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Private Ownership of Public Image: Popular Culture and Publicity Rights  
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### III

#### A CRITIQUE OF THE STANDARD ARGUMENTS FOR A RIGHT OF PUBLICITY

*I am my own commodity. I am my own industry.*

-- Elizabeth Taylor, objecting to an ABC docudrama based on her life n256

*Only that audience out there makes a star. It's up to them. You can't do anything about it. . . . Stars would all be Louis B. Mayer's cousins if you could make 'em up.*

-- Jack Nicholson n257

The main justifications advanced in support of publicity rights fall basically into three categories. There are, first of all, "moral" arguments, based on the supposed right of persons to "reap the fruits of their labors," or the injustice of permitting others to "reap where they have not sown." Next, there are "economic" arguments, the most popular version of which is that the right of publicity, like copyright, provides needed incentives to stimulate creative effort and achievement. A related line of argument, advanced by Posner and others, justifies the right of publicity as a mechanism for promoting allocative efficiency. Finally, some courts and writers argue for the right of publicity in terms of consumer protection. On this view, the right of publicity, like the law of trademark, promotes the flow of useful information about goods and [\*179] services to consumers and protects them from deception and related marketplace harms. In the discussion that follows, I examine and evaluate these various arguments in turn. For the most part, my critique in this Part is *internal*: I take each argument on its own terms and attempt to show either that it fails, or that it relies upon empirical or normative premises, usually unstated, that are controversial, dubious, or clearly erroneous. My ultimate conclusion is that these arguments, individually and cumulatively, are not nearly as compelling as is commonly supposed, nor as compelling as we have reason to demand.

#### *A. Moral Arguments for Publicity Rights*

I have heard it said, with seeming seriousness, that a property right in identity is something a celebrity "deserves" simply for becoming famous. The suggestion is a very curious one. Fame, after all, is "no sure test of merit." n258 Whatever may once have been the case, plenty of people become famous nowadays through sheer luck, through involvement in public scandal, or through criminal or grossly immoral conduct. More to the point, even commercially marketable fame can be achieved in this fashion. Donna Rice, for example, landed an advertising contract with "No Excuses" Jeans after her relationship with Senator (and presidential candidate) Gary Hart was made public. n259 Britain's Great Train Robber, Ronald Biggs, while living as a fugitive in Brazil, "appeared in an ad touting a good cup of coffee 'when you're on the run, like me.'" n260 More recently, the successful marketing of "trading cards" of serial killers and other famous criminals -- Jeffrey Dahmer, Richard Speck, etc. -- has attracted legislative attention. n261

To be sure, advertisers generally prefer to use the persona of a celebrity whose fame is not ill-gotten -- someone whose glamor, credibility, or popularity may rub off on the advertised product or service. But not always. Often enough, an advertiser wants a celebrity image simply to attract attention -- to lift its commercial message out of the general "clutter." n262 Photographs of the villain elite -- national enemies, mob leaders, [\*180] people involved in notorious sex or political scandals -- can be very useful to advertisers for this purpose. For example, shortly after Panamanian General Manuel Noriega was deposed and flown to Miami, the British airline Virgin Atlantic ran an ad with his mug shot and this headline: "Only one person can fly into the USA for less than [90 pounds]." n263 In the weeks after the Iraqi invasion of Kuwait, advertisers put Saddam Hussein's picture to similar use. n264 Advertising of this kind raises an interesting question about the scope of the right of publicity. n265 But that issue aside, the key point for now is simply that being famous, by itself, [\*181] does not make a person deserving of all the fruits of her fame. If public figures are morally entitled to a property right in the commercial value of their identities, it must be on some basis other than their fame itself. n266

The basis most frequently and confidently advanced by courts and commentators is the labor theory on which Nimmer originally relied. In his seminal 1954 article, Nimmer purported to derive the right of publicity from what he called an "axiom" of Anglo-American jurisprudence: "that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations." n267 Nimmer contended that a person who has "long and laboriously nurtured the fruit of publicity values," who has expended "time, effort, skill, and even money" in their creation, is presumptively entitled to enjoy them himself. n268 Numerous courts and writers have since justified the right of publicity in similar fashion: some emphasizing the celebrity's affirmative entitlement, as a matter of moral right or desert, to reap "the fruits of his labors" or to control what he has created; n269 others stressing the supposed injustice of permitting strangers to "reap where they have not sown." n270 In the next two Sections I examine and evaluate this cluster of moral arguments for the right of publicity. n271 My central contention is that there is a good [\*182] deal more to the generation of a commercially marketable public image than the "labor" of the star herself. Once we appreciate what else is involved, a labor-based moral argument for the right of publicity loses much of its initial appeal.

### *1. The Claims of "Labor" on the Fruits of Fame*

A labor-based moral argument for publicity rights presupposes that commercially marketable fame is no mere gift of the gods. For the argument to be plausible, a commercially marketable public image or persona must be viewed as the celebrity's own product, something that she herself

makes or creates by her own individual labor. Most courts subscribe to some such view. Judicial opinions generally treat commercially valuable fame as a crown of individual achievement, the result of conscious and sustained effort in a chosen field of endeavor. Time and again, right-of-publicity plaintiffs are described by the courts as carefully "cultivating" their talents, slowly "building" their images, judiciously and patiently "nurturing" their publicity values -- as working long and hard to make themselves famous, popular, respected, beloved. The bandleader Guy Lombardo, one court says, "invested 40 years" in "carefully and painstakingly" building "his public personality as Mr. New Year's Eve." n272 Elroy "Crazy Legs" Hirsch, another court assures us, devoted "much time and effort" to "assiduously cultivat[ing] a reputation not only for skill as an athlete, but as an exemplary person whose identity was associated with sportsmanship and high qualities of character." n273 A much-cited federal district court opinion puts the general point this way: "A [\*183] celebrity *must* be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics, and other personal characteristics, is the fruit of his labors and is a type of property." n274

Law review writers, too, generally see a commercially valuable public image as something a star attains largely on her own, through some combination of talent, effort, intelligence, pluck, and grit. Professor Sims, for example, says that a celebrity usually creates "a positive or otherwise intriguing image in the public mind, with the concomitant ability to attract the public's patronage, consumption, or support of that with which his name or likeness is associated," in the same way a professional person or business creates "goodwill" -- namely, through "the expenditure of considerable time, money, and effort." n275 Professor McCarthy opines that "[w]hile one person may build a home, and another knit a sweater so also may a third create a valuable personality, and all three should be recognized by the law as 'property' protected against trespass and theft." n276 A student commentator offers this analogy to drive home the point:

A carpenter begins with a virtually worthless piece of wood. Through a combination of hard work, time, and skill, he converts it into a beautiful chair. He now has a thing of value where none existed before. Similarly, a celebrity begins as an unknown. He has no publicity value. Through the investment of many years of hard work, he makes his name and face marketable. Like the carpenter, he has created a valuable asset where none existed before. n277

This "moral" argument for publicity rights has a fair measure of intuitive appeal. The petit bourgeois heart that secretly beats in all our breasts cannot but swell at the thought that Madonna's claim to the commercial value of her public image is morally indistinguishable from a carpenter's claim on a chair that he has built from scratch. Closer examination, however, reveals a number of serious problems with this line of argument for the right of publicity.

The first problem, which plagues labor theories of property generally, is that it is by no means evident that *anyone* -- carpenter or celebrity -- has a natural or moral right to the full *market value* of the product [\*184] of her labor. n278 The second problem cuts deeper. The labor-desert rationale for publicity rights is based, I will argue, on a fundamental misconception of the processes by which fame is generated and public images are formed in contemporary society. When we look at these processes without ideological blinders, we find that celebrities generally do not create commercially marketable public images in anything like the way carpenters make chairs. The notion that a star's public image is nothing else than congealed star labor is just the folklore of celebrity, the bedtime story the celebrity industry prefers to tell us and, perhaps, itself.

In order to assess the strength of a labor-based moral argument for publicity rights, the first thing we need to know is how "publicity" or "associative" values come into being. More specifically, we need to know the extent to which it is the "labor" (time, money, effort) of the celebrity -- or of persons whose labor can be imputed to her -- that produces or ultimately underlies these economic values. The British semiotician Judith Williamson provides a useful starting point for our analysis. According to Williamson, a star persona can enhance the marketability of the commodities with which it is associated only if it already *means* something to the rest of us. Williamson makes this point very clearly in analyzing an advertisement for Chanel No. 5 perfume, which consisted of a close-up photograph of the French actress Catherine Deneuve juxtaposed with a photograph of a bottle of the perfume. As Williamson explains it, Chanel is using what Catherine Deneuve "means" to us already in order to establish a desired meaning for its perfume:

It is only because Catherine Deneuve has an "image", a significance in one sign system, that she can be used to create a new system of significance relating to perfumes. If she were not a film star and famous for her chic type of French beauty, if she did not *mean* something to us, the link made between her face and the perfume would be meaningless. So it is not her face as such, but its position in a system of signs where it signifies flawless French [\*185] beauty, which makes it useful as a piece of linguistic currency to sell Chanel. n279

This passage helps us see that it is only because star images are sources and bearers of *meaning* that they have the power to "sell" commodities with which they are associated. Their economic value (their "associative" or "publicity" value, to use the terms favored by Halpern and Nimmer, respectively) derives from their *semiotic* power -- their power to carry and provoke meanings. n280 But how is it that a star's face becomes a "sign"? How are these meanings generated and what part does star "labor" play in the signifying process?

Unfortunately, courts and commentators have shown little interest in these questions. Instead, the courts make general and often platitudinous assertions, unsupported by any empirical evidence, about how celebrities achieve fame and distinctive public images, and then the commentators cite judicial opinions as support for the same propositions. n281 This gets us nowhere. To evaluate the merits of a labor theory of publicity rights, we need to know what the mechanisms of renown in our society really are, not just what the folklore of celebrity says they are. We need to know how a person's face becomes a "sign," how it comes to have a specific meaning (or range of meanings) for others, and what role star "labor" plays in the overall process. And the best way, if not the only way, we can find this out is inductively, by looking at what John Rodden has called "reputation-histories." n282

Consider, for starters, the case of Einstein. Why did he, alone among theoretical physicists in this century, achieve worldwide recognition and commercially marketable fame? Why has *his* name, rather than Bohr's or Schrodinger's, become virtually synonymous in our vernacular with "genius"? Why is it *his* face, rather than Heisenberg's or Pauli's, that today stares out at us from advertisements, T-shirts, posters, greeting cards, and even party favors? n283 Why, in short, is his face a "sign," while theirs are not? Our first instinct may be to reject these questions as [\*186] somewhat foolish. Einstein, we may think, was a great scientist, probably the greatest scientist of the century, and a "great soul" to boot. Surely, neither his renown nor his cultural significance needs explanation: things could not have turned out otherwise.

Yet a recent article by the historian Marshall Missner casts doubt on this easy answer. Missner has marshalled impressive evidence that Einstein's fame, in America at least, was "by no means inevitable." n284 The process by which Einstein became a celebrity in America in the years immediately after World War I was instead "a tale of serendipity -- a publicity campaign run by an invisible hand." n285 Although it is a long way from Einstein to Madonna and Vanilla Ice, and from the 1920s to the 1990s, Missner's study can teach us something about the mechanisms of renown and popular meaning-making in our society -- about the ways in which fame is generated and specific public images are formed in an era of mass communications. For that reason, I will set out a brief summary of his findings.

Missner suggests that the first puzzle to be explained is why the theory of relativity itself attracted so much public attention. The theory, put forward by Einstein in 1905, "did not have any obvious technological consequences at the time." n286 Nor did it conflict, in any obvious way at least, with religious dogma. True, it was a great theoretical achievement, but the achievements of Bohr and Heisenberg "were of at least similar magnitude" and yet "did not gain any public recognition at all." n287 Why, then, did Einstein's theory cause a public sensation, both in Europe and America, while their work did not? The initial factor, Missner claims, was the dramatic way in which the theory was confirmed: by observation of the deflection of light during the solar eclipse of May 1919. n288 This confirmation was announced, with great fanfare, at a scientific conference held in London in November of the same year. n289 Subsequent newspaper and magazine accounts did much to fuel public interest in the theory, trumpeting it as a "revolutionary" discovery that upset common sense assumptions about time and space. n290

[\*187] According to Missner, however, the primary reason the theory aroused intense interest in the United States was its political and ideological resonance. n291 The period immediately after World War I was a time of intense xenophobia; there was widespread fear of social revolution and alien, antidemocratic conspiracies. The theory of relativity, at least as presented by the popular press, struck many Americans as elitist, sinister, and subversive. n292 Revealingly, a story somehow took hold after 1919 that only "twelve men" in the entire world (all foreigners, presumably) really understood Einstein's theory. n293 Editorialists voiced concern that this elite might ultimately use their knowledge of the theory to alter basic aspects of reality -- to "bend" space and time, to enter a "fourth dimension," and so on -- and thereby achieve world dominion. n294 Even the sober editors of *The New York Times* railed against the theory's antidemocratic implications. n295

In April 1921, Einstein himself paid his first visit to this country as part of a Zionist delegation led by Chaim Weizmann. The American mainstream press misinterpreted the tumultuous welcome that New York City's Jews gave to the delegation, and to Weizmann in particular, as a "hero's welcome" for Einstein. The *Washington Post*, for example, headlined its account of the arrival: "Thousands at Pier to Greet Einstein." n296 *The New York Times* misreported the event in similar fashion. n297 These erroneous reports helped to generate keen curiosity about Einstein as a person. Reporters who sought him out for interviews were relieved to find that he was not a "haughty, aloof European looking down on boorish Americans," n298 but a modest, humorous, and informal man, who "smiled when his picture was taken, and produced amusing and quotable answers to their inane questions." n299 The fact that Einstein wore rumpled, ill-fitting clothing, played the violin, and smoked a pipe seemed particularly reassuring. He simply did not look like "the 'frightening Dr[.] Einstein,'" the "destroyer of space and time." n300

Before very long, the press coverage turned sharply in Einstein's favor, and less was heard about his theory's sinister implications. Einstein had come to America in April 1921, as the somewhat obscure originator of a frightening and "un-American" theory. He left, two months later, a person revered in the American Jewish community and [\*188] widely admired in the general populace, well on his way to secular sainthood and cultural iconization. n301

What can we learn from this about the processes by which fame is generated and public images are formed in our society? *First*, Missner's account underscores an elementary, but occasionally overlooked, sociological truth about fame: fame is a "relational" n302 phenomenon, something that is *conferred by others*. A person can, within the limits of his natural talents, *make himself* strong or swift or learned. But he cannot, in this same sense, make himself famous, any more than he can make himself loved. Furthermore, fame is often conferred or withheld, just as love is, for reasons and on grounds other than "merit." There is ample room for disagreement about just how wide the gap between fame and merit actually is, about just how contingent and morally arbitrary the mechanisms of renown really are. n303 Still, Missner's account illustrates that the reason one person wins universal acclaim, and another does not, may have less to do with their intrinsic merits or accomplishments than with the needs, interests, and purposes of their audience. n304 That Einstein became a celebrity, a cultural icon, while Bohr and Heisenberg did not, had less to do with the quality of his (and their) achievements than with *our* needs and preoccupations. n305 And if Einstein's persona still has significant "publicity value" today, if advertisers and T-shirt makers are still eager to use his face, that is in good part because fame, however initially acquired, tends to "feed[] on itself." n306

*Second*, and this is closely related to the previous point, Missner's account suggests that there is an important element of contingency in the process by which even indisputably great people become famous. The "canon of great names" may appear "like a canopy of fixed and shining stars." n307 But the canon -- literary, scientific, cultural, even athletic -- is in fact a "socially constructed reality," not a "law of nature." n308 While Einstein's fame may now seem to us latecomers to be natural or inevitable, [\*189] there was in fact no necessity to it. Things could well have turned out otherwise. Einstein's fame, as Missner shows, was "built on the contingent association of many different factors": n309

The right kind of announcement of his theory's verification occurred; the right sort of phrases were used to describe the theory; the right chords in the public were touched; Einstein came [to America] at the right time, when interest in the theory was beginning to run its course; the right kind of mass demonstrations to attract attention were held (even if they were often directed toward others); Einstein said the right things and had the right kind of appearance and personality; and there was the right kind of group, the American Zionists and the Jewish community in general, to serve as a vanguard. n310

The point here is not to suggest that there is *nothing* to fame but luck, circumstance, and politics. Nor is it to suggest that there is no "objective" basis upon which Einstein can be judged a greater scientist than, say, the inventors of velcro and teflon. n311 The point, rather, is that Fame does not play fair; it plays favorites. Very wide disparities in fame exist between people (like Einstein and Bohr) whose claims to our attention and esteem are roughly comparable. These wide and seemingly unjustified disparities in fame exist as well in the entertainment and athletic fields, and are usually accompanied there by equally great (and unjustified) disparities in income. "Superstar" ath-

letes, musicians, and screen actors command huge incomes, while performers of only slightly less talent may barely eke out a living. n312

Whether 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. But however that issue is resolved, it seems to me that the state should neither actively compound these disparities nor appear to legitimate them. Yet that, in a way, is the practical effect of the right of publicity. Publicity rights operate to channel additional dollars to the very people -- Einstein rather than Bohr, Vanilla Ice rather than Too Short -- who happen to draw first-prize tickets in the fame lottery.

*Third*, Missner's account illustrates the crucial role of the news media in the creation of these unjustified disparities in fame. The mainstream press *selected* Einstein for celebrity, and it chose him in part [\*190] because he served the media's own institutional interests: he granted interviews, spoke quotably, had the "right appearance." No doubt the media would have looked elsewhere for a symbol of "scientific genius" had Einstein been dour, taciturn, and unphotogenic.

A similar selection process routinely occurs not only in science and the arts, but also in politics and society, and even in entertainment. The media has its own powerful institutional need for a steady supply of recognizable personalities to enlist audience interest, put across ideas and information, and generate consumption demand for the wares of its advertisers. n313 In the "mass-mediated version of reality," Todd Gitlin observes, almost everything of importance -- social and political movements, organizations, scientific breakthroughs -- must be "reduced to personifications." n314 For the mainstream media, "news" consists of events that can be presented as "drama," and the drama "most easily packaged for everyday consumption" is "the drama of *recognizable* individuals" -- of regulars, celebrities, stars. n315 The media thus has a "structured need" and "relentless hunger" for celebrities: it needs them, and *produces* them, in order to carry out its own institutional purposes. n316 Television especially, "with its compulsion to provide visual embodiment to abstraction," desperately needs personalities to "stand for" abstract ideas and developments; it therefore creates celebrities "where there were none." n317

Most importantly, the particular people the media chooses for this purpose tend to be those who best serve its own need to present the world in compellingly *dramatic* terms. Thus, as Gitlin brilliantly shows, media news coverage of the New Left in the 1960s centered on those of its "leaders" who "most closely matched prefabricated images of what an opposition leader should look and sound like: articulate, theatrical, bombastic." n318 These were people who "enjoyed performance, who knew how to flaunt some symbolic attribute, who spoke quotably." n319 The public actions of Jerry Rubin, Abbie Hoffman, Tom Hayden, Mark Rudd, and Stokely Carmichael made "good copy" because they "generated sensational pictures rich in symbolism." n320

[\*191] The media, of course, did not *invent* these New Left leaders out of whole cloth, any more than the media invented Einstein. People like Rubin, Hoffman, and Hayden "were already *leaders* in some sense, or the media would not have noticed them." n321 But the media picked them out from a much larger pool of New Left leaders and then "promoted them *selectively*," n322 just as the media did with Einstein (and did not do with Bohr and Heisenberg). And once the media had made these particular leaders well-known, it continued to cover them *because* they were well-known.

*Fourth*, and most importantly for present purposes, Missner's account helps us begin to see what is wrong with the radically individualistic picture of public image formation that dominates the case

law and academic writing on the right of publicity. As Missner shows, the particular images of Einstein that were generated and circulated in the early 1920s had little to do with anything we might meaningfully call "labor," or even purposeful effort, on his part. It was the press and the public, working out their own anxieties and concerns, that first created the sinister "Dr. Einstein" and later replaced him with the smiling, violin-playing sage. The media and the public, in other words, first "read" Einstein one way, and then another, entirely for reasons of their own. They made "Einstein" *mean* what they needed or wanted him to mean. Einstein was certainly a participant of sorts in this signifying process -- during his 1921 visit he clowning for American reporters, posed with his violin, and so on -- but he was not the sole and sovereign author of his public image.

