$450 million – a rate of 1.5% – over the past twenty years.\textsuperscript{88} Other musical acts, such as U2, have made similar arrangements, as have entertainment entities, such as the Elvis Presley estate and CKX Inc., the entertainment company that owns a portion of “American Idol.”\textsuperscript{99}

By establishing holding companies to take advantages of the tax shelters available in the Netherlands, these entertainers have mimicked the practices of major multinational corporations, such as Coca-Cola, Nike, and Ikea.\textsuperscript{99} Two incentives that parties considering the Netherlands as a tax shelter find appealing are the Dutch Finance Ministry’s willingness to issue advance rulings that approve tax shelters and the speed with which such rulings are executed.\textsuperscript{99}

Currently, there are almost 20,000 “mailbox companies,” in the Netherlands.\textsuperscript{99} The term “mailbox company” refers to corporate shells established by foreign individuals and other entities to avoid taxation on royalties, dividends, and interest payments.\textsuperscript{95} Stichting Onderzoek Multinationale Corporations (SOMO), the Center for Research on Multinational Corporations, estimates that 1,165 companies worldwide use Dutch tax shelters to reduce or eliminate taxes stemming from royalties and patents.\textsuperscript{95} In addition, SOMO has voiced concern that the number of “mailbox companies” in the Netherlands will continue to increase in the future.\textsuperscript{99}

VI. CONCLUSION

As the above discussion demonstrates, the United States tax implications for non-resident musical acts that generate income in the United States can be multifaceted. This note, however, does not aim to provide a comprehensive list of tax issues that may be applicable non-resident musicians. The circumstances of individual non-resident musical acts may differ, but those with dreams of “conquering” the United States, like many of their predecessors, should familiarize themselves with the consequences of generating income in the United States to avoid unexpected tax obligations.

\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{95} Id.
had publicly vowed never to pay. 10

The *If I Did It, This Is How It Happened* drama marked Simpson's return to the front pages for the first time since his highly-publicized murder trial. What those front page stories generally failed to mention was that this drama would have been impossible had Simpson not emerged victorious from yet another courtroom just a few days before the announcement of his book deal. 11 Had Simpson lost that courtroom battle, he would not only have been prevented from profiting from his book, but would also have potentially had to give the right to use his fame (or notoriety) to promote future profitable ventures to those who harbor the most ill will towards him.12

On September 5, 2006, Frederic Goldman, the late Ronald Goldman's father and the co-beneficiary of the purportedly unpaid civil judgment against O.J. Simpson, filed a motion in the Los Angeles Superior Court requesting that the court assign and transfer Simpson's right of publicity to Frederic Goldman to satisfy the unpaid civil judgment that Simpson owed Goldman.13 This marked the first attempt ever made to have a court assign a person's right of publicity in satisfaction of a judgment. 14 It was a calculated gamble: over the past few decades, responding to pressure from celebrities seeking to protect their sources of income, courts and legislatures throughout the country declared that the right to profit from one's publicity was a transferable, inheritable property right. 15 As some noted scholars have argued,

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10 O.J. Simpson Makes Rare Public Appearance, MSNBC.COM, Oct. 1, 2005, http://www.msnbc.com/id/9546656/. In the meantime, Simpson has been living on a $1.1 million football pension in a mansion in Florida, neither of which the pension nor the mansion is reachable by the courts. See Rofy, 103 Cal. Rptr. 2d at 520.

11 I refer specifically to the California Superior Court of West L.A. County. Goldman v. Simpson, No. SC056940 (Cal. Super. Ct. W. L.A. Cty. Oct. 31, 2000). See generally Rofy, 103 Cal. Rptr. 2d at 520 (suggesting that the California Superior Court of West L.A. County would be the appropriate venue where the case would be settled and vowing to pursue Simpson to his grave).

12 To the Goldman family, that is. Fred Goldman, Ronald Goldman's father and the executor of his estate, vowed to pursue Simpson to his grave. See Goldman v. Simpson, 115 L.A. L.B. J. 1143, 1144 (2002). In the meantime, however, Simpson has been living off a $1.1 million fortune, which he has been able to accumulate from his book sales, a calculated gamble: over the past few years, he has been able to attract numerous television opportunities, including talk shows, an autobiography, a reality show, and a video game. See id.

13 Plaintiff's Motion for Transfer and Assignment of Right of Publicity, 115 L.A. L.B. J. 1143 at 1144 (2002). Goldman v. Simpson, 115 L.A. L.B. J. 1143, 1144 (2002). In the meantime, however, Simpson has been living off a $1.1 million fortune, which he has been able to accumulate from his book sales, a calculated gamble: over the past few years, he has been able to attract numerous television opportunities, including talk shows, an autobiography, a reality show, and a video game. See id.


15 The gold standard for the use of publicity rights in entertainment contracts is the Goldsmith v. campus Sports, Inc. decision in California, in which the California Court of Appeal held that the exclusive right to distribute film rights to an athlete was a personal property right, not a publicity right. Goldsmith v. Campus Sports, Inc., 1 Cal. 3d 848, 856 (1970).
there seemed to be little reason why this property, just like any other, should not be reachable by one’s creditors. Goldman, relying on this line of legislation, case law, and commentary, argued that Simpson held a very valuable piece of property that could—and should—be used to satisfy his debt.

On October 31, 2006, Superior Court Judge Linda K. Lefkowitz denied the motion to transfer Simpson’s right of publicity, relying on a 27-year-old California Supreme Court decision that had arguably since been overruled by legislation, as well as common business practices. Judge Lefkowitz’s decision, which she acknowledged would “undoubtedly be subject to perceptions of equity that appeal to the contrary outcome,” was a seeming backlash to a national trend towards celebrity commodification. Though she could have denied the motion on narrower grounds, Judge Lefkowitz made a sweeping decision that ties the right of publicity back to its roots in the dignitary right of privacy.

Judge Lefkowitz’s decision is actually in line with what courts had already been doing—regardless of whether they called what they were protecting the “right of privacy,” the “right of publicity,” or something entirely different, courts have been recognizing and protecting not one but two important and coexisting interests held by celebrities: a proprietary right to the fruits of their labor, and a dignitary right to control the association of their image with commercial ventures. However, what Judge Lefkowitz failed to realize, and what this Note argues, is that these two interests may be, and— for the sake of both equity and order— should be, severed into two separate rights: an inalienable personal right, unreachable by a civil court, and a transferrable property right that may be attached to satisfy a money judgment. By doing so, Judge Lefkowitz could have provided Goldman with some relief, while protecting every dignitary right to which Simpson remained entitled.

In this Note, I argue for the recognition of two separate rights: an assignable proprietary right to publicity profits and a personal dignitary right to publicity control. I contend that such a division is both conceptually sound and would best balance the rights and interests of the celebrity and the celebrity’s creditors.

Section I of this Note provides an overview of the evolution of the publicity right as a quasi-property right. It examines its development both in the courtrooms and in the academic arena and demonstrates that, from its inception, the label “right of publicity” has been applied to describe two different rights, each having different characteristics and protecting different interests.

Section II discusses the Goldman v. Simpson right of publicity case. This section will describe and summarize the case’s procedural history, the relevant California law, Goldman’s argument, and the court’s holding and reasoning.

Section III analyzes the Goldman v. Simpson decision, arguing that Judge Lefkowitz was correct in viewing the right of publicity as a right that protected both proprietary and dignitary interests, but that she was mistaken in using this as a reason to deny Goldman any relief. This section further argues that it is entirely possible to separate the proprietary right to publicity profits from the personal right to control commercial uses of one’s publicity, giving the celebrity’s creditors relief by assigning the former to them, while still protecting a celebrity’s rights in the latter.

