A Positive Economic Theory of the Right of Publicity

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I. INTRODUCTION

The right of publicity allows entertainers and other celebrities to charge for the commercial use of their names, likenesses, and distinctive performance styles. It is a common-law and statutory[1] right that exists as a supplement to statutory copyright protection. Why, from an economic point of view, should celebrities have this right? The incentives to become a star already seem sufficient. Under the theory presented in this article, the right of publicity is needed to ensure that publicity assets are not wasted by a scramble to use them up as quickly as possible. The right of publicity privatizes a public good (in publicity) and thus encourages a more sensible use of this type of social asset.

II. THE THEORY OF PUBLIC GOODS

Public goods are characterized by "nonexcludability" and "nonrivalrous consumption."[2] A pure public good satisfies both conditions at the same time. "Nonexcludability" means that it is impossible to exclude people who have not paid to use the resource. These nonpaying users are often called "free riders."[3] It is ordinarily desirable for people to pay for a resource so that producers have an incentive to

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1. Important statutes recognizing the right are CAL. CIV. CODE § 990 (West 1994); FLA. STAT. ANN. § 540.08 (West 1988); KY. REV. STAT. ANN. § 391.170 (Michie 1984); NEV. REV. STAT. § 598.984 (1991); OKLA. STAT. ANN. tit. 12, § 1448 (West 1993); TENN. CODE ANN. § 47-25-1104 (1988); TEX. PROP. CODE ANN. § 26.002 (West Supp. 1993-1994); VA. CODE ANN. § 8.01-40 (Michie 1992). For a description of publicity statutes, *see* Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers—A 21st Century Challenge for Intellectual Property Law*, 41 J. COPYRIGHT SOC'Y 19, 73-78 (1993).

2. *See* Tyler Cowan, *Public Goods and Externalities: Old and New Perspectives*, *in* THE THEORY OF MARKET FAILURE: A CRITICAL EXAMINATION 3-4 (Tyler Cowan ed. 1988); ARMEN ALCHIAN & WILLIAM ALLEN, EXCHANGE AND PRODUCTION THEORY IN USE 251-53 (1969).

3. *See, e.g.*, Earl R. Brubaker, *Free Ride, Free Revelation, or Golden Rule?*, 18 J.L. & ECON. 147 (1975).

produce it.[4] Unless nonpaying users can somehow be excluded, capitalists might have too little incentive to build lighthouses.[5] For this reason, the market might fail to produce enough public goods. Nevertheless, some public goods do not have to be produced, but exist naturally. Air for breathing is a good example. It would not make good economic sense to make breathers pay, because the air will exist whether consumers pay or not.

A pure public good is also characterized by "nonrivalrous consumption." This means that one person's consumption of the good does not interfere with another person's consumption. Again, air for breathing is a classic example.[6] One person's breathing does not reduce the amount of air available for someone else to breathe. Private goods, on the other hand, are characterized by "rivalrous consumption." One person's consumption of a loaf of bread limits the ability of another person to get utility from the same bread.

When consumption is rivalrous, unless consumers pay prices that correspond to production costs, it is probable that they will consume wastefully. For instance, during the former Soviet Union's collapse, President Gorbachev used to stress (as an argument for increasing the price of Soviet bread) that the regulated price was so low that children used loaves of bread as footballs, and farmers fed it to cattle.[7] A price lower than cost is economically inefficient, because it encourages people to use bread in ways that have lower values than those of the goods that might have been produced instead.[8] For this reason, cost-based prices are ordinarily indispensable to social welfare. Never-

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4. *See* Thomas E. Borcherding, *Competition, Exclusion and the Optimal Supply of Public Goods*, 21 J.L. & ECON. 111 (1978).

5. *See* Ronald H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357 (1974) [hereinafter *Lighthouse*].

6. Cowan, *supra* note 2, at 4.

7. *See Gorbachev: "We Are Not Asking for a Free Ride,"* L.A. TIMES, June 2, 1990, at A8. President Gorbachev said,

> On the first of July, the price of bread is to be raised. Bread is too cheap in the Soviet Union. One kilo of bread costs two dollars here [in the United States], and in the Soviet Union, the best bread costs . . . just one-tenth of your price . . . . The kids play football with loaves of bread, feed bread to cattle, and it's really outrageous, and our people are asking that this be changed . . . .

8. *See* GEORGE J. STIGLER, THE THEORY OF PRICE 111 (3d ed. 1966).

theless, for pure public goods, the efficient price is zero. For instance, if bread were subject to nonrivalrous consumption (during the feeding of the five thousand?), it would be inefficient to discourage people from eating as much as they wanted.

Many goods are neither purely public nor private.[9] A relatively uncongested bridge is a good example. Within broad limits, one person's travel does not diminish anyone else's. When the bridge becomes crowded (at rush hour), it becomes more and more subject to rivalrous consumption as additional travelers slow other travelers down. Hence, there is a continuum between rivalrous and nonrivalrous consumption, and judged by this criterion goods are more or less public goods.

There is also a continuum between the excludability and nonexcludability of free riders. Formerly, economists thought that an inability to exclude free riders resulted from the very nature of some goods. For instance, prior to Ronald Coase's famous article on the subject, most economists thought that lighthouses were inevitably subject to nonexcludability. How could shipowners be charged for using lighthouses? (These economists concluded that the government would inevitably have to build and operate them.) In a famous article, Coase demonstrated that lighthouses in England were once private and that users were indeed charged for lighthouse services.[10] Hence, there was a private incentive to build lighthouses.

Coase was building upon earlier work by Harold Demsetz that argued that society will tend to privatize goods—create private property rights—when the benefits from the increased efficiency outweigh the costs of enforcement.[11] Demsetz argued that society could benefit from excluding free riders when an asset becomes sufficiently scarce and valuable.

The right of publicity attaches to a celebrity's name, likeness, and

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9. *See* Harold Demsetz, *The Private Production of Public Goods*, 13 J.L. & ECON. 293 (1970).

10. *See generally Lighthouse, supra* note 5.

11. *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (Papers & Proc. 1966) [hereinafter *Toward a Theory*].

personality.[12] Typically, the defendant in these actions has appropriated a distinctive personal asset in order to sell a product. For instance, the singer Tom Waits has a distinctively gravelly way of singing that many people associate with him alone. Before the case about to be described, he had always refused to use his voice to sell products (other than artistic ones).[13] Knowing Waits's views, Frito-Lay found a Tom Waits sound-alike and produced a TV commercial for Doritos corn chips with this person singing the voice-over in Waits's distinctive style.[14] Even Waits's friends were fooled. When he sued, the court entered judgment on the jury's $2.4 million verdict.[15] Analyzing the result much as an economist would, Waits declared, "Now I have a fence around my larynxization."[16]

This article gives an economic explanation of *Waits v. Frito-Lay, Inc.*, and similar cases. From a public-goods perspective, there is an economic argument against the *Waits* result, but a better one in favor of it. Waits's distinctive singing style is partly a public good. When a television viewer enjoys the soundtrack for the unauthorized Doritos commercial she does not thereby prevent another fan from enjoying Waits's actual voice on an album. One could argue, therefore, that the court was mistaken in declaring that Waits had a private property right. Nevertheless, Waits's distinctive singing style is not a pure public good, because in some ranges of use—intensive ones—more commercials using Waits's voice tire his public of it and reduce its enjoyment of his artistic works. Unless Waits has his fence, free riders, such as Frito-Lay, could produce so many low-valued works that they would crowd out higher-valued ones.

