

SHARING THE SPOTLIGHT: EQUITABLE DISTRIBUTION OF THE RIGHT OF PUBLICITY

INTRODUCTION

To date, no jurisdiction has held that a celebrity's right of publicity¹ alone is marital property.² Four courts, however, have held generally that a celebrity career is marital property subject to equitable distribution upon divorce.³ These decisions are significant because of the basic assets inherent in a celebrity career that are not present in the average career: celebrity reputation, celebrity status, and the right of publicity.⁴

¹ Definitions of the right of publicity include: "the right of each person to control and profit from the publicity values which he has created or purchased," Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954) and "the right of an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of his name and picture or likeness and to prevent others from unfairly appropriating this value for their commercial benefit." *Estate of Presley v. Russen*, 513 F. Supp. 1389, 1353 (D.N.J. 1981). Judge Jerome Frank coined the phrase the "right of publicity" in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), cert. denied, 346 U.S. 816 (1953).

² Recently, a spouse made such a claim but it was time-barred. See *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (former husband's claim to ownership rights in former wife's right of publicity barred under Texas law because once assets have been divided in divorce decree, subsequent suits to divide property are barred).

For an argument that the right of publicity should not be treated as marital property, see Robin P. Rosen, Note, *A Critical Analysis of Celebrity Careers As Property Upon Dissolution of Marriage*, 61 GEO. WASH. L. REV. 522 (1993) (noting that New York and New Jersey include publicity rights as marital assets and arguing that the view of these states reflects a distorted definition of property).

For a discussion of the status of a celebrity's right of publicity in a community property state, see Gary Stiffelman, Comment, *Community Property Interests in the Right of Publicity: Fame, and/or Fortune*, 25 UCLA L. REV. 1095 (1978).

For an analysis of Stiffelman's argument, specifically regarding the valuation of the right of publicity in a community property jurisdiction, see Stuart B. Walzer & Jan C. Gabrielson, *Celebrity Goodwill*, AM. ACAD. MATRIMONIAL L. (1986).

³ *Piscopo v. Piscopo*, 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989) (determining that it is unnecessary to distinguish between a right of publicity and a celebrity's goodwill and holding that celebrity goodwill is marital property); *Elkus v. Elkus*, 572 N.Y.S.2d 901 (N.Y. App. Div. 1991); *Golub v. Golub*, 527 N.Y.S.2d 946 (N.Y. Sup. Ct. 1988). Most recently, however, in *Mann v. Mann*, N.Y.L.J., Jan. 10, 1995, at 26 (Sup. Ct. N.Y. County), Justice David B. Saxe ruled that jazz flutist Herbie Mann's celebrity career declined during his nineteen year marriage, rendering his celebrity status separate property and not subject to equitable distribution.

⁴ See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-76 (1977) (describing the economic value of performance that is the product of the artist's "talent and energy").

Regarding the valuation of intangible assets like the right of publicity, it is important to consider that "[t]he recognition of intellectual property as an important business asset is too often reactive rather than proactive. The value and use of a [person's] ideas, information, identity, goodwill, inventions, know-how and creative expressions associated with its products and services frequently are overlooked and left unprotected." John R. Kettle III,

Regarding the first two assets, the special recognition awarded to a person who becomes famous tends to increase that person's earning potential.⁵ Similarly, the right of publicity is the celebrity's exclusive ability to sell her/his name and likeness through advertising, product endorsement, and other economic ventures.⁶ Treatment of a celebrity career as marital property does not adequately address the need to separately and distinctly subject a celebrity's right of publicity to equitable distribution. While celebrity goodwill is the expectation of future partonage or future employment, a right of publicity is a right to capitalize on the celebrity's name and likeness. By concentrating on celebrity goodwill and reputation, the courts have effectively ignored the unique and significant value of the right of publicity.

This Note explores the relationship between the value of a ce-

Spotting Issues Before They Become Problems: The Intellectual Property Audit, N.J. LAW., Feb. 6, 1995, at 14.

⁵ See *Elkus*, 572 N.Y.S.2d at 902 (noting that an opera singer's income rose significantly when she became famous).

⁶ There have been several recent celebrity lawsuits concerning the right of publicity. For example:

A three judge panel . . . will take up the appeal of actors George Wendt and John Ratzenberger, who portray "Norm" and "Cliff," respectively, on the TV series *Cheers*. The two seek a reversal of a federal court's summary judgment for Host International in their challenge to Host's operation of *Cheers*-type bars that feature "Norm"-like and "Cliff"-esque robots . . . They claimed violations of common-law trademark rights and *right of publicity* and privacy.

Steve Albert, *'Cheers' Bar: It's a Place Where Everybody Knows Your Trademark*, RECORDER, Feb. 7, 1995, at 2 (emphasis added).

In addition, other celebrities such as television sensation Pamela Anderson and movie star Tom Cruise have had similar claims:

Michael R. Blaha of Santa Monica, Calif., is representing actress Pamela Anderson, a star of the TV series "Baywatch," in her libel and *right of publicity* action against the *Globe*, a weekly tabloid. The article in dispute claims, among other things, that Anderson has been addicted to heroine [sic], engaged in unprofessional conduct and was "written out" of the TV series. In the Nov. 22 complaint filed in L.A. federal court, Anderson is asking for \$10 million in damages for libel, \$1 million for unauthorized use of her name and likeness for sale purposes and unspecified punitive damages. . . . Actor Tom Cruise's suit against Philips Interactive Media of America Inc., over the alleged unauthorized use of Cruise's name, likeness and voice in TV commercials to advertise Magnavox CD-i video technology, alleges *right of publicity*, unfair competition, Lanham Act and unjust enrichment claims. . . . Cruise is seeking \$10 million, plus unspecified punitive damages, as well as an injunction against further use of his likeness or persona.

Courthouse Steps, ENT. L. & FIN., Dec. 1994, at 5 (emphasis added).

Also consider former professional football star O.J. Simpson's right of publicity claim: An attorney for double murder defendant O.J. Simpson threatened . . . to sue anyone who duplicates or broadcasts a videotape of his 1985 wedding to the slain Nicole Brown. Attorney Anthony Glassman accused a San Diego man of trying to sell the videotape to TV shows. . . . "There is no question that the ownership and attendant copyright and rights of publicity . . . rest solely with Mr. Simpson," Glassman said.

Simpson Threatens Suit Over Wedding Tape, UPI, Oct. 27, 1994.

lebrity career and marital property in a divorce proceeding occurring in an equitable distribution jurisdiction.⁷ The facts of the following hypothetical help set the stage for this inquiry. Assume that Jordana Michael, famous female athlete extraordinaire, has been married to Douglas Michael for twenty years. Throughout their marriage, Douglas, who is unemployed, provided direct contributions by primarily assuming responsibilities of managing the household, maintenance, and meal preparation for Jordana and their three children. In addition, Douglas served as a sounding board for Jordana's business decisions, routinely served as Jordana's unofficial manager, and photographed her for magazines and promotions. Assume that Jordana was married to Douglas prior to achieving her celebrity status.⁸ Assume further that during the marriage and after Jordana had achieved celebrity status, she received a four million dollar legal award as compensation for an unauthorized use of her image in an interactive advertisement on CD-ROM.⁹ Immediately thereafter, the Michaels went through marital dissolution. One issue that should be raised is how to incorporate Jordana's right of publicity, to which Douglas contributed, in the equitable distribution of marital property upon divorce.

Arguably, to the extent that the four million dollar damage award was intended to compensate Jordana for the misappropriation of her right of publicity as a property right,¹⁰ Douglas might

⁷ Most states have passed equitable distribution statutes that apportion marital property upon divorce based on what is "fair and just" rather than on which spouse has had legal title to the property. Such equitable distribution statutes reflect the view that marriage is a partnership, entitling each spouse to an equitable share of the partnership. See William E. Schwartz, *Family Law—Equitable Distribution—Brown v. Brown*, 112 N.C. App. 15, 484 S.E.2d 873 (1993), 72 N.C. L. REV. 1801 (1994).

⁸ See *infra* note 40.

⁹ With the advent of new computer and video technologies, a celebrity's identity can be evoked in new and subtle ways. Multimedia producers, who regularly deal with these sophisticated technologies, are thus confronted with the question of when they must obtain permission from the celebrity whose image or performance is imbedded in preexisting material. Multimedia works frequently use preexisting stock photographs or film clips. Because of this, it is not enough for companies producing multimedia projects to obtain only the copyright licenses for the preexisting materials. Companies will also need to obtain permission from any celebrity whose image or performance is contained in the works. An example is the recent series of Diet Coke television commercials, which used the magic of digital manipulation to show entertainers like Paula Abdul and Elton John performing with deceased celebrities like Humphrey Bogart, Louis Armstrong and James Cagney. Coca-Cola no doubt obtained releases from the heirs of these deceased celebrities as well as the appropriate copyright licenses.

Michael C. Lasky & Howard Weingrad, *Is Permission Needed to Make His Day? Right of Publicity Often Implicated By News Systems*, N.Y.L.J., Mar. 7, 1994, at S1.

¹⁰ "Because a person often expends considerable amounts of time, money and energy

be entitled to a share of the award or future awards based on his contributions to and enhancement of Jordana's celebrity career.¹¹ In other words, based on both his direct and indirect contributions of time, money, and effort during the marriage, Douglas acquired a proprietary interest in Jordana's right of publicity which has a value distinct from Jordana's goodwill and reputation.¹²

This Note focuses on the treatment of the right of publicity as marital property within the realm of equitable distribution. Part I provides a history of equitable distribution law and the types of contributions which can be made to the acquisition of marital property by a noncelebrity spouse like Douglas. Part II outlines the history of the right of publicity and explores the myriad misappropriation causes of action available to a celebrity plaintiff like Jordana, including a discussion concerning the difficulty of valuation. Part III argues for the treatment of the right of publicity as marital property and examines the property interest inherent in the right of publicity. Part IV compares contributions made to celebrity status and goodwill to those made toward the right of publicity.¹³ If the right of publicity is in fact a marital asset to which a noncelebrity spouse can contribute during a marriage, then it too should be considered marital property subject to equitable distribution upon divorce.

to develop recognition of his/her name and likeness, the private interests of the right of privacy and the right of publicity must be weighed against the public interest in public persons such as celebrities." *California Trial Court Strikes Elizabeth Taylor's Request for Injunction Barring Broadcast of Unauthorized TV Biography*, ENT. L. REP., Nov. 1994, at 6.

¹¹ The theory grows from a widely recognized concept that in addition to money and material possession, a marriage can involve valuable property of an intangible nature. In particular, courts in most states have held that the good will of a medical or law practice, say, constitutes property acquired in a marriage and should be valued and divided on divorce.

Georgia Dullea, *The Law: When Stars Divorce, Good Will Has Top Billing*, N.Y. TIMES, Apr. 15, 1988, at B8.

¹² A property division ought to accord value to those non-monetary contributions of one spouse which enable the other spouse to devote substantial effort to paid employment which, in turn, enables the family to acquire tangible marital assets. The investment of human capital in homemaking has worth and should be evaluated in a property division incident to a dissolution of marriage. . . . [E]quitable distribution of property should take into consideration the plaintiff's contributions to the marriage, including homemaking activities and primary caretaking responsibilities.

O'Neill v. O'Neill, 536 A.2d 978, 984, cert. denied, 540 A.2d 374 (Conn. 1988).

¹³ This "professional good-will" concept has led to the similar theory of celebrity good will. It holds, in part, that since famous names and faces sell commercial products, celebrities have a potentially lucrative asset in a right of publicity. This asset represents property of the marriage and so, the theory goes, the celebrity's spouse should share in its value in a divorce.

Id.

I. WHAT IS EQUITABLE DISTRIBUTION?

A. History

Beginning in the 1970s, the economic disparity between divorcing parties became the focus of attention in many state legislatures as many jurisdictions adopted so-called equitable distribution statutes.¹⁴ Drafters of equitable distribution laws intended recognition of the efforts of a spouse, like Douglas, who has made substan-

¹⁴ In general, there are two types of statutes governing division of marital property: community property and equitable distribution. Ten states have adopted community property statutes: Arizona, California, Idaho, Louisiana, Mississippi, Nevada, New Mexico, Texas, Washington, and Wisconsin. The rest of the states fall under the large umbrella of equitable distribution states.

Equitable distribution is mandatory, that is, the statute provides that the court "shall" divide the marital or community property "as appears just and equitable," in the following jurisdictions: Arizona, ARIZ. REV. STAT. ANN. § 25-318 (1994); Colorado, COLO. REV. STAT. § 14-10-113 (1994); District of Columbia, D.C. CODE ANN. § 16-910(b) (1994); Illinois, 750 I.L.C.S. 5/403 (1994); Indiana, IND. CODE § 31-1-11.5-11(b) (1994); Iowa, IOWA CODE ANN. § 598.21(1) (West 1994); Kansas, KAN. STAT. ANN. § 60-1610(b)(1) (1993); Kentucky, KY. REV. STAT. ANN. § 403.190(1) (Baldwin 1994); Maine, ME. REV. STAT. ANN. tit. 19, § 722-A(1) (West 1994); Minnesota, MINN. STAT. ANN. § 518.58(1) (West Supp. 1993); Missouri, MO. ANN. STAT. § 452.330(1) (Vernon Supp. 1993); Montana, MONT. CODE ANN. § 40-4-202(1) (1994); Nevada, NEV. REV. STAT. ANN. § 125.150(1)(b) (Michie 1993); New York, N.Y. DOM. REL. LAW § 236(B)(5)(c) (McKinney 1994); North Dakota, N.D. CENT. CODE § 14-05-24 (1993); Oklahoma, OKLA. STAT. ANN. tit. 43, § 121 (West 1994); Oregon, OR. REV. STAT. § 107.105(f) (1993); South Dakota, S.D. CODIFIED LAWS ANN. § 25-4-44 (Supp. 1994); Texas, TEX. FAM. CODE ANN. § 3.63(a) (West 1994); Washington, WASH. REV. CODE ANN. § 26.09.080 (West 1994); and Wyoming, WYO. STAT. § 20-2-114 (1994).

Equitable distribution is mandatory if one or both parties request it in Delaware, DEL. CODE ANN. tit. 13, § 1513(a) (1993); Pennsylvania, 23 PA. CONST. STAT. ANN. § 3504 (1994); South Carolina, S.C. CODE ANN. § 20-7-472 (Law Co-op 1993); Tennessee, TENN. CODE ANN. § 36-4-121(a)(1) (1994); Vermont, VT. STAT. ANN. tit. 15, § 751(a) (1994); and Virginia, VA. CODE ANN. § 20-107.3(A) (Michie 1994).

Equitable distribution is permissive or discretionary, that is, the statute provides that the court "may" divide the marital or community property "as appears just and equitable," in Alabama, ALA. CODE § 30-2-51 (1993); Alaska, ALASKA STAT. § 25.24.160(4) (1992); Connecticut, CONN. GEN. STAT. ANN. § 46b-81(a) (West 1992); Georgia, GA. CODE ANN. § 19-5-13 (1994); Hawaii, HAW. REV. STAT. § 580-47(a) (1994); Maryland, MD. CODE ANN., FAM. LAW. § 8-203(a) (1994); Massachusetts, MASS. ANN. LAWS ch. 208, § 34 (Law Co-op 1994); Michigan, MICH. COMP. LAWS ANN. §§ 552.19, 552.23(1), 552.401(1) (West 1993); Nebraska, NEB. REV. STAT. § 42-365 to 366 (1994); New Hampshire, N.H. REV. STAT. ANN. § 458:16-a (1993); New Jersey, N.J. STAT. ANN. § 2A:34-23(9) (West 1993); New Mexico, N.M. STAT. ANN. § 40-4-7(B)(4) (1994); Ohio, OHIO REV. CODE ANN. § 3105.171(b) (Baldwin 1994); Puerto Rico, P.R. LAWS ANN. tit. 31, § 3697 (1991); Rhode Island, R.I. GEN. LAWS § 15-5-16.1 (1993); Utah, UTAH CODE ANN. § 30-3-5(1) (1994); and Virgin Islands, V.I. CODE ANN. tit. 16, § 109 (1993).

The following jurisdictions either require equal (as distinguished from equitable) distribution, or state a preference for equal distribution in the absence of compelling circumstances: Arkansas, ARK. CODE ANN. § 9-12-315 (Michie 1994); California, CAL. FAM. CODE § 2550 (1994); Idaho, IDAHO CODE § 32-712(1)(a) (1994); Louisiana, LA. REV. STAT. ANN. § 2365 (West 1994); North Carolina, N.C. GEN. STAT. § 50-20(c) (1994); West Virginia, W. VA. CODE § 48-2-32(a), (c), (d)(2) (1994); Wisconsin, WIS. STAT. ANN. § 767.255 (West 1993).

Florida and Mississippi provide for equitable distribution of property, either in a lump sum or by payment of permanent alimony. See *Abbe v. Abbe*, 475 So. 2d 206, 207 (Fla. 1985); *Cannakaris v. Cannakaris*, 382 So. 2d 1197, 1201 (Fla. 1980); *Lewis v. Lewis*, 472 So. 2d 542 (Fla. Dist. Ct. App. 1985); FLA. STAT. ANN. § 61.08 (West 1985); *Tutor v. Tutor*, 494

tial personal and financial sacrifices for the enhancement of his partner's career.¹⁵ The particular phrase used to describe the goal of a property division¹⁶ under equitable distribution varies among states, with most states requiring that the division be "just," "fair," or "equitable."¹⁷ In defining these terms, most courts recognize that a property division does not have to be equal¹⁸ or restricted by inflexible formulas or rules.¹⁹

Implementation of equitable distribution requires a court to identify and value both tangible and intangible assets.²⁰ If the asset to be distributed is tangible and easily valued, like a car or a pet,²¹ most courts have little difficulty in awarding the other spouse an

So. 2d 362, 364 (Miss. 1986); *Schilling v. Schilling*, 452 So. 2d 834, 835 (Miss. 1984); Miss. CODE ANN. § 93-5-23 (Supp. 1987).

¹⁵ For example, section 236(B)(5)(d)(6) states that in determining the equitable disposition of marital property the court must look at:

[A]ny equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party.

N.Y. DOM. REL. LAW § 236(B)(5)(d)(6).

¹⁶ "[A] recognized goal of the equitable distribution of assets is 'not only a fair division based upon the facts of the case, but also an attempt to finalize the division of assets and conclude the parties' legal relationship, leaving them in a self sufficient state.'" *Gambrell v. Gambrell*, 650 So. 2d 517, 520 (Miss. 1995) (consideration of alimony and child support award in light of stipulated division of marital property entered into by the parties).

¹⁷ See David Kaufman, *The New York Equitable Distribution Statute: An Update*, 53 BROOK. L. REV. 845 (1987) (arguing that premise of equitable distribution is based on the theory that marriage is a form of economic partnership).

