MORALITY, UTILITY, REALITY? JUSTIFYING CELEBRITY RIGHTS IN THE 21ST CENTURY

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CONTENTS

I. INTRODUCTION

The question whether image rights - as part of a person's "persona" - fall within the scope of the classic intellectual property theories is disputed among scholars. The current leading theories of intellectual property are: (1) Locke's Labor Theory; (2) Utilitarianism; and (3) Personality Theory of Property. Although the classic theories have been criticized for failing to provide analytical certainty and clarity, in the absence of widely accepted alternatives, they have proven to be a robust starting point for global legislative and jurisprudential debates around intellectual property rights.[1]

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1. *See, e.g.*, Stephen G. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 HARV. L. REV. 281 †1970); Lynn Sharp Paine, *Trade Secrets and Justifications of Intellectual Property*, 20 PHILOS. PUB. AFF. 247 (1991).

This article reviews the three most influential theories of intellectual property rights and examines their applicability to the protection of a celebrity's public image.[2] The article addresses the most common criticism raised about publicity rights in the U.S., a recognized pioneer and leader among nations in protecting celebrity rights.[3] It assesses the scope, and the moral, economic, and cultural benefits of celebrity rights from both a legal and sociocultural perspective, while offering a new, wider conception of the "*creator*" *in the intellectual property theory*. This highlights the legal background and development of image right protection in the U.S., U.K., and Europe in the wake of the U.K.'s vote to leave the European Union. The author argues that, although there is currently no unified approach with respect to image right protection, returning to, and rethinking, unifying traditional philosophical justifications for intellectual property rights can help promote a more workable and enforceable harmonized international standard in this area of law.

II. THE LEADING THEORIES ON THE JUSTIFICATION FOR CELEBRITY RIGHTS

A. Locke's Theory

The 17th century philosopher John Locke originated the labor theory of property. In the fifth chapter of his *Second Treatise of Government* (1690), Locke argued that a person enjoys a natural right in the fruits of his labor in transforming raw materials that are held in common into a finished product of enhanced value.[4] The theory holds that whatever a person

2. *See* William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 191 (Stephen Munzer ed., 2001) (outlining four main theoretical approaches to intellectual property, including the social planning theory).

3. *See* Marshall Leaffer, *The Right of Publicity: A Comparative Perspective*, 70 ALB. L. REV. 1357, 1358 (2007); Roberta Rosenthal Kwall, *Fame*, 73 IND. L. J. 1, 16 (1997).

4. *See* John Locke, *The Second Treatise of Government and a letter concerning Toleration*, *in* DOVER THRIFT EDITIONS, 1, 13 (Tom Crawford ed., Dover Publications, 2002)(1690).

> Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others. *Id.*

produces by his own initiative, intelligence and industry is his property.[5] Locke, however, also recognized that earthly resources are not infinite by nature, and that a person should be thoughtful of leaving some resources to the community.[6] This is commonly referred to as Locke's proviso, where a person must ensure that "enough, and as good, left in common for others."[7]

Despite the latter qualification, for some critics a self-*contradiction* of Locke's *theory* is evident: on the *one hand*, whilst it recognizes the earth's resources to be common to all men; on the other hand, individual persons should be entitled to property rights in such resources.[8] Others have raised doubts as to whether the simple process of mixing labor with external objects must always result in valid claims of property.[9] More recently, the U.S. Supreme Court seemed to reject Locke's theory in its 1991decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*, at least with regards to its application to copyright.[10]

But does the theory provide support for the protection of a celebrity's persona against the exploitation of that persona without consent? Some critics argue that a person's image does not ordinarily result from labor, but often from luck, random public taste, or the independent efforts of the media and the audience in creating the personality.[11] Similarly, it has been pointed out that celebrities already receive adequate remuneration in other

5. LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 32 (Routledge & Kegan Paul eds., 1977).

6. LOCKE, *supra* note 4, at 15.

7. LOCKE, *supra* note 4, at 15. Locke's proviso has been interpreted in different ways. *See generally* Geoffrey P. Miller, *Economic Efficiency and the Lockean Proviso*, 10 HARV. J.L. & PUB. POL'Y 401, 410 (1987); Clark Wolf, *Contemporary Property Rights, Lockean Provisos, and the Interests of Future Generations*, 105 ETHICS 791, 792 (1995).

8. Fisher, *supra* note 2, at 183.

9. *See* John T. Sanders, *Justice and the Initial Acquisition of Property*, 10 HARV. J.L. & PUB. POL'Y 367, 390 (1987); *see generally* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 178-82 (1974) (famously asking, "If I pour my can of tomato juice into the ocean, do I own the ocean?").

10. *See* Feist Publ'ns, Inc. v. Rural Telephone Serv. Co. 499 U.S. 340, 359-60 (1991). The case concerned a dispute between two competing publishers of telephone books with the claimant alleging that the defendant had copied its directory listings. *Id.* At 342-44. The Court held that the "sweat of the brow" doctrine did not extend copyright protection to factual information – the original publisher of the telephone directory could not claim copyright protection over its collection of telephone numbers merely because it had expended labour compiling them. *Id.* at 359-60.

11. *See* JANE GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE AND THE LAW 228 (1991); *see also* Rosemary Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1864 (1991); *see generally* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 186 (1993).

ways for their labor, for example, by signing highly lucrative sports or film contracts.[12]

Not only legal scholars,[13] but also many famous sociologists,[14] have emphasized the role of the media and public relations in creating a celebrity persona. Fifty years ago, cultural historian, Daniel Boorstin, famously described a celebrity as sometimes being "known for his well-knownness."[15] According to him, fame is not the result of specific accomplishment, but rather the attention and coverage of public media.[16] A more recent view, taken by the famous sociologist Gabler, considered this too reductive an analysis, although he acknowledged the inter-dependent relationship between celebrity and the media.[17] In his view, celebrities provide a narrative that society may choose for entertainment, inspiration, or as a role model, often times teaching life lessons valued by our culture, such as the benefits of self-discipline, the meaning of power and money, or a healthier way of living.[18] Gabler argues that nowadays, celebrities perform functions of art by means of story.[19] They take on personal meaning to many individuals in society and create a feeling of common experience around which society can identify.[20] This way, society can create or discover meaning through celebrities.[21] Celebrity culture has, therefore, been conceived as an entertaining work of art, albeit at the lower

12. *See* Madow, *supra* note 11, at 215.

13. Vincent M. de Gradpré, *Understanding the Market for Celebrity: An Economic Analysis of the Right of Publicity*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 73, 100 (2001).

14. *See* Violina P. Rindova et al., *Celebrity Firms: The Social Construction of Market Popularity*, 31 ACAD. MGMT. REV. 50, 50 (2006); *see also* JOSHUA GAMSON, CLAIMS TO FAME, CELEBRITY IN CONTEMPORARY AMERICA 42 (1994).

15. DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 217 (1961).

16. *See id.*

17. NEAL GABLER, TOWARD A NEW DEFINITION OF CELEBRITY 5 (2001).

18. *See id.*; *see also* RICHARD SCHICKEL, *INTIMATE STRANGERS: THE CULTURE OF CELEBRITY 309 (2000).*

19. GABLER, *supra* note 17, at 10.

20. *See* Madow, *supra* note 11, at 128.

> Entertainment and sports celebrities are the leading players in our public drama. We tell tales, both tall and cautionary, about them. We monitor their comings and goings, their missteps and heartbreaks. We copy their mannerism their styles, their modes of conversation and of consumption. Whether or not celebrities are the "chief agents of moral change in the United States", they certainly are widely used - far more than are institutionally anchored elites - to *symbolize* individual aspirations, group identities, and cultural values. Their images are thus important expressive and communicative resources: the peculiar, yet familiar idiom in which we conduct a fair position of our cultural business and everyday conversation. *Id.*

21. *See* Coombe, *supra* note 11, at 1865-66.

end of the cultural spectrum, built upon money and media rather than upon traditional values of art, performance excellence and the wider enrichment of society.[22] In this respect, it may be compared to a popular work of art that is not measured by its creativity but is "generally 'meant to entertain, to stimulate emotion, or project sentimentality.'"[23] Under this view, Locke's Labor Theory provides support for the publicity right even if the celebrity status is not the result of a purely artistic achievement, but solely an entertaining narrative, for example, the participation in a reality show or the marriage to an already famous person. Even if one does not agree with this view, it must be borne in mind that the right of publicity generally applies to any person, not just someone who has achieved fame. Courts and commentators have generally expressed that the right of publicity belongs to every individual, and even where no state statute protects it, it is protected by the common law of tort.[24]

Still, the question remains whether the influence of the media and public relations managers might be a reason to deny or limit publicity rights to celebrities, or at least distribute the rewards among all of these parties as some critics suggest.[25] The answer depends on whether the contribution of the media to the creation of the celebrity persona would be a unique occurrence within the traditional protection scheme of intellectual property rights. However, many forms of modern art and music also largely depend on media coverage, public, and public relations strategies.[26] In this respect, much *has changed* in the creation of art and science *since* the *time* of *Locke and the evolution of copyright protection. The traditional concept of the classic writer, painter, or "carpenter [who] makes a chair from a block of a wood,"*[27] carrying the only creative power within his works and thereby *deserving to reap the fruits of his labor, seems no longer to be the only*

22. *See* GABLER, *supra* note 17, at 12.

23. Pete Singer, *The Three Stooges Latest Act: Attempting to Define the Scope of Protection the First Amendment Provides to Works of Art Depicting Celebrities, Comedy III Productions, Inc. v. Saderup, Inc., P.3D 797 (Cal. 2001)*, 27 U. DAYTON L. REV. 313, 332 (2002) (quoting SUSAN G. JOSEPHSON, FROM IDOLATRY TO ADVERTISING: VISUAL ART AND CONTEMPORARY CULTURE 95 (1996)).

24. *See* Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 47 (1994); *see also* Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954); *see also* Jennifer L. Carpenter, *The Case for an Expanded Right of Publicity for Non-Celebrities*, 6 VA. J.L. & TECH. 1522 (2001); *see also* Dora v. Frontline Video, Inc., 18 Cal. Rptr. 2d 790, 790 (Ct. App. 1993).

25. *See* Gradpré, *supra* note 13, at 115.

26. *See* Daragh O'Reilly, *The Marketing of Popular Music*, *in* ARTS MARKETING 6, 8 (Finola Kerrigan et al eds., 2004).