Nowadays, of course, much less is left to chance in these matters. Especially in the entertainment world, the production of fame and image has become more organized, centralized, methodical, even "scientific." n323 The work of "fashioning the star out of the raw material of the person" n324 is done not only by the star herself, but by an army of specialists -- consultants, mentors, coaches, advisors, agents, photographers, and publicists. Much time and effort may be devoted to establishing and maintaining a distinct public image that the celebrity, or her handlers in the "celebrity industry," has chosen for its market appeal. n325 Consider, [\*192] for example, the testimony of actor Tony Roberts before the New York Legislature in support of a bill that would create a broad and descendible right of publicity:

How does an actor establish credibility -- or shall we say an identity or an image or a persona by which people know him? The answer is, through a lifetime of correct decisions and choices, or incorrect decisions and choices. . . . [H]e attempts throughout his career to establish an image of himself which offers him the greatest opportunities for advancement in his chosen profession. . . . To this end, one hires personal managers at 15% to advise and screen out the wrong kinds of publicity, personal appearances and so on. Press agents, at great expense, arrange interviews with reputable publications, and arrange appearances on television talk shows, and at award ceremonies. . . . One chooses to endorse certain products, camps, hotels, diets, resorts, etc., or one doesn't. One chooses to be associated with certain causes, benefits, political ideologies or not.

And so, shouldn't this creation which is the result of a life-time of careful nurturing, of scrupulous monitoring and shaping, be enough of a reality to be protected after one's death . . . ? n326

There is no reason to doubt that many celebrities *attempt* to manage the process by which their images are formed in something like the way Roberts describes. The more important and more difficult questions are, first, how well they succeed, and, second, whether and to what extent the law should assist them in these efforts. On the first question, it seems plain to me that the image-formation process resists centralized capture or control more than celebrities would like. A public figure obviously cannot simply pick out a preferred image, like an off-the-rack coat, and make it stick. No matter how long and conscientiously he "labors" to create and maintain a preferred public image, and no matter how adept and shrewd his advisors and handlers are, he cannot make his persona "mean" precisely and solely what he wants it to mean. Richard Dyer explains why:

[\*193] A film star's image is not just his or her films, but the promotion of those films and of the star through pin-ups, public appearances, studio hand-outs and so on, as well as interviews, biographies and coverage in the press of the star's doings and "private" life. Further, a star's image is also what people say or write about him or her, as critics or commentators, the way the image is used in other contexts such as advertisements, novels, pop songs, and finally the way the star can become part of the coinage of everyday speech. Jean-Paul Belmondo imitating Humphrey Bogart



in *A bout de souffle* is part of Bogart's image, just as anyone saying, in a mid-European accent, "I want to be alone" reproduces, extends and inflects Greta Garbo's image. n327

However strenuously the star may fight the intertextuality of his image, however "scrupulously" he may try to "monitor" and "shape" it, the media and the public always play a substantial part in the image-making process. n328 True, audiences "cannot make media images mean anything they want to," but they can (and do) "select from the complexity of the image the meanings and feelings, the variations, inflections and contradictions, that work for them." n329 It is not just that the audience, by giving the public figure "cues" as to what it is it "wants" from him, [\*194] helps to determine the particular image he seeks to create and project. n330 After all, something of the same sort occurs with the design and marketing of many products. Even a carpenter, for example, will respond to hints and cues from the public as to what kind of chair they want. The crucial difference, however, is that the public participates directly and actively in the meaning-making process, as they do not in the chair-making process. Again, Dyer gets the matter about right:

[T]he agencies of fan magazines and clubs, as well as box office receipts and audience research, mean that the audience's ideas about a star can act back on the media producers of the star's image. This is not an equal to-and-fro -- the audience is more disparate and fragmented, and does not itself produce centralised, massively available media images; but the audience is not wholly controlled by Hollywood and the media, either. In the case, for example, of feminist readings of Monroe (or of John Wayne) or gay male readings of Garland (or Montgomery Clift), what those particular audiences are making of those stars is tantamount to sabotage of what the media industries thought they were doing. n331

The example of Judy Garland, which Dyer develops at some length, is a useful one. In the mainstream culture of the 1940s and 1950s, Judy Garland was just "the girl next door." What she meant for most Americans was normality and ordinariness. That, presumably, was just what MGM *wanted* "Judy Garland" to mean. (It may also have been, though this is less clear, the meaning that Garland sought for herself.) Dyer shows, however, that after Garland's firing by MGM and her suicide attempt, urban gay men found in Garland's image, particularly her androgyny and her fragile facade of normality, a powerful means of "speaking to each other about themselves." n332 They reworked or recoded Garland in a way that served their own particular subcultural needs and interests. And, what is most important to see, this popular disruption and reorganization of meaning considerably *increased* the "publicity value" (market value) of Garland's image. The additional, [\*195] alternative meanings that were popularly generated created whole new markets for Garland's image -- for Judy Garland impersonators and Judy Garland merchandise -- that would not otherwise have existed.

For instance, Dyer reports that "[i]n 1982, Rockshots, a gay greetings card company, issued a card depicting Garland as Dorothy, in gingham with Toto in a basket, in a gay bar, with her opening line in *Oz* as the message inside." n333 It is difficult to see how Garland, or MGM for that matter, could assert a plausible moral claim to *these* particular merchandising values. If these values were the product of something that can be called "labor" at all -- a point that is not free from doubt or difficulty -- had not the relevant labor, the semiotic work, really been done by Garland's gay male "fans" rather than by Garland herself (or MGM)?

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. Contingency cannot be entirely erased. The creative (and autono-

mous) role of the media and the audience in the meaning-making process cannot be excised. n334 To be sure, the precise distribution of semiotic power will vary from case to case, as will the part played by luck and politics. Sometimes, the celebrity herself or persons in her pay seem to perform the lion's share of the meaning-making work; at other times, the work is left to experts in the celebrity industry, for whom the celebrity is little more than "raw material" to be "mined and worked up into" n335 a saleable commodity. Sometimes, the meaning the celebrity (or her sponsors) initially selects and circulates largely resists displacement; at other times, this "preferred meaning" n336 is inflected, subverted, or inverted, either in the culture at large or in a particular subculture, as the celebrity's fans weave their own narratives and create their own fantasies about her. But despite these variations, a celebrity's public image is *always* the product of a complex *social*, if not fully democratic, process in which the "labor" (time, money, effort) of the celebrity herself (and of the celebrity industry, too) is but one ingredient, and not always the main one. The meanings a star image comes to have, and hence the "publicity values" that attach to it, are determined by what different groups and individuals, with different needs and interests, make of it and from it, as they use it to make sense of and construct themselves and the world. [\*196] Contrary to the assertion of Professor McCarthy, n337 then, a celebrity like Madonna cannot say of her public image what the carpenter can say of his chair: "*I made it.*" And because she cannot say this of her public image, she cannot lay a convincing moral claim to the *exclusive* ownership or control of the economic values that attach to it. n338

## 2. *The Prevention of Unjust Enrichment*

In judicial opinions and law reviews, right-of-publicity defendants are often described as "poachers," "parasites," "pirates," or "free riders." They are denounced for "misappropriating" values created by others, for "reaping" where others have "sown." n339 In contrast, only seldom is a jaundiced eye turned on Madonna, or Bette Midler, or Johnny Carson. The "labor" and the "originality" of celebrity plaintiffs are simply taken for granted. The contest between the celebrity and the unauthorized appropriator of his image is thus framed starkly as *Sower v. Reaper*. The reality, however, is a good deal more complicated and morally ambiguous.

For one thing, it is a fairly safe bet that the celebrity plaintiff has done some "borrowing" himself. Just as the carpenter does not start from scratch in building a chair, but instead draws upon a pre-existing body of techniques, tools, and craft knowledge, so it is with artists, musicians, actors, and even athletes. n340 Cultural production is *always* (and necessarily) a matter of reworking, recombining, and redeploying already-existing symbolic forms, sounds, narratives, and images. Once [\*197] we trace out the influences and identify the borrowings -- of which even the performer or artist may be unaware -- how much is there left for him to claim as his own "original" contribution? Think, for example, of Elvis Presley (or the Rolling Stones) and black rhythm-and-blues. Or, closer to home, think of the white "faux-rapper" Vanilla Ice, 1991's suburban teen idol. How much does he owe to black rappers like KRS-One or Public Enemy, whose music and lyrics are too threatening, raunchy, and militant for the mainstream (white) market? n341 How much does he owe to M. C. Hammer, who first made rap "wholesome" enough for mainstream consumption? How much does he owe to the lyrics of the Beach Boys? To the style of Elvis ("purloinment upon purloinment," to use Peter Wollen's apt phrase n342)? Or take Madonna, whose entire persona, as John Fiske has observed, is an ironic reworking of the Hollywood myth of "the blonde." n343 How much does she owe to Marilyn Monroe? n344 To the directors (Hawks, Huston, Mankiewicz, Wilder, etc.) who made the films in which Monroe appeared? To Andy Warhol and the Kennedy

brothers, who helped elevate her to icon status? In short, to ask the question that David Lange asked about the Marx Brothers, how much has Madonna "invented" and how much has she "converted"?  
n345

Again, this is not to suggest that popular artists and performers like Vanilla Ice and Madonna make *no* creative contribution of their own, that their work is nothing but "theft." The point, rather, is that courts and commentators should approach claims of "originality" and "creativity" made by, or on behalf of, entertainers and popular artists with a healthy degree of skepticism. If, as seems plausible, the proper measure of a performer's "moral desert" is the value of what she *adds* to what she starts with, and *not* the market value of the resulting product, then it becomes imperative, as Lange has noted, n346 to assess the magnitude or value of her contribution. This sort of calculation was hard enough to make back when the line between "creativity" and "theft" was reasonably clear and steady -- when there was a rough consensus about the difference [\*198] between "homage," "allusion," "influence," or "parody" on the one hand, and "piracy" on the other. It is, however, even more difficult to assess the magnitude or value of a performing artist's "original contribution," and therefore of her moral desert, in a postmodern period that has collapsed the old "metaphysical separation" between "original and derivative." n347 The whole "postmodern" movement in music and art, as in everyday life, is one in which pre-existing works and images are consciously and openly appropriated, reworked, and recycled. Repetition, pastiche, bricolage, even plagiarism, have become "typical forms of postmodern cultural production." n348

Viewed against the background of these developments in cultural theory and practice, the "moral" case for the right of publicity seems a bit quaint. It is tied, normatively and conceptually, to a picture of individual creation and originality, and of self-authorship as well, that was always to some degree mythical, but that new technologies of reproduction (from photography to digital sampling) and new aesthetic practices have rendered otiose. n349 When a quintessentially "postmodern" (that is, openly and unabashedly derivative) performer like Madonna complains [\*199] of unauthorized appropriation of her image, she is seeking to have it both ways. Having drawn freely and shamelessly on our culture's image bank, she is trying to halt the free circulation of signs and meanings at just the point that suits her. She is seeking to enforce against others a moral norm that her own self-consciously appropriationist practice openly repudiates. The law need not be party to such contradiction.

But what about an actor or performer who has largely succeeded in the project that Tony Roberts described above, an actor who has carefully and wisely chosen which roles to accept and which associations to embrace and has thereby developed a distinct, relatively univocal, and commercially marketable public image? Consider, for example, that *least* postmodern of actors, Robert Young. For several years he appeared regularly in television ads as a spokesman for Sanka Coffee. Although these ads introduced him by his own name -- "Robert Young for Sanka Coffee," if I remember rightly -- Young did not really speak to us in these ads *as* Robert Young, natural person. Instead, as Michael Schudson has noted, he "played" the generalized Robert Young character. n350 That character was cheerful, moderate, mature, and full of good sense, a combination of Young's role as the suburban paterfamilias Jim Anderson in the series *Father Knows Best* and his title role in the series *Marcus Welby, M.D.* n351 What Sanka was "buying" when it hired Young to pitch its coffee was not, then, the person Robert Young. After all, for all we know, *that* Robert Young is a self-destructive profligate. Nor was Sanka buying Young's acting ability; there were any number of unfamous actors who could have delivered the ad's lines with equal or greater ability. No, what Sanka was buying was the Robert Young *persona*, the public image, which in turn was largely the

product of the *roles* Young had previously played on television. n352 Yet, and this is the crucial point, Young *played* those roles; he did not create them himself.

To be sure, Young may have wisely chosen to accept roles that exploited and reinforced this particular image. And he may have played those roles with consummate skill. But in assessing the strength of Young's moral claim to "his" publicity values, it is essential to see that [\*200] the roles he played -- which generated the particular meaning "Robert Young" has come to have for us, and hence the value his name and face have for advertisers -- were in good part created *for* him by screenwriters, directors, producers, and so on. n353 I certainly do not mean to suggest that Young should therefore be barred from capitalizing on his television personality, n354 or even that he should be forced to share his advertising income with the screenwriters and directors of the series in which he appeared. My point, rather, is that Young is already enjoying something of a windfall himself. That being the case, he cannot very convincingly cry foul when someone markets a T-shirt emblazoned with his smiling, benign face and the slogan "Father Knows Nothing" -- provided, of course, it is clear to consumers that Young himself has neither approved nor sponsored the product.

A supporter of publicity rights might concede all that has been said to this point and still maintain that unauthorized appropriation of a celebrity's identity is an injustice that ought to be prevented. He might say that what is morally problematic about unauthorized commercial appropriation is not so much that the celebrity created her image all by herself and thus deserves to control it, but that the appropriator (the merchandiser, advertiser, impersonator) had no hand in its creation at all. On this view, the reason the law ought to give a celebrity a right of property in the commercial value of her persona is that society has a strong and independent moral interest in preventing people from free riding. Unless the law gives the celebrity a property right in her persona, complete strangers to the process by which her fame and public image were generated will be free to "reap without sowing," to "get something for nothing." One might deem such parasitism to be morally objectionable whether or not it injures the celebrity or violates her rights. On this view, prohibition of free riding "is justified to prevent *unjust gain* even when it is not necessary to prevent *unfair loss*." n355

There are a number of possible responses to this line of argument. The first is simply that a "free-floating evil" of this kind seems hardly serious enough, all by itself, to overcome "the standing case for liberty." n356 But that aside, the more important point is that in American law, free riding *simpliciter* is very seldom actionable, n357 and for good reason. n358 [\*201] True, litigants have sometimes sought to expand the "misappropriation" tort of the old *INS* case n359 into a general "unjust enrichment" rule barring free-riding per se. But despite the renewed vigor of the so-called "misappropriation doctrine," n360 there is still no *general* common law prohibition against benefiting from the commercial efforts of others. The general American rule, admittedly under considerable pressure nowadays, n361 has long been that absent some special and compelling need for protection -- such as the need to prevent consumer deception (passing off), or the need to provide adequate incentives for creation (copyright) and innovation (patent, trade secrets) -- *intangible* products, once voluntarily placed in the market, are as "free as the air to common use." n362 The traditional presumption in favor of free appropriability of intangibles rests in part on the widespread sense that progress in all spheres of human activity -- science, business, art -- depends on imitation, and thus requires that people be largely left free to "reap" where others have "sown." n363 It also reflects the recognition that inasmuch as an intangible product -- an idea, a style, a business method -- is susceptible of "nonrivalous" use, its "appropriation" by others deprives the creator only of some

of the profits that he might otherwise derive from its monopoly control. [\*202] It does not divest him of the *use* of what he has created by his labors. n364

A few examples should suffice to show the extent to which the law tolerates, even smiles on, commercial free riding. Absent passing off or similar independent wrongdoing, there is generally no cause of action for imitating or copying a successful good or product, no matter how seriously sales are diverted. n365 A different rule, as one commentator notes, "would have deprived the public of any alternatives in automobiles, ice cream cones, rubber tires and skyscrapers." n366 Similarly, once a business idea or method has been published or put into practice, competitors are free to adopt it, "however novel, concrete, and valuable it may be." n367 A different rule, as the same commentator observes, "might have prevented copying such ingenious methods as the supermarket, the drive-in bank, and the loose-leaf law service." n368 In addition, the law generally permits one manufacturer to capitalize on an image (say, of exclusivity or quality) that is the product of another's efforts, provided there is no passing off or similar consumer deception. Thus, for example, the law does not prevent the Miller Brewing Company from referring to its product as "the champagne of bottled beers." n369 Likewise, a business (Disney World, for instance) may draw millions of visitors to a particular geographical location (like Orlando), but it cannot stop others from capitalizing on its efforts by setting up shop in the vicinity. n370

Examples could easily be multiplied. n371 Chief Judge Breyer stated the general point well, however, in a recent First Circuit case. The promoter [\*203] of the Boston Marathon and a local television station it licensed to broadcast the race had sued to enjoin another television station from broadcasting the event. In an opinion denying the injunction, Chief Judge Breyer pointedly observed that there is no general legal bar to free-riding on the investments of others:

As a general matter, the law *sometimes* protects investors from the "free riding" of others; and *sometimes* it does not. The law, for example, gives inventors a "property right" in certain inventions for a limited period of time; it provides copyright protection for authors; it offers certain protections to trade secrets. But, the man who clears a swamp, the developer of a neighborhood, the academic scientist, the school teacher, and millions of others, each day create "value" (over and above what they are paid) that the law permits others to receive without charge. n372

Chief Judge Breyer also pointed out, quite rightly in my view, that "[j]ust how, when, and where the law should protect investments in 'intangible' benefits or goods" is not a matter of abstract "moral" principle; rather, it is a matter of "carefully weighing relevant competing interests." n373 One of the relevant interests, I should think, is whether investment would fall off or even dry up if the law were to permit unrestricted appropriation. Thus, for example, it might be appropriate to impose liability on "unjust enrichment" grounds when a free riding threatens not simply to divert profits from the plaintiff but also to "kill the goose that lays the golden egg": to destroy the plaintiff's livelihood or the marketability of his product and thereby remove his incentive to undertake or continue his productive activity. n374

For reasons identified below, n375 unrestrained commercial appropriation of a celebrity's image would not have this drastic, incentive-destroying effect. Even in a world without publicity rights, celebrities would still be able to derive substantial income from their publicity values, to say nothing of the income they would continue to derive from the activities to which they owe their fame. Whether the Associated Press would have ceased to gather and publish news stories if its rivals had been left free to [\*204] copy and sell them is subject to question. n376 Actors and musi-

cians, however, will certainly not cease making movies or record albums if their images are freely available for use on T-shirts and the like. n377

There is one last way in which the standard *Sower v. Reaper* picture is inaccurate and misleading in the right-of-publicity context. Not only do celebrity plaintiffs typically "reap where others have sown," but on the other side of the moral ledger, unauthorized commercial appropriators usually do some "sowing" of their own. Granted, one needs little creativity or entrepreneurial ability to manufacture and market a Madonna T-shirt or concert poster. ("It's the entrepreneurial equivalent of shooting fish in a barrel.") But not all unauthorized commercial appropriation is quite this risk free. (After all, as a waggish friend once asked me rhetorically, "What *do* you do with one million Tiny Tim T-shirts?")

More importantly, unauthorized commercial appropriators oftentimes *add* something of their own -- some humor, artistry, or wit -- to whatever they "take," and their products may service markets different from those that the celebrity herself (or her licensees) chooses to service. This is most evident when the star image is used to create or carry an oppositional meaning, as in the case of the John Wayne and Judy Garland greeting cards that I have already described. n378 But there is some entrepreneurial verve and creativity at work even in more mainstream appropriations. For example, while Leona Helmsley was on trial for tax evasion, a company offered for sale a T-shirt showing a photograph of the self-proclaimed "hotel queen" above the caption, "Off With Her Head." n379 Shortly after PeeWee Herman's arrest for indecent exposure, T-shirts appeared in stores with the double entendre slogan, "Keep Your Head Up, PeeWee." After the columnist Carl Rowan, a vocal gun control advocate, used his FBI agent son's gun to shoot a teenager who was trespassing in his backyard, a poster was marketed showing him in a "Rambo" pose, armed with a Chinese rocket launcher, and bearing these [\*205] words: "Warning, this home protected by Carl Rowan." n380 In each of these examples the (presumably unauthorized) appropriator did something more than "reap where another has sown." The artistry or wit displayed may be paltry. But it is *his* wit or artistry -- and it contributes in its own way to "building of the whole culture." n381

### *B. Economic Arguments for Publicity Rights*

Generally speaking, "economic" arguments for private property rights are of two basic kinds. First, there are arguments that rely on what Posner calls the "dynamic" benefits of private property rights, the incentives they create for productive investment. On this account, people will farm land or write books only if they have some measure of assurance that they will be able to reap what they sow. The point of private property is to give them that assurance. n382 Second, there are arguments for private property that rely on what Posner terms its "static" benefits. On this view, private property is a mechanism that promotes efficient use of *pre-existing* scarce resources. The inexorable logic of common property, the argument goes, is overuse. Private property, in contrast, ensures that users of resources pay the full social cost of their activities. n383 Arguments of both these sorts have been advanced in support of the right of publicity. Whatever one may think of these arguments as a general matter, n384 neither is very compelling when applied to celebrity personas.

