Elvis Is Alive, But He Shouldn't Be: The Right of Publicity Revisited

Lee Goldman
Elvis Is Alive, But He Shouldn’t Be:  
The Right of Publicity Revisited  

Lee Goldman*  

I. INTRODUCTION  

The right of publicity protects against the unauthorized commercial appropriation of a person’s name, likeness, performance or identity. The most common invocation of this right occurs when a third party appropriates a celebrity’s name or likeness for endorsement purposes, for the sale of memorabilia, or in connection with artistic or literary works.¹ Celebrity plaintiffs also may raise the right when their style or performance has been imitated or reproduced.²  

In today’s marketplace, use of a celebrity’s name or likeness may generate millions of dollars in revenue. Disputes about entitlements to that revenue take many forms. The

---

* Professor of Law, University of Detroit Mercy School of Law.  
National Hockey League suffered a strike, in part, because of a dispute concerning the distribution of revenues from player trading cards.\(^3\) USA Basketball, the governing body for the United States Olympic Basketball team, threatened to remove Michael Jordan from its squad when his assignment to Nike of exclusive rights to his likeness prevented USA Basketball from distributing group shots of the American team on T-shirts and other articles of clothing.\(^4\) Bette Midler successfully sued Ford Motor Company when, in its advertising, Ford used a sound-alike to perform a song Ms. Midler had made famous.\(^5\)

Questions about the scope of the right of publicity, its descendibility and its interaction with First Amendment and copyright interests have been the subject of numerous commentaries and judicial decisions.\(^6\) No writer, however, has questioned the doctrine itself. This article undertakes that task and concludes that the right of publicity should be abolished. Any interest furthered by the right of publicity is more appropriately protected by state unfair competition law or section 43 of the Lanham Act,\(^7\) the tort of misappropriation.\(^8\)

---


\(^5\) Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); see also infra note 114.

\(^6\) See infra notes 27-32.

\(^7\) 15 U.S.C. § 1125(a) (1988). Section 43(a) embodies a federal unfair competition and deceptive trade practices law. The section prohibits false or misleading descriptions or representations of fact. An essential element of a section 43(a) claim is a likelihood of confusion concerning sponsorship, origin or a person's association with goods or services.

\(^8\) The misappropriation tort derives from the Supreme Court decision in International News Serv. v. Associated Press, 248 U.S. 215 (1918). The basic elements of the claim are that (1) plaintiff expended substantial effort to create the "thing" appropriated; (2) the defendant took and made commercial use of the plaintiff's asset with little cost or effort; and (3) the defendant's taking injured the plaintiff and potentially eliminated an incentive for others to create the type of "thing" appropriated. Id. at 240-41. See also J. THOMAS MCCARTHY, *TRADEMARKS AND UNFAIR COMPETITION* § 10:25, at 396 (2d ed. 1984). In INS, the defendant news service took "hot news" stories from early editions of East Coast newspapers that subscribed to Associated Press, rewrote the stories and used them in INS newspapers on the West Coast. Often the INS papers would print the stories before publication in competing Associated Press subscribing papers. The Supreme Court approved the lower court's injunction prohibiting INS from using Associated Press's public dispatches so long as the dispatches remained "hot news." 248 U.S. at 245-46.
and possibly the right of privacy.\textsuperscript{9}

Part II of this article provides a brief historical discussion of the derivation and development of the right of publicity. Part III discusses the rationales suggested by courts and commentators to justify the right of publicity. Part IV argues that the right of publicity is not merely superfluous, but harmful. Recognition of a right of publicity conflicts with free market, First Amendment and copyright interests. Finally, part V concludes that, absent confusion or misappropriation of a celebrity's performance, there is no valid reason to protect the commercial value of a celebrity's name or likeness.

\section*{II. THE DEVELOPMENT OF THE RIGHT OF PUBLICITY}

The right of publicity evolved from Samuel Warren's and Louis Brandeis's classic law review article on the right of privacy.\textsuperscript{10} Warren and Brandeis argued that the law should secure to all a "right to be let alone."\textsuperscript{11} Their emphasis was upon the embarrassing disclosure of private facts.\textsuperscript{12} The first judicial decision to adopt their proposed right of privacy, however, involved the commercial appropriation of an individual's name and likeness.

In 1905, Paulo Pavesich alleged that a newspaper advertisement falsely identifying him, with picture and testimonial, as a thankful holder of life insurance, constituted an invasion of privacy and a libel. Although the lower court dismissed Pavesich's complaint for failure to state a claim, the Georgia Supreme Court reversed.\textsuperscript{13} Pavesich v. New England Life Insurance Co., like most of the early appropriation cases that followed, fits squarely within the Warren and Brandeis conception of privacy.\textsuperscript{14} Although alleging a misappropriation of identity, plaintiff was a private citizen seeking damages for "wounded feelings."\textsuperscript{15} The emphasis was upon the invasion of

\begin{flushleft}
\begin{itemize}
\item \textsuperscript{9} See infra note 58 and accompanying text.
\item \textsuperscript{10} Samuel D. Warren \& Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 198 (1890).
\item \textsuperscript{11} Id. at 193.
\item \textsuperscript{12} Id. at 196, 215-16. Dean Prosser has suggested that Warren and Brandeis were motivated by the perceived prying, unfair press treatment of the social affairs of Samuel Warren and his proper Bostonian family. William Prosser, Privacy, 48 CAL. L. REV. 383, 423 (1960).
\item \textsuperscript{13} Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).
\item \textsuperscript{15} 50 S.E. at 73.
\end{itemize}
\end{flushleft}
personal autonomy or integrity, not the loss of a commercial opportunity.\textsuperscript{16}

Born at a time when celebrity status generally was not perceived as a commodity capable of wide exploitation, it was perfectly reasonable to view misappropriation of identity as a type of privacy tort.\textsuperscript{17} However, as society became captivated by motion picture, television, and sports personalities, the characterization of the misappropriation tort as an invasion of privacy appeared problematic. Given widespread media coverage of celebrities, courts could not see how the celebrity plaintiff could suffer mental distress or wounded feelings from additional publicity. Indeed, for many celebrities, such publicity was a boon. Therefore, when a plaintiff whose identity was already well known alleged an infringement of his privacy interest, courts often found the celebrity to have waived his privacy right.\textsuperscript{18}

Celebrities wanting to capitalize on the commercial value of their fame needed a new theory. Judge Frank, writing for the Second Circuit in \textit{Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.},\textsuperscript{19} was the first to accommodate their need. In \textit{Haelan}, the court enjoined a baseball card company's unauthorized use of player photographs, holding that, in addition to and independent of a right of privacy, the players had an exclusive "right of publicity" in the pecuniary value of their likenesses.\textsuperscript{20} Damages for this action did not depend on any injury to feelings. Rather, plaintiffs' claims were for the financial rewards from the commercial use of their notoriety.

\textsuperscript{16} Id. at 80. "The tort of improper appropriation is thus perceived as an outer bulwark for the protection of self." Richard A. Epstein, \textit{A Taste for Privacy: Evolution and the Emergence of a Naturalistic Ethic}, 9 J. LEGAL STUD. 665, 669 (1980).

\textsuperscript{17} See Sheldon W. Halpern, \textit{The Right of Publicity: Commercial Exploitation of the Associative Value of Personality}, 39 VAND. L. REV. 1199, 1205 (1986). Dean Prosser, in his widely influential article on privacy, reviewed the decisional law and concluded that the right of privacy did not protect against a single wrong, but four distinct types of injury: "(1) [i]ntrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) [p]ublic disclosure of embarrassing private facts about the plaintiff; (3) [p]ublicity which places the plaintiff in a false light in the public eye; and (4) [a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness." Prosser, supra note 12, at 389. It was the fourth category that emerged as the right of publicity.


