2002

Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity

Melissa B. Jacoby, *University of North Carolina at Chapel Hill*
Dianne Leenheer Zimmerman, *New York University*

FORECLOSING ON FAME: EXPLORING THE UNCHARTED BOUNDARIES OF THE RIGHT OF PUBLICITY

MELISSA B. JACOBY* & DIANE LEENHEER ZIMMERMAN**

Since the 1950s in the United States, fame increasingly has been treated as a commodity rather than a purely personal attribute. States, encouraged largely by entertainers, sports figures, and their families, have created a new form of intellectual property interest called the right of publicity, a right to exploit one's identity for commercial purposes. This right permits famous people—and increasingly their heirs and legatees—to control how, and demand payment when, their names and faces are used by others. Moreover, the right is freely alienable, meaning that it can be transferred to third parties in whole or in part. Most of the scholarship examining this form of intellectual property has concentrated on the justifications for giving famous people this kind of control over, and right to profit from, the commercial use of their identities, or on the First Amendment ramifications of the interest. In other words, the scholarship has focused on the pros and cons of creating a property interest that advantages a celebrity, her heirs, and assigns. But the legal assignment of property status to an interest can, under some circumstances, decrease, rather than increase, the control that the "owner" has over the valued asset. That darker side of the equation has received almost no attention either in the literature or in the case law dealing with publicity. In this Article, we examine the right of publicity as an asset in the context of the debtor-creditor system. Whereas personal rights in one's privacy or reputation are generally unavailable for creditor seizure and sale, the transformation of the persona into a commodity logically should make it vulnerable to seizure by an unsatisfied creditor, permitting control

* Assistant Professor of Law, Temple University School of Law.

** Professor of Law, New York University School of Law. Professor Zimmerman acknowledges the generous support of the Filomen D'Agostino Greenberg and Max E. Greenberg Faculty Research Fund at New York University School of Law.

We would like also to thank friends and colleagues from both the debtor-creditor and the intellectual property worlds who read and commented on the article: Richard Dannay, Walter Effross, Sheldon Halpern, Peter Jaszi, Roberta Kwall, Lynn LoPucki, Thomas McCarthy, Thomas Plank, David Post, and Rodney Smolla. Their comments aided us immeasurably. Thanks also to William Woodward for helpful discussions of this topic and to Kenneth Klee for reading an early draft of our work in this area. We also gratefully acknowledge our research assistants at NYU, DePaul and Temple who helped us on this article: Laura McGeoch, Roxanne Paul, Kate Starshak, Mark Wachlin, Ronald Webster, Whitney Whisenhunt, and Nila Williams. Thanks are due, as well, to the National Conference of Bankruptcy Judges for inviting us to speak on some of these issues at its 2000 annual meeting, and in particular to the Hon. Mary Davies Scott, then-president of the NCBJ, and to members of the educational program committee (Judges Robert Martin, Robert Ginsberg, and Barbara Houser and Denise Neary from the Federal Judicial Center). Special appreciation must be expressed to Judge Sidney Brooks who moderated our discussion at that meeting, and to Judge Martin and our late friend and colleague Lawrence King for bringing the Authors together and encouraging us to explore this previously uncharted terrain.

over how the right is exploited to be transferred by sale to the highest bidder. The right of publicity presents some complexities in the debtor-creditor context because the property interest in some cases may need to be disentangled from its residual overlay of personal rights, and because the use of property to satisfy a creditor's claims must be handled in a way that respects the debtor's right to the benefits of her future labor. Our examination of the issues leads us to conclude that the complexities presented by treating publicity rights as property in the debtor-creditor context are resolvable and indeed are similar to those presented by other types of property that are currently recognized as such in the debtor-creditor system and used to satisfy unpaid debts; the complexities do not militate against treating the right of publicity as an asset in the debtor-creditor system.

INTRODUCTION

Let us imagine that, although basketball legend Michael Jordan owns a lot of property, he has many debts and has not been paying them. Let us further imagine that one of his creditors is the young golf legend Tiger Woods. If Woods fails to convince Jordan to pay back what he owes through informal means, state law would permit Woods to file a lawsuit and obtain a judgment against him.[1] Judgment in hand, Woods could send the local sheriff to levy on Jordan's property.[2] In essence, Jordan's failure to pay his debts would give Woods the power to haul off most of Jordan's personal property in a wheelbarrow for sale to the highest bidder.[3] Once Jordan's assets were auctioned off, the proceeds would then be used to satisfy the debt that Jordan owed, but failed to pay, to Woods.

This brief hypothetical captures the essence of the debtor-creditor system: If you do not pay your debts, you are at risk of losing your property. All across the various sectors of the debtor-creditor system, the outcome is roughly similar. A chapter 7 bankruptcy filing, whether initiated voluntarily by the debtor[4] or involuntarily by her

[1] In fact, if Jordan gave Woods a security interest in his property at the time of the loan, Woods could seize Jordan's property once Jordan defaulted on his obligations and ultimately could dispose of it without court involvement. See U.C.C. § 9-609 (2000) (authorizing secured party to take possession of collateral after default, without judicial process, if it proceeds without breach of peace); see id. § 9-610 (authorizing commercially reasonable disposition).

[2] See generally Lynn M. LoPucki & Elizabeth Warren, Secured Credit: A Systems Approach 5-20 (3d ed. 2000) (describing unsecured creditors' rights and debt collection process).

[3] See Lawrence P. King & Michael L. Cook, Creditors' Rights, Debtors' Protection and Bankruptcy 79-81 (3d ed. 1997) (explaining that state law determines what property of debtor may be seized for satisfaction of judgment, but generally includes everything in which debtor has property interest).

[4] See 11 U.S.C. § 301 (2001) (authorizing commencement of voluntary bankruptcy case).

creditors,[5] requires that the debtor's assets be marshalled and sold to satisfy her obligations. So, too, the Internal Revenue Service has expansive powers to seize and sell property to satisfy unpaid debt.[6]

Most people who contemplate the consequences of their unpaid debt have some awareness of the risk that they might lose their houses and other tangible possessions. But suppose, in the hypothetical dispute between Woods and Jordan, Jordan's most valuable property—and hence the most desirable target for creditors—is not his real estate or other tangible goods, but his ability to exploit his fame commercially. Does his "celebrity" go into the "wheelbarrow" of assets along with his cars and his yachts?

One might be inclined to respond, "But fame isn't property; it's identity." That instinct, however understandable, actually would be out of step with the current legal reality.[7] Over the last fifty years, state law increasingly has come to treat the ability to profit from the commercialization of one's persona less as a privacy interest and more as a kind of property interest, fully alienable,[8] and, in many jurisdictions, descendible as well.[9] Called a "right of publicity," it permits licensing and transfers, and violation of the right is remediable by a combination of injunctive relief and damages.[10] This shift in state law has benefitted celebrities particularly by allowing them to control more aggressively, and mine the value of, their images and other aspects of their identities.[11]

---

[5] See § 303 (authorizing creditors to file involuntary bankruptcy case against debtor, subject to certain restrictions).

[6] See 26 U.S.C. § 6331(a) (2001).

[7] By some estimates, more than half the jurisdictions in the United States now recognize a property right in the commercial exploitation of an individual's persona. See infra note 82. R

[8] See, e.g., Ind. Code Ann. § 32-36-1-16 (West 2002) (making publicity rights assignable); Nev. Rev. Stat. 597.800(1) (2001) (same); Martin Luther King, Jr. Ctr. for Soc. Change v. Am. Heritage Prods., 296 S.E.2d 697 (Ga. 1982) (same); Nature's Way Prods., Inc. v. Nature-Pharma, Inc., 736 F. Supp. 245, 252 (D. Utah 1990) (same); Restatement (Third) of Unfair Competition § 46 cmt. g (1995) ("The interest in the commercial value of a person's identity is in the nature of a property right and is freely assignable to others.").

[9] Oklahoma law, for example, describes publicity rights in the following way:

> The rights recognized under this section are property rights, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents, whether the transfer occurs before the death of the deceased personality, by the deceased personality or his or her transferees, or, after the death of the deceased personality, by the person or persons in whom such rights vest under this section or the transferees of that person or persons.

Okla. Stat. Ann. tit. 12, § 1448(B) (West 2002).

[10] See, e.g., Restatement (Third) of Unfair Competition §§ 48-49 (stating that injunctive relief and damages are typically available for violations of rights of publicity).

[11] For examples of recent, expansive statutory definitions of the publicity right, see, e.g., Ind. Code Ann. § 32-36-1-8 (West 2002); Okla. Stat. tit. 12 (West 2002). For examples

But because the debtor-creditor system has not taken note of this developing property interest in one's persona, it has been blind to the many millions of dollars worth of publicity rights that have passed through the system. A casual search turned up dozens of people with valuable personas who have filed for bankruptcy in recent years, including Burt Reynolds,[12] Gary Coleman,[13] Gary Burghoff (Radar on M*A*S*H),[14] Debbie Reynolds,[15] Ron Isley (of Isley Brothers fame),[16] Mickey Rooney,[17] Meat Loaf,[18] Wayne Newton,[19] Isaac Hayes,[20] Tom Petty,[21] Tammy Wynette,[22] Peter Bogdanovich,[23] Melba Moore,[24] Luther Campbell (of Two Live Crew),[25] Tia Carrere,[26] M.C. Hammer (now just "Hammer"),[27] Kim Basinger,[28] Lynn Redgrave,[29]

---

of cases where celebrities, their heirs, and assigns are expanding the margins of what constitutes an actionable commercial use of a celebrity persona, see Wendt v. Host Int'l, Inc., 125 F.3d 806 (9th Cir. 1997) (recognizing actors' rights to sue to prevent robotic representations of fictional characters where actors are identified with characters); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001) (involving holders of rights of deceased actors known as "Three Stooges" who objected to lithographic reproductions of drawing of them used for posters and T-shirts).

[12] See Belinda Luscombe, People, Time, Dec. 16, 1996, at 87.

[13] See Former Child Star Coleman Files for Personal Bankruptcy, Chi. Trib., Aug. 19, 1999, at C2.

[14] See 'Radar' Gets His Financial Bearings Again, Times-Picayune (New Orleans), Aug. 1, 1999, at A25.

[15] See Nancy Rivera Brooks, Debbie Reynolds, Hotel in Chapter 11, L.A. Times, July 8, 1998, at D1.

[16] Interestingly, in Isley's bankruptcy, his rights to his songs, which were to be included in a comprehensive sale of his assets, were the subject of a bidding war between a sympathetic and hostile bidder. See Paul Farhi, Settling an Old Score?; Singer Michael Bolton Lost a Plagiarism Fight, But He Could Win R&B Legend Ronald Isley's Fortune, Wash. Post, Feb. 22, 2000, at C1; Paul Farhi, No Isley Estate for Michael Bolton, Wash. Post, Feb. 24, 2000, at C12 (reporting that lower bid for assets was approved by court).

[17] See Belinda Luscombe, People, Time, July 22, 1996, at 101.

[18] See Mike Joyce, Meat Loaf, Out of Hell, Wash. Post, May 20, 1994, at N17.

[19] See Associated Press, Wayne Newton Files Under Bankruptcy Law, Chi. Trib., Aug. 18, 1992, at C4.

[20] See From Shaft to Chef, Newsweek, Mar. 23, 1998, at 60.

[21] See Robert Palmer, The Pop Life; Tom Petty: Ready to Fight the Good Fight, N.Y. Times, May 6, 1981, at C25.

[22] See Mike Boehm, Steel Magnolia; Resilience, Not Heartache, Is the Real Root of Tammy Wynette's Success, L.A. Times, Jan. 17, 1991, at 4.

[23] See David Crook, Bogdanovich's Bankrupt Memorial, L.A. Times, Dec. 19, 1985, Part 6, at 1.

[24] See Katy Kelly, Melba Moore Has Wolves at the Door, USA Today, Dec. 14, 1993, at 2D.

[25] See Luther Campbell Files for Bankruptcy Protection, Sun-Sentinel (Fort Lauderdale), June 14, 1995, at 2A.

[26] See James Grant, Her Hospital Role in Remission, Tia Carrere Cries A-Team or Bust, People, Apr. 28, 1996, at 116.

[27] See Benjamin Pimentel, Rap Star's Bankruptcy Troubles; MC Hammer Accused of Not Declaring Some Assets to Trustee, S.F. Chron., July 1, 1999, at A18.

[28] See Ginia Bellafante, People, Time, June 7, 1993, at 73.

Zsa Zsa Gabor,[30] Jerry Lewis,[31] Jerry Lee Lewis,[32] Toni Braxton,[33] Lorraine Bracco,[34] Francis Ford Coppola,[35] baseball players Tony Gwynn[36] and Jack Clark,[37] and football players Harvey Martin,[38] Rich Upchurch,[39] and Bruce Clark.[40] In addition to those from the sports and entertainment industry, other prominent figures who have declared bankruptcy include former governors John Connally[41] and Fife Symington.[42]

The celebrities, and the courts and legislators that have responded to their pleas by creating ever more expansive publicity rights, most likely never considered the possibility that these rights might be subject to the demands of unpaid creditors.[43] In this Article, however, we explore the suggestion that, once the individual persona is transformed from something purely personal into a fully alienable commodity, these publicity rights should be just as susceptible to forced sale in the debtor-creditor system as cars, boats, or businesses.[44] We begin with a brief history of the development of the right of publicity and look at some differences in applicable state law that may affect whether and in what form a publicity right can be said to exist. We then turn to the debtor-creditor system and focus particu-

---

[29] See Thomas D. Elias, Redgrave Can't Pay Lawyers, Files for Bankruptcy, Star Trib. (Minneapolis), June 1, 1994, at 6E.

[30] See Zsa Zsa Gabor Files for Bankruptcy in L.A., Chi. Trib., Mar. 18, 1994, at C2.

[31] See Jerry Lewis Settles Suit, N.Y. Times, Feb. 15, 1981, § 1, at 67.

[32] See Kim Clark, Why So Many Americans Are Going Bankrupt, Fortune, Aug. 4, 1997, at 24, 25.

[33] See Joy Bennett Kinnon, The Rise and Fall and Rise of Toni Braxton, Ebony, Dec. 2000, at 165.

[34] See David Cobb Craig, Passages, People, June 28, 1999, at 83 Split the Pie, N.Y. Post, Oct. 2, 1999, at 8.

[35] See Hal Foster, $289 Million in Debts: Coppola Files for Bankruptcy, S.F. Chron., Jan. 26, 1990, at A2.

[36] See Tom Friend, San Diego's Gwynn Files for Bankruptcy, L.A. Times, May 24, 1987, § 3, at 10.

[37] See Bankruptcy Is Seen as Fresh Start by Clark, Com. Appeal (Memphis), Aug. 9, 1992, at D2.

[38] See Another Strike Casualty, N.Y. Times, Dec. 10, 1982, at B9.

[39] Id.

[40] Steve Liesman & Jon Wilson, NFL Riches: It's Easy Come Easy Go; Players Get Ripped off All Too Often, Star Trib. (Minneapolis), May 10, 1992, at 12C.

[41] See John Connally Files for Bankruptcy, Chi. Trib., Aug. 1, 1987, at 6C.

[42] See Pat Flannery, Governor Files Bankruptcy; Symington's Assets to Be Liquidated to Pay Off Creditors, Phoenix Gazette, Sept. 20, 1995, at A1.

[43] But see 765 Ill. Comp. Stat. 1075/15 (West 2001) (exempting publicity rights, but not income earned from exploiting them, from levy or attachment by creditors). To the best of the authors' knowledge, the Illinois exemption is unique.

[44] Cf. Jessica Litman, Information Privacy/Information Property, 52 Stan. L. Rev. 1283, 1295-96 (2000) ("If we don't intend the item to be transferred, then we needn't treat it as property at all.").

larly on how publicity rights might be treated in a chapter 7 federal bankruptcy case.