¹⁸ *Shelton v. Shelton*, 595 So. 2d 900 (Ala. Civ. App. 1992); *Barkett v. Barkett*, 593 So. 2d 1026 (Ala. Civ. App. 1992); *Hayes v. Hayes*, 756 P.2d 298 (Alaska 1988); *In re Marriage of Bookout*, 833 P.2d 800 (Colo. Ct. App. 1991), cert. granted, 1992 Colo. LEXIS 724 (Colo. Aug. 17, 1992); *Bain v. Bain*, 553 So. 2d 1389 (Fla. Dist. Ct. App. 1990); *Goldstein v. Goldstein*, 414 S.E.2d 474 (Ga. 1992); *In re Marriage of Siddens*, 588 N.E.2d 321 (Ill. App. Ct. 1992), appeal denied, 596 N.E.2d 637 (Ill. 1992); *In re Marriage of Moll*, 597 N.E.2d 1230 (Ill. App. Ct. 1992); *In re Marriage of Sadecki*, 825 P.2d 108 (Kan. 1992); *Garett v. Garett*, 766 S.W.2d 634 (Ky. Ct. App. 1989); *Pongonis v. Pongonis*, 606 A.2d 1055 (Me. 1992); *Misler v. Misler*, 816 S.W.2d 241 (Mo. Ct. App. 1991); *Sinclair v. Sinclair*, 837 S.W.2d 355 (Mo. Ct. App. 1992); *McNabney v. McNabney*, 782 P.2d 1291 (Nev. 1989); *Greenwald v. Greenwald*, 565 N.Y.S.2d 494 (N.Y. App. Div. 1991); *Ellars v. Ellars*, 591 N.E.2d 783 (Ohio Ct. App. 1990); *Magill v. Magill*, 816 S.W.2d 530 (Tex. Ct. App. 1991); *Artis v. Artis*, 392 S.E.2d 504 (Va. Ct. App. 1990); *Srinivasan v. Srinivasan*, 396 S.E.2d 675 (Va. Ct. App. 1990).

¹⁹ *In re Marriage of Scoville*, 598 N.E.2d 1026 (Ill. App. Ct. 1992) (while division of property should never be reduced to pure numbers, under certain circumstances unequal proportions are an indication that the marital estate is inequitably distributed); *Brown v. Brown*, 586 So. 2d 919 (Ala. Civ. App. 1991); *Kurz v. Kurz*, 443 N.W.2d 782 (Mich. Ct. App. 1989); *King v. King*, 762 S.W.2d 544 (Mo. Ct. App. 1989); *Fox v. Fox*, 467 N.W.2d 762 (S.D. 1991); *Osguthorpe v. Osguthorpe*, 804 P.2d 530 (Utah 1990).

²⁰ See Leslie F. Burns & Gregg A. Grauer, Note, *Human Capital As Marital Property*, 19 HOFSTRA L. REV. 499 (1990) (discussing treatment of advanced educational degrees as marital property based on parties' expectations).

²¹ See Howard Troxler, *Thinking of Divorce? Consider the Dog*, ST. PETERSBURG TIMES, Feb. 17, 1995, at B1 ("He said Roddy [the dog] was a premarital asset and all his. She said he had bought Roddy as a gift for her, to keep her company . . .").

equitable share of the asset or its value.²² If the asset, however, is intangible, or difficult to value, like the right of publicity, some courts have been less willing to recognize it as a marital asset.²³ Instead, these courts have resorted to traditional divorce remedies, such as maintenance awards, alimony, and the distribution of other tangible, marital property in order to solve the inequity created.²⁴

Under equitable distribution laws, property division is related to other economic awards of alimony²⁵ and child support.²⁶ Some courts recognize that equitable distribution is designed to preclude the need to award spousal support payments,²⁷ that judging the equitableness of a property division requires consideration of all economic awards together,²⁸ and that the amount of income-producing property included in the award affects the equitableness of the award.²⁹ Moreover, in some states, equitable distribution is available only under specifically enumerated circumstances.³⁰

²² *In re Marriage of Graham*, 574 P.2d 75 (Colo. 1978) (en banc) (purpose of division of marital property in a dissolution proceeding is to allocate to each spouse that property which, as a result of the marriage, should properly belong to him or her).

²³ See, e.g., *In re Hall*, 692 P.2d 175 (Wash. 1984) (evidence of the existence of goodwill or any analyses of the factors is unnecessary to value goodwill); *Pacht v. Jadd*, 469 N.E.2d 918 (Ohio Ct. App. 1983).

²⁴ See, e.g., *Silverstein v. Silverstein*, 748 P.2d 1004 (Okla. Ct. App. 1987) (alimony); *In re Marriage of Fernau*, 694 P.2d 1092 (Wash. Ct. App. 1984) (maintenance award).

²⁵ *Clark v. Clark*, 293 So. 2d 447 (Miss. 1974) (wife who performed many hours of work without compensation entitled to "fair, equitable and just allowance" through an alimony award either in lump-sum plus monthly payments or substantial monthly payments); *Holcomb v. Holcomb*, 541 N.E.2d 597 (Ohio 1989) (alimony comprised of both periodic payments for sustenance and support and division of marital assets); *Berger v. Berger*, 464 So. 2d 649 (Fla. Dist. Ct. App. 1985) (trial judge has capability to make an equitable distribution by way of lump-sum alimony and may make property settlement agreement based on justification rather than need); see also Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827 (1988) (arguing in favor of equitable property distribution).

²⁶ See *supra* note 16.

²⁷ *In re Marriage of Wade*, 511 N.E.2d 156 (Ill. App. Ct. 1987); *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987); *Dorweiler v. Dorweiler*, 413 N.W.2d 572 (Minn. Ct. App. 1987); *Lepis v. Lepis*, 416 A.2d 45 (N.J. 1980).

²⁸ *In re Marriage of Gunn*, 598 N.E.2d 1013 (Ill. App. Ct. 1992) (a spouse applying for maintenance has an affirmative duty to seek gainful employment); *McIntosh v. McIntosh*, 328 S.E.2d 600 (N.C. Ct. App. 1985); *Garnos v. Garnos*, 376 N.W.2d 571 (S.D. 1985); *Rodriguez v. Rodriguez*, 550 So. 2d 16 (Fla. Dist. Ct. App. 1989); *In re Marriage of Swigers*, 531 N.E.2d 858 (Ill. App. Ct. 1988); *Jones v. Jones*, 532 So. 2d 574 (Miss. 1988); *Spadaro v. New York City Police Dept. Pension Serv.*, 454 N.Y.S.2d 374 (N.Y. Sup. Ct. 1982); *In re Marriage of Shaffner*, 695 P.2d 51 (Or. Ct. App. 1985); *Weston v. Weston*, 773 P.2d 408 (Utah 1989).

²⁹ *Ryken v. Ryken*, 440 N.W.2d 300 (S.D. 1989) (factors to consider include: duration of marriage, value of property, age of parties, competency to earn a living, relative contributions, and income producing capacity of parties' assets); *Wanberg v. Wanberg*, 664 P.2d 568 (Alaska 1983); *In re Marriage of Mitra*, 450 N.E.2d 1229 (Ill. App. Ct. 1983); *Kobylack v. Kobylack*, 442 N.Y.S.2d 392 (N.Y. Sup. Ct. 1981), modified, 465 N.Y.S.2d 581 (N.Y. App. Div. 1983), rev'd on other grounds, 465 N.E.2d 829 (N.Y. 1984).

³⁰ *Sheridan v. Sheridan*, 589 A.2d 1067 (N.J. Super. Ct. App. Div. 1990) (fair and common sense interpretation of statutory purpose in permitting division of "legally and beneficially acquired" property in dissolution proceedings bars equitable distribution of property

Overall, courts using an equitable approach in their analyses of intangible assets primarily focus on compensating the contributing spouse,³¹ and are relatively less concerned with using a restrictive definition of marital property.³²

Thus, in equitable distribution jurisdictions, the issue is not ownership of property, but rather what stake or right each spouse has in the property. Marriage is seen as a "joint enterprise" or "economic partnership,"³³ and courts are free to distribute the parties' accumulated assets as the equities of each case require, not

obtained with illicit funds (quoting *Painter v. Painter*, 320 A.2d 484, 488 (N.J. 1974)); *Rogers v. Rogers*, 368 S.E.2d 412 (N.C. Ct. App.), cert. denied, 373 S.E.2d 548 (N.C. 1988) (business given to husband during marriage was not subject to equitable distribution where there was no evidence of any surreptitious contributions made by the husband to the business nor any evidence of active appreciation of the business); *Heath v. Heath*, 368 S.E.2d 222 (S.C. Ct. App. 1988) (equitable distribution of medical degree was improper); *LaRue v. LaRue*, 304 S.E.2d 312 (W. Va. 1983) (court adopts different approaches for economic contributions to acquisition of property and homemaking contributions to marriage).

³¹ One New Jersey court explained the concept of equitable distribution as follows: As we understand the concept of equitable distribution, it is a corollary of the principal concept that marriage is a joint enterprise whose vitality, success and endurance is dependent upon the conjunction of multiple components, only one of which is financial. The nonremunerated efforts of raising children, making a home, performing a myriad of personal services and providing physical and emotional support are, among other noneconomic ingredients of marital relationship, at least as essential to its nature and maintenance as are the economic factors, and their worth is consequently entitled to substantial recognition. Thus, the extent to which each of the parties contributes to the marriage is not measurable only by the amount of money contributed to it during the period of its endurance but rather by the whole complex of financial and nonfinancial components contributed. The function of equitable distribution is to recognize that when the marriage ends, each of the spouses, based on the totality of the contribution made to it, has a stake in and right to a share of the family assets accumulated while it endured, not because that share is needed but because those assets represent the capital product of what was essentially a partnership entity.

Gibbons v. Gibbons, 415 A.2d 1174, 1177 (N.J. Super. Ct. App. Div. 1980); see also *Wood v. Wood*, 465 N.Y.S.2d 475, 477 (N.Y. Sup. Ct. 1983) (citing *Gibbons* with approval); *O'Brien v. O'Brien*, 489 N.E.2d 712, 718 (N.Y. 1985) (quoting *Wood* with approval).

³² See *Rosen*, supra note 2.

³³ *Gibbons*, 415 A.2d at 1177. See *Goldman v. Goldman*, 589 A.2d 1358 (N.J. Super. Ct. App. Div. 1991) (despite restraint against alienation of the assets of the parties in any manner, defendant-husband used approximately \$400,000 worth of marital funds to keep his business alive); *In re Marriage of Komnick*, 417 N.E.2d 1305 (Ill. 1981); *Tibbetts v. Tibbetts*, 406 A.2d 70 (Me. 1979); *Davidson v. Davidson*, 474 N.E.2d 1137 (Mass. App. Ct. 1985); *Goller v. Goller*, 758 S.W.2d 505 (Mo. Ct. App. 1988); *Moore v. Moore*, 553 A.2d 20 (N.J. 1989); *Mele v. Mele*, 544 N.Y.S.2d 25 (N.Y. App. Div. 1989); *Conteh v. Conteh*, 457 N.Y.S.2d 363 (N.Y. Sup. Ct. 1982) (court expressly notes that equitable distribution considers marriage a partnership and refers to partnership laws in deciding equitable distribution question); *Smith v. Smith*, 331 S.E.2d 862 (N.C. 1985); *Wolfe v. Wolfe*, 350 N.E.2d 413 (Ohio 1976); *In re Marriage of Pierson*, 653 P.2d 1258 (Or. 1982); *Stevenson v. Stevenson*, 511 A.2d 961 (R.I. 1986); *Walker v. Walker*, 368 S.E.2d 89 (S.C. Ct. App. 1988); *Popp v. Popp*, 432 N.W.2d 600 (Wis. Ct. App. 1988); *Hollensbe v. Hollensbe*, 519 N.E.2d 40 (Ill. App. Ct. 1988); *In re Marriage of Lay*, 512 N.E.2d 1120 (Ind. Ct. App. 1987); *Fausett v. Fausett*, 661 S.W.2d 614 (Mo. Ct. App. 1983); *Gilboe v. Gilboe*, 789 P.2d 343 (Alaska 1990); *Bain*, 553 So. 2d at 1389.

solely according to who holds legal title.³⁴

B. Marital v. Separate Property

In the absence of a valid prenuptial agreement,³⁵ any marital dissolution proceeding requires consideration of three fundamental inquiries: (1) is a particular asset marital property?³⁶ (2) if so, what is its value? and (3) how do we equitably distribute this asset?³⁷ In general, property is classified as marital or separate property based on the time of acquisition. Property acquired before marriage is separate property, while property acquired during the marriage is marital. However, many exceptions do apply. In most states, including New York,³⁸ only "marital property" may be divided upon divorce and it is therefore essential in a marital dissolution proceeding to determine which of the accumulated assets are

³⁴ *Bowen v. Bowen*, 549 So. 2d 1284 (Fla. Dist. Ct. App. 1989) (if property was lawfully acquired by either or both parties after marriage and enhanced during the marriage by marital funds or labor, the property is a marital asset); *Wilson v. Wilson*, 404 So. 2d 76 (Ala. Civ. App. 1981); *Hale v. Hale*, 439 So. 2d 160 (Ala. Civ. App. 1983); *Bussell v. Bussell*, 623 P.2d 1221 (Alaska 1981); *Gilboe*, 789 P.2d at 343; *Pyeatte v. Pyeatte*, 661 P.2d 196 (Ariz. Ct. App. 1982); *Glover v. Glover*, 628 S.W.2d 882 (Ark. Ct. App. 1982); *In re Marriage of McVey*, 641 P.2d 300 (Colo. Ct. App. 1981); *Yontef v. Yontef*, 440 A.2d 899 (Conn. 1981); *Bowser v. Bowser*, 515 A.2d 1128 (D.C. 1986); *Bain*, 553 So. 2d at 1389; *Halpern v. Halpern*, 352 S.E.2d 753 (Ga. 1987); *Fisher v. Fisher*, 656 P.2d 129 (Idaho 1982); *In re Marriage of Ryman*, 527 N.E.2d 18 (Ill. App. Ct. 1988); *In re Marriage of Salas*, 447 N.E.2d 1176 (Ind. Ct. App. 1983); *In re Marriage of Miller*, 452 N.W.2d 622 (Iowa Ct. App. 1989); *Zandford v. Wiens*, 549 A.2d 13 (Md. 1988); *Drapek v. Drapek*, 503 N.E.2d 946 (Mass. 1987); *Spooner v. Spooner*, 437 N.W.2d 346 (Mich. Ct. App. 1989); *In re Marriage of White*, 708 P.2d 267 (Mont. 1985); *Smith*, 331 S.E.2d at 682; *Dorton v. Dorton*, 336 S.E.2d 415 (N.C. Ct. App. 1985); *Fleck v. Fleck*, 427 N.W.2d 355 (N.D. 1988); *Teel v. Teel*, 766 P.2d 994 (Okla. 1988); *Naranjo v. Naranjo*, 751 P.2d 1144 (Utah 1988); *Kaufman v. Kaufman*, 375 S.E.2d 374 (Va. Ct. App. 1988); *In re Marriage of Anglin*, 759 P.2d 1224 (Wash. Ct. App. 1988).

While the courts have referred to marriage as a "joint enterprise" or "economic partnership," some have argued that these models are not adequate at law to provide the remedy for the interests of the other spouse at divorce. A marriage consists of much more than the economic partnership aspect; it is not entered into with the same narrow objectives and judgment criteria that characterize most business partnerships. See *Bea A. Smith, The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 692 (1990) (arguing that early community property laws were "attempts to remove married women's severe legal disabilities and are similar to the married women's property acts enacted at the same time in common-law states").

³⁵ See *Kaylah C. Zelig, Putting Responsibility Back Into Marriage: Making A Case For Mandatory Prenuptials*, 64 U. COLO. L. REV. 1223 (1993) (proposing system of mandatory prenuptial contracting to facilitate valuation of individual contributions).

³⁶ Marital property is generally defined as property acquired after the marriage except by gift, bequest, or inheritance. For instance, New York's equitable distribution law includes only two classes of property: marital property and separate property. N.Y. DOM. REL. LAW § 236(B)(1)(b), (c), (d). There are, however, slight variations among jurisdictions. See *Doris J. Freed & Timothy B. Walker, Family Law in the Fifty States: An Overview*, 24 FAM. L.Q. 309 (1991).

³⁷ Leonard G. Florescue, 'Average' Valuation: Equitable Distribution, N.Y.L.J., Apr. 29, 1988, at 1, col. 1 (citing *Brown, Price v. Price: A Judicial Perspective*, FAM. L. REV., June 1987, at 3, 4).

³⁸ See N.Y. DOM. REL. LAW § 236(B)(5)(b), (c).

"marital property."³⁹ Thus, all property owned by either Jordana or Douglas before marriage continues to be her/his separate property after marriage.⁴⁰ Moreover, separate property remains separate despite any mutations as long as it can be clearly and indisputably traced and identified.⁴¹ Consistent with these principles, the vast majority of courts have held or recognized that an increase in value in the separate property of a spouse, not attributable in any manner to any contribution of funds, property, or effort by either of the spouses, constitutes separate property.⁴² This rule has been applied in determining the status of enhancements in real estate,⁴³ shares of stock,⁴⁴ and other items of personal property.⁴⁵

C. Equitable Distribution of Intangible Assets

1. New York

Human capital as marital property first gained recognition by the New York Court of Appeals in *O'Brien v. O'Brien*.⁴⁶ Here, the

³⁹ See Grace G. Blumberg, *Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, or Replacement, Analysis*, 33 UCLA L. REV. 1250 (1986) (examining movement toward equitable distribution and expansion of definition of marital property).

⁴⁰ Separate property includes . . . property owned by a spouse before the marriage, which retains its separate status during coverture because it is maintained in an uncommingled state as a spouse's individual property. Where . . . a spouse brings separate property to the marriage, its increased or enhanced value, produced by investment managed by neither spouse or by appreciation . . . beyond the parties' control, cannot be treated as a divisible marital asset unless, of course, there be proof that the increase resulted from efforts, skills or funds of either spouse. . . . The burden is upon the non-owning spouse to show that the enhancement is the result of either spouse's endeavors.

Thielenhaus v. Thielenhaus, 890 P.2d 925, 930-31 (Okla. 1995) (division of jointly-acquired property included the in-marriage increase in the husband's retirement fund).

⁴¹ Herma H. Kay, *Commentary: Toward A Theory of Fair Distribution*, 57 BROOK. L. REV. 755 (1991) (discussing distribution of property upon divorce).

⁴² *Romano v. Romano*, 530 N.Y.S.2d 155 (N.Y. App. Div. 1987) (for purposes of equitable distribution of marital property, increases in value of one spouse's separate property is itself separate property, except to extent that such appreciation is due in part to contributions or to efforts of other spouse).

⁴³ *McCann v. McCann*, 539 N.Y.S.2d 281 (N.Y. App. Div. 1989) (in divorce action, wife would not be entitled to share in appreciation in value of house that was husband's separate property if appreciation was due solely to market forces and had nothing to do with direct or indirect contributions of either wife or husband); *Chotiner v. Chotiner*, 829 P.2d 829 (Alaska 1992).

⁴⁴ *Rosenstock v. Rosenstock*, 531 N.Y.S.2d 133 (N.Y. App. Div. 1988) (appreciation in husband's stock in the company of which he was president was husband's separate property and not divisible as marital property where it was not shown that wife had contributed to its increase in value).

⁴⁵ *In re Marriage of Richards*, 439 N.W.2d 876 (Iowa Ct. App. 1989) (appreciation of inheritance not due to tangible efforts of either party).

