Right of Publicity From the Performer's Point of View

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From an American performer’s point of view, the most startling aspect of the legal community’s debate over the right of publicity is its underlying assumption. It is generally accepted that upon entry into the public eye by virtue of his or her creative work, the performer subsequently relinquishes all rights that would otherwise protect him or her. This debate centers on whether a performer’s persona is a public resource to which anyone may have free and unfettered access. One side of the debate maintains that the First Amendment demands this access be virtually without limit, while the other side avers that the performer should be able to retain some controls in limited circumstances.

Interestingly, the question posed by the performer is markedly different. The performer asks: “At what point did I make an agreement with the public that the way in which I earn my living ipso facto denies me the protections which generally apply to the rest of the population?” The simple answer is no such agreement exists. An artist’s work exposes him to direct public scrutiny. Although it is assumed that public exposure quite naturally causes

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the public to view artists and performers as public property, this assumption is intrinsically wrong.

Actors, singers, comedians, models and sports figures come into the public’s eye by virtue of their work. Similar to all other members of the society, the performer’s work is also the means by which the family is supported. Most performers have little or no concept of the dramatic life changes that success will bring. All performers start out unknown—a condition that remains constant for the vast majority of artists. Most artists and performers never have to deal with the attendant problems and disruptions associated with extreme notoriety and celebrity.

As in any profession, there are those who rise to the top. Being a performer is unique in the sense that success carries with it an unusual measure of celebrity. Furthermore, a performer’s persona—her body, voice and face—defines her value in the marketplace. The basic asset the performer possesses, that which he depends upon to earn a living, is his own persona.

Unlike others who come into the public eye, such as politicians and other public servants, performers are neither on the public payroll nor have they sought and obtained the public’s trust in order to get their jobs. This is the distinction between the public official and the far more broadly defined “public figure.” Public officials, whether elected, appointed, or hired, have indeed made an agreement with the public to serve them and have directly and willingly accepted the scrutiny and sense of propriety to which the public has a right. Performers, on the other hand, have entered the public eye without agreeing to accept public funds in exchange for the public’s trust. Performers are members of the public in exactly the same sense as any other person in American society. Therefore, they have every reason to expect that the rights available to others should be equally available to them.

Such an expectation, however, is not entirely realistic. Celebrity brings with it a certain loss of privacy that is unavoidable. How much privacy a performer can reasonably be expected to lose is a question for another forum. The more relevant question is whether performers should be expected to lose the right to protect their most valuable asset (i.e., their persona) from being misappropriated by anyone who chooses to use it. No reasonable explanation exists
for narrowing a performer's rights as compared to the protections enjoyed by the rest of society.

The right of publicity was conceived as a tool by which an individual could seek redress for the unauthorized use of his or her persona—generally described as a person's name, likeness, voice or signature. Rights of publicity, which exist for living persons have long recognized that the right is an amalgam of personal privacy and property rights. Where rights exist to cover the use of the personas of deceased persons, the privacy element is consistently excluded, since the dead have no legal status as persons, and therefore no right of personal privacy. However, the property element is retained and has been thoroughly tested.

Over twenty state jurisdictions recognize some form of right of publicity, either through common law or statute. Unfortunately, great variation exists among the states that currently have some legal coverage in place. This variation and the lack of either common law or statutory rights in many other jurisdictions creates a confusing "crazy-quilt effect," causing terrible uncertainty for those whose rights are abridged and those who may unintentionally infringe upon them.

Professional performers do their work all over this country. Their completed work is distributed worldwide through a number of different media. In today's world, there is no longer any such thing as a local broadcast or local publication. Digital recording and reproduction can create copies that are identical in content and quality to the original regardless of how many generations of reproductions are made. Digital technology has dramatically escalated the possibilities for abuse. Individual state jurisdiction over this kind of privacy invasion and misappropriation of property is insufficient and inexcusable given the capabilities of current technology. A uniform federal statute is the only means possible to protect the interests of performers and others whose personas may be misappropriated.

The argument most often raised in objection to a federal right of publicity statute is based upon the maintenance of the free

1 J. THOMAS McCARTHY, MCCARTHY ON TRADEMARKS § 28 (4th ed. 2000 rev.).
marketplace of ideas, as enshrined in the First Amendment. Proponents of this argument claim the free marketplace of ideas allows each individual in society access to every image, every word and every note of music. Without this First Amendment protection, speech will become commodified thereby increasing the threat of censorship.

