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NOTES

Finding a Better Analogy for the Right of Publicity

INTRODUCTION

The right of publicity is the simple idea that there "is [an] inherent right of every human being to control the commercial use of his or her identity."[1] Although conceptually straightforward, it has been the subject of significant commentary and debate.[2] Neither courts nor scholars have accepted a uniform theoretical foundation for the right of publicity.[3] Consequently, it has developed into a disjointed doctrine.[4] Scholars invariably analogize to more grounded concepts in an attempt to rationalize and set limits on the right.[5] When either justifying the right of publicity's existence or resolving a doctrinal issue, writers have argued that the right of publicity should mirror copyright law,[6] trademark law,[7]

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[1] 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2011).

[2] *See, e.g.*, K.J. Greene, *Intellectual Property Expansion: The Good, the Bad, and the Right of Publicity*, 11 CHAP. L. REV. 521, 521 (2008) ("Is there really anything left to say about this topic, given the proliferation of writing on it in the last ten to fifteen years? A lot has been said about the right of publicity, most of it negative.").

[3] *See* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 238 (1993) ("[T]he affirmative case for publicity rights is at best an uneasy one. Individually and cumulatively, the standard justifications are not nearly as compelling as is commonly supposed.").

[4] *See* Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 227, 228 (1999).

[5] *See, e.g.*, Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1163-64 (2006) ("This approach turns the right of publicity into a new form of IP right, one based explicitly on analogies to and justifications for real property. Thinking about the right of publicity by analogy to IP law may indeed be helpful.").

[6] Randall T.E. Coyne, *Toward a Modified Fair Use Defense in the Right of Publicity Cases*, 29 WM. & MARY L. REV. 781, 782 (1988) (arguing that the right of publicity should be structured in the same manner as the fair use doctrine under

or trademark dilution.[8] Using tools from other academic disciplines, other scholars have argued for or against the right of publicity.[9] Indeed, whenever scholars encounter the right of publicity, their first instinct is to compare it to something else.

While these analogies often provide novel and insightful critiques, the commentaries often ignore the significant differences between whatever perspective they are arguing from and the right of publicity. Indeed, at least one commentator has noted that legal issues created by the right of publicity cannot be resolved by "automatic invocation of a ready-made framework."[10] One analogy that has been overlooked, which parallels the right of publicity and is far more practical than others frequently offered, is private contracting in the commercial and entertainment industries. In many ways, comparing this sort of private contracting is not an analogy at all, but a reference to business custom. Industry collective bargaining agreements protect similar interests as the right of publicity, and operate in many of the same ways.[11] Specifically, both the right of publicity and entertainment collective bargaining agreements developed out of the same social and technological changes.[12] Collective bargaining agreements confer rights—the most important of which is the right to residual compensation[13]—to actors and performers to control and compensate those individuals for use of their personas within the contractual relationship.[14] The right of publicity ensures individuals' control of their personas from the world at large.[15] The one discernible difference between collective bargaining and violations of the right of publicity is that the

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copyright law); Roberta Rosenthal Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 192 (1983) (same).

[7] *See generally* Dogan & Lemley, *supra* note 5.

[8] *See generally* Sarah M. Konsky, *Publicity Dilution: A Proposal for Protecting Publicity Rights*, 21 SANTA CLARA COMPUTER & HIGH TECH L.J. 347 (2004).

[9] *See generally* Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 411-30 (1999) (arguing that the theories of Immanuel Kant justify the right of publicity); Madow, *supra* note 3 (arguing from a Cultural Studies perspective).

[10] Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 62 (1994).

[11] *See infra* Part II.B.

[12] *See infra* Part I.

[13] *See infra* notes 203-09 and accompanying text.

[14] *See infra* notes 198-204 and accompanying text.

[15] 1 MCCARTHY, *supra* note 1, § 1:3.

usage in contracts is with consent of the individual and usage that violates the right of publicity is without consent.[16]

This note suggests a new method to analyze the right of publicity. Voluntary contracts within the entertainment industry provide an analytical tool to assess both the underlying policy justifications for the right of publicity and the doctrinal rules within it. First, in terms of an underlying justification for the right of publicity, reference to contracts and business practice shows that the right of publicity is not a half-baked intellectual property right with little justification. Rather, this analytical framework supports unjust enrichment and natural rights theory justifications for the right of publicity—not labor theory and diminution-in-value justifications, as some scholars have suggested.[17] Second, contractual structure in entertainment contracts, which is an industry standard determined through collective bargaining and protects similar interests as the right of publicity,[18] provides a tool to analyze doctrinal rules within the right of publicity. Comparing entertainment contracts to the right of publicity supports extending the right of publicity to non-celebrities.[19] Additionally, entertainment contracts provide lawmakers and courts with a benchmark to determine whether unauthorized usage of an individual's image or persona is incidental to, and therefore not infringing on, the right of publicity.[20]

Given that unions dominate the commercial and entertainment industries,[21] the most appropriate place to find standard entertainment contracts is coordinated collective bargaining agreements. Since right-of-publicity infringements are most prevalent in advertising due to First Amendment limitations,[22] this note focuses primarily on the Commercial

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[16] Richard Goldstein & Arthur Kessler, Comment, *The Twilight Zone: Meanderings in the Areas of Performers' Rights*, 9 UCLA L. REV. 819, 819-20 (1962).

[17] *See infra* Part III.

[18] *See infra* Part II.

[19] *See infra* Part IV.A.

[20] *See infra* Part IV.B.

[21] *See infra* notes 165-68 and accompanying text.

[22] *See* 2 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 8:16 (2d ed. 2011) ("Today, advertising is labeled as 'commercial speech' which is within the First Amendment, but it enjoys a lower level of constitutional protection than does 'news' or 'entertainment.' In some cases, its level of First Amendment protection seems so attenuated as to be practically nonexistent."); Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1597-99 (1979) (arguing that news and entertainment have higher levels of constitutional protection and that commercial speech "is not regarded as being of constitutional proportions"). However, the right of publicity can prevail against even the strongest First Amendment interests. *See, e.g.*, Zacchini v. Scripps-Howard Broad.

Contracts between the American Federation of Television and Radio Artists (AFTRA), Screen Actors Guild (SAG), Association of National Advertisers (ANA), and American Association of Advertising Agencies (AAAA). However, contractual relations in movies, television, radio programming, and screen writing are referenced when relevant.

Part I compares the historical development of the right of publicity and collective bargaining in the commercial and entertainment industries. It argues that both developed in response to the same social and technological changes. Part II compares the current collective bargaining and right-of-publicity regimes. Part III analyzes the traditional justifications for the right of publicity and suggests, with reference to the contractual relations, that unjust enrichment and natural rights theories best justify the right of publicity. Part IV considers several rules within the right of publicity. First, this part argues that the right of publicity should extend to non-celebrities. By offering evidence that non-celebrities have commercial value when appropriated, this part concludes that the right should extend to all individuals. Finally, examining the incidental use doctrine for the right of publicity, this part suggests that judges and legislators should use analogous collective bargaining provisions as a benchmark in formulating incidental use doctrine.

I. THE COMMON ORIGINS

Many scholars trace the right of publicity back to the right of privacy.[23] However, more nuanced accounts recognize that the right of publicity originated as a response to two phenomena: a cultural shift that placed higher value on celebrity and fame, and the inadequacy of privacy rights in protecting celebrity rights.[24] The increased value of celebrity

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Co., 433 U.S. 562, 575 (1977) (holding that news broadcast infringed on a performer's right of publicity by televising his entire act).

[23] Most of these accounts begin with Samuel D. Warren and Louis Brandeis's famous law review article *The Right of Privacy*, 4 HARV. L. REV. 193, 196 (1890), in which they argued for a new common law right that protected an individual's privacy. *See, e.g.*, Dogan & Lemley, *supra* note 5, at 1167-68; Seth A. Dymond, Comment, *So Many Entertainers, So Little Protection: New York, The Right of Publicity, and the Need for Reciprocity*, 47 N.Y.L. SCH. L. REV. 447, 449 (2003); Alicia M. Hunt, Comment, *Everyone Wants to Be a Star: Extensive Publicity Rights for Noncelebrities Unduly Restrict Commercial Speech*, 95 NW. U. L. REV. 1605, 1612 (2001).

[24] *See, e.g.*, Madow, *supra* note 3, at 167 ("The right of publicity was created not so much from the right of privacy as from frustration with it. Moreover, . . . the whole matter was negotiated by courts and commentators with something less than divine ease and grace.").

occurred in three distinct periods. First, around the late nineteenth and early twentieth century, society's icons changed from those who were known for their accomplishments—such as inventors or political leaders—to actors and athletes.[25] Second, in the first half of the twentieth century, mass media began to treat personality as a valuable commodity as the new celebrities were employed for commercial gain.[26] Third, in the 1950's, with the breakdown in the studio system and the invention of television, actors' images became particularly vulnerable to misappropriation.[27] As will be shown, modern collective bargaining in the entertainment and advertising industries derives from these same cultural shifts, which makes it the closest set of principles to the right of publicity. Thus, it was not the law that shaped the contractual relations here. Instead, both developed independently out of the same cultural shifts.

A. The Invention of Celebrity, the Commodification of Persona, and the End of an Era

1. Cultural and Technological Shifts Lead to Commodification of Persona

The face of fame undeniably changed from the nineteenth to the twentieth century.[28] Starting with the Revolutionary period, society's heroes were civic leaders.[29] At the time, merchants appropriated the founding fathers' images with impunity.[30] According to Professor Michael Madow, the founders "viewed their images as a kind of common republican property."[31] Indeed, given the treatment of public personas as common property, famous people seemingly had no right to prevent commercial appropriation of their image.[32] Following the Revolutionary period, from 1820 to 1860, "poets, essayists, critics, historians, and preachers" wrote the national narrative,

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[25] *Id.* at 160-61; Amy Henderson, *Media and the Rise of Celebrity Culture*, OAH MAG. OF HIST., Spring 1992, at 49, 49 ("By [the] mid-twentieth century, the pedestal belonged not to politicians or generals, but to baseball players and movie stars.").

[26] *See infra* notes 61-63 and accompanying text.

[27] *See infra* notes 79-84 and accompanying text.

[28] Henderson, *supra* note 25, at 49.

[29] *Id.* ("Above all other figures of the Revolutionary generation, George Washington stood as the great embodiment of national virtue, the symbol of the fledgling nation's essential worthiness.").

[30] Madow, *supra* note 3, at 148-49.

[31] *Id.* at 150.

[32] *Id.* at 152.

but personas remained public property.[33] Society knew the famous more by their words or actions than by their images.[34] By contrast, nineteenth-century society placed a low value on actors and performers.[35]

Starting in the late nineteenth century, a new face of fame emerged. As a result of changes in technology and journalism,[36] society's attention focused on captains of industry and inventors.[37] Specifically, the invention of photography and chromolithography revolutionized the reproduction of images.[38] In the 1880s, modern newspapers "were made possible by high-speed presses, the linotype, halftone photo reproduction, and the emergence of news-gathering organizations such as the Associated Press."[39] These advancements lead to drastic changes in journalism, which Professor Madow describes as "genuinely pictorial or illustrated 'personalities' journalism."[40] Magazines and newspapers began to focus on prominent members of society, and often printed their pictures.[41]

It is within this period that Samuel D. Warren and Louis Brandeis wrote their renowned law review article on the right of privacy.[42] In response to the press's increasing interest in the private lives of prominent citizens[43] and the widespread

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[33] Henderson, *supra* note 25, at 49; *see also* Madow, *supra* note 3, at 152 ("According to the social historian Neil Harris, commercial exploitation of famous persons—living and dead, political and theatrical, fictional and real—was common throughout the nineteenth century . . . .").

[34] Madow, *supra* note 3, at 159.

[35] *Id*. at 226 ("A century ago actors, entertainers, and athletes were still socially marginal and politically inconsequential.").

[36] Henderson, *supra* note 25, at 49-50 (explaining effects of "image reproduction and of facilities for mass dispersion of information"). Historian Daniel Boorstin termed the era the "Graphic Revolution." *Id.* at 49; *see also* DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 47 (25th Anniversary ed., Vintage Books 1992) (1962) (describing how advances in technology create a mechanism to manufacture celebrities' "well-knownness").

[37] Henderson, *supra* note 25, at 50 (describing how society came to idolize "hero-inventors" and "captains of industry").

[38] *Id.* at 49.

[39] *Id*. at 49-50; *see also* Madow, *supra* note 3, at 157 ("The closing decades of the nineteenth century also brought several related changes in popular journalism. Daily newspaper circulation jumped from 2.6 million in 1870 to 8.4 million in 1890.").

[40] Madow, *supra* note 3, at 158.

[41] *See* Henderson, *supra* note 25, at 50 ("The new magazines such as 'McClure's' that appeared in the 1890s also played a role in enlarging the popular imagination, thereby redefining ideals of fame, success, and national heroism."); *see also* Madow, *supra* note 3, at 159.

[42] *See* Warren & Brandeis, *supra* note 23.

[43] *Id.* at 196 ("To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.").

use of photographs in media,[44] the authors advocated for a new common law doctrine that guaranteed private citizens the "right to be let alone."[45] This new right of privacy would ostensibly prevent publishers from printing private facts about, or photographs of, ordinary citizens.[46] However, Warren and Brandeis carefully circumscribed an exception to the rule: "The right to privacy does not prohibit any publication of matter which is of public or general interest."[47] This exception often resulted in courts' denying right-to-privacy actions for misappropriating famous people's professional identities, under the theory that famous people waived their right of privacy.[48]

In the late nineteenth and early twentieth century, a new face of fame emerged: the celebrity.[49] Americans first became fixated with the personal lives of "political leaders, businessmen, financiers, scientists and inventors."[50] However, by the 1920s, society's attention shifted to "film actors, entertainers, athletes, and the like, people who excelled in the world of play."[51] According to historian Daniel Boorstin, society no longer idolized men of merit who achieved status through accomplishment; instead, Americans worshiped "celebrities," defined as those "who [are] known for [their] well-knownness."[52] This shift in society's interests resulted from social changes and technological advances.[53] Foremost, dramatic alterations in national demographics occurred because of immigration. From 1890 through the 1920s, approximately 23 million Eastern Europeans and Italians immigrated to the United States, many

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[44] *Id.* at 195 ("Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life . . . .").