\textsuperscript{19} 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953).

\textsuperscript{20} Id. at 868.
Following Haelan, several jurisdictions similarly created this new right through statute or judicial decision.21

Widespread recognition of a right of publicity did not occur, however, until after the Supreme Court’s 1977 decision in Zacchini v. Scripps-Howard Broadcasting Co.22 In Zacchini, the defendant videotaped the plaintiff’s “human cannonball” act in its entirety and showed it during defendant’s television news program. The Court’s opinion cited with approval the case law recognizing a right of publicity23 and provided two widely repeated rationales for protection of that right: (1) providing an economic incentive, analogous to patents and copyrights, for the investment required to produce performances of interest to the public,24 and (2) “preventing unjust enrichment by the theft of good will.”25 The Court then reinstated the plaintiff’s claim for damages (which the lower court had denied), rejecting the defendant’s First Amendment defense.26

Following Zacchini, most courts and commentators accepted the existence of a right of publicity and only concerned themselves with its scope.27 Litigation and commentary have focused on whether there is a postmortem right of publicity,28

---

23. Id. at 572.
24. Id. at 573, 576.
25. Id. at 576.
26. The Court reasoned, in part, that the plaintiff was not trying “to enjoin the broadcast of his act; he simply sought compensation for the broadcast.” Id. at 573-74. The Court also emphasized that the defendant did not merely report a newsworthy fact, but broadcast the plaintiff’s entire act. The First Amendment could not immunize that appropriation any more than it could privilege the defendant to broadcast a copyrighted work without payment to the copyright owner. Id. at 574-75.
27. As of 1991, the right of publicity is explicitly recognized, by common law or statute, in 24 states. See J. Thomas McCarthy, The Rights of Publicity and Privacy § 6.1[B], at 6-6 (1992). No state explicitly rejects the right of publicity. Id.
whether the right extends beyond name and likeness to voice and other aspects of identity,29 if and when the state right is preempted by federal copyright law,30 and the appropriate contours of the First Amendment defense to the right of publicity.31 Despite years of litigation and commentary, confusion remains.32

The following sections of this article question the rationales underlying the right of publicity and suggest that countervailing considerations far outweigh any interests protected by the publicity right. The policy implications of this conclusion are several. Congress should contemplate federal legislation preempting the right of publicity. Courts and legislators that have not addressed the right of publicity should reject such a right. Legislators that have adopted a right of publicity should consider its repeal. At a minimum, courts attempting to determine the scope of the right of publicity should interpret the right as narrowly as possible. They should decline to protect aspects of identity beyond name and likeness, reject a postmortem right of publicity and expansively define First Amendment and copyright interests.


III. EVALUATION OF THE RATIONALES FOR THE RIGHT OF PUBLICITY

The three rationales most often cited as justifying a broad right of publicity are (1) allowing persons to reap the full commercial value of their talents creates incentives that benefit society; (2) protecting a person's interest in his or her name, likeness or identity furthers personal autonomy and integrity; and (3) prohibiting appropriation of the commercial value of another's identity or personality prevents unjust enrichment. Despite the superficial appeal of these rationales, they do not withstand closer analysis.

A. The Incentives Rationale

As explained by the Supreme Court in Zacchini, the incentives rationale posits that the right of publicity "provides an economic incentive for [individuals] to make the investment required to produce a performance of interest to the public." This is the same rationale underlying the patent and copyright laws.

In the vast majority of publicity cases, however, it is unnecessary to protect the commercial value of a celebrity's name or likeness to encourage the activity that makes the individual famous. Many celebrities are motivated by concerns other than money. Actors love to act; sports stars enjoy the competition. Even for the more mercenary, the rewards of the primary activity are often so great that additional incentives are superfluous. True, not all performers are well compensated for


34. Zacchini, 433 U.S. at 576.

35. Id.

36. Fame or celebrity is not a requirement for a right of publicity claim. Nevertheless, the incentive rationale generally has little application outside the celebrity context.

37. In economic terms, the celebrity often operates at an inelastic portion of their supply curve. Given the alternatives available, a change in the rewards of celebrity will not decrease the number of persons seeking stardom.

Professor McCarthy suggests that a right of publicity is necessary to encourage
their talents. Many gifted artists find commercial success elusive. The likelihood of additional compensation from collateral sources, however, varies inversely with need.38 It is the Madonnas and Michael Jordans who reap the greatest rewards from the right of publicity, not the struggling actor or author. Moreover, eliminating the right of publicity would not remove all collateral sources of celebrity revenue. Businesses using a celebrity’s name or likeness would still be subject to state unfair competition law and the Lanham Act prohibition against misrepresentation.39 Celebrities, therefore, would still receive licensing income for the right to distribute “official” products as well as endorsement income from publicly associating with a company’s goods or services.40

Not only is the right of publicity unnecessary to encourage creativity, it also may be undesirable. The public may enjoy the collateral uses of a celebrity’s identity more than it appreciates the talents that gave rise to the celebrity’s fame. If so, increasing the collateral benefits from celebrity status through the right of publicity may lead to over-investment in the primary activity.41 This raises the related normative question: Do we want a society in which fame has economic value apart from the activity that creates celebrity? Are the Olympics the same

individuals who fear the “crass commercialization” of his or her name to undertake enriching activities that may lead to social prominence. McCARTHY, supra note 27, § 2.2, at 2-10. Although Professor McCarthy labels this concern an incentive justification for the right of publicity, it seems more appropriately categorized as a personal autonomy argument. The personal autonomy rationale for the right of publicity is discussed in detail below. See infra notes 47-58 and accompanying text. Briefly, if the First Amendment protected media coverage of the prospective celebrity does not dissuade him or her from undertaking the desired activity, it seems doubtful that the possible commercialization of his or her name and likeness will have that effect. This is especially true if the public knows that the individual has not authorized and does not profit from the commercialization.

38. See Hoffman, supra note 31, at 120.
39. See supra note 7.
40. Admittedly, however, the celebrity’s income would be reduced. No longer would a company have to pay a license fee for uses of the celebrity’s name or likeness that were accompanied by a clear and conspicuous disclaimer. The celebrity would also lose revenue when the context made it clear that the celebrity neither endorsed nor was associated with the product sold. For example, parodies would likely be immune from suit without recourse to the First Amendment. Few people would think that Richard Nixon endorsed the poster of a pregnant woman that had the caption “Nixon’s the one.”
41. Cf. Rochelle C. Dreyfuss, Expressive Genericity: Trademarks as Language in the Pepsi Generation, 65 NOTRE DAME L. REV. 397, 408 (1990). If the supply curve for the primary activity is perfectly inelastic, however, over-investment would not occur.
if athletes compete only for the economic rewards that fame may bring? Do we really want sports figures to make themselves controversial so that their heightened name recognition can increase their collateral revenues? Recognizing a right of publicity may also distort competition in the market for collateral goods. For example, the most artistic or highest quality producers of T-shirts may not prevail in the marketplace if they do not get the support of the "hot" celebrity.

The popularity of the incentives rationale derives from the Supreme Court's language in *Zachinii* and the analogy to patent and copyright law. The rationale's popularity, however, is misplaced. *Zachini* involved the appropriation of the plaintiff's performance, his "stock in trade." In performance cases, similar to patent and copyright, it is the plaintiff's primary activity that is being protected. Consequently, incentives are beneficial and do not distort competition in secondary markets. This is not true of most publicity cases. Even in appropriation of performance cases, a right of publicity is not required. The Copyright Act will protect most celebrities' performances, and the tort of misappropriation or common law copyright can provide protection in the few performance cases outside the scope of the federal Act. In short, although the incentives rationale is the most oft-cited policy supporting the right of publicity, it is also the weakest. The creation of collateral incentives for celebrity through a right of publicity is unnecessary and often may be economically and socially undesirable.

