

**SQUEEZING THE JUICE:
THE FAILED ATTEMPT TO ACQUIRE O.J. SIMPSON’S RIGHT
OF PUBLICITY, AND WHY IT SHOULD HAVE SUCCEEDED**

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INTRODUCTION

The Simpson trial, the most televised trial in history, has been dubbed by many as the “Trial of the Century.”¹ When Orenthal James (“O.J.”) Simpson, member of the NFL Hall of Fame, was put on trial for the murder of his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman, he received more media attention than he had received during his entire illustrious football career.² In 2006, the infamous star of one of the most-watched murder trials of the century once again made headlines when he announced his plans to release a book titled *If I Did It, This Is How It Happened*.³ The book was to describe “hypothetically” how the murders of Nicole Brown Simpson and Ronald Goldman were committed.⁴ O.J. Simpson’s publisher, Judith Regan, touted the book as his confession.⁵ Though a subsequent deluge of public disapproval led to the cancellation of the book’s release,⁶ and though the Goldman family was subsequently assigned the rights in the book,⁷ O.J. Simpson had allegedly already received an advance payment of up to \$1 million from the publisher, which he reportedly routed through a shell corporation⁸ to keep the court from attaching it to the \$33.5 million judgment that he owed the Brown and Goldman families,⁹ an outstanding debt that Simpson

¹ The twentieth century, that is. See ‘Not Guilty’: “Trial of the Century” Ends With Simpson’s Acquittal, CNN.COM, Oct. 3, 1995, <http://www.cnn.com/US/OJ/daily/9510/10-03/index.html>.

² See Thomas L. Jones, *The O.J. Simpson Trial: Prologue*, CRIMELIBRARY.COM, http://www.crimelibrary.com/notorious_murders/famous/simpson/index_1.html (last visited Sept. 25, 2007) (describing the extent of the media coverage).

³ See *Publisher Dubs O.J. Simpson Chat a ‘Confession’; Victims’ Families Lash Out*, FOXNEWS.COM, Nov. 16, 2006, <http://www.foxnews.com/story/0,2933,229907,00.html>.

⁴ *Id.*

⁵ *Id.*

⁶ See *News Corp. Cancels O.J. Simpson Book and TV Special*, FOXNEWS.COM, Nov. 21, 2006, <http://www.foxnews.com/story/0,2933,230838,00.html>.

⁷ See Jane Sutton, *Goldman Family Gets Rights to O.J. Simpson Book*, REUTERS.COM, July 30, 2007, <http://www.reuters.com/article/entertainmentNews/idUSPAR10010320070731>.

⁸ See *id.*

⁹ *Rufo v. Simpson*, 103 Cal. Rptr. 2d 492 (Cal. Ct. App. 2001). In the civil trial for wrongful death that followed the criminal trial for murder, a jury awarded Sharon Rufo and Frederic Goldman, Ron Goldman’s parents, \$8.5 million in compensatory damages and, as the executors of his estate, \$12.5 million in punitive damages. Louis H. Brown, as executor of Nicole Simpson’s estate, was awarded \$12.5 million in punitive damages as well. See *id.*

had publicly vowed never to pay.¹⁰

The *If I Did It, This Is How It Happened* drama marked Simpson's return to the front pages for the first time since his highly-publicized murder trial. What those front page stories generally failed to mention was that this drama would have been impossible had Simpson not emerged victorious from yet another courtroom just a few days before the announcement of his book deal.¹¹ Had Simpson lost that courtroom battle, he would not only have been prevented from profiting from his book, but would also have potentially had to give the right to use his fame (or notoriety) to promote future profitable ventures to those who harbor the most ill will towards him.¹²

On September 5, 2006, Frederic Goldman, the late Ronald Goldman's father and the co-beneficiary of the purportedly unpaid civil judgment against O.J. Simpson, filed a motion in the Los Angeles Superior Court requesting that the court assign and transfer Simpson's right of publicity to Frederic Goldman to satisfy the unpaid civil judgment that Simpson owed Goldman.¹³ This marked the first attempt ever made to have a court assign a person's right of publicity in satisfaction of a judgment.¹⁴ It was a calculated gamble: over the past few decades, responding to pressure from celebrities seeking to protect their sources of income, courts and legislatures throughout the country declared that the right to profit from one's publicity was a transferable, inheritable property right.¹⁵ As some noted scholars have argued,

¹⁰ *O.J. Simpson Makes Rare Public Appearance*, MSNBC.COM, Oct. 1, 2005, <http://www.msnbc.msn.com/id/9546656/>. In the meantime, Simpson has been living on a \$4.1 million football pension in a mansion in Florida, neither of which (the pension nor the mansion) is reachable by the courts. See *Rufo*, 103 Cal. Rptr. 2d at 529.

¹¹ I refer specifically to the California Superior Court of West L.A. County. *Goldman v. Simpson*, No. SC036340 (Cal. Super. Ct. W. L.A. Cty. Oct. 31, 2006).

¹² To the Goldman family, that is. Fred Goldman, Ronald Goldman's father and the executor of his estate, vowed to pursue Simpson to his grave. See *Goldman Vows to Keep Shadowing Simpson*, LAS VEGAS REVIEW-JOURNAL, Nov. 18, 2007, <http://www.lvrj.com/news/11544636.html>. So far, Goldman has made good on his vow: over the past few years, he has gone to court numerous times in attempts to deprive Simpson of any item of value in his possession, from a Rolex watch later discovered to be a cheap knockoff, through royalties from B movies he appeared in, to profits from the use of his likeness in a video game. See *id.*, *O.J. Simpson Ordered to Pay Video Game Money to Goldman Family*, FOXNEWS.COM, Aug. 8, 2007, <http://www.foxnews.com/story/0,2933,292533,00.html>.

¹³ Notice of Motion and Motion by Plaintiff Frederic Goldman for Order Transferring and Assigning Right of Publicity of Defendant and Judgment Debtor Orenthal James Simpson, *Goldman v. Simpson*, No. SC036340 (Cal. Super. Ct. W. L.A. Cty. Oct. 17, 2006) [hereinafter "Motion for Transfer and Assignment of Right of Publicity"].

¹⁴ *Goldmans Seek Control of O.J. Simpson's Right to Publicity*, CNN.COM, Sept. 6, 2006, <http://www.cnn.com/2006/LAW/09/05/oj.simpson/index.html>.

¹⁵ Fred M. Weiler, *The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT. L.J. 223, 228 (1994) (The development of publicity protection as a legal mechanism distinct from privacy theory was no historical accident. Rather, as the cult of celebrity arose during the twentieth century, invasion of privacy

there seemed to be little reason why this property, just like any other, should not be reachable by one's creditors.¹⁶ Goldman, relying on this line of legislation, case law, and commentary, argued that Simpson held a very valuable piece of property that could—and should—be used to satisfy his debt.¹⁷

On October 31, 2006, Superior Court Judge Linda K. Lefkowitz denied the motion to transfer Simpson's right of publicity, relying on a 27-year-old California Supreme Court decision that had arguably since been overruled by legislation, as well as common business practices.¹⁸ Judge Lefkowitz's decision, which she acknowledged would "undoubtedly be subject to perceptions of equity that appeal to the contrary outcome,"¹⁹ was a seeming backlash to a national trend towards celebrity commodification.²⁰ Though she could have denied the motion on narrower grounds, Judge Lefkowitz made a sweeping decision that ties the right of publicity back to its roots in the dignitary right of privacy.²¹

Judge Lefkowitz's decision is actually in line with what courts had already been doing: regardless of whether they called what they were protecting the "right of publicity," the "right of privacy," or something entirely different, courts have been recognizing and protecting not one but two important and coexisting interests held by celebrities: a proprietary right to the fruits of their labor, and a dignitary right to control the association of their image with commercial ventures.²² However, what Judge Lefkowitz failed to realize, and what this Note argues, is that these two interests may be, and— for the sake of both equity and order— should be,

proved inadequate as a basis for protecting famous persons from misuses of their names or likenesses").

¹⁶ Most notably, Melissa Jacoby and Diane Zimmerman. See Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322 (2002).

¹⁷ Motion for Transfer and Assignment of Right of Publicity, *supra* note 13.

¹⁸ Goldman v. Simpson, No. SC036340 (Cal. Super. Ct. W. L.A. Cty. Oct. 31, 2006) (relying on *Lugosi v. Universal Pictures*, 603 P.2d 425, 427-28 (1979)).

¹⁹ *Id.* at 12.

²⁰ Such as Muhammad Ali's securitization and sale of 80% of his right of publicity. See *CKX Partners with Muhammad Ali*, THE OFFICIAL MUHAMMAD ALI WEBSITE, Apr. 11, 2006, <http://www.ali.com/news/default.asp?newsId=15>.

²¹ J. THOMAS MCCARTHY, 1 RIGHTS OF PUBLICITY AND PRIVACY § 1:7 (2d ed. 2005) ("the right to control the commercial use of one's identity first historically developed within the domain of 'privacy' law, focusing upon the indignity and mental trauma incurred when one's identity was widely disseminated in an unpermitted commercial use"); Weiler, *supra* note 15 ("The right of publicity originated as part of the right to privacy, the right 'to be let alone'").

²² See *id.* § 4:21 ("Given a proper set of provable facts, there is no inconsistency in joining together in one lawsuit claims for both invasion of privacy (injury to dignity and feelings) and infringement of the right of publicity (injury to the commercial value of human identity). While both claims flow from defendant's unpermitted commercial use, they measure different types of injury, one to 'person,' the other to 'property'").

severed into two separate rights: an inalienable personal right, unreachable by a civil court, and a transferrable property right that may be attached to satisfy a money judgment. By doing so, Judge Lefkowitz could have provided Goldman with some relief, while protecting every dignitary right to which Simpson remained entitled.

In this Note, I argue for the recognition of two separate rights: an assignable proprietary right to publicity profits and a personal dignitary right to publicity control. I contend that such a division is both conceptually sound and would best balance the rights and interests of the celebrity and the celebrity's creditors.

Section I of this Note provides an overview of the evolution of the publicity right as a quasi-property right. It examines its development both in the courtrooms and in the academic arena and demonstrates that, from its inception, the label "right of publicity" has been applied to describe two different rights, each having different characteristics and protecting different interests.

Section II discusses the *Goldman v. Simpson*²³ right of publicity case. This section will describe and summarize the case's procedural history, the relevant California law,²⁴ Goldman's argument, and the court's holding and reasoning.

Section III analyzes the *Goldman v. Simpson*²⁵ decision, arguing that Judge Lefkowitz was correct in viewing the right of publicity as a right that protected both proprietary and dignitary interests, but that she was mistaken in using this as a reason to deny Goldman any relief. This section further argues that it is entirely possible to separate the proprietary right to publicity profits from the personal right to control commercial uses of one's publicity, giving the celebrity's creditors relief by assigning the former to them, while still protecting a celebrity's rights in the latter.

I. A PICTURE IS WORTH A THOUSAND DOLLARS: THE CONVOLUTED DEVELOPMENT OF THE RIGHT OF PUBLICITY

This much can be stated with a fair amount of certainty: the right of publicity is "the inherent right of every human being to control the commercial use of his or her identity. . . ."²⁶ Most

²³ *Goldman v. Simpson*, No. SC036340 (Cal. Super. Ct. W. L.A. Cty. Oct. 31, 2006).

²⁴ It should be noted that Simpson asked that the case should be determined under Florida law, the law of his state of domicile, and that both parties argued their cases under both California and Florida laws. Because the court ultimately considered the parties' claims solely under California law, *see id.*, and because California right of publicity law is considerably better developed than Florida law in this area, this Note focuses only on the former.

²⁵ *Goldman v. Simpson*, No. SC036340 (Cal. Super. Ct. W. L.A. Cty. Oct. 31, 2006).