Indeed, to introduce one more economic concept, it is possible to view Waits's gravelly style as a unique asset that has few alternative uses. Perhaps his next best employment would be as an auctioneer. Economists would call the difference in value between Waits's highest

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12. *See, e.g.*, Motschenbacher v. R. J. Reynolds Tobacco, 498 F.2d 821 (9th Cir. 1974).

13. Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992), *amended, substituted opinion, in part*, 1992 U.S. App. LEXIS 24838 (9th Cir. Aug. 5, 1992), *cert. denied*, 113 S. Ct. 1047 (1993).

14. *Id.* at 1097-98.

15. *Id.*

16. *See 1990: A Retrospective; Voices*, L.A. TIMES, Jan. 1, 1991, at B3.

valued use (singing) and the next highest valued use (auctioning tobacco) a "rent."[17] For singing, Waits receives an amount vastly larger than the amount necessary to keep his talent in the music industry: he earns an economic rent. Nevertheless, this rent corresponds to a real social asset. Society would be poorer if Waits left singing and took up work as an auctioneer.

The question is whether the creation of a right of publicity, and its nature, can be explained in economic terms. When examined in the light of the theory of public goods, the closest analogy to publicity is the special type of public goods problem known as the "common pool problem."[18] Imagine that there is a pool containing fish that no one owns. If there were an owner, that person would have an incentive to fish slowly enough so that the fish would be preserved. The owner would think: "Every fish that I catch today is a fish that I cannot catch tomorrow and, indeed, if there is a critically small number of fish, every fish caught today could mean two fish sacrificed tomorrow." Hence, the pool owner internalizes both the benefit from fishing and the cost, so she has the correct incentives to conserve the resource.

In the contrary example, the pool is not privately owned, but is either not owned at all or is owned by a sufficiently large group of people that they find it difficult to implement controls. In this situation, each angler has an incentive to catch as many fish as possible today and to give no heed to tomorrow. The reason is that the angler gets the full benefit of a fish today, but does not incur the full cost. Whereas the private owner internalizes the cost if she catches too many fish today, because inevitably there would be fewer fish tomorrow, the nonowner and the communal owner face little or no cost from catching a fish today. The reason is simple. If the angler does not catch the fish today, someone else (not the angler herself) will probably catch the fish tomorrow. In this situation, on each and every day, each angler has an incentive to acquire a gill net large enough to capture all of the fish in the pool. Obviously, the situation without property rights

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17. *See* STIGLER, *supra* note 8, at 106 n.1.

18. *See* H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954). *See also* ARTHUR F. MCEVOY, THE FISHERMAN'S PROBLEM: ECOLOGY AND LAW IN THE CALIFORNIA FISHERIES 1850-1980 (1986).

is not economically or socially optimum. The value of the fish in the pool to those who might catch and eat the fish is also a rent. When anglers race to catch the fish as quickly as possible, many modern economists call the race "rent dissipation."[19] There are three costs to this race. First, the fish may be caught too quickly, and the pool may ultimately be over-fished, even to the point where the fish die out.[20] Second, the anglers may invest in costly equipment simply to capture the fish at the inappropriately high rate. Finally, and possibly implicit in the first cost, consumers could make inappropriate consumption choices, because the price of fish is too low during the time of the race, and too high after the fish have become extinct. Indeed, following the lead of the Soviet ranchers who fed bread to cattle, the price of fish could fall so low that people might use it as fertilizer, even when in the future the price of fish for food becomes unaffordable. As will be spelled out below, if Tom Waits's voice were freely appropriable, society would also bear each of these costs, albeit in slightly different forms.

The legal right of publicity can be understood as a fishing license designed to avoid races that would use up reputations too quickly. The asset to which the right of publicity attaches is obviously not a reputation in the old-fashioned sense of good or bad. Instead, it is an image that people enjoy for itself or otherwise find valuable in certifying products. Although repetition of these images could for a time increase the value of subsequent repetitions, as when radio listeners learn to enjoy a new song, ultimately there is a point of diminishing marginal returns beyond which subsequent displays and performances diminish the value of the asset. Indeed, with advanced communications technology, it is easy to imagine a rate of reproduction so high that the value of a further repetition of Tom Waits's gravelly voice would actually become negative for all but his most loyal fans. At some such point, copyists would lose their incentive to exploit Waits's singing style and turn to another one. As with the depleted fishery,

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19. *See* Mark F. Grady & Jay I. Alexander, *Patent Law and Rent Dissipation*, 78 VA. L. REV. 305, 316-21 (1992).

20. *See* J. R. Gould, *Extinction of a Natural Fishery by Commercial Exploitation: A Note*, 80 J. POL. ECON. 1031 (1972); Ronald W. Johnson & Gary D. Libecap, *Contracting Problems and Regulation: The Case of the Fishery*, 72 AM. ECON. REV. 1005 (1982).

society could squander a social asset.[21]

When Waits has a private property right over his singing style, he has the incentive and ability to regulate current uses so as to maximize the present value of the asset over the future. Indeed, he would become like a single owner of a fishery who for that reason would have an incentive efficiently to manage the asset. Mindful of foregone values ten years from now, the private owner will limit uses today. By contrast, under the system of common ownership that would exist in the absence of a right of publicity, promoters and other publicists would draw down the value of the image too quickly, each in an effort to capture as much of it for herself as possible. Among other things, publicists would substitute too many low-valued uses (Doritos commercials) for uses that listeners value more (artistic uses).

The right of publicity has been developed by the courts only since about the middle of this century.[22] Why did it take so long for this law to emerge? There is a provocative analogy to Harold Demsetz's analysis of the development of private property rights among Canadian aborigines.[23] In the early period on the Labrador peninsula, before the French developed the fur trade, hunting lands were owned in common.[24] The resource was so plentiful relative to demand that it was hardly worth the added administrative expense of platting out hunting grounds and enforcing private claims over them. Nevertheless, after the French developed the fur export trade, beaver pelts became

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21. Those tempted to think that Waits's singing style is socially worthless should see the movie DOWN BY LAW (Island Pictures 1986), where the juxtaposition of Waits's voice and black and white pictures of rural Louisiana create a haunting image that would be impossible to evoke among people familiar with the pirated Doritos ads.

