *Id.*

183 Edwin Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 37 (1989) ("[A]ssuming that labor's fruits are valuable, and that laboring gives the laborer a property right in this value, this would entitle the laborer only to the value she added, and not to the total value of the resulting product.").

184 *See id.*; Madow, *supra* note 29, at 183–205.

publicity.[185]

The moral rights justification is also problematic because the notion that the right of publicity is necessary to prevent the unjust enrichment of free-riders overlooks the fact that the legal recognition of exclusive, transferable publicity rights is part of what establishes the high market value of the commercial use of identity.[186] This justification is based on the incorrect assumption that the market for the commercial use of celebrities' personas has always existed. In fact, until the mid-twentieth century—when the right of publicity was created—the unauthorized commercial use of celebrities' personas was actually quite common.[187] Scholars reviewing this history criticize the circular logic of the unjust enrichment justification as "a massive exercise in question-begging."[188]

Furthermore, under a network effects analysis, the value of a celebrity's identity exists in large part because the public recognizes the persona.[189] The public's recognition of the star is what creates space for the celebrity to develop a secondary meaning within society. This secondary meaning transforms the individual into a recognized celebrity, and it is precisely what makes the star's identity commercially valuable and licensable.[190] Ironically, by granting the exclusive right of

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185 Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 975 (10th Cir. 1996) ("Celebrities, however, are often not fully responsible for their fame. Indeed, in the entertainment industry, a celebrity's fame may largely be the creation of the media or the audience . . . . Professional athletes may be more responsible for their celebrity status, however, because athletic success is fairly straightforwardly the result of an athlete's natural talent and dedication. Thus, baseball players may deserve to profit from the commercial value of their identities more than movie stars.").

186 *Cf.* Madow, *supra* note 69, at 353 ("The mere fact that immense 'publicity values' attach to celebrity personas, however, is not reason enough to grant celebrities a property right in them. To be sure, advertisers, merchandisers, and the media *will* pay celebrities for the use of these values if the law requires them to do so. But the question that needs to be answered is whether the law *ought* to require them to pay—specifically, whether a property right in identity should be recognized.").

187 Madow, *supra* note 29, at 148–78.

188 Coombe, *supra* note 75, at 368 ("Celebrities, then, have an interest in policing the use of their personas to insure that they do not become tainted with associations that would prematurely tarnish the patina they might license to diverse enterprises. This potential commercial value is generally offered as reason in itself to protect the star's control over his identity through the allocation of exclusive property rights; because such interests have market value, they deserve protection. Others, like myself, see this as 'a massive exercise in question-begging.' Market values arise only after property rights have been established and enforced; the decision to allocate particular property rights is a prior question of social policy that requires philosophical and moral deliberations and a consideration of social costs and benefits.").

189 *See* de Grandpré, *supra* note 27, at 106 ("What makes celebrities' likeness valuable . . . is the meaning associated with their persona, their power to evoke positive ideas and feelings from an audience."); DYER, *supra* note 144, at 2–20 (demonstrating that value and meaning are created not only by the producer, by also by the consumer and the audience, who create demand and value for the celebrity's image).

190 The public's role in the value of star's persona points to one reason why the right of publicity should be limited to leave room for the public's access, as "the power to license is the

publicity to the star, the law vests the star with the power to silence the very public whose recognition establishes that star's fame.[191]

Under a labor justification, reality television stars as a class are the least deserving of the right of publicity due to the heavy involvement of the reality television industry in the creation of reality stars' fame and the construction of their personas.[192] As previously discussed, the authorship of a reality television star's identity is a complicated web—the final broadcasted product is the result of efforts by numerous individuals and institutions.[193] The reality television star's fame depends on the production company's decision to cast the star, the quality and appeal of the show concept, the writer's development of the episode plotlines, the editing team's construction of the personality within the show storyline, as well as the network's marketing efforts and decision to actually broadcast the show.[194]

While talent-based celebrities' careers may also be affected by the decisions of the networks or managers, their fame is not wholly dependent on these decisions because their success also depends on the quality of their underlying cultivated talents. Of course, performing on a reality television show is not a wholly laborless task. The point is simply that the reality television star's labor of promoting persona in order to exploit her personality[195] is distinguishable from the promotion of persona in order to share a cultivated talent or skill with the public.[196] This difference may be reason to legally differentiate reality television stars' right of publicity claims from the claims of other celebrities.

2. Economic Incentive Justification

The economic incentive justification for the right of publicity is often analogized to the rationale behind copyright protection, because the right of publicity also involves a barter between the celebrity and the public.[197] In this barter, the public grants the celebrity with exclusive publicity rights as an economic incentive to cultivate talent and produce

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power to suppress." Madow, *supra* note 29, at 135.