In addition to such basic legal questions as whether publicity rights fit into the definition of a debtor's "property" for bankruptcy purposes, we also consider larger questions raised by involuntary divestiture of this form of wealth. We examine whether it is appropriate to expose an asset of this sort to the full set of consequences that result from involvement in the debtor-creditor system, and we ultimately conclude that it is. Publicity rights retain intensely personal associations and are closely tied to the personal efforts and labor of the celebrity, but the debtor-creditor system gives little weight to the importance that personal control may have for debtors in relation to privately owned property generally. On examination, it is unclear why that concern should be weighed differently in the case of publicity rights. Although the debtor may be dismayed by the prospect that her publicity rights will be transferred to the highest bidder (who may be a stranger and whose intentions may be at odds with those of the debtor celebrity), this outcome is consistent with the loss of control over property interests inherent in the debtor-creditor system. Furthermore, as we will explain, the impact is not as dire as it might first appear. Accounting for publicity rights as an asset in the debtor-creditor system need neither deprive the celebrity of the benefit of her future labor nor unreasonably interfere with her reputational and other dignitary interests in how her persona is used by others.

We do not suggest that recognizing publicity rights in this way will be a problem-free endeavor, and we acknowledge that the result likely will be undesirable from the perspective of a celebrity debtor, whose interests largely have controlled the development of publicity rights thus far. But, on balance, we conclude that if publicity rights are going to be treated as property interests outside of the debtor-creditor system, it seems appropriate to treat them similarly in the debtor-creditor system.

One piece of support for this position comes from the fact that advocates of a substantial overhaul of American personal bankruptcy law often have used celebrity bankruptcies as examples of the injustice in the current system. They argue that reform is needed to prevent rich and famous people from using the bankruptcy system to discharge their debts in bankruptcy while at the same time not liquidating their assets or substantially repaying their creditors.[45] This ar-

[45] See Greg Miller, Senate OKs Strict Law on Bankruptcy, L.A. Times, Mar. 16, 2001, at 1; Katharine Q. Seelye, Bankruptcies by Musicians Inspire a Bill, N.Y. Times, May 15, 1998, at A18.

gument might have less force if celebrities' publicity rights were characterized as property within the debtor-creditor system, requiring debtors either to liquidate them or to pay for the right to retain them.

I
PUBLICITY RIGHTS: HOW THEY ORIGINATED, WHAT THEY ARE, AND OTHER INFORMATION ABOUT THEM OF RELEVANCE TO THE DEBTOR-CREDITOR SYSTEM

A. How They Originated and What They Are

Publicity rights are creatures of state law. The interest is conceived of as a classic property right in that it can be alienated, licensed, and in many states, passed on to one's descendants by will or intestate succession.[46] The property right inheres in a cluster of characteristics that evoke recognition of a natural person when they are either used directly or are imitated.[47] Whoever owns this cluster of characteristics—be it an individual or a corporation—has control over all commercial uses of that persona.[48]

The right of publicity had its origins in a body of tort law that was designed to protect personal privacy. In the early twentieth century, courts began to recognize a cause of action for the invasion of several clusters of personal interests loosely grouped under the privacy rubric.[49] One of the most widely recognized of these interests prevented

---

[46] See supra notes 8-10 and accompanying text.

[47] See generally J. Thomas McCarthy, The Rights of Publicity and Privacy (2d ed. 2001); Diane L. Zimmerman, Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort, 68 Cornell L. Rev. 291 (1983).

[48] The definition of a commercial use is currently the subject of much disagreement, as will be discussed at greater length, infra Part I.B.1. It certainly includes uses in advertisements, and is often said to apply to uses on goods intended for sale. See, e.g., Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001) (considering unauthorized lithograph of "The Three Stooges" on T-shirts and posters commercial use); Lugosi v. Universal Pictures, 603 P.2d 425 (Cal. 1979) (recognizing depictions of Bela Lugosi as Dracula on T-shirts, card games, candy dispensers, and other merchandise as commercial use). The extent to which uses for purposes other than advertising can legitimately be termed "commercial" and hence fall within the celebrity's property interest is currently the subject of much litigation. Although the California Supreme Court in *Saderup* continued to apply a fairly broad definition of "commercial," other courts have begun to cut back. See, e.g., Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 970 (10th Cir. 1996) (denying that use of identity on baseball trading cards is "commercial" use). Although the cards in *Cardtoons* were clearly parodies, the court did not limit its analysis to parody, but rather stated that trading cards in general are informational rather than commercial works. Id. at 969-70.

[49] These interests ultimately were sorted out and classified by Dean William Prosser. Dean Prosser pointed out that, in addition to a protection against unwanted commercialization of one's persona—the relevant interest for this paper—the privacy tort also included a right to be protected against intrusions into one's seclusion, against the publication of embarrassing private information, and against publication of false information about the

the use without consent of a person's name or image for "commercial" purposes. Plaintiffs whose identities were appropriated improperly for such purposes were typically awarded injunctive relief, although they also could obtain damages for dignitary harm (usually couched as an award for emotional distress).[50] The vast majority of cases involved the use of a name or face in advertising or in purported testimonials for products and services.[51] Because privacy rights were personal, no one other than the individual whose identity was appropriated could sue, and the right expired at the time of the individual's death.[52] An undercurrent of embarrassment attended the tort when celebrities invoked it, however, because it was conceptually difficult to understand how further commercialization could harm the privacy of someone who already earned his bread by exploiting his fame voluntarily in just this fashion.

The law on unconsented commercialization underwent a radical transformation in 1953 when Judge Jerome Frank decided a dispute between two producers of baseball trading cards.[53] A player had entered into an agreement giving the plaintiff the exclusive right to use his face on its cards. Later, however, the player entered into a similar agreement with the defendant. The defendant argued that the plaintiff was not entitled to exclusivity under its agreement with the baseball player because, as a legal matter, the contract simply was a release from liability for invasion of privacy.[54] Judge Frank disagreed. He concluded that the agreement was not a release, but rather a transfer of a valuable economic interest generated by the ballplayer's status as a celebrity.[55] At least among people who trade on their fame, said the judge, a commercial use of the individual's persona without con-

individual (the so-called false light tort). William Prosser, Privacy, 48 Cal. L. Rev. 383 (1960). The origins of the privacy tort can be traced largely to Warren and Brandeis's influential article addressing the necessity of creating a cause of action to protect privacy. Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890); see also Pavesich v. New England Life Ins. Co., 50 S.E. 68, 74 (Ga. 1905); Zimmerman, supra note 47 at 295. **R**

[50] For examples of courts issuing injunctive relief, see Onassis v. Christian Dior, 472 N.Y.S.2d 254 (Sup. Ct. 1984); Brinkley v. Casablancas, 438 N.Y.S.2d 1004 (App. Div. 1981). For cases resulting in monetary damages, see, e.g., Nat'l Bank of Commerce v. Shaklee Corp., 503 F. Supp. 533, 545-47 (W.D. Tex. 1980); Genesis Publ'ns, Inc. v. Goss, 437 So. 2d 169 (Fla. Dist. Ct. App. 1983).

[51] See, e.g., *Pavesich*, 50 S.E. at 68 (involving use of plaintiff's name and face in fabricated testimonial for insurance company).

[52] See, e.g., Maritote v. Desilu Prods., Inc., 345 F.2d 418 (7th Cir. 1965), cert. denied, 382 U.S. 833 (1965) (holding that posthumous telecasts concerning Al Capone did not invade privacy of offspring, relatives, or friends not mentioned therein).

[53] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

[54] Id. at 867.

[55] Id. at 868.

sent is not an invasion of his privacy, but rather an appropriation of a valuable asset for which the celebrity must be compensated.[56] And when a celebrity grants exclusive rights in his persona to someone else, what has occurred is the transfer of this property. The assignee thereafter has the power to exclude rivals from making competing uses.

Judge Frank did not focus on the normative justifications for treating this "asset" as formal property, but subsequent commentators and courts have supplied a variety of such justifications. Most start from the premise that celebrities "create" their valuable personas in much the same way that a novelist creates a work of fiction or an inventor a new device. Thus, giving the famous individual a property right in this form of intellectual property has been explained as an incentive to promote future creativity, as a reward for a valuable service to the public, or as a means of preventing unjust enrichment.[57]

Following the *Haelan* decision, courts—and more recently legislatures—in many states have followed Judge Frank's lead by breaking so-called publicity rights free of their roots in privacy and treating them instead as a kind of intellectual property, alienable in whole or in part by license, sale, or assignment.[58]

The recognition of this property right has contributed to a burgeoning "market" for fame. Since 1953, trading in identity has become big business. The two famous figures in the hypothetical that began this article are, as it turns out, excellent examples of how profitable it can be to exploit a persona affirmatively. Tiger Woods is primarily a professional golfer and clearly is well-compensated for his performance on the golf course. But he reportedly earned an additional fifty to sixty million dollars in 2000 alone by licensing out the use of his face and his name to companies that want to use them to promote products.[59] He has a contract with Nike, for example, to li-

[56] Judge Frank highlighted the irony in requiring celebrities who wanted publicity but wanted compensation as well to try to bring their complaint under the common law of privacy—the only body of law that seemed available. See id.

[57] The various justifications for the recognition of publicity rights are set out in Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 Cal. L. Rev. 127, 178-215 (1993); Diane Leenheer Zimmerman, Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!, 10 DePaul-LCA J. Art & Ent. L. & Pol'y 283, 304-13 (2000).

[58] See supra notes 8-10 and accompanying text. The distinction between privacy and publicity interests are detailed in Sheldon W. Halpern, The Right of Publicity: Commercial Exploitation of the Associative Value of Personality, 39 Vand. L. Rev. 1199, 1203-15 (1986).

[59] See Grainger David, Tiger Woods, Fortune, Apr. 30, 2001, at 25; Dave Anderson, Big Money, a Broken Bat and a Wonder Named Woods, N.Y. Times, Dec. 31, 2000, § 8, at 1; 2000: The Year in Review, People, Advertising Age, Dec. 18, 2000, at 38.

cense sports gear and merchandise, like posters of Woods, to his fans and admirers.[60] Woods, in fact, has set up a corporation, ETW, for the sole purpose of managing his publicity rights.[61] Michael Jordan, before his last "retirement" from professional basketball, was reported to have earned forty million dollars in a single year by allowing his name to be used in connection with sneakers, underwear, and telephone service.[62]

A further indication of the value of fame as a commodity can be gleaned from the efforts in recent years by famous people to securitize the value of their identities. Singer David Bowie started the trend in 1997 when he floated fifty-five million dollars in bonds backed by future income from his music and recordings.[63] As one commentator noted, ownership of intellectual property alone was not enough to make this sort of bond successful; in addition, the issuer had to be a "superstar."[64] Since then, other celebrities have come even closer than Bowie in marketing what approaches "pure" fame, as distinguished from any other pre-existing intellectual property interests. Baseball player Frank Thomas securitized his future career with the Chicago White Sox in 1998, seeking to raise a reported twenty million dollars.[65] Rap singer Sean "Puffy" Combs (once commonly known as Puff Daddy and now as P. Diddy) made plans to cash in on his fame and that of other African-American entertainers through an initial public offering in a company that would sell merchandise endorsed by

---

[60] Woods recently signed a contract with Nike worth $100 million. See Mark Hyman, The Yin and Yang of the Tiger Effect, Business Week, Oct. 16, 2000, at 110.

[61] ETW Corp. registered the trademark "TIGER WOODS" "for art prints, calendars, mounted photographs, notebooks, pencils, pens, posters, trading cards, and unmounted photographs . . . ." ETW Corp. v. Jireh Publishing, Inc., 99 F. Supp. 2d. 829, 830 (N.D. Ohio 2000).

[62] Associated Press, Jordan Wants Out of Endorsements, Columbian (Vancouver, WA), Mar. 23, 2000, at C4 (reporting Jordan's endorsement income for 1997). Woods and Jordan may be particularly successful in capitalizing on their fame, but they are not unique among successful sports figures. In 1993, tennis stars Andre Agassi and Monica Seles earned about seven million dollars a piece for licensing their publicity rights. John J. Coneys, Jr., To Tax or Not To Tax: Is a Non-Resident Tennis Player's Endorsement Income Subject to Taxation in the United States?, 9 Fordham Intell. Prop. Media & Ent. L.J. 885, 886 & nn.6 & 7 (1999).

[63] See Russ Wiles, Unglamorous Asset-Backed Securities Outdo Glitzy Cousins, Ariz. Republic, Feb. 14, 1999, available at 1999 WL 12746494. For a description of Bowie's securitization process, see Corey Field, Their Master's Voice? Recording Artists, Bright Lines, and Bowie Bonds: The Debate over Sound Recordings as Works Made for Hire, 48 J. Copyright Soc. 145, 184-88 (2000).

[64] Id. at 187. Clearly only part of the value of what Bowie securitized was the worth of his recordings and songs. The rest comes from his popularity as a performer and the interest the public has in him as a personality.

[65] Lisa Tibbits, Hambro Hits Homer with ABS Deal for Chisox All-Star, Investment Dealers' Dig., Apr. 20, 1998, at 6, 6-7.

them.[66] The idea was derailed, at least temporarily, by Mr. Combs's highly publicized brush with the criminal justice system.[67] Nevertheless, Mr. Combs continues to own and promote a brand of sportswear that was expected to generate $200 million in sales in 2001.[68]

A final indication of the worth to celebrities of their publicity rights is the size of the compensatory awards that they receive when defendants are found to have misappropriated this intellectual property. A federal district court recently concluded that using actor Dustin Hoffman's image once as a "commercial" model in a news magazine was worth $1.5 million.[69] The Beatles, whose act was imitated in the show Beatlemania, were awarded close to eight million dollars in 1986 for the use of their respective personas in the offending production.[70] And, more than a decade ago, Bette Midler won $400,000 in compensation for the offense of having her voice imitated by someone else in a commercial.[71] Clearly, as these examples show, the property interest introduced by the *Haelan* decision is not trivial, either to the celebrities, or in absolute terms.

B. Defining the Property at Issue

A court or creditor interested in liquidating a publicity right must know something about the laws that define (and in some instances, fail to define) it. It will be important to know if the right exists at all, and it may be useful to understand the scope of what can be sold, in order, for example, to decide whether the asset is likely to have significant market value. Not all states clearly recognize publicity rights, and those that do vary in what these rights protect. Also, because enforcement of the exclusive property right in the use of a celebrity identity can implicate the speech rights of others, awareness of recognized and evolving First Amendment limitations on the right of publicity is also helpful. What follows, therefore, is a brief review of

[66] See Rosemarie Maldonado, Celeb IPOs: Names Only Go So Far: Beyond the Glitz, Business Fundamentals Still Rule, Investment News, Jan. 24, 2000, available at 2000 WL 9429795.

[67] See id.

[68] The sportswear line is called Sean John. Guy Trebay, Fashion Statement: Hip-Hop on Runway, N.Y. Times, Feb. 9, 2002, at A1. Combs appears in all the print advertisements for it. Polly Devaney, Celebrities Vie for a Part of the Own-Brand Market, Marketing Wk., July 19, 2001, at 28.

[69] Hoffman v. Capital Cities/ABC Inc., 33 F. Supp. 2d 867 (C.D. Cal. 1999), rev'd on other grounds, 255 F.3d 1180 (9th Cir. 2001). The lower court also awarded Hoffman punitive damages in the amount of $1.5 million. Hoffman lost, however, on appeal when the court concluded that the defendants had a First Amendment defense available to them.

[70] See Apple Corps. Ltd. v. Leber, 229 U.S.P.Q. 1015, 1016 (Cal. Super. Ct. 1986).

[71] Midler v. Young & Rubicam, Inc., Nos. 90-55027, 90-55028, slip op. at 2 (9th Cir. Sept. 20, 1991).

issues in publicity law that may have particular relevance to the debtor-creditor system.