I. A PICTURE IS WORTH A THOUSAND DOLLARS: THE CONVOLUTED DEVELOPMENT OF THE RIGHT OF PUBLICITY

This much can be stated with a fair amount of certainty: the right of publicity is “the inherent right of every human being to control the commercial use of his or her identity.” Most

17 Goldman v. Simpson, supra note 21, § 1.3 ("The 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 their image.")
states recognize the right, and consider it to be in the nature of property.\textsuperscript{27} This is where things become vague: though the right is recognized throughout most of the U.S., few courts have actually analyzed what the right actually encompasses, what the fact that it is "in the nature of property" means, and how it interacts with the possessor's dignitary rights, most notably, the right of privacy.\textsuperscript{28} J. Thomas McCarthy, author of an authoritative treatise on the right of publicity, was so frustrated by the difficulties inherent in trying to fit the right's protections into one of the traditional "privacy" and "property" pigeonholes that he suggested that a "legal死角" should have decreed a new label altogether.\textsuperscript{29} Treatises such as McCarthy's should be consulted for a true understanding of the right's convoluted past, the policy reasons behind it, and the current state of national law.\textsuperscript{30} Nevertheless, a short overview is appropriate to understand how the same right could be protected by courts and legislatures throughout the country for fifty years, without any kind of consensus about what the right truly protects.

A. Warren and Brandeis's Right of Privacy: A Personal Right of Publicity

Courts and scholars first recognized a right to control one's publicity when they adopted the right to privacy advocated by Justices Samuel D. Warren and Louis D. Brandeis in their influential 1890 article.\textsuperscript{31} Specifically, they advocated the right to be free from the indignity and mental damage caused by widespread dissemination of one's identity for profit.\textsuperscript{32} Georgia became the first state to incorporate the right into its common law in 1905, in the case of Pavesich v. New England Life Insurance Co.\textsuperscript{33} The case involved a man whose picture, accompanied by a fictional testimonial, was used in an advertisement for a life insurance company.\textsuperscript{34} The man claimed that the advertisement made him the butt of his friend's jokes.\textsuperscript{35} The court declared that it recognized a right to privacy and "that the publication of one's identity and persona in court damages and the commercial value of an unpermitted taking."\textsuperscript{36}

\begin{itemize}
\item \textsuperscript{27} "All the time of this writing, under either statute or common law, the right of publicity is recognized as the law of twenty-eight states. ... In only two states has a court expressly rejected the concept and held that a common law right of publicity does not exist in that state."
\item \textsuperscript{28} See 1 MCCARTHY § 1:7 (stating that "many judges and lawyers today are perplexed as to exactly what the 'right of publicity' is and how it is different from 'privacy'.")
\item \textsuperscript{29} Id. § 1:6.
\item \textsuperscript{30} See id.
\item \textsuperscript{31} See Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890).
\item \textsuperscript{32} Id. See 1 MCCARTHY, supra note 21, § 1:7; Weiler, supra note 15, at 227.
\item \textsuperscript{33} 50 S.E. 68 (Ga. 1905).
\item \textsuperscript{34} See id. at 81.
\item \textsuperscript{35} See id.
\item \textsuperscript{36} See id.
\end{itemize}
celebrities could assign or license their right of publicity to others; as a personal right, such a right was considered inalienable.77 As celebrity endorsements became a popular trend in the 1930s and 1940s, courts increasingly faced the need to either protect or delegitimize an increasingly common social reality that treated publicity as a transferrable, marketable asset.49

B. Haelan: First Judicial Recognition of an Assignable Right

In the landmark case, Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., the Second Circuit coined the term "right of publicity" and became the first court in the country to declare that a person's publicity was a negotiable commodity, alienable by assignment or license.45 Haelan Laboratories, Inc., a baseball trading card manufacturer, made an exclusive contract with a number of professional baseball players to use the players' photographs on its cards.50 When Topps Chewing Gum, Inc., a rival baseball card manufacturer, started using those same players' images on its own cards, Haelan sued the rival company.51 In response, Topps claimed that, since the right to publicity was part of the right to privacy, it was an inalienable personal right, which the players could not transfer in the first place; they could, at most, contract to waive their right to sue for invasion of privacy.52

The Second Circuit rejected Topps' reasoning and held that the right to publicity existed as a right separate from and independent of the traditional right of privacy.53 Judge Frank, writing for the majority, reasoned that

in addition to and independent of [a] right of privacy . . . a man has a right in the publicity value of his photograph, i.e., his right to prevent the exclusive privilege to publish his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or anything else.54

Judge Frank's approach was decidedly equitable: he recognized the functional need for such a right, since "many prominent persons[,] . . . far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways."55 However, the judge intentionally stopped short of calling the right that he was creating a "property right," stating that "whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth."56 Judge Frank insisted that the court was merely creating an assignable right, not one necessarily imbued with the characteristics and derivatives of a property right, whatever those characteristics may have been.57 Thus, Haelan marked the first judicial recognition of something that had become, by that point, a prevalent practice in the entertainment industry: the entitlement of public figures to assign and transfer the right to use their personal image and likeness.58

C. Post-Haelan: Privacy versus Property

Apparently, the few courts that addressed the issue in Haelan's wake were comfortable adopting Judge Frank's functionalist view of the right, since none found it necessary to further define the precise category of law to which it belonged.59

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48 Id.
49 Id. Though, arguably, by declaring that the right is both pecuniary and separate from the celebrity as a person, Judge Frank is in fact declaring it a property right—at least according to the most commonly-used definition of property.
50 In its widest sense, property includes all a person's legal rights, of whatever description. A man's property is all that he has in law. This usage, however, is obsolete at the present day, though it is common enough in the older books.
51 In a second and narrower sense, property includes not all a person's rights, but only his proprietary as opposed to his personal rights. The former constitute his estate or property, while the latter constitute his status or personal condition. In this sense a man's land, chattels, shares, and the like, are property; but not his life or liberty or reputation. . . . In a third application, which is that adopted [here], the term includes not even all proprietary rights, but only those which are both proprietary and in rem. The law of property is the law of proprietary rights in rem, the law of proprietary rights in personam being distinguished from it as the law of obligations. According to this usage a leasehold or leasehold estate in land, or a patent or copyright, is property; but a debt or the benefits of a contract is not . . . Finally, in the narrowest use of the term, it includes nothing more than corporeal property—that is to say, the right of ownership in a material object, or that object itself.
53 See id.; see also Westfall & Landau, supra note 42, at 78-79.
54 See Westfall & Landau, supra note 42, at 78.
55 See id. at 76-80; see, e.g., Miller v. Comm'r, 299 F.2d 706, 709 n.4 (2d Cir. 1962).
56 Holding that a publicity rights license, given by a famous band leader's widow to a movie product company, did not constitute a transfer of a capital asset for income tax purposes.
57 The Alford court noted that Haelan "carefully avoided terming it a 'property right,' no doubt in order to avoid unintended consequences which might flow from such classification." Id. at 709 n.4. Melissa Jacoby and Diane Zimmerman suggest that, in most
However, the academic community, while also quick to adopt the new right, was clearly ill at ease with the right's amorphous status and attempted to categorize the right more precisely. The result was a scholarly battleground, where those who favored the property label clearly outnumbered—if not outmatched—those on the side of preserving the privacy tag.

In an influential 1954 article, Melville Nimmer insisted that the Lockean labor-desert justification for property rights, or the view commonly accepted in Anglo-American society that one should have a property right to the fruits of one's labor, mandated viewing the right of publicity as a property right, with all its inherent traits. Other influential commentators were quick to follow in Nimmer's footsteps. Thus, while courts remained wary of imbuing the right of publicity with more property-based characteristics, commentators were making a powerful push towards acceptance of the right of publicity as an independent and completely intangible property right.

