

BEYOND TRADEMARK LAW: WHAT THE RIGHT OF PUBLICITY CAN LEARN FROM CULTURAL STUDIES

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INTRODUCTION – THE CELEBRITY TRINITY

I want to be a celebrity. I want to be loved. I want the glitz, the glamour, the sparkle and the existential glow I want to be harassed and harangued by the tabloid press I want fame. I want celebrification I want to be the centre of attention.¹

The fact is – celebrity sells. Famous faces greet us at every turn – on billboards, on television, on public transport, in the newspapers and magazines, and even on cereal boxes. Celebrities are beginning to dominate modern society in many new and unprecedented ways. Celebrities can capture the imagination of a nation and the purses of the people. To be celebrated appears to be the apogee of success in our society, whether as an actor, a musician, a professional athlete, a supermodel or a chef. Regardless, these public personalities wield significant power in contemporary society through their associations with causes, products and events. Bolstered by their ubiquitous presence in the mass media, their commercially valuable reputations are often widely exploited. As cultural studies scholar Graeme Turner

¹ Su Holmes & Sean Redmond, *Introduction: Understanding Celebrity Culture*, in *FRAMING CELEBRITY: NEW DIRECTIONS IN CELEBRITY CULTURE 1* (Su Holmes & Sean Redmond eds., 2006).

suggests,

it is the pervasiveness of celebrity across the modern mass media that encourages us to think of it as a new development. The exorbitance of celebrity's contemporary cultural visibility is certainly unprecedented, and the role that the celebrity plays across many aspects of the cultural field has certainly expanded and multiplied in recent years.²

There is a wealth of legal literature in the United States – both cases and academic commentaries – that discusses a panoply of doctrinal bases for the recognition of the right of publicity.³ In a recent article in the *Stanford Law Review*, Stacey Dogan and Mark Lemley correctly pointed out “the elusiveness of a theoretical justification for the right of publicity . . . [and that] the right of publicity rests upon a slew of sometimes sloppy rationalizations.”⁴ While some have argued that the copyright analogy may be apropos,⁵ Dogan and Lemley contend that “the right of publicity has more in common with trademark law than with copyright”⁶ and that “[r]econceiving the right of publicity as a trademark-like right offers significant benefits in defining the right's scope and limitations.”⁷

Generally, celebrity actors and athletes lead the field of personalities who enjoy a substantive economic value and goodwill in the market—much like a trademark. Indeed world-renowned actors and athletes like Angelina Jolie, Brad Pitt, Tiger Woods, Michael Jordan and Maria Sharapova each command huge fees for product endorsements, merchandising and event appearances. Even exposure of their private lives by the tabloid press has

² GRAEME TURNER, *UNDERSTANDING CELEBRITY 4* (2004).

³ E.g., Melville B. Nimmer, *The Right of Publicity*, 19 *LAW & CONTEMP. PROBS.* 203 (1954); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 *CAL. L. REV.* 127, 129 (1993); Roberta Rosenthal Kwall, *Fame*, 73 *IND. L.J.* 1 (1997); Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 *DUKE L.J.* 383 (1999); Vincent M. de Grandpre, *Understanding the Market for Celebrity: An Economic Analysis of the Right of Publicity*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L. J.* 73 (2001); Michael Sloan, *Too Famous for the Right of Publicity: ETW Corp. and the Trend Towards Diminished Protection for Top Celebrities*, 22 *CARDOZO ARTS & ENT. L.J.* 903; Haelan Labs, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003).

⁴ Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 *STAN. L. REV.* 1161, 1162 (2006).

⁵ E.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573, 576 (1977); *Comedy III Prods. v. Gary Saderup, Inc.*, 21 P.3d 797, 804, 808-10 (Cal. 2001); Randall T.E. Coyne, *Toward a Modified Fair Use Defense in Right of Publicity Cases*, 29 *WM. & MARY L. REV.* 781, 812 (1988); Kevin S. Marks, Comment, *An Assessment of the Copyright Model in Right of Publicity Cases*, 70 *CAL. L. REV.* 786 (1982).

⁶ Dogan & Lemley, *supra* note 4, at 1164.

⁷ *Id.* at 1165.

become a lucrative industry. It appears that the celebrity personality is an intangible and valuable asset, and a trademark framework may prima facie suit a majority of right of publicity cases. However, revising the right of publicity to conform to the rules in trademark cases will not, as Dogan and Lemley claim, "put the right on a more solid conceptual grounding."⁸ On the contrary, by attempting to locate the theoretical justification of the right of publicity in trademark law, one ends up obfuscating the true nature of celebrity in contemporary society. Salient principles from trademark law, like the likelihood of confusion and dilution, may provide a legal *framework* for navigating the vast terrain that the right of the publicity inhabits, but they do not necessarily provide an appropriate *justification* for the recognition of publicity rights. Despite the claim by Dogan and Lemley that "[t]he best justifications for a right of publicity are trademark-based justifications,"⁹ an understanding of the celebrity phenomenon through the lens of cultural studies will no doubt open up even more theoretical possibilities for our consideration.

The purpose of this article is to evaluate how the understanding of the contemporary production, circulation and consumption of the celebrity personality can assist the development of right of publicity laws in this area. By situating the legal debate on the right of publicity in a wider context of cultural studies that investigate the phenomena of globalization, cultural commodification, transnational marketing and mass consumerism, this article will offer some suggestions on how elements of the present law may be reformulated and combined with these insights.

This article argues that in contemporary society, there exists a "celebrity trinity" comprising the celebrity individual, the audience and the producers. The *celebrity individual* is the physical human person as distinguished from the public image of the famous personality that the audience perceives and with whom it identifies. The *audience* encompasses anyone who consumes or uses the celebrity product or any product associated with a celebrity; this includes consumers and users of the mass media and purchasers of goods and services. The *producers* include the mass media and other cultural intermediaries, like advertising agencies, transnational corporations, local businesses, brand consultants, talent management and public relations firms, that contribute to the creation, development and propagation of the celebrity personality.

⁸ *Id.* at 1166.

⁹ *Id.* at 1220.

A fleeting remark by the English House of Lords indicates some judicial cognizance of this troika:

Naomi Campbell is a famous fashion model who lives by publicity. What she has to sell is herself: her personal appearance and her personality. She employs public relations agents to present her personal life to the media in the best possible light just as she employs professionals to advise her on dress and make-up.¹⁰

However, the courts rarely articulate their analyses of how the relationships between the celebrity individual, the audience and the producers have influenced, if at all, judicial reasoning and legal considerations. Too often, the law focuses only on the celebrity individual as the equivalent of the "celebrity personality", ignoring the quintessential roles of the audience and producers. This article explores how, if the contemporary contours of celebrity are recognized as being shaped by the constituents of the celebrity trinity, courts and legislatures might respond to legal claims by the celebrity individual for an unauthorized commercial use of identity.

Part I provides an outline of the legal protection of the commercial value of the celebrity personality in the United States, highlighting the laws of two state jurisdictions which are home to the key entertainment and media hubs in America – California and New York – with respect to their definition of the commercial use of identity.

Part II briefly examines the dominant normative bases that are explicitly given or implicit in the judgments and legal literature for the recognition and protection of the economic value of the celebrity identity. It will be obvious that these theoretical justifications overwhelmingly tend to focus on the celebrity individual and insufficiently on the important roles that the audience and the culture producers play in the definition of the celebrity personality; there is a potential for insights from cultural studies to fill some of the doctrinal lacunae in the current legal understanding of celebrity.

Part III introduces relevant key writings in cultural studies on

¹⁰ *Campbell v. MGN Ltd.*, [2004] 2 A.C. 457 (H.L.) (appeal taken from E.W.C.A. Civ.). In a recent article, Rosina Zapparoni comments: "[t]he work of 'fashioning the star out of the raw material of the person' is done not only by the star herself, but by an army of specialists – consultants, mentors, coaches, advisors, agents, photographers, and publicists." Rosina Zapparoni, *Propertising Identity: Understanding the United States Right of Publicity and Its Implications – Some Lessons for Australia*, 28 MELB. U. L. REV. 690, 720 (2004).

the celebrity phenomenon, including the definition of what constitutes a celebrity, focusing in particular on the contemporary works of Graeme Turner, P. David Marshall, Chris Rojek, Richard Dyer, Joshua Gamson, and Jean Baudrillard. The research in cultural studies on the conceptualization, propagation and social significance of celebrity may aid the law in refining doctrines and developing solutions that cohere with the practices and processes of contemporary culture. Celebrity, being a hierarchical phenomenon, exhibits an ordered taxonomy of fame; due to the impact that high-profile celebrity cases may have on the development of the law, this thesis will focus mainly on celebrities at the pinnacle of this hierarchy – the instructive case studies of the movie star and the elite athlete.

Part IV proposes how central themes from cultural studies may be appropriately adapted and integrated into the development of publicity rights. In particular, the applicability of two major prongs of trademark law – likelihood of confusion and dilution – as highlighted by Dogan and Lemley¹¹ will be contrasted with key themes drawn from cultural studies.

This article concludes that the best way forward for the right of publicity is an approach to the celebrity personality that is based on an understanding of context and contingency, a reevaluation of a priori legal knowledge, and a focus on contemporary cultural practices and economic exigencies.

I. PROTECTING THE COMMERCIAL VALUE OF THE CELEBRITY PERSONALITY

Personality rights in the United States are understood to comprise the right of publicity and the right of privacy.¹² The right of publicity is the right to control uses of one's identity that protects the commercial value of the celebrity personality; it is broadly defined as the "inherent right of every human being to control the commercial use of his or her identity."¹³ It prevents the unauthorized commercial use of an individual's identity, giving a celebrity the exclusive right to licence the use of his or her identity for commercial promotion. The right of privacy is the right of the individual to be let alone, and it protects dignitary

¹¹ Dogan & Lemley, *supra* note 4, at 1191-1200.

¹² Although "personality rights" tends to be a term commonly used in the European context, it broadly represents the two types of interests relating to the human personality protected by the law: (i) economic or pecuniary interests; and (ii) dignitary or non-pecuniary interests. HUW BEVERLEY SMITH, *THE COMMERCIAL APPROPRIATION OF PERSONALITY* 3-24 (2002).

¹³ J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2003).

interests.¹⁴ For celebrities who actively seek fame through the attention of the media, it was a tenuous argument to extend the traditional right of privacy to prevent the unauthorized commercial uses of their identities.¹⁵ Confronted with this reality of an economic value ascribed to the celebrity personality, courts in the United States have taken pains to create a separate tort of right of publicity, which can sometimes be confused with the tort of appropriation of personality under the rubric of invasion of privacy.¹⁶ The right of publicity, while focused entirely on the economic value of a celebrity's identity, has also been "described as a descendant of the right of privacy."¹⁷ But the United States courts have not resolved the overlap between the right of publicity and the appropriation tort under the fourth limb of the actionable tort of invasion of privacy, often preferring to declare summarily that whether the right is "denominated [the] right to privacy or [the] 'right to publicity[,]'. . . it stems from [the court's] recognition that an individual has the right to control the use of his own name and image and the publication of information about himself."¹⁸

In general, the *Restatement (Third) of Unfair Competition*¹⁹ covers the protection of the commercial value of a person's identity, and the *Restatement (Second) of Torts*²⁰ defines the scope of the right of privacy. Each state, however, has developed its own common law and statutes that may expand or limit the principles articulated in both *Restatements*. Of all the states, California, home to Hollywood, has one of the broadest definitions of "identity," that extends generous protection to even a celebrity's mannerism, characterization, and performing style in the common law right of

¹⁴ *E.g.*, Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); Daniel J. Solove, *Reconceptualizing Privacy*, 90 CAL. L. REV. 1087 (2002); Pavesich v. New England Ins. Co., 50 S.E. 68 (Ga. 1905).

¹⁵ *See, e.g.*, United States cases from the early twentieth century, where the courts protected individuals from unauthorized commercial uses of name and likeness by enforcing a right of privacy: Pavesich v. New Eng. Ins. Co., 50 S.E. 68 (Ga. 1905); Edison v. Edison Polyform Mfg. Co., 67 A. 392 (N.J. 1907); Kunz v. Allen, 172 P. 532 (Kan. 1918); Foster-Milburn Co. v. Chinn, 120 S.W. 364 (Ky. 1909); Flake v. Greensboro News Co., 195 S.E. 55 (N.C. 1938).

¹⁶ *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995); RESTATEMENT (SECOND) OF TORTS § 652C (1977).

¹⁷ Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 227 (2005). Courts have also agreed that the publicity right developed as "a collateral outgrowth of the 'law of privacy.'" *See* Current Audio, Inc. v. RCA Corp., 337 N.Y.S.2d 949, 954 (N.Y. Sup. Ct. 1972). *See also* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

¹⁸ Carson v. Nat'l Bank of Commerce Trust & Sav., 501 F.2d 1082, 1084 (8th Cir. 1974).

¹⁹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (1995).

²⁰ RESTATEMENT (SECOND) OF TORTS §§ 652A-652I (1977).

publicity action.²¹ But in New York, celebrities have a statutory claim against the use of *only* their "name, portrait, picture or voice . . . for advertising purposes or for the purposes of trade."²² In all state jurisdictions, balancing approaches are undertaken by the courts to weigh the assertion of publicity rights against the freedom of speech and press articulated in the First Amendment of the Constitution,²³ with the First Amendment often placed in the preeminent position in the event of a conflict.

A. *The Right of Publicity – An Overview*

The right of publicity has grown out of the commercial reality of the burgeoning "associative value" that celebrities impose upon products and services.²⁴ The right of publicity, as determined by the United States Court of Appeals for the Second Circuit in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* (decided in 1953), gives a celebrity the right to damages and other relief for the unauthorized commercial appropriation of that celebrity's identity, and such a right is independent of a common law or statutory right of privacy.²⁵ In 1977, the common law right of publicity was affirmed by the United States Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*²⁶ In the course of fifty years since *Haelan Laboratories* was decided, the doctrine has become more sophisticated and the definition of identity more expansive, but, unfortunately, in the absence of a federal standard, the cornucopia of state laws governing the right of publicity in the United States exhibits significant variation.

As a result of the kaleidoscopic schemes of the different states with regard to the scope and term of the publicity right, conflicts

²¹ *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (Bette Midler soundalike); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *cert. denied* 508 U.S. 951 (1993) (Vanna White robot lookalike); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (Tom Waits soundalike); *Lugosi v. Universal Pictures*, 25 Cal.3d 813 (1979) (Count Dracula appearance and performing style); *Wendt v. Host Int'l, Inc.*, 125 F.3d 806 (9th Cir. 1997) (*Cheers* character appearance); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (signature racecar characterization).

²² N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2007).

²³ The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I. Of particular importance are the freedoms of speech and of press, which can trump both an individual's right of privacy and publicity. *See, e.g.*, *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978); *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454 (1979); *Finger v. Omni Publ'ns. Int'l Ltd.*, 77 N.Y.2d 138 (1990); *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115 (1993).

²⁴ Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 856, 859-60 (1995). *See also* J. Thomas McCarthy, *The Spring 1995 Horace S. Manges Lecture – The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 133 (1995).

²⁵ 202 F.2d 866 (2d Cir. 1953).

²⁶ 433 U.S. 562 (1977).

are likely to arise when a celebrity asserts his or her claim in a particular jurisdiction. In 2007, at least thirty states provided their citizens with a remedy for infringement of the right of publicity: eleven states recognize publicity rights by way of common law²⁷ and nineteen states via statute.²⁸ Section 46 of the *Restatement (Third) of Unfair Competition* states, "[o]ne who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability."²⁹ Section 47 of the *Restatement (Third) of Unfair Competition* notes, "[h]owever, [that the] use 'for purposes of trade' does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses."³⁰ It is clear that where the celebrity's identity has been used in connection with advertising in a legitimate newsworthy context, the advertisements are usually permitted.³¹

Identity can be interpreted broadly across different state jurisdictions to include almost any attribute associated with a celebrity individual, like Bette Midler's distinctive voice³² and Johnny Carson's famous phrase, "Here's Johnny."³³ Even where the use of a robot that was identified with Vanna White did not constitute a likeness of the celebrity, the Ninth Circuit held that it was nonetheless an appropriation of her identity.³⁴ In particular, the Court commented that

[t]he more popular the celebrity, the greater the number of people who recognize her, and the greater the visibility for the product. The identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name,

²⁷ NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE RIGHT TO PUBLICITY (2006), <http://www.ncsl.org/programs/lis/privacy/publicity04.htm> (last visited Nov. 14, 2007). The states are Alabama, Arizona, Connecticut, Georgia, Hawaii, Maine, Michigan, Minnesota, Missouri, New Jersey and Oregon.

²⁸ *Id.* The states are California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin.

²⁹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

³⁰ *Id.* at § 47.

³¹ *See, e.g.*, *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639 (6th Cir. 1995); *Lane v. Random House, Inc.*, 985 F.Supp. 141 (D.D.C. 1995).

³² *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

³³ *Carson v. Here's Johnny Portable Toilets, Inc.*, 810 F.2d 104 (6th Cir. 1987) (concerning the use of the phrase "Here's Johnny" from the popular 1960s show, *The Tonight Show Starring Johnny Carson*).

³⁴ *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992).

likeness, or voice.³⁵

It appears that the definition of identity will continue to expand as the areas in which a contemporary celebrity personality is able to generate significant economic value grow.³⁶ Some courts are prepared to find that the identity requirement is satisfied as long as a clear reference to a celebrity has been evoked by an advertisement from which the defendant may gain a clear commercial advantage.³⁷ Even in New York, where there is no independent actionable right of publicity,³⁸ perhaps in recognition of the importance of the state's entertainment industry, the courts have adopted a broad interpretation of "portrait or picture," as used in section 50 of the *New York Civil Rights Law*, "to cover any likeness or representation of the [celebrity], whether two or three dimensional"³⁹ and "a sketch, a cartoon, or a caricature[, that] . . . selectively omits some features and accentuates others."⁴⁰ Finding against Christian Dior for publishing an advertisement that included a look-alike of Jacqueline Kennedy Onassis, New York Supreme Court pointed out that "the essential purpose of the statute must be carried out by giving it a common sense reading which bars easy evasion."⁴¹ Courts have also prohibited uses of identity that traditionally were not regarded as commercial in nature, such as the use of civil rights activist Rosa Parks' name as the title of a song.⁴² The Court

³⁵ *Id.*

³⁶ These areas include: (i) the demand for information about the lives of celebrities in the form of news and tabloid publications, biographies, interviews, documentaries, etc.; (ii) the large and lucrative market for merchandise and paraphernalia bearing the names, faces, and other identifying characteristics of celebrities; and (iii) direct celebrity endorsement of or association with a wide range of products and services to increase brand appeal, marketability, and sales. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 129 (1993).

³⁷ See, e.g., *Midler*, 849 F.2d at 460; *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992); *White*, 971 F.2d at 1395.

³⁸ *Stephano v. News Group Publ'ns.*, 474 N.E.2d 580 (N.Y. 1984).

³⁹ *Onassis v. Christian Dior-N.Y., Inc.*, 472 N.Y.S.2d 254, 258 (1984), *aff'd* 488 N.Y.S.2d 943 (App. Div. 1985).

⁴⁰ *Id.* at 262. In *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978), the "portrait or picture" was a composite photo-drawing depicting a naked black man in a boxing ring, with the recognizable facial features of the former world heavyweight boxing champion Muhammad Ali. It is often sufficient that the advertisement portrays a recognizable likeness that "catch[es] the eye and focus[es] it on the advertisement." *Negri v. Schering Corp.*, 333 F. Supp. 101, 105 (S.D.N.Y. 1971).

⁴¹ *Onassis*, 472 N.Y.S.2d at 260. "There are many aspects of identity. A person may be known not only by objective indicia - name, face, and Social Security Number - but by other characteristics as well - voice, movement, style, coiffure, typical phrases, as well as by his or her history and accomplishments." *Id.* at 261.

⁴² *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003) (reversing grant of summary judgment in favour of band OutKast and allowing Rosa Parks to pursue a claim for use of her name in the title of a song). Contrast the preceding example with the example given in the majority opinion of another case regarding the song title, "*Bette Davis Eyes*," where

of Appeals for the Tenth Circuit considered a claim of infringement on a celebrity's publicity right, even though an explicit disclaimer was given regarding the celebrity's endorsement. The court hypothesized:

Suppose, for example, that a company, Mitchell Fruit, wanted to use pop singer Madonna in an advertising campaign to sell bananas, but Madonna never ate its fruit and would not agree to endorse its products. If Mitchell Fruit posted a billboard featuring a picture of Madonna and the phrase, "Madonna may have ten platinum albums, but she's never had a Mitchell banana," Madonna would . . . have a publicity rights claim, because Mitchell Fruit misappropriated her name and likeness for commercial purposes.⁴³

Most state jurisdictions that recognize a right of publicity have acknowledged that "[t]he first step toward selling a product or service is to attract the consumers' attention"⁴⁴ and to capture the "associative value" of a celebrity's identity.⁴⁵ The states have also accepted that the advantage element of the right of publicity is focused on the defendant's primary intent to obtain a commercial benefit from the use of the plaintiff's identity, and there was no need to prove that the defendant actually succeeded in obtaining a commercial advantage.⁴⁶

In the first, and only, right of publicity case decided by the United States Supreme Court, the Court held:

The rationale for (protecting the right of publicity) is the straightforward one of preventing unjust enrichment by the theft of goodwill. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.⁴⁷

In *Zacchini*, the issue was not about the "identity" (in the sense of a name or likeness) that was the subject of an

the title was found to be permissible artistic expression. *Rogers v. Grimaldi*, 875 F.2d 994, 999-1000 (2d Cir. 1989).

⁴³ *Cardtoons, L.C. v. Major League Baseball Players Assn.*, 95 F.3d 959, 967-68 (10th Cir. 1996).

⁴⁴ *Doe v. TCI Cablevision*, 110 S.W.3d 363, 371 (Mo. 2003) (quoting *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996)).

⁴⁵ Halpern, *supra* note 24.

⁴⁶ *Doe*, 110 S.W.3d at 370-71. See also *Brown v. Ames*, 201 F.3d 654, 661-62 (5th Cir. 2000); *Henley v. Dillard Dep't. Stores*, 46 F. Supp. 2d 587, 597 (N.D. Tex. 1999).

⁴⁷ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573, 576 (1977) (quoting *Harry Kalven Jr., Privacy in Tort Law - Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966)).

unauthorized use, but the performance of a human cannonball that was appropriated. How far the Supreme Court is willing to go to define "identity" remains uncertain; the majority opinion, as delivered by Justice White, notes that "the State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his *act* in part to encourage such entertainment."⁴⁸ The Court prohibited the broadcast of the plaintiff's *entire act* under the right of publicity because the unauthorized broadcast posed "a substantial threat to the economic value of that performance."⁴⁹ Thus, it is important to note that *Zacchini* is an unusual case, that concerned not the appropriation of a celebrity's identity but the "appropriation of the very activity by which the entertainer acquired his reputation in the first place."⁵⁰ The Court's ruling was so specific to the facts at hand, that it provides minimal guidance for most right of publicity cases, which typically involve use of identity in their advertising, merchandise, or for the purposes of trade.⁵¹

B. Competing Values – The First Amendment and Newsworthiness

The right of publicity, whether common law or statutory in nature, must be weighed against the preeminent position of the freedom of speech and press guaranteed in the First Amendment.⁵² Granting an injunction to prevent irreparable injury requires "a weighing of the private interest of the right of publicity against matters of public interest calling for constitutional protection, and a consideration of the character of these competing interests."⁵³ Whenever a celebrity asks the court to impose a prior restraint on publication, the risk to free expression is at its highest, and an injunction will usually not be granted.⁵⁴ The truth is, the First Amendment invariably triumphs

⁴⁸ *Id.* at 573 (emphasis added). Justice White also notes that "the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors." *Id.* at 573.

