

Comments

A Right in Search of a Coherent Rationale—Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights

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Introduction

THE INCREASING PROLIFERATION of mass media and the commodification of identity that has accompanied this proliferation is a well-known characteristic of our modern age.¹ Advances in mass printing technologies in the nineteenth century resulted in mass advertising, “‘convert[ing] gossip into a marketable commodity.’”² The twentieth century witnessed the development of mass reproduction of sound and distribution of moving pictures, fueling the rise in value of

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1. See Oliver R. Goodenough, *Rethinking Privacy and Publicity*, 1 I.P.Q. 37, 39–40 (1997); see also George M. Armstrong, Jr., *The Reification of Celebrity: Persons as Property*, 51 LA. L. REV. 443, 444 (1991).

2. Goodenough, *supra* note 1, at 40 (citing E.L. Godkin, writing in *Scribner's Magazine*, July 1890, *quoted in* DON R. PEMBER, *PRIVACY AND THE PRESS, THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT* 16 (1972)).

celebrity identity.³ Today, widespread access to broadband technologies and the explosive growth of the Internet has inaugurated the age of do-it-yourself marketing where anyone can be a star.⁴ Advertisers, confronted with the success of video-sharing sites such as YouTube, and the increasing popularity of social networking sites such as Facebook and MySpace, are in the process of radically transforming the techniques they use to reach consumers.⁵ While the associative value of human identity as a means of attracting attention to consumer products is as pervasive as ever, in the future it is likely that everyone and anyone, as much as celebrities, will command advertisers' interest on a scale previously unattainable.⁶

Concurrently, the geographically limitless reach of media technology, typified by the growth of the Internet and satellite television, has provoked increasing international attention to the legal protection afforded the individual's interest in his or her identity.⁷ Within this context, many scholars and commentators regard the United States as "at the forefront of nations regarding the development and implementation of . . . the right of publicity,"⁸ a relatively recent intel-

3. *Id.* Goodenough cites in this regard the Ninth Circuit's observation in *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512 (9th Cir. 1993): "Television and other media create marketable celebrity value. Considerable energy and ingenuity are expended by those who have achieved celebrity identity value to exploit it for profit."

4. See, e.g., Manohla Dargis, *Hot Properties: How the Old Hollywood Studio System Discovered, Refurbished, Sold and Sold Out Its Most Glamorous Commodities*, N.Y. TIMES, Dec. 30, 2007, § 7, at 17 ("In this area of D.I.Y. stardom, you don't need God or Goldwyn to grab your 15 minutes; you need only a webcam and the minor technological wherewithal to upload your own fabulousness. Information dissemination is cheap thanks to the Internet, and now so is fame, which has become the virtual-reality birthright of every Tom, Dick, and Lonelygirl115 itching to go viral. In the new global meritocracy, anyone can be a star.").

5. Facebook's recent (although ultimately unsuccessful) attempt to introduce through its social network "social advertising," where users' profile photos next to commercial messages are shown to their friends about items they purchased or registered an opinion about, is an example of the type of techniques advertisers may now hope to develop. See Louise Storey, *Facebook is Marketing Your Brand Preferences (With Your Permission)*, N.Y. TIMES, Nov. 7, 2007, at C3, available at <http://www.nytimes.com/2007/11/07/technology/07adco.html>.

6. See Goodenough, *supra* note 1, at 39–40 (describing how effective advertising has used "[p]eople, their faces, history, and identities" to capture the interest of other people, using celebrities as well as the previously unknown, since the mass reproduction and distribution of print and picture at the close of the nineteenth century).

7. See F. Jay Dougherty, *Symposium Foreword: The Right of Publicity—Towards a Comparative and International Perspective*, 18 LOY. L.A. ENT. L. REV. 421, 422 n.5 (1998); Alain J. Lapter, *How the Other Half Lives (Revisited): Twenty Years Since Midler v. Ford—A Global Perspective on the Right of Publicity*, 15 TEX. INTELL. PROP. L.J. 239, 243–44 (2007).

8. Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L.

lectual property doctrine that protects individuals against the commercial exploitation of their identities.⁹ Although international commentators often look to the United States as a model for the right's development,¹⁰ the right itself in the United States has provoked much scholarly and judicial dispute,¹¹ with some legal commentators going so far as to call for the right's demise.¹²

Much of the dispute in the United States has concerned the "elusiveness of a theoretical justification for the right of publicity."¹³ One strand of this critique focuses on the predominant justification for the right by the classical natural rights labor theory of intellectual property¹⁴ and finds its resulting emphasis on the proprietary economic

REV. 151, 152; see also Emily Grant, Comment, *The Right of Publicity: Recovering Stolen Identities Under International Law*, 7 SAN DIEGO INT'L L.J. 559, 562 (2006) (asserting the development of the United States right of publicity suggests the most complete, although not perfect, set of laws to protect persona).

9. The right of publicity in the United States originated in the right of privacy, and separated as an independent right during the 1950s. The doctrine was first articulated in the Second Circuit decision, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953). See 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:26 (2d ed. 2007). In the United States, courts have expressly recognized the right of publicity as existing under the common law of eighteen states. *Id.* § 6:3. Of those, eight also have statutory provisions broad enough to encompass the right of publicity. *Id.* In addition, ten states have statutes which, while some are labeled "privacy" statutes, are worded in such a way that most aspects of the right of publicity are embodied in those statutes. *Id.* Thus, under either statute or common law, the right of publicity is recognized as the law of twenty-eight states. *Id.*

10. See, e.g., Jan Klink, *50 Years of Publicity Rights in the United States and the Never Ending Hassle with Intellectual Property and Personality Rights in Europe*, 4 I.P.Q. 363, 363–87 (2003); Rosina Zapparoni, *Propertising Identity: Understanding the United States Right of Publicity and its Implications—Some Lessons for Australia*, 28 MELB. U. L. REV. 690, 692 (2004).

11. See MCCARTHY, *supra* note 9, § 1:40; Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn From Trademark Law*, 58 STAN. L. REV. 1161, 1162–63 (2006).

12. See Lee Goldman, *Elvis Is Alive, But He Shouldn't Be: The Right of Publicity Revisited*, 1992 BYU L. REV. 597, 598; Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 929 (2004).

13. Dogan & Lemley, *supra* note 11, at 1162.

14. McCarthy explains this concept this way:

The natural rights of property justification is an appeal to first principles of justice. Each and every human being should be given control over the commercial use of his or her identity. Perhaps nothing is so strongly intuited as the notion that my identity is *mine*—it is my property to control as I see fit.

MCCARTHY, *supra* note 9, § 2:1. John Locke's labor theory represents the classic formulation of the natural rights theory of intellectual property. See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540 (1993) (asserting that courts have so often applied Lockean labor theory as a justification for intellectual property rights that courts have misapplied certain key aspects of the theory); see also Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in the United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 9–11 (asserting that Lockean natural rights labor theory provided a predominant

elements of right of publicity claims troubling.¹⁵ Unlike the restrictions on the exclusive rights embodied in other intellectual property, such as copyrights and patents, no inherent limits structure the scope of intellectual property rights in identity.¹⁶ According to this view, the formalist classification of publicity rights as property, bolstered by the moral claims of Lockean labor theory, has led to the construction of “a property right of remarkable and dangerous breadth.”¹⁷ By broadly conceptualizing identity as property, courts in the United States have increasingly expanded the identity protections afforded by the right, at the expense of the public’s interest in expression and the free dissemination of information, often without a thorough analysis of the actual interests involved.¹⁸

In addition, the natural rights labor theory justification traditionally offered in support of intellectual property rights rests upon a fundamental incoherence when applied to property rights in persona.¹⁹ While Lockean labor theory may provide some support for justifying celebrity publicity rights,²⁰ assuming that celebrities do purposefully exert effort to create a public persona, the theory does little to explain why noncelebrities should equally benefit from that protection.²¹ The doctrine’s incoherence is also evident in the way that courts may still

justification for copyright law in the United States in the eighteenth and nineteenth centuries and continues to justify copyright today by modern day proponents of this theory).

15. See, e.g., Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383 (1999); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225 (2006).

16. Unlike other intellectual property areas such as copyright and patent law, publicity rights are almost unlimited in scope, particularly where the use is labeled “commercial.” David S. Welkowitz, *Catching Smoke, Nailing Jell-O to a Wall: The Vanna White Case and the Limits of Celebrity Rights*, 3 J. INTELL. PROP. L. 67, 88 (1995). Congress provided limited monopolies over ideal objects to provide incentives for innovation because without some monopoly control by the creator, creativity would be stifled. *Id.* Patents and copyrights, however, are limited both in time and in scope. *Id.* By contrast, limitations providing for the public interest such as the fair use doctrine in copyright law or the disclosure incentives for patents do not exist under the right of publicity. *Id.* at 88–89.

17. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1514 (9th Cir. 1993) (Kozinski, J., dissenting).

18. *Id.*; see McKenna, *supra* note 15, at 246 (asserting that the property label has become so powerful that courts and some commentators have “short-circuited analysis of the appropriateness and/or scope of protection and offered no more of a justification for the claim than that identity is property”).

19. See *infra* Part I.C.

20. This claim has been strongly criticized. See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 188–95 (1993) (asserting that celebrities do not earn their right to publicity, because fame and celebrity are conferred by others in the construction of social meaning).

21. See *infra* Part I.C.1.

consider the personal interests of the individual despite their purported sole focus on the right as an economic property right.²² The expansion of the right of publicity doctrine coupled with this internal incoherence has led some legal theorists to advocate a rearticulation of the right based on a theory that would both limit its breadth and provide a sounder conceptual basis than the natural rights intellectual property justifications generally advanced. These critics argue for a right based on autonomy rather than labor theory, asserting that the proper focus of the right is not the work product, but the individual.²³

A publicity right based on individual autonomy retains the moral force of the natural rights justification, while also furnishing a more logically coherent theoretical support for the right.²⁴ An autonomy-based theory of identity protection incorporates the important insight that some forms of property are more essential to personhood than others,²⁵ and that property in persona—“the inherent right of every human being to control the commercial use of his or her identity”²⁶—deserves a particular form of protection in our legal system.²⁷ The currently prevailing formalist conception envisions the right of publicity as a traditional intellectual property right.²⁸ A focus on individual autonomy, however, permits inclusion of both the personal and purely economic elements of the right, and enables a particular “form of intellectual property,” incorporating a “sui generis mixture of personal rights, property rights, and rights under the law of unfair com-

22. See *infra* Part I.C.2.

23. See Haemmerli, *supra* note 15, at 402–03, 412–28 (advocating a publicity right based on Kantian autonomy rationale); McKenna, *supra* note 15, at 279–93 (advocating a publicity right based on the individual’s interest in autonomous self-definition).

24. See *infra* Part I.C.3. According to Justin Hughes, the most powerful alternative to the Lockean model of property is the personality justification which, “like the labor theory, . . . has an intuitive appeal when applied to intellectual property: an idea belongs to its creator because the idea is the manifestation of the creator’s personality or self.” Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330 (1988).

25. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 971–78, 1013–15 (1982) (arguing on the basis of Hegelian theory that some property, like a person’s home, is more personal than others, and therefore is entitled to special types of treatment and different kinds of protection).

26. MCCARTHY, *supra* note 9, § 1:3.

27. See *id.* § 1:40 (stating that a sui generis legal “‘right of identity’ with damages measured by both mental distress and commercial loss” would constitute a more coherent legal doctrine but that the law of publicity rights in the United States has not developed in such a coherent fashion).

28. See David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 76–83, 122–23 (2005) (tracing the right of publicity’s origin from a carefully considered narrow functionalist approach to the problem of assignability to its current formalist incorporation as intellectual property under “the property syllogism”).

petition,”²⁹ a perspective one of the right’s leading commentators suggests may constitute a “more accurate” approach.³⁰

Despite the intuitive force of the autonomy-based rationale, legal scholars often dismiss an autonomy-based publicity right as “quaint,”³¹ or as inappropriate based on its lack of historical or global precedent as a publicity right justification.³² In light of this, and the increasing international interest in the right itself, other jurisdictions which similarly protect against the commercial exploitation of identity provide an instructive perspective. Indeed, a rearticulation of the publicity right based on an autonomy rationale strongly resembles the conceptualization of personality rights in Germany, which is based on individual autonomy.³³ German personality rights provide protection for both economic and personal interests,³⁴ and rest upon a primarily Kantian notion of individual freedom and personal dignity.³⁵ Unlike publicity rights in the United States, however, German personality rights do not constitute intellectual property and are therefore not fully alienable.³⁶ Because of this limitation, legal scholars comparing the two generally consider German personality rights to be conceptually fundamentally different from publicity rights in the United States.³⁷ A careful examination, however, reveals that a comparison of the American and German approaches offers critical insight as to how an autonomy-based *sui generis* publicity right might be structured.

This Comment examines United States publicity rights in light of the autonomy critique and its civil law parallel in German personality rights to argue that a publicity right based on autonomy theory is not only possible, but plausible. An investigation of the key theories underlying the rights and their corresponding scope suggests the strength of autonomy theory in providing a coherent basis for a *sui generis* publicity right that incorporates both personal and proprie-

29. MCCARTHY, *supra* note 9, § 1:7 (quoting S.J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC’Y 111, 112 (1980) (internal quotations omitted)).

30. *Id.*

31. Goldman, *supra* note 12, at 606.

32. Dogan & Lemley, *supra* note 11, at 1163 (asserting the impropriety of a moral right of control justification for publicity rights in the absence of such a right in most of the world and throughout most of United States history).

33. *See infra* Part II.

34. *See infra* Part II.B.1.

35. *See infra* Part II.B.2.

36. *See infra* Part II.B.2.

37. *See, e.g.*, Susanne Bergmann, *Publicity Rights in the United States and Germany: A Comparative Analysis*, 19 LOY. L.A. ENT. L. REV. 479, 521–22 (1999).

tary interests, and protects both celebrities and non-celebrities alike. In contrast to the current traditional intellectual property rationales supporting the right, a publicity right based on individual autonomy rationally limits the right's current expansionist tendencies, by restricting the indicia of identity to more personal individual attributes. This restriction in turn impedes the right's potential to invade the public's interest in protected speech. Autonomy theory further aligns with the origins of the United States publicity doctrine in privacy and provides a careful balancing of conflicting interests in a way that a publicity right built on traditional intellectual property rationales does not. Most importantly, a publicity right based on autonomy preserves the moral strength of the claim, by incorporating basic principles of individual freedom and personal dignity—foundational notions embedded in the American legal tradition.³⁸ Even outspoken critics of the right of publicity concede the intuitive force of the moral claim underlying the right of publicity.³⁹ Given the likely continued transformation of advertising techniques due to the growth of new media technologies, a rearticulation of the basic rationale underlying the right that provides a more coherent and comprehensive protection for all individuals is necessary now more than ever.

Many analyses of publicity and personality rights have looked to the United States as the leader in developing publicity rights, but few

38. See Haemmerli, *supra* note 15, at 413–14. Indeed, the Lockean labor theory itself proceeds from the premise that the individual as an autonomous being precedes the creation of property. See Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, in *COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 43, 55–57 (Adam Thierer & Wayne Crews eds., 2002). Palmer asserts that the hinge to a Lockean labor theory of property is ownership in ourselves. *Id.* at 57. “Our ownership rights in ourselves are based on our natural freedom, and are indeed synonymous with it; they cannot rest on labor-based moral desert, as we are not the products of our own labor.” *Id.* This is precisely the rationale underlying Kantian personality rights as personal rights and therefore not constitutive of intellectual property. See *infra* Parts II.B.1, II.B.2. Kim Treiger-Bar-Am notes the incoherency of mixing personality, property, and Kant in the context of copyright law, but argues that Kantian autonomy theory can serve as support for the Anglo-American model of authors' rights, observing that “[t]he idea of autonomy of expression is central to our legal system and society, and its roots can be traced to Kant.” Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 *CARDOZO ARTS & ENT. L.J.* 1059, 1064–65, 1075 (2008). Treiger-Bar-Am argues that a Kantian concept of autonomy supports an Anglo-American theory of authorial expression in affording “authors autonomy, namely choice and control over their expression.” *Id.* at 1075. Treiger-Bar-Am describes this Kantian notion of autonomy as choice “as the basis for many of the fundamental rights in the United States and England.” *Id.* at 1093.