[45] *Id.* at 193.

[46] *Id.* at 215 ("The general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn.").

[47] *Id.* at 214.

[48] *See infra* notes 117-21 and accompanying text.

[49] *See* Henderson, *supra* note 25, at 50 (describing the public's increasing fascination with entertainers starting in the 1880's).

[50] Madow, *supra* note 3, at 163 (citing LEO LOWENTHAL, *The Triumph of Mass Idols*, *in* LITERATURE, POPULAR CULTURE, AND SOCIETY 109, 109-14 (1961)); *see also* Henderson, *supra* note 25, at 50.

[51] Madow, *supra* note 3, at 163.

[52] BOORSTIN, *supra* note 36, at 57. According to Boorstin, modern celebrities are celebrated not for their achievements, but instead for constantly being in the public spotlight. *See id.* at 57-58. The creation of new celebrities is possible only through advancements in technology, which Boorstin labels the "Graphic Revolution." *Id.* at 57.

[53] Henderson, *supra* note 25, at 50 (discussing demographic changes and advancements in technology).

of them settling in eastern cities.[54] This demographic change caused a cultural shift, much of which was "rooted in the entertainment industry."[55] Additionally, rapid technological advancement allowed mass media to expose the public to the new celebrity[56] : the radio brought the celebrities' voices into the nation's homes.[57] The motion picture captivated audiences and brought people closer to the actors with close-ups,[58] creating a more personal connection not achievable in live theater.[59] The television completed the creation of the modern celebrity by bringing the picture and sound of actors and performers into the home, which creates "the greatest degree of intimacy and familiarity between performers and their audiences."[60]

The rise of celebrity culture became associated with a larger sociological shift in America from a society of production to a society of consumption.[61] According to some historians, American consumption required a new way to distinguish people within society; "[p]ersonality became a means to distinguish our individual selves from the mass."[62] Advertising practices reflected consumption of personalities.[63] With these significant changes in culture and technology, personality arguably became a commodity.[64]

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[54] *Id.*

[55] *Id*.

[56] Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 27 (1997) ("Our society's view of fame was most influenced at the outset by print, and then was completely revolutionized in the wake of the birth of film and broadcasting.").

[57] *Id.* at 30 ("Radio, while lacking the visual aspect of film, created a new level of intimacy by bringing the performer to the listener 'live.' This intimacy allowed people to feel there was very little separating them from the celebrity."); Henderson, *supra* note 25, at 52 ("Unlike movies, radio was a household presence: in 1934 an average radio cost about $35, and 60% of all American household had at least one set. And, unlike records, radio was live: entertainment and information were there at the touch of the dial.").

[58] Kwall, *supra* note 56, at 29 ("The motion picture, like the photograph, delivered a new level of realism, only it was superior to photographs in that it transcended the provision of stars' images and allowed audiences to observe stars' behaviors and mannerisms.").

[59] Madow, *supra* note 3, at 162 ("Moviegoers, in contrast [to those who attended stage performances], got to see their favorites regularly—and, most importantly, they got to see them in close-ups. This fostered an illusion of intimacy and generated widespread curiosity about the stars' private lives and doings.").

[60] Kwall, *supra* note 56, at 31.

[61] Henderson, *supra* note 25, at 50-51.

[62] *Id.* at 51.

[63] For example, Professor Madow points to two advertising practices using celebrities: product placements in movies and celebrity endorsements. Madow, *supra* note 3, at 164-65.

[64] *Id.* at 166.

Mass media, and in particular early Hollywood, played a substantial role in the commodification of personality. For instance, mass media notoriously "packaged" celebrities—turning nobodies into the famous through a careful media strategy to maximize commercial value.[65] Prior to the 1950s, despite society's treatment of personality as a commodity for nearly half century, property law provided no rights to protect this new value.[66]

2. Media Exploits and Expands the Commodity of Persona

An explanation of the commodification of personality is incomplete without an analysis of the media structure itself. In particular, the motion picture industry, with its prominence before radio and television, played a substantial role in exploiting personas for commercial gain. Between 1912 and 1915, movie producers moved to California and opened up the first studios.[67] Studios in the first half of the twentieth century approached movie making like mass production.[68] In a process known as vertical integration,[69] studios dominated every aspect of the industry.[70] They owned the film lots, the means to produce feature length movies, and the theaters where audiences watched the final products.[71] Most importantly, the studios controlled the actors of the era. Prior to 1948, studios hired actors to work exclusively for them[72] and controlled nearly every aspect of actors' careers.[73] One writer summarized, "Imagine working under a seven-year contract that you cannot break and more than likely will be forced to renew, for a producer who can tell you who you can marry, what your

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[65] Kwall, *supra* note 56, at 32-34.

[66] *See, e.g.*, *infra* notes 116-21 and accompanying text.

[67] *The Emergence of the Hollywood Studio System*, FILMREFERENCE.COM, http://www.filmreference.com/encyclopedia/Romantic-Comedy-Yugoslavia/Studio-System-THE-EMERGENCE-OF-THE-HOLLYWOODSTUDIO-SYSTEM.html (last visited Jan. 10, 2012).

[68] *Id*.

[69] *See id.*; *see also* THOMAS SCHATZ, THE GENIUS OF THE SYSTEM: HOLLYWOOD FILMMAKING IN THE STUDIO ERA 39 (First Univ. of Minn. Press 2010) (1989) (describing how studios coordinated movie production with theatre operations).

[70] *See The Emergence of the Hollywood Studio System*, *supra* note 67.

[71] *Id.* ("Key to the studio system was the Big Eight's domination of all areas of the industry.").

[72] Ken Orsatti, *How SAG Was Founded: The Actor's Road to Empowerment*, SCREEN ACTORS GUILD (1995), http://www.sag.org/node/22.

[73] *See* SCHATZ, *supra* note 69, at 42 (explaining that actors had "little control over their individual careers or their pictures").

morals must be, even what political opinions to hold."[74] Indeed, movie studios exploited the personas of their actors by controlling the licensing of stars' images to advertisers.[75]

The studio system thrived on monopolistic practices.[76] Studios refused to poach each other's actors.[77] Collusive norms within the movie industry and the massive amount of control that the studios exacted over their actors allowed only rare commercial misappropriation of actors.[78]

However, in 1948, the Supreme Court handed down a landmark decision in *United States v. Paramount Pictures, Inc.*, which shocked the equilibrium within mass media. The Court held that the "Big Five" movie studios' ownership of and dealings with theaters violated antitrust law.[79] The courts ordered divestment from ownership of theaters[80] and effectively ended the studio system.[81] The studio RKO was the first to

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[74] Orsatti, *supra* note 72.

[75] One notable example of the studios contracting their stars out for endorsements occurred in the tobacco industry. Given that the tobacco industry had a large national advertising budget, the studios placed their stars in "tie-ins," where stars in tobacco ads sold both tobacco and new movies. K.L. Lum et al., *Signed, Sealed and Delivered: "Big Tobacco" in Hollywood, 1927-1951*, 17 TOBACCO CONTROL 313, 314 (2008). The studios "maximize[d] marketing opportunities" through "[c]ross-promotion" advertisements that showcased tobacco products and big budget films together. *Id.* at 321. While the studios controlled when and where advertisers could use the stars' personas, these "campaigns also paid stars substantial sums while reinforcing the stars' notoriety, boosting their value to the studios and other national advertisers." *Id.*

[76] *See* SCHATZ, *supra* note 69, at 9 ("The Hollywood studio system was, as economists and the federal courts well understood, a 'mature-oligopoly'—a group of companies cooperating to control a certain market."). For example, the studios engaged in block-booking with theaters, which is "the practice of licensing . . . one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period." United States v. Paramount Pictures, Inc., 334 U.S. 131, 156 (1948). In order to have the rights to show quality movies, the studios forced the theaters to buy lesser quality movies. SCHATZ, *supra* note 69, at 39 (describing how studios used block booking and blind bidding to forced theatre owners to run second rate movies in order to access "A-class features and star vehicles").

[77] Orsatti, *supra* note 72 ("As there was a tacit agreement among studios not to raid each other for a star[']s services at their contracts end, actors were not able to choose their roles which is crucial in building a career.").

[78] *Id.*; *see* K.L. Lum et al., *supra* note 75, at 318 ("[S]tudio talent contracts gave studios complete control over the use of their celebrity 'brand names'. Major studios negotiated the content of testimonials, insisted that the timing of adverts and radio appearances be coordinated with movie releases, and denied permission for deals that did not serve their interest.").

[79] *Paramount*, 334 U.S. at 141-61.

[80] *Id.* at 175 (remanding the case to district court to determine whether divesture was necessary); United States v. Paramount, 85 F. Supp. 881, 899-900 (S.D.N.Y. 1949) (ordering studios' divestment from theaters).

[81] *See The Independent Producers and the Paramount Case, 1938-1949*, SOC'Y OF INDEP. MOTION PICTURE PRODUCERS, http://www.cobbles.com/simpp_archive/paramountcase_6supreme1948.htm (last visited Jan. 10, 2012).

break the vertical integration by divesting from theater ownership, and the others followed suit soon afterwards.[82] As part of the movie industry's restructuring, studios no longer hired actors in long-term contracts; instead, the studios hired actors per film.[83] The actors became free agents.[84] However ironically, actors no longer received the studios' protection, which had long defended actors' personas through collusive practices.[85] As a result, entertainers needed a new form of protection to stop misappropriation of their most valuable assets: their identities.

The invention of television brought additional instability. Actors feared that television stations would replay movies with impunity, resulting in fewer movie productions, less employment of screen actors, and diminution in value of personalities.[86] One commentator explains, "By repeating episodes of favorite television programs and by airing old movies, television producers could squeeze additional revenue out of entertainment products with very little extra expenditure."[87]

Commodification of personality also occurred within professional athletics.[88] Similar to the control that the studio system exacted over actors, the notion of amateurism regulated nineteenth-century athletes' abilities to commodify their public persona.[89] However, starting in the late nineteenth and early twentieth century, professional athletics allowed athletes to be

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[82] *See id*.

[83] Emily C. Chi, *Star Quality and Job Security: The Role of the Performers' Unions in Controlling Access to the Acting Profession*, 18 CARDOZO ARTS & ENT. L.J. 1, 31-33 (2000).

[84] *See* SCHATZ, *supra* note 69, at 482 ("For top industry talent . . . declining studio control meant unprecedented freedom and opportunity.").

[85] *See supra* note 75 and accompanying text.

[86] *See* Chi, *supra* note 83, at 35-36. Television, initially centered in New York, brought significant unemployment to the movie actors who were located in California. *Id.* at 35.

[87] *Id.*

[88] *See* Kristi Lee Covington Baker, A History of Sports Marketing and the Media 1 (Dec. 6, 2007) (unpublished M.S. thesis, Univ. of Kan.) (on file with author).

[89] *See* Henry Yu, *Tiger Woods at the Center of History: Looking Back at the Twentieth Century Through the Lenses of Race, Sports, and Mass Consumption*, *in* SPORTS MATTERS: RACE, RECREATION, AND CULTURE, 320, 322 (John Bloom & Michael Nevin Willard eds., 2002) ("[A]mateur sports almost exclusively involved men of privilege whose wealth meant they did not have to exchange labor for money, and therefore their sporting activities were practices exempt from monetary transactions."). For example, the Olympic Committee stripped Jim Thorpe of his gold medals in track after it became apparent that he had been compensated for playing in minor league baseball in the past. Covington Baker, *supra* note 88, at 13.

compensated for their performance.[90] Starting in the 1920s, radio broadcasting within sports, particularly within baseball, communicated sports contests throughout the nation, as athletes became icons.[91] Unlike actors under the studio system, professional athletes largely had control over licensing their personas.[92] For example, Babe Ruth made approximately half his salary in endorsements during the 1920s and had a substantial effect on society given "the number of personal and radio appearances . . . as well as photo images and newspaper articles about him."[93] Given professional athletes' personal control over the public's perceptions of them, as opposed to actors who had ceded any rights to studios that were engaged in collusive activities, there was some demand for legal protection against misappropriating their personas. This can be seen in right of privacy cases, like *Hanna v. Hillerich & Bradsby Co.*[94] and *O'Brien v. Pabst Sales Co.*,[95] in which athletes argued invasion of privacy when their images had been misappropriated.[96] Nevertheless, like for actors, the advent of the television brought about significant increase in athletes' exposure to the American public, and with it an increased probability that their images would be misappropriated.[97] Thus, although the need to protect athletes' personas was addressed with the advent of professional sports, the demand for greater legal protection only increased with the invention of television. Athletes' increased demand coincided with actors' needs, as seen from the end of the studio era.

In the late nineteenth and early twentieth centuries, the nature of fame changed, which resulted in commodifying of identity. No rights existed to protect these new commodities, but the amount of control under the studio system made these rights moot. However, the remarkable changes to movie studio structuring and the advent of television quickly required new

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[90] *See* Covington Baker, *supra* note 88, at 6-7 (describing the compensation for professional football teams in the 1890's).

[91] *Id.* at 7-11.

[92] *See, e.g.*, *id.* at 10-11 (describing how Red Grange, a professional football player from the 1920s and 1930s, endorsed a number of products, including ginger ale, candy bars, and meatloaf).