27. Madow, *supra* note 11, at 195.

valid model.[28] For example, performance art is often multi-disciplinary, with the active participation of the audience and media.[29] Most examples of virtual internet art and electronic art are also highly interactive.[30] A similar trend has emerged in music: artists release music as a digital interactive experience in the form of apps or by using body movements of the audience members.[31] Rather than doing the creative work all by themselves, the artists involve the fans in the creative process, just as celebrities may engage their followers and fans on social media into creating their own particular style that is easily identifiable as their celebrity persona. If an artist does not make a final completed piece of art and instead produces an area of activity for the receivers, who engage in some form of cultural artistic interaction with their audiences, then there is no apparent reason why artists and celebrities should be treated differently.[32]

Locke's theory has also been considered unsuitable for the justification of publicity rights based on moral and sociological concerns. Some scholars have pointed out that the celebrity cult may dangerously blur the line between entertainment and politics, causing an imbalance of power and a threat to democracy.[33] In this respect, Madow has asked: "[c]an a democracy flourish, or even survive, when political leaders and candidates 'must resort to the strategies of entertainers . . . to gain and retain public attention?'"[34] While this argument may, to some extent, reflect the practical reality, it cannot justly limit Locke's natural rights. As mentioned above, the only valid limitation on Locke's natural right of property - Locke's proviso – derives from the duty and responsibility to respect the rights of others.[35] A liberal system, such as Locke's vision, therefore, recognizes individual property rights, but the proper functioning

28. *See id.* (stating "[a] celebrity, in short, does not make her public image, her *meaning for others*, in anything like the way a carpenter makes a chair from a block of wood. She is not the sole and sovereign "author" of what she means for others").

29. *See* Ryszard W. Kluszczynski, *Strategies of Interactive Art*, 2 J. AESTHETICS & CULTURE 1, 2 (2010).

30. *See* OLIVER GRAU, VIRTUAL ART: FROM ILLUSION TO IMMERSION 7 (2003).

31. Roberto Morales-Manzanares et al., *SICIB: An Interactive Music Composition System Using Body Movements*, 25 COMPUTER MUSIC J. 25, 36 (2001).

32. *See* Kwall, *supra* note 3, at 14.

33. *See* Madow, *supra* note 11, at 227; *see also* David S. Meyer & Joshua Gamson, *The Challenge of Cultural Elites: Celebrities and Social Movements*, 65 SOC. INQUIRY 181, 185-86, 201-02 (1995); Jeremy Gilbert, *Small Faces: The Tyranny of Celebrity in Post-Oedipal Culture*, 2 MEDIAACTIVE 86, 88 (2004).

34. Madow, *supra* note 11, at 227 (quoting Suzanne Keller, *Celebrities and Politics: A New Alliance*, 2 RES. POL. SOC. 145, 146 (1986)).

35. *Id.*

of the system depends upon people exercising those rights responsibly.[36] It depends on people taking seriously their *duty* to respect the rights of others.[37] It could be argued that while celebrities today are eager to claim their rights, too few are willing to accept the attendant duties. However, can celebrities really be accused of simple hollowness and selfishness?

Certainly, some celebrities use their star power to support good causes, and celebrity philanthropy has increased over the last few decades.[38] Actors, comedians, and filmmakers have consistently helped raise awareness for global problems such as war, hunger, and pollution of the environment. For example, actor Leonardo DiCaprio spoke at the Climate Change Summit about the importance of clean air and a healthy climate and donated $15 million to environmental projects.[39] Similarly, actress and movie director, Angelina Jolie is an advocate for the worldwide safety and shelter of refugees.[40] Even if the motivations for the stars to campaign and donate to good causes were solely to improve their "brand" or to promote their new projects as some critics argue,[41] they would still raise money for a good cause, ultimately benefitting society.[42]

Another argument is that celebrities already receive adequate remuneration in other ways for their labor; this too, however, fails to convince. Celebrities may suffer disadvantages solely based on their typical higher earnings, depriving them of a right to claim an additional income from property rights. What may violate our moral intuitions, that rich celebrities get richer for little or no achievement, should be addressed by the state and law in other ways; for example, by imposing higher income taxes on high earners or properly regulating tax havens.[43] Based on Locke's

36. *See* Estelle Derclaye & Tim Taylor, *Happy IP: Replacing the Law and Economics Justification for Intellectual Property Rights with a Well-Being Approach*, 37 EUR. INTELL. PROP. REV. 197, 203 (2015); Nozick, *supra* note 9, at 178, 182.

37. *See* Helga Varden, *The Lockean Enough-and-as-Good' Provviso: An Internal Critique*, 9 J. OF MORAL PHIL. 410, 416 (2012).

38. *See* Elaine Jeffreys & Paul Allatson, *Celebrity Philanthropy: An Introduction, in* CELEBRITY PHILANTHROPY 1, 4 (2015).

39. Nick Visser, *Leonardo DiCaprio Foundation Gives $15 Million to Save the Planet*, HUFFINGTON POST (July 14, 2015), *available at* http://www.huffingtonpost.com/2015/07/14/leonardo-dicaprio-foundation-donation_n_7795826.html (last visited Nov. 16, 2016).

40. *See* Jo Littler, "*I Feel Your Pain*": *Cosmopolitan Charity and the Public Fashioning of the Celebrity Soul*, 18 SOC. SEMIOTICS 237, 237-38 (2008).

41. *See, e.g.*, Grant McCracken, *Who Is the Celebrity Endorser? Cultural Foundations of the Endorsement Process*, 16 J. CONSUMER RES. 310, 311 (1983).

42. Kwall, *supra* note 3, at 15.

43. *But see* Madow, *supra* note 11, at 189 (noting, "[w]hether or not the state should undertake, through tax policy or some other way, to redress or offset these disparities in fame and fortune is a large and difficult question").

understanding of a natural right of property, though, this can only be limited by Locke's proviso. As long as the proviso, that "enough and as good [is] left" for others is satisfied, the additional income of celebrities from publicity rights does not prejudice anyone, and celebrities cannot justly be deprived of it.[44]

Having said this, the standard criticism of Locke's theory as a justification for publicity rights is not convincing in all respects. It is quite apparent that there are far greater issues to deal with than simply deciding on moral grounds, or according to a labor analysis, whether a personality right should be granted, or indeed, whether a celebrity could be compared to an entertaining art form. As for the potential negative effects associated with an overly distinct celebrity culture, much of the ethical controversy rests on the question of how much should the law respond to cultural developments in society. Some believe that individuals have free choice and should take personal responsibility for their own behavior.[45] They argue that people have a free choice to believe what celebrities say and which role models they follow.[46] Under this school of thought, perhaps more consistent with the American tradition of individual liberty, there would be no need for the interference of law.[47] It would not be necessary to reject or limit publicity rights to protect society from the potentially negative effects of an inflated celebrity culture. Others, however, believe that behavior is not solely a matter of free choice, but is affected by the socioeconomic cultural environments in which people live. Such advocates would promote a stronger allocation of the law, interfering with celebrity rights to protect society from a growing, evermore influential celebrity culture, helping to make their vision for the country and the public good come true.[48]

As mentioned above, there are many different approaches to the justification of publicity rights. Each theoretical perspective acts as a guide, which may help to develop the most beneficial solution for society and at the same time take into account the socio-economic reality and public

44. *See* Locke, *supra* note 4, at 15.

45. *See* ROBERT KANE, THE SIGNIFICANCE OF FREE WILL 4 (1998).

46. *See* GAYLE BREWER, MEDIA PSYCHOLOGY 128 (2011).

47. *See* Kent Greenawalt, *Legal Enforcement of Morality*, 85 J. CRIM. L. & CRIMINOLOGY 710, 724 (1995).

48. "Publicity rights, in other words, move us even further away from what John Fiske has called a 'semiotic democracy' - a society in which all persons are free and able to participate actively, if not equally, in the generation and circulation of meanings and values." Madow, *supra* note 11, at 146 (footnote omitted).

good.[49] Indeed, the achievement of maximum social utility is central to the next leading theory, the Utilitarian Theory of Property.[50]

B. Utilitarianism

Most legal systems, particularly Anglo-American systems, recognize the utilitarian view of intellectual property rights.[51] The U.S. Supreme Court, Congress, and many legal scholars have considered utilitarianism to be the principal scope of American copyright and patent law.[52] Similarly, the U.S. Constitution appears to underpin the rationale that intellectual property rights are a means to benefit American society. [53]

Modern utilitarian philosophy began with 17th century philosopher Jeremy Bentham.[54] According to Bentham, and later Stuart Mill, the *striving* of each *man and proper scope of behavior* is directed to the attainment of pleasure and the *avoidance of pain*.[55] The best measure of right and wrong is then, according to Bentham, "the greatest happiness of the greatest number."[56] In this context, intellectual property is justified for the utilitarian, if it helps to promote some similar value. Intellectual property rights are seen as a reward, granted to creators of things that will help contribute to an increased overall good or social utility.[57] Individuals are incentivized by exclusive rights for a limited duration, which motivate

49. *See generally* Chidi Oguamanam, *Beyond Theories: Intellectual Property Dynamics in the Global Knowledge Economy*, 9 WAKE FOREST INTELL. PROP. L.J. 104, 154 (2009).

50. *See* John C. Harsany *Morality and Incentives*, *in* ETHICS, RATIONALITY, AND ECONOMIC BEHAVIOUR 25 (Francesco Farina et al. eds. 1996).

51. *See* Adam D. Moore, *Intellectual Property, Innovation and Social Progress: The Case Against Incentive Based Arguments*, 26 HAMLINE L. REV. 601, 630 (2003).

52. *See Harper & Row Publishers, Inc. v. Nation Enters.*, *471 U.S. 539, 558* (*1985*); *see Carson v. Here's Johnny Portable Toilets, Inc.*, *698 F.2d 831, 837* (*6th Cir. 1983*); *see* Diamond v. Chakrabarty, 447 U.S. 303, 307 (1980); *see also* F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions* 85 MINN. L. REV. 697, 698 (2001) (stating, "the consensus among those studying the American patent system is to focus on utilitarian approaches").

53. *See* U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power "[to] promote the Progress of Science and useful Arts, by securing, for limited Times to Authors and Inventors the exclusive rights to their respective Writings and Discoveries").

54. *See* Wolfgang Kersting, *Politics*, *in* THE CAMBRIDGE HISTORY OF EIGHTEENTH-CENTURY PHILOSOPHY 1062 (Knud Haakonssen ed., 2006).