⁴⁶ 489 N.E.2d 712. In *O'Brien*, a couple married in 1971 in New York. In 1973, they moved to Mexico so that Mr. O'Brien could attend medical school. In 1976, they returned to New York so Mr. O'Brien could complete school and his internship. During the mar-

court held that the enhanced earning capacity created by a medical license acquired during the marriage was marital property.⁴⁷ Cases following *O'Brien* have extended the definition of marital property beyond licenses and degrees.⁴⁸ In *McAlpine v. McAlpine*,⁴⁹ the court confronted the issue of whether the attainment of professional "distinction" during marriage was a marital asset. The husband was an actuary before marrying. During the marriage, he became a fellow in the Society of Actuaries. Because this honor theoretically brought an enhanced earning capacity, the court held it to be marital property.⁵⁰ In so holding, the court said: "[A] trend has developed wherein the court will consider as a marital asset, the enhanced earning capacity that a party has achieved during marriage by virtue of attaining a professional license, academic degree, or other accomplishment."⁵¹

riage, both parties shared expenses and contributed to Mr. O'Brien's educational expenses. Mrs. O'Brien worked throughout the marriage, and the trial court found that she contributed roughly seventy-five percent of the parties' income. Mr. O'Brien was licensed to practice medicine in October of 1980. Two months later, he commenced an action for divorce. *Id.* at 713-14.

⁴⁷ *Id.* at 716. The court recognized the medical license as marital property and held that Loretta O'Brien's contributions to the attainment of the license entitled her to a forty percent share of the expected future income stream from Michael O'Brien's use of the license (\$472,000), or \$188,800. *Id.* at 714. See Kenneth R. Davis, *The Doctrine of O'Brien v. O'Brien: A Critical Analysis*, 13 PAGE L. REV. 863 (1994).

Other jurisdictions apply the equitable distribution approach to determine whether intangible assets are marital property. See, e.g., *Lewis v. Lewis*, 448 N.W.2d 735 (Mich. Ct. App. 1989) (wife's sacrifice to take care of children while husband earned master's degree deemed contribution sufficient to warrant distribution of degree as marital property); *Sonek v. Sonek*, 412 S.E.2d 917 (N.C. Ct. App. 1992) (classifying an increase in value in spouse's degree, not the degree itself, to be property).

⁴⁸ See generally Scott E. Willoughby, Note, *Professional Licenses as Marital Property: Responses to Some of O'Brien's Unanswered Questions*, 73 CORNELL L. REV. 133 (1987) (proposing changes in method of valuing licenses in New York to make property distribution more equitable).

⁴⁹ 539 N.Y.S.2d 680 (N.Y. Sup. Ct. 1989).

⁵⁰ *Id.* at 681. Because the wife had not contributed, financially or otherwise, to the husband's achievement of professional distinction, the court did not award her a share of the husband's increased earning potential.

⁵¹ *Id.*

In New York state, the system of property distribution upon divorce is called equitable distribution. The court will divide up the marital assets whether they are held in the name of the wife, husband or jointly. An equitable division is a fair division and not necessarily half. Some property, however, is treated as separate property and is not divided by the court. Property is separate if it belongs to one spouse prior to marriage. It is also separate if it is acquired after the beginning of the separation or divorce action. If the property is obtained between the date of marriage and the beginning of a divorce action, it must fit one of five categories to remain separate. The five exceptions include when one spouse receives an inheritance, or a gift from a third party. The other exceptions include compensation for personal injuries, property received solely in exchange for separate property, and any increase in the value of separate property.

Peter Danziger, *Divorce Could Tie Up Comingled Property*, TIMES UNION, Feb. 2, 1995, at C3.

2. Other Jurisdictions

Some jurisdictions do not recognize intangible assets, such as the medical license in *O'Brien*, as marital property. In these jurisdictions, courts have held that enhanced earning capacity cannot be property because it cannot be "assigned, sold, transferred, conveyed, or pledged;"⁵² it is "personal to the holder;"⁵³ it does not "possess the attribute of joint ownership;"⁵⁴ it is "at most a mere expectancy of some future income or earnings;"⁵⁵ there is no "vested present interest" at the time of divorce;⁵⁶ or because, as one court put it, it simply "does not fit" the definition of property.⁵⁷

A majority of the jurisdictions have concluded that professional goodwill is marital property subject to equitable distribution. These courts classify goodwill as marital property because "[t]o hold otherwise would result in a windfall to the professional spouse."⁵⁸ To achieve an equitable distribution of marital property, a court must consider the contributions each spouse may have made to the tangible and intangible assets of the professional practice.⁵⁹ Courts also recognize that based on the facts of a given case, a professional practice may have no goodwill value, and that a case-by-case inquiry into valuation is required.⁶⁰

D. Contributions to Marital Property

In order for Douglas to have a claim to an equitable share of Jordana's right of publicity, he must show that he contributed to its acquisition during the marriage as a partner in the marital entity.

⁵² *Graham*, 574 P.2d at 77.

⁵³ *Id.*

⁵⁴ *Muckleroy v. Muckleroy*, 498 P.2d 1357, 1358 (N.M. 1972) (defined broadly, property includes every interest a person may have in a thing that can be the subject of ownership, including the right to enjoy, use, freely possess, and transfer that interest).

⁵⁵ *In re Marriage of Weinstein*, 470 N.E.2d 551, 559 (Ill. App. Ct. 1984) (citing *In re Marriage of Goldstein*, 423 N.E.2d 1201, 1204 (Ill. App. Ct. 1981)).

⁵⁶ *In re Marriage of McManama*, 399 N.E.2d 371, 373 (Ind. 1980) (citing *Wilcox v. Wilcox*, 365 N.E.2d 792, 795 (Ind. Ct. App. 1977)); accord *Hughes v. Hughes*, 438 So. 2d 146, 150 (Fla. Dist. Ct. App. 1983); *Grosskopf v. Grosskopf*, 677 P.2d 814, 822 (Wyo. 1984).

⁵⁷ *Wisner v. Wisner*, 631 P.2d 115, 122 (Ariz. Ct. App. 1981) (no rigid and unvarying rule for the determination of the value of goodwill has been laid down by prior case law and each case must be determined on its own facts and circumstances).

⁵⁸ *Russell v. Russell*, 399 S.E.2d 166, 168 (Va. Ct. App. 1990) (if trial court determines from greater weight of the evidence that a professional practice has goodwill, it must be valued as part of marital property).

⁵⁹ See *In Re Marriage of Huff*, 834 P.2d 244 (Colo. 1992) (en banc) (recognizing goodwill of husband's law firm partnership as marital property of which wife was entitled to an equitable share); *Fleet v. Davis*, No. 173-86 (Del. Fam. Ct. Aug. 26, 1987) (equitable distribution of copyright protected computer software master program).

⁶⁰ See *supra* note 59.

1. Monetary

States generally do not disagree significantly as to what types of activities can constitute contribution. Often, it is the court's job to weigh the respective contributions of the contending parties, and then balance these contributions against other statutory factors.⁶¹ Thus, for example, in a marriage of short duration, non-monetary spousal contributions may become a less significant factor.⁶²

Some state statutes create certain presumptions regarding spousal contributions. The Minnesota statute provides that it shall be conclusively presumed that each party made a substantial contribution to the acquisition of income and property;⁶³ the New Jersey statute provides for a rebuttable presumption that each party made a substantial financial or nonfinancial contribution to the acquisition of income and property;⁶⁴ the Oregon statute provides for a rebuttable presumption that the parties contributed equally to the acquisition of property;⁶⁵ and the Ohio statute provides that each party shall be considered to have contributed equally to the production and acquisition of marital property.⁶⁶ The primary purpose of such presumptions is to account for the noneconomic contributions of a homemaker spouse like Douglas.⁶⁷

⁶¹ See *infra* note 69.

⁶² See, e.g., *Comins v. Comins*, 595 N.E.2d 804 (Mass. App. Ct. 1992) (awarding wife fifty-six percent and husband forty-four percent of the net assets sufficiently reflected the wife's family's economic contributions to the marriage in light of the forty-eight year duration of the marriage, the husband's contributions to the marriage as a partnership, and the parties' mutual reliance on the wife's trust fund as a means of bolstering their standard of living throughout the years); *Lolli-Ghetti v. Lolli-Ghetti*, 568 N.Y.S.2d 29 (N.Y. App. Div. 1991) (division of marital property allocating sixty percent to the wife and forty percent to the husband, based on the court's attempt to compensate the wife for hardships, including the husband's reluctance to make interim payments, was reversed; such compensation for hardships was an inappropriate consideration since it did not relate to either a spouse's contributions to the economic partnership or to a spouse's ability to be economically productive upon the termination of the partnership); *Murray v. Murray*, 439 S.E.2d 312 (S.C. Ct. App. 1993) (order awarding the wife a fifty percent special equity in the appreciation of the marital residence plus one third of the marital estate was affirmed based on her direct and indirect contributions during the parties' seventeen year marriage; this was a second marriage for both parties; at the time of the marriage, the parties were in their fifties and sixties respectively; during the marriage, the husband directly contributed \$396,000 and the wife \$167,000).

⁶³ MINN. STAT. ANN. § 518.58(1).

⁶⁴ N.J. STAT. ANN. § 2A:34-23.1.

⁶⁵ OR. REV. STAT. § 107.105(1)(f).

⁶⁶ OHIO REV. CODE ANN. § 3105.171(c)(2).

⁶⁷ *Rappleye v. Rappleye*, 855 P.2d 260 (Utah 1993). The trial court's award of all of the proceeds from the sale of the hardware store to the husband as his pre-marital asset was not supported by the evidence; evidence showed that some of the wife's pre-marital assets were commingled in the hardware store operation and that during the marriage the wife worked without salary; in awarding all of the proceeds from the sale of the store to the husband, the trial court apparently never considered whether the wife's contributions, fi-

2. Nonmonetary

One of the major differences between common law and equitable distribution statutes is the acknowledgment of a spouse's nonfinancial contributions to the marital estate.⁶⁸ Since most states with applicable statutes give the trial court authority to consider "any other" relevant matter during equitable distribution,⁶⁹ Douglas's nonfinancial contributions are likely to be a factor.⁷⁰ To date, courts have recognized the following nonfinancial factors as appropriate for consideration: a spouse's foregone opportunity,⁷¹ a spouse's homemaking services,⁷² and a spouse's performance of "social obligations."⁷³

Some state statutes specify that the contributions of a spouse to the acquisition of marital property can include a spouse's nonmonetary contributions, including the contributions of a spouse as a homemaker.⁷⁴ Other statutes use a two-tiered inquiry, based both on the contributions of a spouse to the acquisition of prop-

nancial or otherwise, to the hardware business financially benefitted the parties during the marriage.

⁶⁸ See Carmen V. Patel, Note, *Treating Professional Goodwill as Marital Property in Equitable Distribution States*, 58 N.Y.U. L. REV. 554 (1983) (arguing for equal treatment of professional and commercial goodwill since both represent a valuable and identifiable portion of an enterprise's total worth).

⁶⁹ See, e.g., N.Y. DOM. REL. LAW § 236B(5)(D)(13), which reads as follows: "any other factor which the court shall expressly find to be just or proper."

See Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827 (1988) (arguing that property division has rarely been used to address need, and that it ordinarily reflects contribution alone).

⁷⁰ See Deborah A. Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. REV. 751 (1988) (enhanced earning capacity is property subject to distribution upon divorce).

⁷¹ *Chestnut v. Chestnut*, 499 N.E.2d 783 (Ind. Ct. App. 1986); *Carlson v. Carlson*, 362 N.W.2d 258 (Mich. Ct. App. 1984); *Bisca v. Bisca*, 485 N.Y.S.2d 302 (N.Y. App. Div. 1985); *Parrott v. Parrott*, 292 S.E.2d 182 (S.C. 1982).

⁷² *Smith v. Smith*, 369 So. 2d 1235 (Ala. Civ. App. 1987); *Allison v. Allison*, 491 So. 2d 1201 (Fla. Dist. Ct. App. 1986); *In re Marriage of Hart*, 551 N.E.2d 737 (Ill. App. Ct. 1990); *Robinson v. Robinson*, 554 A.2d 1173 (Me. 1989); *Elwell v. Elwell*, 372 N.W.2d 67 (Minn. Ct. App. 1985); *In re Marriage of Reid*, 733 P.2d 1302 (Mont. 1987); *Marcello v. Marcello*, 560 N.Y.S. 841 (N.Y. App. Div. 1990); *Malseed v. Malseed*, 565 A.2d 453 (Pa. Super. Ct. 1989); *Dunn v. Dunn*, 802 P.2d 1314 (Utah 1990).

⁷³ *In re Marriage of McNamer*, 452 N.W.2d 812 (Iowa Ct. App. 1990); *In re Marriage of Huffman*, 453 N.W.2d 246 (Iowa Ct. App. 1990); *Nastrom v. Nastrom*, 284 N.W.2d 576 (N.D. 1979).

⁷⁴ See, e.g., Arkansas, ARK. CODE ANN. § 9-12-315(a)(1)(A)(viii); Colorado, COLO. REV. STAT. § 14-10-113(1)(a); Delaware, DEL. CODE ANN. tit. 13, § 1513(a)(6); Illinois, ILL. ANN. STAT. ch. 40, para. 503(d)(1); Indiana, IND. CODE ANN. § 31-1-11.5(c)(1); Kentucky, KY. REV. STAT. ANN. § 403.190(1)(a); Maine, ME. REV. STAT. ANN. tit. 19, § 722-A(1)(A); Massachusetts, MASS. GEN. LAWS ANN. ch. 208, § 34; Missouri, MO. ANN. STAT. § 452.930(2); New York, N.Y. DOM. REL. LAW § 236B(5)(d)(6); North Carolina, N.C. GEN. STAT. § 50-20(c)(6); Oregon, OR. REV. STAT. § 107.105(1)(f); Pennsylvania, 23 PA. CONS. STAT. ANN. § 3504(d)(7); South Carolina, S.C. CODE ANN. § 20-7-472(3); Tennessee, TENN. CODE ANN. § 36-4-121(c)(5); Virginia, VA. CODE ANN. § 20-107.3(e)(2); Vermont, VT. STAT. ANN. tit. 15, § 751(b)(11); West Virginia, W. VA. CODE § 48-2-32(c)(2).

erty and the contributions of a spouse as a homemaker.⁷⁵ Still other statutes are less specific in recognizing a spouse's nonmonetary contributions;⁷⁶ however, even in the absence of such explicit statutory provisions, nonmonetary contributions may still be a factor.⁷⁷ According to *O'Neill v. O'Neill*,⁷⁸ "[a] property division ought to accord value to those nonmonetary contributions of one spouse which enable the other spouse to devote substantial effort to paid employment which, in turn, enables the family to acquire tangible marital assets."⁷⁹

In addition, an interruption in a spouse's personal career or education, when sustained in order to further marital objectives, should be relevant as a noneconomic contribution.⁸⁰ In *Mele v. Mele*,⁸¹ the court explained that

[The equitable distribution] statute is a reflection of the aware-

⁷⁵ See, e.g., District of Columbia, D.C. CODE ANN. § 16-910(b); Massachusetts, MASS. GEN. LAWS ANN. ch. 208, § 34; Minnesota, MINN. STAT. ANN. § 518.58(1); Montana, MONT. CODE ANN. § 40-4-202(1); New Jersey, N.J. REV. STAT. ANN. § A:34-23.1(i); Rhode Island, R.I. GEN. LAWS § 15-5-16.1(a).

⁷⁶ See, e.g., Florida, FLA. STAT. ANN. § 61.075(1)(a) (contributions to the marriage include contributions for the care and education of children and services as a homemaker); Iowa, IOWA CODE ANN. § 598.21(a)(c) (contributions to the marriage include giving appropriate economic value to each party's contributions in homemaking and child care services); Maryland, MD. CODE ANN., FAM. LAW § 8-205(b)(1) (contributions to the well-being of the family); Nebraska, NEB. REV. STAT. § 42-365 (contributions to the marriage by each party, including contributions to the care and education of the children); New Hampshire, N.H. REV. STAT. ANN. § 458:16-aII(g) (significant disparity between the parties in relation to the contributions to the marriage, including contributions to the care and education of children and care and management of the home); and Virginia, VA. CODE ANN. § 20-107.3(E)(1) (contributions to the well-being of the family).

⁷⁷ *Jacobitti v. Jacobitti*, 623 A.2d 794 (N.J. Super. Ct. App. Div. 1993) (the \$75,000 equitable distribution award to the wife, representing a fifty percent interest in the marital dwelling, was affirmed in light of evidence of the wife's nonmonetary contributions to the marriage, which included her participation in decorating the home, her contributions to the husband's medical practice and status in the community, and her contributions to the family unit prior to the onset of debilitating illness; the parties had been married for sixteen years; the husband was an eighty-five year old physician, and the wife was sixty-six years old and confined to a wheelchair, suffering from multiple sclerosis).

⁷⁸ 536 A.2d at 982 ("we must invoke the fundamental rule of construction which mandates that this court ascertain and give effect to intention of the legislature").

⁷⁹ *Id.* at 984; see also *McNabney*, 782 P.2d at 1296; *Rothman v. Rothman*, 320 A.2d 496 (N.J. 1974) (decided prior to statutory amendment); *Mele*, 544 N.Y.S.2d at 26; *Behm v. Behm*, 427 N.W.2d 332, 337 (N.D. 1988); *Stice v. Stice*, 779 P.2d 1020, 1028 (Or. 1989); *Van Duinwyk v. Van Duinwyk*, 511 A.2d 975, 977 (R.I. 1986); *Dunn*, 802 P.2d at 1322.

⁸⁰ Some statutes specifically provide to that effect. See, e.g., FLA. STAT. ANN. § 61.075(1)(d); NEB. REV. STAT. § 42-365; N.H. REV. STAT. ANN. § 458.16-aII(h). Even in the absence of such statutory provision, such an interpretation may be relevant. See *McNabney*, 782 P.2d at 1296 (the preeminent example where equal division may not be equitable is that of the wife and mother in a long term marriage who gave up career opportunities for her family's benefit); *Morales v. Morales*, 402 N.W.2d 322, 324 (N.D. 1987) (spouse sacrificed her advancement so that other spouse could get his education); *Parrott*, 292 S.E.2d at 184.

⁸¹ 544 N.Y.S.2d at 26 (wife made significant and vital contributions as a homemaker, spouse, and primary caretaker of their children).

ness that marriage is, among other things, an economic partnership, the success of which depends not only on the respective economic contributions of the parties, but also on a wide range of unenumerated services to the joint enterprise, such as homemaking, raising children, and providing the emotional and moral support necessary to sustain the other spouse in coping with life outside the home.⁸²

Other judicial decisions have treated a wide range of noneconomic conduct as being a "contribution." Thus, in making equitable distributions, courts have cited such factors as the contributions made by a spouse who cared for her ill husband and the loss of earnings which resulted while attending to his needs.⁸³ In addition, courts have recognized contributions made by a spouse employed for one third of the marriage, who for two additional years, drove the other to and from work, and prepared dinner during the duration of the marriage;⁸⁴ a disabled spouse who engaged in an active social life which advanced her husband's commercial business;⁸⁵ a wife who supported her husband while he was drinking, gambling, depressed, and threatening suicide, and who planned intervention by herself and his friends to stop him from drinking;⁸⁶ and a spouse who held two jobs and sacrificed his own lifestyle and career opportunities so that his spouse could pursue her career and education.⁸⁷ Finally, courts have found contributions where one spouse worked without remuneration in a business co-owned by the spouses, or owned by the other spouse,⁸⁸ and where the nonmonetary contributions of one spouse furthered the other spouse's military career.⁸⁹

3. Valuation of Contributions

The valuation of Douglas's nonmonetary contributions can be difficult. The courts' perspectives regarding valuation of marital property range from the view that a specific finding of the value of each significant item of marital property is required,⁹⁰ to the holding that a specific finding of the value of each item of marital prop-

⁸² *Id.*

⁸³ Euler v. Euler, 537 N.E.2d 554, 556 (Ind. Ct. App. 1989).

⁸⁴ Michael v. Michael, 791 S.W.2d 772, 774 (Mo. Ct. App. 1990).