[93] *Id.* at 11.

[94] 78 F.2d 763 (5th Cir. 1935).

[95] 124 F.2d 167 (5th Cir. 1942).

[96] *See infra* notes 117-21 and accompanying text.

[97] Covington Baker, *supra* note 88, at 14-18. For example, *Baseball Weekly* ranked television "as the most important change in the game of baseball during the 20th century, second only to Jackie Robinson's breaking the color barrier." *Id*. at 16.

rights. Both the right of publicity and patterns of collective bargaining in entertainment derive from a need for more protection of personalities in an age where image was valuable but no longer institutionally controlled.

B. Right of Publicity as a Response

The right of publicity can be seen as a direct legal response to the commodification of personality and technological change. Doctrinally, the right of publicity has its genesis in the right of privacy.[98] Warren and Brandeis advocated for a new common law right of privacy, which protected the "right to be let alone."[99] William Prosser later famously divided privacy into four distinct torts that are generally recognized,[100] but the only category that is relevant for the purposes of this note is the one that Prosser called "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness."[101] The right of privacy for misappropriation vindicates plaintiffs for mental distress, rather than commercial loss, resulting from unwillingly being placed in the public eye.[102]

Roberson v. Rochester Folding Box Co.[103] was the first case to test the right of privacy. The Franklin Mills Company, one of the defendants, placed a picture of Abigail Roberson, the plaintiff, on twenty-five thousand packages of flour without her consent.[104] Roberson claimed that she suffered mental distress[105] and that the advertisement violated her right to privacy.[106] The court refused to recognize a common law right of privacy, but

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[98] *See, e.g.*, Dymond, *supra* note 23, at 449; Dogan & Lemley, *supra* note 5, at 1167-68.

[99] Warren & Brandeis, *supra* note 23, at 193.

[100] William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) ("The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, 'to be let alone.'"); 1 MCCARTHY, *supra* note 1, § 1:19 ("The courts have almost uniformly adopted Prosser's four-part division as the 'gospel' of privacy law. Anyone who refuses to talk in Prosser's language will meet blank stares of incomprehension.").

[101] Prosser, *supra* note 100, at 389.

[102] 1 MCCARTHY, *supra* note 1, § 1:7.

[103] 64 N.E. 442 (N.Y. 1902).

[104] *Id.* at 442.

[105] *Id.* ("[H]er good name has been attacked, causing her great distress and suffering, both in body and mind; that she was made sick, and suffered a severe nervous shock, was confined to her bed, and compelled to employ a physician, because of these facts . . . .").

[106] *Id.* at 443.

suggested that the legislature could enact a statute creating such a right.[107] In response to *Roberson*, the New York State legislature passed section 50 of the N.Y. Civil Rights Law,[108] which proscribes using "name, portrait or picture of any living person without having first obtained the written consent" for advertising or trade purposes.[109]

The Georgia Supreme Court broke with New York's rejection of the common law right of privacy in *Pavesich v. New England Life Ins. Co*.[110] Under facts similar to *Roberson*,[111] the court concluded that there was a common law right of privacy[112] and that "[t]he novelty of the complaint is no objection, when an injury cognizable by law is shown to have been inflicted on the plaintiff."[113] *Pavesich* adopts several influential rules of law from Warren and Brandeis's article that affected the development of publicity rights. First, the court recognized that public figures waive their rights of privacy to the extent that the information disclosed is relevant to the public interest.[114] The court recited the example that a political candidate loses a certain degree of privacy in his or her private life because private information "may throw light upon his qualifications for the office, or the advisability of imposing upon him the public trust which the office carries."[115] Second, the court declared that the right of privacy is a personal right[116] that is not assignable.

With increasing acceptance of a privacy right for misappropriation, several plaintiffs unsuccessfully attempted to use privacy as a legal protection against misappropriating celebrities' images. In essence, these claims sought damages for harm done to a professional persona rather than any actual mental distress suffered by the plaintiff. First, in *Hanna*

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[107] *Id.* ("The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent.").

[108] 1 MCCARTHY, *supra* note 1, § 1:16.

[109] N.Y. CIV. RIGHTS LAW § 51 (McKinney 2011).

[110] 50 S.E. 68 (Ga. 1905).

[111] *See id.* at 68-69 (suing for defendant's use of picture in a newspaper advertisement without the plaintiff's consent).

[112] *Id.* at 78.

[113] *Id.* at 69.

[114] *Id.* at 72 ("The right of privacy, however, like every other right that rests in the individual, may be waived by him, or by any one authorized by him, or by any one whom the law empowers to act in his behalf, provided the effect of his waiver will not be such as to bring before the public those matters of a purely private nature which express law or public policy demands shall be kept private.").

[115] *Id.*

[116] *Id.* at 73 ("It therefore follows from what has been said that a violation of the right of privacy is a direct invasion of a legal right of the individual.").

Manufacturing Co. v. Hillerich & Bradsby Co., a bat manufacturer that had the exclusive rights to use the names and autographs of famous baseball players sued a competing bat manufacturer for using the same names on its bats.[117] The court held, in part, that the plaintiffs had no right-to-privacy claim because the baseball players' names were not property capable of assignment;[118] therefore, the plaintiff gained no property right from the exclusive contract and had no cause of action against the infringers.[119] Second, in *O'Brien v. Pabst Sales Co.*, a famous college football player sued a beer manufacturer for placing his picture in their promotional calendar without consent.[120] The court held that the right of privacy did not apply because the plaintiff waived his privacy rights regarding his football career as a public figure.[121] *Hanna* and *O'Brien*, respectively, illustrate two major deficiencies in the right of privacy when it comes to protecting publicity rights: (1) public waiver of privacy, as seen in *O'Brien*, and (2) the nonassignability of personality traits, as seen in *Hanna*.

Despite several attempts to transform privacy into a legal protection for celebrities' persona, the legal system recognized a right of publicity only after the immense changes in technology, such as the advent of television and the end of the studio system within the entertain industry.[122] In *Haelan Laboratories v. Topps Chewing Gum, Inc.*,[123] a case with eerily similar facts to *Hanna*,[124] Judge Frank of the Second Circuit was the first to recognize a right to protect commercial value of personality.[125] Judge Frank was well aware of the commodification of persona and the significant structural changes within the entertainment industry, as he wrote:

> 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

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[117] Hanna Mfg. Co. v. Hillerich & Bradsby Co., 78 F.2d 763, 764 (5th Cir. 1935).

[118] *Id.* at 766.

[119] *Id*. at 766-67.

[120] O'Brien v. Pabst Sales Co., 124 F.2d 167, 168 (5th Cir. 1942).

[121] *Id.* at 170.

[122] *See supra* Part I.A.

[123] 202 F.2d 866 (2d Cir. 1953).

[124] Like the bat manufactures in *Hanna*, in *Haelan*, a gum manufacturer sued a rival gum manufacturer for inducing a baseball player, who had an exclusive contract with the plaintiff, to allow the defendant to use the player's image in advertisements. *Id.* at 867.

[125] *Id.* at 868.

> money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.[126]

Academics of the era defended the newly created right of publicity and provided a more elaborate justification. In his law review article *The Right of Publicity*,[127] Melville B. Nimmer argued that the right of privacy "is not adequate to meet the demands of the second half of the twentieth century, particularly with respect to the *advertising, motion picture, television, and radio industries*."[128] His specific concern for the entertainment industry shows that the right of publicity was supposed to address not only the commodification of persona, but also the significant technological and structural changes in the entertainment industry.

C. Collective Bargaining Agreements as a Response

The right of publicity was not the exclusive response to the commodification of personality and rapidly improving technology. Entertainment collective bargaining agreements also sought to protect actors from misappropriation of their commercial images. Unions in the entertainment industry existed long before the 1950s.[129] Under the studio system, which provided relatively stable employment,[130] workers formed unions to guarantee standardized wages[131] and working conditions.[132] The unions' jurisdiction divided along profession. Each position within the industry had its own craft union.[133] For example, the

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[126] *Id.*

[127] Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

[128] *Id.* (emphasis added).

[129] For example, Actors' Equity Association, which represents theater actors, started in the early twentieth century, and was recognized by the American Federation of Labor in 1919. *Historical Overview*, ACTORS' EQUITY ASS'N, http://www.actorsequity.org/aboutequity/historicaloverview.asp (last visited Jan. 10, 2010).

[130] Alan Paul & Archie Kleingartner, *Flexible Production and the Transformation of Industrial Relations in the Motion Picture and Television Industry*, 47 INDUS. & LAB. REL. REV. 663, 666 (1994).

[131] *See* DAVID F. PRINDLE, THE POLITICS OF GLAMOUR: IDEOLOGY AND DEMOCRACY IN THE SCREEN ACTORS GUILD 16-25 (1988) (describing how SAG was formed following a significant pay cut in 1933).

[132] *See* Orsatti, *supra* note 72 (suggesting that SAG gained better working conditions for actors under the studio system, but "the studios still basically 'owned' their stars").

[133] *See* Paul & Kleingartner, *supra* note 130, at 666 ("DGA represents all directors, whether in film or videotape production; WGA has jurisdiction over writers, including most news writers; SAG and the American Federation of Television and Radio Artists (AFTRA) represent all performers except instrumental musicians, who are represented by the American Federation of Musicians . . . .").

American Federation of Radio Artists, the precursor to AFTRA, started as a representative of radio performers,[134] and SAG represented actors in movies and later television.[135]

After the collapse of the studio system and the advent of new technology, actors faced less demand for their services and massive unemployment.[136] Two technological advances at that time were particularly important. First, starting in the early 1940s, radio gained the ability to record and rerun radio shows.[137] Second, starting in the 1950s, television began rerunning programming and movies on television.[138] Both of these practices reduced the number of productions while continuing to expose the performers to the public at large, thereby diminishing the value of the actors' personas.

To address these issues, unions compromised. Following the demise of the studio system, performers' unions no longer fought for job security.[139] Instead, the unions focused on increasing the wages and working conditions of their rank-and-file members when they actually had work.[140] To do so, the unions negotiated for a three-tier compensation system,[141]

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[134] *History*, AM. FED. TELEVISION & RADIO ARTISTS (July 13, 2009), http://www.aftra.org/history.htm.

[135] PRINDLE, *supra* note 131, at 3 ("The guild is a labor union composed of actors who have performed in feature motion pictures, television series, television commercials, and industrial and educational films.").

[136] Chi, *supra* note 83, at 33 ("Consequently, many actors were set adrift from the studios and, faced for the first time with uncertain professional futures . . . .").

[137] Matt Jackson, *Residuals*, MUSEUM BROAD. COMM., http://www.museum.tv/eotvsection.php?entrycode=residuals (last visited Jan. 10, 2012). Residuals payable to unions date as far back as the 1920s for phonograph recording. Paul & Kleingartner, *supra* note 130, at 669. However, scholars generally recognize the 1941 American Federation of Radio Artists' (AFRA) Transcription Code as the first instance of performers receiving residual payments for reuse of radio programming. *Id.*; *see also* Jackson, *supra*.

[138] Paul & Kleingartner, *supra* note 130, at 669; *see also* PRINDLE, *supra* note 131, at 82 ("As the 1950s advanced, it became clear to the networks that filmed television was superior to live. For one thing, film could be shown at the same time in each time zone. For another, it could record a performance on one day and be broadcast on another. Moreover, film could be saved and reshown, thus generating revenue many times, whereas once a live performance was over it and its earnings were gone forever.").

[139] *See* Chi, *supra* note 83, at 34 (describing how the union became a mechanism of "monitoring and restricting access to acting work"); *see also* PRINDLE, *supra* note 131, at 11 ("One of the major functions of a union—providing its members with job security—is therefore forbidden.").

[140] *See* Chi, *supra* note 83, at 27 ("Together, the above-the-line entertainment unions, including but not limited to SAG and AEA, estimate that ninety to ninety-five percent of their members are unemployed on any given day. . . . Although the talent unions have *secured higher wages and more humane working conditions for their members*, a union card cannot guarantee employment." (emphasis added)); *see also Mission Statement*, SCREEN ACTORS GUILD, http://www.sag.org/about-us/mission-statement (last visited Feb. 16, 2012) ("The Guild exists to enhance actors' working conditions, compensation and benefits and to be a powerful, unified voice on behalf of artists' rights.").

[141] Paul & Kleingartner, *supra* note 130, at 667.

which still exists today.[142] First, all actors receive minimum wage rates.[143] The minimum wage rates compensate actors for time spent working on a project,[144] and compensate directors and writers for products delivered.[145] Second, personal service-contracts provisions within the collective bargaining agreements allow individuals to negotiate outside of the collective bargaining compensation scale, provided that the wages are higher than the contract scale.[146] These allow well-known or high-quality actors, writers, and directors to demand more for their services.[147] Third, and most importantly, actors receive residual payments. Residual payments are supplemental payments to actors for reuse of "entertainment product in media other than the one for which it was originally created, or for its reuse within the same medium subsequent to the initial exhibition."[148]

Residual payments first appeared in 1941 when radio introduced recording technology.[149] Prior to this advancement, radio performers presented their program multiple times per day—at least once on the East Coast and once on the West Coast.[150] Since the performers were paid per performance, had the American Federation of Artists not secured residual payments, compensation would have been cut in half without supplemental payment for the programming's reuse.[151] Residuals emerged next in television. SAG secured residual payments for its members for rerunning television programs in 1952,[152] for repeated use of television commercials in 1953, and for movies reformatted and aired on television in 1960.[153] Residuals

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[142] *See infra* Part II.B.2 (describing how the same three-tier compensation system still operates under the current Commercials Contract).