²⁶ 1 MCCARTHY, *supra* note 21, § 1:3 ("The 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

states recognize the right, and consider it to be in the nature of property.²⁷ This is where things become vague: though the right is recognized throughout most of the U.S., few courts have actually analyzed what the right actually encompasses, what the fact that it is “in the nature of property” means, and how it interacts with the possessor’s dignitary rights, most notably, the right of privacy.²⁸ J. Thomas McCarthy, author of an authoritative treatise on the right of publicity, was so frustrated by the difficulties inherent in trying to fit the right’s protections into one of the traditional “privacy” and “property” pigeonholes that he suggested that “a ‘legal czar’ should have decreed a new label altogether.”²⁹ Treatises such as McCarthy’s should be consulted for a true understanding of the right’s convoluted past, the policy reasons behind it, and the current state of national law.³⁰ Nevertheless, a short overview is appropriate to understand how the same right could be protected by courts and legislatures throughout the country for fifty years, without any kind of consensus about what the right really protects.

A. *Warren and Brandeis’s Right of Privacy: A Personal Right of Publicity*

Courts and scholars first recognized a right to control one’s publicity when they adopted the right to privacy advocated by Justices Samuel D. Warren and Louis D. Brandeis in their influential 1890 article.³¹ Specifically, they advocated the right to be free from the indignity and mental damage caused by wide dissemination of one’s identity for profit.³² Georgia became the first state to incorporate the right into its common law in 1905, in the case of *Pavesich v. New England Life Insurance Co.*³³ The case involved a man whose picture, accompanied by a fictional testimonial, was used in an advertisement for a life insurance company.³⁴ The man claimed that the advertisement made him the butt of his friend’s jokes.³⁵ The court declared that it recognized a right to privacy and “that the publication of one’s

identity and persona and recover in court damages and the commercial value of an unpermitted taking.”)

²⁷ *Id.* § 6:3 (“[A]t the time of this writing, under either statute or common law, the right of publicity is recognized as the law of twenty-eight states. . . . In only two states has a court expressly rejected the concept and held that a common law right of publicity does not exist in that state.”).

²⁸ See 1 MCCARTHY § 1:7 (stating that “many judges and lawyers today are perplexed as to exactly what the ‘right of publicity’ is and how it is different from ‘privacy’”).

²⁹ *Id.* § 1:6.

³⁰ See *id.*

³¹ See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

³² *Id.* See 1 MCCARTHY, *supra* note 21, § 1:7; Weiler, *supra* note 15, at 227.

³³ 50 S.E. 68 (Ga. 1905).

³⁴ See *id.* at 81.

³⁵ See *id.*

picture without his consent by another as an advertisement, for the mere purpose of increasingly [sic] the profits and gains of the advertiser, is an invasion of this right.”³⁶ The *Pavesich* court declared that the violation of the plaintiff’s right of privacy was a tort, for which damages could be assessed for “wounded feelings.”³⁷ Subsequent courts, in following *Pavesich*, affirmed that the right was personal, as opposed to proprietary, and carried with it damages exclusively for mental anguish.³⁸ Plaintiffs were limited to damages that they could prove they had suffered, rather than the economic benefit derived by the defendant.³⁹

The common law right of publicity was squarely aimed at protecting the rights of private individuals.⁴⁰ Celebrities could find little recourse under the right to privacy, since it was believed that a celebrity, far from seeking to be left alone, sought to be placed in the public eye.⁴¹ As such, plaintiffs were generally deemed to have waived their right to assert most traditional invasion of privacy claims by virtue of already having implicitly consented to the type of behavior they were now seeking to bar.⁴²

A public interest in protecting the unique rights of public figures— namely, these figures’ *financial* interests in profiting from their publicity— first arose only in the early twentieth century.⁴³ With the rise of the celebrity as a popular culture icon, an increasing percentage of a particular celebrity’s earning potential derived from commercial uses of his or her popularity.⁴⁴ Celebrities and public figures demanded an equitable means to protect their livelihood by preventing unauthorized profiteering from the use of their names and likenesses.⁴⁵

One line of reasoning, accepted in some early cases, suggested that the right of publicity was akin to a sort of “natural copyright”— that a person’s name and likeness was that person’s property.⁴⁶ What this approach lacked was a method by which

³⁶ *Id.*

³⁷ *Id.* at 73.

³⁸ *See, e.g.,* Eick v. Perk Dog Food Co., 106 N.E.2d 742, 745 (Ill. App. Ct. 1952).

³⁹ Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn From Trademark Law*, 58 STAN. L. REV. 1161, 1171 (2006).

⁴⁰ *See* 1 MCCARTHY, *supra* note 21, § 1:7; Dogan & Lemley, *supra* note 39, at 1171.

⁴¹ *See* 1 MCCARTHY, *supra* note 21, § 1:7; Dogan & Lemley, *supra* note 39, at 1171.

⁴² *Cf. Pavesich v. New Eng. Life Ins. Co.*, *supra* note 20, at 72 (recognizing that a person may explicitly or implicitly waive the right of privacy by stating that “any person who engages in any pursuit . . . which calls for the approval or patronage of the public submits his private life to examination by those to whom he addresses his call . . .”). *See also* 1 MCCARTHY, *supra* note 21, § 1:7; David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 76 (2005).

⁴³ *See* Weiler, *supra* note 15, at 229.

⁴⁴ *See id.*

⁴⁵ *See* Westfall & Landau, *supra* note 42, at 76.

⁴⁶ *See id.*; *see, e.g.,* Edison v. Edison Polyform & Mfg. Co., 67 A. 392 (N.J. Ch. 1907)

celebrities could assign or license their right of publicity to others; as a personal right, such a right was considered inalienable.⁴⁷ As celebrity endorsements became a popular trend in the 1930s and 1940s, courts increasingly faced the need to either protect or delegitimize an increasingly common social reality that treated publicity as a transferrable, marketable asset.⁴⁸

B. *Haelan: First Judicial Recognition of an Assignable Right*

In the landmark case, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, the Second Circuit coined the term “right of publicity” and became the first court in the country to declare that a person’s publicity was a negotiable commodity, alienable by assignment or license.⁴⁹ *Haelan Laboratories, Inc.*, a baseball trading card manufacturer, made an exclusive contract with a number of professional baseball players to use the players’ photographs on its cards.⁵⁰ When *Topps Chewing Gum, Inc.*, a rival baseball card manufacturer, started using those same players’ images on its own cards, *Haelan* sued the rival company.⁵¹ In response, *Topps* claimed that, since the right to publicity was part of the right to privacy, it was an inalienable personal right, which the players could not transfer in the first place; they could, at most, contract to waive their right to sue for invasion of privacy.⁵²

The Second Circuit rejected *Topps*’s reasoning and held that the right to publicity existed as a right separate from and independent of the traditional right of privacy.⁵³ Judge Frank, writing for the majority, reasoned that

in addition to and independent of [a] right of privacy . . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made ‘in gross,’ i.e., without an accompanying transfer of a business or of anything else.⁵⁴

Judge Frank’s approach was decidedly equitable: he recognized the functional need for such a right, since “many prominent persons[,] . . . far from having their feelings bruised through public exposure of their likenesses, would feel sorely

(restraining a company from using Thomas Edison’s name to promote a product under this theory).

⁴⁷ Weiler, *supra* note 15, at 229.

⁴⁸ *Id.*

⁴⁹ 202 F.2d 866, 868 (2d Cir. 1953) (“This right might be called a ‘right of publicity.’”).

⁵⁰ *See id.* at 867.

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See id.* at 868.

⁵⁴ *Id.*

deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.”⁵⁵ However, the Judge intentionally stopped short of calling the right that he was creating a “property right,” stating that “[w]hether it be labelled a ‘property’ right is immaterial; for here, as often elsewhere, the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth.”⁵⁶ Judge Frank insisted that the court was merely creating an assignable right, not one necessarily imbued with the characteristics and derivatives of a property right, whatever those characteristics may have been.⁵⁷ Thus, *Haelan* marked the first judicial recognition of something that had become, by that point, a prevalent practice in the entertainment industry: the entitlement of public figures to assign and transfer the right to use their personal image and likeness.⁵⁸

C. Post-*Haelan*: Privacy versus Property

Apparently, the few courts that addressed the issue in *Haelan*'s wake were comfortable adopting Judge Frank's functionalist view of the right, since none found it necessary to further define the precise category of law to which it belonged.⁵⁹

⁵⁵ *Id.*

⁵⁶ *Id.* Though, arguably, by declaring that the right is both pecuniary and separate from the celebrity as a person, Judge Frank is in fact declaring it a property right—at least according to the most commonly-used definition of property:

In its widest sense, property includes all a person's legal rights, of whatever description. A man's property is all that is *his in law*. This usage, however, is obsolete at the present day, though it is common enough in the older books. . . . In a second and narrower sense, property includes not all a person's rights, but only his proprietary as opposed to his personal rights. The former constitute his estate or property, while the latter constitute his status or personal condition. In this sense a man's land, chattels, shares, and the debts due to him are his property; but not his life or liberty or reputation. . . . *In a third application, which is that adopted [here], the term includes not even all proprietary rights, but only those which are both proprietary and in rem. The law of property is the law of proprietary rights in rem, the law of proprietary rights in personam being distinguished from it as the law of obligations.* According to this usage a freehold or leasehold estate in land, or a patent or copyright, is property; but a debt or the benefit of a contract is not. . . . Finally, in the narrowest use of the term, it includes nothing more than corporeal property—that is to say, the right of ownership in a material object, or that object itself.

BLACK'S LAW DICTIONARY (property) (8th ed. 2004) (quoting JOHN SALMOND, JURISPRUDENCE 423-24 (Glanville L. Williams ed., 10th ed. 1947)) (emphasis added) (omissions in the original).

⁵⁷ See *id.*; see also Westfall & Landau, *supra* note 42, at 78-79.

⁵⁸ See Westfall & Landau, *supra* note 42, at 78.

⁵⁹ See *id.* at 76-80; see, e.g., *Miller v. Comm'r*, 299 F.2d 706, 709 n.4 (2d Cir. 1962) (holding that a publicity rights license, given by a famous band leader's widow to a movie product company, did not constitute a transfer of a capital asset for income tax purposes). The *Miller* court noted that *Haelan* “carefully avoided terming it a ‘property right,’ no doubt in order to avoid unintended consequences which might follow from such classification.” *Id.* at 709 n.4. Melissa Jacoby and Diane Zimmerman suggest that, in most

However, the academic community, while also quick to adopt the new right, was clearly ill at ease with the right's amorphous status and attempted to categorize the right more precisely.⁶⁰ The result was a scholarly battleground, where those who favored the property label clearly outnumbered— if not outmatched—those on the side of preserving the privacy tag.⁶¹

In an influential 1954 article, Melville Nimmer insisted that the Lockean labor-desert justification for property rights, or the view commonly accepted in Anglo-American society that one should have a property right to the fruits of one's labor, *mandated* viewing the right of publicity as a property right, with all its inherent traits.⁶² Other influential commentators were quick to follow in Nimmer's footsteps.⁶³ Thus, while courts remained wary of imbuing the right of publicity with more property-based characteristics, commentators were making a powerful push towards acceptance of the right of publicity as an independent and completely intangible property right.⁶⁴

On the other hand, in an article published in 1964, Edward J. Bloustein wrote that

[n]o man wants to be "used" by another against his will, and it is for this reason that commercial use of a personal photograph is obnoxious. Use of a photograph for trade purposes turns a man into a commodity and makes him serve the economic needs and interest of others. In a community at all sensitive to the commercialization of human values, it is degrading to thus make a man part of commerce against his will. . . .

. . . .