39. See, e.g., Volokh, *supra* note 12, at 929 (acknowledging that “[t]he right of publicity may seem intuitively appealing to many people”).

have analyzed how publicity rights⁴⁰ in the United States might benefit from a comparative approach. The expansion of international transactions, the globalization of legal culture, and the movements for unification, federation, and law reform around the world suggest the desirability of a comparative approach now more than ever.⁴¹ In the United States itself, the history of publicity rights is “one in which legal commentators have had an extraordinary impact on the development of the law . . . plant[ing] the philosophical seeds which practitioners and the courts have cultivated. Thus has theory been turned into practice to create a growing and thriving field of law.”⁴² By analyzing the key theoretical justifications that structure United States publicity rights and German personality rights, this Comment contributes to the ongoing debate regarding how the law ought to conceptualize persona for the purposes of legal protection within a comparative context.

Part I of this Comment briefly surveys the right of publicity in the United States and its predominant natural rights labor theory rationale. In so doing, it provides a critique of labor theory from the perspective of an autonomy-based publicity right. This analysis then briefly touches upon the history of the right of publicity in the United States and its historical origins in privacy, which strongly resemble certain theoretical characteristics of German personality rights. Part II of this Comment then looks to the philosophical conceptualization of personality rights in Germany to suggest the plausibility of an American *sui generis* publicity right, encompassing both personal and proprietary interests, justified by a theory of individual autonomy. Finally, Part III of this Comment concludes by suggesting how a publicity right based on an autonomy rationale might be structured.

I. The United States Right of Publicity

A. Survey of the Right of Publicity

In the United States, the right of publicity is a state-law created intellectual property right comprising “the inherent right of every human being to control the commercial use of his or her identity.”⁴³ Infringement of the right is a commercial tort of unfair competition,⁴⁴

40. See, e.g., Klink, *supra* note 10, at 364; Zapparoni, *supra* note 10, at 692.

41. Dougherty, *supra* note 7, at 421 (citing P. John Kozyris, *Comparative Law for the Twenty-First Century: New Horizons and New Technologies*, 69 TUL. L. REV. 165, 178 (1994)).

42. McCARTHY, *supra* note 9, § 1:4.

43. *Id.* § 1:3.

44. *Id.*

evidenced by the right's inclusion in the Restatement of Unfair Competition.⁴⁵ The Restatement recognizes the right of publicity as an appropriation of trade values, stating that "[o]ne who causes harm to the commercial relations of another by appropriating the other's intangible trade values is subject to liability to the other for such harm only if . . . the actor is subject to liability for an appropriation of the commercial value of the other's identity."⁴⁶ Section 46 of the Restatement further defines the cause of action for a right of publicity, providing that "[o]ne who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability."⁴⁷

Although technically the right of publicity protects everyone, courts have primarily focused on celebrities because celebrities have greater incentive to litigate claims for commercial exploitation of their identities than non-celebrities.⁴⁸ A quintessential right of publicity case targets a defendant's use of a celebrity's name or likeness in advertising to draw attention to an ad.⁴⁹ The attributes of identity that are protected, however, have undergone a dramatic expansion from the right's original focus on name or picture to include indicia of identity that merely evoke celebrity identity.⁵⁰ The right of publicity has been used to prevent advertisers from imitating Bette Midler's characteristic voice and singing style,⁵¹ to protect a race car driver's right to publicize his identity,⁵² and controversially, to prohibit a company from featuring a blonde robot mechanically turning letters of a game show set, just like hostess Vanna White's role on "Wheel of Fortune."⁵³ Following the Ninth Circuit's now well-known decision in the latter case,⁵⁴ critics charged that the court had overstepped the necessary limits of the doctrine by continually expanding its parameters to

45. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46–49 (1995).

46. *Id.* § 38.

47. *Id.* § 46.

48. MCCARTHY, *supra* note 9, § 4:20.

49. See J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 133 (1995).

50. Westfall & Landau, *supra* note 28, at 91–93.

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

52. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

53. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512 (9th Cir. 1993).

54. *Id.*

include attributes of identity that only indirectly evoked the persona of the individual in the minds of consumers.⁵⁵

1. The Expansion of the Property Right in Persona: Indicia of Identity

The Ninth Circuit has greatly influenced the development of publicity rights in the United States in a series of oft-cited decisions that expanded the outer limits of identifiability to include attributes beyond mere name and picture.⁵⁶ For example, in *Motschenbacher v. R.J. Reynolds Tobacco Co.*,⁵⁷ the plaintiff, a famous race car driver, brought a claim for misappropriation of his name, likeness, personality, and endorsement for a national cigarette ad that featured a car identifiable as one he usually drove.⁵⁸ Although the driver in the advertisement's photograph was neither recognizable nor expressly identified by name, and the car featured in the advertisement was not the driver's car, the plaintiff had consistently "individualized" his cars enough to set them apart from those of other drivers, making them more readily identifiable as his own.⁵⁹ Because the advertisement "caused some persons to think the car in question was [the] plaintiff's"⁶⁰ and thus to "infer that the person driving the car was the plaintiff,"⁶¹ the Ninth Circuit determined that the plaintiff's "proprietary interest in his own identity" may have been appropriated.⁶²

The decision in *Motschenbacher* provided the basis for the court's subsequent decisions concerning protection of a plaintiff's voice as indicative of identity.⁶³ In a pair of decisions, the Ninth Circuit upheld the plaintiffs' right to sue companies that had imitated a singer's distinctive voice and singing style.⁶⁴ In *Midler v. Ford Motor Co.*,⁶⁵ the

55. See, e.g., Welkowitz, *supra* note 16, at 68 (stating that the "metaphoric" use of identity as part of the publicity right's expansion transcends the limits of traditional intellectual property).

56. Westfall & Landau, *supra* note 28, at 91; see also Lapter, *supra* note 7, at 242. Lapter notes, however, that not all states have followed the Ninth Circuit's lead in expanding the identity parameters of the right. *Id.* Many state statutes restrict the protections the right affords to name and likeness. *Id.*

57. 498 F.2d 821 (9th Cir. 1974).

58. *Id.* at 822.

59. *Id.* at 822-23.

60. *Id.* at 827.

61. *Id.*

62. *Id.* at 825-26.

63. Welkowitz, *supra* note 16, at 72.

64. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1096, 1098 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463-64 (9th Cir. 1988).

65. 849 F.2d 460 (9th Cir. 1988).

court cited *Motschenbacher* extensively to support its finding that Ford had unlawfully appropriated “part of [Midler’s] identity” when an advertising agency imitated Midler’s voice in a song known to be sung by her.⁶⁶ In the subsequent case of *Waits v. Frito-Lay Inc.*,⁶⁷ the court further found that although the ad agency’s song featured in the advertisement “echoed the rhyming word play of [a] Waits song,” the singer’s “gravelly” distinctive singing style was clearly identifiable as Waits and the court found his identity through misappropriation of his voice illegally infringed.⁶⁸

In *White v. Samsung Electronics America, Inc.*,⁶⁹ the Ninth Circuit relied on these decisions in holding that an advertisement featuring a robot in a blonde wig and gown, standing next to a set of capital letters like those on the Wheel of Fortune game show, evoked Vanna White’s identity in the mind of an individual viewing the advertisement—and did so enough that it might violate her common law right of publicity.⁷⁰ As in the preceding decisions, the advertisement at issue did not involve White’s actual picture or likeness (or accessory (car), or voice). Yet the court nevertheless found that the evocation of White’s identity in the context of a game show may constitute sufficient infringement on her right of publicity.⁷¹

Such decisions have not been limited to the Ninth Circuit. The Sixth Circuit has held that a typical phrase associated with a celebrity plaintiff violated the celebrity’s right of publicity,⁷² while the Third Circuit has upheld an actor’s right to sue for infringement based on the fictional television character that the court found potentially “inextricably identified” with him.⁷³ As courts have increasingly con-

66. *Id.* at 463–64.

67. 978 F.2d 1093 (9th Cir. 1992).

68. *Id.* at 1097–98, 1112. In considering the defendant’s claim that the jury instructions were in error, the court emphasized the distinction between Waits’s singing “style” and voice, noting that style was not protected whereas voice, when identifiable as Waits, constituted one of the elements of protected indicia of identity. *Id.* at 1101–02.

69. 971 F.2d 1395 (9th Cir. 1992), *reh’g denied*, 989 F.2d 1512 (9th Cir. 1993).

70. *Id.* at 1399.

71. *Id.*

72. *See Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836–37 (6th Cir. 1983) (holding that the phrase “Here’s Johnny” in an advertisement for portable toilets violated the plaintiff’s right of publicity).

73. *See McFarland v. Miller*, 14 F.3d 912, 921–22 (3d Cir. 1994) (holding that restaurant’s use of name and image of screen actor’s fictional character “Spanky McFarland” was sufficient to constitute a violation of the actor’s right of publicity when actor’s own identity would be invoked by use of fictional character). The Ninth Circuit has also upheld actors’ right of publicity in their fictional characters. *See Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 810–12 (9th Cir. 1997) (finding possible violation of right of publicity when airport restau-

strued identity in this expansive fashion, they have also found violations of publicity rights where the defendant's use is not traditionally commercial. Well-noted examples include the use of the Three Stooges' charcoal portraits reproduced on t-shirts,⁷⁴ the use of Rosa Parks's name as the title of a song,⁷⁵ and the use of the name of the former hockey player, Tony Twist, as a mafia character in a comic book series.⁷⁶ These decisions indicate the challenges courts face when applying the right of publicity doctrine to cases where expression and commercial speech intertwine, implicating the First Amendment. The concomitant broadening of the doctrine to include use not traditionally considered commercial demonstrates that a rearticulation of the rationale underlying the doctrine should strongly limit the doctrine's potential encroachment on protected expression.⁷⁷ The broader the scope of the right in expanding the concept beyond name, likeness, and signature, the more likely its potential infringement on freedom of speech concerns.⁷⁸

2. Expansion of the Right of Publicity: First Amendment Concerns

*Doe v. TCI Cablevision*⁷⁹ illustrates a recent example of the doctrine's potential encroachment on protectable speech. In that case, the defendant, a creator of "a dark and surreal fantasy"⁸⁰ comic series called "Spawn," used the name of former professional hockey player Tony Twist to create the fictional character, "Anthony 'Tony Twist' Twistelli."⁸¹ The Missouri Supreme Court rejected the defendant's First Amendment defense, adopting a test that weighed the expressive

rant used with license animatronic robotic figures based on actors' characters on the Cheers TV show).

74. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 800-02, 810-12 (Cal. 2001) (holding under transformative test that an artist's charcoal sketch of the Three Stooges violated the actors' right of publicity when printed on T-shirts or otherwise used commercially).

75. *Parks v. LaFace Records*, 329 F.3d 437, 441, 461, 463 (6th Cir. 2003) (reversing summary judgment in favor of hip-hop group and finding that Rosa Parks could pursue right of publicity claim for use of her name in title of song).

76. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 370-72 (Mo. 2003) (en banc) (holding former hockey player's right of publicity violated by defendant's use of his name for character in comic book series).

77. See Volokh, *supra* note 12, at 904-05 (opposing the right of publicity outside the core commercial speech zone but providing observations as to how to better define a broader right of publicity and challenge the doctrine's breadth).

78. See Westfall & Landau, *supra* note 28, at 95.

79. 110 S.W.3d 363 (Mo. 2003).

80. *Id.* at 366 (internal quotations omitted).

81. *Id.* at 365-66.

quality of the use of an individual's identity against its commercial purpose.⁸² The test denies the defendant a First Amendment defense where an individual "literary device" has "little literary value [when] compared to its commercial value."⁸³ The court thus found that the "metaphorical reference" to Twist's name had become "predominantly a ploy to sell comic books and related products rather than an artistic or literary expression, and under these circumstances, free speech must give way to the right of publicity."⁸⁴

While *Doe v. TCI Cablevision* may demonstrate an egregious example of the expansion of the right of publicity on protected speech, the *White* case itself presaged such an outcome. In *White*, the court dismissed the defendant's First Amendment parody defense, stating that the advertisement's "spoof of Vanna White and Wheel of Fortune [was] subservient and only tangentially related to the ad's primary message: 'buy Samsung VCRs.'"⁸⁵ But given legal precedents such as *Carson v. Here's Johnny Portable Toilets*,⁸⁶ in which the Sixth Circuit asserted that "a celebrity's legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes,"⁸⁷ such outcomes are not surprising. As evidenced by the courts' decisions in the *Twist* and *White* cases, "[t]he ambiguous phrase 'appropriated for commercial purposes' is subject to many interpretations."⁸⁸

The dissent in *White* forcefully stated that the majority in that decision had overextended the doctrine beyond its necessary limits by "erect[ing] a property right of remarkable and dangerous breadth."⁸⁹ According to the dissent, the appellate panel's holding that a simple evocation of "[a] celebrity's image in the public's mind"⁹⁰ infringes on the celebrity's right to publicity even without use of the "celebrity's name, voice, signature or likeness,"⁹¹ and without implication that "the celebrity endorses a product,"⁹² creates an "Orwellian notion"⁹³ of intellectual property that "withdraws far more from the public do-

82. *Id.* at 374.

83. *Id.*

84. *Id.*

85. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1401 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512 (9th Cir. 1993).

86. 698 F.2d 831 (6th Cir. 1983).

87. *Id.* at 837.

88. Welkowitz, *supra* note 16, at 74.

89. *White*, 989 F.2d at 1514 (Kozinski, J., dissenting).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

main than prudence and common sense allow.”⁹⁴ By enabling celebrity plaintiffs to bring “vague claims”⁹⁵ of commercial “appropriation of identity,”⁹⁶ well-defined limited characteristics such as name, likeness, or voice disappear, increasing the likelihood of infringement on protected speech.⁹⁷

As the Sixth Circuit noted in a subsequent opinion in which it cited the *White* dissent and denied the celebrity plaintiff’s claim, “There is an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment.”⁹⁸ Referring to the expanded concept of persona upheld by the majority in the *White* decision,⁹⁹ the dissent starkly underlined the danger a broadly construed property right in persona poses to protected speech: “The intellectual property right created by the panel here has none of [the] essential limitations: No fair use exception; no right to parody; no idea-expression dichotomy. It impoverishes the public domain, to the detriment of future creators and the public at large.”¹⁰⁰ In light of this danger, courts have attempted to fashion various tests that strike an appropriate balance between the right of publicity and protected speech.¹⁰¹ The result in *Doe v. TCI Cablevision*, however, demonstrates the challenges courts continue to face when considering whether a defendant’s use of a celebrity’s name constitutes a commer-

94. *Id.*

95. *Id.* at 1516.

96. *Id.* (internal quotations omitted).

97. *Id.* *But see* *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 868 F. Supp. 1266, 1275 (N.D. Okla. 1994) (allowing First Amendment parody defense to right of publicity claim even when use is deemed “commercial”); *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 822–23 (8th Cir. 2007) (holding that information contained in fantasy baseball games and available in the public domain protected by First Amendment).