[143] Paul & Kleingartner, *supra* note 130, at 667 (detailing how entertainment contracts "contain[] a minimum compensation schedule").

[144] *Id.* (describing how entertainment contracts calculate actors', singers', and stunt players' minimum rates based on either a day rate, week rate, or a rate for a specified term).

[145] *Id*.

[146] *Id*. at 668.

[147] *Id*. at 669 ("Personal service contracts provide for the exchange of scarce, differentiable, and perishable talent.").

[148] *Id*.; *see also* PRINDLE, *supra* note 131, at 82 (describing how residual payments became a necessity to actors' economic survival after movies could be replayed on television, as "[a]ctors discovered that they were competing with their former selves for jobs, and losing").

[149] Jackson, *supra* note 137.

[150] *Id.*

[151] *Id.*

[152] *Id.*; Orsatti, *supra* note 72.

[153] Orsatti, *supra* note 72.

expanded to nearly all collective bargaining agreements in the entertainment industry, including writers and directors.[154]

Not all performers that work under entertainment contracts receive residual payments. Under the standard union contracts, only those whose professional personas are *exploited* by reuse are paid residuals. In film, television, and television commercials, only principal actors receive residual payments; extras are entitled only to minimum payments.[155] Even writers represented by the Writers' Guild of America (WGA) receive residual payments for screenplays only when they are given screen credit.[156] Given this set of circumstances, the residual payments represent more than a deferral in compensation to offset long periods of unemployment; to fulfill that justification, they would have to extend to everyone in the industry. Instead, residuals compensate workers for dilution of their professional-persona value by exploiting reuse of contractually bound material. The emergence of residual payments, like the right of publicity, was a reaction to the commodification of identity and advancing technology, but within the contractual relationship rather than the world at large.

II. HOW THE RIGHT OF PUBLICITY AND COLLECTIVE BARGAINING PROTECT AGAINST MISUSE OF PERSONA

Thus far, this note has established that the right of publicity and patterns in collective bargaining in the entertainment industry arose from the same historical context. In the entertainment industry, the right of publicity and collective bargaining agreements also both operate to protect actors against misappropriation of their personas. This section will draw upon the AFTRA/SAG Television Commercials Contracts with the ANA/AAA (Commercials Contracts) to illustrate how collective bargaining agreements afford these protections.

A. Scope of the Rights

Both the right of publicity and the Commercials Contracts are limited in scope. However, a brief analysis of

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[154] *See* Paul & Kleingartner, *supra* note 130, at 671 (describing how residuals are calculated under various collective bargaining contracts).

[155] Robert W. Gilbert, *"Residual Rights" Established by Collective Bargaining in Television and Radio*, 23 LAW & CONTEMP. PROBS. 102, 107 (1958).

[156] *Id.* at 108.

where and upon whom they apply will show that both are disproportionately influential on the media industry.

1. The Scope of the Right of Publicity

The right of publicity is a state law doctrine recognized in approximately nineteen states by statute.[157] Twenty-one states recognize a common law right of publicity,[158] eight of which also have a statute.[159] Therefore, thirty-one states have explicitly recognized the right of publicity. The protections afforded under the right of publicity vary from state to state. While the number of states that recognize the right of publicity is limited, the right's effect on media is enormous because the largest and most media-concentrated states accept it. In particular, one writer points to California, New York, and Tennessee as the states "whose economies are impacted the most by the entertainment industry."[160]

2. Scope of the Commercials Contracts

The Commercials Contracts are collective bargaining agreements between actors' unions and the advertising industry. The Joint Policy Committee for Broadcast Talent Relations (JPC) represents advertising management in negotiations.[161] JPC is a multi-employer bargaining unit

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[157] *See* 1 MCCARTHY, *supra* note 1, § 6:8 (identifying California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin as recognizing right of publicity by statute); *see also* Hunt, *supra* note 23, at 1607 n.20 (listing eighteen states, but excluding Pennsylvania which passed its statute after the publication of Hunt's article).

[158] *See* 1 MCCARTHY, *supra* note 1, § 6:3 (identifying Alabama, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, South Carolina, Texas, Utah, West Virginia, and Wisconsin as recognizing right of publicity through common law).

[159] *See id.* § 6:3 nn.7-8 (identifying California, Florida, Illinois, Kentucky, Ohio, Pennsylvania, Texas, and Wisconsin as having both a common law and statutory right).

[160] Dymond, *supra* note 23, at 448.

[161] *See* Memorandum from Douglas J. Wood, ANA-AAAA Joint Policy Comm. on Broad. Talent Union Relations, Unions and the Prod. of Commercials for Traditional and Non-Traditional Media 1 (Jan. 28, 2009), *available at* http://www.adlawbyrequest.com/uploads/file/Why%20be%20an%20Authorizer.pdf ("The JPC is the multi-employer bargaining unit that represents the interests of the advertising industry in negotiations with the various unions that represent performers and musicians who perform commercials . . . . The JPC is comprised of thirty members—fifteen appointed by the Association of National Advertisers and fifteen appointed by the American Association of Advertising Agencies. The ANA also appoints the JPC Lead Negotiator and legal counsel.").

comprising the Association of National Advertisers (ANA)[162] and the American Association of Advertising Agencies (AAAA).[163] JPC negotiates the collective bargaining agreements jointly with the Screen Actors Guild (SAG) and the American Federation of Television and Radio Artists (AFTRA).[164]

The Commercials Contracts deal exclusively with advertisements on television, Internet, radio, and new media, such as video advertisements on cellular phones.[165] The contracts do not bind non-union employers, and do not cover photography for print advertising.[166] Like the right of publicity, the Commercials Contracts are limited in scope but influential on the advertising industry. Advertisers produce 90 percent of television commercials under the Commercials Contracts,[167] which totals approximately $1 billion in compensation to unionized performers.[168]

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[162] The ANA is a trade organization for companies that advertise. It represents more than four hundred companies and ten thousand brands, which spend more than $250 billion on advertising and marketing annually. *About the ANA: Leading the Marketing Community*, ASS'N NAT'L ADVERTISERS, http://www.ana.net/about (last visited Jan. 11, 2012).

[163] AAAA is a national trade organization for advertising agencies. Its members produce approximately 80 percent of all advertisements within the United States annually. *Join Us*, AM. ASS'N ADVERTISING AGENCIES, http://www.aaaa.org/about/Pages/default.aspx (last visited Jan. 11, 2012).

[164] *See* Wood, *supra* 161, at 1.

[165] *See* 2003 Commercials Contract, Screen Actors Guild and the ANA-AAAA Joint Policy Committee on Broadcast Talent Relations §§ 4-5, as amended by Screen Actors Guild 2006-2008 Extension to the Commercials Contract Memorandum of Agreement §§ 2, 6, as amended by Screen Actors Guild 2009 Commercials Memorandum of Agreement §§ 9-10 [hereinafter SAG Commercials Contract]; 2003 AFTRA Television Recorded Commercials Contract, American Federation of Television and Radio Artists, Association of National Advertisers, and American Association of Advertising Agencies Joint Policy Committee on Broadcast Talent Relations § I(1)(B), as amended by American Federation of Television and Radio Artists 2006-2008 Extension to the Television Recorded Commercials Contract Memorandum of Agreement § 5, as amended by American Federation of Television and Radio Artists 2009 Television Recorded Commercials Contract Memorandum of Agreement §§ 9-10 [hereinafter AFTRA Commercials Contract]. All documents related to both SAG's and AFTRA's Commercials Contracts are available at http://www.adlawbyrequest.com/articles/unions/.

[166] *See* SAG Commercials Contract, *supra* note 165, § 5 (limiting scope of contract to commercials); *id.* § 4 (defining "commercials" as "short advertising or commercial messages made as *motion pictures*, 3 minutes or less in length, and intended for showing over television" (emphasis added)); AFTRA Commercials Contract, *supra* note 165, §§ 1(B), 4(A) (same).

[167] Jack Neff, *Industry Explores New Compensation Model for $1 Billion in Commercial Talent Fees*, ADVERTISING AGE (May 3, 2010), http://adage.com/article/news/industry-explores-compensation-model-talent-fees/143638/.

[168] Wood, *supra* note 161, at 1.

B. The Nature of the Right

Both the right of publicity and the Commercials Contracts create a framework for individuals to control their personas within commercials. The significant difference between the two is that the Commercials Contracts protect against misuse by the other party to the agreement, whereas the right of publicity protects against the world at large.

1. The Nature of the Right of Publicity

The right of publicity is "the inherent right of every human being to control the commercial use of his or her identity."[169] It protects the plaintiff from unauthorized commercial use that causes damage to the commercial value of his or her persona.[170] The right of publicity treats personality as property that the owner can exclude others from using for commercial gain.[171] As a result, unlike the right of privacy, publicity rights are fully assignable.[172] Furthermore, many states allow a performer's right of publicity to pass to that performer's heirs.[173] Remedies for an infringement of the right of publicity include an injunction against future use, statutory damages, compensatory damages, disgorgement of profits, punitive damages, and attorney's fees.[174] Therefore, the right of

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[169] 1 MCCARTHY, *supra* note 1, § 1:3.

[170] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) ("[T]he State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual . . . ."); *see also* 1 MCCARTHY, *supra* note 1, § 3:2 ("Likely damage to commercial value is a hallmark of the right of publicity, distinguishing it from the various types of 'privacy' rights. However, this is not to state that evidence of some quantifiable commercial damage is an essential element of proof of liability for infringement of the right of publicity." (footnote omitted)).

[171] *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) ("One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability . . . ."); *id.* at cmt. g ("The interest in the commercial value of a person's identity is in the nature of a property right . . . ."); *see also* 2 MCCARTHY, *supra* note 22, § 10:7.

[172] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, cmt. g ("[T]he commercial value of a person's identity is . . . freely assignable to others.").

[173] Some states allow estates to enforce the right of publicity for a limited number of years after death. *See* CAL. CIV. CODE § 3344.1(g) (West Supp. 2012) (granting the estate the right of publicity for up to seventy years after death). Other states grant the estate a right of publicity for a minimum number of years followed by a right in perpetuity, which permits enforcement for as long as the estate continues to exploit the persona commercially. *See* TENN. CODE ANN. § 47-25-1104 (2001) (granting the estate a minimum right for ten years, and a right in perpetuity that extinguishes after two years of disuse).

[174] *See* 2 MCCARTHY, *supra* note 22, §§ 11:21-11:38.

publicity is a guarantee of control over the commercial use of one's persona against the world at large.

Since the right of publicity derives from state law, the amount of protection varies from state to state.[175] Nearly every state that recognizes the right protects against at least the unauthorized use of name and likeness.[176] For example, New York, which recognizes only a statutory right and not a common law right,[177] protects against the unauthorized use of "name, portrait, picture or voice."[178] Other states provide for a wider array of uses that may damage the commercial value of persona.[179] For instance, California's statutory right protects against "knowingly us[ing] another's name, voice, signature, photograph, and likeness."[180] California's common law protects further against additional types of use, including mannerism, characterizations, and performing style.[181]

Additionally, the right of publicity is limited by the context in which the use takes place. States place particular constraints on the context of the usage within their statutes or common law. These constraints exist to comply with First Amendment free speech, press, and expression, as well as to prevent the doctrine from stifling cultural exchange in society.[182] For example, in New York, in order for unauthorized use to be an infringement, it has to be either for advertising or trade purposes.[183] Courts broadly interpret advertising purposes to include usage in solicitation to buy products or services.[184] Trade purposes are uses that draw attention to the defendant's business, but do not directly solicit.[185] Furthermore, New York

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[175] *See* 1 MCCARTHY, *supra* note 1, § 6:8.

[176] *See, e.g.*, *id.* (listing that every statutorily recognized right of publicity protects against the unauthorized use of name and likeness).

[177] Stephano v. News Grp. Publ'ns, Inc., 474 N.E.2d. 580, 584 (N.Y. 1985) (ruling that the right of privacy is statutory, and there is no common law cause of action in New York).

[178] Dymond, *supra* 23, at 447.

[179] *See, e.g.*, White v. Samsung Elecs. Am., Inc. 971 F.2d 1395, 1399 (9th Cir. 1991) (holding under California law that a robot in a commercial that was made to resemble Vanna White infringed on her common law right of publicity); Motschenbacher v. Reynolds Tobacco Co., 498 F.2d 821, 825-27 (9th Cir. 1974) (holding under California law that using a car that looked similar to the plaintiff's racing car infringed on his right of publicity).

[180] CAL. CIV. CODE § 3344(a) (West 1997).

[181] Dymond, *supra* note 23, at 464-65.

[182] *See* Hunt, *supra* note 23, at 1629-39 (discussing restrictions on media and commercial speech).

[183] 1 MCCARTHY, *supra* note 1, § 6:86.

[184] *Id.*

[185] *Id.*

exempts certain uses without the subject's consent, including use within the news,[186] and incidental uses.[187]

2. The Nature of Persona Rights Under the Commercials Contracts

Like the right of publicity, the Commercials Contracts allow principal performers control over the use of their persona, but within the confines of a contractual relationship. A number of specific contractual provisions demonstrate the nature and limit of this control.

First, and most importantly, the compensation structure protects performers from damage to the commercial value of their personas by placing a supplemental price on use of the commercial. All performers are entitled to session fees of varying amounts depending on their role within the production.[188] Session fees represent the minimum compensation within the three-tier structure implemented by the union.[189] Principal performers, as opposed to extras,[190] are central to the purpose of the commercial; their personas are used and identifiable within the commercial.[191] As a result, the Contract gives additional compensation to principal performers in the form of holding fees and residual compensation.