22. *Compare* Lahr v. Adell Chem., 195 F. Supp. 702 (D. Mass. 1961) (finding no authority for Bert Lahr's claim that defendants unlawfully appropriated his "pitch, inflection, accent, and comic sounds"), *vacated*, 300 F.2d 256 (1st Cir. 1962), *with* Lahr v. Adell Chem., 300 F.2d 256 (1st Cir. 1962) (reversing district court and upholding his novel cause of action). In California, which along with New York, has been an innovator in creating publicity rights, the leading case comes from 1979. *See* Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979) (rejecting posthumous right of publicity when artist did not commercially exploit it during his lifetime).

23. *See Toward a Theory, supra* note 11, at 350-53.

24. *Id.* at 352.

scarce relative to the demand.[25] At this point, according to Demsetz's historical and anthropological sources, private property developed.[26] We might understand the recent development of the right of publicity in a similar way. Either the images themselves have become more scarce (more valuable in our culture) or the technology available for their rapid depreciation has become cheaper. Perhaps both forces have been at work simultaneously.

Recognizing that a private property right over celebrities' names, likenesses and personalities would sometimes produce economic benefits is not in itself a complete theory of the doctrine that the courts have developed. Even from a strictly economic point of view, there are important problems of delimitation. For instance, although good economic arguments can be made in favor of the result in *Waits*, it is possible for the courts to go too far. Suppose the original swing musicians sought a property right over this entire genre. Giving them this right seems economically undesirable because it would tax subsequent swing musicians without a corresponding benefit. In another famous case in the area, the New York Court of Appeals refused to create a private property right over Artie Shaw's type of swing music.[27] The court was willing to protect the plaintiff from the defendant's passing off its phonorecords as genuine Artie Shaw recordings, but not from the defendant's mere appropriation of the Artie Shaw sound.[28] A useful theory of the doctrine should explain the difference between *Waits* and *Shaw*.

III. JUDICIAL THEORIES OF PUBLICITY RIGHTS

The theory presented here is one about the way courts behave, not about how they should behave. In the Legal Realist tradition, judges

25. *Id.*

26. *Id.*

27. Shaw v. Time-Life Records, 38 N.Y.2d 201, 341 N.E.2d 817, 379 N.Y.S.2d 390 (1975).

28. The court said: "Artie Shaw does not have any property interest in the Artie Shaw 'sound.' So long as there is an absence of palming off or confusion, competitors might 'meticulously' duplicate or imitate his renditions of musical compositions." 38 N.Y.2d at 205.

should have legislative theories about the cases that they decide.[29] They should have some story about public policy that applies to each important category of cases, and apply this story along with the more traditional types of precedent.[30] In the same tradition, commentators and treatise writers should vie with the judges to find the best theory. These theories are prescriptive, or "normative," in that they purport to dictate or at least justify the results reached in the cases to which the theories apply.[31] The economic theory presented here is not of this type. The rent dissipation theory presented here seeks only to explain as many of the cases as possible without proposing an economic rule of decision for the judges. Indeed, it would be unwise for courts to adopt this theory as a rule of decision.

Judges and treatise writers are lawyers, not economists, and it is usually immodest for them to apply economic theory to cases. At the least, they should be very cautious. Legal Realist judges often have older views of economics, since Legal Realism congealed in the 1930s before modern neoclassical economics became popular.[32] Indeed, modern law and economics is so new that there is not enough agreement about its theories so that they could be reliable sources for judges. As Richard Posner has sometimes stressed, since few judges know much about modern economics, it is usually wiser for them to rely on traditional methods of legal reasoning[33]—analogizing and distinguishing precedent cases. Posner instanced a Ninth Circuit opinion that reasoned, supposedly based on Guido Calabresi's economic theory of accident law,[34] that commercial anglers should have

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29. *See* Karl N. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1222-56 (1931); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (recommending that judges decide all cases based on policy analysis) [hereinafter *Transcendental Nonsense*]. *See generally* Mark F. Grady, *Toward a Positive Economic Theory of Antitrust*, 30 ECON. INQUIRY 225 (1992).

30. *See Transcendental Nonsense, supra* note 29 (criticizing courts that decide cases using traditional legal concepts).

31. *See* Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975).

32. *See* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 64-75 (1980) (emphasizing how Legal Realist scholars embraced sociology and other nonreductionist social sciences).

33. *See* Posner, *supra* note 31.

34. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).

a common-law action for fish killed by offshore drilling operations.[35] Although this result seems sensible in light of precedent,[36] the court's use of Calabresi's theory was tautological. The Ninth Circuit reasoned that oil drillers were "cheaper cost avoiders" than seafood consumers. This "analysis" assumes the economic conclusion in question, unless the court meant to suggest that seafood consumers had a realistic opportunity to go out and save the fish themselves. It seems unlikely that economic theory had much to do with the court's actual reasons for its decision.[37]

Some judicial theories of the right of publicity are economic, but, whether economic or not, most of these judicial theories tend to be tautological in a way similar to the *Oppen* court's theory that oil drillers are cheaper cost avoiders than seafood consumers. These judicial theories of the right of publicity purport to dictate a liability result in the case at hand. Nevertheless, the theories are often overbroad so that they also dictate liability results in many cases in which the courts would never find liability. In most cases in which these theories are recited, it seems doubtful that even the judges take them very seriously, but many judges include them probably out of deference to the Realist tradition, which requires an explicit consideration of "public policy" in practically every case. As Leon Green wrote early in the Realist movement, "[t]he struggle which men are making to rise above the *word* level seems to have no end."[38] In publicity cases, judges and Realist commentators have commonly mentioned three theories:

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35. The case was Union Oil v. Oppen, 501 F.2d 558 (9th Cir. 1974).

36. The case is distinguishable from Borcich v. Ancich, 191 F.2d 392 (9th Cir. 1951), *cert. denied*, 342 U.S. 905 (1952), where the same circuit held that commercial anglers did not have a cause of action for the destruction of their boat. Nevertheless, the *Oppen* facts seem more analogous to the case in which there is a cause of action for destroyed property. *See, e.g.*, Spartan Steel & Alloys v. Martin & Co. (Contractors), [1973] 1 Q.B. 27 (liability for destroyed steel in process); Muirhead v. Industrial Tank Specialities, [1986] 1 Q.B. 507 (liability for killed lobsters). The *Oppen* court did not mention the *Borcich* precedent.

37. *See also* Elbert v. Saginaw, 363 Mich. 463, 109 N.W.2d 879 (1961), where the Michigan Supreme Court found the defendant liable for an attractive nuisance based on an extensive review of and citation to the literature of developmental psychology. It seems doubtful that this theory had much bearing on the court's reasons for deciding the case as it did.

38. Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1016 (1928).

(1) the labor theory; (2) the prevention of unjust enrichment theory; and (3) the economic incentives theory.[39] Each is an insufficient guide to the decision of cases and is also a faulty predictor of actual case results.

