

Million Dollar Baby: Celebrity Baby Pictures and the Right of Publicity

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INTRODUCTION	611
I. BACKGROUND	614
A. <i>Influences from Other Areas of Law</i>	614
1. The Right to Privacy.....	616
a) Evolution of Privacy Law to Publicity Law	619
2. Intellectual Property Rights.....	621
a) Copyrights and Patents.....	621
b) Trademarks and the Lanham Act	622
3. Development of Intellectual Property and the Right of Publicity	624
a) Incorporation into the Right of Publicity	625
B. <i>The Right of Publicity in the Common Law and Statutory Forms</i>	625
1. Common Law Rise of the Right of Publicity	625
2. Overlap Between Common Law and Statutes.....	629
3. Statutory Rights of Publicity	630
a) California.....	631
b) New York	633
C. <i>Tabloids</i>	635
1. History	635
2. Celebrity Culture	636

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II. DIVIDED SCHOLARSHIP—HOW SHOULD THE RIGHT OF PUBLICITY EVOLVE?	637
A. <i>Protecting Celebrities: Arguments in Support of a Strong Right of Publicity</i>	638
1. More Recognition but Less Uniformity Among States	638
2. Development Away from Privacy or Property Rights.....	639
3. Inherent Unfairness and Celebrities' Need for Protection.....	641
a) The Value of the Right of Publicity and Protection from "Free-Riding"	641
b) Anti-Paparazzi Statutes	643
4. State Support for a Restrictive View of Newsworthiness.....	645
a) California.....	645
b) New York	647
B. <i>Protecting the Public's Interest: Arguments for a Weaker Right of Publicity</i>	648
1. Eliminating the Right of Publicity Entirely.....	649
2. The Need to Distinguish the Right from Other Intellectual Property Rights.....	650
3. Protection of the First Amendment and the Press.....	651
4. Broadly Defining the Newsworthiness Exception.....	653
C. <i>The Role of Gossip in Society and the Media</i>	655
1. Baby Pictures.....	657
2. The Ugly Side of Free Press.....	658
III. THE NEED FOR A LESS RESTRICTIVE FEDERAL RIGHT	659
A. <i>Uniformity by Federal Statute</i>	659
B. <i>Federalization of Other IP Rights</i>	660
C. <i>Proposition for a Federal Statute</i>	661
1. Wording.....	661
2. Inclusion of Newsworthiness Exception	662
D. <i>Gossip as a Protectable Interest</i>	663
E. <i>What Is Newsworthy Now?</i>	664
CONCLUSION.....	666

INTRODUCTION

Sunk in the bottom of a depressed economy, we look back on frivolous purchases of the past with a mixture of awe and disgust. Someone bought a 603 carat diamond for a cool \$12 million.¹ Others sipped on \$2 million dollar bottles of Cognac.² *People* magazine, instead, dropped \$14 million dollars for rights to the first photos of celebrities Angelina Jolie's and Brad Pitt's newborn twins, Vivienne and Knox.³ This figure is hardly an outlier. Actresses,⁴ musicians,⁵ models,⁶ and sports figures⁷ have all pocketed huge sums of money by auctioning the rights to publish the first photos of their infants, along with a story about the growing family, often approved by the parents before publication. Magazines are willing to pay the exorbitant amounts because, in theory, the price is offset by the massive sales of the issue of the magazine featuring the exclusive baby photographs plastered on the cover.

The influence of American celebrities is felt worldwide. For example, the infamous U.K. tabloid *The Sun* devotes an entire

¹ The Lesotho Promise diamond, one of the largest diamonds ever found, sold at auction for \$12.36 million. See Reuters, *Huge African Diamond Sells for over \$12 Million*, MSNBC ONLINE, Oct. 12, 2006, <http://www.msnbc.msn.com/id/15195458/>.

² Henri IV Dudognon Heritage, aged for more than one hundred years and sold in a jeweled bottle, sells for approximately \$2 million. See William Dowd, *Dowd on Drinks, Two Million Reasons This Cognac Is Claiming a World Record*, TIMES UNION, Feb. 28, 2008, at E3, available at <http://blog.timesunion.com/dowdondrinks/2-million-reasons-this-cognac-has-a-world-record/384/>.

³ *People* received the U.S. rights to the photographs and accompanying story, while U.K. magazine *Hello!* received the rights to the photos in the U.K.; the companies split the \$14 million cost. Associated Press, *Jolie-Pitt Baby Pics Fetch \$14 Million*, MSNBC ONLINE, Aug. 1, 2008, <http://www.msnbc.msn.com/id/25967334>. The couple donated the money they received from the sale to charity. See *id.*

⁴ See Marcus Baram & Sheila Marikar, *Are Celebrity Baby Photos Really Worth Millions?*, ABC NEWS, July 16, 2008, <http://abcnews.go.com/entertainment/story?id=5378829&page=1>.

⁵ See *id.*

⁶ Former Playboy model, Kendra Wilkinson, posed with her new son on the cover of *Ok!* magazine. *Introducing Kendra's Baby Boy*, *OK!*, Dec. 17, 2009, at cover page.

⁷ *OK!* magazine purchased the first pictures of actress Bridget Moynahan's newborn son with NFL star Tom Brady for \$100,000. See The Inside Track, *Bouncing Baby Brady Graces Cover of OK Magazine*, BOSTON HERALD, Sept. 26, 2007, at 19, available at http://bostonherald.com.nyud.net/track/inside_track/view.bg?articleid=1034114&cache_interval=14121.

section called “Bizarre USA” to American “showbiz;”⁸ Japan frequently features Hollywood celebrities as spokespeople in commercials;⁹ and actors confronting local customs are just as highly publicized, such as when actor Richard Gere attended a charity event in India.¹⁰ American “celebrity” status, long a valuable commodity domestically, is increasingly advantageous in foreign markets, which are now flooded with celebrity news from across the globe.

Publicity rights have changed in the United States as celebrities’ role in society has changed. The public’s attitude has turned from adulation of celebrities in the past (e.g., the public’s fascination and respect for first lady Jackie Kennedy) to a sense of schadenfreude (e.g., the public’s encouragement of the rise and fall of pop star Britney Spears). Although the attitude of the public appears to have grown more malicious or spiteful in recent years, celebrities benefit from this increased level of attention to the details of their personal lives. Exclusive photos of lavish celebrity weddings,¹¹ front-page “coming out” stories,¹² and pictures of stars

⁸ See Gordon Smart’s Bizarre USA, SUN, available at <http://www.thesun.co.uk/sol/homepage/showbiz/bizarre/usa/>.

⁹ For example, both Keanu Reeves and Sean Connery have appeared in Suntory Whiskey commercials. See Suntory, <http://www.suntory.com/yamazaki/main.html> (last visited Jan. 21, 2010); see also A Tale of Two Whiskies, <http://sickbobby.blogspot.com/2008/04/tale-of-two-whiskies.html> (Apr. 27, 2008, 21:57 JST). The practice of celebrity cameos was satirized by the film *Lost in Translation*, where Bill Murray portrayed an aging American actor shilling for, incidentally, Suntory Whiskey. See *id.*

¹⁰ See, e.g., *Gere-Shetty Kiss Provokes Outrage in India*, CBC NEWS, Apr. 16, 2007, <http://www.cbc.ca/arts/media/story/2007/04/16/gere-shetty-kiss.html>. Richard Gere hosted an AIDS awareness event in India with a Bollywood actress, but his resulting behavior (i.e., a playful, but public, kiss exchanged with the actress that led to a warrant issued for this “obscene act”) generated more press than the actual event itself. *Gere Faces Indian Arrest Warrant*, BBC NEWS, Apr. 27, 2007, <http://news.bbc.co.uk/2/hi/entertainment/6596163.stm>.

¹¹ “Celebutante” Khloe Kardashian and fiancé Lamar Odom sold the rights to pictures of their September 2009 wedding to *Us Weekly* for \$300,000—perhaps a sign that the economy is turning around. See Reid Cherner & Tom Weir, *\$300K for Odom-Kardashian Wedding Photos?*, USA TODAY, Sept. 18, 2009, <http://blogs.usatoday.com/gameon/2009/09/300k-for-odomkardashian-wedding-photos.html>.

¹² See Lance Bass: *I’m Gay*, PEOPLE, Aug. 7, 2006, at cover page & 86, available at <http://www.people.com/people/article/0,26334,1219142,00.html> (noting that Lance Bass’s story was “exclusively” given to *People*).

acting “just like us”¹³ sell magazines to the voyeuristic public, but they also enhance the marketability of those who appear on their pages, whether willingly or unwillingly. However, when celebrities willingly invite news coverage of their private lives, their claims that their privacy should be protected are undermined.

However pleased they are by positive publicity, celebrities bristle at unflattering appearances in tabloid magazines and can sue the publication under a number of claims, such as the right of publicity. This right allows a person to control or prevent use of her image, as well as to profit from any uses thereof.¹⁴ Enforcement of this right indirectly allows a celebrity to protect his or her often highly guarded privacy. Many states recognize the existence of this right in some form or another, basing it on a convoluted history of privacy expectations and intellectual property rights.¹⁵ However, some states contemplate a person’s actions (such as inviting a tabloid to take photographs of children or a wedding), and find that such actions undermine the expectation of privacy and conflict with the public’s interest to hear about events—and the tabloids’ right of free speech under the First Amendment.¹⁶ Courts have had difficulty reconciling the privacy and pecuniary interests of the celebrity with those of the news-hungry public and have reached conflicting decisions both among and within jurisdictions.¹⁷

This Note addresses the fractured state of the right of publicity in the various states that recognize it and promotes the necessary development of a comprehensive federal scheme. Part I of this Note considers the development of the right of publicity in its common law and statutory forms, its roots in common law property and privacy rights, and the historical trend towards federalization of other intellectual property rights. Part I also explores the history of tabloid culture and public fascination with

¹³ The “Just Like Us” feature is a regular portion of *Us Weekly*, showing pictures of celebrities doing ordinary things that purportedly make them just like the rest of us. See, e.g., Carolyn Davis, *Stars—They’re Just Like Us!*, *US WKLY.*, Nov. 23, 2009, at 26–27.

¹⁴ See *infra* Part I.B.

¹⁵ See *infra* Part I.B.3.

¹⁶ See *infra* Part II.B.3.

¹⁷ See *infra* Part II.B.4.

celebrity figures. Part II of this Note outlines the diverging scholarly views of a future for the right of publicity, reflected in conflicting case law at the state level. This Part also analyzes the newsworthiness exception that narrows the protection of the right of publicity in some states. Finally, Part III of this Note recommends the development of a less protective federal statute that recognizes that the right of publicity has outgrown its privacy roots and focuses instead on the restrictions set out by the newsworthiness exception.

I. BACKGROUND

This Part explores the common law origins of the right of publicity, first surveying the history of its analogues in the fields of privacy and property rights. This Part then reviews several state statutes that grant a right of publicity. Finally, this Part examines the seedy but lucrative history of tabloid magazines and the public's obsession with all things celebrity, as exemplified by the short-lived trend of multi-million dollar auctions of the exclusive rights to photographs of celebrities' babies.

A. *Influences from Other Areas of Law*

The right of publicity, despite its frequent enforcement by those who are household names, applies to the reclusive common man as well as to the often-photographed celebrity.¹⁸ The right encompasses both privacy and property aspects: on one hand, the enforcer of the right seeks to vindicate an invasion of his privacy, and on the other, seeks to maintain control over profits that arise from use of his image.¹⁹ Typically, to state a cause of action for a

¹⁸ Professor J. Thomas McCarthy notes that, “[t]he right of publicity is not merely a legal right of the ‘celebrity,’ but is a right inherent to everyone to control the commercial use of identity and persona and recover in court damages and the commercial value of an unpermitted taking.” J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:4 (2009). Nonetheless, this Note focuses less on “everyone” and more on the “celebrity.”

¹⁹ See, e.g., CAL. CIV. CODE § 3344(a) (West 2010) (describing the enforceable right of publicity for unauthorized use of one's image); N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2009) (same); TEX. PROP. CODE ANN. § 26.013 (Vernon 2000 & Supp. 2009) (same).

violation of the right of publicity, the plaintiff must prove: (1) the validity of his or her right of publicity; and (2) that this right has been infringed upon by the defendant(s).²⁰ Both interpretations of state common law and statutory codifications of the right of publicity require each of the two prongs.²¹ The second prong usually requires that the plaintiff's name or likeness be used for the benefit of the defendant (whether for commercial profit or other benefit) without the consent of the plaintiff in a manner likely to cause harm to the plaintiff.²²

In 1953, Judge Jerome Frank of the Second Circuit gave name to the "right of publicity" in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,²³ recognizing a growing trend in both privacy and property law.²⁴ In the fifty years since *Haelan*, the right of publicity has been recognized under the common law of, or has been statutorily defined by, many states. Twenty-eight of the fifty states recognize some form of the right of publicity, either by statute or as a right existing under the common law.²⁵ Seven states have statutory provisions that "encompass the right of publicity."²⁶ Another ten states have privacy statutes that embody the characteristics of the right of publicity.²⁷ The courts in the

²⁰ See MCCARTHY, *supra* note 18, § 3:2.

²¹ See, e.g., CAL. CIV. CODE § 3344; N.Y. CIV. RIGHTS LAW § 51. The common law action in some states requires similar, if not the same, elements: "A common law cause of action for appropriation of name or likeness [in California] may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983).

²² See *Eastwood*, 198 Cal. Rptr. at 347-48.

²³ 202 F.2d 866 (2d Cir. 1953).

²⁴ See *id.* at 868 ("[One has] the right to grant the exclusive privilege of publishing his picture This right might be called a 'right of publicity.'").

²⁵ See MCCARTHY, *supra* note 18, § 6:3 nn.8-9.

²⁶ See *id.* § 6:3. California (CAL. CIV. CODE § 3344), Florida (FLA. STAT. § 540.08 (West 2007 & Supp. 2010)), Illinois (765 ILL. COMP. STAT. 1075/1-60 (2001)), Kentucky (KY. REV. STAT. ANN. § 391.170 (West 1999 & Supp. 2009)), Ohio (OHIO REV. CODE ANN. § 2741.01 (LexisNexis 2009)), Texas (TEX. PROP. CODE ANN. §§ 26.001-.015 (Vernon 2000 & Supp. 2009)), and Wisconsin (WIS. STAT. ANN. § 995.50 (West 2007 & Supp. 2009)) all have explicit statutory provisions regarding the right of publicity. See MCCARTHY, *supra* note 18, § 6:3 nn.8-9.