191 *See id.* at 128, 135.

192 *See supra* Parts II.A, II.D–F.

193 *See id.*

194 *See supra* Part II.D.

195 *See, e.g.*, *Kim Kardashian's 'wedding staged' says her ex-publicist*, N.Y. POST, Nov. 9, 2011, http://www.nypost.com/p/pagesix/kim_kardashian_wedding_staged_says_9wn0dhXx3T8PphlfXhyfOI.

196 T.L. Stanley, *The situation for reality TV stars? Money, honey*, L.A. TIMES, Oct. 18, 2011, http://articles.latimes.com/2011/oct/18/entertainment/la-et-reality-shills-20111019 ("After all, some [reality stars] are famous only for their inability to self-censor. It doesn't matter that some of the stars have no discernible skills other than shameless self-promotion.").

197 Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576–77 (1977); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 805–09 (Cal. 2001).

new work.[198]

Yet, the economic incentive justification for the right of publicity has been criticized as erroneous because, unlike copyright—which incentives less economically secure career paths like visual arts and writing—the grant of exclusive publicity rights rarely functions to encourage entertainers to develop their careers.[199] For example, successful actors, musicians, and athletes are already well compensated for their professional performances and work product. While the right of publicity may enable stars to control the commercialization of their celebrity "brand," and thus secure additional compensation through merchandising, advertising, and endorsement deals, it is doubtful that the loss of this additional compensation would actually create a *disincentive* to cultivate talent and seek fame *in the first place*.[200]

Concededly, the possibility of gaining wealth through advertising deals and endorsement opportunities may be a motivating factor for some individuals to participate in reality television shows.[201] Yet, even without broad publicity rights, reality television stars' interests in these endorsement opportunities are already protected under Section 1125(a) of the Lanham Act.[202] A Lanham Act claim may even be an easier case for reality star plaintiffs because, unlike the state-based right of publicity, a Lanham Act claim is actionable under the same standard (and subject to the same defenses) in every jurisdiction.[203]

The Lanham Act however, will only protect reality television stars against deceptive unauthorized uses of their personas; unauthorized commercial uses that fail to mislead or deceive go untouched. It is possible then, that a limitation on reality television stars' publicity rights would create a disincentive to perform on reality television shows.[204] As a society, though, we may for policy reasons want to disincentivize such

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198 *Zacchini*, 433 U.S. at 577.

199 Lugosi v. Universal Pictures, 25 Cal. 3d 813, 846–48 (1979) (Bird, C.J., dissenting) (citation omitted) ("The incentive effect of publicity rights, however, has been overstated. Most sports and entertainment celebrities with commercially valuable identities engage in activities that themselves generate a significant amount of income; the commercial value of their identities is merely a by-product of their performance values."); *see also* Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 973–74 (10th Cir. 1996).

200 Madow, *supra* note 29, at 209–10.

201 Stanley, *supra* note 196 ("If you're part of a reality TV show and might be famous for 15 minutes, tops, it's probably best to cash in while you can. But what if you're not a breakout star on the Kim Kardashian level? No worries. Blue-chip national advertisers, nightclub promoters and book publishers still want you. And they're willing to fork over real money—sometimes six figures and up—for your recognizable face.").

202 See *supra* Part II.C.

203 *See supra* Parts I.E., II.C.

204 "Collectively referred to as the 'right of publicity,' the ability to exploit one's image has become an increasingly valuable commodity, often eclipsing the value of the celebrity's principal occupation. Indeed, for today's reality stars—many of whose fame is rooted in no particular skill set per se, but who are 'famous for being famous'—it is the *only* commodity." Leichtman et al., *supra* note 15.

behavior. A paternalistic reason might be to protect potential reality television participants from the industry's exploitative business practices, unhealthful working environments, and mandatory "bullet-proof" participant waivers.[205] If limiting publicity rights for reality television star participants results in reduced advertising and merchandising opportunities for the show participants, then it may help ensure that the financial fruits of a catapult into national fame do not blind individuals from properly considering the risks of participation in reality television shows.[206] Such a deterrent force may also benefit society by disincentivizing the exploitation of persona and incentivizing the cultivation of a talent or skill.[207]

3. Consumer Protection Justification

The third justification for the right of publicity is closer to trademark law's goal to protect the consumer from confusion as to the source or endorsement of a product.[208] This justification is strongest in cases where a celebrity's identity is used to advertise a product. For example, in 1991 Public Enemy rapper Chuck D sued the makers of St. Ides "40-ounce" malt liquor for five million dollars for violating his right of publicity when they produced advertisements that used the rapper's voice to promote their product without his consent.[209] Chuck D was vocally against the sales of high-alcohol content malt liquor beverages in inner-city areas.[210] Therefore, the appropriation of Chuck D's voice in a St. Ides commercial harmed him by confusing consumers as to his endorsement of and connection with St. Ides—using Chuck D's voice to promote a product he was publicly against harmed the artist by making him appear to be a hypocrite and "sell-out."[211]

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205 *See supra* notes 119–123, 130 and accompanying text.