### B. The Personal Autonomy Rationale

Several commentators have suggested that the celebrity's interest in personal autonomy and liberty justifies a broad right of publicity. The use by others of the commercial value

---

42. Recently, some entrepreneurs have produced mass murderer trading cards. If the families of the villains portrayed have a right of publicity claim, the potential consequences are mind-boggling.

43. Theoretically, the best T-shirt maker should still triumph, but with higher costs. That is, the most efficient manufacturer should bid the highest for the licensing rights. However, in the real world, with transaction costs, including strategic bargaining, theory and practice often do not coincide.

44. See *supra* note 8. To prevent misappropriation from swallowing whole the right of publicity, the tort should be limited to situations in which the defendant injures the plaintiff's primary activity or "stock in trade." See International News Serv. v. Associated Press, 248 U.S. 215, 236 (1918).

45. See *supra* note 27, § 8.13, at 8-92 to 8-94.

46. See *MCCARTHY*, *supra* note 27, at 625; Richard A. Epstein, *Privacy, Prop-*
of the celebrity's name or likeness "affects the very essence of
the individual. Whether or not to exploit this value is a deci-
sion that shapes and modifies the scope of one's personality
and one's image." \(^{48}\) The individual's interest in maintaining
control over his or her persona is most compelling when others
use the celebrity's associational value in offensive ways. For
example, a vegetarian may experience a great loss of personal
autonomy if his or her persona is used to sell beef. It is this
personal autonomy interest that distinguishes the right of pub-
licity from other intangible property rights.

There is no question that the celebrity's image may be
damaged through association with disreputable products. Such
associations may limit future endorsement opportunities or
even impede professional development.\(^{49}\) Unrestricted use of
the celebrity's name and likeness also may harm the celebrity's
reputation by creating the perception that the celebrity is moti-
vated solely by greed. Both effects, however, can be remedied
through state unfair competition law or section 43(a) of the
Lanham Act.\(^{50}\) Absent a likelihood of confusion as to source,
the celebrity's image and reputation, at most, should be only
marginally affected. If the public is aware that the celebrity
neither endorsed a product nor profited from the use of his or
her name, the public's perception of the celebrity should remain
unchanged. It is doubtful, for example, that many people
thought less of Johnny Carson merely because a portable toilet
company made unauthorized use of a slogan associated with
Mr. Carson.\(^{51}\) It is a person's personality, his interactions with
others, and perhaps, the media coverage he engenders, not non-
confusing uses of his name or likeness, that define or affect
"the very essence" of the individual.

The notion that the individual should have absolute control
over the use of his or her identity is quaint, but naive—at least
for the celebrity plaintiff. Because the First Amendment pro-
tects most articles about public figures,\(^{52}\) the famous have lit-

\(^{48}\) Salomon, supra note 33, at 1189.

\(^{49}\) See Kwall, supra note 28, at 199.

\(^{50}\) See supra note 7.

\(^{51}\) See Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir.
1983) (maker of "Here's Johnny Portable Toilet" advertised product as "World's
Foremost Commodian").

v. Sullivan, 376 U.S. 254 (1964); see also infra notes 93-94 and accompanying text.
title control over the most embarrassing presentations of their name and likeness. For example, a quick perusal of the supermarket tabloids and fan magazines suggests that the media coverage of celebrities is intense and often negative. If Burt Reynolds's personal identity can survive questionable stories about his alleged homosexuality, it is unlikely that it will suffer by the sale of a calendar with his picture accompanying one of the months.

Admittedly, a celebrity may feel frustrated if his name or likeness is used to further sales of a product or service he affirmatively dislikes. Absent confusion or misrepresentation, however, most such uses of a celebrity's identity would have an expressive element worthy of First Amendment protection. In any event, it is unlikely that a celebrity often would face the indignity of non-confusing, offensive uses of his persona. Most businesses would fear that the annoyed celebrity would publicly respond with a negative endorsement. For example, Reebok will probably not advertise that their sneakers let you fly like Michael Jordan because Mr. Jordan might respond by telling the press that he has tried Reebok, but much prefers Nike. Similarly the vegetarian celebrity might respond to a beef association campaign using his or her name by speaking out against the health risks of eating red meat.

Finally, the personal autonomy rationale cannot justify the scope of the right of publicity recognized by many courts. Absent some further rationale, there should be neither a postmortem right of publicity nor a right of publicity for groups. The damages resulting from an assault on personal autonomy are to feelings, as in traditional privacy actions. The law does not recognize a postmortem right of privacy since the privacy interest in one's liberty and feelings dies with the individual.

53. False tabloid stories may be actionable under defamation laws. New York Times Co. v. Sullivan, 376 U.S. 254 (1964), however, requires the public figure plaintiff to demonstrate actual malice to prevail. The difficulty of proof and attendant expense under that standard deter many celebrities from bringing such actions.

54. Of course, if there was a likelihood of confusion or misrepresentation, a state unfair competition or federal Lanham Act claim would lie. See supra note 7.

55. For a list of courts and legislatures that have recognized a postmortem right of publicity, see McCarthy, supra note 27, § 9.5, at 9-31 to 9-40. Courts recognizing a right of publicity for groups include Brockum Co. v. Blaylock, 729 F. Supp. 438, 446 (E.D. Pa. 1990), and Bi-Rite Enters. v. Button Master, 555 F. Supp. 1188, 1199 (S.D.N.Y. 1983).

There is no reason personal autonomy should support a greater entitlement in right of publicity actions. Recognition of a right of publicity in groups introduces a similar incongruity. Groups cannot have a personal autonomy interest. To state the obvious, a group is not a person. Although individual members of the group have a personal autonomy interest derived from portrayals of the group, it is a weak interest. By its very nature, group membership requires relinquishment of exclusive control of decision making which, in turn, lessens the personal autonomy—and thus the interest in personal autonomy—of the group's members. In short, recognition of a postmortem right of publicity and extension of the right to groups suggests that the personal autonomy rationale cannot be the primary justification supporting the right of publicity.

To summarize, the personal autonomy interest, born in privacy law, protects feelings, not the commercial value of the plaintiff's name or likeness. This interest may justify a privacy suit by private individuals, but should not support relief for the celebrity. Unlike private citizens, celebrities arguably have waived certain rights to privacy, are routinely subject to media scrutiny protected by the First Amendment, and often can effectively respond to public misrepresentations. Absent confusion, then, the celebrity's asserted personal autonomy interest is more rhetoric than reality.

**C. The Unjust Enrichment Rationale**

A final rationale for the right of publicity is "the straightforward one of preventing unjust enrichment." \[59\] "[A]n intuition of fairness, a norm often linked to natural rights," \[60\] and

---

57. Nonetheless, a court may choose to award damages corresponding to the commercial value of the celebrity's persona. By removing the "unjust enrichment" from the defendant, the commercial value damages more effectively deter the misappropriation. Also, it may be easier to determine a market value for the celebrity's persona than it is to estimate the injury to the celebrity's feelings.

58. The celebrity should be denied even injunctive relief. A contrary rule only would encourage strategic bargaining by the celebrity. Given the commercial value of the celebrity's persona, the celebrity could threaten to seek an injunction unless the defendant paid for the use of the celebrity's name or likeness. The result would be similar to that which exists under current law.


a respect for the property rights of individuals underlie this rationale. Plaintiffs should be entitled to the fruits of their labor and defendants should not be allowed to "reap where another has sown." As explained by the Supreme Court, "No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.’