²⁷ MCCARTHY, *supra* note 18, § 6:3. Indiana (IND. CODE § 32-36-1-1 (2002 & Supp. 2009)), Massachusetts (MASS. GEN. LAWS ch. 214, § 3A (West 1999 & Supp. 2009)),

remaining eleven states have recognized that a common law right of publicity exists, although there is no corresponding statute.²⁸

1. The Right to Privacy

The right to privacy has a colorful history in the United States, perhaps in part because the things that people most often want to keep private are things that are scandalous or otherwise interesting to the public. Courts did not recognize a common law right to privacy until about 100 years ago,²⁹ when Louis Brandeis, prior to his tenure as a justice of the Supreme Court, and his close friend, prominent Boston attorney Samuel D. Warren, published a seminal article in the Harvard Law Review titled *The Right to Privacy*.³⁰ This article advocated legal protection of “the privacy of private life,” particularly from newspaper articles detailing private affairs and other “flagrant breaches of decency and propriety.”³¹ The authors noted the growth of legal rights that protected property, the tangible as well as the intangible.³² Noting a judicial trend

Nebraska (NEB. REV. STAT. §§ 20-201 to 211, 25-840.01 (2009)), Nevada (NEV. REV. STAT. § 597.790 (2004)), New York (N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2009)), Oklahoma (OKLA. STAT. tit. 21, § 839.1 (2002 & Supp. 2010)), Rhode Island (R.I. GEN. LAWS § 9-1-28 (1997 & Supp. 2008)), Tennessee (TENN. CODE ANN. §§ 47-25-1101 to 1108 (West 2001)), Virginia (VA. CODE ANN. § 8.01-40 (West 2007 & Supp. 2009)), and Washington (WASH. REV. CODE § 63.60.010 (West 2005 & Supp. 2010)) have privacy statutes that correspond similarly to the elements of the right of publicity.

²⁸ Arizona, Alabama, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Utah, and Wisconsin all recognize a common law right of publicity. See MCCARTHY, *supra* note 18, § 6:3 & nn.18–35 (listing several cases in each state that acknowledge a common law right of publicity). Several states that have statutorily defined the right of publicity have also found that the right of publicity exists in the common law (e.g., California and Illinois). See MCCARTHY, *supra* note 18, § 6:3 n.25.

²⁹ See E. Leonard Rubin, *Rights of Publicity and Entertainment Licensing*, 950 PLI/Pat 159, 163 (2008) (“There was no common law right of privacy prior to the publication of the Warren-Brandeis article, which has been labeled by some as the most influential law review article ever published.”).

³⁰ Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

³¹ *Id.* at 215–16. “Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’” *Id.* at 195.

³² *Id.* at 194.

recognizing the existence of a “right to be let alone,” Brandeis and Warren also noted that there was a sentiment “long keenly felt” by the general public that the law should afford a remedy against “the evil of invasion of privacy by the newspapers.”³³ Although they relied heavily on the concepts of propriety and decency in encouraging the development of this right of privacy, Brandeis and Warren also reflected on the existing torts of libel and slander, finding them insufficient to protect against the exact wrongs committed when privacy was destroyed by intrusive newspapers.³⁴ Emphasizing the importance of allowing an individual to determine his own thoughts or feelings (as evidenced by the proprietary rights granted when an author pens a poem, for example), the authors found that these so-called property rights in fact encapsulated key privacy interests.³⁵ However, they did not find that the right to privacy was absolute.³⁶ Instead, they felt that “the right to privacy [should] not prohibit any publication of matter which is of public or general interest.”³⁷ Courts recognizing a right of publicity would allow plaintiffs to seek damages, including “substantial compensation . . . for injury to feelings,” and in a limited number of cases, injunctive relief.³⁸ The article, both by recognizing a growing trend in courts nationwide (and worldwide) and by emphasizing public sentiment toward invasive press, struck a chord with the legal community after its publication.

In the decades following the article’s publication, courts across the country picked up on Brandeis’s and Warren’s ideas, and most acknowledged a common law right of privacy.³⁹ For example, a scant five years after the article was published, a New York court

³³ *Id.* at 195.

³⁴ *See id.* at 197.

³⁵ *See id.* at 190–200, 213.

³⁶ *See id.* at 214.

³⁷ *Id.* The authors noted that there were certainly “difficulties in applying such a rule,” but that courts would be able to discern the instances of matters of public interest, particularly in instances where the individual seeking privacy had already made his affairs public (e.g., an elected official who had, by dint of his position, already thrust himself into the limelight). *Id.* at 214–15.

³⁸ *Id.* at 219.

³⁹ *See, e.g.,* Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957, 959 (D. Minn. 1948); Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 74, 79 (Ga. 1905); Schuyler v. Curtis, 42 N.E. 22, 25–26 (N.Y. 1895).

recognized the existence of a legal right to privacy in *Schuyler v. Curtis*.⁴⁰ In *Schuyler*, the relatives and friends of a deceased woman sued a charitable organization, the Women's Memorial Fund (of which the deceased was a founder), for displaying a bust of the dead woman, as well as circulating pamphlets with information about her.⁴¹ The court noted at the outset that the right of privacy was a nascent one, a right whose "boundaries [were not] very well recognized or plainly laid down."⁴² The relatives alleged that she was a private woman who would have disliked this attention, but the court was "unimpressed" by the claim, and found that any claim of a right to privacy had died with the woman.⁴³

A decade later, courts still grappled with the intricacies of the ill-defined right to privacy. In a Georgia case, *Pavesich v. New England Life Insurance Co.*,⁴⁴ a life insurance company in Atlanta, Georgia, used a picture of resident Paolo Pavesich to depict a satisfied customer of their life insurance policy—despite the fact that he had not posed for the photograph and was not even a customer of the company.⁴⁵ The court analyzed the cases studied in the Brandeis and Warren article, as well as cases that had occurred in the fifteen years since its publication, before concluding that a right to privacy existed (or should exist) in Georgia.⁴⁶ The court was "[s]o thoroughly satisfied" by the existence of the right of privacy that it "venture[d] to predict that the day will come when the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability."⁴⁷

Despite these inroads, development of the right of privacy was not instantaneous, and courts nationwide continued to develop it for several decades. For example, in Minnesota, the Minneapolis Star and Tribune Company published a newspaper called *The Times: The Picture Newspaper*, and in an issue ran a picture of

⁴⁰ 42 N.E. 22 (N.Y. 1895).

⁴¹ *Id.* at 25.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 50 S.E. 68 (Ga. 1905).

⁴⁵ *Id.* at 69.

⁴⁶ *See id.* at 74–79.

⁴⁷ *Id.* at 80–81.

local resident Carl Berg, taken when he was in a courtroom.⁴⁸ Berg allegedly protested greatly at the time the picture was taken, and filed suit, alleging a violation of his right to privacy.⁴⁹ The court recognized Brandeis's and Warren's article, but emphasized the exception in cases of public interest.⁵⁰ It noted that since "pioneer days," there had been clear public interest in courtroom proceedings, and that the photograph was therefore a matter of public interest and not subject to the right of privacy.⁵¹

Eighty-six years after the publication of *The Right to Privacy*, Dean William Prosser enumerated this growing trend of recognizing privacy rights in the Restatement (Second) of Torts.⁵² The Restatement identified four separate rights of action relating to privacy: (1) "unreasonable intrusion upon the seclusion of another;" (2) "appropriation of the other's name or likeness;" (3) "unreasonable publicity given to the other's private life;" and (4) "publicity that unreasonably places the other in a false light before the public."⁵³ Courts later used these four torts to distinguish different types of privacy claims.⁵⁴ By its language alone, Prosser's fourth tort seems to lend itself best to applications to claims of violation of the right of publicity.

a) Evolution of Privacy Law to Publicity Law

The common law right to privacy is now recognized in the vast majority of jurisdictions.⁵⁵ In some states, the right to privacy has

⁴⁸ Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957, 957 (D. Minn. 1948).

⁴⁹ *Id.* at 958.

⁵⁰ See *id.* at 959–60.

⁵¹ See *id.* at 960.

⁵² RESTATEMENT (SECOND) OF TORTS § 652A cmt. c (1977).

⁵³ *Id.* § 652A.

⁵⁴ See, e.g., Galella v. Onassis, 353 F. Supp. 196, 229–32 (S.D.N.Y. 1972) (discussing the four torts and the application of the First Amendment); Cordell v. Detective Publ'ns, Inc., 307 F. Supp. 1212, 1215 (E.D. Tenn. 1968) (discussing unreasonable publicity given to private life); Werner v. Times-Mirror Co., 14 Cal. Rptr. 208, 213–14 (Cal. Dist. Ct. App. 1961) (same).

⁵⁵ See RESTATEMENT (SECOND) OF TORTS § 652A app., reporter's note (noting that, as of the mid-1970s, privacy rights were recognized under the common law of thirty-six states and expressly rejected in only three); see also Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 234 (Minn. 1998) (stating that only Wyoming, Minnesota and North Dakota

been broadly construed and used to cover claims that would otherwise be brought under a right of publicity claim in other states.⁵⁶ For example, a case in Hawaii featured the typical elements of a right of publicity claim: the defendant, a real estate company, used pictures of the plaintiffs and their home, as well as their names, “in sales brochures, in advertisements in publications, and in television commercials” without their permission.⁵⁷ The court found that the defendant had “appropriated the plaintiffs’ name and personality for its own benefit in advertising,” but found that plaintiffs had stated a claim for invasion of the right of *privacy*, not publicity.⁵⁸ This court was neither the first nor the last to attempt to disentangle the two doctrines, and this case is an example of how easily both courts and parties can mistake these doctrines.

However, as more and more jurisdictions adopt either statutory or common law rights of publicity, courts rely less frequently on the right of privacy to cover the concept.⁵⁹ The right of publicity can include aspects of some or all of Prosser’s four torts, depending on the wording and construction of the statute or the interpretation of the underlying common law. In describing a cause of action for a violation of the right of publicity, a California court noted that “[i]n such an action a plaintiff does not rely upon the inaccuracy of the content of an article; instead, he charges that even if accurate the publication of the facts interferes with his ‘right to be let alone.’”⁶⁰ This description is more or less an amalgamation of Prosser’s first (“unreasonable intrusion upon the seclusion of another”) and third (“unreasonable publicity given to the other’s private life”) torts.⁶¹ Courts have crafted an

have failed to recognize any of Prosser’s four torts, and only Nebraska and New York have expressly declined to recognize a common law right to privacy).

⁵⁶ See, e.g., *Fergerstrom v. Hawaiian Ocean View Estates*, 441 P.2d 141, 142 (Haw. 1968).

⁵⁷ See *id.* at 142.

⁵⁸ *Id.* at 144. *But see* CAL. CIV. CODE § 3344 (West 2010) (stating that a violation of the right of *publicity* requires that the defendant misappropriate the plaintiff’s image, name, etc., for his own commercial benefit).

⁵⁹ See *infra* Part I.B.

⁶⁰ *Kapellas v. Kofman*, 459 P.2d 912, 921 (Cal. 1969) (quoting *Melvin v. Reid*, 297 P. 91, 92 (Cal. App. Dist. 1931)).

⁶¹ RESTATEMENT (SECOND) OF TORTS § 652A (1977).

2010]

CELEBRITY BABY PICTURES

621

approximation of the right of publicity out of its tangled privacy roots, but have also turned to its property aspects to develop the nuances of the right of publicity.

2. Intellectual Property Rights

Unlike the privacy right aspect of the right of publicity, which focuses on repairing mental anguish caused by the unauthorized “publicity,”⁶² the property right aspect allows a plaintiff to control (and profit from) the commercial use of his or her image.⁶³ Intellectual property rights are largely in the domain of the federal government; some, such as patents, have never been under state control, whereas others, such as trademarks, have only recently shifted to a uniform system of federal control.⁶⁴

a) Copyrights and Patents

Copyrights and patents have a unique role in the federal regime of intellectual property, as they are the only categories of intellectual property mentioned directly by the Constitution.⁶⁵ The Constitution secures to the federal government the right “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶⁶ This clause has been so long established as acknowledging protection of what we now know as copyrights and patents that it has been given the moniker “the Copyright clause.”⁶⁷ Although the founders clearly recognized the importance of both copyrights and patents, they could not anticipate every creation (or “discovery”) that would need to be protected, and the protective spheres of copyright and patent have been expanded over time.

⁶² See *id.* § 652H(b) cmt. b.

⁶³ See *id.* § 652C cmt. a.

⁶⁴ This section serves as a brief overview of several important intellectual property categories, but does not purport to cover a detailed history of each.

⁶⁵ See U.S. CONST. art. I, § 8, cl. 8.

⁶⁶ *Id.*

⁶⁷ See, e.g., HOWARD B. ABRAMS, THE LAW OF COPYRIGHT § 1:3 (2008) (referring to the clause as both the “Copyright-Patent clause” and the “Copyright clause”).

The Copyright Act abolished all complementary state laws on the subject in 1976.⁶⁸ More recent incarnations of the statute have widened the scope of the Act to include everything from literary works such as poems and novels (as anticipated by the founding fathers) to technological innovations such as sound recordings and semiconductor chips (probably not as predictable at the time of the drafting of the Constitution).⁶⁹

Patents have an entire title of the United States Code devoted to their intricacies.⁷⁰ Patents protect novel inventions, from methods of making chemicals⁷¹ to useful (or even not-so-useful) objects.⁷² The first Patent Act was issued almost 220 years ago, demonstrating a long history of federal control over this venerable intellectual property right.⁷³ However, the application of patents to the field of the right of publicity is somewhat limited; trademarks may in some ways provide a closer analogy.

b) Trademarks and the Lanham Act

The history of trademarks conflicts notably with the straightforward trajectory of copyrights and patents. Trademarks were traditionally protected by the common law of each state,⁷⁴ and trademark owners claiming a misappropriation of their trademark had to rely on the tort of unfair competition.⁷⁵ Trademarks were not federally protected until 1870,⁷⁶ and even

⁶⁸ 17 U.S.C. § 301 (2006).

⁶⁹ See 17 U.S.C. § 102.

⁷⁰ Title 35 of the United States Code is appropriately and succinctly titled “Patents.” 35 U.S.C. Refs. & Annots. (2006).

⁷¹ See Henry Paynter, *The First Patent*, INVENTION & TECH., Fall 1990, at 19, 21 (describing the first patent ever issued in the United States, for a process of refining ash for use in soaps and other items).

⁷² See, e.g., Eugene R. Quinn, Jr., *Obscure Patent of the Week: The Dog Umbrella and Leash*, IPWATCHDOG.COM, Jan. 20, 2009, http://www.ipwatchdog.com/op_dog_umbrella.html (describing a patent for a combination pet leash and dog umbrella).

⁷³ For an interesting description of the history of the Patent Acts, and the first patent ever issued, see Mary Bellis, *The 212th Anniversary of the First American Patent Act*, ABOUT.COM, <http://inventors.about.com/library/weekly/aa073100a.htm>.

⁷⁴ See *Trade-Mark Cases*, 100 U.S. 82, 93 (1879).

⁷⁵ See generally Deven R. Desai & Sandra L. Rierson, *Confronting the Genericism Conundrum*, 28 CARDOZO L. REV. 1789, 1800 (2007) (stating that trademark law “emerged from the common law tort of unfair competition”).