Thus, there is really no "right to publicity"; there is only a right, under some circumstances, to command a commercial price for abandoning privacy.⁶⁵

states, the lack of a specific label is simply the result of sparse case law, stating that "[t]he majority of states simply never have had occasion to address the distinction between publicity and privacy rights." Jacoby & Zimmerman, *supra* note 16, at 1335.

⁶⁰ See Westfall & Landau, *supra* note 42, at 80.

⁶¹ *Id.*

⁶² Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954). See also Westfall & Landau, *supra* note 42, at 82; Weiler, *supra* note 15, at 241.

⁶³ Harold Gordon, for instance, advocated attaching a property tag to the right as a necessary means of "furnishing a firm basis for distinguishing between claims which have a solid pecuniary worth and those involving injured feelings." Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553, 607 (1960).

⁶⁴ Westfall & Landau, *supra* note 42, at 83.

⁶⁵ Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 988-89 (1964).

D. *Prosser and the Second Restatement of Torts: A Proprietary "Invasion of Privacy"*

In 1960, Prosser wrote a highly influential law review article that would seal the fate of the privacy/property debate. Prosser dissected Warren and Brandeis's right of privacy into four distinct categories: intrusion, disclosure, false light, and appropriation.⁶⁶ While the first three were described as dignitary rights, Prosser stated that the fourth category, "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness," was unique in that unlike the other three privacy invasions, it violated a "proprietary" commercial interest.⁶⁷ Because a proprietary interest was involved, Prosser concluded that the right of publicity should be assignable and, therefore, *Haelan* was correctly decided.⁶⁸

Prosser also recognized that, similarly to the other three prongs of the privacy tort, appropriation could violate a dignitary interest as well; a plaintiff could bring a cause of action alleging violation of both dignitary and proprietary rights and collect damages for emotional distress as well as for loss of profits.⁶⁹ While believing the right should be given more "property-like" protections than the other three prongs of the cause of action, Prosser agreed with Judge Frank's decision to avoid labeling it a property right and to employ a policy-centric approach in determining its scope.⁷⁰

Nevertheless, Prosser's advocacy of a proprietary, assignable right in one's publicity effectively ended the privacy vs. property debate, with property emerging the victor. When the Second Restatement of Torts adopted Prosser's tort of appropriation, as well as his placement of the tort as the fourth prong of the general tort of invasion of privacy, it noted that

[a]lthough the protection of [a plaintiff's] personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is *in the nature of a property right*, for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it.⁷¹

⁶⁶ William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

⁶⁷ *Id.* at 389. See also Weiler, *supra* note 15, at 227-228. The other three privacy invasions are intrusion upon seclusion, public disclosure of embarrassing private facts, and publicity that places the plaintiff in a false light in the public eye. *Id.*

⁶⁸ Prosser, *supra* note 66, at 406-07.

⁶⁹ *Id.* at 406.

⁷⁰ Westfall & Landau, *supra* note 42, at 81.

⁷¹ RESTATEMENT (SECOND) OF TORTS § 652C (1977) (emphasis added). It is worth noting that William Prosser was Chief Reporter for the Second Restatement. See Westfall & Landau, *supra* note 42, at 81; 1 MCCARTHY, *supra* note 21, § 1:24.

E. *Aftermath: A Property-Based Right of Publicity*

Living in a world that was exposed daily to such household names as “Elvis” and “Marilyn Monroe” and was growing very aware of the commodification potential of the celebrity, Edward Bloustein’s fear that celebrities were turning from people into products was understandable.⁷² At the same time, it was probably also viewed as academic and out of touch with economic realities. More importantly, Bloustein just didn’t have the “star power” that Prosser did.⁷³ As a result, Bloustein’s concerns were left by the wayside, and the prevailing view was the one advocated by Prosser.⁷⁴

Prosser’s approach centered on replacing the traditional right of privacy that celebrities were deemed to have waived with new legal protection for the publicity they gained in its stead.⁷⁵ He viewed their interests as being adequately protected by recognition of the new tort that he labeled “appropriation,” which encompassed both the proprietary and the dignitary interests they required.⁷⁶

What Prosser failed to acknowledge was that a label that encompassed both personal rights and property rights could generate a potential conflict. The rights inherent in an assignable property right may be asserted by someone other than their original owner, and, at times *against* their original owner. Personal rights, in contrast, cannot be assigned—nor reached by a celebrity’s creditors.⁷⁷ Thus, Prosser inadvertently formed a snowball that began rolling with the Second Restatement and finally crashed in *Goldman v. Simpson*,⁷⁸ where his joining of

⁷² See Part IIIC.

⁷³ See Westfall & Landau, *supra* note 42, at n.43 (surmising that if Bloustein “had been a more prominent commentator than Prosser, the propertyization of publicity rights might not have occurred”).

⁷⁴ See Jonathan Kahn, *Bringing Dignity Back To Light: Publicity Rights And The Eclipse Of The Tort Of Appropriation Of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 270-71 (1999). 225-226.

⁷⁵ Referring to Judge Frank’s decision to recognize a proprietary right that a celebrity could capitalize upon by selling licenses, Prosser stated that, while it “ha[d] not yet been followed, it would seem clearly to be justified.” Prosser, *supra* note 66, at 407.

⁷⁶ See *id.* at 406 (stating that appropriation was an invasion of the right that the *Haelan* court sought to protect).

⁷⁷ See 6 AM. JUR. 2D *Attachment & Garnishment* § 119 (2007) (“It is generally held that personal rights and privileges not constituting property are not attachable, for the reason that only property, and generally only leviable property, is liable to attachment or garnishment.”). See, e.g., *In re Fleming’s Estate*, 66 A. 874 (Pa. 1907) (holding that a husband’s statutory right to take under his wife’s will was a purely personal right that could not be reached by creditors); *Cleveland Nat’l Bank v. Morrow*, 42 S.W. 200 (Tenn. 1897) (holding that the right to appoint a pupil to a college to which the defendant donated money before becoming insolvent was a personal right that could not be reached by creditors).

⁷⁸ *Goldman v. Simpson*, No. SC036340 (Cal. Super. Ct. W. L.A. Cty. Oct. 31, 2006).

personal and property rights under one label, in an attempt to protect both, instead forced the court to choose one or the other. Most chose the latter.⁷⁹ Over the decades that followed *Haelan*, more than one half of the states, either through their courts or through their legislatures, had adopted a property-based right of publicity.⁸⁰

II. SEEKING SIMPSON'S RIGHT OF PUBLICITY

A. Background— *The O.J. Trials*

The civil award against O.J. Simpson was, from its inception, intimately connected to Simpson's right of publicity. In the 1997 civil verdict, Nicole Brown's and Ronald Goldman's families were together awarded \$8.5 million in compensatory damages and \$25 million in punitive damages.⁸¹ The punitive damages award was reached by estimating the income that Simpson could earn for the rest of his life from his name and likeness.⁸² On appeal, the court affirmed the award, noting that Simpson had \$4.1 million in football pension funds that were not reachable,⁸³ and therefore that the large punitive award would not financially destroy Simpson.⁸⁴

Nine years later, in his motion to assign Simpson's right of publicity, Goldman asserted that he was still waiting to collect and that the award and the interest owed on it have together ballooned to over \$38 million.⁸⁵ In the years leading up to the legal action that lies at the heart of this Note, Simpson appeared in a number of public events, signing various sports memorabilia

⁷⁹ 2 MCCARTHY § 10:7 ("The courts have uniformly held that the right of publicity is a 'property' right").

⁸⁰ Dogan & Lemley, *supra* note 39, at 1174; *see also* Westfall & Landau, *supra* note 42, at 83. Ironically, New York is no longer one of those states. In 1984, New York's highest court rejected the decision in *Haelan* and held that the right of publicity is not a separate right but is rather part of the unassignable right of privacy, as defined by New York Civil Rights Law. *See* *Stephano v. News Group Publ'ns., Inc.*, 474 N.E.2d 580, 584 (1984).

⁸¹ *Rufo v. Simpson*, 103 Cal. Rptr. 2d 492, 523 (Cal. Ct. App. 2001). The plaintiffs presented expert testimony from Mark Roesler, chairman and chief executive officer of a firm that both "negotiates contracts that utilize the name or likeness of the personality, running the gamut of ways to exploit them," and protects against misappropriations of the personality's name and likeness. *Id.* at 523. Based on an analysis of the potential value of autographs, merchandise or memorabilia, endorsements, media, books and tapes, movies, and personal property, Roesler testified that Simpson could expect to earn \$2 to \$3 million a year, and that "\$25 million was a reasonable amount that a reasonable person in Roesler's business would pay in present dollars for the exclusive right to use Simpson's name and likeness for the rest of Simpson's life." *Id.*

⁸² *Id.* at 529.

⁸³ *Id.* at 529.

⁸⁴ *Rufo v. Simpson*, 103 Cal. Rptr. 2d 492, 529 (Cal. Ct. App. 2001).

⁸⁵ Motion for Transfer and Assignment of Right of Publicity, *supra* note 13, at 4.

that were subsequently sold for hundreds of dollars.⁸⁶ He also appeared in a short-lived reality show, “Juiced,” where he played pranks on unsuspecting victims, sometimes using items similar to the ones associated with Nicole Brown Simpson and Ron Goldman’s murder as props.⁸⁷ Since 2001, Simpson has allowed over seventy hours of candid footage of him to be taken.⁸⁸ The producer of the footage released a three minute segment of it on www.judgeoj.com, receiving over four million downloads and, at the time the motion was filed, was allegedly in negotiations with various video-on-demand services to distribute the footage.⁸⁹ Simpson publicly claimed that he had not received, and had no intention of receiving, any compensation for any of these appearances and uses of his publicity.⁹⁰ Finally, it appears that the advance for Simpson’s cancelled book agreement with HarperCollins, which Goldman claimed was worth approximately \$1 million, was allegedly paid to a shell company established in Florida expressly in order to avoid Simpson’s judgment creditors’ reach.⁹¹

Frederic Goldman’s motion to attach and assign O.J. Simpson’s right of publicity asked the court to view Simpson’s right to make money from these ventures as a reachable asset in and of itself.⁹² On September 5, 2006, Goldman filed a motion in the Superior Court of California, Los Angeles County, requesting that the court order the transfer and assignment of Simpson’s right of publicity to Goldman in satisfaction of the nine-year-old judgment against him.⁹³ Citing various authorized and unauthorized uses of Simpson’s publicity,⁹⁴ Goldman argued that Simpson was “intentionally evading his obligation to pay the judgment”⁹⁵ by “exploiting his right of publicity and then directing

⁸⁶ *Id.* at 8-9; see, e.g., *Simpson Kicked Out of Convention*, INTERNET MOVIE DATABASE, Aug. 2, 2005, <http://www.imdb.com/news/wenn/2005-08-02#celeb10>.

⁸⁷ *Treading on the Past, O.J. Pulls Bronco Prank*, MSNBC.COM, May 15, 2006, <http://www.msnbc.msn.com/id/12754888/>.

⁸⁸ *Owner of O.J. Simpson Video Seeks Court Ruling*, WLNS.COM, Oct. 16, 2006, <http://www.wlns.com/Global/story.asp?S=5545344>.

⁸⁹ *Id.*

⁹⁰ The promoter of O.J.’s appearance at one convention told the Associated Press that Simpson “was ‘not getting a penny’ for his visit but was using the event as a dry run for possible future public appearances he might make in exchange for donations to his children’s college fund.” See *Simpson Makes Rare Public Appearance*, *supra* note 10.

⁹¹ See First Amended Complaint to Set Aside Fraudulent Conveyance, For Relief Under Fair Competition Law, and For Declaratory Relief, *Goldman v. Simpson*, No. CV06-8104R, at 4 (C.D. Cal. Jan. 16, 2007).

⁹² Motion for Transfer and Assignment of Right of Publicity, *supra* note 13.