#### [\*206] *1. The Incentives Argument: The Copyright Analogy*

It is frequently asserted that the purpose of the right of publicity, like that of copyright, n385 is to provide an economic incentive for enterprise, creativity, and achievement. On this view -- which receives considerable support in both the case law n386 and the commentary n387 -- the justification for the right of publicity is that it induces people to expend the time, effort, and resources nec-

essary to develop talents and produce works that ultimately benefit society as a whole. We give celebrities a legal entitlement to the economic value of their identities not because they "deserve" it or have a moral "right" to it, but rather because we thereby encourage socially valuable activities and achievements. The following statement, by Chief Justice Bird in her dissent in *Lugosi v. Universal Pictures*,<sup>388</sup> is representative:

[P]roviding legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition. . . . [\*207] While the immediate beneficiaries are those who establish professions or identities which are commercially valuable, the products of their enterprise are often beneficial to society generally. Their performances, inventions and endeavors enrich our society. . . .<sup>389</sup>

Nowhere in the cases or the law reviews, however, do adherents of this view provide evidence or argument to support the claim that the right of publicity in fact has this benign incentive effect. Perhaps they think the proposition too obviously true to require demonstration. I imagine, however, that proponents, if pressed, would say something like the following: in the fields that primarily generate commercially valuable fame (sports, music, acting, and the like) the odds on success are very, very long. Until they "make it," aspirants in these fields may earn incomes well below what they could earn in alternative endeavors.<sup>390</sup> In addition, the "price" of success, and the fame it brings in its train, can be very high. Celebrities must endure media intrusion into their privacy<sup>391</sup> and the familiarities, entreaties, and fickleness of fans. As "public figures," they are all but defenseless against defamation.<sup>392</sup> They run the risk of unexpected animosity (and even the possibility of violence) from people whom they have neither harmed nor heard of.<sup>393</sup> Given this "occupational profile" -- substantial uncertainty of success at time of entry, foregone income during apprenticeship, psychic and dignitary costs of stardom -- the "rate of return" must be very high to induce talented people, in sufficient number, to make the sacrifices, take the chances, and put in the time and effort to achieve prominence and success in these fields.

This, I suppose, is what proponents of the right of publicity must have in mind when, without any explanation, they invoke the need for "incentives" to creation and achievement. To evaluate this argument we need the answers to two questions. First, does the right of publicity in fact lead to an increase in effort, creativity, and achievement, and if so, how substantial an increase is it? Second, even if there is a marginal social benefit from the right of publicity, in the form of creations and performances that would not otherwise be forthcoming, how should we value it, and is it offset or even outweighed by costs of one kind or another? I will consider these questions in turn.

[\*208] *a. The Magnitude of the Incentive Effect*

Does the right of publicity lead to an increase in effort, creativity, and achievement in athletics, entertainment, and related fields, and if so, how substantial an increase? A question like this is hard to answer with any degree of assurance. It necessarily involves a fair amount of sociological guesswork, based in good part on one's views about human nature and human motivation.<sup>394</sup> Nevertheless, there are a number of reasons to believe that the incentive effect of the right of publicity is in fact very slight, and consequently that its abolition would not appreciably (or even noticeably) diminish effort or achievement in the spheres that generate commercially valuable fame.

*First*, the analogy that courts and commentators regularly draw to the incentive effect of copyright protection on intellectual and artistic creation is fundamentally flawed. One reason for the in-

aptness of the analogy is that writing (like farming) is an activity almost wholly devoid of what I would call "performance value." n395 People are not willing to [\*209] pay to *watch* Novelist Brown write a mystery, anymore than they are willing to pay to watch Farmer Brown plant and harvest his corn. What alone is valuable and marketable is what these activities produce: books, corn. But a commercially marketable public image is different. It is usually, though not always, a by-product of activities that have significant "performance value" and therefore generate income. Whereas copyright directly protects the primary, if not only, source of income of writers, n396 the right of publicity protects only a *collateral* source of income for athletes, actors, and entertainers. Abolition of the right of publicity would leave entirely unimpaired a celebrity's ability to earn a living from the activities that have generated his commercially marketable fame.

*Second*, the particular activities in our society that generate commercially marketable fame are themselves, again with isolated exceptions, n397 very handsomely compensated. Eddie Murphy, for example, collected \$ 10 million for his role in the movie *Coming to America*, and Michael Douglas received \$ 9 million for his role in *Fatal Attraction*. n398 In 1992, 273 major league baseball players had annual salaries in excess [\*210] of \$ 1 million. n399 Michael Jackson collected an \$ 18 million advance against royalties for a record album under his last contract, n400 and he recently negotiated a new record-and-film contract with the Sony Corporation that is even more lucrative. n401

These figures suggest that even without the right of publicity the rate of return to stardom in the entertainment and sports fields is probably high enough to bring forth a more than "adequate" supply of creative effort and achievement. As a result, whatever additional money celebrities in these fields earn from commercial exploitation of their merchandising and promotional values is simply economic rent, n402 "more like the proverbial icing on the cake than a necessary inducement." n403 Farmer Brown might give up growing corn and turn to hunting if marauders were free to invade his land and steal his crop. n404 Novelist Brown might give up writing mysteries and turn to investment banking if others were free to copy and sell his books. n405 But will Quarterback Brown give up professional football and his multimillion dollar salary if others are free to use his picture on posters or T-shirts without paying him for the privilege? Not likely. n406

[\*211] *Third*, even in a world without a right of publicity celebrities would derive some, probably considerable, income from their publicity values. Suppose, for example, that sneaker makers were free to use Michael Jordan's picture in their advertisements. Even so, Jordan would still be able to command a price, maybe a hefty one, for wearing a particular brand of sneaker in the Big Game or for touting or demonstrating its virtues in a television commercial. Or suppose T-shirt makers were free to use Bruce Springsteen's picture without his permission. Some consumers would probably choose to purchase the T-shirt "officially authorized" by Springsteen -- because they would expect him to monitor its quality, because they would want their money to go to him, or because they would derive a closer sense of identification with him in this way. n407 Similarly, retailers might prefer to handle an "official" product line if Springsteen, or his licensee, established a reputation for quality control. Moreover, celebrity merchandise is frequently sold at sites that are under the control, or at least potential control, of the celebrities themselves -- concert halls, sports arenas, and so on. n408 Even in a free-use regime, Springsteen could contract with the owner of a concert site to ban sales of T-shirts other than those he had licensed. n409 In short, stripping celebrities of their right of publicity would not divest them of *all* the income they now earn through endorsements and merchandising. They would still be able to capture a substantial chunk of the merchandising and promotional values attaching to their personas.



Suppose, however, I have underestimated the financial loss to celebrities that abolition of the right of publicity would entail. Suppose that the Bill Cosbys and Madonnas of this world stood to lose most, or even substantially all, of the income they currently earn from advertising and merchandising. What then? Would their incentive to perform, create, and achieve be reduced? Would they make fewer movies, write fewer (or inferior) jokes or songs, give fewer live performances? Or might they instead respond in precisely the opposite way -- increasing their level of performance and creation (and hence direct income) in order to make up for the lost collateral income?

[\*212] Only a fool or a charlatan would claim to know for sure. But it is at least possible, if not likely, that in a world without a right of publicity entertainers would actually be *more*, not less, active and productive. In the present regime, after all, they can coast once they have established a commercially valuable persona: Robert Young and Karl Malden need never act in another movie or television program; they can live nicely on the income they make doing advertisements for Sanka Coffee and American Express, respectively. Top musical performers nowadays spend less of their time in concert before live audiences than they once did. n410 Part of the reason is obviously that other sources of direct income -- from records, royalties, and music videos -- have greatly increased. But the fact that their collateral income, especially from merchandising, has soared n411 may also have something to do with it. If abolition of the right of publicity were to reduce this latter source of income, it might actually bring about more live performances. In any event, the important point, made in general form by Kennedy and Michelman, is that whether loss of collateral income from abolition of the right of publicity would increase or decrease creative effort and production is an empirical question -- turning largely on the relation between income effects and substitution effects. n412 It is not a question whose answer can be deduced from supposedly non-controversial assumptions about human nature. n413

Up to this point I have been considering the possible incentive effect of the right of publicity on persons who have already achieved some measure of renown and thereby established a commercially valuable persona. Although it is impossible to know precisely how much their incomes would fall if the right of publicity were abolished tomorrow, or precisely how much their effort and achievement would be altered at the margin, the foregoing considerations suggest that their motivational calculus is unlikely to be much affected, and that there would not be an appreciable, or even noticeable, loss of socially valuable activity or achievement.

[\*213] But what about the possible incentive effect of the right of publicity on persons contemplating or aspiring to a career in music, acting, or sports, or on persons who have already entered one of these fields but have yet to meet with much or any success: the Screen Actors Guild member who hasn't had a film role in a year, n414 the aspiring chanteuse who is performing on the streets for spare change, the baseball player who has languished in the minors for five years? Is the incentive argument any more persuasive with respect to them? For several reasons, the answer has to be "No."

First, unlike copyright, which to some extent protects the income of even struggling and second-tier writers, the right of publicity primarily benefits persons who are already established "stars" and have commensurately large direct incomes. It helps those who need help least. The vast majority of actors, musicians, and entertainers never make a dime's worth of income from licensing the commercial use of their names or pictures. Consequently, the right of publicity does nothing to help the struggling actress or singer scrape by in the early days of her career -- during the period when her income is likely to be less than what she could earn in some other occupation and the temptation

to call it quits is keenest. Moreover, it seems fanciful to suppose that the possibility of benefiting from the right of publicity once she has "made it" will persuade her to stay the course. If the prospect of a \$ 20 million movie or record contract is not enough to induce her to persist, it is hard to imagine that the prospect of still more millions from advertising and merchandising fees will do the trick.

The more basic point, however, is this: the distribution of both output and income in entertainment, sports, and related fields is very skewed. A handful of "superstars" command huge audiences and huge incomes, while everybody else -- including persons only slightly less talented than the stars, or more talented and less lucky or ruthless -- is "pushed into the background" and "underrewarded." n415 This "all or nothing" phenomenon is not confined to popular entertainment fields. It can be seen in chess, where Kasparov and Karpov play for millions, while grandmasters just a notch below barely eke out a living, and in classical music, where the number of full-time soloists is dwindling and slight differences in talent -- differences most consumers would have difficulty discerning -- generate huge income differentials. n416 Whatever the [\*214] reasons for this phenomenon, n417 the right of publicity does nothing at all to check or mitigate it. To the contrary, it only further widens the income gap between the "superstars" and the rest. If what is desired is some way of reducing the skewed distribution of income in these fields, so that truly talented people do not throw in the towel too soon, then we must look elsewhere.

A final reason for believing that the marginal incentive effect of the right of publicity is probably slight is the existence of uniquely powerful *noneconomic* motivations to excellence and achievement in fields like sports and entertainment. n418 There is, first of all, the desire for fame itself: for renown, for recognition, for glory, for "liberation from powerless anonymity." n419 There is the satisfaction of realizing and exercising one's talents, of developing and displaying proficiency at some difficult or complicated activity. There is the pleasure of winning people's applause, inspiring their love or awe, earning their respect or gratitude. Aside from these psychic rewards, which have long motivated people to excel, there are social and status rewards that are unique to modern celebrity --the opportunity for social intercourse with other stars; n420 access to and deference from social and political elites; influence over public tastes, styles, and mores. n421

It is difficult, of course, to gauge with any precision the impact of [\*215] such noneconomic rewards as power, status, access, and prestige on the calculations of persons who are contemplating or already embarked on careers in the entertainment and sports fields. n422 But when one adds these rewards to the very large incomes stars earn through their primary activities, the overall "rate of return" certainly seems more than sufficient to induce self-interested and ambitious talent-bearers to "reveal" and utilize their talents for the common good. n423 Again, this is not to deny that the right of publicity may have some incentive effect on the margin. The point, rather, is that given the magnitude of the other economic and noneconomic incentives at work in the sports and entertainment fields, there is little reason to believe that the marginal effect in this context is at all significant. n424

#### *b. Some Overlooked Offsetting Costs*

Suppose, however, that the right of publicity, by channeling additional dollars to celebrities (or the celebrity industry), *does* significantly increase the total level of investment in the fields that generate commercially marketable fame. As a result, society has some performances, athletic achievements, creative works, and "personalities" (henceforth "cultural output") that would not oth-

erwise exist. If we assume further [\*216] that this additional cultural output is worth something to someone, then there is a prima facie social benefit to recognizing publicity rights.

Even on these assumptions, however, the right of publicity would be justified only if its recognition produced no outweighing social costs. Among the purely economic costs that one would need to take into account are the costs involved in administering the right of publicity -- both transaction costs (would-be users of a celebrity's persona must contact him, bargain with him, and arrange for payment) and enforcement costs (costs involved in policing and litigating). Although neither of these costs is insignificant, I shall not attempt to estimate their magnitudes here. Instead, I want to identify several possible costs of recognizing the right of publicity that proponents of the incentive argument either overlook or understate.

#### *i. "Overinvestment" in Celebrity-Production*

According to the incentive argument, the right of publicity induces some people to enter into entertainment and sports careers and to work harder or better at them. Proponents of this view take it for granted that this is an unalloyed good thing because they focus on the gain in cultural output -- the jokes and songs we would not otherwise hear, the slam dunks and dance moves we would not otherwise see. A question that they do not ask, much less answer, is what people, both those who attain stardom and those who do not, would *otherwise* have done if the right of publicity had not drawn their attention and talents to the task of achieving commercially marketable fame. n425 Might the additional cultural output gained by virtue of the right of publicity be offset, or even outweighed, by the loss of *other* output? After all, it is not as if the people who are supposedly induced by the right of publicity to embark on, or persist in, entertainment and sports careers are otherwise unemployable. Is it not at least *possible* that society would be better off if some of the kids who are now devoting themselves to perfecting their jumpshots (or guitar riffs) in the usually vain hope of making it to the NBA (or the top of the charts) said "to hell with it," and started thinking of other ways of making a living? Maybe we would lose a Michael Jordan or two that way, but we might get a great many engineers or computer programmers in exchange. The questions we need to ask are whether the immense economic and status rewards of celebrity already draw *too much* aspiration and effort -- too much "investment" -- into fields in which only a very few persons ultimately succeed, and whether the right of publicity exacerbates the problem by further increasing those rewards.

I suspect that for some economists the notion that there is any way [\*217] to second-guess the free market in these matters is misguided or incoherent. For them, the "optimal" amount of investment in the production of any commodity will occur if those who produce it are permitted to capture its full market value. There is no need to challenge the general validity of this proposition here. I do, however, want to suggest that there are special reasons to anticipate suboptimal (in this case, excessive) investment in the production and pursuit of celebrity.

First, the high visibility of sports and entertainment careers means that it is easier (and cheaper) for people to find out about these careers (to find out that they exist and what they are like) than it is for them to find out about many others. All else being equal, there will be over-investment in careers with lower than average "search costs."

Second, sports and entertainment are fields in which narcissism, vanity, fantasy, and self-deception probably take more than their usual toll on rational decisionmaking. Aspirants in these fields are especially likely both to overestimate their talents (and their chances of "making it") and

to underestimate the quality of their competition. n426 To the extent this is so, socially wasteful investment will be the result.

Third, people considering careers in these fields do not have anything approaching perfect information about just how long the odds on success actually are. Part of the reason is that the mass media, for purposes of its own, shows us "only the winners in the scramble to the pinnacle." n427 How many people who are considering a professional screenacting career know, for instance, that over half the members of the Screen Actors Guild go year after year without landing even a single part? n428 How many know that seventy-five percent of SAG members earn less than \$ 3000 annually from acting? n429 Isn't it likely that fewer people know these facts than know that movie stars like Eddie Murphy and Arnold Schwarzenegger earn several million dollars per film? Given this informational asymmetry, there will tend to be overinvestment in the screen-acting field, however perfectly the market in careers functions in other respects.

A related problem is what economists call "market failure." Many people, I think, would prefer it if economic incentives figured *less* prominently in the motivational calculus of athletes, actors, musicians, and the like. n430 Yet there is no way for the "market" to register these preferences [\*218] directly and effectively. There is no way for you and me to bring to bear in the market our preferences, say, for Olympic athletes whose only interest in "gold" is a medal. Similarly, we can whine our heads off about the "greed" of today's professional athletes, but the market does not effectively register our dissatisfaction on this score either. My heart sinks every time a million-dollar sneaker endorsement deal is announced. It sinks not because I am envious or resentful, or because my sense of distributive justice is offended, although I am and it is. My heart sinks because the lucrative endorsement contracts take some of the fun and innocence out of "the game" for me by reminding me that athletes are in the business of performing for money. Yet the market will not register this disutility unless and until I get sufficiently fed up with \$ 3 million sneaker deals to shift my attention elsewhere. For now, whatever additional income the right of publicity funnels the way of professional ballplayers only makes me, and doubtless others, a bit unhappier. The standard economic analysis of publicity rights, however, takes no account of these externalities.

## ii. Distributional Consequences

Proponents of the incentive argument seldom consider, much less evaluate, the *distributional* consequences of recognizing a right of publicity. Certain of these consequences have already been mentioned. First, the right of publicity raises the price of celebrity merchandise and of advertising in general, thereby shifting wealth away from the great mass of consumers to a very small group of persons who are already very handsomely compensated. n431 Second, the right of publicity widens the already immense income gap between "superstars" and others in the entertainment, sports, and related fields. n432 Third, for reasons that I will explain in the next Section, the legal protection of publicity rights probably works to the systematic advantage of large over small advertisers, thereby increasing corporate concentration in the general economy.

While views may differ as to how undesirable these distributional consequences are, or indeed whether they are undesirable at all, I will not attempt to resolve these issues here. I do, however, want to call attention to another possible distributional consequence of recognizing publicity rights: namely, the disparate impact the right of publicity may have on the motivations and career aspirations, and hence life-chances, of the members of certain minority groups.

The sociologist Harry Edwards, who has thought long and hard [\*219] about the impact of professional sports on African-Americans, laments the fact that "young blacks are encouraged toward attempts at 'making it' through athletic participation, rather than through pursuit of other occupations that hold greater potential for meeting the real political and material needs of both themselves and their people." n433 Sports, Edwards says, "stifle[] the pursuit of rational alternatives by black people." n434 In his view, the "obsessive pursuit" of athletic success is a major cause of black "cultural and institutional underdevelopment" because black youths are drawn away from "other critically vital areas of occupational and career emphasis." n435

Along the same lines, John Gaston has asserted that professional sports are a "major contributor[]" to the destruction of the current generation of black males" because sports are "perceived as being the shortcut to the pinnacle of American society. The professional athlete enjoys 'the long bread,' a 'bad new ride,' plus a high degree of social acceptance." n436 These views may overstate the extent to which the lure of sports stardom explains the present predicament of young African-American men. In addition, given the limited educational and economic opportunities open to most poor minority youths, a long-shot bid for sports stardom may be less "irrational" than Edwards acknowledges.

Nevertheless, Edwards and Gaston implicitly raise an important and disturbing question: does the cult of celebrity, which the right of publicity arguably both reflects and fosters, have a greater hold on certain groups within our society than others? Is its impact thus to diminish further the life-chances of already disadvantaged groups? Does it even contribute to the economic and political "underdevelopment" of these groups? If so, is this something the law should take into account when a decision is made whether to recognize publicity rights? What we need to ask is not simply whether publicity rights "create added incentives" for effort, achievement, and excellence in such fields as music, acting, and sports. We also need to inquire *on whom* these added incentives operate, and with what results, both for their individual lives and for the welfare of the groups and communities of which they are members.

[\*220] 2. *Allocative Efficiency -- The Tragedy of the Celebrity Commons?*

A familiar economic argument for the superiority of private property to common property is that it promotes more efficient use of existing scarce resources. n437 The inefficiency of common property is often illustrated by reference to what has become known as "the tragedy of the commons." n438 Imagine a community of rational, utility-maximizing herdsmen that holds a pasture in common. All of the herdsmen are free to graze their cows on the pasture without asking permission or making payment. Because they do not have to pay for grazing a cow, they can and will ignore the real (social) cost of doing so -- the burden each additional cow of theirs imposes on all their fellow herdsmen. Conversely, if some other (rational, utility-maximizing) herdsman adds a cow, there will be less grass for all the cows to eat, but there is no way to stop him. In fact, the response of the other herdsmen will most likely be to add yet another cow, since they'll be better off with  $n + 1$  underfed cows than  $n$  underfed cows. When all these self-interested defensive efforts are aggregated, the common pasture will be "grazed to dust." n439 "Freedom in a commons brings ruin to all." n440

The familiar solution to the overexploitation problem is, of course, private property. If someone is given a property right in the pasture, a right to exclude users except on payment of a fee, then he will have an incentive to allow only the "optimal" number of cows to graze. The fee he charges for

each cow will "include the cost he imposes on the other farmers by pasturing additional cows, because that cost reduces the value of the pasture to the other farmers and hence the price they are willing to pay the owner for the use of the pasture." n441

This argument for private property has been subjected to various criticisms. n442 I do not want to pursue these general objections here, however. My only concern is to consider whether something like the tragedy of the commons would befall us if celebrity personas were treated as [\*221] common (in other words, unowned) property. Judge Posner apparently thinks so. In his 1978 Sibley lecture on privacy, Posner suggested that the right of publicity prevents inefficient overexploitation of celebrity personas:

There is a perfectly good economic reason for assigning the property right in a photograph used for advertising purposes to the photographed individual: this assignment assures that the advertiser to whom the photograph is most valuable will purchase it. Making the photograph the communal property of advertisers would not achieve this goal. . . .