1. Publicity Rights Are Subject to Limits Imposed by the First Amendment of the Constitution

The right of publicity is limited by the First Amendment of the federal Constitution largely to uses that are deemed "commercial"; it cannot be used to limit newsworthy publications.[72] There remains, however, considerable disagreement over where the line between commercial and protected uses falls.[73] Most would agree that the property interest can extend to the use of personal characteristics in advertising[74] or in promotions designed to sell goods and services. But many other, more controversial types of uses also have been variously labeled "commercial."[75] For example, owners of publicity rights often claim the right to control depictions on posters and other memorabilia[76] and in shows and performances based on imitations of famous people.[77] California, by statute, extends the property right to uses of a celebrity's identity in what is frankly recognized as editorial content if the use is "so directly connected with a product, article of merchandise, good, or service as to constitute an act of advertising, selling, or soliciting purchases . . . ."[78] This provision appears to require writers and editors to obtain licenses to use celebrity identities

[72] There was one notable exception to this otherwise standard distinction. In the only U.S. Supreme Court case ever to deal with publicity rights, the Court said that a state was free to compensate a performer whose entire act—in this case, a fifteen-second flight out of a cannon and into a net—was used without permission as part of a newscast. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 575-76 (1977). The videotape of Zacchini, known as "the human cannonball," was shown on a news broadcast as part of the coverage of a local fair. The Court was concerned that permitting a broadcaster to present an entire event as "news" would deprive performers of the ability to draw paying audiences, thereby damaging their incentives to provide the performance at issue.

[73] For discussion of this problem, see Zimmerman, supra note 57. See also, White v. Samsung Elec. Am., Inc., 989 F.2d 1512, 1520 (9th Cir. 1993) (Kozinski, J., dissenting) ("[T]he line between the commercial and noncommercial has not merely blurred; it has disappeared."). **R**

[74] See, e.g., Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

[75] See, e.g., McFarland v. Miller, 14 F.3d 912 (3d Cir. 1994) (involving photographs of plaintiff playing fictional Spanky McFarland and use of name in association with restaurant); Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013 (C.D. Cal. 1998) (involving use of late Princess Diana's image on variety of products); MJ & Partners Rest. Ltd. P'ship, 10 F. Supp. 2d 922 (N.D. Ill. 1998) (involving use of Michael Jordan's name in connection with restaurants); Estate of Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981) (involving musical entertainment featuring Elvis Presley imitator); Comedy III Prods., Inc. v. Saderup, 21 P.3d 797 (Cal. 2001) (involving use of "The Three Stooges" images on posters and T-shirts).

[76] See, e.g., *Comedy III Prods.*, 21 P.3d at 797.

[77] See, e.g., *Estate of Presley*, 513 F. Supp. at 1339.

[78] Cal. Civ. Code § 3344.1 (West 2002).

in "soft" news stories such as consumer-oriented reporting about fashion or home furnishings.[79] The attempt to subject these sorts of uses to private control has generated considerable litigation, and courts at this point vary widely in what they are willing to classify as commercial.[80] Indeed, some commentators and judges have even argued that many uses of famous people's identities in advertising are protected by the First Amendment and cannot be subjected to private rights of ownership.[81] Were this line of thought to prevail, the publicity right, and the subject of this paper, would largely evaporate. There has been no hint to date, however, that such an evaporation is likely, and indeed the current trend, at least at the legislative level, seems to favor ever-broader definitions of commercial use in publicity rights law. Nevertheless, any conclusions about the scope of publicity rights must factor in their somewhat unusual relationship with the federal Constitution.

---

[79] A federal court, however, recently rejected a publicity rights claim, on free speech grounds, that would seem to be exactly the sort of use covered by the California statute. In Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001), the court found that the use of Dustin Hoffman's image to illustrate an article about current fashion was protected speech.

[80] Because the line between protected and unprotected uses is so unclear, disputes over this issue are common in the courts. Challenges involving uses of personas without permission in editorial content, see supra notes 78-79 and accompanying text, are only one category. Defendants are also arguing that they have a free speech right to use celebrity personas without permission in connection with products, services and entertainments. See *Comedy III Prods.*, 21 P.3d at 797. However, in Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959 (10th Cir. 1996), the Court of Appeals for the Tenth Circuit raised questions about allowing sports figures to control the use of their images on trading cards, suggesting that such cards are a form of protected communication. The court ruled that, at least where the images were being used for purposes of parody (as was the case in *Cardtoons*), a First Amendment privilege exists. Similarly, in a case brought on behalf of golfer Tiger Woods against a small art publishing company for making and selling prints depicting Woods, a federal district court held that the use was fully privileged by the First Amendment. ETW Corp. v. Jireh Publ'g, Inc., 99 F. Supp. 2d. 829 (N.D. Ohio 2000). This case is on appeal to the United States Court of Appeals for the Sixth Circuit. For details, see Diane Leenheer Zimmerman, Amicus Curiae Brief of Seventy-Three Law Professors in Support of Jireh Publishing, Inc., 22 Whittier L. Rev. 391 (2000). Even classic cases of advertising use may be subject to First Amendment defenses under the right circumstances. A recent case in New York found that a magazine advertisement poking fun at the mayor did not violate the mayor's publicity right, and it further noted that the advertising space in question, the exterior of a public bus, was a privileged forum for noncommercial and commercial speech alike. New York Magazine v. Metro. Transp. Auth., 987 F. Supp. 254 (S.D.N.Y. 1997), aff'd 136 F.3d 123 (2d Cir. 1998). More than thirty years ago, actor and comedian Pat Paulsen also lost a suit against manufacturers of T-shirts bearing his image on the ground that his quasi-humorous "campaign" for the presidency made him a public figure who could not object to use of his name or face in conjunction with products bearing on the campaign. Paulsen v. Personality Posters, Inc., 299 N.Y.S.2d 501 (Sup. Ct. 1968).

[81] See supra note 79 and accompanying text. **R**

2. *State Law Issues Involving the Scope of Publicity Rights*

a. Is there a property interest recognized by the relevant state? For the debtor-creditor system to recognize publicity rights and treat them as assets, those rights would have to exist in the applicable jurisdiction. Currently it is unclear how many states do, or probably would, recognize an alienable property interest in the human persona.[82] In some places, the answer is clear because case law or statutes on point exist.[83] The situation in many other states, however, is ambiguous. Some seem to recognize publicity rights as property, but in a very limited way. New York, for example, has a statute that was originally designed to create a privacy protection against unwanted commercial appropriations. But courts have managed to tuck a limited recognition of publicity rights within the confines of that law.[84] As a result, in New York, personal characteristics can be protected as property, but only where the attribute at issue is listed in the statute, and the property interest cannot survive the celebrity.

Other states sometimes use the term "right of publicity" in their case law, but the courts do not make clear whether they are talking about a full-blown property right or simply about traditional privacy rights under a more "modern" (and somewhat inaccurate) name.[85] The majority of states simply never have had occasion to address the distinction between publicity and privacy rights, and, therefore, it cannot be said safely that they will or will not eventually recognize the right to control commercial exploitation of a persona as a property, rather than solely as a privacy, interest.[86]

A state's failure to recognize the right of publicity as a property right may not be the deciding factor, however. At least where national media are involved, virtually any claimant can find a jurisdiction within which to enforce his publicity rights. Indiana law permits plaintiffs to enforce the interest without regard to where the violation occurred or where the rights holders are domiciled as long as the

[82] Perhaps the best available figure is that given by J. Thomas McCarthy in his treatise. McCarthy says that twenty-eight states currently recognize publicity rights. McCarthy, supra note 47, § 6.3. **R**

[83] See, e.g., sources cited supra notes 8-10.

[84] See Stephano v. News Group Publ'ns., 474 N.E.2d 580 (N.Y. 1984) (holding that state privacy law provides protection against appropriations of property right in human persona and is subject to same limitations that apply to privacy actions).

[85] See, e.g., Lawrence v. A.S. Abell Co., 475 A.2d 448 (Md. 1984); see also Libel Def. Res. Ctr., 50-State Survey 2001-2002, Media Privacy and Related Law 7923 (2001) (discussing Maryland law).

[86] Federal courts, however, from time to time have opined about whether one or another state would protect publicity rights if the opportunity arose. See, e.g., Ventura v. Titan Sports, 65 F.3d 725, 730 (8th Cir. 1995) (asserting that Minnesota Supreme Court would recognize tort of violation of publicity rights).

offending publications or products were distributed or displayed in some way within that state.[87] California recently enacted legislation that permits nondomiciliaries to rely on California publicity law as long as any violation takes place within that state's borders.[88]

b. Who and What Are Covered? Initially, publicity rights were thought of as the sole province of celebrities and entertainers who developed and then exploited their fame for economic gain. Gradually, however, many jurisdictions began to extend coverage to any famous person, including those whose prominence came not through sports or entertainment, but as a secondary effect of their participation in public affairs or politics.[89] A quick look at modern advertising campaigns—in which the late Congressman Tip O'Neill became a spokesperson for American Express and former Senator Robert Dole the "voice" of Viagra—suggests that such individuals may indeed have potentially marketable rights in their personas.

Today, several states simply have given up any attempt to limit publicity rights to some particular group of individuals and have taken the position that everyone has at least a nascent property interest in commercial exploitation of her identity. The Florida publicity statute, for example, says that commercial use of "the name, portrait, photograph, or other likeness of any natural person" without permission is actionable.[90] It is unlikely, however, that the forced sale of the publicity rights of an ordinary citizen would net anything for creditors; thus, the right is usually significant only where the individual has achieved some measure of renown.

Another factor that may affect the value of the publicity right is the range of characteristics protected. Again, this varies from jurisdiction to jurisdiction.[91] In all states recognizing publicity rights, the use

[87] Ind. Code Ann. § 32-36-1-9 (West 2002). See generally Jonathan L. Faber, Indiana: A Celebrity-Friendly Jurisdiction, 43 Res Gestae 24, 29 (March 2000) (noting broad reach of Indiana statute, regardless of celebrity's domicile).

[88] Astaire Celebrity Image Protection Act, S.B. No. 1385, 1999-2000 Reg. Sess. (Cal. 2000). There has been discussion from time to time of passing federal legislation protecting publicity rights. This approach, of course, would introduce uniformity where there is now great diversity of approaches. One such set of proposals is discussed in Symposium, Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress, 16 Cardozo Arts & Ent. L.J. 209 (1998).

[89] See, e.g., Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 703 (Ga. 1982) (holding that plastic bust of Dr. King violated his publicity rights).

[90] Fla. Stat. Ann. § 540.08 (West 2002).

[91] Some advocates of publicity rights have proposed that these variations in state law be "cured" by passage of a federal statute. See, e.g., Felix H. Kent, An Overview of the Right of Publicity, 216 N.Y.L.J. 3, 37 (1996); Thomas McCarthy, The Spring 1995 Horace S. Manges Lecture—The Human Persona as Commercial Property: The Right of Publicity,

of likenesses and names is covered. In some places, however, voices, signatures, and even tag lines may be protected as well.[92] The offending performance or material need not even use the actual face or voice of the celebrity; the imitation of a famous person's voice or his appearance by another may in some jurisdictions also fall within the right.[93]

c. Duration of Publicity Rights. The duration of publicity rights is pertinent to debtor-creditor law in two ways. First, at least for truly iconic individuals, the length of time that the publicity interest survives will influence its present value. But it should also be recognized that, especially in cases where the right survives the life of a celebrity, a debtor who is himself completely unknown to the public may nonetheless turn out to be the owner of someone else's valuable persona by virtue of an inheritance or a long-past intervivos transfer. Not all jurisdictions permit the right to survive the celebrity. Among those that do,[94] the term varies considerably. Tennessee, for example, treats publicity rights a bit like a trademark, allowing the interest to last as long as heirs and successors continuously exploit them—potentially forever.[95] California follows a copyright model by permitting survival of the right for a maximum of seventy years after the death of the individual.[96] Still other states permit the right to endure for the life of the celebrity plus 100 years.[97]

If a publicity right has been transferred, either by sale, gift, or at death by will or intestate succession, tracking the ownership of the interest may be difficult. Only a few states require successors to register their interests in the rights of a deceased personality as a predicate

19 Colum.-VLA J.L. & Arts 129, 141-42 (1995); J. Eugene Salomon, Jr., Note, The Right of Publicity Run Riot: The Case for a Federal Statute, 60 S. Cal. L. Rev. 1179 (1987); see also supra note 88. **R**

[92] See, e.g., Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983) (considering tag line associated with Johnny Carson element of his publicity rights).

[93] See, e.g., White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992) (finding celebrity's right of publicity violated by robotic parody in advertisement); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (holding actress and singer Bette Midler's publicity right infringed by use in automobile commercial of singer with similar-sounding voice). For a discussion of the expanding definition of the protected attributes of the persona, see Sheldon W. Halpern, The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality, 46 Hastings L.J. 853, 859-66 (1995).

[94] See, e.g., Cal. Civ. Code § 3344.1(d) (Deering 2002); Fla. Stat. Ann. § 540.08(1)(c) (West 2002); Ind. Code Ann. § 32-36-1-8 (West 2002); Okla. Stat. Ann. tit. 12, § 1448(B) (West 2002).

[95] Tenn. Code Ann. § 47-25-1104 (West 2002).

[96] Cal. Civ. Code § 3344.1(g) (Deering 2002).

[97] See, e.g., Ind. Code Ann. § 32-36-1-8 (West 2002); Okla. Stat. Ann. tit. 12, § 1448(G) (West 2002).

to seeking damages for infringement.[98] But in no state of which we are aware is registration a condition of preserving the interest. In reality, therefore, there is no reliable way to assure that parties have advance notice of who the current rights holders might be. The matter is further complicated by the fact that state laws are not uniform as to which rights survive. A recent court decision in Kentucky, for example, interpreted the state's fifty-year survival provision to apply only in cases where the late individual's identity has a "significant 'commercial value.'"[99] Showing that the deceased was well known does not necessarily satisfy the requirement, the court said, and heirs and legatees cannot exploit publicity rights of anyone whose persona fails to meet the "significant commercial value" test.[100]

This Article concentrates on the celebrity who owns his or her own rights at the time of the relevant debt-related proceeding. But the value of the surviving publicity interests of deceased stars such as Elvis Presley and Frank Sinatra suggests that a broader range of bankruptcy cases—and not just those of celebrity debtors who retain possession of their publicity rights at the time of filing—may involve valuable publicity rights that currently are going unrecognized.

II
Publicity as Property Outside the Debtor-Creditor Context: Divorce and Taxes

Because it is so common today to see famous people successfully market their fame, one might have predicted that publicity rights routinely would be treated as assets by anyone with a claim against a celebrity. Interestingly, though, this rarely seems to be the case; the idea that fame is now a commodity seems to have slipped under the radar screens of most courts and lawyers. There have been, however, a small handful of "harbinger" cases in the context of taxation and divorce.

In one instance, *Estate of Andrews v. United States*,[101] the Internal Revenue Service successfully claimed in federal district court that

[98] See, e.g., Cal. Civ. Code § 3344.1 (f)(1)-(f)(2) (Deering 2002) (establishing that claimant can sue only for damages arising after registration); Okla. Stat. Ann. tit. 12, § 1448(F)(1), (2) (same).

[99] Montgomery v. Montgomery, 1999 WL 1086279 (Ky. Ct. App. Nov. 19, 1999), rev'd on other grounds, 60 S.W.3d 524 (Ky. 2001).

[100] Id.

[101] 850 F. Supp. 1279 (E.D. Va. 1994). To the extent that publicity rights generate current income, they are, of course, captured as part of an individual's or a company's earnings for income tax purposes. What is new is the recognition that these rights can be valued in and of themselves for a variety of reasons. For valuation of the right current income would serve merely as some evidence of its worth as a res.

the value of a deceased author's name—one of the attributes protected under the rubric of publicity rights—should be included in her taxable estate.[102] The "celebrity" in question was V.C. Andrews, whose works include "Flowers in the Attic" and other novels in the so-called "children in jeopardy" genre. Andrews' estate had arranged to have further books written by a ghost writer and attributed to Andrews but had not listed the value of the author's name as a taxable asset in her estate. Several years later, the IRS sent out a deficiency notice.[103] Following a trial, the district court agreed that the author's name was a taxable asset and assigned a $703,500 valuation to it as of the date of her death.[104]

Similarly, in divorce cases, state courts in New Jersey and New York have ruled that publicity rights count as part of a couple's marital assets.[105] When actor and comedian Joe Piscopo and his wife divorced, the New Jersey court hearing the case concluded that what it termed Piscopo's celebrity "good will," to the extent that it was developed during the marriage, was marital property and subject to the same treatment that is given in the state to a spouse's professional practice or license.[106]

New York courts in two other cases, *Golub v. Golub*[107] and *Elkus v. Elkus*,[108] permitted the spouses of actress and model Marisa Berenson and opera singer Frederica von Stade, respectively, to prove and share in the value of their wives' fame to the extent that the husbands could show they had contributed to it during the marriage.[109]

---

[102] See generally Ray D. Madoff, Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity, 17 Va. Tax Rev. 759 (1998); Note, Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value, 108 Harv. L. Rev. 683 (1995).