⁹³ *Id.*

⁹⁴ See *id.* at 9 (additionally citing Simpson’s appearance at the 2005 NecroComicon convention, Simpson’s selling autographs at the National Sports Collectors Convention for \$100-\$125, and his participating in the planned television prank show “Juiced”).

⁹⁵ *Id.*

the proceeds out of the hands of his judgment debtors.”⁹⁶ He asserted that this was the only way in which Simpson could be compelled to satisfy the wrongful death judgment rendered against him.⁹⁷

B. *The Right of Publicity in California*

From the first day that the right of publicity was enshrined in the California common law, it was unclear what it actually protected. California courts first recognized the right to protect commercial exploitation of one’s own identity in 1974 in the case of *Motschenbacher v. R.J. Reynolds Tobacco Co.*⁹⁸ Holding that a racecar driver could seek injunctive relief and damages from the unauthorized use of his distinctive car’s image in a tobacco advertisement, the court parroted *Haelan* and stated that it need not decide whether it would do so “under the rubric of ‘privacy,’ ‘property,’ or ‘publicity,’” but merely that it would “recognize such an interest and protect it.”⁹⁹

The California legislature declared the right statutory in 1972, when it enacted California Civil Code section 3344, which provided at the time that

[a]ny person who knowingly uses another’s name, photograph, or likeness, in any manner, for purposes of advertising products, merchandise, goods, or services, or for purposes of solicitation of purchases of products . . . without such person’s prior consent . . . shall be liable for any damages sustained by the person . . . injured as a result thereof.¹⁰⁰

In *Eastwood v. Superior Court*, the court stated that the statutory right *complemented*, rather than codified, the privacy-derived common law right of appropriation of name or likeness.¹⁰¹ The court enumerated the four elements required to bring a common law cause of action for appropriation of name or likeness: “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”¹⁰²

In 1979, in the landmark case of *Lugosi v. Universal Pictures*,¹⁰³ the California Supreme Court first tried to answer the question of

⁹⁶ *Id.* at 10.

⁹⁷ *See id.*

⁹⁸ 498 F.2d 821 (9th Cir. 1974).

⁹⁹ *Id.* at 825-26.

¹⁰⁰ CAL. CIV. CODE. § 3344(a) (West 1983).

¹⁰¹ *Id.* at 416.

¹⁰² *Id.* at 417.

¹⁰³ *Lugosi v. Universal Pictures*, 603 P.2d 425, 427-28 (1979).

whether a public figure's estate had standing to assert rights to the decedent's public image in light of a statute that gave it property-like protection during the celebrity's lifetime.¹⁰⁴ In light of the right of publicity's evolution and California's very pro-celebrity bend, the court's answer probably came as quite a surprise.

Lugosi involved Universal Pictures' licensing of Bela Lugosi's image in his famous 1930's role as Count Dracula for use on various products, including T-shirts, cards, games, and bar accessories, beginning approximately four years after the actor's death.¹⁰⁵ The actor had never approved the use of his likeness on the merchandise during his lifetime, nor had such use been made then.¹⁰⁶ His widow and surviving son brought suit, claiming that Universal had exploited a property right that belonged to the Lugosi estate and seeking injunctive relief and recovery of profits.¹⁰⁷

The trial court approached the issue in the same way that most courts in the country did, by first asking whether the right was an element of the privacy right (making it personal to its—now deceased—subject) or an independent property right.¹⁰⁸ Finding that it was the latter, the court saw no problem in holding that it was an inheritable part of a celebrity's estate.¹⁰⁹ The trial court reasoned that, since the right of publicity had sufficient pecuniary value to serve as consideration for a contract, it must by extension “have sufficient standing and value that the concept of a descendible property right may be bestowed upon it.”¹¹⁰

The California Supreme Court disagreed. This court first determined that the statutory right was merely a complement to the common law right and did not by its terms extend past the celebrity's death.¹¹¹ It then determined that, as far as the common law right was concerned, the trial court was asking—and answering—the wrong question.¹¹² The California Supreme Court stated that asking whether the common law right was in the

¹⁰⁴ In 1971, California enacted Civil Code section 3344, a statutory right of publicity authorizing recovery of damages by any living person whose name, photograph, or likeness has been used for commercial purposes without his or her consent. The statute made no provisions for assertion by a person's heirs or assignees. CAL. CIV. CODE. § 3344 (West 2007).

¹⁰⁵ *Lugosi v. Universal Pictures*, 172 U.S.P.Q. (BNA) 541, 542 (Cal. Super. Ct. L.A. Cty. 1972).

¹⁰⁶ *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 (1979).

¹⁰⁷ *Lugosi*, 172 U.S.P.Q. (BNA) at 541.

¹⁰⁸ *Id.* at 544.

¹⁰⁹ *Id.* at 551.

¹¹⁰ *Id.*

¹¹¹ *See Lugosi*, 603 P.2d at 428 (1979).

¹¹² *Id.* (“The trial court found, and the parties have extensively briefed and argued, that the interest in question is one of ‘property’ We agree, however, with Dean Prosser who considers a dispute over this question ‘pointless’”).

nature of property or privacy was irrelevant, and that the important question was instead whether, from an equitable perspective, the assertion of the right should be solely in the hands of the person to whom it was tied.¹¹³ The court then answered that it should, and determined that, absent an affirmative decision by a celebrity to exploit his likeness for commercial purposes during his lifetime, the right would not survive past his death.¹¹⁴

The California Supreme Court emphasized that the problem with placing the right as a whole under the rubric of property was one of line-drawing.¹¹⁵ Though this appellate court accepted that “[t]he tie-up of one’s name, face and/or likeness with a business, product or service creates a tangible and saleable product[,]”¹¹⁶ the court also stated that it did not seem logical “that because one’s immediate ancestor did not exploit the flood of publicity . . . [that] he received in his lifetime for commercial purposes, the *opportunity* to have done so is property which descends to his heirs.”¹¹⁷ Furthermore, the court refused to dive into the legal thicket of questions that would have resulted from such a decision: for instance, if the *heirs* did not exploit the right, could *their* heirs, as well as the heirs immediately following, do so?¹¹⁸ If a line were to be drawn, the court said, it would be up to the legislature to draw it.¹¹⁹ Until the legislature decides otherwise, the court held, the right to one’s name and likeness, being “a personal one,”¹²⁰ became public domain at the person’s death if it was not exploited during the person’s lifetime.¹²¹

In 1985, in *Lugosi*’s wake, the California legislature inserted several amendments into California Civil Code section 3344.¹²² The most important among them, in the context of the characterization of the privacy right, was the explicit recognition of a plaintiff’s right to recover lost profits.¹²³ The identification of a pecuniary right removed the ambiguity surrounding the statute, making it clearer that the legislature was aiming at protecting commercial, and not dignitary, interests.¹²⁴ The legislature also

¹¹³ *See id.* at 431 (“[W]hether or not the right sounds in tort or property, . . . what is at stake is the question whether this right is or ought to be personal.”).

¹¹⁴ *Id.* at 431.

¹¹⁵ *Id.* at 430.

¹¹⁶ *Id.* at 428.

¹¹⁷ *Id.* at 430 (emphasis added).

¹¹⁸ *See id.* at 430.

¹¹⁹ *See id.*

¹²⁰ *Id.* at 430.

¹²¹ *See id.* at 431.

¹²² *See* 1 MCCARTHY, *supra* note 21, § 6:23.

¹²³ *See id.*

¹²⁴ *See id.* (stating that “[t]he 1985 additions to § 3344(a), which explicitly permit

enacted California Civil Code section 990(h), allowing a celebrity's heirs to assert rights nearly identical to those assertable by the living celebrity under section 3344 for fifty years following the celebrity's death.¹²⁵ In 2000, the statute—renumbered section 3344.1—was amended to extend the moratorium period to seventy years.¹²⁶

In the last California Supreme Court case to deal with the right of publicity, *Comedy III Productions v. Saderup*,¹²⁷ the court recognized that its decision in *Lugosi*¹²⁸ was at odds with subsequently-enacted legislation and attempted to resolve the conflict.¹²⁹ *Comedy III Productions* involved an attempt by the assignee of the Three Stooges trio's publicity rights to bar the unauthorized use of their likeness and image on T-shirts and posters. The appellate court, affirming the trial court's award of damages, articulated its view of the right of publicity as being "both a statutory *and* a common law right."¹³⁰ The court declared that the *post-mortem* right of publicity statute seeks "to secure and protect a declared interest in property" and "resembles the nation's copyright, patent, trademark and tradename laws."¹³¹ At the same time, the court took pains to explain that both the original statutory right of publicity under section 3344 and the *post mortem* statutory right, enacted post-*Lugosi*, complemented—rather than replaced—the common law right, which was derived

recovery of defendant's profits from the unauthorized use, certainly sound like the recovery of commercial damages, the hallmark of the right of publicity, rather than mental distress damages, the hallmark of the appropriation form of invasion of privacy").

¹²⁵ See *Comedy III Prods., Inc. v. Gary Saderup, Inc. (Comedy I)*, 80 Cal. Rptr. 2d 464, 466 (Cal Ct. App. 1998), *aff'd*, 21 P.3d 797 (2001), *cert. denied* 534 U.S. 1078 (2002); CAL. CIV. CODE § 990 (West 2007).

¹²⁶ CAL. CIV. CODE § 3344.1 (West 2007).

¹²⁷ *Comedy III Prods., Inc. v. Gary Saderup, Inc. (Comedy II)*, 21 P.3d 797 (2001), *cert. denied*, 534 U.S. 1078 (2002).

¹²⁸ *Lugosi v. Universal Pictures*, 603 P.2d 425 (1979).

¹²⁹ See *Comedy II*, 21 P.3d at 799 ("The statutory right originated in Civil Code section 3344 . . . , authorizing recovery of damages by any living person whose name, photograph, or likeness has been used for commercial purposes without his or her consent. Eight years later, in *Lugosi* . . . , we also recognized a common law right of publicity, which the statute was said to complement. But because the common law right was derived from the law of privacy, we held in *Lugosi* that the cause of action did not survive the death of the person whose identity was exploited and was not descendible to his or her heirs or assignees. In 1984 the Legislature enacted an additional measure on the subject, creating a second statutory right of publicity that *was* descendible to the heirs and assignees of deceased persons. The statute was evidently modeled on section 3344: many of the key provisions of the two statutory schemes were identical. The 1984 measure is the statute in issue in the case at bar") (citations omitted).

¹³⁰ *Id.* (emphasis added).

¹³¹ *Comedy I*, 80 Cal. Rptr. 2d at 471. Granted, the court's decision is hardly a ringing endorsement of a property-based assignable right of publicity. Citing an article by Professor Michael Madow that questions the social utility of the right of publicity, the court rested its opinion on the reasoning that the legislature nevertheless had a "rational basis" for enacting section 990. *Comedy II*, 21 P.3d at 805.

from the right of privacy.¹³²

Importantly, though California is arguably the state with the most developed right of publicity jurisprudence, the number of actual court decisions involving that right are few and far between.¹³³ The result is that, as discussed above, while the statutory right has been revised and re-revised to give it more property-like traits, there is a dearth of judicial guidance as to the way those statutory revisions interact with the common law right.