206 *See supra* notes 119–123, 130–131 and accompanying text.

207 Assuming, of course, that society benefits more from the production and consumption of cultivated talents, than from the production and consumption of exploited personas.

208 The Lanham Act, 15 U.S.C. § 1051 et seq. (2006).

209 Peter Kobel, *Chuck D: 'This One's Not for You',* ENTERTAINMENT WEEKLY, Sept. 27, 1991. For a general discussion of the St. Ides advertising campaign and criticism of it for confusing consumers as to whether they were watching ads or music videos, see Charne Graham, *St. Ides & Hip-Hop: Would Today's Rappers Endorse Malt Liquor?*, HOUSTON PRESS (Oct 24, 2011), http://blogs.houstonpress.com/rocks/2011/10/st_ides_and_hip-hop_would_toda.php.

210 GEORGE NELSON, HIP HOP AMERICA 211 (1998).

211 For a personal account of the case, see GREENE, *supra* note 179, at 289–90 ("[T]his was a case where an artist's personal integrity—an aspect of personality and, autonomy—had been appropriated. Even assuming Chuck D could not show consumer confusion, the law should give some protection against such uses."). In addition to the lawsuit, Chuck D also responded by writing *1 Million Bottlebags*, a "diss-rap" and critique of 40-ounce malt liquor consumption. The lyrics are available at *1 Million Bottlebags*, PUBLICENEMY, http://www.publicenemy.com/album/4/97/1-million-bottlebags.html (last visited Aug. 28, 2013).

As the Chuck D-St. Ides dispute illuminates, the violation of a celebrity's right of publicity in the advertisement-endorsement context can create real damage, especially if the individual's identity is used to endorse harmful or dangerous goods. Such a violation may cause harm to both the celebrity—who suffers reputational damage—as well as the public, which improperly trusts the product as a result of the false endorsement.[212] However, when right of publicity violations involve a false endorsement, the individual already has a cause of action under the Lanham Act and some state unfair competition laws, as well as defamation law if reputational injury occurs.[213] For the same reasons discussed in regards to the economic justification, limiting reality television stars' access to publicity law may be fair in light of the protection they will continue to receive under the Lanham Act and various state unfair competition and defamation laws.

IV. DEFENSES AND OTHER INTERESTS

A. *The First Amendment Defense and the Public's Interest in Accessing Celebrities' Identities for Communicative and Commentary Purposes*

Federal law is often implicated in right of publicity cases as a First Amendment defense.[214] The First Amendment generally protects the public from government abridgement of the freedoms of speech and expression.[215] The First Amendment is implicated in right of publicity cases between private parties because when states and courts recognize and enforce the right of publicity, they effectively impose restrictions on private parties' rights to the freedoms of speech and expression.[216]

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212 Madow, *supra* note 29, at 231–34; *see also* Randall T.E. Coyne, *Towards a Modified Fair Use Defense in Right of Publicity Cases*, 11 WM. & MARY L. REV. 781, 799 (1988).

213 *See* Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 975 (10th Cir. 1996) ("The final economic argument offered for rights of publicity is that they protect against consumer deception . . . . The Lanham Act, however, already provides nationwide protection against false or misleading representations in connection with the sale of products."). A cause of action may also stand under unfair competition law. *See, e.g.*, Hogan v. A.S. Barnes & Co., 114 U.S.P.Q. (BNA) 314, 316 (Pa. Ct. C.P. 1957) ("We conclude, therefore, that defendant has misappropriated plaintiff's 'right of publicity', but that this is simply an application of the doctrine of unfair competition to a property right entitled 'right of publicity'. This, therefore, is not a separate cause of action, but rather is unfair competition under another label.").

214 *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 574–75 (1977); Hilton v. Hallmark Cards, 599 F.3d 894, 911 (9th Cir. 2010); *Cardtoons*, 95 F.3d 959, 962; Hart v. Elec. Arts, Inc., 717 F.3d 141, 150 n.12 (3d Cir. 2013) ("Appellee concedes that *NCAA Football* infringes on the right of publicity as recognized in New Jersey . . . therefore . . . we are concerned only with whether the right to freedom of expression overpowers the right of publicity."); Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 865–76 (1979).