On the other hand, in an article published in 1964, Edward J. Bloustein wrote that

[n]o man wants to be "used" by another against his will, and it is for this reason that commercial use of a personal photograph is obnoxious. Use of a photograph for trade purposes turns a man into a commodity and makes him serve the economic needs and interest of others. In a community at all sensitive to the commercialization of human values, it is degrading to thus make a man part of commerce against his will.


Thus, there is really no "right to publicity"; there is only a right, under some circumstances, to command a commercial price for abandoning privacy.

states, the lack of a specific label is simply the result of sparse case law, stating that "[t]he majority of states simply never had occasion to address the distinction between publicity and privacy rights." Jacoby & Zimmerman, supra note 16, at 1335.

60 See Westfall & Landau, supra note 42, at 80.
61 Id.
63 Harold Gordon, for instance, advocated attaching a property tag to the right as a necessary means of "furnishing a firm basis for distinguishing between claims which have necessary means of furnishing a firm basis for distinguishing between claims which have

64 Westfall & Landau, supra note 42, at 83.

67 Id. at 389. See also Weiler, supra note 15, at 227-228. The other three privacy invasions are invasion upon seclusion, public disclosure of embarrassing private facts, and publicity that places the plaintiff in a false light in the public eye. Id.
68 Prosser, supra note 66, at 406-07.
69 Id. at 406.
70 Westfall & Landau, supra note 42, at 81.
71 RESTATEMENT (SECOND) OF TORTS § 652C (1977) (emphasis added). It is worth noting that William Prosser was Chief Reporter for the Second Restatement. See Westfall & Landau, supra note 42, at 81; McCarthy, supra note 21, § 1:24.
E. Aftermath: A Property-Based Right of Publicity

Living in a world that was exposed daily to such household names as “Elvis” and “Marilyn Monroe” and was growing very aware of the commodification potential of the celebrity, Edward Bloustein’s fear that celebrities were turning from people into products was understandable. At the same time, it was probably also viewed as academic and out of touch with economic realities. More importantly, Bloustein just didn’t have the “star power” that Prosser did. As a result, Bloustein’s concerns were left by the wayside, and the prevailing view was the one advocated by Prosser.

Prosser’s approach centered on replacing the traditional right of privacy that celebrities were deemed to have waived with new legal protection for the publicity they gained in its stead. He viewed their interests as being adequately protected by recognition of the new tort that he labeled “appropriation,” which encompassed both the proprietary and the dignitary interests they required.

What Prosser failed to acknowledge was that a label that encompassed both personal rights and property rights could generate a potential conflict. The rights inherent in an assignable property right may be asserted by someone other than their original owner, and, at times against their original owner. Personal rights, in contrast, cannot be assigned—nor reached by a celebrity’s creditors. Thus, Prosser inadvertently formed a snowball that began rolling with the Second Restatement and finally crashed in Goldman v. Simpson, where his joining of personal and property rights under one label, in an attempt to protect both, instead forced the court to choose one or the other. Most chose the latter. Over the decades that followed Hadian, more than one half of the states, either through their courts or through their legislatures, had adopted a property-based right of publicity.

II. SEEKING SIMPSON’S RIGHT OF PUBLICITY

A. Background—The O.J. Trials

The civil suit against O.J. Simpson was, from its inception, intimately connected to Simpson’s right of publicity. In the 1998 civil verdict, Nicole Brown’s and Ronald Goldman’s families were together awarded $8.5 million in compensatory damages and $25 million in punitive damages. The punitive damages award was reached by estimating the income that Simpson could earn for the rest of his life from his name and likeness. On appeal, the court affirmed the award, noting that Simpson had $41 million in football pension funds that were not reachable, and therefore that the large punitive award would not financially destroy Simpson.

Nine years later, in his motion to assign Simpson’s right of publicity, Goldman asserted that he was still waiting to collect and that the award and the interest owed on it have together ballooned to over $38 million. In the years leading up to the legal action that lies at the heart of this Note, Simpson appeared in a number of public events, signing various sports memorabilia

77 See Part IIIC.
78 See Westfall & Landau, supra note 42, at n.43 (summarizing that if Bloustein “had been a more prominent commentator than Prosser, the propagation of publicity rights might not have occurred”).
80 Referring to Judge Frank’s decision to recognize a proprietary right that a celebrity could capitalize upon by selling licenses, Prosser stated that, while it “is[d] not yet been followed, it would seem clearly to be justified.” Prosser, supra note 66, at 407.
81 In re Frank’s decision to recognize a proprietary right that a celebrity could capitalize upon by selling licenses, Prosser stated that, while it “is[d] not yet been followed, it would seem clearly to be justified.” Prosser, supra note 66, at 407.
82 2 McCarthy § 10:7 (“The courts have uniformly held that the right of publicity is a ‘property’ right.”)
83 Dogan & Lemley, supra note 59, at 1174; see also Westfall & Landau, supra note 42, at 83. Ironically, New York is no longer one of those states. In 1984, New York’s highest court rejected the decision in Hadian and held that the right of publicity is not a separate right but is rather part of the unassignable right of privacy, as defined by New York Civil Rights Law. See Stephan v. News Group Publ., Inc., 474 N.E.2d 580, 584 (1984).
84 Rufo v. Simpson, 108 Cal. Rptr. 2d 495, 523 (Cal. Ct. App. 2001). The plaintiffs presented expert testimony from Mark Roseler, chairman and chief executive officer of a firm that both negotiates contracts that utilize the name or likeness of the personality, running the gamut of ways to exploit them, and protects against misappropriations of the personality’s name and likeness. Id. at 525. Based on an analysis of the potential value of autographs, merchandise or memorabilia, endorsements, media, books and tapes, movies, personal property, Roseler testified that Simpson could expect to earn $2 to $3 million a year, and that “$25 million was a reasonable amount that a reasonable person in Roseler’s business would pay in present dollars for the exclusive right to use Simpson’s name and likeness for the rest of Simpson’s life.” Id.
85 Id. at 529.
86 Id. at 529.
88 Motion for Transfer and Assignment of Right of Publicity, supra note 13, at 4.
that were subsequently sold for hundreds of dollars.\textsuperscript{56} He also appeared in a short-lived reality show, "Juiced," where he played pranks on unsuspecting victims, sometimes using items similar to the ones associated with Nicole Brown Simpson and Ron Goldman's murder as props.\textsuperscript{57} Since 2001, Simpson has allowed over seventy hours of candid footage of him to be taken.\textsuperscript{58} The producer of the footage released a three-minute segment of it on video-on-demand services to distribute the footage,\textsuperscript{59} Simpson publicly claimed that he had not received, had no intention of receiving, any compensation for any of these appearances and uses of his publicity.\textsuperscript{60} Finally, it appears that the advance for Simpson's cancelled book agreement with HarperCollins, which Goldman claimed was worth approximately $1 million, was allegedly paid to a shelf company established in Florida expressly in order to avoid Simpson's judgment creditors' reach.\textsuperscript{61}

Frederic Goldman's motion to attach and assign O.J. Simpson's right of publicity asked the court to view Simpson's right to money from these ventures as a reachable asset in and of itself.\textsuperscript{62} On September 5, 2006, Goldman filed a motion in the Superior Court of California, Los Angeles County, requesting that the court order the transfer and assignment of Simpson's right of publicity to Goldman in satisfaction of the nine-year-old judgment against him.\textsuperscript{63} Citing various authorized and unauthorized uses of Simpson's publicity,\textsuperscript{64} Goldman argued that Simpson was "intentionally evading his obligation to pay the judgment" by "exploiting his right of publicity and then directing the proceeds out of the hands of his judgment debtors."\textsuperscript{65} He asserted that this was the only way in which Simpson could be compelled to satisfy the wrongful death judgment rendered against him.\textsuperscript{66}