. . . Furthermore, the multiple use of the identical photograph to advertise different products would reduce its advertising value, perhaps to zero. n443

Posner does not develop the point any further. But presumably he would contend that in a common property regime advertisers will disregard the costs they impose on others and hence overuse celebrity personas, just as the herdsmen overused the common pasture.

If, instead, a celebrity is given a property right in his persona, he will endeavor to maximize its advertising value. To this end, he will charge would-be advertisers the full costs involved in using his picture. If *X* proposes to him that he permit his photograph to be used in a magazine ad for Brand *X* Beer, he will balance the short-term return (the fee *X* has offered him) against the effect of *X*'s use on the long-term advertising value of his face. He will take into account the fact that the advertising impact of a name or face decreases the more often it is used. He will also take into account the fact that if *X*'s advertising campaign succeeds in associating him in the public mind with Brand *X* Beer, his face will be rendered less valuable to advertisers of competing products (Brand Beer) and incompatible products, say diet and health foods. n444

There are, I think, several problems with this line of reasoning. Start with Posner's apparent premise that the value of a celebrity's photograph diminishes the more often it is used. This may well be the case in advertising, though the example of Bill Cosby suggests that it may [\*222] take quite some time before the onset of what the British call "face wearout." But what about the use of famous faces in merchandising -- say, on T-shirts or posters or coffee mugs? Here it is far from clear that the value of the celebrity's photograph will fall the more often it is used. Indeed, the opposite may sometimes be the case. A Madonna T-shirt may be worth *more*, not less, to consumers precisely because millions of her fans are already wearing them. The value of the T-shirt may be greater just because "everybody's got one."

Similarly, the marketing of Madonna T-shirts may actually increase the demand for other sorts of Madonna paraphernalia: posters, buttons, and so on. In the merchandising context, where fadism and emulation are important forces, sometimes it is "the more the merrier." If that is so, then the way to maximize economic value is to make the merchandise available to any and every one who is willing to pay the marginal cost of its production. n445

[\*223] In the advertising context, too, Posner's argument runs into difficulty when proper account is taken of the transaction costs inherent in the operation of a private property scheme. Note Posner's claim that assigning to the celebrity a property right in his photograph assures that "the" advertiser to whom it is most valuable will purchase it. This reference to *one* advertiser is obviously loose talk. What Posner must be understood to mean is that the grant of a property right ensures that the photograph's advertising value will be maximized -- that the celebrity will license its use in such a way as to maximize his total return from its advertising use. Sometimes this may mean an exclusive license agreement with a single advertiser. More often, the celebrity will do best by selling the right to use his photograph to several advertisers.

Take this simple example. Assume five national companies have expressed interest in buying the right to use Celebrity *A*'s photograph in their advertising. Each is willing to pay \$ 1 million for the exclusive right to use *A*'s photograph. But the price each is willing to pay drops with increases in the number of other advertisers who will have the same right: \$ 600,000 if there are two licensees; \$ 450,000 if there are three licensees; \$ 300,000 if there are four licensees; \$ 200,000 if all five are licensed. In these circumstances what will *A* do? Clearly, his total return is highest (\$ 1.35 million) if he licenses three advertisers at \$ 450,000 apiece.

Is this, however, the "optimal" number of advertising users? Maybe not. Suppose that in addition to the five large national advertisers interested in using *A*'s photograph, there are 15,000 small, geographically dispersed businesses -- dry-cleaners, groceries, whatever -- that would happily pay \$ 100 each to use *A*'s photograph in their advertising. The total value they place on *A*'s photograph (\$ 1.5 million) is greater than [\*224] that placed on it by the three national advertisers. According to Posner's theory, it is they who should wind up with the right to use *A*'s photograph. But will they? Probably not, because the transaction costs (in locating them, negotiating with them, etc.) would almost certainly more than eat up the \$ 150,000 difference. In other words, once transaction costs are taken into account, it becomes an open empirical question whether the right to use the celebrity's photograph will in fact wind up in the hands of "the advertiser to whom the photograph is most valuable." More important, the existence of transaction costs will probably skew use toward a small number of very well-heeled advertisers. Small-fry advertisers will be left out in the cold, even in circumstances where the total advertising value to them of *A*'s photograph exceeds the value to the bigger outfits. n446

Why not, then, let any advertiser who wants to use *A*'s photograph do so? Posner's answer is that this will "reduce its advertising value, perhaps to zero." n447 Advertisers will use *A*'s photograph until it has been squeezed dry of advertising value. But so what if they do? We are not dealing here with a nonrenewable natural resource like land. Because celebrity is a social creation, "there will always be a certain supply of existing and newly-created personalities to exploit." n448 Well before the advertising value of *A*'s photograph is driven down to zero, advertisers will replace him with a "fresh" face. As Frazer puts it, "[f]rom the viewpoint of the individual [celebrity] concerned, . . . over-use of his or her personality is costly; but from the viewpoint of the user and society at large, the cost is small since a fairly plentiful supply of alternative resources exists." n449 After all, there would be no "tragedy" in the classic parable if the herdsmen, after depleting their common pasture, could simply move on to another one.

But what if the appetite of advertisers for celebrities outstrips the supply, and advertisers at some point run out of celebrities? Would even this be cause for concern? Here again the analogy to land or to high seas fisheries n450 is misleading. Land is a necessary factor of production: no

land, no corn. Fish are a direct consumption good: no fish, no sushi. [\*225] But the promotional values attaching to celebrity personas are a very different kind of resource. They are a way of enhancing the marketability of *other* goods and services. If advertisers were to run out of celebrities, they would simply rely more on one or another of the myriad other techniques by which they currently attract attention to, and create favorable associations for, their products. Indeed, there are arrows aplenty in Madison Avenue's quiver.

There is one final point to make about Posner's argument. Although it has found occasional support among commentators, n451 no court, to my knowledge, has ever put this argument forward in support of the right of publicity. In part this may be because most judges and lawyers "are not used to thinking of legal rights in terms of maximizing allocative efficiency." n452 But I suspect the failure of Posner's argument to attract any judicial support also has something to do with the fact that an allocational efficiency analysis captures next to nothing of what most people -- judges and lawyers, as well as laypersons -- believe to be wrong with the unauthorized commercial appropriation of famous personalities. n453

### 3. *The Limitations of Economic Analysis: Publicity Rights and the Culture of Celebrity*

To this point I have taken the economic arguments for publicity rights on their own terms and focused on their internal weaknesses. There is, however, a more fundamental and intractable problem with any purely economic argument for the right of publicity. An economic analysis takes people's existing preferences as given and does not question or evaluate them; it does not ask whether people *ought* to want the things they currently want, or whether people *ought* to aspire to be the kinds of people they currently aspire to be. Moreover, it does not ask what types of activities we should value and foster, or what types of motivations we should encourage and reward. For this reason, an economic analysis cannot help us very much whenever -- as is the case with the publicity rights issue -- "the choice of legal rules involves determining what kind of people we want to become." n454 An economic analysis does not and cannot, for example, help us determine whether it would be better if athletes and performers in our society sought fame for its own sake, rather than for its commercial payoff. Nor, most importantly, can it help us to [\*226] resolve the broader question whether our culture attaches too much value or importance to celebrity itself and, if so, whether publicity rights contribute in any appreciable way to this collective overvaluation.

A century ago actors, entertainers, and athletes were still socially marginal and politically inconsequential. While a popular actor was among President Cleveland's favorite fishing companions, not even the most celebrated stage performers were welcome in polite society in the late nineteenth century. n455 When Sarah Bernhardt toured this country in 1880, for example, the *haut monde* flocked to her performances but pointedly denied her admission to their homes. n456 Thirteen years later, the actress Lillian Russell's appearance in the clubhouse at Chicago's Washington Park racetrack on Derby Day caused such alarm that she was required to move to the grandstand. n457 In the decades immediately before World War I, however, the social standing of actors and entertainers began to improve. Among some younger socialites, rebelling against the decorousness and formality of their Victorian elders, "theater people" suddenly became coveted companions and prized dinner guests. n458 About the same time, the popular press began to lavish great attention on their lives, doings, and views. Stage actors in particular became objects of popular fascination and widespread emulation, as the nineteenth century's "culture of character," which had stressed self-discipline and self-sacrifice, gave way to a culture that emphasized instead the importance of a distinctive "personality." n459 Traditional social elites responded to this challenge not by closing



ranks against theatrical celebrities but by visibly associating with them, hoping thereby to retain some of their former prestige and cultural authority. n460

The process of "celebrity desegregation" accelerated sharply during World War I, as Washington officials called on Hollywood stars like Chaplin, Fairbanks, and Pickford to mobilize popular support, promote enlistment, and sell war bonds. n461 After the war ended, metropolitan socialites and institutional elites began to mingle regularly with entertainment and sports celebrities in the glittering "cafe society" of the 1920s. n462 By the 1950s, the "metropolitan 400s" had largely faded, and celebrities had achieved a kind of status parity with institutional elite groups. Writing in 1956, the sociologist C. Wright Mills remarked on the frequent and easy access that celebrities had to those in the "power elite." "In America," Mills observed with a mixture of alarm and [\*227] amusement, "a man who can knock a small white ball into a series of holes in the ground with more efficiency and skill than anyone else thereby gains social access to the President of the United States," and "a chattering radio and television entertainer becomes the hunting chum of leading industrial executives, cabinet members, and the higher military." n463 More remarkable still, Mills thought, was that institutionally anchored elites (politicians, industrialists, etc.) increasingly had to compete with celebrities for attention and acclaim, and even *borrow* prestige from them. "In part, [the celebrities] have stolen the show, for that is their business; in part, they have been given the show by the upper classes who have withdrawn and who have other business to accomplish." n464

The tendencies Mills identified in the 1950s have greatly intensified in recent years. More than wealth, power, or descent, fame is now the chief fount of prestige and status in American society. No longer shunned, sports and entertainment celebrities are "sought after by rich and powerful individuals to assure the success of important ventures." n465 Political candidates, in search of glamour and legitimacy, court them. n466 Philanthropic and social cause groups vie for their blessings and support. They cross over to high political and business positions with ease and frequency. Their views on weighty and complex issues -- everything from childrearing to nuclear proliferation -- are taken seriously and reported widely by the media. n467 When Gorbachev visited this country in 1990, Cher graciously offered to fly from Chicago to Minneapolis to meet with him. n468 Gorbachev demurred, but the fact that Cher even made the suggestion -- and that the media solemnly reported it -- indicates how far the convergence of political and celebrity elites has progressed.

What are the implications of these developments for our polity and our culture? Can a democracy flourish, or even survive, when political leaders and candidates "must resort to the strategies of entertainers . . . to gain and retain public attention"? n469 Or when, "in a curious reversal of rank," they "increasingly turn to celebrities for reflected status"? n470 And what about the impact of the culture of celebrity on everyday life and experience? Cynthia Heimel, for example, laments that we have [\*228] come to believe that "unless you are a celebrity, you don't exist at all." n471 The cult of celebrity, she thinks, has the effect of radically devaluing private life and inner experience. "If you are not a celebrity, you are inert filler. If the media isn't flashbulbing your every gesture, it didn't happen. Private epiphanies, soul-wrenching despairs, so what, who cares? You are a tree falling alone in the forest." n472 Along somewhat the same lines, Christopher Lasch worries that the cult of celebrity has made Americans passive spectators of other people's lives and has intensified their "narcissistic dreams of fame and glory." n473 The average American, Lasch thinks, is encouraged to "identify himself with the stars and to hate the 'herd,'" and so he finds it increasingly difficult to "accept the banality of everyday existence." n474

It is entirely possible, of course, that HeimeI and Lasch are mistaken. Identification with the famous may operate instead, as Roger Caillois claims, as a "compensatory mechanism." n475 It may provide ordinary people with a vicarious liberation from anonymity and a temporary respite from routine, boredom, failure, and frustration. The cult of celebrity may actually be one of the chief means by which the old romance of individualism and the old dream of autonomy are kept alive in a bureaucratic mass society. But however that may be, the important point is that a purely economic analysis has nothing to offer when it comes to *evaluating* the central place that celebrity has come to occupy in our culture. It cannot help us decide whether to embrace this development warmly or resist it steadfastly. Consequently, it cannot tell us what we perhaps most need to know when we decide whether the law should grant celebrities a property right in their publicity values.

### *C. Consumer Protection Arguments for Publicity Rights*

A different instrumental rationale sometimes advanced in support of the right of publicity is that it functions in effect as a private law mechanism for advertising regulation. The most common version of this argument focuses on the need to protect consumers from deceptive trade practices, especially false representations of endorsement or sponsorship. Another version emphasizes the undesirability of permitting advertisers of dangerous or shoddy products to manipulate consumers by exploiting powerful celebrity images.

#### [\*229] *1. Preventing Deception in Advertising -- The Trademark Analogy*

According to Professor Treece, the right of publicity, by affording celebrities a private cause of action for unauthorized advertising use of their names and likenesses, operates to protect consumers from being "misled about the willingness of a celebrity to associate himself with a product or service." n476 Along the same lines, Douglas Baird, in his student Note, said that rights of publicity, like trademarks, help consumers make "rational economic choices": They "promote the flow of useful information about commercial goods and services to the public by ensuring that the public is not confused by a false implication that a particular celebrity has endorsed a particular good." n477

Why, according to Treece, is it important that consumers not be confused or misled "about the willingness of a celebrity to associate himself with a product or service"? How, according to Baird, does the right of publicity help consumers make more "rational" purchase decisions? The following example illustrates what Treece and Baird apparently have in mind. Suppose a consumer, while flipping through a magazine, happens upon an ad for Brand *X* laundry detergent, which prominently features a picture of a star tennis player *Y* crushing a backhand on center court at Wimbledon. Under the picture is a caption comparing Brand *X*'s cleansing power to that of *Y*'s backhand. What "information" does this ad convey to the consumer? That *Y* personally uses and favors Brand *X*? Probably not. Recent surveys suggest that a significant majority of consumers harbor no illusions on this score. n478 Nevertheless, the [\*230] ad -- by virtue of the right of publicity -- does provide the consumer with some "information": it tells him that the folks at Brand *X* bargained for and obtained *Y*'s authorization to use his picture in this connection. Moreover, this piece of information enables him to make a cheaper and better-informed product choice, for he can now reason as follows: "I don't know one detergent from another, and I'm much too busy to find out which is best. Even though *Y* is in it just for the money, he is probably concerned enough about his credibility and public image not to associate himself with a product without first hiring experts to check the product out. So Brand *X* must be OK." n479

The first response to this example is that consumers may not respond to celebrity advertising in the manner implicitly assumed by Treece and Baird. Most consumers probably think little and care less about licensing arrangements between celebrities and advertisers. Celebrity advertising does not generate sales "by creating, or relying on, any specific conclusions" n480 or by triggering "a logical train of thought" n481 in the minds of readers or viewers. Instead, association of a celebrity image with a product "proceeds more subtly to foster favourable inclination towards it, a good feeling about it, an emotional attachment to it." n482

Yet even if some consumers do in fact respond to celebrity advertising in the way hypothesized, n483 it is not clear that the "rationality" of their consumer purchase decisions is thereby enhanced. For one thing, my hypothetical consumer has simply *assumed* that the star tennis player is worried enough about his image and credibility to "do his homework" before lending his name to a product. Perhaps some celebrities do proceed in this cautious manner -- having the detergent tested or the insurance [\*231] company's books examined. n484 That many celebrities do not n485 is not surprising in light of the huge fees dangled before their eyes n486 and the slim chance that they will be held liable in tort if something goes amiss. n487 A consumer who reasons in the fashion imagined above might *feel* as if his decision to buy Brand X detergent is more rational than an arbitrary selection would be, and this feeling might be a rather pleasant one. n488 But the feeling could well be entirely illusory. Thus, whether consumers' purchase decisions are made more or less "rational" on the whole because of the right of publicity cannot be determined *a priori*. It depends on the extent to which celebrity endorsers actually do the "homework" consumers impute to them.

A more serious problem with the standard consumer deception argument is that the right of publicity enables celebrities to prevent commercial uses of their personas that are not in any way misleading or fraudulent. In other words, the right of publicity applies even where there is no danger that consumers will be misled into believing that the featured celebrity has endorsed or associated himself with the product. [\*232] In one well-known case, n489 for example, the defendant marketed portable toilets under the corporate name "Here's Johnny." The admitted intent and obvious effect was to bring to mind the entertainer Johnny Carson, who was regularly introduced as host of the *Tonight Show* with that same phrase. The company reinforced this association by advertising its product as "The World's Foremost Comedian." n490

Carson, president of a men's apparel company that used the phrase "Here's Johnny" on its labels and in its advertising, n491 was not in the least amused by what the defendant described as an attempted "play on a phrase." n492 Carson brought suit on several grounds, including unfair competition under section 43(a) of the federal Lanham Act n493 and Michigan common law, as well as infringement of his right of publicity. The Sixth Circuit dismissed the unfair competition claims, affirming a lower court finding that there was no "likelihood of confusion" on the part of consumers. n494 Even though the defendant had intended to "capitalize on the phrase popularized by Carson," he had not intended to "deceive the public into believing Carson was connected with the product," and there was no evidence that the public had or would be misled. n495 On the right-of-publicity claim, however, the court decided in Carson's favor, holding that the defendant had misappropriated Carson's "identity" to promote its product. With respect to this claim, the fact that consumers would not be misled into thinking that Carson was in any way connected with defendant's product was irrelevant. It sufficed that the defendant had evoked Carson in order to benefit from his fame and popularity. n496

The precise reach of the *Carson* decision is uncertain. Would [\*233] "Make My Day" Vitamins infringe Clint Eastwood's right of publicity? What about "Read My Lips" Lipstick? Nevertheless, the case illustrates that the right of publicity is neither directed at, nor confined to, the prevention of consumer deception. n497 The focus of the right of publicity is not the interest of the consuming *public* in freedom from deception but rather the *celebrity's* interest in controlling and benefiting from the economic value of his identity. The point can be sharpened by consideration of an increasingly common advertising practice -- the use of celebrity "look-alikes" and "sound-alikes."

Sheldon Halpern, for example, puts the hypothetical case of an advertisement featuring a Woody Allen look-alike accompanied by the following conspicuous and unequivocal disclaimer of identity and endorsement: "This is not Woody Allen. Woody Allen doesn't know we are running this ad, and he doesn't like our product." n498 Clearly, in a case of this sort there is no appreciable danger of consumer confusion or deception. Even the proverbial "moron in a hurry" should realize that Allen has nothing to do with the ad or the product. n499 Yet, as Halpern persuasively argues, the ad nevertheless infringes Allen's right of publicity, for it evokes his identity in order to attract attention and promote sales. n500 The upshot is this: although the right of publicity may in some circumstances protect consumers from being "misled about the willingness of a celebrity to associate himself with a product or service," n501 it also applies in many cases where no such consumer protection function is served. n502

More decisively, to the extent that the right of publicity *does* prevent consumer deception in advertising, it is largely redundant. In circumstances presenting a realistic danger that consumers will be deceived or confused about a celebrity's endorsement of or association with an advertised product or service, the celebrity can obtain appropriate relief under [\*234] the Lanham Act n503 or a state law equivalent. n504 In other words, if our sole or chief concern is that consumers not be deceived or confused about the willingness of a celebrity to endorse or associate himself with an advertised product or service, then legal mechanisms better tailored to that purpose already exist. A property-like right of publicity "must find [its] own justification." n505 If there are gaps in the Lanham Act's coverage, then the appropriate response is to amend it, rather than to create a novel property right that is neither tied nor confined to deception or confusion.

Furthermore, the relation of the right of publicity to "truth-in-advertising" is not nearly as straightforward and unambiguous as the consumer protection argument suggests. Consider this example: Brand *X* Sneaker Co. runs an ad truthfully stating that Michael Jordan bought and wore its sneakers throughout his college basketball career and switched to Brand *Y* only upon turning pro and signing a fat endorsement contract with Brand *Y*'s company. The ad uses a picture of Jordan from his college days, but makes unequivocally clear that Jordan has not authorized this use of his name and likeness. Has Jordan's right of publicity been infringed? It is hard to see why not, for Jordan's name and "goodwill" have been appropriated by the advertiser to promote a product. n506 It is possible, of course, that Brand *X* has a First Amendment right to publish this information that would trump Jordan's publicity [\*235] right. n507 My point is only that the right of publicity itself can as easily thwart as promote "the flow of useful information about commercial goods and services to the public." n508 As Professor Shiffrin notes, the right of publicity gives a public figure power "to control the dissemination of truth for his or her own profit." n509

Finally, the consumer protection argument for the right of publicity necessarily involves a kind of bootstrapping. The argument begins from the premise that the average consumer who comes

upon a magazine ad or T-shirt featuring Michael Jordan's picture assumes or infers that Jordan has given authorization for the use of his likeness. It is not at all clear, as an empirical matter, that today's average consumer assumes or infers any such thing -- at least with respect to celebrity merchandise (such as posters, T-shirts, etc.). n510

But let that go. Let us suppose that many or most consumers of ordinary intelligence and sophistication do react this way. What is it that accounts for their reaction? After all, they do not draw any such inference when they see Michael Jordan's picture on the cover of *Sports Illustrated* or in the sports section of their daily newspaper. If they have a different reaction to ads and merchandise, it can only be because they have some vague background sense of what the law permits and how businesses operate in this area. They have some notion that the law, or business custom, or both, require advertisers and merchandisers (but not the news media) to obtain a celebrity's consent before using his picture.

