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PROTECTION OF "PERSONA" IN THE EU AND IN THE U.S. :

A COMPARATIVE ANALYSIS

by

ANNA EMELIE HELLING

(Under the Direction of Prof. David Shipley)

ABSTRACT

The American Right of Publicity has been developed and applied differently in the states of the U.S. for several decades and still several questions remain regarding the nature of the right. In Europe, many countries seem to follow the American development or have a similar right protecting the commercial value of a person's identity emerging in their legal system. With the constant globalization and increase in interaction of the sports and entertainment markets in the world, harmonization of the different rules protecting this commercial interest in a persona is necessary to grant sufficient protection. This work is a comparative study of the rules and developments in the U.S. and in several countries in the European Union. If enough common traits can be found in these countries, there may be a way to start harmonization within the member countries of the European Union. By looking at the current status and history of development in all of these countries, this work aims at establishing whether or not there could be a harmonized European right protecting the commercial value of a persona and what the appropriate elements of such a right would be.

INDEX WORDS: Right of Privacy, Right of Publicity, Intellectual Property, Trademark, Copyright, European Union, Harmonization, Persona

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1. INTRODUCTION

The sports and entertainment industry has grown tremendously in the past decades and today it has a significant influence and impact on society. One of the main reasons is that sports and entertainment, previously performed on a more or less voluntary basis, now has become a lucrative business for both its participants and investors. The stars of the industry are paid unbelievable salaries to shoot a movie, play football for one season or record a music album. A noticeable change from the past is also the number of people who are considered celebrity. Today, not only actors and star athletes are the interest of society but also average people participating in TV reality shows, lottery winners, and extravagant young people with very rich parents. At the same pace as the fascination with all these famous people grows, so does the value of having a product or service associated with them.

The price for having your commercial run during a sports event and the money spent on endorsements deals is today almost out of control. To put things into perspective there are some good examples to look at. During the Superbowl 2005 it cost $2.4 million to have air a 30- second commercial at half time[1]. Also, in 2000 Tiger Woods made $73 million from endorsement deals. This is twice the amount he won in prize money between 1996 and 2000[2]. In other words, Tiger Woods makes more money off of his name than he does from his skills in golf, which is what he is actually famous for. The

[1] http://www.superbowl.com/news/story/8156717.
[2] SIMON GARDINER et al., SPORTS LAW, 44 (2d ed. 2001).

value of a name is also apparent when looking at the transfer of the soccer player Zinedine Zidane. When Real Madrid bought Zidane they paid him the equivalent of $10 million in exchange for 90% of the right to use of his name and "image". During the first year he played for the club, they made $26 million from the sale of t-shirts with Zidane's name on it alone[3].

Looking at the numbers given, it is obvious that many celebrities wish to protect the value of their persona, so that they can make the most profit from it. The reasons behind this are not always greed. Considering how short and uncertain the career of a football player can be, for example, making a lot of money from endorsement deals may be very important. When the career is over, there may still be potential to exploit the identity for many years to come. The protection sought is not only intended to keep all profits to one self but also to make sure that the "good will" of the persona is not ruined. Once society loses interest or respect for the name, the face or something else representing the persona, no one will be able to profit from it anymore. For those exploiting the identity of celebrities this is not likely to cause any problems as the market is constantly fed with new characters. For the celebrity however, this could have devastating effects and possibly end their career.

It has not always been possible for celebrities to prevent others from using characteristics of their persona. Perhaps there was not always a need for such protection, considering that celebrities existed and had lifelong careers, long before the idea of protecting them ever occurred. Today however, there is a clear demand for rules preventing others from exploiting someone's famous persona. In the U.S., the music-, sports-, and movie industry probably generate more money than in any other country. It is

[3] http://www.eveningtimes.co.uk/hi/sport/6019817.html.

therefore not surprising that the legal system has come far with its development of rules protecting the identity of celebrities. The rules are not perfectly clear however and are frequently being questioned and discussed in American legal doctrine. In other parts of the world there are generally very few rules, if any, that aim at protecting famous personas. Some countries are slowly taking after the examples set by the U.S. but it can be a slow process with an uncertain result.

Not only is the difference in regulations due to faster or slower development of the rules. Civil law systems and common law systems have quite different legal theories upon which they base their legislation. These underlying theories can help or prevent a principle, protecting celebrity persona, from being established. Also, within the two types of legal systems, the views on what should be protectable can be dramatically different. Such is the case with the U.S. and England, two countries that are both using the common law system.

1.1. Purpose of the Study

In the U.S. the protection granted to celebrities is found in the Right of Publicity. This right is not regulated in federal law but has been recognized by the U.S. Supreme Court. For American celebrities granted this right, it can be hard protecting their famous characteristics from being exploited abroad. Celebrities from other countries are likely to face even greater difficulties, as they may not even have a right in their own country.