B. The Right of Publicity in California

From the first day that the right of publicity was enshrined in the California common law, it was unclear what it actually protected. California courts first recognized the right to protect commercial exploitation of one's own identity in 1974 in the case of Motschenbacher v. R.J. Reynolds Tobacco Co.\textsuperscript{67} Holding that a racecar driver could seek injunctive relief and damages from the unauthorized use of his distinctive car's image in a tobacco advertisement, the court parroted Haelen and stated that it need not decide whether it would do so "under the rubric of 'privacy,' 'property,' or 'publicity,'" but merely that it would "recognize such an interest and protect it."\textsuperscript{68}

The California legislature declared the right statutory in 1972, when it enacted California Civil Code section 3344, which provided at the time that

\[\text{[any person who knowingly uses another's name, photograph, or likeness, in any manner, for purposes of advertising products, merchandise, goods, or services, or for purposes of solicitation of purchases of products . . . without such person's prior consent . . . shall be liable for any damages sustained by the person . . . injured as a result thereof.]}\textsuperscript{69}

In Eastwood v. Superior Court, the court stated that the statutory right complemented, rather than codified, the privacy-derived common law right of appropriation of name or likeness.\textsuperscript{70} The court enumerated the four elements required to bring a common law cause of action for appropriation of name or likeness: "(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."\textsuperscript{71}

In 1979, in the landmark case of Lugosi v. Universal Pictures,\textsuperscript{72} the California Supreme Court first tried to answer the question of
whether a public figure’s estate had standing to assert rights to the
decedent’s public image in light of a statute that gave it property-
like protection during the celebrity’s lifetime. In light of the
right of publicity’s evolution and California’s very pro-celebrity
bend, the court’s answer probably came as quite a surprise.

Lugosi involved Universal Pictures’ licensing of Bela Lugosi’s
image in his famous 1930’s role as Count Dracula for use on
various products, including T-shirts, cards, games, and bar
accessories, beginning approximately four years after the actor’s
death. The actor had never approved the use of his likeness on
the merchandise during his lifetime, nor had such use been made
then. His widow and surviving son brought suit, claiming that
Universal had exploited a property right that belonged to the
Lugosi estate and seeking injunctive relief and recovery of
profits.

The trial court approached the issue in the same way that
most courts in the country did, by first asking whether the right
was an element of the privacy right (making it personal to its
now deceased—subject) or an independent property right. Finding
that it was the latter, the court saw no problem in holding
that it was an inheritable part of a celebrity’s estate. The trial
court reasoned that, since the right of publicity had sufficient
pecuniary value to serve as consideration for a contract, it must
by extension have sufficient standing and value that the concept of a
descendible property right may be bestowed upon it.

The California Supreme Court disagreed. This court first
determined that the statutory right was merely a complement to the
common law right and did not by its terms extend past the
celebrity’s death. It then determined that, as far as the common
law right was concerned, the trial court was asking—and
answering—the wrong question. The California Supreme
Court stated that asking whether the common law right was in the

104 In 1971, California enacted Civil Code section 3444, a statutory right of publicity
authorizing recovery of damages by any living person whose name, photograph, or
likeness has been used for commercial purposes without his or her consent. See id.

1972).


108 Id. at 544.

109 Id. at 552.

110 Id.

111 See Lugosi, 603 P.2d at 428 (1979).

112 Id. ("The trial court found, and the parties have extensively briefed and argued, that
the interest in question is one of ‘property’ . . . . We agree, however, with Dean Proser
who considers a dispute over this question ‘pointless’.

nature of property or privacy was irrelevant, and that the
important question was instead whether, from an equitable
perspective, the assertion of the right should be solely in the
hands of the person to whom it was tied. The court then
answered that it should, and determined that, absent an
affirmative decision by a celebrity to exploit his likeness for
commercial purposes during his lifetime, the right would not
survive past his death.

The California Supreme Court emphasized that the problem
with placing the right as a whole under the rubric of property was
one of line-drawing. Though this appellate court accepted that
"[t]he tie-up of one’s name, face and/or likeness with a business,
product or service creates a tangible and saleable product," the
court also stated that it did not seem logical "that because
one’s immediate ancestor did not exploit the flood of publicity . . .
that he received in his lifetime for commercial purposes, the
opportunity to have done so is property which descends to his
heirs." Furthermore, the court refused to dive into the legal
thicket of questions that would have resulted from such a decision:
for instance, if the heirs did not exploit the right, could their heirs,
as well as the heirs immediately following, do so? If a line were
to be drawn, the court said, it would be up to the legislature to
draw it. Until the legislature decides otherwise, the court held,
the right to one’s name and likeness, being “a personal one,”
became public domain at the person’s death if it was not exploited
during the person’s lifetime.

In 1985, in Lugosi’s wake, the California legislature inserted
several amendments into California Civil Code section 3444. The
most important among them, in the context of the
characterization of the privacy right, was the explicit recognition
of a plaintiff’s right to recover lost profits. The identification of
a pecuniary right removed the ambiguity surrounding the statute,
making it clearer that the legislature was aiming at protecting
commercial, and not dignitary, interests. The legislature also

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144 See id. at 431 ("Wether or not the right sounds in tort or property, . . . . what is at
stake is the question whether this right is or ought to be personal.").

145 Id. at 431.

146 Id. at 430.

147 Id. at 428.

148 Id. at 428 (emphasis added).

149 See id. at 430.

150 See id.

151 Id. at 430.

152 See id. at 431.

153 See J. McCARTHY, supra note 21, § 6:23.

154 See id.
enacted California Civil Code section 990(h), allowing a celebrity’s heirs to assert rights nearly identical to those assertable by the living celebrity under section 3344 for fifty years following the celebrity’s death. In 2000, the statute—renumbered section 3344.1—was amended to extend the moratorium period to seventy years.

In the last California Supreme Court case to deal with the right of publicity, Comedy III Productions v. Sadlerup, the court recognized that its decision in Lugosi was at odds with its subsequently-enacted legislation and attempted to resolve the conflict. Comedy III Productions involved an attempt by the assignee of the Three Stooges trio’s publicity rights to bar the unauthorized use of their likeness and image on T-shirts and posters. The appellate court, affirming the trial court’s award of damages, articulated its view of the right of publicity as being “both a statutory and a common law right.” The court declared that the post-mortem right of publicity statute seeks “to secure and protect a declared interest in property” and “resembles the nation’s copyright, patent, trademark and tradename laws.” At the same time, the court took pains to explain that both the original statutory right of publicity under section 3344 and the post-mortem statutory right, enacted post-Lugosi, complemented—rather than replaced—the common law right, which was derived from the right of privacy.

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Frederic Goldman based his claim against O.J. Simpson on the argument that the right of publicity qua privacy and the right of publicity qua property should be, and have been, interpreted as two distinct and inversely proportional rights: “[t]he more famous (or infamous) a person may be, the less private that person can claim to be.” Thus, he reasoned, a private person suffering no monetary harm would be limited to action under the appropriation tort—Prosper’s “fourth prong” — while a celebrity who had waived his or her privacy would be limited to the right of publicity tort. The latter, he contended, far from being a part of the person, is “merely the ability to commercially exploit who the person is.” Thus, Goldman argued, the assignment that he requested did not implicate Simpson’s personal rights.

Furthermore, Goldman insisted that such an assignment did not mean that he could force Simpson to perform any acts against his will since the right of publicity, he claimed, stands apart from any performance obligation and can be exploited with or without Simpson’s consent.

Goldman’s briefs cite numerous California cases stating that the right of publicity is a property right, is in the nature of a property right, and at the very least is a commercial right.