[103] *Andrews*, 850 F. Supp. at 1281.

[104] Id. at 1295; see also Neil Caulkins, A Trustee's Duties When a Celebrity Persona is the Asset, 83 J. Pat. & Trademark Off. Soc'y 31, 33 (2001) ("[V]aluation of celebrity personas for tax purposes is . . . similar to valuation of traditional assets in that it relies on expert testimony and records of like transactions to determine fair market value.").

[105] See infra notes 106-08 and accompanying text. For discussion of potential valuation methods, see Alicia Brokars Kelly, Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill, 51 Rutgers L. Rev. 569, 604-11 (1999); Joel A. Rakower, Quantifying Celebrity Status As a Marital Asset, 15 Fair Share 7 (1995). See also Jonathan Kranz, Sharing the Spotlight: Equitable Distribution of the Right of Publicity, 13 Cardozo Arts & Ent. L.J. 917, 954 (1995) (explaining distinction between publicity rights and celebrity goodwill); Allen M. Parkman, Human Capital as Property in Celebrity Divorces, 29 Fam. L.Q. 141 (1995).

[106] See Piscopo v. Piscopo, 555 A.2d 1190 (N.J. Ch. 1988).

[107] 527 N.Y.S.2d 946 (Sup. Ct. 1988).

[108] 572 N.Y.S.2d 901 (App. Div. 1991).

[109] *Elkus*, 572 N.Y.S.2d at 901; *Golub*, 527 N.Y.S.2d at 946. For a discussion of the implications of treating other intellectual property as marital property, see Miranda Oshige McGowan, Property's Portrait of a Lady, 85 Minn. L. Rev. 1037, 1114-16 (2001) (considering extent to which nonauthor-spouse should have rights to dispose of copyright held by

Although publicity rights appear in the legal literature almost entirely in contexts where the celebrity or his assignee is asserting an exclusive right to control and profit from the exploitation of fame, *Andrews*, *Piscopo*, *Golub*, and *Elkus* lend credence to the argument that the choice to convert the human persona into an asset subject to market exchange not only provides a vehicle for channeling extra benefits to the famous and to their voluntary tranferees but also opens the door for others—whether spouses, the IRS, or unsatisfied creditors—to assert inchoate or actual claims to the value of that fame.

We recognize, of course, that the divorce and tax situations are different from debtor-creditor law in that liabilities attaching to publicity interests in the former settings can be satisfied without necessarily requiring that the celebrity or his assignees divest themselves of control over the asset. The value of the asset is shared rather than transferred in its entirety. This difference (and its significance) is something we will discuss at length in subsequent sections.[110] The point here is that these cases suggest there is no reason ex ante to suppose that a right of publicity could not be an asset for purposes of the debtor-creditor system. The court in the *Piscopo* case noted that it would make no sense to treat publicity rights as full-fledged property only when that characterization favors the celebrity or assignees but not when it would favor some other interest, including those of ex-spouses.[111] We suggest that the same logic applies when the interest in question is that of other creditors.

III
Publicity as Property in the Debtor-Creditor System

Any consideration of publicity rights in the debtor-creditor context must be set into a framework that acknowledges the power of creditors' interests in our legal scheme. The debtor-creditor system exhibits a preference for marshalling nearly all assets and making

author-spouse, and expressing concern that granting such right "inappropriately commodifies a kind of property that has a peculiarly close relationship to the author's self, perhaps even giving the spouse the ability to commodify the author's self"). But see Rodrigue v. Rodrigue, 218 F.3d 432, 435 (5th Cir. 2000) ("[A]n author-spouse in whom a copyright vests maintains exclusive managerial control of the copyright but. . .the economic benefits of the copyrighted work belong to the community while it exists and to the former spouses in division thereafter."); Worth v. Worth, 195 Cal. Rptr. 135, 138 (Ct. App. 1987) (finding that "a copyright on a literary work produced during the marriage is as much a divisible community asset as the underlying artistic creation itself").

110 See infra Part III.C.2, IV.

111 See *Piscopo*, 555 A.2d at 1192. But see Robin P. Rosen, Note, A Critical Analysis of Celebrity Careers as Property upon Dissolution of Marriage, 61 Geo. Wash. L. Rev. 522 (1993) (arguing that celebrity careers are not property under traditional definitions of property).

them available to satisfy unpaid creditors, regardless of any discomfort and indignity the process inflicts on the debtor.

The modern state is not as heavy-handed in favoring creditors as earlier legal systems have been. There is no parallel in contemporary American debtor-creditor law to the Roman law, permitting a debtor to be killed and his creditors to cut his body into proportional parts for nonpayment of debts.[112] Nor are debt peonage and enslavement of debtors still in favor,[113] although it remains possible to be imprisoned for failure to pay certain debts, such as child support.[114] The disappearance of overtly draconian laws does not mean, however, that the state gives modern creditors only modest rights to collect what they are owed.

Legal institutions do not merely enforce terms (including those creating security interests[115]) in a contract that originally created the debtor-creditor relationship. They also entitle unpaid creditors to the value of wholly unrelated assets of the debtor. In some instances, laws

---

[112] See generally Richard Ford, Imprisonment for Debt, 25 Mich. L. Rev. 24, 24-25 (1926) (reporting on Ancient Roman law).

[113] See generally 42 U.S.C. § 1994 (2001) (abolishing peonage and declaring null and void "all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise"); see also 18 U.S.C. § 1581 (2001) ("Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined under this title or imprisoned not more than 20 years, or both."); Peter J. Coleman, Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy 250-53 (1974); cf. Paul Rock, Making People Pay 219-58 (1973) (presenting sociological study of English debt collection process, including imprisonment, prior to legislative changes that substituted attachment of earnings for imprisonment).

[114] See Child Support Recovery Act of 1992, 18 U.S.C. § 228 (2001).

[115] See U.C.C. § 9-203 (2000) (explaining how to create a security interest, or to make it "attach"); id. § 9-601 (delineating rights of secured creditor to take possession of and foreclose on property interests of debtor in event of debtor's default). See generally Shubha Ghosh, The Morphing of Property Rules and Liability Rules: An Intellectual Property Optimist Examines Article 9 and Bankruptcy, 8 Fordham Intell. Prop. Media & Ent. L.J. 99, 115-16 (1997) ("At the state level, a secured creditor can sue a defaulting debtor and attach the underlying collateral described in the financing statement. The right to attach usually means the right to sell the collateral."). Although commentators vary in how they characterize the nature of a security interest in collateral, they agree that it has at least some attributes of a property right, as well as those of a contract right. See, e.g., Thomas W. Merrill & Henry E. Smith, The Property/Contract Interface, 101 Colum. L. Rev. 773, 834-35 (2001) (describing borderline nature of security interest, given its property aspects and contract aspects); Lawrence Ponoroff & F. Stephen Knippenberg, The Immovable Object Versus the Irresistible Force: Rethinking the Relationship Between Secured Credit and Bankruptcy Policy, 95 Mich. L. Rev. 2234 (1997); cf. In re Cybernetic Servs., Inc., 252 F.3d 1039, 1048 (9th Cir. 2001) (drawing distinction between security interest and ownership).

automatically create statutory liens in favor of creditors.[116] And even unsecured creditors (those who lack contractual rights to recover from specified assets) have powerful legal tools to help them get the value of a debtor's property when he fails to pay. For example, under state law, once a creditor receives a judgment from a court, it may be able to garnish part of the debtor's wages or instruct the local sheriff to levy on the debtor's property.[117] The sheriff may even be personally liable to the creditor if the sheriff comes up empty-handed.[118]

Thus, when a debtor owes money to a creditor, the identification of all the debtor's assets is of paramount importance. To the extent that fame is commodified, we argue that it is therefore appropriate to consider whether it, too, should be part of what is up for grabs.

Although the federal bankruptcy system is only one of several fora in which creditors stake claims to a debtor's property interests, we will use bankruptcy as the framework for the detailed discussion of publicity rights in the debtor-creditor system because the requirements of the bankruptcy system relating to property rights provide the clearest and most broadly applicable legal framework against which to examine and test our thesis. Different parts of the bankruptcy law satisfy the claims of creditors in different ways. In chapter 7, creditors generally are supposed to receive payment from the sale of the debtor's assets to the highest bidder. By contrast, if the debtor files under one of the reorganization chapters, such as chapters 11, 12, or 13, she will be permitted to keep her property but must pay creditors from future income at least, and sometimes more than, what they would have received from the liquidation of that property in chapter 7. Because the chapter 7 entitlement establishes the benchmark for the other types of bankruptcy, and in order to simplify the analysis, our discussion assumes that the type of relief sought is that provided by chapter 7 of the Bankruptcy Code.[119]

---

[116] See, e.g., Scott M. Martin & Peter W. Smith, The Unconstitutionality of State Motion Picture Film Lien Laws (Or How Spike Lee Almost Lost It), 39 Am. U. L. Rev. 59, 63-79 (1989) (describing New York film lien laws that give certain creditors rights in film). See generally James N. Duca, The Interaction Between Mechanic's Lien Laws and the Bankruptcy Code, 53 Bus. Law. 1283 (1998) (discussing treatment of state lien laws in bankruptcy).

[117] See generally Lynn M. LoPucki, The Death of Liability, 106 Yale L.J. 1, 9-10 (1998).

[118] See, e.g., Vitale v. Hotel California, Inc., 446 A.2d 880 (N.J. Super. Ct. Law Div. 1982) (discussing sheriff's default of duty in failing to properly execute judgment against debtor).

[119] 11 U.S.C. §§ 701-784 (2001).

A. *Treatment of a Debtor's Property Interests under Chapter 7 of the Bankruptcy Code*

Whether a federal bankruptcy case is initiated voluntarily by the debtor or involuntarily by creditors,[120] the bankruptcy system is, at least in theory, a creditor's remedy insofar as it gives creditors access to the value of nearly all of the debtor's assets. Thus, although the Bankruptcy Code offers no definition of property, the bankruptcy system places a premium on identifying "all legal or equitable interests of the debtor in property" because the bankruptcy "estate" will be comprised of those interests.[121] The implementation of this system depends largely on self-reporting; the debtor is expected to disclose all property interests,[122] and failure to identify assets can lead to denial of bankruptcy relief,[123] as well as to criminal sanctions.[124]

A form of wealth identified as property of the estate ultimately will be liquidated for the benefit of creditors,[125] unless the property is exempt,[126] abandoned due to lack of value to the estate,[127] or is subject to some other applicable restriction that prevents its use for a given purpose.[128] Once the trustee has administered the estate, the

---

[120] See 11 U.S.C. § 303 (2001) (authorizing the filing of involuntary bankruptcy petitions if certain criteria are satisfied); see also News Release, Admin. Office of the U.S. Courts (Feb. 19, 2002), at http://www.uscourts.gov/press_releases/cy01bk.pdf (tracking bankruptcy filings).

[121] 11 U.S.C. § 541(a) (2001).

[122] See Official Forms Schedule A (requiring that debtor list all real property), B (requiring that debtor list all personal property), and C (requiring that debtor designate all property that debtor claims to be exempt); see also Cusano v. Klein, 264 F.3d 936, 945-46 (9th Cir. 2001) (noting affirmative duty on debtor to schedule assets and liabilities and to prepare schedules "carefully, completely, and accurately") (citations omitted).

[123] 11 U.S.C. § 727 (2001) (providing grounds for objections to discharge).

[124] 18 U.S.C. § 152 (2001) (criminalizing concealment of assets).

[125] 11 U.S.C. §§ 507, 726 (2001) (providing claim priority and distribution scheme).

[126] Id., § 522. Exempt property is property that the Bankruptcy Code or applicable nonbankruptcy law (and sometimes state constitutions) say cannot be reached by unsecured creditors. Such laws generally list exempt property by both type and dollar limitations. Among the kinds of property often made the subject of state law exemptions are equity in a home, home furnishings, and all or part of the value of a car. Some homestead exemptions are extremely generous, such as those found in Florida, Texas, Iowa, South Dakota, and Kansas. See National Bankruptcy Review Commission Final Report, Bankruptcy: The Next Twenty Years, 299 annex D (1997). Legislative exemption schemes also tend to exempt property of low monetary value but tremendous personal importance, such as family portraits and wedding rings. See id. at 117-18.

[127] Id., § 554 (authorizing abandonment of property of estate that is burdensome or of inconsequential value to estate).

[128] For example, although a debtor's rights under a government license may be property of the estate, whether the property interest can be freely administered in bankruptcy is an entirely different matter. See generally NextWave Pers. Communications, Inc. v. FCC, 254 F.3d 130 (D.C. Cir. 2001), cert. granted, 70 U.S.L.W. 3551 (U.S. Mar. 4, 2002) (No. 01-653);

court grants an individual chapter 7 debtor a discharge,[129] unless the debtor has engaged in some sort of wrongdoing.[130] The discharge injunction permanently prohibits most creditors from collecting any further on prepetition debts.[131]

Given its central role in defining the rights of creditors to the value of assets, such as publicity rights, a close look at the term "property of the estate" in bankruptcy cases is in order.[132] As previously noted, the Bankruptcy Code does not attempt to define property, and applicable nonbankruptcy law plays a large role in establishing the baseline for what in bankruptcy constitutes a property right. If something is a property right under state law, it is also likely to qualify as property of the estate.[133] Courts sometimes take an expansive view of "interests in property" in an effort to capture rights of the debtor that have value to creditors.[134]

A debtor's interest in tangible property, such as a house, boat, or car, may seem the easiest to identify, but the bankruptcy system also has long recognized the debtor's interest in intangible assets as part of the estate in bankruptcy.[135] The debtor's rights in intellectual prop-

In re Cent. Ark. Broad. Co., 68 F.3d 213 (8th Cir. 1995). See also Cal. Bd. of Equalization v. MGM Liquor Warehouse, 52 B.R. 77 (D. Minn. 1985).

[129] 11 U.S.C. § 524 (2001) (establishing discharge injunction).

[130] See, e.g., § 727 (delineating grounds for objecting to discharge, such as failing to list all assets).

[131] § 524(a). The discharge injunction does not give total protection to the debtor against creditor collection efforts. A creditor can try to collect its debt after bankruptcy if its debt fits into an exception to discharge (e.g., debts incurred by fraud or willful and malicious injury), § 523(a), or if during the bankruptcy case the creditor made a new contract with the debtor, known as a reaffirmation agreement, in which the debtor agrees to be liable for that debt even after discharge. See § 524(c)-(d). Creditors that have security interests in property of the debtor (e.g., home mortgage lender, car lender) also can repossess that property after bankruptcy if the debtor does not pay, although the debtor has no personal liability for those debts. § 524(a). And, of course, the discharge injunction does not prevent creditors from attempting to collect any debts incurred after the bankruptcy.

[132] Of course, only the debtor's interest in the property will be property of the estate. See Thomas E. Plank, The Outer Boundaries of the Bankruptcy Estate, 47 Emory L.J. 1193, 1194-95 (1998).

[133] See, e.g., Douglas G. Baird, The Elements of Bankruptcy 5 (3d ed. 2001) ("Knowing the outcome under nonbankruptcy law can go a long way toward understanding the problem in bankruptcy."). See generally Barnhill v. Johnson, 503 U.S. 393, 398 (1992) (holding that in absence of any controlling federal law, "property" and "interests in property" are creatures of state law).