The restrictive concepts embodied in U.S. copyright and trademark law stand in stark contrast to this position. Although it is not possible to obtain a copyright for one's persona, the Lanham Act\(^2\) does provide recourse for misappropriation of a persona in some specific situations. However, trademark misappropriation of a persona presupposes that a sale is the goal of the misappropriation. The Lanham Act does not cover instances in which the value of the property may be diminished or diluted as a result of the unauthorized use.\(^3\)

Our system of laws governing the use of intellectual property developed in the age of the printed word and the still photograph. Over time, adaptations have been made to bend these laws to accommodate recorded sounds and moving pictures. These adaptations worked reasonably well in the era of film, vinyl and analog electronic recording (i.e., video and audio tape). Now however, with the advent of digital recording, reproduction and distribution, the landscape has irrevocably changed.

These changes, in regard to copyright protections, are slowly being recognized, domestically as well as internationally. Many who oppose any rights for performers, have labored long and hard to preserve their own rights as copyright holders. Performers have consistently supported the protection of copyrights in the digital age. Many performer contractual rights are connected to the income derived by the copyright holders—rights pertaining to the distribution and sale of copyrighted works.

In the digital age, however, many misappropriations can occur that do not effect the copyright holder sufficiently to stimulate the taking of protective action. For example, a performer who appears in a film, which is distributed on digital video disk ("DVD"), may


\(^3\) Id.
have his or her image stolen and put to a use that was never intended or to which the performer never agreed. In these cases, however, the copyrighted work itself is not damaged in the slightest. This creates a situation in which the only party that has the status to act (the copyright holder), lacks a reason to act, and the party with a reason to act (the performer), does not have any legal status. This creates a very unstable situation that needs to be addressed.

The question then arises whether an individual has a right to control the use of another’s persona without permission, in circumstances which would either invade personal privacy or tend to damage, destroy, diminish or dilute the property value of that persona. While some may say that an answer in the affirmative damages the First Amendment and the free marketplace of ideas, I would contend that answering any other way isolates one class of intellectual property from protection—the personas of those who are sufficiently recognizable so that their personas have value worth appropriating—while allowing other forms of intellectual property to be protected. Although a right of publicity may provide one method of protecting the personal privacy and the valuable property of performers, a better way may exist.

Rights of publicity have traditionally been aimed at guarding against misappropriation for commercial purposes. The arguments, both for and against a right of publicity have focused on how broadly the term “commercial” should be applied. However, the reason for the misappropriation of a persona in the digital age may not fit neatly into the traditional “commercial” definition.

Use of these new technologies may render serious abuses against an individual’s persona. It is widely accepted that the use of a persona of a well-known individual in an expressive work is fully protected under the First Amendment. But consider the following example. It is already possible to perform a full body and face scan of an actor, intended for use in one motion picture, and have that scanned persona appear as a newly created performance in an entirely different film. Since that second film would also be an expressive work, this use would be allowed under current law. But the damage to the actor would include not merely the income lost
as a result of not having been properly paid to appear in the second film, it could constitute serious further damage to the actors reputation and “good name.”

Here is another hypothetical. A well-known actress appears in a film, a clip from which is posted on the Internet for promotional purposes. This digital clip is then downloaded, the actress’ image is copied into a program that manipulates and animates it, thereby creating a new piece of digital film which carries a perfect copy of the actress’ image. At this point, a new expressive work has been created in which the actress’ image appears.

Continuing with this same hypothetical situation, assume that the new work is a screen saver, which digitally removes the actress’ clothes. Assume even further that the screen saver animates the actress and poses her in a series of suggestive and lewd positions. If that screen saver is then distributed and made available to others over the Internet and no fee is charged for downloading it, no current right of publicity would be of use to the actress in pursuing the author of the screen saver. Furthermore, since the original image was derived from a copyrighted work that was used to promote the original film, under current law only the copyright holder would be entitled to seek restitution for the misappropriation of the material. But since there is no damage to the copyrighted work, the copyright holder would have no interest in pursuing the matter.

Image theft of this nature has already occurred involving still photographs. It has caused serious damage to the reputations of the effected performers, with little or no recourse available to them. As technology develops, enabling more and more thefts of both still and moving images to occur, a mechanism for curtailing this type of abuse becomes increasingly necessary.

Can a uniform federal right of publicity address both commercial and non-commercial uses without doing damage to the First Amendment? Or would it be better to address these problems with an entirely new legal approach? It is clear that a mechanism must be put in place to protect the privacy and property rights of those whose very notoriety has made their personas objects of substantial intrinsic value. If not through a uniform federal right of publicity, then some other vehicle must be found.