55. *See generally* Jeremy Bentham, *A Comment on the Commentaries and a Fragment on Government*, *in* THE COLLECTED WORKS OF JEREMY BENTHAM (J.H. Burns & H.L.A. Hart eds., 1977); *see also* James H. Burns, *Happiness and Utility: Jeremy Bentham's Equation*, 17 UTILITAS 46 (2005); *see generally* John Stuart Mill *Utilitarianism*, *in* DOVER THRIFT EDITIONS (Mary Carolyn Waldrep et al. eds., 2007).

56. Bentham, *supra* note 55, at 393.

57. *See* Moore, *supra* note 51, at 607.

them to create culturally valuable works.[58] Without this incentive, utilitarians argue, authors would not feel motivated to "invest the time, energy, and money necessary to create these works because" anyone could copy them cheaply and freely, "eliminating an authors' ability to" generate income from their works.[59]

The utilitarian theory has also attracted some criticism, albeit not as much as the labor theory.[60] With respect to publicity rights, some critics argue that, from a utilitarian standpoint, the right to protect a person's image from economic exploitation seems unnecessary.[61] It is not necessary to provide an incentive of exclusive rights to celebrities to motivate them to create culturally valuable distinct identities. Without this incentive, celebrities may still invest the time and energy necessary to create their identities as many celebrities have other, more relevant sources of income.[62] Some note that the publicity right encourages people, once they have become celebrities, to become dependent on their endorsement incomes rather than continue to provide the public the services that made them famous.[63]

The incentive theory generally assumes that the prospect of financial reward is the primary motivator for artists. The publicity right primarily arose in the early 20th century to address unauthorized commercial appropriation of a public figure's identity.[64] Both copyright and authors' rights arose in relations between authors and publishers and the need to provide an income for authors other than patronage.[65] Artists need to work for money, otherwise they would be forced to do something else and social welfare would be diminished.[66] Critics of publicity rights, though, argue that at some point the amount of money earned will have a negative

58. *See id.*

59. Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1751 (2012).

60. *See* Herman T. Tavani, *Recent Copyright Protection Schemes: Implications for Sharing Digital Information*, *in* INTELLECTUAL PROPERTY RIGHTS IN A NETWORKED WORLD: THEORY AND PRACTICE 182, 191 (Richard A. Spinello & Herman T. Tavani eds., 2005).

61. *See* Madow, *supra* note 11, at 208.

62. *See* Madow, *supra* note 11, at 194.

63. *See id.*

64. *See* Pavesich v. New England Life Ins. Co., 50 S.E. 68, 80-81 (Ga. 1905); Edison v. Edison Polyform Mfg. Co., 67 A. 392, 395 (N.J. Ch. 1907); *see* Foster-Milburn Co. v. Chinn, 120 S.W. 364, 365-66 (Ky. 1909); *see* Kunz v. Allen, 172 P. 532, 532-33 (Kan. 1918); *see* Flake v. Greensboro News Co., 195 S.E. 55, 63-64 (N.C. 1938).

65. *See* MIREILLE VAN EECHOUD ET AL., HARMONIZING EUROPEAN COPYRIGHT LAW: THE CHALLENGES OF BETTER LAWMAKING 186 (P. Bernt Hugenholz ed., 2009).

66. *Id.*

effect on production and hinder creativity.[67] They suggest that the effect on creativity before an artist becomes a famous celebrity would be substantially different after that point.[68] Once a celebrity enjoys a steady income from publicity rights, she may stop being creative altogether or just produce commercial reproductions like artist and celebrity, Andy Warhol, in his later years.[69]

A closer examination of the creative output of celebrities, however, suggests otherwise. Despite their tremendous wealth, music stars like Madonna, Barbara Streisand and Cher have been creating new images for decades, some of them turning from singers into actors or actresses.[70] One reason for this might be the simple fact that most artists really enjoy what they do. This reflects the general weakness of the economic incentive theory: it does not take into consideration that creativity may be a result of intrinsic motivation (intellectual fulfillment), and not only external motivation (money).[71] If celebrities like what they do – instead of retiring as millionaires – they tend to be more open to new creative projects as part of their personal self-realization. To this end, full financial security may actually help, rather than hinder them. Similarly, celebrities have some marketing value that make investors more comfortable taking risk in supporting them taking on new creative roles.[72] For example, actors Angelina Jolie, Clint Eastwood and George Clooney became successful directors after, or alongside, their careers as actors.[73] Victoria Beckham became an internationally acclaimed fashion designer after her career as a pop star with the Spice Girls.[74] Many *models, like Cara Delevigne*, have appeared in films, and some have launched side *singing* careers.[75] In the

67. Fisher, *supra* note 2, at 195.

68. *Id.*

69. *Id.*

70. Stephen Holden, *Madonna Re-Creates Herself- Again*, N.Y. TIMES (March 19, 1989), *available at* http://www.nytimes.com/1989/03/19/arts/madonna-re-creates-herself-again.html?pagewanted=all (last visited Nov. 20, 2016).

71. Tavani, *supra* note 60, at 191.

72. Hazel Carty, *Advertising, Publicity Rights and English Law*, 3 Intell. Prop. Q. 209, 252 (2004).

73. Joan Dupont, *Clint Eastwood, a Director Who Aims to Get to the Heart of the 'Whole Story'*, N.Y. TIMES (March 22, 2008), *available at* http://www.nytimes.com/2008/05/23/arts/23iht-dupont.1.13119662.html (last visited Jan. 9, 2017).

74. *See* Sarah Lyall, *Victoria Beckham, Working Girl*, N.Y. TIMES STYLE MAGAZINE (Aug. 22, 2013), *available at* http://www.nytimes.com/2013/08/22/t-magazine/victoria-beckham-working-girl.html (last visited May 17, 2017).

75. Logan Hill, *Cara Delevigne, Ready to Conquer Hollywood, Immerses Herself in 'Paper Towns'*, N.Y. TIMES (July 16, 2015), *available at* http://www.nytimes.com/2015/07/19/movies/cara-delevingne-ready-to-conquer-hollywood-immerses-herself-in-paper-towns.html (last visited Nov. 20, 2016).

era of, what a recent article by Sheila Marikar in the New York times called the "Slash Generation,"[76] where roles and jobs are not defined anymore and a celebrity can be seen modelling / acting / singing / designing and so on, celebrities may easily develop more than one asset of their career simply for their well-being or because they have the financial means to try new things.

Does society need all these additional personalities of the celebrities? Will the production of beneficial celebrity personae increase, and therefore improve overall well-being? Alternatively, will the right of publicity, as Fisher points out, ultimately just "waste[] social resources by inducing excessive numbers of adolescents to seek fame?"[77] As mentioned above, generally, financial rewards tend to result in additional investments in celebrity-making by an increasing number of individuals. With a financial incentive, ongoing renown can be achieved.[78] Furthermore, the right of publicity does not seem to be a waste of resources. If the publicity right were abolished, young people would still try to seek fame as the economic value of the celebrity right only makes up for a small part of a celebrities' income.[79] Moreover, the non-economic motivation to achievement in sports and entertainment, such as the desire for applause, recognition and attention should not be underestimated.[80] There is also no evidence that the publicity right is a cause for increasing consumer prices. Prices tend to rise when there is high demand of a good and service. Although there is generally high demand for the goods and the services of celebrities, many other factors such as changing tastes, fashions, incomes, price changes in complementary and substitute goods, and market expectations may affect consumer prices as well.[81] On the other hand, with a publicity right in place, generally, more jobs and industries in PR, Media and IT are created.[82] Even rich celebrities may need financial incentives, as they often take high financial risks when they develop new careers. For example, singer Madonna self-financed the majority of the budget for her movie

76. Sheila Marikar, *The Lives of Millennial Career Jugglers*, N.Y. TIMES (Dec. 5, 2014), *available at* http://www.nytimes.com/2014/12/07/fashion/the-lives-of-millennial-career-jugglers.html?_r=0 (last visited Feb. 7, 2017).

77. Fisher, *supra* note 2, at 195.

78. De Gradpre, *supra* note 13, at 101.

79. Madow, *supra* note 11, at 210.

80. *See* Michael A. Carrier, *Cabining Intellectual Property through a Property Paradigm* 54 DUKE L.J. 1, 43, 44 (2004).

81. *See* Dwight E. Robinson, *The Economics of Fashion Demand* 75 Q. J. OF ECON. 376, 398 (1961).

82. *See* Madow, *supra* note 11, at 203.

W.E.[83]; rapper Kanye West invested millions of dollar in his second career as a fashion designer.[84] In light of these examples, it would seem that celebrities need an economic incentive to develop culturally valuable new personas.

C. Personality Theory of Property

Finally, the personality theory of property can be traced back to the 19th century philosophers Hegel and Kant.[85] The central idea of the theory is that the author's work and creativity deserves protection as an integral part of his personality.[86] An author's work is seen as an expression of himself and as such, reflects the author's personality. The artwork is neither protected because of the labor the creator may have invested in it, nor because of social utility/economic good that might result from bringing it to the public. Rather, the personality theory of property focuses on the personal rights of the author, as distinct from his economic rights.

The theory found expression in various intellectual property laws in continental Europe, in particular in the concept of moral rights (droit moral) in France, and is enshrined in Article 6bis of the Berne Convention.[87] In this respect, authors and artists have the right to, for example, control the public disclosure of their works and to protect their works against mutilation and destruction.[88] The strong connection

83. *See W.E.*, IMDB, *available at* http://www.imdb.com/title/tt1536048/trivia (last visited Jan. 9, 2017).

84. Emily Jane Fox, *Kanye West's $53 Million Dollar Debt Explained*, VANITY FAIR (Feb. 17, 2016), *available at* http://www.vanityfair.com/news/2016/02/kanye-west-53-million-dollar-debt-explained (last visited Nov. 20, 2016).

85. *See* Immanuel Kant, *On the Wrongfulness of Unauthorized Publication of Books* (1785), *in* IMMANUEL KANT: PRACTICAL PHILOSOPHY 29-35 (Mary J. Gregor ed., 1996).