⁸⁵ Coxe v. Coxe, 363 S.E.2d 906, 908 (N.C. Ct. App. 1989).

⁸⁶ Watson v. Watson, 351 S.E.2d 883, 887-88 (S.C. Ct. App. 1989).

⁸⁷ Srinivasan, 396 S.E.2d at 675.

⁸⁸ See, e.g., Antepencko v. Antepencko, 549 So. 2d 1357, 1359 (Ala. Civ. App. 1989); White v. White, 557 So. 2d 480 (Miss. 1989).

⁸⁹ See Morales, 402 N.W.2d at 325; Bullock v. Bullock, 354 N.W.2d 904, 910 (N.D. 1985).

⁹⁰ Husband G. v. Wife G., 410 A.2d 155 (Del. Super. Ct. 1979).

erty in dispute is not required.⁹¹ Most courts, however, have adopted a view somewhere in between these two extremes. The view that has garnered the support of most jurisdictions is to force the trial court to determine the value of all marital property before distributing it.⁹²

The difficulty of valuation is a factor that tends to make it more difficult to reverse a property distribution made by the trial court, which has evaluated evidence dealing with the nature and extent of nonmonetary contributions. Thus, courts have occasionally focused all attention toward valuing nonmonetary contributions.⁹³ One court has specifically recognized that it is difficult at best for a family court judge to value indirect contributions and even more difficult for an appellate court to value such contributions based on the lower court's record.⁹⁴ In addition, expert testimony as to the valuation of Douglas's nonmonetary services may or may not be permissible. Even if permissible, however, such testimony, may not be given much weight in view of the difficulties of valuing nonmonetary contributions.⁹⁵

II. WHAT IS A RIGHT OF PUBLICITY?

Given the legal framework within which equitable distribution

⁹¹ *In re* Marriage of Walsh, 440 N.E.2d 310 (Ill. App. Ct. 1982).

⁹² Norgauer v. Norgauer, 511 N.Y.S.2d 731 (N.Y. App. Div. 1987); Bowen v. Bowen, 473 A.2d 73 (N.J. 1984); Toler v. Toler, 356 S.E.2d 429 (S.C. Ct. App. 1987).

⁹³ See, e.g., Watson, 351 S.E.2d at 887-88 (support of the wife while the husband was drinking, gambling, being depressed, and threatening suicide cannot be valued in hours; wife's concern for his drinking problem and instigation of the planned intervention by herself and his friends to cause him to stop drinking cannot be valued quantitatively with mathematical certainty).

⁹⁴ See Peirson v. Calhoun, 417 S.E.2d 604, 606 (S.C. Ct. App. 1992) (trial court heard evidence from the husband's expert that the husband made direct contributions of \$1,698,508 and the wife made direct contributions of \$164,962 (based on application of the minimum wage to the wife's services as homemaker); the husband made indirect contributions of \$48,901 and the wife made indirect contributions of \$295,743). The court awarded the husband seventy-five percent and the wife twenty-five percent of the marital assets; on appeal the court agreed with the wife that it was debasing to value her homemaker services at the minimum wage, but, since she failed to present any evidence at trial as to the value of her indirect contributions, or to address her equal partnership theory of dividing the assets or the foregone career opportunities theory, the appellate court reluctantly affirmed the award, implying that it would have reached the merits of these issues had they been properly preserved for appeal.

⁹⁵ See Bidwell v. Bidwell, 504 N.Y.S.2d 327, 329 (N.Y. App. Div. 1986) (trial court did not err in disallowing plaintiff's labor expert to testify concerning the value of her services as a homemaker; the value of such services is not a subject which necessitates elucidation by expert testimony); Smith v. Smith, 294 S.E.2d 404, 408 (S.C. Ct. App. 1987) (trial court did not err in denying expert's testimony that wife's contributions to the accumulation of assets did not exceed thirty-seven percent; court may give such weight to expert evidence as it deems appropriate); see also *In re* Marriage of Schulte, 546 S.W.2d 41, 47 (Mo. Ct. App. 1977) (it is not necessary to prove the value of homemaker services on a dollar per hour basis); Watson, 351 S.E.2d at 887-88.

operates, it is necessary to define Jordana's right of publicity to determine its appropriateness as marital property. Jordana's right of publicity falls under the rubric of the right of privacy.⁹⁶ The right of publicity "signif[ies] the right of an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of his name and picture or likeness and to prevent others from unfairly appropriating this value for their commercial benefit."⁹⁷ Publicity rights give a person control over commercial use of one's identity.⁹⁸ Although they are developed largely by federal courts,⁹⁹ publicity rights are governed by state law,¹⁰⁰ with each

⁹⁶ Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890). Warren and Brandeis argued that the law should "protect the privacy of private life [T]he matters of which the publication should be repressed may be described as those which concern the private life, habits, acts and relations of an individual." *Id.* at 215-16. See Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991).

Theories of copyright, quasi-contract, and unfair competition have all been used to protect a celebrity's right of publicity. See *Columbia Broadcasting Sys., Inc. v. DeCosta*, 377 F.2d 315 (1st Cir. 1967) (copyright); *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir.), *cert. denied*, 315 U.S. 823 (1942) (quasi-contract); *Chaplin v. Amador*, 269 P. 544 (Cal. Dist. Ct. App. 1928) (unfair competition); *Sullivan v. Ed Sullivan Radio & T.V., Inc.*, 152 N.Y.S.2d 227 (N.Y. App. Div. 1956) (unfair competition).

⁹⁷ *Presley*, 513 F. Supp. at 1353; See *Brimley v. Hardee's Food Sys.*, No. 93 Civ. 1797, 1995 U.S. Dist. LEXIS 1471 (S.D.N.Y. Feb. 9, 1995) (series of commercials featuring character portrayed by character bearing striking resemblance to celebrity plaintiff); *Lane v. Random House, Inc.*, No. 93-2564, 1995 U.S. Dist. LEXIS 1332 (D.D.C. Jan. 26, 1995) (unauthorized use of plaintiff's photograph in newspaper advertisement for a new book); *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979) (en banc) ("The so-called right of publicity means in essence that the reaction of the public to name and likeness, which may be fortuitous or which may be managed or planned, endows the name and likeness of the person involved with commercially exploitable opportunities."); Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1201 (1986) (use of celebrities to increase marketability of consumer products has existed throughout history of advertising). There is, by contrast, no comparably protected property interest in one's position and title of employment. See *Rodgers v. Georgia Tech. Athletic Ass'n*, 303 S.E.2d 467 (Ga. Ct. App. 1983).

⁹⁸ According to Beverly E. Loew:

Performance rights are, or should be, of primary importance to the . . . performer. . . . A . . . performer's material is his livelihood; the performer may spend years and resources developing his shuck. . . . [S]ome performers achieve wild success; most either find only moderate success or are forced to give up their aspirations because of lack of available work and resources. The risks associated with developing a career as a . . . performer are great; the risks should be compensated by not only financial reward, but also by the right to exploit the material and reputation the performer develops. Many performers become synonymous with the characters they portray; similarly, a performer may become identified with and inseparable from his . . . routines, which may include characters. It seems unfair to deny a performer the right to exploit the material he developed and which is associated with him since the material often defines the performer's identity. A performer should have the right to control the use of his personality against unwanted associations, since overexposure, competing or undesirable uses can diminish the performer's commercial value.

Beverly E. Loew, *Exit Letterman Laughing?*, 15 ENT. L. REP. 11 (Apr. 1994).

⁹⁹ See Paul Heald, *Federal Intellectual Property Law and the Economics of Preemption*, 76 IOWA

state free to prescribe its own substantive contours of the right.¹⁰¹

The right of publicity was first explicitly recognized in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*¹⁰² Since *Haelan*, half of the states have adopted the right of publicity in some form. Twenty-five states have recognized the right under their common law,¹⁰³ while fourteen others have statutes which embody the right.¹⁰⁴ To date, only two courts have expressly rejected the existence of a common law right of publicity.¹⁰⁵

L. REV. 959 (1991) (discussing economic rationale used in determining proper scope of preemption power of federal intellectual property statutes).

For an argument supporting federal right of publicity legislation, see J. Eugene Salomon, Jr., Note, *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179 (1987).

¹⁰⁰ See Richard C. Cray, Comment, *Choice of Law in Right of Publicity*, 31 UCLA L. REV. 640 (1984) (arguing that divergent state laws to govern controversies arising from multistate exploitation of publicity rights is inherently arbitrary and federal legislation is needed for uniformity).

¹⁰¹ See *Zacchini*, 433 U.S. at 578-79 (concluding that Ohio may constitutionally determine the First Amendment confines of its right of publicity).

¹⁰² 202 F.2d 866.

¹⁰³ See, e.g., *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70 (W. Va. 1992) (the right of privacy protects individual personalities and feelings; the right of publicity protects the commercial value of a name or likeness); *McFarland v. E & K Corp.*, 18 U.S.P.Q.2d (BNA) 1246 (D. Minn. 1991); *Cullison v. Medley*, 570 N.E.2d 27 (Ind. 1991); *Lusby v. Cincinnati Monthly Publishing Corp.*, 17 Media L. Rep. (BNA) 1962 (6th Cir. 1990) (Ohio); *Birmingham Broadcasting Co. v. Bell*, 68 So. 2d 314 (Ala. 1953); *Smith v. Surat*, 7 Alaska 416 (D. Alaska 1926); *Reed v. Real Detective Publishing Co.*, 162 P.2d 133 (Ariz. 1945); *Olan Mills, Inc. v. Dodd*, 353 S.W. 22 (Ark. 1962); *Cher v. Forum Int'l Ltd.*, 692 F.2d 634 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983) (applying California law); *Vassiliades v. Garfinkel's*, 492 A.2d 580 (D.C. 1985); *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prod., Inc.*, 296 S.E.2d 697, 703 (Ga. 1982); *Fergerstrom v. Hawaiian Ocean View Estates*, 441 P.2d 141 (Haw. 1968); *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284 (Idaho 1961); *Stone v. Creative Communications, Inc.*, 216 U.S.P.Q. (BNA) 261 (N.D. Ill. 1981); *Kunz v. Allen*, 172 P. 532 (Kan. 1918); *McAndrews v. Roy*, 131 So. 2d 236 (La. Ct. App. 1961); *Nelson v. Maine Times*, 373 A.2d 1221 (Me. 1977); *Lawrence v. A.S. Abell Co.*, 475 A.2d 448 (Md. 1984); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (Mich.); *Candebat v. Flanagan*, 487 So. 2d 207 (Miss. 1986); *Haith v. Model Cities Health Corp.*, 704 S.W.2d 684 (Mo. Ct. App. 1986); *Uhlaender v. Harris*, 134 S.W. 1076 (Mo. Ct. App. 1911); *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458 (N.J. Super. Ct. 1967); *McNutt v. New Mexico State Tribune Co.*, 538 P.2d 404, 408 (N.M. Ct. App. 1975); *Flake v. Greensboro News*, 195 S.E. 55 (N.C. 1938); *Anderson v. Fisher Broadcasting Co.*, 712 P.2d 803 (Or. 1986); *Kennedy v. Ministries, Inc.*, 10 Media L. Rep. (BNA) 2459 (E.D. Pa. 1984); *Cox v. Hatch*, 761 P.2d 556 (Utah 1988); *State ex rel. LaFollette v. Hinkle*, 229 P. 317 (Wash. 1924).

¹⁰⁴ See California, CAL. CIV. CODE §§ 990, 3344 (West Supp. 1991); Florida, FLA. STAT. ANN. § 540.08(3) (West 1988); Kentucky, KY. REV. STAT. ANN. § 391.170 (Michie/Bobbs-Merrill 1984); Massachusetts, MASS. GEN. LAWS ANN. ch. 214, § 3A (West 1989); Nebraska, NEB. REV. STAT. § 20-202 (1987); Nevada, NEV. REV. STAT. ANN. §§ 598.980-82 (Michie Supp. 1989); New York, N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney Supp. 1991); Oklahoma, OKLA. STAT. ANN. tit. 21, § 839.1-839.3 (West 1983); Rhode Island, R.I. GEN. LAWS § 9-1-28 (1985); Tennessee, TENN. CODE ANN. §§ 47-25-1101 to -1108 (1988); Texas, TEX. PROP. CODE ANN. § 26 (West 1991) (protecting rights of deceased persons); Utah, UTAH CODE ANN. § 45.31 (1988); Virginia, VA. CODE ANN. §§ 8.01-40 (Michie 1984), 18.2-216.1 (1988); Wisconsin, WIS. STAT. ANN. § 895.50(2)(b) (West 1974). For a discussion of the statutes, see J.T. MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* ch. 6 (1987).

¹⁰⁵ One of these held that the state's statute was preemptive. See *Stephano v. News Group Publications*, 474 N.E.2d 580 (N.Y. 1984). The other was later overturned by the

The common law tort of misappropriation of Jordana's name, likeness, or image has three elements: (1) a showing of Jordana's substantial investment of time, effort, and money into creating the thing misappropriated such that the court can characterize that "thing" as a kind of property right; (2) a showing that the defendant has profited unjustly from use of Jordana's "property right;" and (3) a showing that the defendant has injured Jordana by the misappropriation.¹⁰⁶ The right of publicity doctrine recognizes that for a celebrity like Jordana, her persona is her product. Therefore, taking a celebrity's persona and using it for commercial gain is little different from stealing a manufacturer's product and selling it, whether or not there is actual confusion as to sponsorship.¹⁰⁷ Right of publicity laws also protect the intrusion into Jordana's privacy arising from having her identity used in a manner with which she disagrees.¹⁰⁸ Thus, the tort would compensate Jordana for injuries to her feelings of peace and happiness, as well as for her economic losses.

A state's interest in protecting Jordana's right of publicity "is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of [her] endeavors. . . ."¹⁰⁹ Like copyright, the policy underlying the right of publicity is to provide an incentive for Jordana's enterprise and creativity by allowing Jordana to benefit from her own efforts.¹¹⁰ A state's interest in the right of publicity has also been described in terms of preventing unjust enrichment.¹¹¹ Additionally, one judge

state's legislature. See *Carson v. National Bank of Commerce*, 501 F.2d 1082 (8th Cir. 1974); NEB. REV. STAT. § 20-201.

¹⁰⁶ J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 10.25 (3d ed. 1992). This doctrine originated with the United States Supreme Court decision of *International News Serv. v. Associated Press*, 248 U.S. 215 (1918). In this case, Associated Press ("AP") sought to enjoin a competing wire service from using AP-generated news stories in East Coast papers to scoop AP subscribers on the West Coast. The Court held that the AP had a quasi-property interest in "hot" new stories, which it could assert against its competitors.

¹⁰⁷ See, e.g., *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), cert. denied, 113 S. Ct. 2443 (1993) (robot dressed and posed like game show hostess Vanna White).

¹⁰⁸ See, e.g., *Tom Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), cert. denied, 113 S. Ct. 1047 (1993) (sound-alike of singer Tom Waits).

¹⁰⁹ *Zacchini*, 433 U.S. at 573.

¹¹⁰ Analogizing between the right of publicity and copyright, the Supreme Court stated: The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

Id. at 576 (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

¹¹¹ 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 advanced by

has linked the right of publicity to a state's interest in the development of the entertainment industry within its borders.¹¹² Courts have established that a state's interest in protecting publicity rights from unauthorized exploitation should be balanced against societal interests in free expression.¹¹³ In balancing these interests, commentators have argued that, in the realm of consumer merchandise, the right of publicity generally prevails over a merchandiser's First Amendment claim that merchandising conveys neither information nor ideas, and contributes virtually nothing to the public enlightenment.¹¹⁴

1. Private Figures

Initially, several individual states confronted the right of publicity only of private figures. For instance, in 1903, the New York Legislature adopted a statute creating both criminal and civil liability for the unauthorized use of "the name, portrait, or picture of any living person" for "advertising purposes, or for the purposes of trade."¹¹⁵ This legislation was aimed at reversing the court of appeals's decision in the notorious *Roberson* case.¹¹⁶ Two years later, in *Pavesich v. New England Life Insurance Co.*, the Georgia Supreme Court held the unauthorized use of a person's photograph in a testimonial advertisement actionable as an invasion of privacy.¹¹⁷ Subsequently, protection from unauthorized use of name and likeness became an accepted facet of the right of privacy. Although the plaintiffs in *Roberson* and *Pavesich* successfully asserted claims involving rights to anonymity, autonomy, and reputation, these

having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay. See Harry Kalven, Jr., *Privacy In Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966).

¹¹² See *Factors Etc., Inc., v. Pro Arts, Inc.*, 652 F.2d 278, 288 (2d Cir. 1981) (Mansfield, J., dissenting) [hereinafter *Factors II*]. In arguing that Tennessee should recognize a descendible right of publicity, Judge Mansfield stated: "[I]t would be rational for the Tennessee courts to adopt a policy enhancing the continued growth of Nashville and Memphis as centers for the lives and activities of music industry personalities." *Id.*

¹¹³ See, e.g., *Zacchini*, 433 U.S. at 569-79; *Presley*, 513 F. Supp. at 1355-60.

¹¹⁴ See Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577 (1979) (right of publicity encompasses use of name, likeness, and personal characteristics but limits of right are unclear).

¹¹⁵ 1903 N.Y. LAWS ch. 132, §§ 1-2 (codified as amended at N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1990)).

¹¹⁶ *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (N.Y. 1902) (holding that there is no common law right of privacy). The unsuccessful plaintiff in *Roberson* was a minor whose photograph had been used without her consent on a widely distributed advertising poster for flour.

¹¹⁷ *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905). The plaintiff in this case was an artist of no great renown whose photograph was used without permission in a testimonial advertisement for life insurance.

plaintiffs were not celebrities like Jordana.¹¹⁸ Emotional injury claims made by private figures were far more convincing than similar claims by celebrities who were less likely to suffer distress or humiliation from additional publicity.¹¹⁹ In addition, although celebrities also have an interest in protecting their autonomy in commercialization of their personality and their reputation, they do not have an interest in anonymity by virtue of their celebrity status.¹²⁰ Thus, a celebrity like Jordana is likely to be less disturbed by unwanted publicity and is more concerned with receiving just compensation for exploitation of her name and likeness.¹²¹

2. Celebrities

In the 1920s and 1930s, celebrity claims seeking relief for violation of their right of publicity were unsuccessful because many courts simply held that celebrity status carries with it a burden of fame, visibility, and exposure.¹²² Other jurisdictions only considered "offensive" publicity actionable, thus making the normal commercial appropriation untouchable.¹²³ Even the few successful privacy actions by celebrities achieved only small damage awards based solely on compensation for indignation.¹²⁴

¹¹⁸ In both cases, the plaintiffs had their anonymity destroyed by unconsented exposure to widespread publicity.

¹¹⁹ According to Michael I. Rudell, Chairman-elect of the American Bar Association Forum on the Entertainment and Sports Industry:

Usually, torts of public disclosure and false light are found to conflict with the First Amendment because of the impact upon dissemination of information to the public. If, however, it is alleged that the entire publication is a "calculated falsehood" designed as a subterfuge or commercial appropriation of plaintiff's name and likeness, the court must consider First Amendment limitations in right of publicity cases.

Michael I. Rudell, *Refusal to Enjoin*: Elizabeth Taylor v. Miniseries, N.Y.L.J., Dec. 23, 1994, at 3.

¹²⁰ The right of publicity cannot and should not "be used as a vehicle to stifle undesired discussion and legitimate commentary on the lives of public persons." McCARTHY, *supra* note 106, § 11.6(c).