⁴⁹ *Id.* at 575.

⁵⁰ *Id.* at 576.

⁵¹ Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 35, 36-37 (1998).

⁵² See *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967); *Smith v. California*, 361 U.S. 147, 150 (1959).

⁵³ *Eastwood v. Super. Ct.*, 198 Cal. Rptr. 342, 349 (Cal. Ct. App. 1983). See also *Cher v. Forum Int'l Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982) (plaintiff succeeds in a right of publicity claim against the publishers of the *Star* tabloid).

⁵⁴ *Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823, 839 (C.D. Cal. 1998). See also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First

when there is a conflict between the right of publicity and free speech values.⁵⁵

The different balancing tests developed by the state courts – like the "transformative uses" test in California⁵⁶ and the "predominant purpose" test in Missouri⁵⁷ – attempt to find an acceptable balance that safeguards *both* private property and free speech interests, both of which are important to American society. But the ability of courts to make evaluations that involve juxtaposing "the fame of the celebrity . . . [against] the creativity, skill, and reputation of the artist"⁵⁸ is often questionable. In California, certain categories of speech are explicitly protected under the *California Civil Code*.⁵⁹ In New York, the artistic use of an image is exempted from action under the *New York Civil Rights Law*, as art is deemed to be constitutionally protected speech even if it conveys no discernible message.⁶⁰ In addition, the "newsworthiness" and "incidental use" exceptions also serve to exculpate users of unauthorized images.⁶¹ Similarly, in other states, cases have shown that there is no need to obtain consent if the use of photographs or other images is in connection with a newsworthy event or purpose.⁶²

Amendment rights"). Even commercial speech is offered some constitutional protection. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

⁵⁵ See, e.g., *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001); *Montana v. San Jose Mercury News, Inc.*, 34 Cal.App.4th 790, 40 Cal.Rptr.2d 639 (Ct.App. 1995); *Dora v. Frontline Video, Inc.*, 15 Cal.App.4th 536, 18 Cal.Rptr.2d 790 (Ct.App. 1993).

⁵⁶ The key question is "whether the depiction or imitation of the celebrity is the very sum and substance of the work in question" (in which case the right of publicity prevails) or "whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness" (in which case the First Amendment protects the defendant from right of publicity liability). *Comedy III Prods. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001).

⁵⁷ In the "predominant purpose" test, if the defendant uses the celebrity's identity in a manner that identifies the celebrity, even if the identity was transformed, predominantly to profit from or to commercially exploit that celebrity's fame, the right of publicity outweighs the defendant's First Amendment right to speech. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 373-74 (Mo. 2003). See also Gloria Franke, *The Right of Publicity vs. The First Amendment: Will One Test Ever Capture the Starring Role?*, 79 S. CAL. L. REV. 945, 979-91 (2006); Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 488-98, 500 (2003).

⁵⁸ *Comedy III*, 21 P.3d at 810. See also *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) (denying celebrity golfer Tiger Woods' right of publicity claim under Ohio law and finding that the defendant's limited edition prints had "added a significant creative component . . . to Woods's identity.>").

⁵⁹ See CAL. CIV. CODE § 3344.1 (West 2007).

⁶⁰ *Hoepker v. Kruger*, 200 F. Supp. 2d 340 (S.D.N.Y. 2002); *Simeonov v. Tieggs*, 602 N.Y.S.2d 1014 (N.Y. Civ. Ct. 1993); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 569 (1995). See also Jason D. Sanders, *Artistic Expression or Unfair Exploitation: The Right of Publicity, the First Amendment and Fair Use in Films and Fine Art*, 17 N.Y. ST. B.A. ENT. ARTS & SPORTS L.J. 41' (2006).

⁶¹ See, e.g., *Messenger v. Gruner+Jahr Printing & Publ'g*, 94 N.Y.2d 436 (N.Y. 2000); *Stern v. Delphi Internet Serv.*, 626 N.Y.S.2d 694 (N.Y. Sup. Ct. 1995).

⁶² See, e.g., *Ventura v. Titan Sports, Inc.*, 65 F.3d 725 (8th Cir. 1995); *Cheatham v.*

The rationales for First Amendment protection are widely accepted to rest on the tripartite goals of the Framers of the US Constitution that comprise sponsoring enlightenment, self-fulfillment and providing a safety valve.⁶³ The First Amendment goal of enlightenment enables public access to information in a democracy so that people can make informed choices in politics and other socially important areas without undue state interference. This objective of a "marketplace of ideas" in which "the ultimate good desired is . . . reached by free trade in ideas",⁶⁴ with the best ideas gaining the most social acceptance, does not focus on *how* different social groups in contemporary society use the celebrity personality to express themselves. However, all speech is not equal. The courts have accorded different levels of protection depending on the type of speech and its content.

Political speech and news represent the core value of the enlightenment rationale as they are the most relevant to debate about public issues in a democracy and therefore receive the highest protection. Although speech intended to entertain also receives protection, but to a lesser degree,⁶⁵ the use of the celebrity personality by the audience in its identity formation process needs to be classified as political speech by the courts in order to receive "the most rigorous scrutiny".⁶⁶ It is widely accepted that the constitutional safeguard "was fashioned to assure unfettered exchange of ideas for the bringing about of social and political changes desired by the people."⁶⁷ But the courts have had difficulty in drawing "[t]he line between the informing and the entertaining",⁶⁸ and will continue to face problems deciding whether a particular use of a celebrity image is to inform (thereby securing the highest political speech protection) or to entertain (hence getting a lower degree protection). Art is protected because it "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic

Paisano Publ'ns, 891 F. Supp. 381 (W.D. Ky. 1995); *Dora v. Frontline Video, Inc.*, 18 Cal.Rptr.2d 790 (Cal. Ct. App. 1993).

⁶³ *Whitney v. California*, 274 U.S. 357, 375 (1927).

⁶⁴ *Abrams v. United States*, 250 U.S. 616, 630 (1919).

⁶⁵ Entertainment may be embodied in any medium: "motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works". *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981). It also extends "from painting and photography to music and the printed page". J THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 8:15 (2d ed, 2003).

⁶⁶ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 475 U.S. 749, 759 n. 5 (1985).

⁶⁷ *New York Times, Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *Roth v. United States*, 354 U.S. 476, 484 (1957).

⁶⁸ *Winters v. New York*, 333 U.S. 507, 510 (1948).

expression."⁶⁹ Commercial speech occupies the lowest rung in the hierarchy of First Amendment protection.⁷⁰ Although advertising, a form of commercial speech, receives some constitutional protection as the information it provides is needed for "private economic decisions",⁷¹ the unauthorized and unremunerated appropriation of a celebrity identity by an advertiser is unlikely to receive First Amendment protection.

In contrast, the self-fulfillment function shifts the attention from the polity to the individual. The US Supreme Court has acknowledged that "the human spirit . . . demands self-expression."⁷² The safety valve function arises from Brandeis J's notion that the opening of the valve to discuss freely supposed grievances and proposed remedies allows the release of social tension in the form of speech rather than violence. These two rationales suggest that the cultural expressions of the audience – through the myriad uses of the celebrity personality – can be protected under the First Amendment. Courts should be cognizant of the fact that an over-regulation of the use of celebrity signs by personality rights law may have significant political repercussions for minority groups. This is one of the most important insights that cultural studies can bring to First Amendment jurisprudence and Part III will explore cover this in greater depth.

II. THE BASES FOR PROTECTION

The main justifications proposed in support of the protection of commercial interests that underpin the right of publicity include moral, economic and, to a lesser extent, consumer protection rationales. Dogan and Lemley called them "the usual explanations" and expressed them as belonging to three categories: "the moral or natural rights story; the exhaustion or allocative-efficiency account; and the incentive-based rationale."⁷³ These doctrinal bases have all been subject to numerous criticisms, but the right of publicity in the United States is firmly entrenched in American jurisprudence and is the fundamental protection for the commercial value of celebrities' identities. The most common moral justifications for the right of publicity involve Lockean labor and unjust enrichment considerations, while the economic rationales for protection comprise incentive creation

⁶⁹ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

⁷⁰ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

⁷¹ *Id.* at 765.

⁷² *Procurier v. Martinez*, 416 U.S. 396, 427 (1974).

⁷³ Dogan & Lemley, *supra* note 4, at 1180 (footnotes omitted).

and allocative efficiency considerations. It has been said that the right of publicity promotes the societal interests of "fostering creativity, safeguarding the individual's enjoyment of the fruits of her labors, preventing consumer deception, and preventing unjust enrichment."⁷⁴ Since the justifications do not themselves adequately explain the need for existence of the right of publicity, this article will briefly summarize them as the four main *considerations* that legislatures, courts and commentators most frequently invoke, usually in different combinations, to justify various aspects of the right of publicity.

A. Lockean Labor Considerations

In writing about property in the second of his *Two Treatises*, John Locke argues that every individual has a property in his or her own person, and that labor is also the property of the individual who has expended the effort.⁷⁵ The Lockean philosophy views private property as the reification of one's past efforts, and therefore, one deserves to keep what one has labored to produce. The law should intervene if someone appropriates another's product of labor if such a taking "interferes with a goal or project to which the laborer has purposely directed her [or his] effort."⁷⁶ According to the Lockean theory, the economic value of identity should be allocated to the celebrity individual because the value is primarily the result of the celebrity's labor. One of the leading advocates of this theory, Sheldon Halpern, has even argued that

[f]orty years of judicial and legislative effort have produced a coherently defined and rather clearly enumerated independent right of publicity protecting the economic associative value of identity. With limited (if not idiosyncratic) dissent, the development was fostered and encouraged by legal scholarship. Debate over policy limitations and boundaries was thoughtful and productive and had largely come to an end with the maturation of the right of publicity.⁷⁷

While Halpern may be correct in his observation that dissent has been limited, the bases for the recognition of the right of

⁷⁴ Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 54 (1994); Franke, *supra* note 57, at 953-54.

⁷⁵ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 288-96 (Peter Laslett ed., 1988) (quoted in JOHN W. YOLTON, *LOCKE: AN INTRODUCTION* 70 (1985)).

⁷⁶ Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1547 (1993).

⁷⁷ Halpern, *supra* note 24, at 869 (footnotes omitted).

publicity are anything but coherent. Existing doctrine appears to be in a state of disarray, with "fifty state regimes [in the United States] protecting differing aspects of identity, for varied terms, and with disparate remedies."⁷⁸

In *Haelan Laboratories*, Judge Jerome Frank, writing for the majority of the court, held that in addition to the New York privacy statute, there was an independent right of publicity in common law protecting economic interests that was exclusively assignable.⁷⁹ *Uhlaender v. Hendrickson* is exemplary of judicial treatment of such a right, declaring that a "celebrity has a legitimate proprietary interest in his public personality."⁸⁰ The deceptively simple judicial recognition of the right of publicity was taken up by Melville Nimmer, who was concerned that the conceptual foundation of such a legal right lacked a moral justification and turned to Lockean philosophy to justify such a right:

It would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations. Yet, because of the inadequacy of traditional legal theories[,] . . . persons *who have long and laboriously nurtured the fruit of publicity values* may be deprived of them, unless judicial recognition is given to what is here referred to as the right of publicity⁸¹

Nimmer's argument assumed that it was the celebrity individual who had "long and laboriously nurtured the fruit of publicity values" and should therefore be entitled to the award of a property right to protect his or her name and likeness. Generally, the courts in the United States, with the endorsement of a majority of commentators, have relied almost uniformly on a version of Lockean labor theory to protect the economic value of a celebrity's identity.⁸²

The United States also seems to be relatively unique in its recognition of the right of publicity as property that can be

⁷⁸ Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 389 (1999).

⁷⁹ *Haelan Labs*, 202 F.2d at 868.

⁸⁰ 316 F. Supp. 1277, 1282 (D. Minn. 1970).

⁸¹ Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954) (emphasis added).

⁸² See Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 15 (1997) ("[A] property-based conception for publicity rights is the natural outgrowth of our cultural norms as well as our theoretical conceptions of property."); Madow, *supra* note 36; *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

assigned and licensed.⁸³ Although the United States right of publicity was first labelled as a "property right" on its inception in *Haelan Laboratories*,⁸⁴ it appeared that the term "property" was used only metaphorically to symbolize the fact that the courts would enforce a claim that had a pecuniary worth. In some instances, the courts have held that the mere fact that the right of publicity is termed a property right will not automatically mean that the individual will enjoy the full standard attributes of a legal proprietary title.⁸⁵ In *First Victoria National Bank v. United States*, the Fifth Circuit pointed out that in the right of publicity context, "property" only expresses a legal conclusion rather than any independent meaning. The court said

[a]n interest labelled [sic] "property" normally may possess certain characteristics: it can be transferred to others; it can be devised and inherited; it can descend to heirs at law; it can be levied upon to satisfy a judgment; it comes under the jurisdiction of a bankruptcy court in a bankruptcy proceeding; it will be protected against invasion by the courts; it cannot be taken away without due process of law.⁸⁶

In the only United States Supreme Court case affirming the right of publicity,⁸⁷ the Court, "focusing on the right of the individual to reap the reward of his endeavors,"⁸⁸ employed a combined Lockean and incentive-creation argument analogous to copyright and patent law for upholding the right of publicity.⁸⁹ Perhaps unintentionally, the Court's fixation on the act rather than identity has shifted the emphasis to a view of publicity rights that is Lockean in nature, in which property rights are grounded in labor rather than in human personality. Thus, the right of

⁸³ See William Van Caenegem, *Different Approaches to the Protection of Celebrities Against Unauthorized Use of Their Image in Advertising in Australia, the United States and the Federal Republic of Germany*, 12 EUR. INTELL. PROP. REV. 452, 458 (1990).

⁸⁴ *Haelan Labs.*, 202 F.2d at 868 ("[H]ere, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth").

⁸⁵ See, e.g., *First Victoria Nat'l Bank v. United States*, 620 F.2d 1096, 1103-04 (5th Cir. 1980).

⁸⁶ *Id.* at 1103 (footnotes omitted). Delivering the judgment on behalf of the court, Judge Goldberg took pains to explain that property is often used as an expansionist term, explaining that

[t]he attempt to define "property" is an elusive task. There is no cosmic synoptic definiens that can encompass its range. The word is at times more cognizable than recognizable. It is not capable of anatomical or lexicographical definition or proof. It devolves upon the court to fill in the definitional vacuum with the substance of the economics of our time.

Id. at 1102.

⁸⁷ *Zacchini*, 433 U.S. at 562.

⁸⁸ *Id.* at 573.

⁸⁹ *Id.* at 574-77.

publicity under the United States Supreme Court has taken the form of a property right more akin to intellectual property rights, rather than a right based on inviolate personality.

It is obvious that the courts recognize that the identity of a celebrity can have a significant economic value that ought to be protected. Over thirty years ago, Judge Neville observed in *Uhlaender v. Henricksen* that

[a] name is commercially valuable as an endorsement of a product or for financial gain only because the public recognizes it and attributes good will and feats of skill or accomplishments of one sort or another to that personality.⁹⁰

The judgment implicitly acknowledges the critical role that the audience plays in the creation and perpetuation of the celebrity personality, but goes no further to assess the importance of the public's contribution to the commercial value of that personality. Should the celebrity individual, who has been attributed "feats of skill or accomplishments of one sort or another" by the public, be entitled to exclusive proprietary rights? In *Haelan Laboratories*, which was decided over a decade before *Uhlaender*, the court glossed over this with a perfunctory comment that "[w]hether it be labelled [sic] a 'property' right is immaterial,"⁹¹ as the courts are effectively enforcing a claim which has pecuniary worth. Generally, with degrees of variations across different state jurisdictions, the United States courts continued to endorse this approach over the next forty years as they recognized the right of celebrities to recover for the unauthorized commercial use of their personae irrespective of the label attached to the right; the doctrinal justification, however, has become almost irrelevant in the courts' alacrity to protect celebrities from such unauthorized uses.⁹²

Nevertheless, in contemporary society, fame is nurtured through the joint efforts of the celebrity trinity – the producers, the audience, and the celebrity individual, – and the Lockean labor doctrinal justification does not address the substantial labor put in by those other than the individual celebrity—labor that can often exceed the labor put in by the celebrity. Ironically, in the

⁹⁰ 316 F. Supp. 1277, 1283 (D. Minn. 1970).

⁹¹ *Haelan Labs.*, 202 F.2d at 868.

⁹² See, e.g., *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), cert. denied 508 U.S. 951 (1993); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Cher v. Forum Int'l Ltd.*, 692 F.2d 634 (9th Cir. 1982), cert. denied, 462 U.S. 1120 (1983); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

last few decades, as the celebrity production industry grew in power, organization, and reach, resulting in the diminution of the labor of the celebrity individual, the courts saw an even greater need to recognize the publicity right as the sole property of the celebrity individual.

B. Unjust Enrichment Considerations

A supporter of the right of publicity may just concede that since the celebrity individual is not solely responsible for the labor expended on the creation of the celebrity personality, an unauthorized appropriation of the identity is nevertheless an injustice that ought to be prevented by the law. What is morally reprehensible about unauthorized commercial appropriation, then, is that the merchandiser or advertiser or impersonator had no hand in the creation of the celebrity personality at all and that complete strangers were able to reap without sowing, to get something for nothing. From this point of view, the law should prohibit free-riding, which is "justified to prevent *unjust gain* even when it is not necessary to prevent *unfair loss*."⁹³

Generally, the law does not prevent commercial free-riding based on moral grounds. In a United States First Circuit case, Chief Judge Breyer points out that "[j]ust how, when and where the law should protect investments in 'intangible' benefits or goods" is not a matter of moral principle, but a matter of "carefully weighing relevant competing interests."⁹⁴ Perhaps, it is a sense of moral righteousness that someone has made an undeserving profit that drives judges to find ways to prevent unjust enrichment from arising in society. In *Zacchini*, the United States Supreme Court advanced the "prevent[ion of] unjust enrichment by the theft of good will" as one of the justifications for upholding the right of publicity.⁹⁵ The district court judge in a Bette Midler soundalike case said that the defendants were no better than the "average thief."⁹⁶ In *Onassis v. Christian Dior-New York, Inc.*, the court chastised the defendants for using a Jacqueline Onassis lookalike model in one of their print advertisements, entering a judgment in favour of Onassis. The *Onassis* court stated,

[l]et the word go forth – there is no free ride. The commercial hitchhiker seeking to travel on the fame of another will have to

⁹³ JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* 212 (1988).

⁹⁴ *WCVB-TV v. Boston Athletic Ass'n*, 926 F.2d 42, 45 (1st Cir. 1991).

⁹⁵ *Zacchini*, 433 U.S. at 576.

⁹⁶ *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988).

learn to pay the fare or stand on his own two feet.⁹⁷

In a strong dissenting judgment in *Moore v. Regents of the University of California*, Judge Mosk considered the policy issues explicitly, and found that a property right existed in human cells:

[o]ur society values fundamental fairness in dealings between its members, and condemns the unjust enrichment of any member at the expense of another. This is particularly true when, as here, the parties are not in equal bargaining positions.⁹⁸

If we followed the views of Judge Mosk, it would appear that the courts, in the appropriate circumstances, should grant a *sui generis* property right to prevent unjust enrichment. This position has found support among some commentators. According to Fitzgerald and Gamertsfelder,

[t]he search for property tends to engage us in unnecessary formalisms which hide the substantive question involved. The basic point is that an action for unjust enrichment should be sustainable where one can show they are sufficiently linked or proximate to value or in other words a *marketable commodity*.⁹⁹

The plaintiff's right to sue in unjust enrichment depends on the plaintiff's proving that the defendant has been enriched at the expense of – or that economic value has been subtracted from – the plaintiff. There is no need to show interference with a proprietary interest. Therefore, one may validly argue that to award to the plaintiff a property right, on the basis that the defendant had gained some kind of an advantage or benefit, may, in fact, unjustly enrich the plaintiff. The grant of a property right connotes *exclusivity* of control on the part of the property owner. While this may be a desirable and convenient outcome for the celebrity individual and the culture producers – especially for advertising agencies and transnational corporations that rely on celebrity sponsorships, endorsements, and associations, – it does not account for the role of the audience that has participated in the celebrity-creation process. This is where, according to the right

⁹⁷ 472 N.Y.S.2d 254, 261 (N.Y. Sup. Ct. 1984), *aff'd*, 488 N.Y.S.2d 943 (N.Y. App. Div. 1985).

⁹⁸ 793 P.2d 479 (Cal. 1990) (Mosk, J., dissenting).

⁹⁹ Brian Fitzgerald & Leif Gamertsfelder, *A Conceptual Framework for Protecting the Value of Informational Products Through Unjust Enrichment Law*, 16 AUST. BAR REV. 257, 270 (1998) (emphasis added) (footnote omitted).

of publicity, the status of a full property right akin to that of land and chattel lacks a compelling doctrinal justification. However, one may find greater support for unjust enrichment considerations if the right of publicity were instead articulated as a limited-term monopoly right of the celebrity individual to commercially exploit his or her valuable identity and prevent free-riding.

C. Incentive Creation Considerations

The assertion that the purpose of the right of publicity, like that of copyright, is to provide an economic incentive for enterprise, creativity, and achievement has received considerable support in United States case law¹⁰⁰ and academic commentaries.¹⁰¹ The incentive-based rationale differs from the Lockean labor theory in that the latter focuses on reward for the actual labor performed rather than the motivation for such labor. Representative of the incentive creation view is the dissenting judgment of Chief Judge Bird in *Lugosi v. Universal Pictures*, which notes that

providing legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition.¹⁰²

The United States Supreme Court in *Zacchini* supported this incentive creation rationale when it recognized that the right of publicity "provides an economic incentive for [a performer] to make the investment required to produce a performance of interest to the public."¹⁰³ The economic incentive rationale may be more applicable to copyright and patents, where a competitive monopoly is granted to creators whose artistic works and inventions enrich and benefit society. It is difficult to see how the right of publicity can lead to an increase in effort, creativity, and achievement in entertainment or sport that will benefit society,

¹⁰⁰ See, e.g., *Zacchini*, 433 U.S. at 576-77; *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980), cert. denied, 449 U.S. 953 (1980); *Lugosi v. Universal Pictures*, 603 P.2d 425, 441 (Cal. 1979); *Martin Luther King, Jr., Center for Social Change v. Am. Heritage Prods.*, 296 S.E.2d 697, 705 (Ga. 1982).

¹⁰¹ See, e.g., David E. Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673, 681 (1981); Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1128 (1980).

¹⁰² *Lugosi*, 603 P.2d at 441 (Bird, C.J., dissenting).

¹⁰³ *Zacchini*, 433 U.S. at 576.

especially in an age where "celebrities" with dubious claims to fame are produced overnight by the media through a proliferation of reality television series such as *The Biggest Loser*, *Fear Factor*, and *Survivor*.