1. Goldman's Argument

Frederic Goldman based his claim against O.J. Simpson on the argument that the right of publicity *qua* privacy and the right of publicity *qua* property should be, and have been, interpreted as two distinct and inversely proportional rights: “[t]he more famous (or infamous) a person may be, the less private that person can claim to be.”¹³⁴ Thus, he reasoned, a private person suffering no monetary harm would be limited to action under the appropriation tort –Prosser’s “fourth prong” – while a celebrity who had waived his or her privacy would be limited to the right of publicity tort.¹³⁵ The latter, he contended, far from being a part of the person, is “merely the ability to *commercially exploit* who the person is.”¹³⁶ Thus, Goldman argued, the assignment that he requested did not implicate Simpson’s personal rights.¹³⁷ Furthermore, Goldman insisted that such an assignment did not mean that he could force Simpson to perform any act against his will since the right of publicity, he claimed, stands apart from any performance obligation and can be exploited with or without Simpson’s consent.¹³⁸

Goldman’s briefs cite numerous California cases that state that the right of publicity is a property right, is in the nature of a property right, or— at the very least— is a commercial right

¹³² See *Comedy I*, 80 Cal. Rptr. 2d at 471. See also *Eastwood v. Super. Ct.*, 198 Cal. Rptr. 342, 346 (Cal. Ct. App. 1983) (rejecting previous statement that section 3344 “codified” the right of privacy and asserting that “the fourth category of invasion of privacy, namely, appropriation, has been *complemented* legislatively by Civil Code section 3344”) (quotations omitted, emphasis added).

¹³³ See 1 MCCARTHY, *supra* note 21, § 6:11.

¹³⁴ Plaintiff’s Supplemental Brief in Support of Motion for Order Transferring and Assigning Right of Publicity at 7, *Goldman v. Simpson*, No. SC 036340 (Ca. Super. Ct. W. L.A. Cty. Oct. 20, 2006) [hereinafter “Plaintiff’s Supplemental Brief”].

¹³⁵ See *id.* (citing *KNB Enters. v. Matthews*, 92 Cal. Rptr. 2d 713, 718, n.6 (Cal. Ct. App. 2000)).

¹³⁶ Plaintiff’s Consolidated Reply in Support of Motion for Order Transferring and Assigning Right of Publicity and Opposition to Defendant’s Motion to Dismiss Plaintiff’s Motion for Lack of Jurisdiction at 9, *Goldman v. Simpson*, No. SC 036340 (Ca. Super. Ct. W. L.A. Cty. Oct. 10, 2006) [hereinafter “Plaintiff’s Consolidated Reply”].

¹³⁷ See *id.*

¹³⁸ See *id.* at 10.

separate from the personal right of privacy.¹³⁹ Additionally, the briefs state that the California case law on the issue of the *inter-vivos* assignability of the right uniformly holds in favor of such assignability.¹⁴⁰ Providing a few examples, including Muhammad Ali's recent sale of 80% of his right of publicity,¹⁴¹ Goldman argued that *inter-vivos* transfers are a common practice.¹⁴² Accepting the property view of the right, he argued, necessitates accepting its assignability.¹⁴³

Goldman asserted in his brief that an order assigning Simpson's publicity right would, therefore, have no impact on Simpson's remaining dignitary rights.¹⁴⁴ Simpson could still protect his personal interests, since his right of privacy would remain vested in him, albeit in limited form as a public celebrity.¹⁴⁵ Goldman stated that, under the First Amendment, Goldman—and anyone else—had a vested right to disparage Simpson non-commercially, so long as no defamation of Simpson's persona or invasion of Simpson's privacy took place.¹⁴⁶ Furthermore, Goldman argued that, even if Goldman intended to disparage Simpson through some sort of commercial means, the market would bar such attempts for fear of legal reprisals by Simpson.¹⁴⁷

For the most part, Goldman argued, having Simpson's right of publicity assigned to him would simply allow Goldman to chase

¹³⁹ Plaintiff's Supplemental Brief, *supra* note 134, at 4-5 (citing *Macchi v. Jackson*, No. B143614, 2002 WL 265887 (Cal. Ct. App. 2002); *Waits v. Frito Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), *cert. denied*, 503 U.S. 951 (1992); *Perfect 10, Inc. v. CCBILL, LLC*, 340 F.Supp.2d 1077 (C.D. Cal. 2004); *Hoffman v. Capital Cities/ABC, Inc.*, 33 F.Supp.2d 867 (C.D. Cal. 1999); *Ingerson v. Twentieth Century Fox Film Corp.*, Nos. B152698, B153595, 2003 WL 147771 (Cal. Ct. App. 2003); *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790 (Cal. Ct. App. 1993)).

¹⁴⁰ See Plaintiff's Consolidated Reply, *supra* note 136, at 7 (citing *KNB Enters. v. Matthews*, 92 Cal. Rptr. 2d 713 (Cal. Ct. App. 2000) (holding that a corporation to whom various erotic photography models had assigned their rights of publicity could bring action against possible infringement separately from a copyright violation action); *id.* at 8 n.7 (stating that exhaustive research failed to uncover any case to the contrary, and that Simpson failed to cite any such case).

¹⁴¹ See *CKX Partners with Muhammad Ali*, THE OFFICIAL MUHAMMAD ALI WEBSITE, Apr. 11, 2006, <http://www.ali.com/news/default.asp?newsId=15>.

¹⁴² Plaintiff's Consolidated Reply, *supra* note 136, at 8. Goldman rejects Simpson's view of section 3344.1 as necessarily excluding *inter vivos* rights. He states that, while it speaks of *post-mortem* rights, it "specifically contemplates the transfer of such rights *during life*, by contract, trust or testamentary documents[.]" and that such a transfer would necessarily be a transfer of property rights. Plaintiff's Supplemental Brief, *supra* note 134, at 10.

¹⁴³ *Id.* at 7 (citing *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 703 (1982), a Georgia decision holding that a person's estate can prevent commercial post-mortem uses of his name and likeness, regardless of whether the right was commercially exploited during the person's lifetime. The *Martin Luther King, Jr.* court stated that "without assignability the right of publicity could hardly be called a 'right.'"). *Martin Luther King, Jr. Ctr. for Soc. Change*, 296 S.E.2d at 704.

¹⁴⁴ See *id.* at 12.

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* at 13.

¹⁴⁷ See *id.*

after the numerous third-parties currently using Simpson's name and likeness.¹⁴⁸ If Simpson were truly not benefiting from those uses, Goldman reasoned, then he would be losing nothing; however, if he were benefiting surreptitiously, then the money would belong to Goldman anyway.¹⁴⁹

In order to demonstrate that the court had the power to assign the privacy right, Goldman analogized this right to other forms of intellectual property rights that are assignable under California law.¹⁵⁰ Goldman first interpreted *Comedy III Products* to signify that California reframed the common law right of publicity as a form of intellectual property.¹⁵¹ He then argued that California courts already recognize their ability to act equitably by compelling the assignment of a debtor's rights to other forms of intellectual property in satisfaction of a judgment¹⁵² and reasoned that it followed that "[f]inding that the right of publicity is 'property of the judgment debtor' subject to enforcement is consistent with settled California law."¹⁵³ Thus, Goldman argued, California law allows the court to compel O.J. Simpson to assign his right of publicity to satisfy the monetary judgment against him.¹⁵⁴

Finally, Goldman contended that the public policy favoring the satisfaction of a monetary judgment, particularly in cases involving punitive multi-million dollar judgments against defendants who then intentionally avoided them, outweighed the public policy of allowing people to control what products they chose to associate with.¹⁵⁵ Any concern over dignitary harms to a judgment debtor should thus be outweighed by the concern for the creditor who is left out in the cold.

C. *The Ruling*

On October 31, 2006, Judge Lefkowitz issued a ruling denying Goldman's motion and holding that "neither the law, nor

¹⁴⁸ See Plaintiff's Supplemental Brief, *supra* note 134, at 13-14.

¹⁴⁹ See *id.* at 14.

¹⁵⁰ See *id.* at 13-15.

¹⁵¹ See *id.* at 4 (citing *Comedy III Prods. v. Gary Saderup, Inc. (Comedy II)*, 21 P.3d 797, 804 (2001), *cert. denied*, 534 U.S. 1078 (2002), where the court states that "[t]he right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility").

¹⁵² *Id.* at 5-8. In support, Goldman cited *Pac. Bank v. Robinson*, 57 Cal. 520 (1881) (ordering a judgment debtor to assign the rights to his patents to a receiver) and various subsequent decisions following this holding, as well as the California Code of Civil Procedure, § 708.510(a) (West 2007) (allowing a court to order a judgment debtor to assign "all or part of a right to payment due or to become due, . . . including but not limited to . . . [p]ayments due from a patent or copyright").

¹⁵³ Motion for Transfer and Assignment of Right of Publicity, *supra* note 13, at 8.

¹⁵⁴ See Plaintiff's Supplemental Brief, *supra* note 134, at 18.

¹⁵⁵ See *id.* at 15, 21.

the limits of this court's equity jurisdiction, support outright transfer of a judgment debtor's inter vivos right of publicity."¹⁵⁶ Judge Lefkowitz provided two main reasons for her refusal to transfer Simpson's right of publicity: her reluctance to search for – and fashion solutions to deal with – the myriad logistical pitfalls that such an involuntary transfer may entail,¹⁵⁷ and her belief that such a transfer would endanger the privacy that the right protected.¹⁵⁸

Judge Lefkowitz provided at least one sound reason for rejecting Frederic Goldman's motion: the novelty of the motion meant that she would have had to invent answers to a host of questions that such a transfer raised, questions that should reasonably be answered by the legislature and not by the courts.¹⁵⁹ In her opinion, Judge Lefkowitz identified a series of such questions,¹⁶⁰ presenting no suggestions as to possible answers and stating simply that "California Enforcement of Judgments Law as currently enacted does not provide a vehicle for the relief requested."¹⁶¹ In other words she explicitly left it up to the legislature to answer these questions.

Though Judge Lefkowitz could presumably have rejected Goldman's motion outright by passing the ball to the legislature, the fact that she did not do so points to the possibility that a celebrity's right to control his or her own publicity made Judge Lefkowitz ill at ease. Accordingly, the Judge proceeded to provide

¹⁵⁶ Goldman v. Simpson, No. SC 036340, at 13 (Ca. Super. Ct. W. L.A. Cty. Oct. 31, 2006).

¹⁵⁷ See *id.* at 7-8.

¹⁵⁸ See *id.* at 13.

¹⁵⁹ See *id.* at 7-8.

¹⁶⁰ *Id.* The Judge's questions included the following:

[S]hould the assignee further assign or undertake a license, or on his own enter into a business venture involving the commercial use of the celebrity's business -and fail- how is the court to assess whether the celebrity should be credited against the judgment under such circumstances; Is it not necessary that the court assume an auditing role in monitoring credits against the judgment; would the assignee be entitled to file actions against third parties believed to infringe upon the commercial use of the celebrity's likeness, and how are costs assessed in the event of a loss through settlement or at trial; is the assignee a fiduciary responsible for prudent decision-making? Even assuming the propriety of appointing a receiver to undertake some of the court's monitoring and audit function, as authorized by Pacific Bank, which side pays the cost of a receiver? Is the assignment of the right of publicity routinely available as a post-judgment enforcement remedy, or must there be a preliminary showing that all other means of enforcement have been exhausted? Does such transfer overrule the choice of law provisions provided by Section 946? What of the impact of such a ruling upon public personalities of impeccable repute, who might equally be impacted by so broad a reading of the post-judgment enforcement remedies, even in cases unaccompanied by claims of punitive damages?

Id.