¹²¹ See James M. Treece, *Commercial Exploitation of Names, Likeness, and Personal Histories*, 51 TEX. L. REV. 637, 641 (1973) (harm to celebrity from misappropriation emanates primarily from failure to pay).

¹²² *O'Brien*, 124 F.2d at 169 ("all-American" college football player surrendered his right of publicity by willingly exposing himself to the national media through repeated photograph shoots); *Paramount Pictures, Inc. v. Leader Press, Inc.*, 24 F. Supp. 1004 (W.D. Okla. 1938) (posters of movie stars), *rev'd on other grounds*, 106 F.2d 229 (10th Cir. 1939); *Martin v. F.I.Y. Theatre Co.*, 10 Ohio Op. 338 (C.P. 1938) (theater poster of actress).

¹²³ See Nimmer, *supra* note 1.

¹²⁴ See, e.g., *Miller v. Madison Square Garden Corp.*, 28 N.Y.S.2d 811 (N.Y. Sup. Ct. 1941) (well-known performer, who acknowledged that defendant's use of his photograph on the cover of an official program for a sporting event had not caused him any humiliation, awarded six cents in damages); *Fisher v. Murray M. Rosenberg, Inc.*, 23 N.Y.S.2d 677 (N.Y. Sup. Ct. 1940) (compensatory damages recoverable for invasion of privacy limited to "injured feelings," \$300 award for use of a famous dancer's photograph in a shoe advertisement).

Ultimately, it was apparent that a celebrity required broader protection against unauthorized commercial exploitation of her/his name and likeness to fully realize the benefits of publicity to which she/he is entitled.¹²⁵ Thus, the right of publicity for celebrities like Jordana was destined to take on a property value to be bought and sold in the market.¹²⁶

B. Cause of Action

Publicity rights protect Jordana's personal identity features, including name,¹²⁷ voice,¹²⁸ associated objects,¹²⁹ appearance or likeness,¹³⁰ and personality.¹³¹ For a publicity claim to arise, Jordana is

¹²⁵ See Patti T. Cotten, *Torts—The Right of Publicity—Protecting A Celebrity's Rights*, 52 TENN. L. REV. 123 (1984). "[T]he rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will." *Id.* at 130.

¹²⁶ See Fred M. Weiler, Note, *The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT. L.J. 223 (1994) (proposing privileged appropriation of identity to offset "all or nothing" approach to identity misappropriation); 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 (1985) (analysis of merits of extending a right of publicity to political figures).

¹²⁷ E.g., *Cher*, 692 F.2d at 634 (first name); *Hirsch v. S.C. Johnson & Sons, Inc.*, 280 N.W.2d 129 (Wis. 1979) (nickname). Some courts hold that plaintiff must show from use's context that plaintiff is identifiable. See, e.g., *T.J. Hooker v. Columbia Pictures Indus., Inc.*, 551 F. Supp. 1060 (N.D. Ill. 1982) (fictional name of policeman did not refer to nonfictional woodcarver); *Carson*, 698 F.2d at 831 (defendant's use of the "Here's Johnny!" slogan together with the phrase "The World's Foremost Comedian" to market its portable toilets, identified entertainer Johnny Carson). Some courts have found that the New York statute protects only names, not nicknames. E.g., *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 355-56 (S.D.N.Y. 1968) (pen name "Dr. Seuss").

¹²⁸ *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (imitation of singer Bette Midler's voice in advertisement, *cert. denied*, 503 U.S. 951 (1992)). See *Waits*, 978 F.2d at 1093 (imitation of singer Tom Wait's voice in advertisement). See generally Keith E. Lurie, Note, *Waits v. Frito-Lay: The Song Remains the Same*, 13 CARDOZO ARTS & ENT. L.J. 187 (1994) (arguing for analysis of advertisements in their entirety and proposing a test to distinguish between commercial and artistic uses of a celebrity's identity); Russell A. Stamets, *Ain't Nothin' Like the Real Thing, Baby: The Right of Publicity and the Singing Voice*, 46 FED. COM. L.J. 347 (1994); Patrick Buckley, *The Implications of Waits v. Frito-Lay for Advertisers who Use Celebrity Sound-Alikes*, 68 ST. JOHN'S L. REV. 241 (1994); Cynthia M. Judy, *Waits v. Frito-Lay, Inc.: Ninth Circuit Reaffirms Viability of Voice Misappropriation as a California Tort*, 23 GOLDEN GATE U. L. REV. 339 (1993); Leonard A. Wohl, Note, *The Right of Publicity and Vocal Larceny: Sounding Off On Sound-Alikes*, 57 FORDHAM L. REV. 445 (1988).

¹²⁹ *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974) (distinctively painted car identified race car driver). See Robert C. Denicola, *Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols*, 62 N.C. L. REV. 603 (1984) (arguing that economic factors provide practical limitations on the impact of recognizing an exclusive right to the merchandising value of a trade symbol).

¹³⁰ See *Newton v. Thomason*, 22 F.3d 1455 (9th Cir. 1994); *White*, 971 F.2d at 1395 (advertisement depicted robot resembling game show hostess Vanna White); CAL. CIV. CODE §§ 990(a), 9344(a). See John F. Hyland & Ted C. Lindquist, III, *White v. Samsung Electronics America, Inc.: The Wheels of Justice Take an Unfortunate Turn*, 23 GOLDEN GATE U. L. REV. 299 (1993); Gretchen A. Pemberton, *The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity*, 27 U.C. DAVIS L. REV. 97 (1993).

¹³¹ See Seth E. Bloom, *Preventing the Misappropriation of Identity: Beyond the Right of Publicity*, 13 HASTINGS COMM. & ENT. L.J. 489 (1991) (discussing competing interests of needs of individuals to control use of their identities with society's interest in freedom of expres-

only required to show that her identity was used without her authority.¹³² To illustrate the importance of incorporating the right of publicity as marital property, it is useful to examine the myriad of claims possibly available to a celebrity spouse.

1. Advertisement

Jordana's right of publicity includes the power to control exploitation of her personality through licensing agreements¹³³ as well as the right to obtain relief when a third party appropriates her name and likeness for commercial purposes without permission.¹³⁴ Typically, the defendant would use Jordana's name, picture, or portrait¹³⁵ in an advertisement for defendant's product.¹³⁶

sion); Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988) (advocating the judicial development of moral rights protections from common-law tort principles).

¹³² According to Stephen R. Barnett, Professor of Law at the University of California at Berkeley:

At stake are ads that poke fun at popular culture or politics and the celebrities who people these realms. In recent years, the right to make such ads has come under increasing challenge from celebrities wielding the right of publicity, the state-created tort that lets celebrities sue for the unconsented commercial use of their names or likenesses. This used to mean just their names or likenesses, with advertisers left free to call the celebrity to mind by evoking other aspects of his or her identity. There was assumed to be, as well, a certain right to parody even the name or likeness. Recent decisions of the U.S. Court of Appeals for the 9th Circuit have changed all that. Most significant is the court's well-known ruling in *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992), in favor of Vanna White, famed letter-turner on television's "Wheel of Fortune" game show. White sued Samsung Electronic and its ad agency, David Deutsch, over an ad that showed a female-shaped robot, dressed like White, turning letters on a game show in 2012 A.D. The court said a jury could find that the ad "appropriated"—or "evoked"—White's "identity," and it brushed aside the First Amendment parody defense because this was advertising, "garden-variety commercial speech."

Stephen R. Barnett, *The Big Chill: Free Speech In Advertising*, LEGAL TIMES, Dec. 19, 1994, at 21. See also Christopher Pesce, *The Likeness Monster: Should the Right of Publicity Protect Against Imitation?*, 65 N.Y.U. L. REV. 782 (1990) (arguing for expansion and contraction of right of publicity).

¹³³ See *Haelan Laboratories*, 202 F.2d at 866. The court stated that the "right of publicity would usually yield . . . no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures."

¹³⁴ Relief in cases involving misappropriation has come in two forms. Generally, when the relief is intended to compensate for a loss of a proprietary nature, it will be in the form of monetary damages representing the fair market value of the name and likeness. See, e.g., *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973) (awarding Cary Grant damages based on the fair-market value of his face for an unauthorized use in a magazine fashion layout). In other jurisdictions which recognize the right as one of privacy, relief may be injunctive, on the ground that the commercial use may be so offensive that monetary relief is insufficient. See, e.g., *Melvin v. Reid*, 297 P. 91 (Cal. Ct. App. 1931) (enjoining the showing of a film which revealed a former prostitute's past). In some jurisdictions, statutes allow both forms of relief concurrently.

¹³⁵ See D. Scott Gurney, Note, *Celebrities and the First Amendment: Broader Protection Against the Unauthorized Publication of Photographs*, 61 IND. L.J. 697 (1986) (arguing that right of publicity maximizes "incentive to develop and maintain skills and talents that society finds appealing").

Thus, Jordana has a cause of action where her identity is used to advertise any of a wide variety of products regardless of whether or not such commercial use constitutes a technical endorsement.¹³⁷ Some examples are: dog food,¹³⁸ baseball cards,¹³⁹ cigarettes,¹⁴⁰ portable toilets,¹⁴¹ medical products,¹⁴² picture frames,¹⁴³ shoes,¹⁴⁴ cameras,¹⁴⁵ watches,¹⁴⁶ table tennis,¹⁴⁷ bowling pins,¹⁴⁸ books,¹⁴⁹ magazines,¹⁵⁰ movies,¹⁵¹ and alcoholic beverages.¹⁵²

¹³⁶ See Consuelo L. Kertz & Roobina Ohanian, *Recent Trends in the Law of Endorsement Advertising: Infomercials, Celebrity Endorsers and Nontraditional Defendants in Deceptive Advertising Cases*, 19 HOFSTRA L. REV. 603 (1991) (examining liability of creator of advertising message).

¹³⁷ *Eick v. Perk Dog Food Co.*, 106 N.E.2d 742, 745 (Ill. App. Ct. 1952); *Flores v. Mosler Safe Co.*, 164 N.E.2d 853, 857 (N.Y. 1959); *Eastwood v. Superior Ct.*, 198 Cal. Rptr. 342, 347-48 (Cal. Ct. App. 1983).

¹³⁸ *Eick*, 106 N.E.2d at 743-45.

¹³⁹ *Haelan Laboratories*, 202 F.2d at 868.

¹⁴⁰ *Motschenbacher*, 498 F.2d at 822-27.

¹⁴¹ *Carson*, 698 F.2d at 834-37 (defendant used "Here's Johnny" in its corporate name and to sell its product).

¹⁴² *Nature's Way Prods., Inc. v. Nature-Pharma*, 736 F. Supp. 245, 253 (D. Utah 1990) (defendant used the identity of plaintiff's vendor to advertise its herbal medicines).

¹⁴³ *Faber v. Condecor, Inc.*, 477 A.2d 1289, 1292-93 (N.J.), cert. denied, 491 A.2d 684 (N.J. 1984) (plaintiff's family picture was used in defendant's picture frame).

¹⁴⁴ *Fisher*, 23 N.Y.S.2d at 678 (ads and display cards using plaintiff's photo to promote shoe sales); *Sidny v. A.S. Beck Shoe Corp.*, 274 N.Y.S. 559, 560 (N.Y. Sup. Ct. 1934) (plaintiff-actress's photo was used in shoe ads).

¹⁴⁵ *Selsman v. Universal Photo Books, Inc.*, 238 N.Y.S.2d 686, 687 (N.Y. App. Div. 1963) (plaintiff-actress's photo was used in a camera manual together with a legend depicting her as using defendant's camera while filming her recent movie).

¹⁴⁶ *Andretti v. Rolex Watch U.S.A., Inc.*, 437 N.E.2d 264, 265 (N.Y. 1982) (ad used name and photo of a well-known race car driver).

¹⁴⁷ *Miles v. Sears, Roebuck & Co.*, 403 N.Y.S.2d 18, 19 (N.Y. App. Div. 1978) (defendant used in a promotional booklet twenty-five drawings of plaintiff and two references to his name, which were taken from an earlier publication sold to defendant).

¹⁴⁸ *Gravina v. Brunswick Corp.*, 338 F. Supp. 1, 2 (D.R.I. 1972) (use of plaintiff bowler's name and photo as a satisfied user of defendant's product).

¹⁴⁹ *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904, 913-14 (D.N.J. 1986) (plaintiff's war-time photograph, not used in a series on Vietnam, was used in advertising to hype the book product); *Eliot v. Jones*, 120 N.Y.S. 989, 990 (N.Y. Sup. Ct.), aff'd, 125 N.Y.S. 1119 (N.Y. App. Div. 1910) (use of plaintiff-academic's name in conjunction with a series of books); *Bromhall v. Rorvik*, 478 F. Supp. 361, 368 (E.D. Pa. 1979) (use of plaintiff-scientist's experimental techniques to "lend a false air of scholarship" to a book); *Thompson v. G.P. Putnam's Sons*, 243 N.Y.S.2d 652, 654 (N.Y. Sup. Ct. 1963) (a distorted version of a review by plaintiff enclosed as an introductory "Note" to a sexually explicit book was actionable).

¹⁵⁰ *Clark v. Celeb Publishing, Inc.*, 530 F. Supp. 979, 981-84 (S.D.N.Y. 1981) (nude photos of plaintiff were used on pornographic magazine's cover and in advertising inserts); *Roberts v. Conde Nast Publications, Inc.*, 146 N.Y.S.2d 493, 494-95 (N.Y. App. Div. 1955) (defendant used a positive reference to its magazine at a public meeting by plaintiff-educator in card inserts advertising the magazine).

¹⁵¹ *Kerby v. Hal Roach Studios, Inc.*, 127 P.2d 577, 580-81 (Cal. 1942) (letter to a thousand men using plaintiff's name advertising a movie).

¹⁵² *Orsini v. Eastern Wine Corp.*, 73 N.Y.S.2d 426, 427 (N.Y. Sup. Ct.), aff'd, 78 N.Y.S.2d 224 (N.Y. App. Div.), appeal denied, 79 N.Y.S.2d 870 (N.Y. App. Div. 1947) (plaintiff's surname and coat of arms were used on the label of defendant's wine); *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826, 828 (S.D.N.Y. 1990) (a "rap" group look-alike was used in a beer commercial).

2. Business Promotion

Liability has also been imposed for the use of a plaintiff's identity to advertise or promote a business, such as a fitness center,¹⁵³ real estate company,¹⁵⁴ college athletic event,¹⁵⁵ insurance company,¹⁵⁶ movie,¹⁵⁷ television show,¹⁵⁸ radio station,¹⁵⁹ jewelry store,¹⁶⁰ dance company,¹⁶¹ railroad,¹⁶² ski resort,¹⁶³ night club,¹⁶⁴ car dealership,¹⁶⁵ or telephone company.¹⁶⁶ Actionable commercial exploitation, however, is broader than mere use of a plaintiff's identity in advertising.

In addition to advertisements, liability has been imposed for uses of "some similar commercial purpose."¹⁶⁷ Thus, defendants

¹⁵³ *McAndrews*, 131 So. 2d at 259.

¹⁵⁴ *Canessa v. J.I. Kislak, Inc.*, 235 A.2d 62, 64-79 (N.J. 1967) (use of plaintiff's picture in a salesman's kit used to help sell homes); *Fergerstrom*, 441 P.2d at 144 (use of plaintiff's name and photo in real estate ads); *Notage v. Amercian Express Co.*, 452 So. 2d 1066, 1068 (Fla. Dist. Ct. App. 1984) (plaintiff-doorman's picture was used as the focus of posters and postcards advertising a condominium complex).

¹⁵⁵ *Kimbrough v. Coca-Cola/USA*, 521 S.W.2d 719, 721-23 (Tex. Ct. App. 1975) (use of former college football player's name and picture in an ad in a college football program); *Miller*, 28 N.Y.S.2d at 812-13 (use of plaintiff's picture with a caption in an official program of a sporting event put on by defendant).

¹⁵⁶ *Pavesich*, 50 S.E. at 69; *Candebat*, 487 So. 2d at 209-12 (use of information about plaintiff's wife's accidents and copies of insurance checks incorporated in a salesman's "kit"); *United States Life Ins. Co. v. Hamilton*, 238 S.W.2d 289 (Tex. Ct. App. 1951) (use of facsimile of a signature of former employee in an advertising letter); *Hamilton v. Lumberman's Mut. Casualty Co.*, 82 So. 2d 61, 62 (La. Ct. App. 1955) (as advertisement in plaintiff's name for witnesses to an accident).

¹⁵⁷ *Loftus v. Greenwich Lithographing Co.*, 182 N.Y.S. 428, 429-32 (N.Y. App. Div. 1920).

¹⁵⁸ *Jeppson v. United Television, Inc.*, 580 P.2d 1087, 1088 (Utah 1978) (defendant announced plaintiff's name and telephone number on the air on "Dialing for Dollars" and then televised a conversation with her without divulging this to her).

¹⁵⁹ *Birmingham Broadcasting Co.*, 68 So. 2d at 320; *Bell v. Birmingham Broadcasting Co.*, 82 So. 2d 345, 346 (Ala. 1955) (defendant used plaintiff-announcer's name in soliciting sponsors).

¹⁶⁰ *Munden v. Harris*, 134 S.W. 1076, 1078-79 (Mo. Ct. App. 1911) (plaintiff-child's picture was used to solicit sales of jewelry).

¹⁶¹ *Murray v. Rose*, 30 N.Y.S.2d 6, 7 (N.Y. Sup. Ct. 1941) (advertisements indicating plaintiff danced for the defendant).

¹⁶² *Gilham v. Burlington N., Inc.*, 514 F.2d 660 (9th Cir. 1975) (publication of plaintiff's picture under defendant's credit line in a magazine might be a publication for advertising purposes); *Almind v. Sea B. R. Co.*, 141 N.Y.S. 842, 843 (N.Y. App. Div. 1913) (plaintiff's picture was used to demonstrate proper egress from and ingress into a railroad car).

¹⁶³ *Seidelman v. State*, 110 N.Y.S.2d 380, 381-82 (N.Y. Sup. Ct. 1952) (use of plaintiff's picture for trade and advertising purpose by a state ski resort).

¹⁶⁴ *Le Flore v. Reflections of Tulsa, Inc.*, 708 P.2d 1068, 1070 (Okla. 1985) (use of plaintiff contest-winner's name in promoting defendant's night club in conjunction with local media).

¹⁶⁵ *Tooley v. Canal Motors, Inc.*, 296 So. 2d 453, 455 (La. Ct. App. 1974) (plaintiff's name and profession were used in a laudatory radio ad describing employees of defendant).

¹⁶⁶ *Staruski v. Continental Tel. Co.*, 581 A.2d 266, 267-68 (Vt. 1990) (plaintiff's picture was used in newspaper ads together with a false testimonial).