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[186] *Id.* § 6:93 ("[T]here is no doubt that there is no statutory liability for distribution and syndication of a general interest television news program which shows a film of the plaintiff as part of a newsworthy report."). The First Amendment places additional limits on the right of publicity. *See supra* note 22. However, New York's statutory scheme prohibits newsworthy uses in advertising material. *See* 1 MCCARTHY, *supra* note 1, § 6:89 ("The fact that newsworthy information also appears in a context that clearly advertises a product or service does not immunize what would otherwise be a violation of the statutory right.").

[187] *Id.* § 6:90 ("New York recognizes an 'incidental use' exception from statutory liability for insignificant or fleeting usages of persona that have no real commercial significance.").

[188] *See* SAG Commercials Contract, *supra* note 165, § 20 ("Producer shall pay *principal performers* the following rates per 8-hour day which shall also constitute payment for the first commercial made for one designated advertiser . . . ." (emphasis added)); AFTRA Commercials Contract, *supra* note 165, § 20 (same); SAG Commercials Contract, *supra* note 165, sch. D, § 6 (detailing minimum rates for extras); AFTRA Commercials Contract, *supra* note 165, sch. C, § 2 (same).

[189] *See supra* note 143-45 and accompanying text.

[190] *See infra* Part IV.B (discussing the distinction between principal performers and extras, and how that distinction relates to the incidental use doctrine within the right of publicity).

[191] SAG Commercials Contract, *supra* note 165, § 6 (listing the types of uses that constitute principal performers, including speaking lines or silent appearance of a face that can be identified with a product); AFTRA Commercials Contract, *supra* note 165, § 6 (same).

Holding fees are payments from the advertiser to the principal performer for each thirteen-week cycle that the advertisement airs.[192] The session fee constitutes the holding fee for the first thirteen-week cycle,[193] but subsequent cycles require payment of a holding fee equal to the original session fee.[194] An advertiser's failure to pay holding fees voids its right to use the commercial.[195] Ultimately, holding fees place a price on airing commercials over an extended period, and compensate actors for damage done to their commercial value when advertisements are aired over a long period of time.

Traditionally, residual payments paid performers for each reuse of the commercial within the thirteen-week cycle.[196] But under the contract, which is the product of over fifty years of negotiation,[197] the exact calculation for residuals varies depending on the television channel and the geographic reach of the commercial broadcast. For example, Class A commercials, which run on traditional networks like NBC and air in sufficient locations, receive payments every time the commercial airs.[198] Cable commercials, on the other hand, compensate principal performers with residual payments for only the first two thousand airings.[199] To fix anomalies, the advertising industry has proposed calculating residuals across all television programming based on gross rating points (GRP)

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[192] SAG Commercials Contract, *supra* note 165, § 31; AFTRA Commercials Contract, *supra* note 165, § 31.

[193] SAG Commercials Contract, *supra* note 165, § 31(c) ("The session fee shall be deemed the holding fee payable for the first fixed cycle."); AFTRA Commercials Contract, *supra* note 165, § 31(c) (same).

[194] SAG Commercials Contract, *supra* note 165, § 31(b) ("[U]pon the commencement of each consecutive fixed cycle thereafter throughout the maximum permissible period of use or any extension thereof, a principal performer shall be paid a separate fee, herein called the holding fee, in an amount equal to a session fee . . . ."); AFTRA Commercials Contract, *supra* note 165, § 31(b) (same).

[195] SAG Commercials Contract, *supra* note 165, § 31(e) ("If Producer fails to pay the holding fee on or before the date on which it is due . . . all further right of Producer to use the commercial shall cease and terminate, and the principal performer shall thereupon be automatically released from all contractual obligations with respect to the commercial."); AFTRA Commercials Contract, *supra* note 165, § 31(e) (same).

[196] Susan Shelley, The Screen Actors Guild and the Commercials Strike of 1978-79 (1979) (research paper), *available at* http://www.extremeink.com/strike.htm (last visited Jan. 13, 2012) ("Actors, in other words, would receive continuing payments as long as their work was being used to generate revenue for an advertiser.").

[197] Neff, *supra* note 167 ("The current system is based on a model first developed in the 1950s . . . ."); *see also* Shelley, *supra* note 196 (describing that the general terms of the SAG Commercials Contract date back to the 1950's).

[198] SAG Commercials Contract, *supra* note 165, § 34(a)-(b); AFTRA Commercials Contract, *supra* note 165, § 34(a)-(b).

[199] SAG Commercials Contract, *supra* note 165, § 35(c); AFTRA Commercials Contract, *supra* note 165, § 35(c).

rather than a pay-per-use standard.[200] In effect, advertisers would pay residuals based on the number of viewers that saw the commercial rather than the number of times the commercial aired.[201] Additionally, similar to states that allow a descendible right of publicity, the heirs of principal performers are entitled to residuals postmortem.[202] In this sense, the residuals are analogous to a property right rather than a typical contractual right.

Regardless of how the contract calculates residuals, they represent more than mere supplemental compensation. Legally, despite several attempts to treat residuals as a form of property,[203] the law treats them as supplemental compensation.[204] Indeed, residuals account for the largest proportion of compensation under the Commercials Contracts.[205] Performers often survive long periods of unemployment through residuals, as they are deferred compensation.[206] Economically, however, residuals play a larger role than typical deferred compensation. Residual payments protect principal performers against overexposure by placing a price on the advertiser for every use of

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[200] *See* Neff, *supra* note 167 ("There can be anomalies in cable buys where the media costs less than the talent . . . . We hope to switch to the same GRPs and ROI measurement we use for other media and 99% of the dollars spent, so the tail will no longer be wagging the dog." (quoting Douglas Wood)). During the 2009 negotiations, the parties agreed to retain a consulting firm to assess the feasibility of the proposal, and to start the 2012 negotiations early to devote time to consider the proposal. SAG Commercials Contract, *supra* note 165, § 21(a).

[201] *See* BOOZ ALLEN HAMILTON, TALENT COMPENSATION FINAL STEERING COMMITTEE MEETING 24 (2007), *available at* http://www.adlawbyrequest.com/uploads/file/Talent%20Compensation%20Final%20Update_12192007_main%20document.pdf.

[202] *Estates*, SCREEN ACTORS GUILD, http://www.sag.org/content/estates (last visited Jan. 13, 2012) ("As you may know, residual payments are made in perpetuity (as long as a project is being exhibited somewhere in the world). Residuals are considered property (similar to a piece of artwork) and can be passed through a last will and testament and/or a living trust.").

[203] *See, e.g.*, Gilbert, *supra* note 155, at 112 n.15 ("§ XXVII of the 1955 Filmed Commercials contract, which provides that 'The right of a player to compensation for the use and re-use of a commercial shall be a vested *property right* and shall not be affected by the expiration of this contract or by any act on the part of the Producer.'"(emphasis added)).

[204] *See id.* at 104 ("From a legal standpoint, the importance of recognizing that these residuals are a type of wage payment cannot be stressed too greatly."); Paul & Kleingartner, *supra* note 130, at 672 ("In the 1950's, residuals were seen purely as a mechanism to compensate workers for lost work and over-exposure.").

[205] *See* REPORT ON THE PROGRESS OF COMMERCIALS MONITORING DURING THE TERM OF THE SAG/AFTRA 2000 COMMERCIALS CONTRACT 2 (2003), *available at* http://www.sag.org/files/sag/documents/Report%20on%20Progress%20-%20Comm%20Monitoring_0.pdf (citing that residuals comprised of 66 percent of actors' payments under the 1998-2002 SAG Commercials Contract).

[206] *See* Paul & Kleingartner, *supra* note 130, at 672 ("[Residuals] cushion the impact of unemployment, especially among the neophytes who suffer long periods of unemployment . . . .").

the commercial.[207] Paul and Kleingartner explain, "Residuals reconcile that divergence of interests by specifying cash compensation for the presumed devaluation of future work via present-day overexposure."[208] Additionally, expanding residuals into new media forms maintains an adequate level of compensation when new technology reduces the demand for performers' services.[209] Therefore, like the right of publicity, residuals provide compensation to actors for damage done to their commercial personas.

The Commercials Contracts provide principal performers with other means of control beyond compensation. The Contracts limit producers' power to use principal performers' work to only agreed-upon commercials.[210] If a producer uses a performer's work in another commercial, the performer is entitled to liquidated damages equal to three session payments and usage fees, as well as residual fees that would be due had the performer consented to the use.[211] Additionally, a performer has the option to arbitrate with or

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[207] Section 1(a) of the SAG Commercials Contract states that principal performers receive residual compensation because:

> [A] principal performer rendering services in a commercial performs, to a great extent, the duties of a demonstrator or salesperson of a particular product or service and as such, tends to be identified with that particular product or service . . . . [T]his identification increases proportionately with the continued telecasting of a commercial . . . . [A]dvertisers and their agencies seldom approve the employment of a principal performer who has become identified with another product or service, especially if the product or service is competitive. These conditions and practices tend to reduce opportunities for further employment in this field.

[208] Paul & Kleingartner, *supra* note 130, at 672.

[209] *Id.* at 671 ("The single most important factor in the growth of residual compensation has been the expansion of residual obligations to new entertainment markets.").

[210] SAG Commercials Contract, *supra* note 165, § 17(a)-(b) ("The rights granted to Producer in commercials shall be limited to the right to use, distribute, reproduce and/or exhibit such commercials over television . . . . Producer agrees that no part of the photography or sound track of a principal performer made for a commercial shall be used other than in commercials as provided hereunder without separately bargaining with the principal performer and reaching an agreement regarding such use."); AFTRA Commercials Contract, *supra* note 165, § 17(a)-(b) (same). But the contracts provide exceptions that producers can use the "name and likeness of the principal performer and his/her acts, poses and appearances . . . for the purpose of publicizing the business of the Producer." SAG Commercials Contract, *supra* note 165, § 17(a); AFTRA Commercials Contract, *supra* note 165, § 17(a). This exception allows the advertising agencies, photographers and directors to show the content of their work to prospective clients without violating the contract.

[211] SAG Commercials Contract, *supra* note 165, § 17(b); AFTRA Commercials Contract, *supra* note 165, § 17(b).

sue a producer rather than accepting liquidated damages provided within the Commercials Contracts.[212]

Finally, the Commercials Contracts create options for principal performers to limit the maximum length an advertiser can run a commercial to twenty-one months.[213] However, principal performers waive this right if they fail to give written notification of their desire to cease running the commercial.[214]

Both the right of publicity and the Commercials Contracts provide actors ways to control the usage of their images within advertising. The right of publicity prevents unauthorized usage and compensates for damage done to the commercial value of actors' personas. The Commercials Contracts give actors some control over the usage of their images in voluntary relations with advertisers, and compensate for commercial devaluation of their personas via residuals and holding fees. Given these analogous functions, the Commercials Contracts are an apt benchmark for comparison when considering both the policy justifications and doctrinal rules within the right of publicity.

III. ANALYZING THE RIGHT OF PUBLICITY'S POLICY JUSTIFICATIONS BY REFERENCE TO THE COMMERCIALS CONTRACTS

Justifying the right of publicity has sparked significant debate among scholars, as it "is both hard to object to and hard to support."[215] Having a compelling policy justification for the right of publicity is essential for two reasons. First, it provides a general rationale for the right of publicity's existence. Second, policy justifications affect how judges and legislators shape the rules and doctrines within the right of publicity. Adopting a flawed policy justification can lead to illogical doctrine and

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[212] SAG Commercials Contract, *supra* note 165, § 17(b); AFTRA Commercials Contract, *supra* note 165, § 17(b).

[213] SAG Commercials Contract, *supra* note 165, § 30(a) ("[T]he maximum period during which a commercial may be used shall be not more than [twenty-one] months after the date of commencement of the first fixed cycle . . . ."); AFTRA Commercials Contract, *supra* note 165, § 30(a) (same).

[214] SAG Commercials Contract, *supra* note 165, § 30(d); AFTRA Commercials Contract, *supra* note 165, § 30(d). The performer must give the advertiser written notification no earlier than sixty days before, and no later than 120 days after the twenty-first month of use. SAG Commercials Contract, *supra* note 165, § 30(d); AFTRA Commercials Contract, *supra* note 165, § 30(d).

[215] David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 122 (2005).

inequitable consequences.[216] The Commercials Contracts—with their common origin and similar protections to the right of publicity—can be used as a tool to analyze the merits of frequently asserted policy justifications for the right of publicity. This section concludes that any analogy to copyright or trademark[217] fails in light of policy analysis and actual business custom. Instead, unjust enrichment and natural rights best explain the right of publicity.

A. Economic Incentives, Labor Theory, and Copyright

A common justification for the right of publicity is that it incentivizes creative endeavors, which benefits society as a whole.[218] This justification can be broken down into two steps. First, it assumes that individuals create the value of their personas through labor and effort. Professor Haemmerli likens this explanation to Lockean labor theory.[219] For example, in *Zacchini v. Scripps-Howard Broadcasting Co.*,[220] the only right of publicity case the United States Supreme Court has ever heard, the Court stated that "the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors."[221] Melville B. Nimmer, in his seminal article *The Right of Publicity* stated:

> It is also unquestionably true that in most instances a person achieves publicity values of substantial pecuniary worth only after he has expended considerable time, effort, skill, and even money. It would seem to be a first principle of Anglo-American jurisprudence . . . that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations.[222]

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[216] For example, adopting a trademark dilution justification leads to the conclusion that non-celebrities should not be protected by the right of publicity. *See infra* notes 238-44 and accompanying text.

[217] *See supra* notes 6-8 and accompanying text.

[218] Kwall, *supra* note 56, at 35 ("Proponents of the right of publicity often rely on a copyright law analogy and argue that publicity rights are needed to spur incentives to creation just as copyright law exists, by constitutional command, to enhance economic incentives for the betterment of society." (footnote omitted)).