Yet if the law (and business practice) were otherwise, would not their assumptions and inferences change? Presumably, consumers who purchased Ben Franklin clocks and snuff boxes in the 1770s, for example, did not believe that Franklin had licensed or otherwise authorized their [\*236] production. n511 Consumers in the 1880s presumably realized that Oscar Wilde had not approved the use of his photograph on trade cards for Marie Fontaine's Moth and Freckle Cure. n512 In short, the reaction of today's consumer to celebrity advertising and merchandise is neither "natural" nor inevitable. It reflects instead his understanding of what legal and customary norms currently require in these matters, and it thus cannot be used to *ground* those norms.

Suppose the law permitted free advertising and merchandising use of celebrity personas, but prohibited false claims of authorization. In other words, suppose anyone could market Michael Jordan T-shirts, but only Jordan's licensee could put "official version" on the label. Likewise, suppose anyone could use Jordan's picture or name in a commercial "tie-in," but no advertiser could run a spurious testimonial or falsely represent that it had Jordan's permission. If these were the legal rules, and if business practice came to reflect them, then consumer reactions to celebrity advertising and merchandise would change accordingly, and there would be no serious danger that consumers would be "misled about the willingness of a celebrity to associate himself with a product or service." n513 That being so, we have to look elsewhere for a justification of the right of publicity.

## 2. *Fostering Accountability in Advertising*

A somewhat different version of the consumer protection argument, outlined by Treece and recently developed by my colleague Samuel Murumba, n514 views the right of publicity not (or not only) as a means of protecting consumers from false information, but also as an indirect means of fostering restraint and social responsibility in the deployment of powerful celebrity images. This argument starts from the premise that the aim of much modern advertising is not to provide the consumer with "information" about the product, but rather to grab his attention and then set up some association, arouse some feeling or mood or anxiety, that will activate him to buy the product. Although some celebrity advertising involves straightforward testimonial endorsements, much of it "works" not by giving the consumer a *reason* to buy the product, but by affording him "an opportunity to associate himself with a public figure, however fleetingly and remotely." n515 No "logic" tells the consumer that sneakers are better because Michael Jordan wears them in a television ad, but "the [sneakers] *are* better in his eyes, worn by his idol." n516 [\*237] Strictly speaking, such advertisements do not involve "deception" or "misrepresentation." Image advertising, as Murumba

says, has no truth-value. It is largely nonpropositional: it "cannot be false because it cannot be true, and so it is meaningless to talk about misrepresentation in this context." n517 Michael Schudson makes the same point slightly differently, arguing that the messages conveyed in this sort of advertising are not deceptive because the entire audience *knows* them to be false. n518

If this is the nature of much or most celebrity advertising, what follows? According to Treece, "[S]ociety might decide that the 'emulating' behavior of consumers would channel itself more acceptably if the persons emulated had some control over the decision to link their names and likenesses with particular products." n519 Along somewhat the same lines, Murumba argues that if celebrities were given firm control over the use of their identities, "the worst abuses" of image advertising could be avoided. Celebrities would "select carefully which products or services they wish to be associated with" and would "weigh the attraction of the advertiser's fee against potential risk to their image." n520 They would tend to eschew association of their images with "shoddy or dangerous merchandise." n521

The critical aspect of this version of the consumer protection argument is that the danger sought to be prevented by the right of publicity is not (as it was in the first version) that consumers will be misled into thinking that a celebrity has endorsed or associated himself with a product. Rather, the danger here is that advertisers of "bad" products will exploit powerful celebrity images to grab our attention or motivate us to buy. The spectre Treece and Murumba implicitly summon up is of a world in which gun merchants are free to use pictures of Clint Eastwood or Sylvester Stallone to promote the sale of attack weapons, and swindlers are free to use pictures of Robert Young and Karl Malden to drum up deposits for a savings and loan hovering on insolvency.

While this variant of the consumer protection argument for the right of publicity is more subtle and plausible than the first, it too relies on faulty assumptions. First, strictly as a factual matter, celebrities have not shown either the inclination or the ability to "channel" consumer behavior in socially desirable ways. Concern for their image or reputation [\*238] doubtlessly leads some to avoid association with products which they realize are shoddy or fraudulent. But, as already mentioned, there are celebrities who endorse products that they do not themselves use, n522 and there are others who tout products whose effectiveness or soundness they have neither investigated nor verified. n523 More importantly, ever since the advent of modern testimonial advertising in the 1920s, n524 prominent entertainers and athletes have consistently lent their names and faces to the promotion of products with high individual and social costs. n525 It is possible that the imposition of tort duties on endorsers would make celebrities somewhat more discriminating. Absent that development, however, celebrities cannot realistically be counted on to "channel" popular consumption to the extent envisioned by Murumba and Treece.

Another problem with the argument Murumba advances is that celebrity advertising, however potent it may be, is not uniquely powerful. It is only one of many techniques in the modern image advertiser's repertoire. Thus, even if celebrities can be expected to avoid association with dangerous or socially harmful products, the advertisers of these products will simply substitute some other proven advertising method. This substitution is unlikely either to undercut the effectiveness of the advertising pitch or to raise its cost significantly.

In any event, Murumba's argument applies only to the use of celebrity images in advertising. Celebrity merchandise -- posters, T-shirts, greeting cards, etc. -- may sometimes be shoddy or tawdry. But it is seldom, if ever, "dangerous" to its users or third parties. Thus, we must look else-

where if we are to explain why celebrities should be given a property right in their *merchandising* values....

#### FOOTNOTES:

n256 Tamar Lewin, *Whose Life Is It, Anyway? Legally, It's Hard to Tell*, N.Y. TIMES, Nov. 21, 1982, B 2, at 1.

n257 FOWLES, *supra* note 179, at 84.

n258 A NEW DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES FROM ANCIENT AND MODERN SOURCES 384 (H.L. Mencken ed., 1942) (quoting Thomas Carlyle).

n259 See Phyllis Furman, *New Retail's Cole Is a Savvy Young Soul; He Built New Jeans Brand with Strong Ads*, CRAIN'S N.Y. BUS., Dec. 18, 1989, at 6.

n260 JOHN LAHR, AUTOMATIC VAUDEVILLE 220 (1984).

n261 See *"True Crime" Cards Thriving Despite Outrage*, N.Y. TIMES, Dec. 6, 1992, at 44. In response to protests by victims' rights groups and others, a bill has been introduced in the New York Legislature that would make the sale of such trading cards to minors a misdemeanor. See S. 7691-A, 1991-1992 N.Y. Reg. Sess.

n262 One recently developed Madison Avenue tactic is to design advertisements in such a way as to trigger public controversy and thereby obtain free news coverage. This tactic, initiated by political consultants in the 1980s, has now "become a standard act in the repertoire of product and service marketers." See Randall Rothenberg, *Commercials Become News, and the Air Time Is Free*, N.Y. TIMES, Jan. 8, 1990, at D1. Here are a few examples involving public figures. In a February 1988 speech, President Reagan, while urging congressional support for the Contras in Nicaragua, compared Nicaraguan President Daniel Ortega to "that fellow in the Isuzu commercial" -- Joe Isuzu -- who is always making false or exaggerated claims. When Ortega makes promises, the President quipped, "there should be subtitles under [him] telling the real story." Isuzu's ad agency quickly moved to capitalize. It made a television commercial including Reagan's remarks and some film footage of Ortega delivering a speech in Spanish, with subtitles providing fictitious translation: "Hey, Joe Isuzu. Could you cut me a deal on an Impulse Turbo? I hear the Impulse is faster than a speeding bullet. I could use that in a car." All three major networks refused to run the ad -- but their refusal received substantial news coverage. See *No Lie: Networks Reject Isuzu Ad Using Ortega*, L.A. TIMES, Feb. 19, 1988, at D5. At the end of December 1989, the Schering-Plough Corporation's ad agency submitted a commercial to the major television networks for the cold medication Drixoral. The ad used footage of Presidents Bush and Gorbachev smiling and shaking hands at the Malta summit, with the slogan: "In the New Year, may the only cold war in the world be the one we're fighting." (A full-page print version of the ad also appeared in newspapers. See N.Y. TIMES, Dec. 28, 1989, at A22.) Permission to use the presidential images was neither sought nor granted, and two television networks refused to run the ad. Their decision was in turn widely reported on many television news programs, which did include parts of the ad -- much to the delight of the ad agency. Having originally budgeted \$ 100,000 to broadcast the spot, Schering received, in the words of an exuberant Drixoral ad executive, "millions and millions of dollars worth of free time." Rothenberg, *supra*, at D1, D8.

A more recent example of this tactic occurred shortly after the conclusion of the Gulf War. On the same day that General Norman Schwarzkopf received a "hero's welcome" from Congress, N.Y. TIMES, May 9, 1991, at A1, America West Airlines introduced an ad campaign featuring the actor Jonathan Winters dressed in army desert fatigues to resemble the general. In the print version of the ad, Winters is shown standing at a podium -- as if at a press briefing -- under the caption "Announcing Air Superiority for Civilians." See N.Y. TIMES, May 9, 1991, at B5. As America West doubtless hoped and expected, the ad received considerable news coverage. See, e.g., *Stormin' Jonathan's Mission Is to Rescue America West*, N.Y. TIMES, May 9, 1991, at D8.

n263 See *Poster Boy*, PARADE MAG., Feb. 25, 1990, at 11.

n264 See, e.g., UPPER W. SIDE RESIDENT, Oct. 1, 1990, at 2 (ad for Ultimate Car Care, Inc., which states, under Hussein's photograph, "He may be responsible for an increase in the price of gas, but, at Ultimate Car Care, we're happy to announce a decrease").

n265 As best as I have been able to determine, the question of whether the right of publicity protects the infamous has not been squarely confronted by American courts. *But cf.* *Miller v. American Tobacco Co.*, 158 F. Supp. 48, 49 (S.D.N.Y. 1957) (holding that a bank robber, having no property right in his crime, may not recover damages for its television reenactment). It is likely, however, that monetary relief at least would be denied to an infamous right-of-publicity plaintiff on the basis of the ancient equitable maxim that a court will not assist a wrongdoer to profit from his wrongs. *See Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889). Moreover, it is hard to see how any of the chief rationales for the right of publicity -- incentive to achievement, labor-desert, or consumer protection -- would be furthered by affording protection to people who owe their fame to criminal or grossly immoral conduct. On the other hand, if the purpose of the right of publicity is to vindicate a dignitary or autonomy interest, rather than an economic one, there is no apparent reason to deny protection to the infamous, at least by way of injunctive relief.

n266 *But cf.* *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) ("The law protects the celebrity's sole right to exploit [her publicity] value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof."), *amended*, 1992 U.S. App. LEXIS 19253 (9th Cir. Aug. 19, 1992).

n267 *Nimmer*, *supra* note 13, at 216.

n268 *Id.*

n269 *See, e.g.,* *McFarland v. E & K Corp.*, 18 U.S.P.Q.2d (BNA) 1246, 1247 (D. Minn. 1991) ("A celebrity's identity, embodied in his name, likeness, and other personal characteristics, is the 'fruit of his labor' and becomes a type of property entitled to legal protection.") (quoting *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970)); *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 462 (N.J. Super. Ct. 1967) ("[T]he basic and underlying theory is that a person has the right to enjoy the fruits of his own industry free from unjustified interference."); *Shipley*, *supra* note 27, at 677 ("If an individual has worked to develop in his name and likeness sufficient value to excite the desire of another to market them, then that person arguably deserves property rights in the interests and entitlement to control their resulting profitability.") (footnote omitted).

n270 A number of cases have stated that the right of publicity prevents unjust enrichment. *E.g.,* *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 221 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1198 (S.D.N.Y.), *supplemental opinion*, 578 F. Supp. 59 (S.D.N.Y. 1983); *Lugosi v. Universal Pictures*, 603 P.2d 425, 438 (Cal. 1979) (Bird, C.J., dissenting); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 134-35 (Wis. 1979); *see also* SAMUEL K. MURUMBA, *COMMERCIAL EXPLOITATION OF PERSONALITY* 72 (1986) ("Proprietary justice demands that 'he who reaps shall sow.'"); *Kalven*, *supra* note 12, at 331 (rationale for the right of publicity is "the straightforward one of preventing unjust enrichment by the theft of good will"); *Shipley*, *supra* note 27, at 682, 686 (right of publicity, like the tort of misappropriation, prevents "[u]njust enrichment through the conversion of hard-earned and valuable intangible interests").

n271 A somewhat different moral argument rests on the supposed offense to "dignity" or "autonomy" in having one's persona associated with commercial products or projects not of one's choosing or liking. I will not evaluate this line of argument in this Article because it can at most, I think, justify a *personal* right against certain kinds of unauthorized commercial appropriation. Even if one were to agree that a celebrity should be protected from unwanted associations generally, or more plausibly, from those commercial appropriations of his identity that falsely suggest sponsorship or involvement on his part, that protection can be afforded without creating an assignable and descendible *property* right in identity. The existing law of false advertising, defamation, and "false light" privacy is largely adequate for these purposes.

To the extent this body of law is believed to provide insufficient protection to the celebrity's legitimate interests in autonomy and dignity, the appropriate response is to amend it, rather than to commodify celebrity personas. For example, it might be appropriate to reconsider the notion that celebrities, by assuming positions of prominence and visibility and/or by seeking news coverage, *waive* their right of *privacy* against any and all commercial appropriation. A celebrity who, on principle, has consistently refused to appear in advertisements or endorse products -- known in the industry as an "advertising virgin" -- may perhaps legitimately complain if an advertiser or merchandiser uses his persona without his consent in such a way that consumers will infer his voluntary association with the product. He has a substantial in-



terest, one might think, in not having his persona used in a way that leads people to believe he has at last succumbed to temptation and decided to cash in on his fame. Indeed, even a celebrity who has previously done some advertisements or endorsements can perhaps legitimately complain if her identity is used in a way that suggests her endorsement of a particular product that she morally abhors or that is particularly tawdry or shoddy. But if relief is deemed appropriate in such circumstances, there is no need to invent a full-blown property right in identity. The harm or injury in such cases is not to the celebrity's pocketbook, but to her interest in not being *misrepresented* or cast in an offensive "false light." That interest can be protected through privacy law, false advertising law, or both.

n272 *See Lombardo v. Doyle, Dane & Bernbach, Inc.*, 396 N.Y.S.2d 661, 664 (App. Div. 1977).

n273 *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 134-35 (Wis. 1979).

n274 *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (emphasis added). Why celebrities "must" be considered to have done so is left unexplained.

n275 *Sims*, *supra* note 27, at 459.

n276 MCCARTHY, *supra* note 13, § 2.1[D], at 2-8.

n277 Eileen R. Reilly, Note, *The Right of Publicity for Political Figures: Martin Luther King, Jr.*, Center for Social Change, Inc. v. American Heritage Products, 46 U. PITT. L. REV. 1161, 1168 n.37 (1985).

n278 Edwin Hettinger has argued that although a laborer may have a moral (or "natural") right to possess or use what she produces by her own labor, she is not entitled to the market value of the final product (or even of her own contribution to the final product) because this value is determined by market forces and institutional arrangements that are not of her making. According to Hettinger:

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

Hettinger, *supra* note 239, at 38; *see also* John Christman, *Entrepreneurs, Profits and Market Shares*, 6 SOC. PHIL. & POL'Y 1, 12-14 (1988) (arguing that moral desert is inappropriate as a justification for market shares whenever supply and demand determine the magnitude of those shares). Whether, and to what extent, individual laborers should be permitted to receive the market value of their products is therefore, according to Hettinger, "a question of social policy; it is not solved by simply insisting on a moral right to the fruits of one's labor." Hettinger, *supra* note 239, at 39; *cf.*

BECKER, *supra* note 32, at 45-53 (arguing that while laborers may deserve *some* reward for their labor, they do not always deserve *property rights* in the thing labored upon).

n279 JUDITH WILLIAMSON, *DECODING ADVERTISEMENTS: IDEOLOGY AND MEANING IN ADVERTISING* 25-26 (1984).

n280 The sociologist John Thompson has coined the term "cross-valorization" to describe the use of "symbolic values" as a means of increasing (or decreasing) "economic values." He cites the use of celebrities in advertising as a primary example of this process. *See* THOMPSON, *supra* note 4, at 157.

n281 *See, e.g., Sims*, *supra* note 27, at 459 n.32.

n282 JOHN RODDEN, *THE POLITICS OF LITERARY REPUTATION: THE MAKING AND CLAIMING OF "ST. GEORGE" ORWELL* 7 (1989). Rodden makes the interesting point that the process through which reputation and prestige are generated, in the literary field and elsewhere, has attracted surprisingly little academic attention. *Id.* at 54.

n283 For examples of recent advertisements and merchandise making unauthorized use of Einstein's name or picture, see appendix to Statement of Roger Richman Before the N.Y. State Senate in Support of the Celebrity Rights Act 3 (May 15, 1989) (transcript and appendix on file with author). The samples include: an Einstein blow-out party favor; an ad for a technical institute using a photograph of Einstein: "You don't have to be a genius to succeed in High Technol-

ogy"; an ad for a halogen protection system: "For The EINSTEIN in Your Life"; and an Einstein look-alike in a condominium ad.

n284 Marshall Missner, *Why Einstein Became Famous in America*, 15 SOC. STUD. SCI. 267, 288 (1985).

n285 *Id.*

n286 *Id.* at 267.

n287 *Id.* at 268.

n288 See ABRAHAM PAIS, "SUBTLE IS THE LORD . . .": THE SCIENCE AND THE LIFE OF ALBERT EINSTEIN 309 (1982) (dating "the birth of the Einstein legend" to the London conference of November 1919); Missner, *supra* note 284, at 267; *id.* at 269 ("Usually, scientific theories are established through the slow accumulation of data; however, the theory of relativity was dramatically confirmed by one event.").

n289 Missner, *supra* note 284, at 270.

n290 *Id.*

n291 *Id.* at 277-81.

n292 *Id.* at 278-81.

n293 *Id.* at 275-76.

n294 *Id.* at 276-77.

n295 *Id.* at 275-81.

n296 *Id.* at 285.

n297 *Id.*

n298 *Id.* at 281.

n299 *Id.* at 282.

n300 *Id.* at 281.

n301 *Id.* at 287.

n302 RODDEN, *supra* note 282, at 51.

n303 Compare GARY TAYLOR, REINVENTING SHAKESPEARE 4-6, 373-411 (1989) (emphasizing the radical contingency of literary reputations) with RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 58-73 (1990) (noting that while luck and politics play a role in the formation of reputation, so, too, do "merit" and "worth").

n304 John Rodden impressively demonstrates this point in his fascinating case study of the making of George Orwell's reputation. See RODDEN, *supra* note 282.

n305 The same has been shown to be true of other members of the 1920s pantheon -- of Lindbergh, for instance, who was not the first but the 27th flyer to cross the Atlantic by air, and whose contributions to aviation were matched or exceeded by Admiral Byrd and others. See BRAUDY, *supra* note 94, at 19-25; ORRIN E. KLAPP, SYMBOLIC LEADERS 29-30 (1964).

n306 POSNER, *supra* note 303, at 68; *see also* TODD GITLIN, *THE WHOLE WORLD IS WATCHING* 147 (1980) ("After a point, celebrity can be parlayed -- by celebrity and by media -- into more celebrity: it is like money or a credit rating.").

n308 *Id.*

n309 Missner, *supra* note 284, at 288.

n310 *Id.*

n311 For an illuminating discussion of the comparative merits of Einstein and Bohr as physicists, see Jeremy Bernstein, *King of the Quantum*, N.Y. REV. BOOKS, Sept. 26, 1991, at 61 (reviewing ABRAHAM PAIS, *NIELS BOHR'S TIMES, IN PHYSICS, PHILOSOPHY, AND POLITY* (1991)).

n312 *See* Emanuel Levy, *The Democratic Elite: America's Movie Stars*, 12 QUALITATIVE SOC. 29, 31 (1989) (discussing the grossly uneven distribution of wealth among screen actors); Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845, 845-46 (1981).

n313 *See* Suzanne Keller, *Celebrities and Politics: A New Alliance*, 2 RES. POL. SOC. 145, 148 (1986) ("Television needs its daily ration of heroes great and small, genuine and contrived, both to enlist audience interest and to advertise the wares of the consumer society.").