This argument assumes the answer to the question under consideration. There is no unjust enrichment unless the law recognizes a right of publicity in the plaintiff and defines the defendant's taking of that right as wrongful. Whether the law should consider the defendant's appropriation a misappropriation demands a balancing of interests. The "fruits of their labor" and "should not reap where another has sown" mantras merely trivialize the required analysis.

The notion that a person should not reap where he or she has not sown, or free ride on the creativity of others, admittedly has intuitive appeal. Taken literally, however, it is drastically overbroad. Our culture permits many forms of free-riding. Even though all professional golfers owe a figurative debt to Arnold Palmer for popularizing the sport and thereby increasing the revenues available to them, Arnold Palmer is not entitled to a commission from every other professional golfer's income. Computer software companies might not have a market if IBM did not develop computer hardware; still, IBM is not entitled to royalties from those companies' software sales. In the analogous field of trademark law, courts specifically

61. See McCARTHY, supra note 27, § 2.1[A], at 2-1 to 2-3; Kwall, supra note 28, at 198.
62. See McCARTHY, supra note 27, § 2.1[A], at 2-1 to 2-3; Gordon, supra note 60, at 156; Kwall, supra note 28, at 198.
63. Zacchini, 433 U.S. at 576 (quoting Harry Kalven, Jr., Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 LAW & CONTEMP. PROBS. 326, 331 (1966)).
64. Cf. James M. Treece, Commercial Exploitation of Names, Likenesses, and Personal Histories, 51 TEX. L. REV. 637, 643 (1973) ("The assertion that a celebrity has lost a fee when an advertiser appropriates his name or likeness without consent states a bare conclusion. He has lost a fee only if other advertisers would be willing to pay it, which in turn depends on whether the law requires the payment.").
65. See Gordon, supra note 60, at 167.
66. According to Professor Gordon, "A culture could not exist if all free riding were prohibited within it. Every person's education involves a form of free riding on his predecessors' efforts, as does every form of scholarship and scientific progress." Id.
have ruled that one can capitalize on a market or fad created by another provided there is no confusion.\(^{67}\) Often even the celebrity plaintiff free rides on the efforts of others. Media coverage may increase the celebrity's popularity and revenues, yet the celebrity does not have to pay a fee for such attention. In short, we live in an age of economic and social interdependence. Free-riding, standing alone, is not wrongful or unjust.\(^{68}\)

Free-riding primarily is troublesome when it places the originator at a competitive disadvantage because he incurs development costs that the free rider avoids. In such cases, allowing a party to "reap where another has sown" can discourage desired creative activity.\(^{69}\) This is not the situation in the typical right of publicity case.\(^{70}\) The "free rider" does not compete in the celebrity's primary market.\(^{71}\) In the secondary market, e.g., the market for memorabilia, the activity that brought fame to the celebrity plaintiff generally will cover any expenses that the free rider evades.\(^{72}\) Indeed, the celebrity plaintiff will be at a competitive advantage vis-a-vis another competitor in the market for collateral goods. The celebrity will be able to advertise his or her goods as "official" and publicly endorse the sale of those goods. State unfair competition laws

---


68. Cf. National Football League v. Governor of Del., 435 F. Supp. 1372, 1378 (D. Del. 1977) (holding that the NFL had no legal right to prevent the state lottery from using the popularity of NFL football to further lottery sales).


70. The free rider may place entertainers at a competitive disadvantage in appropriation of performance cases. Those cases, however, can be handled by misappropriation actions. See supra note 8.

71. Free riders also might discourage useful activity if their actions injure the originator's primary market. This can be true even if the free rider does not compete in the primary market. For example, if the free rider damages the celebrity's reputation, the celebrity may lose revenues from, and the incentive to participate in, the primary market. For a discussion of these possible harms, see infra notes 79-82 and accompanying text.

72. It might be argued that licensees incur costs that the free rider escapes. If there were no right of publicity, however, all future licensees only would pay a fee that corresponded to the benefit they received from the right to sell "official" goods. The licensees would not operate at a competitive disadvantage unless they negotiated improvident contracts.
and the federal Lanham Act prohibit the "free rider" from matching that activity.\textsuperscript{73} Frequently, the only reason the "free rider" reaps rewards is because he or she adds value unmatched by others. He or she may have more creative T-shirt patches, better quality clothing or more clever advertising. In these cases, even labeling the competitor a "free rider" may be inappropriate.

Just as the reap/sow principle undervalues defendants' contributions and interests, the natural rights/fruits-of-one's-labor argument overstates plaintiffs' entitlement to the commercial value of their identity. A natural right to the fruits of one's labor has not been recognized. For example, creative writings and inventions must be protected by statutes and that protection extends only for a limited time.\textsuperscript{74} When Congress enacted copyright legislation, the House Report specifically stated that the legislation was "not based upon any natural right that the author has in his writings... but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings."\textsuperscript{75} If creative artists are not entitled to all direct rewards from their labor, celebrities surely do not have a right to all collateral benefits from their celebrity. A natural right to one's publicity value seems especially doubtful given that the right of publicity was not even recognized until this century.\textsuperscript{76}

One might even question whether the commercial value of a celebrity's identity should be regarded as the fruits of the celebrity's labor. Fame frequently is fortuitous. It always depends on public participation and often hinges on sympathetic, or at least extensive, media coverage.\textsuperscript{77} Although the celebrity's talents are at least partially responsible for the celebrity's notoriety, those talents are compensated by revenues from the celebrity's primary market. If the public believes that

\begin{flushleft}
\textsuperscript{73} See \textit{supra} note 7.
\textsuperscript{76} See \textit{supra} notes 10-26 and accompanying text.
\end{flushleft}
the celebrity is entitled to still greater returns, it can always choose to pay the premium for “official” celebrity sponsored goods.

Even if celebrities do not have a “natural right” to all the fruits of their labor, simple fairness and incentive concerns might demand that the law deem an appropriation of the commercial value of a celebrity’s persona unjust if it injures the celebrity’s primary activity. Two principal injuries may result from another’s use of a celebrity’s persona in a secondary market: (1) association with disreputable products or false suggestions of endorsement may diminish the public’s perception of the celebrity; and (2) overexposure of the celebrity’s persona may create a public backlash that reduces the demand for the celebrity’s primary activity.

As suggested earlier, the first type of harm will be accompanied by confusion of source or misrepresentations that are actionable under state unfair competition law or the Lanham Act. Therefore, a right of publicity is not necessary to protect the celebrity from this harm. The second type of injury may exist even in the absence of confusion or misrepresentation. The injury to the celebrity would be analogous to dilution of trademark. Market saturation might tarnish the celebrity’s image. Again, however, the injury is more apparent than real. Much of the harm from overexposure derives from the public’s perception that the celebrity is motivated solely by greed. Such a perception, however, should not exist in the absence of confusion of source. In any event, the greatest overexposure results from media coverage protected by the First Amendment, not from the sale of celebrity products or services. Accordingly, a right of publicity would not affect that source of overexposure.

