

A CRITICAL EXAMINATION OF NEW YORK'S RIGHT OF PUBLICITY CLAIM

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The rapid proliferation of the news and media industries, the ascent of tabloid journalism, and the increasing use of celebrities in advertising campaigns have brought intellectual property concerns to the forefront of legal debate. The right of publicity claim, which concerns an individual's right to commercially control his or her image,¹ is one such issue receiving increased attention. Having recently gained recognition as an independent claim in the latter half of this century, the substance and shape of publicity rights have yet to be clearly settled and vary greatly among jurisdictions. In an attempt to codify the concepts of the right of publicity claim, some states have established various, and often inconsistent, standards as to the scope and nature of this right. Other jurisdictions have continued to rely solely on common law publicity rights.² Within this legal framework, this Note will analyze New York's publicity rights claim,³ which is incorporated within its right to privacy statute. Taking into account the patchwork of various state laws, in addition to legal commentary on the subject, this Note maintains that New York should establish a separate and distinct property-based right of publicity claim.

To better understand the nature of this newly recognized cause of action; this Note will first provide a general overview of

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¹ See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* at v (2d. ed. 2000).

² See Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 J. ART & ENT. L. 227, 231, 235 (1999) (stating that "[i]nstead of waiting for the courts to fully develop this evolving area of law, [many] state legislatures have created their own statutory laws" concerning publicity rights and reporting that "the right of publicity is recognized as existing under the common law of sixteen states").

³ See N.Y. CIV. RIGHTS LAW § 50-51 (McKinney 1999 & Supp. 2000).

the right of publicity claim. It will define the term "right of publicity" and examine the origins and justifications for its recognition and development. In addition, it will describe the development of the claim and set forth the current state of the law. Second, this Note will specifically examine the right of publicity claim as it currently exists in New York. It will follow New York case law on the issue and provide an in-depth examination of sections 50 and 51 of the New York Civil Rights Law,⁴ the privacy statute in which publicity rights are incorporated. Third, this Note will reveal the shortcomings of sections 50 and 51 of the New York Civil Rights Law. In so doing, the New York claim will be compared to California's more broadly defined property based publicity claim,⁵ thus highlighting the numerous advantages of the California statute. Fourth, this Note will address the constitutional limitations on a person's right of publicity and will propose that such limitations serve to address many of the concerns often raised by those opposed to enacting a more broadly defined right of publicity claim in New York. Finally, this Note will conclude that the establishment of a separate property-based claim would better represent the ideals encompassed within the right of publicity cause of action—namely, to provide individuals with more adequate protection and increase predictability in the law.⁶ The bill to amend the New York Civil Rights Law by adding a new Article 5-b, which was proposed by Senator Emmanuel Gold in 1995,⁷ will be set forth as a model of a statutorily-defined property based right that should be adopted by the New York legislature.

"An entire industry has developed around the merchandising and commercial exploitation of endorsements which often surpass the monies earned directly through

⁴ See *id.*

⁵ See CAL. CIV. CODE § 3344(e) (Deering Supp. 2000).

⁶ The need for consistency and predictability is imperative, given the fact that the state of the law in this area is extremely confused and has even been referred to as a "haystack in a hurricane." *Ettore v. Philco Tel. Broad. Corp.*, 229 F.2d 481, 485 (3d Cir. 1956); see also Leonard M. Marks & Robert P. Mulvey, *Celebrity Rights Law Needed in New York*, N.Y. L.J. Nov. 6, 1995, at 1.

⁷ See Marks & Mulvey, *supra* note 6, at 1, 4 (stating that the proposed bill was much like its California counterpart in that it would last 50 years after the death of the personality, was freely transferable, and punitive damages would be available for willful violators).

performance by entertainers and sports stars.”⁸ In light of this current explosion in the intermingling of the media, entertainment, and advertising industries, it is imperative that an individual’s right to protect and capitalize upon their own image is safeguarded, as image is the celebrity’s most expressive and valuable resource. Thus, now more than ever, it is vital that New York clarify and broaden an individual’s right of publicity claim to ensure that individuals gain adequate protection for their most precious and intimate commodity—their identities. A separate and distinct property-based right of publicity would fulfill that goal.

I. THE RIGHT OF PUBLICITY: A GENERAL OVERVIEW

“The right of publicity is . . . the inherent right of every human being to control the commercial use of his or her identity.”⁹ The right is defined in Black’s Law Dictionary as “the right of [an] individual, especially [a] public figure or celebrity, to control [the] commercial value and exploitation of his name or picture or likeness or to prevent others from unfairly appropriating that value for their [own] commercial benefit.”¹⁰ “This legal right is infringed by unpermitted use which damages the commercial value of this inherent human right of identity and which is not immunized by principles of free press and free speech.”¹¹

The right, which is now recognized as the right of publicity, was originally rooted in privacy law.¹² In 1890, an extremely influential and groundbreaking law review article entitled *The Right to Privacy*, written by Louis Brandeis and Charles Warren, first introduced the concept of a right of publicity.¹³ The historic article, which initially recognized an individual’s “right ‘to be let

⁸ *Id.* at 4.

⁹ MCCARTHY, *supra* note 1, at v.

¹⁰ BLACK’S LAW DICTIONARY 1325 (6th ed. 1990) (citing Presley’s Estate v. Russen, 513 F. Supp. 1339, 1353 (D.N.J. 1981)).

¹¹ MCCARTHY, *supra* note 1, at v; *see also* Brinkley v. Casablancas, 438 N.Y.S.2d 1004, 1010 (1st Dep’t 1981) (stating that the distinguishing feature of the right to publicity is the use of the plaintiff’s protected right for the direct commercial advantage of the defendant).

¹² *See* Goodman, *supra* note 2, at 229.

¹³ *See* Louis Brandeis & Charles Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

alone,'¹⁴ laid the groundwork for both the recognition of privacy law and the initial ideas embedded in publicity rights. The article acknowledged that "privacy rights include one's right to ordinarily determine 'to what extent his thoughts, sentiments, and emotions shall be communicated to others.'"¹⁵ "Until [this time], one's right to control the publicity of his or her persona had not been clearly defined or expressed as an actionable right."¹⁶ Thus, "[a]lthough Warren and Brandeis did not refer to this right as one of publicity, their article is credited with being the birthplace for the doctrine."¹⁷

Since the introduction of these concepts, the rights of both privacy and publicity have greatly evolved. Yet, for the first half of this century, privacy rights remained the primary means of enforcing one's right of publicity, as publicity rights did not gain independent recognition until the 1950s.¹⁸ Traditionally, courts confronted with the issue of "unpermitted commercial use of a person's identity," used tort law concepts of "personal injury to dignity and state of mind" to address the plaintiff's harm.¹⁹ As more and more cases began to involve the "celebrity plaintiff," however, it became evident that privacy law was inadequate to accommodate "uncompensated, rather than unwelcome, publicity."²⁰

Since an invasion of the right and the measure of damages in a privacy claim is based upon the indignity and personal affront of having one's identity spread into the public, courts

¹⁴ *Id.* at 195 (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888)).

¹⁵ Goodman, *supra* note 2, at 230. The article recognized that "[w]hile privacy rights prohibited one from unnecessarily looking into the privacy of another's life, publicity rights would prohibit one from exploiting another's life in public." *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). The court stated that "in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph," and further stated that "[t]his right might be called a 'right of publicity.'" *Id.*; see also Goodman, *supra* note 2, at 233 (stating that "[t]he term 'right of publicity' was first coined in 1953, in the now landmark case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*").

¹⁹ J. Thomas McCarthy, *Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 U.C.L.A. L. REV. 1703, 1705 (1987).