120 See Comedy III, 80 Cal. Rptr. 2d at 471; see also Eastwood v. Super. Ct., 188 Cal. Rptr. 342, 346 (Cal. Ct. App. 1983) (rejecting previous statement that section 3344 “codified” the right of privacy and asserting that “the fourth category of invasion of privacy, namely, appropriation, has been complemented legislatively by Civil Code section 3344”) (quotations omitted, emphasis added).

121 See McCarty, supra note 21, ¶ 8:11.


123 See id. (citing RNB Enters. v. Matthews, 92 Cal. Rptr. 2d 715, 718, n.6 (Cal. Ct. App. 2000)).


125 See id. at 10.
after the numerous third-parties currently using Simpson's name and likeness. If Simpson were truly not benefiting from those uses, Goldman reasoned, then he would be losing nothing; however, if he were benefiting surreptitiously, then the money would belong to Goldman anyway.

In order to demonstrate that the court had the power to assign the privacy right, Goldman analogized this right to other forms of intellectual property rights that are assignable under California law. Goldman first interpreted Comedy III Products to signify that California reframed the common law right of publicity as a form of intellectual property. He then argued that California courts already recognize their ability to act equitably by compelling the assignment of a debtor's rights to other forms of intellectual property in satisfaction of a judgment and reasoned that it followed that "[f]inding that the right of publicity is 'property of the judgment debtor' subject to enforcement is consistent with settled California law." Thus, Goldman argued, California law allows the court to compel O.J. Simpson to assign his right of publicity to satisfy the monetary judgment against him.

Finally, Goldman contended that the public policy favoring the satisfaction of a monetary judgment, particularly in cases involving punitive multi-million dollar judgments against defendants who then intentionally avoided them, outweighed the public policy of allowing people to control what products they chose to associate with. Any concern over dignity harms to a judgment debtor should thus be outweighed by the concern for the creditor who is left out in the cold.

C. The Ruling

On October 31, 2006, Judge Leffkowitz issued a ruling denying Goldman's motion and holding that "neither the law, nor

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109 See id., at 14.
110 See id. at 14.
111 See id. at 14.
112 See id. at 14.
113 See id. at 14.
114 See id.
115 See id.
116 See id.
117 See id.
118 See id.
119 See id.
120 See id.
121 See id.
122 See id.
123 See id.
124 See id.
125 See id.
126 See id.
127 See id.
128 See id.
129 See id.
130 See id.
131 See id.
132 See id.
133 See id.
134 See id.
135 See id.
136 See id.
137 See id.
138 See id.
139 See id.
140 See id.
141 See id.
142 See id.
143 See id.
144 See id.
145 See id.
146 See id.
147 See id.
148 See id.
149 See id.
150 See id.
151 See id.
152 See id.
153 See id.
154 See id.
155 See id.
156 See id.
157 See id.
158 See id.
159 See id.
160 See id.
161 See id.
the limits of this court’s equity jurisdiction, support outright transfer of a judgment debtor’s inter vivos right of publicity. Judge Lefkowitz provided two main reasons for her refusal to transfer Simpson’s right of publicity; her reluctance to search for fashion solutions to deal with — the myriad logistical pitfalls that such an involuntary transfer may entail, and her belief that such a transfer would endanger the privacy that the right protected.

Judge Lefkowitz provided at least one sound reason for rejecting Frederic Goldman’s motion: the novelty of the motion meant that she would have had to invent answers to a host of questions that such a transfer raised, questions that should reasonably be answered by the legislature and not by the courts. In her opinion, Judge Lefkowitz identified a series of such questions, presenting no suggestions as to possible answers and stating simply that “California Enforcement of Judgments Law as currently enacted does not provide a vehicle for the relief requested.” In other words she explicitly left it up to the legislature to answer these questions.

Though Judge Lefkowitz could presumably have rejected Goldman’s motion outright by passing the ball to the legislature, the fact that she did not do so points to the possibility that a celebrity’s right to control his or her own publicity made Judge Lefkowitz ill at ease. Accordingly, the judge proceeded to provide

another reason for her denial, namely that the privacy interests protected by the right — interests that are of “direct constitutional magnitude” under the California constitution — prevented her from considering an involuntary transfer of the right. Citing heavily from the California Supreme Court’s decision in Lugosi, Judge Lefkowitz’s ruling rejected Goldman’s characterization of the right of publicity as a transferrable property right. Denying the relevance of both the “extensive body of extra-jurisdictional case authority and treatises” cited by Goldman and the section 3344.1 post mortem survival statute that superseded Lugosi, she held that the view of the right of publicity as a “personal” right is still the law, as well as the correct view of the right. She stated that

[a]lthough assignable during lifetime, and thus bearing at least one characteristic of a property right, the nature of the publicity right during the lifetime of the celebrity is equally characterized by privacy rights which mitigate against court-enforced transfer of the right to obtain commercial profit from his or her likeness.

Judge Lefkowitz interpreted Lugosi as separating a personal right, which is what a celebrity holds while he or she is still alive, from a property right, which only comes into existence in the hands of a deceased celebrity’s survivors. She distinguished California’s right of privacy from that of other jurisdictions, noting that the articulation of the right in Article I, section 1 of the California constitution is considered “broader and more protective . . . than its federal counterpart.” She reasoned that this purportedly uniquely Californian emphasis on privacy “perhaps explains why there are no California decisions providing for the waiver of all aspects of a celebrity’s life, even in the case of broad public rebuke.”

107 See id. at 7-8.
108 See id. at 13.
109 See id. at 7-9.
110 Id. The judge’s questions included the following:

[S]hould the assignee further assign or undertake a license, or on his own behalf, enter into a business venture involving the commercial use of the celebrity’s name or likeness? Is it necessary for the assignee to protect the interest of the assignor? Is the assignee’s interest protected by the law of privacy?

Even assuming the propriety of appointing a receiver to undertake some or all of these tasks, how does one go about determining whether the right to assign or license the name or likeness is actually held by the assignor or assignee, or is it a question of law rather than fact?

111 Id. at 11.
112 See id. at 13.
113 See id. at 8-9.
114 See id.
115 Id. at 9 (emphasis added).
116 See id.
117 Id. at 11. Article I, section 1 of the California constitution provides, “[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” CAL. CONST. art. I, § 1 (emphasis added). Am. Acad. of Pediatrics v. Lundgren, 940 P.2d 707, 833 (1997), the case cited by Judge Lefkowitz in support of her proposition, states that the difference lies in the fact that, while the Federal constitution has been interpreted to implicitly protect privacy, the California constitution provides it explicitly. She did not, however, explain whether this actually resulted in a quantitative difference from privacy protections in other states.
Rather than issue a narrow ruling, possibly one that would have solely pertained to those debtors who were found liable for punitive damages and who intentionally evaded paying the judgment, Judge Lefkowitz chose to categorically deny the remedy as a matter of law.\(^{170}\) Refusing to create a new remedy where the law did not support it “outright,”\(^{171}\) Judge Lefkowitz held that a celebrity’s right of publicity protected important dignitary interests that would always take precedence over a judgment creditor’s claims, presumably without regard to how the celebrity attained his or her publicity, why the judgment was owed, and whether or not the celebrity acted in good faith in attempting to satisfy the judgment.\(^{172}\)

III. THE RIGHT OF PUBLICITY AS TWO SEPARATE RIGHTS

Despite its birth as an element of the right of privacy, many lower California courts, as well as countless courts throughout the country, have characterized the right of publicity as a property right.\(^{173}\) However, when faced with the prospect that a plaintiff could be deprived of the right, just like of any other form of property, Judge Lefkowitz drew back, holding that the right, nevertheless, protected dignitary rights that the court could not invade to enforce a monetary judgment.\(^{174}\)

Judge Lefkowitz’s conclusion was a reasonable response to decades of mislabeling, and her initial conclusion correct: the right of publicity cannot be viewed as a pure property right. Since its inception, the right has protected important dignitary, personal interests that should not be invaded by a court to satisfy a monetary judgment.\(^{175}\) Further, the questions that Judge Lefkowitz raised to highlight the unresolved procedural aspects of such a transfer are all good ones.\(^{176}\) She erred, however, in failing to even consider the possibility of dividing the right’s personal and dignitary interests, assigning only the latter to Goldman while still preserving and protecting Simpson’s dignitary rights in his own publicity.