While copyright protects the primary source of income for the artist, writer and composer, and patent law protects the inventor, the right of publicity protects only the incidental or collateral income of actors, entertainers, and athletes. Denying celebrities of their proprietary right of publicity would not divest them of all of the potential income from endorsements and merchandising; the tortious action of unfair competition is still available.¹⁰⁴ Failure to prohibit third parties from using a celebrity's image to sell a product may prevent a celebrity from capturing all of the commercial value of his or her personality, but the celebrity still "has an incentive to invest substantially in that persona even absent any protection."¹⁰⁵ For other individuals contemplating or aspiring to a career in movies, music, or sports, the existence of the right of publicity does not provide much economic incentive. Unlike copyright, which, to some extent, protects the struggling composers and writers, the right of publicity benefits mostly the established celebrities, thus seemingly helping those who need help least.¹⁰⁶ Even in a world without the right of publicity, celebrities would still be able to derive substantial income from their associative values for endorsements and merchandising, in addition to the income they would continue to garner from the activities to which they owe their fame. Even if their images were freely available for use on t-shirts, coffee mugs, and calendars, Tiger Woods would not stop playing golf, and Tom Cruise would not stop acting in movies.

D. Allocative Efficiency Considerations

The concept of economic allocative efficiency has also been invoked to justify the granting of property rights to celebrities for the protection of their personalities. Property is viewed as a system of allocating to producers and distributing to consumers a basic resource for satisfying certain human needs; it facilitates

¹⁰⁴ See Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2006).

¹⁰⁵ McKenna, *supra* note 17, at 262. McKenna argues that the "potential salaries of professional athletes would seem to provide sufficient incentive to invest in becoming a good basketball player"; similarly, an actor's visibility and star power enhance his or her ability to attract customers to the box-office, thereby allowing the actor to command higher fees for his or her appearance in a movie. *Id.* at 260-62. See also Vincent M. de Grandpre, *Understanding the Market for Celebrity: An Economic Analysis of the Right of Publicity*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 73, 103 (2001).

¹⁰⁶ *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 933 (6th Cir. 2003); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 974 (10th Cir. 1996).

exchanges on the goods and services market, thus efficiently allocating and rationing limited resources.¹⁰⁷ Richard Posner suggests that private property rights give rise to "dynamic" and "static" benefits. The former incentivises productive investments because of the assurance that people will be able to reap what they sow, while the latter promotes efficient use of scarce resources.¹⁰⁸

Moreover, the marginal social benefit, if any, from a proprietary right of publicity that would result in new creations or performances, may be outweighed by the social costs. Assuming that the cultural output in the form of arts performances, entertainment programs, athletic achievements, and other creative works is of some value to someone, we can argue that there is a prima facie social benefit to according publicity rights. The right of publicity would be justified only if its recognition were not outweighed by social costs, including transaction costs, enforcement costs, and other externalities. However, adopting a different view of economic efficiency, Michael Madow argues that celebrity personalities are "public goods" and, therefore, from an allocative standpoint, their unrestricted use may instead result in greater efficiency.¹⁰⁹ Public goods are characterized by "nonexcludability" and "nonrivalrous consumption," but many goods are neither purely public nor private, as they exist on a consumption continuum.¹¹⁰ In his famous 1974 article, Ronald Coase,¹¹¹ building on the work of economist Harold Demsetz,¹¹² argued that society will tend to privatize goods by creating private property rights when the benefits from increased economic efficiency outweigh the costs of enforcement. Supporting the tragedy of the commons argument that "[f]reedom in a commons brings ruin to all,"¹¹³ Posner suggested that the right of publicity prevents an inefficient over-exploitation of the celebrity personality;¹¹⁴ in the absence of such a right, "overexposure of a celebrity may turn people off in the short run and truncate the period in which his [or her] name and likeness retains

¹⁰⁷ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 29-33 (3d ed. 1986); LAWRENCE BECKER, *PROPERTY RIGHTS* 69-74 (1977); Stephen R. Munzer, *The Acquisition of Property Rights*, 66 NOTRE DAME L. REV. 661 (1991).

¹⁰⁸ POSNER, *id.* at 30-31.

¹⁰⁹ Madow, *supra* note 36, at 220-25.

¹¹⁰ Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 98-100 (1994). "Nonexcludability" means that it is impossible to exclude other people who have not paid to use or consume the resource; these non-paying users are called "free riders." "Nonrivalrous consumption" means that one person's consumption of the good does not interfere with another person's consumption.

¹¹¹ See Ronald H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357 (1974).

¹¹² See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1966).

¹¹³ Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968).

¹¹⁴ Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411 (1978); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 255 (1981).

commercial value."¹¹⁵ In economic terms, Mark Grady explains,¹¹⁶ we can imagine a fishing pool that is either not owned at all or is owned by such a large group of people that it is difficult to implement controls. In this situation, each angler has an incentive to catch as many fish as possible today and give no heed to tomorrow. Such a scenario, devoid of property rights, is neither economically nor socially optimal. According to this view, like the anglers racing to catch the fish as quickly as possible, the value of the celebrity identity will experience "rent dissipation"¹¹⁷ if its use was not regulated.

The opponents of the right of publicity have pointed out that its protection encourages an over-investment in celebrity culture, which results in economic waste and inefficiency, contributing little, if at all, to the overall welfare of society.¹¹⁸ The popular view that celebrities, especially high-performing athletes, are valuable role models, has been the subject of intense scrutiny in cultural studies. The increasing ease with which one can become a modern day celebrity through heightened media exposure and journalistic rhetoric has severely compromised any value that a celebrity may have as a role model. The winners of reality television programs such as *Survivor* and *Big Brother*, who might arguably possess few positive character attributes or exceptional talents, attain celebrity status, and may even enjoy wider public recognition than Olympic gold medalists. The observations made by legal commentators like Kwall that "[p]eople in need of moral guidance may look to celebrities as symbolic icons of spirituality,"¹¹⁹ with glib references to celebrity role models like Christopher Reeve (for being an inspiration to the disabled community in America) and Oprah Winfrey (for being an inspiration to African-Americans and abused children) fail to take into consideration the countless other celebrities whose moral standing in society may be far more equivocal. Would we so readily place the notorious Pamela Anderson or Paris Hilton on the same pedestal as Reeve or Winfrey? Is the "beneficial role that the fame phenomenon plays in our culture"¹²⁰ an indisputable fact that necessitates, from both a doctrinal and sociological

¹¹⁵ WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 223 (2003).

¹¹⁶ Grady, *supra* note 110, at 102-04.

¹¹⁷ See, e.g., Mark F. Grady & Jay I. Alexander, *Patent Law and Rent Dissipation*, 78 VAND. L. REV. 305, 316-21 (1992). On occasion the courts have also referred to the economic concept of rent dissipation. *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 462 (Cal. 1979); *Lahr v. Adell Chem.*, 300 F.2d 256, 259 (1st Cir. 1962).

¹¹⁸ See Madow, *supra* note 36, at 216-17.

¹¹⁹ Kwall, *Fame*, *supra* note 82.

¹²⁰ *Id.* at 57.

perspectives, a recognition of the right of publicity as a property right?

These questions are not easy ones to answer. The next Part of this article will present relevant perspectives from cultural studies that can contribute to this continuing debate. The important learning from cultural studies is that despite their commodified status, celebrities may be used "to maintain a sense of belonging in a chaotic modern world in which concepts of place and community are no longer clear cut."¹²¹ This article contends that an appreciation of these contemporary cultural practices can better guide the development of publicity laws and relevant First Amendment jurisprudence in this area.

III. THE CELEBRITY PERSONALITY – A CULTURAL STUDIES APPROACH

A. *An Overview of Cultural Studies*

The celebrity in contemporary society is characterized by an individual distinction, mass appeal, ubiquity and popular authorship. However, the present approaches adopted by the law in the protection of the celebrity personality in various jurisdictions do not adequately define the meaning of "celebrity" and its context in society. Most judicial decisions and academic writings do not seem to appreciate how an analysis of interlocking, interdependent cultural institutions comprising the production, distribution and consumption of cultural commodities can help us to situate the celebrity personality in complex social and economic spaces, within which fame is conditioned and determined.¹²² Much of current legal literature is preoccupied with the argument of delineating economic interests from dignitary interests, with insufficient attention paid to how a celebrity personality is created and what is its true nature in society.¹²³ It is, therefore, instructive

¹²¹ Susan J. Drucker & Robert S. Cathcart, *The Celebrity and the Fan: A Media Relationship, in AMERICAN HEROES IN A MEDIA AGE* 260, 264 (Susan J. Drucker & Robert S. Cathcart eds., 1994). See also John Fiske, *The Cultural Economy of Fandom, in THE ADORING AUDIENCE* 30, 33 (Lisa A. Lewis ed., 1992) (noting that the fans of celebrities often "acquire an unofficial cultural capital that is a major source of self-esteem among the peer group"); JIB FOWLES, *ADVERTISING AND POPULAR CULTURE* 77, 161 (1996) (observing that "Americans have come to treat celebrity entertainers as they used to treat fellow villagers" and they become "caught up in a net of sustaining human relations"). See generally, JOHN B. THOMPSON, *IDEOLOGY AND MODERN CULTURE* 163 (1990); JOSHUA GAMSON, *CLAIMS TO FAME: CELEBRITY IN CONTEMPORARY AMERICA* 132-41 (1994).

¹²² BEN AGGER, *CULTURAL STUDIES AS CRITICAL THEORY* 13 (1992); HERBERT I. SCHILLER, *CULTURE, INC.: THE CORPORATE TAKEOVER OF PUBLIC EXPRESSION* 30-31 (1989). Included in the culture industries are film, radio, television, Internet, publishing, the press, photography, advertising, sports, and other new information technologies.

¹²³ With some notable exceptions, such as Madow, *supra* note 36; Andrew T. Kenyon & Esther Milne, *Images of Celebrity: Publicity, Privacy, Law*, 10 *MED. & ARTS L. REV.* 311 (2005). As Sarat and Simon point out, "[l]aw and legal studies are relative latecomers to cultural

to turn to cultural studies to acquire a better understanding of the celebrity phenomenon in order to assist the development of a more coherent and effective legal framework in this area.

Why is the field of cultural studies useful to law? Some commentators have been perfunctorily dismissive of the contribution of cultural studies to legal scholarship, particularly to the use of a cultural studies approach by the courts.¹²⁴ Cultural studies is inherently interdisciplinary, blending different theoretical disciplines like linguistics, literary theory, cultural anthropology, film studies, media studies, art criticism, sociology, marketing, and consumer studies in the field's appreciation of the phenomena of popular culture.¹²⁵ It is a diverse field of study encompassing many different approaches, methods, and academic perspectives that aim to examine the subject matter in terms of cultural practices and power relationships. Whether from a sociological perspective or from an empirical economic approach, cultural scholars investigate and critique, with varying emphases depending on their field of study, the extent to which the audience helps determine cultural meanings and messages, and the interactions of the audience with the producers and distributors of cultural products.

The next three subsections trace the development of relevant schools of cultural studies over the last half century. Three general themes that emerge from cultural studies that are pertinent to an understanding of the production, circulation and consumption of the celebrity personality and their relevance to the law on personality rights will be analyzed in Sections B, C, and D below.

1. The Frankfurt School: Pre-1960s

The origins of cultural studies may be traced to a particular social and historical context. Commonly known as the Frankfurt School, its most ardent proponents, Max Horkheimer and Theodor Adorno, postulated a passive and resigned audience in a society where certain cultural products and practices reproduce

analysis and cultural studies." See Austin Sarat & Jonathan Simon, *Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship, in CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM* 1-13 (Austin Sarat & Jonathan Simon eds., 2003).

¹²⁴ E.g., Michael Sloan, *Too Famous for the Right of Publicity: ETW Corp. and the Trend Towards Diminished Protection for Top Celebrities*, 22 *CARDOZO ARTS & ENT. L.J.* 903, 924-30 (2005).

¹²⁵ Contemporary cultural studies are said to have "a bracing impact in giving new energy and life to the study of culture, freeing it from its homogenizing and reifying tendencies It invites study of the quotidian world." Sarat & Simon, *supra* note 123, at 12-13. Cultural studies are also linked to "questions of social stratification, power, and social conflict." *Id.*

domination.¹²⁶ Despite some stark differences in their focus, the Frankfurt School and much of contemporary cultural studies share "at least a family of resemblances as practices that attempt to understand . . . the culture of commodity culture."¹²⁷

In the *Dialectic of Enlightenment*, first published in 1947, Horkheimer and Adorno were concerned with the emancipation of the consumer from the tyranny of producers.¹²⁸ Frankfurt School theorists generally view the culture producers, which include the mass media, as dominant institutions that impose their products and cultural meanings on society. As a result, mass-mediated popular culture is a field in which autocratic and dominant meanings are systematically reproduced and reinforced by the culture industries.¹²⁹ Generally, the Frankfurt School has its roots in the dialectical materialism of Marxism and its writings constitute the prehistory of cultural studies. The Frankfurt proponents' revision of Marxism involved "not an abandonment of his dialectical method or political utopianism but rather a fresh empirical analysis of the structural contradictions and crisis tendencies of capitalism."¹³⁰ The Frankfurt thinkers usually adopt a pessimistic view of culture as an anti-enlightenment opiate for the masses. In his defining treatise, *One-Dimensional Man*, Herbert Marcuse developed the Horkheimer-Adorno argument further, to explain how the culture industry has successfully commodified mass culture to contribute to both profit and social control.¹³¹

¹²⁶ MAX HORKHEIMER & THEODOR W. ADORNO, *DIALECTIC OF ENLIGHTENMENT* (John Cumming trans., 1998); Theodor Adorno, *Culture Industry Reconsidered*, in THEODOR ADORNO, *THE CULTURE INDUSTRY: SELECTED ESSAYS ON MASS CULTURE* 98 (1991); Theodor Adorno, *Freudian Theory and Patterns of Fascist Propaganda*, in THEODOR ADORNO, *THE CULTURE INDUSTRY: SELECTED ESSAYS ON MASS CULTURE* 132 (1991).

¹²⁷ Imre Szeman, *The Limits of Culture: The Frankfurt School and/or Cultural Studies*, in *RETHINKING THE FRANKFURT SCHOOL: ALTERNATIVE LEGACIES OF CULTURAL CRITIQUE* 59, 61 (Jeffrey T. Nealon & Caren Irr eds., 2002).

¹²⁸ HORKHEIMER & ADORNO, *supra* note 126.

¹²⁹ The term "Frankfurt School" was first used in the 1960s to refer to the key works of Horkheimer and Adorno. Later theoreticians used the label "Critical Theory" to describe their writings in this area. ROLF WIGGERSHAUS, *THE FRANKFURT SCHOOL: ITS HISTORY, THEORIES AND POLITICAL SIGNIFICANCE* 1-8 (Michael Robertson trans., 1994). See also Tony Bennett, *Theories of the Media, Theories of Society*, in *CULTURE, SOCIETY AND THE MEDIA* 30, 41-47 (Michael Gurevitch, Tony Bennett, James Curran & Janet Woollacott eds., 1982); JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* (Frederick Lawrence trans., 1990); STUART EWEN, *ALL CONSUMING IMAGES: THE POLITICS OF STYLE IN CONTEMPORARY CULTURE* (1988); STUART EWEN & ELIZABETH EWEN, *CHANNELS OF DESIRE: MASS IMAGES AND THE SHAPING OF AMERICAN CONSCIOUSNESS* (1982).

¹³⁰ AGGER, *supra* note 122, at 57.

¹³¹ HERBERT MARCUSE, *ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY* (1968). The rate of cultural commodification, especially in the United States, rapidly accelerated after World War II. The capitalist enterprises of books, movies, television, radio, journalism, and advertising became gigantic industries. See, e.g., SCHILLER, *supra* note 122; LEWIS A. COSER, CHARLES KADUSHIN & WALTER W. POWELL, *BOOKS: THE CULTURE AND COMMERCE OF PUBLISHING* (1982). Since the 1980s, sports have witnessed a much more rapid global commercialization, compared to movies, television or music, that transcends language and cultural barriers, a phenomenon

Marcuse argues that

[t]he products indoctrinate and manipulate; they promote a false consciousness which is immune against its falsehood Thus emerges a pattern of *one-dimensional thought and behaviour* in which ideas, aspirations, and objectives that, by their content, transcend the established universe of discourse and action are either repelled or reduced to the terms of this universe.¹³²

In his analysis of the representation of prominent public figures in the American press, Marcuse's contention is that the media (a culture producer) uses a language that tended toward an "authoritarian identification of person and function,"¹³³ and this language of mediation "constantly imposes *images*, militates against the development and expression of *concepts*."¹³⁴

Extending this Frankfurt view to the contemporary celebrity personality, the culture producers would appear to be creating and perpetuating a product – the celebrity – that induces the audience to live in "a world of hypnotic definitions and automatic ideological equations which rule out any effective cognitive mediation on our part."¹³⁵ The celebrity personality would have been employed as a site of false value in a system of manipulation that serves to seduce the masses into an acceptance of the modern condition; the prolific use of the celebrity personality in advertising, and its focus in an increasing number of celebrity tabloids, is testament to its cultural power of consumer seduction.

As culture becomes a business, the celebrity personality is deindividuated. The celebrity personality is no more than a cultural artifact – a "commodity" – that is produced in order to be exchanged for money. This celebrity artifact is mediated in ways that ensure the profitability of movies, television, radio, newspapers, magazines, books and the Internet. As film historian Richard deCordova points out, the constitution of the actor as a "picture personality" is "a viable means of product differentiation" that could be exploited and advertised to generate revenues.¹³⁶ However, the Frankfurt view that there are certain *false* needs propagated by mass culture in order to both reproduce capital

referred to as "hypercommodification." Richard Giulianotti, *Supporters, Followers, Fans and Flaneurs: A Taxonomy of Spectator Identities in Football*, 26 J. SPORT & SOC. ISSUES 25, 29 (2002).

¹³² MARCUSE, *id.* at 26-27.

¹³³ *Id.* at 83.

¹³⁴ *Id.* at 84.

¹³⁵ Bennett, *supra* note 129, at 44.

¹³⁶ RICHARD DECORDOVA, *PICTURE PERSONALITIES: THE EMERGENCE OF THE STAR SYSTEM IN AMERICA* 50 (1990).

and divert people from realizing their own objective interest in total social transformation suggests a one-sided relationship between cultural producers and their consumers.¹³⁷ In their sociologically focused research, Nicholas Abercrombie and Brian Longhurst analyzed the behavioral paradigms of audiences, and concluded that audiences are shaped by complex social influences and they do not necessarily accept or passively absorb what is fed to them by the mass media.¹³⁸ They point out that the gap between empirical evidence and the grand theory propounded by the Frankfurt School is significant: research shows an increasing fragmentation rather than coherence in media consumption, i.e. the development of a diffused audience in contemporary society.¹³⁹ Other commentators have also pointed out that "consumers of cultural products may also be crucial in the production of these and even constitute the text itself."¹⁴⁰

2. The Birmingham School: 1960s-1980s

In contrast to the Frankfurt School, the highly influential Birmingham Centre for Contemporary Cultural Studies (the "Birmingham School"), established in 1964 by Richard Hoggart, and later headed by Stuart Hall, tended to see popular culture as a contested terrain in which individuals make and establish their own cultural meanings, and, in the process, resist and even subvert the preferred meanings that are generated and circulated by the culture industries.¹⁴¹ Through this approach, the Birmingham School has been regarded as having produced some of the foundational texts of cultural studies.

¹³⁷ See the criticisms against the cultural *deus ex machina* in ALASDAIR MACINTYRE, *HERBERT MARCUSE: AN EXPOSITION AND A POLEMIC* (1970); STUART EWEN, *CAPTAINS OF CONSCIOUSNESS: ADVERTISING AND THE SOCIAL ROOTS OF THE CONSUMER CULTURE* (1976); STUART EWEN, *ALL CONSUMING IMAGES: THE POLITICS OF STYLE IN CONTEMPORARY CULTURE* (1988).

¹³⁸ NICHOLAS ABERCROMBIE & BRIAN LONGHURST, *AUDIENCES: A SOCIOLOGICAL THEORY OF PERFORMANCE AND IMAGINATION* (1998). See also SCHILLER, *supra* note 122, at 146-56.

¹³⁹ ABERCROMBIE & LONGHURST, *id.* at 15-16, 30-34, 68-69.

¹⁴⁰ GARRY CRAWFORD, *CONSUMING SPORT: FANS, SPORT AND CULTURE* 3 (2004). For film historian Benjamin Hampton, the emergence of the star system in Hollywood had proven the democratic basis of the cinematic institution. The audience created stars by voting for its favorite actors at the box office, and, in doing so, asserted both its freedom from and its control over the production process. BENJAMIN HAMPTON, *HISTORY OF THE AMERICAN FILM INDUSTRY* 92 (1970). Marshall elevates the 20th century audience to an almost omnipotent status: "[the] categorical and formative power of the audience is at the center of the power of the celebrity." P. DAVID MARSHALL, *CELEBRITY AND POWER: FAME IN CONTEMPORARY CULTURE* 61 (1997).

¹⁴¹ See, e.g., Stuart Hall, *Encoding/Decoding*, in *CULTURE, MEDIA, LANGUAGE: WORKING PAPERS IN CULTURAL STUDIES, 1972-1979*, at 128 (Stuart Hall, Dorothy Hobson, Andrew Lowe & Paul Willis eds., 1980) 128; IAIN CHAMBERS, *POPULAR CULTURE: THE METROPOLITAN EXPERIENCE* (1986); JOHN FISKE, *READING THE POPULAR* (1989)

The key tenet of the Birmingham School is a rejection of the Frankfurt School's blanket assertion of a single enveloping mass culture and treatment of cultural expressions as if they lie along a continuum.¹⁴² Its signature interdisciplinary approach stresses a broad definition of culture: that culture is not a literary, aesthetic or moral concept, but it is instead the anthropological ensemble of learning and experience that makes us human.¹⁴³ It is an enveloping context in which people learn identity, values and behavior. It is also an ongoing practice that builds on the lived experience of society, requiring participation from the top down as well as the ground up – an emphatic reversal of the mechanism and determinism of orthodox Marxism. In contrast to the Frankfurt School and the poststructuralist scholars, the Birmingham group engaged in important empirical research against a background of theoretical reflexivity.¹⁴⁴

Thus, the Birmingham School assigns a less important role to culture producers, focusing instead on the cultural products and what they mean to the audience. Stuart Hall, one of the most influential scholars in *media studies* – a field within the broader aegis of cultural studies – is concerned with the effects that the media has on individuals. The effects of the media may be empirically determined in terms of a direct influence on individuals where "switches of choice . . . were viewed as a paradigm case of measurable influence and effect."¹⁴⁵ The idea in cultural studies that the media has a key role in defining, and not merely reproducing, reality is an important one when considering both the creation of the celebrity personality and its use in the process of identity formation in contemporary society. This analysis is largely absent in the law; judgments in the United States

¹⁴² See generally, RICHARD HOGGART, *THE USES OF LITERACY* (1957); RAYMOND WILLIAMS, *CULTURE AND SOCIETY* (1958); E. P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (1978); Hall, *supra* note 141, *CULTURE, MEDIA AND LANGUAGE: WORKING PAPERS IN CULTURAL STUDIES, 1972-1979* (1980); Stuart Hall, *Cultural Studies: Two Paradigms*, 2 *MEDIA CULTURE & SOC'Y* 57 (1980).

¹⁴³ For Hall, popular culture is one of the sites where the "struggle for and against a culture of the powerful is engaged It is the arena of consent and resistance." Stuart Hall, *Notes on Deconstructing the "Popular,"* in *PEOPLE'S HISTORY AND SOCIALIST THEORY* 228, 239 (Raphael Samuel ed., 1981).