⁷⁶ *Trade-Mark Cases*, 100 U.S. at 92.

this first attempt at legislating universal protection of trademarks was invalidated by the Supreme Court less than a decade later, in 1879.⁷⁷ In the *Trade-Mark Cases*,⁷⁸ the Court found that the Act was unconstitutional, as Congress's powers to regulate trademarks were limited to those powers provided by the Commerce Clause.⁷⁹ Throughout the next seventy years, more legislation was passed.⁸⁰ Some proposals were more effective than others, but the general confusion surrounding these pieces of legislation led to the creation of the Lanham Act.⁸¹

The Lanham Act prevents, among other things, false endorsement—it forbids the use of “any word, term, name, symbol, or device, or any combination thereof” when doing so would confuse (intentionally or otherwise) a consumer of the product into thinking that the product was endorsed by or sponsored by someone who is, in actuality, not affiliated with the product.⁸² The Lanham Act was crafted by Congress largely to deal with unfair competition and trademark infringement on a federal level, when they had previously been addressed by states alone.⁸³ However, Congress also drafted the Act to modernize state law to address business practices of the day, which had changed greatly since the inception of the common law: “one of the principal purposes of the 1946 revisions of the Lanham Act was ‘(t)o modernize the trade-mark statutes so that they will conform to legitimate present-day business practice.’”⁸⁴

Section 43(a) of the Lanham Act can sometimes serve as an “appropriate vehicle for the assertion of claims of falsely implying

⁷⁷ See *id.* at 92–96.

⁷⁸ 100 U.S. 82, 93 (1879).

⁷⁹ *Id.* at 96.

⁸⁰ See Law of February 20, 1905, ch. 592, 33 Stat. 724; Law of March 3, 1881, ch. 138, 21 Stat. 502.

⁸¹ See Margreth Barrett, *Finding Trademark Use: The Historical Foundation for Limiting Infringement Liability to Uses “In the Manner of a Mark,”* 43 WAKE FOREST L. REV. 893, 933–37 (2008).

⁸² 15 U.S.C. § 1125(a) (2006).

⁸³ See, e.g., *Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686, 692 (2d Cir. 1971) (“The Act’s purpose . . . is exclusively to protect the interests of a purely commercial class against unscrupulous commercial conduct.” (citation omitted)).

⁸⁴ *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 277 (2d Cir. 1981) (quoting S. REP. NO. 79-1333, at 3 (1946), as reprinted in 1946 U.S.C.C.A.N. 1274, 1276).

the endorsement of a product or service by a real person.”⁸⁵ Use of a celebrity’s image could confuse consumers as to whether or not a celebrity endorsed a particular product.⁸⁶ However, the Lanham Act’s provisions regarding false advertising may not be applicable to publications that inform or entertain (such as tabloid magazines).

3. Development of Intellectual Property and the Right of Publicity

Just as intellectual property rights recognize the time and effort that a creator expends when developing a new invention or composing a piece of music, and reward the inventor with a pecuniary benefit, the right of publicity recognizes that a celebrity should enjoy certain benefits when he or she expends time and effort to establish his or her celebrity “status,” name recognition, and general desirability. Courts have slowly begun to recognize the link between traditional forms of intellectual property and the hybridized form found in the right of publicity.⁸⁷ Although the right of publicity has its roots in the right of privacy, its valuable intellectual property aspects helped it expand nationwide.⁸⁸ Judge Jerome Frank in *Haelan* wryly noted that the right of publicity was of such great concern to celebrities not because of fears of “having their feelings bruised through public exposure,” but because they “would feel sorely deprived if they no longer received money” for

⁸⁵ *Albert v. Apex Fitness*, No. 97 Civ. 1151, 1997 U.S. Dist. LEXIS 8535, at *3 (S.D.N.Y. June 12, 1997) (quoting 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:15 (4th ed. 1996)).

⁸⁶ *See, e.g., Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 456 (S.D.N.Y. 2008) (noting that defendants’ representation of the plaintiff in advertising might mislead consumers into believing that plaintiff had endorsed the product).

⁸⁷ “[S]ince the celebrity spends time, money, and energy in developing a commercially lucrative persona, that persona is the fruit of the celebrity’s labor and entitles her to its reward.” Sudakshina Sen, Comment, *Fluency of the Flesh: Perils of an Expanding Right of Publicity*, 59 ALB. L. REV. 739, 740 (1995) (discussing modern applications of philosopher John Locke’s theory that a person has a property right in their own person and in the work they produce).

⁸⁸ *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995); Alain J. Lapter, *How the Other Half Lives (Revisited): Twenty Years Since Midler v. Ford A Global Perspective on the Right of Publicity*, 15 TEX. INTELL. PROP. L.J. 239, 247–50 (2007).

2010]

CELEBRITY BABY PICTURES

625

use of their image.⁸⁹ Nonetheless, the court in that instance found that whether or not the right of publicity was categorized as a property right was “immaterial,” as the label “simply symbolizes the fact that courts enforce a claim which has pecuniary worth.”⁹⁰

a) Incorporation into the Right of Publicity

Most right of publicity statutes require that the use of the person’s name, image, or other “publicity” aspect be for trade or advertising purposes;⁹¹ that is, that the violator is making money or otherwise earning a benefit through unauthorized use of the plaintiff’s image. In this sense, the right of publicity incorporates aspects of a personal property right and allows for recovery of damages. For example, California law awards plaintiffs “the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by [plaintiff] as a result of the unauthorized use, and any profits from the unauthorized use.”⁹² New York likewise allows plaintiffs to “sue and recover damages for any injuries sustained by reason of such use,” and also permits “exemplary damages” at the discretion of the jury.⁹³ These economic damages mimic the underlying purposes of intellectual property rights and separate the right of publicity from the right of privacy, which focuses more on protection of feelings of embarrassment or other emotional injuries.

B. The Right of Publicity in the Common Law and Statutory Forms

1. Common Law Rise of the Right of Publicity

Several states (though by no means a majority) recognize a common law right of publicity.⁹⁴ This change has taken place over time, spurred in part by Brandeis’s and Warren’s article and the resulting court reactions, as well as by the growth of various forms

⁸⁹ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

⁹⁰ *Id.*

⁹¹ Lapter, *supra* note 88, at 273.

⁹² CAL. CIV. CODE § 3344(a) (West 2010).

⁹³ N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009).

⁹⁴ *See supra* note 28 and accompanying text.

of media, from the radio to the Internet. Some states, such as Pennsylvania, have recognized this common law right of publicity by distinguishing it from similar rights, such as the general right of privacy or the more specific tort of misappropriation of commercial identity.⁹⁵

Other states have recognized the right of publicity because of the growing trend of nationwide recognition and the necessity of protecting the interests at stake.⁹⁶ Arizona is one such example. In 2007, a federal court reviewing Arizona law noted that “[i]t seems clear to this Court that a celebrity’s interest in his name and likeness is unequalled and has been recognized as such by more than half the states in this country,” and found “no reason why a claim for invasion of the right of publicity should not be recognized in Arizona.”⁹⁷ On the East Coast, a federal court applying Connecticut law also saw “no reason” to “buck the apparent trend in the law towards recognizing the right of publicity.”⁹⁸

Only one state has explicitly denied a common law right of publicity.⁹⁹ New York has denied both a common law right to privacy as well as of publicity, and all claims for a violation of either right must instead be brought under its statutory provisions.¹⁰⁰ This denial of a common law right to privacy was made over one hundred years ago, when New York’s highest court found that “the so-called ‘right of privacy’ has not as yet found an abiding place in our jurisprudence, and . . . the doctrine cannot now be incorporated without doing violence to settled principles of

⁹⁵ A Pennsylvania court noted recently “that although similar, the right of publicity is not identical to invasion of privacy by appropriation of name or likeness.” *Rose v. Triple Crown Nutrition, Inc.*, No. 4:07-CV-00056, 2007 WL 707348, at *3 (M.D. Pa. Mar. 2, 2007).

⁹⁶ *See Pooley v. Nat’l Hole-In-One Ass’n*, 89 F. Supp. 2d 1108, 1111–12 (D. Ariz. 2000) (discussing states that have recognized a right of publicity and why they have done so); *Jim Henson Prods., Inc. v. John T. Brady & Assocs., Inc.*, 867 F. Supp. 175, 189 (S.D.N.Y. 1994) (same).

⁹⁷ *Pooley*, 89 F. Supp. 2d at 1112.

⁹⁸ *Jim Henson Prods., Inc.*, 867 F. Supp. at 189. Yes, even Muppets have a right of publicity (or at least their creators can enforce it). *See id.*

⁹⁹ *See, e.g., Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (N.Y. 1902). This case still serves as the standard of recognition for disavowal of a common law right.

¹⁰⁰ *See Stephano v. News Group Publ’ns, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984).

law.”¹⁰¹ The New York Court of Appeals has subsequently used the fact that a common law right of privacy does not exist in New York to hold that a common law right of *publicity* does not exist either.¹⁰² The court held that “[s]ince the ‘right of publicity’ is encompassed under the [New York] Civil Rights Law [section 50] as an aspect of the right of privacy, which . . . is exclusively statutory in this State, [a] plaintiff cannot claim an independent common-law right of publicity.”¹⁰³ Though New York is alone in its explicit denial of this common law right, the difference between the New York action for a violation of the right of publicity (i.e., a recovery only under statute) and that of other states is more or less a technical difference.

The development of the common law right is illustrated by a number of cases across the United States. In *Clark v. Celeb Publishing, Inc.*,¹⁰⁴ Lynda Clark, a model, sued *Celeb Magazine*, an apparently low-brow and “very explicit” pornographic publication, under the California common law right of publicity when the magazine used her photograph without permission in an advertisement within the magazine.¹⁰⁵ A photograph of the plaintiff taking her pants off appeared on both the front and back covers of the magazine, as well as in an advertisement inside, bizarrely encouraging readers to “[t]ake off [their] pants and subscribe to Celeb.”¹⁰⁶ Clark claimed a number of emotional problems resulting from this unauthorized appearance, as well as an invasion of her privacy and a misappropriation of her commercial identity (i.e., a violation of her right of publicity).¹⁰⁷ The court awarded Clark economic damages to compensate for the economic injury suffered due to the misuse of her image in a commercial context.¹⁰⁸ The court noted that “considerable money,

¹⁰¹ *Roberson*, 64 N.E. at 447.

¹⁰² *See Stephano*, 474 N.E.2d at 584.

¹⁰³ *Id.*

¹⁰⁴ 530 F. Supp. 979 (S.D.N.Y. 1981).

¹⁰⁵ *Id.* at 981. Although the court does not describe the reputation of the publication in depth, it does reference plaintiff’s claim that gentlemen’s magazines such as *Penthouse* (not particularly renowned for its classiness) wanted “nothing more to do with her” after her appearance in *Celeb Magazine*. *Id.* at 982.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 983.

¹⁰⁸ *Id.* at 983–84.

time and energy” must be expended to “create considerable commercial value in one’s identity” and that this self-created value should be protected by the courts.¹⁰⁹ Ms. Clark was able to recover damages, both compensatory and punitive, from the magazine¹¹⁰ without invoking the complementary statutory protection in California.¹¹¹

In a more recent case in Minnesota, wrestler (not yet Governor) Jesse Ventura brought charges against the wrestling organization, the World Wrestling Federation (“WWF,” now “World Wrestling Entertainment”), for distributing videotapes featuring his image and commentary, alleging that the WWF had been unjustly enriched by misappropriating his right of publicity.¹¹² The federal court found that Minnesota would recognize a common law tort of the right of publicity, despite the fact that the state does not explicitly recognize Prosser’s four torts of privacy.¹¹³ In distinguishing the right of publicity from the right of privacy, the court noted that “[t]he right to publicity protects pecuniary, not emotional, interests.”¹¹⁴ Thus, the court reasoned, the wrestling organization’s profit from Ventura’s name and image, without his consent, violated this right, even though Minnesota did not recognize any of Prosser’s four torts.¹¹⁵

The recognition of a common law right to publicity continues to surface in recent cases,¹¹⁶ despite the rise of state statutes covering the right.¹¹⁷ Even an homage to a celebrity, meant to be flattering, can trigger a claim for misappropriation of this right.¹¹⁸ In Missouri, a Canadian hockey player, Tony Twist, sued comic

¹⁰⁹ *Id.* at 984 n.2.

¹¹⁰ *Id.* at 984–85.

¹¹¹ *See id.*; *see also infra* Part I.B.3.a (discussing the statutory right).

¹¹² *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 725 (8th Cir. 1995). Ventura became Governor of Minnesota three years later. *See Pam Belluck, A ‘Bad Boy’ Wrestler’s Unscripted Upset*, N.Y. TIMES, Nov. 5, 1998, at A1, available at <http://www.nytimes.com/1998/11/05/us/the-1998-elections-the-states-the-maverick-a-bad-boy-wrestler-sunscripted-upset.html>.

¹¹³ *Ventura*, 65 F.3d at 730.

¹¹⁴ *Id.* (citing *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1280–81 (D. Minn. 1970)).

¹¹⁵ *See id.*

¹¹⁶ *See, e.g., supra* notes 95–98 and accompanying text.

¹¹⁷ *See infra* Part I.B.3.

¹¹⁸ *E.g., Doe v. McFarlane*, 207 S.W.3d 52, 52 (Mo. Ct. App. 2006).

book author Seth McFarlane for giving an evil mafia boss character the same name.¹¹⁹ Although McFarlane was “a self-proclaimed hockey fanatic” who openly admitted that he had deliberately named the villain after the plaintiff, the court found that the defendant had “used Twist’s name and identity to gain a commercial advantage.”¹²⁰ The court found that the commercial value of the plaintiff’s name outweighed the artistic license (and perhaps fan worship) of the defendant, and awarded the plaintiff \$15 million for the misappropriation.¹²¹

2. Overlap Between Common Law and Statutes

Unlike New York, several states that recognize a common law right of publicity also have a statute in place protecting the same or similar interests.¹²² Despite their similarities, the statutory and common law rights sometimes differ in the outcome or allowed recovery.¹²³ In California, for example, a plaintiff relying on the common law right of publicity must prove: “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”¹²⁴ California courts have acknowledged that the common law right of publicity protects slightly different (although substantively similar) interests than those that are protected by the statute.¹²⁵ In reality, however, the difference between statutory rights of publicity and

¹¹⁹ *Id.*

¹²⁰ *Id.* at 59–60.

¹²¹ *See id.* at 52, 57–58.

¹²² *See infra* Part I.B.3.

¹²³ *See, e.g.,* Eastwood v. Superior Court, 198 Cal. Rptr. 342, 346 n.6 (Cal. Ct. App. 1983) (noting that the California statute “requires a ‘knowing’ use [of a plaintiff’s name, photograph or likeness] whereas under case law, mistake and inadvertence are not a defense against commercial appropriation,” which a plaintiff may not be able to prove).

¹²⁴ *Id.* (basing the required elements of California’s common law right of publicity on those of Prosser’s fourth tort, the tort of publicity that unreasonably places another in a false light before the public); *see also supra* text accompanying note 53.