98. *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 931 (6th Cir. 2003).

99. 989 F.2d at 1514 (Kozinski, J., dissenting).

100. *Id.* at 1516.

101. *See, e.g.*, *Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808–10 (Cal. 2001) (establishing transformative use test to determine that when a defendant significantly transforms a work, defendant is entitled to a First Amendment defense to plaintiff’s right of publicity claim); *see also Kirby v. Sega of Am.*, 50 Cal. Rptr. 3d 607, 615–17 (Ct. App. 2006) (applying transformative test and denying plaintiff’s claim for right of publicity violation because defendant’s video game character contained “sufficient expressive content to constitute a transformative work” (internal quotations omitted)). Commentators as well as courts have addressed the need to properly balance the First Amendment against the publicity right. For example, the Restatement contains a now well-settled exception for newsworthiness that applies in right of publicity cases to news reporting, commentary, entertainment, or works of fiction or nonfiction. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. a (1995); *see also* 2 MCCARTHY, *supra* note 9, § 8:47.

cial ploy to sell a product, or a form of creative expression.¹⁰² The intuitive force of the natural rights Lockean labor theory rationale underlying the right's development, with its singular focus on protecting the economic value of identity, has contributed to this challenge by providing the rhetorical strength of the classical intellectual property rationale as support for the right of publicity.¹⁰³ Justified by the exclusive property owner's right to exclude others from reaping where they have not sown, the strength of the property rationale has thus supported the doctrine's expansion as the predominant normative rationale employed by courts and commentators in support of the broad construction of a property right in persona.¹⁰⁴

B. The Right of Publicity as Intellectual Property: Natural Rights Labor Theory

The notion of an intellectual property right, defined solely as an economic interest in the exploitation of identity, is grounded primarily in the natural law right to the fruit of one's labor.¹⁰⁵ The Lockean natural rights labor theory focuses on an individual's moral entitlement to own the objects that have been mixed with (or are the fruits of) his labor—commonly referred to as the labor-desert theory.¹⁰⁶ Labor theory also encompasses the related utilitarian incentive theory which focuses on the common good.¹⁰⁷ Both theories relate to the

102. 110 S.W.3d 363, 374 (Mo. 2003).

103. See McCARTHY, *supra* note 9, § 2:1 (“The natural rights of property justification is an appeal to first principles of justice . . . Perhaps nothing is so strongly intuited as the notion that my identity is *mine* . . . it is my property to control as I see fit.”); Hughes, *supra* note 24, at 297, 300 (asserting that “the Lockean explanation of intellectual property has immediate intuitive appeal”); Palmer, *supra* note 38, at 45 (“Many defenses of intellectual property rights are grounded in the natural law right to the fruit of one's labor.”).

104. See McCARTHY, *supra* note 9, § 2:2 (“[T]he prevention of unjust enrichment is ‘probably the most common judicial theory in favor of the right of publicity.’”) (quoting Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97 (1994)); McKenna, *supra* note 15, at 229–30 (asserting Lockean labor theory as endorsed by majority of commentators); Westfall & Landau, *supra* note 28, at 82, 123 (discussing development of publicity rights in connection with Lockean labor theory and asserting rhetorical power of the “property syllogism” in expansion of right of publicity).

105. See Haemmerli, *supra* note 15, at 388; see also Palmer, *supra* note 38, at 45; Radin, *supra* note 25, at 958.

106. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); see Hughes, *supra* note 24, at 305. Hughes explains that this position holds “that when labor produces something of value to others—something beyond what morality requires the laborer to produce—then the laborer deserves some benefit for it.” *Id.* (citation omitted) (internal quotations omitted).

107. Hughes, *supra* note 24, at 303 (explaining that labor theory's instrumental argument is based on a utilitarian foundation that justifies the promotion of labor—labor pro-

well-known Lockean premise that an individual's labor gives rise to that individual's claim of exclusive property rights:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.¹⁰⁸

Under a labor-desert theory, an individual is morally entitled to "the fruits of his own industry free from unjustified interference."¹⁰⁹ Under the related incentive theory, property rights exist because "recognizing the right to exclude others encourages individuals to expend labor productively and ultimately enhances social welfare."¹¹⁰

1. Labor-Desert Theory

Lockean natural rights labor theory strongly emphasizes the moral desert of the creator, inventor, or author:¹¹¹ "He that had as good left for his Improvement . . . ought not to meddle with what was already improved by another's Labour: If he did, 'tis plain he desired the benefit of another's Pains, which he had no right to . . .'"¹¹² From the moral entitlement to the fruits of one's labor flows the correlative right to prevent others from benefiting from "another's pains"¹¹³ and "unjustly enriching themselves at the expense of another's labor."¹¹⁴

The inaugural stage of publicity rights in the United States, which followed the Second Circuit's decision to recognize an independent

notes the public good by rewarding "the unpleasantness of labor" with property because "people must be motivated to perform labor"); see also Radin, *supra* note 25, at 958.

108. LOCKE, *supra* note 106, at 287–88.

109. McKenna, *supra* note 15, at 251 (citations omitted).

110. *Id.* Palmer asserts that natural rights arguments and utilitarian arguments may be considered closely related. Palmer, *supra* note 38, at 45 n.5. Natural rights theories usually contain "buried utilitarian assumptions" that "concern human flourishing or the attainment of a man's natural end." *Id.* According to Palmer, a sharp separation between natural rights theory and utility, or the common good, would be foreign to a natural law theorist. *Id.*

111. Palmer, *supra* note 38, at 51.

112. LOCKE, *supra* note 106, at 291. As Tom G. Palmer explains: "When one has improved what was before unimproved (or created what before did not exist), one is entitled to the result of one's labor. One deserves it." Palmer, *supra* note 38, at 51.

113. LOCKE, *supra* note 106, at 291.

114. Gordon, *supra* note 14, at 1582; Dogan & Lemley, *supra* note 11, at 1181 (describing the "flip sides of the Lockean coin: the asserted rights to the fruits of one's labor and protection against unjust enrichment").

right of publicity claim,¹¹⁵ also famously heralded the use of labor-desert theory as the right's fundamental justification.¹¹⁶ Melville Nimmer, in one of the most influential articles advocating a judicially-created right of publicity,¹¹⁷ explicitly employed the labor theory rationale in support of his proposition that it is a "first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors."¹¹⁸ Nimmer asserted as unquestionable the assumption that "in most instances a person achieves publicity values of substantial pecuniary worth only after he has expended considerable time, effort, skill, and even money."¹¹⁹ Without such a right, persons who had "long and laboriously nurtured the fruit of publicity values"¹²⁰ would be "deprived" of their right "to control and profit from the publicity values which [they] ha[ve] created or purchased."¹²¹

The Supreme Court subsequently echoed this reasoning in its only decision thus far on the right of publicity.¹²² In that case, not only did the Court utilize an explicit labor-desert theory justification for the right, but it also employed the related incentive theory to find that the plaintiff's right of publicity had been violated.¹²³

2. Incentive Theory

In *Zacchini v. Scripps-Howard Broadcasting Company*,¹²⁴ Zacchini, a circus artist, performed as a "human cannonball."¹²⁵ A local broadcasting company videotaped his performance and broadcasted the entire fifteen-second performance as part of its evening news program

115. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

116. See McCARTHY, *supra* note 9, § 1:27; McKenna, *supra* note 15, at 250 n.117.

117. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977). *Zacchini* is not generally understood to constitute a typical right of publicity case because it deals with the use of the plaintiff's performance as opposed to the more typical use of a person's identity for its identification value. See McCarthy, *supra* note 49, at 133. Nonetheless, as the only Supreme Court case yet to consider the right of publicity, *Zacchini* has been influential in spurring interest in using the right of publicity by attorneys and judges. See Welkowitz, *supra* note 16, at 71.

123. *Zacchini*, 433 U.S. at 573, 576.

124. 433 U.S. 562 (1977).

125. *Id.* at 563.

without Zacchini's consent.¹²⁶ In holding that the broadcasting company violated Zacchini's right of publicity, the Court noted that the distinctive aspect of the right of publicity is that it protects "the proprietary interest of the individual in his act in part to encourage such entertainment."¹²⁷ Utilizing the labor theory rationale, the Court upheld Zacchini's right of publicity against defenses based on First Amendment privilege, stating that the right of publicity was one "focusing on the right of the individual to reap the reward of his endeavors."¹²⁸ The court explicitly stated the state's interest in permitting a right of publicity was thus "closely analogous to the goals of patent and copyright law."¹²⁹

In considering the incentive theory, the Court emphasized that the broadcast of Zacchini's entire performance "pose[d] a substantial threat to the economic value of [his] performance."¹³⁰ The broadcast thus went "to the heart of [Zacchini]'s ability to earn a living as an entertainer,"¹³¹ constituting an "appropriation of the very activity by which [Zacchini] acquired his reputation in the first place."¹³² The Court stated:

The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.¹³³

The Supreme Court's decision in *Zacchini* helped establish the right as a property right grounded in Lockean labor theory.¹³⁴ *Zacchini's* focus on the incentive approach to the right of publicity, justified by analogy to patent and copyright law, has contributed to the "fixation on the right as exclusively pecuniary," at the expense of other important interests integral to the protection of identity.¹³⁵ Since *Zacchini*, the right has continued to expand and develop based primarily on the Lockean labor rationale¹³⁶ with the related preven-

126. *Id.* at 563–64.

127. *Id.* at 573.

128. *Id.*

129. *Id.*

130. *Id.* at 575.

131. *Id.* at 576.

132. *Id.*

133. *Id.* (quoting Harry Kalven Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 *LAW & CONTEMP. PROBS.* 251, 326, 331 (1966)) (internal quotations omitted).

134. *See, e.g.*, Haemmerli, *supra* note 15, at 402–03.

135. *Id.*

136. *See, e.g.*, *McFarland v. E & K Corp.*, No. 4-89-727, 1991 WL 13728, at *2 (D. Minn. Jan. 17, 1991) ("A celebrity's identity, embodied in his name, likeness, and other personal

tion of unjust enrichment serving as “the most common judicial theory in favor of the right of publicity.”¹³⁷

C. Labor Theory Critique

Critics have viewed the right of publicity’s expansion as a result of this economic fixation on commercial value and the underlying Lockean labor theory that has predominantly justified its development.¹³⁸ Classifying the right of publicity as a traditional intellectual property right enables courts to shortchange their analysis by avoiding a careful determination of the right’s proper scope and the interests implicated by publicity claims.¹³⁹ Beyond rhetorically employing the “property” label, courts often offer little justification for the claim, as if the label itself determines the scope of protection persona should be granted.¹⁴⁰ Without the inherent limitations accorded traditional intellectual property rights, the right of publicity has no limiting mechanism that would require a more careful and thoughtful analysis.¹⁴¹ To the extent a court deems a defendant’s use a commercial exploitation of the plaintiff’s identity, an “invocation of commerciality” substitutes for a careful examination of other factors that might permit the defendant’s use of a celebrity’s identity.¹⁴² Following from this view, some critics argue the expansion of the right and its encroachment on protected speech as not surprising, but predictable.¹⁴³

characteristics, is the ‘fruit of his labor’ and becomes a type of property entitled to legal protection.” (quoting *Uhlaender v. Henrickson*, 316 F. Supp. 1277, 1282 (D. Minn. 1970)); see also McKenna, *supra* note 15, at 229–30; Madow, *supra* note 20, at 181.

137. McCARTHY, *supra* note 9, § 2:2 (quoting Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 109 (1994)).

138. See McKenna, *supra* note 15, at 233; Madow, *supra* note 20, at 181–82.

139. See McKenna, *supra* note 15, at 246–47.

140. See *id.* (citing *Herman Miller, Inc. v. Palazetti Imps. & Exps., Inc.*, 270 F.3d 298, 326 (6th Cir. 2001) (“We believe that the weight of authority indicates that the right of publicity is more properly analyzed as a property right and, therefore, is descendible.”); see also 2 McCARTHY, *supra* note 9, § 10.8. McCarthy counsels against the application of labels without thought:

The right of publicity is “property.” From that label flows a plethora of legal categorizations and conclusions, but Justice Cardozo warned us to beware of “the tyranny of labels.” The word “property” is merely a convenient label and should not be viewed as a magic substitute for thought. As Judge Jerome Frank cautioned in the seminal *Haelan* case, “Whether [the right of publicity] be labeled a “property” right is immaterial; for here, as often elsewhere, the tag “property” simply symbolizes the fact that courts enforce a claim which has a pecuniary worth.”

Id.

141. See Welkowitz, *supra* note 16, at 87–88 (discussing lack of limitations in publicity law unlike other areas of intellectual property).

142. *Id.* at 95.

143. See McKenna, *supra* note 15, at 233.

1. The Right of Publicity: Non-Celebrities

In addition to contributing to the right's expansionist tendencies, the natural rights labor theory of publicity rights does not serve as a coherent rationale for the outcome of many decisions, despite its predominance.¹⁴⁴ In particular, an economic rationale grounded in natural rights labor theory does not justify why someone other than a celebrity should have publicity rights.¹⁴⁵ Despite the majority view that the "[t]he right of publicity is not merely a legal right of the 'celebrity,' but is a right inherent to everyone to control the commercial use of identity and persona,"¹⁴⁶ the Lockean labor theory rationale does not support this assertion.¹⁴⁷ To be morally justified in claiming property rights under Lockean theory, an individual must purposely have directed efforts to achieve an intended result.¹⁴⁸ Lockean property rights arise and persist only through productive use.¹⁴⁹ Even if it were true that celebrities themselves have "achieve[d] publicity values of substantial pecuniary worth"¹⁵⁰ after having expended "considerable time, effort, skill and even money"¹⁵¹ in creating their public personas,¹⁵² this provides little explanatory support for non-celebrities.¹⁵³ Unknown individuals may suddenly find their identity commercially exploited by enterprising advertisers, although they themselves expended no effort in purposefully developing their public image.¹⁵⁴

Despite the incoherence of the labor rationale in justifying why everyone is morally entitled to benefit from a right of publicity, many courts clearly apply the right of publicity to protect the rights of non-

144. See Haemmerli, *supra* note 15, at 388–89.

145. See McKenna, *supra* note 15, at 264.

146. McCARTHY, *supra* note 9, § 1:3; see also *id.* § 4:16.

147. McKenna, *supra* note 15, at 264–65.

148. *Id.* at 255–56.

149. See LOCKE, *supra* note 106, at 290–91. "Aimless effort is not labor. . . . Most important from the perspective of the laborer's claim . . . is the laborer's purposiveness." Gordon, *supra* note 14, at 1547. As Gordon explains: "A stranger's taking of another's labored-on objects is likely to merit legal intervention only if the taking interferes with a goal or project to which the laborer has purposely directed her effort." *Id.* Accordingly, Gordon asserts that the scope of the laborer's purpose defines the scope of the rights she can assert. *Id.* at 1548.