¹⁶⁷ RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (1977).

have been liable for appropriating a plaintiff's identity by selling or publishing nude photographs,¹⁶⁸ selling copies of a well-known wartime photograph of a kissing sailor,¹⁶⁹ using the photograph of a well-known model on a poster,¹⁷⁰ publishing a nude drawing of a famous fighter to attract attention to defendant's magazine,¹⁷¹ republishing the picture of a band member with records and videos sold to the public,¹⁷² simulating the stage performance of a famous singer or group,¹⁷³ and using plaintiff's name and likeness in a television show.¹⁷⁴

3. Noncommercial Purposes

Protection has also been extended to noncommercial appropriations under common law, "even though the benefit sought to be obtained is not a pecuniary one."¹⁷⁵ Accordingly, a cause of action has been provided against a defendant who uses a plaintiff's name in a letter to a contractor,¹⁷⁶ forges the name on a federal tax return,¹⁷⁷ represents that she is plaintiff's spouse,¹⁷⁸ uses the name without consent in the denomination of a political party,¹⁷⁹ files litigation in the name,¹⁸⁰ enters the name in a presidential primary,¹⁸¹ or uses the name as the father of an illegitimate child.¹⁸² Where a state, however, has only a statutory action (for example, the New York statute is limited to appropriations for advertising or

¹⁶⁸ *Hudson v. Montcalm Publishing Corp.*, 379 S.E.2d 572, 576-77 (Ga. Ct. App. 1989) (sale by an ex-husband of a nude photograph of plaintiff); *Myers v. United States Camera Publishing Corp.*, 167 N.Y.S.2d 771, 772-73 (N.Y. App. Div. 1957).

¹⁶⁹ *Mendonsa v. Time, Inc.*, 678 F. Supp. 967, 972 (D.R.I. 1988).

¹⁷⁰ *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004 (N.Y. App. Div. 1981); *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 88-89 (2d Cir. 1989) (question of fact existed as to whether large, fold-out pictures of wrestlers constituted a use for purposes of trade). In such a close case the decision whether the poster is published primarily for its public interest or whether the public interest is incidental to the commercial purpose requires close analysis of the factors therein—the nature of its relationship to customary magazine content, the facility with which it can be removed, whether it is suitable for use separately when detached, and the manner in which defendant markets the photo and magazine. *Id.* at 89.

¹⁷¹ *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 725-28 (S.D.N.Y. 1978).

¹⁷² *Ippolito v. Lennon*, 542 N.Y.S.2d 3, 6 (N.Y. App. Div. 1989).

¹⁷³ *Presley*, 513 F. Supp. at 1339 (defendant also used Elvis's likeness on the cover or label of records, on pendants, and in promotions of his "Big El" show); *Apple Corps., Ltd. v. Leber*, 227 U.S.P.Q. (BNA) 1015 (Cal. App. 1986) ("Beatlemania" show employing "sound-alikes" and "look-alikes").

¹⁷⁴ *Durgom v. Columbia Broadcasting Sys., Inc.*, 214 N.Y.S.2d 752 (N.Y. Sup. Ct. 1961).

¹⁷⁵ RESTATEMENT (SECOND) OF TORTS § 652C.

¹⁷⁶ *Slivinsky v. Watkins-Johnson Co.*, 270 Cal. Rptr. 585 (Cal. Ct. App. 1990).

¹⁷⁷ *Schlessman v. Schlessman*, 361 N.E.2d 1347, 1349 (Ohio Ct. App. 1975).

¹⁷⁸ *Burns v. Stevens*, 210 N.W. 482 (Mich. 1926).

¹⁷⁹ *Hinkle*, 229 P. at 319.

¹⁸⁰ *Steding v. Battistoni*, 208 A.2d 559, 561-62 (Conn. 1964).

¹⁸¹ *Battaglia v. Adams*, 164 So. 2d 195, 197-98 (Fla. 1964); *State ex rel. Burch v. Gray*, 125 So. 2d 876 (Fla. 1960).

¹⁸² *Vanderbilt v. Mitchell*, 67 A. 97, 99-102 (N.J. 1907).

purposes of trade),¹⁸³ such noncommercial uses have been held to be nonactionable. For example, a New York decision held that no cause of action existed for unauthorized use of plaintiff's name in the filing of litigation,¹⁸⁴ while acknowledging that a common law action would be permitted in most jurisdictions.¹⁸⁵

C. Damages

The case law would clearly treat Jordana's misappropriation action as having hybrid characteristics for damage purposes.¹⁸⁶ Although much of the case law, including many important early decisions, emphasized the "laceration to feelings"¹⁸⁷ aspect, modern law has tended to focus more often on the publicity, particularly when celebrities like Jordana are involved. The modern cases, however, have also generally rejected any attempt to create an iron-clad dichotomy between the two. Thus, damages for both aspects have regularly been awarded or authorized in the same action.¹⁸⁸ In some states, however, statutory minimum damages have been established to protect an individual whose name and likeness has an inconsequential market.¹⁸⁹

Jordana may also collect for any special damages, such as lost earnings, suffered as a result of the misappropriation of her name, likeness, or identity.¹⁹⁰ As one leading case has stated: "The unauthorized use disrupts the individual's effort to control his public image, and may substantially alter that image. The individual may be precluded from future promotions in that as well as other

¹⁸³ See *infra* note 248.

¹⁸⁴ *Griffin v. Harris, Beach, Wilcox, Rubin & Levey*, 481 N.Y.S.2d 963, 966-67 (N.Y. Sup. Ct. 1984).

¹⁸⁵ See *id.* Common law appropriation and false light actions would be generally available elsewhere. See also R.I. GEN. LAWS § 9-1-28.1(a)(2) (1993), which has been interpreted as applying to non-commercial appropriations. See *Mendonso*, 678 F. Supp. at 973.

¹⁸⁶ See *supra* note 4.

¹⁸⁷ *Grant*, 367 F. Supp. at 881.

¹⁸⁸ *Staruski*, 581 A.2d at 269-71.

¹⁸⁹ See, e.g., N.Y. CIV. RIGHTS LAW §§ 50, 51:

§ 50 Right of privacy

A person, firm or corporation that uses for advertising purposes, or for the purpose of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person . . . is guilty of a misdemeanor.

§ 51 Action for injunction and for damages

Any person whose name, portrait, or picture is used within this state for advertising purposes or for the purpose of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use . . .

¹⁹⁰ *Clark*, 530 F. Supp. at 983-84 (substantial compensation for mental anguish).

fields."¹⁹¹ In addition, Jordana may recover the advertising value of the use of the material in the manner and for the time used¹⁹² "commensurate with her role in and importance to the common enterprise."¹⁹³ This may include a "recognized first time value"¹⁹⁴ for an endorsement of a prominent person who had not previously been associated with a commercial use of her/his identity.

Punitive damages are also available under the general rule "to deter acts deemed socially unacceptable and . . . to discourage the perpetuation of objectionable corporate policies."¹⁹⁵ Generally, some form of common-law malice¹⁹⁶ is required and mere intentional appropriation¹⁹⁷ or statutory violation may not be sufficient to justify exemplary damages. Thus, punitive damages are unavailable where a defendant acts in good faith but is mistaken as to consent¹⁹⁸ or is merely negligent.¹⁹⁹ New York, however, does permit exemplary damages for "mere knowing"²⁰⁰ uses of name, portrait, or picture and does not require any form of common law malice.²⁰¹ Of course, assessment of punitive damages normally includes consideration of defendant's financial position.²⁰²

D. Recent Decisions

It is helpful to consider some recent decisions which describe the current status of the right of publicity. In *McFarland v.*

¹⁹¹ *Id.*

¹⁹² *Midler*, 849 F.2d at 463 (the value of an imitative use of a well-known singer's voice is what the market would have paid to get her to sing the commercial).

¹⁹³ *Canessa*, 235 A.2d at 75 (plaintiff consented to use of picture in real estate journal but not for use in advertisement).

¹⁹⁴ *Grant*, 367 F. Supp. at 881 (common law publicity right is analogous to commercial entity's right to profit from goodwill it has built up in its name).

¹⁹⁵ See *supra* note 190.

¹⁹⁶ *Staruski*, 581 A.2d at 272-73 (refusal to take plaintiff's legal rights seriously constituted "a reckless or wanton disregard" of her rights).

¹⁹⁷ *Genesis Publications, Inc. v. Goss*, 437 So. 2d 169, 170 (Fla. Dist. Ct. App. 1983), *review denied*, 449 So. 2d 264 (Fla. 1984) (misappropriation must rise to level revealing malice, moral turpitude, wantonness "conceived in the spirit of mischief or criminal indifference to civil obligations").

¹⁹⁸ *Emanuel v. Free Lance Photographer Guild, Inc.*, 219 N.Y.S.2d 626 (N.Y. App. Term. 1960) (facts tended to show a lack of malice and should not avert an award of punitive damages).

¹⁹⁹ *Cabanis v. Hipsley*, 151 S.E.2d 496, 509 (Ga. Ct. App. 1966) (unauthorized reproduction and sale of plaintiff's picture for the financial gain of defendant is an actionable tort independent of elements of injury to person).

²⁰⁰ *Welch v. Mr. Christmas, Inc.*, 440 N.E.2d 1317, 1319 (N.Y. 1982) (knowledge may be found where plaintiff notifies defendant of non-authorization, defendant receives no response from its source after inquiry as to consent, and defendant continues to use the photograph).

²⁰¹ The *Welch* court noted that "[t]he imputation of knowledge, and its concomitant responsibility, cannot be avoided by the simple expedient of closing one's eyes, covering one's ears, and holding one's breath." *Id.* at 1321.

²⁰² *Staruski*, 581 A.2d at 273 (adopting § 909 of the RESTATEMENT (SECOND) OF TORTS).

Miller,²⁰³ the Third Circuit held that a famous individual's name, likeness, and endorsement carry value and an unauthorized use harms the person both by diluting the value of the name and depriving that individual of compensation.²⁰⁴ Regarding the right of publicity, the court explained that

[a]t its heart, the value of the right of publicity is associational: People link the person with the items the person endorses and, if that person is famous, that link has value. Celebrities' names and likenesses are things of value. Defendant has made them so, for it has taken them for its own commercial benefit.²⁰⁵

Thus,

the right to publicity protects the value a performer's identity has because that identity has become entwined in the public mind with the name of the person it identifies. It is this value that Miller sought to use without authority or right. McFarland, not Miller, crafted the irrepressible persona of "Our Gang"'s Spanky. Spanky's image is not Miller's to exploit or convey.²⁰⁶

In *Jim Henson Productions v. John T. Brady & Associates*,²⁰⁷ the U.S. District Court for the Southern District of New York held that

a right of publicity action is designed for individuals who have placed themselves in the public eye. It secures for them the exclusive right to exploit the commercial value that attaches to their identities by virtue of their celebrity. The right to publicity protects that value as property, and its infringement is a commercial, rather than a personal tort. Damages stem not from embarrassment but from the unauthorized use of the plaintiff's property.²⁰⁸

In *Cardtoons v. Major League Baseball Players Ass'n*,²⁰⁹ a district court

²⁰³ 14 F.3d 912 (3d Cir. 1994) (movie actor brought action for damages against restaurant which had name identical to movie character played by actor).

²⁰⁴ *Id.* The district court held that an actor who portrays a character in such a manner that the character becomes inextricably intertwined with the individual, to such an extent that the individual comes to utilize the character's name as his own, has no proprietary interest in the exploitation of the name or image.

²⁰⁵ *Id.* at 919 (quoting *Canessa*, 235 A.2d at 76). "In taking McFarland's name, Miller unfairly sought to capitalize on its value. The very act of taking it for that purpose demonstrates that the name itself has worth." *Id.* at 922.

²⁰⁶ *Id.* According to the court, the value of that right is what the market would pay to receive such an endorsement.

²⁰⁷ 867 F. Supp. 175 (S.D.N.Y. 1994) (holder of "Muppet" mark brought action against corporation that used two of holder's puppet characters in advertising campaign).

²⁰⁸ *Id.* at 188.

²⁰⁹ 838 F. Supp. 1501 (N.D. Okla. 1993) (parody trading cards of active major league baseball players infringed right of publicity under Oklahoma law given unincorporated association that served as exclusive collective bargaining agent for all major league baseball players). See Joseph Mauro, *Impact of 'Cardtoons' on Intellectual Property Law*, N.Y.L.J., Feb. 10,

explained that

[w]hile courts have not uniformly applied the tort, most agree concerning the right's general purposes. First, the right to publicity recognizes the economic value of an individual's identity. Second, the publicity right is an incentive for creativity, encouraging the production of entertaining and intellectual works. Finally, the right prevents unjust enrichment of those who usurp the identity of another.²¹⁰

Based on these recent views toward the right of publicity, there is a strong foundation for acknowledging the likelihood of a celebrity like Jordana having multiple right of publicity claims, of which a noncelebrity spouse, like Douglas, deserves an equitable share.

III. ARGUMENT FOR TREATMENT OF RIGHT OF PUBLICITY AS MARITAL PROPERTY

There is no exact definition as to what constitutes marital property for purposes of equitable distribution. While courts generally evaluate each asset's characteristics independently, there are two main considerations: the asset must be distinct and separate, and capable of valuation.²¹¹ A distinct and separate asset must have its own value and existence apart from its holder, be capable of sale, and be susceptible to ownership.²¹² For valuation, an asset must have either an objective transferable value on an open market or an exchangeable value.²¹³

Although a proprietary interest must be established to maintain a right of publicity claim,²¹⁴ it is unnecessary in some jurisdic-

1995, at 5 ("when the cards begin to actually 'say' something about the person depicted, they become a publication, and the image presented becomes supplement to the editorial content").

²¹⁰ *Id.* at 1511. The court goes on to refer to the "right of publicity" as codified by the Oklahoma legislature in OKLA. STAT. tit. 12, § 1449(A).

²¹¹ See *In re Copeland*, 151 B.R. 907 (Bankr. W.D. Ark. 1993); *Viles v. Viles*, 610 A.2d 988 (Pa. Super. Ct. 1992); *Buckl v. Buckl*, 542 A.2d 65 (Pa. Super. Ct. 1988); *Reiss v. Reiss*, 500 A.2d 24 (N.J. Super. Ct. App. Div. 1985). For cases dealing with the "distinct and separate" requirement, see *Mums v. Mums*, 790 P.2d 116 (Utah 1990); *Dunn*, 802 P.2d at 1314. For cases dealing with the "valuation" requirement, see *Prahinski v. Prahinski*, 582 A.2d 784 (Md. 1990); *Vertrees v. Vertrees*, 508 N.E.2d 868 (Mass. App. Ct. 1987).

²¹² *Mums*, 790 P.2d 116.

²¹³ *Archer v. Archer*, 493 A.2d 1074 (Md. 1985) (explaining that mere expectancy of future enhanced income does not qualify as a present property interest).

²¹⁴ Constitutional protection is not limited to factual works but is extended to all expressive works, whether factual or fictional. Therefore, "an action for infringement of the right of publicity can be maintained only if the proprietary interests at issue clearly outweigh the value of free expression in this context." *California Trial Court Strikes Elizabeth Taylor's Request for Injunction Barring Broadcast of Unauthorized TV Biography*, 16 ENT. L. REP., Nov. 1994, at 6 (quoting *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454 (Cal. 1979) (Bird, C.J., concurring)).

tions to show the "proprietary interest" of Jordana's right of publicity to subject it to equitable distribution as marital property. According to one equitable distribution jurisdiction:

When . . . we designate property as marital or nonmarital, we are using words which have no relationship to traditional concepts of property. Whether property is marital or nonmarital has nothing whatsoever to do with who owns it, possesses it, or uses it. The very concepts of marital and nonmarital property arise only in the context of a marriage, and they have significance only in the event of and at the time of a judicial dissolution of the marriage relationship. The sole purpose of determining whether property is marital or nonmarital is to enable a divorce court to adjust equities arising out of the marriage relationship by awarding one party or the other a sum of money if a division of property according to ownership would be inequitable. "Marital" and "nonmarital" are adjectives descriptive not of ownership or other rights in property but merely of the time or manner of acquisition by either or both spouses.²¹⁵

Specifically regarding intellectual property like Jordana's right of publicity, another equitable distribution jurisdiction has concluded that "[a]s distinguished from tangible assets, intangibles have no intrinsic value, but do have a value related to the ownership and possession of tangible assets. Some intangibles, such as a trademark, trade name or patent, are related to an identifiable tangible asset."²¹⁶ Similarly, Jordana's right of publicity is related to identifiable, tangible assets: Jordana's name, voice, picture, and image.²¹⁷

Even if an equitable distribution jurisdiction required that Jordana's right of publicity be a proprietary interest, the general view has been to treat the tort as proprietary in nature.²¹⁸ Early

²¹⁵ *Kline v. Kline*, 581 A.2d 1300, 1306 (Md. Ct. Spec. App. 1990) (equitable distribution of jointly-owned properties, including house and video business). For further explanation, the *Kline* court added that:

If instead of "marital" and "nonmarital" we could substitute other adjectives, such as "red" and "green," the concept would be easier to grasp: a gift by one spouse to the other of a green chattel will effect a change of ownership, not of color; the chattel would still be green, unless the parties, by agreement, changed the color or at least agreed that as between themselves they would deem the chattel to be red. But just as a change of ownership has no effect on the color, a change of color would have no effect on the ownership.

Id.

²¹⁶ *Dugan v. Dugan*, 457 A.2d 1, 3 (N.J. 1983) (equitable distribution of attorney's goodwill in his exclusively owned professional corporation).

²¹⁷ See *supra* note 1.

²¹⁸ RESTATEMENT (SECOND) OF TORTS § 652C cmt. a. Several cases have analogized the tort to one for theft of personality. See *Grant*, 367 F. Supp. at 883; *McQueen v. Wilson*, 161 S.E.2d 63, 66 (Ga. Ct. App. 1968), *rev'd on other grounds*, 162 S.E.2d 313; *Rosenberg v. Lee's Carpet & Furniture Warehouse Outlet, Inc.*, 363 N.Y.S.2d 231, 233 (N.Y. Sup. Ct. 1974); *Midler*, 849 F.2d at 462-63 (trial court characterized defendant as an "average thief" and

support for the property proposition of the right of publicity came in *Edison v. Edison Polyform Mfg. Co.*,²¹⁹ and a few other lower state court decisions.²²⁰ Consequently, within various jurisdictions, the right of publicity may be assigned in gross,²²¹ is enforceable despite the public character of the plaintiff²²² or the public nature of the information publicized,²²³ and survives the death of the claimant.²²⁴

the appellant court concluded defendant's imitative use of plaintiff's voice was "to pirate her identity").

Some decisions have constructed a dichotomy between the privacy and proprietary aspects of the tort. Under this dichotomy, if the interest is deemed a personal aspect of privacy, the right is not transferable, may be waived by public actions, and does not survive. See *Bi-Rite Enters. Inc. v. Button Master*, 555 F. Supp. 1188, 1198-99 (S.D.N.Y. 1983) (assignees cannot enforce the claim); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 396 N.Y.S.2d 661, 664 (N.Y. App. Div. 1977) (an estate could not revive cause of action where decedent-plaintiff had died).

²¹⁹ 67 A. 392, 394 (N.J. Ch. 1907).

²²⁰ See, e.g., *Munden*, 134 S.W. at 1078 ("If there is value in [a person's appearance], sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?"); *Roberson*, 64 N.E. 442.

Note that the appropriation-publicity tort may overlap with other bases of liability. See *McCARTHY*, *supra* note 104. And note that some limited aspects of the tort of misappropriation may be preempted by federal copyright law. See *CEO Marketing Promotions Co. v. Heartland Promotions, Inc.*, 739 F. Supp. 1150, 1152 (N.D. Ill. 1990) (no action for appropriation-publicity could be brought for misuse of copyrighted advertisement materials); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 674-76 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987) (rights in players' game performances were preempted by copyright law).