215 U.S. CONST. amend. I.

216 *Cardtoons*, 95 F.3d at 968; Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 867

Celebrities serve as reference points for millions of people around the world; they are part of a shared experience and collective memory.[217] Scholars including Michael Madow, Rosemary Coombe, and David Tan have argued for greater First Amendment protection to appropriate and reference celebrities' identities.[218] Noting that celebrities hold secondary meaning in our society and are part of our collective cultural heritage, these scholars argue that the public should have broad license to access, reference, and "re-code" celebrities as "signs."[219] In order to ensure this access, celebrities' personas must remain in the public domain, available for communicative uses by the public without the threat of legal liability.[220] The consequences of denying such access may be severe, as preserving minority groups' ability to access and "re-code" celebrities' images to fit their own cultural needs is central to participatory democracy.[221] Under Tan's formulation, the use of celebrity images by minority groups to "re-code" majority icons and create alternative narratives should be granted the highest form of First Amendment protection as political speech.[222]

Despite the public's need for access, the enforcement of the right of publicity can effectively grant a celebrity, her heirs, and assigns with

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(1995) ("By its nature, the right of publicity implicates speech: whatever else it may be, the right of publicity involves a communicative tort.").

217 JOHN B. THOMPSON, IDEOLOGY AND MODERN CULTURE: CRITICAL SOCIAL THEORY IN THE ERA OF MASS COMMUNICATION 163 (1991) ("[Celebrities are] common points of reference for millions of individuals who may never interact with one another, but who share, by virtue of their participation in a mediated culture, a common experience and a collective memory.").

218 Coombe, *supra* note 75; Madow, *supra* note 29; Tan, *supra* note 75.

219 Recoding is defined as "a set of subcultural practices and activities in which 'the consumption of commodified representational forms is productive activity in which people engage in meaning-making to adapt signs, texts, and images to their own agendas.'" Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding" Rights—Comment on Robert H. Rotstein, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work"*, 68 CHI.-KENT L. REV. 805, 810 (1993) (quoting Rosemary Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1863 (1991)).

220 *See generally* Lange, *supra* note 66 (discussing the importance of a lively and unencumbered public domain). Communicative uses may include both commercial and non-commercial uses. *See infra* note 223 and accompanying text.

221 *See generally* James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine: A Reply*, 97 VA. L. REV. 491 (2011) (arguing that the right to participate in democratic self-governance is the core of freedom of speech). *See also* Tan, *supra* note 75, at 7 ("This Article adopts the premise that the underlying rationale of the First Amendment is the advancement of a democracy where the public can freely participate in deliberating issues important to decision-making in a democracy ('participatory democracy'). This is a plausible and well-supported view of the First Amendment . . . . Part III argues that the various tests formulated to give effect to First Amendment goals in right of publicity claims do not accord sufficient protection to political speech because they do not adequately address how uses of the celebrity identity may contribute to the advancement of democratic deliberation and debate.").

222 Tan, *supra* note 75, at 35–36. For a case study of minority groups' appropriations of the identities of Marilyn Monroe, Judy Garland, and Paul Robeson, see DYER, *supra* note 144, at 2–3.

the power to silence any alternative appropriation or representation of the celebrity's image that does not fit the rights owner's tastes or politics.[223] Judges and scholars note this power to silence is a reason to be wary of the right of publicity,[224] as strict enforcement of the right places great restraint on the public domain.[225]

B. *The Current Landscape of First Amendment Defenses Falls Short*

When the right of publicity conflicts with the First Amendment, courts apply various tests to analyze the competing interests of the rights holder and the public. These tests include the transformative use test, the balancing test, the predominant purpose test, and the artistic relevance test. While they all present valid attempts to limit publicity law's abridgment of the public's First Amendment rights, these tests fall short as both over- and under-inclusive. Furthermore, in the context of reality television stars, these test fail to broadly protect the public's interest in commenting on the phenomenon of reality television star fame and participating in the construction of meaning of reality television and culture.[226]

1. The Balancing Test

The balancing test was formulated by the Tenth Circuit in *Cardtoons, L.C. v. Major League Baseball Players Association* to balance the magnitude of the right of publicity's restriction on speech

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223 *See supra* notes 188–191 and accompanying text; Madow, *supra* note 29, at 142–43 ("[The subtext of publicity rights] is *control over the production and circulation of meaning* in our society. This is so because star images are widely used in contemporary American culture to create and communicate meaning and identity. The fact that the culture and advertising industries routinely and systematically use celebrity images in this way should be obvious enough. Indeed, it is only because celebrity images carry and provoke meaning that they can enhance the marketability of the commodities with which they are associated. Their 'associative' or 'publicity' value derives from their semiotic power. What is somewhat less obvious is that individuals and groups also use star signs in their everyday lives to communicate *meanings of their own making*.").