[134] See A. Mechele Dickerson, From Jeans to Genes: The Evolving Nature of Property of the Estate, 15 Bankr. Dev. J. 285, 293-94 (1999) (explaining that courts interpret Bankruptcy Code's property-of-estate concept "to include everything of value the debtor possesses even if the property, or the debtor's interest in that property, is 'novel'").

[135] See, e.g., Bd. of Trade v. Johnson, 264 U.S. 1 (1924) (concluding that debtor's membership in Chicago Board of Trade was property passing to trustee in bankruptcy).

erty such as patents,[136] copyrights,[137] trademarks,[138] and trade secrets[139] are assets that can be included.[140] This is consistent with the fact that commercial law and intellectual property law permit and recognize the creation of security interests in these kinds of assets.[141]

The boundaries on property of the estate have a temporal element as well. Again, using a basic chapter 7 liquidation case as our model, property of the estate will be composed primarily of property rights held by the debtor at the commencement of the case.[142] The date of filing establishes what property will or will not be included in the bankruptcy estate.[143] Once an asset is deemed to be property of the estate, the estate also includes any value that flows from the property in the form of "proceeds, product, offspring, rents, or profits of or from property of the estate."[144] In the case of intellectual property,

---

[136] See, e.g., Szombathy v. Controlled Shredders, Inc., No. 97-C481, 1997 U.S. Dist. LEXIS 5168 (N.D. Ill. Apr. 10, 1997) (noting that debtor listed patent for shredder as asset of bankruptcy estate).

[137] See, e.g., Cusano v. Klein, 264 F.3d 936, 946 (9th Cir. 2001) (acknowledging copyrighted compositions as assets under bankruptcy plan).

[138] See, e.g., Licensing by Paolo, Inc. v. Sinatra (In re Gucci), 126 F.3d 380, 385 (2d Cir. 1997); Adams Apple Distrib. Co. v. Papeleras Reunidas, S.A., 773 F.2d 925, 931 (7th Cir. 1985) ("[T]rademark is an asset of a bankrupt's estate which is saleable in bankruptcy proceedings along with the bankrupt's goodwill or tangible business assets."); see also Am. Sleek Craft, Inc. v. Nescher, 131 B.R. 991 (D. Ariz. 1991) (determining whether trade names are corporate asset of bankrupt corporation).

[139] See, e.g., Harmon v. McGee (In re McGee), 157 B.R. 966 (Bankr. E.D. Va. 1993); see also Lars S. Smith, Trade Secrets in Commercial Transactions and Bankruptcy, 40 IDEA 549, 570-74 (2000) (explaining that trade secrets are included in property of estate and noting adverse consequences of failing to list trade secrets as property interests).

[140] Chesapeake Fiber Packaging Corp. v. Sebro Packaging Corp., 143 B.R. 360, 372 (D. Md. 1992) ("[I]t is undisputed that the property of the debtor's estate includes the debtor's intellectual property, such as interest in patents, trademarks, and copyrights." (citing United States v. Inslaw Inc., 932 F.2d 1467, 1471 (D.C. Cir. 1991))).

[141] See, e.g., In re Cybernetic Servs., Inc., 252 F.3d 1039 (9th Cir. 2001) (holding that security interest in patent should be perfected in accordance with state law, not by filing record in Patent and Trademark Office). Intellectual property interests are generally considered general intangibles under Article 9 of the Uniform Commercial Code. See U.C.C. § 9-102(a)(42) (2000). See generally Richard M. Cieri & Michelle M. Morgan, Licensing Intellectual Property and Technology from the Financially-Troubled or Startup Company: Prebankruptcy Strategies to Minimize the Risk in a Licensee's Intellectual Property and Technology Investment, 55 Bus. Law. 1649, 1697 n.165 (2000) (collecting cases on requirements for perfecting security interests in intellectual property).

[142] 11 U.S.C. § 541(a) (2001) (providing that estate includes, inter alia, "all legal or equitable interests of the debtor in property as of the commencement of the case").

[143] See generally Everett v. Judson, 228 U.S. 474, 479 (1913) (noting that purpose of bankruptcy is to cleave time such that property owned by debtor at time of filing is property of estate, whereas property acquired postpetition is not). The fact that the property may be in the hands of a party other than the debtor is not determinative. For example, money received postpetition for work performed prepetition is property of the estate.

[144] 11 U.S.C. § 541 a(6) (2001). See generally Louis M. Phillips & Tanya Martinez Shively, Ruminations on Property of the Estate—Does Anyone Know Why a Debtor's

for example, the estate may include subsequent income—for example, royalties from copyrighted songs—generated by a preexisting asset.[145]

There is, however, a sharp legal divide—even if it is sometimes blurry in practice—between money generated postpetition by *property* and money generated by an *individual's services*. Profits or proceeds from services performed by an individual debtor after the commencement of the case do not qualify as property of the estate.[146] Such postpetition earnings receive special protection in the liquidation context, it is commonly said, in order to preserve the debtor's incentive to be productive after the bankruptcy is concluded.[147] If past creditors were entitled to the debtor's ongoing income, even in bankruptcy, the debtor might have little reason to be innovative or hardworking in the future, a result that would serve no one's interest.[148] Thus, to honor this statutory distinction, it is important to determine whether income generated postpetition flows from a preexisting property right or instead from the debtor's postpetition labor.[149]

Postpetition Earnings, Generated by Her Own Earning Capacity, Are Not Property of the Bankruptcy Estate?, 58 La. L. Rev. 623, 630-32 (1998).

[145] See, e.g., Cusano v. Klein, 264 F.3d 936, 945 (9th Cir. 2001); In re Dillon, 219 B.R. 781, 784 (Bankr. M.D. Tenn. 1998) (holding that royalties received postpetition from songs created prepetition are rooted in prebankruptcy past and are property of estate).

[146] 11 U.S.C. § 541(a)(6) (2001) (excluding from property of estate "earnings from services performed by an individual debtor after the commencement of the case"); cf. id., § 1306 (providing that postpetition earnings are property of estate in chapter 13 repayment plan context).

[147] See generally Local Loan Co. v. Hunt, 292 U.S. 234 (1934) (setting forth rationale for protecting future human capital).

[148] Id.

[149] See, e.g., Towers v. Wu (In re Wu), 173 B.R. 411, 414 (B.A.P. 9th Cir. 1994). In determining whether renewal commissions paid to the debtor postpetition constituted income from the debtor's postpetition services, the court focused on the rights and obligations of the debtor under an employment agreement and on whether receipt of commissions was dependent on the performance of postpetition services. This issue arises as well in the context of covenants not to compete, where the debtor will receive the payment postpetition, but will not actually be doing any affirmative work (other than refraining from competing) in order to be entitled to that payment. Perhaps most relevant to our analysis, some cases have also rested their conclusion that postpetition income under these circumstances belongs to the estate, and not to the debtor, on the ground that the payments are really for a commodified intangible completely disconnected from any activity by a debtor. In one case, the court wrote: "The fact the anti-competition payments must be paid even in the event of Johnson's death indicates it is Johnson's good will and not his services that are being sold." Johnson v. Taxel (In re Johnson), 178 B.R. 216, 220 (B.A.P. 9th Cir. 1995). The court added that: "The anti-competition payments are a method of paying for the value of Johnson's name, and for insuring that Pioneer Centers will receive all of the good will previously owned by Johnson Corp. The good will and the value of Johnson's name in the Porsche business were established pre-petition." Id. at 219. But see In re Hammond, 35 B.R. 219 (Bankr. W.D. Okla. 1983) (postpetition noncompeti-

Having highlighted the relevant aspects of the role of property interests in chapter 7, we turn to the issue of how publicity rights fit into this scheme. We note at the outset that we cannot inform our analysis by drawing on practical experiences with the treatment of publicity rights in bankruptcy because we have found no evidence, including in the case law, to suggest that famous bankrupts have been required to account for this interest, notwithstanding the surprisingly large roster of famous bankruptcy alumni.[150] Although it is possible that their fame as a potential asset affected the negotiations in indirect ways,[151] that is quite different from specifically identifying publicity rights as assets and administering them accordingly.

We think that this absence is more likely to reflect a failure to recognize fame as an asset than to represent an affirmative determination that it should be excluded from consideration.[152] As we noted earlier, some critics of the bankruptcy system have emphasized that, in

---

tion payments conditioned on debtor's compliance with covenant were not property of estate, and debtor could not be compelled to perform services for benefit of his creditors).

[150] For a partial list, see supra notes 12 to 42 and accompanying text. The Court of Appeals for the Ninth Circuit recently came close to broaching the issue, but ultimately decided the case on other grounds. See *Cusano*, 264 F.3d at 949-50 (dismissing musician's right of publicity claim as barred by statute of limitations). Even this court dealt more with the tort cause of action aspects of the right of publicity rather than with the inchoate right itself.

[151] See, e.g., Eliot Kleinberg, Reynolds Gets out from Under Bankruptcy, Palm Beach Post, Oct. 8, 1998, at 1B (reporting on confirmed plan of reorganization in Burt Reynolds's chapter 11 bankruptcy case, and noting that "Reynolds's show-business resurgence and prospects for increased income, which followed his Oscar nomination for 'Boogie Nights,' helped push through the agreement"). Yet, Reynolds's unsecured creditors still will receive less than twenty cents on the dollar, according to creditors' lawyers. Id.; see also Mitch Lipka, Actor's Bankruptcy in Freeze-Frame; Judge Orders Reynolds' Lawyers to Finalize Repayment Plan for Creditors, Sun-Sentinel (Fort Lauderdale), Apr. 16, 1998, at 1B (listing Reynolds's creditors and debts).

[152] There might be other, albeit more ad hoc, methods of taking account of publicity rights in bankruptcy that are not dependent on recognizing publicity rights as an asset. For example, a trustee, court or creditor might use evidence of a famous person's valuable publicity rights as the basis of a claim that the debtor filed the bankruptcy case in bad faith, justifying its dismissal. This is somewhat analogous to the circumstances in cases such as Huckfeldt v. Huckfeldt (In re Huckfeldt), 39 F.3d 829 (8th Cir. 1994), in which the Court of Appeals upheld the dismissal "for cause" under 11 U.S.C. § 707(a) (2001) of a doctor's bankruptcy case. In *Huckfeldt*, a debtor attempted to undercut his divorce decree by saddling his ex-spouse with large enough debts to force her into bankruptcy. The court relied in part on the high salary Huckfeldt would shortly command when he finished his fellowship and began his career as a surgeon. The court characterized his choice to file for bankruptcy while he was still earning a fellow's stipend as an attempt to manipulate his current earnings to the disadvantage of his former wife. Id. at 832; see also In re Altchek, 124 B.R. 944, 956 (Bankr. S.D.N.Y. 1991) (excluding debtor's postpetition earnings from property of estate, but noting that creditors have alternative remedy of moving for conversion or dismissal under § 1112, alleging that debtor cannot effectuate feasible plan without those postpetition earnings).

a number of high-profile celebrity bankruptcy cases, individuals were permitted to file for relief and receive a discharge of their debts without liquidating many of their assets or paying their creditors in full. One might question whether this problem is important enough to justify rewriting all of American personal bankruptcy law, but it has been highly enough publicized that we doubt courts would purposefully decide to exclude the value of fame from celebrities' estates in bankruptcy without so much as a comment. Given the current realities of the market for fame, it seems certain that requiring a well-known individual or her successors to treat her right of publicity as an asset could, in many instances, provide greater fairness to creditors in the debtor-creditor system.[153]

B. Fitting Publicity Rights into Property of the Estate

As previously noted, a right of publicity, to be an asset in a liquidation, would have to fit within both the substantive and temporal parameters of "property of the estate."[154] At least facially, it seems to fit into even the most conservative interpretations of "interests in

[153] Of course, we recognize the possibility that famous persons, who are likely to have access to sophisticated legal advice, might be able to arrange their financial affairs in a way that would protect them against the risk of having to forfeit such valuable assets. How this might be done, and what preventative legal measures might be appropriate to avoid such a result are, however, beyond the scope of this Article.

[154] This is the case whether or not the debtor has licensed a third party to use her name, face, or other aspects of her identity, because the debtor, unless she has transferred her publicity rights wholesale to a third party, is still the owner of the underlying right. It may not always be clear after the fact whether the originator of a publicity right transferred it to a third party outright or merely gave him a limited license for a specific use. See, e.g., Microsoft Corp. v. Dak Indus., Inc. (In re Dak Indus., Inc.), 66 F.3d 1091, 1095 (9th Cir. 1995) (considering economic realities of arrangement and deciding that there was lump-sum sale of software units to Dak prior to bankruptcy, not license for use of intellectual property). See generally Cieri & Morgan, supra note 141, at 1654-59 (distinguishing between outright transfer, assignment and license, and effect of these distinctions on treatment in bankruptcy). Licenses may cover a specific geographic area or be for specific purposes or a limited time. Even an outright grant may transfer all rights only in a specific context or for a particular attribute (such as a voice). Of course, debtors who believe they have licensed their publicity rights for an overly-modest sum might also seek to reject such executory contracts under 11 U.S.C. § 365 (2001). See Delightful Music Ltd. v. Taylor, 913 F.2d 102 (3d Cir. 1990) (permitting debtor in possession to reject executory contract); In re Noonan, 17 B.R. 793 (Bankr. S.D.N.Y. 1982) (same). But see In re Carrere, 64 B.R. 156, 160 (Bankr. C.D. Cal. 1986) (finding that § 365 concerning assumption or rejection of contract does not apply to personal services contract in bankruptcy case). Although § 365(n) governs the assumption or rejection of many types of intellectual property licensing agreements in which the debtor is the licensor, it will not govern licenses for publicity rights, which, like trademarks, are not expressly included in the definition of intellectual property in 11 U.S.C. § 101(35A) (2001).

R

property," particularly because of its alienability.[155] Even if a famous debtor has not exploited her publicity rights prior to the commencement of the bankruptcy case, she nevertheless owns a valuable property interest that she could exploit, created by actions taken prior to the filing of her petition.[156] Assuming the chapter 7 context, the liquidation of this asset for the benefit of creditors would seem a logical outcome.[157]

In some cases, it may be difficult to classify payments received postpetition by the celebrity debtor. Depending on the circumstances, money received postpetition could be excludable income from postpetition personal services, or, instead, includable proceeds from the preexisting publicity right. But these types of questions are not unique to publicity rights in bankruptcy.[158] For example, in cases involving professionals, courts sometimes have been called upon to distinguish income that flows from the individual's actual services from the value of the goodwill that flows from his established practice or business.[159]

[155] See supra Part I; see also McCarthy, supra note 47, § 10:13 (explaining that rights of publicity are assignable and are not subject to the antiassignment in gross trademark rules). Indeed, as noted in supra Part I.B.2(c), publicity rights could be property of the estate in the bankruptcy case of a transferee of publicity rights. For example, if Kim Basinger transferred her publicity rights to her nonfamous cousin Shelby, and Shelby filed for bankruptcy, it would seem clear that publicity rights were an asset of Shelby's bankruptcy estate. In such a case, it would be even more clear that they can comfortably have this status. **R**

[156] If the debtor is not a classic celebrity, and has no track record of seeking outlets for marketing her persona, the interest (if it exists under state law) may be of such limited value that it has no benefit for the creditors. In such an instance, the trustee may abandon the interest to the debtor. See 11 U.S.C. § 554 (2001) (permitting trustee to abandon any property of estate that is burdensome to estate or that is of inconsequential value and benefit to estate). Or, the debtor might use assets other than property of the estate to reacquire the property interest for a nominal sum.

[157] See Waterson, Berlin & Snyder Co. v. Irving Trust Co., 48 F.2d 704, 710 (2d Cir. 1931) (finding that copyrights held by bankrupt publisher, having been transferred by composers, were now in bankruptcy estate, and rejecting composer's arguments that there was implied covenant that bankrupt publisher itself had to publish songs and that copyright could not be transferred).