A. *The Labor Theory*

Professor Melville Nimmer advocated a labor theory in support of the right of publicity. He wrote:

> It is an unquestioned fact that the use of a prominent person's name, photograph or likeness (*i.e.*, his publicity values) in advertising a product or in attracting an audience is of great pecuniary value . . . . It is also unquestionably true that in most instances a person achieves publicity values of substantial pecuniary worth only after he has expended considerable time, effort, skill, and even money. It would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations. Yet, because of the inadequacy of traditional legal theories . . . persons who have long and laboriously nurtured the fruit of publicity values may be deprived of them, unless judicial recognition is given to what is here referred to as the right of publicity . . . .[40]

This passage was obviously influenced by John Locke, who argued that since everyone has a property right in the labor of his own body, when a person mixes his labor with something that is "natural" or unowned, the product thereby becomes his property, at least if there is "enough and as good left in common for others."[41]

Nimmer's theory explains practically every publicity case in which the court awarded liability, because celebrities do not create valuable publicity without expending some labor. Nevertheless, the theory is

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39. These theories are described and critiqued in Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993), which is the most important source for the discussion that follows.

40. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 215-16 (1954).

41. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 17-19 (Thomas P. Peardon ed., Bobbs-Merrill Co. 1952) (1690). *See* Madow, *supra* note 39, at 175, 239.

ultimately unsatisfying as a positive theory—one that explains the pattern of precedent—because there are many cases in which the celebrity has expended much labor to develop her publicity but in which there is also no right. The case of Artie Shaw,[42] mentioned above, is one example. It seems dubious that Tom Waits spent more labor on his distinctive singing style than did Artie Shaw in developing his style of playing swing music. Yet it was Waits's right that the court recognized and enforced. Indeed, Professor Nimmer himself recommended that his theory should not be applied normatively (prescriptively) in situations in which "there are important countervailing public policy considerations."[43]

No scholar or judge has made a more important contribution to the field of entertainment law than Professor Nimmer did. Nevertheless, anyone who has read Nimmer's careful analysis of case precedent, or had the privilege to sit in his class, should realize that he did not lay as much importance on theory as on the more traditional forms of case analysis of which he was a master. His great contribution was to provide the first reliable glosses of a new and unruly body of case precedent and thereby provide a solid foundation for the whole field. None of this work depended on the labor theory or anything similar. I venture that Nimmer's recitation of the labor theory was obliged more by conventions of Legal Realist scholarship than by anything else.

B. *Prevention of Unjust Enrichment*

The "prevention of unjust enrichment" is probably the most common judicial theory in favor of the right of publicity. The district court judge in a Bette Midler "sound-alike" case, similar in its facts and result to the *Waits* case, said that the defendants were no better than the "average thief."[44] Nevertheless, this theory is equally tautological,

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42. Shaw v. Time-Life Records, 38 N.Y.2d 201, 341 N.E.2d 817, 379 N.Y.S.2d 390 (1975).

43. Nimmer, *supra* note 40, at 215-16.

44. Midler v. Ford Motor, 849 F.2d 460, 462 (9th Cir. 1988), *cert. denied*, 112 S. Ct. 1513, *and cert. denied*, 112 S. Ct. 1514 (1992).

because it does not tell us when a copyist's enrichment is "unjust." Often the best clue as to whether an attempted enrichment was unjust is simply the result that a court actually reaches in a case. In *Onassis v. Christian Dior-New York, Inc.*[45] the defendants used a Jacqueline Onassis lookalike model in one of their print ads featuring the "Diors," a fictional group of three close friends who went to many parties and used Dior products. The court said that the judgment it entered in favor of Onassis should warn others: "Let the word go forth—there is no free ride. The commercial hitchhiker seeking to travel on the fame of another will have to learn to pay the fare or stand on his own two feet."[46] Although it may seem self-evident that Christian Dior enriched itself unjustly at the expense of Jacqueline Onassis, can this theory also explain the *Shaw* case[47] where we must assume that those who copied Artie Shaw's style of swing music were not unjustly enriched? Certainly the bare idea of "free rider" cannot perform this work. The unjust enrichment theory, like the prior one, often explains the cases of liability, but usually fails to explain the cases of no liability.

C. *Economic Incentives*

Some have argued that famous people must have the right to their publicity or else there will be insufficient economic incentive to acquire the skills and talents that generate fame. For instance, Chief Justice Rose Bird (of the California Supreme Court) argued in her dissent in *Lugosi v. Universal Pictures*:

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

45. 472 N.Y.S.2d 254 (Sup. Ct. 1984), *aff'd without opinion*, 110 A.D.2d 1095 (1985).
46. *Id.* at 261.
47. Shaw v. Time-Life Records, 38 N.Y.2d 201, 341 N.E.2d 817, 379 N.Y.S.2d 390 (1975).

commercial enterprises may communicate valuable information to consumers.[48]

In *Lugosi*, the heirs of Bela Lugosi, who played the lead in the first Dracula movie, sought to enforce a legal right over the commercial exploitation of that image—Lugosi as Dracula on t-shirts, coffee mugs, and so forth. The majority declined to recognize the right, because Lugosi was dead by the time of the action and there was no evidence that he had ever exploited this publicity value during his life, as by licensing it to t-shirt manufacturers.

Practically any creation of a private property right will increase the incentive of the holder to develop the underlying resource. Nevertheless, in many situations in which development incentives would be strengthened, the courts nonetheless refuse to create a private right. For instance, there might be more new football plays if courts enforced rights over them. Nevertheless, these rights do not exist. Parades might be more inventive if a private right existed to broadcast them.[49] There is again the example of the future Artie Shaws who might be more creative if their performance rights were more enforceable. Finally, on the merits of this theory, it seems doubtful that adding a right of publicity to the already substantial rewards from being a movie star would much improve the allocation of resources. Some economists believe that the winner-take-all aspect of "tournaments" to become the next Paul Newman actually cause too many people to compete at the expense of output in the industries that they would otherwise serve (for example, the restaurant industry).

D. *Rent Dissipation*

Although it remains a minority theme, some courts have stressed rent dissipation in their opinions. For instance, consider *Lahr v. Adell Chemical*,[50] a case in which the defendant, which was advertising a

48. Lugosi v. Universal Pictures, 25 Cal. 3d 813, 840, 603 P.2d 425, 160 Cal. Rptr. 323 (1979) (Bird, C.J., dissenting).

49. *See* Production Contractors v. WGN Continental Broadcasting, 622 F. Supp. 1500 (N.D. Ill. 1985) (creators and designers of parade had no exclusive right to license its broadcast).