¹⁴⁴ See STUART HALL & TONY JEFFERSON, *RESISTANCE THROUGH RITUALS: YOUTH SUBCULTURES IN POST-WAR BRITAIN* (1976); MIKE BRAKE, *THE SOCIOLOGY OF YOUTH CULTURE AND YOUTH SUBCULTURES: SEX, DRUGS AND ROCK 'N' ROLL* (1980); Angela McRobbie, *Settling Accounts with Subcultures: A Feminist Critique*, in *CULTURE, IDEOLOGY AND SOCIAL PROCESS* 111 (Tony Bennett ed., 1981). See also the two Marxist thinkers whose contrasting theses have greatly influenced the Birmingham School: ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (1971); LOUIS ALTHUSSER, *LENIN AND PHILOSOPHY AND OTHER ESSAYS* (1971).

¹⁴⁵ Stuart Hall, *The Rediscovery of "Ideology": Return of the Repressed*, in *MEDIA STUDIES, IN CULTURE, SOCIETY AND THE MEDIA* 56, 59 (Michael Gurevitch, Tony Bennett, James Curran & Janet Woollacott eds., 1982).

focus instead on First Amendment doctrines and freedom of speech and expression arguments. In reality, the media defines a particular celebrity personality on its own terms through the selective emphasis and the choice of words and images, whether in print, broadcast or Internet. Hall explains that

[t]his implies the active work of selecting and presenting, of structuring and shaping: not merely the transmitting of an already-existing meaning, but the more active labour of *making things mean* . . . defined as a "signifying practice." The media were signifying agents.¹⁴⁶

The production and articulation of messages within specific signifying systems – also known as "content analysis"¹⁴⁷ – is a distinctive focus of media scholars. Although much of Hall's work generally relates to the television media, his key thesis may be extended to encompass other forms of media. The mediated celebrity personality can be viewed as a "naturalistic illusion," constituted by "the combination of verbal and visual discourse . . . [requiring] the most skillful and elaborate procedures of coding: mounting, linking and stitching elements together, working them into a system of narration or exposition which 'makes sense.'"¹⁴⁸ As Hall has suggested,

we must recognize that the symbolic form of the message has a privileged position in the communication exchange: and that moments of "encoding" and "decoding," though only "relatively autonomous" in relation to the communication process as a whole, are *determinate moments*.¹⁴⁹

Hall's defining treatise, *Encoding/Decoding*,¹⁵⁰ is an important guide to a better understanding of the contemporary celebrity, and it will be discussed in Section D, below.

The Birmingham School's view on culture suggests a distinction between cultural texts and subtexts: meanings and values are conveyed explicitly (text), and also implicitly, through

¹⁴⁶ *Id.* at 64.

¹⁴⁷ Jane Woollacott, *Messages and Meanings*, in *MEDIA STUDIES, IN CULTURE, SOCIETY AND THE MEDIA* 91, 92-93 (Michael Gurevitch, Tony Bennett, James Curran & Janet Woollacott eds., 1982).

¹⁴⁸ Hall, *supra* note 145, at 76.

¹⁴⁹ Hall, *supra* note 141, at 129.

¹⁵⁰ Stuart Hall, *Encoding/Decoding*, in *CULTURE, MEDIA, LANGUAGE: WORKING PAPERS IN CULTURAL STUDIES, 1972-1979*, at 128 (Stuart Hall, Dorothy Hobson, Andrew Lowe & Paul Willis eds., 1980).

what Jean Baudrillard calls "simulations"¹⁵¹ that represent and reproduce reality through frames of advertising and cultural expression (subtext). In the subtext, obscured messages and values are encoded in cultural gestures – e.g. the association of high-performing athletes with a product – and these are decoded by the audience to yield specific meanings. These concepts have become the key foundations for the development of contemporary cultural studies on the celebrity.

3. Contemporary Cultural Studies: 1990s & Beyond

Contemporary cultural studies are concerned with the practices of popular culture, the relationships between the audience and the producers, the formation of identity, and the nature of consumption. In modern urban societies, popular culture has been crucially shaped by the development of industrial mass production, the introduction of new technologies of sound and image broadcasting and recording, and the growth of mass media industries – the film, broadcast television and radio, book and magazine publishing industries, as well as the print and electronic news media. In fact, it has been claimed that "mass media use is now the third-ranked activity after work and sleep" in the United States.¹⁵² But popular culture cannot be described as just the aggregate product of these industries; instead, it is the result of a continuing interaction between these industries and those who consume their products.

From the 19th to the 21st century, as each new medium appears, the human image it conveys is intensified and the number of individuals celebrated grows. Concomitantly, there is a flourish of academic writing in cultural studies on the meaning of celebrity and fame in contemporary culture.¹⁵³ Contemporary cultural studies depart from the Frankfurt School, and builds on the works of the Birmingham School, in viewing culture as "porous, ambivalent and incompletely 'colonized' by capitalist

¹⁵¹ JEAN BAUDRILLARD, *SIMULATIONS* 11 (Paul Foss, Paul Patton & Philip Beitchman trans., 1983). Baudrillard explains several successive phases of an image where the final stage of "simulacrum" is one of such near-perfect replication that the difference between the original and the copy becomes almost impossible to spot.

¹⁵² JIB FOWLES, *STARSTRUCK: CELEBRITY PERFORMERS AND THE AMERICAN PUBLIC* 263 (1992).

¹⁵³ See, e.g., TURNER, *supra* note 2; CHRIS ROJEK, *CELEBRITY* (2001); DAVID GILES, *ILLUSIONS OF IMMORTALITY: A PSYCHOLOGY OF FAME AND CELEBRITY* (2000); MARSHALL, *supra* note 140; JOSHUA GAMSON, *CLAIMS TO FAME: CELEBRITY IN CONTEMPORARY AMERICA* (1994); LEO BRAUDY, *THE FRENZY OF RENOWN: FAME & ITS HISTORY* (1986); RICHARD DYER, *HEAVENLY BODIES: FILM STARS AND SOCIETY* (1986); RICHARD DYER, *STARS* (1979); DANIEL BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* (1971).

rationality"¹⁵⁴ and emphasizing "the democratic and participatory rather than the authoritarian and repressive potential of contemporary popular culture."¹⁵⁵ It also includes scholars who adopt a postmodern or poststructural approach¹⁵⁶ to the study of culture where the products or "texts" of the culture industries (film, music, sport, fashion, celebrities etc.) are deconstructed and particular attention is paid to the process in which audiences – whether as individuals or groups – compete to establish their presence, identities and meanings. This identity politics that is featured so prominently in cultural studies should not be ignored by courts in their First Amendment considerations.

Daniel Boorstin's influential reading of the superficiality of the celebrity in 1961,¹⁵⁷ has aptly captured the essence of the contemporary celebrity in his observation that the celebrity enjoys heightened recognition in society and is constantly seeking public attention to establish its particular distinctiveness:

A celebrity is a person who is known for his well-knownness
He is the human pseudo-event.¹⁵⁸

In addition, Boorstin's reading of fame explains the rapid proliferation of celebrities and the equally rapid decline of any particular celebrity, as well as the central role of the media in the creation of the celebrity.¹⁵⁹

An exegesis of the cultural writings on the contemporary celebrity is unfortunately beyond the scope of this article. However, the influential works of four important scholars in the contemporary study of the celebrity will be highlighted. First, Richard Dyer, in *Heavenly Bodies: Film Stars and Society*, focuses on the various cultural tensions involved in the construction of the contemporary celebrity personality through a study of film stars like Marilyn Monroe and Judy Garland. Dyer asserts that

We're fascinated by stars because they enact ways of making sense of the experience of being a person in a particular kind of social production (capitalism), with its particular

¹⁵⁴ Szeman, *supra* note 127, at 63.

¹⁵⁵ DOMINIC STRINATI, INTRODUCTION TO THEORIES OF POPULAR CULTURE 85 (1995).

¹⁵⁶ See, e.g., JEAN BAUDRILLARD, THE CONSUMER SOCIETY: MYTHS AND STRUCTURES (1998); JEAN BAUDRILLARD, THE SYSTEM OF OBJECTS (James Benedict trans., 1997); MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (1974); Jacques Derrida, *Structure, Sign and Play in the Discourse of the Human Sciences*, in WRITING AND DIFFERENCE (Alan Bass trans., 1978).

¹⁵⁷ BOORSTIN, *supra* note 153.

¹⁵⁸ *Id.* at 57.

¹⁵⁹ *Id.* at 57-58. The ephemeral quality of the celebrity was later covered in Jean Baudrillard's theory of simulations concerning the ability of the sign to attach or detach from objects at will. BAUDRILLARD, *supra* note 151. See also ZYGMUNT BAUMAN, POSTMODERNITY AND ITS DISCONTENTS 29 (1997).

organisation into public and private spheres . . . Stars represent typical ways of behaving, feeling and thinking in contemporary society, ways that have been socially, culturally, historically constructed.¹⁶⁰

Dyer's conclusions have been featured prominently in the writings of other scholars that are discussed below.¹⁶¹

David Marshall, in his definitive work *Celebrity and Power*,¹⁶² builds on Dyer's arguments in examining the celebrity as a form of cultural power and its significance in identity formation. Through "a hermeneutic reading of particular celebrities as texts", Marshall contends that the celebrity is "the public representation of individuality in contemporary culture."¹⁶³ Marshall's views appear to be influenced by the Frankfurt School when he concludes that "the celebrity figure is constructed by these apparatuses to contain the public – in effect, to represent the public."¹⁶⁴ Both the commodity status of the celebrity and its quintessential role as a stable configuration of collective formations are emphasized:

[Celebrities] are the active agents that in the public spectacle stand in for the people . . . Celebrities, in this fluid construction of identity through consumption, represent flags, markers, or buoys for the clustering of cultural significance through patterns of consumption . . . The celebrity functions as a semistable identity and cultural icon that runs through several cultural forms and establishes an identity through which an audience can estimate the cultural forms' relative value.¹⁶⁵

In *Celebrity*, Chris Rojek postulates that mass-media representation is the key principle in the formation of celebrity culture and highlights the split between the public celebrity personality and the authentic veridical self.¹⁶⁶ Rojek introduces the concept of "celebrification" to encapsulate the ubiquitous character of the contemporary celebrity phenomenon in everyday life.¹⁶⁷ He concludes that

¹⁶⁰ DYER, HEAVENLY BODIES, *supra* note 153, at 15-16.

¹⁶¹ See, e.g., MARSHALL, *supra* note 140, at 19.

¹⁶² *Id.*

¹⁶³ *Id.* at 242.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 244-45.

¹⁶⁶ ROJEK, *supra* note 153, at 11-12.

¹⁶⁷ Rojek describes the celebrification process as "the general tendency to frame social encounters in mediagenic filters that both reflect and reinforce the compulsion of abstract desire." *Id.* at 186-87.

[the celebrity] embodies desire in an animate object, which allows for deeper levels of attachment and identification than with inanimate commodities. Celebrities can be reinvented to renew desire, and because of this they are extremely efficient resources in the mobilization of global desire. In a word, they *humanize* desire.¹⁶⁸

Graeme Turner's study of the pervasiveness of the celebrity personality in *Understanding Celebrity* emphasizes the "importance of understanding the industrial conditions that produce celebrity" and attempts to "conceptualise celebrity as something to be professionally managed"¹⁶⁹ Furthermore, Turner has implicitly highlighted the tensions that the law faces in its continual attempts to strike an appropriate balance between individual privacy and the freedom of speech when he asserts that

[t]he analysis of the cultural function of celebrity – the 'identity work' it helps us perform, for instance – must not obscure the equal importance of competing concerns. These would range from issues of privacy and redress for the subjects of 'attack dog' journalism, to the news media's diminishing capacity to perform the critical investigative work once regarded as its most fundamental democratic service.¹⁷⁰

Indeed Turner's treatise goes beyond the celebrity-as-commodity argument; it covers a broad range of contemporary issues ranging from the role of the culture producers in manufacturing the celebrity personality, "tabloidisation" and privacy and the function of celebrities in formation of cultural identity. Turner, like Boorstin, identifies the celebrity as one who excites a disproportionate level of public interest.¹⁷¹ Turner, Bonner and Marshall suggest that "celebrities are people that the public is interested in; if the public is interested in this person, they are a celebrity; therefore, anyone the public is interested in is a celebrity."¹⁷²

In summary, the "celebrity trinity" of the celebrity individual, the audience and the producers work in concert, although not necessarily in a coordinated conscious fashion, to create what we, and the law, know as the "celebrity". This article begins with the

¹⁶⁸ *Id.* at 189.

¹⁶⁹ TURNER, *supra* note 2, 136.

¹⁷⁰ *Id.* at 129-30.

¹⁷¹ *Id.* at 3.

¹⁷² GRAEME TURNER, FRANCES BONNER & P. DAVID MARSHALL, FAME GAMES: THE PRODUCTION OF CELEBRITY IN AUSTRALIA 9 (2000).

premise that there exist certain personalities called "celebrities" who can command general recognition from a diverse population. Drawing from a series of performances (e.g. from the movies and sporting arena) or media representations, the audience will "abstract and reapply to the [celebrity individual] a particular, defined personality . . . that takes on iconic significance."¹⁷³ The producers – be it the media or advertisers – can shape the identity of a celebrity through their narratives and extend a celebrity's ubiquity through multifarious channels; the audience's consumption of the celebrity as a commodity and their interpretation and encoding/decoding of the celebrity as a cultural sign will in turn affect the responses of the producers. In addition, there is a proliferation of subcultural practices that use existing cultural forms (like the celebrity personality) in improvisations that provide opportunities for the articulation of emergent cultural identities. In North American society, a number of marginalized social groups rely on the utilization of certain celebrity personalities to express their alternative identities in a participatory democracy. The interdependency and interconnectedness of the culture producers and the audience is a recurring theme in contemporary cultural studies; the construction, circulation and consumption of the contemporary celebrity personality is a mutually reinforcing loop that binds both the culture producers and the audience. Thus, the contemporary celebrity may be defined as possessing three key characteristics:

it is a public personality created by both the culture producers and the audience, as distinct from the physical human individual;

it is a commodity with an economic value that may be exploited for commercial gain; and

it is a cultural sign used in the process of identity formation by members of the society.¹⁷⁴

The next three sections will critically evaluate these three key characteristics of the contemporary celebrity that emerged from the relevant cultural studies writings and their potential relevance to the law governing publicity rights.

¹⁷³ FOWLES, *supra* note 121, at 118. Celebrities can also exert "an imaginary but actual presence in the conduct of the individual [audience member] – sometimes strongly but more often only referentially The investment that [audiences] make in their popular culture stars represents a sort of equity that advertisers can only eye covetously." *Id.* at 119.

¹⁷⁴ ELLIS CASHMORE, BECKHAM 192 (2004).

B. *The Celebrity Personality as a Duality of Selves*

This Section highlights two contrasting but interrelated aspects intrinsic to the celebrity personality – a public identity that the audience perceives and a private veridical self that is the physical human individual. It outlines how both the public personality and the private self that may be commercially exploited in contemporary society.

1. The Public Celebrity Personality and the Private Veridical Self

Rojek calls the *I* the “veridical self”;¹⁷⁵ Dyer refers to the personal and private aspect of the celebrity as the “authentic self” of the individual,¹⁷⁶ in contrast to the public personality of the celebrity. This perspective in cultural studies has been echoed in social psychology where George Herbert Mead postulated that the split between the *I* (the real self or the ego) and the *Me* (the self as perceived by others) is the inevitable human condition and “[t]aken together they constitute a personality as it appears in social experience.”¹⁷⁷ According to Mead,

[t]he individual not only has rights, but he has duties; he is not only a citizen, a member of the community, but he is one who reacts to this community and in his reaction to it . . . changes it. The “I” is the response of the individual to the attitude of the community as this appears in his own experience.¹⁷⁸

Like Mead’s argument that the public presentation of self is always a staged activity,¹⁷⁹ in which “the human actor presents a ‘front’ or ‘face’ to others while keeping a significant portion of the self in reserve,”¹⁸⁰ the celebrity individual faces this dilemma when attempting to control the exploitation of his or her fame through right of publicity laws and, *at the same time*, protecting his or her veridical self through privacy laws. Mead observes that

¹⁷⁵ ROJEK, *supra* note 153, at 11.
¹⁷⁶ DYER, STARS, *supra* note 153, at 24.
¹⁷⁷ GEORGE HERBERT MEAD, MIND, SELF, AND SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST 178 (Charles W. Morris ed., 1974). Mead argues that “[t]here would not be an ‘I’ in the sense in which we use that term if they were not a ‘me’; there would not be a ‘me’ without a response in the form of the ‘I.’” *Id.* at 182.
¹⁷⁸ *Id.* at 196.
¹⁷⁹ Mead contends that “the self appears in experience essentially as a ‘me’ with the organization of the community to which it belongs.” *Id.* at 200. The “me” determines “the sort of expression which can take place, sets the stage, and gives the cue. . . . [T]he ‘me’ is determined by the situation.” *Id.* at 210. See also GEORGE HERBERT MEAD, ON SOCIAL PSYCHOLOGY 199-246 (1956).
¹⁸⁰ ROJEK, *supra* note 153, at 11.

[t]he individual enters as such into his own [social] experience only as an object, not as a subject . . . It is true that certain contents of experience . . . are accessible only to the given individual organism and not to any others; and that these private or “subjective”, as opposed to public or “objective”, contents of experience are usually regarded as being peculiarly connected with the individual’s self.¹⁸¹

Indeed this socio-psychological perspective is important to our understanding of how the celebrity personality is perceived by society – as a public *object* of desire, adulation or curiosity – but there exists a personal realm where the individual is very much his or her own private *subject*. As Dyer argues, celebrities are “both labour and the thing that labour produces . . . the person is a body, a psychology, a set of skills that have to mined and worked up into a star image.”¹⁸²

Rojek recalls an incident at a London restaurant involving celebrity actor Johnny Depp attacking the paparazzi when the actor complained: “I don’t want to be what you want me to be tonight.”¹⁸³ British boxing legend Chris Eubank once said that

[t]here is Chris Eubank the fighter and there is Chris Eubank who is talking to you now who is a far different personality. He is a personality which is true, which is real and above all he is good.¹⁸⁴

Celebrities frequently face situations where their overwhelming public personality engulfs the veridical self, even to the extent that the veridical self may be treated as inauthentic. The bigger the fame of the celebrity, the more likely the extinction of the veridical self will occur. World-renowned celebrities like David Beckham or Tom Cruise would have every moment of their lives open to media and public scrutiny as the audience’s desire to “possess” the celebrity personality has resulted in “the colonization of the veridical self by the public face.”¹⁸⁵ In the language of the law, the celebrity has become a “public figure”¹⁸⁶ and the concomitant “public interest”¹⁸⁷ in the life of

¹⁸¹ MEAD, *supra* note 177, at 225.
¹⁸² RICHARD DYER, HEAVENLY BODIES: FILM STARS AND SOCIETY 5 (2d ed. 2004).
¹⁸³ ROJEK, *supra* note 153, at 12.
¹⁸⁴ GILES, *supra* note 153, at 87.
¹⁸⁵ ROJEK, *supra* note 153, at 11.
¹⁸⁶ See, e.g., Eastwood v. Super. Ct., 198 Cal. Rptr. 342, 422 (Cal. Ct. App. 1983); Carlisle v. Fawcett Publ’ns, Inc., 20 Cal. Rptr. 405, 415 (Cal. Ct. App. 1962).
¹⁸⁷ See, e.g., Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975); Michaels v.

the celebrity will often trump the celebrity individual's privacy claims to protect the veridical self. The need for privacy – at least a private space that one can enter at will to escape the crucible of public scrutiny – is a fundamental human requirement. Does becoming a celebrity mean you have implicitly given up any modicum of personal privacy?¹⁸⁸ The loss of privacy extends to the intrusions of the media into the personal space of other people close to the celebrity individual – partners, children, parents, and other friends and relatives. A discussion of the right of privacy, however, is beyond the scope of this article.

A legal definition of personality should acknowledge this intrinsic duality: the public image that the audience identifies with the celebrity *and* the physical human person or veridical self who is the real site of it. We cannot escape from the fact that “[e]ach element is complex and contradictory, and the star is all of it taken together.”¹⁸⁹ Rather than use the word “dichotomy” which connotes a divide between the public and the private self, “duality” signifies coherence and unity, much like the two-faced Janus or the two sides of a coin – they are each different, yet part of the same whole. The public face crystallizes into a formal commodity to be guarded, and the private side is an authentic self to be protected.

2. The Celebrity Economy – Public Endorsement, Private Exposé

Both the public celebrity personality and the veridical self are capable of being commercially exploited. In clear contrast to the exploitation of the economic associative value of celebrity through advertising and endorsement where the myth of the celebrity personality is sustained and enhanced, the revelation of personal lives leading to the demystification of the celebrity has a different economic imperative. The celebrity might “represent the ultimate in unauthenticity through the perceived superficiality of their personality” but the audience interest is nevertheless aroused “by the possibility of penetrating that construction and gaining access to some essential knowledge about that celebrity.”¹⁹⁰ The more “private” is the nature of the information revealed, the more

Internet Entm't Group, Inc., 5 F. Supp. 2d 823, 841-42 (C.D. Cal. 1998); Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 767 (Cal. Ct. App. 1983). Cf. Time, Inc. v. Firestone, 424 U.S. 448, 454 (1974).

¹⁸⁸ “Fame is desired because it is the ultimate justification, yet it is hated because it brings with it unwanted focus as well, depersonalizing as much as individualizing Then, when the public image threatens to become overpowering, privacy seems to be a retreat.” BRAUDY, *supra* note 153, at 578.

¹⁸⁹ DYER, *supra* note 182, at 7.

¹⁹⁰ TURNER ET AL., *supra* note 172, at 12.

magazines or newspapers will be sold. The media, especially the celebrity-centric tabloids, are constantly competing for the best scoop and the most revealing photographs of the celebrity individual. The public personality of the celebrity connotes certain encoded values/traits – e.g. glamour (for movie stars) and excellence (for sport icons) – and the consumption of products associated with the celebrities reflect a desire to possess these values/traits. Paradoxically, the revelation of the authentic veridical self which impels a consumer desire to possess information relating to the physical human individual behind the public celebrity personality is antithetical to the very concept of celebrity that the audience has embraced in the first instance (this aspect of the celebrity economy is more relevant to its impact on the right of privacy which is not within the ambit of this article).