[158] In Szombathy v. Controlled Shredders, Inc., No. 97-C481, 1997 U.S. Dist. LEXIS 5168 (N.D. Ill. Apr. 10, 1997), for example, the court had to decide whether the debtor's postbankruptcy development of new technology belonged to the debtor personally or belonged to the estate. The court decided that the technology belonged to the debtor, characterizing it as the debtor's postpetition activity. Cf. In re Gucci, 202 B.R. 686, 690-91 (Bankr. S.D.N.Y. 1996) (finding that debtor's postpetition designs belonged to purchaser of trademark). The temporal divide questions are also inherent in divorce proceedings. See, e.g., Roddenberry v. Roddenberry, 51 Cal. Rptr. 2d 907 (Ct. App. 1996) (rejecting claim of Star Trek creator's first wife that she retained ongoing profit participation interest in generic literary property).

[159] See, e.g., In re Prince, 85 F.3d 314 (7th Cir. 1996) (holding that § 541(a)(6) exception does not preclude considering goodwill in value of stock in orthodontist's sole proprietorship); Fitzsimmons v. Walsh (In re Fitzsimmons), 725 F.2d 1208, 1211 (9th Cir. 1984) (hold-

Although sensitive and difficult, this type of line drawing is one with which the bankruptcy system regularly copes.

Thus, rights of publicity do not appear uniquely to strain either the substantive or temporal limitations on property of the estate. As a consequence, it would seem reasonable on the face of the matter to count this form of property as property of the estate and thus as part of the creditors' entitlement—unless, of course, it is exempt as a matter either of state[160] or federal law. A similar analysis would apply in debtor-creditor actions under state law.[161]

C. A Closer Look at the Bar Against Conscripting Future Labor

As noted in our previous discussion, the fruits of the individual chapter 7A debtor's postpetition labor are not property of the estate.[162] Identifying the boundary between existing property (and the income that flows from it) and future labor is tricky because, despite the intense concern of celebrities and lawmakers with recognizing and expanding the right of publicity, not very much careful thinking has gone into analyzing what the right actually is: whether it inheres solely in the famous individual's identifying characteristics or whether it also includes elements of performance by the celebrity as well. In other words, if publicity rights are to be put on the auction block, what exactly does their purchaser acquire? If the right of publicity is, in part, a right to future cooperation from, and performances by, the famous person, does part of the right of publicity fall outside the boundaries of property of the estate? And, even if publicity encompasses only passive rights, would sale of such an interest nonetheless have an impermissibly inhibitory impact on a celebrity's ability to benefit from her future labor?

ing that § 541(a)(6) exception applies only to services performed personally by individual debtor, with remainder of income from lawyer's sole proprietorship belonging to bankruptcy estate); In re Weber, 209 B.R. 793, 798 n.6 (Bankr. D. Mass. 1997) (providing summary of courts' approaches in distinguishing between income for postpetition services and estate property). See generally Susan Gummow, Earnings Exception, 98 Com. L.J. 379 (1993).

[160] At least one state, Illinois, exempts publicity rights from levy or attachment, although the statute does permit creditors to reach income earned from the exploitation of the rights. 765 Ill. Comp. Stat. Ann. 1075/15 (West 2002).

[161] State law may offer the additional option of garnishment for creditors to benefit from the value of the debtor's asset if the debtor is actively exploiting it.

[162] 11 U.S.C. § 541(a)(6) (2001) (excluding "earnings from services performed by an individual debtor after the commencement of the case").

1. How Should the Property Interest in Publicity Be Bounded?

Addressing these questions in the order they have been posed, we turn first to the question of what can be sold in bankruptcy under the rubric of publicity rights. In a voluntary transaction, the purchaser or licensee of another's publicity rights might bargain to obtain both the ability to use a celebrity's name or likeness and the ability to call on the celebrity to perform in future commercials or to make public appearances on behalf of a product or service. The parties may not be concerned with articulating whether the publicity right covers both the use of his identity and of the celebrity's labor. But if, for example, Michael Jordan's publicity rights were sold to a third party to satisfy creditors' claims, the purchaser ought not to expect that she could require Jordan to travel around the country to promote a new energy drink as its official spokesperson.

Although little attention has been given to a precise definition of the term, we suggest that state-law-created publicity rights are properly understood as purely passive in nature; any associated right to command active participation by a celebrity should be understood as arising separately as a result of a specifically negotiated contract term.[163] This interpretation makes sense in light of current practices and best comports with existing legal principles. Simply put, publicity

[163] There are some cases suggesting that the publicity right encompasses both a celebrity's attributes and all her performances as well. See, e.g., Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) ("human cannonball" has publicity rights in his performances); Ettore v. Philco Television Broad. Corp., 229 F.2d 481 (3d Cir. 1956) (acknowledging that boxer has property right, distinct from privacy right, in performance footage). We believe, however, that publicity rights do not cover performances per se, and that the cases suggesting the contrary were using the term "publicity rights" when the problem was actually something more closely akin to common law misappropriation. See, e.g., Int'l News Serv. v. Assoc. Press, 248 U.S. 215 (1918) (finding it illegal to appropriate news reporting of competitor). Publicity rights are commodified interests subject to alienation. It is difficult, logically, to reconcile the notion of alienability, so much at the heart of how publicity rights are defined both by the courts and by legislatures, with an extension of the right to performances. If performance were truly an aspect of the publicity right, an individual who exercised her option to transfer all or part of her property interest in her persona might then be faced with having also sold the right to benefit from (and possibly control) some or all of her future performances. As noted in infra the text accompanying notes 171-75, the law in other contexts strongly disfavors such a result, and it should not be assumed that either courts or legislators intended to ratify it in the publicity context. For this reason, we believe that the definition of the right as "passive" and not one that implicates actual performances is correct. But, even if the authors of this Article are wrong in their definition of the right, the basic scheme set out in the paper would not change. Because of the rules against conscription of future services in bankruptcy, only that part of the publicity right that could be exploited passively should be subject to forced sale. As noted below, however, some limit on the future performances of a bankrupt celebrity would be necessary to prevent the individual from infringing on the rights that were transferred. See infra notes 168-72 and accompanying text.

R

rights, standing alone, do not include the right to direct a person's future labor.

As a practical matter, many of the most valued existing publicity rights—for example those of such celebrity personas as Elvis Presley[164] or The Three Stooges[165]—must perforce be entirely passive. The individuals in question are dead and could scarcely be expected to "participate" in new forms of commercial exploitation of their identities. This does not seem to present serious impediments to economic enjoyment of the property in question. The name, attributes, existing images, artistic renderings, and even computer-generated or manipulated images of the celebrity are all usable without requiring the celebrity, dead or alive, to do anything after the property right in question has been transferred.

Even if the interest arguably would be worth more (particularly if the debtor is bankrupt) were it to include a right to call on living celebrities for future performances, existing law creates formidable barriers to enforcing such an interest. In the first place, forcing a debtor to perform at the behest of the asset purchaser evokes a deep-seated social and even constitutional unease with arrangements that smack of involuntary servitude.[166] Clearly, the celebrity's performance would neither be for his own benefit nor depend on his own wishes, but would instead be for the benefit of the purchaser and, indirectly, the creditors (who might be able to command a higher price if they could convey both the celebrity's services and the right to make "passive" uses of his persona).

---

[164] See, e.g., Elvis Presley Enters., Inc. v. Capace, 141 F.3d 188 (5th Cir. 1998) (recognizing publicity and trademark claims against "Velvet Elvis" service mark); Elvis Presley Enters., Inc. v. Elvisly Yours, Inc., 936 F.2d 889 (6th Cir. 1991) (holding that seller of Elvis memorabilia violated Presley's publicity right).

[165] Comedy III Prods., Inc. v. Saderup, 21 P.3d 797 (Cal. 2001) (ruling that use of image of Three Stooges on posters and t-shirts violates their publicity rights).

[166] The Thirteenth Amendment of the Constitution of the United States bars both slavery and involuntary servitude. The amendment was one passed in the aftermath of the Civil War and has generally been applied where issues of race discrimination have been implicated. See, e.g., Griffin v. Breckenridge, 403 U.S. 88 (1971) (finding support in Thirteenth Amendment for holding that 42 U.S.C. § 1985(3) outlawed private conspiracies to deprive citizens of their constitutional rights because of race). However, in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968), the Court said that the amendment was an "absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." This language suggests that the amendment protects all citizens, regardless of race, against involuntary servitude. See Laurence H. Tribe, American Constitutional Law 331-34 (2d ed. 1988). Although the question remains unresolved, it is difficult to believe, given the history of the United States with slavery, that the Supreme Court would interpret the Constitution to permit slavery or involuntary servitude to be imposed on individuals, no matter what the grounds for selection of those to be so burdened.

In light of the fact that filing for bankruptcy is a "privilege" offered by the government, rather than a constitutional right,[167] one might be tempted to counterargue that any "servitude" that results from the sale of assets, at least in a voluntary bankruptcy case, would itself be "voluntary." We do not find this argument a convincing basis for treating the publicity right, even in the bankruptcy context, as embodying rights to personal services. For one thing, if we assume that every citizen has a constitutional right not to be subjected to involuntary servitude,[168] making a benefit like bankruptcy available only if the recipient agrees to "perform or forego an activity that a preferred constitutional right normally protects from interference" may call into play the unconstitutional-conditions doctrine.[169] Even if the govern-

[167] See United States v. Kras, 409 U.S. 434, 446 (1973) (denying request for fee waiver for filing bankruptcy petition, and holding that there is no constitutional right to obtain discharge in bankruptcy). The Court stated:

> Kras' alleged interest in the elimination of his debt burden, and in obtaining his desired new start in life, although important and so recognized by the enactment of the Bankruptcy Act, does not rise to the same constitutional level [as marriage or marriage dissolution]. . . . If Kras is not discharged in bankruptcy, his position will not be materially altered in any constitutional sense. Gaining or not gaining a discharge will effect no change with respect to basic necessities. We see no fundamental interest that is gained or lost depending on the availability of a discharge in bankruptcy.

Id. at 445.

[168] See supra note 166. **R**

[169] See, e.g., Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) (finding it unconstitutional to prohibit federally funded legal services lawyers from representing clients in actions to amend or challenge validity of welfare laws). See generally Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1499-1500 (1989); Cass R. Sunstein, Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion), 70 B.U. L. Rev. 593, 593-94 (1990) (noting that doctrine "operates as a shorthand response to the view that those who voluntarily participate in government programs have 'waived' their constitutional objections, and also to the claim that the government's power not to create a regulatory program necessarily includes the power to impose on that program whatever conditions it chooses").

At least one bankruptcy scholar has raised the issue of unconstitutional conditions in the context of consumer bankruptcy. See Karen Gross, The Debtor As Modern Day Peon: A Problem of Unconstitutional Conditions, 65 Notre Dame L. Rev. 165, 205 (1990) (raising this argument in context of conditioning debt relief on completion of repayment plan under chapter 13 of Bankruptcy Code). See generally 11 U.S.C. §§ 1301-1307, 1321-1328 (2001). In chapter 13, the debtor need not forfeit nonexempt assets; rather, the debtor's discharge is generally conditioned upon completion of a repayment plan funded, presumably, out of the debtor's future income. In other words, a debtor who is deemed ineligible for chapter 7 bankruptcy relief but "needs" a discharge of debt has no tolerable "choice" but to work for the benefit of creditors. See id. § 1328. Forcing a debtor, as a condition of receiving bankruptcy relief, to contribute performance in the future to the purchaser of publicity rights might raise similar concerns. Others, however, do not agree that obligations to pay creditors from future earnings as a condition of debt relief is involuntary servitude. See Theodore Eisenberg, Bankruptcy Law in Perspective, 28 UCLA L. Rev. 953, 988-89 (1981) (arguing that debtor is not working against his will insofar as he is permitted to keep substantial portions of earnings for care of himself and his family). This skepticism

ment is under no duty to provide a benefit in the first place, acceptance of the benefit does not necessarily constitute a waiver of constitutional protection.[170] And the waiver argument would have no logical purchase in cases of involuntary bankruptcy or involuntary state law debt collection, except perhaps if one took the position that the act of not paying debts itself constitutes a waiver.

In other contexts as well, forced personal service is disfavored. In standard contract law, courts do not require personal service contracts actually to be performed, even if the defaulting party entered the agreement under circumstances that were unambiguously voluntary. The most that a disappointed party can hope for is money damages, not a specific performance decree.[171]

The same resistance to specific performance for personal service contracts clearly exists within the debtor-creditor system. When a bankruptcy case involves an individual with unique skills, questions about the enforceability of personal services contracts may arise.[172] Here, too, it is generally agreed that, just as a debtor cannot force a nondebtor party to accept another's services in lieu of his own,[173] neither can the nondebtor obtain specific performance from the debtor.[174] As the Court of Appeals for the Third Circuit has noted, "[p]ersonal services contracts differ from other executory contracts . . . in that the consent of the parties is required before the trustee has the authority to assume them—a qualification which reflects the peculiar nature of such contracts and the widespread distaste for involuntary servitude."[175]

---

might be diminished if the debtor were actually being required to provide future personal services rather than being required merely to submit a portion of future income.

[170] Sullivan, supra note 169, at 1460. **R**

[171] See, e.g., Arthur Linton Corbin, Corbin on Contracts § 1204 (1964) (discussing limitations on specific performance).

[172] Debtors' contracts can, under some circumstances, be assumed (continued), rejected (breached), or assigned to a third party, even over the objection of the party who originally entered into the contract with the debtor. See 11 U.S.C. § 365(f) (2001).

[173] See generally David G. Epstein, Steve H. Nickles & James J. White, Bankruptcy § 5-15 (1993) (explaining grounds for nonassignability).

[174] See, e.g., Cloyd v. GRP Records (In re Cloyd), 238 B.R. 328, 335 (Bankr. E.D. Mich. 1999) (noting that limiting trustee's ability to enforce personal services contracts is means of protecting debtors against involuntary servitude (citing Delightful Music v. Taylor, 913 F.2d 102 (3d Cir. 1990))).

[175] *Delightful Music*, 913 F.2d at 107. One court attributed the rule to the fact that "courts have always understood that an artist does not work well under compulsion." In re Noonan, 17 B.R. 793, 797-98 (Bankr. S.D.N.Y. 1982) ("Where an executory contract between the debtor and another is of such a nature as to be based upon the debtor's personal skill, the trustee does not take title to the debtor's rights and cannot deal with the contract. . . . The Arista contract is simply not the kind of an asset to which the creditors can look by insisting that the debtor assume it."); cf. In re Carrere, 64 B.R. 156 (Bankr. C.D. Cal. 1986). Other courts, such as *Cloyd*, have been able to protect the debtor from forced

The fact that publicity rights are valuable without the celebrity's active cooperation, coupled with the law's dislike of coerced personal performances, supports our conclusion that the celebrity's future services are not part of her publicity rights. From this, we further conclude that publicity rights can be incorporated into the debtor-creditor context without requiring violation of the principle that the debtor should retain control over her future labor.

2. *Does Inclusion of the Right of Publicity in a Debtor's Estate Impose an Indirect Burden on Future Earning Capacity?*

If one defines the right of publicity as purely passive in nature, the forced sale of publicity interests should not offend the limitation on "property of the estate" that excludes earnings generated by postpetition services of the debtor.[176] Bounding the property right this way permits a valuable *res* to be sold while appearing to preserve for the celebrity the monetary rewards of future work.

In practice, however, it is important to ask whether the sale of publicity rights to the highest bidder in bankruptcy might nonetheless have indirect implications for the celebrity's ability to enjoy the fruits of her future economic endeavors. Although we believe that it does, we do not believe that they are of a sort that would or should render publicity rights ineligible for inclusion as an asset in the debtor-creditor system.

Clearly, the celebrity must refrain from exercising the right of publicity once it is owned by someone else so as not to negate the value of the asset that has been transferred.[177] Even though the celebrity might be tempted to enter contracts to make advertisements or participate in future marketing endorsements—performances that the purchaser cannot claim were part of the publicity interest that he purchased—a celebrity could not do so without putting herself into competition with the purchaser, in effect rendering her an infringer of her

assumption without reaching the property of the estate questions central to Bofill and Noonan. In re Bofill, 25 B.R. 550 (Bankr. S.D.N.Y. 1982) (arguing that personal services contract is not property of estate because trustee cannot assume it and because 11 U.S.C. § 541(a)(6) (2001) excludes from property of estate any future profits from such contracts). See *In re Cloyd*, 238 B.R. at 335.