²⁰ Robert C. Denicola, *Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols*, 62 N.C. L. REV. 603, 622 (1984); see also McCarthy, *supra* note 19, at 1706.

were reluctant, and often unwilling, to allow a famous person whose identity was already in widespread use throughout the media to claim that an unauthorized commercial use of their identity invaded a "right to be let alone."²¹ On the contrary, the celebrity persona often craves and seeks out public attention so that "the publicity is not, of itself, unwelcome."²² Thus, in many cases, it is an anomaly to apply privacy concepts of mental distress and emotional harm caused by the public attention to a "publicity" wrong. Judges often refused to accept the proposition that the person who purposefully thrusts himself into the public eye suffered such harms.²³ In a publicity rights suit, the plaintiff's complaint is not so much the violation of their right to be let alone, but rather that the plaintiff was deprived of the financial gain reaped from that publication. Thus, in such instances, plaintiffs do not seek compensation for mental or emotional distress, but rather compensation based on revenues flowing from the defendant's unauthorized use of their personas.²⁴ The inadequacy of privacy law to accommodate compensation for the unauthorized use of a public person's identity became increasingly evident.²⁵

While the inability of privacy laws to accommodate "publicity" wrongs was being revealed, numerous arguments supporting a right to protect the commercial exploitation of one's identity began to emerge.²⁶ The justifications for establishing a

²¹ See McCarthy, *supra* note 19, at 1705 ("Courts were unwilling to allow a public person to claim that [such uses] invaded a 'right to be left alone'").

²² Goodman, *supra* note 2, at 293.

²³ See, e.g., *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983) ("Plaintiffs' claims fail under [a privacy cause of action] for as public figures, with their likenesses, names and images already in the public domain, they have waived their rights to claim intrusions into their common law privacy rights.")

²⁴ See Denicola, *supra* note 20, at 622 (stating that "[r]emedies linked to mental distress clearly were inadequate when the real complaint was uncompensated, rather than unwelcome, publicity").

²⁵ See McCarthy, *supra* note 19, at 1706 (stating that the failure of privacy laws to accommodate a claim against a defendant for the unauthorized commercial use of one's identity left the situation "ripe for a break in traditional thinking").

²⁶ See, e.g., *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983) ("[T]he right of privacy generally protect[s] the right 'to be let alone,' while the right of publicity protects the celebrity's pecuniary interest in the commercial exploitation of his identity. Thus the right of privacy and the right of publicity protect fundamentally different interests and must be analyzed separately.")

new right that would protect against the unauthorized commercial exploitation of one's identity fall into three main categories: (1) the moral argument for the recognition of such a right, (2) economic concerns, and (3) public interest concerns.²⁷ The moral argument focuses mainly on the failure of privacy laws to adequately address the plaintiff's harm.²⁸ The two aspects of the moral argument for the recognition of a right of publicity cause of action are: the notion of unjust enrichment and the equitable policy of "labor desserts."²⁹ The unjust enrichment aspect of this argument stresses the "injustice of permitting strangers to reap [benefits] where they have not sown."³⁰ In other words, a defendant should not be allowed to enjoy the rewards of that which he himself has not worked for.

The labor-dessert rationale focuses instead on the injustice to the plaintiff, arguing that people should be entitled to "reap the rewards of [their] endeavors."³¹ Advocates of the right of publicity who focus on this labor theory of justification state that the right of publicity stems from the axiom of Anglo-American jurisprudence which holds that "every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations."³² This argument maintains that "a person who has 'long and laboriously nurtured the fruit of publicity values,' who has expended 'time, effort, skill, and even money' in their creation," should be entitled to reap the financial

²⁷ See Paul Cirino, *Advertisers, Celebrities, and Publicity Rights in New York and California*, 39 N.Y.L. SCH. L. REV. 763, 766-67 (1994).

²⁸ See *id.*

²⁹ See *id.* (stating that "[t]he moral aspect [of the justifications for the right of publicity] centers on the prevention of unjust enrichment and the equitable policy of enabling successful persons to reap the rewards of their labor").

³⁰ Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 181 (1993); see also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) ("The rationale for protecting the right of publicity is a straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.").

³¹ *Zacchini*, 433 U.S. at 573 (noting that the state's interest in the protection of the right of publicity is to ensure "the right of the individual to reap the reward of his endeavors, and [has] little to do with protecting feelings or reputation"); see also *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004, 1010 (1st Dep't 1981) (citing *Zacchini*, 433 U.S. at 573).

³² Melville Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954).

benefits stemming from their identity for themselves.³³ Both aspects of this equity-driven rationale have been cited frequently by courts as justification for the right of publicity claim.³⁴

In addition to the moral argument justifying the right of publicity claim, advocates have also cited the economic need for its existence. The economic argument highlights the need to protect the economic value of the celebrity's identity in order to stimulate creative effort and achievement.³⁵ Unless mental labor and inventiveness are rewarded, people will cease to produce creative works, for without the certainty that they will be able to keep the benefits of their hard work and talent, individuals will have little motivation to produce socially desirable services and products.³⁶ Proponents of the right of publicity point out that the right encourages people "to become successful by assuring them that no one may use the increased value of their persona without their permission."³⁷ Thus, a public interest argument flows directly from the economic justification of the right—the incentive benefits the public because it encourages effort, creativity, and achievement in entertainment, athletics, and other related fields.

There is one final aspect of the public interest argument that is sometimes raised in support of protecting an individual's right to control the commercial use of his or her identity—the

³³ Madow, *supra* note 30, at 181 (stating that "[t]he basis most frequently and confidently advanced by courts [in justifying the recognition of the right of publicity] is the labor theory on which Nimmer originally relied"); *see also* Nimmer, *supra* note 32, at 216.

³⁴ *See Zacchini*, 433 U.S. at 576; *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); *Brinkley*, 438 N.Y.S.2d at 1010.

³⁵ *See* McCarthy, *supra* note 19, at 1710–11.

³⁶ *See* Cirino, *supra* note 27, at 767 (posing the question, "why should a celebrity work to achieve superstar status only to have others reap all the endorsement profit?").

³⁷ *Id.*; *see also* *Lugosi v. Universal Pictures*, 603 P.2d 425, 438, 441 (Cal. 1979) (Bird, C.J., dissenting). The *Lugosi* dissent stated:

Often considerable money, time, and energy are needed to develop one's prominence in a particular field. Years of labor may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion . . . providing legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition . . .

Id.

consumer protection justification. This view reasons that allowing the appropriation of a celebrity persona without his or her consent may mislead the public into believing such person actually endorses the product or service being advertised when, in fact, he or she may not. Thus, there exists the possibility of deceptive advertising in that advertisers may lure consumers into purchasing their product or service because the consumers believe that the celebrity, whose image is being appropriated, actually endorses what is being advertised.³⁸

In light of both the inadequacies of privacy law in compensating for the unauthorized commercial use of one's identity and the strong policy arguments justifying the need for its existence, the inevitable occurred when the right of publicity finally gained independent recognition in 1953. In the seminal case, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,³⁹ Judge Jerome Frank first coined the term "right of publicity."⁴⁰ *Haelan* involved a chewing gum manufacturer's contract for the exclusive use of a professional baseball player's photograph in connection with selling the manufacturer's chewing gum. The player agreed not to grant any gum manufacturer the right to use his photo for a designated term. The defendant was a competing gum manufacturer who wanted to use the baseball player's image for advertisements.⁴¹ The court rejected the defendant's contention that a man has no legal interest in the publication of his picture other than his right "not to have his feelings hurt by [the] publication."⁴² The court maintained that, "in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph . . ."⁴³ Judge Frank further stated that this right might be called a "right of publicity."⁴⁴ In arguing for the acknowledgment of such

³⁸ See Fred M. Weiler, *The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT. L.J. 223, 244 (1994-95).

³⁹ 202 F.2d 866 (2d Cir. 1953).

⁴⁰ *Id.* at 868 (stating "this right might be called a 'right of publicity'").

⁴¹ See *id.* at 867.