²²¹ *Haelan Laboratories*, 202 F.2d at 866. The cases have generally involved celebrities or public personages. *Id.*; *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975); *Bi-Rite Enters.*, 555 F. Supp. at 1199-1200 (assignees may enforce the right); *Winterland Concessions Co. v. Sileo*, 528 F. Supp. 1201, 1213-14 (N.D. Ill.), *aff'd in part and rev'd in part on other grounds*, 735 F.2d 257 (7th Cir. 1981); *Martin Luther King, Jr., Center for Social Change*, 296 S.E.2d at 704 (without assignability exploitation would be practically impossible); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1281 (D. Minn. 1970); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 220-21 (2d Cir. 1978), *cert. denied*, 440 U.S. 908; *Bi-Rite Enters., Inc. v. Bruce Miner Co.*, 757 F.2d 440, 442 (1st Cir. 1985); RESTATEMENT (SECOND) OF TORTS § 652C cmt. a.

²²² *Hauth*, 704 S.W.2d at 688 (amount of damages, including nominal damages, is for trier of fact to determine); *Palmer*, 232 A.2d at 458.

²²³ *Uhlaender*, 316 F. Supp. at 1279-83 (names and accomplishments of major league baseball players used by defendant on table games); *Palmer*, 232 A.2d at 460; *Tellado*, 643 F. Supp. at 911-14.

²²⁴ *National Bank of Commerce v. Shaklee Corp.*, 503 F. Supp 533, 538-39 (W.D. Tex. 1980) (author of book had equitable ownership of copyright because she retained right to royalties, right to preclude various uses of her material, and right to reclaim the copyright at expiration of agreement). The majority and modern rule makes the interest descendible and enforceable post-mortem by assignees. *Factors II*, 652 F.2d at 287 (Mansfield, J., dissenting). See also *State ex rel. Elvis Presley Int'l Memorial Found. v. Crowell*, 733 S.W.2d 89, 97-99 (Tenn. Ct. App. 1987); *Gracey v. Maddin*, 769 S.W.2d 497, 500-01 (Tenn Ct. App. 1989); *Presley*, 513 F. Supp. at 1354-55; *Hicks v. Casablanca Records*, 464 F. Supp. 426, 430 (S.D.N.Y. 1978); *Price*, 400 F. Supp. at 843-46; *Price v. Worldvision Enters., Inc.*, 455 F. Supp. 252 (S.D.N.Y. 1978), *aff'd without opinion*, 603 F.2d 214 (2d Cir. 1979); *Nature's Way Prods.*, 736 F. Supp. at 255 (survivability is the "majority and modern rule").

1. *Hanna Manufacturing Co.*

The idea of the right of publicity as a proprietary interest, however, failed in its first attempt at the federal level in 1935.²²⁵ In *Hanna Manufacturing*, plaintiffs contracted with certain famous baseball players for the "exclusive right" to use their names, autographs, and photographs in connection with the sale and advertising of baseball bats. Plaintiffs then sued to enjoin a competing manufacturer from using the marks, based on property rights in the marks. Reversing the district court's decision,²²⁶ the court of appeals declared that "[f]ame is not merchandise. It would help neither sportsmanship nor business to uphold the sale of a famous name to the highest bidder as property."²²⁷ Consequently, the Fifth Circuit held that plaintiff's contracts with the players operated only to prevent the players from objecting to its own use of their names.²²⁸

Gradually, *Hanna Manufacturing* received harsh criticism from commentators.²²⁹ With the formation of an active, growing market in celebrity names and faces, *Hanna Manufacturing's* concept of the "market-inalienability"²³⁰ of fame was widely rejected.²³¹

2. *Haelan Laboratories Inc.*

Haelan Laboratories Inc. v. Topps Chewing Gum, Inc.,²³² marks the

²²⁵ *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*, 78 F.2d 763 (5th Cir. 1935).
²²⁶ The federal district court held for plaintiffs on grounds of unfair competition and violation of right of publicity, and enjoined defendants from using on its bats the name of any player under contract with plaintiff.
²²⁷ See *Hanna Mfg.*, 78 F.2d at 768.
²²⁸ *Id.*
²²⁹ See, e.g., *Trade-Marks and Trade Names—Rights of Privacy—Action by Assignee of Baseball Player's Name Against Use by Competing Bat Manufacturer*, 36 COLUM. L. REV. 502 (1936); *Assignability of Rights in a Person's Name as Property*, 45 YALE L.J. 520, 523 (1936).
²³⁰ See Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1852-55 (1987) (discussing paid surrogacy arrangements and commodification of children).
²³¹ Twenty years after *Hanna Mfg.*, for example, the author of an entertainment law treatise expressed sharp dissatisfaction with "the strange reluctance of modern courts to recognize publicity as property":

Why shouldn't publicity created by mental labor be viewed as property? Today favorable created publicity may have great and definite financial value. The publicity value of "puffing" of a ware by a successful stage or screen actor, by a singer, ball player, pugilist, or other performer enjoying the public's favor, is tremendous Such publicity is not accidental. It is created by skill and labor. . . .

[T]hough a human being is not property and can not be bought and sold, the personality of living persons is bought and sold in the market place. The pictured face or figure of a pin-up, a living beautiful girl, is dealt in as property. The public interest is not contravened thereby.

SAMUEL SPRING, RISKS AND RIGHTS IN PUBLISHING, TELEVISION, RADIO, MOTION PICTURES, ADVERTISING AND THE THEATER 244-45 (2d rev. ed. 1956).

²³² 202 F.2d at 866.

decisive legal acceptance of the right of publicity as a "property right," by holding that people, especially celebrities, "in addition to and independent of" their right of privacy, have "a right in the publicity value of [their] photograph[s]."²³³ This right could be licensed or assigned and the licensee or assignee could enforce it against third parties.²³⁴ *Haelan Laboratories*, however, did not go so far as to explicitly label the right of publicity as a "property right" for fear of the effect on unsettled issues regarding inheritance, tax, and divorce.²³⁵ Arguably, with *Haelan Laboratories*, the court was simply giving legal protection to a preexisting legal practice.²³⁶ Nonetheless, the court observed "that many prominent persons . . . far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways."²³⁷

Although *Haelan Laboratories* gained favorable early notices in the law reviews,²³⁸ the courts were initially reluctant to embrace the new right.²³⁹ For instance, in *Namath v. Sports Illustrated*,²⁴⁰ former

²³³ *Id.* at 867.

²³⁴ The court explained that:
 This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.

Haelan Lab., 202 F.2d at 868.

²³⁵ Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 173 n.229 (1993) ("[T]he court may have been concerned that a 'property' label would appear to predetermine the resolution of such issues as whether the right of publicity is inheritable, whether it is to be taken into account in a divorce settlement, how its sale should be treated for tax purposes . . .").

²³⁶ See, e.g., George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443 (1991) (in *Haelan Laboratories*, Judge Frank recognized a property right in publicity because these values were already being exchanged in the market; the legal form followed the commodity form and not the other way around).

²³⁷ *Haelan Lab.*, 202 F.2d at 868. Many courts have recognized a similar right of exploitation:

Perhaps the basic and underlying theory is that a person has the right to enjoy the fruits of his own industry free from unjustified interference. It is unfair that one should be permitted to commercialize or exploit or capitalize upon another's name, reputation or accomplishments merely because the owner's accomplishments have been highly publicized.

Palmer, 232 A.2d at 462.

²³⁸ See, e.g., Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553 (1960) (praising the growing judicial recognition of distinct commercial or proprietary interest in personality); Nimmer, *supra* note 1; Note, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123 (1953) (approving *Haelan Laboratories'* recognition of a right of publicity because the right of privacy gives inadequate protection to commercial interest).

²³⁹ See, e.g., *Strickler v. NBC*, 167 F. Supp. 68, 70 (S.D. Cal. 1958). Others, while expres-

New York Jets quarterback Joe Namath objected to a "blow-in" subscription flyer used by Sports Illustrated. It showed a copy of the magazine that happened to include a cover photo of Namath playing in a football game.²⁴¹ The court said that the photograph was "merely incidental" to the advertisement and dismissed the suit.²⁴² Judicial acceptance of the right of publicity as a property right, however, has gradually increased²⁴³ as the "celebrity industry"²⁴⁴ has grown in power, organization, and sophistication.

3. *Zacchini*

The Supreme Court decision of *Zacchini v. Scripps-Howard Broadcasting Co.*²⁴⁵ expressly approved of the right of publicity, asserting that damages may be recovered by a party denied compensation for the performance of her/his activity, even if the press is the appropriating party.²⁴⁶ According to the Supreme Court, "the

sing general approval of the right and its rationale, chose to base their decision on some more familiar ground. See, e.g., *Palmer*, 232 A.2d at 458 (granting relief on privacy, though noting that "[i]t is unfair that one should be permitted to commercialize or exploit or capitalize upon another's name, reputation or accomplishment merely because the owner's accomplishments have been highly publicized"); *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. (BNA) 314, 320 (C.P. Pa. 1957) (right of publicity only "another way of applying the doctrine of unfair competition").

²⁴⁰ *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10 (N.Y. App. Div. 1975) (advertising to promote a news medium is not actionable under an appropriation of publicity theory so long as advertising does not falsely claim that the public figure endorses that news medium).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ See, e.g., *Zacchini*, 433 U.S. at 576 (identifying its rationale as the creation of an "economic incentive" to investment in cultural endeavors); *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969); *O'Brien*, 124 F.2d at 167; *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401 (E.D. Pa. 1963); *Canessa*, 235 A.2d at 62; *McQueen*, 161 S.E.2d at 63; *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 487-92 (3d Cir.), cert. denied, 351 U.S. 926 (1956); *Lavery v. Automation Management Consultants, Inc.*, 360 S.E.2d 336, 339-42 (Va. 1987); *Candebat*, 487 So. 2d at 210-11; *Fergerstrom*, 441 P.2d at 144; *Midler*, 849 F.2d at 463. But see one older case to the contrary, *Hanna Mfg. Co.*, 78 F.2d at 766, which has been "generally ignored." *Uhlaender*, 316 F. Supp. at 1277.

²⁴⁴ "[T]he celebrity industry consists of specialists who take unknown and well-known people, design, and manufacture their images, supervise their distribution, and manage their rise to high visibility." IRVING J. REIN ET AL., *HIGH VISIBILITY* 33 (1987). Many of the cases refer to the right as the right of publicity when it involves a celebrity. *Crowell*, 733 S.W.2d at 93-95; *Presley*, 513 F. Supp. at 1353 (the right of publicity is the "right of an individual, especially a public figure or celebrity, to control the common value and exploitation of his name and picture or likeness"); *Ali*, 447 F. Supp. at 728 (the publicity right is usually asserted only by persons with "some degree of a celebrated status"); *Brinkley*, 438 N.Y.S.2d at 1010; *Grant*, 367 F. Supp. at 879-83.

²⁴⁵ *Zacchini*, 433 U.S. at 562.

²⁴⁶ *Id.* at 562. The Supreme Court recognized the "right of publicity" action not against a manufacturer or an advertiser, but a local television news program. The television station had broadcast the entire two-minute act of a carnival "human cannonball" and thereby diluted the act's commercial value. In entertaining the cannonball's lawsuit, a court did not violate the TV news program's First Amendment rights, said the Supreme Court. See Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right*

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,"²⁴⁷ thus "the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public."²⁴⁸ The result of *Zacchini* has been the steady stream of judicial decisions and statutes recognizing a property-like right of publicity.²⁴⁹

4. New York

Under New York law, there is no independent common-law right of publicity. "[T]he 'Right of Publicity' is encompassed under the Civil Rights Law as an aspect of the right of privacy, which . . . is exclusively statutory."²⁵⁰ Section 51 of the New York Civil Rights Law provides a cause of action for any person whose "name, portrait, or picture" is used within New York for advertising or trade purposes without their consent. The statute not only encompasses a right to privacy which minimizes the intrusion or publication of damaging material to a person by use of their name or picture, but also encompasses a right to publicity, which protects the proprietary nature of the person's public personality.²⁵¹

The nature of an action under the statute for a right of publicity has been articulately explained in *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*²⁵²

The instant action is quite clearly premised upon an appropriation for commercial exploitation of plaintiff's property rights in his name and career rather than upon an injury to feelings.

of Publicity and Copyright Cases, 57 TUL. L. REV. 836 (1983) (proposing two-part analysis of First Amendment claims in publicity cases).

²⁴⁷ *Zacchini*, 433 U.S. at 573.

²⁴⁸ *Id.* at 576.

²⁴⁹ *Cepeda*, 415 F.2d at 1206; *Presley*, 513 F. Supp. at 1355; *Uhlaender*, 316 F. Supp. at 1282. See *Armstrong*, *supra* note 236, at 443. But see Timothy P. Terrel & Jane S. Smith, *Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue*, 34 EMORY L.J. 1 (1985) (arguing that the right of publicity is a liberty interest and should not be inheritable). The *Haelan Laboratories* case established that publicity rights are transferable by license and assignment. *Haelan Lab.*, 202 F.2d at 866. Other courts have concluded that the value of the right of publicity lies in the association between celebrity and product so that the right of publicity is worthless without identification. See, e.g., *White*, 971 F.2d at 1395; *Carson*, 698 F.2d at 831. Most recent statutes have held that the right is descendible as well with twelve states recognizing a postmortem right of publicity.

²⁵⁰ *Stephano*, 474 N.E.2d at 580.

²⁵¹ See *Brinkley*, 438 N.Y.S.2d at 1009-10. "[W]e believe that the so-called right of publicity is subsumed in sections 50 and 51 of the Civil Rights Law to the extent that even a public figure has a privacy interest which finds recognition in the statute and for violation of which a remedy of monetary redress is provided." *Id.* at 1012.

²⁵² 340 N.Y.S.2d 144 (N.Y. Sup. Ct.), modified on other grounds, 345 N.Y.S.2d 17 (N.Y. App. Div. 1973) (use of plaintiff's name and biographical data in selling adult educational career game was an act of appropriation of property rights belonging to plaintiff).

There is no question . . . that a celebrity has . . . [a] legitimate proprietary interest in his public personality. He must be considered as having invested years of practice and competition in a public personality which eventually may reach marketable status. That identity is the fruits of his labor and a type of property.²⁵³

IV. PROPOSAL FOR TREATMENT OF RIGHT OF PUBLICITY AS MARITAL PROPERTY SEPARATE FROM CELEBRITY GOODWILL

A. *Celebrity Goodwill*

The idea of celebrity goodwill acquired during marriage as marital property that can be separately valued and equitably distributed has been recognized in New York and New Jersey, but not in California, even though many states, including California, have used the goodwill concept for other professions.²⁵⁴ Support for the separate consideration of the right of publicity as marital property, distinct from celebrity goodwill and reputation, can be found in the recent movement in New York and New Jersey toward recognition of celebrity goodwill as marital property.

1. *Piscopo v. Piscopo*

In *Piscopo v. Piscopo*,²⁵⁵ a New Jersey court held that a celebrity plaintiff had a reliable future income²⁵⁶ and that a celebrity career is valuable;²⁵⁷ therefore, the goodwill associated with celebrity status is property.²⁵⁸ By adopting this approach, valuable careers that develop during a marriage are now considered marital property.²⁵⁹ In *Piscopo*, the appellate court was not persuaded by the distinction between celebrity goodwill and the right of publicity.²⁶⁰ It held that the two assets were essentially the same.²⁶¹

²⁵³ *Id.* at 146-47.

²⁵⁴ There are three steps involved in determining celebrity goodwill: (1) is there any goodwill at all; (2) how do you value the goodwill; and (3) how can the goodwill be eroded or diminished? Stan Soocher, *How to Calculate Celebrity Goodwill in Divorce Cases*, N.Y.L.J., Mar. 9, 1990, at 5.

²⁵⁵ 555 A.2d at 1190.

²⁵⁶ *Piscopo*, 557 A.2d at 1042 (appellate court decision). *Piscopo* had established a corporation, *Piscopo Productions, Inc.*, and most of his income flowed from the corporation. Valuation was therefore similar to valuation of any other corporation. *Id.* at 1040.

²⁵⁷ *Id.* at 1041.

²⁵⁸ *Id.* at 1042-43.

²⁵⁹ See *id.* at 1043; *Golub*, 527 N.Y.S.2d at 950.

²⁶⁰ *Piscopo*, 557 A.2d at 1042-43.

²⁶¹ *Id.* In rejecting Mr. *Piscopo's* argument that celebrity goodwill is distinguishable from professional goodwill since professional goodwill has educational and regulatory requirements while celebrity goodwill requires ineffable talent, the trial court held that "it is the person with particular and uncommon aptitude for some specialized discipline

Because the court never squarely addressed this question, it is uncertain whether *Piscopo* is precedent for the proposition that a celebrity's right of publicity, if acquired during marriage, is marital property upon divorce. A possible distinction, however, may be that celebrity goodwill is the expectation of future patronage or future employment,²⁶² whereas a right of publicity is a right to capitalize on the celebrity's name and likeness.²⁶³ Thus, compensation based on Jordana's goodwill and status does not necessarily include damage awards given to Jordana for misappropriation. If it does not, a noncelebrity spouse like Douglas will be left undercompensated.

2. *Golub v. Golub*

In a radical expansion of *O'Brien*,²⁶⁴ the New York Supreme Court, in *Golub v. Golub*,²⁶⁵ held that actress Marisa Berenson's celebrity status was marital property,²⁶⁶ meaning that the increased earning potential arising from Berenson's status as a film star and model was marital property subject to equitable distribution.²⁶⁷ In holding "fame" to be marital property, the court even noted that "the right to exploit a celebrity's fame has been held to descend to his heirs."²⁶⁸

At trial, the court found that Ms. Berenson's husband, "by dint

whether law, medicine or entertainment that transforms the average professional or entertainer into one with measurable goodwill." *Piscopo*, 555 A.2d at 1192.

²⁶² See Stuart B. Walzer & Jan C. Gabrielson, *Celebrity Goodwill*, 2 J. AM. ACAD. MATRIMONIAL L. 35, 38 (1989) (defining celebrity goodwill as the expectation of future public patronage by reason of being well-known to the public; or more specifically, a baseball player's ability to earn a higher salary as a baseball player).

²⁶³ See generally Rosen, *supra* note 2.

²⁶⁴ 489 N.E.2d at 712.

²⁶⁵ 527 N.Y.S.2d at 946. See generally Cynthia M. Germano, Note, "Do You Promise to Love, Honor and Equitably Divide Your Celebrity Status Upon Divorce?" A Look at the Development and Application of New York's Equitable Distribution Statute, 9 LOY. ENT. L.J. 153 (1989) (analyzing *Golub* and concluding that although there are problems involved in evaluating celebrity status, the approach is probably fair).

²⁶⁶ *Golub*, 527 N.Y.S.2d at 948.

²⁶⁷ *Id.* at 950.

²⁶⁸ *Id.* at 949 (citing *Price*, 400 F. Supp. at 836). In *Golub*, the New York court said:

There seems to be no rational basis upon which to distinguish between a degree, a license, or any other special skill that generates substantial income. In determining the value of marital property, all such income generating assets should be considered if they accumulated while the marriage endured. If one spouse has sacrificed and assisted the other in an effort to increase that other spouse's earning capacity, it should make no difference what shape or form that asset takes so long as it in fact results in an increase earning capacity. . . . The noncelebrity spouse should be entitled to a share of the celebrity spouse's fame, limited, of course, by the degree to which that fame is attributable to the noncelebrity spouse. The source of the fame must still be traced to the marital efforts.