[176] 11 U.S.C. § 541(a)(6) (2001).

[177] That a celebrity who transfers a publicity right and then attempts to exploit it himself is an infringer has been clear from the outset. In Haelan Labs. Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 870 (2d Cir. 1953), for example, the court made clear that a baseball player could not transfer exclusive rights to use his image on a baseball card and then turn around and grant exclusive rights for the same purpose to someone else. See also MJ & Partners Rest. Ltd. P'ship v. Zadikoff, 10 F. Supp. 2d 922, 930 (N.D. Ill. 1998) (considering, among other claims, whether Michael Jordan infringed right of publicity that he had transferred to restauranteurs).

own publicity right. The need for a "negative injunction" limiting the celebrity's future freedom of action raises two potential problems. First, there are likely to be areas of ambiguity as to what is and is not "infringing activity." Second, there will be limits on the ways in which the famous person can develop her career and pursue income in the future.

In some instances, courts may need to decide whether a debtor's future activities are appropriate uses of human capital or are inappropriate attempts to exploit publicity rights that the celebrity no longer owns or controls.[178] For example, a model like Cindy Crawford earns her livelihood wearing clothes and makeup designed by others. In some instances, when she shows the clothes and makeup she is pursuing her primary career as a fashion model. In others, she may be exhibiting herself in the clothes or makeup specifically to endorse them as products. Distinguishing one from the other might be difficult, but courts are no strangers to this kind of line-drawing; it is the mainstay of infringement actions,[179] and the fact-sensitivity of this enterprise does not provide a compelling reason to refrain from treating publicity rights as alienable property in the bankruptcy context. The problem of celebrities infringing publicity rights that they transferred to others has already arisen in settings outside of bankruptcy[180] and no doubt will continue to do so.

The fact that a famous person who has parted with publicity rights will be precluded from engaging in some income-amplifying activities is a more serious concern, but it does not necessarily mean that the sale of the rights will interfere illegitimately with her postpetition earnings. The impact of the sale on the celebrity would be quite similar to what already happens in bankruptcy when other forms of intellectual property are subject to forced sale. A designer whose name is

[178] See generally, Andrew Beckerman-Rodau, Are Ideas Within the Traditional Definition of Property?: A Jurisprudential Analysis, 47 Ark. L. Rev. 603, 603 (1994) ("Products of the mind can be simultaneously possessed and used by multiple parties, and different parties may even use the same product of the mind differently. In contrast, the mythical Blackacre cannot be simultaneously used as an airport and as a cornfield."); Ghosh, supra note 115, at 121 (noting that indistinct boundaries of intellectual property regimes provide broad protection but fuzziness creates uncertainty as to what is actually protected). R

[179] In the Dustin Hoffman case, for example, the court was called upon to draw a line between commercial and noncommercial uses by deciding whether a fashion spread in a magazine was a disguised advertisement, as the plaintiff charged, or, instead, protected editorial matter. Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184-86 (9th Cir. 2001).

[180] See, e.g., *Zadikoff*, 10 F. Supp. 2d at 930. This sort of infringement problem occurs in other forms of intellectual property as well. See, e.g., Gross v. Seligman, 212 F. 930 (2d Cir. 1914) (holding that photographer infringed one of his own former photographs whose copyright he had sold along with picture).

also his trademark, for example, will not be able to exploit that asset to sell clothes in the future once the trademark has been sold to a third party.[181]

The celebrity whose publicity rights have been sold may actually be in a better position to generate future earnings from personal performance than the designer in the example just given. The limitations on the scope of the right of publicity and the prohibitions on the future activities by the celebrity suggest an opportunity for mutually beneficial cooperation. Although the celebrity could not exploit his publicity rights without reacquiring them, neither could the purchaser obtain specially posed photographs or performances or personal appearances without negotiating separately with the celebrity for such benefits. The parties, therefore, both stand to benefit in many instances by cooperating with one another in finding the most valuable ways of utilizing the publicity interest.

IV
The Associational Consequences of Alienating Publicity Rights

The most vigorous objections to treating publicity rights as assets in the debtor-creditor system are not likely to result from the "fit" of the publicity right into standard definitions of property or even from the fact that the celebrity will be divested of its economic value. Rather, they will come from the fact that an individual, through a forced sale, will lose control over the use of her identity if it is treated as a form of property.[182] This is where debtor-creditor law differs most starkly from the taxation and divorce cases discussed in Part II: For the most part, those cases were about sharing value, rather than

[181] See, e.g., In re Gucci, 202 B.R. 686, 690 (Bankr. S.D.N.Y. 1996) (explaining that "upon the bankruptcy of the trademark owner, the trademark together with the goodwill it symbolizes becomes vested in the trustee in bankruptcy" and reasoning that designs created postpetition had to belong to purchaser of trademark or court "would essentially be creating in Paolo the right to continue the very business the trustee sold"); see also Licensing by Paolo, Inc. v. Sinatra (In re Gucci), 126 F.3d 380 (2d Cir. 1997) (finding merits of sale of intellectual property unreviewable due to nonappealability of sale to good faith purchaser under 11 U.S.C. § 363). Trademark law distinguishes between the commercial use of a person's name, which cannot be continued once that asset has been transferred to another, and the use of the name in the individual's private capacity to identify himself, which may continue to be used. See McCarthy, supra note 47, § 10.11. **R**

[182] See, e.g., Am. Sleek Craft, Inc. v. Nescher, 131 B.R. 991, 996 (Bankr. D. Ariz. 1991) (explaining that if trade name was asset of bankrupt corporation, it had been sold to purchaser); Allegheny Health, Educ. & Research Found. v. Williams (In re Allegheny Health, Educ. & Research Found.), 233 B.R. 671, 675 (Bankr. W.D. Pa. 1999) (finding no dispute that intellectual property, which was property of bankruptcy estate, was sold to third-party purchaser and now is exclusively owned by that party, not by estate or debtor); *In re Gucci*, 202 B.R. at 690-91.

sharing control over or, worse yet, divesting control of, the publicity right.[183] Neither the IRS nor the former spouse obtained sole authority to decide how the celebrity's name, likeness, and other attributes were to be used in commercial settings. In the debtor-creditor context, by contrast, forced sale of the asset gives to the highest bidder complete control over the exploitation of the right of publicity, including the right to sue for infringement.[184] The end result is that the treatment of publicity rights in the debtor-creditor system leads to exactly the opposite of what was hoped for in deciding to commodify the interest. The successful bidder, not the famous person, gets to make the decisions about the commercial associations to be made with her public identity. With the right in the hands of a stranger, celebrities who argue for an expansive interpretation of the right may find that the very breadth of the right they originally desired has turned into a personal and professional liability.

In *Haelan*, Judge Frank thought it made sense to turn the celebrity persona into property because he believed that most well-known people really only wanted to earn money from their fame. He did not think celebrities were interested in defending themselves against the use of their identities in commercial settings because they wanted to retain their personal privacy.[185] Contrary to Judge Frank's expectations, however, publicity rights have never been completely severed from their roots in privacy, and the property-privacy tension[186] is

[183] If intellectual property interests such as copyrights are divided between spouses at divorce, control can sometimes be an issue because the co-owners have independent power to divest themselves of their shares and substitute a new party into the relationship. At least one court has tried to avoid this problem by leaving managerial control over the copyrighted works at issue in the hands of the artist who created them and awarding the spouse only a beneficial interest in the economic returns generated by the works. Rodrigue v. Rodrigue, 218 F.3d 432 (5th Cir. 2000); see also McGowan, supra note 109. R

[184] See, e.g., *Zadikoff*, 10 F. Supp. 2d at 930 (concluding that acquirer of exclusive license to use Michael Jordan's name on Chicago restaurant had standing to sue Jordan and Zadikoff for infringement of right of publicity). The court noted that "much of the confusion between the right of privacy and publicity has resulted from the fact that many litigants choose to sue for invasion of privacy rather than for appropriation of property rights in situations where injury to feelings has only secondary application." Id. at 930 n.3.

[185] See Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953). See also supra notes 53-56 and accompanying text.

[186] See Alice Haemmerli, Whose Who? The Case for a Kantian Right of Publicity, 49 Duke L.J. 383 (1999). Dean Haemmerli has argued that publicity rights have their origin in individual autonomy, and that, as a result, have both moral and the economic dimensions. Id. Her arguments would clearly cut against the treatment of a celebrity persona as an economic res functionally indistinguishable from a stock certificate or an unset diamond. Related arguments are made in Roberta Rosenthal Kwall, Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century, 2001 U. Ill. L. Rev. 151; Richard Masur, Right of Publicity From the Performer's Point of View, 10 DePaul-LCA J. Art & Ent. L. & Pol'y 253 (2000);

clearly implicated by the prospect of placing publicity rights in the hands of the highest bidder as a result of debt collection or bankruptcy.

In addition, not all famous people share Judge Frank's view that all they want from the right of publicity is the ability to earn money. Some object to all commercial uses. For these individuals, the ability to avoid exploitation of their property interest is motivated by something much more closely akin to dignitary rather than economic concerns. One of the earliest decisions to ratify the publicity right as a defensive tool for avoiding commercial exploitation came from the Supreme Court of Georgia and involved an objection by the estate of Dr. Martin Luther King to the sale of plastic commemorative busts of the civil rights leader.[187] Had the court been required to rely on the privacy tort to deal with the case, it would have been unable to rule in favor of the estate because King's privacy interests died with him. A publicity right, by contrast, was a property interest and could survive. This gave the court a mechanism for protecting what was conceptually indistinguishable from a privacy right. Publicity rights, the court declared, were as important a tool for those who did not want to have their image exploited commercially as they were for those who sought to extract the maximum value from their fame.[188]

Dr. King was not a classic celebrity, and neither he nor his survivors had any reason to be concerned with developing a popular following for its own sake. But subsequently, several entertainers have taken a comparable approach, enforcing their publicity rights in a similar negative sense to prevent all commercial uses of their identities.[189]

Even celebrities who have exploited their identities for profit in the past may value control as much, or almost as much, as the economic benefits from marketing themselves. To them, the issue is not

---

Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957 (1982); cf. Madoff, supra note 102 (expressing concern with treating publicity rights as taxable part of estate when deceased or her heirs and legatees do not wish to exploit interest). **R**

[187] Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E. 2d 697, 706 (Ga. 1982) ("[A] person who avoids exploitation during life is entitled to have his image protected against exploitation after death just as much if not more than a person who exploited his image during life.").

[188] Id.

[189] See, e.g., Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1097 (9th Cir. 1992), cert. denied, 506 U.S. 1080 (1993) (noting that Waits stated publicly that "musical artists should not do commercials because it detracts from their artistic integrity"); Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988) ("Midler did not do television commercials."); Hoffman v. Capital Cities/ABC Inc., 33 F. Supp. 2d 867, 870 (C.D. Cal. 1999), rev'd 255 F.3d 1180 (9th Cir. 2001) (concluding that Dustin Hoffman's "name and likeness is an extremely valuable commodity and privilege not only because of Mr. Hoffman's stature as an actor, but because he does not knowingly permit commercial uses of his identity").

whether to appear in commercial contexts, but rather how to retain control over the circumstances of their appearances. Some of their interest in control may simply reflect a desire to ration their exposure to retain its value; they do not want their fans to tire of them or develop unwanted associations between the star and questionable or tasteless products.[190]

Often, however, the control provides more than an economic management tool; celebrities may have personal objections to a connection with a product or cause, or even to an entire category of usage. For example, when former Dodger pitcher Don Newcombe discovered a drawing of someone who strongly resembled him in an advertisement for Coors beer, he sued.[191] Newcombe's objection to being associated with a beer advertisement arose not from any economic strategy or apparent antipathy to commercials generally but from the fact that he was a recovering alcoholic. The Ninth Circuit, ruling in his favor, noted in passing that, in California, publicity law is available to protect both dignitary and economic interests.[192]

The most fervent argument against allowing publicity rights to be forcibly sold, therefore, is that these interests, to an extent not matched by other forms of intellectual property, implicate personal dignity, reputational interests, and human autonomy.[193] If the state forces individuals to relinquish control over their personas to others who can then connect the individual, against his will, with undesired (or undesirable) commercial enterprises, it arguably violates associational rights. One might go so far as to argue that these problems demonstrate that the human persona is wholly unsuitable to characterization and treatment as a commodity[194] and should not be treated as one in the debtor-creditor arena.

States could, of course, adopt this view and could pass laws exempting publicity rights from the debtor-creditor system. Illinois, in

[190] Sometimes, stars simply change their minds about exploiting their publicity interests and decide to withdraw from the commercial arena. For example, Michael Jordan recently announced that he no longer wants to endorse products, although he had previously made millions doing so. Associated Press, Jordan Wants out of Endorsements, The Columbian, Mar. 23, 2000, at C4.

[191] Newcombe v. Adolf Coors Co., 157 F.3d 686 (9th Cir. 1998).

[192] Id.; see also Brinkley v. Casablancas, 438 N.Y.S.2d 1004, 1012 (App. Div. 1981) (stating that dignitary and economic "damages are caused by the same wrong and should be redressed by the same cause of action").

[193] For these arguments, see sources cited in note 186, supra. R

[194] Professor Radin has been notable in arguing against the use of markets for certain highly valuable interests and against the trend toward commodification of the self. See generally Radin, supra note 186. R

fact, has created an especially expansive exemption of this sort.[195] As noted earlier in this Article, state and federal law can declare some property exempt from the reach of unsecured creditors who attempt to satisfy their claims from the debtors' property after the debtors have failed to pay. Among the several justifications for property exemptions, certain forms of wealth may be seen as so intimately connected to the human psyche that it would be morally offensive to permit creditors free reign in exploiting them after the debtor has failed to pay. Exemptions for items such as family photographs, wedding rings, and perhaps even homesteads seem to recognize the personal and intimate relationship between these objects and the individual who owns them, and the undesirability of permitting creditors to use the ultimate threat of loss of these objects as leverage for collection. By specifically identifying a type of property, like publicity rights, and placing it beyond the reach of creditors, states can give force to the judgment that it is a form of wealth, like a wedding ring, that is invested with such delicate psychic values that it should be shielded from some or all creditors.

An exemption for publicity rights would have to proceed, of course, from an assumption that the associational and dignitary interests at stake outweigh the benefits of treating these rights like other ordinary assets in the debtor-creditor system. We question whether such an assumption is valid. For one thing, the claimed benefits of allowing the celebrity to retain control over uses of her persona are not entirely convincing.[196] Although many commentators emphasize the reputational, dignitary, and autonomy-protecting qualities of the publicity right,[197] the truth is that the right of publicity provides those benefits only in a very narrow sphere. In most important regards, celebrities do not control the ways in which their image is presented to

[195] See 765 Ill. Comp. Stat. Ann. 1075/15 (West 2002) (prohibiting security interests in, or levy or attachment of, publicity rights themselves but not of income earned from exploiting them). This exemption is unusually expansive because most property exemptions protect property against unsecured creditors, but do not prevent debtors from giving creditors enforceable security interests in that property.

[196] In actual fact, when a right of publicity is transferred, the purchaser is in some senses at the mercy of the celebrity in a way that the purchaser of almost any other form of property is not. For example, advertisers who paid for the use of O.J. Simpson's name and face were left with considerably less than they bargained for when the former football star became enmeshed in a notorious murder case. Prior to being charged with the murder of his former wife, O.J. Simpson was a spokesperson for the auto rental giant, Hertz. He was dropped by the company as a result of the scandal. Patrick Saunders, Perfect Pitch: Advertisers Try to Match Products, Personalities, Denver Post, June 24, 2001, at C1.