The celebrity has become a “significant international currency”¹⁹¹ with advertisers relying on their mass appeal to global audiences to strengthen brands and sell products. The courts have also taken cognizance of the value of celebrity in the marketplace.¹⁹² Legal commentators, particularly in the United States, have observed that

[t]he phenomenon of celebrity generates commercial value. A celebrity's persona confers an associative value, or economic impact, upon the marketability of a product. Whether we like commercialization of personality or not, the economic reality persists The market place recognizes an associative economic value.¹⁹³

In a way, celebrity endorsements can function in much the same manner as trademarks do to communicate information

¹⁹¹ Alan Clarke & John Clarke, *Highlights and Action Replays – Ideology, Sport and the Media*, in SPORT, CULTURE AND IDEOLOGY 62, 64 (Jennifer Hargreaves ed., 1982); BOORSTIN, *supra* note 153, at 58. Celebrities have also been referred to as “acmes of consumerism.” See FOWLES, *supra* note 152, at 178. There is a preponderance of American, and some European, researchers who have developed various models to explain the effectiveness and value of celebrity endorsers. See generally Sejung Marina Choi, Hee-Jung Kim & Wei-Na Lee, *Lessons from the Rich and Famous: A Cross-Cultural Comparison of Celebrity Endorsement in Advertising*, 34 J. ADVERTISING 85 (2005); B. Zafer Erdogan, *Celebrity Endorsement: A Literature Review*, 15 J. MKTG. MGMT. 291 (1999); Jagdish Agrawal & Wagner A. Kamakura, *The Economic Worth of Celebrity Endorsers: An Event Study Analysis*, 59 J. MKTG. 56 (1995); Michael Kammins & Kamal Gupta, *Congruence Between Spokesperson Image and Product Type: A “Match-Up” Hypothesis Perspective*, 11 PSYCHOL. & MKTG. 569 (1994); Grant McCracken, *Who is the Celebrity Endorser? Cultural Foundations of the Endorsement Process*, 16 J. CONSUMER RES. 310 (1989).

¹⁹² See, e.g., Grant v. Esquire, Inc., 367 F. Supp. 876, 881 (S.D.N.Y. 1973). (“[T]he Court can take judicial notice that there is a fairly active market for the exploitation of the faces, names and reputations of celebrities”).

¹⁹³ Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1242-43 (1986).

about products,¹⁹⁴ but it does not mean that the celebrity identity should be considered a trademark for the purposes of its protection.

Every celebrity is a marketing potential in an era of consumer capitalism – from character merchandizing to paid endorsements to strategic associations (e.g. wearing a Giorgio Armani gown to the Oscars). Cinema studies and new media scholar Angela Ndalians points out that contemporary society is “saturated by media signs and representations that seek to glorify – and thus make economically viable – a diverse range of [celebrities].”¹⁹⁵ The exhortation to “Be like Beckham” or “Be like Tom Cruise” has a significant impact on consumers worldwide. Advertising works by appropriating, or drawing on, meanings from other sign systems or commodity forms. The celebrity commodity is a powerful cultural sign which, if properly incorporated into advertising, can reap significant economic rewards. Celebrity endorsements affect consumer purchase decisions in different ways, like enhancing product or brand recall and improving the perception of product or brand quality. In economic terms, it is all about the transfer of the value from the personality of the celebrity to the product he endorses or stands for.

The movie star and the sport icon are two of the best known global personalities who operate at different ends of the personality spectrum. The movie star plays a fictitious character in the cinemas, but the athlete performs as himself or herself in the sporting arena.¹⁹⁶ Yet both can command international recognition and millions of dollars in commercial endorsements. Business magazine *Forbes* maintains an annual *Celebrity 100* list¹⁹⁷ which assesses the power of a celebrity based on factors such as earnings, web mentions on Google, press clips compiled by LexisNexis, and appearances on cover of magazines. Actors Tom Cruise, Brad Pitt and Angelina Jolie are as much a global brand as Tiger Woods and David Beckham – they all appear in the top 20 on the 2007 *Celebrity 100* list.

The commodification of the celebrity as a public personality being used in commercial endorsements of products will be

¹⁹⁴ See, e.g., ROCHELLE COOPER DREYFUSS & ROBERTA ROSENTHAL KWALL, *INTELLECTUAL PROPERTY* 24 (1996).

¹⁹⁵ Angela Ndalians, *Introduction*, in *STARS IN OUR EYES: THE STAR PHENOMENON IN THE CONTEMPORARY ERA* vii, vii (Angela Ndalians & Charlotte Henry eds., 2002).

¹⁹⁶ The former group includes actors in film, drama and television; the latter comprises athletes, musicians, television presenters and accidental celebrities. TURNER ET AL., *supra* note 172.

¹⁹⁷ Lea Goldman, Monte Burke & Kiri Blakeley, *The Celebrity 100*, FORBES.COM, Dec. 17, 2007, http://www.forbes.com/2007/06/14/best-paid-celebrities-07celebrities_cz_lg_0614celeb_land.html.

examined in greater detail in the next section. This will be relevant to defining with greater clarity the contours of the right of publicity.

C. The Celebrity Personality as a Commodity

This Section suggests that, broadly defined, culture producers include the media, advertisers, publicists and anyone who contributes to the creation and propagation of the celebrity personality. It discusses how the culture producers construct this celebrity “commodity” that represents particular attributes that audiences identify with and therefore “consume”; the physical celebrity individual may not in fact possess these attributes.

1. The Role of Culture Producers

The culture industry commodifies representations of individuals both to sell products and to enforce conformity. Leading poststructural, social theorist Baudrillard notes that “the web of artificial signs will be inextricably mixed up with the real elements”¹⁹⁸ and what we get is “a hallucinatory resemblance of the real with itself.”¹⁹⁹ Be it the audience or the consumer, one “no longer relates to a particular object in its specific utility, but to a set of objects in its total signification.”²⁰⁰ Ellis Cashmore utilizes the work of American pop artist Andy Warhol, and in particular, his silkscreen repetition of images of stars such as Marilyn Monroe and Elizabeth Taylor, to highlight the manner in which contemporary celebrities are produced and reproduced in the mass media like any other consumer commodity. As Cashmore writes, David Beckham is “as much a [media] construction as Bob the Builder or Tony Soprano – a product of imagination and industry, rather than exploits.”²⁰¹ Roland Barthes, in an early study of the Greta Garbo phenomenon, highlights the portrayal of the commoditized movie star as “the essence of the corporeal person, descended from heaven where all things are formed and perfected in the clearest light.”²⁰²

In recent years, the culture producers have propagated media spectacles for the audience in a multitude of spaces and sites, and

¹⁹⁸ BAUDRILLARD, *supra* note 151, at 39.

¹⁹⁹ *Id.* at 142.

²⁰⁰ JEAN BAUDRILLARD, *THE CONSUMER SOCIETY: MYTHS AND STRUCTURES* 27 (Chris Turner trans., 1998) [trans. of: *LA SOCIÉTÉ DE CONSUMMATION* (1970)].

²⁰¹ CASHMORE, *supra* note 174, at 192.

²⁰² ROLAND BARTHES, *The Face of Garbo*, in *MYTHOLOGIES* 56, 57 (Annette Lavers trans., 1972).

the "spectacle itself is becoming one of the organizing principles of the economy, polity, society, and everyday life."²⁰³ The concept of the "society of the spectacle," developed by French theorist Guy Debord, describes a media and consumer society organized around the production and consumption of images, commodities and staged events.²⁰⁴ The correlate of the celebrity spectacle is therefore the spectator – the audience and consumer of a social system predicated on conformity, passivity and the cultivation of marketable difference. The commodity spectacle that is the "celebrity personality," created by a combination of forces in advertising, marketing, public relations and journalism, is calculated to hold the attention of the audience long enough for them to consume both the mediated image and the material product. While Debord's notion of the spectacle written almost forty years ago tends to be more theoretical and abstract, contemporary cultural and media studies scholar Douglas Kellner offers a more concrete and pragmatic approach to the study of spectacles and spectators. He observes:

[c]elebrities are icons of media culture, the gods and goddesses of everyday life. To become a celebrity requires recognition as a star player in the field of media spectacle, be it sports, entertainment, fashion, or politics. Celebrities have their handlers and image managers, who make sure that their clients continue to be seen and positively perceived by the public. Just as with corporate brand names, celebrities become brands to sell their Madonna, Michael Jordan, Tom Cruise, or Jennifer Lopez product and image.²⁰⁵

The aim of advertisements featuring celebrities was to produce an audience desire to resemble physically the idealized image or to identify with the celebrity personality through the consumption of the product associated with the celebrity; the celebrity personality is "imbued with euphoric values."²⁰⁶ The celebrity identity has been employed to heighten the consumption values of the advertised product. This involves

the production of a new self-image through the pleasure taken

²⁰³ DOUGLAS KELLNER, MEDIA SPECTACLE 1 (2003). Kellner also comments that "spectacle culture is moving into new domains of cyberspace that will help to generate future multimedia spectacle and networked infotainment societies." *Id.* at 10.

²⁰⁴ GUY DEBORD, THE SOCIETY OF THE SPECTACLE (1967).

²⁰⁵ KELLNER, *supra* note 203, at 4.

²⁰⁶ ROLAND BARTHES, *The Rhetoric of the Image*, in IMAGE-MUSIC-TEXT 32, 35 (Stephen Heath trans., 1977).

in a star image The purchasing of items such as clothing and cosmetics in relation to particular stars brings into particularly sharp focus the relationship between the cinematic industries and other forms of the capitalist industry.²⁰⁷

It impels the consumer to purchase Revlon's *Age Defying Makeup* so that she may look more like Susan Sarandon or to buy anything from shoes to dresses by Versace because Halle Berry is endorsing the brand. It is this "extra-cinematic identification"²⁰⁸ that propels the cultural economy of the glamorous movie star celebrity and defines the economic associative value of the celebrity with regard to both the production and consumption of goods and services.

Similarly, sport icons have been identified by advertising agencies and management consultants as offering highly effective means for establishing a distinctive set of emotional meanings and values around products that will contribute to the process of brand building, if not the enhancement of brand value.²⁰⁹ Increasingly, transnational corporations are associating their brands with celebrity personalities that evoke a "feeling of authenticity" and the cultural form that has been identified as most readily exemplifying authenticity has been sport.²¹⁰ Moreover, those who control the media not only select which sports will be covered, but also what kinds of images and commentary will be emphasized in the coverage, including which athletes will be highlighted as the ones to watch.²¹¹ Hence, the media has intensified the process of commercialization of sports and commoditization of its celebrity athletes. The pre-match analysis, the camera coverage, the camera angles, the close-ups, the slow-motion replays, the special attention given to particular athletes, the commentator's play-by-play descriptions, the quotes from the athletes, and the post-match summary all contribute to the *making* of the celebrity athlete. As Cunningham, Miller and Rowe point out, a key element of this media narrative is the power of the television to create and promote athletes as celebrities in

²⁰⁷ Jackie Stacey, *Feminine Fascinations: Forms of identification in Star-Audience Relations*, in STARDOM: INDUSTRY OF DESIRE 141, 156 (Christine Gledhill ed., 1991).

²⁰⁸ *Id.* at 159.

²⁰⁹ SEAN NIXON, ADVERTISING CULTURES: GENDER, COMMERCE, CREATIVITY 40 (2003).

²¹⁰ NAOMI KLEIN, NO LOGO 16-19, 36 (2001).

²¹¹ DAVID ROWE, SPORT, CULTURE AND THE MEDIA: THE UNRULY TRINITY 97-103 (1999) (on the powerful impact of live sport commentary); *id.* at 120-144 (on proliferation of myths through photography). Paletz and Entman have made similar comments: "the very process of selecting, editing, structuring and presenting stories renders journalists' claimed adherence to objectivity chimerical . . . to edit is to interpret, to speak is to define, to communicate is to structure reality." DAVID PALETZ & ROBERT ENTMAN, MEDIA POWER POLITICS 22 (1981).

accentuating the specific character traits of the athletes.²¹²

Sociologist Barry Smart contends that "the level of public acclaim was deemed to be a product of something more than the quality of sporting performance alone."²¹³ The culture producers were largely responsible for creating the larger-than-life images of the achievements of athletes. Television's celebrity outreach encompasses not just actors and musicians, but also athletes, who through the medium of television, can transcend "mere stardom based on excellence in their specialties to become 'personalities' recognizable even by those people who do not follow their sport."²¹⁴ Footballer (soccer player) David Beckham and golfer Tiger Woods first gained recognition in their own countries based on their sporting achievements, before being catapulted to international fame largely through the globalized circulation of their images and writings. In Michael Jordan,

globalization, commodification, sports, entertainment, and media come together to produce a figure who serves as an emblematic totem of athletic achievement, business success, and celebrity in the contemporary era.²¹⁵

In summary, there are commonalities between the movie star and the sport icon. While the primary difference lies in the authenticity of their performances, the media as a key culture producer has played a quintessential role in shaping the public identities of these two types of celebrities. Indeed, a celebrity is not created in a vacuum, but is very much a product of, and dependent on, the media, i.e. a "mediated persona". In another influential sociological study on this topic, Joshua Gamson analyzes the celebrity creation process through both an exploration of what the media texts are saying about celebrities, and by researching the celebrity production process and studying audience reaction through focus groups.²¹⁶ The burgeoning growth in the range of media outlets and the increased speed of circulation of information, have combined to create the

²¹² STUART CUNNINGHAM, TOBY MILLER & DAVID ROWE, *CONTEMPORARY AUSTRALIAN TELEVISION* 77 (1994). Douglas Kellner, in his analysis of the celebrity of Michael Jordan, notes that images of "Jordan's windmill dunking, blazing baseline heroics, and flying through the air to net key shots thrilled sports spectators throughout the world, as did his controlled fade-away jump shooting and uncanny ability often to bag the decisive game-winning shot in his best years." KELLNER, *supra* note 203, at 64.

²¹³ BARRY SMART, *THE SPORT STAR: MODERN SPORT AND THE CULTURAL ECONOMY OF SPORTING CELEBRITY* 13 (2005).

²¹⁴ RICHARD SCHICKEL, *INTIMATE STRANGERS* 249-50 (1985).

²¹⁵ KELLNER, *supra* note 203, at 63.

²¹⁶ JOSHUA GAMSON, *CLAIMS TO FAME* 166-69 (1994).

phenomenon of a vortex effect, which Garry Whannel terms "vortextuality".²¹⁷ In the midst of a vortextual moment, a celebrity can be born almost instantaneously, when the newspapers, television, radio, tabloids, columnists, Internet chatrooms and blogs are all drawn into the same topic.

The media narratives, as well as other narratives found in advertising, biographies and blogsites, have created an almost fictitious personality for athletes through selective highlights of specific attributes, in virtually the same manner that movie stars have been infused with certain cultural meanings. In his seminal analysis of celebrity endorsements, Grant McCracken observes that

when consumers respond to [a celebrity's] 'attractiveness,' they are, in fact, responding to a very particular set of meanings. They are identifying with a bundle of symbolic properties Celebrities have particular configurations of meanings that cannot be found elsewhere . . . [and they] 'own' their meanings because they have created them on the public stage by dint of intense and repeated performance.²¹⁸

As the fame of a celebrity grows, the appearance/image of the individual is recognizable by more and more people. The image of the celebrity is the necessary mediation between the ideal and the product that enables the commoditization of celebrities. In the next part, we turn to see how this aspect of celebrity is commercially exploited.

2. Exploiting the Economic Associative Value of Celebrity

The "economic associative value" that a celebrity brings to a brand is the transfer of the perceived attributes of the celebrity – for example, success, glamour, beauty and talent – directly to the brand he or she is associated with.²¹⁹ This is the value that right of publicity laws seek to protect.²²⁰ In a leading article on the cultural foundations of the use of the celebrity in advertising, McCracken

²¹⁷ GARRY WHANNEL, *MEDIA SPORT STARS: MASCULINITIES AND MORALITIES* 206 (2002).

²¹⁸ McCracken, *supra* note 191, at 312, 315. Celebrities draw on these powerful meanings from the "roles" they assume in their movie, television, sporting, or other careers. According to Grant McCracken's approach, whether one plays a character in a movie or plays football in the sporting arena, the celebrity is, in fact, fulfilling a cultural role that contains a configuration of meanings to the public audience. It is the "accumulated meanings of celebrities that make them so potent a source of significance." *Id.* at 316.

²¹⁹ See FOWLES, *supra* note 121, at 127; McCracken, *supra* note 191, at 316.

²²⁰ See, e.g., *White v. Samsung Elecs. Am., Inc.*, 971 F.2d at 1395, 1399 (9th Cir. 1992); *Uhlaender v. Henrickson*, 316 F. Supp. 1277, 1282 (D. Minn. 1970).

argues that

the endorsement process depends upon the symbolic properties of the celebrity endorser. Using a "meaning transfer" perspective, these properties are shown to reside in the celebrity and move from celebrity to consumer good and from good to consumer.²²¹

Generally, celebrity endorsements translate into better product sales only when consumers feel that whatever cultural meanings attached to the celebrity can shift along unimpeded paths from the celebrity to the product. In the words of Stuart Hall, this would be an idealized state where the advertiser assumes a "dominant-hegemonic position" and the "perfectly transparent communication" results in the audience's consumption of the product.²²²

To understand why the laws protect the economic value of the celebrity personality, we must also turn to the basics of consumer choice. In seeking to *maximize utility*, consumers show *preference* for one celebrity over another, or for one celebrity-endorsed product over an alternative, and the preferred choice acquires a higher *economic value* over the others. There are numerous different theories about consumer behavior but they resonate around similar themes. One of the more compelling theories, based on empirical observations of human motivation is the motivational paradigm, based on Abraham Maslow's hierarchy of needs, which classifies human motives into categories of orientation, survival, adaptation, expectation/resolution and play.²²³ Another on consumer behavior theory identifies five consumption values influencing consumer choice - *functional*

²²¹ McCracken, *supra* note 191, at 310. McCracken lists four types of celebrity endorsements: (i) explicit mode ("I endorse this product"); (ii) implicit mode ("I use this product"); (iii) imperative mode ("You should use this product"); and (iv) copresent mode (in which the celebrity appears with the product). *Id.*

²²² Hall, *supra* note 141, at 136.

²²³ RICHARD C. MADDOCK, MOTIGRAPHICS: THE ANALYSIS AND MEASUREMENT OF HUMAN MOTIVATIONS IN MARKETING 103-201 (2000). Maddock explains that his research

has gone beyond Maslow (1) in generating statistical (empirical) support for the building blocks [of human motivation], (2) in appealing to recent research on the brain and brain structures, and (3) in a reliance upon advertising and marketing, where we believe there is already an appreciation and understanding of motivation and emotion.

Id. The research was carried out in three states and it involved about 200 people filling out a 200-item questionnaire that was in a semantic differential format. *Id.* at 105. The relatively small sample size, compared to the consumer population, may cast doubts on the statistical significance of the findings. Nevertheless, motigraphics presents a good theoretical foundation and *prima facie* supportable conclusions that provide a springboard for further research in this area.

value, *social value*, *emotional value*, *epistemic value* and *conditional value*²²⁴ - where a purchasing decision may be influenced by any or all of the consumption values.

It suffices for this article to recognize that the use of the celebrity personality in advertising is a tried-and-tested global marketing strategy to increase the emotional²²⁵ and social consumption values of brands.²²⁶ The economic associative value of the celebrity personality is realized when the enhanced emotional and social consumption values of brands translate to improved sales and customer loyalty. In this respect, Nike stands head and shoulders above other brands in its distinctive ability to capture the elusive emotional value through connecting its representations of celebrity athletes that intimately connect fans to the consumption of its products:

People don't concentrate their emotional energy on products in the way fans abandon themselves to the heroes of their games. But great products that were necessary to great athletic figures, [Phil] Knight reasoned, could create customers, who were like fans. "Nobody roots for a product," Knight would say; the products needed to be tethered to something more compelling and profound.²²⁷

²²⁴ Jagdish N. Sheth, Bruce I. Newman & Barbara L. Gross, *Why We Buy What We Buy: A Theory of Consumption Values*, 22 J. BUS. RES. 159, 160 (1991). Various disciplines, including economics, sociology, and psychology have contributed theoretical insights and research findings to these values. *See also* JAGDISH N. SHETH, BRUCE I. NEWMAN & BARBARA L. GROSS, CONSUMPTION VALUES AND MARKET CHOICES: THEORY AND APPLICATIONS (1991); JAGDISH N. SHETH, BANWARI MITTAL & BRUCE I. NEWMAN, CUSTOMER BEHAVIOR: CONSUMER BEHAVIOR AND BEYOND (1998).

²²⁵ Successful transnational brands have thrived on building a cachet of high emotional value with their customers through 'emotional branding' campaigns that engender enduring loyalty. The emotional value is often the overriding consideration in the purchasing decision. *See, e.g.*, MARC GOBÉ, EMOTIONAL BRANDING: THE NEW PARADIGM FOR CONNECTING BRANDS TO PEOPLE (2001); SCOTT ROBINETTE & CLAIRE BRAND, EMOTIONAL MARKETING: THE HALLMARK WAY OF WINNING CUSTOMERS FOR LIFE (2001).

²²⁶ From the human motivational perspective, the Personal Orientation, Spiritual and Physical Survivals, and the Adaptation Motives are the strongest ones. MADDOCK, *supra* note 223, at 142. Diana Gonsalves observes that the "Adaptation Motive is one that predates birth" and

[celebrity] testimonials appeal directly to the Adaptation Motive, by using the desire of people to be like the others he or she knows, to keep up with them, or in some way have what they have Whatever the faces are famous for, the endorsement game provides financial benefits to the endorser and a ready-made image to the marketer.

Diana Gonsalves, *The Adaptation Motive*, in MADDOCK, *supra* note 223, at 167-68, 178-79. In addition, Gonsalves claims that the image that a woman presents to the world, in dress and makeup, "is grounded in the Personal Orientation Motive, but takes form from the Adaptation Motive." *Id.* at 179.

²²⁷ DONALD R. KATZ, JUST DO IT: THE NIKE SPIRIT IN THE CORPORATE WORLD 6 (1994). So strong is the emotional connection that brand consciousness of Nike's "global power brand" now extends "anywhere there is a faint possibility of a growing middle class." *Id.* at 198.

These empirical studies raise pertinent issues for the law when considering an unauthorized use of the celebrity identity calculated to capture the emotional and social consumption values under the cloak of freedom of speech and expression. Character merchandizing and evocative uses of identity fall into this area as both types of uses are clearly intended to exploit the commercial value of the celebrity personality, but are invariably accorded First Amendment protection in the United States.

As a significant number of the celebrity cases in the United States regarding unauthorized commercial use of identity have been brought by movie stars and sport icons, the next two sections shall briefly consider how these two types of celebrities have been commoditized in advertising.

(a) The Movie Star

[T]he film star aura . . . was built on a dialectic of knowledge and mystery. The incomplete nature of the audience's knowledge of any screen actor became the foundation on which the film celebrity was constructed into an economic force.²²⁸

A movie star is mythic – like no-one you've ever seen in your daily life.²²⁹

As the above quotes illustrate, the movie star is the rarefied royalty at the top of the celebrity hierarchy, portrayed as possessing a mythic aura of glamour and desirability. In the contemporary consumer society, we are deluged with images of movie stars everywhere and everyday: from Brad Pitt touting a TAG Heuer watch to Halle Berry in a Versace campaign, from Kate Winslet and Ken Watanabe for American Express to Susan Sarandon for Revlon cosmetics. Celebrities offer the consumer an excellent shortcut to a branding message, with a visual immediacy that generates a high mass-market impact.²³⁰

²²⁸ MARSHALL, *supra* note 140, at 81-82.

²²⁹ Carmel Giarratana, *The Keanu Effect – Stardom and the Landscape of the Acting Body: Los Angeles/Hollywood as Sight/Site*, in STARS IN OUR EYES: THE STAR PHENOMENON IN THE CONTEMPORARY ERA 61, 61 (Angela Ndaliansis & Charlotte Henry eds., 2002) (quoting John Waters).

²³⁰ Vivian Manning-Schaffel, *Brands Get Celebrity Exposure*, BrandChannel.com, http://www.brandchannel.com/features_effect.asp?pf_id=301 (last visited June 3, 2006) (quoting GERRIE LIM, *IDOL TO ICON: THE CREATION OF CELEBRITY BRANDS* (2005)). Actors are the most frequently used celebrity group in advertisements in the United States. Choi et al., *supra* note 191, at 94.