¹⁶¹ *Id.* at 8.

another reason for her denial, namely that the privacy interests protected by the right – interests that are of “direct constitutional magnitude” under the California constitution¹⁶² – prevented her from considering an involuntary transfer of the right.¹⁶³ Citing heavily from the California Supreme Court’s decision in *Lugosi*, Judge Lefkowitz’s ruling rejected Goldman’s characterization of the right of publicity as a transferrable property right.¹⁶⁴ Denying the relevance of both the “extensive body of extra-jurisdictional case authority and treatises” cited by Goldman and the section 3344.1 *post mortem* survival statute that superseded *Lugosi*, she held that the view of the right of publicity as a “personal” right is still the law, as well as the correct view of the right.¹⁶⁵ She stated that

[a]lthough assignable during lifetime, and thus bearing at least one characteristic of a property right, the nature of the publicity right during the lifetime of the celebrity is *equally* characterized by privacy rights which mitigate against court-enforced transfer of the right to obtain commercial profit from his or her likeness.¹⁶⁶

Judge Lefkowitz interpreted *Lugosi* as separating a personal right, which is what a celebrity holds while he or she is still alive, from a property right, which only comes into existence in the hands of a deceased celebrity’s survivors.¹⁶⁷ She distinguished California’s right of privacy from that of other jurisdictions, noting that the articulation of the right in Article I, section 1 of the California constitution is considered “broader and more protective . . . than its federal counterpart.”¹⁶⁸ She reasoned that this purportedly uniquely Californian emphasis on privacy “perhaps” explains why there are no California decisions providing for “the waiver of all aspects of a celebrity’s life, even in the face of broad public rebuke.”¹⁶⁹

¹⁶² *Id.* at 11.

¹⁶³ *See id.* at 13.

¹⁶⁴ *See id.* at 8-9.

¹⁶⁵ *See id.*

¹⁶⁶ *Id.* at 9 (emphasis added).

¹⁶⁷ *See id.*

¹⁶⁸ *Id.* at 11. Article I, section 1 of the California constitution provides, “[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*.” CAL. CONST. art. I, § 1 (emphasis added). *Am. Acad. of Pediatrics v. Lundgren*, 940 P.2d 797, 833 (1997), the case cited by Judge Lefkowitz in support of her proposition, states that the difference lies in the fact that, while the Federal constitution has been interpreted to *implicitly* protect privacy, the California constitution protects it *explicitly*. She did not, however, explain whether this actually resulted in a *quantitative* difference from privacy protections in other states.

¹⁶⁹ *Goldman v. Simpson*, No. SC036340, at 12 (Ca. Super. Ct. W. L.A. Cty. Oct. 31, 2006).

Rather than issue a narrow ruling, possibly one that would have solely pertained to those debtors who were found liable for punitive damages and who intentionally evaded paying the judgment, Judge Lefkowitz chose to categorically deny the remedy as a matter of law.¹⁷⁰ Refusing to create a new remedy where the law did not support it “outright,”¹⁷¹ Judge Lefkowitz held that a celebrity’s right of publicity protected important dignitary interests that would always take precedence over a judgment creditor’s claims, presumably without regard to how the celebrity attained his or her publicity, why the judgment was owed, and whether or not the celebrity acted in good faith in attempting to satisfy the judgment.¹⁷²

III. THE RIGHT OF PUBLICITY AS TWO SEPARATE RIGHTS

Despite its birth as an element of the right of privacy, many lower California courts, as well as countless courts throughout the country, have characterized the right of publicity as a property right.¹⁷³ However, when faced with the prospect that a plaintiff could be deprived of the right, just like of any other form of property, Judge Lefkowitz drew back, holding that the right, nevertheless, protected dignitary rights that the court could not invade to enforce a monetary judgment.¹⁷⁴

Judge Lefkowitz’s conclusion was a reasonable response to decades of mislabeling, and her initial conclusion correct: the right of publicity cannot be viewed as a pure property right. Since its inception, the right has protected important dignitary, personal interests that should not be invaded by a court to satisfy a monetary judgment.¹⁷⁵ Further, the questions that Judge Lefkowitz raised to highlight the unresolved procedural aspects of such a transfer are all good ones.¹⁷⁶ She erred, however, in failing to even consider the possibility of dividing the right’s personal and dignitary interests, assigning only the latter to Goldman while still

¹⁷⁰ *See id.* at 4.

¹⁷¹ *Id.* at 13.

¹⁷² *See id.* at 4 (“[I]t should be understood at the outset that the issue . . . is one of pure law[, and] is in no way dependent upon a determination of the perceived equities of either side, or a review of the facts presented at trial. Quite to the contrary, the determination of whether post-judgment enforcement remedies may properly include the transfer of publicity rights to a prevailing plaintiff could have, in theory, been raised by any plaintiff holding a judgment against any defendant perceived as holding financially viable publicity rights.”).

¹⁷³ *See* 1 MCCARTHY, *supra* note 21, § 10:7 (stating that “[t]he courts have uniformly held that the right of publicity is a ‘property’ right” and providing a comprehensive list of national jurisprudence describing it as such).

¹⁷⁴ *See* Goldman v. Simpson, No. SC036340, at 4.

¹⁷⁵ *See* Part IA, discussing the right’s roots in the right to privacy, and Part IIIA *infra*.

¹⁷⁶ *See* Goldman v. Simpson, No. SC036340, at 7-8, as discussed *supra* in note 160.

preserving and protecting Simpson's dignitary rights in his own publicity.

The right of publicity held by a famous celebrity encompasses both property-based and privacy-based concerns.¹⁷⁷ In every case until *Goldman v. Simpson*, those concerns realistically rested with the same party, so any debate on the subject was purely academic.¹⁷⁸ Courts were never actually made to decide where one ended and the other began.¹⁷⁹ However, both California law and public policy dictate that the bundle of rights that has been erroneously identified and labeled as one "right of publicity" containing both privacy and property traits,¹⁸⁰ should actually be viewed as two separate and mutually exclusive rights: on one end, an assignable, proprietary right to *profit from* the use of one's persona; on the other, a personal, privacy-based, nonassignable right to *control* the use of one's persona for profit. Such a separation is both workable and is the best way to balance the public's interest in letting individuals decide when and whether their image could be commercially exploited as well as the public's interest in protecting the economic rights of creditors.

A. The Right of Publicity Protects Important Dignitary Interests that Cannot Be Assigned to Satisfy a Creditor

The O.J. Simpson right of publicity case is a great example of the potential injustice of allowing celebrities to shield what is, in essence, their most valuable asset from their creditors.¹⁸¹ Scholars have argued that celebrities are reaping the rewards of a property-based right of publicity without paying the price, and that justice requires that, if the right of publicity is to be treated as property when it benefits the celebrity, it should be treated as property for all intents and purposes, including being reachable by a celebrity's

¹⁷⁷ See *infra* Part IIIA.

¹⁷⁸ See Westfall & Landau, *supra* note 42, at 101-104.

¹⁷⁹ See *id.* The few cases dealing with assessing the value of a celebrity's publicity upon divorce chose to treat it as "celebrity goodwill" and merely concern themselves with assessing its current monetary value, rather than attempt to divide the celebrity's actual right of publicity as a piece of property in and of itself. See *id.* at 103; see, e.g., *Golub v. Golub*, 527 N.Y.S.2d 946, 949 (Sup. Ct. 1988); *Piscopo v. Piscopo*, 555 A.2d 1190 (N.J. Ch. 1988), *aff'd*, 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989).

¹⁸⁰ *Goldman v. Simpson*, No. SC036340, at 11 (Ca. Super. Ct. W. L.A. Cty. Oct. 31, 2006). ("[a]lthough assignable during lifetime, and thus bearing at least one characteristic of a property right, the nature of the publicity right during the lifetime of the celebrity is equally characterized by privacy rights . . .").

¹⁸¹ Providing a long list of celebrities who filed bankruptcy in the years immediately preceding the writing of their article and successfully shielded their right of publicity from reach, Melissa Jacoby and Diane Zimmerman state that the bankruptcy court system "has been blind to the many millions of dollars worth of publicity rights that have passed through the system." Jacoby & Zimmerman, *supra* note 16, at 1325. The list includes such household names as Burt Reynolds, Kim Basinger, Francis Ford Coppola, and Zsa Zsa Gabor. *Id.*

creditors.¹⁸² Most notably, Professors Melissa Jacoby and Diane Zimmerman, who proposed in a 2002 article that the right of publicity be included in a celebrity's assets in bankruptcy,¹⁸³ reason that, "in counting the gains, celebrities and advocates of expansive property rights in identity may not have taken into account the loss of control that commodification may bring" and that "if the choice we make is to continue to opt for commodification, then personas, like yachts, should be 'properties for all seasons.'"¹⁸⁴

Jacoby and Zimmerman compare the right of publicity to copyright.¹⁸⁵ The right of publicity, they argue, is associated with the person to the same extent that other forms of intellectual property are.¹⁸⁶ When a book author sells to his publisher the copyright to his tragic novel, for instance, he cannot bar the publisher from making a musical comedy based on the novel.¹⁸⁷ When a trademark holder's business is sold in an insolvency proceeding, he can no longer ensure that his trademark is not later tarnished by the business's production of lower quality merchandise.¹⁸⁸

The comparison to other forms of intangible property is a familiar one. The Supreme Court, having abstained from deciding whether the right of publicity was a property right in the sole right of publicity case that it ever considered,¹⁸⁹ nevertheless compared the entitlements that the right of publicity protects to those underlying patent and copyright laws.¹⁹⁰ The Court based its reasoning on the fact that all of these protections provide against unjust enrichment and give the artist "an economic incentive . . . to make the investment required to produce a performance of interest to the public."¹⁹¹ Further, the comparison

¹⁸² See Jacoby & Zimmerman, *supra* note 16.

¹⁸³ Jacoby & Zimmerman, *supra* note 16.

¹⁸⁴ *Id.* at 1367-68. Importantly, despite the fact that many courts have applied the property label syllogistically to the right of publicity, reasoning that if it had certain attributes of property, then it must have all of them, there is no doctrinal requirement that this be the case. Courts have long recognized that a right may have some of the characteristics of property while not having others, and that there is no distinct bundle of rights that are consistent with all forms of property. See *First Victoria Natl. Bank v. United States*, 620 F.2d 1096, 1103-05 (5th Cir. 1980). Jacoby and Zimmerman argue that the right of publicity *should* have all the rights normally associated with property, not that it *does* have it. Jacoby & Zimmerman, *supra* note 136.

¹⁸⁵ See *id.* at 1364-65.

¹⁸⁶ *Id.* at 1364.

¹⁸⁷ *Id.* at 1364-65.

¹⁸⁸ *Id.* at 1364.

¹⁸⁹ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977). The case involved the right of a television station to tape and broadcast a circus entertainer's entire performance. It is the seminal case dealing with the balance between the right of publicity and the right to free speech, an interesting topic in and of itself which is, unfortunately, outside the scope of this Note.

¹⁹⁰ See *id.* at 576.

¹⁹¹ *Id.*

is apt to a large extent: like an author or inventor who trades his right to control his ideas and expression for the right to profit from their dissemination, a celebrity sacrifices his right to control certain uses of his image in exchange for the right to profit from them.¹⁹² Like a copyright or patent holder, a celebrity who chooses to allow certain uses of his image loses the right to object when those uses turn out to be not to that celebrity's satisfaction.

In *Pacific Bank v. Robinson*, the California Supreme Court held in a landmark decision that California courts could compel the assignment of patents and copyrights to satisfy a monetary judgment.¹⁹³ This was the case that Goldman relied on to support his proposition that the right of publicity could similarly be attached.¹⁹⁴ The court reasoned that

[i]t would be marvelous, if not unjust perpetuation of the ideal, if an inventor, *having obtained a patent, thus divulging his secret*, and at the same time acquiring a property in it for practicable purposes, should be permitted to hold it unused against his creditors, until, either by compromise or the lapse of time, his obligations should be discharged; and this, too, although it might be one which, by assignment, or upon manufacture of the thing invented, would readily yield enough to pay all existing [sic] liabilities.¹⁹⁵

Indeed, it would. But the above quote also highlights the primary flaw of the argument: patent and copyright protections are given only to those ideas and expressions that the inventor or artist has, through publication or registration, made a clear affirmative choice to exploit.¹⁹⁶ An author or inventor, by virtue of allowing the use of a certain expression or idea in order to gain copyright or patent protection, is not thereby putting at risk the right to control those ideas and masterpieces that the artist or inventor *has yet to publish, express or even conceive of*. This is where the comparison fails: the right of publicity is concerned both with the right to profit from authorized uses of a celebrity's publicity *and* with those the prevention of uses of a celebrity's publicity that the celebrity has affirmatively chosen *not* to exploit, or rather with

¹⁹² See Jacoby & Zimmerman, *supra* note 16, at 1364 ("If an author sells her publisher the copyright in her tragic novel, she cannot object if the purchaser later decides to turn it into a musical comedy, however strong the emotional and identity links between the creator and the purity of her creation").