[219] Haemmerli, *supra* note 9, at 412-13.

[220] 433 U.S. 562 (1977).

[221] *Id.* at 573.

[222] Nimmer, *supra* note 127, at 216. Other commentators frequently invoke labor theory justifications. *See* Goldstein & Kessler, *supra* note 16, at 819 ("Justification for affording legal protection to the performer rests on the theory that anyone who contributes something of value to society should be entitled to share in the fruits of his labor."); Coyne, *supra* note 6, at 812 ("[B]y permitting individuals to benefit from their personal efforts, both [the right of publicity and copyright] provide incentive for creative endeavor.").

The second step of the justification contends that protecting the fruits of labor incentivizes creativity, which benefits society. *Zacchini* concludes: "the protection provides an economic incentive for [the performer] to make the investment required to produce a performance of interest to the public."[223] This justification is analogous to the justification for copyright law.[224]

Professor Madow questions both of these propositions. First, he argues that the celebrities with the most valuable images are not necessarily the hardest working.[225] Second, he argues that there are powerful noneconomic motivations for fame, which dilute the need for the right of publicity as an incentive for creativity.[226]

Looking to collective bargaining at the rank-and-file level within the entertainment industry shines some light on whether the most talented actors get the best roles. Many assume, to justify the higher compensation in the Contract, that union members are higher-quality actors compared with non-unionized actors.[227] However, Emily C. Chi questions whether entertainment union members are really better, arguing that this assumption is a myth.[228] According to her, entertainment unions "operate de facto closed shops."[229] Through strong union security clauses, and economic coercion of employers, the actors' unions require actors to be members to get roles.[230] However, actors have difficulty becoming

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[223] *Zacchini*, 433 U.S. at 576.

[224] *See id.* ("This same consideration underlies . . . copyright laws long enforced by this Court."); Coyne, *supra* note 6, at 813 ("Apparently, lurking beneath the surface in both publicity right and copyright decisions is the notion that 'protection exists primarily not to benefit the artist, but rather to benefit the public by offering artists economic incentives to create.'" (quoting Note, *Human Cannonballs and the First Amendment:* Zacchini v. Scripps-Howard Broadcasting Co., 30 STAN. L. REV. 1185, 1192 (1978))).

[225] Madow, *supra* note 3, at 213 ("A handful of 'superstars' command huge audiences and huge incomes, while everybody else—including persons only slightly less talented than the stars, or more talented and less lucky or ruthless—is 'pushed to the back' and 'unrewarded.'").

[226] *Id.* at 214 ("There is, first of all, the desire for fame itself: for renown, for recognition, for glory, for liberation from powerless anonymity. There is the satisfaction of realizing and exercising one's talents, of developing and displaying proficiency at some difficult or complicated activity. There is the pleasure of winning people's applause, inspiring their love or awe, earning their respect or gratitude." (footnote omitted)).

[227] *See, e.g.*, Memorandum from Douglas J. Wood, Reed Smith LLP, on Unions & the Prod. of Commercials for Traditional & Non-Traditional Media 3 (Jan. 28, 2009), *available at* http://www.adlawbyrequest.com/uploads/file/Why%20be%20an%20Authorizer.pdf ("Without doubt, union performers are the best professional and sought after performers for commercials. They understand their craft and bring great efficiency to the workplace.").

[228] Chi, *supra* note 83, at 65-70.

[229] *Id.* at 11.

[230] *Id.* at 37-44.

members of the actors' unions.[231] For example, there are only three ways to become a member of SAG: to be cast in a SAG production as a principal performer,[232] to work as an extra on a SAG production for three days,[233] or to be a dues-paying member of an equivalent acting union.[234] But since the unions control the supply of jobs in the industry, a non-union actor has significant difficulty joining SAG.[235] Therefore, the difference between those that make it into the union and those that do not becomes, in large part, a question of luck rather than skill.[236] Referencing the collective bargaining relationship here provides further support for Professor Madow's position that the value of a personality in entertainment is not proportional to the amount of the individual's effort. This undercuts the labor theory as a justification for the right of publicity and questions the validity of any analogy to copyright.

B. Diminution in Value and Trademark

Another common argument for the right of publicity is that it protects against diminishment in the value of persona. The right of publicity allows individuals to maximize upon the value of their persona through licensing at a specified price-per-use, which ensures that advertisers to whom the persona is most valuable will purchase it.[237] However, "[u]nrestricted use of a person's name or likeness makes that name or likeness less scarce and thus, less valuable,"[238] which justifies a property protection. This justification is analogous to trademark dilution under the Lanham Act.[239] Traditional trademark infringement requires proof

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[231] *Id.*

[232] *Id.* at 40.

[233] *Id.* at 41.

[234] *See id*. (describing how SAG controls the extras in many productions and how only a "small number of lucky extras may be assigned an 'unscripted line' while they are on the set").

[235] *Id.*

[236] *Id.* at 68 ("Due to the element of arbitrariness in the determination of which actors become members of the union, the lack of regular . . . SAG-provided training to ensure some basic level of skill and experience, and the uncertainty regarding the reasons why producers have not substantially resisted union control over the acting labor supply, . . . SAG [cannot] hold itself out as an expert arbiter of quality or talent.").

[237] Madow, *supra* note 3, 223 (summarizing Richard Posner's argument).

[238] Konsky, *supra* note 8, at 350.

[239] *See* 15 U.S.C. § 1125(c)(1) (2006) ("Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark."); *see also* Greene, *supra* note 2, at 532-33 ("The

that the violator's use creates consumer confusion.[240] Trademark dilution, an alternative theory, requires a showing that the mark is famous and distinctive but requires no showing of consumer confusion.[241] Congress promulgated this section to protect famous trademarks from diminishment in value by overuse, even when the use causes no consumer confusion.[242] Arguably, trademark dilution is analogous to the right of publicity because both aim to protect a commercially valuable intangible property from diminishing in value. As a result, commentators often assert that the right of publicity should be restricted by the same limits placed on trademark dilution,[243] which would require the mark to be distinctive and famous.[244]

But rank-and-file actors in commercials also face overexposure. An advertiser's unrestricted use of a commercial leads to the principal performer becoming associated with the product. As a result, there is a risk that other advertisers will not hire the performer for new commercials.[245] The Commercials Contracts address this overexposure problem with the compensation scheme; holding fees and residuals compensate principal performers proportional to the damage to their images from overexposure.[246]

However, the Commercials Contracts also prove that non-famous individuals have valuable personas. Performers that receive contract-scale wages are not famous, as well-known individuals command significantly higher wages through overscale contracts.[247] Additionally, unionized

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overexposure theory is very close, if not identical, to a dilution-by-blurring theory . . . . The theory underlying dilution is that, if the law permits willy-nilly use of trademark, even if consumer confusion is evident, there is still harm to the mark-holder, who has invested goodwill in its mark . . . .").

[240] Konsky, *supra* note 8, at 354.

[241] *Id*. ("Unlike a trademark infringement action, a trademark dilution action can be brought in the absence of consumer confusion about the goods."); *see also* 15 U.S.C. § 1125(c)(1) (stating that plaintiff can seek injunction "regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury").

[242] Konsky, *supra* note 8, at 354 ("Trademark dilution law is concerned with protecting a trademark owner against uses that 'whittle away' the value of the mark, diminishing its uniqueness.").

[243] *Id*. at 359 ("The current right of publicity should be replaced with a right of publicity dilution, similar to trademark dilution law. A right of publicity dilution would prohibit the most harmful uses of a person's name or likeness without chilling valuable commentary.").

[244] *Id*. at 355.

[245] *See supra* note 207.

[246] *See supra* notes 203-09 and accompanying text.

[247] *See* Chi, *supra* note 83, at 21 ("Most of the members of these unions are neither rich nor famous; it is only in the entertainment industry that huge disparities

advertisers must pay union wages to everyone that appears as a principal, including uncast individuals in reality situations.[248] These uncast individuals are not well-known or famous, but business practice still compensates them for damage to their images through holding fees and residual payments. While the diminution-in-value justification is an apt similarity between trademark and right-of-publicity law, personalities are not trademarks. Transplanting trademark dilution onto the right of publicity discriminates against non-celebrities, as it would protect only famous individuals despite the business practice of compensating non-famous for damage to their personas.

C. Unjust Enrichment

Courts and commentators often invoke an unjust enrichment justification for the right of publicity. This justification maintains that the law must protect individuals from misappropriators.[249] For example, the Supreme Court has stated that "[t]he rationale for protecting the right of publicity is the straight-forward one of preventing unjust enrichment by theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."[250] Additionally, Judge Holmes, dissenting in *O'Brien*, advocated for a right-of-publicity-like right[251] because appropriation "is contrary to usage and custom among advertisers in the marts of trade. They are undoubtedly in the habit of buying the right to use one's name or picture to create demand and good will for their merchandise."[252]

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exist without limits between the salaries and overall market values of unionized superstars and rank-and-file members." (footnote omitted)).

[248] *See, e.g.*, PRINDLE, *supra* note 131, at 11 ("Many nonactors have joined because, for example, they happened to become caught up in a 'real people' television commercial while shopping at a supermarket one day, thereby earning the right to acquire a SAG card."). "Uncast" performers refer to principal performers under the Commercials Contract who the producers select during the shooting of the commercial rather than prior to the shooting through a casting process. For a description of how advertisers utilize uncast performers in advertisements, see *infra* note 284.

[249] Kwall, *supra* note 10, at 85 ("It is perhaps easiest to see the harm that the presence of unjust enrichment engenders for the publicity plaintiff, and her relatives and assignees, since they are being denied the value of the defendant's gain by virtue of the unauthorized appropriation.").

[250] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 563, 576 (1977) (quoting Harry Kalven, Jr., *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966)) (brackets omitted).

[251] O'Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir. 1942) (Holmes, J., dissenting).

[252] *Id.* at 171.

Residual payments provide an apt analogy to the unjust enrichment justification for the right of publicity. The unions demanded residual payments in response to the emergence of new technology that allowed reproduction of actors' performances.[253]According to the union, compensation for the reuse of the broadcast was fair because the technology distributed its members' performances for free when consumers would customarily pay for them.[254] Therefore, the residuals compensate performers for the unjust enrichment that advertisers receive from reusing advertisements, as the industry has historically compensated actors for each performance. After referencing the business custom, the unjust enrichment justification is persuasive. This conclusion affirms that the right of publicity has a theoretically grounded purpose within our jurisprudence. Additionally, it suggests that when analyzing the doctrine within the right of publicity, the right should be approached from an unjust enrichment angle rather than a quasi-copyright or trademark.

D. Natural Rights Theory

Advocates for the right of publicity justify it by arguing control over persona is an innate and natural right. Infringing on the right of publicity damages more than the commercial value of the persona; it also takes away the individual's natural right to control the use of their persona.[255] Professor McCarthy, for one, argues that "[p]erhaps nothing is so strongly intuited as the notion that my identity is *mine*—it is my property to control as I see fit. Those who are critical of this principle should have the burden to articulate some important countervailing social policy which negates this natural impulse of justice."[256] Professor Haemmerli draws upon the philosophy of Immanuel Kant to intellectually strengthen the natural rights justification for the right of publicity.[257] Haemmerli concludes,

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[253] *See supra* Part I.C. For example, in radio, the unions negotiated for residuals following the radio stations' shift from having actors perform in each time zone to replaying the same recorded broadcast in each time zone. *See supra* notes 148-54 and accompanying text.

[254] *See supra* notes 148-54 and accompanying text.

[255] *See, e.g.*, Haemmerli, *supra* note 9, at 385-86 ("The right of publicity can also be viewed as a property right grounded in human autonomy. As such, it belongs to all, . . . and it embraces noneconomic objections to the commercial exploitation of identity." (footnote omitted)).

[256] 1 MCCARTHY, *supra* note 1, § 2:1.

[257] Haemmerli, *supra* note 9, at 416.

"The central concept of autonomy in Kantian philosophy could lend itself to a philosophical justification of a right of publicity. Autonomy implies the individual's right to control the use of her own person, since interference with one's person is a direct infringement of the innate right of freedom . . . ."[258]

Analyzing a natural rights justification from the perspective of a consensual agreement seems counterintuitive. However, the Commercials Contracts provide some support for the natural rights justification. When the performer agrees to appear in a specific commercial, the Commercials Contracts allow advertisers discretion over when, where, and how much the advertisement will run, like a property rule;[259] yet, the advertiser has to compensate the performer for its usage, which acts as a liability rule.[260] When the producer extends the performer's use beyond the agreed-upon terms by using the performer in a new commercial, the performer can prevent the use by going through arbitration or the judicial process.[261] Therefore, the idea that performers have an innate right to control their personas pervades even collective bargaining agreements in entertainment. The natural rights justification reinforces the unjust enrichment justification as well: rather than efficiently allocating property—like copyright or trademark—the right of publicity promotes fairness for individuals whose identities are misappropriated. Thus, the rules within the right of publicity ought to operate as natural property rights that prevent unjust enrichment.

IV. EVALUATING DOCTRINAL RULES WITHIN THE RIGHT OF PUBLICITY

The Commercials Contracts provide a point of reference to evaluate how the right of publicity actually operates within the law. Specifically, this part will analyze the underlying assumptions of rules that operate within the right-of-publicity jurisprudence by paralleling the rules to business practice, as seen through the Commercials Contracts.

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[258] *Id*.
[259] *See supra* Part II.B.2.
[260] *See supra* Part II.B.2.
[261] *See supra* note 212 and accompanying text.