86. *Id.*

87. World Intellectual Property Organization, Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, (Sept. 9, 1886; revised July 24, 1971 and amended 1979; entered into force for U.S. Mar. 1, 1989 (Sen. Treaty Doc. 99-27)) [hereinafter Berne Convention]. The French Code de la Propriété Intellectuelle (CPI) [Intellectual Property Code] created by **LOI 92-597 du 1er juillet 1992 relative au code de la** propriété intellectuelle (partie legislative) [Law 92-597 of July 1, 1992 on the Intellectual Property Code, Journal Officiel de la République française] [J.O.] [OFFICIAL GAZETTE OF FRANCE], February 8, 1994, last consolidated August 27, 2016 provides for four main moral rights: le droit de paternité [the right of an author to be identified as such] (Article L121-1); le droit au respect de l'oeuvre [the right to prevent the work from being modified or destroyed] (Article L121-1); le droit de divulgation [the right of the author to decide when and how his work will be revealed to the public] (Article L121-2) and le droit de retrait et de repentir [the right of the author to take back works which have previously been disclosed to the public] (Article L121-4).

88. Sonya G. Bouneau, *Honor and Destruction: The Conflicted Object in Moral Rights Law*, 87 ST. JOHN'S L. REV. 53, 105 (2013).

between copyrights and the person of the author is also expressed, for example, in both French and German copyright laws, which protect "works of the mind," *oeuvres de l'esprit*, and *persönliche geistige Schöpfungen*.[89] The term "author" is generally used in a very wide sense, and may include artists, sculptors, writers and composers, although the exact definition varies from country to country.[90] Until recently, the personality theory did not receive much attention in American law; however, it has found increasing recognition among American lawmakers, as evidenced by the adoption of the federal Visual Artists Rights Act in 1990.[91]

Does the personality theory provide a justification for celebrity rights? Some legal scholars argue because a person's image is an important part of the personality, it deserves extensive legal protection.[92] A celebrity's persona is a distinct expression of one's self, which other persons should not be able to exploit commercially without consent.[93] As long as an individual identifies with his personal image, he will have a personality stake in that image.[94] Others argue that, due to its economic nature, the celebrity right is unable to protect personhood.[95]

To address the latter criticism, a closer look into Hegel's perception of personality may be helpful. One of Hegel's central ideas about property might be seen in the following passage: "the circumstance that I, as free will, am an object to myself in what I possess and only become an actual will by this means constitutes the genuine and rightful element in possession, the determination of property."[96] Hegel seems to suggest that through possession of property, men develop and reinforce their capacities and self-understandings that make up their personality.[97] Private property helps to develop personality because it gives the individual a concrete

89. *See* Article 111-1 CPI: "L'auteur d'une oeuvre de esprit jouit sur cette oeuvre, du seul fait de sa création, d'un droit de propriété incorporelle exclusive e opposable à tous;" *see also* in Germany: Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgestz) [Copyright Law], Sept. 9, 1965 BGBL. I at 1273, last amended by Gesetz [G], December 3. 2015 BGBl. I at 2178, § 2 para 2: "Werke im Sinne dieses Gesetzes sind nur persönliche geistige Schöpfungen."

90. PASCAL KAMINA, FILM COPYRIGHT IN THE EUROPEAN UNION 469 (2016).

91. *See* Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N. C. L. REV. 6 (1997); Geri J. Yonover, *The Dissing of da Vinci: The Imaginary Case of Leonardo v Duchamp: Moral Rights, Parody and Fair Use*, 29 VAL. U. L. REV. 935, 938 (1995).

92. Justin Hughes, *The Philosophy of Intellectual Property* 77 GEO. L.J., 287 (1988).

93. *Id.*

94. *Id.*

95. Fisher, *supra* note 2, at 194.

96. GEORG W. F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 76-77 (Allen W. Wood ed., H.B. Nisbet, trans., Cambridge University Press, 2003) (1821).

97. *Id.*

perception of his independence, a perception that is an essential part of being a person.[98] Similarly, Kant's view is that personality requires the awareness of any physical object, and comes into existence in the initial stage in which persons willingly claim and exercise rights against other persons.[99] Hence, both philosophers argue that property is intrinsically linked to personality.[100]

Having said this, under the concept of personality, the argument that celebrities make money from their personae – an ability not particularly close to the heart of personality development – does not seem to be fully convincing. Rather, strictly applying Hegel's and Kant's views, one must *assume the opposite*: property and money are necessary prerequisites for celebrities to become aware of, and develop, their personality. Although there is a common belief that too much money can spoil the character and hinder the development of an individual's personality, making money from the own personae cannot categorically be seen as a barrier to personality development. As previously outlined, based on an economic incentive, celebrities may be more willing to take risks to develop new images. This is ultimately good for society, as creative output will increase.

Although the Lockean labor theory, the Utilitarian theory and the Hegelian personality theory may not serve as an overall explanation for, or justification of, celebrity rights, all of these theories do reflect some important values which are widely reflected in the laws and jurisprudence of the U.S., the U.K. and continental Europe. The following chapter provides a concise and comparative perspective on selected jurisdictions in respect to the treatment of celebrity rights. This serves to stimulate and inform the debate on the practical value of the theories of intellectual property.

III. CELEBRITY RIGHTS IN THE UNITED STATES, THE UNITED KINGDOM AND CONTINENTAL EUROPE

A. United States

In the U.S., traditionally, a wide scope has been given for the exploitation and commoditization of image rights.[101] Over the course of a century, a right of privacy, famously conjured out of common law

98. ALAN PATTEN, HEGELS IDEA OF FREEDOM 148 (1999).

99. Immanuel Kant, *Metaphysics of Morals*, *in* PRACTICAL PHILOSOPHY 408-409 (Mary J. Gregor ed., 1996).

100. VICTOR MUNIZ-FRATICELLI, THE STRUCTURE OF PLURALISM 93 (2014).

101. *See* Eliana Torres, *The Celebrity Behind the Brand International Protection of the Right of Publicity*, 6 PACE INTELL. PROP. SPORTS & ENT. L.F. 119, 142 (2016).

precedents by Warren and Brandeis, was developed into a right of publicity, which gave celebrities the power to prevent the commercial use of their names, endorsements, images, voices, and other attributes of their personality, by unauthorized third parties.[102] In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* in 1953[103] and *Zacchini v. Scripps-Howard Broadcasting Co.* in 1977,[104] courts for the first time recognized a distinction between the personal right to be left alone and the economic right to exploit one's own fame.[105] In defining such a right, much attention has been focused on separating what is commercially unacceptable from what is desirable free speech under the First Amendment of the U.S. Constitution.[106] It has also been important to settle the duration of such rights.[107] Publicity rights as a commercial value of a person's identity are therefore well established in the U.S., although state laws vary widely as to the extent of protection.[108] The right of publicity issues frequently overlap with trademark issues and account for numerous decisions involving trademark infringement and unfair competition claims.[109] While it is a distinct legal category, the right of publicity shares elements of both property and tort law.[110]

A significant body of jurisprudence from across the U.S. focuses on determining the fair market value that a celebrity's personality or image

102. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 199 (1890).

103. *See* Haelan Lab., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

104. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977); C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Adv. Media, L.P., 505 F.3d 818 (8th Cir. 2007).

105. *See* Susanne Bergmann, *Publicity Rights in the United States and Germany: A Comparative Analysis*, 19 W. LOY. L.A. ENT. L. REV. 480, 522 (1999).

106. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619 (6th Cir. 2000); ETW Corp. v. Jireh Publ'g., Inc., 332 F.3d 915 (6th Cir. 2003).

107. *Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.,* 589 F. Supp.2d 331 (S.D.N.Y. 2008); *Milton* H. Greene *Archives,* Inc. *v. Marilyn Monroe LLC*, 692 *F.3d 983,* 993–94 (*9th Cir.* 2012).

108. Bergmann, *supra* note 105, at 482.

109. Under current law, any uses that falsely suggest that the individual endorsed or approved of the company using his or her image, or that company's product or service, gives rise to an unfair competition claim under Section §43(a) of the Lanham Trademark Act of 1946 as codified in the *United States Code*: 15 U.S.C. § 1125(a) (1946) and/or state statutory or common law. *See, e.g.*, Parks v. LaFaceRecords, 329 F.3d 437 (6th Cir. 2003); *see also* Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992).

110. *See* Frederick R. Kessler, *A Common Law for the Statutory Era: The Right of Publicity and New York's Right of Private Statute*, 15 FORDHAM URB. LAW J. 968, 997 (1986).

can generate in a commercial setting.[111] Generally echoing the utilitarian view, judges have opined that the right of publicity is beneficial for society by offering incentives for potential celebrities to invest in skills that could make them famous and increase the value of their persona.[112] In the case *Motschenbacher v. R.J. Reynolds Tobacco Company* (1974)[113] the court held the use of the identifiable racecar of a well-known racecar driver in a television commercial violated the right of publicity of the driver.[114] In *Carson v. Here's Johnny Portable Toilets, Inc.* (1983)[115] the court ruled that the usage of the phrase 'Here's Johnny', by which the actor, Johnny Carson, was introduced for NBC's long-running *The Tonight Show*, violated the right of publicity.[116] However, courts have also seen consumer protection as a justifying cause for publicity rights. In the case, *Vanna White v. Samsung Electronics America, Inc.*,[117] the court ruled that the use of a robot dressed like the hostess of the famous show *Wheel of Fortune*, did not violate her right of publicity on the basis that the claimant in the case did not prove that consumers confused the robot with her identity.[118] In *Cardtoons, L.C. v. Major League Baseball Players Association* the court held that parody trading cards did not infringe on players' rights of publicity.[119] In *Comedy III Productions Inc. v. Gary Saderup, Inc.*, it was noted, "[the] right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility.[120] The court further quoted Chief Justice Rose Bird's dissent in *Lugosi v. Universal Pictures:*

> Often considerable money, time and energy are needed to develop one's prominence in a particular field. Years of labor may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to

111. Carson v. Here's Johnny Portable Toilets, Inc., 698 F. 2d 831 (6th Cir. 1983); Lugosi v. Universal Pictures, 603 P.2d 425 (Cal. 1979); Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129 (Wis. 1979); *see also* Martin H. Redish & Kelsey B. Shust, *The Right of Publicity and the First Amendment in the Modern Age of Commercial Speech*, 56 WM. & MARY L. REV. 1443, 1443 (2015).

112. *See, e.g.*, William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 28 J. LEGAL STUD. 325, 326 (1989).

113. Motschenbacher v. R.J. Reynolds Tobacco Company 498 F. 2d 821 (9th Cir. 1974).

114. *Id.* at 827.

115. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983).

116. Carson, 698 F.2d at 833.

117. *White v. Samsung Electronics America*, Inc., *989 F.2d 1512* (9th Cir. 1993).

118. *Id.*

119. Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959 (10th Cir. 1996).