224 Lange, *supra* note 66, at 153.

225 White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1521 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc) ("The right to draw ideas from a rich and varied public domain, and the right to mock, for profit as well as fun, the cultural icons of our time. In the name of avoiding the 'evisceration' of a celebrity's rights in her image, the majority diminishes the rights of copyright holders and the public at large.").

226 For example, these tests would grant very limited—if any—First Amendment defenses to the appropriation of celebrities' personas for unauthorized use or reference in advertisements. Yet, **"[**t]o let celebrities control all uses of their 'identity' in advertising is to let them control the way their image is presented in a very large realm of public communication and popular culture." Stephen R. Barnett, *The Right of Publicity Versus Free Speech in Advertising; Some Counterpoints to Professor McCarthy*, 18 HASTINGS COMM. & ENT. L.J. 593, 598 (1996).

against the government's interest in protecting the right of publicity as an intellectual property right.[227] Recognizing that "[o]ne of the primary goals of intellectual property law is to maximize creative expression," this test generally provides greater First Amendment protection to creative works, like parodies, that involve self-expression or social criticism.[228] Yet, some courts criticize the *Cardtoons* court's heavy emphasis on the social importance of parody as depending too much on the expressive nature of the use, while failing to analyze the amount and type of appropriation that occurred.[229] Others praise the court's nuanced approach,[230] but acknowledge the burden that a balancing test places on courts and the unpredictability that it creates for potential litigants.[231]

2. The Transformative Use Test

The California courts, finding that the *Cardtoons* balancing test overemphasizes the social benefits of a defendant's use, instead formulated a transformative use test.[232] Under the transformative use

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[227] Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 972 (10th Cir. 1996) (finding Cardtoons' interest in publishing parody baseball cards outweighed the state's interest in protecting the right of publicity). In a few instances, other courts have employed the balancing test. *See, e.g.*, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media L.P., 505 F.3d 818, 823 (8th Cir. 2007); Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1182–83 (C.D. Cal. 2002); Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 313–14 (Cal. Ct. App. 2001).

[228] *Cardtoons, L.C.*, 95 F.3d at 976. *See also id.* ("The application of the Oklahoma publicity rights statute to Cardtoons' trading cards presents a classic case of overprotection. Little is to be gained, and much lost, by protecting MLBPA's right to control the use of its members' identities in parody trading cards. The justifications for the right of publicity are not nearly as compelling as those offered for other forms of intellectual property, and are particularly unpersuasive in the case of celebrity parodies. The cards, on the other hand, are an important form of entertainment and social commentary that deserve First Amendment protection.").

[229] Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 809 (Cal. 2001).

[230] *See* Tan, *supra* note 75, at 25 ("For courts that favor a participatory theory of democracy, direct balancing can be used to examine how the presence of expressive content in the defendant's speech contributes to democratic deliberation and debate. If courts adopt the balancing approach, they ought to consider, on the one hand, the content, form, and context of the defendant's speech and the benefit of the communication to both the defendant and the intended recipient, and on the other hand, the harm to the celebrity individual in having his or her identity used in that manner. This refined approach allows courts to examine the constitutional value of the communication and better evaluate the relative benefits and harms to the parties in a claim."); Madow, supra note 69, at 367.

[231] *See* Madow, *supra* note 69, at 367 ("Instead of a sterile and indeterminate debate on whether the trading cards were 'transformative,' the [*Cardtoons*] court engaged in a serious, open and remarkably nuanced weighing of the relevant social values in the particular case before it. Although this approach has much to recommend it—especially when applied by a court as sophisticated and sensitive to the competing interests as the one in *Cardtoons*—it may provide too little predictability for would be-speakers. For this reason, a harder-edged categorical rule might be preferable.").