150. Nimmer, *supra* note 117, at 216.

151. *Id.*

152. But see Madow, *supra* note 20, at 181–82. Madow argues that Lockean labor analysis is inappropriate because the right of publicity incorrectly ascribes exclusive rights to the creation of a persona which rightly belongs to the public domain; celebrity persona is a social construct that reflects the public's interest in the creation of cultural symbols that do not belong to the celebrity, but rather to the public at large. *Id.*

153. See McKenna, *supra* note 15, at 264–65.

154. *Id.*

celebrities. One example of this is a case involving a relatively unknown kindergarten teacher and former model, who successfully asserted his statutory right of publicity after discovering that his face had been used without his knowledge or consent on millions of Taster's Choice instant coffee labels.¹⁵⁵ Although the plaintiff was not a celebrity, the court found that the right of publicity allowed him to protect his identity from commercial exploitation by Nestle.¹⁵⁶ The court alluded to the incentive theory rationale for the right of publicity by prominently citing *Zacchini*¹⁵⁷ for the proposition that "no social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."¹⁵⁸

In discussing the development of the right of publicity, the court also stated that "[t]he right of publicity protects the very identity or persona of the plaintiff as a human being."¹⁵⁹ Other decisions upholding non-celebrities' claims for appropriation of their proprietary interest in their persona have included the use of a plaintiff's picture of himself and his family in real estate advertisements,¹⁶⁰ the inclusion of video clips of a carpenter installing tiles in a television commercial,¹⁶¹ as well as a twenty-year old photograph of a former Vietnam veteran presented in a promotional brochure for a publisher's multi-volume series on the Vietnam experience.¹⁶² A coherent justification for these claims does not ultimately rest on the basis of the labor the individual has exerted in developing his or her persona or the social good that is served by incentivizing the plaintiffs' claims. Rather, the strength of these claims depends on a more fundamental basis: the recognition of the right every individual possesses to control the use of his or her persona—a right more justifiably based on the concept of individual autonomy.

A similar analysis applies to cases where the celebrities themselves have not created the persona the defendant exploits, but nonetheless

155. See, e.g., *Christoff v. Nestle USA, Inc.*, 62 Cal. Rptr. 3d 122, 126–28, 140–41 (Ct. App. 2007), *rev'g on other grounds*, 169 P.3d 888 (Cal. 2007); see also Jeffrey J. Brown, Comment, *Defending the Right of Publicity: A Natural Rights Perspective*, 10 INTELL. PROP. L. BULL. 131, 136 (2006).

156. *Christoff*, 62 Cal. Rptr. 3d at 140–41.

157. *Id.* at 125.

158. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

159. *Christoff*, 62 Cal. Rptr. 3d at 130 (citations omitted) (internal quotations omitted) (quoting *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1004 (9th Cir. 2001)).

160. *Canessa v. J.I. Kislak, Inc.*, 235 A.2d 62, 75–76 (N.J. Super. Ct. Law Div. 1967).

161. *Ainsworth v. Century Supply Co.*, 693 N.E.2d 510, 511–12, 514 (Ill. App. Ct. 1998).

162. *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904, 905–06, 914 (D.N.J. 1986).

benefit from the right to recoup the loss of the commercial appropriation.¹⁶³ Thus in *White*, the court stated that “[t]he law protects the celebrity’s sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof.”¹⁶⁴ As these cases demonstrate, courts may not require that individuals have purposefully directed their efforts towards the creation of their persona, nor made previous commercial use of their identity, in order to claim a right of publicity. The *Tellado v. Time-Life Books, Inc.* decision,¹⁶⁵ in particular, indicates the extent to which the autonomy rationale better supports these types of claims by incorporating both personal and economic interests, rather than the exclusive protection of proprietary interests the Lockean labor theory ostensibly provides. In *Tellado*, the plaintiff brought suit based on the emotional trauma he experienced when he first discovered his picture on the publisher’s promotional materials, even though the court granted his claim on the defendant’s commercial appropriation of his likeness.¹⁶⁶ As Alice Haemmerli, the former Assistant Dean for Transnational Curricula Development at Columbia Law School, states: by “defining the right of publicity as a strictly economic property right . . . the right of publicity lost a crucial part of its *raison d’être* as a right based on, and protective of, personal autonomy.”¹⁶⁷

2. The Right of Publicity: Personal Interests

Decisions such as *Tellado*, in which courts consider both the personal and proprietary interests of the plaintiff, support a rearticulation of a publicity right based on autonomy rather than a Lockean labor theory natural rights rationale. In *Waits*, the Ninth Circuit awarded the plaintiff two million dollars in punitive damages because the singer had expressly refused any commercialization of his image through product advertising due to “his philosophy that musical artists should not do commercials because it detracts from their artistic integrity.”¹⁶⁸ By using a sound-alike for the commercial, the court

163. See, e.g., *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992), *reh’g denied*, 989 F.2d 1512 (9th Cir. 1993).

164. *Id.* at 1399; see also *Madow*, *supra* note 20, at 181–82.

165. 643 F. Supp. at 914.

166. *Id.* at 906, 914; see *Lapter*, *supra* note 7, at 269–70 (asserting that in some jurisdictions, based on this precedent, private individuals, unlike celebrities, retain a cause of action for reputational and commercial harm arising out of the commercial use of their identity).

167. Haemmerli, *supra* note 15, at 408–09.

168. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097 (9th Cir. 1992).

found that Frito-Lay had misappropriated Waits's voice, damaging his reputation "by making him an apparent hypocrite."¹⁶⁹ Although the defendants had argued that in right of publicity actions, only damages to compensate for economic injury were available, the court disagreed, awarding Waits two million dollars in damages for injury to personal interests causing humiliation, embarrassment, and mental distress.¹⁷⁰

Similarly in *White*, the plaintiff may have been concerned with protecting her reputation as much as complaining of an economic misappropriation:¹⁷¹ the use of the robot in the defendant's advertisement implied a denigration of the plaintiff as an individual by implicitly conveying the idea that her role as a game show host could be played by a robot mechanically spinning letters on a game-board.¹⁷² In this way, courts implicitly recognize that celebrities may care about more than simply the loss of remuneration for the commercial exploitation of their identities.¹⁷³

3. The Autonomy-Based Theory

Despite the inconsistencies inherent in the labor theory rationale, its normative appeal in providing a moral justification for the right of publicity has proved extremely appealing to both commentators and judges alike.¹⁷⁴ The labor theory rationale, however, born of an era when Hollywood studios invested considerable efforts in developing celebrity identities,¹⁷⁵ makes little sense today, given the explo-

169. *Id.* at 1103.

170. *Id.*; see also *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996) (accepting plaintiff's claim for emotional injury resulting from an unauthorized use of his name). The fifteen million dollars in damages granted in the *Twist* case may also suggest that the court recognized the implicit denigration of the plaintiff's identity that the defendant's appropriation seemed to imply. See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 366 (Mo. 2003) (depicting plaintiff's fictional cartoon character as a "Mafia don whose list of evil deeds includes multiple murders, abduction of children and sex with prostitutes" with defendant referring to hockey player as a renowned enforcer, i.e., "goon"); *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004, 1012 (App. Div. 1981) (awarding damages for injury to property interest as well as emotional distress under New York statute).

171. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512 (9th Cir. 1993) (comparing Vanna White in appearance and conduct to a robot that turned letters on game-board).

172. *Id.* at 1396, 1399; Welkowitz, *supra* note 16, at 98.

173. See *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 880 (S.D.N.Y. 1973) (describing actor Cary Grant's assertion that no one, including himself, should profit by the publicity value of his name and reputation).

174. See *supra* notes 103–04 and accompanying text.

175. See Nimmer, *supra* note 117, at 203 ("But although the concept of privacy which Brandeis and Warren evolved fulfilled the demands of Beacon Street in 1890, it may seri-

sion of new media technologies and enterprising new advertising techniques that may exploit the identity value associated with any individual simply because a particular consumer has bought a specific product or has visited a particular web-site.¹⁷⁶ Cases where the courts have considered the plaintiffs' personal and proprietary interests indicate that the right protects more than the plaintiffs' economic rights against commercial exploitation of their personas.¹⁷⁷

At its most fundamental, the right of publicity protects every human being's inherent right to *control* the commercial use of identity,¹⁷⁸ not because of the labor invested in creating that identity, but because of the individual interest in autonomy in determining how persona is to be displayed to the world.¹⁷⁹

On this view, the proper focus of the right should be the person, not the work product.¹⁸⁰ Because identity appropriation infringes individuals' control as to the use of their persona, and consequently their interest in "autonomous self-definition,"¹⁸¹ a theory based on the autonomy of the person better supports a unifying rationale for a publicity right that encompasses both economic and moral objections to that infringement.¹⁸² This approach recognizes that the individual's complaint is not only that the objectification of identity is harmful, or that its exploitation represents a commercial loss, but rather, more fundamentally, that the individual has lost control over which uses are made of his or her identity.¹⁸³ As Professor Mark McKenna explains: "Since all individuals share the interest in autonomous self-definition, every individual should be able to control uses of her identity that

ously be doubted that the application of this concept satisfactorily meets the needs of Broadway and Hollywood in 1954.").

176. See *supra* note 5 and accompanying text.

177. See *supra* Part I.C.2.

178. See McCARTHY, *supra* note 9, § 1:3.

179. See JULIUS C.S. PINCKAERS, FROM PRIVACY TOWARD A NEW INTELLECTUAL PROPERTY RIGHT IN PERSONA 242 (1996) ("From the principle of personal autonomy it follows that every human being should have the right to develop his own identity and to decide how and what aspects of this personal identity will be shown to the rest of the world.").

180. See Haemmerli, *supra* note 15, at 402–03.

181. See McKenna, *supra* note 15, at 285.

182. See Haemmerli, *supra* note 15, at 422. Haemmerli advocates a Kantian autonomy-based property right rationale for publicity rights. See *id.* at 413–22. While much of Haemmerli's analysis applies to the discussion of Kantian personality rights below, personality rights based on a Kantian theory do not constitute property. See *infra* Part II; see also McKenna, *supra* note 15, at 283 (advocating a publicity right based on the individual's interest in autonomous self-definition).

183. McKenna, *supra* note 15, at 283.

interfere with her ability to define her public character.”¹⁸⁴ Because such use curtails the individual’s fundamental freedom to choose how to present his or her public persona to the world, commercial appropriation that implicates an individual’s “legitimate interest in autonomous self-definition” constitutes a violation of individuals’ right to publicity regardless of the degree or nonexistence of their fame.¹⁸⁵

A focus on the actual person behind the persona highlights the personal interest implicated in the right. This focus has the potential to restrict the doctrine significantly by circumscribing the realm of identity indicia to those characteristics within the more direct, personal sphere of the plaintiff.¹⁸⁶ The closer the particular use of a likeness to the “personal sphere” of the individual, the less the likelihood that cases involving evocative indicia of identity implicating creative or parodic expression will constitute infringement.¹⁸⁷ However, cases involving images, voice, and other immediately identifiable personal attributes of an individual would fall in the personal attributes category and would justify decisions such as *Waits*¹⁸⁸ or *Midler*¹⁸⁹ where the defendant appropriated the sound of the plaintiff’s actual voice. Attributes evoking identity however, such as those at issue in *White*¹⁹⁰ or in *Carson*,¹⁹¹ would be less likely to fall within the ambit of this more narrowly construed personal sphere.¹⁹² As will be discussed more fully below, this restriction is consonant with the Kantian theory underlying German personality rights, which similarly limit actionable attributes of infringement to those directly and immediately identifying the plaintiff.¹⁹³

184. *Id.* at 285.

185. See PINCKAERS, *supra* note 179, at 242; McKenna, *supra* note 15, at 231.

186. See David W. Melville & Harvey S. Perlman, *Protection for Works of Authorship Through the Law of Unfair Competition: Right of Publicity and Common Law Copyright Reconsidered*, 42 ST. LOUIS U. L.J. 363, 398 (1998) (advocating a restriction on the right of publicity limited to when the indicia of identity appropriated by the defendant are within the direct personal sphere of the plaintiff).

187. See *supra* Part I.A.1.

188. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1093 (9th Cir. 1992).

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

190. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992), *reh’g denied*, 989 F.2d 1512 (9th Cir. 1993); see also *White v. Samsung Elecs. Am., Inc.*, 989 F.2d at 1514 (Kozinski, J., dissenting).

191. See *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836–37 (6th Cir. 1983).

192. See Haemmerli, *supra* note 15, at 460–64; see also Melville & Perlman, *supra* note 186, at 398.

193. See *infra* Part II.B.3.

A focus on the individual's autonomy and integrity not only emphasizes moral as well as economic interests but also lessens courts' tendency to apply the formalist conception of property to the right that has accompanied the right's expansion.¹⁹⁴ While it would seem plausible that an analysis which pits a plaintiff's commercial interest in advertising royalties against societal interests in free expression would tip the scales in favor of the public, this has not been the case.¹⁹⁵ Rather, courts have found in favor of the plaintiff's exclusive right to the commercial use of his or her identity, holding that as an intellectual property right, the right of publicity constitutes a weighty property claim that trumps other interests.¹⁹⁶ This argument is well-supported by analogy to the Anglo-American tradition of real property rights.¹⁹⁷ However, this traditional approach ignores the critical differences between a property right in human persona and other forms of intangible property such as patents and copyright.¹⁹⁸ An autonomy-based sui generis publicity right references the tradition of balancing of the interests integral to the tort of privacy while providing a counterbalance to the rhetorical appeal of the property claim.¹⁹⁹ At a minimum, a right based on personal autonomy compels a more thoughtful balancing of the interests involved and allows a more flexible approach to better accommodate competing interests,²⁰⁰ spurred

194. See McKenna, *supra* note 15, at 246–47; see also Westfall & Landau, *supra* note 28, at 72–73.

195. See *supra* Parts I.A.1, I.A.2.

196. Even courts that explicitly address the tension between the right of publicity and First Amendment concerns fall prey to this approach. See, e.g., *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 805 (Cal. 2001) (“Although surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we follow those that have in concluding that depictions of celebrities amounting to little more than the appropriation of the celebrity’s economic value are not protected expression under the First Amendment.”).

197. Palmer, *supra* note 38, at 45–46.

198. These differences include not only the lack of restrictions on the right typical of the limitations inherent to patents and copyright, see *supra* note 16 and accompanying text, but encompass more importantly, the fundamental distinction that “[h]uman beings are intrinsically tied to their public identity, into which they have projected a part of their personality, their very ‘selves.’” PINCKAERS, *supra* note 179, at 243.

199. See 2 McCARTHY, *supra* note 9, § 8:32 (citation omitted) (internal quotations omitted) (suggesting that the interest to be weighed against freedom of speech in right of publicity cases is not so much the property interest but rather the privacy interest).

200. See *id.* (stating that in balancing expression and commercial use in right of publicity cases in borderline cases, the court should ideally focus on exactly what is alleged to be the “message” of the defendant’s use, and that the strength of the publicity claim “will wax or wane depending upon the relationship between defendants’ message and plaintiff’s identity”).

by greater sensitivity to the context in which the use occurs and the different situations in which right of publicity claims arise.

4. Autonomy-Based Theory and Privacy

A publicity right based on personal autonomy that focuses on the individual's right to control the use of his or her identity accounts for the intuitive force publicity rights exert. Even outspoken critics of the right concede that "[t]he right of publicity may seem intuitively appealing to many people."²⁰¹ The autonomy-based approach incorporates personal rights consistent with the right's origins in privacy, when courts initially recognized an interest in autonomous self-definition.²⁰² This approach is very similar to the theory informing German copyright law that underlies aspects of German personality rights.²⁰³

In *Pavesich v. New England Life Insurance*,²⁰⁴ the defendant used the plaintiff's photograph for a life insurance advertisement without the plaintiff's permission.²⁰⁵ The advertisement suggested Pavesich had secured life insurance from the company.²⁰⁶ The court held that the defendant's use violated Pavesich's privacy, stating that "[t]he form and features of [Pavesich] are his own. . . . Nothing appears from which it is to be inferred that [he] has waived his right to determine himself where his picture should be displayed in favor of the advertising right of the defendants."²⁰⁷ In its reasoning, the court recognized the plaintiff's right to control the commercial placement and

201. Volokh, *supra* note 12, at 929; *see also* Haemmerli, *supra* note 15, at 429 ("Perhaps it is because there is so much intuitive force to the notion of control over the use of one's own identity that commentators like Professor McCarthy have asserted that the right of publicity is 'self-evident.'" (citation omitted)).