The right of publicity held by a famous celebrity encompasses both property-based and privacy-based concerns.\(^{177}\) In every case until Goldman v. Simpson, those concerns realistically rested with the same party, so any debate on the subject was purely academic.\(^{178}\) Courts were never actually made to decide where one ended and the other began.\(^{179}\) However, both California law and public policy dictate that the bundle of rights that has been erroneously identified and labeled as one “right of publicity” containing both privacy and property traits,\(^{180}\) should actually be viewed as two separate and mutually exclusive rights: on one end, an assignable, proprietary right to profit from the use of one’s persona; on the other, a personal, privacy-based, nonassignable right to control the use of one’s persona for profit. Such a separation is both workable and is the best way to balance the public’s interest in letting individuals decide when and whether their image could be commercially exploited as well as the public’s interest in protecting the economic rights of creditors.

A. The Right of Publicity Protects Important Dignitary Interests that Cannot Be Assigned to Satisfy a Creditor

The O.J. Simpson right of publicity case is a great example of the potential injustice of allowing celebrities to shield what is, in essence, their most valuable asset from their creditors.\(^{181}\) Scholars have argued that celebrities are reaping the rewards of a property-based right of publicity without paying the price, and that justice requires that, if the right of publicity is to be treated as property when it benefits the celebrity, it should be treated as property for all intents and purposes, including being reachable by a celebrity’s

170 See id. at 4.
171 Id. at 13.
172 See id. at 4 (“[I]t should be understood at the outset that the issue ... is one of pure law, and is in no way dependent upon a determination of the perceived equities of the case.”). Quotations as to the opinion, the context side, or a review of the entire case presented at trial. Quotations in the contrary, the plaintiff side, or a review of the entire case presented at trial. Quotations in the contrary, the plaintiff side, or a review of the entire case presented at trial.
173 See 1 Mccary, supra note 21, § 10.7 stating that “[t]he courts have uniformly held that the right of publicity is a 'property right' and providing a comprehensive list of national jurisdictional means describing it at such.”
175 See Part IIA, discussing the right’s roots in the right to privacy, and Part IIIA infra.
176 See Goldman v. Simpson, No. SC0306340, at 7-8, as discussed supra in note 100.
177 See infra Part IIIA.
178 See Westfall & Lhullier, supra note 42, at 101-104.
179 See id. The few cases dealing with assessing the value of a celebrity’s publicity upon divorce chose to treat it as “celebrity goodwill” and merely concern themselves with assessing its current monetary value, rather than attempt to divide the celebrity’s actual right of publicity as a piece of property in and of itself. See id. at 103; see, e.g., Gold v. Gold, 257 N.Y.S.2d 924, 949 (Sup. Ct. 1965); Piscopo v. Piscopo, 555 A.2d 1190 (N.J. Ch. 1988), aff’d, 357 A.2d 1040 (N.J. Super. Ct. App. Div. 1989).
180 Goldman v. Simpson, No. SC0306340, at 11 (Ca. Super. Ct. L.A. Cty. Oct. 31, 2008). (“[A]lthough assignable during lifetime, and thus bearing at least one characteristic of a property right, the nature of the right of publicity during the lifetime of the celebrity is equally characterized by privacy rights... .”)
181 Providing a long list of celebrities who filed bankruptcy in the years immediately preceding the writing of their article and successfully shielded their right of publicity from pretrial judgment enforcement, Anetta Jacoby and Diane Zimmerman state that the bankruptcy court system “has been hit by the many millions of dollars worth of publicity rights that have passed through the system.” Jacoby & Zimmerman, supra note 16, at 1525. The list includes such household names as Burt Reynolds, Kim Basinger, Francis Ford Coppola, and Zsa Zsa Gabor. Id.
is apt to a large extent: like an author or inventor who trades his right to control his ideas and expression for the right to profit from their dissemination, a celebrity sacrifices his right to control certain uses of his image in exchange for the right to profit from them.192 Like a copyright or patent holder, a celebrity who chooses to allow certain uses of his image loses the right to object when those uses turn out to be not to that celebrity's satisfaction.

In Pacific Bank v. Robinson, the California Supreme Court held in a landmark decision that California courts could compel the assignment of patents and copyrights to satisfy a monetary judgment.193 This was the case that Goldman relied on to support his proposition that the right of publicity could similarly be attached.194 The court reasoned that

[i]t would be marvelous, if not unjust perpetuation of the ideal, if an inventor, having obtained a patent, thus divulging his secret, and at the same time acquiring a property in it for practicable purposes, should be permitted to hold it unused against his creditors, until either by compromise or the lapse of time, his obligations should be discharged; and this, too, although it might be one which, by assignment, or upon manufacture of the thing invented, would readily yield enough to pay all existing liabilities.195

Indeed, it would. But the above quote also highlights the primary flaw of the argument: patent and copyright protections are given only to those ideas and expressions that the inventor or artist has, through publication or registration, made a clear affirmative choice to exploit.196 An author or inventor, by virtue of allowing the use of a certain expression or idea in order to gain copyright or patent protection, is not thereby putting at risk the right to control those ideas and masterpieces that the artist or inventor has yet to publish, express or even conceive of. This is where the comparison fails: the right of publicity is concerned both with the right to profit from authorized uses of a celebrity's publicity and with those than the prevention of uses of a celebrity's publicity that the celebrity has affirmatively chosen not to exploit, or rather with

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192 See Jacoby & Zimmerman, supra note 16.
193 Jacoby & Zimmerman, supra note 16.
194 Id. at 1567.68. Importantly, despite the fact that many courts have applied the property label synecdochically to the right of publicity, reasoning that it is the right to control only if it has some certain attributes of property, there is no doctrinal requirement that this be the case. Courts have long recognized that a right may have some of the rights that are consistent with all forms of property. See First Victoria Nat. Bank v. United States, 620 F.2d 1096, 1103-06 (D.C. Cir. 1980). Jacoby and Zimmerman argue that the property that right of publicity should have all the rights normally associated with property, if it has have if. Jacoby & Zimmerman, supra note 156.
195 See id. at 1564-45.
196 Id. at 1564.
197 Id. at 1564-45.
198 Id. at 1564.
199 See Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977). The case involved the right of a television station to tape and broadcast a circus entertainer's entire performance. It is the seminal case dealing with the balance between the right of publicity and the right to free speech, an interesting topic in and of itself which is unfortunately outside the scope of this Note.
200 See id. at 576.
201 Id.
one's right to make that choice in the first place. In the seminal article that gave birth to the right of publicity, Warren and Brandeis describe the interplay between the protections of copyright and privacy thus:

[the aim of the copyright statute is to secure to the author, composer, or artist the entire profits arising from its publication; but the privacy protection enables him to control absolutely the act of publication and, in the exercise of his own discretion, to decide whether there shall be any publication at all. The statutory right is of no value unless there is a publication; the common-law right is lost as soon as there is a publication.]