There is also a real question whether saturation in the market for collateral goods causes lasting harm to the celebrity’s primary activity. Madonna’s and Michael Jackson’s media coverage is exhaustive (and exhausting); the

78. See supra notes 49-50 and accompanying text.
79. Dilution law prohibits the unauthorized, non-confusing, but frequently offensive use of another's trademark when the result is a weakening or tarnishment of that trademark.
80. Overexposure may reduce the celebrity's sale of secondary goods. That harm, however, is consistent with free market competition. Preserving the celebrity's market for collateral goods is not necessary to preserve desired incentives. See supra notes 34-46 and accompanying text.
marketplace is filled with their memorabilia. Nevertheless, their concerts always sell out. Moreover, even in the trademark field, the dilution theory is far from universally accepted.81 The federal government has rejected enactment of an anti-dilution law.82 Given that the primary source of the celebrity's overexposure is the First Amendment protected media, there is even less reason to adopt a dilution theory in the right of publicity context. Thus, although the law is rightly concerned about maintaining incentives for creativity in primary markets, it is not necessary to define the appropriation of a celebrity's commercial value in collateral markets as unjust to preserve those incentives.

Finally, the unjust enrichment rationale also fails because it compares the rights of the plaintiff with those of the defendant rather than with the public's interests.83 It is the public that ultimately pays if celebrities are accorded an exclusive right to all commercial value of their name and likeness. The public must suffer the higher prices and reduced output associated with monopoly as well as face possible infringement on First Amendment interests.84

In summary, unjust enrichment does not stand as an independent justification for the right of publicity. In an era of interdependence, free riders cannot be eliminated and individuals do not have a right to all the fruits of their labor. The real question, then, is where the line demarcating celebrities' entitlement should be drawn. I have argued that incentive and fairness concerns support drawing that line at the celebrity's primary activity. Given public interests, and the absence of some other compelling rationale, celebrities' entitlement should not be extended beyond that point.

IV. COUNTERVAILING INTERESTS AGAINST THE RIGHT OF PUBLICITY

Our economic system favors free and open competition

82. See id. at 537.
83. Professor Gordon warns: "Against an articulate plaintiff who is enunciating what sounds like a moral interest in reaping what she has sown often stands a commercially motivated defendant who may be an unsympathetic figure poorly situated to communicate what the community has at stake." Gordon, supra note 60, at 279.
84. See infra notes 86-112 and accompanying text.
unless monopoly control would enhance overall competition or further some other social goal. The previous section challenged the policy arguments for granting an individual monopoly control over his or her identity. The following sections discuss affirmative countervailing interests that strengthen the case against adoption or continuation of a right of publicity.

A. The Effect of the Right of Publicity on Competition

The right of publicity encumbers free enterprise and competition by granting the individual monopoly control over the commercial value of his or her persona. As with all other monopolies, this grant of monopoly power has distributive and efficiency effects.

The obvious distributive effect is that purchasers pay a higher price for celebrity memorabilia. The celebrity, often already well-compensated, reaps relatively more of the gains from trade with consumers than would be the case in a more competitive market. Although many economists are not concerned with distributive effects, it is difficult to ignore the distributive consequences of a doctrine so often justified by concepts of fairness and equity.

Apart from the distributive effect, the right of publicity generates a less than optimal allocation of resources. The monopolist must create an artificial scarcity of supply to generate higher prices. Consequently, consumers who value the monopolist's product more than the marginal cost of its production, but less than the inflated market price, do not purchase the product. Consumer wants that could efficiently be fulfilled go unsatisfied.

One commentator has questioned whether permitting the celebrity's persona to enter the public domain would actually increase competition and allocative efficiency. He suggests that the relevant market may not be memorabilia that bears a


86. See supra notes 60-64 and accompanying text.

87. See Denicola, supra note 14, at 633.

88. See Kevin S. Marks, Comment, An Assessment of the Copyright Model in Right of Publicity Cases, 70 CAL. L. REV. 786, 803 (1982); cf. Denicola, supra note 14, at 634-35 (making a similar argument in the context of institutional trademarks).
particular celebrity's likeness, but instead the market for all pop-hero merchandise. The consumer then would enjoy the benefits of competition between different celebrity's products. For example, if Michael Jordan posters became too expensive, the consumer instead could purchase a Magic Johnson poster.

Undeniably, there is some competition among each celebrity's memorabilia. Nevertheless, it is easy to overstate the degree of competition. For many, only a given celebrity's merchandise will do. Ringo may substitute for George, but not for Paul or John. No one may substitute for Elvis. Geographic and temporal factors further militate in favor of defining the market as each individual celebrity's pop merchandise. Little competition exists for a given celebrity's products at concert tour sites, other special locations (like Graceland), or immediately following the celebrity's death. This is significant because there is evidence that the majority of entertainers' revenues from collateral sources derive from concert, as opposed to retail, sales. 89

Theoretical market definitions aside, it is clear that the marketplace for celebrity merchandise is not competitive. In a perfectly competitive market, price is equal to the seller's marginal cost. The marginal cost of celebrity endorsements, however, effectively is zero. Once the celebrity has achieved fame, there is no additional commitment of resources necessary to supply an additional user with the right to use the celebrity's name or likeness. 90 Thus, license fees in a perfectly competitive market should approach zero. That is far from the case in the real world. Millions, if not billions, of dollars are paid in license fees. As suggested earlier, license fees were, in large part, the cause of a National Hockey League strike as well as the dispute between Michael Jordan and USA Basketball. 91 It is those license fees that contribute to the dislocation of resources and redistribution of wealth.

Finally, even if celebrities were not interested in raising prices through output restriction, some dislocation of resources would result. Some celebrities choose not to license any products or engage in strategic bargaining that produces the same

---

90. Cf. Denicola, supra note 14, at 634-35 (making a similar point for institutional trademarks).
91. See supra notes 3-4.
result. Demand for their product goes unmet. If, absent confusion, a celebrity's name or likeness were considered public domain material, that demand would be satisfied.

The economic arguments may be interesting, but a simple equation has the greatest persuasive value: the right of publicity = higher license fees = higher costs = higher prices = reduced demand.92 State unfair competition laws and the federal Lanham Act will prevent complete elimination of license fees. There are many situations, however, where non-confusing use is made of a celebrity's persona. Abolishing the right of publicity would result in lower or no license fees in such cases.

B. Free Expression and the Right of Publicity

The right of publicity often conflicts with the public's interest in free expression. The First Amendment protects both the right of the speaker to speak and that of her audience to hear.93 Courts and commentators have recognized that both of these First Amendment interests may be jeopardized by the right of publicity. To balance these competing interests they generally have adopted a broad commercial/non-commercial speech dichotomy. The unpermitted use of an individual's identity for news, information, or cultural purposes is constitutionally immune from liability; the unpermitted use in advertising or on commercial products themselves triggers infringement of the right of publicity.94 Life, however, is not that simple. The line between protected and unprotected appropriation is diffi-

92. The equation assumes that consumer demand is not perfectly inelastic or perfectly elastic. If the former were true, demand would not decrease as price rose. If consumer demand were perfectly elastic, higher costs would not equate to higher prices. There is, however, no reason to believe that these assumptions are invalid.


cult to draw with theoretical consistency. Consequently, some expression that should be immune from liability goes unprotected. The courts' uncertain standard also may chill expressive conduct unquestionably protected by the First Amendment. Moreover, in the absence of a convincing rationale for the right of publicity, even commercial speech should receive First Amendment protection.

To illustrate the difficulty with a commercial/non-commercial dichotomy, consider a Leroy Neiman portrait of Michael Jordan. Artistic use of an individual's persona is considered non-commercial and classically subject to full First Amendment protection. Should the same result obtain if Mr. Neiman sells 100 limited edition posters of the Jordan portrait? One million posters? What if the portrait is silk-screened on T-shirts or other articles of clothing?95

Some have suggested that the answer lies in the medium of expression.96 If the celebrity's identity is used in a traditional medium for information or entertainment (e.g., books, newspapers, movies, artwork), First Amendment protection should preclude right of publicity liability. By contrast, use of a celebrity's persona in connection with "mere merchandise" should not receive First Amendment immunity. Under this standard, for example, the Jordan T-shirts would clearly be unprotected.