Within the EU, more and more of the legislation is being harmonized. The purpose of this article is to find out if there is a trend towards protecting people's persona in some of the

countries of the European Union. Furthermore, the intention is to suggest how such a right could be established for the entire union in a reasonable way.

2. THE RIGHT OF PRIVACY AND PUBLICITY IN AMERICAN LAW

To understand the complexity of the Right of Publicity it is necessary to look at its origin. This will also help give a better perspective of how the rights differ in the U.S and in Europe.

The Right of Publicity has its roots in the Right of Privacy but has been influenced by several areas of law such as defamation law, trademark law, copyright law, misappropriation law and false advertising law[4]. It has the closest resemblance however, with the Right of Privacy. The Right of Privacy cannot be found in the U.S. Constitution. To create this right the courts have therefore drawn support for it from a number of the amendments[5] such as the First, Third, Fourth, Fifth, Ninth and Fourteenth[6]. According to American legal doctrine[7] the Right of Privacy was first mentioned in a law review article written by Samuel Warren and Louis Brandeis in 1890[8]. In the article the authors stress the need for regulations protecting people from public intrusion of their privacy. This is by many considered the starting point for the development of the Right of Privacy[9].

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[4] J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY, 16 (2d ed. 2004).
[5] Griswold v. Connecticut, 381 U.S. 479, 484, 499 (1965).
[6] U.S. CONST. amend. III, IV, V, IX, XIV.
[7] Supra note 4 at 14.
[8] Samuel D. Warren & William Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).
[9] Lauren B. Cardonsky, *Towards a meaningful right of privacy in the United Kingdom*, 20 B.U. Int'l L.J. 393, 395 (2002).

2.1 Origin of the Right of Privacy

In 1905 the Georgia Supreme Court settled a case in which the court found for the plaintiff, based on a "right of privacy"[10]. Though this right conflicted with the right of free speech the court found that the use of plaintiff's picture was not the type of expression protected under that fundamental right. From the opinion of the court it appears as if the court was taking into consideration the emotional distress that could be caused if a person's picture could be used freely, without any restrictions[11]. The "right of privacy" established in this case was slowly accepted by the courts in other states and incorporated in their common law[12]. In 1960 another influential law review article was published, written by William Prosser[13]. In his article Prosser asserted that the right of privacy was comprised of four different torts. Up until this time many courts had emphasized that the right of privacy only protected people from "mental anguish "[14]. In his article Prosser claimed that the right actually served as protection from intrusion, disclosure, false light and appropriation. This view is today adopted universally by the courts and was used in its entirety in the 1977 Restatement of Torts[15]. The Right of Privacy can be found in articles §§ 652A- 652I.

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[10] Pavesich v. New England Life Ins. Co. 122 Ga. 190, 50 S.E. 68 (1905).
[11] *Id*. at 71-73
[12] Supra note 4 at 29.
[13] *Id.* at 30.
[14] See e.g. Eick v. Perk Dog Food Co., 347 Ill.App. 293, 294, 106 N.E.2d 742 (1952).
[15] Supra note 4 at 31, 41.

2.2 The Right of Privacy today

The Right of Privacy protects individuals from the embarrassment, humiliation and mental distress caused by a public disclosure of private facts[16]. The right does not serve the purpose of protecting any commercial value in the persona but is supposed to prevent intrusions into people's private lives. The protection is therefore not for a proprietary value in but for a personal right in "private facts". This becomes clear when looking at the grounds for damages described in Restatement (Second) of Torts § 652H. According to this rule, a violation of the Right of Privacy entitles a person to recover damages for:

> "(a) the harm to his interest in privacy resulting from the invasion;
> (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and (c) special damage of which the invasion is a legal cause."[17].

In his article from 1960, Dean Prosser divided the Right of Privacy into four categories. According to these categories, there could be an intrusion into privacy by[18]:

1) Intrusion into a person's private affairs
2) Public disclosure of private facts
3) Publicity which brings false light onto a person
4) Appropriation of a person's name or likeness

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[16] Silvio Martuccelli, *An up-and-coming Right – The Right of Publicity: Its birth in Italy and its consideration in the United States*, 4 Ent. L. Rev. 109, 112 (1993).
[17] Restatement (Second) of Torts, § 652H (1977).
[18] James M. Left, Not for *Just Another Pretty Face: Providing Full Protection Under the Right of Publicity*, 11 U. Miami Ent. & Sports L. Rev. 321, 325 (1994).