⁴² *Id.* at 868 (addressing the defendant's contention that none of the plaintiff's contracts created more than a release of liability "because a man has no legal interest in the publication of his picture other than his right of privacy, i.e., a personal and non-assignable right not to have his feelings hurt by such a publication").

⁴³ *Id.*

⁴⁴ *Id.*

a right, Judge Frank pointed out that “many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways.”⁴⁵

Thus, Judge Frank utilized the publicity right as a way to “avoid the awkward and illogical jump”⁴⁶ that was necessary to provide relief for a public figure who complained of an invasion of privacy whenever his or her celebrityhood was misappropriated. In realizing the inappropriateness of having the only claim available to such plaintiffs be that they were emotionally injured by the exposure, the *Haelan* decision opened the way for “publicity-seeking people” to gain control over the “associate value” of their names and faces.⁴⁷ The parameters of this new property right were studied and defined in a highly influential law review article written by Melville B. Nimmer entitled, *The Right of Publicity*.⁴⁸ Nimmer’s 1954 article, which was to become the “cornerstone of the right of publicity,”⁴⁹ portrayed the deficiencies in privacy law relating to the protection of an individual’s commercial interest in his or her identity. In arguing that what the celebrity needed was not protection against unreasonable intrusion into privacy, but rather some right to control the commercial use of identity, Nimmer’s eloquent endorsement for a right of publicity helped give the newly recognized claim legitimacy and credibility.⁵⁰

⁴⁵ *Id.*

⁴⁶ Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 J. ART & ENT. L. 35, 44 (1998). In her article, Zimmerman stated that Judge Frank used the *Haelan* case “as an opportunity to transform the appropriation tort into a form he deemed more suitable to the needs of famous people.” *Id.*

⁴⁷ *Id.* (citing Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 864–69 (1995)); see also Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1203–15 (1986)).

⁴⁸ See Nimmer, *supra* note 32.

⁴⁹ McCarthy, *supra* note 19, at 1706.

⁵⁰ See MCCARTHY, *supra* note 1, at 1.27 (“If Judge Frank was the architect of a ‘right of publicity,’ then Professor Nimmer was the first builder.”); see also McCarthy, *supra* note 19, at 1704 (maintaining that Nimmer’s seminal 1954 article laid the foundation for the right of publicity, “and all subsequent case

The common law right of publicity has evolved since its recognition in the 1950s, and currently sixteen states recognize this right as existing under common law.⁵¹ In addition, at least fifteen states have codified the common law through statutes that recognize one's right of publicity.⁵² The right of publicity has also gained recognition in both the Restatement of Torts⁵³ and the Restatement of Unfair Competition.⁵⁴

II. THE RIGHT OF PUBLICITY IN NEW YORK

Although New York was an early leader in the advancement of publicity rights, the recognition of the right has rapidly declined and is now confined within the strictures of a narrowly defined privacy statute.⁵⁵ The development of the right of publicity claim in New York began with a 1902 case, *Roberson v. Rochester Folding Box Co.*⁵⁶ In this case, the picture of a young woman, who was still a minor, was used in an advertisement for the defendant's flour company. The young Abigail Roberson's likeness had been reproduced and used by the defendant for

law and commentary has built upon this foundation," something that few law review articles are able to accomplish).

⁵¹ See Goodman, *supra* note 2, at 231 (stating that the courts of California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Pennsylvania, Texas, Utah, and Wisconsin have all recognized the existence of a common law right of publicity).

⁵² See *id.* at 236 (citing CAL. CIV. CODE §§ 990, 3344 (West 1998); FLA. STAT. § 540.08 (1997); IND. CODE ANN. §§ 32-13-1-1 to 32-13-1-20 (West 1998); KY. REV. STAT. ANN. § 391.170 (Banks-Baldwin 1997); MASS. GEN. LAWS ANN. ch. 214, § 3a (West 1998); NEB. REV. STAT. § 20-202 (1997); NEV. REV. STAT. ANN. §§ 597.770-810 (Michie 1997); N.Y. Civ. Rights Law §§ 50-51 (McKinney 1976); OKLA. STAT. tit. 21, §§ 839.1-3 (1983); R.I. GEN. LAWS § 9-1-28 (1997); TENN. CODE ANN. §§ 47-25-1101 to 47-25-1108 (1997); TEX. PROP. CODE ANN. §§ 26.001-.015 (West 1997); UTAH CODE ANN. §§ 45-3-1 to 45-3-6 (1998); VA. CODE ANN. §§ 8.01-.40 (Michie 1998); WIS. STAT. § 895.50 (1997)).

⁵³ See RESTATEMENT (SECOND) OF TORTS § 652A-D (1977) (breaking down the privacy tort into four distinct categories: intrusion into one's physical solitude, publicity placing someone in a false light, public disclosure of private facts, and appropriation of one's name and likeness to another's advantage); see also Goodman, *supra* note 2, at 234 (stating that "it is [this] fourth type of privacy tort that protects one's right of publicity").

⁵⁴ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (defining the tort of "Appropriation of the Commercial Value of a Person's Identity: The Right of Publicity" and stating that one who appropriates the commercial name, likeness, or other indicia of a person's identity for purposes of trade is subject to liability); see also Goodman, *supra* note 2, at 234.

⁵⁵ See N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1999).

⁵⁶ 64 N.E. 442 (N.Y. 1902).

advertising purposes in more than 25,000 prints and photographs without her permission.⁵⁷ Her suit for invasion of privacy was dismissed by the court, which held that "in the absence of legislation, the plaintiff and her legal guardian had no cause of action."⁵⁸

Public outcry over the perceived unfairness of the decision led to a rapid response by the New York State legislature. Within a year of the *Roberson* decision, New York enacted sections 50 and 51 of the Civil Rights Law entitled "Right of Privacy."⁵⁹ The statutorily created right prohibits the use of a person's name, picture, or likeness for advertising or trade purposes.⁶⁰ Section 50 provides for criminal penalties for such prohibited use while section 51 gives the individual victim of such appropriation the right to obtain an injunction and bring a cause of action to obtain compensatory and exemplary damages.⁶¹

Before delving into an analysis of New York Civil Rights Law sections 50 and 51, it is important to address the fact that New York does not recognize a common law right of publicity.⁶² Thus, sections 50 and 51 provide a plaintiff's sole basis for relief. It is rather ironic that it took a New York federal court to first acknowledge an independent right of publicity⁶³ while today New York State courts have consistently refused to recognize such a

⁵⁷ See *id.* at 442.

⁵⁸ Marks & Mulvey, *supra* note 6, at 4; see also *Roberson*, 171 N.Y. at 543-44, 64 N.E. at 443.

⁵⁹ See *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 129 (2d Cir. 1984) (stating that public response over the seemingly unfair decision in *Roberson* resulted in the enactment of sections 50 and 51 of the Civil Rights Law); see also Marks & Mulvey, *supra* note 6, at 4.

⁶⁰ See N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1999).

⁶¹ See *id.*; see also Marks & Mulvey, *supra* note 6, at 4.

⁶² See *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984) (stating that the right of publicity is exclusively statutory in New York and the plaintiff could not claim an independent common law right of publicity); *Brinkley v. Casablancas*, 435, 438 N.Y.S.2d 1004, 1009 (1st Dep't 1981) (stating that New York state courts had never explicitly recognized a non-statutory right of publicity); see also Marks and Mulvey, *supra* note 6, at 1 (tracing the development of New York's privacy statute and the "rise and decline of a right of publicity in New York").