However, the medium of expression test for commercial/unprotected speech does not accurately represent current law. In fact, in the lone right of publicity case decided by the Supreme Court, Zacchini v. Scripps-Howard Broadcasting Co., First Amendment protection was denied even though plaintiff's identity was appropriated in a television news broadcast.97 Liability also has been found for imitation of a celebrity's persona in other media traditionally protected by the First Amendment. For example, in the "Beatlemania" case,98 the defendants imitated the Beatles' appearance and singing style on stage, performing live twenty-nine Lennon-McCartney songs.

95. See Pesce, supra note 29, at 808.
96. See McCarthy, supra note 27, § 7.6(A), at 7-17 to 7-18; Hoffman, supra note 31, at 128 n.89, 140; Salomon, supra note 33, at 1203.
97. 433 U.S. 562, 578-79 (1977). Admittedly, the Court in Zacchini emphasized that the defendant appropriated the plaintiff's entire performance and suggested that a lesser taking would have received First Amendment protection. Id. at 574-75.
Although the individual members of the Beatles had not performed together in years, the court awarded plaintiffs over 7.5 million dollars in damages. Likewise, in *Groucho Marx Productions*, the defendants, producers and authors of the Broadway musical-comedy *A Day in Hollywood/A Night in the Ukraine* were alleged to have infringed the Marx Brothers’ right of publicity by presenting Chekhov’s *The Bear* in the style of the Marx Brothers. Despite critical acclaim and the fact that the Marx Brothers were deceased, the lower court entered summary judgment against the defendants. In both the “Beatlemania” and *Groucho Marx Productions* cases, strong First Amendment arguments were dismissed. Conversely, First Amendment protection has been extended to some uses in seemingly non-traditional modes of communication representing limited free expression interests.

Even if the medium of expression standard for commercial speech accurately reflected existing law, significant First Amendment interests still might be compromised. For example, board games or computer software are not traditional media of expression, yet they can be educational as well as entertaining. Indeed, to encourage learning, effective teaching tools need to challenge and maintain interest. But the medium of expression standard effectively penalizes the creator/educator for making a product too entertaining. Once such educational tools become entertainment, they are categorized as commercial speech and lose First Amendment protection. The medium of expression standard also does not eliminate difficult line drawing issues. For example, should statues commemorating deceased celebrities be considered art forms or crass commercialization?


100. The Second Circuit reversed on the grounds that California, not New York, law applied. In dicta, the court acknowledged that the defendants had a “substantial argument” that the play was First Amendment protected literary expression. 689 F.2d at 319 n.2.


Insofar as the line between commercial and noncommercial is ill-defined, the right of publicity threatens both types of speech. Because First Amendment protection must depend upon the proper exercise of a judge's or jury's discretion, expression-restrictive outcomes, such as those in the Marcinkus, "Beatlemania" and Groucho Marx Productions cases, become possible. As a result, the unclear standard also may have a chilling effect on clearly protected expression. Rather than risk the costs of litigation, much less an improper or questionable judicial verdict, the putative defendant may forego any use of the celebrity's persona. For example, despite the public's fascination with the Beatles, fear of a large damage award now will deter most producers from presenting a live anthology of Beatles songs without the consent of each individual group member.

Furthermore, even if there were complete agreement concerning the definition of commercial speech, the right of publicity still would interfere with many forms of creative expression. Commercial speech can no longer be dismissed as having no First Amendment value. Successful advertisements often are more entertaining than the programs the advertisers sponsor. Awards are given for the most creative advertisements and a collection of the winners sometimes is shown on television or in museums and movie houses. Advertisers contribute a part of themselves to many campaigns and in that sense may be thought to fulfill the First Amendment goal of self-actualization.

American Heritage Prods., Inc., 296 S.E.2d 697 (Ga. 1982) (plastic bust of Martin Luther King, Jr. unprotected by First Amendment). See also Kwall, supra note 28, at 242-43.

The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.

See also Thomas I. Emerson, Toward a General Theory of the First Amendment, 72
The purchaser of commercial items may have an even greater First Amendment interest. A consumer's choice among the great variety of celebrity memorabilia is a statement about herself. It has emotive and communicative value. An Ice-T T-shirt may suggest dissatisfaction with authority; a poster with a red "X" through Madonna's picture may reflect a preference for sexual conservatism and definitely says that the purchaser does not like Madonna.

Finally, when there is no likelihood of confusion as to source, advertisements and celebrity memorabilia frequently use the celebrity's persona in a communicative, as opposed to exploitive, manner. The associations with some celebrities evoke images that words cannot effectively match. For example, an advertisement for Excedrin might show John McEnroe berating an umpire, focus the camera on the umpire and caption the ad "Excedrin headache number 102." Anyone familiar with tennis would immediately understand the message without the need to elaborate on the words spoken to the umpire. Such usage does not require the viewer to believe that McEnroe endorses or is associated with the product. In this sense, it might be viewed as analogous to the "fair use" defense in trademark law.

Some have suggested that the right of publicity does not conflict with any First Amendment interests because the plaintiff does not wish to prevent speech, but merely be paid for the use of his or her identity. That argument is disingenuous. Many plaintiffs seek injunctive relief, not merely damages. Some refuse to permit commercial use of their persona at any price. This is particularly true when the putative defendant seeks to use the celebrity's identity for parody or otherwise present the celebrity's persona in an unflattering light. Sometimes complications such as transaction costs or strategic bargaining will prevent expressive uses of a celebrity's persona. The risk of such complications is especially great when the use...
RIGHT OF PUBLICITY

requires the authorization of more than one individual. For example, although John Lennon's estate, Ringo Starr, and George Harrison may authorize a show such as "Beatlemania," Paul McCartney's refusal may prevent its production. Finally, as a matter of simple economics, if license fees are required and costs increase, the supply of some commercial speech will be eliminated. Unprofitability will deter production of some celebrity memorabilia and concomitantly restrict consumers' forms of expression. In these ways (and no doubt others) the right of publicity conflicts with First Amendment interests.

There is no question that commercial speech is not entitled to the same degree of First Amendment protection as political speech. This article does not suggest anything to the contrary. Rather, it contends that the commercial use of a celebrity's persona has some First Amendment value. While that value may be comparatively slight, unless there is a substantial competing government interest, that value should not be dismissed. In part III, I have argued that there is no such government interest supporting the right of publicity. Accordingly, the expressive component of commercial speech should be enough to reject a right of publicity for non-confusing uses of a celebrity's persona. The possibility that some courts will find non-commercial speech actionable and that an uncertain standard will chill all speech only strengthens this conclusion.

C. Conflict Between the Right of Publicity and Copyright Policies

The right of publicity sometimes conflicts with federal copyright objectives. Specifically, the right of publicity may (1) prevent free access to matters that Congress intended to be in the public domain or (2) interfere with the untrammelled


112. Confusing commercial uses of a celebrity's persona are actionable under state unfair competition laws and the Lanham Act and do not raise First Amendment issues. Misleading commercial speech is not protected speech within the First Amendment. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

113. For example, the majority of states recognize a postmortem right of publicity. Thus, it is possible that after the copyright on a film expires, the public will still be precluded from freely using the copyrighted work. See Shipley, supra note 30, at 724-25; see also Pesce, supra note 29, at 819 ("A state right of publicity that prohibits vocal imitation is inconsistent with Congressional intent" to preclude
exercise of the rights accorded the copyright owner or his licensee.\textsuperscript{114} Although some such conflicts will result in federal preemption, often the celebrity's right of publicity will be enforced at the expense of copyright interests.