While some brands are more subtle with the celebrity association – for example, Donna Karan simply featured actress Cate Blanchett in its 2004 print advertisements without a mention of the name of the celebrity²³¹ – others make explicit reference to the name of the celebrity in a manner that indicates an unequivocal endorsement of the brand. In making full exploitation of the economic associative value of celebrities, luxury brand Versace has declared unabashedly: “Demi Moore for Versace” and “Halle Berry for Versace” when featuring the actresses in its 2005 Fall-Winter campaign and 2006 Spring-Summer campaign respectively.²³² Variations of this celebrity referencing can be seen in Christian Dior’s advertising for its perfume *J’Adore* (“Charlize Theron, Dior”), Revlon’s beauty products (“Susan Sarandon is wearing Age Defying Makeup for Dry Skin in Medium Beige” or “Eva Mendes is wearing Super Lustrous Lipstick in Goldpearl Plum”) and the Oriental Hotel’s familiar taglines (“He’s a fan” or “She’s a fan”).²³³ Last but not least, more subtle associations may be employed, especially by the luxury fashion houses, with movie stars wearing designer gowns on the red carpet or being photographed with the latest handbag and accessories.

(b) The Sport Icon

Because of his capacity to be all things to all people, David Beckham has been recognized as having the ability to sell anything to anyone Whether it’s modelling clothes and sunglasses, or selling chocolate and second-hand cars, the Beckham brand is big business David Beckham has fast

²³¹ See <http://jozworld.club.fr/dkny.html> (last visited December 17, 2007). In a similar fashion, international luxury icon Louis Vuitton has featured actors Hayden Christensen, Scarlett Johansson, and Uma Thurman in its campaigns in 2004 and 2005. See <http://jozworld.club.fr/louis-vuitton.html>. American fashion label St. John featured Angelina Jolie in its 2006 and 2007 print advertisements. See <http://jozworld.club.fr/st-john.html>; <http://www.sjohnknits.com/sjkineternet/index.cfm>.

²³² Versace has continued with the celebrity endorsement approach in its advertising, signing up actor Jonathan Rhys-Meyer for its 2007 Spring-Summer campaign. See <http://jozworld.club.fr/versace.html> (last visited Dec. 17, 2007).

²³³ The Mandarin Oriental Hotel Group is one of the leading luxury hotel groups in the world and operates twenty three luxury hotels in different countries across the globe. Its international advertising campaign connects the Group’s well-recognized symbol – the fan – with international celebrities who regularly stay at the hotels and consider themselves to also be fans of the Group. All of the celebrities featured were photographed in a location of their choice that, for them, best represents the feeling of well-being. Each fan chose a charity to which Mandarin Oriental made a donation of \$10,000. Movie stars who have graced this campaign include Helen Mirren, Michelle Yeoh, Maggie Cheung, and Whoopi Goldberg; the mix of Asian and Hollywood movie stars ensures the appeal of the campaign to a transnational audience. Mandarin Oriental Hotel Group, *Fans of Mandarin Oriental* <http://www.mandarinoriental.com/hotel/507000041.asp> (last visited June 1, 2007).

become the most desired, photographed and marketable man on the planet.²³⁴

Celebrity footballer David Beckham is one of the best recognized individuals in the world, and his celebrity personality – “Brand Beckham” – has been associated with a dazzling array of consumer products.²³⁵ Advertising in the media has capitalized successfully on the cultural significance of sporting achievement, and in virtually all the advertisements, from Nike to Gatorade:

the athlete superhero has been turned into a hyperinflated signifier of the benefits of hard work and the achievement ethic . . . in contemporary American society the star athlete’s representation emerged as an over-idealized role model for childhood and adolescent cultures.²³⁶

It is evident that sporting celebrities can wield immense power in influencing people’s attitudes, choices and behaviors. The top athletes have a sense of heightened ubiquity as global ambassadors and iconic representations of their sport. For example, Michael Jordan and David Beckham are not only iconic athletes in themselves, but they are also emblematic of the sports of basketball and soccer. Their public personalities have been widely exploited on a global scale. Advertisements feature Jordan endorsing brands like Nike, Gatorade, McDonald’s and Oakley, while Beckham’s associations span Adidas, Pepsi, Gillette, Brylcreem and Vodafone. In 2006, Wimbledon champion Maria Sharapova had a stable of lucrative endorsements that included Nike, Prince, Motorola, Canon, TAG Heuer, Land Rover and Colgate-Palmolive. American golfer Tiger Woods has been in promotional campaigns for everything from credit cards (American Express) and breakfast cereals (Wheaties) to cars (Buick) and watches (TAG Heuer).

Today, international athletes often earn more from endorsing products than from competing. To cross geographical

²³⁴ LUCIE CAVE, BECKHAM: UNAUTHORISED AND UNOFFICIAL 87-88 (2004).

²³⁵ See ANDY MILLGAN, BRAND IT LIKE BECKHAM: THE STORY OF HOW BRAND BECKHAM WAS BUILT 201 (2004); Paul Maidment, *Brand Beckham*, FORBES.COM, Apr. 1, 2005, http://www.forbes.com/commerce/2005/04/01/cx_pm_0401beckham.html; Chris Noon, *Disney Helps Beckham Raise U.S. Profile*, FORBES.COM, Jan. 29, 2007, http://www.forbes.com/facesinthenews/2007/01/29/beckham-disney-advert-face-lead-cx_cn_0129autofacescan02.html.

²³⁶ ROBERT GOLDMAN & STEPHEN PAPSON, NIKE CULTURE: THE SIGN OF THE SWOOSH 48 (1998). For example, Nike first signed up Michael Jordan in 1984 for just \$2.5 million for a five-year endorsement contract. As Jordan’s career progressed in leaps and bounds, Nike continued to associate him with “themes of transcendent skill and iron determination while keeping him human.” *Id.* at 49.

and cultural borders effectively, global brands often use athletes to showcase universal moralistic or heroic traits. In the “Adidas Makes You Do Better” campaign, for example, English footballer David Beckham (clearing the streets of litter), Trinidadian sprinter Ato Boldon (returning a stolen television set), and New Zealand rugby player Jona Lomu (rescuing a suffocating fish), all use their sporting or physical skills for the good of humanity as a whole. Other brands simply bank on the mass appeal of the sport celebrity; the mere image of the personality in association with the product is sufficient to boost sales internationally.

D. *The Celebrity Personality as a Cultural Sign*

This Section examines the definition of the contemporary audience and how the audience uses the celebrity sign as a form of social identification and cultural expression. It argues that audiences contribute significantly to the meaning of the celebrity personality and need an adequate level of access to the celebrity sign as part of the process of identity formation.

1. The Conception of the Audience

The terms “public” and “audience” draw on distinctive bodies of theory and can sometimes be in opposition. In such discourses, the public is often valued as active, critically engaged and politically significant, while the audience is seen to be trivial, passive and individualized.²³⁷ In the 21st century, there is little need for a reductive polarization of public and audience as there are few if any aspects of social or personal life untouched by, or independent of, the media. The distinction between public and audience is increasingly difficult to sustain as the media becomes even more deeply entrenched in all aspects of contemporary society.²³⁸

Indeed the audience and the public are composed of the same people. The media provides a set of resources, albeit biased, through which everyday meanings and practices are constituted by the people; these in turn shape identity, participation and culture. As Silverstone concludes, the audience is

²³⁷ See, e.g., JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger trans., 1989); PETER DAHLGREN, TELEVISION AND THE PUBLIC SPHERE: CITIZENSHIP, DEMOCRACY AND THE MEDIA (1995); IEN ANG, DESPERATELY SEEKING THE AUDIENCE (1990); MICHEL DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE (1984).

²³⁸ See, e.g., Sonia Livingstone, *On the Relation between Audiences and Publics*, in AUDIENCES AND PUBLICS: WHEN CULTURAL ENGAGEMENT MATTERS FOR THE PUBLIC SPHERE 17, 36 (Sonia Livingstone ed., 2005); DENIS MCQUAIL, MASS COMMUNICATION THEORY: AN INTRODUCTION 219 (2d ed. 1987).

a potentially crucial pivot point for the understanding of a whole range of social and cultural processes that bear on the central questions of public communication . . . [which are] essentially questions of culture.²³⁹

The key element in this version of the "audience" is the existence of an active and interactive social group – like consumers of products – which is served by the media, but does not depend on the media for its existence. The audience is thus the consumer, and the consumer is the audience, as commodities, both material and symbolic offerings of the producers, are incorporated into their lives:

Consumption of either involves an engagement in the appropriation of mass-produced and distributed commodities. Consumption in both cases is not a matter simply of the fulfillment of utilitarian needs, but a significant component in modern society, significant for the establishment of status and the construction of individual and social identities.²⁴⁰

In the same way audiences consume ("purchase") a material product like clothes and food, they also consume ("buy into") mediated images – including representations of celebrity personalities – and the meanings associated with these images. Through the media's consumed and consuming messages, consumption possibilities are open to the audience, and decisions to consume are made. The celebrities then become "common points of reference for millions of individuals who may never interact with one another, but who share, by virtue of their participation in a mediated culture [as the audience], a common experience and a collective memory."²⁴¹ As Dyer explains,

a star's image is also what people say or write about him or her, . . . the way the image is used in other contexts such as advertisements, novels, pop songs, and finally the way the star

²³⁹ Roger Silverstone, *Television and Everyday Life: Towards an Anthropology of the Television Audience*, in PUBLIC COMMUNICATION - THE NEW IMPERATIVES: FUTURE DIRECTIONS FOR MEDIA RESEARCH 173, 173 (Marjorie Ferguson ed., 1990). See also ROGER SILVERSTONE, TELEVISION AND EVERYDAY LIFE 132-58 (1994).

²⁴⁰ Roger Silverstone, *From Audiences to Consumers: The Household and the Consumption of Communication and Information Technologies*, in THE AUDIENCE AND ITS LANDSCAPE 281, 286 (James Hay, Lawrence Grossberg & Ellen Wartella eds., 1996).

²⁴¹ JOHN B. THOMPSON, IDEOLOGY AND MODERN CULTURE: CRITICAL SOCIAL THEORY IN THE ERA OF MASS COMMUNICATION 163 (1990).

can become the coinage of everyday speech.²⁴²

It is through consumption that the audience simultaneously defines a celebrity's identity and constructs its own identity. The next subsection explains this consumption as a process of interpreting and using cultural texts.

2. Producing and Interpreting Cultural Texts in a Commercial Context

The phenomenon of projecting new meanings upon celebrity images is a widespread practice. In the language of cultural studies, this is known as interpretive practice where cultural meanings are contested. Semiological approaches in cultural studies, emerging from the study of the structure of language and its associated problems, are focused on the importance of the *sign*.²⁴³ According to Marshall, a leading cultural studies scholar in this area, the "celebrity" is a sign²⁴⁴ that represents individuals who are given heightened significance through mass circulation in the social world and this forms a cultural text imbued with meanings to be interpreted by the audience..

To adequately understand the celebrity sign, we need to be familiar first with the deconstructive method employed in poststructuralism. Poststructuralism refers to the theory of knowledge and language commonly associated with the work of Jacques Derrida.²⁴⁵ Poststructuralism's insight is that every reader brings his or her own critical, interpretive and political interests to bear constitutionally on the sense of the text in question. The poststructuralist celebrity personality is not an absolute identity belonging to an individual, but is a "text" which is given meaning by a mélange of consumers, publicists, journalists, marketers etc. Unfortunately, much of the poststructural literature is expressed

²⁴² DYER, HEAVENLY BODIES, *supra* note 153, at 2-3.

²⁴³ Semiology is the science of signs and symbols that studies significations apart from their content. See, e.g., CLAUDE LÉVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP (1970); ROLAND BARTHES, ELEMENTS OF SEMIOLOGY (1967); FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (Roy Harris trans., 1986).

²⁴⁴ Marshall, *supra* note 140, at 57. The "celebrity-function" is as important as Michel Foucault's "author function" in its power to organize the domains of the personal and individual within the social. The origin of the sign may be attributed to the influential Swiss linguist de Saussure, who perceived linguistics as a branch of a general science of signs he called semiology (now known as semiotics). DE SAUSSURE, *supra* note 243. See also Michel Foucault, *What is an Author?*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS (1977); JEAN BAUDRILLARD, THE MIRROR OF PRODUCTION (Mark Poster trans., 1975).

²⁴⁵ See JACQUES DERRIDA, OF GRAMMATOLOGY (1976); JACQUES DERRIDA, WRITING AND DIFFERENCE (1978); JACQUES DERRIDA, POSITIONS (1981).

in a language style incomprehensible to judges and lawyers trained in a different tradition that promoted positivist values. Judges and lawyers are interested in seeking an outcome to legal disputes, not in discussing the reification of commodities and the hegemony of power. Moreover, such writings are frequently perceived as nihilistic and disruptive, threatening the very institution in which judges and lawyers exist.

In the critique of popular culture, deconstruction challenges the authorial privilege of self-presentation in an age of simulation. The representation of the celebrity personality in a television program, magazine, advertisement or movie announces itself in its own terms, asserting a dogmatic authorial privilege. Such "texts" preempt reading by the audience, hence shutting out dialogue. These peremptory cultural self-presentations lead readers – including the courts when attempting to define the meaning of the celebrity personality – to acquiesce to this cultural self-framing process by reviewing the work on its own presented terms.

Roland Barthes' deconstructive analysis of the three different messages – a linguistic message, a literal message (the non-coded iconic message) and a cultural/symbolic message (the coded iconic message)²⁴⁶ – in a Panzani advertisement is instructive in our study of the use of the celebrity personality in advertising. According to Barthes, the audience, when viewing the image of the celebrity, receives at the same time, "the perceptual message and the cultural message."²⁴⁷ In the use of the celebrity image in advertising, for example Brad Pitt for TAG Heuer, the literal image of the photograph of Brad Pitt is the non-coded iconic message,²⁴⁸ which together with the linguistic message (the words in the advertisement), constitutes what Barthes calls "denotation". The coded iconic message, which represents the overall symbolic value of the advertisement, is called "connotation". The literal image is *denoted* and the symbolic cultural image *connoted*. The photograph of Brad Pitt used in the TAG Heuer advertisement (the denoted image) serves to naturalize the symbolic message, "masking the constructed meaning under the appearance of the given meaning."²⁴⁹

Like broadcasters who encode messages in television

²⁴⁶ BARTHES, *supra* note 206, at 32, 36. See also ROLAND BARTHES, *The Photographic Message*, in IMAGE-MUSIC-TEXT 32, 35 (Stephen Heath trans., 1977).

²⁴⁷ BARTHES, *supra* note 206, at 36.

²⁴⁸ According to Barthes, in the absence of a linguistic anchorage, "the image is not the reality but at least it is its perfect analogon." The analogon is the denoted message, and the connoted message is "the manner in which the society to a certain extent communicates what it thinks of it." BARTHES, *The Photographic Message*, *supra* note 246, at 17.

²⁴⁹ BARTHES, *supra* note 206, at 46.

programs in the form of meaningful discourse, the culture producers also encode messages in the celebrity personality, which are then decoded by the audience. As Stuart Hall points out,

It is this set of decoded meanings which 'have an effect,' influence, entertain, instruct or persuade, with very complex perceptual, cognitive, emotional, ideological or behavioural consequences.²⁵⁰

The celebrity personality is a complex sign. It is both visual and aural, and at the same time "iconic" as "it possesses some of the properties of the thing represented."²⁵¹ The celebrity sign produces apparently natural recognitions which conceal the practices of coding inherent in the sign. This often leads the audience to think that the celebrity sign actually *is*, rather than *represents*, the celebrity individual or the authentic veridical self. Linguistic theory frequently employs the distinction "denotation and connotation". Denotation is equated with the literal meaning of a linguistic sign, while connotation is used to refer to associative meanings that may vary from instance to instance and therefore must depend on the intervention of codes. Hall argues that most signs in the real world will possess *both* denotative and connotative aspects which are "encoded" in the sign, and that the focus should be on the "decoding" by the audience.²⁵²

For example, the celebrity signs of Brad Pitt or David Beckham, as articulated through widely distributed photographic and televisual images, tend to be read as natural by the audience, and their encoded meanings, especially in advertising, are more likely to be decoded in the dominant mode. Every celebrity sign in advertising – like in the case of Brad Pitt for TAG Heuer watches or David Beckham for Police sunglasses – "connotes a quality, situation, value or inference, which is present as an implication or implied meaning, depending on the connotational positioning."²⁵³ The celebrity actor or athlete is not the sole and sovereign author of what he or she means to others. Today, the name Brad Pitt is a global brand that promises not only alluring cinematic masculinity, but is also perceived as a symbol of high quality by the audience, regardless of the type of movie he appears in. In part, Pitt has to thank the audience for "select[ing] from the complexity of the [media representations], the meanings and

²⁵⁰ Hall, *supra* note 141, at 130.

²⁵¹ *Id.* at 131.

²⁵² *Id.* at 132-33.

²⁵³ *Id.* at 133.

feelings, the variations, inflections and contradictions, that work for them."²⁵⁴ According to Hall, an audience member is operating inside the dominant mode when he or she "takes the connoted meaning . . . full and straight" and "decodes the message in terms of the reference code in which it has been encoded."²⁵⁵ The desired effect of this idealized symmetrical decoding will be the consumption of products associated with the celebrity sign.

What this means is that, in a commercial context, one needs not make use of a literal image of a celebrity in order to capture the associative value – it is sufficient that some evocative use has the same connotative meaning for the audience. Thus a transformative use of a celebrity's identity may be no different from a literal non-transformative use if they both have the same connotation for the audience. A caricature or some other evocative non-literal representation of Brad Pitt or David Beckham may still be as effective in leveraging the associative value of the celebrity's identity; one should not readily accord such uses First Amendment protection without further inquiry into whether the real purpose was profit-motivated and whether the use of the First Amendment defense was to avoid paying an appropriate fee for the commercial use of the celebrity's identity.

3. The Significance of the Celebrity Sign in Identity Formation

The names and the images of celebrities are constitutive of our cultural heritage. The star signs of "Marilyn Monroe," "Judy Garland," "Michael Jordan," and "David Beckham," are replete with cultural meanings in contemporary society. In contrast to the commercial context discussed in the previous subsection, cultural practices that represent the "vibrant role played by these cultural icons in the self-authorings of minority, subaltern, or alter/native social groups"²⁵⁶ have a potential to be classified as political speech that deserve First Amendment protection. For example, the gay male camp subcultural groups have appropriated or recoded the Judy Garland sign as an expression of their alternative social identities—a form of subtle political activism to seek affirmative association with society in general. For the female African-American community in this decade, the Oprah Winfrey sign has come to stand for social emancipation and personal

²⁵⁴ DYER, *supra* note 153, at 5.

²⁵⁵ Hall, *supra* note 141, at 136. Indeed advertisers desire a "perfectly transparent communication" where the consumers take the meaning as the advertisers intended. *Id.* at 135.

²⁵⁶ ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 89 (1998).

empowerment. However, the use of celebrity images is by no means limited to an expression of gender or racial identity by marginalized alternative social groups. In so-called mainstream culture, the audience may identify with certain traits embodied by the heroic male archetypes (the signs of Sylvester Stallone, Arnold Schwarzenegger and Tom Cruise) and the female glamour screen sirens (the signs of Uma Thurman and Nicole Kidman).

Marshall observes that celebrities are the public representation of individuality in our culture when he wrote:

the modalities of [celebrity] production and reception [are incorporated] into the organization of political representations of self and identity. . . . Emerging from the identification of the audience-subject and the production of the cultural industries and the political culture is a form of identity that permeates contemporary culture.²⁵⁷

Complex identity formations have to be analyzed in terms of the economic, political and ideological institutions and practices in society. One's identity in society is expressed in a social framework and is often expressed through cultural signs. In addition to its economic significance as a commodity, the celebrity sign has an immense cultural significance. Marshall sees the celebrity personality as "wedding consumer culture with democratic aspirations" while participating in the "active construction of identity in the social world."²⁵⁸ Barthes' study of the photographs of political candidates and electoral appeal is also relevant to furthering our understanding of the celebrity sign and its usage by the audience in identity formation. What is transmitted through the celebrity image are all the attributes and values – "all this style of life of which he is at once the product, the example and the bait."²⁵⁹ The celebrity has become

a mirror, what we are asked to read is the familiar, the known; it offers to the [audience] his own likeness, but clarified, exalted, superbly elevated into a type.²⁶⁰

Similarly, Wark argues that we inhabit a world structured by unstable categories and fluid identities, and that celebrities have become crucial elements in the formation of individual and

²⁵⁷ MARSHALL, *supra* note 140, at 70.

²⁵⁸ *Id.* at xi.

²⁵⁹ ROLAND BARTHES, *Photography and Electoral Appeal*, in *MYTHOLOGIES* *supra* note 202, at 91.

²⁶⁰ *Id.*

cultural identity:

[celebrities] embody not just the particular cultures from which they come, they also embody something beyond. We may not like the same celebrities . . . but it is the existence of a population of celebrities, about whom to disagree, that makes it possible to constitute a sense of belonging. Through celebrating (or deriding) celebrities, it is possible to belong to something beyond the particular culture with which each of us might identify.²⁶¹

As Turner, Bonner and Marshall observe, “[c]elebrities clearly have representative qualities – Richard Dyer’s ‘type of the individual’ is semiotically embedded in the nation’s stars.”²⁶² For example, the cultural sign of the African-American Academy-Award winning actress Halle Berry signifies positive attributes that many African-Americans (race and class) and women (gender) identify with. Hence the use of the Halle Berry celebrity personality as an icon in race, class and gender identity formation can be expressed in many ways. African-Americans and women (regardless of color) may want to be identified with Halle Berry as being a black, confident and successful woman through the consumption of products endorsed by Halle Berry. Interest groups may desire to draw upon the qualities of perseverance and hard work epitomized by Halle Berry in her path to Oscar glory. Social causes may wish to align themselves with Halle Berry such that the audience who identifies with the celebrity will also want to be identified with these causes. Satirists may want to parody Halle Berry such that it will be obvious to those who identify with the values embodied by the celebrity personality what qualities are in essence being critiqued.

The public, having imbued the celebrity signs with meaning, use them as “expressive and communicative resources.”²⁶³ The celebrity personality is

especially likely to attract the energies of those in subordinate or marginal groups for whom social recognition and a positively evaluated identity are pressing concerns.²⁶⁴

In questioning traditional mainstream formulations of social

²⁶¹ MCKENZIE WARK, *CELEBRITIES, CULTURE AND CYBERSPACE: THE LIGHT ON THE HILL IN A POSTMODERN WORLD* 33 (1999).

²⁶² TURNER ET AL., *supra* note 172, at 166. See also DYER, *STARS*, *supra* note 153, at 111.

²⁶³ Madow, *supra* note 36, at 128.

²⁶⁴ COOMBE, *supra* note 256, at 107.

identity, minority groups seek their political and cultural spaces by using signs in the mass media that the majority in society are familiar with.