n314 GITLIN, *supra* note 306, at 146; *see also* Leon V. Sigal, *Sources Make the News*, in *READING THE NEWS* 9, 13-14 (Robert K. Manoff & Michael Schudson eds., 1986) (arguing that television needs celebrities to stand for political values and programs and thus "creates celebrities where there were none by re-presenting the same people again and again to represent social and political groups -- Ted Kennedy to stand for liberals and Jesse Helms, the radical right; Gloria Steinem for and Phyllis Schlafly against the women's rights movement").

n315 GITLIN, *supra* note 306, at 147.

n316 *Id.* at 146, 154.

n317 Sigal, *supra* note 314, at 13-14.

n318 GITLIN, *supra* note 306, at 154.

n319 *Id.* at 153.

n320 *Id.* at 153-54, 176 (emphasis omitted).

n321 *Id.* at 152-53.

n322 *Id.* at 153.

n323 *See generally* REIN ET AL., *supra* note 253, at 64-88 (applying modern "marketing science" to the manufacture and marketing of celebrity). Rein and his colleagues take the position that virtually anyone can be made into a celebrity if the right methods are followed. For the contrary view -- that the making and marketing of stars is more like guesswork than science -- *see* KLAPP, *supra* note 305, at 26-32.

n324 DYER, *supra* note 69, at 5.

n325 A crucial aspect of this process is the systematic attempt to foster audience involvement with and interest in the celebrity through the design, manipulation, and promotion of dramatically compelling "storylines." *See* REIN ET AL., *supra* note 253, at 146 (arguing that "the conscious design, manipulation, and promotion" of dramatically compelling

"storylines" so as to promote fan involvement and interest was "the celebrity industry's major breakthrough in the 1970s and 1980s"). For clarity's sake, it is useful to draw a distinction, which courts and commentators are not careful to make, between two kinds of "labor" upon which a celebrity might attempt to base a moral claim to a property right in her identity. The first is the work that a celebrity does within her chosen field of endeavor -- acting, entertainment, athletics, etc. -- to achieve excellence and renown. The second is the "work" that a celebrity does directly on her "image" -- the time, money, and effort she expends in selecting, establishing, and maintaining a specific public image, based either on aesthetic vision or market calculation. It is fairly obvious that many, perhaps most, of the people who attain commercially marketable fame in our society have performed labor of both these varieties. Whether the latter form of "labor" is one that the law *ought* to reward at all is an interesting -- and seldom asked -- question, but one which is largely beyond the scope of this Article.

n326 See Statement of Tony Roberts Before the N.Y. Senate in Support of the Celebrity Rights Act 2-3 (May 15, 1989) (transcript on file with author).

n327 DYER, *supra* note 69, at 2-3; see also S. ELIZABETH BIRD, FOR ENQUIRING MINDS: A CULTURAL STUDY OF SUPERMARKET TABLOIDS 153 (1992) ("[T]he images of celebrities are constructed not only through their work but also through the many layers of narrative about their professional and personal lives -- narratives constructed in the media and interpersonal gossip. . .").

n328 Cf. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 959 (6th Cir.) (fame "always depends on the participation of the public in the creation of an image"), *cert. denied*, 449 U.S. 953 (1980). I do not mean to deny that a celebrity may *try* to enforce a fixed and determinate public image, and that she may have some success. But she can become widely popular, I suspect, only if she *fails* in this project. To attain what Dyer calls "star-sized currency and appeal," DYER, *supra* note 69, at 142, a performer's image must *provoke* more "meaning" than she herself can control or police. Cf. John Fiske, *Television: Polysemy and Popularity*, 3 CRITICAL STUD. MASS COMM. 391 (1986) (making a similar argument with respect to television programs). Her image must, to some extent, remain open or "polysemic": susceptible to being "read" in a number of different and even contradictory ways by diverse social groups. The biggest stars -- Madonna, Michael Jackson, Bruce Springsteen -- are supermarkets of meanings, from which their various audiences make their selections in accordance with their particular needs and interests and appetites. See, e.g., FISKE, *READING THE POPULAR*, *supra* note 49, at 95-113 (analyzing "Madonna" as a "site of semiotic struggle" between contradictory -- patriarchal and feminist -- conceptions of sexuality); Ian H. Angus & Sut Jhally, *Introduction*, in *CULTURAL POLITICS IN CONTEMPORARY AMERICA* 1, 1-2 (Ian H. Angus & Sut Jhally eds., 1989) (describing the contradictory ways in which Springsteen is "read" by his fans); Fiske, *British Cultural Studies*, *supra* note 49, at 271 (examining how the "gaps" or "spaces" in Madonna's image "allow her audiences to make meanings that connect with their social experience"); Lawrence Grossberg, *Putting the Pop Back into Postmodernism*, in *UNIVERSAL ABANDON? THE POLITICS OF POSTMODERNISM* 167, 183 (Andrew Ross ed., 1988) (discussing the wide range of interpretations placed on Springsteen and his work by critics and fans); see also Tessa Perkins, *The Politics of "Jane Fonda,"* in *STARDOM: INDUSTRY OF DESIRE*, *supra* note 68, at 237 (arguing that "Jane Fonda" is a "sign" whose meaning(s) have been the subject of continuous contestation since the late 1960s).

n329 DYER, *supra* note 69, at 5.

n330 Typically, as Orrin Klapp has explained, the process by which a public figure's image or style is formed is one of "dialectical" interaction, in which the "performer" (actor, musician, politician) "'finds himself' by using cues from audience responses and making himself into what people want." KLAPP, *supra* note 305, at 32-37. Sometimes the process involves "painful trial and error" on the performer's part. In other cases, the performer simply "hits on" what the public wants from her quickly, or by accident. *Id.* at 32. Klapp gives this interesting example of such a lucky hit: Betty Hutton, widely known for her explosive vocal style, began as an ordinary nightclub singer. One night she heard that she was about to be fired. In desperation, she grabbed the mike with a strangle hold and began to "belt out" songs in a rather unladylike manner. The audience reacted enthusiastically. Her contract was renewed; a major bandleader hired her. *Id.* at 35.

n331 DYER, *supra* note 69, at 5.

n332 *Id.* at x.

n333 *Id.* at 181-82. The line referred to is, of course, "Toto, I don't think we're in Kansas anymore."

n334 Legal recognition of a right of publicity, of course, may restrict the audience's ability to participate in this process. Publicity rights give celebrities (or their assignees) an effective veto power over disfavored commercial appropriations or "readings" of star images. As I have suggested, it is the potential this veto power creates for private censorship of popular meaning-making that should make us hesitant about embracing the right of publicity. *See supra* text accompanying notes 84-87.

n335 DYER, *supra* note 69, at 5.

n336 *See supra* note 50 for an explanation of this term.

n337 *See* MCCARTHY, *supra* note 13, § 2.1[D], at 2-8.

n338 It is occasionally suggested that publicity rights can be grounded in a "personality" theory of property. One writer, for example, suggests that the persona "is the ideal property for the personality justification," since the individual closely "identifies with his personal image." Hughes, *supra* note 239, at 340; *see also* MURUMBA, *supra* note 270, at 132 ("Whatever weaknesses there may be in the Hegelian theory of private *property* as an extension of *personality* . . . this is one instance in which it is probably vindicated."). In my view, a personality theory of publicity rights fails for much the same reason that the labor-desert theory fails. No doubt, celebrities are typically "bound up" very closely with their public images. No doubt, too, many subjectively experience their personas as something into which they have projected or sunk their very "selves." But as we have seen, there is a good deal more than "personality" in the persona. Interestingly, Hughes himself seems ultimately to give up on the personality theory. *See* Hughes, *supra* note 239, at 341 n.220 ("[I]t is difficult to fit personas into both the labor and personality theories of intellectual property" inasmuch as they are "quite often . . . creations of pure chance, perhaps the only 'intellectual property' without intentionality").

n339 The district court judge in the recent Bette Midler "sound-alike" case, for example, characterized the defendants' conduct as that of "the average thief." *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988); *see also* *Onassis v. Christian Dior-N.Y., Inc.*, 472 N.Y.S.2d 254, 261 (Sup. Ct. 1984) ("Let the word go forth -- there is no free ride. The commercial hitchhiker seeking to travel on the fame of another will have to learn to pay the fare or stand on his own two feet."), *aff'd without opinion*, 110 A.D.2d 1095 (N.Y. App. Div. 1985).

n340 Yes, even athletes. Take a baseball player like Dwight Gooden. He could not have become a top-notch pitcher without borrowing from a common store of pitching art. After all, he did not *invent* the changeup, the slider, the curveball, the overhand delivery, the no-look pickoff move, and so on.

n341 *See* James Bernard, *Why the World Is After Vanilla Ice*, N.Y. TIMES, Feb. 3, 1991, § 2, at 1. Black rap musicians have somewhat less cause for complaint on this score than did the black rhythm-and-blues artists whom Elvis copied. For contemporary rappers themselves, aided by new digital sampling techniques, routinely and shamelessly lift lyrics and instrumental passages from the records of other musicians. *See* Jon Pareles, *In Pop, Whose Song Is It, Anyway?* N.Y. TIMES, Aug. 27, 1989, § 2, at 1 (Tone-Loc's hit song "Wild Thing," for example, took its title from the Troggs and lifted a key guitar riff from a Van Halen record.).

n342 Peter Wollen, *Ways of Thinking About Music Video (and Post-Modernism)*, CRITICAL Q., Spring-Summer 1986, at 167, 169.

n343 *See* FISKE, TELEVISION CULTURE, *supra* note 49, at 108.

n344 Madonna's hit music video "Material Girl," for example, parodied Marilyn Monroe's song and dance number "Diamonds Are a Girl's Best Friend," from the Howard Hawks movie *Gentleman Prefer Blondes*. *Id.*

n345 *Cf.* Lange, *supra* note 26, at 161 ("[W]hen we examine the record of the Marx Brothers, it is difficult . . . to distinguish what they invented from what they converted.").

n346 *See id.* at 161-63.

n347 CHAMBERS, *supra* note 49, at 196.

n348 Wollen, *supra* note 342, at 169; *see* HEBDIGE, *supra* note 49 (describing postmodern subcultures, with an emphasis on those, such as Punk, that are organized around music and dress); Wollen, *supra* note 342, at 168-69 (characterizing the "art of postmodernism" as "one whose typical forms are eclecticism and historicism. Its characteristic modes are those of appropriation, simulation and replication. . . . Reproduction, pastiche, and quotation, instead of being forms of textual parasitism, become constitutive of textuality. . . . Songs are made out of found music, images out of found footage.").

Mainstream commercial music video, for example, "plunders old films, newsreels, avant-garde art: it parodies romances, musicals, commercials." FISKE, *TELEVISION CULTURE*, *supra* note 49, at 254. Musicians, aided by new digital sampling techniques, routinely and openly "borrow" lyrics and instrumental passages from the records of other performers. *See* Pareles, *supra* note 341, at 1, 26.

"Appropriation" and self-conscious "intertextuality" are central as well to the work of contemporary visual artists. Barbara Kruger, for example, has taken photographs from newspapers and magazines, and blown them up as background for ironic or menacing lines of text. *See* Richard B. Woodward, *It's Art, but Is It Photography?*, N.Y. TIMES, Oct. 9, 1988, B 6 (Magazine), at 29, 30, 46. The photographer Sherrie Levine has "reshot" famous photographs by Walker Evans, Edward Weston, and other masters in order to challenge photography's standing as a fully "auratic" fine art and to "upset the foundation stones (authorship, originality, subjective expression) on which the integrity and supposed autonomy of the work of art is presumed to rest." Abigail Solomon-Godeau, *Living with Contradictions: Critical Practices in the Age of Supply-Side Aesthetics*, in UNIVERSAL ABANDON? THE POLITICS OF POSTMODERNISM, *supra* note 328, at 191, 194-95. Jeff Koons has used a copyrighted photo, which he found on a greeting card in an airport gift shop, as the model for a series of sculptures. *See* Constance L. Hays, *A Picture, a Sculpture and a Lawsuit*, N.Y. TIMES, Sept. 19, 1991, at B2; *see also* Rogers v. Koons, 751 F. Supp. 474 (S.D.N.Y. 1990) (holding that the reproduction of a copyrighted photograph in a sculpture was not fair use of the photograph), *aff'd*, 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

n349 *Cf.* Barry King, *Articulating Stardom*, SCREEN, Sept.-Oct. 1985, at 27 (observing how the star-as-auteur, like the notion of the literary "author," works to deny inevitable intertextuality); Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990) (arguing that post-modernist theory and practice render obsolete the "serious artistic value" prong of the Supreme Court's obscenity standard).

n350 SCHUDSON, *supra* note 139, at 212-13. As Schudson points out, this is not unusual. "Television stars who do commercials, ostensibly in their own names, invariably present their television personalities, not their own." *Id.* at 213. For example, when American Express sought to emphasize the hazards of travelling with cash, they "'looked for a spokesman perceived by the public as an authority on crime.'" *Id.* To whom did they turn? The actor Karl Malden, "not because he is Karl Malden, but because he was once Lt. Mike Stone in [the television series] 'The Streets of San Francisco.'" *Id.*; *see also* Howard Rosenberg, *Celebrity Advocates: Is It Their Role?*, L.A. TIMES, Nov. 5, 1990, at F1 (describing the way television ads, for causes as well as products, merge the celebrity and his dramatic role).

n351 *See* SCHUDSON, *supra* note 139, at 212-13.

n352 As the creative director of Sanka's advertising agency explained, Young was selected as a spokesman for Sanka because he "represents deliberate, mature, seasoned advice." Nancy Yoshihara, *Advertising Success? It's in the Stars*, L.A. TIMES, Feb. 12, 1981, at D1, D18.

n353 *Cf.* Lugosi v. Universal Pictures, 603 P.2d 425, 432 (Cal. 1979) (Mosk, J., concurring) ("Bela Lugosi was a talented actor. But he was an actor, a practitioner of the thespian arts; he was not a playwright, an innovator, a creator or an entrepreneur. As an actor he memorized lines and portrayed roles written for him, albeit with consummate skill.").

n354 However, the risk involved in permitting "Marcus Welby" to pitch health-related products on television gives one pause.

n355 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 212 (1988).

n356 4 *id.* at 214.

n357 For a somewhat dated but still useful guide, see James A. Rahl, *The Right to "Appropriate" Trade Values*, 23 OHIO ST. L.J. 56 (1962).

n358 *See generally* Gordon, *supra* note 62, at 166-70 (explaining why free riding is not intrinsically wrongful).

n359 *See* International News Serv. v. Associated Press, 248 U.S. 215 (1918). The facts of that case were as follows: The International News Service (INS), having been barred by British censors from sending cables about the war in Europe to its member newspapers in the United States, copied (uncopyrighted) news stories from AP bulletin boards and early editions of AP-member newspapers on the east coast and sent them to its west coast newspapers. Inasmuch as certain INS newspapers on the west coast hit the stands before the AP newspapers in the same cities, INS newspapers sometimes reported war news even before those served by the AP. The Supreme Court held that INS's conduct amounted to "unfair competition": the AP had expended "labor, skill, and money" in gathering the news, and was thus entitled to have its news stories protected, as "quasi-property," from (mis)appropriation by a free-riding rival seeking to "reap where it ha[d] not sown." *Id.* at 238-40.

n360 For insightful recent discussion and criticism of the *INS* case and the misappropriation doctrine, see Gordon, *supra* note 62 (arguing for a "slimmed-down" misappropriation tort based on a theory of corrective justice); Leo J. Raskind, *The Misappropriation Doctrine as a Competitive Norm of Intellectual Property Law*, 75 MINN. L. REV. 875 (1991) (arguing that the misappropriation doctrine should be restated in terms that are consistent with competitive market norms).

n361 *See* Gordon, *supra* note 62, at 151-55.

n362 *International News Serv.*, 248 U.S. at 250 (Brandeis, J., dissenting). Brandeis wrote: The general rule of law is, that the noblest of human productions -- knowledge, truths ascertained, conceptions, and ideas -- become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it.  
*Id.*

n363 *See* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 2 (1967) ("[I]f man has any 'natural' rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown. Education, after all, proceeds from a kind of mimicry, and 'progress' . . . depends on generous indulgence of copying.").

n364 *See* Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 413 (1983).

n365 *See, e.g.,* Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929), *cert. denied*, 281 U.S. 728 (1930) (clothing maker may copy the best-selling designs of a competitor); Societe Comptoir De L'Industrie Cotonniere v. Alexander's Dep't Stores, Inc., 190 F. Supp. 594 (S.D.N.Y. 1961) (holding that retail seller may copy couturier's fashion designs and even denominate its goods as copies thereof), *aff'd*, 299 F.2d 33 (2d Cir. 1962); PETER B. KUTNER & OSBORNE M. REYNOLDS, JR., *ADVANCED TORTS* 354 (1989) (collecting product imitation cases).

n366 Rahl, *supra* note 357, at 68.

n367 *Id.* at 68; *see also id.* at 68-69 (citing cases).

n368 *Id.* at 68-69.

n369 *Cf.* H.P. Bulmer Ltd. v. J. Bollinger S.A., [1978] R.P.C. 79 (Eng. C.A.) (cider maker may market its beverage in champagne-style bottles with the name "Champagne Cider"). *But cf.* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (upholding the right of the United States Olympic Committee to prohibit a nonprofit gay rights organization from making nonconfusing use of the word "Olympic" to designate its own athletic competition, on the ground that the word's "value" was the product of the labor, skill, and money of the USOC).

n370 *Cf.* International News Serv. v. Associated Press, 248 U.S. 215, 259 (1918) (Brandeis, J., dissenting) ("He who makes a city known through his product, must submit to sharing the resultant trade with others who, perhaps for that reason, locate there later.").

n371 *See, e.g.,* NFL v. Governor of Del., 435 F. Supp. 1372, 1378 (D. Del. 1977) (holding that Delaware may use NFL football scores in its state lottery, and stating: "It is true that Delaware is thus making profits it would not make but for the existence of the NFL, but I find this difficult to distinguish from the multitude of charter bus companies who generate profit from servicing those of plaintiffs' fans who want to go to the stadium or, indeed, the sidewalk popcorn salesman who services the crowd as it surges toward the gate.").

n372 WCVB-TV v. Boston Athletic Ass'n, 926 F.2d 42, 45 (1st Cir. 1991) (citations omitted); *see also* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV 281, 285-86 (1970).

n373 WCVB- TV, 926 F.2d at 45; *cf. International News Serv.*, 248 U.S. at 250, 259 (Brandeis, J., dissenting) (rejecting AP's property interest in its news bulletins on the grounds of the general rule that "incorporeal productions," once voluntarily communicated to others, are free for common use).

n374 *See* CHARLES R. MCMANIS, UNFAIR TRADE PRACTICES IN A NUTSHELL 293-94 (2d ed. 1988); Rahl, *supra* note 357, at 73 (contending that the appropriate role of the misappropriation doctrine is "to protect trade values against copying of a sort which will cause their destruction or their frustration"); Raskind, *supra* note 360, at 882 (arguing that the misappropriation doctrine "can serve as a barrier against competitive behavior that reduces the supply of a given product to the detriment of social welfare").

n375 *See infra* text accompanying notes 394-409.

n376 *See* Denicola, *supra* note 206, at 629-30 (arguing that the Court's economic analysis may have been faulty).

n377 It is for this reason that the *INS* case provides much less support for the right of publicity than is sometimes suggested. *See, e.g.,* Shipley, *supra* note 27, at 686 (arguing that "[t]he rationale used in *INS* to protect the newsgathering efforts of the Associated Press closely resembles the rationale for protecting the right of publicity"). In my view, what Shipley fails to see is that the Court's decision in *INS* turned on its particularistic analysis of the *practical effect* of the defendant's conduct on the ability of the plaintiff to continue to gather and market the news. *See International News Serv.*, 248 U.S. at 241. It was only because permitting conduct of the kind engaged in by *INS* would, it was thought, render the plaintiff's publication "profitless, or so little profitable as in effect to cut off the service," that the Court found the defendant's enrichment to be actionably "unjust." *Id.* The decision did *not* endorse a general prohibition on "reaping where another has sown."

n378 *See supra* text accompanying notes 77, 333.

n379 *See* Georgia Dullea, *T-Shirts' New Mood Is Sarcastic*, N.Y. TIMES, Sept. 10, 1989, B 1, pt. 2, at 54.

n380 *See Columnist Pleads Not Guilty to Pistol Possession Charges*, N.Y. TIMES, Aug. 2, 1988, at A12.

n381 THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970). What is more, it is precisely creative uses of this kind that the right of publicity puts in most direct jeopardy. The average celebrity is happy to license the sale of admiring posters and T-shirts. But a celebrity is much less likely to be willing to license merchandise which heaps scorn or ridicule on him (the Helmsley T-shirt and the Rowan poster), or which threatens to destabilize the "preferred meaning" of his public image (the PeeWee Herman poster), or which makes his image carry a meaning that



he (or his fans) finds deeply offensive (the John Wayne and Clark Gable greeting cards). Indeed, it seems safe to say that the more "creative" the merchandiser's intended use -- the more critical, satiric, or subversive its bite -- the less likely it is that the celebrity will grant a license for it. This strongly suggests the need for a "fair use" privilege to immunize from liability, at a minimum, celebrity merchandise whose *content* is such that a voluntary market transaction between the celebrity and the would-be appropriator is infeasible. Cf. Richard A. Posner, *When Is Parody Fair Use?*, 11 J. LEGAL STUD. 67 (1992)(proposing a similar fair use defense in copyright and trademark parody cases).