50. 300 F.2d 256 (1st Cir. 1962).

floor cleaner, hired a Bert Lahr imitator to do Lahr's then-famous duck imitation routine. In upholding Lahr's action, the court said: "It could well be found that defendant's conduct saturated plaintiff's audience to the point of curtailing his market. No performer has an unlimited demand."[51] Former California Supreme Court Chief Justice Rose Bird mentioned the rent dissipation theory in connection with a famous case involving the right to exploit Rudolph Valentino's image. She said: "The truthful account [of Valentino's life] may sate the public's desire for 'contact' with Valentino, making any other plan for exploitation or revelation a profitless venture."[52]

The clearest judicial statement of the rent dissipation theory is in the recent case of *Matthews v. Wozencraft*.[53] In *Matthews*, the plaintiff and the defendant had served as undercover narcotics agents and had had many adventures together. They were threatened by drug dealers and placed in a safe house by Ross Perot. Subsequently, both were convicted of civil rights violations. In the meantime, they married each other, and were later divorced. All of these events were publicized in the press at the time they occurred. The defendant sought to publish a history of their joint exploits, and the plaintiff objected that the book would infringe his right of publicity. In denying the plaintiff recovery, Judge Jerry E. Green of the Fifth Circuit wrote: "We can ration the use of highways by imposing tolls. We grant celebrities a property right to ration the use of their names in order to maximize their value over time."[54] Judge Green reasoned that the publication of the defendant's book would not decrease the plaintiff's publicity value, but instead would increase it. Therefore, there was no cause of action. This analysis is the same as that presented in this article.

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51. *Id.* at 259.

52. Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 870, 603 P.2d 454, 160 Cal Rptr. 352 (1979) (Bird, C.J., concurring).

53. No. 93-4434, 1994 U.S. App. LEXIS 3855 (5th Cir. Mar. 3, 1994).

54. *Id.* at *10 n.2. The court cited to Frank H. Knight, *Some Fallacies in the Interpretation of Social Cost*, 38 Q.J. ECON. 582 (1924).

IV. FALSIFIABLE THEORY

Under the modern philosophy of science, theories should be both predictive and capable of being proved false.[55] Each of the Legal Realist theories described above fails to satisfy at least one of these criteria. The labor theory, for instance, is not predictive. Because every celebrity expends labor of some kind, the theory predicts (incorrectly) that virtually all publicity will be protected. The unjust enrichment theory probably fails both criteria.[56]

Karl Popper, the philosopher of science who has most influenced modern scientists,[57] argued that the "truth content" of theory is measured by the number of ways in which it can be proved false.[58]

At one extreme is the tautology: "People sleep because they possess the dormitive force." This theory has zero truth content

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55. The physicist Stephen Hawking has written:

> A theory is a good theory if it satisfies two requirements: It must accurately describe a large class of observations on the basis of a model that contains only a few arbitrary elements, and it must make definite predictions about the results of future observations. For example, Aristotle's theory that everything was made out of four elements, earth, air, fire, and water, was simple enough to qualify, but it did not make any definite predictions. On the other hand, Newton's theory of gravity was based on an even simpler model, in which bodies attracted each other with a force that was proportional to a quantity called their mass and inversely proportional to the square of the distance between them. Yet it predicts the motions of the sun, the moon, and the planets to a high degree of accuracy.
>
> Any physical theory is always provisional, in the sense that it is only a hypothesis: you can never prove it. No matter how many times the results of experiments agree with some theory, you can never be sure that the next time the result will not contradict the theory. On the other hand, you can disprove a theory by finding even a single observation that disagrees with the predictions of the theory. As philosopher of science Karl Popper has emphasized, a good theory is characterized by the fact that it makes a number of predictions that could in principle be disproved or falsified by observation. Each time new experiments are observed to agree with the predictions the theory survives, and our confidence in it is increased; but if ever a new observation is found to disagree, we have to abandon or modify the theory. At least that is what is supposed to happen, but you can always question the competence of the person who carried out the observation.

STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME 9-10 (Bantam ed. 1988).

56. *See* text accompanying *supra* note 44.

57. *See* quotation from Stephen Hawking, *supra* note 55.

58. *See generally* KARL R. POPPER, A POCKET POPPER (David Miller ed. 1983).

because it is impossible to prove false. At the other extreme would be Newton's theory of gravity, which posits that the acceleration of gravity between two bodies is directly proportionate to their masses and inversely proportionate to the distance that separates them. The second theory can be proved false. Indeed, an experiment conducted in water will prove it false. The first type of theory predicts so perfectly that it cannot be replaced by a better theory by someone looking at evidence for and against. Hence, Popper thought that branches of knowledge that did not use falsifiable theory would not exhibit progress. Unlike theories in biology or particle physics, many of which improve every year, unfalsifiable theories never improve. They are "perfect" from their inception. Popper particularly criticized theories that their originators made so complicated or contingent that they were "immunized" from falsification.[59] Many Legal Realist theories seem precisely of this type. From Popper's point of view, because such a theory is so difficult to refute, it has little truth content. Paradoxically, simpler theories are often better, even when they intentionally leave out considerations that are plausibly important.[60] Again, the reason is that simple, falsifiable theories have the capability of being replaced by other, similar theories that better explain the

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59. Criticizing theories of psychoanalysis, Popper wrote:

> Neither Freud nor Adler excludes any particular person's acting in any particular way, whatever the outward circumstances. Whether a man sacrificed his life to rescue a drowning child (a case of sublimation) or whether he murdered the child by drowning him (a case of repression) could not possibly be predicted or excluded by Freud's theory; *the theory was compatible with everything that could happen—even without any special immunization treatment.*

Karl Popper, *The Problem of Demarcation in* POPPER, *supra* note 58, at 128 (emphasis in original).

60. A good example of a theory that is intentionally simple is Landes and Posner's theory of tort law. Here is their explanation of why they leave risk aversion (peoples' negative taste for risk) out of their explanations of tort doctrine:

> We adopt so seemingly unrealistic an assumption [of risk neutrality] not only because a risk-neutral model of liability rules is simpler, but also because . . . it yields more definite predictions than a model that assumes risk aversion. Assuming risk aversion would give us too many degrees of freedom in explaining the rules of tort law and would make the efficiency theory of those rules difficult to refute (and hence to confirm).

WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 57 (1987).

evidence (for instance, case results). Also, because of the very tension that exists between a simple theory and a complicated reality, simple theories often produce more fresh insight than more complicated theories can. Indeed, the ability of a simple theory to produce a new view of an old problem is one important justification for such theories.

Perhaps it is unfair to criticize Legal Realist theories as tautological. Historically, Legal Realists have designed their theories, not to be falsifiable, but to justify or criticize judicial decisions at a level beyond that of "formal legal concepts."[61] Hence, when a Realist court says that a result is required in order to prevent "free riding," the court's intention may not be to provide a theory that would explain past or future cases, or still less to contribute to any general theory of policy analysis, but simply to use policy reasoning in its opinion. So long as courts do not disregard the factual pattern of precedent, and the traditional methods of dealing with it, no real harm results.

V. EXPLAINING LEGAL DOCTRINE UNDER THE RENT-DISSIPATION THEORY

The following economic theory of the right of publicity is different from the usual Legal Realist theory in two ways. First, it is not proposed as advice to judges. Its objective is to account for right-of-publicity doctrine in terms different from those used by judges deciding cases. Many judges are either unknowledgeable of modern economic theory or hostile to it. For these reasons it would be fatuous to suppose that any purely economic theory would accurately reflect the judges' stated grounds of decision. Also, judges have well developed legal methods for deciding cases, methods that are independent of modern economic theory. The most important of these is to assess whether a new case is critically similar or dissimilar to prior cases. Judges continue to use this analogical method of reasoning even when they fill their opinions with Legal Realist policy analysis. Indeed, to the extent that a body of cases can be successfully explained by policy

61. *See Transcendental Nonsense, supra* note 29 (criticizing courts that decide cases using traditional legal concepts).

considerations that judges have not stressed, it casts doubt on the importance of their own policy analysis.