120. Comedy III Prods., Inc. v. Saderup, Inc. 25 Cal. 4th 387, 399 (2001), *cert. denied* 151 L.Ed 2d 692 (2002).

> permit an economic return through some medium of commercial promotion. For some, the investment may eventually create considerable commercial value in one's identity.[121]

However, courts generally have centered their argument on the defendant's unjust behavior to justify the economic claims of celebrities. In this respect, the courts have focused on the unjust enrichment derived from the unauthorized commercial misappropriation and exploitation of a celebrity's popularity.[122] In judicial opinions concerning potential violations of celebrity rights, courts have often titled defendants as "pirates,"[123] or accused them of taking free rides[124] on the fame of others. They have also criticized them for "misappropriating" values created by others or for "reaping" what others have "sown."[125]

In a number of recent cases concerning football videogames using the likenesses of athletes, the Third and Ninth Circuit Courts handed down opinions on the ongoing balancing of individuals' right of publicity against the First Amendment guarantee of freedom of artistic expression.[126] In *Hart v. Electronic Arts*, *Keller v. Electronic Arts* and the appeal in *Davis v. Electronic Arts,* in an analogy to the fair use test in copyright law[127], courts applied the "transformative use" test, which asks whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness.[128] The courts found that a video game's computer generated recreations of the athletes were not a "transformative use," and thus the First Amendment guarantee did not preclude the athlete's individual right of publicity.[129] In *No Doubt v. Activision Publishing, Inc.*,[130] another recent lawsuit involving video games, the musical group 'No Doubt' claimed that the use of its images and songs in Band Hero, a video game made by Activision, exceeded the scope of the license by allowing game users to

121. *Id.* at 399, *quoting* Lugosi v. Universal Pictures, 25 Cal. 3d 813 (Cal. 1979).

122. Redish & Shust, *supra* note 111, at 1443-44.

123. *Midler v. Ford Motor Co., 849 F.2d 460, 463* (9th Cir. *1988*).

124. Onassis v. Christian Dior-N.Y. Inc., 472 N.Y.S.2d 254 (Sup. Ct. 1984), aff'd, 110 A.D.2d 1095
(App. Div. 1985).

125. *See* Madow, *supra* note 11, at 178.

126. Keller v. Elec. Arts, Inc., 724 F.3d 1268, 1271 (9th Cir. 2013); Hart v. Elec. Arts, Inc., 717 F.3d 141, 170 (3d Cir. 2013); Davis v. Elec. Arts, Inc., 775 F.3d 1172 (9th Cir. 2015).

127. Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994) (discussing transformative use as a factor of fair use in copyright law).

128. Comedy III Prod., Inc. v. Saderup, Inc., 25 Cal. 4th 387, 403 (2001).

129. Keller, 724 F.3d at 1271; Hart, 717 F.3d at 170; Davis, 775 F.3d at 1172.

130. No Doubt v. Activision Pub., Inc., 122 Cal. Rptr.3d 397, 403 (Ct. App. 2011).

manipulate various elements of the avatars' voices.[131] The California appellate court concluded that the developer's use was not transformative and thereby violated the rights of publicity of the individual band members because the video game characters were "literal recreations of the band members" doing "the same activity by which the band achieved and maintains its fame."[132] However, in the recent case *Sarver v. Chartier*[133], the Ninth Circuit found that the filmmakers' protected expression outweighed Sarver's purely commercial claim for compensation in the film's use of elements of his identity.[134] In that case, a reporter, who subsequently wrote an article about his experiences and observations, had interviewed U. S. Army Sergeant Jeffrey Sarver, a specialist in disarming Improvised Explosive Devices during the conflict in Iraq.[135] The article was later used for a concept of a screenplay that became the award winning film *The Hurt Locker*.[136] The central character in that film, Sergeant Will James, was admittedly based in large part on Sarver.[137] Sarver claimed that the unauthorized use of a real person as the basis for a character in a film created a commercial harm, which outweighed the filmmakers' First Amendment right to free artistic expression.[138] In its decision, the Ninth Circuit surprisingly relied on *Zacchini v. Scripps-Howard* rather than *Comedy III,* which was generally used as a point of reference in previous cases.[139] *Zacchini* arose because a television station, as part of its regular news program, broadcast the cannonball performance of Hugo Zacchini at a county fair without his consent.[140] The Supreme Court held that the First Amendment did not outweigh a right of publicity claim where the defendant news company had broadcast the claimant's entire performance (being shot from a cannon) as a TV news story.[141] On this basis, the court argued in *Sarver* that the film, *The Hurt Locker*, is not commercial speech proposing a commercial transaction, and the film makers, unlike the TV news program in *Zacchini*, did not appropriate the economic value of the

131. *Id.*

132. *Id.* at 411; *see also* Michael Schoeneberger, *Unnecessary Roughness: Reconciling Hart and Keller with a Fair Use Standard Befitting the Right of Publicity*, 45 CONN. L. REV. 1875, 1897 (2013).

133. Sarver v. Chartier 813 F.3d 891, 907 (*9th Cir. 2016*).

134. *Id.* at 905.

135. *Id.* at 896.

136. *Id.*

137. *Id.*

138. Sarver v. Chartier, 813 F.3d at 896.

139. *Id.* at 906; *see also* Zacchini v. Scripps-Howard Broad Co., 433 U.S. 562, 562 (1977); *see also* Comedy III Prods., Inc. v. Saderup, Inc. 25 Cal. 4th 387, 399 (2001), *cert. denied* 151 L.Ed 2d 692 (2002).

140. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 at 563-64.

141. *Id.*

plaintiff's 'performance'.[142] The Court also stressed that professional athletes are more like 'performers' in *Zacchini*, who work hard to develop talent and skill at what they do.[143] Consequently, when game companies take direct advantage of the athletes' identities, the athlete deserves compensation. [144]

The different outcome in *Sarver* shows that U.S. courts face an ongoing challenge to resolve tension between the First Amendment guarantee of freedom of artistic expression and an individual's right of publicity. In this respect, *Sarver* did not fully explain how the use of a football player's image in a computer game appropriates economic value while a film's incorporation of the skills and accomplishments of a soldier like Sarver does not. It may be assumed that because famous athletes can command high licensing fees for use of their names and images in endorsements and sponsorships, that value is wrongfully appropriated by including their images in video games, whereas Sarver did not command a licensing market, and therefore his war experiences had no economic value capable of being misappropriated by a film based on his recollections.[145] Generally, the Ninth Circuit may have been reluctant to open the floodgates to claims of individuals who are depicted in the media against filmmakers, but it remains to be seen how the courts will master the legal challenges posed by new technological developments in future cases. [146]

B. United Kingdom

The concept of appropriation and/or misappropriation is also reflected in the English tort of "passing off," the main common law concept used by English judges to justify actions where claimants are seeking to protect their images and likenesses.[147] As opposed to the U.S., in the U.K. there is currently no specific image or character right that allows a celebrity to control the use of their name or image.[148] Various

142. *See* Sarver v. Chartier, 813 F.3d 891, 904-05 (*9th Cir. 2016*).

143. *See id.*

144. *See id.*

145. *See* Michael Suppappola, *Is Tiger Woods Swing Really a Work of Art? Defining the Line Between the Right of Publicity and the First Amendment*, 28 W. NEW ENG. L. REV. 57, 59 (2005).

146. *See generally* Dora Georgescu, *Two Tests Unite to Resolve the Tension Between the First Amendment and the Right of Publicity*, 83 FORDHAM L. REV. 907 (2014).

147. Jennifer Davies, *Why the United Kingdom Should Have a Law Against Misappropriation*, 69 C.L.J. 561 (2010); Hazel Carty, *Passing off: Frameworks of Liability Debated*, 2 INTELL. PROP. Q. 106, 117 (2012).

148. Catherine Walsh, *Are Personality Rights Finally on the UK Agenda?*, EUR. INTELL. PROP. REV., 253, 260 (2013); Huw Beverley-Smith & Liddy Barrow, *Talk That Tort . . . of Passing Off: Rihanna and the Scope of actionable Misrepresentation: Fenty v. Arcadia Group Brands Ltd. (t/a Topshop)*, 36 EUR. INTELL. PROP. REV. 57, 58 (2014); Corinna Coors & Peter Mezei, *Image Rights:*

causes of action, such as breach of confidence, privacy, copyright and trademark infringement, and passing off/false endorsement are available when seeking to protect a celebrity's claim for image right protection.[149] None of these rights was designed to protect image or personality rights; however, English courts are increasingly stretching the boundaries of traditional common law by recognizing the commercial value of celebrity endorsements.[150]

One of the first false endorsement cases in the U.K. was *Irvine v. Talksport* in 2002, where the radio station Talksport sent out promotional material to potential advertising buyers including a brochure featuring a photograph of the F1 racing driver Eddie Irvine.[151] In this case, Talksport had manipulated a previous photo of Irvine in which he had been holding a mobile phone by superimposing a radio onto the image in place of the phone bearing the radio station's logo.[152] Irvine successfully sued Talksport Radio for passing off.[153] The *Irvine* case was a significant step towards the development of image right protection in the U.K., bringing traditional passing off law in line with modern commercial reality. In the first instance the judge, Mr. Justice Laddie, clarified that the action of passing off was limited to false endorsement claims: if the actions of the defendant created a false message, which would be understood by the customers to mean that his goods have been endorsed or recommended by the claimant, then the claimant could succeed in a passing off action.[154]

The boundaries of an action of passing off were further tested in a recent decision of the English Court of Appeal.[155] The case involved the famous pop star Rihanna and the fashion chain Topshop.[156] Lord Justice Kitchin confirmed that: "There is in English law no 'image right' or

Exploitation and Legal Control in English and Hungarian Law, 57 HUNG. J. OF LEGAL STUD. 10, 11 (2016).

149. *See* Wombles Ltd. v. Wombles Skips Ltd. [1977] Ch 99 (Eng.); Lyngstad v. Anabas Prod. Ltd. [1977] FSR 61 (Eng.); Mirage Studios v. Counter-Feat Clothing Co. Ltd. [1991] FSR 145 (Eng.); Elvis Presley Enter. Inc. v. Sid Shaw Elvisly Yours [1999] RPC 567 (Eng.).

150. *See* Walsh, *supra* note 148, at 260; Jeremy Blum & Tom Ohta, *Personality Disorder: Strategies for Protecting Celebrity Names and Images in the UK*, 9 J. OF INT'L. PROP. L. AND PRAC. 137, 139 (2014).