Section 301 of the Copyright Act provides specific statutory authority for federal preemption. That section provides that any state law is subject to federal preemption if the state law reproduction, but not imitation, of copyrighted sound recordings.).\textsuperscript{114} See Hoffman, supra note 31, at 130. Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc., 296 S.E.2d 697 (Ga. 1982) illustrates one potential conflict. In Martin Luther King, Jr., the defendant marketed a plastic bust of the deceased civil rights leader. The original sculpture could be copyrighted, see 17 U.S.C. § 102(a)(5) (1988), and did not infringe the King estate's right of publicity because it was protected by the First Amendment. See supra note 94 and accompanying text. The Georgia Supreme Court, however, found the right of publicity violated by the reproduction and commercial distribution of the busts. This result severely restricted the exclusive rights guaranteed under section 106 of the Copyright Act to every author. See 17 U.S.C. § 106 (1988 & Supp. II 1990). By limiting the potential revenues available to sculptors, the court effectively restructured the incentives for creativity provided by Congress.

The ability to exploit one's copyright also may be threatened by the effect the right of publicity has on the liability exposure of licensees. For example, a licensee that has paid for the use of copyrighted material for advertising purposes may face liability to celebrities who are associated with the copyrighted work. Such was the situation in Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); cf. Factors, Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979) (defendant enjoined from selling copies of copyrighted photograph); Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970), cert. denied, 402 U.S. 906 (1971) (liability denied, but litigation expenses incurred by defendant that used the copyrighted song "These Boots Are Made for Walkin" as part of its advertising campaign). In Midler, the defendants used a Midler sound-a-like to perform the song "Do You Want to Dance" as part of an automobile advertisement. Although they paid the copyright holder for use of the song, they did not make any payment to Midler. The defendants were found to have violated Ms. Midler's right of publicity and damages were assessed. 849 F.2d at 463. In Midler, there was evidence that the defendants deliberately attempted to evoke Ms. Midler's image. The defendants first requested Ms. Midler to participate in the advertisement, and when she refused, they instructed the singer they hired to "sound as much as possible like the Bette Midler record." Id. at 461. In such cases the conflict with copyright is minimal. Nevertheless, an innocent copyright licensee similarly may face liability exposure, or at least litigation expenses, if a disgruntled celebrity erroneously concludes that the use of a song strongly identified with him or her was designed to suggest the celebrity's participation or endorsement. Rather than attempting to anticipate all potential lawsuits and negotiating rights fees, see David E. Shipley, Three Strikes and They're Out at the Old Ball Game: Preemption of Performers' Rights of Publicity Under the Copyright Act of 1976, 20 ARiz. St. L.J. 369, 419-20 (1988); McCarthy, supra note 27, § 11.14[C], at 11-81, the advertiser simply may choose to forego use of the copyrighted work. See Sinatra, 435 F.2d at 718. Admittedly, this latter conflict with copyright policy might be avoided if the copyright holder initially contracts with the performer for all publicity rights. Not all copyright holders, however, will be able to reach agreement with all subjects of and participants in the copyrighted works.
grants rights "equivalent to any of the exclusive rights within the general scope of copyright" in "works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright."  

Section 301, however, does not adequately protect federal copyright policies from interference by a state-recognized right of publicity. Many courts have held that the intangible proprietary interest protected by the right of publicity is not a writing. Although the transitory image or sound of the celebrity may be fixed in a photograph or recording, the persona or publicity values generated by the celebrity are not. Copyright law protects the expression of ideas, not the ideas themselves. The celebrity's name or likeness, however, falls on the idea side of the idea/expression dichotomy and therefore should not come within the subject matter of copyright.

Statutory preemption is supplemented by constitutional preemption. Under the Supremacy Clause state law is preempted whenever it stands as an obstacle to the objectives of federal law. When the right of publicity prevents a copyright holder from freely licensing or distributing her work, the incentive to create, the central policy of the Copyright Act,

120. "The Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby." U.S. CONST. art. VI.
121. See Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941). It may seem anomalous to presume congressional intent to preempt state law when specific statutory preemption provisions are unavailable. Nevertheless, given § 301's drafting limitations, preemption clearly may be appropriate even when § 301 does not apply. For example, it is axiomatic that copyright does not protect ideas. See 17 U.S.C. § 102(b) (1988). The public interest is thought to be furthered by free access to ideas. Yet, because ideas are not the subject matter of copyright, a state law that extended copyright-like protection to ideas would not be preempted under a literal reading of § 301. That result is untenable. See Pesce, supra note 29, at 812.
122. See, e.g., Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
is diminished.

Nevertheless, constitutional preemption also does not fully protect copyright interests. Despite the apparent conflict between the right of publicity and copyright policies, constitutional preemption may be unavailable. The rights granted by copyright do not include an unqualified guarantee of maximum commercial opportunity. Many bodies of law limit the value of the copyright holder's parcel of rights. For example, states may validly prohibit "blind bidding" of copyrighted motion pictures even though the effect of such laws is to reduce the copyright holder's revenues. Similarly, a federal court has upheld the California Resale Royalties Act's limitation on the right to dispose of copyrighted art works. What constitutes sufficient interference with the copyright holder's rights to mandate preemption ultimately is a matter of line drawing that requires a balancing of interests. However, it is not necessary for this article to engage in such balancing. Rather, it is enough to recognize that there have been and will continue to be some cases in which federal interests are compromised, but preemption is rejected.

Admittedly, the frequency and severity of non-preempted conflict with copyright policy may not demand immediate action. Nevertheless, the interference with copyright interests, when combined with free market and First Amendment interests, makes recognition of a right of publicity singularly unappealing.

123. "Blind bidding" is the practice of licensing a motion picture to an exhibitor without the exhibitor first viewing the film.
126. Given this article's view that the right of publicity has no persuasive justification, I would recommend preemption if copyright interests are infringed even to a de minimis extent. This, however, is not the law. See, e.g., Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Factors, Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979); Lugosi v. Universal Pictures, 603 F.2d 425 (Cal. 1979) (Bird, C.J., dissenting). Courts operate under the implicit assumption that the right of publicity protects valid state interests. Given this assumption, minimal interference with federal interests cannot justify preemption.
127. See supra note 125 and accompanying text.
128. See supra notes 86-112 and accompanying text.
129. Moreover, if states did not recognize a right of publicity, not only would the interference with copyright interests be eliminated, but litigation over preemption issues would be drastically reduced. Without a right of publicity, many celebrities whose name or likeness is appropriated will bring state unfair competition or fed-
V. SUMMARY AND CONCLUSIONS

The right of publicity originated at a time when many entertainers were poorly compensated for their creative endeavors. The ballplayers in Haelan received salaries that were a minuscule fraction of what similar athletes currently earn. In that milieu, fairness concerns and a desire to maintain incentives for creativity might easily have justified a right of publicity. The facts have changed. It now seems that recognition of the right of publicity is driven by fear: fear that a celebrity's name or likeness will be plastered everywhere; fear of Mel Gibson toilet bowl cleaners and Whitney Houston toothpastes; and fear that celebrities forced to endure such uncompensated indignities might react by withdrawing from the public spotlight.