[197] The importance of the reputational interest in how publicity rights are exploited is discussed in Roberta Rosenthal Kwall, Fame, 73 Ind. L.J. 1, 37-45 (1997); Kwall, supra note 186; Masur, supra note 186. See also Haemmerli, supra note 186. **R**

the public, and attempts to exercise such control would violate the First Amendment rights of others. Newsworthy uses of celebrity personas, even highly unflattering ones, are virtually never subject to a celebrity's property right.[198] Furthermore, the very concept of alienability means that the law contemplates the real possibility that celebrities will assign all or part of the right to use their personas to others—at which point they necessarily give up, albeit voluntarily, any legal right to object to how the assignee uses their identities in the future.[199]

It is also important to add that forced sale of publicity rights does not strip the debtor of legal remedies against egregious misuses of her identity. For example, the celebrity would retain the right to sue for defamation and to complain of unfair trade practices under either the Lanham Act or state law.[200] Creators of other kinds of intellectual

[198] See McCarthy, supra note 47, § 8:56 ("A celebrity cannot use the right of publicity to claim a 'property right' in his or her likeness, as reflected in photos taken in a public place and used to illustrate a newsworthy story."); see e.g., Time, Inc. v. Sand Creek Partners, 825 F. Supp. 210, 213 (S.D. Ind. 1993) (finding that newsworthiness of celebrity wedding photos "has primacy over any privacy rights"). But see Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (holding that newsworthiness is not First Amendment defense where performer's entire act is taken). R

[199] In a voluntary alienation, the celebrity has the opportunity to select the new owner of the rights and can choose based on past experience, trust, and affirmative representations memorialized in the contract for sale. Yet, even voluntary transactions can substantially sour. An example that illustrates this point can be found in the history of a recording industry deal between the musician Prince and Warner Bros. Although the arrangement was entered into consensually, Prince quickly became dissatisfied with the way in which Warner Bros. exercised control. For example, Prince opposed the rerelease of one of his early songs, "1999," saying on his website that "[t]he release . . . most benefits the owner of the master recording (not the artist and creator of the work, [The Artist Formerly Known as Prince])." See Rob Brunner, Partying Shot, Ent. Wkly., Dec. 4, 1998, at 14. Absent the ability to supersede Warner Bros.'s decisions legally, Prince apparently exercised his leverage and dissatisfaction in a different way by producing substandard albums, by changing his name to an unpronounceable symbol and by having the word "slave" written on his face when he appeared in videos. Will Lee, Sign O' the Time; His Royal Purpleness, Prince, Changed His Name to [Symbol for the Artist Formerly Known as Prince], June 7, 1993, Ent. Wkly., June 4, 1999, at 98; Richard Torres, Breaking Free, Gloriously, Newsday, Dec. 15, 1998, at C00; Jim Farber, Sour Deal Finally Ends in 'Chaos'; Artist Formerly Known for Inspired Work Releases His Worst Album Ever, Daily News, July 16, 1996, at 37; Mark Scheerer, Donald Van de Mark & Beverly Schuch, The Artist Formerly Known as Prince, Biz Buzz, CNNFN, July 30, 1997, Transcript #97073007FN-L04.

[200] See, e.g., Geisel v. Poynter Prods., Inc., 295 F. Supp. 331, 348-54 (S.D.N.Y. 1968) (although toys based on characters of Dr. Seuss were made pursuant to license from copyright owner, Geisel (Seuss's real name)—despite having no copyright interest in relevant work—was permitted to raise Lanham Act § 43(a) claim, and hang tags on toys were changed to eliminate any suggestion that they were endorsed or approved by Seuss). If the name or image of the celebrity were to be used in a way that suggests, falsely, that the individual personally endorses a particular product or service, this too might be remediable under § 43(a). Professor McCarthy argues that a celebrity might also be able to use a privacy theory to sue for unwanted commercial uses of her identity even after transferring her publicity rights. McCarthy, supra note 47, § 4.13. Were this the case, however, it would R

property have used these remedies to protect their personal interests after their economic interests in their creations have been transferred to others.[201] While they are not perfect tools, they are significant ones.

The claims of forced association are also questionable grounds for an exemption. In the first place, the scope of associational rights under the Constitution is not very well defined,[202] and the likelihood that the First Amendment protects what arguably are mostly economic activities and interests is particularly uncertain.[203] Second, much of what motivates the desire not to associate with commercial enterprises appears to reflect personal taste rather than issues of constitutional stature, such as deep-seated belief systems, political affiliations, or concern with social causes. To the extent that the objectionable association is serious enough to cause a celebrity objective harm—for example, reputational injury—the law offers, as we have already noted, alternative forms of redress.[204]

We also believe that states should not categorically place publicity rights beyond the reach of creditors for other reasons, including the message that such an exemption might convey. As previously noted, proponents of bankruptcy reform often use celebrity bankruptcies to justify a significant overhaul of the system.[205] Just as unlimited

---

negate the purpose of making publicity rights alienable. Licensees and assignees would be held hostage to the risk of a privacy action whenever the celebrity disliked the use made of her persona, largely gutting the value the right might have to a transferee. For a discussion of the possibility that false light claims might also be an alternative route to controlling commercial uses, see Walter A. Effross, Seamless Seaminess?: Fake Nudes "Crop" Up On-Line, Computer L. Strategist (Dec. 1998).

[201] Some advocates of publicity rights argue that other bodies of law such as defamation and the Lanham Act do not give sufficient protection to celebrities. See, e.g., Kwall, supra note 197, at 37-38. The sufficiency of the protection may depend, for example, on whether or not one believes that publicity rights are so important that their owners should not have to meet the constitutional tests imposed in ordinary libel litigation or meet the requirements of the Lanham Act that the plaintiff show misrepresentation to prevail. That is not the view of the authors of this Article. **R**

[202] Although described as a First Amendment right, freedom of association is not actually mentioned in the Constitution. Its existence is clearest as a protection against government attempts to interfere with the ability of individuals to associate for political purposes. See, e.g., NAACP v. Alabama, 357 U.S. 449 (1958) (finding that requiring civil rights organization to disclose its membership violates associational rights); Watkins v. United States, 354 U.S. 178 (1957) (holding that legislative investigation into political association violates associational rights). Even here, however, its scope is somewhat uncertain. See, e.g., Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961) (upholding legislative requirement that Communist Party register and disclose its membership).

[203] See, e.g., Lyng v. Int'l Union, 485 U.S. 360 (1988) (upholding law making households of striking workers ineligible for food stamps).

[204] See supra text accompanying notes 200-01.

[205] See Miller, supra note 45; Seelye, supra note 45. **R**

homestead exemptions—which helped debtors like Burt Reynolds shelter significant wealth while failing to pay his creditors in full—are now coming under attack, a special exemption for publicity rights would be similarly vulnerable to accusations that they are a form of favoritism toward the wealthy and well-advised.

In addition to sending a questionable message to the public about privilege for the privileged, it would be anomalous in other regards to exempt publicity rights from the category of property reachable by creditors. First of all, as the discussion of creditors' rights earlier in this article points out,[206] the overall philosophy of our current debtor-creditor system puts the interests of the creditor in forcing the sale of the debtor's assets—publicity rights or otherwise—ahead of the preferences of the delinquent debtor.

Second, particularly where the owner of publicity rights voluntarily avails himself of the extraordinary relief provided by chapter 7 bankruptcy, one could reason that the filing implies consent to the sale of any or all of his valuable assets, including the value of his persona, as a fair *quid pro quo*.[207] Others have used this sort of reasoning to justify the liquidation of other kinds of intellectual property similarly invested with aspects of the individual's personality and dignitary interests.[208] For example, a bankrupt author can be forced to transfer her rights in her copyrights to her published and unpublished works, however much a part of her personhood she may deem them.[209] An individual who is closely and personally identified with a trademark—for example, someone whose name is the mark in question—may lose ownership of that quite personal form of intellectual property, if it is associated with a business that is sold in an insolvency proceeding. He would then face the prospect that subsequent works produced under his name might be, from his perspective, of poorer design or otherwise unrepresentative of the originator's style, desires, or preferences.

This loss of control typically attends the voluntary transfer of rights in copyrights and other forms of intellectual property. If an author sells her publisher the copyright in her tragic novel, she cannot

[206] See supra text accompanying notes 112-18.

[207] The argument that participation in bankruptcy, whether voluntarily or involuntarily, implies consent to the transfer of one's property has been proffered as an explanation for why the federal copyright law, 17 U.S.C. § 201(e) (2001), makes an exception for bankruptcy in its overall prohibition against involuntary transfers of copyrights. See Martin & Smith, supra note 116, at 93. R

[208] Martin & Smith, supra note 116, at 93. R

[209] 17 U.S.C. § 201(e) (2001). Under the 1976 Copyright Act, all works are covered by statutory copyright as soon as they are fixed in tangible form; the law makes no distinction between works that are published and ones that are unpublished. Section 201(e) refers generically to "copyrights" and therefore presumably applies to unpublished manuscripts.

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. Many authors have lobbied for a legal right to exercise continuing control over how their works are used even after the transfer of their economic interest in their copyrights—a type of protection that is available under the continental European system of moral rights[210]—but the United States has been extremely reluctant to adopt such an approach.[211]

If legislators remain uncomfortable about the idea of forced sales of an interest like publicity, a possible middle ground might be to limit forced sales in bankruptcy to the publicity interests only of those who had been exploiting them prior to bankruptcy. This compromise would respect the fundamental choice of the individual about whether or not to engage in commercial exploitation of the self, or instead to choose greater privacy, as well as any possible reputational benefits that might flow from being known as someone who shuns commerciality.

At least two problems with this approach seem evident to us, however. First, the line drawn is a questionable one. It is not clear, for example, that the interest in control really is stronger in the case of someone who never makes advertisements than, for example, of someone like Don Newcombe, who might feel comfortable about endorsing sneakers but would loathe the idea of appearing in a commercial for beer.[212] Second, the distinction would risk abuse. In most circumstances, publicity rights exist as a legal interest whether or not the individual ever chooses to exploit them. Therefore, unless the holder of an unexploited right could be barred from changing her mind in the future, creditors could see their access to a potentially

[210] Moral rights are explained in Roberta Rosenthal Kwall, Copyright and the Moral Right: Is an American Marriage Possible?, 38 Vand. L. Rev. 1 (1985).

[211] The one exception in copyright law is the so-called Visual Artists Rights Act, a recent addition to the statute which creates limited moral rights in some creators of artworks. 17 U.S.C. § 106A (2001). Generally, however, American law (in contrast to continental European law) has chosen not to view authors as entitled to control over use of their work once ownership of the copyright has been given up. Sometimes, however, the creators successfully enforce their preferences even in the absence of an evident legal claim. For example, the remaining Beatles expressed distress at the use of their song "Revolution" in a Nike advertisement, although Nike acquired the right to use the song from the song's legal "owner." See Janice Kalmar, Nike Vows to Continue Using Beatles Song in Ads, United Press Int'l, Aug. 4, 1987. As a result, when Volkswagen wanted to use Beatles music in advertisements for the reintroduced Beetle, Volkswagen sought permission of the Beatles's management company in addition to the owner of the songs. Graham Bowley & Alice Rawsthorn, Beetles want Beatles, If VW Can Afford It, Fin. Times, Feb. 5, 1998, at 25.

[212] See supra notes 191-92 and accompanying text. **R**

valuable asset evaporate, only to witness its full exploitation by the debtor subsequent to her discharge.

Another possible compromise that would respect the interests of the celebrity but nonetheless leave something on the table for creditors might be to sever the economic interest in publicity rights from control over how they are exploited. A creditor could benefit from the stream of future income from the exploitation of the property interest but the celebrity or her consensual assigns would retain control over how the interest is exploited. An approach similar to this was taken recently in a Fifth Circuit case involving copyrights.[213] The wife of a painter argued that under Louisiana community property law, she was entitled upon divorce to share in the ownership of the copyrights in those of her husband's art works created during the period of their marriage. She also claimed an ownership interest in later works that were derivative of those paintings. The court agreed that Ms. Rodrigue was entitled to share the copyrights. But instead of traditional co-ownership, the court left managerial control over the paintings with the husband and gave Ms. Rodrigue rights only to share in the economic value that flowed from them.[214] This approach finds some analogy in the state law wage garnishment process as well.[215]

A division of rights along these lines may have much to recommend it where both parties continue to have an economic stake in how the work is exploited. In the *Rodrigue* case, the fact that the ex-husband will benefit as much as his ex-wife from sound management of the intellectual property creates some assurance that he will act in ways that will also protect the beneficial owner's interests. But in bankruptcy, the sale would mean severing control from the right to benefit, and would provide no such assurances.[216] In fact, it sets up serious negative incentives, comparable, as discussed earlier, to those that would flow from making the future income from a debtor's postpetition services subject to creditors' claims.[217] A celebrity would

[213] Rodrigue v. Rodrigue, 218 F.3d 432 (5th Cir. 2000).

[214] Id. One of the rights provided to owners of copyrights is control over the making of derivative works. 17 U.S.C. § 106(2) (2001). A derivative work is one that reuses expression from a prior copyrighted work.

[215] See generally, Coleman, supra note 113, at 212; Cecilia M. Martaus, Garnishment of Employee Wages in Ohio: Whose Money Is It Anyway?, 18 Ohio N.U. L. Rev. 197 (1991). R

[216] In other parts of the debtor-creditor system, however, where garnishment of rights to payment is an alternative method of satisfying creditor claims, it might be possible to create a parallel to *Rodrigue* by garnishing a portion of incoming payments stemming from licensed uses of the debtor's right of publicity.

[217] For a discussion of the rule in bankruptcy about income from future services, see supra notes 142-48 and accompanying text.

have little impetus to nurture and develop an interest, the economic benefits from which would flow entirely to someone else.

Finally, we must note an option that already exists to preserve a debtor's control over assets. At least in the bankruptcy context, the debtor usually has the alternative of satisfying creditors out of a repayment plan (and retaining ownership and control over her assets) rather than out of the liquidation of her assets. Because these options, found in chapters 11 and 13 of the Bankruptcy Code, require that the debtor pay at least what her creditors would have received had she liquidated her assets in chapter 7, this option becomes significantly more expensive and risky for celebrities if publicity rights are recognized as assets. Thus, control may be available even in the debtor-creditor context, but the debtor must purchase it, and at a potentially steep price.

For those reasons, we adhere to our view that the interest should be treated as property of the estate, without limitations and without exemptions, even recognizing that this treatment will likely offend those who otherwise favor the recognition of property rights in identity. Again, echoing the court in *Piscopo*,[218] the question is whether it is reasonable and fair to create a form of property that is legally cognizable only when it favors the famous or their assigns, but not when the benefits of doing so would flow to ex-spouses, taxing authorities, or people to whom a celebrity owes money.

Conclusion

The commodification of fame has allowed celebrities to tap into new sources of wealth and exercise control over uses of the valuable identities they helped to create. But, 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. This Article has examined commodified fame in the context of the debtor-creditor system and has shown that the right of publicity has the formal attributes that make it suitable for creditors to reach in satisfaction of delinquent debts. The identification and seizure of alienable property interests have long been central to the debtor-creditor system. Valuable intangible property interests, although more difficult to "seize" per se, are no exception. Thus, as a consequence of filing a bankruptcy petition or otherwise being a debtor in the debtor-creditor system, the celebrity may be forced to part with her interest in controlling and exploiting the value of her identity in advertising and a broad range of other "commercial" settings. To the extent that

[218] 555 A.2d 1190, 1192 (N.J. Ch. 1988).

the forced sale of commodified fame presents either practical or associational and dignitary concerns, we believe they are not analytically different from those that arise when other kinds of intellectual property that have long been available to satisfy unpaid debts are at issue. The sale of publicity rights does not implicate interests of an appreciably different magnitude than, for example, divesting an author of her copyrights.

Even if one were to disagree with this assessment, however, it is nevertheless important to recognize that there are consequences of the basic decision to treat fame as a commodity, and that these consequences up until now have largely been ignored. If those consequences are unacceptable, then change should come in the form of an alteration in the legal characterization of the right rather than through tweaking property exemption schemes or compromising creditors' rights in the debtor-creditor system. But if the choice we make is to continue to opt for commodification, then personas, like yachts, should be "properties for all seasons."