A second way that the rent dissipation theory is different from Realist theories is that it has been intentionally kept simple to make it falsifiable. Ideally, a theory should be both falsifiable and true. Nevertheless, half a loaf is better than none.

The public goods/rent dissipation theory of public goods has already been outlined. The following is a more detailed description.

A. *Publicity Assets of Modest Value Will Not Be Protected*

In his review of early property institutions in Labrador, Harold Demsetz found that the aboriginal people had common property in their animal hunting grounds prior to the French fur trade, but private property in these same hunting grounds after the French arrived and increased the demand for furs.[62] As Demsetz explains, the incremental costs of private property rights over common property ones—largely the costs of enforcing private property rights—only became justified after the resource became relatively scarce and valuable.[63] When fur-bearing animals are plentiful, it would be efficient for a society to hold the hunting lands in common, because that way the community would not have to expend scarce resources on boundary disputes and trespass cases. The evolving law of publicity affords an analogy. When a person's publicity value becomes modest, it falls into the public domain.

For instance, in *Schumann v. Loew's Inc.*,[64] the plaintiffs were great-grandchildren of Robert Schumann, the celebrated composer, who died in 1856. In their complaint, they acknowledged that toward the end of his life Schumann became insane and died suffering from a mental disease and that his sister suffered from the same malady. The defendant had recently produced and exhibited a motion picture entitled *Song of Love*, which accurately depicted Schumann's life, includ-

62. *See Toward a Theory, supra* note 11, at 352.
63. *Id.* at 354.
64. 135 N.Y.S.2d 361 (Sup. Ct. 1954).

ing his mental illness and that of his sister. The plaintiffs alleged sixty-one causes of action for infringement of Robert Schumann's supposedly descended right of publicity, one for each jurisdiction in which the defendant's film had been exhibited. After reviewing the law in these jurisdictions, the court concluded that not one would allow suit on behalf of a person so long dead. Since, at the time of suit, the value of Schumann's publicity had already declined to such modest value, it would be efficient for it to be held in common by the community. Al Capone's estate and survivors were also not allowed to recover against the producers of the television series *The Untouchables*, which was based on his life.[65] In *Guglielmi v. Spelling-Goldberg Productions*,[66] the heirs of Rudolph Valentino had no cause of action against tele-vision producers who depicted his life fifty years after his death in 1926. Similarly, a man who had allowed his panther to escape was not permitted to sue the producers of *Dragnet*, who used it as the basis for a radio play.[67] The value of his publicity was simply too modest to make it desirable for society to build a fence around it.

In *Brewer v. Hustler Magazine*,[68] an individual with no fame, but with an uncopyrighted special effects picture of himself supposedly shooting himself in the head, was not allowed to recover against Hustler Magazine when it ran a part of the picture in its magazine. If this person had been famous, there would have been a cause of action. For instance, in the *Onassis* case, already mentioned, Jackie Onassis was allowed to recover when the defendant featured a lookalike in its ad.[69]

By contrast, in *White v. Samsung Electronics America*,[70] the defendant produced television commercials for its VCRs. Each was set in the twenty-first century and conveyed the message that the Samsung

65. Maritote v. Desilu Prods., 345 F.2d 418 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965).

66. 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979).

67. Smith v. National Broadcasting Co., 138 Cal. App. 2d 807, 292 P.2d 600 (1956).

68. 749 F.2d 527 (9th Cir. 1984).

69. Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254 (Sup. Ct. 1984), *aff'd without opinion*, 110 A.D.2d 1095 (1985). Similarly, in Allen v. National Video, 610 F. Supp. 612 (S.D.N.Y. 1985), the plaintiff was allowed to recover when the defendant used a Woody Allen lookalike in its video advertising.

70. 971 F.2d 1395 (9th Cir. 1992), *amended*, 1992 U.S. App. LEXIS 19253 (9th Cir. Aug. 19, 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

product would still be in use at that time. By hypothesizing outrageous future outcomes for the cultural items, the ads created humorous effects. For example, one lampooned current popular notions of an unhealthy diet by depicting a raw steak with the caption: "Revealed to be health food. 2010 A.D."[71] Another depicted irreverent "news"-show host Morton Downey, Jr., in front of an American flag with the caption: "Presidential candidate. 2008 A.D." The ad to which the plaintiff Vanna White objected depicted a robot, dressed in a wig, gown, and jewelry that the defendants consciously selected to resemble White's hair and dress.[72] The robot was posed next to a game board that to many was instantly recognizable as the Wheel of Fortune game-show set, in a stance for which White is famous. The caption of the ad read: "Longest-running game show: 2012 A.D."

The court held that the plaintiff had stated claims that should go to a jury for decision.[73] Unlike Robert Schumann's image, Vanna White's image is so valuable—hence, so vulnerable to dissipation—that it is an unusually strong case for protection. Moreover, if Vanna White had made her enormous fame by pretending to shoot herself in the head, a poster of a lookalike performing this act would also infringe her publicity rights. Indeed, that would be an easier case, because a Vanna White shooting herself in the head would be even more distinctive than a Vanna White standing in front of a game board.

A case similar to *Schumann* is *Dora v. Frontline Video*,[74] where the plaintiff, an early surfer, sued the producers of a documentary that chronicled the events and personalities of the early surfing culture at Malibu beach. The defendant's video, which was publicly displayed, contained footage of famous surfers, including the plaintiff Mickey Dora, the real Gidget, and other historical surfers. Many of these people were interviewed for their on-camera reminiscences. The program also contained the audio portion of an interview with the plaintiff, which was heard in the background as the viewer saw the plaintiff in photographs, even though the plaintiff never granted an

71. *Id.* at 1396.
72. *Id.*
73. *Id.* at 1402.
74. 15 Cal. App. 4th 536, 18 Cal. Rptr. 2d 790 (1993).

interview to the defendant, and he never consented to the defendant's use of his name, photograph, likeness, or voice. Nevertheless, the California Court of Appeal denied the plaintiff's claim for publicity infringement, stressing that the matters depicted in the video were matters of "public interest."[75] Given the modest value of Mickey Dora's publicity relative to, say, Vanna White's, there was little risk that the defendant's documentary would squander any asset of significant social value. Indeed, as stressed below, the documentary probably increased the total value of the plaintiff's publicity, creating new opportunities for him to license t-shirts.