¹²⁵ *See* Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (noting that the protections afforded by the California common law right of publicity are much broader than those available under its statutory complement); *see also* Michaels v. Internet Entm’t Group, 5 F. Supp. 2d 823, 836 (C.D. Cal. 1998) (“This distinction [between statute and common law] is important because the common law right protects a broader range of interests against a broader range of infringing conduct than does the statutory right.”).

those granted by the common law are mostly a technical difference, rather than one with meaningfully and discernibly different outcomes.

3. Statutory Rights of Publicity

State statutes protecting the right of publicity can complement the common law right of publicity, or they can subsume it entirely. The statutes vary greatly in wording and scope. Development of statutory protections has taken place over the last 100 years; each statute represents specific demands on its individual state legislatures brought by constituents, courts, or even celebrities.¹²⁶ New York was the first state to draft a statute protecting the right of privacy (including language that would be expanded by later courts to include the misappropriation of the right of publicity).¹²⁷ While some states, such as Utah¹²⁸ and Virginia,¹²⁹ enacted statutes modeled after New York's a few years later after its drafting, other states developed their own statutes to be deliberately distinct from the New York statute.¹³⁰ One such state that does not adhere to the elements of the New York statute is California. The two states are perhaps the most interesting in regards to the right of publicity due to their unique positions: California serves as undoubtedly the state most populated by celebrities and thus as the pioneer of many developments of the right of publicity, and New York represents both a cultural center that attracts many celebrities as well as the home of many publications. Moreover, both states incorporate a "newsworthiness" exception that speaks directly to the line drawn between the rights of celebrities and the rights of the public.¹³¹

¹²⁶ Tennessee, for example, was prompted to draft its right of publicity to protect one of its most valuable (deceased) denizens: Elvis Presley. See Lee Goldman, *Elvis Is Alive, But He Shouldn't Be: The Right of Publicity Revisited*, 1992 BYU L. REV. 597, 600-03.

¹²⁷ See N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2009); MCCARTHY, *supra* note 18, § 6:72.

¹²⁸ See UTAH CODE ANN. § 45-3-1 to 6 (West 2009).

¹²⁹ See VA. CODE ANN. § 8.01-40 (West 2007 & Supp. 2009).

¹³⁰ See, e.g., CAL. CIV. CODE § 3344 (West 2010).

¹³¹ See *id.* § 3344(d); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 727 (S.D.N.Y. 1978) ("In this regard it is the established law of New York that the unauthorized use of an individual's picture is not for a 'trade purpose', and thus not violative of s 51, if it is 'in connection with an item of news or one that is newsworthy.'" (quoting *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. 1952) (citations omitted)).

a) California

The statutory provision supplementing the common law right of publicity in California is commonly known as the “Celebrity Rights Act.”¹³² It protects the “name, voice, signature, photograph, or likeness” of any person (not just a celebrity, despite the title of the act) when any of the aforementioned are used without permission, “for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods[,] or services.”¹³³ The post-mortem provision of section 3344.1 extends protection of the right of publicity an additional seventy years after the death of the celebrity in question, allowing the inheritors of the right of publicity to continue to protect the celebrity’s image after his death (the so-called “Astaire Celebrity Image Protection Act”).¹³⁴

One expects the case reporters of California, the most populous state (and, according to McCarthy, the most litigious),¹³⁵ as well as the home of Hollywood and its pantheon of celebrities, to be overflowing with decisions concerning the right of publicity.¹³⁶ This is not so. For any number of reasons—settlement before an ultimate adjudication, lack of interest in including these cases in the reporters, or other factors—the number of cases reported pales in comparison to those reported in other states, such as New York.¹³⁷

Nonetheless, numerous cases of angry celebrities versus defiant magazines, promoters, and advertisers have made it to the pages of the reporters. *Eastwood v. Superior Court*¹³⁸ exemplifies a case typically brought under the statutory provision governing the right of publicity.¹³⁹ Actor Clint Eastwood sued *The National Enquirer*

¹³² CAL. CIV. CODE § 3344.

¹³³ *Id.* § 3344(a).

¹³⁴ The statute overrules previous California case law, which had held that the protection of publicity rights did not extend past the celebrity’s death. *See* Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979). The right of publicity is now a devisable and descendible right. *See, e.g.,* Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221 (2d Cir. 1978).

¹³⁵ MCCARTHY, *supra* note 18, § 6:11.

¹³⁶ *See id.*

¹³⁷ *Id.*

¹³⁸ 198 Cal. Rptr. 342 (Cal. Ct. App. 1983).

¹³⁹ *See id.* at 344.

for publishing a 600-word article about a purported love triangle in which he was involved, including pictures of himself and one of the women placed on the cover of the tabloid.¹⁴⁰ To satisfy the requirements of the statute, Eastwood was required to plead that the defendants knowingly used his name and image without his consent for commercial profit.¹⁴¹ Because he failed to do so, his claim failed on statutory grounds.¹⁴²

California recognizes an exception to the statutory protection granted by section 3344: uses of the image that are considered “newsworthy” do not violate the statute.¹⁴³ Although California courts have tended to apply the newsworthiness exception broadly,¹⁴⁴ they have failed to define “newsworthy” specifically. It is unclear whether this protection applies to most tabloid-style articles or pictorials, due to their tendency to stretch the truth for the sake of sales, because “[e]ven though the [newsworthiness] exceptions are to be broadly construed, the newsworthiness privileges do not apply where a defendant uses a plaintiff’s name and likeness in a knowingly false manner to increase sales of the publication.”¹⁴⁵ This exception to the newsworthiness exception is aptly referred to most often as the “knowing falsehood” exception.¹⁴⁶

However, in *Solano v. Playgirl*,¹⁴⁷ the court refused to classify all tabloids or gossip magazines as publications that fell outside the newsworthiness exception, merely because their purpose was to entertain or amuse.¹⁴⁸ The court found that even “vulgar” publications can be classified as news and that news may serve to

¹⁴⁰ *Id.* at 344–45.

¹⁴¹ *See id.* at 347. For an in-depth discussion of the facts and holding of the *Eastwood* case, see *infra* notes 234–40 and accompanying text.

¹⁴² *See Eastwood*, 198 Cal. Rptr. at 352.

¹⁴³ Section 3344(d) provides that the use of an image, likeness, etc., does not violate the statute when the use is “in connection with any news, public affairs, or sports broadcast or account, or any political campaign.” CAL. CIV. CODE § 3344(d) (West 2010).

¹⁴⁴ *See, e.g., Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 794 (Cal. Ct. App. 1993).

¹⁴⁵ *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1089 (9th Cir. 2002).

¹⁴⁶ *Id.* at 1089 (citations omitted); *Eastwood*, 198 Cal. Rptr. at 352.

¹⁴⁷ 292 F.3d 1078 (9th Cir. 2002).

¹⁴⁸ *See id.* at 1089 n.8.

entertain or amuse as well as to inform.¹⁴⁹ Without the newsworthiness exception, there might be no protection of First Amendment concerns or a free press; its existence limits the otherwise broad protections of the right of publicity in California and prevents those seeking to enforce their publicity or privacy rights from running roughshod over the interests of the public.

b) New York

New York has never recognized a common law right to publicity, and instead, plaintiffs must rely entirely on sections 50 and 51 of the New York Civil Rights Laws to protect their publicity *and* their privacy rights.¹⁵⁰ These laws prohibit the nonconsensual misuse of a plaintiff's "name, portrait, picture or voice . . . for advertising purposes or for the purposes of trade."¹⁵¹ As in California, this cause of action allows for recovery in the form of both appropriate damages and injunctive relief.¹⁵²

The "misuse" must be for trade or advertising purposes;¹⁵³ this is a narrowly-construed categorization, crafted by the legislature to "[strike] a balance" between the concerns of private individuals and the First Amendment concerns that encourage "free speech and a free press," particularly in regards to events that are of

¹⁴⁹ See *id.* For a full discussion of the case, see *infra* notes 227–32 and accompanying text.

¹⁵⁰ See *supra* notes 99–103 and accompanying text. One of the major problems with the right of publicity, as opposed to the right of privacy, is that it remains a valuable right after a person's death and thus can be exploited by heirs and assignees. It no longer retains the individuality and privacy concerns that exist while the person is alive. However, in New York, neither the right of privacy nor the right of publicity has been recognized as extending post-mortem. See MCCARTHY, *supra* note 18, § 6:81. Legislation has been introduced several times over the last twenty years in attempts to grant post-mortem rights to the heirs or successors of the deceased, but has failed to become law. The most recent attempt to extend the rights of publicity after death was introduced in 2007, but has yet to make progress in the New York State Senate. See, e.g., 2009–2010 N.Y. Sess. Laws 5066. Opponents of the bill express concern that the bill, as drafted, would be unconstitutional, would impermissibly restrict freedom of the press, and would be difficult to implement in practice. See NYC BAR ASS'N, REPORT EXPRESSION OPPOSITION TO A.8836/S.6005 (2009), available at http://www.nycbar.org/pdf/report/Dead_Celebrities.pdf.

¹⁵¹ N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009).

¹⁵² See *id.* § 51.

¹⁵³ See *id.*

general noteworthiness.¹⁵⁴ It does not include “incidental” uses of a plaintiff’s name, likeness, etc.¹⁵⁵ Judges have particularly explored the boundaries of the words “portrait” and “picture;” although it is “settled that ‘any recognizable likeness, not just an actual photograph, may qualify as a ‘portrait or picture,’” the words are still interpreted on a case-by-case basis.¹⁵⁶

Like California, New York also recognizes a newsworthiness exception to the right of publicity statute (although it is not codified, as it is in California),¹⁵⁷ which allows publications to use celebrities’ names and likenesses without their consent when the matter is one of public interest.¹⁵⁸ “New York courts early recognized the need to encourage the free exchange of ideas” when reviewing claims for an invasion of privacy or a misappropriation of the right of publicity, and they thus “created a broad privilege for the legitimate dissemination to the public of news and information.”¹⁵⁹ Although the exception is not statutorily conferred, it is as broadly recognized as it is broadly construed.¹⁶⁰

Adding to the ambiguity of this uncodified exception is the existence of certain exceptions to the newsworthiness exception.¹⁶¹ One such exception-to-the-exception is the reasonable relation requirement, articulated in *Finger v. Omni Publications International*.¹⁶² This exception applies to pictures that

¹⁵⁴ *D’Andrea v. Rafla-Demetriou*, 972 F. Supp. 154, 156 (E.D.N.Y. 1997) (quoting *Arrington v. N.Y. Times Co.*, 434 N.E.2d 1319, 1322 (N.Y. 1982)). This concern also speaks to the newsworthiness exception. See *infra* notes 158–67 and accompanying text.

¹⁵⁵ *Id.* at 157. “In other words, ‘isolated’ or ‘fleeting and incidental’ uses of a person’s name or image, even if unauthorized, are insufficient to establish an invasion of privacy claim.” *Id.* (quoting *Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 256 N.Y.S.2d 301, 304 (N.Y. App. Div. 1965)).

¹⁵⁶ See, e.g., *Burck v. Mars, Inc.*, 561 F. Supp. 2d 446, 451 (S.D.N.Y. 2008) (quoting *Allen v. Nat’l Video, Inc.*, 610 F. Supp. 612, 622 (S.D.N.Y. 1985)) (considering different possible interpretations for a picture or a portrait in various cases).

¹⁵⁷ See *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978).

¹⁵⁸ See, e.g., *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984).

¹⁵⁹ *Id.* at 131.

¹⁶⁰ See, e.g., *Finger v. Omni Publ’ns Int’l*, 566 N.E.2d 141, 143 (N.Y. 1990) (“Although the statute does not define ‘purposes of trade’ or ‘advertising,’ courts have consistently refused to construe these terms as encompassing publications concerning newsworthy events or matters of public interest.” (citations omitted)).

¹⁶¹ See *id.* at 144.

¹⁶² 566 N.E.2d 141 (N.Y. 1990).

accompany an article that is a matter of public interest; if the picture has no “real relationship” to the article or the article is an advertisement in disguise, then the right of publicity statute applies.¹⁶³ The real relation exception is less protective than it seems—in *Finger*, the court held that there could be a real relation between an article about in vitro fertilization and other techniques, such as “caffeine-spritzed sperm,” and an image of the defendant’s family of six children (none of whom were conceived through in vitro fertilization or caffeinated sperm).¹⁶⁴ The court therefore found that an article generally about fertility and an image of a family that was probably fairly fertile were adequately related.¹⁶⁵

Additionally, the newsworthiness exception does not apply when “the defendant’s use was infected with material and substantial fiction or falsity.”¹⁶⁶ However, a simple factual or research error will not suffice; instead, the defendant must have acted with “some degree of fault” or otherwise have known in some way that the misuse was false.¹⁶⁷ This exception is similar to that of California’s knowing falsehood exception.¹⁶⁸ The knowing falsehood exception is the most useful to celebrities seeking to vindicate their rights in light of an obviously exaggerated or untruthful tabloid article.

C. *Tabloids*

1. History

Tabloids serve many purposes.¹⁶⁹ To reputable newspapers, they represent the scourge of the publishing industry; to celebrities, they serve as a harbinger of bad publicity; to the supermarket-going public, they are a guilty pleasure glanced at surreptitiously while waiting in the checkout line. Named after a condensed pill

¹⁶³ *Id.* at 143 (quoting *Murray v. N.Y. Magazine Co.*, 267 N.E.2d 256, 258 (N.Y. 1971)).

¹⁶⁴ *See id.* at 143.

¹⁶⁵ *Id.*

¹⁶⁶ *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 132 (2d Cir. 1984).

¹⁶⁷ *Id.*

¹⁶⁸ *See id.*; *see also Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 352 (Cal. Ct. App. 1983).

¹⁶⁹ Excluding liner for bird cages.

popular in pharmacies at the turn of the century,¹⁷⁰ the category of “tabloid journalism” is both a genre involving scandalous, not-always-true, vapid news stories, and an epithet denoting the lowest form of journalism. In the 1960s, these broadsheet papers turned their focus from alien abductions to the foibles of the celebrity world, latching on to the nuances of Jackie Kennedy’s marriage to Aristotle Onassis or the death of Elvis Presley.¹⁷¹ Throughout the last fifty years, tabloid circulation and popularity has ebbed and flowed, but a number of changes have invigorated the industry. Some are simple: *Star Magazine*, once relegated to the racks behind the conveyer belt at the supermarket checkout with the other tabloids, has since been moved to the ranks of long-running women’s magazines like *Cosmopolitan* or *Vogue*, due to its new glossy format.¹⁷² Other changes are more complicated, arising from advancing technology, such as the popularity of celebrity gossip websites, which can report news—or, more likely, rumors—faster than a traditional print medium.¹⁷³

2. Celebrity Culture

Whether tabloids ignited American fascination with celebrities or simply recognized this fascination and profited from it, this phenomenon has not gone unrecognized by legal scholars:

¹⁷⁰ See T.F. HOAD, *Tabloid*, in THE CONCISE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY (1996), available at <http://www.encyclopedia.com/doc/1O27-tabloid.html>.