A. Right of Publicity to Non-Celebrities

The question of whether the right of publicity extends to non-celebrities is the most apparent division between jurisdictions. Because the right of publicity evolved out of celebrities' struggles to recover under the right of privacy, the question of whether non-celebrities could recover for appropriation of commercial value of their personalities has divided both courts and commentators. The bulk of jurisdictions recognize a cause of action for individuals who are not famous personalities.[262] These jurisdictions follow Melville B. Nimmer's principle:

> It is impractical to attempt to draw a line as to which persons have achieved the status of celebrity and which have not; it should rather be held that every person has the property right of publicity, but that damages which a person may claim for infringement of the right will depend upon the value of the publicity appropriated which in turn will depend in great measure upon the degree of fame attained by the plaintiff.[263]

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[262] *See, e.g.*, Bowling v. Missionary Servants of the Most Holy Trinity, No. 91-5920, 1992 WL 181427, at *5 (6th Cir. July 20, 1992) (holding that under Kentucky common law a non-celebrity has a right of publicity cause of action); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 825 n.11 (9th Cir. 1974) (recognizing in dicta that under California common law non-celebrities have a cause of action for the right of publicity); Fanelle v. Lojack Corp., No. CIV.A. 99-4292, 2000 WL 1801270, at *11 (E.D. Pa. Dec. 7, 2000) ("I am convinced that the right of publicity resides in every person, not just famous and infamous individuals."); KNB Enters. v. Matthews, 92 Cal. Rptr. 2d 713, 722 n.12 (Cal. 2d. Dist. 2000) ("In our view, determining preemption of a plaintiff's section 3344 claim on the basis of the plaintiff's celebrity status would be violative of California law. Under California law, the statutory right of publicity exists for celebrity and non-celebrity plaintiffs alike."); Dora v. Frontline Video, Inc., 18 Cal. Rptr. 2d 790, 792 n.2 (Cal. 2d. Dist. 1993) (recognizing in dicta that under California common law non-celebrities have a cause of action for the right of publicity); Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 703 (Ga. 1982) (concluding that the right of publicity exists "whether the person whose name and likeness is used is a private citizen, entertainer, or as here a public figure who is not a public official"); Fergerstrom v. Hawaiian Ocean View Estates, 441 P.2d 141, 144 (Haw. 1968) (holding that there was a right of publicity cause of action for a private citizen); Ainsworth v. Century Supply Co., 693 N.E.2d 510, 514 (Ill. App. 1998) (holding that the right of publicity extends to non-celebrities); Canessa v. J.I. Kislak, Inc., 235 A.2d 62, 75 (N.J. Super. Ct. Law. Div. 1967) ("[I]t seems to us that however little or much plaintiff's likeness and name may be worth, defendant, who has appropriated them for his commercial benefit, should be made to pay for what he has taken . . . ."); Cohen v. Herbal Concepts, Inc., 473 N.Y.S.2d 426, 431 (N.Y. App. Div.1984) ("The legislative protection is clear, extending to 'any person' within the general public, not merely to those with a publicly identifiable feature . . . ."); *see also* 1 MCCARTHY, *supra* note 1, § 4:14 ("[T]he majority of commentators and courts hold that everyone, celebrity and noncelebrity alike, has a right of publicity.").

[263] Nimmer, *supra* note 127, at 217.

These jurisdictions presume that the non-famous individual's persona has commercial value based upon the defendant's usage in a way that exploits the persona for commercial benefit.[264] This standard comports to the unjust enrichment and natural rights justifications: the advertiser receives the plaintiff's image without his or her consent, which violates the non-famous person's natural rights.[265] And the advertiser would normally pay for such services, which suggests unjust enrichment.[266] The question of the value of the plaintiff's persona only becomes a factor when determining compensatory damages. Although the amount of compensatory damages may be insignificant when a non-celebrity is commercially exploited, many states permit right-of-publicity plaintiffs to disgorge profits[267] and recover punitive damages from misappropriators.[268] For example, in *Christoff v. Nestle*, a jury awarded over $15 million dollars in profits to an unknown model, who had been working as a kindergarten teacher, for using his picture on coffee packaging.[269]

Other courts have refused to extend the right of publicity to individuals with unknown personas.[270] Often these

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[264] 1 MCCARTHY, *supra* note 1, § 4:17 ("The courts use the commonsense rule that if defendant uses plaintiff's personal identity for commercial purposes, then it will be presumed that plaintiff's identity had commercial value. This presumption is similar to a presumption well established in trademark law.").

[265] Many commentators endorse, at least in theory, a broad right of publicity that applies to everyone because of natural rights theory. *See* Greene, *supra* note 2, at 538 ("[D]enying a publicity claim to a non-celebrity discounts personality rationales of personhood . . . . Arguments against non-celebrity right of publicity claims, regardless of merit, in effect value commercial speech over rights of personhood." (footnote omitted)); *see also* Goodman, *supra* note 4, at 249 ("[T]he right of publicity must protect all persons and must not become a special interest right for celebrities only."); Kwall, *supra* note 10, at 55-56 ("This Author believes that the right of publicity has the potential for safeguarding from unauthorized use any marketable and publicly recognizable attribute of any individual, regardless of whether that person is a celebrity."); James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 648 (1973) ("[A] non-celebrity can argue, if he chooses, that an advertising use of his personality has unlawfully invaded an economic interest.").

[266] *See supra* note 249 and accompanying text.

[267] 2 MCCARTHY, *supra* note 22, § 11:34 ("In the analogous areas of trademark and copyright infringement, recovery of the profits made by defendant from the infringing sales are a standard form of monetary recovery.").

[268] *Id.* § 11:36 ("Under the law of most states, punitive or exemplary damages may be obtained in privacy and publicity suits.").

[269] Christoff v. Nestle, Inc., 213 P.3d 132, 133-34 (Cal. 2009). The Supreme Court of California later overturned the verdict because the statute of limitations barred plaintiff's claim, unless the plaintiff could show that the defendant had hindered the plaintiff's discovery of the unauthorized use of his likeness. *Id.* at 134.

[270] *See, e.g.*, Vassiliades v. Garfinckel's, Brooks Bros., 492 A.2d 580, 592 (D.C. Cir. 1985) (holding that the plaintiff had no cause of action because her likeness lacked value); Pesina v. Midway Mfg. Co., 948 F. Supp. 40, 42 (N.D. Ill. 1996) ("The plaintiff

courts require proof that a plaintiff's personality has objective value outside of the alleged commercial use. For example, in *Cheatham v. Paisano Pub., Inc.*, the court developed a threshold test to determine whether a plaintiff's identity has commercial value:[271] "Commercial value may be established by proof of (1) the distinctiveness of the identity and by (2) the degree of recognition of the person among those receiving the publicity."[272] Courts that follow this reasoning reject the presumption that the commercial exploitation by a defendant proves that a plaintiff's persona has value.

Several commentators have supported denying the right of publicity to non-celebrities.[273] In particular, those who advocate for a trademark-dilution analogy assert that the right of publicity should not protect non-celebrities because trademark law does not protect unknown marks.[274] Others argue that the First Amendment bars non-celebrity right-of-publicity claims.[275] For instance, Alicia Hunt argues that protecting the right of publicity for celebrities is a state interest substantial enough to pass the First Amendment's protection of

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claiming the infringement of this right must show that, prior to the defendant's use, the plaintiff's name, likeness, or persona had commercial value."); Cheatham v. Paisano Pub., Inc., 891 F. Supp. 381, 386 (W.D. Ky. 1995) (ruling that plaintiffs must prove commercial value to establish a right of publicity claim); Barnako v. Foto Kirsch, Ltd., Civ. A. No. 86-1700, 1987 WL 10230, at *2 (D.D.C. Apr. 16, 1987) ("[T]he plaintiff must allege, and later prove, that the defendant's commercial benefit was derived from the identity of the plaintiff and the value or reputation which the public associates with that identity."); Jackson v. Playboy Enters., 574 F. Supp. 10, 13 (S.D. Ohio 1983) ("[T]he complaint must allege that plaintiff's name or likeness has some intrinsic value, which was taken by defendant for its own benefit, commercial or otherwise."); Ali v. Playgirl, Inc., 447 F. Supp. 723, 729 (S.D.N.Y. 1978) (suggesting in dicta that the right of publicity may not extend to non-celebrities under New York's right to privacy statute); Cox v. Hatch, 761 P.2d 556, 564 (Utah 1988) ("[T]he complaint fails because it must allege that the plaintiffs' names or likenesses have some 'intrinsic value' that was used or appropriated for the defendants' benefit." (citing *Jackson*, 574 F. Supp. at 13)).

[271] *Cheatham*, 891 F. Supp. at 386.

[272] *Id.*

[273] *See, e.g.*, Howard I. Berkman, Note, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOK. L. REV. 527, 533 (1976) ("In a suit grounded upon the commercial appropriation of a private individual's name or picture, the correct measure of damages is the extent of injury to the individual's feelings and not the value that the defendant received from the unauthorized use of his name or picture.").

[274] *See* Dogan & Lemley, *supra* note 5, at 1166 ("Doctrinally, such an approach would limit the right to circumstances in which the use of an individual's name or likeness in connection with the sale of a product is likely either to confuse consumers or to dilute the significance of a famous name."); Konsky, *supra* note 8, at 366-70 (arguing for a requirement that the plaintiff be distinct and famous in order to recover for the right of publicity).

[275] *See, e.g.*, Hunt, *supra* note 23, at 1609 ("The extension of the right of publicity to noncelebrities is disturbing because in many instances, it interferes with the First Amendment's protection of commercial speech.").

commercial speech, but that the interest in protecting the right of publicity of *non-celebrities* is not substantial enough.[276] Under the *Central Hudson*[277] precedent, the standard for determining if restrictions on commercial speech violate the First Amendment, "the government may restrict truthful and nonmisleading commercial speech only if it proves (1) it has a substantial state interest in regulating speech, (2) the regulation directly and materially advances the interest, and (3) the regulation is no more extensive than necessary to serve that interest."[278] Hunt concludes that the non-celebrities' rights of publicity are not substantial under the test because non-celebrities' identities have no provable economic value.[279] Hunt questions the legitimacy of the presumption that non-celebrities have commercial value based on the manner that the infringer uses their persona, suggesting that the commercial value of non-famous people does not change by overuse.[280]

Business practice under the Commercials Contracts sheds some light on this issue. In particular, business practice is integral to determine the rationality of the legal presumption that personas of non-celebrities have commercial value when commercially exploited. Undoubtedly, anyone working in a commercial under the union scale could hardly be considered "famous."[281] Nonetheless, these individuals receive

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[276] *Id.* at 1639-52.

[277] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980). Various members of the Supreme Court have at times questioned the continued application of the *Central Hudson* standard. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518-19 (1996) (Thomas, J., concurring) (arguing that in cases of restrictions on truthful commercial speech, *Central Hudson* balancing test should be replaced by *per se* violation of the First Amendment); *id.* at 517 (Scalia, J., concurring) (expressing "discomfort with the *Central Hudson* test, which seems to me to have nothing more than policy intuition to support it"); *see also* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2664 (2011) (holding that content based restrictions on commercial speech receive heightened scrutiny rather than applying the balancing test established by *Central Hudson*).

[278] Hunt, *supra* note 23, 1619-20.

[279] *Id.* at 1643 ("[I]t is unlikely that the government's interest would be 'substantial' in cases involving private individuals with no level of fame, notoriety or goodwill attached to their identities. In these cases, the commercial value is merely 'presumed,' even though there is no evidence that the identity in fact has any commercial value.").

[280] *Id.* at 1643-44.

[281] "Union scale" refers to the minimum payments allowable under the Commercials Contracts. Commercial producers generally pay famous actors above the union scale. *See* Prindle, *supra* note 139, at 14 ("Before starting on a project, stars would have had their agents negotiate a work agreement much more favorable to themselves than is the standard SAG contract.").

compensation for loss in the commercial value of their personas through residual payments. On the other hand, there may be an argument that an actor who consistently works under the Commercials Contracts has a persona with proven commercial value, and therefore passes the "intrinsic value" threshold. In commercials made under the Commercials Contracts, which make up 90 percent of all commercials made in the United States,[282] all performers must be paid at least the union wage.[283] If the advertiser uses uncasted performers in its commercials, those performers must also be paid at least the union scale—advertisers will on occasion pay residuals to anonymous individuals who are not professional actors.[284] Therefore, advocates for a non-celebrity right are supported by industry practice in paying residuals to non-celebrities in the contractual setting.

B. Incidental Use Exception for Fleeting and Insignificant Use

Another doctrinal rule within the right of publicity that could be shaped by reference to the Commercials Contracts is the incidental use exception for fleeting and insignificant use. Seemingly every state that recognizes the right of publicity makes an exception to liability when the use is fleeting or insignificant.[285] The straightforward reason for this exception is

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[282] Neff, *supra* note 167.

[283] *See* SAG Commercials Contract, *supra* note 165, at Sch. B, § I(A)-(C) (requiring all principal performers to join the union within 30 days after hire in order to work on a union production); AFTRA Commercials Contract, *supra* note 165, at Sch. B, § I(A)-(C) (same); SAG Commercials Contract, *supra* note 165, at Sch. D, § 6(a) (setting forth minimum compensation for all extras on unionized productions); Commercials Contract, *supra* note 165, at Sch. C, § 2(a) (same).

[284] *See, e.g.*, PRINDLE, *supra* note 131, at 93 ("[A]dvertising agencies had fallen into the habit of using 'real people' in their TV commercials. Once they had appeared on screen, these nonprofessionals were eligible for a SAG card, which many of them acquired for its prestige value. No one in the guild knew how many members were thus nonactors, but there was widespread agreement that they swelled the membership lists without adding to the talent pool.").