n382 RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 30 (3d ed. 1986).

n383 *Id.* at 31.

n384 See generally MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 153-67 (1987)(discussing economic arguments for private property); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980) (critiquing economic arguments in support of private property and free contract).

n385 The constitutional provision empowering Congress to grant copyrights and patents is framed in instrumental terms. See U.S. CONST. art. I, § 8, cl. 8 (empowering Congress to grant copyrights and patents in order "[t]o promote the Progress of Science and useful Arts"). The Supreme Court, taking its cue therefrom, has consistently described the purpose of copyright protection in broadly utilitarian or instrumental terms. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating that copyrights and patents are "intended to motivate the creative activity of authors and inventors"); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (characterizing "the ultimate aim" of copyright as providing an "incentive" to "stimulate artistic creativity for the general public good"); *Goldstein v. California*, 412 U.S. 546, 555 (1973) (stating that the purpose of copyright protection is "to encourage people to devote themselves to intellectual and artistic creation"); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (concluding that "[t]he economic philosophy" behind the Patents and Copyrights Clause is "the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare"); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors."); see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545-46, 558 (1985).

n386 See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576-77 (1977); *Carson v. Here's Johnny Portable Toilets, Inc.* 698 F.2d 831, 837 (6th Cir. 1983); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 287 (2d. Cir. 1981)(Mansfield, J., dissenting); *Lugosi v. Universal Pictures*, 603 P.2d 425, 441 (Cal. 1979)(Bird, C.J., dissenting); *Martin Luther King, Jr., Ctr. for Social Change, Inc. v. American Heritage Prods., Inc.*, 296 S.E.2d 697, 705 (Ga. 1982).

n387 See, e.g., Felcher & Rubin, *Descendability*, *supra* note 27, at 1128 ("The social policy underlying the right of publicity is encouragement of individual enterprise and creativity by allowing people to profit from their own efforts."); Steven J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y 111, 118 (1980)("Like the copyright and patent regimes, the right of publicity may foster the production of intellectual and creative works by providing the financial incentive for individuals to expend the time and resources necessary to produce them."); Shipley, *supra* note 27, at 681 ("Protecting the right of publicity provides incentive for performers to make the economic investments required to produce performances appealing to the public."); D. Scott Gurney, Note, *Celebrities and the First Amendment: Broader Protection Against the Unauthorized Publication of Photographs*, 61 IND. L.J. 697, 707 (1986) (arguing that the right of publicity serves to "maximize incentive to develop and maintain skills and talents that society finds appealing").

n388 603 P.2d 425 (Cal. 1979).

n389 *Id.* at 441 (Bird, C.J., dissenting).

n390 See Glenn M. MacDonald, *The Economics of Rising Stars*, 78 AM. ECON. REV. 155 (1988).

n391 See *supra* note 12.

n392 See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974) (public figure may recover damages for libel only upon proof that the defendant published the statement with "actual malice").

n393 See JOHN L. CAUGHEY, *IMAGINARY SOCIAL WORLDS: A CULTURAL APPROACH* 1-7 (1984).

n394 Nevertheless, the question posed here is a good deal *less* speculative than, say, the question of whether abolition of copyright protection would "seriously threaten book production." Breyer, *supra* note 372, at 291. It is less speculative simply because a world without the right of publicity, unlike a world without copyright, is *not* an "undiscover'd country" that "puzzles the will, / And makes us rather bear those ills we have / Than fly to others that we know not of." *Id.* at 322 (quoting WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 1). Our society was not radically or even noticeably lacking in aspiration, effort, and achievement in the fields of music, entertainment, and athletics before the right of publicity was recognized. This alone should make us initially skeptical of the incentive argument.

n395 As has been already noted, the chief purpose of the right of publicity is to give celebrities exclusive control over the merchandising and advertising uses of their identities. Occasionally, however, courts have relied on the right of publicity to protect what may be called "performance values." One such case is *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). In that case, a local television news reporter filmed the plaintiff's "human cannonball" act at an Ohio county fair. Fifteen seconds of the film, which included the climactic moments in which Zacchini was shot from a cannon into a net some 200 feet away, were aired on defendant's evening news program. Zacchini sued for damages in state court, alleging wrongful appropriation of his professional property. The trial court granted defendant's motion for summary judgment, but the state court of appeals reversed, holding *sua sponte* that Zacchini had stated two causes of action: conversion and infringement of common law copyright. *Id.* at 564. (The federal copyright statute did not apply inasmuch as the performance appropriated was not a "fixed work.") The Ohio Supreme Court then held that the appropriate cause of action for Zacchini was neither conversion nor common law copyright infringement but rather misappropriation of his "right to the publicity value of his performance." *Id.* at 565 (quoting *Zacchini v. Scripps-Howard Broadcasting Co.*, 351 N.E.2d 454, 455 (Ohio 1976), *rev'd*, 433 U.S. 562 (1977)). That court nevertheless ruled against Zacchini on the ground that the defendant's news report of the cannonball act was privileged under the First Amendment. *Id.* at 565-66.

The United States Supreme Court, in a narrowly worded 5-4 decision, held that the First Amendment did not give Scripps-Howard the right to broadcast Zacchini's "entire act." *Id.* at 574-75. Throughout its opinion, the Court, following the court below, used the phrase "right of publicity" to denote Zacchini's legally protectible interest in controlling the dissemination of his *performance*. The Court further expressed its view that legal protection of this interest has the same aim and rationale as patent and copyright protection, in that it "provides an economic incentive for [an entertainer] to make the investment required to produce a performance of interest to the public." *Id.* at 576. However, the Court took care to point out that the incentive rationale is much more compelling when a performer's entire act has been appropriated than it is in the typical right-of-publicity case, which involves unauthorized advertising or merchandising use:

[T]he broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade . . . goes to the heart of petitioner's *ability to earn a living as an entertainer*. Thus, in this case, Ohio has recognized what may be *the strongest case* for a "right of publicity" -- involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.

*Id.* (emphasis added).

In my view, it is a very serious mistake to characterize the interest Zacchini sought to vindicate here as a "right of publicity." The "right of publicity" protects a celebrity's interest in the economic value of his *identity*. What Zacchini complained of was the appropriation of the economic value of his *performance*, not the marketable *public image* he had perhaps acquired through the success of that performance. Following Douglas G. Baird's suggestion, I would refer to the type of right involved in *Zacchini* as a "right of performance." See Douglas G. Baird, Note, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.*, 30 STAN. L. REV. 1185, 1186 n.7 (1978). I would reserve the term "right of publicity" for the commercial value of identity.

Clearly, as the *Zacchini* Court implicitly recognized, an *ex ante* economic incentive argument makes a good deal more sense for performance rights (and for copyright) than for publicity rights. Regrettably, however, courts and commentators have failed to make this distinction, and have repeatedly cited the Supreme Court's opinion in *Zacchini* as authority for the assertion that the right of publicity, like copyright, is justified as an economic incentive to creation and achievement.

n396 A standard argument for copyright protection, which I have no need to challenge here, is that without such protection authors might be unable to recover the costs they incur in creating their works. *See, e.g.,* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989). On this view, an author is less likely to expend resources writing a book if others, who have not incurred "the costs of expression," can later copy the work and produce it at the same marginal cost as the author. Since competition will drive the book's price down to (or toward) marginal cost, the author will be unable to recoup his sunk costs of expression. *But see* Breyer, *supra* note 372, at 299-308 (arguing that market headstart, among other factors, may provide sufficient assurance of reward for authors). Whatever the merits of this argument for copyright, it has little force, for the reasons explained in the text, when applied to publicity rights.

n397 Olympic medalists are one obvious example.

n398 *See* Richard W. Stevenson, *The Magic of Hollywood Math*, N.Y. TIMES, Apr. 13, 1990, at D1.

n399 *See* Murray Chass, *\$ 1 Million Men a Dime a Dozen*, N.Y. TIMES, Feb. 25, 1992, at B9.

n400 *See* Randall Rothenberg, *Michael Jackson Gets Thriller of Deal to Stay with Sony*, N.Y. TIMES, Mar. 21, 1991, at C17. In the discussion that follows, I will refer to the money celebrities earn in the form of salaries, royalties, and the like as "direct" income or compensation, and to the money earned through licensing the commercial use of their identities as "collateral" income.

n401 *See id.* Jackson's sister Janet is doing nicely too. She recently signed a multirecord contract with Virgin Records for a reported \$ 30 to \$ 50 million. *Id.*

n402 The "economic rent" in a person's pay is the difference between what he actually receives and the amount that would suffice to prevent him from transferring to another job. Alternatively, "economic rent" can be viewed as compensation in excess of what is necessary to induce a worker to take a job. Economic rent is thus "that portion of a worker's pay which from a psychological standpoint does not act as an incentive to perform but is instead supererogatory." James C. Dick, *How to Justify a Distribution of Earnings*, 4 PHIL. & PUB. AFF. 248, 268 (1975).

n403 Hoffman, *supra* note 387, at 120.

n404 *See* POSNER, *supra* note 382, at 27. *But see* Kennedy & Michelman, *supra* note 384, at 717-19 (arguing that people might respond to the insecurity of a no-property regime by working and producing "more rather than less," in order to maintain the same level of welfare from consumption).

n405 *See* Landes & Posner, *supra* note 396, at 328-29.

n406 It is true enough, as Judge Easterbrook has admonished us, that economic incentives work *on the margins*. *See* Frank H. Easterbrook, *The Supreme Court, 1983 Term -- Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 12-13 (1984); *see also* WARD S. BOWMAN, *PATENT AND ANTITRUST LAW* 34-38 (1973) (arguing that economic incentives must be evaluated using an incremental analysis). There may, therefore, be *some* celebrities (or aspirants) whose behavior would be altered by abolition of the right of publicity -- some who would strive less hard, or even switch to another line of endeavor, if they were denied this source of additional income. This is most likely to be the case for those celebrities -- their number is few, but apparently growing -- who receive more money from merchandising and advertising than they do for their work. Certain top athletes, for example, reportedly can expect to earn about three times as much money from endorsements as from salary. *See* REIN ET AL., *supra* note 253, at 59 (quoting a former executive of ProServ, Inc.); Marilyn A. Harris, *The Smash Women Are Making in Tennis*, BUS. WK., Apr. 8, 1985, at 92 (top women tennis stars make more money from endorsements than from tournaments and exhibitions); *see also* Kogan, *supra* note 11, at 52 (discussing celebrity endorsement revenues, though without comparing them to salaries). It is entirely possible that for this category of performers the income generated by the right of publicity is not perceived as mere "icing on the cake" and has some non-negligible incremental incentive effect. But even if this is so, we would still need to know how many performers fit into this category, how substantial the marginal incentive effect is,

and whether the beneficial effects of the added incentive are offset or outweighed by social costs of one kind or another. *See infra* Section III.B.1.b.

n407 *Cf.* Breyer, *supra* note 372, at 301 (making a similar argument with respect to "authorized" editions of uncopied works).

n408 *See, e.g.,* Winterland Concessions Co. v. Sileo, 528 F. Supp. 1201, 1207 (N.D. Ill. 1981) (exclusive licensee of shirts bearing names of popular musical groups made 90% of its sales at concert sites), *aff'd in part and rev'd in part*, 735 F.2d 257 (7th Cir. 1984).

n409 *Cf.* Denicola, *supra* note 206, at 636-37 (making similar arguments with respect to the merchandising of famous trade symbols).

n410 *See* Rohter, *supra* note 10, at D9.

n411 *See id.*

n412 *See* Kennedy & Michelman, *supra* note 384, at 717-20.

n413 *See* KELMAN, *supra* note 384, at 155-59 (criticizing the economic incentive arguments for private property). Moreover, what the right of publicity actually encourages and rewards is not "creativity" itself, but rather the development and maintenance of a commercially marketable public image. There is no obvious or necessary relationship between these two things. Indeed, often a performer can preserve his commercially valuable image only by *ceasing* to be venturesome or creative. Take the example of Robert Young again. Through his roles in two television series -- *Father Knows Best* and *Marcus Welby, M.D.* -- Young developed a well-defined public image as a person of sound judgment, practical wisdom, and uncommon integrity. *See supra* note 352. This made him valuable as an endorser of "good sense" products like decaffeinated coffee, which in turn created a strong incentive for him to eschew dramatic roles -- villains, hotheads, rascals, liars -- that might jeopardize his image. To some extent, then, the availability of large fees for product endorsements may, if anything, create a powerful disincentive to genuine creativity on the part of performers.

n414 Screen acting is a highly stratified profession with chronic, built-in unemployment and a large income gap between the top stars and everyone else. In 1983, for example, about 85% of the 54,000 members of the Screen Actors Guild experienced unemployment, and 81.9% earned less than \$ 5000 from screen acting. By contrast, popular stars receive several million dollars per movie, and much more if they are the producers or share in the film's profits. *See* Levy, *supra* note 312, at 31.

n415 *See* RICHARD SENNETT, *THE FALL OF PUBLIC MAN* 288-93 (1977).

n416 *See* Rosen, *supra* note 312, at 845 (1981).

n417 The economist Sherwin Rosen plausibly explains this phenomenon -- "concentration of output among a few individuals, marked skewness in the associated distributions of income and very large rewards at the top" -- in terms of two factors. *Id.* First, lesser talent in these fields is a poor substitute for greater talent. Second, and more important, the economy of scale made possible by "joint consumption technology" (radio, records, etc.) enables relatively few performers to service the entire market. *See id.* at 846-47; *see also* Moshe Adler, *Stardom and Talent*, 75 AM. ECON. REV. 208, 208 (1985) (arguing that "large differences in earnings could exist even where there are no differences in talent at all" inasmuch as consumers minimize the costs of searching for knowledgeable discussants by patronizing the most popular artists). Richard Sennett has called attention to the same general phenomenon, but stresses sociological and ideological factors. He sees the "star system" in the arts as an aspect of the "culture of personality" that emerged in the late 19th century. *See* SENNETT, *supra* note 415, at 288-93.

n418 To my knowledge, only one court has given these noneconomic incentives their due. *See* Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 958 (6th Cir.) ("The basic motivations [to fame and stardom] are the desire to

achieve success or excellence in a chosen field, the desire to contribute to the happiness or improvement of one's fellows and the desire to receive the psychic and financial rewards of achievement."), *cert. denied*, 449 U.S. 953 (1980).

n419 BRAUDY, *supra* note 94, at 7.

n420 As early as the 1950s, C. Wright Mills noted the curious tendency of "stars" from diverse fields to gravitate toward, and mingle with, one another:

It does not seem to matter what the man is the very best at; so long as he has won out in competition over all others, he is celebrated. Then, a second feature of the star system begins to work: all the stars of any other sphere of endeavor or position are drawn toward the new star and he toward them.

C. WRIGHT MILLS, *THE POWER ELITE* 74 (1956). This tendency has intensified in recent years, giving rise to the common belief -- carefully encouraged by the media and the celebrity industry -- that there is an "intimate, almost familial connection among figures of glamour and authority." SCHICKEL, *supra* note 3, at 255.

n421 *See generally* FOWLES, *supra* note 179; SCHICKEL, *supra* note 3.

n422 The difficulty is by no means confined to these particular occupations. There is, for example, sharp disagreement with respect to the level of monetary compensation necessary to induce people to take corporate executive positions. On the one hand, Michael Walzer suggests that "one might well want to be a corporation executive . . . merely to make all those decisions." Michael Walzer, *In Defense of Equality*, *DISSENT*, Fall 1973, at 399, 406. His sociological hunch is that the noneconomic rewards (power, deference, status, prestige) are so great that there would be no lack of candidates "even if we paid [executives] no more than was paid to any other corporate employee." *Id.* at 407. In contrast, the economist Harold Lydall thinks that people in corporate leadership positions have more "worry" than other employees -- and that worry is a cost for which they have to be compensated. In his view, "there is little doubt that, if posts of higher responsibility were not paid more highly, there would be a marked shortage of people to take them." HAROLD LYDALL, *THE STRUCTURE OF EARNINGS* 127 (1968).

n423 On the problem of inducing talented people to "reveal" their talents, see Simon Green, *Taking Talents Seriously*, 2 *CRITICAL REV.* 202, 213 (1988) ("Economic and material or social and status rewards to talent must sufficiently satisfy the ambitions and desires of self-interested talent-bearers so as to induce them to reveal and utilize for the common good those talents which they command in their persons.").

n424 Frazer, *supra* note 32, at 303 ("Although no evidence can be presented, it is suggested that a person's incentive to excel will not be substantially diminished by the absence of a legal right to exclusive control of their personality once fame is achieved."). A somewhat more plausible version of the incentive argument has been suggested to me by Professor C. Edwin Baker: Even if the right of publicity does not significantly alter the motivational calculus and behavior of celebrities themselves or of celebrity aspirants, it may still have a substantial effect on the "celebrity industry," the army of consultants, mentors, coaches, advisors, agents, stylists, publicists, and so on, who "take unknown and well-known people, design and manufacture their images, supervise their distribution, and manage their rise to high visibility." REIN ET AL., *supra* note 253, at 33. By increasing the market value of celebrity, the right of publicity may increase the resources that are drawn into this particular "industry" -- and hence into the production of celebrity itself. Whether this additional investment is a good thing or not is another matter. *See infra* Section III.B.1.b.

n425 *Cf.* Arnold Plant, *The Economic Theory Concerning Patents for Inventions*, 1 *ECONOMICA* (n.s.) 30, 40-41 (1934) (making a similar argument with respect to the patent system).

n426 One writer has observed that to young people "it can seem almost easier to become a star than to become anything else." Whereas most other jobs "call for apprenticeships, for working one's way up a ladder on which youth and inexperience are liabilities," youth is an asset in sports and entertainment. FOWLES, *supra* note 179, at 45.

n427 *Id.*

n428 *Id.* at 53.

n429 *Id.*

n430 For example, the commercial ethos of the 1992 Olympic Games generated some dissatisfaction. Calvin Trillin captured this nicely in a two-line poem:

*I liked it best in days of old,*

*Before they bought and sold the gold.*

Calvin Trillin, *On the Modern Olympics*, 255 NATION 197 (1992).

n431 See *supra* text accompanying notes 38-41; *infra* note 446.

n432 See *supra* text accompanying notes 308-12.

n433 Harry Edwards, *The Black Athlete: 20th Century Gladiators for White America*, PSYCHOL. TODAY, Nov. 1973, at 43, 44.

n434 *Id.*

n435 Harry Edwards, *"The Single-Minded Pursuit of Sports Fame and Fortune Is Approaching an Institutionalized Triple Tragedy in Black Society . . ."*, EBONY, Aug. 1988, at 138, 138.

n436 John C. Gaston, *The Destruction of the Young Black Male*, 16 J. BLACK STUD. 369, 371, 376 (1986). Gaston offers a poem, entitled "I'm Going to the N.B.A.," that expresses what he considers the myopia and self-destructiveness of the myth of basketball stardom. The poem's opening stanza is:

Hey, I'm sorry Miss Teacher,

I don't have time to stay after school for no help today. I've got to go practice . . . Cause I'm on my way to the NBA.

*Id.* at 377.

n437 See, e.g., POSNER, *supra* note 382, at 29-33; Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 356 (1967).

n438 See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244-45 (1968). The seminal article is H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954).

n439 ALAN RYAN, PROPERTY 105 (1987).

n440 Hardin, *supra* note 438, at 1244.

n441 POSNER, *supra* note 382, at 31.

n442 First, it is not at all clear that the argument proves what it is supposed to prove -- namely, that "private property" best promotes efficient use of scarce resources. At most it is an argument for placing a scarce resource in the control of *someone* who can charge the full economic price for its use. There is no apparent reason why that someone has to be an individual or private entity. It could just as well be a collective entity like the state. So even if the argument is read for all it is worth, it is a not an argument *for* private property so much as an argument *against* common property. See KELMAN, *supra* note 384, at 164-67. Second, the argument only works at all on the (unrealistic) assumption that *non-legal* barriers to overuse -- such as social disapproval or custom -- are nonexistent or impotent. *Id.* at 167.

n443 Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411 (1978). Posner makes the same point, in almost exactly the same words, in RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 255 (1981). More recently, in an article he coauthored with David Landes, Posner goes further and argues on like grounds that publicity rights should be inheritable:

Suppose an insurance company wants to use a picture of George Washington in its logo and an heir of George Washington appears and objects, claiming that the right of publicity is a descendible right. The heir could not argue that the recognition of such a right almost two hundred years after the death of a public figure is necessary to recoup the investment in becoming a public figure, but he could argue that, unless there is a property right in the public figure's name and like-

ness, there may be congestion, resulting in a loss of value. This is the economic insight behind the growing movement toward making publicity rights inheritable. . . .  
Landes & Posner, *supra* note 396, at 362-63.

n444 Frazer, *supra* note 32, at 303.

n445 If I am right on this score -- and I freely concede the speculative character of these observations -- then restricting access to celebrity personas may actually result in an allocative *loss*. Whether that is in fact the case will depend on the extent to which celebrity personas share the attributes of what economists call "public goods."