¹⁷¹ Kate Pickert, *A Brief History of: Tabloids!!*, TIME, Aug. 25, 2008, at 18, available at <http://www.time.com/time/magazine/article/0,9171,1832868,00.html>. Pickert notes that *The National Enquirer* paid a relative of Elvis Presley to photograph him in his coffin, attesting to the incredible lengths tabloids will go to for the exclusive inside celebrity scoop. *Id.*

¹⁷² See *id.* *Star* switched from a broadsheet, newsprint format to a glossy, magazine-like format in 2004. *Id.*

¹⁷³ For a sampling of celebrity gossip websites written in different “voices,” ranging from the gossipy insider to the macho chauvinist, see, e.g., D-Listed, <http://www.dlisted.com> (last visited Nov. 12, 2009); Oh No They Didn’t (ONTD), <http://www.livejournal.com/community/ohnotheydidnt> (last visited Nov. 12, 2009); Perez Hilton, <http://www.perezhilton.com> (last visited Nov. 12, 2009); What Would Tyler Durden Do?, <http://www.wwtdd.com> (last visited Nov. 12, 2009). The eponymous author of the Perez Hilton blog has parlayed his inside knowledge of the celebrity sphere into numerous guest-hosting spots at popular bars and clubs, and even a television special on VH1.

2010]

CELEBRITY BABY PICTURES

637

A good deal of coverage in the media devoted to celebrities seems to delight in the misfortunes of prominent people. The Germans have a word for the human impulse to take pleasure in the misfortunes of others: Schadenfreude. “Seeing such rich, arrogant people brought down to earth is for many deeply satisfying.”¹⁷⁴

However, the increasing attention paid to celebrities has engendered a backlash of lawsuits filed by the celebrities, in attempts to protect their privacy, their good name, or at least recoup some of the revenue earned by the tabloids when an image of the celebrity (and often a shocking headline) is splashed across the cover of a tabloid. Most of these lawsuits proceed on a variety of theories and encompass several claims, from infliction of emotional distress to the misappropriation of the right of publicity.¹⁷⁵ For example, when *The National Enquirer* published a fabricated interview with Clint Eastwood about his relationship with actress Frances Fisher and his newborn baby,¹⁷⁶ he sued the tabloid for a host of wrongs: violation of the Lanham Act; invasion of his personal privacy; misappropriation of his likeness under both statutory and common law grounds; and damage to his reputation.¹⁷⁷ As seen in this example, the interactions between celebrities and tabloids are complex, and outcomes can vary widely by state, depending on which causes are recognized either statutorily or under the common law, and which exceptions apply.

II. DIVIDED SCHOLARSHIP—HOW SHOULD THE RIGHT OF PUBLICITY EVOLVE?

This Part of the Note analyzes the divide between scholars and courts who advocate a more protective right of publicity and those who champion a less protective right of publicity or even propose

¹⁷⁴ MCCARTHY, *supra* note 18, § 8:56 & n.4 (quoting Prof. John Portman, quoted in K. Breslau, *Silicon Valley's Latest Craze: Schadenfraude*, NEWSWEEK, Nov. 6, 2000, at 64).

¹⁷⁵ See *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249 (9th Cir. 1997), for an example of a lawsuit encompassing several theories.

¹⁷⁶ *Id.* at 1250.

¹⁷⁷ *Id.*

to eliminate it entirely. It illustrates these viewpoints with inconsistent outcomes between two major players in the right of publicity debates, New York and California. This Part additionally considers “newsworthiness” exceptions that are more or less protective and considers their relation to the growth—or decline—of the right of publicity.

A. *Protecting Celebrities: Arguments in Support of a Strong Right of Publicity*

Many commentators view the growth of the right of publicity as a work-in-progress and advocate a federal system that recognizes the right and expands its protection or encourages more states to take a protective stance.¹⁷⁸ These scholars espouse the growth of the right of publicity for a number of reasons: there is a growing trend of states to recognize the right of publicity;¹⁷⁹ the right of publicity has expanded from privacy or other intellectual property roots;¹⁸⁰ and celebrities require protection from increasingly aggressive and intrusive behavior from paparazzi or magazines.¹⁸¹ These scholars often advocate a more stringent newsworthiness exception,¹⁸² which would eliminate the protection for certain uses in publications, while limiting First Amendment protections.

1. More Recognition but Less Uniformity Among States

Although more states have come to accept a right of publicity over the last fifty years, each state’s interpretation of what, exactly, constitutes this right can differ sharply.¹⁸³ The differences in these statutes breed a lack of uniformity among forum states, allowing

¹⁷⁸ See, e.g., Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 477 (1999).

¹⁷⁹ See *id.* at 394–400.

¹⁸⁰ See *id.* at 411–12.

¹⁸¹ See generally Keith Willis, Note, *Paparazzi, Tabloids, and the New Hollywood Press: Can Celebrities Claim a Defensible Publicity Right in Order to Prevent the Media from Following Their Every Move?*, 9 TEX. REV. ENT. & SPORTS L. 175, 178 (2007) (discussing examples of celebrities being hounded by the media).

¹⁸² See, e.g., *id.* at 186–92.

¹⁸³ See generally Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity “Wheel” Spun Out of Control*, 45 KAN. L. REV. 329 (1997).

celebrities to “forum-shop” in order to obtain a favorable result in one jurisdiction, where the outcome might not be as favorable in another.¹⁸⁴ More simply, the lack of uniformity among states, particularly with respect to the newsworthiness exception, makes right of publicity protection essentially available on a case-by-case basis.¹⁸⁵ This lack of uniformity differs from other intellectual property rights, which often derive their strength from their ability to be protected in the same or similar fashion in every jurisdiction (and, increasingly, among countries).¹⁸⁶ Because of the lack of homogeneity among cases and statutes, some commentators advocate for a stronger *federal* right of publicity.¹⁸⁷

2. Development Away from Privacy or Property Rights

Other commentators advocate for a stronger right of publicity because they believe it has outgrown its origins in privacy law.¹⁸⁸ At the same time, these commentators note that the right of publicity also differs in important respects from property rights. Professor Michael Madow articulates this disjunction by noting a difference between the right of publicity and other intellectual property torts: a celebrity “is not the sole and sovereign ‘author’ of what she means for others.”¹⁸⁹ This view finds that “celebrity” is created not just by the celebrity and her labor, but also by the cultural and contextual meaning infused by the media, the

¹⁸⁴ See generally Kevin M. Fisher, Comment, *Which Path to Follow: A Comparative Perspective on the Right of Publicity*, 16 CONN. J. INT’L L. 95 (2000) (noting that the benefits of a federal right would reduce the likelihood of forum shopping by celebrities).

¹⁸⁵ See generally Langvardt, *supra* note 183 (detailing the host of evils that have resulted from conflicting state laws and interpretations of the right of publicity). Langvardt also addresses the possibility that celebrities would want to sue in federal court and thus tack on a possibly redundant or unnecessary Lanham Act claim to obtain jurisdiction. *Id.* at 355–56.

¹⁸⁶ See *supra* Part I.A.2.

¹⁸⁷ See, e.g., Eric J. Goodman, Comment, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. 227 (1999); Sean D. Whaley, “*I’m a Highway Star*”: *An Outline for a Federal Right of Publicity*, 31 HASTINGS COMM. & ENT. L.J. 257 (2009).

¹⁸⁸ See Haemmerli, *supra* note 178, at 383 (noting the prevailing “doctrinal bifurcation of publicity and privacy rights”).

¹⁸⁹ Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 195 (1993).

audience, and others.¹⁹⁰ This view also strips away the argument that the right of publicity is analogous to a privacy right because a privacy right is entirely contained within (and created by the existence of) one person.¹⁹¹

Sometimes, however, scholars suggest that it is the Lockean property aspect that the right of publicity has outgrown.¹⁹² Some commentators reject the Lockean labor theory that underlies most intellectual property rights (i.e., the idea that the labor and creative energy put into an object make it property).¹⁹³ Instead, scholars such as Dean Alice Haemmerli propose an alternate view: that the right of publicity is “a property right grounded in human autonomy.”¹⁹⁴ This conception of the right of publicity eschews the idea that labor makes the right of publicity valued, and instead embraces the moral or personal aspects of the right of publicity.¹⁹⁵ This “Kantian” understanding avoids First Amendment concerns by making the right a purely personal one that can be exercised at will.¹⁹⁶ This autonomous conception of the right of publicity would, in theory, allow a celebrity to object to any unauthorized use, regardless of its newsworthiness, because of its innate connection to the celebrity’s personhood.¹⁹⁷

Other scholars likewise focus on the underlying property interests that helped to generate the right, but do not reject its Lockean labor underpinnings.¹⁹⁸ Professor David Westfall, for example, analyzes the role of the right of publicity in bankruptcy, martial assets, and other transferring situations to support his thesis

¹⁹⁰ See *id.* at 193, 195.

¹⁹¹ See generally discussion *supra* Part I.A.1 (discussing the evolving definition of the right to privacy); Part I.A.1.a (discussing how some states have analogized the right to privacy to the right to publicity, and have broadly construed the right to privacy to cover claims that would otherwise be brought under right of publicity claims in other states).

¹⁹² See Haemmerli, *supra* note 178 (focusing instead on the moral and personal aspects of the right of publicity).

¹⁹³ See, e.g., *id.* at 383.

¹⁹⁴ *Id.* at 385.

¹⁹⁵ *Id.* at 421–22.

¹⁹⁶ See *id.* at 429–30.

¹⁹⁷ *Id.* at 433 (“Indeed, with a freedom-based right capable of general application, [a celebrity] could theoretically object to any unauthorized use.”).

¹⁹⁸ See, e.g., David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71 (2005).

that scholarship and courts alike should view publicity rights in the context of property.¹⁹⁹ However, he warns against the tendency of judges and scholars alike to “fall victim to the property syllogism,” instead suggesting that the deeply personal nature of the right of publicity (as opposed to, for example, the less personal attachment an inventor has to a patent or a company to a trademark) should require that those analyzing the right of publicity “weigh competing policy concerns against one another every time a new context arises in which the label of property has consequences.”²⁰⁰ Advocates of a stronger right of publicity who focus on the property aspects share a line of thought with advocates who focus on the economic implications of the right of publicity: both note the monetary value at stake in the right.

3. Inherent Unfairness and Celebrities’ Need for Protection

Scholars who advocate for a stronger right of publicity also reject assumptions that the right is not worth protecting because, for example, celebrities earn plenty of money already or are not harmed when their images are used.²⁰¹ These arguments consider the literal value of the right of publicity, in the revenue brought in to tabloid magazines by their use of celebrity images, as well as the potential dangers that face celebrities when the actions of the paparazzi and tabloids are unregulated.²⁰²

a) The Value of the Right of Publicity and Protection from “Free-Riding”

Another dimension to the argument for a structured right of publicity is concerns about “free-riding;” that is, concerns about

¹⁹⁹ See *id.* at 113–17.

²⁰⁰ *Id.* at 123.

²⁰¹ See Goldman, *supra* note 126, at 614–15 (wryly noting that celebrities are already “well-compensated,” even without collecting on their right of publicity).

²⁰² See Samantha J. Katze, Note, *Hunting the Hunters: AB 381 and California’s Attempt to Restrain the Paparazzi*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1349, 1351–53 (2006) (discussing accidents and break-in attempts by paparazzi and the constitutional challenge in regulating their behavior); see also David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies*, 25 CARDOZO ARTS & ENT. L.J. 913, 959–65 (2008) (examining the economic associative value of the celebrity personality).

the inherent unfairness from those using a celebrity identity in a commercial context without having to pay for each use.²⁰³ Scholars argue that these concerns override the potential conflicts with the First Amendment by limiting enforcement of the right of publicity when a usage is potentially “newsworthy.”²⁰⁴

Intellectual property attorney W. Mack Webner puts this position succinctly: “The press . . . should not, and need not, be exempt from paying for the use of the persona of a celebrity when the use is for purely commercial purposes.”²⁰⁵ Looking at two similar cases concerning sports figures, he finds that the grant of newsworthiness to the papers that used the players’ images, were it to be granted in any other context (e.g., a sports retailer) would “mock[] the publicity right” entirely.²⁰⁶ Like other commentators in this position, he finds troubling the fact that “[n]ewsworthiness is interpreted sufficiently loosely and broadly so that almost any activity associated with a press activity will be held to be under [its] umbrella.”²⁰⁷ Commentators recommend reducing the reach of the newsworthiness exception, and sharply identifying when the use of a celebrity’s image is commercial, so that the celebrity may advance his or her publicity right.²⁰⁸ “When . . . [publishers] use the images of celebrities in advertisements intended to sell their publications, they should pay for the use just as car manufacturers and clothing manufacturers must.”²⁰⁹ By this line of thinking, the subscription cards inserted into each *Us Weekly*, featuring pictures of actress Katie Holmes at an awards ceremony, would be violative

²⁰³ See Tan, *supra* note 202, at 932 (noting the law should prohibit free-riding for moral reasons); W. Mack Webner & Leigh Ann Lindquist, *Transformation: The Bright Line Between Commercial Publicity Rights and the First Amendment*, 37 AKRON L. REV. 171, 190, 194 (2004) (arguing that the press should not be able to use the property of others for commercial gain without compensating the owner).

²⁰⁴ See Webner & Lindquist, *supra* note 203, at 194.

²⁰⁵ *Id.* at 188.

²⁰⁶ *Id.* at 190.

²⁰⁷ *Id.* at 193.

²⁰⁸ See Tan, *supra* note 202, at 982, 992 (advocating a test that “takes into account a subjective inquiry into the intentions of the defendant”); Webner & Lindquist, *supra* note 203, at 190 (arguing that the broad interpretation of “newsworthiness” currently applied by courts seems to allow newspapers and magazines a “free license to use celebrity personas”).

²⁰⁹ Webner & Lindquist, *supra* note 203, at 194.

of her right to publicity, and she should be compensated, just as she would be if she agreed to model clothes for Miu Miu.²¹⁰

Other scholars echo this view and deride the “free-riding exploitative commercial use” of celebrity images by tabloid magazines.²¹¹ One scholar, David Tan, notes that “the contemporary reality of the celebrity economy suggests a degree of protection ought to be accorded” to the celebrities.²¹² Tan suggests changing the inquiry in the newsworthiness exception to one of the defendants’ intentions; this would preserve First Amendment rights to artistic liberties (and, more broadly, the news) but would prevent this economic “free-riding.”²¹³ These economic concerns hearken back to the property aspects of the right of publicity, but growing concerns about the safety of celebrities and others in the face of an unfettered paparazzi speak to the right of publicity’s privacy roots.

b) Anti-Paparazzi Statutes

The threatening presence of the paparazzi is troubling not only to celebrities, but those who are injured or otherwise disturbed by their aggressive, intrusive behavior, resulting in an increase of state legislation that targets the paparazzi.²¹⁴ Car accidents from the mundane, such as Britney Spears running over the foot of a paparazzo,²¹⁵ to the extreme, such as the deaths of Princess Diana and fiancé Dodi al Fayed after a high-speed pursuit by paparazzi on mopeds,²¹⁶ have alerted state legislatures to the problems that

²¹⁰ See generally Leisa Barnett, *Katie Holmes’ Miu Miu Ad Unveiled*, VOGUE U.K., Jan. 14, 2009, <http://www.vogue.co.uk/news/daily/090114-katie-holmes-miu-miu-ads-unveiled.aspx>.