⁶³ See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); see also Marks & Mulvey, *supra* note 6, at 4 (stating that in *Haelan*, the federal courts of New York were the first to recognize an independent common law right protecting plaintiffs' economic interests).

common law right.⁶⁴ Following the *Haelan* decision, federal courts continued to interpret New York law in this area as recognizing a common law right of publicity.⁶⁵

Despite the favorable treatment publicity rights experienced in the federal courts, New York State courts have repeatedly asserted that New York does *not* recognize a common law right of publicity. Since 1903, New York State courts have "expressly and repeatedly renounced any judge-made right to a remedy for the unauthorized appropriation of a person's name or likeness."⁶⁶ For example, in the 1984 case of *Stephano v. News Group Publications, Inc.*,⁶⁷ the court held that since the right of publicity is encompassed under the Civil Rights Law as an aspect of the right to privacy, which is exclusively statutory in the State of New York, "the plaintiff cannot claim an independent common-law right of publicity."⁶⁸ Subsequent cases, such as the 1987 case of *Welch v. Group W. Products Inc.*,⁶⁹ the 1989 case of *James v. Delilah Films, Inc.*,⁷⁰ and *Dana v. Oak Park Marina, Inc.*,⁷¹ have agreed with the *Stephano* court's finding that New York does not recognize a common law right of publicity claim.⁷²

⁶⁴ See *Freihofer v. Hearst Corp.*, 480 N.E.2d 349, 353 (N.Y. 1985); *Stephano*, 474 N.E.2d at 584; *Arrington v. New York Times Co.*, 434 N.E.2d 1319, 1321 (N.Y. 1982); *Brinkley*, 438 N.Y.S.2d at 1009; *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828, 829 (1st Dep't 1980); see also Marks & Mulvey, *supra* note 6, at 1.

⁶⁵ See *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 220-21 (2d Cir. 1978); *Groucho Marx Prod., Inc. v. Day & Night Co.*, 523 F. Supp. 485, 487-89 (S.D.N.Y. 1981); *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429-30 (S.D.N.Y. 1978); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843-44 (S.D.N.Y. 1975).

⁶⁶ *Cirino*, *supra* note 27, at 771-72; see also *Arrington*, 434 N.E.2d at 1321 (stating that there is no support for the existence of a common law right of privacy in New York).

⁶⁷ 474 N.E.2d 580 (N.Y. 1984). This case involved a claim brought by a professional male model against the defendant for violating both N.Y. Civil Rights Law section 50 and his common law right to publicity by publishing a picture of the plaintiff modeling a "bomber jacket" in a magazine for trade and advertising purchases without the plaintiff's consent. See *id.* at 581.

⁶⁸ *Id.* at 584.

⁶⁹ 525 N.Y.S.2d 466, 468 n.1 (Sup. Ct. N.Y. County 1987).

⁷⁰ 544 N.Y.S.2d 447, 450 (Sup. Ct. N.Y. County 1989).

⁷¹ 660 N.Y.S.2d 906, 909 (4th Dep't 1997) (holding that the right to privacy in New York is governed exclusively by Civil Rights Law 50 and 51, and that there is no additional common law protection).

⁷² See *Arrington v. New York Times Co.*, 434 N.E.2d 1319, 1321, (N.Y. 1982); *Cohen v. Hallmark Cards, Inc.*, 382 N.E.2d 1145, 1146 n.2 (N.Y. 1978);

The right to control the commercial use of one's identity must come solely under Article 5, sections 50 and 51 of the New York Civil Rights Law.⁷³ Section 50 states:

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.⁷⁴

Section 51 provides:

Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages.⁷⁵

Thus, in order for a plaintiff to make out a claim under sections 50 and 51 of the Civil Rights statute, a plaintiff must establish that the defendant (1) used plaintiff's name, portrait, picture, or voice; (2) for the purposes of advertising or trade; and (3) without the plaintiff's written consent.⁷⁶

Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 258 (Sup. Ct. N.Y. County 1984); *Apple Corps Ltd. v. Adirondack Group*, 476 N.Y.S.2d 716, 720 (Sup. Ct. N.Y. County 1983) (stating that all cases cited supporting the "alleged right of publicity are in the Federal courts or courts of other States"); see also *Cirino*, *supra* note 27, at 771-72.

⁷³ See N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1999); see also *Cirino*, *supra* note 27, at 777.

⁷⁴ N.Y. CIV. RIGHTS LAW § 50 (McKinney 1999).

⁷⁵ N.Y. CIV. RIGHTS LAW § 51 (McKinney 1999 & Supp. 2000) (amended Nov. 1, 1995). It is important to note that Section 51 was recently amended to include protection of the voice. Prior to 1995, a person's name, portrait, or picture was the only characteristics of one's persona that were protected. This amendment helped broaden the scope of protection afforded to individuals in controlling the commercial use of their identity. This Note, however, still maintains that the right, as recognized in New York today, nonetheless fails to provide the "celebrity plaintiff" adequate protection.

⁷⁶ See *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 129 (2d Cir. 1984); *Cohen v. Herbal Concepts, Inc.*, 472 N.E.2d 307, 308, (N.Y. 1984); see also *Goodman*, *supra* note 2, at 239.

Since New York has elected to restrict the concept of publicity rights within the strictures of its narrow right of privacy statute, a person's right to control the commercial use of his or her image is very limited in New York. Privacy rights are inherently personal in nature.⁷⁷ It is widely recognized that the very nature of a personal right prohibits it from being sold or given to someone else, or from surviving the lifetime of the protected individual.⁷⁸ Since New York recognizes the right of not having one's identity commercially appropriated without written authorization as a privacy right, it follows that this right is neither transferable nor descendible. Thus, under sections 50 and 51, an individual cannot assign these rights to anyone, nor can an individual's estate sue for the violation of such rights.

This fact was illustrated by the court's decision in *James v. Delilah Films*,⁷⁹ a case involving an action under sections 50 and 51 for the misappropriation of the plaintiffs' likeness for marketing and advertising purposes. The plaintiffs in this case were the predecessors in interest of some 1960s popular music performers collectively known as the "girl groups." The defendant, Delilah Films, produced, marketed, and advertised a film and video containing footage of these groups performing, without first obtaining the performers' consent.⁸⁰ The court held that these plaintiffs, as successors in interest, had "no cause of action under Civil Rights Law . . . sections 50 [and] 51, as the statutory rights created by said law do not survive death."⁸¹ The court stressed the fact that whatever invasion of privacy actions the performers may have had, those rights "extinguished at their deaths."⁸² Numerous court decisions interpreting the statutory right support the *Delilah* court's contention that a cause of

⁷⁷ See Zimmerman, *supra* note 46, at 37-38 (stating that "personality" has been protected as a personal interest under the law of privacy since the 1950s); see also Nimmer, *supra* note 32, at 209 (stating that privacy could never be the foundation of a commercial market for "publicity values" because the law defined privacy as a personal and non-assignable right).

⁷⁸ See Nimmer, *supra* note 32, at 209 (stating that a prominent person's name and portrait—their publicity value—is greatly restricted and cannot be assigned to others).

⁷⁹ 544 N.Y.S.2d 447 (Sup. Ct. N.Y. County 1989).

⁸⁰ See *id.* at 449.

⁸¹ *Id.* at 451. The invasion of privacy causes of action interposed on behalf of the deceased performers were dismissed because such causes of action terminated upon their deaths. See *id.*

⁸² *Id.*

action under Civil Rights Law sections 50 and 51 is *not* descendible.⁸³ Since the right under the statute is purely personal and may be enforced only by the actual person whose name or likeness is used, it naturally follows that the right is not transferable.⁸⁴ Therefore, under privacy law, a grant to a commercial advertiser would be “no more than a release or waiver of the right to sue”⁸⁵ for privacy invasion. The commercial firm would have no legally enforceable right against a third party.