202. McKenna, *supra* note 15, at 283; *see also* McCARTHY, *supra* note 9, § 1:7. Such a focus on personal interest would also conform to a better understanding of the right. *Id.* According to McCarthy, it may well be "more accurate to think of [the right of publicity] as a sui generis mixture of personal rights, property rights, and rights under the law of unfair competition than to attempt, Procrustean-like [*sic*], to fit it precisely into one of those categories." *Id.* (quoting S.J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y 111, 112 (1980) (internal quotations omitted)). A right of publicity based on autonomy would also comprise an individual's decision to transfer the right, the issue that initially provoked the necessity for an independent publicity right separate from privacy. *Id.*; *see* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

203. *See infra* Parts II.B.1, II.B.2.

204. 50 S.E. 68 (Ga. 1905).

205. *Id.* at 68.

206. *Id.* at 68–69.

207. *Id.* at 79.

the use of his photograph,²⁰⁸ describing how if he saw “his picture displayed in places where he would never go to be gazed upon, at times when and under circumstances where if he were personally present the sensibilities of his nature would be severely shocked.”²⁰⁹

The *Pavesich* decision upheld the plaintiff’s right of privacy²¹⁰ and in doing so explicitly endorsed²¹¹ the seminal Warren and Brandeis article²¹² that is credited with the creation of the doctrine, published fifteen years before *Pavesich* was decided.²¹³ It has long been established that Warren and Brandeis’s *The Right to Privacy*²¹⁴ has had a tremendous and lasting impact on the development of the privacy doctrine.²¹⁵ Less discussed is the continental influence that shaped the doctrine, in particular, the German philosophical tradition underlying the development of continental intellectual and artistic property.²¹⁶ Given this influence, however, the emphasis the *Pavesich* court placed on the plaintiff’s right to define where and how his photograph should be displayed—how his picture would be “gazed upon”—is not surprising, because the *Pavesich* court’s approach echoes the then developing conception of personality embodied in German copyright law:²¹⁷ the right to “a public image of our own making, as the right to control our public face.”²¹⁸ The concept of “inviolate person-

208. *Id.* at 80. According to the court, “as long as the advertiser uses him for these [advertising] purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, [and] that he is no longer free.”

209. *Id.* at 80 (citations omitted) (internal quotations omitted).

210. *Id.* at 81.

211. *Id.* at 74.

212. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

213. McCARTHY, *supra* note 9, §§ 1:11, 1:17.

214. Warren & Brandeis, *supra* note 212.

215. McCARTHY, *supra* note 9, § 1:14.

216. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1205–08 (2004). Whitman asserts that Warren and Brandeis pursued a German approach to the law of personality which drew on the roman civil law of insult and on intellectual and artistic property—Urheberrecht. *Id.* German writers had held that privacy functioned as a limitation on property and constituted an evolutionary outgrowth of the growing sensitivity to the needs of “personality.” *Id.* Warren and Brandeis echoed these ideas in claiming that primitive ideas of property would cease as the common law evolved to protect not only mere material “property rights” but also the immaterial damage of emotional and moral injuries. *Id.*

217. See PINCKAERS, *supra* note 179, at 242–44 (asserting that the personality interest in controlling how and what aspects of one’s personal identity will be shown to the world is found in German copyright law); see also *infra* Parts II.B.1, II.B.2.

218. Whitman, *supra* note 216, at 1168. Whitman states that Warren and Brandeis’s idea of privacy concerned the right to “a public image of our own making, as the right to control our public face” similar to the set of continental rights over the control of one’s

ality,”²¹⁹ which grounds Warren and Brandeis’s conception of the right of privacy, has direct intellectual-historical ties to the German concept of personality rights evolving at that time.²²⁰

Given this history, it is not surprising that the theory of an autonomy-based publicity right strongly resembles the theories underlying German personality rights,²²¹ and in particular, the philosophy of Immanuel Kant, one of the key theorists of the concept of personality in Germany.²²² Legal scholars in the United States have stimulated much of the right of publicity’s doctrinal evolution and have had “extraordinary impact on the development of the law.”²²³ Should this degree of influence continue, critics advocating a rearticulation of the right based on autonomy theory would do well to consider the theoretical principles underlying personality rights in Germany.²²⁴ To that end, a brief examination of the primary theory underlying German personality rights and recent developments in German personality law will be explored below.

image, name, and reputation. *Id.* at 1167–68. For this reason, Warren and Brandeis, among other American theorists, insisted on a connection between privacy and personhood. *Id.* at 1168.

219. Warren & Brandeis, *supra* note 212, at 205.

220. Whitman, *supra* note 216, at 1207–08. McKenna describes the origins of the doctrine thus: Warren and Brandeis claimed that a number of cases purportedly decided on other grounds, such as breach of trust or common-law copyright, actually represented efforts to protect an author’s expressions of her thoughts and feelings—elements of personality that Warren and Brandeis believed should be recognized separately and protected directly. McKenna, *supra* note 15, at 234. By focusing most of their attention on unpublished works of authorship, Warren and Brandeis looked to protect such works on the basis of common law claims of “originality” as the true grounds of “the title of the property.” *Id.* at 235 (citations omitted) (internal quotations omitted). Since originality was a matter of expressing the mind of a creator or originator, personal appearance, sayings, acts, and personal relations were similar expressions of personality which Warren and Brandeis suggested the law should protect as well. *Id.* This “right to privacy,” the general “right to be let alone,” when considered with all of its applications, constituted “in reality not the principle of private property, but that of an inviolate personality.” *Id.* (quoting Warren & Brandeis, *supra* note 212, at 193–95, 205 (internal quotations omitted)).

221. See *infra* Part II.

222. See *infra* Part II. Interestingly, critics who advocate autonomy-based theories have cited Kant in support, but do not explicitly address the historical intellectual connection. See, e.g., Haemmerli, *supra* note 15, at 413–22; McKenna, *supra* note 15, at 287 (describing the interest in autonomous self-definition as similar to the interest Kant believed was implicated by the counterfeiting of books).

223. McCARTHY, *supra* note 9, § 1:4.

224. For example, the desirability of explicitly including moral and personal rights within an international right of publicity has not gone unnoticed. See, e.g., Grant, *supra* note 8, at 562 (stating that to be most effective, a new internationally-recognized right of publicity must embrace both the traditional American economic rationales for the right, based on the commercial value of the persona, and the social values of the right which derive from the idea of personal autonomy and moral rights).

II. German Personality Rights

German law protects against the unauthorized use of an individual's identity, although "no distinct right of publicity exists that is comparable to that in the U.S."²²⁵ German courts have decided cases concerning the commercial appropriation of personality since the early twentieth century.²²⁶ A much broader right in Germany protects a person's commercial interests, a general right of personality, that has developed primarily by case law.²²⁷ As in the United States, legal scholars have greatly influenced the development of the right as it has evolved from its antecedents in Roman civil law through the jurisprudence of legal theorists influenced by the idealist philosophy of Immanuel Kant.²²⁸

Because of these origins, the right of personality in Germany does not constitute an intellectual property right, but rather a personal right.²²⁹ It guarantees the protection of human dignity and the right to freely develop one's personality.²³⁰ Strongly based as it is on a Kantian theory of individual autonomy and freedom,²³¹ the general per-

225. Bergmann, *supra* note 37, at 500.

226. HUW BEVERLY-SMITH ET AL., PRIVACY, PERSONALITY AND PROPERTY: CIVIL LAW PERSPECTIVES ON COMMERCIAL APPROPRIATION 94 (2005). In 1910, the famous aviator, Count Zeppelin, prevented the unauthorized registration of his name and portrait as a trademark for tobacco. Reichsgericht [RG] [Federal Court of Justice 1880–1945] Oct. 28, 1910, 74 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 308 (312) (F.R.G.) (*Graf Zeppelin*) [Count Zeppelin].

227. See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] May 25, 1954, 13 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 334 (338) (F.R.G.) (*Leserbrief*) [Reader's Letter], translated in BASIL S. MARKESINIS, A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORTS 378, 414 (4th ed. 2002) [hereinafter MARKESINIS, A COMPARATIVE INTRODUCTION] (recognizing that "the general personality right must be regarded as a constitutionally guaranteed fundamental right" in private law); see also BEVERLY-SMITH ET AL., *supra* note 226, at 10, 100–01 (stating that many commentators considered the judiciary's decision "to take the lead in a disputed question" not yet decided by the legislature a "bold judgment").

228. See BEVERLY-SMITH ET AL., *supra* note 226, at 96–97.

229. Bergmann, *supra* note 37, at 520.

230. See, e.g., BGH Dec. 1, 1999, 143 BGHZ 214 (218) (F.R.G.) (*Marlene Dietrich I*), translated in BASIL S. MARKESINIS, ESSAYS ON FOREIGN LAW AND COMPARATIVE METHODOLOGY 401, 407 (2001) [hereinafter MARKESINIS, COMPARATIVE METHODOLOGY] ("[The general right of personality] guarantees as against all the world the protection of human dignity and the right to free development of the personality.").

231. EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 62 (2002); see RÜDIGER KLÜBER, PERSÖNLICHKEITSSCHUTZ UND KOMMERZIALISIERUNG; DIE JURISTISCH-ÖKONOMISCHEN GRUNDLAGEN DES SCHUTZES DES VERMÖGENSWERTEN BESTANDTEILE DES ALLGEMEINEN PERSÖNLICHKEITSRECHTS [PERSONALITY PROTECTION AND COMMERCIALIZATION: THE JUDICIAL–ECONOMIC BASIS FOR THE PROTECTION OF THE PROPRIETARY COMPONENTS OF THE GENERAL PERSONALITY RIGHT] 6, 40–44 (2007)

sonality right constitutes a personal right, integral to the self, which cannot be alienated.²³² On the one hand, this underlying theory structures the scope of the right, providing an instructive example of how publicity rights based on autonomy theory in the United States might restrict the expansion the right of publicity has undergone since its inception as a separate intellectual property right, distinct from privacy.²³³ On the other hand, the issues German courts have encountered in confronting the restriction on alienability, for example, illustrate the necessity of a limited propertization of personality rights for modern commercial markets²³⁴ and thus affirms the desirability of a sui generis approach to publicity rights in general.²³⁵

A. Survey of the General Right of Personality in Germany

Most of the judgments concerning appropriation of personality are based on the various specific personality rights recognized by German law.²³⁶ Section 12 of the Bürgerliches Gesetzbuch [Civil Code of 1900]²³⁷ (“BGB”) prohibits the unauthorized use of another person’s name.²³⁸ Section 22 of the Kunsturheberrechtsgesetz [Act on Copyright in Works of Visual Arts of 1907]²³⁹ (“KUG”) provides that a person’s portrait may only be exhibited or disseminated with the depicted person’s consent.²⁴⁰ “[T]hese rights to one’s name and to one’s image are known as ‘specific personality rights’ (besondere Per-

(discussing Kant and Hegel as key theorists in the development of natural rights protections of the German general personality right).

232. See, e.g., BGHZ 143, 214 (220) (*Marlene Dietrich I*), translated in MARKESINIS, COMPARATIVE METHODOLOGY, *supra* note 230, at 408 (“Insofar as the rights of personality protect non-material interests, they are indissolubly bound to the person of the holder of them and, as highly personal rights, are not renounceable and are inalienable, and are therefore not transferable and not inheritable.” (citing BGH Mar. 20, 1968, 50 BGHZ 133 (137) (F.R.G.) (*Mephisto*))).

233. See *infra* Part II.A.

234. See *infra* Part II.B.5.

235. MCCARTHY, *supra* note 9, § 1:7.

236. See *infra* Part II.B.

237. Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, Reichsgesetzblatt [RGBl] § 12, available at Gesetze im Internet, <http://www.bundesrecht.juris.de>. For a translation see http://www.bundesrecht.juris.de/Teilliste_translations.html (last visited Feb. 20, 2008).

238. *Id.*

239. Kunsturheberrechtsgesetz [KUG] [Act on Copyright in Works of Visual Arts of 1907] § 22, available at Gesetze im Internet, <http://www.bundesrecht.juris.de>, translated in COPYRIGHT LAWS AND TREATIES OF THE WORLD (U.N. Educ., Scientific & Cultural Org. et al. eds., 1996–19).

240. *Id.*

sönlichkeitsrechte).”²⁴¹ Before the 1950s, these specific rights constituted the only legal protection of personality in Germany.²⁴²

In 1954, the Bundesgerichtshof (Federal Supreme Court of Justice) (“BGH”) supplemented these rights by recognizing a “general personality right” (allgemeines Persönlichkeitsrecht)²⁴³ which protects all other aspects of a personality against violation.²⁴⁴ The Court stated that the “general personality right”²⁴⁵ must be regarded as a constitutionally guaranteed fundamental right based on Articles 1 and 2 of the Grundgesetz (Basic Law of 1949) (“GG” or “Basic Law”).²⁴⁶ This interest is further protected under section 823 I BGB.²⁴⁷

The constitutional principles of the Basic Law embrace the respect and protection of human dignity based on “the Kantian proposition that humans are to be treated always as ends in themselves, never as means.”²⁴⁸ “The free human person and his dignity are the highest values of the constitutional order” which “[t]he state in all of its forms is obliged to respect and defend.”²⁴⁹ This approach is based on the conception of individuals as moral autonomous beings, endowed with the freedom to determine and develop themselves.²⁵⁰ The language of Article 2 of the Basic Law describes this self-determination as di-

241. BEVERLY-SMITH ET AL., *supra* note 226, at 94 (citing JÜRGEN HELLE, *BESONDERE PERSÖNLICHKEITSRECHTE IN PRIVATRECHT* [Specific Personality Rights in Private Law] 37 (1991)).

242. *Id.* at 94–95.

243. BGH May 25, 1954, 13 BGHZ 334 (338) (F.R.G.) (*Leserbrief*), translated in MARKESINIS, *A COMPARATIVE INTRODUCTION*, *supra* note 227, at 414.

244. *Id.*

245. *Id.*

246. *Id.*

247. BGB § 823(1), available at Gesetze im Internet, <http://www.bundesrecht.juris.de>. For a translation, see www.bundesrecht.juris.de/Teilliste_translations.html (last visited Feb. 20, 2008). Section 823(1) provides that damages can be recovered in the event wrongful damage is caused to another’s life, body, health, freedom, property or “other right.” *Id.* The court recognized a “general right to one’s personality” under this “other right” within the meaning of BGB section 823. See BGH Feb. 14, 1958, 26 BGHZ 349 (354–355) (F.R.G.) (*Herrenreiter*) [Gentleman Rider], translated in MARKESINIS, *A COMPARATIVE INTRODUCTION*, *supra* note 227, at 417–18.

248. Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 974.

249. *Id.* at 973 (citations omitted).