On the other hand, one need not exploit one's right of publicity, or be a celebrity for that matter, in order to assert that someone else has done so without his consent. In this way, the right of publicity parallels both the dignitary right of privacy and the proprietary rights of copyright and patent. More specifically, the right of publicity as a property right begins where the right of publicity as a dignitary right ends. A person essentially chooses to exchange his or her right to be free from commercial exploitation for a property-based right to freely commercially exploit his or her image—or, in other words, to exchange control for profits.

Professor Jonathan Kahn proposes looking at the dynamic between the dignitary right and the property right as a movement along a continuum, stating that:

the more intimately a name or image is bound up with one's self, the more its appropriation implicates privacy-based personal identity rights; the more one is willing or able to conceive of one's name or image as a marketable commodity, the more its use implicates property-based rights of publicity.

However, it is essential to our notions of identity, he argues, that we recognize the fact that no celebrity, no matter how famous, can completely give up his dignitary interest in himself.

The majority in Lugosi v. Universal Pictures, refusing to extend Bela Lugosi's right of publicity to his heirs without an explicit legislative grant, grounded its holding in the statement that the right to use one's publicity for profit is one that may not necessarily be quantifiable in terms of dollars and cents. "The very decision to exploit name and likeness is a personal one," the court stated. The court recognized the multitude of considerations that may go into such a decision by noting that [i]t is not at all unlikely that Lugosi and others in his position did not during their respective lifetimes exercise their undeniable right to capitalize upon their personalities, and transfer the value thereof into some commercial venture, for reasons of taste or judgment or because the enterprise to be organized might be too demanding or simply because they did not want to be bothered.

If we treat the right of publicity as "property for all seasons," we ignore the fact that the right protects not just the celebrity's interest in profiting from his publicity but also the right to choose whether or not to do so in the first place. If we declare the right to be a property right in order to satisfy creditors, we confirm Edward Blumenthal's worst fears, that the courts will "make a man part of commerce against his will." Courts should not go so far merely to satisfy a monetary judgment.

B. The Right of Publicity Concurrently Protects Both Dignitary and Proprietary Interests, Regardless of Previous Exploitation

That we should not treat the right of publicity as pure property does not mean that the creditors should be left out in the cold. Though a celebrity's creditors may not reach the entire package known as the "right of publicity," it may still be possible for them to seek those rights in the bundle that are not personal rights. An approach must therefore be found to separate between the right of publicity assignable property and the right of publicity as a dignitary personal right.

One tempting solution is to allow a court to examine a debtor's history of voluntary commercial exploitation and to declare whether or not that debtor has, in fact, waived her right to privacy and exchanged it for a property right of publicity; in other words, to find a discrete moment at which a person volunteers to become a commodity. Such a moment, unfortunately, does not exist. There is no point at which a person asserting the right to publicity is no longer asserting a privacy-based dignitary right, which is neither assignable nor detachable, and begins asserting a property-based commercial right, which may be reached by that
person's creditors. Rather, the right of publicity as a personal right exists harmoniously with the right of publicity as a property right. The property rights that a celebrity holds protect the value of her persona; the personal rights protect her right, at all times and regardless of how famous she is, to choose whether to recognize that value.

After Lugosi, courts and legislatures have nearly universally denied a lifetime exploitation requirement in the context of post mortem use.287 One of the reasons that they have chosen to do so is because they could find no viable way to distinguish between a right a dead celebrity would not have exploited and a right that the celebrity did not have a chance to exploit, nor how much exploitation is necessary for the right to have been exhausted.288 By the same token, a court that needs to decide whether a person has exploited his or her celebrity status for profit must make the exact sort of calculus that courts have nearly universally declined to make in the context of the post mortem right.289

The idea that a celebrity may sue a commercial appropriator of her identity both for injury to feelings and for injury to commercial value is not novel. J. Thomas McCarthy wrote that “everyone, including a ‘celebrity,’ has both ‘publicity’ and ‘privacy’ rights in his or her identity,” and that “[s]ince we are really talking about two distinct rights and two distinct torts, there should be nothing inherently inconsistent with joining the claims together, assuming of course that the facts support both claims.”290 Prosser, who had asserted that the tort of appropriation was an assignable proprietary right, nevertheless recognized that celebrities may bring an action both for lost profits and for emotional distress.291 California courts in particular are familiar with such actions. In Waits v. Frito Lay, Inc., the Ninth Circuit upheld singer Tom Waits' claim against a snack manufacturer that used an imitation of Waits' distinctive voice to make it sound like Waits was promoting its products.292 The court awarded double what the fair market value for these services would have been had they been rendered by the artist, emphasizing that Waits had consistently refused numerous lucrative offers to participate in commercials because

287 1 McCarthy, supra note 21, § 9:17 (“The overwhelming majority rule under either statute or common law is that the right of publicity is descendable property and has a postmortem duration which is not conditioned on lifetime exploitation.”).
288 See, e.g., Lugosi v. Universal Pictures, 663 P.2d 425, 428 (1983) (J. Bird, dissenting) (“There is no reasonable method for ascertaining in a particular case if the right has been sufficiently exploited to warrant passing the right to the decedent’s beneficiaries.”).
289 1 McCarthy, supra note 21, § 9:17
290 Id. § 431.
291 See Prosser, supra note 66, at 406.
Chief Justice Bird did not see the extension of property-based protections to the right of publicity as necessarily preventing a plaintiff from asserting privacy-based protections as well. She recognized that celebrities could authorize certain uses in order to generate profits while retaining the right to prevent other uses, regardless of how profitable they are. According to her, a violation that affected both a plaintiff's feelings and a plaintiff's wallet could be brought under either property-based protections or privacy-based protections, or both. The subsequent 1985 amendments to California Civil Code section 3344 and the enactment of Section 990(h), which dovetail remarkably with Chief Justice Bird's vision of the right, demonstrate that the California legislature shared her view.

The problem with saying that a celebrity trades a dignitary right for a property right is that we are attempting to find a line that does not exist. As Professor Alice Haemmerli so aptly put it, "[d]oes the fact that a prostitute has commodified her body mean that she can be raped with impunity, or that the rape should be viewed solely in terms of economic impact?" Or, as another example, does the fact that Paris Hilton appeared in a raunchy Burger King commercial mean that other commercial venues are free to depict her in the same manner, so long as they pay her? The choice to allow one's image to be exploited for profit is not a choice a celebrity makes just once. It is a choice the celebrity is making anew in each novel situation.

C. The Right of Publicity as a Property Right Can Be Severed From the Right of Publicity as a Personal Right

Any line drawn between the right of publicity as a dignitary right and the right of publicity as a property right is illusory and arbitrary. Since the two coexist to protect complementary interests, such an attempt would result in a necessary sacrifice of one or the other. A more conceptually sound approach is to divide the right into its respective interests and re-label it as two separate and complementary rights.

The right of publicity may be divided into the following two components: first, a personal privacy-based right, which may be labeled "the right to publicity control" (this right would protect a celebrity's exclusive right to approve and control the use of his image for commercial gain); second, a property-based right, which can be dubbed "the right to publicity profits" (this right includes the right to profit from uses of one's likeness and image, as well as the right to make profitable licenses of such uses). The former would not be assignable, while the latter one would be; the former would expire when the celebrity does, while the latter may live on for as long as the state's legislature decides. A plaintiff's showing to satisfy both may be identical and may consist of (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. The difference, however, would be in the type of injury that the plaintiff could claim. The remedies for the control portion of the right of publicity would be limited to emotional distress and punitive damages, while the remedies for the profits portion of the right of publicity would be limited to lost profits.

D. Courts Should Be Able to Assign a Celebrity's Proprietary Interests in His Right of Publicity While Protecting the Celebrity's Dignitary Interests

While a celebrity debtor's creditors may have to give up their claims to that celebrity's right of publicity as a whole, they should not have to leave empty-handed. Once the right of publicity is divided into a property right to publicity profits and a personal right to celebrity control, courts and legislatures will find it much easier to find elements of value that they may make available to creditors without the fear of depriving celebrities of free choice and turning them into mere products.