The New York statute provides clear notice of the scope of the right by listing the personal attributes that are to be protected from unauthorized commercial use.⁸⁶ The statute protects only the person’s “most fundamental personal attributes—name and likeness—those by which he is known and recognized on a daily basis and which are most valuable.”⁸⁷ Up until 1995, it listed only three items as being the sole attributes protected by the state against unauthorized commercial use: name, photograph, and picture.⁸⁸ In 1995, the New York

⁸³ See *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 585 (2d Cir. 1990) (holding that the statute’s right to privacy protection is “clearly limited to ‘any living person’ ”); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 284–85 (S.D.N.Y. 1977), *rev’d on other grounds after remand*, 652 F.2d 278 (2d Cir. 1987); *Smith v. Long Island Jewish-Hillside Med. Ctr.*, 499 N.Y.S.2d 167, 168 (2d Dep’t 1986); *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004, 1010 (1st Dep’t 1981) (stating that although other courts applying New York law have found the right of publicity to be a valid transferable property right, New York courts have found the statutory right of privacy to be neither descendible nor assignable); *Antonetty v. Cuomo*, 502 N.Y.S.2d 902, 906 (Sup. Ct. Bronx County 1986).

⁸⁴ See *Rosemont Enter., Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122, 129 (Sup. Ct. N.Y. County 1968) (holding that the right of privacy “is a purely personal one which may be enforced only by the party himself”); *Zimmerman*, *supra* note 46, at 41 n.19 (stating that the right cannot be sold or given to someone).

⁸⁵ MCCARTHY, *supra* note 1, at 10-82 §10:53.

⁸⁶ See *Cirino*, *supra* note 27, at 778.

⁸⁷ *Id.*

⁸⁸ See N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 1909, amd., 1911, 1921, 1979, 1983); see also *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 129 (2d Cir. 1984) (stating that the statute covers any person whose “name, portrait or picture” is used for trade or advertising purposes without consent); *Arrington v. New York Times Co.*, 434 N.E.2d 1319, 1321 (N.Y. 1982) (stating that these sections were narrowly defined to include “only the commercial use of an individual’s name and likeness and no more”); *Brinkley*, 438 N.Y.S.2d at 1007 n.4 (stating that Section 51 of the Civil Rights Law provides “[a]ny person whose name, portrait or picture is used”); see also *Cirino*, *supra* note 27, at 764 n.8.

legislature expanded the scope of the statute "to include a cause of action for the misappropriation of one's voice."⁸⁹ This small refinement granted individuals significant additional protection against the unauthorized commercial use of their personas. Two other important factors should be noted when discussing the scope of sections 50 and 51. First, the use must be "for advertising purposes, or for the purpose of trade."⁹⁰ Second, the use must contain a clear, recognizable representation of the plaintiff.⁹¹

III. THE SHORTCOMINGS OF NEW YORK'S STATUTORY RIGHT

The New York "publicity right" claim greatly limits the ability of an individual to effectively control the commercial exploitation of his or her persona because the claim is rooted within a right of privacy statute. Upon comparing the New York right with a property-based statutory right, such as those recognized in California⁹² and New Jersey,⁹³ the shortcomings of a publicity right subsumed in privacy law become evident. The most significant shortcoming is that because the New York right is rooted in privacy law, it fails to allow for either transferability

⁸⁹ Goodman, *supra* note 2, at 235-36; *see also* N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1992) (amended 1995).

⁹⁰ N.Y. CIV. RIGHTS LAW § 50 (McKinney 1999); *see also* Beverley v. Choices Women's Med. Ctr., 587 N.E.2d 275, 278 (N.Y. 1991) (stating that "[u]se for 'advertising purposes' and use 'for the purposes of trade' are separate and distinct statutory concepts and violations"); McGraw v. Watkins, 373 N.Y.S.2d 663, 665 (3d Dep't 1975) (stating that whether a picture depicting the plaintiff naked was used for advertising purposes, was essential to the determination of whether the right of privacy had been violated); Fleischer v. W.P.I.X., Inc., 213 N.Y.S.2d 632, 647 (Sup. Ct. N.Y. County 1961).

⁹¹ *See* Negri v. Schering Corp., 333 F. Supp. 101, 103 (S.D.N.Y. 1971) (holding that a picture used for advertising purposes is not actionable unless it is "a clear representation of the plaintiff, recognizable from the advertisement itself"); Shamsky v. Garan, Inc., 632 N.Y.S.2d 930, 932-34 (Sup. Ct. N.Y. County 1995) (stating that baseball players could assert claims for defendant's use of a team picture, even though the reproduction was of poor quality and the player's faces were small, because the individual players *were* identifiable in the picture).

⁹² *See* CAL. CIV. CODE §§ 990, 3344 (Deering 1990).

⁹³ *See* Estate of Elvis Presley v. Russen, 513 F. Supp. 1339, 1354 (D.N.J. 1981) (holding that a claim based on the appropriation of a plaintiff's likeness and name for the defendant's commercial gain is "an action for invasion of their 'property' rights and not one for 'injury to the person'"); *see also* Larry Moore, *Regulating Publicity: Does Elvis Want Privacy?*, 5 J. ART & ENT. L. 1, 36 (1995) (stating that New Jersey's right to privacy is a common law right).

or descendibility of a publicity right claim. In characterizing this as a property-based right, rather than a personal right that is attached to the individual, it is "capable of being disassociated from the individual and transferred by him for commercial purposes."⁹⁴ Numerous advantages are posed by allowing for a transferable and descendible right of publicity.

One principal argument in favor of a transferable right is that "transferability promotes economic creation incentives by allowing those who hold the right to exploit it to their advantage."⁹⁵ Proponents of a transferable right of publicity point to the transferability and assignability of other intellectual property interests such as copyright, trademark, and patents, and how transferability in these instances has proven to promote economic efficiency.⁹⁶ Allowing celebrities to license or assign their images as they see fit enables them to fully utilize their images to reap maximum commercial benefits. Providing celebrities with this additional control over their personas thus serves to increase the "investment of resources in one's profession."⁹⁷

Likewise, descendibility better ensures that individuals will make investments in themselves that serve the public interest. A descendible publicity right would allow an individual to transfer the benefits of his or her labor to a chosen successor; thereby assuring that the right is vested in a "suitable beneficiary."⁹⁸ This trusted beneficiary will have incentive to preserve the image that the decedent has labored so hard to create and thereby also reap the financial benefits of that image. Proponents who advocate for the recognition of a descendible right argue that "[i]t cannot be seriously disputed that artistic incentives will be enhanced and furthered if performers are secure in the knowledge that the valuable image they cultivate

⁹⁴ *Estate of Elvis Presley*, 513 F. Supp. at 1354–55.

⁹⁵ J. Eugene Salomon, Jr., *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179, 1205 (1987) (discussing the need for a transferable right of publicity law).

⁹⁶ See *id.* (stating that the value of a publicity right may be greatly diminished if the right were not transferable); see also Goodman, *supra* note 2, at 257 (citing Assignee Rights in Patent and Trademark, 37 C.F.R. § 3.1 (1998), 17 U.S.C. § 204 (1998)).

⁹⁷ *Estate of Elvis Presley*, 513 F. Supp. at 1355.

⁹⁸ *Id.* (stating that a right which is descendible assures the individual that "control over the exercise of the right can be vested in a suitable beneficiary").

in their lifetimes will be protected and commercially exploited only by their chosen representatives after they die."⁹⁹ In fact, in some cases, passing on property to others may have "as great a motivational effect" as acquiring property for oneself.¹⁰⁰ Individuals are often motivated to succeed in order to provide for the financial security and prosperity of their families and heirs.