[285] *See, e.g.*, CAL. CIV. CODE § 3344(e) (West 1997) ("[I]t shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required."); FLA. STAT. ANN. § 540.08(3)(c) (West 2007) (mandating that the right of publicity does not apply to "[a]ny photograph of a person solely as a member of the public and where such person is not named or otherwise identified in or in connection with the use of such photograph"); NEB. REV. ST. § 20-202(3) (2007) (mandating that the right of publicity does not apply to "[a]ny photograph of a person solely as a member of the public when such person is not named or otherwise identified in or in connection with the use of such photograph"); OKL. ST. ANN. tit. 12, § 1449(e) (West 2010) ("[I]t shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or

that, in these cases, the individual's persona is not being exploited commercially.[286] Additionally, courts do not want to overburden expression by exposing parties to liability when an individual incidentally appears in media.[287]

New York has the most developed incidental use doctrine. A court first invoked the incidental use doctrine in 1915, under the right-to-privacy statute (which today also protects the right of publicity), in *Merle v. Sociological Research Film Corp.*[288] There, the court ruled that a glimpse of the plaintiff's business sign in defendant's movie did not violate right-to-privacy law.[289] Specifically, the court held that for there to be a violation under the right-to-privacy statute, "it must appear that the use of the plaintiff's picture or name is itself for the purpose of trade and not merely an incidental part of a photograph."[290] The New York Court of Appeals in *Gautier v. Pro-Football Company* established a clear precedent when a defendant's use of plaintiff's name or likeness is incidental. In *Gautier*, the plaintiff was an animal trainer who performed during the half-time show for a professional football team.[291] The defendant broadcasted part of the plaintiff's performance without the plaintiff's express consent.[292] The plaintiff filed a right-of-publicity-like claim under the privacy statute and claimed that the defendant appropriated his image for commercial purposes because advertisements aired during the broadcast.[293] The court ruled that the defendant's use of the plaintiff's image was incidental because the use was not

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likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required."); Brown v. Twentieth Century Fox Film Corp., 799 F. Supp. 166, 172 (D.C. Cir. 1992); Gautier v. Pro-Football, Inc., 107 N.E.2d 485, 488-89 (N.Y. 1952); Vinci v. Am. Can Co., 591 N.E.2d 793, 794 (Ohio Ct. App. 1990); Henley v. Dillard Dep't Stores, 46 F. Supp. 2d 587, 590 (N.D. Texas 1999); Cox v. Hatch, 761 P.2d 556, 563 (Utah 1988); Staruski v. Cont'l Tel. Co. of Vt., 581 A.2d 266, 270 (Vt. 1990); Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 363 (Va. 1995).

[286] *See* Aligo v. Time-Life Books, Inc., No. C 94-20707 JW, 1994 WL 715605, at *2 (N.D. Cal. Dec. 19, 1994) ("The rationale for this rule is that an incidental use has no commercial value.").

[287] *See* Preston v. Martin Bergman Prods., Inc. 765 F. Supp. 116, 120 (S.D.N.Y. 1991) ("The doctrine of incidental use was developed to address concerns that penalizing every unauthorized use, no matter how insignificant or fleeting, of a person's name or likeness would impose undue burdens on expressive activity, and carry consequences which were not intended by those who enacted the statute.").

[288] Merle v. Sociological Research Film Corp., 152 N.Y.S 829 (App. Div. 1915).

[289] *Id.* at 831-32.

[290] *Id.* at 832.

[291] Gautier v. Pro-Football, Inc., 107 N.E.2d 485, 487 (N.Y. 1952).

[292] *Id.*

[293] *Id.*

directly related to the commercial purpose of the advertisement.[294] The court reasoned that the plaintiff "was not connected with the product either by visual, oral or other reference, nor was any issue of fact created by the physical juxtaposition of the [commercial] prior to his performance."[295] Consequently, the dispositive question under the *Gautier* decision is whether defendant's use of plaintiff's persona directly connects with plaintiff's advertising or trade purpose.

With varying results, New York continues to follow the *Gautier* test to determine incidental use today. Often this test leads to fair results, for instance when it is clear that the defendant's usage does not exploit the plaintiff's persona.[296] However, courts have ruled usage incidental when a plaintiff's name or likeness clearly helped the defendant advertise.[297] Given the factual nature of the incidental use doctrine, courts often leave the question to juries.[298]

California's right-of-publicity statute requires the plaintiff to be identifiable in pictures[299] and exempts liability when the individual is part of a group where he or she is "represented in the photograph solely as a result of being present at the time the photograph was taken and have not been singled out as individuals in any manner."[300] Additionally, California has a common law incidental use doctrine, which follows New York's jurisprudence.[301] In *Aligo v. Time-Life, Books Inc.*, the court set out a test for determining when use is incidental:

> A number of factors are relevant in this regard: (1) whether the use has a unique quality or value that would result in commercial profit to the defendant, (2) whether the use contributes something of significance, (3) the relationship between the reference to the

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[294] *Id.* at 488.

[295] *Id.*

[296] *See, e.g.*, Candelaria v. Spurlock, No. 08 Civ. 1830, 2008 WL 2640471, at *4 (E.D.N.Y. July 3, 2008) (holding that the four second appearance of a fast food worker in a documentary about fast food was incidental).

[297] *See, e.g.*, D'Andrea v. Rafla-Demetrious, 972 F. Supp. 154, 157-58 (E.D.N.Y. 1997) (holding that the defendant's usage in a hospital brochure of a picture of the plaintiff working in a hospital was incidental because it did directly convey information about the hospital).

[298] *See* Doe v. Darien Lake Theme Park & Camping Resort, Inc., 715 N.Y.S.2d 825, 825-26 (App. Div. 2000) (ruling that incidental use is a question for the jury).

[299] CAL. CIV. CODE § 3344(b)(1) (West 1997) ("A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use.").

[300] *Id.* § 3344(b)(3).

[301] *See, e.g.*, Aligo v. Time-Life Books, Inc., No. C 94-20707 JW, 1994 WL 715605, at *2 (N.D. Cal. Dec. 19, 1994).

> plaintiff and the purpose and subject of the work, and (4) the duration, prominence or repetition of the name, or likeness relative to the rest of the publication.[302]

The Commercials Contracts, and collective bargaining in the entertainment industry more generally, provide an apt basis for comparison to evaluate the rationality of the incidental use doctrine. Specifically, the divide between principal performers and extras in the Commercials Contracts mirror the incidental use doctrine. Principal performers receive residual compensation and holding fees for the usage of their personas;[303] advertisers pay extras only session fees and no residuals or holding fees.[304] Therefore, an advertiser's use of extras is analogous to unauthorized incidental usage: neither requires compensation for commercial exploitation of an individual's persona.

Historically, the entertainment industry treated acting and extra work as two completely different trades. SAG and AFTRA represented actors and performer; the Screen Extras Guild (SEG) represented extras.[305] For example, the National Labor Relations Board excluded from an extras union's jurisdiction individuals who performed more than extra work, including stunts, singing, or performances involving lines.[306] The decision explains, "all work before the motion picture camera falls primarily in two main classes, the one being known as acting work . . . and the other being known as extra work . . . customarily described in the industry as atmospheric or background work."[307] Although SEG disbanded in 1992 and SAG acquired SEG's former jurisdiction,[308] there is a historical norm of separating principal performers from extras.

This norm is readily apparent in the Commercials Contracts. The contracts provide a general definition of a principal performer in a television commercial: "Anyone who is seen and who speaks a line or lines of dialogue . . . .";[309]

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[302] *See id*. at *3 (citations omitted).

[303] *See supra* notes 190-95 and accompanying text.

[304] *See* SAG Commercials Contract, *supra* note 165, at sch. D, § 6; AFTRA Commercials Contract, *supra* note 165, sch. C, § 2.

[305] *Television and Movie Agreement—Collective Bargaining Agreement; Screen Actors Guild, American Federation of Television and Radio Artists, Alliance of Motion Picture and Television Producers*, MONTHLY LABOR REV. (Aug. 1992), http://findarticles.com/p/articles/mi_m1153/is_n8_v115/ai_12624085/.

[306] *In re* R.K.O. Radio Pictures, Inc., 61 N.L.R.B. 112 (1945).

[307] *Id.* at 113.

[308] *Television and Movie Agreement*, *supra* note 305.

[309] SAG Commercials Contract, *supra* note 165, § 6(A); AFTRA Commercials Contract, *supra* note 165, § 6(A)(1).

"[a]nyone whose face appears silent, alone in a stationary camera shot, and is identified with the product . . . ."[310]; or "[a]nyone whose face appears silent and is identifiable and whose foreground performance demonstrates or illustrates a product or service, or illustrates or reacts to the on- or off-camera narration or commercial message."[311] The contracts treat performers not within the general definition of the principal performer as extras,[312] with several exceptions for, among other things, close-ups,[313] stunt performers,[314] dancers,[315] and off-camera voice usage.[316] The detailed distinction between a principal performer and an extra provides a framework to determine when a television commercial uses an individual's persona.

The division between principal performers and extras leads to two observations about the right of publicity. First, it demonstrates that the connection between the advertising purpose and the individual's part within the commercial affect whether the individual will receive compensation for reuse of persona. This can be seen in the definition of a principal performer within the Commercials Contracts for "foreground performance [that] demonstrates or illustrates a product or service or illustrates or reacts to the on or off-camera narration or commercial message."[317] This standard parallels *Gautier*'s directly-related-to-the-advertising-or-trade-purpose standard for incidental use in a right-of-publicity case.

Second, the Commercials Contracts present a reference point for courts to use when determining if an unauthorized appropriation of identity is incidental in a television commercial. Courts should find unauthorized use—and not incidental use—in a commercial that qualifies as principal

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[310] SAG Commercials Contract, *supra* note 165, § 6(B); AFTRA Commercials Contract, *supra* note 165, § 6(A)(2).

[311] SAG Commercials Contract, *supra* note 165, § 6(C); AFTRA Commercials Contract, *supra* note 165, § 6(A)(3).

[312] SAG Commercials Contract, *supra* note 165, § 6(C) ("Persons appearing in the foreground solely as atmosphere and not otherwise covered by the foregoing shall be deemed extra performers."); AFTRA Commercials Contract, *supra* note 165, § 6(A)(4) (same).

[313] SAG Commercials Contract, *supra* note 165, § 6(D); AFTRA Commercials Contract, *supra* note 165, § 6(A)(4).

[314] SAG Commercials Contract, *supra* note 165, § 6(F) ("Stunt performers need not be identifiable per se; only the stunt performed need be identifiable."); AFTRA Commercials Contract, *supra* note 165, § 6(A)(6) (same).

[315] SAG Commercials Contract, *supra* note 165, § 6(G); AFTRA Commercials Contract, *supra* note 165, § 6(A)(7).

[316] SAG Commercials Contract, *supra* note 165, § 6(H); AFTRA Commercials Contract, *supra* note 165, § 6(A)(8).

[317] SAG Commercials Contract, *supra* note 165, § 6(C); AFTRA Commercials Contract, *supra* note 165, § 6(A)(3).

performance under the Commercials Contracts. By referencing the Commercials Contracts, courts gain an elaborate benchmark when considering if the use is directly related to the advertising or trade purpose.

Use of the Commercials Contracts in this context is easy to apply. For example, in *Pooley v. National Hole-in-One Ass'n*, the plaintiff won a million dollars from the defendant for hitting a hole-in-one in a competition.[318] The defendant used six seconds of footage of the plaintiff winning the competition without the plaintiff's consent during an eight-minute infomercial advertising the defendant's services.[319] Although the plaintiff appeared only briefly, his appearance was integral to the infomercial, as he was the only winner of the defendant's competitions. The court found, applying the *Aligo* standard, that the incidental use doctrine did not apply.[320] Under the Commercials Contracts, the plaintiff's part within the infomercial would qualify him as a principal performer. The plaintiff's "face appear[ed]" and his "foreground performance demonstrate[d] or illustrate[d]" the defendant's service, as he actually won the contest.[321]

CONCLUSION

Courts and commentators should no longer automatically look to other intellectual property rights or academic frameworks when analyzing the right of publicity. Instead, with common origins and analogous rights to the right of publicity, collective bargaining agreements in entertainment provide an appropriate tool to scrutinize both the substantive rules and policy justifications for the right of publicity. Unjust enrichment and natural rights justifications for the right of publicity are supported by reference to the Commercials Contracts. Furthermore, the Commercials Contracts favor extending the right of publicity to non-celebrities. Finally, courts and lawmakers can import the Commercials Contracts when analyzing whether an unauthorized use of an individual's image or persona is incidental.

The comparison to the Commercials Contracts is not necessarily limited to these points. The right of publicity and collective bargaining agreements both face the challenge of

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[318] Pooley v. Nat'l Hole-in-One Ass'n, 89 F. Supp. 2d 1108, 1109 (D. Ariz. 2000).

[319] *Id.* at 1110-11.

[320] *Id.* at 1113 ("There is nothing, however, insignificant about the use of Plaintiff's name and footage in the videotape. His name, while only briefly mentioned, prominently stands out as the highlight of Defendant's advertisement.").

[321] *See supra* note 317 and accompanying text.

adapting to rapidly changing technology.[322] When faced with these new technologies, looking to how collective bargaining agreements have dealt with these new obstacles may be the best way to shape the right of publicity in a rational manner going forward.

Andrew T. Coyle[†]

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[322] *Compare* Anthony L. Pessino, Note, *Mistaken Identity: A Call to Strengthen Publicity Rights for Digital Personas*, 4 VA. SPORTS & ENT. L.J. 86 (2004) (arguing that new uses of digital technology necessitate strengthening the right of publicity), *with* Craig J. Ackermann, *E-Issues Take Center Stage: The 2000 SAG/AFTRA Strike*, 8 VILL. SPORTS & ENT. L.J. 293 (2002) (describing how labor disputes within entertainment collective bargaining all relate to advances in technology).

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