These subcultural and alternative practices may initially seem distant from the legal regime of publicity rights. But law operates in a social context, and its prohibitions, as well as its definitions, of cultural forms has a significant impact on the everyday life of the audience, and subsequently on the quality of speech in a marketplace of ideas. Through different modes of expressing the celebrity personality – like adulation, irony, parody, satire and burlesque – social groups are able to advance their political ideologies, comment on their marginalization and form a sense of collective community. The circulation of the celebrity personality by subaltern groups – often in a recoded form – is an important form of political activism that allows them to use such signs to “reverse perceptions of social devaluation or stigma, articulate alternative narratives of national understanding, and challenge exclusionary imaginaries of citizenship.”²⁶⁵

Generally, the movie star sign embodies attributes like glamour, beauty, and prestige, and the use of this cultural sign may be to reinforce the cultural encoding or to oppose its popular connotation. Similarly, the dominant encoding of the sports icon sign conveys discipline and commitment to excellence, but an oppositional reading may instead connote a lifestyle of indulgence and debauchery. In copyright law, this oppositional use is generally permitted under the “fair use” or “fair dealing” doctrines of parody and satire.²⁶⁶ From a cultural studies’ perspective, it is therefore important for the law to give the audience access to the celebrity sign for both forms of expression as part of the identity formation process.

However, consider the California formulation of the right of publicity.²⁶⁷ It fails to take into the account the possible expressive uses by social groups. When adjudicating a right of publicity claim in which free speech arguments are raised, the courts in California have adopted the transformative test. The key question is “whether the depiction or imitation of the celebrity is the very sum and substance of the work in question” (in which case the right of

²⁶⁵ *Id.* at 32.

²⁶⁶ Parody, as a method of criticism, has been a very popular means for authors, entertainers and advertisers to communicate a particular message or point of view to the public. In the United States, this is encompassed by the fair use defense. See Copyright Act, 17 U.S.C. § 107 (1976); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). In Australia, parody or satire is considered “fair dealing” and will not infringe copyright in a literary, dramatic, musical work, sound recording, film or broadcast if it is for the purpose of parody or satire. See Copyright Act, 1968, § 41A (Austl.).

²⁶⁷ See CAL. CIV. CODE §§ 3344-3344.1 (West 2007).

publicity prevails) or "whether a product containing a celebrity likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness" (in which case the First Amendment protects the defendant from right of publicity liability).²⁶⁸

This approach restricts minority groups from appropriating celebrity signs for the construction of their social identities in everyday activities. For example, the groups will be prohibited from using a literal depiction (eg a photograph) of a particular celebrity on silkscreened t-shirts. They may not be able to produce paraphernalia bearing the celebrity's image for sale to group members – a cultural signifying practice – unless it is associated with an overt political cause. More specifically, gay-oriented cafes may not be able to name items on the menus after celebrity icons like David Beckham and Brad Pitt, and ethnic minorities may not trade in merchandise bearing the likeness of Tiger Woods, Oprah Winfrey or Jackie Chan. Although the 'public interest' and 'newsworthiness' defenses – usually raised by the media when using images of celebrities in a commercial context without their consent – will invariably trump the rights of a celebrity individual to control the circulation of his or her identity,²⁶⁹ the above uses may be not accorded the appropriate "breathing space" under present right of publicity laws.²⁷⁰

In summary, whether through economic consumption (e.g. buying products endorsed by a particular celebrity) or cultural expression (e.g. employing a celebrity image to express a particular viewpoint) – and these are often inextricably intertwined – the audience is using the celebrity sign to forge both a sense of individual and social identity. The law ought to be cognizant of this identity formation aspect of the use of the celebrity personality when constructing a test to determine if an appropriation of a celebrity's identity in a particular commercial context was justified. The current balancing approaches that

²⁶⁸ Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P. 3d 797, 809 (Cal. 2001).

²⁶⁹ In *Montana*, the California Court of Appeal found against football star Joe Montana's claim that a newspaper's poster reproducing its Super Bowl cover story violated his statutory and common law rights of publicity as (i) the posters represented newsworthy events, and (ii) a newspaper has a constitutional right to promote itself by reproducing its news stories. *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 40 Cal. Rptr. 2d 639 (Ct. App. 1995). Similarly, in *Dora*, the California Court of Appeals decided against surfer Mickey Dora, who complained that a videotape documentary misappropriated his right of publicity. The court held the documentary contained matters of public interest. *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 18 Cal. Rptr. 2d 790 (Ct. App. 1993).

²⁷⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 298 (1964), quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974) ("In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise.").

present the right of publicity as a competing right to be weighed against the right to free speech do not sufficiently consider the inherent social and cultural significance of the celebrity personality in identity formation.

E. *Interim Conclusions*

Through the lens of key writings in cultural studies examined in Part III, one will have acquired a better appreciation of the nature of "celebrity" in contemporary society, the workings of the celebrity production enterprise, the way in which the audience participates in its construction and development, and the manner in which the audience uses the celebrity in identity politics.

Indeed the contemporary celebrity is a media spectacle that encompasses a repertoire of images and meanings to be consumed by the audience; at the same time, it is also a polysemic text to be interpreted, personalized and incorporated into our daily lives. As observed by numerous cultural scholars discussed in this Part, the celebrity is

therefore a combination of the commercial interests of a cultural industry . . . and the shifting desires of an audience . . . [the celebrity personality serves] different political ends of each component of this relationship – as a means of reaching a fragmenting mass market (for the production industry), and as a means of comprehending a fragmented and confusing culture (for the audience).²⁷¹

While there may arguably be an economic justification for allocating property rights in a celebrity's identity to *someone*, the concentration of broad sweeping control powers over the use of identity as conferred by the right of publicity in many states may become "a powerful new vehicle for the private censorship of culture" especially when "[b]ig stars seem to believe that they ought to control evocations of their names, no matter the context."²⁷² Through enforcing the right of publicity, the law authors the celebrity²⁷³ and, in doing so, controls particular practices of popular culture, thus demonstrating "the signifying

²⁷¹ TURNER ET AL., *supra* note 172, at 11-12.

²⁷² DAVID BOLLIER, *BRAND NAME BULLIES: THE QUEST TO OWN AND CONTROL CULTURE* 133-4 (2005).

²⁷³ See generally Rosemary Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 101 (Martha Woodmansee & Peter Jaszi eds., 1994).

power of law and law's power over signification."²⁷⁴ As public policy analyst David Bollier points out,

[a] subordinate community uses the most prevalent icons available to it . . . to fashion a subculture that reflects its own identities and worldviews . . . this project of borrowing commercial icons to create a subculture often conflicts with the proprietary agenda of celebrities and their estates.²⁷⁵

The current approach of weighing the proprietary publicity right against First Amendment values posits a tension between private and public interests and obscures the cultural and political significance of the celebrity sign.

Finally, one should also acknowledge that what is encoded into advertising by the producers is not always identical to what is decoded by the consumers. It is a fallacy to believe that advertising exploits consumers. According to Mary Douglas and Baron Isherwood,

[t]heories of consumption which assume a puppet consumer, prey to the advertiser's wiles, of consumer jealousy competing with no sane motive, or lemming consumer rushing to disaster, are frivolous, even dangerous.²⁷⁶

Consumers bring their own personal readings to the representations in the media and create their own meanings of the celebrity sign.²⁷⁷ As explained above, consumers attach a combination of different consumption values to commodities. Evocative idealizations of the celebrity personality in advertising are aimed at increasing consumption values that lead ultimately to an active purchasing decision. Evocation usually has the same effect that the use of an actual image or name of the celebrity has on the audience. Consumers have either attached significant emotional or social consumption values to the commodities associated with a celebrity, or they have developed high adaptation

²⁷⁴ Rosemary Coombe, *Contingent Articulations: A Critical Cultural Studies of Law*, in *LAW IN THE DOMAINS OF CULTURE* 21, 64 (Austin Sarat & Thomas R. Kearns eds., 1998).

²⁷⁵ BOLLIER, *supra* note 272, at 138.

²⁷⁶ MARY DOUGLAS & BARON ISHERWOOD, *THE WORLD OF GOODS: TOWARD AN ANTHROPOLOGY OF CONSUMPTION* 89 (1979). David Mick points out that "we must move beyond conceiving advertising in terms of what it does to people and view it more in terms of what people do with advertising." David G. Mick, *Consumer Research and Semiotics: Exploring the Morphology of Signs, Symbols and Significance*, 13 *J. CONSUMER RES.* 196, 205 (1986). See also WILLIAM LEISS, STEPHEN KLINE, SUT JHALLY & JACKIE BOTTERILL, *SOCIAL COMMUNICATION IN ADVERTISING: PERSONS, PRODUCTS AND IMAGES OF WELL-BEING* (3d ed., 2004).

²⁷⁷ Hall, *supra* note 141, at 128.

motives toward the acquisition of these celebrity-related products. Advertisers do not need to use the actual image of a celebrity to invoke its economic associative value; an adroit evocative use of a widely recognized celebrity like Tom Cruise or Tiger Woods in an advertisement can achieve the same effect. The legal tests that govern the commercial use of a celebrity's identity should not ignore the reality of contemporary consumption.

The celebrity personality is therefore a combination of the commercial interests of culture producers and the mercurial desires of the audience, focused on turning a veridical self into a public face. The complex relationships between the celebrity individual, the producers and the audience in the trinity operate to serve different ends at different times. Sometimes it is the use of a well-recognized face to reach a fragmented mass consumer market, at other times, it is employed as a means of creating a distinctive social identity within a fragmenting culture. At the centre of this cultural maelstrom stands the veridical self, often complicit in satisfying the desires of the producers and the audience, yet occasionally resistant when asserting to reclaim its authenticity. By focusing on just the commercial value of the celebrity personality or its function as an indicia of source or origin, one misses the cultural significance of the celebrity as a sign in identity formation. The critical insights into the celebrity personality will be of significant relevance to the jurisprudence of personality rights and in contributing to the refinement of the present legal framework for the right of publicity. The law cannot ignore the realities of the contemporary celebrity phenomenon and must learn to negotiate its way through this cultural terrain.

IV. THE RIGHT OF PUBLICITY, TRADEMARK LAW AND CULTURAL STUDIES

Although trademark law may be a better analogy than copyright law for understanding the ambit of the right of publicity, reconceiving the right of publicity as a trademark-like right, while assisting in defining the scope and limitations of the right, nevertheless obscures the true nature of the production, circulation and consumption of celebrity in contemporary society. Since trademark cases are usually decided based on the likelihood of confusion or on dilution grounds,²⁷⁸ this Part will address the suitability of applying these two principles to the right of publicity in the light of cultural studies perspectives.

²⁷⁸ Dogan & Lemley, *supra* note 4, at 1165.

A. *Beyond Trademark Law: Perspectives from Cultural Studies*

The trademark analogy with the right of publicity has been argued in cases where a celebrity's claim under section 43(a) of the Lanham Act²⁷⁹ alleges that his or her distinctive identity is similar to an unregistered trademark, which should receive essentially the same protection as a registered mark. Generally, there is "no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed."²⁸⁰ Hence, a trademark is "not property in the ordinary sense" but an indicia of origin or source of a product.²⁸¹ To prevail in a trademark infringement claim, a plaintiff must establish that the symbols in which this right is asserted are "valid, legally protectable trademarks" owned by the plaintiff, and that the defendant's "subsequent use of similar marks is likely to create confusion as to origin of the goods."²⁸²

In *ETW Corp. v. Jireh Publishing, Inc.*, the Sixth Circuit rejected celebrity golfer Tiger Woods' trademark claim and held that as a general rule, a person's image or likeness cannot function as a trademark, primarily because it does not perform the trademark function of designation.²⁸³ In *Pirone v. MacMillan, Inc.*, the Second Circuit rejected a claim asserted by the descendants of baseball legend Babe Ruth in holding that "a photograph of a human being, unlike a portrait of a fanciful cartoon character, is not inherently 'distinctive' in the trademark sense of tending to indicate origin."²⁸⁴ While courts have rejected the trademark analogy, several commentators like Dogan and Lemley continue to argue that trademark law has much to offer in the development of the right of publicity. Putting aside the usual legal objections to treating a right of publicity like a trademark, the next two sections will discuss the limitations of applying some of the key principles of trademark law to the protection of a cultural phenomenon like the celebrity.

²⁷⁹ TRADEMARK ACT 1946 § 43(a), 15 U.S.C. § 1125(a) (2008).

²⁸⁰ *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918).

²⁸¹ *Indus. Rayon Corp. v. Dutchess Underwear Corp.*, 92 F.2d 33, 35 (2d Cir. 1937), cert. denied, 303 U.S. 640 (1937).

²⁸² *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 582 (2d Cir. 1990) (citation omitted).

²⁸³ 332 F.3d 915 (6th Cir. 2003).

²⁸⁴ *Pirone*, 894 F.2d at 583 (citing *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360, 366 n.12 (S.D.N.Y. 1988)); see also *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1363-64 (D.N.J. 1981).

1. From "Likelihood of Confusion" to "Economic Exploitation"

For over a century, United States trademark law has been synonymous with the protection of consumers from deception. As a result, the consequent principle accords protection to mark owners "against the use of the same or a similar mark as a brand, generally by competitors, in circumstances likely to confuse the consuming public."²⁸⁵ The Lanham Act also defines a trademark as including "any word, name, symbol, or device, or any combination thereof" used by a person "to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."²⁸⁶ However, the law today no longer requires cases of "passing off" to be limited to goods or services manufactured, produced or supplied by the trademark holder. Indeed the Lanham Act provides a cause of action against any person who falsely implies an "affiliation, connection or association" with a trademark holder, or causes confusion "as to the origin, sponsorship, or approval of his or her goods, services or commercial activities."²⁸⁷ Since celebrities do not typically sell products themselves,²⁸⁸ Dogan and Lemley were of the view that "confusion about affiliation or sponsorship is most directly analogous to right of publicity cases."²⁸⁹ However, they made a clear distinction between soundalike and lookalike cases (where consumers may be confused as to whether the celebrity endorses or appears to endorse the product) and evocative cases (where consumers should not in fact be confused). This is a tenuous argument that obviates the fact that in both scenarios, the defendant is deliberately using the celebrity's identity to call to

²⁸⁵ Dogan & Lemley, *supra* note 4, at 1191 (citing *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 767-68 (1992)).

²⁸⁶ 15 U.S.C. § 1127 (2007). See also J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 3:1 (2002).

²⁸⁷ Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2008). The Lanham Act also provides "a right of action to persons engaged in interstate and foreign commerce, against deceptive and misleading use of words, names, symbols, or devices, or any combination thereof, which have been adopted by a . . . merchant to identify his goods and distinguish them from those manufactured by others."

²⁸⁸ Increasingly, celebrities are launching products that bear their own names as brands. See, e.g., Paul Newman's food products (*Newman's Own*); Sarah Jessica Parker's perfume (*Lovely*); and David Beckham's cologne (*Instinct*).

²⁸⁹ Dogan & Lemley, *supra* note 4, at 1193. Courts have often used an eight-factor test for determining likelihood of confusion. They are: (i) strength of plaintiff's mark; (ii) relatedness of the goods; (iii) similarity of the marks; (iv) evidence of actual confusion; (v) marketing channels used; (vi) likely degree of purchaser care; (vii) defendant's intent in selecting the mark; and (viii) likelihood of expansion of product lines. *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 626-27 (6th Cir. 2000); *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).

mind the affective relationship that consumers have with the celebrity and to realize the economic associative value. While one may desire to impose some limitations on the expanding right of publicity, the requirement of consumer confusion is not an appropriate principle for this purpose. This section suggests that the focus of the right of publicity ought to be on the nature of economic exploitation of the associative value of the celebrity identity rather than consumer confusion.

As Part III has shown, regardless of the meaning of celebrity or the complex culture producers-audience interaction that is an integral part of the celebrity's construction and propagation, it is an incontrovertible fact that a celebrity's identity has a significant economic associative value in contemporary society. Transnational brands pay celebrities substantial fees to front their global advertising campaigns and to endorse their products; measurement tools like the Davie-Brown Index and Q Scores aid corporations to arrive an optimal selection – and price – of a celebrity as part of their advertising, marketing and media strategies. Although from a cultural studies' viewpoint the celebrity individual may not be morally entitled to the full value of his or her identity, it does not follow that others are entitled to freely appropriate this associative value for *purely* commercial gain.

Indeed Lockean labor theory fails as a normative justification of identity protection in contemporary society where the celebrity personality is a result of a complicated social process that comprises three quintessential elements: the individual, the audience, and the producers (which include the media, movie studios, advertisers and other cultural intermediaries). Lockean labor theory gives celebrities much more credit than they deserve for the labor expended in creating the economic value of their identities.²⁹⁰ Some academic writers, however, still see the attainment of fame as something that a star does largely on his or her own. Andrew Sims, for example, thinks that a celebrity usually creates "a positive or otherwise intriguing image in the public mind, with the concomitant ability to attract the public's patronage, consumption, or support of that with which his name or likeness is associated."²⁹¹ There is a fundamental

²⁹⁰ See, e.g., Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control*, 45 U. KAN. L. REV. 329 (1997); Lee Goldman, *Elvis Is Alive, But He Shouldn't Be: The Right of Publicity Revisited*, 1992 BYU. L. REV. 597.

²⁹¹ Andrew B. Sims, *Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453, 459 (1981). See also J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (1992) §§ 2.1(D), 2.8 (1992); Eileen R. Rielly, *Note, The Right of Publicity for Political Figures: Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods.*, 46 U. PITT. L. REV. 1161, 1168 (1985).

misconception here with the process of celebritization. Although outstanding athletes like tennis player Roger Federer and swimmer Michael Phelps can possibly lay a more legitimate claim to the contribution of individual labor to the final celebrity product, film stars and other performing artists often rely on the well-oiled machinery of the entertainment industry to nurture their celebrity status. One can make a case for Boris Becker becoming celebrated worldwide for winning the Wimbledon Championship as an unseeded and unknown player due to his own hard work and labor, but actors like Clint Eastwood and Bette Midler had the support of the entire Hollywood studio system in their rise to stardom. When the courts recognize the publicity rights of Eastwood²⁹² and Midler²⁹³ premised on a Lockean labor-based moral argument, they do not address why when mixing one's labor with a thing that one does not initially own, can give one a property right in that thing. Robert Nozick's famous statement illustrates this clearly:

why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea . . . do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?²⁹⁴

Indeed Nozick's argument is an intellectually compelling one, but it does present a formidable measurement problem of determining how much of a product's value may be attributable to an individual's labor.²⁹⁵ Under this revision of the Lockean labor theory, do we then award property rights to all the parties who have contributed labor to the creation of the celebrity product? Instead, should we be looking for a different jurisprudential basis – one that is doctrinally sound and implementable in practice – to ground the right of publicity? Dyer contends that celebrities are

²⁹² *Eastwood v. Super. Ct.*, 198 Cal. Rptr. 342 (Cal. Ct. App. 1983).

²⁹³ *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

²⁹⁴ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 174-75 (1974).

²⁹⁵ There is another interesting perspective that offers a different but related set of problems. Edwin Hettinger has argued that although a laborer may have a moral claim to possess what is produced by his or her own labor, the individual is not entitled to the market value of the final product because this value is determined by market forces and institutional arrangements which are not of the individual's making. According to Hettinger,

[m]arket value is a socially created phenomenon, depending on the activity (or nonactivity) of other producers, the monetary demand of purchasers, and the kinds of property rights, contracts, and markets the state has established and enforced. The market value of the same fruits of labor will differ greatly with variations in these social factors.

Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. PUB. AFF. 31, 38 (1989).

"both labour and the thing that labour produces . . . the person is a body, a psychology, a set of skills that have to be mined and worked up into a star image."²⁹⁶ Athletes who do not stay at the top of their sport can rapidly lose their celebrity status; actors who do not turn in good performances in movies are quickly forsaken by the audience and the media.

Even if we accept the view that a celebrity individual should not be entitled to the exclusive use of his or her identity, it does not mean that *everyone*, particularly profit-oriented companies, should therefore be entitled to an unrestricted use of the celebrity identity. Cultural studies unfortunately raise more questions than answers. In the face of the highly lucrative associative value of the celebrity personality, the adoption of a "likelihood of confusion" limiting principle in assessing a right of publicity claim would permit economic free-riding by corporations. One would agree with the Ninth Circuit that if "the trademark owner does not have the right to control public discourse whenever the public imbues his mark with a meaning beyond its source-identifying function,"²⁹⁷ then a celebrity individual should similarly be denied a right to dictate the ambit of public discourse with respect to the cultural sign of the celebrity. In the only Supreme Court decision that considered the right of publicity, the Court correctly observed that

[t]he rationale for (protecting the right of publicity) is the straightforward one of preventing unjust enrichment by the theft of good will. *No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.*²⁹⁸

The proper inquiry is not whether there is a likelihood of confusion on the part of the audience/consumer or whether under a Lockean labor justification, the celebrity individual should be entitled to the full value of the celebrity identity. The inquiry should be focused on whether the predominant purpose of the defendant is to exploit the economic associative value of the celebrity without paying an appropriate fee; it is an inquiry that correctly questions the subjective intent of the defendant rather than the expressive content or nature of the use of identity. As indicated in Part IC, once the First Amendment defence has been invoked, it invariably trumps the right of publicity, even in

²⁹⁶ DYER, *supra* note 153, at 5.

²⁹⁷ *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002). See also *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 946 (6th Cir. 2003).

²⁹⁸ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (citation omitted) (emphasis added).

situations where the defendant's real intent is to exploit the associative economic value of the celebrity identity and the artistic/expressive use of the identity is just an ingenious cloak that attracts First Amendment protection.

Consider an example in pop music, particularly American pop music. Although the recording is the true representation of the music, it is *both* the song and the style that is the sign of the pop music celebrity.²⁹⁹ The love ballads *Saving All My Love for You*, *The Greatest Love of All* and *I Will Always Love You* are identified with Whitney Houston, known for her commitment to a style familiar to the audience. For example, in order to capture the economic associative value of Whitney Houston at the height of her fame, one needs only to *evoke* the affective relationship that the audience may have with Whitney Houston. Broadcasting an advertisement featuring an African-American woman in a resplendent gown on stage crooning *I Will Always Love You* evoking the celebrity's performance in the movie *The Bodyguard* has the same effect as employing a lookalike. If it is the continual iconic chameleonic style transformations that made Madonna a globally recognized celebrity, then both an advertisement featuring a model in Madonna's signature Jean Paul Gaultier-designed conical bustier (evocative) and one featuring a legitimately obtained photograph of Madonna (actual use of identity) achieve the same purpose of exploiting the economic associative value of the celebrity identity. Cases like *Grant v. Esquire, Inc.*³⁰⁰ and *Doe v. TCI Cablevision*³⁰¹ got it right when the courts decided that the unauthorized use of the celebrities' identity were primarily to attract consumer attention to the defendants' products, and infringed the right of publicity despite the presence of expressive elements. Like a global brand who pays a substantial fee "to enhance its own positioning by a close commercial association with a celebrity, thus acquiring some of their iconic status for itself,"³⁰² a free-rider's primary intention is to leverage on the celebrity personality for commercial gain. The expressive elements in the latter situation are often employed only to enhance the appeal of the celebrity personality to the audience and ultimately increase product sales.

²⁹⁹ According to Marshall, "style" may indicate "a different musical code, a new form of dance, or an altered way of dress A change in style indicates a reassertion by the performer of his or her own authenticity." MARSHALL, *supra* note 140, at 162.

³⁰⁰ 367 F. Supp. 876 (S.D.N.Y. 1973).

³⁰¹ 110 S.W.3d 363 (Mo. 2003) (en banc), *cert. denied*, 540 U.S. 1106 (2004).