²¹¹ Tan, *supra* note 202, at 992.

²¹² *Id.*

²¹³ See *id.* at 982, 992–93.

²¹⁴ See Katze, *supra* note 202, at 1352–53 (listing numerous traffic accidents and breaks caused by paparazzi tracking celebrities, which spurred the amendments to the Civil Code).

²¹⁵ See generally *Britney Spears Appears to Run over Foot of Celebrity Photographer*, INT’L HERALD TRIB., Oct. 19, 2007, <http://www.ihl.com/articles/ap/2007/10/19/america/NA-GEN-US-Spears-Photographer.php>.

²¹⁶ See generally *Coroner Plans Inquest in Death of Princess Diana for January*, USA TODAY, Dec. 18, 2003, at 14, available at http://www.usatoday.com/news/world/2003-12-18-diana-inquest_x.htm (discussing the lingering controversy about the accident).

face both celebrities and ordinary citizens on the roads when paparazzi try to get that perfect shot.

California has amended its civil code to attempt to curb this behavior, or at least provide celebrities with other recourses.²¹⁷ Couched in the language of privacy, this statute ensnares aggressive paparazzi by denoting the acts of picture-taking, sound recording, or other invasive techniques, particularly when the plaintiff is engaged in a “personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy;”²¹⁸ it also encompasses the tabloids that often employ them, whether or not there is an employee-employer relationship.²¹⁹ However, the plaintiff engaging in these familial activities must have had a “reasonable expectation of privacy.”²²⁰

Advocates of a strong right of publicity recognize the fact that celebrities are “followed, hounded and even harassed when they leave their homes.”²²¹ Some promote a more expansive right of publicity not only to protect celebrities’ proprietary interests in their name and to prevent an overly expansive view of the newsworthiness exception, but also to shield celebrities from the aggressive and often dangerous tactics of the paparazzi.²²²

These statutes serve not as a means of addressing the validity of the right of privacy or curbing its limitation by the First Amendment, but instead to comment on a different aspect of the problem of tabloid magazines: the very dangerous way in which these “candid” photos of celebrities are obtained.

²¹⁷ See CAL. CIV. CODE § 1708.8 (West 2010).

²¹⁸ *Id.* § 1708.8(a)–(b) (creating liability when a person trespasses to capture these images or sounds, or invasion of privacy otherwise).

²¹⁹ *Id.* § 1708.8(e).

²²⁰ *Id.* § 1708.8(b). Governor Arnold Schwarzenegger recently signed an amendment to this law that expands the definition of privacy; the amendment took effect in January of 2010. See *Schwarzenegger Signs New Anti-Paparazzi Law*, CNN, Oct. 14, 2009, <http://www.cnn.com/2009/CRIME/10/14/paparazzi.law/index.html>.

²²¹ Willis, *supra* note 181, at 178.

²²² See *id.* at 200–01. See generally Lisa Vance, Note, *Amending Its Anti-Paparazzi Statute: California’s Latest Baby Step in Its Attempt to Curb the Aggressive Paparazzi*, 29 HASTINGS COMM. & ENT. L.J. 99 (2006) (detailing the various amendments to California’s statute and suggesting changes for its success).

4. State Support for a Restrictive View of Newsworthiness

Some commentators see the expansion of the right of publicity as being distinct from its property and its privacy origins.²²³ These commentators focus on the economic realities of the situation—tabloids subverting the newsworthiness exception to their commercial advantage, and encouraging more and more aggressive behavior by the paparazzi they employ directly or indirectly.²²⁴ The concerns advanced by these commentators are not without support in the case law. In fact, courts' restrictions on the newsworthiness exception reflect these opinions and suggest that the right of publicity is broadening in two influential states, California and New York.²²⁵

a) California

Courts have placed certain restrictions on the newsworthiness exception, providing greater protection to celebrities who challenge the legitimacy of publications claiming that their use falls under these exceptions.

In *Solano*,²²⁶ actor Jose Solano, Jr., at the time well-recognized for his portrayal of a character on the beach-drama *Baywatch*, was featured on the cover of *Playgirl*, a pornographic magazine “ostensibly focused on a female readership.”²²⁷ Solano neither posed for the magazine nor granted them an interview, and, perhaps disappointingly to the readership, did not appear nude anywhere in the issue.²²⁸ Despite such promising cover taglines as “Primetime’s Sexy Young Stars Exposed” and “12 Sizzling Centerfolds Ready to Score With You” framing the cover image of Solano, his sole appearance in the magazine was a clothed picture

²²³ See discussion *supra* Part I.A.2.

²²⁴ See, e.g., Vance, *supra* note 222, at 102 (describing aggressive tactics used by the paparazzi in pursuit of a celebrity).

²²⁵ See *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1089 (9th Cir. 2002) (restricting the newsworthiness exception in California); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 727–28 (S.D.N.Y. 1978).

²²⁶ This case is briefly discussed *supra* text accompanying notes 147–49.

²²⁷ *Id.* at 1080.

²²⁸ *Id.*

with a brief profile as part of a relatively tame (and non-nude) article about rising television stars.²²⁹

Solano sued the magazine on a variety of privacy and publicity claims under California law, claiming both a violation of the right of publicity statute, as well as the common law right of publicity.²³⁰ The court of appeals disagreed with the district court's grant of summary judgment, which held that the use fell under the newsworthiness exception and therefore denied recovery to Solano.²³¹ Instead, the court of appeals found that Solano had raised a genuine issue as to whether the magazine had used the picture, despite knowing that its representation was false.²³² The court remanded the case to the district court with a warning that the newsworthiness exception was not infinite and that malicious intent or knowing falsehoods could remove its protection entirely.²³³

Similarly, the court in *Eastwood* refused to allow an entirely "unfettered press."²³⁴ *The National Enquirer*, a prominent supermarket tabloid, published an article claiming that actor Clint Eastwood had found himself in a tumultuous "love triangle" between singer Tanya Tucker (with whom he allegedly "publicly 'cuddled'" for ten nights) and actress Sondra Locke (who purportedly "camped at his doorstep" to beg him to take her back).²³⁵ Eastwood was not as amused or entertained as the tabloid-buying public may have been and sued the tabloid for, among other things, both a violation of the statutory right of publicity and the complementary common law right.²³⁶ Though the court acknowledged that there were exceptions to be made for public interest, particularly involving "people who, by their accomplishments, mode of living, professional standing or calling,

²²⁹ *Id.* at 1081.

²³⁰ *Id.* at 1088. The court here terms the common law right of publicity as "commercial misappropriation invasion of privacy." *Id.*

²³¹ *Id.* at 1089.

²³² *See id.*

²³³ *Id.* Over six years later, the case is still pending on remand, probably due to some form of settlement agreement between the two parties.

²³⁴ *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 352 (Cal. Ct. App. 1983).

²³⁵ *Id.* at 345.

²³⁶ *See id.* at 347.

create a legitimate and widespread attention to their activities,”²³⁷ it also recognized that this exception should not come at the “total sacrifice” of celebrities who work to maintain their status.²³⁸ Although Eastwood’s claim ultimately failed because he failed to specifically allege in his cause of action the “scienter of the alleged calculated falsehood” of the *Enquirer* article, the court still recognized that aggressive tabloid behavior would not automatically be protected by the newsworthiness exception.²³⁹ The court noted that “[t]he spacious interest in an unfettered press is not without limitation” and that knowing or reckless lies “masquerading as truth” were not exempt in the otherwise broad “canopy of ‘news.’”²⁴⁰

These examples show California courts’ willingness to question the reach of the newsworthiness exception for tabloids, particularly when permitting the misuse of the plaintiff’s image or name under First Amendment concerns is, in the court’s view, somehow injurious or unfair.

b) New York

New York courts have also sought to reduce the scope of the newsworthiness exception. For example, a New York court found that the newsworthiness exception was not applicable even in the case of an image of a *likeness* of a celebrity (never mind an actual photograph of the celebrity, as in *Solano*).²⁴¹ Muhammad Ali, the famous boxer and self-proclaimed “the Greatest,” brought an action against *Playgirl* magazine for a cover sketch that depicted a nude black man in a boxing ring, with features very similar to his

²³⁷ *Id.* at 350 (quoting *Carlisle v. Fawcett Publ’ns, Inc.*, 20 Cal. Rptr. 405, 414 (Cal. Ct. App. 1962)).

²³⁸ *Id.*

²³⁹ *Id.* at 352.

²⁴⁰ *Id.* (citations omitted). Although *Eastwood*’s recognition of knowing falsehood exception has been recognized by some (though not all) other California decisions, part of the case has been overruled by a 1984 amendment to the California right of publicity statute: it is no longer true that the misuse of the plaintiff’s image be for “purposes of advertising” or “solicitation of purchases.” See *KNB Enters. v. Matthews*, 92 Cal. Rptr. 2d 713, 717 n.5 (Cal. Ct. App. 2000) (discussing the amendment to section 3344).

²⁴¹ See *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 727–28 (S.D.N.Y. 1978).

own, captioned “the Greatest.”²⁴² The court acknowledged the newsworthiness exception to the statute, but found that *Playgirl*’s use of Ali’s likeness did not fall under the exception.²⁴³ Instead, the court held that the likeness of Ali was “clearly included in the magazine solely ‘for purposes of trade e. g. [sic], merely to attract attention.’”²⁴⁴ The court did not hesitate to eliminate the possibility of the newsworthiness exception, even contending that the text accompanying the portrait was a “plainly fictional and allegedly libellous [sic] bit of doggerel.”²⁴⁵ This decision could have had wide-ranging implications for tabloids in particular, since shocking covers are created expressly to attract attention.²⁴⁶

B. Protecting the Public’s Interest: Arguments for a Weaker Right of Publicity

In contrast to those who advocate a wider, more protective right of publicity, many scholars have taken their cues from courts who have painted a broad picture of the newsworthiness exception. These scholars present a right of publicity that favors the public interest—or a world where the right of publicity ceases to exist entirely.²⁴⁷ These scholars emphasize a broad expanse of newsworthiness to protect First Amendment concerns or feel that the expanding right of publicity impinges on the territory of other established intellectual property rights.²⁴⁸

The problem with analyzing the case law of any given jurisdiction is the expansive and often inexplicable gaps in the case law. Although chronological gaps are the most noticeable, these lurches in time are enhanced by the fact that celebrities often resort to many different theories of recovery in scattershot filings that allege violations of the right of publicity, defamation, false light

²⁴² *Id.* at 725.

²⁴³ *Id.* at 727.

²⁴⁴ *Id.* (quoting *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 881 (S.D.N.Y. 1973)).

²⁴⁵ *Id.* at 727.

²⁴⁶ However, like most right of publicity cases, the case was not followed widely by other courts, and its holding has not been acknowledged for many years.

²⁴⁷ See Goldman, *supra* note 126, at 216–25 (arguing that a right of publicity conflicts with free market, First Amendment, and copyright interests).

²⁴⁸ See *id.*

torts, and anything that will “stick.”²⁴⁹ This means that many right of publicity claims are subsumed by tort recovery, never making it to the trial stage, or, as previously mentioned, are settled out of court.

1. Eliminating the Right of Publicity Entirely

Professor Lee Goldman advocates dispensing entirely with the right of publicity.²⁵⁰ He notes a number of economic concerns, such as that the right of publicity “encumbers free enterprise and competition by granting the individual monopoly control over the commercial value of his or her persona.”²⁵¹ However, his main contention is that the right of publicity is unnecessary.²⁵² He posits the idea that celebrities, unlike creators of other forms of intellectual property, do not need a monetary incentive to “create” their image.²⁵³ Expressing concern that the right is not simply “unnecessary” but also “undesirable,” Goldman discourages a societal view where fame has economic benefits on its own aside from the celebrity’s primary activity, such as acting, athletics, or otherwise.²⁵⁴

This view is fairly extreme, and Goldman himself acknowledges that “there does not appear to be any ground swell of support for such legislation [preempting the right of publicity].”²⁵⁵ If the right of publicity were eliminated entirely, celebrities pursuing claims against tabloids or online gossip websites would be in the same situation they were prior to the development of right of publicity; they would have to rely on defamation, privacy, or other intellectual property claims to

²⁴⁹ See, e.g., *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1081 (9th Cir. 2002) (claiming that the magazine depicted Solano in a “false light”); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 344 (Cal. Ct. App. 1983) (stating the cause of action is for “false light invasion of privacy”).

²⁵⁰ See generally Goldman, *supra* note 126.

²⁵¹ *Id.* at 614.

²⁵² *Id.*

²⁵³ See *id.* at 603 (“Actors love to act; sports stars enjoy the competition. Even for the more mercenary, the rewards of the primary activity are often so great that additional incentives are superfluous.”).

²⁵⁴ *Id.* at 604–05.

²⁵⁵ *Id.* at 628.

recover for misuse of their image. However, Goldman's idea that the right of publicity differs from other rights is similarly framed by other legal scholars' concerns that the right of publicity is infringing on the domain of other intellectual property rights.

2. The Need to Distinguish the Right from Other Intellectual Property Rights

Other scholars concerned with the development of the right of publicity express fears that its continued expansion will encroach on existing intellectual property law, thus obscuring the purposes of the individual—and separate—rights of publicity.²⁵⁶ Scholars such as Tan strive to differentiate the right of publicity from the development of trademark law.²⁵⁷ Tan notes that celebrities often assert a right of publicity claim in addition to or instead of a Lanham Act claim.²⁵⁸ This conflation of the two claims confuses the “purpose” of the misuse—is it to mislead the consumer (e.g., a tabloid reader) into thinking that the celebrity has sponsored the use of the image, or is it to recoup economic benefits?²⁵⁹ When courts confuse the two, the recovery allowed may vary, and moreover, the purpose of the right of publicity is confused.²⁶⁰ Instead of recognizing that the right of publicity is property itself, a trademark claim attempting to cover the right of publicity merely considers the use of the image “an indicia of origin or source of a product.”²⁶¹ So, if Lindsay Lohan wanted to sue *Star Magazine* for featuring her in an ad for their publication, the use of a Lanham Act claim instead of a right of publicity claim would seem to indicate only that the origin of the magazine ad is misleading, rather than that the magazine had misappropriated her image, which had value on its own. To counteract this problem, Tan advocates a right of publicity that steps away from trademark-like aspects and instead focuses on the economic impact.²⁶²

²⁵⁶ See *infra* notes 257–66 and accompanying text.

²⁵⁷ See, e.g., Tan, *supra* note 202, at 992.

²⁵⁸ *Id.* at 978.

²⁵⁹ See *id.* at 982.

²⁶⁰ See generally *id.* at 978–83.

²⁶¹ *Id.* at 978.

²⁶² See *id.* at 992.