[232] The test was used outside of California by the Third and Sixth Circuit Courts of Appeals. *See* Hart v. Elec. Arts, Inc., 717 F.3d 141, 165 (3d Cir. 2013); ETW Corp. v. Jireh Publ'g, Inc.,

test, the inquiry focuses on whether the defendant's use was sufficiently transformative, namely "whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation."[233] Works that do not meet the transformative threshold are considered "knock-offs" and denied First Amendment protection.[234]

However, like the balancing test, the transformative use test necessitates case-by-case determinations.[235] While a transformative use standard may be clearer than a balancing test, this test is also flawed as both over- and under-inclusive. The transformative use test results in the overprotection of creative works that visually transform the appropriated identity, and under-protection of works that directly reference the celebrity's image and rely on re-contextualization—rather the visual transformation—to create new meanings.[236]

3. The Predominant Purpose Test

In *Doe v. TCI Cablevision*, the Missouri Supreme Court adopted the predominant purpose test, which was first formulated in an article by litigator Mark S. Lee.[237] This test denies First Amendment protection to the appropriation of identity when the predominant purpose of the use was to exploit the commercial value of the identity—regardless of the level of expressive content in the resulting work.[238] The predominant purpose test was expressly rejected in California,[239] and is largely criticized as improperly placing the determination of the *purpose* of creative works into the hands of the judiciary.[240]

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332 F.3d 915, 938 (6th Cir. 2003).

233 *Comedy III Prods*., 21 P.3d at 799. *See* Winter v. DC Comics, 69 P.3d 473 (Cal. 2003) (holding a comic book that included cartoon depictions of real individuals and used their real names and likenesses on cartoon worm bodies, was protected under the First Amendment because it was sufficiently transformative and contained significant expressive content).

234 *See Comedy III Prods.*, 21 P.3d at 810–11; White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1993) (finding the reference to Vanna White was an untransformed visual knock-off).

235 Leichtman, *supra* note 15, at 6.

236 *Compare* No Doubt v. Activision Publ'g, 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011), *with* Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607, 617 (Cal. Ct. App. 2006); *see also* Madow, *supra* note 69, at 368; Tan, *supra* note 75, at 28 ("[T]he usefulness of this test appears confined to visual depictions of the plaintiff, and the extent to which the defendant's use has departed from a realistic rendition of the plaintiff's likeness . . . . Hence the current test tends to overprotect artistic speech but underprotect political speech despite the latter's greater constitutional value.").

237 Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003); Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface,* 23 LOY. L.A. ENT. L. REV. 471, 500 (2003).

238 *Doe*, 110 S.W.3d at 374.

239 *Kirby*, 50 Cal. Rptr. 3d at 617.

240 *See* Tan, *supra* note 75, at 29–30.

4. The Artistic Relevance Test

Another rarely applied minority test is the artistic relevance test, which grants broader First Amendment protection to uses of identity that have some artistic relevance to the underlying work.[241] Under this test, if a court finds the use of identity contains no artistic relevance to the underlying work, then the use is deemed misleading and denied First Amendment protection.[242] Like the predominant purpose test, the artistic relevance test is criticized for mandating inappropriate judicial scrutiny of creative decisions.[243] Like the transformative use test, both the predominant purpose test and the artistic relevance test under-protect conceptual appropriations.

V. PROPOSAL: A BROAD FAIR USE LIMIT ON REALITY TELEVISION STARS' PUBLICITY RIGHTS

Reality television stars' publicity rights should be subject to a broad fair use defense because the line between a reality television star's identity and her constructed persona or character is unclear and difficult to locate.[244] Since the line between character and identity is vague in the world of reality television, broad reality star publicity rights can conflict with federal copyright law by granting reality television stars with affirmative rights over the characters they perform, even though those rights generally belong to someone other than the reality star.[245] Furthermore, the justifications for the right of publicity do not explain why we *as a society* should grant reality television stars with a legal monopoly over the use of their constructed personas—especially given the large role of both production companies in constructing the star and the public in taking notice and, as a result, establishing the reality star's secondary meaning as a celebrity.[246] The justifications also fail to explain why we should grant the right of publicity as a reward for the labor of exploiting a persona in the *same*

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241 *See* Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989).

242 *See* Parks v. LaFace Records, 76 F. Supp. 2d 775, 782 (E.D. Mich. 1999), *aff'd in part, rev'd in part*, 329 F.3d 437 (6th Cir. 2003).

243 Jonathan Bloom, *Parks v. LaFace Records: A Symbol of Freedom Subverts Freedom of Speech*, 14 ENT., ARTS & SPORTS L.J. 15 (2003) (criticizing the use of the test in the *Parks* case).

244 *See supra* Part III.B.

245 *See supra* notes 159–163 and accompanying text. Notably, many elements of reality television stars' characters may be deemed components of stock characters, which are generally not protected by copyright law under the doctrine of scènes à faire. *See* Gaiman v. MacFarlane, 360 F.3d 644, 659–61 (7th Cir. 2004). By allowing the right of publicity to protect elements that federal copyright law leaves in the public domain, the right of publicity stands in direct conflict with copyright law and arguably is preempted under Section 301 of the Copyright Act.