Equitable considerations also support the argument that it is only fair that this valuable asset pass to the heirs of the performer, entertainer, or celebrity who laboriously cultivated the image throughout his or her lifetime.¹⁰¹ It does not seem rational that upon a celebrity's death, advertisers and expropriators should receive a windfall by having the freedom to use, with impunity, the image of the celebrity. Rather, in the interest of fairness, such benefits should fall to the heirs of the celebrity, as is the case with most other forms of property. The state should be more concerned with protecting the financial security of the decedent's family rather than enacting a right favoring expropriators. These arguments are especially persuasive considering that for many celebrities, their popularity survives their death. There is still a large profit to be made off the commercial appropriation of deceased celebrities' identities.¹⁰² This is evident in the recent media frenzy over the deaths of such celebrities as Princess Diana, John F. Kennedy, Jr., Carolyn Bessette, and in the continuing use of the images of such pop-culture icons as Elvis Presley, John Wayne, and Marilyn Monroe in the advertising and marketing industries. Thus, both incentive-driven arguments and equity concerns favor a descendible right whereby the celebrity can pass these potential financial benefits to his or her heirs or beneficiaries.

Finally, it is important to note that much of the commentary against recognizing a descendible right of publicity involves the fear that development of such a right would interfere with free speech and the public's ability to access information.¹⁰³ Yet, as

⁹⁹ Marks & Mulvey, *supra* note 6, at 4.

¹⁰⁰ Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J., 1125, 1128-29 (1980).

¹⁰¹ See Sims, *Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453, 480-81 (1983).

¹⁰² See *Estate of Elvis Presley*, 513 F. Supp. at 1348 (stating that "Elvis Presley's popularity did not cease upon his death").

¹⁰³ See Felcher & Rubin, *supra* note 100, at 1128-32 (stating that publicity

section IV of this Note will discuss, a descendible right of publicity can be limited in response to such First Amendment concerns by explicitly stating such limitations in the wording of the statute. For instance, a statute could provide for a “newsworthiness” exception and limit the publicity right for strictly commercial use. In addition, modeling the inherited right of publicity on copyright law would address many of the concerns raised by opponents of a descendible right. Copyright law balances the tension that exists between the promotion of creative efforts and First Amendment interests by indicating an express period of duration when the right vests in the heirs. After the expiration of such period, the work enters the public domain. Such a limitation could be placed on the descendible right of publicity to address whatever First Amendment conflicts a perpetual publicity interest may pose.

California, for example, has passed legislation to ensure the protection of a descendible right of publicity.¹⁰⁴ California Civil Code section 990 creates a property-based, descendible right of publicity in an individual’s likeness when such use “has commercial value at the time of his or her death.”¹⁰⁵ To address First Amendment concerns raised by a perpetual right of publicity, the California statute follows the model provided by copyright law, limiting the period of time in which a cause of action may be brought under this section to “50 years from the death of the deceased personality.”¹⁰⁶ The law also conditions the right to bring an action on registration of the persona by

rights must be weighed against the countervailing policy of First Amendment interest in the free use of information).

¹⁰⁴ See CAL. CIV. CODE § 990 (Deering 1990); see also Goodman, *supra* note 2, at 237–38 (stating that in 1985, California enacted legislation to codify the publicity rights of deceased individuals).

¹⁰⁵ CAL. CIVIL CODE § 990(h) (Deering 1990). Section 990(h) states:

As used in this section, “deceased personality” means any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods or service.

Id.

¹⁰⁶ CAL. CIV. CODE § 990(g) (Deering 1990) (“No action shall be brought under this section by reason of any use of a deceased personality’s name, voice, signature, photograph, or likeness occurring after the expiration of 50 years from the death of the deceased personality”).

requiring the successor in interest to pay a ten dollar filing fee to register a claim to the defendant's persona with the Secretary of California.¹⁰⁷ This requirement is a way to help ensure the public's access to the individual's persona, in the same manner that copyright registration requirements sought to counterbalance First Amendment concerns.¹⁰⁸ California's Civil Code section 990 provides an excellent model for New York to follow because it provides for a descendible right of publicity that promotes creative incentive and equity concerns, while at the same time avoiding conflicts with the First Amendment.

Originally, the scope of the New York claim of unauthorized appropriation of identity was limited to use of an individual's name, portrait, or picture.¹⁰⁹ Many of the concerns that such a right did not afford adequate protection have been addressed by recent amendments to New York Civil Rights Law sections 50 and 51.¹¹⁰ The current statute now provides for the misappropriation of one's voice. It reads:

Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice . . .¹¹¹

By providing for the recognition of the appropriation of one's voice, the New York legislature greatly expanded the scope of the right and afforded individuals some much-needed additional protection. This amendment is especially significant for singers, radio personalities, and others identified through their voice who had received insufficient protection under the statute as it existed prior to the amendments.¹¹²

¹⁰⁷ See CAL. CIV. CODE § 990(f) (Deering 1990); see also Goodman, *supra* note 2, at 238.

¹⁰⁸ See Felcher & Rubin, *supra* note 100, at 1130–32 (stating that recourse to a copyright analogy to the right of publicity would solve most of the First Amendment concerns).

¹⁰⁹ See N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 1992); see also Cirino, *supra* note 27, at 777 (stating that ninety years after the legislature enacted a remedy for unauthorized commercial use, “the law in New York remains the same: persons can sue only for appropriations of ‘name, portrait or picture’”).

¹¹⁰ See Felcher & Rubin, *supra* note 100, at 765.

¹¹¹ N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 2000).

¹¹² Compare Maxwell v. N.W. Ayer, Inc., 605 N.Y.S.2d 174, 176 (Sup. Ct. N.Y. County 1993) (rejecting the plaintiff's claim for the misappropriation of his

Despite this additional safeguard, New York still provides less protection than other jurisdictions. For example, California's statute adds a person's signature to the list of protected attributes, and federal courts interpreting the common law right of publicity have found "likeness" to include "[t]ransitory adjuncts of personality" such as hairstyle, dress, and mannerisms.¹¹³ In *White v. Samsung Electronics America, Inc.*,¹¹⁴ the court held that appropriation of identity "goes beyond protection of name or likeness and includes the unauthorized use of attributes that leave no doubt as to whom those attributes belong."¹¹⁵ Thus, the court concluded that *Wheel of Fortune* game show hostess Vanna White *did* have a valid claim for unauthorized commercial appropriation of her identity against the defendant, who featured a metallic robot dressed to resemble the hair and style of dress of Vanna White in an advertisement for its products.¹¹⁶ This interpretation of "identity," however, has been widely criticized as too broad and unpredictable.¹¹⁷

Although including protection for such transitory aspects of one's personality as style and mannerisms is arguably extending protection too far, New York should look to the California statute itself, as opposed to interpretations of California's common law

voice because under Sections 50 and 51 there was *no* statutory claim for misappropriation or imitation of voice); *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826, 837-38 (S.D.N.Y. 1990), *with Cerasani v. Sony Corp.*, 991 F. Supp. 343, 356 (S.D.N.Y. 1998) (stating that a cause of action under 50 and 51 included the improper use of plaintiff's "name, portrait, picture or voice") (emphasis added).

¹¹³ See William M. Heberer, III, *The Overprotection of Celebrity: A Comment on White v. Samsung Electronics America, Inc.*, 22 HOFSTRA L. REV. 729, 740 (1994).

¹¹⁴ 971 F.2d 1395 (9th Cir. 1992) (holding that Vanna White had a valid publicity claim).

¹¹⁵ Cirino, *supra* note 27, at 785 (citing *White*, 971 F.2d at 1398-99).

¹¹⁶ See *White*, 971 F.2d at 1401. The lawsuit involved an advertisement for Samsung video cassette recorders, which featured a futuristic *Wheel of Fortune* game show set that included a robot wearing a wig, evening gown, and jewelry typical of the type worn by Vanna White on the actual television show. See *id.* at 1396.

¹¹⁷ See *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1514 (9th Cir. 1992) (Koziniki, J., dissenting from a denial of a petition for rehearing) (stating that the majority's position "is a classic case of overprotection" which "withdraws far more from the public domain than prudence and common sense allow"); see also Heberer, *supra* note 113, at 731-32 (disagreeing with the expansive reading of the right of publicity reached in *White*, as it improperly removes from the public domain aspects of White's performance "which the Copyright Act has determined properly belong there").

right, to provide individuals with some additional means of protection. The amendment to include "voice" as a protected attribute was a huge step in remedying the narrowness of the New York claim. One further addition that could add to this protection would be to include "signature" to the list of attributes, as does the California statute. In so doing, New York's right would provide individuals with adequate protection of their identities while simultaneously maintaining the predictability necessary to keep advertisers on notice of what they can and cannot legally appropriate.