B. *Uses That Dissipate Publicity Rights Will Be Prohibited*

The uses of an artist's publicity that are most likely to depreciate the value of further uses are casual uses to which people can be exposed many times. These are the t-shirt, poster, coffee mug, calendar, and other similar uses.[76] The classic cases of enforcing someone's right of publicity fall into this mold. Besides the robot mockup of Vanna White mentioned above,[77] courts have prohibited unauthorized Elvis Presley[78] and Christie Brinkley posters,[79] baseball card

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75. The *Dora* court said:

> The program in question in this case is a documentary about a certain time and place in California history and, indeed, in American legend. The people who were a part of that era contributed, willingly or unwillingly, to the development of a lifestyle that has become world-famous and celebrated in popular culture. Although any one of them as individuals may not have had a particular influence on our time, as a group they had great impact. This is the point of the program, and it seems a fair comment on real life events "which have caught the popular imagination."

Dora, 15 Cal. App. 4th at 543 (*quoting* Smith v. National Broadcasting Co., 138 Cal. App. 2d 807, 814 (1956)).

76. *See* Hicks v. Casablanca Records, 464 F. Supp. 426, 430 (S.D.N.Y. 1978) (characterizing the most troublesome uses as "posters, bubble gum cards, or some other such 'merchandise' . . . .").

77. *See supra* text accompanying note 69.

78. Memphis Dev. Found. v. Factors Etc., 616 F.2d 956 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

79. Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981).

pictures,[80] Bert Lahr's comic duck sounds,[81] an unauthorized picture of the plaintiff's famous race car,[82] Woody Allen's comic visual appearance,[83] and Tom Waits's gravelly way of singing.[84] The more the public is exposed to these simple but distinctive images, the more the value of the images is depreciated.

C. *Uses That Increase Publicity Value Will Be Allowed*

By contrast, courts generally allow unauthorized uses that do not dissipate a publicity value. In *Hicks v. Casablanca Records*,[85] the plaintiffs, who were the heir and assignees of the famous mystery writer Agatha Christie, sought to enjoin distribution of the movie *Agatha*, which was based on her life. On December 4, 1926, Mrs. Christie, then married to Colonel Archibald Christie, disappeared from her home in England. This disappearance was widely publicized and, although a major effort was launched to find her, everyone was at a loss to explain her disappearance. Eleven days after she was reported missing, however, Mrs. Christie reappeared, but her true whereabouts and the reasons for her disappearance are, to this day, a mystery.[86] Nevertheless, in their movie, the defendants invented the story that Mrs. Christie, during her eleven-day disappearance, engaged in a sinister plot to murder her husband's mistress to regain his affections. The court held that the plaintiffs had no cause of action.[87] This type of story is much less likely to depreciate Agatha Christie's publicity than another Christie Brinkley poster is likely to depreciate hers.

Another contrast with the *Hicks* case is *Eastwood v. Superior Court*

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80. Haelan Labs. v. Topps Chewing Gum, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

81. Lahr v. Adell Chem. Co., 300 F.2d 256 (1st Cir. 1962).

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

83. Allen v. National Video, 610 F. Supp. 612 (S.D.N.Y. 1985).

84. Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992), *amended, substituted opinion, in part*, 1992 U.S. App. LEXIS 24838 (9th Cir. Aug. 5, 1992), *cert. denied*, 113 S. Ct. 1047 (1993).

85. 464 F. Supp. 426 (S.D.N.Y. 1978).

86. *Id.* at 429.

87. *Id.*

(National Enquirer).[88] Clint Eastwood was allowed to go to trial against the National Enquirer for running a story depicting him as involved in a love triangle with singer Tanya Tucker and actress Sondra Locke. The article falsely stated that there were serious problems in Eastwood's relationship with Locke; that he and Locke had had a huge argument over marriage; and that Locke stormed out of his presence.[89] After Eastwood's supposed romantic interlude with Tucker, Locke supposedly camped at his doorstep and on hands and knees begged Eastwood to keep her. The tabloid reported that Locke vowed that she would not pressure him into marriage, but that Eastwood acted oblivious to her pleas.[90]

The *Eastwood* case is superficially similar to *Hicks* because both defendants published fictional love stories about their respective celebrity subjects. Nevertheless, there is an important economic difference. The defendants' invention about Agatha Christie was highly original and would do little to reduce the publicity value left for her heirs and assignees. On the other hand, the *Eastwood* story was pedestrian and routine and would much more likely cause his fans to weary of him and his doings. If the National Enquirer had published a more original story, it might have been safe.

Zacchini v. Scripps-Howard Broadcasting[91] is a famous case in which the Supreme Court upheld a lower court ruling that held the defendant liable for broadcasting, without permission, the plaintiff's human cannonball act. The act itself could not be copyrighted by the plaintiff or anyone else, because it was not "fixed." Accordingly, the lower court found an appropriation based on common-law grounds. Superficially, this case is similar to the one in which Mickey Dora was held to have no cause of action against those who included his image in a video.[92] Nevertheless, by televising the only act that the plaintiff had, the *Zacchini* defendant surely dissipated the plaintiff's publicity value much more than did the producers of the Dora documentary.

88. 149 Cal. App. 3d 409, 198 Cal. Rptr. 342 (1983).
89. *Id.* at 414.
90. *Id.*
91. 433 U.S. 562 (1977).
92. *See supra* text accompanying note 74.

Dora had many possible "acts." Indeed, one could alternatively explain this case in the same way as the Agatha Christie case. The documentary probably increased the publicity value that was available to Dora to exploit for himself.

In *NFL v. Governor of Delaware*,[93] a court allowed the state of Delaware to use NFL football scores in its state lottery. The NFL had claimed that this use appropriated the publicity that it owned by virtue of organizing these games.[94] On economic grounds this case is distinguishable from *Zacchini* in that people will not become sated with the NFL because football scores are used in a lottery. Indeed, many people will take a greater interest in NFL games because of the lottery. Hence, the lottery increases the publicity value left for the NFL. By contrast, broadcasting a video of his act would not increase the value left for Zacchini.

From an economic point of view, *Johnson v. Harcourt, Brace, Jovanovich, Inc.*[95] is similar to the Agatha Christie case. In *Johnson*, the court held that a college English textbook did not violate the plaintiff's rights when it recounted the story of how he had returned $240,000 that had accidentally fallen off a Brink's truck. This story would increase the value of the plaintiff's publicity.[96] This was the problem. He did not want the publicity. As this and other cases reveal, courts permit value-increasing uses of someone's publicity and prohibit only the value-dissipating ones.

Of course, Agatha Christie's heir and assignees would be happier if the fictionalizers of her life had to pay them a royalty. They occupy a worse position than the one they would have with a broader right of publicity. Nevertheless, the doctrine does not key off the value to the assignees, but to society. As the cases just discussed indicate, uses that increase the total value of the celebrity's publicity seem to be permitted; it is only ones that draw the value down that are prohibited. Moreover, the courts seem less concerned with how publicity value is allocated among competing users than with the influence on the total

93. 435 F. Supp. 1372 (D. Del. 1977).
94. *Id.* at 1377.
95. 43 Cal. App. 3d 880, 118 Cal. Rptr. 370 (1974).
96. *Id.* at 891-92.

value, which seems to be the key.