246 *See supra* notes 187–196 and accompanying text.

manner that we reward the cultivation and promotion of an underlying talent or skill.[247]

A broad fair use test is needed because the current First Amendment tests employed by courts lead to overprotect what is, in effect, reality television stars' *constructed* personas and characters.[248] Even under a liberal balancing test,[249] a direct reference to a reality television star's identity may give rise to right of publicity liability if a court finds that the value or amount of the commentary or criticism is minimal. One problem with the current standards is that when reality television stars perform on reality television shows they are often already parodying themselves.[250] Therefore, a simple reference to a reality star's image, or some identifiable feature from one of her performances, may operate as a criticism of or commentary on the star. Such references are "parodies of parodies"—their critical content may be quite clear, even if the author referencing the reality star does little more then re-contextualize the star's image. Without a fair use defense that allows the public to reference a star whose public image already functions as a parody, the right of publicity runs the risk of improperly granting reality stars with monopolies over the use of and reference to their constructed personas and characters.

A broad fair use test could solve this problem by treating any use of a reality television star's persona that falls short of "false

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247 The *Cardtoons* court contemplated a categorical approach to the right of publicity when it noted that athletes deserve publicity rights more than other celebrities. *See supra* note 185 and accompanying text. Recently, the Third Circuit took into account the unique position of college athletes as policy factors contributing to the balancing of interests in a right of publicity case. The main factors the court considered were the athlete's professional position and rank, his chance for continued professional success, and his inability to monetize his fame while in a college athletic program under NCAA rules. *See* Hart v. Elec. Arts, Inc., 717 F.3d 141, 154 n.14 (3d Cir. 2013) ("[P]olicy considerations in this case weigh in favor of Appellant [athlete] . . . intercollegiate athletes are forbidden from capitalizing on their fame while in school. Moreover, the NCAA most recently estimated that less than one in 100, or 1.6 percent, of NCAA senior football players will get drafted by a National Football League (NFL) team . . . Despite all of his achievements, it should be noted that Ryan Hart was among the roughly ninety-nine percent who were not drafted after graduation."). While college athletes are prohibited from monetizing their fame during their tenure as college athletes, reality show participants generally do not face such restrictions and are free to enter endorsement deals and accept public appearance fees while still in contract or season. In fact, self-promotion is often *a reason* to go on reality television. *See, e.g.*, *supra* notes 134–141 and accompanying text.

248 *See supra* Parts III.A–B, IV.

249 *See supra* Part IV.B.I. (describing the balancing test and noting it is generally considered the most liberal test currently in use).

250 The *Cardtoons* court noted that parodies of traditional celebrities function on two levels, "[b]ecause celebrities are an important part of our public vocabulary, a parody of a celebrity does not merely lampoon the celebrity, but exposes the weakness of the idea or value that the celebrity symbolizes in society." Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 972 (10th Cir. 1996). The parody of a reality star has potential to comment *on at least three levels*: the individual, the stock character, and the reality industry as a whole.

endorsement with the intent to deceive" as presumptively fair.[251] By shifting the presumption towards fair use and away from broad reality stars' right of publicity protection, courts could ensure that the public has access to use reality television stars' images for commentary and expressive purposes.[252] A broad fair use test would also limit the exploitative use of the right of publicity in media stunts, where a reality television star uses a barebones right of publicity claim to attract further media attention and public recognition—or to extract early settlements.

While a broad fair use test would free courts from drawing lines between constructed character and "identity," courts would likely have difficulty determining who counts as a reality television star and is thus subject to a fair use test. One possible solution is to draw a categorical line. For example, an individual who participates in one season of a reality show could count as a reality television star. Or, one who has done nothing with her fame since initiating performance on a reality television show could remain classified as a reality television star, regardless of the number of subsequent reality show performances. A categorical approach would be easy to apply, but if the line is not drawn with proper caution, it could wind up as over- or under-inclusive.[253]

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[251] One reason to embrace such a presumption is to allow more "direct reference" commentary uses of reality television stars' images. Under the transformative use test, for example, a parody work is only protected when the appropriation transforms the image, such as by transforming the persona into a cartoon character. Although the *Hilton* case was not decided on the merits, the court noted that the use of Paris Hilton's actual face, as opposed to a cartoon face, trended away from transformative use. Hilton v. Hallmark Cards, 580 F.3d 874, 890 (9th Cir. 2009), *amended and superseded*, 599 F.3d 894 (9th Cir. 2010). Yet, powerful commentaries on reality television stars often *require* direct reference to physical appearances. Arguably, many of these stars already fall into stock character molds, therefore, transformative cartoon representations might not adequately identify them as individuals as opposed to stock character molds.