Id. at 950.

of his legal skills and business acumen," helped her boost her modeling and acting career, and, as a consequence, her annual earnings.²⁶⁹ The court reasoned that there was "no rational basis upon which to distinguish between a degree, a license, or any other special skill that generates substantial income."²⁷⁰ Specifically, the court held that "the skills of an artisan, actor, professional athlete or any person whose expertise in his or her career has enabled him or her to become an exceptional wage earner should be valued as marital property subject to equitable distribution."²⁷¹

In order to justify such a radical extension of *O'Brien*, Judge Silberman observed that, in the cases that followed *O'Brien*, the thing of value was neither the license nor the degree, but rather the enhanced earning capacity each represented.²⁷² In *Golub*, the enhanced earning capacity was Marisa Berenson's "unique ability to commercially exploit . . . her fame."²⁷³ In effect, the *Golub* court went further than *O'Brien* dared. The court in *Golub* sought to "treat all matrimonial litigants equally" and thought it unfair to "prejudice or penalize a spouse who is married to a nonprofessional who may nevertheless become an exceptional wage earner."²⁷⁴ The *Golub* court recognized the injustice in restricting recovery only to cases where formal documentation exists.²⁷⁵

By expanding the reach of *O'Brien*, the court in *Golub* tried to get rid of any class-based impediments inadvertently created by *O'Brien*.²⁷⁶ The logic and reasoning delineated by the *Golub* court should be applied to Douglas's contributions to Jordana's right of publicity so that this form of human capital cultivated during marriage should also be recognized as marital property.

3. *Elkus v. Elkus*

O'Brien was expanded even further in *Elkus v. Elkus*,²⁷⁷ where

²⁶⁹ *Id.* at 948.

²⁷⁰ *Id.* at 950.

²⁷¹ *Id.* The court found the husband assisted the wife by "cleaning up" her personal finances and making efforts throughout the marriage to advance her career.

²⁷² *Id.* at 949.

²⁷³ *Id.* at 950.

²⁷⁴ *Id.* Note, however, that in *Golub* no distributive award was issued because neither the plaintiff nor the defendant introduced evidence of the value of plaintiff's enhanced earning capacity. *Id.*; see also Claudia Weinstein, *Decision Expands Equitable Distribution*, AM. LAW., Mar. 29, 1988, at 3.

²⁷⁵ *Golub*, 527 N.Y.S.2d at 950 (stating that "it was the privileges conferred by the license that was critical to the Court's decision [in *O'Brien*], not the piece of paper itself.").

²⁷⁶ *Id.*

²⁷⁷ 572 N.Y.S.2d at 901. When Frederica von Stade, an opera singer, was married in 1973, she performed minor roles at Metropolitan Opera, earning an annual income of approximately \$2,000. During the course of her seventeen-year marriage, she achieved international acclaim, and her income rose meteorically. In 1989, the year prior to her

the court held that "[t]hings of value acquired during marriage are marital property even though they may fall outside the scope of traditional property concepts,"²⁷⁸ and "[a]ny attempt to limit marital property to professions which are licensed would only serve to discriminate against the spouses of those in other areas of employment."²⁷⁹ The court relied heavily, as had the *O'Brien* court, on New York Domestic Relations Law section 236(B)(5)(d)(6),²⁸⁰ which provides, "in determining an equitable distribution of property the court shall consider any equitable claim to, interest in, or direct or indirect contribution made . . . to the career or the career potential of the other party."²⁸¹ Because von Stade's husband had contributed to her rise to stardom, the court held that he was entitled to a share of the "appreciation" of her career.²⁸² The court concluded that

[d]uring the course of the marriage, the defendant's active involvement in the plaintiff's career, in teaching, coaching, and critiquing her, as well as in caring for their children, clearly contributed to the increase in its value. Accordingly, to the extent the appreciation in the plaintiff's career was due to the defendant's efforts and contributions, this appreciation constitutes marital property. . . . [I]t is the nature and extent of the contribution by the spouse seeking equitable distribution, rather than the nature of the career . . . that should determine the status of the enterprise as marital property.²⁸³

The *Elkus* court clearly noted that "things of value acquired during marriage are marital property even though they may fall outside the scope of traditional property concepts."²⁸⁴

Subsequent cases have followed the *Elkus* decision regarding enhanced earning capacity involving property other than celebrity

divorce, she earned over \$600,000. Through much of the marriage, her husband functioned as her voice coach and teacher, travelled with her on tour, critiqued her rehearsals and performances, and photographed her for magazines and album covers. *Id.* at 901-02. The issue was whether the increased earning potential, occasioned by her celebrity status, was marital property. The wife argued that celebrity status is not marital property because (1) it is not licensed, (2) it is not "owned" in the sense that a business is owned, and (3) it is not protected by due process, as are traditional property rights. *Id.* at 902.

²⁷⁸ *Id.* at 902.

²⁷⁹ *Id.* at 903.

²⁸⁰ *Id.* at 904.

²⁸¹ See N.Y. DOM. REL. LAW § 236(B)(5)(d)(6).

²⁸² *Elkus*, 572 N.Y.S.2d at 904-05.

²⁸³ *Id.*

²⁸⁴ *Id.* at 902. An argument strongly relied upon by both *Elkus* and *Golub* is that treatment of only a license as property would be unfair to those who marry nonlicensed professionals (such as athletes) in contrast to those who marry lawyers and doctors. However, such an argument is premised on a dubious assumption that all marriage partners choose their mates based on the other's choice of career.

status.²⁸⁵ In *Allocco v. Allocco*,²⁸⁶ a wife was entitled to share equally in the value of enhanced earnings based upon her significant contributions to her husband's attainment of his college degrees and successful completion of his civil service examinations.²⁸⁷ As enunciated by the court, "[n]otwithstanding the fact that a particular marital asset may have enhanced a person's earning capacity, the other spouse must establish a contribution thereto in order to benefit from an equitable distribution of such asset."²⁸⁸ In addition, valuation

usually takes the form of expert testimony and involves a comparison between the projected income of a person . . . and the income which would have been received without such marital asset. The difference between these two amounts, should then be adjusted to reflect such factors as income taxes, inflation rate, real interest rate, capitalization rate, and discount for present value.²⁸⁹

4. *Mann v. Mann*

Most recently, in *Mann v. Mann*,²⁹⁰ the Supreme Court, New York County, held that a jazz musician's celebrity status, which declined during his nineteen-year marriage, was not subject to equitable distribution.²⁹¹ In deciding on the classification of Mann's

²⁸⁵ *Chew v. Chew*, 596 N.Y.S.2d 950 (N.Y. Sup. Ct. 1992) (equitable distribution of wife's enhanced earning capacity as a fashion industry executive); *Allocco v. Allocco*, 578 N.Y.S.2d 995 (N.Y. Sup. Ct. 1991) (enhanced earning capacity as a law enforcement officer).

²⁸⁶ 578 N.Y.S.2d at 995.

²⁸⁷ *Id.* at 995.

²⁸⁸ *Id.* at 998.

²⁸⁹ *Id.* at 1000.

²⁹⁰ N.Y.L.J., Jan. 10, 1995, at 26 (Sup. Ct. N.Y. County). Plaintiff Theresa Jan Mann, argued that Herbie Mann's celebrity goodwill was approximately \$96,500, based on a value of \$65,000 at the time of the divorce and \$27,000 for the present value of his career. Though there are several acceptable ways to calculate celebrity goodwill, Jan Mann used a formula offered by her CPA expert, which took into account Herbie Mann's concert income from 1987 through 1990. Per Justice Saxe's written opinion, plaintiff employed the going concern method to calculate twenty-five percent of Herbie Mann's gross revenues. He then capitalized excess income, using a factor of fifty percent over two years, adding back ten percent of Herbie Mann's declared travel, lodging, and entertainment expenses as personal. Justice Saxe accepted this, but refused to accept the argument that whatever goodwill Herbie Mann had prior to the marriage had dissolved and been replaced by goodwill generated during the marriage. *Id.*

²⁹¹ *Id.* Just prior to *Mann*, in *Martin v. Martin*, 614 N.Y.S.2d 775 (N.Y. App. Div. 1994), the Third Department held that a political career, in conjunction with a law licensee, is marital property subject to equitable distribution. According to *Martin*,

[A] review of the record supports Supreme Court's determination that defendant's former Congressional career constitutes "marital property" within the meaning of Domestic Relations Law § 236 (B) (1) (c) subject to equitable distribution. We further find that defendant's law license reemerged as a separate and valuable asset upon the termination of [defendant's] Congressional career

celebrity career as separate or marital property, the court concluded:

In a case where a performer's fame and career were well established prior to the marriage, all the established law indicates that the court determine not the value of the career as of the action, but the amount of increase in the value during the years of the marriage . . . [There] is no evidentiary basis upon which to conclude that . . . [defendant's] career goodwill increased during the marriage. Therefore, based upon the evidence offered at trial, this purported asset remains separate property, not subject to equitable distribution.²⁹²

Thus, although the court agreed with Mrs. Mann's calculation of Mr. Mann's celebrity goodwill based on his performing career during the years 1987 through 1990, Judge Saxe cited *Elkus* in concluding that failure to demonstrate an increase in celebrity status during the marriage precludes equitable distribution of the celebrity career as marital property.²⁹³

CONCLUSION

In concluding that the right of publicity is marital property subject to division, the overriding consideration in making property division should be emphasized: marriage is an economic partnership requiring that all assets acquired through the efforts of the

. . . with the valuation thereof enhanced by virtue of defendant's Congressional experience. Since a law degree is not a prerequisite to serving in Congress, we will not find, as urged by defendant, that defendant's law license merged into his Congressional career. Hence, it is the valuation of defendant's law degree, enhanced by his status as a former Representative, which is now subject to review.

Martin, 614 N.Y.S.2d at 777 (citations omitted).

²⁹² *Mann*, N.Y.L.J., Jan. 10, 1995, at 26. According to defendant Herbie Mann, the overwhelming majority of his work was written before his marriage in 1971. He had guarantees of \$150,000 to \$200,000 a year under his deal with Atlantic Records, which ran from 1959 to 1979, but he had no other deals since then. *Id.* at 27.

²⁹³ According to one report on valuation techniques:

Evaluating the extent of a celebrity's career can help expose weaknesses, such as, when a performer's fame is related to single project or character. It can also help to demonstrate strengths where a career has shown diversity and duration. The nature and trend of earnings represents the economic benefits earned as a consequence of skill and effort of the individual. It is the financial factor by which we can measure all the other factors. An analysis of the earnings can help evaluate the consistency of a career, whether it's on the rise or on the decline, identify the sources of revenue and thereby evaluate the extent of reliance on the fickle tastes of the public and determine the residual component of earnings, i.e., the amount of revenues related to past projects as opposed to current earning capacity.

Donald L. Gurse & Michael T. Miskei, *Valuation Techniques in Equitable Distribution, Celebrity Goodwill*, ALI-ABA Course of Study, Nov. 15, 1991, at 101.

partnership be divided.²⁹⁴ Equitable distribution, at least in theory, attempts to give both spouses an equitable share of the marital property to allow them to maintain the same standard of living to which they were accustomed during marriage.²⁹⁵ Of the thirty-eight jurisdictions that recognize a common law right of publicity²⁹⁶ and/or have a statute governing the right of publicity,²⁹⁷ fifteen jurisdictions require equitable distribution of marital property upon divorce.²⁹⁸ In addition, three jurisdictions require equitable distribution at the request of one or both parties,²⁹⁹ and fourteen jurisdictions allow the use of equitable distribution at the court's discretion.³⁰⁰ In sum, at least thirty-two jurisdictions may have to confront the issue of the equitable distribution of the right of publicity.

Characterizing a celebrity's right of publicity as marital property raises several concerns.³⁰¹ First, Jordana's publicity value is largely dependent on the talent, skills, and attributes of Jordana as an individual performer. As such, it is difficult to distinguish the value of Jordana's celebrity status as a business entity to which Douglas has made contributions and the value of Jordana's reputa-

²⁹⁴ For arguments in support of this position, see Michael G. Heyman, *Goodwill and the Ideal of Equality: Marital Property at the Crossroads*, 31 J. FAM. L. 1 (1992-93).

²⁹⁵ See Schwartz, *supra* note 7 (during pendency of equitable distribution action, there are no assurances that both parties will control enough assets to live at a level which they did prior to divorce).

²⁹⁶ See *supra* note 103.

²⁹⁷ See *supra* note 104.

²⁹⁸ See *supra* notes 14, 103, 104. These jurisdictions include: Arizona, District of Columbia, Illinois, Indiana, Kansas, Kentucky, Maine, Minnesota, Mississippi, Nevada, New York, Oklahoma, Oregon, Texas, and Washington.

²⁹⁹ See *supra* notes 13, 107, 108. These jurisdictions include: Pennsylvania, Tennessee, and Virginia.

³⁰⁰ See *supra* notes 14, 103, 104. These jurisdictions include: Alabama, Alaska, Connecticut, Georgia, Hawaii, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, New Mexico, Ohio, Rhode Island, and Utah.

³⁰¹ According to an article by Edith Updike,

What concerns some is the speculative nature of future earnings. The opera star could get throat cancer. Life doesn't always turn out the way we expect it to. Actor Joe Piscopo, for example, got divorced when he was fresh from Saturday Night Live stardom and a series of popular beer commercials. His "celebrity goodwill" was evaluated by a court-appointed expert at \$158,863. The Piscopos agreed on the lower figure of \$98,708.60. But where is his "celebrity" now? . . . Some economists say the problem is that accountants don't know what they're doing. According to Zellner, some expert witnesses use "a deeply flawed valuation methodology [developed] by accountants who never had any formal training in valuing educational investments." Economists, for example, factor risk into their calculations, to account for the possibility of a singer's throat cancer, or an actor's loss of fame.

Edith Updike, *It's a Matter of Degrees of Separation; Pricing Licenses Spawns More Work for Whole New Line of Divorce Lawyers*, NEWSDAY, Sept. 25, 1994, at A92.

tion which may be considered personal, separate property.³⁰² This may be more of a problem if Jordana had already had a celebrity career prior to her marriage to Douglas. Jordana's right of publicity, which may, however, originally have been separate property had her career begun before her marriage to Douglas, may be treated as a divisible marital asset if "there [is] proof that the increase resulted from efforts, skills or funds of either spouse."³⁰³ Thus, Douglas's interest "in the increased separate [right of publicity] when established through efforts, skills or expanded funds, stands confined to the enhanced value of that separate property."³⁰⁴ Consequently, the burden is upon Douglas to show that the enhancement of Jordana's right of publicity is the result of either spouse's endeavors.³⁰⁵ Second, the value of the right of publicity may be based on expected future earnings; therefore, what is being valued is the potential future income of the celebrity spouse which is not generally subject to division as a marital asset.³⁰⁶ Third, the value of the right of publicity may be difficult to ascertain.³⁰⁷

In confronting this issue, it will be useful for courts to consider the proprietary interest of the right of publicity as marital property, to which contributions can be made by a noncelebrity spouse. Based on *Haelan Laboratories, Zacchini*, and subsequent decisions, the right of publicity should continue to be protected as a property right to encourage investment in a person's celebrity career. To this end, such protection should be extended to a noncelebrity spouse who is both a marital and economic partner in the investment in a celebrity spouse's career. Such protection, however, may not be necessary in those jurisdictions that do not base theories of marital and nonmarital property on traditional concepts of property. Based on principles of equitable distribution as expressed in *Golub, Piscopo, Elkus, and Mann*, a disposition of marital property upon divorce should consider and value the contributions of a noncelebrity spouse's contributions, including sacrifices made as a wage earner and/or homemaker.

³⁰² See Michael W. Kalcheim, *Problems in Valuing Professional Goodwill in Divorce Proceedings*, 78 ILL. BUS. J. 80, 81 (1990).

³⁰³ *Thielenhaus*, 890 P.2d at 930-31 (equitable distribution of retirement fund).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ See James T. Friedman, *Professional Practice Goodwill: An Abused Value Concept*, 2 J. AM. ACAD. MATRIMONIAL L. 23 (1986).

³⁰⁷ See John R. Kettle III, *Spotting Issues Before They Become Problems: The Intellectual Property Audit*, N.J. LAW., Feb. 6, 1995, at 14 ("In order for a [person] to evaluate the scope, value and strength of its intellectual property rights it must first identify the intellectual property.")

Acknowledging that something such as Jordana's interest in her right of publicity is a property interest should implicitly recognize Douglas's interest. Some courts have admitted that the difficulty valuing intangibles is their reason for not treating the enhanced earning capacity as marital property.³⁰⁸ Perhaps another reason for not defining enhanced earning capacity of Jordana's right of publicity is that to do so would require dividing post-dissolution earnings attributable to a right of publicity, despite the fact that such earnings are the separate property of the enhanced spouse.³⁰⁹ For the most part, courts may then deny the status of marital property to the enhanced earning capacity of the right of publicity because they cannot imagine how to measure it equitably.³¹⁰

As for other judicially constructed barriers, difficulty or uncertainty in determining the share of interest should not be a legally sufficient reason to ignore the possibility of considering the right of publicity as marital property.³¹¹ The possibility that the distribution may come from post-marital assets is also not a sufficient reason.³¹² Jordana and Douglas treated the enhanced skill capacity as a valuable asset during their marriage. They each chose to spend money, time, and effort to acquire it instead of acquiring what have

³⁰⁸ One court, for example, observed that if it were to define enhanced earning capacity as property, "[t]he factors and variables involved [would be] simply too speculative and could only act to turn the possibility of inequity on the one hand into a probability of such on the other." *Wehrkamp v. Wehrkamp*, 357 N.W.2d 264, 266 (S.D. 1984).

³⁰⁹ See *supra* note 38. See also *In re Marriage of Aufmuth*, 152 Cal. Rptr. 668, 677 (Cal. Ct. App. 1979); accord *Hughes*, 438 So. 2d at 150.

³¹⁰ One suggestion for valuation of celebrity goodwill has been proposed by a California-based law firm:

The following could be considered a starting point in evaluating celebrity goodwill. The extent and duration of the professional career. The nature and trend of earnings. The financial aspects of contracts and agreements. In evaluating the extent and duration of a performer's career one should begin by reviewing the raw facts and compiling a curriculum vitae, discography or listing of credits. Publicity materials including articles and interviews should be accumulated. Television ratings, box office reports and record sales could be used to further demonstrate the extent of public patronage. Endorsements and product representations could give evidence as to the extent the performer has already exploited his or her recognizability outside his or her primary field of endeavor. It should be noted that good public responses to an actor's films or good television ratings are considered indicators within the entertainment industry of a performer's "bankability." If an actor is considered bankable then the term could easily be considered synonymous with "the expectation of continued public patronage."

Gursey & Miskei, *supra* note 293.

³¹¹ See *Litman v. Litman*, 462 N.Y.S.2d 24 (N.Y. App. Div. 1983); *O'Brien*, 489 N.E.2d at 715; *Conner v. Conner*, 468 N.Y.S.2d 482, 496 (N.Y. App. Div. 1983) (Bracken & Brown, JJ., concurring); Amy H. Kastely, *Compensation for Lost Aesthetic and Emotional Enjoyment: A Reconsideration of Contract Damages for Nonpecuniary Loss*, 8 U. HAW. L. REV. 1, 10 n.45 (1986).

³¹² Illinois and Indiana each make a specific statutory provision for property division out of post-marital assets. See ILL. ANN. STAT. 750 I.L.C.S. 5/401; IND. CODE § 31-1-11.5-11(d).

traditionally been considered marital assets. More importantly, Douglas is entitled to an equitable share of his contributions to Jordana's right of publicity apart from his contributions to her celebrity goodwill and reputation. Although the three are intrinsically related under the rubric of a "celebrity career," Douglas's contributions to Jordana's right of publicity must be considered separately to avoid undercompensation. Preclusion of the right of publicity from equitable distribution of marital property would ignore the definition of marital property that parties like Jordana and Douglas rely on during marriage.

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