250. *Id.* at 973–74.

rected toward “the free unfolding of personality”²⁵¹ and integral to the freedom of the self.²⁵²

The general right of personality applies when the specific statutory provisions are not applicable.²⁵³ The general right of personality thus constitutes an umbrella right that protects different aspects of an individual’s personality from unauthorized public exposure and guarantees the protection of human dignity and the right to freely develop one’s personality—the right to autonomous self-definition.²⁵⁴ Although German courts apply the specific personality rights²⁵⁵ with priority, they consider on a case-by-case basis whether a specific statutory rule applies, or whether the courts should apply the general personality right to cover gaps left by the specific statutes.²⁵⁶

B. Survey of the General Right of Personality: Specific Personality Rights

Two specific statutes protect against appropriation of personality: section 12 of the Civil Code prohibits the unauthorized use of another person’s name²⁵⁷ and section 22 of the KUG [Act on Copyright in

251. GRUNDGESETZ [GG] [Constitution] art. 2 (F.R.G), *available at* Gesetze im Internet, <http://bundesrecht.juris.de>, *translated in* DAVID P. CURIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 343–44 (1994). Article 2(1) guarantees that “[e]veryone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.” *Id.* art. 2(1). Eberle notes the importance of the language in this statute as denoting a personal right. “The German phrasing in article 2 is *Enfaltung*, which connotes more an ‘unfolding’ like a bud from a rose, than ‘development,’ which is translated as *Entwicklung*. Thus, German law is really a focus on the ‘free unfolding of personality’ more than just self-realization connoted by ‘development.’” EBERLE, *supra* note 231, at 61.

252. GG art. 2(1). Critics have noted the general and highly abstract nature of the general personality right, asserting a reduction in legal certainty due to the right’s vague character. BEVERLY-SMITH ET AL., *supra* note 226, at 113. However, several attempts to create a more concrete right on a statutory basis have failed. *Id.* Supporters of the abstract nature of the general personality right note that the “right is highly flexible, thereby allowing the courts to react to new types of violation immediately without having to wait for new legislation.” *Id.*

253. Bergmann, *supra* note 37, at 503.

254. *See, e.g.*, Oberlandesgericht Hamburg [OLG Hamburg] [Hamburg Court of Appeals] May 8, 1989, 1989 Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 666 (666) (F.R.G.) (*Heinz Erhardt*) (enjoining the impersonation of a famous actor’s “characteristic voice and speech patterns” under the general right of personality), *translated in* 21 IIC 881, 882 (1990); *see also* Bergmann, *supra* note 37, at 503; Daniel Biene, *Celebrity Culture, Individuality, and the Right of Publicity as a European Legal Issue*, 36 IIC 505, 510 (2005).

255. *See infra* Part II.B.1.

256. BEVERLY-SMITH ET AL., *supra* note 226, at 114.

257. BGB § 12. Section 12 provides:

If the right of a person to use a name is disputed by another person, or if the interest of the person entitled to the name is injured by the unauthorised use of

Works of Visual Arts of 1907] provides that a person's image may only be exhibited or disseminated with the depicted person's consent.²⁵⁸ Most important for this discussion is the right to one's image. This right bears the strongest resemblance to the theory of autonomy advocated in the United States as an alternative rationale for the right of publicity.²⁵⁹

1. Specific Personality Rights—Right to One's Image

Section 22 of the KUG provides that pictures shall only be published or presented to the general public with the consent of the depicted person.²⁶⁰ At approximately the same time as the Georgia court in *Pavesich* endorsed Warren and Brandeis's theory of privacy²⁶¹ in upholding a person's right to determine the presentation of one's image to the world,²⁶² the German legislature enacted a statutory right to one's image by creating section 22 within the new copyright act, the KUG.²⁶³ In creating section 22, the legislature responded to a case involving two photographers who had unlawfully entered the room where the corpse of the former German Chancellor Otto von Bismark was lying in state, and had photographed the corpse.²⁶⁴ Bismark's heirs successfully applied for an order for destruction of the photo-

the same name by another person, the person entitled may require the other to remove the infringement. If further infringements are to be feared, the person entitled may seek a prohibitory injunction.

Id.

258. KUG § 22.

259. Legal scholars generally consider that section 12 of the Civil Code primarily reflects the influence of the Roman civil law of insult. *See, e.g.,* Eric H. Reiter, *Personality and Patrimony: Comparative Perspectives on the Right to One's Image*, 76 TUL. L. REV. 673, 676–77, 686–87 (2002). As such, its concerns are primarily reputational interests, and it does not immediately reflect the Kantian theory of moral autonomy which explicitly underlies section 22 KUG, except as supported by the general right of personality embodied in Articles 1 and 2 of the Basic Law. *Id.* at 686–90.

260. KUG § 22. Section 22 provides:

Portraits may be distributed or publicly exhibited only with the consent of the person portrayed. In case of doubt, the consent shall be presumed to have been given when the person portrayed received a payment for allowing himself to be portrayed. After the death of the person portrayed, the consent of the relatives of such person shall be required during ten years following his death.

Id.

261. *Pavesich v. New England Life Ins.*, 50 S.E. 68, 74 (Ga. 1905).

262. *Id.* at 79.

263. BEVERLY-SMITH ET AL., *supra* note 226, at 99. *See* JÜRGEN HELLE, *BESONDERE PERSÖNLICHKEITSRECHTE IM PRIVATRECHT* [SPECIFIC PERSONALITY RIGHTS IN PRIVATE LAW] 45–46 (1991) (observing that section 22, from the date of its initial enactment in the KUG, was considered a personality right).

264. RG Dec. 28, 1899, 45 RGZ 170 (170) (F.R.G.) (*Bismark*).

graphs.²⁶⁵ Although the legislature repealed most provisions of the KUG in 1965, section 22 has remained in force.²⁶⁶

Most significant for autonomy theorists of publicity rights in the United States, section 22 constitutes a hybrid right protecting both personal and economic interests.²⁶⁷ In applying section 22 to both personal and economic interests, German courts have interpreted section 22 as modeled on German copyright law which similarly constitutes a hybrid right.²⁶⁸ This monistic²⁶⁹ theory of copyright views the author's right as a fundamentally personal right to determine when, in what form, and for what purpose his creative work is to be communicated to the public.²⁷⁰ On this view, intellectual works are integral to an internal, personal sphere.²⁷¹ An author's right thus constitutes a personality right, rather than a right of property.²⁷² It is part of the self-ownership that an individual has over oneself; economic interests are necessarily subsumed within the personal sphere.²⁷³ Thus, the Federal Supreme Court has stated with respect to the right to one's

265. *Id.* at 174.

266. BEVERLY-SMITH ET AL., *supra* note 226, at 99.

267. See BGHZ Dec. 1, 1999, 143 BGHZ 214 (223) (*Marlene Dietrich I*), translated in MARKESINIS, *COMPARATIVE METHODOLOGY*, *supra* note 230, at 408 (asserting that the general personality right and specific personality rights such as the right to one's image and right to one's name protect not only ideal, but also commercial personality interests); BEVERLY-SMITH ET AL., *supra* note 226, at 108.

268. BGH May 8, 1956, 20 BGHZ 345 (353–54) (F.R.G.) (*Paul Dahlke*) (recognizing the right to one's image as including a pecuniary exclusive right under section 22 (“vermögenswertes Ausschliesslichkeitsrecht”), as the right to determine the commercial use of one's image), construed in Horst-Peter Götting, *Vom Right of Privacy zum Right of Publicity: Die Anerkennung eines Immaterialgüterrechts an der eigenen Persönlichkeit im Amerikanischen Recht* [From the Right of Privacy to the Right of Publicity: The Recognition of an American Intellectual Property Right in Personality], *Gewerblicher Rechtsschutz und Urheberrecht—Internationaler Teil* [GRUR-Int] [Industrial Property Law and Copyright Journal—International] 656, 667 (1995) (describing the judicial integration of commercial and ideal interests encompassed by the general and specific personality rights in *Paul Dahlke* under the monistic theory); BGHZ 143, 214 (226–27) (*Marlene Dietrich I*), translated in MARKESINIS, *COMPARATIVE METHODOLOGY*, *supra* note 230, at 412 (analogizing the hybrid right status of right of personality elements to that of copyright law); see also BEVERLY-SMITH ET AL., *supra* note 226, at 10, 99, 108; PINCKAERS, *supra* note 179, at 242.

269. See BEVERLY-SMITH ET AL., *supra* note 226, at 112; Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 379 (1993).

270. See Netanel, *supra* note 269, at 378.

271. *Id.*; see also EBERLE, *supra* note 231, at 79–80.

272. PINCKAERS, *supra* note 179, at 244. Pinckaers explains that the author's right safeguards “both the financial and the personal interests of the author.” *Id.* Under the monistic theory of copyright, “an author cannot entirely or even partly assign his exclusive (commercial) rights in his work to another party: he can only commercially exploit his copyrights by granting licenses.” *Id.*

273. *Id.*

image: “The protected legal right . . . is solely the portrayed person’s right, as a natural consequence of his personal rights, to decide freely as to whether and how he chooses to make his image available to the business interests of any third party.”²⁷⁴

2. Theory Underlying the Right to One’s Image

This theory of the author or individual’s right to define and control the presentation of his image to the world constitutes a remarkably similar right to that of the publicity right suggested by autonomy theorists in the United States: an individual has a fundamental right to autonomous self-definition.²⁷⁵ A critical difference, however, remains in that the publicity right in the United States constitutes an intellectual property right,²⁷⁶ whereas personality rights in Germany are personal rights that sound in tort.²⁷⁷ This difference results from the fact that in the United States, the natural rights justification for intellectual property views ideal objects as external to the self,²⁷⁸ whereas in Germany, the prevailing approach to ideal objects (such as an author’s expression and individual persona) views intangibles as integral to the self—the “free unfolding of [the] personality” in the world.²⁷⁹ In the United States, the right of publicity has developed as a property right buttressed by Lockean labor theory,²⁸⁰ whereas in Germany, the right to control one’s image has developed according to Kantian idealist philosophy by way of German copyright doctrine.²⁸¹

274. BGH June 26, 1981, 81 BGHZ 75 (80) (F.R.G.) (*Carrera*), translated in 14 IIC 288, 290–291 (1983); see also BGH Feb. 14, 1958, 26 BGHZ 349 (355) (F.R.G.) (*Herrenreiter*), translated in MARKESINIS, A COMPARATIVE INTRODUCTION, *supra* note 227, at 418. In the *Herrenreiter* decision, the court noted that the protection established by section 22 rests:

[I]n essence on the fundamental principle of a person’s freedom in his highly personal private life, in which the outward appearance of human being plays an essential part. . . . The reason a third person’s arbitrary publication of a portrait is not allowed is that the person portrayed is thereby deprived of his freedom to dispose by his own decision of this interest in his individual sphere.

BGHZ 26, 349 (355) (*Herrenreiter*).

275. See *supra* Parts I.C.3, I.C.4.

276. McCARTHY, *supra* note 9, § 1:3.

277. Liability for infringement of personality rights is provided under “the other right” of BGB section 823. See BGHZ 26, 349 (354–55) (*Herrenreiter*), translated in MARKESINIS, A COMPARATIVE INTRODUCTION, *supra* note 227, at 417–18; see also BEVERLY-SMITH ET AL., *supra* note 226, at 97.

278. See Netanel, *supra* note 269, at 354, 356–58.

279. See EBERLE, *supra* note 231, at 61 (internal quotations omitted).

280. See *supra* Parts I.B.1, I.B.2.

281. BEVERLY-SMITH ET AL., *supra* note 226, at 10; Netanel, *supra* note 269, at 378–79; see JÜRGEN SIMON, DAS ALLGEMEINE PERSONLICHKEITSRECHT UND SEINE GEWERBLICHEN ERSCHEINUNGSFORMEN: EIN ENTWICKLUNGSPROZESS [THE GENERAL RIGHT OF PERSONALITY AND

For Kant, individuals possess innate freedom and capacity to exert their free will in and upon the world of external objects.²⁸² External things constitute the objects of the free activity of the human will.²⁸³ Objects may be appropriated and disposed of through exercise of the human will, and are thus different from or other than the person.²⁸⁴ If something is external, it can be possessed and alienated, and if something is internal, such as the individual's body or personality, it cannot be alienated.²⁸⁵ According to Kant:

Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership. But a person cannot be a property, and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.²⁸⁶

Furthermore, according to Kant, a "proPERTIZATION OF THE PROPRIETOR"²⁸⁷ constitutes a violation of an ethical principle that imposes an affirmative obligation on each individual.²⁸⁸ The alienation of the individual in the treatment of oneself or another as a thing constitutes a

ITS COMMERCIAL FORMS] 38–43 (1981) (noting the influence of German theorists Otto von Gierke and Philippe Allfeld in the development of the German theory of copyright and the general right of personality).

282. IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 31–32 (W. Hastie trans., T & T Clark 1887) (1797) [hereinafter KANT, *THE PHILOSOPHY OF LAW*] ("A Person is a Subject who is capable of having his actions *imputed* to him. Moral Personality is, therefore, nothing but the Freedom of a rational Being under Moral laws . . . [A] Person is properly subject to no other Laws than those he lays down for himself, either alone or in conjunction with others."); see also Netanel, *supra* note 269, at 359.

283. See KANT, *THE PHILOSOPHY OF LAW*, *supra* note 282, at 32 ("A Thing is what is incapable of being the subject of Imputation. Every object of the free activity of the Will, which is itself void of freedom, is therefore called a Thing (*res corporealis*).").

284. *Id.* at 62 ("The description of an Object as '*external* to me' may signify either that it is merely 'different and distinct from me as a Subject,' or that it is also 'a thing placed *outside* of me . . .").

285. IMMANUEL KANT, *LECTURES ON ETHICS* 166 (L. Infield trans., Methuen & Co., 1930) (1924) ("The underlying moral principle is that man is not his own property and cannot do with his body what he will. The body is part of the self; in its togetherness with the self it constitutes the person; a man cannot make of his person a thing . . .").

286. *Id.* at 165.

287. Netanel, *supra* note 269, at 360 n.48.

288. KANT, *THE PHILOSOPHY OF LAW*, *supra* note 282, at 99 ("[A] man may be his own Master (*sui juris*) but not the Proprietor of himself (*sui dominis*), so as to be able to dispose of himself at will, to say nothing of the possibility of such a relation to other men; because he is responsible to Humanity in his own person."); see Netanel, *supra* note 269, at 360 n.48.

denigration of what it means to be human, not only for the individual concerned, but for all of humanity.²⁸⁹

Kant viewed an author's words as an expression that constituted an action of the will, rather than an external thing.²⁹⁰ An author's right in a work constitutes a fundamentally personal right, not a right "in the thing . . . but an innate right, in his own person."²⁹¹ Kant characterized this personal right as an act of communication,²⁹² an aspect of autonomy and freedom,²⁹³ "the one sole original, inborn Right belonging to every man in virtue of his Humanity."²⁹⁴ Based on this theory, German courts have interpreted section 22 similarly, with the right to one's image conceived as an innate right, inherent in the person, and generally inalienable.²⁹⁵ Just as the author has the inherent right to determine the communication of the author's thoughts to the public,²⁹⁶ the individual has the inherent right to determine whether and how his image will be displayed in the world.²⁹⁷

3. Restrictions on the Right to One's Image: Personal Features

Section 22 provides that pictures shall only be published or presented to the general public with the consent of the depicted person.²⁹⁸ The right protects the freedom of every person to determine if and how his image is presented and used in public.²⁹⁹ Although, as in the United States, German courts construe the right to one's image

289. KANT, *THE PHILOSOPHY OF LAW*, *supra* note 282, at 99; Netanel, *supra* note 269, at 360 n.48.

290. IMMANUEL KANT, *Of the Injustice of Counterfeiting Books*, in IMMANUEL KANT, *FOUR NEGLECTED ESSAYS* 45 (J. Richardson trans., Philopsychy Press 1994) (1798) [hereinafter KANT, *Of the Injustice of Counterfeiting Books*]. Kant viewed books, as the acts (*operae*) of the author's speech and as having "their existence only in a person." *Id.*; KANT, *THE PHILOSOPHY OF LAW*, *supra* note 282, at 64 (describing as external objects of the will only corporeal external things, another's free will in the performance of a particular act, and certain status relationships); *see also* Netanel, *supra* note 269, at 374.