151. Edmund Irvine & Tidswell Ltd. v. Talksport Ltd. [2002] EWHC (ch) 367 [1], [76] (Eng.), *on appeal* Irvine v. Talksport Ltd. [2003] EWCA (Civ.) 423 [8] (Eng.).

152. Irvine v. Talksport [2002] EWHC (ch) 367 [1], [76] (Eng.).

153. *Id.*

154. *Id.*

155. Fenty v. Arcadia Grp. Brands Ltd. & Anor [2015] EWCA (Civ.) 3 (Eng.).

156. *Id.*

'character right' which allows a celebrity to control the use of his or her name or image."[157]

The court upheld the trial judge's finding that Topshop's unauthorized use of Rihanna's image on a T-shirt was passing off.[158] In March of 2012, Topshop started selling a T-shirt with an image of Rihanna on it.[159] The image showed Rihanna during a video-shoot for her 2011 'Talk That Talk' album.[160] Topshop had obtained a license from the photographer, but no license from Rihanna.[161] Rihanna claimed that the sale of this T-shirt without her consent infringed her image rights, and brought an action against Topshop for passing off and trademark infringement.[162] The High Court found passing off in that the T-shirt damaged Rihanna's goodwill, and would result in loss of sales for her own merchandising business if a substantial number of consumers were likely to buy the T-shirt falsely believing that Rihanna authorized it.[163] The trial judge, Mr. Justice Birss, made clear that "Whatever may be the position elsewhere in the world, and however much various celebrities may wish there were, there is today in England no such thing as a free standing image right."[164] The Rihanna decision, however, is unlikely to open the floodgates for claims to be brought every time a celebrity image is used without a license on merchandising. Each case will depend upon the individual circumstances, as Judge Birss emphasized that "the mere sale by a trader of a t-shirt bearing an image of a famous person does not, in and of itself, amount to passing off."[165]

1. The Developing Law of Privacy

Although historically English common law has recognized no general tort in violation of privacy, privacy in English law is a rapidly developing area that considers in what situations an individual has a legal right to privacy and may be protected from misuse or unauthorized disclosure of

157. *Id.* at [29]; *see also* Susan Fletcher & Justine Mitchell, *Court of Appeal Found No Love for Topshop Tank: The Image Right that Dare Not Speak its Name*, 37 EUR. INTELL. PROP. REV. 394, 394, 403 (2015).

158. Fenty v. Arcadia Grp. Brands Ltd. & Anor [2015] EWCA (Civ.) 3 [5], [62] (Eng.); Fenty v. Arcadia Grp. Brands Ltd. [2013] EWHC (Ch) 2310 [75] (Eng.).

159. Fenty v. Arcadia Grp. Brands Ltd. [2015] EWCA (Civ) 3 [2] (Eng.).

160. *Id.*

161. *Id.* at [2], [3].

162. *Id.* at [3].

163. Fenty v. Arcadia Grp. Brands Ltd. [2013] EWHC (Civ) 2 [23] (Eng.).

164. Fenty v. Arcadia Grp. Brands Ltd. [2013] EWHC (Ch) 2310 [2] (Eng.).

165. *Id.* at [5].

personal or private information.[166] In the absence of a tort of privacy, the doctrine of breach of confidence, a variety of torts limited to intentional infliction of harm to the person and administrative law principles relating to the appropriate use of police powers have all been recently used to resolve cases that involved allegations of an infringement of personal privacy.[167] For example, in *Prince Albert v. Strange* the High Court of Chancery awarded Prince Albert an injunction based on breach of confidence, restraining Strange from publishing a catalogue describing Prince Albert's etchings.[168] Similarly, in *Coco v. AN Clark*, a claim was brought for breach of confidence in respect to disclosed technical information having a commercial value.[169] However, the information was found not to be of a confidential nature as it was already in the public domain.[170] In *Kaye v. Robertson*, the claimant, a well-known actor, attempted to obtain an order restraining the publication of photographs of the injuries he had sustained in a car crash, which had been taken by a tabloid's journalist without his consent while he was still in the hospital undergoing treatment.[171] The claimant's action was based on a number of different torts, including libel, trespass and nuisance.[172] The Court of Appeal concluded that only malicious falsehood was applicable to the circumstances of the case, having decided that no tort of privacy existed in English law.[173] The House of Lords in *Wainwright v Home Office* confirmed this view.[174] Privacy rights have, however, received increasing recognition both nationally and elsewhere in Europe. As mentioned above, the key justification for this change is Article 8 (1) of the European Convention on Human Rights (Eur. Conv. on H.R.), which provides a right to respect for a person's private and family life.[175] Although British politicians,

166. HUW BEVERLEY-SMITH ET AL., PRIVACY, PROPERTY AND PERSONALITY – CIVIL LAW PERSPECTIVES ON COMMERCIAL APPROPRIATION 78 (2005).

167. *See* Coors & Mezei, *supra* note 148, at 12.

168. Prince Albert v. Strange [1849] EWHC (Ch) J20 (Eng.).

169. Coco v. AN Clark Ltd. [1968] EWHC (Ch) 415 (Eng.).

170. *Id.*

171. Kaye v. Robertson [1990] EWCA (Civ.) 21 (Eng.).

172. *Id.*

173. *Id.*

174. Wainwright v. Home Office [2003] UKHL 53 (appeal taken from Eng.).

175. Convention for the Protection of Human Rights and Fundamental Freedoms, European Convention on Human Rights, Nov. 4, 1950 (referring to the original Convention, circa 1950, but also appearing in T.S. 71, Cmd. 8969 in October 1953, after UK ratification on March 8, 1951); *see* Tanya Aplin, *The Development of the Action for Breach of Confidence in a Post-HRA Era*, 1 INTELL. PROP. Q. 19 (2007) (Eng.); Angus McLean & Claire Mackey, *Is There a Law of Privacy in the UK? A Consideration of Recent Legal Developments*, EUR. INTELL. PROP. REV. 389 (2007) (Eng.).

judges and media have all at times expressed concern at the growing influence of European human rights law, two important cases, *Douglas v. Hello!*[176] and *Campbell v. Mirror Group Newspapers*,[177] reflect the fast developing area of privacy law in the UK, which has been supported and enhanced by the enactment of the Human Rights Act 1998 (HRA).[178] The first case concerned two actors, Michael Douglas and Catherine Zeta-Jones.[179] In 2000, the stars had granted exclusive rights to pictures of their wedding to Ok! magazine, but the defendant, the publisher of the Hello! magazine, had its own pictures, which it planned to publish.[180] The claimants obtained an interim injunction in the High Court, preventing the defendant from publishing unauthorized photographs of their wedding on the grounds that the pictures were a breach of confidence and an invasion of the individual claimants' privacy. [181] The defendant, Hello! magazine, successfully appealed to the Court of Appeal, which discharged the interim injunction.[182] The House of Lords, in a split majority of 3-2, upheld the action for breach of confidence.[183] The main issue was whether the photographs represented confidential information.[184] The majority ruled that the disputed photographs provided information as to how the wedding looked and constituted confidential information.[185] However, Lord Walker, in *Douglas v. Hello!*, summed up his position on image rights as follows: "Although the position is different in other jurisdictions, under English law it is not possible for a celebrity to claim a monopoly in his or her image, as if it were a trademark or brand. Nor can anyone (whether celebrity or nonentity) complain simply of being photographed."[186] In *Campbell v. Mirror Group Newspapers*, model Naomi Campbell was photographed leaving a rehabilitation clinic where she regularly attended meetings of Narcotics Anonymous (NA).[187] The photographs were

176. *See* Douglas v. Hello! Ltd. [2001] EWHC (Q.B.) 967 (Eng.); [2003] EWHC (Ch) 786 (Eng.); [2005] EWCA (Civ.) 595 (Eng.).

177. *See* Campbell v. MGN Ltd. [2002] EWC (Civ.) 1373 (Eng.); [2004] UKHL 22 (Eng.).

178. Katja S. Ziegler, Elizabeth Wicks & Loveday Hodson, *The UK and European Human Rights: A Strained* Relationship, in THE UK AND EUROPEAN HUMAN RIGHTS: A STRAINED RELATIONSHIP? 4 (Katja Ziegler et al. eds., 2015).

179. *See* Douglas v. Hello! Ltd. [2001] EWHC (Q.B.) 967 (Eng.); [2003] EWHC (Ch) 786 (Eng.); [2005] EWCA (Civ.) 595 (Eng.).

180. *See* Douglas v. Hello! Ltd. [2005] EWCA Civ. 595 at [13] (Eng.).

181. *Id.* at [14].

182. *Id.* at [15].

183. *See* Douglas v. Hello! Ltd. [2007] HL 21 [293] (Eng.).

184. *See id.* at [1].

185. *See id.*at [281], [283].

186. *Id.* at [293].

187. *See* Campbell v. MGN Ltd. [2002] EWCA Civ. 1373 [2]; [2004] UKHL [22] (Eng.).

published in a publication run by MG Newspapers.[188] The headline alongside the photograph read: "Naomi: I am a drug addict," and the article contained some general information relating to Miss Campbell's treatment for drug addiction, including the number of meetings she had attended in the clinic.[189] Miss Campbell claimed damages under the tort of breach of confidence.[190] On appeal, the House of Lords, by a 3-2 majority, held in favor of Miss Campbell.[191] Whilst it was acceptable to publish a story about her having lied about taking drugs, her addiction, and the fact that she was receiving therapy, publishing the additional information about the treatment with NA and photograph went too far and were deemed irrelevant for a public course defense.[192]

Children may enjoy special protection as held in *Murray v. Big Pictures (U.K.) Limited*, where a photographer depicted the author JK Rowling's son David, then 19 months old, being pushed in a buggy with his parents in an Edinburgh street to and from a local café.[193] In that case, it was argued that the law should protect children from intrusive media attention.[194] A child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication.[195] Likewise, in *Weller & Ors v. Associated Newspapers Limited*,[196] the publication of an article and photographs depicting the famous pop star Paul Weller and his children enjoying a family day out in Los Angeles without his consent breached the family's privacy.[197] A recent appeal against the decision of the High Court was dismissed on the basis that the photos were of a "private family outing" and the parents did not consent to them being taken.[198]

Whether people engaging in adulterous or casual sex affairs have a reasonable expectation of privacy was considered in *Mosley v. News Group Newspapers, Ltd*.[199] In that case, Max Mosley, the former president of the

188. *Id.*
189. *Id.* [2], [4].
190. *Id.*
191. *See* Campbell v. MGN Ltd. [2004] UKHL [22] (Eng.).
192. *Id.* .
193. Murray v. Big Pictures (UK) Ltd. [2008] EWCA [446] (Civ.).
194. *Id.*
195. *Id.* at [57].
196. Weller v. Associated Newspapers Ltd. [2014] EWHC 1163 (QB) (Eng.).
197. *Id.*
198. Weller v. Associated Newspapers Ltd [2015] EWCA Civ 1176 [61] (Eng.).
199. *See* Mosley v. News Grp. Newspapers Ltd. [2008] EWHC 1777 (Eng.); *see* Mosley v. United Kingdom, 53 *Eur. Ct. H.R.* 774 (2011).