³⁰² HAMISH PRINGLE, *CELEBRITY SELLS* 117 (2004).

2. From "Dilution" to "Popular Authorship"

For almost a century, trademark law in the United States has been concerned with the protection of consumers from deception. The dilution approach is a new legal basis of trademark exclusivity that has little to do with protecting consumers from being confused or deceived. It was only in 2003 that the United States Supreme Court considered its first case on trademark dilution. The Court observed in *Moseley v. V. Secret Catalogue, Inc.*, "[u]nlike traditional infringement law, the prohibitions against trademark dilution are not the product of common-law development, and are not motivated by an interest in protecting consumers."³⁰³ In the absence of consumer confusion, trademark dilution doctrine permits mark owners to prevent the "blurring [of] the distinctive significance of a mark by associating it with lots of different products, and tarnishing the image of the mark by associating it with unwholesome products."³⁰⁴ J. Thomas McCarthy summarizes it thus:

The theory is that customers or prospective customers will see the plaintiff's mark used by other persons to identify different sources on a plethora of different goods and services. The assumption is that the unique and distinctive significance of the mark to identify and distinguish one source might be diluted and weakened. If several more uses that call to mind the famous mark are likely to follow within a short period, the assumption of antidilution theory is that the strength of the famous mark will be weakened.³⁰⁵

The 1996 Federal Trademark Dilution Act ("FTDA"), enacted into national law the principle of antidilution law that prohibits a diluting use of a famous mark, even though there is no likelihood

³⁰³ 537 U.S. 418, 429 (2003).

³⁰⁴ Dogan & Lemley, *supra* note 4, at 1197-98. For one of the most influential early writings in this area, see Frank Schecter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 825 (1927) ("[T]he gradual whittling away or dispersion of the identity and hold upon the public mind of the mark."). For a discussion of trademark dilution, see also DAVID S. WELKOWITZ, TRADEMARK DILUTION (2002); Scott C. Wilcox, *The Dilution Solution: Populating the Trademark A-list*, 105 MICH. L. REV. FIRST IMPRESSIONS 113 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol1105/wilcox.pdf>.

³⁰⁵ J. Thomas McCarthy, *Proving a Trademark Has Been Diluted: Theories or Facts?*, 41 HOUS. L. REV. 713, 720 (2004). However, McCarthy expresses strong reservations regarding the clarity of the dilution doctrine: "[n]o part of trademark law that I have encountered in my forty years of teaching and practicing IP law has created so much doctrinal puzzlement and judicial incomprehension as the concept of 'dilution' as a form of intrusion on a trademark." *Id.* at 726.

of customer confusion of source, sponsorship or approval under traditional trademark infringement law. The key provisions of the FTDA provide that the owner of a famous mark shall be entitled, "subject to the principles of equity and upon such terms as the court deems reasonable", to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark.³⁰⁶ The FTDA has the potential to expand significantly the zone of legal exclusivity for famous marks. The new antidilution approach more closely resembles an absolute property right in a trademark. In this respect, it is analogous to the right of publicity which allows the celebrity rights owner to claim against a trespass to a proprietary right in identity.

In *Mattel, Inc. v. MCA Records, Inc.*, the Ninth Circuit observed that an injunction against dilution can have a much more sweeping impact on both fair commercial actions and free speech than one issued in an ordinary infringement case: "[a] dilution injunction, by contrast to a trademark injunction, will generally sweep across broad vistas of the economy."³⁰⁷ McCarthy has also observed that the "Trademark Review Commission has referred to the dilution remedy as an extraordinary one that required a significant showing of fame. Thus, on the validity issue, to be protected, a mark must be truly prominent and renowned."³⁰⁸ Evidentiary burden and issues raised by McCarthy clearly apply to the antidilution claims by mark owners. But the economic argument that there is potential harm to both consumers and mark owners if a once-unique mark loses its uniqueness does not apply to the case of a celebrity's right of publicity. As Dogan and Lemley assert, the use of a celebrity's identity is to *reinforce* the

³⁰⁶ Lanham Act § 43(c)(1), 15 U.S.C. § 1125(c). "Dilution" was originally defined as "the lessening of the capacity of a famous mark to identify and distinguish goods and services, regardless of the presence or absence of - (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake or deception." 15 U.S.C. § 1127. However, the Lanham Act was amended in October 2006 and struck out the definition for dilution leaving it to courts to determine according to notions of equity and reasonableness whether dilution has occurred. Trademark Dilution Revision Act of 2006 (TDRA) amending 15 U.S.C.A. § 1125(c). Pub.L. 109-312, § 2, 120 Stat. 1730 (Oct. 6, 2006). The TDRA was passed in response to the Supreme Court's holding in *Moseley v. V Secret Catalogue, Inc.* which held that a claimant under the federal trademark dilution statute must present evidence of *actual* dilution of its trademark. 537 U.S. 418 (2003). Owners of famous trademarks now have a cause of action against any person who uses a trademark or trade name in commerce that is "likely to cause dilution" of a famous trademark — significantly lowering the evidentiary barrier to recovery. The owner of a famous trademark is entitled to injunctive relief against dilution by "blurring" or "tarnishment."

³⁰⁷ 296 F.3d 894, 904-05 (9th Cir. 2002).

³⁰⁸ McCarthy, *supra* note 305, at 733 (footnotes omitted).

audience's connection between the name and the celebrity, and hence blurring is unlikely in the context of the right of publicity. However, confusingly, they argue that a dilution theory applied to the right of publicity "would require proof of real fame – not some notoriety, but true celebrity";³⁰⁹ and that a dilution rationale would offer "a much more limited right to prevent the use of [the celebrity's] name as a trademark in a way that does not suggest a connection of affiliation between the names."³¹⁰

However, even if personality was a scarce resource, Madow raised the very real possibility that an increase in the exploitation of a particular celebrity's image may result in an increase in its value:

[a] Madonna T-shirt may be worth *more*, not less, to consumers precisely because millions of her fans are already wearing them. . . . Similarly, the marketing of Madonna T-shirts may actually increase the demand for other sorts of Madonna paraphernalia: posters, buttons, and so on. In the merchandising context, where faddism and emulation are important forces, sometimes it is "the more the merrier."³¹¹

Madow's contention is that a celebrity's personality is "nonrivalrous" and "nonexhaustible," and the right of publicity, by enabling a celebrity to charge a significant fee for the use of his or her image, "may result in underproduction and overpricing."³¹² Grady disagrees, observing that in several of the decisions of the United States courts, a celebrity's image, like Vanna White's, is frequently treated as "so valuable – hence, so vulnerable to dissipation – that it is an unusually strong case for protection."³¹³ In his opinion,

[t]he legal right of publicity can be understood as a fishing license designed to avoid races that would use up reputations too quickly. . . . Although repetition of these [celebrity] images could for a time increase the value of subsequent repetitions, . . . ultimately there is a point of diminishing marginal returns beyond which subsequent displays and performances diminish the value of the asset.³¹⁴

³⁰⁹ Dogan & Lemley, *supra* note 4, at 1199.

³¹⁰ *Id.* at 1200 (emphasis added).

³¹¹ Madow, *supra* note 36, at 222.

³¹² *Id.* at 222 n.445.

³¹³ Grady, *supra* note 110, at 118.

³¹⁴ *Id.* at 103.

In *Doe v. TCI Cablevision*, former professional hockey player Anthony Twist introduced evidence that his unauthorized association with the comic book *Spawn* character resulted in "a diminution in the commercial value of his name as an endorser of products."³¹⁵ While the United States courts have prohibited a robot mockup of Vanna White in an advertisement,³¹⁶ Elvis Presley³¹⁷ and Christie Brinkley posters,³¹⁸ Woody Allen's comic visual appearance³¹⁹ and a Tom Waits soundalike in a television commercial,³²⁰ they generally allow unauthorized uses that do not dissipate a publicity value, a result that is compatible with the theme of popular cultural authorship.³²¹

In the alternative, even conceding that the dissipation of value through over-exposure is a concern with respect to at least some kinds of celebrity personalities, the truth is, as cultural studies reveal, audiences and consumers lose interest in particular cultural commodities simply because something new or better that symbolizes a more relevant meaning has come along.³²² As Whannel has pointed out, celebrities can be created in a vortex moment, where public focus is very quickly intensified by the media on a particular individual.³²³

Recasting the dilution argument in the language of popular authorship in cultural studies will acknowledge the true nature of the celebrity personality and its trinity components. From a cultural studies perspective, the celebrity personality does not exist on a solitary eminence. There can be no single perspective because the celebrity is defined by the context in which it appears.³²⁴ What is clear is the use of the term "celebrity" to describe a specific form of representative subjectivity. Marshall

³¹⁵ 110 S.W.3d 363, 367 (Mo. 2003). A sports nutrition company testified that it withdrew a \$100,000 offer to Twist to serve as the company's product endorser when it learned that Twist's name was associated with the evil Mafia don in the comic book. *Id.*

³¹⁶ *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1517 (9th Cir. 1992).

³¹⁷ *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

³¹⁸ *Brinkley v. Casablanca*, 438 N.Y.S.2d 1004 (N.Y. App. Div. 1981).

³¹⁹ *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985).

³²⁰ *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

³²¹ See, e.g., *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978); *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 118 Cal. Rptr. 370 (Cal. Ct. App. 1974). It appears that unauthorized uses that increase the total value of the celebrity's publicity will be permitted by the courts, and it is only the ones that drag down the value that are prohibited.

³²² For all these cultural objects, the public "just switch products or pop icons when they will get more utility from consuming and expressing themselves from other sources." Justin Hughes, "Recording" *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 957 (1999).

³²³ WHANNEL, *supra* note 217.

³²⁴ "Fame is metamorphic The famous person is thus not so much a person as a story about a person." BRAUDY, *supra* note 153, at 591-92.

offers another insight: "The celebrity is a negotiated 'terrain' of significance . . . produced by a commodity system of cultural production . . . [whose] meaning is constructed by the audience."³²⁵ Turner pointedly declares: "Celebrities are developed to make money."³²⁶ Indeed it is an intertextual sign. Although a celebrity may be positioned predominantly in one mediated form, this personality is propagated in newspapers, magazines, television, radio, the Internet and so on. There is no monopoly by the celebrity individual on the construction and representation of the celebrity personality. The dynamism of the meaning of celebrity is a result of the way in which the celebrity sign is interpreted by the audience at different times and in different media; this does not dilute the commercial value of the celebrity identity, and may in fact enhance its value through heightened visibility. This changing "horizon of expectations"³²⁷ recognizes the role of the audience in the identification of the celebrity and the formulation of meaning.

However, be it film, television, pop music, sports, the visual or performing arts, the common theme is high visibility and mass acceptability of the individual by the community – both local and global. The more people "celebrate" an individual, the bigger the fame enjoyed by the celebrity, the wider the reputation, and the greater the economic potential of the celebrity personality.

B. *Rethinking the Right of Publicity through Cultural Studies*

Celebrity is routinely treated as a domain of irrationality, its appeal explained through metaphors of magic (charisma) or pathology (delusion) When we conceptualize celebrity as something to be professionally managed, rather than discursively deconstructed, we think about it differently.³²⁸

To view the right of publicity as a trademark-like right poses a few significant challenges. First, unlike a trademark, the identity of the celebrity is not a distinct designation – it evolves as the

³²⁵ MARSHALL, *supra* note 140, at 47.

³²⁶ TURNER, *supra* note 2, at 34. Similarly, Leo Braudy points out that the audience, once conceived to be a passive receptacle of fame, has now become an "equal partner" in the creation of fame. BRAUDY, *supra* note 153, at 461. Joshua Gamson has also made the observation that the contemporary audience is often in "the position of control" in the celebrity production process. GAMSON, *supra* note 121, at 52.

³²⁷ HANS ROBERT JAUSS, TOWARD AN AESTHETIC OF RECEPTION 23 (Timothy Bathi trans., Univ. of Minn. Press 1982). Jauss' work in literary reception theory is helpful in identifying the socially formative role of the audience. His conclusions oppose the assertions of the Frankfurt School and are sympathetic to views of the Birmingham School.

³²⁸ TURNER, *supra* note 2, at 136.

culture producers, audience and the celebrity individual all contribute to its construction, dissemination, consumption and interpretation. Second, even if courts adopted an "evidentiary rigor" in dilution cases, the extraordinary celebrity taxonomies with their diverse claims to fame will make the proof of "true celebrity" an impossible burden to discharge. Who is a "true celebrity" – a well-known wealthy socialite (Paris Hilton), an Olympic gold medalist (Michael Phelps), a Hollywood actor (Tom Cruise) or a potential presidential candidate (Barack Obama)? Moreover, as the visibility of the celebrity personality increases, the greater will be the recognition and fame of the celebrity. Third, a trademark is a word, name or symbol that is indicative of the source of goods and is used to distinguish a person's goods from that of another. However, the celebrity is a cultural sign that is a result of popular authorship, and its expressive use in political, social or artistic contexts does not serve the function as envisaged in trademark law.

If courts were to apply the key approaches in cultural studies to the law of the right of publicity, the possible implications are:

(i) the right would have a less expansive scope (because courts would be more reluctant to grant a celebrity such broad sweeping control over an identity that the individual – unlike a copyright creator – did not bring into existence solely as result of his or her own effort);

(ii) there would be a greater focus on the motives behind the uses of a celebrity's identity in a commercial context (because the high economic associative value of a celebrity's identity may be unjustly captured by a free-rider whose predominant purpose is to make profits using the identity as a tool for marketing goods and services but using the First Amendment as a shield);

(iii) there would be a more thorough consideration of what constitutes fair or permissible uses by the audience and culture producers, which may result in the development of more sophisticated fair use doctrines, like criticism, comment and news reporting in copyright law³²⁹ (in the sense of uses in the process of social identity formation rather than whether a use is

³²⁹ For example, an appropriate inquiry should be whether the use of the celebrity's identity was *predominantly* for the commercial purpose of capitalizing on the associative value of identity or for non-commercial purposes. Although not every commercial use is presumptively an unfair use, and therefore conclusively determinative against fair use, this criterion emphasizes a preference that fair use will be granted to those works that are created for non-commercial (including parody) or educational purposes rather than for commercial purposes. See Copyright Act of 1976, 17 U.S.C. § 107 (2007). See also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

expressive in the First Amendment sense); and

(iv) there would be a reevaluation of First Amendment jurisprudence³³⁰ to take into account the expressive nature of the use of the celebrity personality by subcultural and subaltern groups as a form of political speech crucial to contemporary identity politics.

Moving forward, in deciding whether the right of publicity should prevail in particular circumstances, insights from cultural studies would suggest that the following factors be considered: the nature of the celebrity personality (i.e. how much of fame is achieved through the contribution of the celebrity's individual's personal labor); the interests of popular authorship in using the celebrity as a cultural sign for various forms of expression; and the prevention of unjust enrichment in the form of commercial free-riding. The resolution of this tension better takes into account the contemporary cultural realities of the celebrity personality than couching the conflict as one between private property rights and a constitutional right to free speech.

The cultural language of popular authorship appears to be incorporated in part by the rhetoric of First Amendment jurisprudence. The recommendation of "a test that will unerringly distinguish between forms of artistic expression protected by the First Amendment and those that must give way to the right of publicity"³³¹ is beyond the scope of this article. The right of publicity as held by a celebrity individual is not a right of censorship but a right to prevent others from misappropriating the economic value generated by the celebrity's "well-knownness"³³² or to prevent free-riding on the "associative value"³³³ of the celebrity personality through advertising or merchandising. Almost every use of a celebrity's identity involves an expressive element. Most of the time, right of publicity claims will involve

³³⁰ Regarding complexities of the scope and coverage of the First Amendment doctrine, see Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004). Schauer contends that if there exists a single theory that can explain the First Amendment's coverage, it has not yet been found. Yet if all of the historically recognized and judicially mentioned normative theories are available ... then their collective coverage is so great as to be of little help in explaining the existing state of First Amendment terrain ... All cultures have their quasi-authoritative symbols, metaphors, and ideas; and understanding a society's rhetorical terrain requires understanding how public actors seek to appropriate those symbols, metaphors, and ideas to their own causes.

Id. at 1786, 1789.

³³¹ *Comedy III Prods., v. Gary Saderup, Inc.*, 21 P.3d 797, 807 (Cal. 2001).

³³² BOORSTIN, *supra* note 153.

³³³ McCracken, *supra* note 191; Jagdish N. Sheth et al., *supra* note 224; FOWLES, *supra* note 121.

works of a "hybrid nature, combining artistic expression and commercial promotion . . . [that] are inextricably intertwined."³³⁴

In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, the California Supreme Court held that there was no First Amendment defense to a California right of publicity claim when artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain but an artist who added "significant transformative elements" could still invoke First Amendment protection.³³⁵ By investigating the "transformative use" of a celebrity's identity, judges are placed in a position of being art critics asking "whether the literal and imitative or the creative elements predominate in the work."³³⁶ Indeed the fact that expressive materials are sold does not diminish the degree of First Amendment protection.³³⁷ However, courts should be concerned with whether the use of a celebrity's identity *primarily* proposes a commercial transaction. If the answer is in the affirmative, then the main objective of the right of publicity that prevents *the economic exploitation of a valuable identity without payment* should prevail; if the primary purpose is one of artistic expression (like in a painting, song or sculpture) or commentary (like in a newspaper or magazine article), then the right of publicity claim must fail. If the predominant purpose was to make economic profits by exploiting the celebrity's fame, then the presence of artistic expression – no matter how significant or transformative – should not be permitted to defeat a right of publicity claim. The social need for the use of the celebrity personality in the process of cultural identity formation should be weighed against the high economic associative value ascribed to the celebrity commodity by the culture producers and the audience. This "predominant purpose" approach – adopted by the court in *Doe* – is aligned with the views of the authors of the *Restatement (Third) of Unfair Competition*, which states that

[t]he use of a person's identity *primarily for the purpose of* communicating information or expressing ideas is not generally actionable as a violation of the person's right of

³³⁴ *Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989).

³³⁵ *Comedy III*, 21 P.3d at 809. The transformative use test requires the court to decide when an "artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame." *Id.* at 810. By investigating the presence of "creative" elements against a "literal" depiction, the courts have missed the point that photographs of celebrities can be literal depictions, but they can also function as critical social commentary that warrant First Amendment protection. In such situations, it is difficult to apply the transformative use test.

³³⁶ *Id.* at 809.

³³⁷ *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 (1988).

publicity.³³⁸

If courts were to consider the cultural value of the celebrity sign, the interpretive practices in contemporary culture, and the potential political significance of celebrity signs to different subcultural groups, the outcome in *ETW Corp. v. Jireh Publishing, Inc.* may be different. While the Sixth Circuit majority referred with approval to the *Cardtoons* judgment which noted that celebrities are "an important element of the shared communicative resources of our cultural domain",³³⁹ the court then devoted the core of its analysis to considerations of the rationales for recognizing a right of publicity³⁴⁰ instead of how social groups within the cultural domain use the celebrity personality as a communicative resource in a manner that deserves First Amendment protection.³⁴¹ The predominant purpose test strikes an appropriate balance between popular authorship of the celebrity personality and the prevention of economic free-riding.

In summary, a celebrity's name, image or any aspect of personality may be used as a sign for cultural expression, a locus for social commentary or a symbol of identity to obtain a commercial advantage. It is the free-riding use of identity as a symbol to gain some pecuniary advantage that the law ought to focus on. The Supreme Court in *Zacchini* got the rationale right; the defendant should not "get free some aspect of the plaintiff that would have market value and for which he would normally pay."³⁴² The dominant theme in cultural studies may suggest that the celebrity identity is in fact a composite of the efforts of the celebrity trinity, but the contemporary reality of the celebrity economy suggests a degree of protection ought to be accorded against free-riding exploitative commercial use. In hybrid cases where the use of identity is both "expressive" and "commercial", the free-rider should not be permitted to seek refuge behind the aegis of the First Amendment. Courts and legislatures need to reconsider adopting a more relevant test that takes into account a subjective inquiry into the intentions of the defendant. While the

³³⁸ RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 47 cmt. c (1995) (emphasis added).

³³⁹ *Id.* at 933, referring to *Cardtoons*, 95 F.3d at 972 (10th Cir. 1996). See also *id.* at 938.

³⁴⁰ *Id.* at 931-38.

³⁴¹ Passing comments were made with regard to the use of the celebrity personality as an important expressive and communicative resource to 'symbolize individual aspirations, group identities and cultural values', but no further analysis was undertaken of what particular uses should have First Amendment protection. *Id.* at 935 (citing *Comedy III*, 21 P.3d at 803 and Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 128 (1993)).

³⁴² *Zacchini*, 433 U.S. at 576 (emphasis added) (quoting Harry Kalven, Jr., *Privacy in Tort Law - Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1996)).

use of identity that is "predominantly a ploy to sell . . . products rather than an artistic or literary expression"³⁴³ may still contribute to the popular authorship of the celebrity personality, it nevertheless seeks to reap the fruits of the labor of others who have contributed to the creation of the identity that now commands a commercial associative value.

V. CONCLUSION

Overprotecting intellectual property is as harmful as underprotecting it [I]ntellectual property law is full of careful balances between what's set aside for the owner and what's left in the public domain for the rest of us.³⁴⁴

Cultural studies are a potent force of demystification in their deconstructive efforts, but their transformative potential for law is largely untapped. It can change the ways we see, understand, read and write, especially with reference to the dominant imageries of the social world that confront us daily. Contemporary cultural studies as a diagnostic critique are concerned with the understanding of the characteristics and conflicts of contemporary culture, decoding the signs of the times, and elucidating relationships between the culture producers, the consumers and the cultural commodities. Through cultural studies, we can better appreciate how the law articulates dominant discourses, and then take apart the mythologies of celebrity to see how they are socially constructed. Finally, we can reconstruct alternative meanings of the celebrity in law that best illuminate contemporary society in the 21st century.

A cultural studies approach to the right of publicity may emphasize "the importance of free use of famous personas in societal discourse,"³⁴⁵ but this use is not completely unfettered by other considerations like unjust enrichment or economic free-riding. While the judgments of the *Cardtoons* and *ETW Corp* courts with their overt references to cultural studies writings may have its shortcomings,³⁴⁶ an approach that "would focus judicial attention solely on the balance of First Amendment and publicity rights"³⁴⁷ would not adequately take into account the celebrity creation and propagation process, the significant economic associative value of

³⁴³ *Doe*, 110 S.W.3d at 374.

³⁴⁴ *White*, 989 F.2d at 1513, 1516.

³⁴⁵ Sloan, *supra* note 124, at 924.

³⁴⁶ *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 972-75 (10th Cir. 1996); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 931-33, 935, 938 (6th Cir. 2003).

³⁴⁷ Sloan, *supra* note 124, at 932 (emphasis added).

the celebrity personality and its relevance to social identity formation. A more nuanced approach would consider *how* the First Amendment can incorporate these cultural practices that contribute to the marketplace of ideas into its jurisprudence.

An understanding of cultural studies can provide an invaluable guide that takes into account the myriad competing interests when moving from the bright lines to the gray zones of the right of publicity. Whether arguing for the legally permissible uses of the celebrity's identity for communicating information and expressing ideas or for the prohibition of free-riding on the economic associative value of identity predominantly for proposing a commercial transaction, the extra-legal perspectives of cultural studies on the meaning, production and consumption of the celebrity personality certainly has much to offer in the formulation of better legal solutions in contemporary times.