291. KANT, *Of the Injustice of Counterfeiting Books*, *supra* note 290, at 45 *{86}.

292. *Id.* ("The [author] takes the book as a writing or a speech . . .").

293. KANT, *THE PHILOSOPHY OF LAW*, *supra* note 282, at 56.

294. *Id.*

295. *See, e.g.*, BGHZ Dec. 1, 1999, 143 BGZH 214 (220) (*Marlene Dietrich I*), translated in MARKESINIS, *COMPARATIVE METHODOLOGY*, *supra* note 230, at 408 (stating that general and specific personality rights insofar as they protect non-material interests are indissolubly bound to the person of the holder of them and, as highly personal rights, are not inalienable); *see also* BEVERLY-SMITH ET AL., *supra* note 226, at 108; Bergmann, *supra* note 37, at 520–21.

296. *See* Netanel, *supra* note 269, at 374–75.

297. *See* PINCKAERS, *supra* note 179, at 242.

298. KUG § 22.

299. Bergmann, *supra* note 37, at 503.

broadly,³⁰⁰ they require that the individual be identifiable by some typically individual feature, generally interpreted as a physical characteristic.³⁰¹ The depicted person must be recognizable, if the person is shown from behind, as long as the viewer may discern typically recognizable features, the individual's right to his or her image may be violated.³⁰² In a case involving an advertisement for a television manufacturer which depicted the back of a famous soccer goalkeeper, the Federal Supreme Court held that the goalkeeper was easily recognizable by his particular stature, posture, and haircut.³⁰³ As long as a particular group of consumers could identify the goalkeeper, the court did not need to find that everyone would for the defendant to be liable under section 22.³⁰⁴

Section 22 would arguably restrict German courts from finding that associative items,³⁰⁵ robots,³⁰⁶ or other such evocations of persona actionable that courts in the United States have held to be violations of the right of publicity.³⁰⁷ However, German courts have

300. KUG § 22 grants individuals the exclusive right to decide to display and distribute their own image ("Bildnis") (literally, "portrait"). See, e.g., OLG Hamburg, Apr. 25, 2003, 2004 Multimedia und Recht [MMR] [Multimedia and Law] 413 (F.R.G.) (*Oliver Kahn*) (holding that section 22 covered the depiction of the German national goalkeeper in a computer game when the character was sufficiently portrayed by typical characteristics of his appearance so that he was recognizable); BGH Nov. 17, 1960, 1961 GRUR 138 (139) (F.R.G.) (*Familie Schölermann*) (finding that the depiction of an actor from a hugely popular television series in television advertisements implicated section 22 because the actor was recognizable in outward appearance); see also BEVERLY-SMITH ET AL., *supra* note 226, at 106 (noting that section 22 has been interpreted to include every type of image, including photographs, motion pictures, statues, and even death masks).

301. See, e.g., BGH June 9, 1965, 1966 GRUR 102 (F.R.G.) (*Spielgefährtin*) [Playmate] (stating that a "portrait" (Bildnis) generally constitutes the depiction of facial features, but that it is sufficient if the depiction portrays an individual in his outward appearance so long as he is identifiable from other individuals).

302. See, e.g., BGH July 2, 1974, 1975 GRUR 561, (F.R.G.) (*Nacktaufnahmen*) [Nude Photos] (holding that a model's right to her image and general personality right was violated when photographs of her naked back were displayed); BGH June 26, 1979, Neue Juristische Wochenschrift [NJW] [Weekly Judicial Reports] 2205 (2205) (F.R.G.) (*Fussballtor*) [Soccer Goal]; see also BEVERLY-SMITH ET AL., *supra* note 226, at 106. Under section 22, for example, it is arguable whether German courts would find a violation of the plaintiff's right in a case like *Motschenbacher*, where the specific features of the driver were unrecognizable, but consumers could have assumed that Motschenbacher was driving the car because other indicia of identity indicated that the car was very similar to Motschenbacher's car. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 822-23 (9th Cir. 1974).

303. NJW 1979, 2205 (2205) (*Fussballtor*).

304. *Id.*

305. See *Motschenbacher*, 498 F.2d at 822-23.

306. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512 (9th Cir. 1993).

307. See *supra* Part I.A.1.

increasingly interpreted section 22 expansively, holding that a double who utilizes the typical costume and gestures of a celebrity, such as the well-known attire and seductive pose of Marlene Dietrich in her famous movie, "The Blue Angel," may infringe section 22.³⁰⁸ In that case, the crucial issue before the court was whether the use of the double led viewers to believe the image actually depicted Marlene Dietrich herself for the use to be actionable under section 22.³⁰⁹ This differs from the Ninth Circuit's reasoning in the *White* case, where there was obviously no question that consumers actually believed the robot was Vanna White, yet the court nonetheless still found a violation of the plaintiff's right of publicity claim based on the robot's evocation of the plaintiff's identity.³¹⁰

Because the scope of section 22 depends on its articulation as a personal right inherent in the individual and is based on individual autonomy,³¹¹ the right to one's image generally implicates immediately personal attributes, usually physical, that typify an individual's outward appearance.³¹² Section 22 thus typically encompasses narrower parameters of identity protection than the expanded associative elements of persona applied by courts in the United States.³¹³ For legal scholars in the United States who have looked to ground the right of publicity on a rationale other than the solely economic, a right based on autonomous self-definition as conceptualized in Germany offers an instructive example as to how such a rearticulation of publicity rights might limit the scope of the doctrine when based on a theory of individual autonomy.

4. Restrictions on the Right: Public Interest

Section 23 provides a significant codified limitation to the right to one's image by codifying exceptions for the public's interest in in-

308. BGH Dec. 1, 1999, 2000 GRUR 715 (717) (F.R.G.) (*Der Blaue Engel*) [The Blue Angel]; BEVERLY-SMITH ET AL., *supra* note 226, at 106.

309. *Id.* The defendant had argued that it was not liable under section 22 because the facial features of the double were clearly visible in the advertisement and because the double was enacting a scene from a film and therefore not infringing the actual persona of Marlene Dietrich. *Id.* at 716. The Federal Supreme Court disagreed. *Id.* As long as the advertisement conveyed the impression through other well-known identifying features that the person was Marlene Dietrich, the court found the defendant liable. *Id.* at 717.

310. *White*, 971 F.2d at 1399.

311. *See supra* Part II.B.2.

312. *See, e.g.*, BGH June 9, 1965, 1966 GRUR 102 (F.R.G.) (*Spielgefährtin*).

313. *See, e.g.*, *White*, 971 F.2d at 1399; *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836-37 (6th Cir. 1983); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 822-23 (9th Cir. 1974).

formation, which may sometimes outweigh the individual's right to autonomous self-definition in the depiction of their identity.³¹⁴

The most important exception provides for pictures from the sphere of contemporary history,³¹⁵ which covers pictures concerning the political, social, economic, sporting, and cultural life of the nation.³¹⁶ Any person linked to a newsworthy event or matters of public interest from the past, present, or future may fall within the exception and be regarded as a "person of contemporary history" (Person der Zeitgeschichte).³¹⁷ The German courts have held that the public interest in information extends to entertainment and gossip,³¹⁸ but have also specifically withheld the defense when a publication violates the

314. Section 23 provides that without the consent required by section 22 the following may be disseminated and exhibited:

1. Portraits belonging to contemporary history;
2. Pictures in which the persons appear only as accessories to a landscape or other locality;
3. Pictures of meetings, processions and similar proceedings in which the persons represented have taken part;
4. Portraits not made to order, in so far as their distribution or exhibition serves some higher interest of art.

KUG § 23(1), available at <http://bundesrecht.juris.de>, translated in COPYRIGHT LAWS AND TREATIES OF THE WORLD (U.N. Educ., Scientific & Cultural Org. et al. eds., 1996–1998); see also BEVERLY-SMITH ET AL., *supra* note 226, at 105; Thomas R. Klötzel, *Germany*, in INTERNATIONAL PRIVACY, PUBLICITY AND PERSONALITY LAWS 167 (M. Henry ed., 2001). Klötzel states that exceptions under section 23 do not apply without limitation. *Id.* at 168. According to Klötzel, "The purpose of section 23(2) is to ensure that the general personality right of the individual will be observed even though the image falls under an exception of section 23(1)." *Id.* Section 23(2) provides: "Such right does not apply to a dissemination or public presentation, if by such means a legitimate interest of the person shown, or, if the person has died, his or her family is violated." KUG § 23(2).

315. KUG § 23(1).

316. Bergmann, *supra* note 37, at 507.

317. *Id.* Two categories of persons fall within the exception: absolute public persons and relative public persons ("absolute und relative Personen der Zeitgeschichte"). *Id.* "Absolute public persons include those permanently bound to contemporary history, such as politicians, members of a royal family, actors, singers, talk show hosts, and athletes." *Id.* "Relative public persons are those linked only to a specific event such as parties involved in an important trial, or participants in a game or talk show." *Id.* at 508. The publication of the likeness of a relative public person falls within the exception only if it has both an actual and recognizable connection to a specific event. *Id.* For example, Marlene Dietrich constitutes an absolute public person. BEVERLY-SMITH ET AL., *supra* note 226, at 108. In a case involving the broadcasting of a newsclip featuring Marlene Dietrich in an advertisement for a newspaper's special edition on fifty years of Germany, the Federal Supreme Court emphasized that the advertisement depicted Marlene Dietrich as an absolute person of contemporary history and did not imply her endorsement to a specific product. BGH May 14, 2002, 151 BGHZ 26 (33) (F.R.G.) (*Marlene Dietrich II*).

318. Rather, the court construed the use of the film clip as supporting the freedom of the press, and therefore contributing to the public interest in information. See BGHZ, 151, 26 (30–31) (*Marlene Dietrich II*); see also BEVERLY-SMITH ET AL., *supra* note 226, at 106.

legitimate interest of the person depicted,³¹⁹ defined as primarily non-pecuniary interests,³²⁰ consistent with the autonomy rationale underlying section 22.³²¹ Generally, German courts construe the defense to exclude advertising from the public interest by determining that using a portrait of a celebrity in advertising primarily serves only the advertiser's interest.³²² Borderline cases, however, require that the courts balance public interest in information with commercial interests.³²³

Two similar cases illustrate how German courts have balanced these interests when cases involve both commercial and informational elements. In the *Ligaspieler* decision,³²⁴ the defendant sold pictures of soccer players on trading cards, sealed in paper bags, without information indicating which specific players' pictures might be contained in the bags.³²⁵ The Federal Supreme Court refused to apply section 23, stating that any purpose the defendant might have in conveying information important to the public was ancillary to the primary goal of exploiting the young consumers' desire to obtain the trading pictures.³²⁶ The Court accordingly held that the soccer players had a legitimate interest in controlling the commercial use of their likenesses

319. BEVERLY-SMITH ET AL., *supra* note 226, at 107. A recent Federal Supreme Court decision in a series of cases concerning photos taken of Caroline of Monaco has limited the public interest to not include information provoking solely curiosity. See BGH Mar. 6, 2007, File No. VI ZR 51/06, at 11–12, *available at* Der Bundesgerichtshof, <http://www.bundesgerichtshof.de>. Some legal commentators see this decision as unduly restricting the freedom of the press to report information involving absolute public persons, thus relativizing the category which should be understood as absolute. See Dietmar Hipp, *Presse Kritisiert Bundesgerichtshof* [The Press Criticizes the Federal Supreme Court] SPIEGEL ONLINE, Mar. 7, 2007, <http://www.spiegel.de/kultur/gesellschaft/0,1518,470503,00.html>; Dietmar Hipp, *die Neue Relativitätstheorie des BGH* [The Federal Supreme Court's New Theory of Relativity], SPIEGEL ONLINE, Mar. 6, 2007, <http://www.spiegel.de/kultur/gesellschaft/0,1518,470271,00.html>.

320. See Christof Krüger, *Right of Privacy, Right of Personality and Commercial Advertising*, 13 IIC 183, 190–91 (1982).

321. See *supra* Part II.B.2.

322. See, e.g., 20 BGHZ 345 (350) (*Paul Dahlke*) (asserting that the exception under section 23 does not apply to the use of a celebrity's portrait for advertising purposes that only serves commercial interests, and not the public's interest in information); see also BEVERLY-SMITH ET AL., *supra* note 226, at 107.

323. See, e.g., Oberlandesgericht Frankfurt [OLG Frankfurt] [Frankfurt Court of Appeals] Jan. 1, 1988, 1989 NJW 402 (403) (F.R.G.) (*Boris Becker*) (holding that the section 23 exception applied to the use of the tennis player's image on the cover of a book concerning individual tennis techniques as a legitimate public interest in weighing the public interest against the commercial use of Boris Becker's likeness); see also BEVERLY-SMITH ET AL., *supra* note 226, at 107.

324. BGH Feb. 20, 1968, 49 BGHZ 288 (F.R.G.) (*Ligaspieler*) [Soccer League Player].

325. *Id.* at 293.

326. *Id.* at 293–94.

and were entitled to benefit from their popularity and their achievements.³²⁷

The *Beckenbauer* decision,³²⁸ by contrast, also involved the picture of the well-known soccer player, Franz Beckenbauer, displayed on the cover page of a soccer calendar,³²⁹ but in that case, the court held that the public interest in the information conveyed by the calendar trumped the plaintiff's commercial interest in the use of the image.³³⁰ In determining that the photograph's main purpose was to convey information, the court emphasized the publication's specific context and the concept of the calendar in its entirety,³³¹ noting that Beckenbauer was captain of the German national team and internationally famous at the time,³³² the publication occurred subsequent to an international soccer event,³³³ and the calendar displayed Beckenbauer as well as other players.³³⁴

The *Beckenbauer* decision exemplifies how autonomy theory might structure the outcome of cases where the commercial use involved does not conflict with the image the individual typically conveys to the public (Beckenbauer was a famous soccer player and the calendar photograph was consistent with his persona)³³⁵ coupled with a strong protection established for the public interest. Decisions such as *Beckenbauer* demonstrate how sensitivity to the nuances involved in these types of cases might yield more balanced decisions when based on an autonomy rationale rather than solely on the commercial appropriation property model used in the United States.

5. Alienability Restrictions: Recent Decisions

Under section 22, "Only the person depicted is, as the holder of the right, . . . entitled to decide whether, when and how [he] wishes to present [him]self to any third party or the public."³³⁶ Although the right to one's image is a personal right, it encompasses economic and moral interests, as a hybrid right akin to copyright, as is shown by the

327. *Id.* at 294; Bergmann, *supra* note 37, at 508–09.

328. BGH Feb. 6, 1979, 1979 NJW 2203 (F.R.G.) (*Fussballspieler/Beckenbauer*).

329. *Id.*; Bergmann, *supra* note 37, at 509.

330. NJW 1979, 2203 (2204) (*Fussballspieler/Beckenbauer*).

331. *Id.*

332. *Id.* at 2203–04.

333. *Id.* at 2203.

334. *Id.*

335. *Id.* at 2203–04.

336. BGH Oct. 14, 1986, 1987 GRUR 128 (F.R.G.) (*Nena*), translated in 19 IIC 269, 271 (1988).

language quoted above.³³⁷ While in the United States, the right of publicity constitutes a freely transferable property right, German courts have traditionally not permitted transfer of ownership of the right to one's image, or any other personality rights on the grounds that all such rights are personal rights.³³⁸ Recent decisions, however, indicate that German courts may be increasingly willing to interpret personality rights to allow for a limited transferability,³³⁹ demonstrating a conceptual shift towards a propertization of the right.