Fédération Internationale de l'Automobile (FIA), brought an action against the News of the World alleging breach of confidence and unauthorized disclosure of personal information for its exposure of his participation in a sadomasochistic orgy with prostitutes.[200] The Court awarded Mosley £60,000 as the defendant failed to persuade the judge that there was a strong public interest in publishing the information.[201]

The English law on privacy has therefore strengthened the economic and private rights of celebrities, but it is questionable if and when ordinary people have a right to commercial confidence.[202] The cases show that even celebrities have a right of privacy during private events on private property and with regard to information about a person's health and their treatment for ill health.

2. The Effects of Brexit

Is the ongoing extension of privacy law in recent years likely to continue after the U.K. voted to leave the EU on June 23, 2016 (BREXIT)? Although the U.K. Parliament would, in the future, be free to introduce new or amended legislation and would no longer be subject to the rules of the Court of Justice of the European Union, it may be envisaged that the precise impact of the vote depends on the form that the exit will take. [203] One option would be to withdraw from the Convention on Human Rights and repeal the Human Rights Act 1998, which potentially incorporates the European Convention on Human Rights into domestic law.[204] In October 2014, the Conservative party published a strategy paper, "Protecting Human Rights in the UK," setting out its plan to repeal the HRA and replace it with a British Bill of Rights and Responsibilities.[205] Although the Convention rights would still be used, the relationship between domestic courts and the European Court of Human Rights would be less

200. *Id.*

201. *Id.*

202. *See* Leaffer, *supra* note 3, at 1373 (noting that creating a regime in the UK similar to the U.S. "would be a regrettable development and those adopting such a regime would suffer the same perverse consequences engendered by publicity rights in the U.S").

203. *See* DENIS MACSHANE, BREXIT: HOW BRITAIN WILL LEAVE EUROPE 4 (2015).

204. *See* Human Rights Act 1998, c. 42, § 3 (U.K.) (stating "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights").

205. CONSERVATIVE PARTY, PROTECTING HUMAN RIGHTS IN THE UK: THE CONSERVATIVES' PROPOSALS FOR CHANGING BRITAIN'S HUMAN RIGHTS LAWS 5 (2014), *available at* https://s3.amazonaws.com/s3.documentcloud.org/documents/1308198/protecting-human-rights-in-the-uk.pdf (last visited Nov. 21, 2016).

formal and less binding.[206] One of the main features of the proposal is to alter the language of HRA 1998, section 2 (1), requiring UK courts to consider as advisory, only, decisions of the European Court of Human Rights.[207] HRA 1998, section 3(1) should be replaced "with a requirement that UK courts 'interpret legislation based upon its normal meaning and the clear intention of Parliament, rather than having to stretch its meaning to comply with Strasbourg case law.'"[208] The introduction of a British Bill of Rights will therefore likely be on the agenda of the new government, as outlined in the Queen's Speech delivered on May 18, 2016 to the Houses of Parliament.[209]

Under this scenario, with respect to privacy claims, UK judgments would no longer be required to operate compatibly with the right to private and family life under the European Convention on Human Rights. Cases like *Douglas*, *Campbell*, and *Mosley* would more likely be judged based on the traditional requirements of the common law tort of breach of confidence. With respect to jurisdiction, British citizens would also no longer be able to apply to the European Court of Human Rights (such as *Mosley v. UK*) and, following the general uncertainty after the BREXIT, English Courts may become less attractive and effective across Europe, leading to an increase in forum shopping.

False endorsement claims like *Irvine* and *Rihanna*, however, will most likely continue to be judged under the traditional requirements of the common law of passing off. Generally during the transitional period, and given the extent of the task of reviewing existing EU-influenced law, the UK courts will most likely continue to consider the judgments of the European Court of Justice and the European Court of Human Rights in the short term. It remains to be seen, however, how the courts will respond to the numerous challenges of the uncertainties following the exit from the European Union in the future.

206. *See* ALLISDAIR GILLESPIE, THE ENGLISH LEGAL SYSTEM 174 (5th ed. 2015).

207. *See id.*

208. STEPHEN DIMELOW & ALISON L. YOUNG, COMMON SENSE OR CONFUSION? THE HUMAN RIGHTS ACT AND THE CONSERVATIVE PARTY 7 (Apr., 2014), *available at* http://www.consoc.org.uk/wp-content/uploads/2015/04/COSJ3217_Common_Sense_or_Confusion_WEB.pdf (last visited Nov. 21, 2016).

209. *See* Queen Elizabeth II, Queen of the U.K., The Queen's Speech to Both Houses of Parliament (May 18, 2016), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524040/Queen_s_Speech_2016_background_notes_.pdf (last visited Nov. 21, 2016).

C. Continental Europe

In contrast to the U.S. and the U.K., the European view has traditionally focused on protecting the reputations and images of individuals from harm.[210] The civilian tradition, which derives from Romanist principles, strongly shapes the continental European view.[211] The personality rights approach can most closely be linked to civilian jurisdictions, such as France and Germany, which recognize a dignitary right to 'personality' as a special legal right closely connected with the human being.[212] In this respect, European law has typically focused on protecting the personality of the individual: his human rights, dignitary interests and autonomy.[213] This trend is continuing with the central importance of instruments such as the European Convention on Human Rights (ECHR). In relation to the protection of one's personal image, the European Court of Human Rights, for example, confirmed in the second *Hannover v. Germany* judgment that the image is

> [O]ne of the chief attributes of (...) personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof.[214]

The civilian approach to personality rights is commonly regarded as a dualistic model because it is based on two different rights, one patrimonial and one non-patrimonial, to protect the interests of exploitation and protection of publicity.[215] French law distinguishes between the right to one's image (droit à l'image), which is an inherent part of the person, and the right over one's image, which is an economic right to commercially exploit one's image.[216] An example of the alternative monistic approach is

210. Bart van der Sloot, *Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of "Big Data*, 31 UTRECHT JOURNAL OF INTERNATIONAL AND EUROPEAN LAW 25, 50 (2015).

211. Silvio Martuccelli, *The Right of Publicity Under Italian Civil Law*, 18 LOY. L.A. ENT. L.J. 543, 545 (1998).

212. Gert Brüggemeier, *Protection of Personality Rights in the Law of Delict/torts in Europe: Mapping Out Paradigms*, *in* PERSONALITY RIGHTS IN EUROPEAN TORT LAW 7 (Gert Brüggemeier et al. eds., 2010).

213. *See* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'T L. 655, 664 (2008).

214. Von Hannover v. Germany (No. 2), 2012-I Eur. Ct. H.R. 399 (2012).

215. *See* Johann Neethling, *Personality Rights: A Comparative Overview,* 38 THE COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTHERN AFRICA 224, 245 (2005).

216. *See* Elisabeth Logeais & Jean-Baptiste Schroeder, *The French Right of Image: An Ambiguous Concept Protecting the Human Persona,* 18 LOY. L.A. ENT. L. REV. 511, 512, 542 (1998).

Germany.[217] There, the general personality right protects both the economic and dignitary interests in publicity.[218] Italy, Spain, and Hungary also follow the monistic approach to image rights.[219]

As in the U.S., the French law emerged from the right of privacy in the 19th century.[220] The first notable case in France concerned a drawing of a famous actress, Rachel, on her deathbed, which was sold by the artist without the consent of the family.[221] The Tribunal de Premiere de la Seine concluded that the family's right of privacy had been invaded, and ordered the confiscation of the drawing.[222] It was not until the *Papillon*[223] case in 1970, that the court recognized a commercial image right independent from all other intrusions into one's private life.[224] The case concerned the publication of a book based on the documents from the files of the court that sentenced Henri Charrière, also known as Papillion, to life imprisonment forty years earlier.[225] Papillion brought an action against his publisher claiming a violation of his right to privacy as well as unauthorized use of his photograph on the cover of the book.[226] While the court held that publication of the book did not amount to an invasion of Papillon's privacy, the unauthorized reproduction of his photograph on the book jacket infringed upon his right of image entitling him to recover damages.[227] After the French courts recognized both the right of privacy and a commercial image right, the French Legislature introduced the specific statutory protection in Article 9 into the French Civil Code and provided for specific offenses in the Penal Code.[228] In France, image rights do not terminate upon death, as confirmed in the Court d'appel case of *Les Editions Sand & M. Pascuito v. M.Kantor, Mme Coluccil*[229] in 1996. In this case the court held that the violation of the right of image would entitle

217. HUW BEVERLEY-SMITH, ANSGAR OHLY ET AL., PRIVACY, PROPERTY AND PERSONALITY: CIVIL LAW PERSPECTIVES ON COMMERCIAL APPROPRIATION 213 (2005).

218. *Id.*

219. *Id.*

220. Logeais & Schroeder, *supra*, note 216 at 514.

221. *See* Tribunaux de première instance [TPI] [ordinary court of original jurisdiction] Seine, June 16, 1858, D.P. III 858, 62. (Fr.).

222. *Id.*

223. Tribunal de grande instance [TGI] [Ordinary Court of Original Jurisdiction] Paris, Feb. 27, 1970, Gaz. Pal. 1970, 1, jurispr., 353 (Fr.).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *See* CODE CIVIL [C. CIV.] [CIVIL CODE] art. 9 (Fr.).