IV. LIMITATIONS ON THE RIGHT TO PUBLICITY

In order to address First Amendment concerns of freedom of speech and public access to information, certain limitations are placed on an individual's right of publicity. In New York, an individual's right of publicity is limited in two important respects: (1) a "newsworthiness" exception exists, prohibiting the application of publicity rights when a person's identity is used for "informational or communicative purposes,"¹¹⁸ and (2) a person's right of publicity is restricted to only those appropriations involving a "commercial use" of the identity.¹¹⁹ To restrain the right of publicity from becoming overly broad, New York courts have established two further limitations. The first is a requirement that the plaintiff's persona is "recognizable" in the unauthorized appropriation,¹²⁰ and the second is an exception for "incidental use."¹²¹

¹¹⁸ See Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 93 (1994); Lisa M. Ferri & Robert G. Gibbons, *Skirting the Right of Publicity in the Wake of Hoffman v. Capital Cities*, N.Y. L.J., Feb. 26, 1999, at 1.

¹¹⁹ See N.Y. CIV. RIGHTS LAW § 51 (McKinney 1999) (stating that the right covers "uses for advertising purposes, or for the purpose of trade"); see also Goodman, *supra* note 2, at 239 (stating that a necessary element of a claim under Sections 50 and 51 is that a plaintiff must prove that the use was "for purposes of trade or advertising") (citing Cohen v. Herbal Concepts, Inc., 472 N.E.2d 307, 308 (N.Y. 1984)).

¹²⁰ See Shamsky v. Garan, Inc., 632 N.Y.S.2d 930, 933-34 (Sup. Ct. N.Y. County 1995); Negri v. Schering Corp., 333 F. Supp. 101, 103 (S.D.N.Y. 1971) (holding that "a picture used for advertising purposes is not actionable under the statute unless it is a clear representation of the plaintiff, recognizable from the advertisement itself").

¹²¹ See Lerman v. Flynt Distrib. Co., 745 F.2d 123, 130 (2d Cir. 1984) (stating that when the advertisement "is merely incidental to a privileged use there is no violation of § 51").

A tension exists between an individual's interest in protecting his or her identity from unauthorized use and the ideals embodied within the First Amendment.¹²² Whereas the First Amendment safeguards of freedom of speech and expression seek to maximize public access to political, informational, and entertainment works,¹²³ a right of publicity enables individuals to control and restrict the public portrayal of their personas.¹²⁴ Thus, a proper balance must be reached between these countervailing interests. The ideals and policy goals embedded within the First Amendment are so fundamental to American democratic society that the right of publicity must be limited in such a way as to prevent intrusion upon protected speech and public interests. Thus, courts recognize a "newsworthiness exception,"¹²⁵ which prohibits the application of a right of publicity claim "where a person's name or likeness is used for informational or 'communicative' purposes."¹²⁶ As a general rule, "a person's right of publicity does not preclude others from incorporating a person's name, features or biography in a literary work, motion picture, news or entertainment story."¹²⁷ It is well established that newspapers, magazines, and other forms of media need not obtain permission to write or display images of persons in the news, or items "reasonably related to . . . matter[s] of public interest."¹²⁸ In cases involving the issue of "material newsworthiness," courts have "generally held matters of public interest to be broadly defined."¹²⁹

¹²² See Felcher & Rubin, *supra* note 100, at 1129-32; Kwall, *supra* note 120, at 47.

¹²³ See Kwall, *supra* note 118, at 47 ("Traditional First Amendment jurisprudence dictates that political, informational, and entertainment works receive substantial protection, and seeks to maximize public access to these works.")

¹²⁴ See McCarthy, *supra* note 19, at 1704 (stating that the right of publicity is the inherent right of every human being to control the commercial use of his or her identity).

¹²⁵ See Goodman, *supra* note 2, at 255 (stating that a court's distinction between commercial use and an application of a newsworthiness exception often determines whether there has been a violation of one's right of publicity).

¹²⁶ Ferri & Gibbons, *supra* note 118, at 8.

¹²⁷ Goodman, *supra* note 2, at 246 (citing *Rogers v. Grimaldi*, 695 F. Supp. 112, 121 (S.D.N.Y. 1988)); see also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977) (holding that "[t]here is no doubt that entertainment, as well as news, enjoys First Amendment protection").

¹²⁸ Ferri & Gibbons, *supra* note 118, at 8.

¹²⁹ *Id.*

New York courts have consistently recognized such an exemption for newsworthy materials and matters of legitimate public interest.¹³⁰ In *Davis v. High Society Magazine*,¹³¹ the court explicitly stated that when the challenged use of one's name and likeness is considered "newsworthy" and a matter of public interest, such uses are "protected by the First Amendment and [are] not considered a use for the purposes of trade within the ambit of the Civil Rights Law."¹³² The newsworthiness exception has been applied to reports of political news and social trends, articles of consumer concerns and fashion trends, and matters of biological and scientific interest.¹³³

Another way in which legislatures ensure protection of the public's access to information is to limit a right of publicity claim to only those instances involving commercial use of the persona,¹³⁴ in which "the First Amendment interest is relatively low."¹³⁵ As stated earlier, New York Civil Rights Law sections 50 and 51 limit claims to uses "for advertising purposes or for the purpose of trade."¹³⁶ In order to account for the legitimate and weighty First Amendment interests in these situations, courts have consistently interpreted the statute to protect an individual's personality from "misappropriation in [the] commercial and advertising spheres only."¹³⁷ Situations in

¹³⁰ See *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984) (stating that from the time of the Civil Rights Law's enactment, courts have consistently held "that these terms should not be construed to apply to publications concerning newsworthy events or matters of public interest") (citations omitted).

¹³¹ 457 N.Y.S.2d 308 (2d Dep't 1982).

¹³² *Id.* at 313; see also *James v. Delilah Films*, 544 N.Y.S.2d 447, 451 (Sup. Ct. N.Y. County 1989).

¹³³ See *Finger v. Omni Publications Int'l, Ltd.*, 566 N.E.2d 141, 144 (N.Y. 1990); *Stefano v. News Group Publications, Inc.*, 474 N.E.2d 580, 585 (N.Y. 1984); *Arrington v. New York Times Co.*, 434 N.E.2d 1319, 1322 (N.Y. 1982); *Pagan v. New York Herald Tribune*, 301 N.Y.S.2d 120, 123 (1st Dep't 1969).

¹³⁴ See *Goodman*, *supra* note 2, at 254-55 (pointing out that unauthorized commercial use amounts to exploitation of an individual's likeness and therefore gives rise to a right of publicity claim).

¹³⁵ *Felcher & Rubin*, *supra* note 100, at 1130.

¹³⁶ N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1999); see also *Arrington*, 434 N.E.2d at 1321 (N.Y. 1982) (holding that the statute was narrowly drawn to "encompass only the commercial use of an individual's name or likeness and no more").

¹³⁷ *Delilah Films*, 544 N.Y.S.2d at 451; see also *Arrington*, 434 N.E.2d at 1321 (holding that the statute applies solely to the commercial use of an individual's name or likeness); *McGraw v. Watkins*, 373 N.Y.S.2d 663, 665 (3d

which the use is considered a matter of public interest are protected by the First Amendment and are therefore *not* considered a use for the purposes of trade under the statute.¹³⁸ Thus, the New York law safeguards First Amendment concerns of free dissemination and public access to information by providing exemptions for legitimate matters of public interest and limiting the right to commercial uses.¹³⁹

It is important to note two further limitations imposed on the right of publicity that prevent the claim from becoming overly broad and therefore, encroaching on the public's ability to access information. First, New York courts have recognized a requirement that the reference to the person asserting the claim be clear in the appropriation. Judicial interpretation of the Civil Rights Law requires that a picture that is used for an advertising purpose cannot be actionable unless it is a "representation of the plaintiff, recognizable from the advertisement itself."¹⁴⁰ Second, there is a recognized exception

Dep't 1975) (holding that the defendant's use of the plaintiff's picture was not for advertising purposes, and therefore was not within the prohibition of civil rights law).