The outcome for appropriation uses is even worse when the appropriation occurs not to parody or comment on the individual star, but rather to comment on society *as a whole*. Given the problematic results of the parody-satire divide in copyright fair use cases, in crafting a fair use doctrine for the right of publicity, courts should broadly allow all forms of commentary in order to avoid the problems of a parody-satire divide. *See* Juli Wilson Marshall et al., *The Satire/Parody Distinctions in Copyright and Trademark Law—Can Satire Ever Be Fair Use?*, ABA Section of Litig. Intell. Prop. Litig. Comm. (2006) (criticizing the parody-satire divide as artificial for reasons including that: some parodies have satiric components, while some satires have parodic components; copyright owners are not necessarily averse to licensing parodies, while quick to license a satiric social commentary; and courts should not pass judgment on the literary meaning and aesthetics of a work, which is required in order to determine whether the work at issue is a parody or satire).

[252] *Cardtoons, L.C.*, 95 F.3d at 976 ("Moreover, fame is a double-edged sword—the law cannot allow those who enjoy the public limelight to so easily avoid the ridicule and criticism that sometimes accompany public prominence.").

[253] For example, a person with prior or subsequent fame for a reason other than their participation in a reality television show might be improperly captured under a one-season test. Further, a test that focuses on what the reality star did with her fame *after the show* could improperly vest the judiciary with a mandate to judge the personal and professional choices of the star in order to determine the star's available legal remedies. Such a judgment would reek of impropriety and judicial bias and would thus undermine the ultimate decision.

Another approach is to look at the plaintiff's underlying skills and labor in order to determine whether a fair use test should apply. Here, the fair use test would only apply when an individual's fame is based *primarily on the exploitation of a persona*, rather than a cultivated underlying talent or skill that is subsequently promoted.

If categorical line drawing or a look to the underlying talents produces inaccurate results, then courts could more broadly focus on the character-identity line.[254] This approach would conceptually borrow from copyright law's merger doctrine, which limits copyright protection in instances where an idea *merges* with the expression.[255] In the publicity context, protection could be withheld when identity "merges," or is inseparable from, a constructed persona or character.

While the adoption of a fair use test, like all balancing tests, will place some burden on the courts, the limitation on publicity rights in these cases would be fair and reasonable. A limitation on reality television stars' claims would not leave these stars without legal rights, particularly because the Lanham Act would remain available to protect against deceptive uses of the stars' personas, and various state laws would continue to protect against unfair competition and defamation.[256] The fair use test also strikes a sensible chord between the extremes of a bright line rule that grants broad publicity rights to everyone—while stifling the public domain and leading to censorship and unjust enrichment—and an unrealistic attempt to abolish the right of publicity in its entirety, which, given the power of the publicity lobby,[257] is not likely to occur in the near future.

CONCLUSION

Just as Nimmer noted in 1954 that the right to privacy must evolve

254 *See supra* Part III.B.

255 *See, e.g.*, Baker v. Selden, 101 U.S. 99, 104–05 (1879); *id.* at 107 ("[T]he mere copyright of Selden's book did not confer upon him the exclusive right to make and use account-books, ruled and arranged as designated by him and described and illustrated in said book."); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971) ("The critical distinction between 'idea' and 'expression' is difficult to draw . . . . The guiding consideration in drawing the line is the preservation of the balance between competition and protection reflected in the patent and copyright laws . . . . What is basically at stake is the extent of the copyright owner's monopoly—from how large an area of activity did Congress intend to allow the copyright owner to exclude others? We think the production of jeweled bee pins is a larger private preserve than Congress intended to be set aside in the public market without a patent. A jeweled bee pin is therefore an 'idea' that defendants were free to copy."); Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678–79 (1st Cir. 1967) (holding that the expression of the rules of a sweepstakes contest was inseparable from the idea of the contest itself, and therefore not protectable by copyright law).

256 *See supra* Part II.C.

257 *See supra* notes 71–76 and accompanying text.

to recognize the needs of Broadway and Hollywood,[258] perhaps the time has now come for the right of publicity to evolve and recognize the public's need to access and reference the identity of those who are merely "famous for being famous."[259]

[258] *See* Nimmer, *supra* note 21.
[259] *See* Hilton v. Hallmark Cards, 599 F.3d 894, 899 (9th Cir. 2010).