¹⁹³ *Pac. Bank v. Robinson*, 57 Cal. 520 (1881)

¹⁹⁴ See Motion for Transfer and Assignment of Right of Publicity, *supra* note 13, at 5.

¹⁹⁵ *Pac. Bank*, 57 Cal. at 524 (quoting *Hesse v. Stevenson*, 3 Bos. & Pul. 565) (emphasis added).

¹⁹⁶ *Id.* The inventor in the above quote knows that obtaining the patent requires divulging the secret, and must choose one or the other.

one's right to make that choice in the first place.¹⁹⁷

In the seminal article that gave birth to the right of publicity, Warren and Brandeis describe the interplay between the protections of copyright and privacy thus:

[t]he aim of [the copyright] statutes is to secure to the author, composer, or artist the entire profits arising from publication; but the [privacy] protection enables him to control absolutely the act of publication and, in the exercise of his own discretion, to decide whether there shall be any publication at all. The statutory right is of no value *unless* there is a publication; the common-law right is lost *as soon as* there is a publication.¹⁹⁸

On the other hand, one need not exploit one's right of publicity, or be a celebrity for that matter, in order to assert that someone else has done so without his consent.¹⁹⁹ In this way, the right of publicity parallels both the dignitary right of privacy *and* the proprietary rights of copyright and patent. More specifically, the right of publicity as a property right begins where the right of publicity as a dignitary right ends. A person essentially chooses to exchange his or her right to be *free from* commercial exploitation for a property-based right *to freely* commercially exploit his or her image— or, in other words, to exchange control for profits.

Professor Jonathan Kahn proposes looking at the dynamic between the dignitary right and the property right as a movement along a continuum, stating that

the more intimately a name or image is bound up with one's self, the more its appropriation implicates privacy-based personal identity rights; the more one is willing or able to conceive of one's name or image as a marketable commodity, the more its use implicates property-based rights of publicity.²⁰⁰

However, it is essential to our notions of identity, he argues, that we recognize the fact that no celebrity, no matter how famous, can completely give up his dignitary interest in himself.²⁰¹

The majority in *Lugosi v. Universal Pictures*, refusing to extend Bela Lugosi's right of publicity to his heirs without an explicit legislative grant, grounded its holding in the statement that the right to use one's publicity for profit is one that may not

¹⁹⁷ See Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 402 n.67 (1999) (pointing out that the comparison is not apt because "the right of publicity arises not from a created work (no matter how imbued with authorial presence), but . . . from human autonomy").

¹⁹⁸ Warren & Brandeis, *supra* note 32, at 200 (emphasis in the original).

¹⁹⁹ See 1 MCCARTHY, *supra* note 21, § 1:3 ("The 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 and recover in court damages and the commercial value of an unpermitted taking.").

²⁰⁰ See Kahn, *supra* note 74, at 270-271.

²⁰¹ See *id.* at 272.

necessarily be quantifiable in terms of dollars and cents.²⁰² “The very decision to exploit name and likeness is a personal one,” the court stated.²⁰³ The court recognized the multitude of considerations that may go into such a decision by noting that

[i]t is not at all unlikely that Lugosi and others in his position did not during their respective lifetimes exercise their undoubted right to capitalize upon their personalities, and transfer the value thereof into some commercial venture, for reasons of taste or judgment or because the enterprise to be organized might be too demanding or simply because they did not want to be bothered.²⁰⁴

If we treat the right of publicity as “property for all seasons,”²⁰⁵ we ignore the fact that the right protects not just the celebrity’s interest in profiting from his publicity but also the right to choose whether or not to do so in the first place. If we declare the right to be a property right in order to satisfy creditors, we confirm Edward Bloustein’s worst fears, that the courts will “make a man part of commerce against his will.”²⁰⁶ Courts should not go so far merely to satisfy a monetary judgment.

B. The Right of Publicity Concurrently Protects Both Dignitary and Proprietary Interests, Regardless of Previous Exploitation

That we should not treat the right of publicity as pure property does not mean that the creditors should be left out in the cold. Though a celebrity’s creditors may not reach the entire package known as the “right of publicity,” it may still be possible for them to seek those rights in the bundle that are *not* personal rights. An approach must therefore be found to separate between the right of publicity assignable property and the right of publicity as a dignitary personal right.

One tempting solution is to allow a court to examine a debtor’s history of voluntary commercial exploitation and to declare whether or not that debtor has, in fact, waived her right to privacy and exchanged it for a property right of publicity; in other words, to find a discrete moment at which a person volunteers to become a commodity. Such a moment, unfortunately, does not exist. There is no point at which a person asserting the right to publicity is no longer asserting a privacy-based dignitary right, which is neither assignable nor detachable, and begins asserting a property-based commercial right, which may be reached by that

²⁰² See *Lugosi v. Universal Pictures*, 603 P.2d 425, 430 (1979).

²⁰³ *Id.*

²⁰⁴ *Id.* at 430.

²⁰⁵ *Jacoby & Zimmerman*, *supra* note 16, at 1367.

²⁰⁶ *Bloustein*, *supra* note 65, at 988.

person's creditors. Rather, the right of publicity as a personal right exists harmoniously with the right of publicity as a property right. The property rights that a celebrity holds protect the value of her persona; the personal rights protect her right, at all times and regardless of how famous she is, to choose whether to recognize that value.

After *Lugosi*, courts and legislatures have nearly universally denied a lifetime exploitation requirement in the context of *post mortem* use.²⁰⁷ One of the reasons that they have chosen to do so is because they could find no viable way to distinguish between a right a dead celebrity *would not* have exploited and a right that the celebrity *did not have a chance* to exploit, nor how much exploitation is necessary for the right to have been exhausted.²⁰⁸ By the same token, a court that needs to decide whether a person has exploited his or her celebrity status for profit must make the exact sort of calculus that courts have nearly universally declined to make in the context of the *post mortem* right.²⁰⁹

The idea that a celebrity may sue a commercial appropriator of her identity both for injury to feelings and for injury to commercial value is not novel. J. Thomas McCarthy wrote that "everyone, including a 'celebrity,' has both 'publicity' and 'privacy' rights in his or her identity," and that "[s]ince we are really talking about two distinct rights and two distinct 'torts,' there should be nothing inherently inconsistent with joining the claims together, assuming of course that the facts support both claims."²¹⁰ Prosser, who had asserted that the tort of appropriation was an assignable proprietary right, nevertheless recognized that celebrities may bring an action both for lost profits and for emotional distress.²¹¹ California courts in particular are familiar with such actions. In *Waits v. Frito Lay, Inc.*, the Ninth Circuit upheld singer Tom Waits' claim against a snack manufacturer that used an imitation of Waits' distinctive voice to make it sound like Waits was promoting its products.²¹² The court awarded double what the fair market value for these services would have been had they been rendered by the artist, emphasizing that Waits had consistently refused numerous lucrative offers to participate in commercials because

²⁰⁷ 1 MCCARTHY, *supra* note 21, § 9:17 ("The overwhelming majority rule under either statute or common law is that the right of publicity is descendible property and has a postmortem duration which is not conditioned on lifetime exploitation.")

²⁰⁸ *See, e.g.,* *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 (1979) (J. Bird, dissenting) ("There is no reasonable method for ascertaining in a particular case if the right has been sufficiently exploited to warrant passing the right to the decedent's beneficiaries.")

²⁰⁹ 1 MCCARTHY, *supra* note 21, § 9:17

²¹⁰ 1 *id.* § 4:21.

²¹¹ *See* Prosser, *supra* note 66, at 406.

²¹² *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

he believed they detracted from one's artistic integrity.²¹³ Similarly, in *Hoffman v. Capital Cities*, a case involving a fashion magazine that superimposed actor Dustin Hoffman's face on a female fashion model's body, a California court awarded Hoffman punitive damages in addition to his actual damages under section 3344, reasoning that he was "commercially exploited and . . . robbed of [his] dignity, professionalism and talent."²¹⁴ In other words, the court stated, he was "violated by technology."²¹⁵

Judge Lefkowitz, resting her decision on the *Lugosi* majority, refused to transfer to Frederic Goldman any part of Simpson's right of publicity by asserting that, since it concerned both privacy and property rights, it could not be assigned.²¹⁶ However, the *Lugosi* majority reached its conclusion by following Prosser's and the *Haelan* court's lead and sidestepping any attempt to categorize the common law right as either privacy or property.²¹⁷ On the other hand, Chief Justice Rose Bird's dissent in *Lugosi* tackled the question head-on.²¹⁸ She arrived at the insightful conclusion that a celebrity's privacy-based rights and his property-based rights are not mutually exclusive, but rather that they coexist, each protecting different interests that are unique to famous persons.²¹⁹

The question, as Chief Justice Bird saw it, was "whether an individual's interest in the commercial use of his likeness is protected *solely* as an aspect of the right of privacy or whether *additional* or *alternative* protection exists."²²⁰ She opted for the latter option, concluding that "[i]n characterizing a prominent individual's interest in the commercial uses of his identity as solely affecting the right of privacy, the majority have failed to confront the dual nature of such appropriations."²²¹ The "dual nature" that she identified is the celebrity's concurrent interests in the just rewards of his labor— an assignable property right— and his personal interest in controlling what commercial ventures he is associated with— a dignitary right.²²²

²¹³ *Id.* at 1097.

²¹⁴ *Hoffman v. Capital Cities*, 33 F. Supp. 2d 867, 873 (C.D. Cal.1999) (emphasis added), *rev'd on other grounds*, 255 F.3d 1180 (9th Cir. 2001).

²¹⁵ *Id.*

²¹⁶ *See* *Goldman v. Simpson*, No. SC036340, at 11 (Ca. Super. Ct. W. L.A. Cty. Oct. 31, 2006).

²¹⁷ *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 (1979) ("The trial court found, and the parties have extensively briefed and argued, that the interest in question is one of 'property' We agree, however, with Dean Prosser who considers a dispute over this question 'pointless').

²¹⁸ *See id.* at 437 (J. Bird, dissenting).

²¹⁹ *See id.*

²²⁰ *Id.* (emphasis added).

²²¹ *Id.* at 452.

²²² *See id.* at 836 (identifying the proprietary interests protected by the right) and *id.* at 836 n11 (acknowledging that they exist concurrently with dignitary interests).

Chief Justice Bird did not see the extension of property-based protections to the right of publicity as necessarily preventing a plaintiff from asserting privacy-based protections as well.²²³ She recognized that celebrities could authorize certain uses in order to generate profits while retaining the right to prevent other uses, regardless of how profitable they are.²²⁴ According to her, a violation that affected both a plaintiff's feelings and a plaintiff's wallet could be brought under either property-based protections or privacy based protections, or both.²²⁵ The subsequent 1985 amendments to California Civil Code section 3344 and the enactment of Section 990(h), which dovetail remarkably with Chief Justice Bird's vision of the right, demonstrate that the California legislature shared her view.²²⁶

The problem with saying that a celebrity trades a dignitary right for a property right is that we are attempting to find a line that does not exist. As Professor Alice Haemmerli so aptly put it, "[d]oes the fact that a prostitute has commodified her body mean that she can be raped with impunity, or that the rape should be viewed solely in terms of economic impact?"²²⁷ Or, as another example, does the fact that Paris Hilton appeared in a raunchy Burger King commercial mean that other commercial ventures are free to depict her in the same manner, so long as they pay her? The choice to allow one's image to be exploited for profit is not a choice a celebrity makes just *once*. It is a choice the celebrity is making *anew* in each novel situation.