Part IV of this article challenged these fears. Rejection of a right of publicity, as recommended by this article, would not result in complete and open access to every celebrity's persona. The Lanham Act and state unfair competition laws still would stand as obstacles to such unbridled appropriations. For example, the result in a case such as Midler would be the same even without a right of publicity. By evoking Midler's general Lanham Act claims. Those claims, however, would not raise preemption issues. Unfair competition and Lanham Act claims require a demonstration of likelihood of confusion. The requirement of that extra element is enough to distinguish those rights from the exclusive rights granted by the Copyright Act. See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 200 (2d Cir. 1983), rev'd on other grounds, 471 U.S. 539 (1985); McCarthy, supra note 27, § 11.13[A][2], at 11-65. Given an absence of "equivalent rights," statutory preemption clearly would fail. Section 301 also specifically disavows any intent to preempt other federal statutes. 17 U.S.C. § 301(d) (1988). Of course, the federal Lanham Act also would not be subject to constitutional preemption. Furthermore, a celebrity could not credibly suggest that Congress intended to protect deceptive uses of a celebrity's persona from state regulation. See Pesce, supra note 29, at 820-21.

131. See supra note 85-129 and accompanying text.
132. Theoretically, advertisers might make unlimited use of a celebrity's name or likeness if such use was accompanied by a clear and conspicuous disclaimer of association or endorsement. Whether a disclaimer was sufficiently clear and prominent, however, would be a fact question. Given evidence that disclaimers generally are not effective, see, e.g., Brockum Co. v. Blaylock, 729 F. Supp. 438, 443, 445 (E.D. Pa. 1990); Jacob Jacoby & Robert Lloyd Raskopf, Disclaimers in Trademark Infringement Litigation: More Trouble Than They Are Worth?, 76 TRADEMARK REP. 35, 44, 49-58 (1986), many defendants would be reluctant to rely on disclaimers to avoid damage liability. Moreover, the clearer the disclaimer, the less valuable the appropriation of the celebrity's identity.
identity and confusingly suggesting that Ms. Midler endorsed or was associated with Ford Motor Company's product, the defendants could be found to have violated section 43 of the Lanham Act.\textsuperscript{133}

Similarly, there is little validity to the concern that celebrities will forego creativity rather than be subject to uncompensated embarrassments. Without a right of publicity, not only will celebrities often receive outlandish revenues from the activities that brought them fame, but they also will continue to receive endorsement income and money to act as the sponsor for "official" goods. Furthermore, the embarrassment from the unauthorized, but non-confusing, commercial use of a celebrity's identity pales in comparison to the possible effects of virtually unrestricted media coverage of the celebrity's public and private lives.\textsuperscript{134} If that coverage does not deter creativity, there is little reason to anticipate such effects from a reduction in collateral revenues.

By the same token, the protection provided by the Lanham Act and state unfair competition law places a limit on the advantages to be gained from a rejection of the right of publicity. Not all license fees would be reduced and not all potential First Amendment infringements and copyright conflicts would be eliminated. Although the benefits from this article's proposal may be modest, they are nonetheless real. Specifically, rejection of the right of publicity would improve access to celebrities' names or likenesses in those situations where confusion or misrepresentation could be avoided. Thus, where parties provide bold and explicit disclaimers, competition would increase and the premium now paid by consumers for monopoly goods would be reduced.\textsuperscript{135} Use of celebrities' persona in contexts where reasonable people would not assume celebrity endorsement or participation also would improve competition or provide new products. For example, USA Basketball likely would be able to distribute group shots of the Olympic team if they prominently displayed the USA Basketball logo. Under such circumstances, it probably would be unreasonable for the consumer to conclude that each player endorsed or participated in

\textsuperscript{133} The plaintiff in Midler, however, originally did not bring a Lanham Act claim and the district court denied the plaintiff's motion to amend her complaint to remedy that oversight. Appellant's Opening Brief at 44-47, Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (No. 87-6168).

\textsuperscript{134} See supra notes 52-54 and accompanying text.

\textsuperscript{135} But see supra note 132.
the manufacture of such products.\textsuperscript{136}

The public would also be able to enjoy the freer use of parody in both commercial and non-commercial settings. Parody, by its very nature, is done by persons other than the individuals parodied. Similarly, use of a celebrity's name in works of fiction would be protected. Finally, imitation of deceased celebrities would not be actionable.\textsuperscript{137} Under these principles, cases such as "Beatlemania,"\textsuperscript{138} Groucho Marx Productions,\textsuperscript{139} Marcinkus,\textsuperscript{140} Miller Brewing,\textsuperscript{141} and Estate of Presley\textsuperscript{142} probably would be decided differently. The obvious result would be greater protection for First Amendment interests.

Rejection of a right of publicity also would yield several peripheral benefits. Litigation costs would be reduced by eliminating difficult First Amendment and preemption issues.\textsuperscript{143} Some cases even may not be brought.\textsuperscript{144} Elimination of the right of publicity also may provide trademark type benefits. If use of a celebrity's likeness is actionable whether or not the knockoff artist disclaims any association with the celebrity, as

\textsuperscript{136} If the right of publicity were rejected, over time it would become increasingly unreasonable to assume celebrity authorization or endorsement. Now, individuals may assume celebrity participation based upon knowledge of the existing law. That is, they may recognize that unauthorized use of the celebrity's identity is actionable and therefore conclude that the celebrity must have authorized use of his or her persona. See Boston Athletic Ass'n v. Sullivan, 867 F.2d 22, 33 (1st Cir. 1989).

\textsuperscript{137} Not only is imitation of a deceased performer unlikely to create confusion, but an estate plaintiff's asserted interests are weaker. The celebrity's estate does not have a personal autonomy interest and cannot claim that the defendant's returns represent the fruits of the plaintiff's labors. Lastly, returns after death probably are not needed to create incentives for an artist while she is living.


\textsuperscript{143} Unfortunately, most actions asserting a right of publicity contain several counts. Many complaints will allege a Lanham Act violation, invasion of privacy, defamation, copyright infringement or misappropriation in addition to the publicity claim. Thus, although some cases may be avoided, cf. Neil L. Shapiro & Karl Olson, Encore Performances: "Do You Want to Sue?" Climbs the Charts, LEGAL TIMES, Jan. 15, 1990, at 27 (Midler's broad right of publicity decision spawned cases that otherwise might not have been brought), realistically, the majority of cases still will be filed. Nevertheless, the cases should raise fewer issues.
is the case under current law, there is an incentive to confuse the public about the knockoff product's origin. By passing off the goods as those of the celebrity's, the appropriator can currently garner greater returns. However, by permitting and protecting "knockoffs" that clearly and conspicuously label themselves as such, the law would indirectly protect consumers from misrepresentation and help foster a greater market for knockoff goods.145

The most efficient and effective way to adopt this article's proposal would be federal legislation. A federal provision preempting state right of publicity laws would create nationwide uniformity. It would provide predictability to national advertisers and publishers and would eliminate difficult conflict of law issues.146 Unfortunately, there does not appear to be any ground swell of support for such legislation. Similarly, it is unlikely that state legislators will repeal statutes or override judicial decisions recognizing the right of publicity. Thus, as a practical matter, the implications of this article's analysis are primarily two-fold. First, policy makers in states that have yet to adopt a right of publicity should refuse to do so. Second, courts in states that have adopted the right should construe its boundaries narrowly. In particular, a postmortem right of publicity should be rejected and First Amendment protection should be defined broadly. The right of publicity has intuitive appeal. But when one looks behind the rhetoric, there is little to support its widespread recognition and much that recommends its rejection.

145. Some knockoff artists would still try to market their goods as "official" goods because "official" goods would demand a higher price. Nevertheless, the premium for "official" goods would be reduced under this article's proposal and hence the incentive for misrepresentation would decrease.
146. See MCCARTHY, supra note 27, at 11-14 to 11-19; Salomon, supra note 33, at 1180-85.