¹³⁸ See *Davis v. High Society Magazine, Inc.*, 457 N.Y.S.2d 308, 313 (2d Dep't 1982).

¹³⁹ The following provide examples of instances where the courts of New York have denied right of publicity claims because of a finding that a legitimate public interest was involved: *Nelson v. Globe Int'l Inc.*, 626 F. Supp. 969, 980 (S.D.N.Y. 1986) (finding the newsworthiness exception to exist where a person's diet was included in a tabloid publication); *Arrington*, 434 N.E.2d at 1323 (finding the photograph of a black financial analyst in a newspaper article to be a matter of public interest); *Virelli v. Goodson-Todman Enter., Ltd.* 536 N.Y.S.2d 571, 575 (3d Dep't 1989) (holding that the plaintiff did not state a claim for invasion of privacy in an action brought over the publication of a newspaper article relating to drug abuse because the challenged article dealt with a newsworthy item); *Rome Sentinel Co. v. Boustedt*, 252 N.Y.S.2d 10, 14 (Sup. Ct. Oneida County 1964) (holding that sudden death in a place of public accommodation clearly falls within the legitimate area of public concern).

¹⁴⁰ *Negri v. Schering Corp.*, 333 F. Supp. 101, 103 (S.D.N.Y. 1971); see also *Levey v. Warner Bros. Pictures, Inc.*, 57 F. Supp. 40, 41 (S.D.N.Y. 1944) (holding that the motion picture did not sufficiently portray the divorced wife of Showman George M. Cohan to sustain a claim for violation of any right of privacy); *DiPortanova v. New York News Inc.*, 440 N.Y.S.2d 535, 535 (1st Dep't 1981) (holding that the published photograph of the home the article reported was being built by the Shah of Iran was not readily recognizable as being the plaintiff's home and thus dismissed the claim for invasion of privacy); *Shamsky v. Garan, Inc.*, 632 N.Y.S.2d 930, 933 (Sup. Ct. N.Y. County 1995) (stating that even though a reproduction of a World Series baseball team's picture was of poor quality and the player's faces were small, the individual players faces were identifiable and therefore they had grounds for a claim under the statute).

for incidental use where either the use itself is "incidental, momentary and isolated,"¹⁴¹ or the commercial aspect of the use was merely incidental to some other protected purpose.¹⁴² Sections 50 and 51 of the Civil Rights Law require that there be more than an incidental connection between the appropriation of a plaintiff's likeness and the main purpose of the work in order to maintain a claim for invasion of privacy.¹⁴³ Additionally, the statute provides an exception for uses when the advertisement is "merely incidental" to a privileged use.¹⁴⁴ In *D'Andrea v. Rafla-Demetrious*,¹⁴⁵ the court held a hospital's use of a medical resident's picture in its recruiting brochure was not an invasion of his right of privacy as the use was incidental to the main purpose of the brochure, which was to provide information about the hospital's programs to prospective employees.¹⁴⁶

CONCLUSION

In 1995, State Senator Emmanuel Gold proposed a bill to amend the New York Civil Rights Law by adding an Article 5-b, which would create a separate statutorily defined right of publicity.¹⁴⁷ This newly-defined right would address many of the problems inherent in recognizing a publicity claim rooted in privacy law, as the right Senator Gold sought to introduce would create a property right transferable in a person's lifetime and descendible to heirs or chosen representatives upon death.¹⁴⁸ Thus, the statute would recognize every person, living or deceased, has a property right in his or her identity.

¹⁴¹ *Stillman v. Paramount Pictures Corp.*, 153 N.Y.S.2d 190, 191(1st Dep't 1956).

¹⁴² *See Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 130 (2d Cir. 1984).

¹⁴³ *See Preston v. Martin Bergman Prod., Inc.*, 765 F. Supp 116, 119 (S.D.N.Y. 1991) (holding that the image of a scantily dressed woman walking the streets of New York shown in the opening scenes of a motion picture was not actionable because her appearance was incidental, and the statute requires a greater connection between the appearance and the main purpose of the work); *Fleischer v. W.P.I.X., Inc.*, 213 N.Y.S.2d 632, 649 (Sup. Ct. N.Y. County 1961) (dismissing the claim because the plaintiff's name was only incidentally shown as part of the commencement of the film).

¹⁴⁴ *See Lerman*, 745 F.2d at 130.

¹⁴⁵ 972 F. Supp. 154 (E.D.N.Y. 1997).

¹⁴⁶ *See id.* at 157 (noting that the fact that the brochure was in print and that the plaintiff might be recognizable did not preclude application of the incidental use doctrine).

¹⁴⁷ *See Marks & Mulvey, supra* note 6, at 1.

¹⁴⁸ *See Goodman, supra* note 2, at 267.

The advantages of such a property-based right are enormous. First, it would provide individuals with some much-needed additional protection over the manner in which their image is spread into the public arena. Second, it would promote economic creation incentives by allowing those who hold the right to exploit it to their advantage. In addition, a property-based right better represents the ideals embedded in the right of publicity and the reasons justifying the need for its existence. In most right of publicity cases, the plaintiff's complaint is not the violation of a right to be let alone, but rather, that he or she was deprived of the financial gain reaped from the unauthorized publication of his or her image. Whereas in a privacy claim, the right invaded and the measure of damages are based upon the indignity and personal affront of having one's identity spread into the public, a property-based right would more adequately address the real harm suffered by the plaintiff. Damages would be measured based on the nature and extent of the appropriation. The plaintiff would recover "either compensatory damages measured by the loss to the plaintiff or restitutionary relief measured by the unjust gain to the defendant."¹⁴⁹

In light of the strong policy arguments favoring the recognition of a property-based right of publicity, this Note maintains that New York should adopt a right similar to that proposed by Senator Gold. In order to address many of the concerns voiced by opponents of a more broadly defined right of publicity, a New York right of publicity statute should incorporate First Amendment limitations and principles directly into the wording of the statute. This could be achieved by maintaining the "commercial use" requirement of New York Civil Rights Law Sections 50 and 51 and by explicitly recognizing a "newsworthiness" exception in the statute. In addition, the property-based right should more clearly define the standard for determining the nature of the subject matter, e.g., whether a particular use is in fact a commercial use or whether it falls within the newsworthiness exception.

"[N]othing is so strongly intuited as the notion that my identity is *mine*—it is my property, to control as I see fit."¹⁵⁰ An individual's identity is his or her most intimate and precious

¹⁴⁹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

¹⁵⁰ McCarthy, *supra* note 19, at 1711.

commodity, a commodity for which he or she expends much time, effort, skill, and money. In light of today's mass merchandizing market and the fact that often the profits gained through endorsements "far surpass the monies earned directly through performances,"¹⁵¹ equitable considerations mandate that an individual's right to exploit their image be adequately protected. Considering the lucrative profits stemming from celebrity-driven advertisement campaigns, should New York wish to "retain its image as an important entertainment and cultural center," it is imperative that the state institute "competitive laws favorable to the interests of the performers."¹⁵² New York's recognition of a separate and distinct property-based right of publicity would ensure that celebrities are allowed to commercially exploit their personas, their most valuable and expressive resource, to their full advantage.

¹⁵¹ Marks & Mulvey, *supra* note 6, at 4.

¹⁵² *Id.* at 6.