C. The Right of Publicity as a Property Right Can Be Severed From the Right of Publicity as a Personal Right

Any line drawn between the right of publicity as a dignitary right and the right of publicity as a property right is illusory and arbitrary. Since the two coexist to protect complementary interests, such an attempt would result in a necessary sacrifice of one or the other. A more conceptually sound approach is to divide the right into its respective interests and re-label it as two separate and complementary rights.

The right of publicity may be divided into the following two components: first, a personal privacy-based right, which may be

²²³ See *id.* at 836 n11 (1979) (J. Bird, dissenting) ("This is not to suggest that commercial misappropriations of one's likeness may not inflict noneconomic injuries.").

²²⁴ See *id.*

²²⁵ See *id.*

²²⁶ Arguably, it was Chief Justice Bird's dissent that was ultimately adopted by the legislature when it decided in 1984 to supercede the *Lugosi* decision and extend the right of publicity to a celebrity's heirs and assigns. See the extensive discussion of California law, *infra* at Part IIB.

²²⁷ Haemmerli, *supra* note 197, at 404.

labeled “the right to publicity control” (this right would protect a celebrity’s exclusive right to approve and control the use of his image for commercial gain); second, a property-based right, which can be dubbed “the right to publicity profits” (this right includes the right to profit from uses of one’s likeness and image, as well as the right to make profitable licenses of such uses). The former would not be assignable, while the latter one would be; the former would expire when the celebrity does, while the latter may live on for as long as the state’s legislature decides. A plaintiff’s showing to satisfy both may be identical and may consist of “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”²²⁸ The difference, however, would be in the type of injury that the plaintiff could claim. The remedies for the control portion of the right of publicity would be limited to emotional distress and punitive damages, while the remedies for the profits portion of the right of publicity would be limited to lost profits.

D. Courts Should Be Able to Assign a Celebrity’s Proprietary Interests in His Right of Publicity While Protecting the Celebrity’s Dignitary Interests

While a celebrity debtor’s creditors may have to give up their claims to that celebrity’s right of publicity as a whole, they should not have to leave empty-handed. Once the right of publicity is divided into a property right to publicity profits and a personal right to celebrity control, courts and legislatures will find it much easier to find elements of value that they may make available to creditors without the fear of depriving celebrities of free choice and turning them into mere products.

Judge Lefkowitz expressed concern that an assignment of a celebrity’s right of publicity could amount to involuntary servitude by “permitting a judgment creditor to, in effect, ‘manage’ the performer’s appearances.”²²⁹ However, if a court transfers a debtor’s right to publicity profits while allowing him to retain his right to publicity control, the debtor would still retain the right to block any commercial use of his persona.²³⁰ The only difference would be in assessing damages, since the celebrity would not be able to claim lost profits. Furthermore, the debtor would not be barred in any way from any profit-generating uses; he would be

²²⁸ These are the four elements of pleading appropriation in California. *See Eastwood v. Super. Ct.*, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983).

²²⁹ *Goldman v. Simpson*, No. SC036340, at 12 (Ca. Super. Ct. W. L.A. Cty. Oct. 31, 2006) (citing *Jacoby & Zimmerman*, *supra* note 16, at 1351-52).

²³⁰ *See Westfall & Landau*, *supra* note 42.

merely prevented from actually profiting from them. The assignee would be able to bring suit, but only for lost profits. He would not be able to prevent the celebrity from acting.

In fact, if the celebrity's right of publicity control is preserved, a creditor's and a debtor's rights and obligations towards each other, though not towards third parties, are virtually identical to what they would be absent such a transfer. A debtor may seek injunctive relief and pursue damages against any commercial uses of his persona by the creditor that he did not explicitly authorize. Conversely, a creditor may demand any profits that the debtor makes from the use of his persona.

As Frederic Goldman asserted before the California courts, a creditor's main use for a celebrity's right of publicity profits concerns third parties.²³¹ Simpson's announcement of the *If I Did It* book deal immediately after Goldman's failed attempt to acquire Simpson's right of publicity demonstrates that a celebrity with no intention of satisfying a monetary judgment may still use his publicity for profit as long as he is not the one who is profiting.²³² A creditor will be forced to track the revenue stream and prove fraudulent conveyance to recover.²³³ If Goldman held Simpson's right to publicity profits at the time the book deal was signed, Goldman could simply sue Harper-Collins for infringement on his right to Simpson's publicity. Even in circumstances involving a celebrity acting in good faith, a celebrity with a judgment as large as Simpson's looming over his head has neither the resources nor the incentive to pursue infringers. It is most efficient to place the right in the hands of the party that can best protect it and has the strongest interest to do so.²³⁴

At first glance, this does not seem like much of a concession to the creditors. If the only thing that Goldman could do with Simpson's right of publicity without Simpson's consent is to pursue third-party infringers, he would be unlikely to recover more than a fraction of the money owed him. The remedy's true added value is in the fact that it changes the parties' incentive structure, making settlements and cooperation far more likely.

²³¹ See Plaintiff's Supplemental Brief, *supra* note 134, at 10-11.

²³² For example, though Goldman was successful in acquiring Simpson's rights in the book *If I Did It*, as well as tracking down some of the money paid out to him, he was unsuccessful in reaching some \$880,000 allegedly paid by the publisher to "a third party" in connection with the project. See Judge Freezes O.J.'s Book Dough, E! ONLINE, Jan. 4, 2007, <http://www.eonline.com/news/article/index.jsp?uuiid=fa21671c-fe26-4eb1-99db-ff1ccb587c73>.

²³³ See *id.*

²³⁴ Note that this does not deprive the celebrity of also having the right to sue third-party infringers if he would like to do so – another concern raised by Judge Lefkowitz. It merely prevents the celebrity from seeking lost profits. See *Goldman v. Simpson*, No. SC 036340, at 7 (Ca. Super. Ct. W. L.A. Cty. Oct. 31, 2006).

Today, celebrities seeking to avoid paying large monetary judgments can find ways to make use of their publicity without directly receiving the benefits, as Simpson did.²³⁵ However, faced with the prospect of losing their most valuable asset, celebrities are far more likely to cooperate. The creditor, too, has a strong incentive to cooperate: when the infringement suits dry up, the creditor's only chance to derive any value from the celebrity's publicity is by giving the celebrity a reason to work; in other words, by entering into an agreement with the celebrity to share the profits.

E. *Directions for Further Research*

A transfer of a celebrity's right to publicity profits raises many additional questions that this Note does not purport to answer. Judge Lefkowitz, too, raised a number of such questions and stated that it would be up to the legislature to answer them. One question was whether, and how, the celebrity should be credited for failed business ventures that the assignee, or a sub-assignee, may undertake involving the commercial use of the celebrity's persona; another was whether such an assignment would necessitate that the court monitor credits against the judgment, and who would bear the costs of a court-appointed receiver; and yet another one was whether the assignee assumes a fiduciary role towards the celebrity.²³⁶

These questions seem to imply that the court will transfer the right to the creditor for only as long as the debt is outstanding, and that it will revert back if and when the judgment is paid in full. They appear to become moot if the right is assigned to the creditor in whole, with no possibility of reversion to the celebrity debtor. This may very well be the case if the present value of the right is assessed at a higher value than the celebrity's remaining debt. The debtor, in this case, would not hold a future interest in the right and thus should be unconcerned with preserving its value or being credited against the judgment.

However, this situation raises a different question: how would the court determine the severed right to publicity profits' value for the remainder of the celebrity's lifetime? Though courts have allowed estimates of the value of a celebrity's right of publicity for the remainder of the celebrity's lifetime in the past, all of the underlying cases involved circumstances where control was to be retained by the celebrity.²³⁷ It is unclear how the right to profits'

²³⁵ See *supra* note 232.

²³⁶ See *id.* at 7-8.

²³⁷ Most notably, this happened in Simpson's own murder trial. See *Rufo v. Simpson*,

value would be determined separately from the right to control.

I am raising these questions merely as catalysts for future discussion. They fall outside of the scope of this Note, but I am confident that they are capable of being addressed. Suffice it to say, that once the right to publicity control is viewed as conceptually separate from the right to publicity profits, concerns over possible abuses of a celebrity's dignitary rights can be much more easily resolved.

IV. CONCLUSION: PAYING THE PRICE OF FAME

Goldman's case was built on as strong a legal foundation as the sparse jurisprudence allowed. Ultimately, though, he was likely hoping that the nature of the parties involved would tip the scale. On one side, there was a plaintiff whose son was brutally murdered, and on the other, a man widely believed to be the son's killer, seeking to assert his right to continue to profit from that very murder.²³⁸ It was a terrible set of circumstances that Judge Linda K. Lefkowitz had encountered, but a set that did not seem to ultimately sway her. Despite calling Simpson's post-judgment activities "ghoulish" and "inequitable,"²³⁹ she stated that the question is one of "pure law" and that "the determination of whether post-judgment enforcement remedies may properly include the transfer of publicity rights to a prevailing plaintiff could have, in theory, been raised by any plaintiff holding a judgment against any defendant perceived as holding financially viable 'publicity rights.'"²⁴⁰ This, in particular, makes the *Goldman v. Simpson* case a terrific case study of the interests that the right of publicity protects and of how courts should rank those interests alongside other interests, such as creditors' rights.

Judge Lefkowitz asserted that the fact that Simpson—or any other celebrity—held financially viable rights that he freely exploited for financial gain did not mean that he did not also hold the right to decide how those rights were exploited.²⁴¹ Her decision correctly implies that we should not have to choose between giving celebrities a property interest in the association of their likeness or image with commercial ventures and giving them

103 Cal. Rptr. 2d 492, 523 (Cal. Ct. App. 2001). A value for such a right has also been assessed during division of marital assets, albeit as part of the larger pie known as "celebrity goodwill." See, e.g., *Piscopo v. Piscopo*, 555 A.2d 1190, 1192-93 (N.J. Ch. 1988), *aff'd*, 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989).

²³⁸ See *Goldmans Seek Control of O.J. Simpson's Right of Publicity*, *supra* note 14.

²³⁹ *Goldman v. Simpson*, No. SC 036340, at 12 (Ca. Super. Ct. W. L.A. Cty. Oct. 31, 2006).

²⁴⁰ *Id.* at 4 (emphasis added).

²⁴¹ *Goldman v. Simpson*, No. SC036340, at 4 (Ca. Super. Ct. W. L.A. Cty. Oct. 31, 2006).

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the inalienable ability to decide whether or not to do so in the first place. Her conceptual failure was one that has plagued the right of publicity from the moment that William Prosser coined the tort of appropriation, insisting that it protected both dignitary and property interests:²⁴² what the Judge had referred to as the “right of publicity” should have been labeled as two separate rights. Had it been so, Frederic Goldman’s claim would have been far easier to adjudicate. By assigning a right to the profits from a celebrity’s publicity while protecting that celebrity’s right to control his own publicity, Judge Lefkowitz could have completely protected Simpson’s dignitary rights while still affording Goldman a modicum of relief. She could have avoided choosing between squeezing “the Juice”²⁴³ to the last drop and leaving the families of his alleged victims high and dry.

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²⁴² See Prosser, *supra* note 66, at 406-07.

²⁴³ Simpson’s well-known nickname. See *O.J. Simpson*, USC LEGENDS, <http://www.usclegends.org/oj-simpson.php> (last visited January 27, 2008).

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