In a case involving the famous German pop singer, Nena,³⁴⁰ the singer had transferred "all the rights necessary for the commercial exploitation of the acoustical and optical aura surrounding Nena" to a merchandising agency.³⁴¹ The agency brought a claim against third party defendants who had offered posters, T-shirts, photographs, stationery, photo toothbrushes, and scarves bearing Nena's likeness without the consent of the merchandising agency.³⁴² The merchandising agency claimed it had the exclusive rights to the commercial exploitation of Nena's likeness and brought an action for compensation.³⁴³ The Federal Supreme Court held in favor of the merchandising agency, stating that:

At issue here is not the right to an injunction order but the right to recover a fee which plaintiff demands for the commercial exploitation of the vocalist Nena's likeness. The decision whether to award this recovery does not require a decision on the controversial question of whether or not the right to one's own likeness, due to its legal nature as a general personality right, is transferable. The defendant's use of Nena's likeness gave rise to the plaintiff's right to recover the usual fee for permission to utilize the likeness which is

337. All personality rights are considered similarly nonalienable since all are personal rights. *See id.* ("[T]he right to one's own likeness is a part or particular aspect of the general personality right. . . . [F]rom the very nature of the right it follows that only the person depicted is, as the holder of the right, entitled to dispose of such likeness"); *see also* Bergmann, *supra* note 37, at 513. As in copyright, a limited license allows for commercial use, but complete transferability of ownership of the right is not allowed. *See* BEVERLY-SMITH ET AL., *supra* note 226, at 133; *see also supra* Part II.B.1.

338. *See* GRUR 1987, 128 (*Nena*), *translated in* 19 IIC at 271; Bergmann, *supra* note 37, at 513.

339. *See* BGHZ Dec. 1, 1999, 143 BGZH 214 (228) (F.R.G.) (*Marlene Dietrich I*), *translated in* MARKESINIS, *COMPARATIVE METHODOLOGY*, *supra* note 230, at 412; BGH May 14, 2002, 151 BGHZ 26 (29) (F.R.G.) (*Marlene Dietrich II*); BEVERLY-SMITH ET AL., *supra* note 226, at 108.

340. GRUR 1987, 128 (*Nena*), *translated in* 19 IIC at 269.

341. *Id.*, *translated in* 19 IIC at 269-70.

342. *Id.*, *translated in* 19 IIC at 270.

343. *Id.*; Bergmann, *supra* note 37, at 513.

based on Sec. 812(1), Civil Code, and does not require that Nena's right in her own likeness had been transferred to the plaintiff.³⁴⁴

German legal scholars have generally interpreted this opinion as supporting the rights of licensees to recover monetary damages.³⁴⁵ This recovery, however, is based on an individual's ability to consent in advance to the use of personality in exchange for a fee, which then in practice allows the person to grant licenses to others.³⁴⁶ Courts have not clarified, however, what effects such licenses might have and which rights would vest in a license.³⁴⁷ However, in a decision following the *Nena*³⁴⁸ case, the Federal Supreme Court further supported the transferability of the economic aspects of general personality rights by holding that these aspects of personality rights are descendible.³⁴⁹

In a case involving the use of Marlene Dietrich's picture on memorabilia such as T-shirts, mugs, and telephone cards, the Federal Supreme Court held that the daughter of the late actress could obtain an injunction and damages against the producer of a musical who had sold the various items of merchandising, and also granted a car manufacturer the right to produce a special model named "Marlene."³⁵⁰ In its decision, the Court offered a detailed explanation of the two aspects of the personality right as protecting not only personal, but also economic interests.³⁵¹

The Bundesgerichtshof has always included the commercial interests in the personality within the protection guaranteed by the personality rights. The personality rights should accordingly protect

344. *Id.*, translated in 19 IIC at 271.

345. *See, e.g.*, Bergmann, *supra* note 37, at 513–14. This interpretation is in line with German copyright doctrine where a limited license allows for the commercial exploitation of the work, but transferability of ownership is not allowed. *See* PINCKAERS, *supra* note 179, at 244.

346. Bergmann, *supra* note 37, at 513.

347. *See* GRUR 1987, 128–29 (*Nena*), translated in 19 IIC at 271–72; BGHZ Dec. 1, 1999, 143 BGZH 214 (220–21) (F.R.G.) (*Marlene Dietrich I*), translated in MARKESINIS, COMPARATIVE METHODOLOGY, *supra* note 230, at 408–09; *see also* BEVERLY-SMITH ET AL., *supra* note 226, at 130; Bergmann, *supra* note 37, at 513.

348. GRUR 1987, 128 (*Nena*), translated in 19 IIC at 271.

349. BGHZ 143, 214 (220, 223–32) (*Marlene Dietrich I*), translated in MARKESINIS, COMPARATIVE METHODOLOGY, *supra* note 230, at 408, 410–15.

350. *Id.*, translated in MARKESINIS, COMPARATIVE METHODOLOGY, *supra* note 230, at 401–02; *see also* BEVERLY-SMITH ET AL., *supra* note 226, at 104. The Federal Court of Justice in *Marlene Dietrich I* specifically stated that the *Nena* decision (as well as others) had intimated the extent to which economic aspects of personality rights might be considered transferable. BGHZ, 143, 214 (221) (*Marlene Dietrich I*), translated in MARKESINIS, COMPARATIVE METHODOLOGY, *supra* note 230, at 408.

351. BGHZ 143, 214 (217–228) (*Marlene Dietrich I*), translated in MARKESINIS, COMPARATIVE METHODOLOGY, *supra* note 230, at 404–15.

the right of free decision, belonging only to the person entitled, on the question of whether and under what conditions his picture or his name—and the same applies for other characteristic features of the personality—is used for the business interests of third parties.³⁵²

In determining that Marlene Dietrich's daughter had standing to bring a claim, the Court held that personality rights, insofar as they protected economic interests, were descendible.³⁵³ Heirs of a deceased individual inherit the personality right to the extent that they are entitled to grant licenses and to claim damages for unauthorized use.³⁵⁴ Justifying its decision, the Court emphasized that the increasing expansion of the technological capabilities for image and sound reproduction and dissemination made economic exploitation of identity more probable for advertising purposes.³⁵⁵ The Court thus stated that an effective posthumous protection of the elements of the right of personality that are of financial value required that the heir become the holder of the right of personality,³⁵⁶ and in defending the presumed interests of the deceased, proceed in the same way as that person could have done against an authorized exploitation.³⁵⁷

In this way, the Court viewed the right of personality as being strengthened, rather than weakened, by the recognition that an independent inheritable element of the right of personality which has financial value entitles the heir to acquire his or her own defensive rights and compensation for harm.³⁵⁸ The Court pointed out, however, that the rights of the heir derive from the owner of the personality right and cannot be used in a manner contrary to his or her

352. *Id.* at 220, translated in MARKESINIS, *COMPARATIVE METHODOLOGY*, *supra* note 230, at 408.

Insofar as the rights of personality protect non-material interests, they are indissolubly bound to the person of the holder of them and, as highly personal rights, are not renounceable and are inalienable, and are therefore not transferable and not inheritable No-one can relinquish his right to his own picture, his right to his name or another personality right completely and conclusively. This would contradict the guarantee of human dignity [Article 1 of the Basic Law] and of the right to self-determination [Article 2 of the Basic Law; other references omitted].

Id.

353. *Id.* at 228–32, translated in MARKESINIS, *COMPARATIVE METHODOLOGY*, *supra* note 230, at 409, 412–15.

354. *Id.* at 228–29, translated in MARKESINIS, *COMPARATIVE METHODOLOGY*, *supra* note 230, at 412–13.

355. *Id.* at 222–23, translated in MARKESINIS, *COMPARATIVE METHODOLOGY*, *supra* note 230, at 409–10.

356. *Id.* at 223, translated in MARKESINIS, *COMPARATIVE METHODOLOGY*, *supra* note 230, at 410.

357. *Id.*

358. *Id.*

presumed wishes.³⁵⁹ “The heir is only allowed to use the opportunities for marketing which exist or continue after the death on taking the deceased’s will into account.”³⁶⁰ In this case, the Court found that the measures taken by Marlene Dietrich’s daughter were unquestionably in the interest of her deceased mother.³⁶¹

These two recent decisions suggest the extent to which the German courts are willing to consider a limited transfer of the rights of personality. In particular, the *Marlene Dietrich*³⁶² decision shows that in allowing a limited transfer of the right, the Federal Supreme Court resorted to labor theory justifications similar to those employed by courts in the United States.³⁶³ The Court noted that individuals contribute to the value of their persona through special achievements.³⁶⁴ This relaxation of the restrictions on the alienability of personality rights pleases critics who argue that Germany should follow the United States and provide for similarly-conceptualized publicity rights.³⁶⁵

The fact remains, however, that the thrust of the Court’s argument in favor of allowing limited transferability of financial elements of a personality claim remained embedded in the Court’s focus on the individual’s right to determine the presentation of their image to the public.³⁶⁶ This emphasis in turn rests on an overall view of general personality rights as based on the individual’s autonomous right to self-definition, the fundamental freedom each individual possesses to determine which use of his personality to permit or prohibit.

359. *Id.* at 226, translated in MARKESINIS, *COMPARATIVE METHODOLOGY*, *supra* note 230, at 411.

360. *Id.*

361. *Id.*

362. BGH Dec. 1, 1999, 143 BGHZ 214 (F.R.G.) (*Marlene Dietrich I*).

363. *Id.* at 219, translated in MARKESINIS, *COMPARATIVE METHODOLOGY*, *supra* note 230, at 407.

364. *Id.*

365. See, e.g., Klink, *supra* note 10, at 381. Klink interprets this decision as a clear indicator that the personality right in Germany has fallen short of satisfactorily dealing with the exploitation of identity. *Id.* He views as doubtful whether a personality right can be stretched far enough to keep up with a fully-fledged publicity right. *Id.* “The price of stretching the human right of personality further towards a publicity right might be dilution of the first and confusion about the second. At the end of this road stands a weaker personality right and an ineffective sort of personality-publicity right.” *Id.*

366. BGHZ 143, 214 (226–27) (*Marlene Dietrich I*), translated in MARKESINIS, *COMPARATIVE METHODOLOGY*, *supra* note 230, at 412.

III. Conclusion

While many scholars of publicity and personality rights have regarded the United States as “at the forefront of nations regarding the development and implementation of a legal doctrine, the right of publicity,”³⁶⁷ few have analyzed how publicity rights in the United States might profit from a comparative approach.³⁶⁸ The recent rearticulation of publicity rights grounded in autonomy theory, however, suggests that the right of publicity would benefit from a closer look at its German counterpart. First, because German personality rights are personal rights, their application remains typically restricted to features inherent in the individual.³⁶⁹ This restriction acts to constrain overly-expansive evocations of identity that critics of publicity rights have found troubling in the United States.³⁷⁰ The narrower scope of German personality rights thus helps limit potential infringement upon protected speech. Moreover, because German courts envision personality rights as hybrids, the rights protect both economic and personal interests,³⁷¹ and do not require an artificial dichotomous approach to the harm experienced by the individual whose fundamental right to control the use of persona has been infringed.³⁷²

Second, German personality rights contain a broad codified restriction that provides explicit exceptions from liability for use of images concerning the sphere of contemporary history.³⁷³ German courts broadly construe this exception to include commercial use for purposes of merchandising and carefully scrutinize the interests impli-

367. Kwall, *supra* note 8, at 152.

368. *See, e.g.*, Grant, *supra* note 8, at 562 (acknowledging a new internationally-recognized right of publicity should embrace both the traditional American economic rationales for the right, based on the commercial value of the persona, and the social values of the right which derive from the idea of personal autonomy and moral rights).

369. *See supra* Part II.B.3.

370. *See, e.g.*, White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1399 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512 (9th Cir. 1993); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 836–37 (6th Cir. 1983); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 822–23 (9th Cir. 1974). *See generally supra* Parts I.A.2, I.C.3.

371. *See supra* Parts II.B.1, II.B.2.

372. *See* Goodenough, *supra* note 1, at 55 (describing the difficulty in distinguishing “personal” harm and interests on the one hand, and “commercial” harm and interests on the other in the subjective experience of the plaintiff and the irrelevance of the distinction except as a result of doctrinal development between privacy and publicity rights in the United States).

373. *See supra* Part II.B.4. McCarthy notes that some courts and commentators in the United States have suggested that the right of publicity should also directly integrate First Amendment values into the cause of infringement of the right of publicity. *See* 2 MCCARTHY, *supra* note 9, § 8:35.

cated when balancing the public's interest in information against commercial protection.³⁷⁴ In the United States, however, the rhetorical force of the intellectual property label that underlies the right of publicity has often blinded the courts to this delicate balance and provoked the right's expansion, allowing commercial use to trump other interests, including those of the First Amendment.³⁷⁵

Third, recent developments in German personality law demonstrate the inevitability and necessity of a limited form of property in persona required by modern commercial markets.³⁷⁶ However, as the Federal Supreme Court has established, a limited form of a hybrid personal and property right, when grounded in individual autonomy, can provide a coherent structure for an identity right incorporating both moral and commercial interests.³⁷⁷ This framing of the right thus allows for limited transferability, the purpose for which the right in the United States was originally created.³⁷⁸ The German model of personality rights, structured by a Kantian notion of individual autonomy, indicates how publicity rights may function as a *sui generis* property right, incorporating a "mixture of personal rights, property rights, and rights under the law of unfair competition."³⁷⁹

The right of publicity arose in the United States as a response to functionalist concerns on the part of judges who saw the need for a limited form of assignability to accommodate existing business practices.³⁸⁰ Since its original functionalist inception in the United States, however, courts have afforded the right of publicity the attributes of intellectual property even as the traditional intellectual property rationales supporting the right's validity have been roundly criticized.³⁸¹

374. See *supra* Parts II.B.4, II.B.5.

375. See generally *supra* Part I.A.2.

376. BGH Oct. 14, 1986, 1987 GRUR 128 (F.R.G.) (Nena), translated in 19 IIC 269, 269 (1988); BGHZ Dec. 1, 1999, 143 BGHZ 214 (220–21) (F.R.G.) (*Marlene Dietrich I*), translated in MARKESINIS, *COMPARATIVE METHODOLOGY*, *supra* note 230, at 401; see Biene, *supra* note 254, at 517 (observing that the German Federal Supreme Court in the *Marlene Dietrich* decision "consciously took a step forward in order to move towards greater convergence with the international state of affairs in personality protection and marketing" (citation omitted)). Biene reiterates that some German commentators now consider that further developments will be similar to those in the United States. *Id.*

377. See PINCKAERS, *supra* note 179, at 245 (stating that personal autonomy justification can justify the protection of both commercial and personality interests).

378. See Westfall & Landau, *supra* note 28, at 76–79 (asserting that the right of publicity emerged from a functionalist concern to allow the right to be alienable via assignment or license); see also McCARTHY, *supra* note 9, §§ 1:26–27.

379. McCARTHY, *supra* note 9, § 1:7.

380. See Westfall & Landau, *supra* note 28, at 76–79, 122–23.

381. See *supra* Parts I.B, I.C.

The German model of personality rights demonstrates how a coherent rationale based on individual autonomy curtails the right's expansive tendencies while providing an impetus for stronger protections for the free dissemination of information. In considering the relevance of German personality rights to the United States publicity right, legal scholars advocating a rearticulation of the right based on an autonomy rationale should find both support for the plausibility of their claims as well as a potentially instructive example of how such a right should be structured.