Other scholars note a similar interference of the right of publicity in copyright claims and criticize the broadening scope of the right.²⁶³ Some scholars claim that an expansive right of publicity encroaches on copyright claims and results in incongruous outcomes, when the right to publicity should be preempted by copyright.²⁶⁴ For instance, “[a]n unfettered right of publicity . . . can conflict with copyright principles, and abrogate copyright protections,” which is particularly troublesome because this outcome “is exactly what Congress sought to prevent by enacting 301 [of the Copyright Act] preemption.”²⁶⁵ These legal scholars propose a more limited right of publicity to counteract these concerns.²⁶⁶

The similarities to other intellectual property rights can sometimes lead to the conflation of the right of publicity with these rights. This argument suggests that a limiting federal scheme would eke out a place for the right of publicity without overshadowing or nullifying existing intellectual property rights.

3. Protection of the First Amendment and the Press

First Amendment concerns are at the heart of many arguments opposed to expanding either the right of publicity or its newsworthiness exception. The balance between the privacy rights of the individual and the newsgathering rights of the public often tips in the favor of the public under the doctrine of free speech.²⁶⁷

Professor Goldman is particularly protective of the First Amendment concerns that arise from limiting the press’s right to report or comment on public figures, finding that they trump any potential use for the right of publicity.²⁶⁸ He is not convinced by

²⁶³ See, e.g., Farbod Moridani, *Toney v. L’Oreal USA, Inc.: Persona and the Unfettered Right of Publicity*, 21 BERKELEY TECH. L.J. 311, 317 (2006) (“[T]he scope of this right has come into question because it primarily benefits celebrities and, in its broadest application, conflicts with fundamental principles underlying copyright law.”).

²⁶⁴ See *id.* at 333; Fisher, *supra* note 184, at 115 (advocating “a middle of the road option under which a more adequate balancing system, such as that under the Copyright Act” guides the right of publicity).

²⁶⁵ Moridani, *supra* note 263, at 333.

²⁶⁶ *Id.*

²⁶⁷ Tan, *supra* note 202, at 924–25.

²⁶⁸ Goldman, *supra* note 126, at 614.

the “free-riding” argument, instead declaring that “in the absence of a convincing rationale for the right of publicity, even commercial speech should receive First Amendment protection.”²⁶⁹ The removal of the right of publicity would not leave celebrities defenseless, but would prioritize the rights of the public and validate newsworthiness exceptions.²⁷⁰

Others take a less extreme view, but still advocate the importance of the First Amendment in connection with the right of publicity. Many are troubled by attempts to limit the broad protections of the newsworthiness amendment, suggesting instead a form of categorization that better discerns between commercial and non-commercial speech (the latter receiving full protection under the First Amendment) rather than elimination of the newsworthiness protection entirely.²⁷¹ Professor Eugene Volokh advances four potential categories to differentiate between types of speech, in order to obtain the maximum protections of the newsworthiness exception.²⁷² Like other scholars, he fears that a limitation of the newsworthiness exception, or a broad definition of what defines “commercial” (i.e., unprotected) speech will limit the freedom of speech generally, as defining commercial speech is a difficult task.²⁷³

First Amendment concerns seem inextricably intertwined with the newsworthiness exception, which reflects many of the core concerns of scholars opposed to a broad federal right of publicity.²⁷⁴ According to these scholars, to expand the right of

²⁶⁹ *Id.*

²⁷⁰ *See id.*

²⁷¹ *See id.* See generally Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003).

²⁷² Volokh, *supra* note 271, at 904 (listing the four categories: non-commercial speech favored by the right of publicity; commercial advertisements for those kinds of non-commercial speech; other kinds of commercial advertisements; and non-commercial speech that is not protected by the right of publicity).

²⁷³ *Id.* at 928–29 (“Both commercial speech and noncommercial speech that uses people’s appearance without their consent is equally harmful, both to the subjects’ economic interests and their dignity. Different treatment of commercial and noncommercial advertising thus seems . . . unjustified.”). Volokh notes, somewhat hopefully, that the Supreme Court (in 2003) currently seemed to be leaning in the direction of protecting commercial speech. *Id.*

²⁷⁴ *See supra* notes 267–73 and accompanying text.

publicity would unfairly tread into the domain of free speech and First Amendment protections.²⁷⁵

4. Broadly Defining the Newsworthiness Exception

Because case law concerning the right of publicity varies not only between states (here, New York and California) but also within the states themselves, there are many courts that endorse the positions of scholars concerned with the direction of the right of publicity, and particularly its impact on First Amendment freedoms.²⁷⁶ Courts have seemingly ignored previous verdicts restricting the newsworthiness exception in favor of protecting free speech and a free press under the First Amendment.²⁷⁷ Some also deflect concerns that an economic harm is being perpetrated against the celebrity (or ignore it entirely) for the sake of creating a broad newsworthiness exception and fuller protections for all aspects of the First Amendment when it clashes with the right of publicity.²⁷⁸

For example, in a pictorial in its March 1997 issue, *Los Angeles Magazine* (“*LAM*”) digitally altered famous stills from movies to show actors such as Cary Grant, Marilyn Monroe, and plaintiff Dustin Hoffman wearing spring 1997 fashions.²⁷⁹ The photograph chosen of Hoffman was an image from the movie *Tootsie*, in a scene where Hoffman, in drag, is dressed in a red evening gown in front of the American flag; *LAM* digitally replaced the dress with a cream evening gown and matching heels, noting that Hoffman “[wasn’t] a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels.”²⁸⁰

Hoffman claimed that, by failing to secure his permission for publication and alteration of the photo, the magazine had violated his statutory and common law protections against misappropriation of the right of publicity.²⁸¹ The district court agreed, finding that

²⁷⁵ See *supra* notes 267–73 and accompanying text

²⁷⁶ See cases cited *infra* notes 279–94 and accompanying text.

²⁷⁷ See cases cited *infra* notes 279–94 and accompanying text.

²⁷⁸ See cases cited *infra* notes 279–94 and accompanying text.

²⁷⁹ *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1183 (9th Cir. 2001).

²⁸⁰ *Id.* at 1182–83.

²⁸¹ *Id.* at 1183.

First Amendment protections did not attach to knowingly false speech and that *LAM* had acted with actual malice.²⁸² However, the Ninth Circuit held otherwise.²⁸³ The Ninth Circuit held instead that the article and its accompanying images were not purely commercial speech, but instead a “combination of fashion photography, humor, and visual and verbal editorial comment.”²⁸⁴ Because *LAM* was accorded full First Amendment protections, its protections could only be revoked with a showing of actual malice, which the court refused to find—the article had made clear that the images were altered.²⁸⁵ The court entered judgment for *LAM*.²⁸⁶

Another example comes from New York. Ann-Margret, an actress and “woman of beauty, talent, and courage,” objected strenuously when an adult magazine, *High Society Celebrity Skin*, published a photographic still taken from one of her movies in which she appeared topless.²⁸⁷ The magazine “specialize[d] in printing photographs of well-known women caught in the most revealing situations and positions that . . . [it is] able to obtain.”²⁸⁸ Although the plaintiff attempted to categorize the publication as “hard core pornography,” the court settled on “tacky.”²⁸⁹

Relying on section 51 of the Civil Rights Laws, Ann-Margret claimed that her right of publicity had been violated by this unauthorized reproduction of the topless scene.²⁹⁰ The court disagreed; it first held that her claim for a violation of the right to privacy (ignoring, seemingly, the fact that her claim concerned the right of publicity) was barred by the fact that she had already willingly appeared in the film, which was seen by millions of movie-goers.²⁹¹ The court went on to state that, as “a woman who has occupied the fantasies of many moviegoers over the years,”

²⁸² *Id.* at 1184 (citing *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 874–75 (C.D. Cal. 1999)).

²⁸³ *Id.*

²⁸⁴ *Id.* at 1185.

²⁸⁵ *See id.* at 1186–88.

²⁸⁶ *Id.* at 1189.

²⁸⁷ *Ann-Margret v. High Soc’y Magazine*, 498 F. Supp. 401, 403–04 (S.D.N.Y. 1980).

²⁸⁸ *Id.* at 403.

²⁸⁹ *Id.* at 403–04.

²⁹⁰ *Id.* at 404.

²⁹¹ *Id.* at 405.

Ann-Margret's topless appearance in one of her films was a matter of great public interest, and thereby protected by the newsworthiness exception.²⁹² The court focused more on the actress's "choice" to appear naked, rather than her loss of a reasonable expectation of privacy.²⁹³

The court avoided explicitly stating whether or not a common law right to publicity exists in New York, but denied recovery via that route nonetheless, finding that the appearance of the picture in the magazine did not constitute a use for trade or advertising purposes.²⁹⁴

These examples of broad applications of the newsworthiness protections are likely not welcomed by the celebrities who fill the pages of tabloid magazines, but offer more protection to the public in the form of preserving a free press.

C. The Role of Gossip in Society and the Media

For better or for worse, tabloids are inextricably linked with another word that either categorizes or blasphemes—gossip. Gossip's role in the news and in the law has been the subject of plenty of debate, although perhaps not given as serious attention as other First Amendment concerns. Gossip even inspired Brandeis and Warren in their initial discussion about the need for privacy:

Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance.²⁹⁵

²⁹² *Id.*

²⁹³ *See id.*

²⁹⁴ *See id.* at 406–07.

²⁹⁵ Brandeis & Warren, *supra* note 30, at 196.

Brandeis and Warren may have had personal motivations for rallying the cry against protection of gossip and rumors,²⁹⁶ but modern courts are unclear as to whether or not gossip is newsworthy; i.e., are rumors protectable by the First Amendment?²⁹⁷ Indulging in celebrity gossip is a guilty pleasure that has been acknowledged by courts for a good part of the last century, even preceding the named “right of publicity.”²⁹⁸ A New York court noted that “the misfortunes and frailties of neighbors and ‘public figures’ are subjects of considerable interest and discussion by the rest of the population;”²⁹⁹ although the court did not particularly condone this vice, it found that “when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books and magazines of the day.”³⁰⁰

Gossip’s potential to conflict with the knowing falsehood exception eliminates it from protection in certain instances. The court in *Eastwood* was troubled by the implications of the *Enquirer* story; on one hand, the subject of the article was a matter of public concern, but on the other, it was potentially a “calculated falsehood” and simply a “coverup or subterfuge for commercial appropriation of his name and likeness.”³⁰¹ The court avoided weighing the interests at stake by finding that, regardless of the outcome, *Eastwood* had failed to plead that the article was knowingly false.³⁰² This begs the question of whether publications are free to print unsubstantiated gossip (particularly when it so closely resembles a “breaking news”-type story), placing the burden of proving the falseness on the target of the publication.³⁰³

²⁹⁶ McCarthy and others allude to the rumors surrounding the circumstances of the article—Brandeis’s sister’s lavish wedding at the center of Bostonian society and the negative press coverage that it generated may have inspired the pair to write the article. See MCCARTHY, *supra* note 18, § 1:12. Fittingly, this story is essentially just a rumor.

²⁹⁷ See *infra* notes 298–303 and accompanying text.

²⁹⁸ See, e.g., *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940). The *Sidis* case predates *Haelan* by more than a decade. See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); *supra* text accompanying note 89.

²⁹⁹ *Sidis*, 113 F.2d at 809.

³⁰⁰ *Id.*

³⁰¹ *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 351 (Cal. Ct. App. 1983).

³⁰² *Id.* at 352.

³⁰³ The court in *Eastwood* noted that this is the allocation of the burden in a claim for defamation or invasion of privacy. See *id.*

1. Baby Pictures

During the last several years, the parasitic relationship of intrusive celebrity magazines feeding off of the publicity generated by the Hollywood elite has evolved into a symbiotic one through the sale of baby pictures. Before Angelina Jolie and Brad Pitt earned \$14 million for the exclusive rights to photographs of their newborn twins, they received \$4 million from the sale of pictures of their first daughter together, Shiloh, in 2005.³⁰⁴ In July of 2008, actress Jessica Alba sold rights to the first photos of her daughter Honor to *OK!* magazine for \$1.5 million.³⁰⁵ Pop star Christina Aguilera made the same amount when she sold the exclusive rights to photographs of her son Max to *People* in 2007.³⁰⁶ Even Jennifer Lopez, who has been out of the acting and musical spotlight for several years, made an estimated \$6 million when *People* purchased the rights to the first images of her twins Max and Emme in March of 2008.³⁰⁷ This trend may have been curbed by the faltering global economy, but there are indications that neither celebrities' willingness to sell their private moments, nor the public's desire to consume such articles, have abated.³⁰⁸

Of course, with each photo spread comes not only the royalty check, but a carefully vetted, favorable news story, showcasing the celebrity and their newborn in the best possible light. For an example of the flowing, cloying language, one can note how Jennifer Lopez is overwhelmed with "twin bliss" as *People* reveals the "intimate" secrets of the "happy new parents."³⁰⁹ These sales have hardly seemed to subside despite claims from some magazine

³⁰⁴ The \$4 million the couple earned went to charity, as it did three years later when the rights to pictures of their twins were sold. *Jolie-Pitt Baby Pics*, *supra* note 3.

³⁰⁵ *Baby Alba Cashes in*, TMZ, July 10, 2008, <http://www.tMZ.com/2008/07/10/baby-alba-cashes-in/>; *see also World Exclusive: Jessica's Dream Baby!*, *OK!*, July 16, 2008, <http://www.okmagazine.com/2008/07/world-exclusive-jessica-albas-dream-baby-7881/> (advertising the "world exclusive" pictures of baby Honor, featured "only in *OK!*").

³⁰⁶ Baram & Sheila, *supra* note 4.

³⁰⁷ *Id.*

³⁰⁸ Former Playboy girlfriend Kendra Wilkinson has documented the various stages of her marriage and pregnancy with "exclusives" given to *Us Weekly*. *See, e.g., Kendra's New Baby Drama!*, *US WKLY.*, Oct. 5, 2009, at 89.

³⁰⁹ *See Jennifer Lopez: Twin Bliss!*, *PEOPLE*, Mar. 20, 2008, at C1.

editors that they are trying to halt the trend of purchasing these images.

2. The Ugly Side of Free Press

However cheerful the stories of newlywed or newborn bliss appear in the magazines, celebrities often find themselves vilified by online bloggers. Although those who write online gossip websites³¹⁰ are often able to hide under the mantle of anonymity, sometimes their cutting remarks are not shrugged off by the celebrities, such as in the case of blogger Mario Lavandeira, better known as Perez Hilton, and D.J. Samantha Ronson.³¹¹ After Hilton's blog posted an article claiming that Ronson planted cocaine in then-girlfriend Lindsay Lohan's car to generate publicity and attempted to trade on Lohan's celebrity status for better publicity for herself, Ronson sued Hilton and the photo agency for \$20 million.³¹² Although her claim was for defamation, it could easily have been for right of publicity; she could have claimed (probably rightly so) that the scandalous story on Hilton's website brought in advertising revenue. Hilton, however, could use the same excuse he used in the defamation lawsuit: that his actions were protected under the First Amendment right that protects the news and free speech.³¹³ Much like in this defamation lawsuit, Ronson's claims could potentially be blocked if a court were to find that Hilton was reporting news (which the public has a right to know), rather than trading on her right of publicity.³¹⁴

³¹⁰ See *supra* note 173.