The example of intellectual property rights will help make the point. Intellectual creations are susceptible to "nonrivalrous consumption," in the sense that their possession or use by one person does not preclude others from possessing or using them as well. If Jones takes or borrows Smith's umbrella, neither Smith nor anyone else can use it. But if Jones takes or borrows Smith's dogtraining trick, or his interior decorating style, or his Dan Quayle joke, that in no way precludes Smith or anyone else from using it. Second, intellectual creations are "nonexhaustible," in that they can be used again and again without being used up. However many times Smith's dog-training trick is used, it is still "there" to be used yet again. It is no less "valuable" to me because countless others have used it before. Third, once an intellectual creation is brought forth into the world, others can appropriate or use it at little or no cost. Because an intellectual creation has these various "public good" features, there will necessarily be *some* social loss whenever anyone is permitted to charge a fee for its use. See William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 267-68 (1987). Judge Easterbrook illustrates the point this way:

[I]f it costs \$ 10 to duplicate a computer program, and the author insists on receiving a royalty of \$ 10 per copy, the program must sell for \$ 20 or more. Some people value the program at more than \$ 10 and less than \$ 20. They will not buy it; yet because the program has been written it costs only \$ 10 to provide each one a copy. The prospective buyers lose the difference between the \$ 10 cost and the value they place on the program's use. Society would be better off if the program sold for \$ 10. Any price higher than \$ 10 creates the same sort of allocative efficiency loss as monopoly. The "overcharge" causes people to buy less and substitute something else that is less useful, takes more real resources to produce, or both.

Easterbrook, *supra* note 406, at 21; see also Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 110 (1990) (noting that intellectual property rights designed to induce and reward invention help create an allocative loss by boosting price in excess of marginal cost).

The situation with respect to commercial use of celebrity personas may be analogous. Celebrity personas clearly have *some* public good attributes. Once a celebrity has developed or acquired a commercially valuable identity, others can use or appropriate it at a cost that is close to zero. Use of the identity, moreover, is "nonrivalrous": if I use Madonna's name or face on a poster or T-shirt, that in no way prevents her (or anyone else) from doing likewise. And a celebrity persona is "nonexhaustible": Madonna's image can be used again and again -- on T-shirt after T-shirt -- without ever being used up. Given that personas have these "public good" features, there may be an allocative loss involved in granting a celebrity the right to charge a fee for use of her image. For example, suppose a T-shirt can be manufactured for \$ 5.00, and that Madonna's name can be emblazoned on it for an additional fifty cents. The T-shirt must sell for \$ 5.50 or more. If, however, Madonna insists on a payment of \$ 2.00 per T-shirt, it must sell for at least \$ 7.50. People who value the T-shirt at more than \$ 5.50 but less than \$ 7.50 will not purchase the T-shirt. This is inefficient, inasmuch as the value they place on the shirt exceeds its cost of production. As in Easterbrook's computer program example, "society would be better off" if the T-shirt sold for \$ 5.50. Easterbrook, *supra* note 406, at 21. Any price higher than that "creates the same sort of allocative efficiency loss as monopoly." *Id.* In short, the right of publicity, by enabling a celebrity to exact a fee for use of her name or face on merchandise, may result in underproduction and overpricing.

The higher the fee exacted, the greater will be the inefficiency. The magnitude of this allocative loss will depend on several factors. One is the elasticity of the demand for the merchandise. If the demand for celebrity T-shirts is sufficiently elastic, so that people will switch to Springsteen T-shirts, or to unadorned garments, once the price of the Madonna T-shirt gets much above \$ 5.00, then Madonna will probably have to content herself with a fee smaller than \$ 2.00. The greater the elasticity of demand, the smaller the fee exacted and the less the inefficiency. A second factor is the possibility of price discrimination among buyers. If Madonna can vary the price to each buyer, so that those who value the T-shirt at \$ 5.50 pay \$ 5.49, those who value it at \$ 7.00 pay \$ 6.99, and so on, inefficient exclusion will be reduced. Cf. Denicola, *supra* note 206, at 634-35 (making a similar point about merchandising trade symbols).

n446 In addition, the large sums expended by the large companies that can afford celebrity advertising may cancel out, with the result that consumers pay higher prices and resources are wasted in sterile competition. The recent Sneaker

Wars and Cola Wars -- in which celebrity advertising has been very prominent -- are cases in point. *Cf.* Hoffman, *supra* note 387, at 120-21 (arguing that celebrity "endorsements lead to economically irrational product differentiation, influencing consumers to make decisions on grounds other than price and quality . . . and giving businesses large enough to afford to pay major celebrities an unfair advantage over their smaller but equally efficient competitors").

n447 Posner, *supra* note 443, at 411.

n448 Frazer, *supra* note 32, at 303.

n449 *Id.* at 303-04.

n450 Raymond H. Goettsch, Comment, *The Right of Publicity: Premature Burial for California Property Rights in the Wake of Lugosi*, 12 PAC. L.J. 987, 996 (1981).

n451 *See id.* at 995.

n452 MCCARTHY, *supra* note 13, § 2.3, at 2-14.

n453 *Cf.* Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455, 459-63 (1978) (criticizing Posner's economic approach to privacy as inadequate, both because of its failure to incorporate the intuitive and moral "sense of justice" and because of dubious economic assumptions).

n454 C. Edwin Baker, *Posner's Privacy Mystery and the Failure of Economic Analysis of Law*, 12 GA. L. REV. 475, 476 (1978).

n455 *See* MCARTHUR, *supra* note 115, at 137, 157.

n456 *Id.* at 137-38.

n457 *Id.* at 137.

n458 *Id.* at 140.

n459 *See* SUSMAN, *supra* note 160, at 273-75, 282-83.

n460 *See* MCARTHUR, *supra* note 115, at 141.

n461 *See* SCHICKEL, *supra* note 3, at 58-59.

n462 *See* LEWIS A. ERENBERG, STEPPIN' OUT 244-46 (1981); MILLS, *supra* note 420, at 72-74.

n463 MILLS, *supra* note 420, at 74.

n464 *Id.* at 75.

n465 Keller, *supra* note 313, at 146.

n466 *Id.*

n467 *See, e.g.,* Suzanne Keller, *Celebrities as a National Elite*, in POLITICAL ELITES AND SOCIAL CHANGE 3, 6-8 (Moshe M. Czumowski ed., 1983) (discussing the trend toward celebrities as "living-room pundit[s] and philosopher[s]"); Rosenberg, *supra* note 350 (discussing the appearance of television and movie celebrities in political ads).

n468 *See* Maureen Dowd, *Gorbachev Passes up Stunts but Dazzles the Heartland*, N.Y. TIMES, June 4, 1990, at A1.



n469 Keller, *supra* note 313, at 146.

n470 *Id.*

n471 Cynthia Heimel, *The Celebrity Decade*, VILLAGE VOICE, Jan. 2, 1990, at 38.

n472 *Id.*

n473 CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM* 21 (1978).

n474 *Id.*

n475 ROGER CAILLOIS, *MAN, PLAY, AND GAMES* 122 (Meyer Barash trans., 1979).

n476 Treece, *supra* note 209, at 647.

n477 Baird, *supra* note 395, at 1187 n.7.

n478 According to one recent survey, 64% of adult television viewers believe that celebrities appearing in ads are "just doing it for the money" -- up from 50% in 1984. *See Celebrities in Commercials: The Glitter is Going, Going . . .*, COM. BREAK, July 1989, at 5. The survey found that the ability of celebrities to attract attention has been diminished by the sheer number of celebrity advertisements, and that their "credibility" has been damaged by the much-publicized admission of some celebrities that they do not use the products they are paid to endorse (e.g., Michael Jackson and Pepsi; Cybil Shepherd and The Beef Council). The survey also found that only 22% of viewers think that celebrity commercials are "more memorable" than other commercials -- down sharply from 41% in 1984. *Id.* Moreover, consumers, aware of the huge fees collected by celebrity endorsers, are beginning to hold them partly responsible for the high prices of the goods they are promoting.

Together, these findings suggest that celebrity advertising may be losing some of its magic. In fact, the head of the research outfit that conducted the survey has predicted that "manufactured" celebrities -- like Joe Isuzu, Ed and Frank for Bartles & Jaymes, and Spuds McKenzie -- will increasingly displace "real" celebrities as marketers' endorsers of choice in the 1990s. *See* Scott Donaton, *Celebs' Star Sinking in Ads*, ADVERTISING AGE, Aug. 28, 1989, at 48. One reason is their greater "reliability": advertisers needn't worry that "Joe Isuzu" will develop an embarrassing drug problem, or get involved in a sexual scandal, or slip up and admit that he does not use or like the product. Similar considerations underlie the increasing reliance of advertisers on dead celebrities, like Babe Ruth, James Dean, Marilyn Monroe, and Humphrey Bogart. The reputations of such people are firmly established and less likely to change. (They also "work" a good deal more cheaply.) According to a recent article in a trade magazine, licensing fees for the use of dead celebrities increased by about 25% in 1990, with revenues exceeding \$ 100 million. *See* Frank Reagan, *Magic for Rent: The Licensing Boom Rolls on*, PROMO: INT'L MAG. FOR PROMOTION MARKETING, June 1991, at 10, 24.

n479 Alternatively, the consumer's reasoning might run something like this: "I don't know one detergent from another and I'm much too busy to investigate the matter myself. But if Brand *X* can afford to pay a big star like *Y* to endorse its detergent, then it must be a very successful company with a pretty good product."

n480 Hogan v. Koala Dundee Pty. Ltd., 83 A.L.R. 187, 195 (Fed. Ct. of Austl., Gen. Div. 1988).

n481 Pacific Dunlop Ltd. v. Hogan, 87 A.L.R. 14, 45 (Fed. Ct. of Austl., Gen. Div. 1989).

n482 *Id.*

n483 The extent to which consumers make purchase decisions in this fashion is probably contingent on a number of factors. As a general matter, consumers are more dependent on secondhand evaluations with respect to "experience" goods than "search" goods. Second, consumers are more likely to rely on a celebrity when he endorses "tools of the trade." For example, when John McEnroe vouches for the quality of a tennis racket (as against a detergent), consumers are more likely to think that he believes what he says and has knowledge sufficient to support that belief. A third factor is the informational and social location of the particular consumer. Some people -- transients, highly immobile people -

- are cut off from other sources of information about products and services, and are therefore more dependent on advertising generally, and on second-hand evaluations in particular. *See generally* SCHUDSON, *supra* note 139, at 117-21 (stating that consumers who are less mobile are more vulnerable to advertising).

n484 *See, e.g.,* Bruce Horovitz, *Stars Likely to Be More Careful in Ads After Lloyd Bridges Case*, L.A. TIMES, Feb. 8, 1990, at D1, D11 (noting Art Linkletter's claim of researching all products he endorses).

n485 *See, e.g.,* Kramer v. Unitas, 831 F.2d 994 (11th Cir. 1987) (involving football player Johnny Unitas' appearance in ad for a financial service company without investigating its advertising claims); Ramson v. Layne, 668 F. Supp. 1162 (N.D. Ill. 1987) (involving actor Lloyd Bridges' endorsement of an investment company subsequently found to be fraudulent); *In re* Diamond Mortgage Corp., 118 B.R. 588 (Bankr. N.D. Ill. 1989) (involving actor George Hamilton's endorsement of a mortgage broker subsequently found to be fraudulent); Cooga Mooga, 92 F.T.C. 310 (1978), *modified*, 98 F.T.C. 814 (1981) (involving singer Pat Boone's endorsement of an acne medicine subsequently found to be ineffective). The bankruptcy court decision in the *Diamond Mortgage* case, however, which held that celebrity endorsers have a duty to obtain independent and reliable information about the product or service, may well induce more caution. *See* Horovitz, *supra* note 484.

n486 *See supra* note 11.

n487 *See generally* Jay S. Kogan, *Celebrity Endorsement: Recognition of a Duty*, 21 J. MARSHALL L. REV. 47 (1987). Kogan says that "no court has ever held a celebrity liable for making an endorsement which caused harm to a consumer." *Id.* at 56. He also notes that indemnification clauses are routinely included in endorsement contracts and that celebrities often require advertisers to take out insurance in their favor. *Id.* at 54. Yet the situation with respect to endorser tort liability has been clouded somewhat by a recent decision in a bankruptcy proceeding, which holds that celebrity endorsers must independently verify the statements they make in advertisements. *See* Joanne Lipman, *Celebrity Endorsers Are in Danger of Tripping on Advertiser's Word*, WALL ST. J., Jan. 31, 1990, at B4 (discussing suit brought by investors in a bankrupt mortgage company against celebrity endorsers Lloyd Bridges and George Hamilton; case settled after denial of celebrity defendants' summary judgment motion). Significantly, a celebrity pictured in an ad may actually have *no* control whatsoever over the advertising use to which his photograph is put; he may have previously assigned his right of publicity to some business entity which, while concerned with protecting its investment, would likely be less interested in the celebrity's personal reputation. Where that is the case, consumer confidence that the specific celebrity featured in the ad has had the product checked out would be baseless.

n488 *Cf.* STEFFAN B. LINDER, *THE HARRIED LEISURE CLASS* 70-74 (1970) (arguing that the object of much advertising is in fact to provide "ersatz information" so that consumers can feel that they are making "the right decision").

n489 *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983).

n490 *Id.* at 833.

n491 Carson had also licensed use of the phrase to a restaurant chain and to a maker of men's toiletries. *Id.*

n492 *Id.*

n493 Section 43(a) of the Lanham Act, codified as 15 U.S.C. § 1125(a) (1988), currently provides as follows: Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which --  
(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or  
(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

n494 *Carson*, 698 F.2d at 833.

n495 *Id.* at 834.

n496 *Id.* at 835.

n497 *See also* *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989) (noting that "the right of publicity, unlike the Lanham Act, has no likelihood of confusion requirement" and is thus "potentially more expansive than the Lanham Act"); *Nimmer*, *supra* note 13, at 212 ("Publicity values of a person or firm may be profitably appropriated and exploited without the necessity of any imputation that such person or firm is connected with the exploitation undertaken by the appropriator.").

n498 *Halpern*, *supra* note 92, at 1245.

n499 *Cf. Newton-John v. Scholl Plough (Austl.) Ltd.*, 11 F.C.R. 233, 234 (N.S.W. Dist. Reg., Gen. Div. 1986) (cosmetics ad using a look-alike photo with the caption, "Olivia? No, Maybelline!" held not to amount to passing off or statutory unfair trading because the ad "tells even the most casual reader, at even the first glance, that in fact it is not Olivia Newton-John who is represented").

n500 *Halpern*, *supra* note 92, at 1245.

n501 *Treece*, *supra* note 209, at 647.

n502 Risk of consumer confusion or deception is especially unlikely when unauthorized use occurs in a *comparative* advertisement. For example, an ad for Chatwell Hotels, which ran on New York City television not long ago, stated: "No need to pay Trumped-up prices in New York anymore."

n503 Recent cases involving celebrity look-alikes and sound-alikes bear this out. *See* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (holding that use of a Tom Waits sound-alike in a radio ad for a food product violates the Lanham Act), *cert. denied*, 113 S. Ct. 1047 (1993); *Prudhomme v. Proctor & Gamble Co.*, 800 F. Supp. 390 (E.D. La. 1992) (involving a claim stated under the Lanham Act for use of a look-alike); *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360 (S.D.N.Y. 1988) (holding that use of a Woody Allen look-alike in an ad for a clothing store violates the Lanham Act unless accompanied by an effective disclaimer of any connection between Allen and the product; injunctive relief granted); *Allen v. National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985) (holding that use of an Allen look-alike in an ad violates the Lanham Act because it creates a likelihood of confusion as to his endorsement or involvement with the advertised product; injunctive relief granted).

The 1988 amendment of the Lanham Act should remove any lingering doubt that these decisions are an appropriate application of § 43(a). *See* Trademark Law Revision Act of 1988, Pub. L. No. 100-667, § 35, 102 Stat. 3935; S. REP. NO. 515, 100th Cong., 2d Sess. 40 (1986) (stating that § 43(a) has been revised "to codify the interpretation it has been given by the courts"). It should also be noted that while likelihood of confusion is necessary to establish a violation of § 43(a), proof of actual confusion (or of injury caused thereby) is not. *Web Printing Controls Co. v. Oxy-Dry Corp.*, 906 F.2d 1202 (7th Cir. 1990). A celebrity can thus obtain injunctive relief on a showing that the appropriation of his identity caused a likelihood of consumer confusion concerning his endorsement of or association with the product or service of another.

n504 *See, e.g., National Bank v. Shaklee Corp.*, 503 F. Supp. 533 (W.D. Tex. 1980) (unfair competition); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 135 (Wis. 1979) (trade name infringement).

n505 *Denicola*, *supra* note 206, at 624.

n506 *See* *Nature's Way Prods., Inc. v. Nature-Pharma, Inc.*, 736 F. Supp. 245, 253 (D. Utah 1990) (rejecting the notion that the right of publicity is not infringed by the publication of "historical information" about plaintiff in a product ad). *But cf. Vinci v. American Can Co.*, 591 N.E.2d 793, 794 (Ohio Ct. App. 1990) (holding use on Dixie Cups of names

and likenesses of Olympic stars, as well as information about their accomplishments, not actionable because "there was no implication that the athletes used, supported, or promoted the product").

n507 See Theodore F. Haas, *Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising*, 19 U.C. DAVIS L. REV. 539, 568 (1986) (arguing that the First Amendment protects advertisements' accurate statements that a celebrity not employed by a company uses the company's product); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1257 n.275 (1983) (in the absence of deception, advertisers should have the right to inform the public about which public figures buy their products).

n508 Baird, *supra* note 395, at 1187 n.7.

n509 Shiffrin, *supra* note 507, at 1258 n.275.

n510 Cf. *International Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912, 918 (9th Cir. 1980) (stating that although consumers display emblems expressing an allegiance to a particular organization, most consumers probably do not believe that the product was sponsored by the organization), *cert. denied*, 452 U.S. 941 (1981); *Bi-Rite Enter., Inc. v. Button Master*, 555 F. Supp. 1188, 1195-96 (S.D.N.Y. 1983) (refusing to rely on a presumption of consumer confusion, and requiring the plaintiff to prove that the unauthorized use of logos would cause or was intended to cause confusion). Professor Simon, however, claims that purchasers of celebrity posters, T-shirts, and the like do in fact assume that the featured celebrity has authorized the use. See Simon, *supra* note 26, at 748. Yet Simon offers no evidence for this assertion, saying only that "[c]onsumers act on the basis of images." *Id.*

n511 See *supra* text accompanying notes 100-05.

n512 See *supra* text accompanying note 116.

n513 Treece, *supra* note 209, at 647.

n514 Samuel Murumba, *Character Merchandising in Australia -- Welcome Home Wanderer*, INTELL. PROP. F., Nov. 1990, at 10.

n515 Treece, *supra* note 209, at 645.

n516 *Pacific Dunlop Ltd. v. Hogan*, 87 A.L.R. 14, 45 (Fed. Ct. of Austl., Gen. Div. 1989).

n517 Murumba, *supra* note 514, at 20.

n518 See SCHUDSON, *supra* note 139, at 11; RAYMOND WILLIAMS, *Advertising: The Magic System, in PROBLEMS IN MATERIALISM AND CULTURE* 170, 188-89 (1980) (modern advertising is a kind of "magic system": "[y]ou do not only buy an object: you buy social respect, discrimination, health, beauty, success, power to control your environment"); Postman, *supra* note 140, at 128 ("Today, on television commercials, propositions are as scarce as unattractive people. The truth or falsity of an advertiser's claim is simply not an issue.").

n519 Treece, *supra* note 209, at 647.

n520 Murumba, *supra* note 514, at 21.

n521 *Id.* at 22.

n522 See *supra* note 478.

n523 See *supra* note 485.

n524 See *supra* text accompanying notes 181-92.

n525 Cigarettes and alcohol are the most obvious and important examples of dangerous products that celebrities have routinely and widely endorsed. *See supra* note 189. An instructive recent example is celebrity advertising for expensive sneakers. Partly in response to effective advertising featuring celebrity endorsements, impressionable and status-craving teenagers from low-income families have reportedly run drugs, or even killed, in order to acquire a pair. *See* Tony Kornheiser, *The Insidious Sneaker*, WASH. POST, Mar. 28, 1990, at D1; John Leo, *The Well-Heeled Drug Runner*, U.S. NEWS & WORLD REP., Apr. 30, 1990, at 20.