Judge Lefkowitz expressed concern that an assignment of a celebrity's right of publicity could amount to involuntary servitude by "permitting a judgment creditor to, in effect, 'manage' the performer's appearances." However, if a court transfers a debtor's right to publicity profits while allowing him to retain his right to publicity control, the debtor would still retain the right to block any commercial use of his persona. The only difference would be in assessing damages, since the celebrity would not be able to claim lost profits. Furthermore, the debtor would not be barred in any way from any profit-generating uses; he would be
merely prevented from actually profiting from them. The assignee would be able to bring suit, but only for lost profits. He would not be able to prevent the celebrity from acting.

In fact, if the celebrity's right of publicity control is preserved, a creditor's and a debtor's rights and obligations towards each other, though not towards third parties, are virtually identical to what they would be absent such a transfer. A debtor may seek injunctive relief and pursue damages against any commercial uses of his persona by the creditor that he did not explicitly authorize. Conversely, a creditor may demand any profits that the debtor makes from the use of his persona.

As Frederic Goldman asserted before the California courts, a creditor's main use for a celebrity's right of publicity profits concerns third parties. The announcement of the If I Did It book deal immediately after Goldman's failed attempt to acquire Simpson's right of publicity demonstrates that a celebrity with no intention of satisfying a monetary judgment may still use his publicity for profit as long as he is not the one who is profiting. A creditor will be forced to track the revenue stream and prove fraudulent conveyance to recover.

If Goldman held Simpson's right to publicity profits at the time the book deal was signed, Goldman could also sue Harper-Collins for infringement on his right to Simpson's publicity. Even in circumstances involving a celebrity acting in good faith, a celebrity with a judgment as large as Simpson's looming over his head has neither the resources nor the incentive to pursue infringers. It is most efficient to place the right in the hands of the party that can best protect it and has the strongest interest to do so.

At first glance, this does not seem like much of a concession to the creditors. If the only thing that Goldman could do with Simpson's right of publicity without Simpson's consent is to pursue third-party infringers, he would be unlikely to recover more than a fraction of the money owed him. The remedy's true added value is in the fact that it changes the parties' incentive structure, making settlements and cooperation far more likely.

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231 See Plaintiff's Supplemental Brief, supra note 134, at 10-11.
232 For example, though Goldman was successful in acquiring Simpson's right in the book If I Did It, as well as tracking down some of the money paid out to him, he was unsuccessful in reaching some $885,000 allegedly paid by the publisher to a third party in connection with the project. See Judge Persson 's Book Deal, F. Online, Jan. 4, 2007, http://www.examiner.com/news/article/index.jsp?uid=51921675-6102-4eib-99b5-f169876c73.
233 See id.
234 Note that this does not deprive the celebrity of also having the right to sue third-party infringers if he would like to do so—a concern raised by Judge Leifkowitz. It merely prevents the celebrity from seeking lost profits. See Goldman v. Simpson, No. SC 006340, at 7 (Ga. Super. Ct. W. L.A. Coy. Oct. 31, 2006).

Today, celebrities seeking to avoid paying large monetary judgments can find ways to make use of their publicity without directly receiving the benefits, as Simpson did. However, faced with the prospect of losing their most valuable asset, celebrities are far more likely to cooperate. The creditor, too, has a strong incentive to cooperate: when the infringement suits dry up, the creditor's only chance to derive any value from the celebrity's publicity is by giving the celebrity a reason to work; in other words, by entering into an agreement with the celebrity to share the profits.

E. Directions for Further Research

A transfer of a celebrity's right to publicity profits raises many additional questions that this Note does not purport to answer. Judge Leifkowitz, too, raised a number of such questions and stated that it would be up to the legislature to answer them. One question was whether, and how, the celebrity should be credited for failed business ventures that the assignee, or a sub-assignee, may undertake involving the commercial use of the celebrity's persona; another was whether such an assignment would necessitate that the court monitor credits against the judgment, and who would bear the costs of a court-appointed receiver; and yet another one was whether the assignee assumes a fiduciary role towards the celebrity.

These questions seem to imply that the court will transfer the right to the creditor for only as long as the debt is outstanding, and that it will revert back if and when the judgment is paid in full. They appear to become moot if the right is assigned to the creditor in whole, with no possibility of reversion to the celebrity debtor. This may be well the case if the present value of the right is assessed at a higher value than the celebrity's remaining debt. The debtor, in this case, would not hold a future interest in the right and thus should be unconcerned with preserving its value or being credited against the judgment.

However, this situation raises a different question: how would the court determine the severed right to publicity profits' value for the remainder of the celebrity's lifetime? Though courts have allowed estimates of the value of a celebrity's right of publicity for the remainder of the celebrity's lifetime in the past, all of the underlying cases involved circumstances where control was to be retained by the celebrity. It is unclear how the right to profits'
value would be determined separately from the right to control. I am raising these questions merely as catalysts for future discussion. They fall outside of the scope of this Note, but I am confident that they are capable of being addressed. Sufficient it to say, that once the right to publicity control is viewed as conceptually separate from the right to publicity profits, concerns over possible abuses of a celebrity's dignitary rights can be much more easily resolved.

IV. CONCLUSION: PAYING THE PRICE OF FAME

Goldman's case was built on as strong a legal foundation as the sparse jurisprudence allowed. Ultimately, though, he was likely hoping that the nature of the parties involved would tip the scale. On one side, there was a plaintiff whose son was brutally murdered, and on the other, a man widely believed to be the son's killer, seeking to assert his right to continue to profit from that very murder.298 It was a terrible set of circumstances that Judge Linda K. Lefkowitz had encountered, but a set that did not seem to ultimately sway her. Despite calling Simpson's post-judgment activities "ghoulish" and "inequitable,"299 she stated that the question is one of "pure law" and that "the determination of whether post-judgment enforcement remedies may properly include the transfer of publicity rights to a prevailing plaintiff could have, in theory, been raised by any plaintiff holding a judgment against any defendant perceived as holding financially viable 'publicity rights.'"300 This, in particular, makes the Goldman v. Simpson case a terrific case study of the interests that the right of publicity protects and of how courts should rank those interests alongside other interests, such as creditors' rights.

Judge Lefkowitz asserted that the fact that Simpson—or any other celebrity—held financially viable rights that he freely exploited for financial gain did not mean that he did not also hold the right to decide how those rights were exploited.301 Her decision correctly implies that we should not have to choose between giving celebrities a property interest in the association of their likeness or image with commercial ventures and giving them the inalienable ability to decide whether or not to do so in the first place. Her conceptual failure was one that has plagued the right of publicity from the moment that Willam Prosser coined the tort of appropriation, insisting that it protected both dignitary and property interests:302 what the Judge had referred to as the "right of publicity" should have been labeled as two separate rights. Had it been so, Frederic Goldman's claim would have been far easier to adjudicate. By assigning a right to the profits from a celebrity's publicity while protecting that celebrity's right to control his own publicity, Judge Lefkowitz could have completely protected Simpson's dignitary rights while still affording Goldman a modicum of relief. She could have avoided choosing between squeezing "the Juice"303 to the last drop and leaving the families of his alleged victims high and dry.

Tal Ganani

301 See Prosser, supra note 68, at 406-07.
303 In acquit, Editor, Cardozo Arts & Entertainment Law Journal, J.D. Candidate, 2008, Benjamin N. Cardozo School of Law; B.A., 2003, University of Maryland University College. I'd like to thank Professor Stewart Sterk for his extensive and incisive insight and input, my wife for bearing with me, and my family for supporting me from afar. ©2008 Tal Ganani.