D. *Only Original and Distinctive Publicity Assets Will Be Protected*

In *Waits*, as already mentioned,[97] Waits was allowed to get damages from Frito-Lay, which had used an imitation of his voice to promote its corn chips. By contrast, in *Shaw*, Artie Shaw was denied the right to stop imitators of his swing style,[98] though the case also held that the plaintiff could succeed if he could show that consumers were confused to the point that they believed that Shaw actually did the recordings.[99] From this point of view, *Shaw* comes to the same result as *Waits*, because in the latter there was clear evidence that many watchers of the Doritos commercials thought that Waits himself had done the voice-over.[100] Nevertheless, there is a real difference between the cases because Waits was able to protect his sound, whereas Shaw was less able. What accounts for the difference? Shaw created a genre of swing music that could be developed by others in ways that the public would value. The subsequent work would not be exactly the same as Shaw's, but would be influenced by it. Indeed, it is not so clear that variations of the Shaw style, performed by other musicians, would reduce the value of Shaw's asset. Conceivably, another artist could improve on Waits's singing style, but that would be a different case than the one that the court decided.

A performer's image must be distinctive in order to get protection. Tom Waits's singing style is highly distinctive and therefore protectable. *Lombardo v. Doyle, Dane & Bernbach, Inc.*,[101] however, is the opposite of the *Waits* case. Lombardo was famous for leading his band playing Auld Lang Syne on New Year's Eve. Nevertheless, Lombardo's version was not particularly distinctive or original within

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97. *See supra* text accompanying note 13.

98. *See supra* text accompanying note 27.

99. Shaw v. Time-Life Records, 38 N.Y.2d 201, 341 N.E.2d 817, 379 N.Y.S.2d 390 (1975).

100. Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1098 (9th Cir. 1992), *amended, substituted opinion, in part*, 1992 U.S. App. LEXIS 24838 (9th Cir. Aug. 5, 1992), *cert. denied*, 113 S. Ct. 1047 (1993).

101. 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977).

the big band genre. Many big bands had played Auld Lang Syne in competition with Lombardo even during his heyday. Although he will always be associated with the song, his contribution was not as original as Waits's contribution to music. Allowing performers to capture pre-existing works might to some extent reduce the rate at which they are performed and hence preserve their value. Nevertheless, it would also induce performers to compete with each other to capture these works. This type of rent dissipation can only be eliminated by a rule that affords special protection to performers who have originated distinctive performances, styles, or other publicity assets. Indeed, the courts seem to follow this rule. In *Murray v. Rose*,[102] the plaintiff, Mae Murray, was a famous dancer and the defendant, Billy Rose, was a famous producer. The plaintiff attempted to enjoin the performance of the "Merry Widow Waltz" and the imitation of her rendition of it. The court refused to do so, stating that the dance had been popular before she started performing it, and that for this reason she had no proprietary rights in it.

E. *Descendibility*

Common-law courts have divided on whether publicity rights are descendible after the death of the performer. Many publicity rights lose value at the time of the performer's death or shortly thereafter. For instance, there is no longer much possibility that people will race to use Bert Lahr's comic duck sound. Nevertheless, the artist's death does not rule out a race to depreciate the artistic image. Indeed, with some artists—James Dean and Marilyn Monroe, for example—the race to dissipate the image increases after the artist's death.

In *Lugosi*,[103] the widow and surviving son of Bela Lugosi sued to stop Universal Pictures from merchandising Lugosi's image in his most famous role—as Count Dracula of Transylvania. The case was complicated by the facts that the defendant was the successor of the

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102. 30 N.Y.S.2d 6 (Sup. Ct. 1941).

103. Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

original producer of the movie: Universal Pictures; that Lugosi, when he took the role, gave Universal a relatively broad right to merchandise his image in connection with the movie;[104] and that the character of Count Dracula was originally created, not by Lugosi or even by Universal, but by the author Bram Stoker, whose novel had fallen into the public domain before the movie was made. Nevertheless, the court was willing to say that during his life, Lugosi would have had at least some publicity rights as against Universal. The court held, however, that after Lugosi's death these rights did not pass to his heirs. In reaching the latter conclusion, the court stressed that during his life Lugosi did not merchandise products using his Dracula image. Since the time of the *Lugosi* case, the California legislature has passed a statute that extends a celebrity's publicity rights fifty years after the celebrity's death.[105]

In *Price v. Hal Roach Studios*,[106] a New York district court enforced a claim by the widows of Laurel and Hardy for the exclusive right to their publicity. Martin Luther King's heirs were also allowed to stop the production of unauthorized busts, even though King did not commercialize his publicity during his life.[107]

As already noted, various legislatures have passed provisions making the right of publicity descendible. Predictably, different states have

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104. The contract that Lugosi signed when he took the role provided:

> The producer shall have the right to photograph and/or otherwise produce, reproduce, transmit, exhibit, distribute, and exploit in connection with the said photoplay any and all of the artist's acts, poses, plays and appearances of any and all kinds hereunder, and shall further have the right to record, reproduce, transmit, exhibit, distribute, and exploit in connection with said photoplay the artist's voice, and all instrumental, musical, and other sound effects produced by the artist in connection with such acts, poses, plays and appearances. The producer shall likewise have the right to use and give publicity to the artist's name and likeness, photographic or otherwise, and to recordations and reproductions of the artist's voice and all instrumental, musical, and other sound effects produced by the artist hereunder, in connection with the advertising and exploitation of said photoplay.

Lugosi, 25 Cal. 3d at 816 n.2.

105. CAL. CIV. CODE § 990(g) (West 1994).

106. 400 F. Supp. 836 (S.D.N.Y. 1975).

107. Martin Luther King, Jr. Ctr. for Social Change v. American Heritage Prods., 250 Ga. 135, 296 S.E.2d 697 (1982).

enacted slightly different provisions.[108] The economic arguments on whether publicity rights should be descendible seem ambivalent. When the value of someone's publicity has been reduced to very low (but still positive) levels, the transaction costs of acquiring permission outweigh the social value of further management of the publicity against dissipation. Especially when an artist has not exploited her publicity during her own life, the residual value after death will often be too small to justify enforcement of a private property right.[109] Nevertheless, in a few cases this will not be true. Even if Marilyn Monroe never authorized a poster during her life, someone should control the rate of production of her posters after her death, or else the asset will be dissipated too quickly. Indeed, an efficient rule would protect publicity after the death of the artist when it is valuable. This factor would distinguish *Price* from *Lugosi* if Laurel and Hardy's posthumous publicity was more valuable than Bela Lugosi's, as seems probable.

VI. CONCLUSION

The foregoing Article has sought to provide a positive theory of the right of publicity. Under this theory the courts create liability in publicity cases so as to prevent too rapid a dissipation of the value of socially valuable publicity assets. The theory has been kept intentionally simple to permit falsification by others who may consider cases not discussed here and future cases not yet decided. The purpose is not to recommend a different approach to judges, but to guide further positive studies of the area.

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108. *See* Beard, *supra* note 1, at 64-78.

109. *See Toward a Theory, supra* note 11, at 354-57.