³¹¹ See Posting of Castina to PopCrunch, *DJ Samantha Ronson Files \$20 Million [sic] Libel Suit Against Perez Hilton and Celebrity Babylon*, <http://www.popcrunch.com/dj-samantha-ronson-files-20-million-libel-suit-against-perez-hilton-and-celebrity-babylon/> (July 15, 2007).

³¹² *Id.*

³¹³ Posting of Castina to PopCrunch, *Samantha Ronson Perez Hilton Defamation Lawsuit Goes to Court*, <http://www.popcrunch.com/samantha-ronson-perez-hilton-defamation-lawsuit-goes-to-court/> (Oct. 11, 2007) (quoting Hilton's lawyer stating that his client "believes that the First Amendment protects him").

³¹⁴ Although the unreported case allegedly came out in Hilton's favor, Ronson's legal troubles were far from behind her. Her own lawyers filed suit against her after she failed to pay their fees; she countersued, claiming she was overcharged and misinformed. See Posting of Nyzombie to The Insider, *DJ Sam Ronson Suing Her Former Attorneys*,

Although no claims concerning a celebrity's right to publicity against an online publication have been reported yet, the growing popularity of internet gossip will create more opportunities for lawsuits to arise.

III. THE NEED FOR A LESS RESTRICTIVE FEDERAL RIGHT

The final Part of this Note advocates the adoption of a federal statute incorporating various states' approaches to the right of publicity. It also emphasizes the history of federalization of intellectual property rights as a basis for federalizing the right of publicity. This Part then suggests a potential structure for the federal statute, including an expansive newsworthiness exception to protect First Amendment concerns and finds that an appropriate federal statute should acknowledge the privacy aspects that have underscored the right of publicity throughout its history—expectations which are now being eroded by the sales of baby pictures.

A. *Uniformity by Federal Statute*

A federal statute should be established for the right of publicity to clarify inconsistencies between states, to bring a right of publicity to states that do not yet recognize the right,³¹⁵ and to acknowledge the changing mores of society.

First, the common law of most states no longer adequately recognizes the interests at stake in the face of new technology and aggressive public interest in the lives of celebrities. In recognizing the right of publicity for the first time, courts have found that “the absence of precedent is a feeble argument” because “[t]he common law system would have withered centuries ago had it lacked the ability to expand and adapt to the social, economic, and political changes inherent in a vibrant human society.”³¹⁶ Eliminating the right of publicity entirely would indeed protect First Amendment

http://www.theinsider.com/news/857258_DJ_Sam_Ronson_Suing_Her_Former_Attorneys (May 2, 2008).

³¹⁵ See discussion *supra* Part I.A.

³¹⁶ *Ferguson v. Hawaiian Ocean View Estates, Inc.*, 441 P.2d 141, 143 (Haw. 1968); see also *supra* text accompanying notes 57–58.

concerns,³¹⁷ but it would entirely ignore the legal development of the right of publicity, which protects important interests not adequately recognized under privacy law.

Second, a federal right of publicity would allow for more uniform results among and within states and would allow a celebrity to assert his or her rights in any jurisdiction. The current differences between states are particularly notable in the newsworthiness exception. Both California and New York have found that the underlying misrepresentation in a publication can completely remove its newsworthiness protections.³¹⁸ However, neither state has consistently applied the newsworthiness exception or explicitly stated what types of “news” are not protected, other than those that are outright (and knowingly) false.³¹⁹ A federal statute would provide a clear framework to distinguish the newsworthiness exception and acknowledge its roots in the First Amendment as well as in defamation law.

B. Federalization of Other IP Rights

A federal right of publicity would acknowledge its core difference from the right to privacy accepted by most states, by recognizing publicity as a type of self-generated property, with pecuniary value.³²⁰ Most other intellectual property rights are federalized, as seen in the examples of copyright and patent, which started out federalized, and trademarks, which required federalization after enforcement became difficult between different jurisdictions and detracted from its core goals.³²¹ The right of publicity has outgrown its common law roots, and courts resort to other doctrines, such as privacy law, to cover its aspects.³²² Other intellectual property rights were federalized for the same reasons: inconsistent results across the country and the necessity for a creator or owner of intellectual property to protect his or her rights

³¹⁷ See *supra* notes 268–70 and accompanying text.

³¹⁸ See *supra* Part II.A.4.

³¹⁹ See *supra* Part II.A.4.

³²⁰ See *supra* note 87 and accompanying text.

³²¹ See *supra* Part I.A.2.

³²² See *supra* Part I.A.1.a.

on a nationwide scale.³²³ In this respect, the right of publicity reflects the development of trademark law, more than the straightforward history of copyrights or patents.³²⁴ Like trademarks, which courts first addressed through the tort of unfair competition,³²⁵ the right of publicity has outgrown the stop-gap measures found in tort law and requires a uniform federal statute. Careful drafting will also prevent the statute from encroaching on the domain of other intellectual property rights and prevent courts from overriding or ignoring these rights in favor of analyzing the nebulous right of publicity.³²⁶

C. Proposition for a Federal Statute

1. Wording

Both statutes studied in this Note, those of New York and California, form a good foundation for crafting the language of a federal statute.³²⁷ A federal statute should contain language similar to these statutes, but should omit or modify the language that has tripped up many a court—for example, the ambiguous “portrait” in the New York statute.³²⁸ The federal statute should include specific terms, such as California’s inclusion of “name, voice, signature, [and] photograph.”³²⁹ However, the broad category of “image” or “likeness” or “photograph,”³³⁰ enclosed as a catch-all in many state statutes, must be addressed somehow in the federal statute. It is difficult to choose a word with such nuanced meaning that it can be interpreted the same way universally but still include the broad and bizarre reaches of the tabloids, such as a nude sketch³³¹ or a cartoon M&M.³³² “Image” is the broadest but most

³²³ See, e.g., Trade-Mark Cases, 100 U.S. 82 (1879).

³²⁴ Compare *supra* Part I.A.2.a., with Part I.B.

³²⁵ See *supra* note 75 and accompanying text.

³²⁶ See *supra* notes 256–66 and accompanying text.

³²⁷ See *supra* Part I.B.3.

³²⁸ See *supra* note 156 and accompanying text.

³²⁹ CAL. CIV. CODE § 3344 (West 2010).

³³⁰ See generally *id.*; KY. REV. STAT. ANN. § 391.170 (West 2006); N.Y. CIV. RIGHTS LAWS §§ 50–51 (McKinney 2009); TENN. CODE ANN. § 47-25-1101 (West 2001).

³³¹ See, e.g., *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

helpful and could be contained from spiraling to encompass too much by a descriptive appendix or legislative history to the statute.³³³

A federal statute might read as follows: Any person or organization who knowingly uses another's name, voice, signature, photograph, or image, for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, shall be liable for any damages sustained by the person injured as a result thereof or must disgorge any profits unfairly obtained from the misuse.³³⁴

2. Inclusion of Newsworthiness Exception

The newsworthiness exception should be included and acknowledged at the federal level through statutory codification, as it is in California.³³⁵ This would recognize the nationwide reach of most publications, especially the rising influence of the internet and its ever-expanding list of gossip websites.³³⁶ Moreover, it would protect First Amendment concerns and give freedom, but not free reign, to the press. The newsworthiness exception at the federal level should acknowledge several exceptions of its own. First, it should incorporate New York's reasonable relation requirement.³³⁷ Pictures of celebrities arguably are the selling point for most celebrity publications, and it would seem incongruous to let these publications skirt a violation of the right of publicity by using, for example, a cover picture of Brad Pitt and

³³² See *Burck v. Mars, Inc.*, No. 08 Civ. 1330, 2008 U.S. Dist. LEXIS 47861 (S.D.N.Y. June 23, 2008).

³³³ Judge Kozinski of the Ninth Circuit would not agree with extending a right of control over images that evoke a celebrity's identity. See *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512, 1518–19 (9th Cir. 1993) (Kozinski, J., dissenting).

³³⁴ This language is based on both the New York and California Statutes. See CAL. CIV. CODE § 3344; N.Y. CIV. RIGHTS LAW §§ 50–51. For the sake of clarity, certain phrases have been excerpted from this example—the federal statute would, of course, need to address minors' ability to give consent, how damages would be calculated, whether the right of publicity applies to products (such as commemorative plates), etc., as has been done at the state level. It also would likely include more broad language (e.g., "person or persons," etc.).

³³⁵ See *supra* Part I.B.3.a.

³³⁶ See *supra* note 173 and accompanying text.

³³⁷ See *supra* Part I.B.3.b.

Angelina Jolie to publicize an article inside the magazine that was about trout-fishing. Second, it is not necessary to acknowledge a knowing falsehood or actual malice standard.³³⁸ This suggestion comes not from a feeling of schadenfreude at the misfortune that befalls a celebrity who sees herself vilified on a tabloid cover story,³³⁹ but because defamation and libel laws are already well-established and are better suited for addressing these claims.³⁴⁰ Recourse for hurt feelings and damaged reputations should be recovered via these pathways, not through claims brought under the right of publicity, which should focus instead on the property right aspects.³⁴¹

D. Gossip as a Protectable Interest

The reasoning of Brandeis and Warren is outdated in the context of publicity rights.³⁴² Protection of gossip, no matter how tenuous the “news” it reports, should still be protected by the First Amendment because “[t]he compass of the First Amendment covers a vast spectrum of tastes, views, ideas and expressions.”³⁴³ It is of little doubt to most courts that the ins and outs of celebrities’ daily lives, no matter how mundane pictures of stars acting “just like us” may seem, are of public interest. As Judge Valente of the New York Supreme Court Appellate Division reluctantly admitted, “We cannot undertake to pass judgment on those reading tastes.”³⁴⁴ Courts—and, by turn, the legislature—should not restrict the rights of the press simply because the news reported is sensational and concerns an individual.³⁴⁵ Hence, the

³³⁸ See *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1089 (9th Cir. 2002) (“Even though the [newsworthiness] exceptions are to be broadly construed, the newsworthiness privileges do not apply where a defendant uses a plaintiff’s name and likeness in a knowingly false manner to increase sales of the publication.”).

³³⁹ See *supra* note 174 and accompanying text.

³⁴⁰ Nonetheless, due to the almost universal inclusion of this exception at the state level, it would be somewhat difficult to eliminate it from the federal level, particularly if the point of the statute is to clarify the limits of the right of publicity, not to obfuscate them.

³⁴¹ See *supra* Part I.A.2.

³⁴² See *supra* notes 295–98 and accompanying text.

³⁴³ *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 138 (2d Cir. 1984) (citing *Pring v. Penthouse Int’l, Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982)).

³⁴⁴ *Goelet v. Confidential, Inc.*, 171 N.Y.S.2d 223, 223 (N.Y. App. Div. 1958).

³⁴⁵ See, e.g., *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940).

newsworthiness exception to the right of publicity allows courts to balance the privacy interests of such an individual with the public interest to be informed, whether by *The New York Times* or by *Us Weekly*.³⁴⁶ While placing the burden on the target of the publication to prove falsity could encourage the proliferation of untrue articles in certain publications that are unconcerned with their reputation (i.e., tabloids), it is no different than the expectations of privacy or defamation law.³⁴⁷

E. What Is Newsworthy Now?

For all its growth, the right of publicity cannot and should not ignore its roots in privacy law.³⁴⁸ The newsworthiness exception incorporates these privacy concerns while recognizing First Amendment limitations—celebrities have the ability to make something newsworthy or not by their actions. It is unreasonable to expect perfect privacy when one willingly invites a magazine into one's home (e.g., to take the baby pictures exclusively promised to the magazine).³⁴⁹ Is it reasonable for a celebrity to collect millions of dollars for the exclusive rights to pictures of her baby along with an approved, positive story about the family, and then sue a publication for a negative story that casts her in an unfavorable light, expecting privacy during her sweaty gym workout or rekindled romance with a married coworker? This author argues that this would be an unreasonable result, both because it goes against the notions of privacy grounded in Prosser's four torts,³⁵⁰ and also because it encroaches too greatly on the First Amendment. It is unfair to attempt to manipulate the media into posting only favorable stories (no celebrity has seemingly ever sued on a story that cast a glowing light on their actions). By recognizing a newsworthiness exception in a federal statute, courts would have the liberty to analyze the privacy implications of celebrities' actions and consider just how private a

³⁴⁶ See *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1089 (9th Cir. 2002), for a discussion of the newsworthiness exception.

³⁴⁷ See *supra* note 303 and accompanying text.

³⁴⁸ See *supra* Part I.A.1.

³⁴⁹ See *supra* Part II.C.1.

³⁵⁰ See *supra* text accompanying note 53.

celebrity's life can be when that life is featured on glossy cover pages brokered by the celebrity herself. At the same time, these courts would be able to acknowledge the property underpinnings of the right by recognizing situations in which the economic interests of the celebrity are violated by "free-riding" publications. In a sense, an expanded federal right of publicity with this emphasis would force celebrities to choose where to reap the benefits of their celebrity: either through selling stories and pictorials to magazines, thereby reducing their privacy expectations, or by preserving their privacy and collecting damages through suits against magazines that exploited their right of publicity.

Even under this type of statutory scheme, however, federal courts might be without guidance in certain circumstances. Consider the celebrity family who recently profited from sales of photographs of their newborn to a popular glossy tabloid. The same magazine later publishes unflattering pictures of the celebrity family without their permission. If these pictures were used in an advertisement card for the magazine, this would certainly constitute a violation of the proposed federal statute of the right of publicity; this is because the pictures themselves, in conjunction with the advertising card, are not "news." But what if these pictures were instead used as a part of a cover story for the magazine's next issue? The court would have the opportunity to consider the "newsworthiness" of the story—not whether the story had merit or was more than mere gossip, because gossip can constitute news, but whether the story was more than an attempt to trade on the "value" of the family. Suffice it to say, there is no statutory scheme that can completely assuage the tense relationship between tabloids and the celebrities they cover; under any language, courts would still occasionally be plagued by cases such as the ones examined in this Note.

Clearly, even a federal statute would often require case-by-case analyses to distinguish legitimate uses from non-legitimate ones. However, a uniform statute would encourage similar results in each jurisdiction, following the same statutory language and the same body of case law.

CONCLUSION

The right of publicity can represent the delicate balance between a humdrum public in line at the supermarket, gawking at the latest tabloid headlines, and the seemingly fascinating celebrities who stroll Robertson Boulevard, a long line of paparazzi in tow. The right of publicity must acknowledge its roots in privacy and the rights of the celebrities by whom we are so fascinated, but at the same time, recognize the property aspects that make the right of publicity so valuable and worth protecting in the first place. The right of publicity has strange bedfellows for an area of the law, from *The National Enquirer* to *Playgirl* to *Hustler*, but its lurid appearances should not detract from its worth. Gossip too has a place under the sheltering umbrella of the First Amendment. A federalized right of publicity is necessary to acknowledge changing times, changing attitudes, and changing expectations of privacy.