229. Cour d'appel [CA] [regional court of appeal] Paris, Sept. 10, 1996, R.D.P.I. 1996, No. 68, 63.

heirs to full compensation of the economic damage stemming from said violation. [230]

In Germany, a general right of personality (Persönlichkeitsrecht) has been recognized in the case law of the German Federal Court of Justice (Bundesgerichtshof) since 1954 as a basic right constitutionally guaranteed by Articles 1 and 2 of the Basic Law (Grundgesetz), and protected in civil law under ss 823(1) (Bürgerliches Gesetzbuch).[231] The fundamental right guarantees the protection of human dignity and the right to free development of the personality, protecting any person against the unauthorized use of specific aspects of their personality.[232] Due to the special nature of the right of personality as a framework right, its scope is not absolutely fixed, but may include several aspects of an individual's personality.[233] One recognized aspect of an individual's personality is the right in one's own picture.[234] Like in the Netherlands[235], in Germany image rights fall under copyright law: section 22(1) of the German Copyright Act (Kunsturhebergesetz, 'KUG') guarantees the freedom for an individual to determine how he presents himself to the public.[236] Therefore, the use of the image of a personality for advertising or commercial purposes generally requires consent of the depicted person unless there is an overriding public interest in the information.[237] The public interest may prevail if the image is not exclusively used to advertise cars, cosmetics, and promotion articles, but for example, to show different techniques of athletes in a book or to provide additional information about the life or work of a person in general.[238] The German Federal Court of Justice has, in this respect, worked out a functioning balance between

230. *See* Patrick N. Broyles, *Intercontinental Identity: The Right to the Identity in the Louisana Civil Code*, 65 LA. L. REV. 823, 842 (2005).

231. Constant case law since Bundesgerichtshof [BGH] [Federal Court of Justice] May 25, 1954, 13 ENTSCHEIDUNGEN DES BUNDESCGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 334 (Ger.).

232. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 14, 1958, 26 ENTSCHEIDUNGEN DES BUNDESCGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 349 (Ger.).

233. Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 1, 1999, 143 ENTSCHEIDUNGEN DES BUNDESCGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 214 (Ger.).

234. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 9 2003, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 762, 2004 (Ger.).

235. *See* Auteurswet 1912, Stb. 1912, Art. 21 (Neth.) (stating "If a portrait is made without having been commissioned by or on behalf of the persons portrayed, the copyright owner shall not be allowed to communicate it to the public, in so far as the person portrayed or, after his death, his relatives have a reasonable interest in opposing its communication to the public.").

236. HUW BEVERLEY-SMITH, ANSGAR OHLY ET AL., *supra* note 217 at 106.

237. *Id.*

238. *Id.* at 107.

the right of free speech and the right of general personality.[239] The protection of personality rights was first recognized in the *Schacht* decision.[240] However, it was not until 1958 in the *Gentleman Rider* case that the German Federal Court, for the first time, acknowledged a pecuniary value in personality rights.[241] Over the decades, the courts gradually started to recognize the commercial value of a person's image right and therefore granted a stronger protection. In 1999, for example, the daughter of Marlene Dietrich sued for damages because of the unauthorized use of her mother's image in the advertisement for a musical about her life.[242] The lower courts rejected the protection of a similar commercial interest, but the Bundesgerichtshof overturned these rulings and held that patrimonial interests were also protected, especially for famous individuals.[243] The commercial value of privacy rights was also recognized in the famous Princess Caroline von Hannover decisions regarding the Princess's long fight with German magazines for showing pictures of her on holiday with her family.[244] Following complaints to the European Court of Human Rights,[245] the German Federal Court recently adopted a concept of graduated protection.[246] This concept requires the courts to consider, in each individual case, whether the image concerned is part of the sphere of contemporary history.[247] This approach has been held to be in line with constitutional principles by the German Federal Constitutional Court (Bundesverfassungsgericht), and was confirmed in a recent judgment of the European Court of Human Rights, giving important clarification on the criteria relevant for balancing the conflicting rights of the parties in cases concerning the image and privacy rights of celebrities.[248]

In Italy, Article 10 of the codice civile contains a specific provision on image rights (diritto all'immagine).[249] Italian courts have interpreted

239. As Lord Wilberforce (Lord of Appeal in Ordinary from 1964 to 1982) stated in his 'Foreword' to BASIL S MARKESINIS, ALWAYS ON THE SAME PATH (2001): "[T]he German approach shows us the way, avoiding the brutal simplicity of the First Amendment, to work out a balance between the right of free speech and the right of privacy."

240. *See* 13 BGHZ 334 (Ger.).

241. 26 BGHZ 349 (Ger.).

242. 143 BGHZ 214 (Ger.).

243. *Id.*

244. 131 BGHZ 131 (Ger.); BVerfGE, 1 BvR 653/96, Nov. 9, 1999.

245. *See* Von Hannover v. Germany (No. 2), 2012-I Eur. Ct. H.R. 399, 419-20.

246. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 6, 2007, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1981, 2007 (Ger.).

247. *Id.*

248. *See* Von Hannover v. Germany (*No. 2*), *2012-I* Eur. Ct. H.R. 399, 419-20.

249. Martuccelli, *supra* note 211, at 547.

Article 10 quite widely, holding that not only the commercial use of an image of a celebrity, but also even the unauthorized use of elements that merely evoke him/her, could amount to an infringement under Italian image rights law.[250] For example, in 1984, in the case of *Dalla v. Autovox SpA*, an Italian District Court found that the misappropriation of a celebrity's persona wrongfully evoked an association between a celebrity and a product.[251] The case concerned a popular Italian pop star, Lucio Dalla who brought an action against Autovox an Italian producer of auto radios and stereos.[252] Dalla contended that Autovax misappropriated his persona by using two of the most distinctive elements of his appearance in an advertisement, a woolen cap and a binocular pair of glasses, creating a wrongful association between himself and Autovox.[253] The Court found for Dalla and held that Autovax misappropriated his persona, not through the use of an image, but of distinctive indicia of his identity.[254] Similarly, in 1997, the Italian Supreme Court found that the personality rights of the famous actor Totò had been infringed by a chocolate manufacturer's use of a drawing and graphic in an advertisement, showing some characteristic elements of Totò's appearance and the formation of the word Totò.[255] The Supreme Court held that, Totò's special facial features - the crooked chin and the almond eyes - could evoke the image of the famous actor in the public's mind.[256] The High Court in Milan recently confirmed the wide interpretation of Article 10 of the codice civile. [257] The case concerned an advertising campaign, which included the use of a photographic reproduction of an ambience and a character played by a model that, according to Hepburn's estate, resembled Audrey Hepburn's image and a famous sequence from Breakfast at Tiffany's.[258] The court held in favor of the estate and ruled that the scope of Article 10 of the codice civile extended to elements, such as dressing, accessories, and make up, if an observer would associate these elements with the famous personality.[259]

250. Martuccelli, *supra* note 211, at 553.

251. *Pret., 18 aprile 1984*, Giur. it. 1985, I, 2, 544 (It.); *see also* Trib. 26 ottobre 1992, Diritto dell'informazione e dell'Informatica [Dir. Inf.], 1993, 942 (It.) (stating that the use of a lookalike of the Italian actress *Monica Vitti* to advertise living room furniture was unauthorized).

252. *Id.*

253. *Id.*

254. *Id.*

255. Cass., sez. un., 12 marzo 1997, n. 2223, Dir. inf., 1997, 542 (It.).

256. *Id.*

257. *See generally* Trib., 21 gennaio *2015*, n 766, Foro it. 2015, II 1, 2 (It.).

258. *Id.*

259. *Id.*

Like in most European countries, the concept of image right protection in Spain is linked to the right of privacy. It rests on the statutory Organic Law of May 5, 1982, which provides protection for the fundamental rights to honor personal and family privacy, and one's own image (el derecho a la propia imagen) guaranteed by Article 18 of the Spanish Constitution of 1978.[260] Article 7.6 of the Organic Law provides for specific protection against the use of a person's name, voice or picture for purposes of advertising, business, or of a similar nature.[261] Like in Germany, the use, reproduction, or distribution of a person's own image can only be legitimized by another constitutional right, like the interest in public information, and not by the mere financial interest of a third person.[262] In this respect, the Spanish Supreme Court confirmed, in a case concerning trading cards of football players, that an image can be reproduced without consent only for purposes of information rather than commercial exploitation and advertising.[263]

One common denominator across the jurisdictions with respect to personality, publicity and privacy rights is therefore the concept of unlawful commercial exploitation in the form of misappropriation, the recognition of a reasonable expectation of privacy and/or the lack of consent. It explains why the law, in a variety of distinct categories of statutes and case law, recognizes an obligation of the recipient to make restitution.

IV. CONCLUSION

Celebrity rights will continue to become more important as opportunities to exploit one's identity grows commercially. By acknowledging both the moral and economic value of the persona of a celebrity and addressing the most influential criticisms, individually and cumulatively, the standard theories for intellectual property rights appear to serve as valid justifications for publicity rights. This paper has offered a new, wider conception of the *'creator' in intellectual property theory, which could have* important implications for the justification of intellectual property rights in the digital era. Although there is a trend of increasing celebrity rights protection, with the emerging significance of the economic

260. *See Ley Orgánica 1/1982 (R.C.L. 1982, 1197) (Spain)* (stating "[e]l derecho fundamental al honor, a la intimidad personal y familiar y a la propia imagen," which translates to "[t]he fundamental right to honor, personal and family privacy, and one's own image").

261. "[L]a utilización del nombre, de la voz o de la imagen de una persona parafines publicitarios, comerciales o de naturaleza análoga." Organic Law, Article 7.6.

262. Stephen R. Barnett, *The Right to One's Own Image: Publicity and Privacy Rights in the United States and Spain,* 47 *AM. J. COMP. L.* 574, 581 (1999).

263. S.T.S., May 9, 1988 (R.J., No. 1988, p. 4099) (Spain).

side of image rights, it has become more difficult to assess the core nature of these rights. It remains to be seen whether the U.K. can resist the pressure to recognize an individual image right, bringing the law in line with the economic reality or whether such a right could be introduced 'through the backdoor' by strengthening the privacy rights of celebrities. Generally, different legal traditions and concepts in Europe and the U.K. currently prevent further harmonization of laws, which may result in increasing legal uncertainty, conflict of laws in cross border transactions and wider possibilities for forum shopping. The differences in the degree of legal protection provided by the states, for example the recognition of a post-mortem right of image, are, however, not irreconcilable as the development of the French jurisprudence shows. After initially denying a post-mortem image right based on its links with the concept of privacy, the courts appear, finally, to be moving toward recognizing a post-mortem right based on the economic value of the image right.[264] Similarly, some scholars in the U.S. have tried to advance quasi-personality rights in the right of publicity. These examples show that the similarities between the treatment of image rights (recognizing both, economic and dignitary interests) may outweigh the existing traditional differences (the nature and justification for image rights) in the long term. The law will presumably recognize both economic and moral elements, helping to promote a more workable, enforceable and harmonized international standard in the future.

264. *See* Elisabeth Logeais & Jean-Baptiste Schroeder, *supra* note 216 at 537.