The Right to Privacy has, after the publication of Prosser's article, been divided into these four different torts and this view on privacy law is still predominant today in the U.S.[19]. The categories can actually be found in the Right of Privacy rules in the 1977 Restatement of Torts, Second. According to Prosser himself, the fourth category focuses more on the commercial value to the plaintiff rather than the mental anguish that could be caused by the appropriation. The concern is more for a protection of the proprietary interest in the identity and not quite as much for a mental interest[20]. As will be described later, the appropriation tort seems very similar to the Right of Publicity.

2.3 Origin of The Right of Publicity

In principal, the Right of Privacy seeks to protect human dignity and the personal feelings of people and not an economic interest[21]. The right is also known as "the right to be left alone"[22]. In the 1940's, this definition made it difficult for courts to apply the rule in cases where the plaintiff was a celebrity[23]. A plaintiff, making his living being famous and well known and sometimes even seeking that status, could not show the need or the desire, to be left alone. Judges therefore found it hard to justify an application of the Right of Privacy when the plaintiff's motives were not to be left alone but to protect the value of their persona, so that they could exploit it themselves[24]. This was not the original purpose of the Right of Privacy. Additionally, in many of the cases before the courts, the

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[19] Supra note 4 at 31.
[20] *Id*. 4 at 39.
[21] *Id.*
[22] Samuel D. Warren & William Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).
[23] See e.g. O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941).
[24] Supra note 4 at 43-44.

defendant had not used information that would cause mental anguish, nor had the information been used in a context that would have such effects[25]. The use was in these instances merely a commercial exploitation of a person's name or likeness. What the plaintiffs tried to protect was thereby a property interest in their persona rather than their given right to privacy.

Since the Right of Privacy did not protect these interests, the courts found themselves unable to grant judgments in favor of the plaintiffs[26]. A famous case where the court had to face this problem was O'Brien v. Pabst Sales Co.[27]. In this case a famous football player sued a beer company for using a photograph of him in their advertisement. The court found that the football player was not a private person and therefore he was not hurt by publicity, which he had previously sought himself. Deciding the case only on the basis of a Right of Privacy, the court held that the football player could not support his claim[28].

The idea of a Right of Publicity was first brought up in the courts in the case Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.[29]. Here, the court had to two companies selling chewing gum both wanted to use the pictures of famous baseball players on chewing gum cards. One of the companies brought a lawsuit against the other for contracting with, and using the picture of, a baseball player who had given the plaintiff an exclusive right to his picture. As the Right of Privacy is personal, it could not serve as basis for a lawsuit made by the chewing gum company. Judge Jerome Frank avoided this problem however, by declaring that there was still a Right of Publicity that

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[25] *Id.* at 527.
[26] *Id.* at 528.
[27] O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941).
[28] *Id.* at 170.
[29] Haelean Laboratories v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

could support plaintiff's claim. This right, he argued, granted a person protection against unauthorized commercial use of his identity and a possibility of transferring the right to other people or entities[30].

> "We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else[31]."

It is clear that Judge Jerome made a clear distinction between the Right of Privacy and the Right of Publicity. Instead of protecting people from being embarrassed publicly or mentally distressed this new right was intended to protect the value of a person's persona.

> "This right might be called a 'right of publicity.' For it is common knowledge 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, busses,

[30] *Id.* at 868.
[31] *Id.*

trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.[32]"

In 1954 Professor Melville Nimmer published an article that became the "legal foundation" to build this new right upon[33]. In this article Nimmer recognized the need to find another basis for the Right of Publicity than the personal, non-assignable right to privacy. According to Nimmer, the new right was supposed to protect a commercial value, as opposed to the feelings of an individual and had to be assignable. This right shared some traits with the regulations set out in privacy, trademark and unfair competition law but non of these adequately protected this new right[34]. Six years later, another article written by William Prosser supported Nimmer's opinion and developed it further[35]. As mentioned above, Prosser's four torts became widely accepted by the courts and his "Right of Publicity was distinguished as a right of its own, completely separate from the Right of Privacy[36].

The Right of Publicity was also expanded by some courts to protect not only the name and likeness of a person but almost anything that was identifiable with that person. One example of how remote the connection can be for there to be a valid claim is found in the Motschenbacher case[37]. The plaintiff in this case was a famous race car driver who claimed his Right of Publicity had been infringed by a tobacco company in their

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[32] *Id.*
[33] Melville Nimmer, *The Right of Publicity*, 19 Law & Contemporary Problems 203 (1954).
[34] Supra note 4 at 54-55.
[35] *Id*. at 528.
[36] *Id*. at 62-63.
[37] Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974).

advertisement. The alleged infringing use was a TV commercial which contained the picture of a race car and its driver. The picture created the impression that the driver and the car were sponsored by the tobacco company. No name was presented and there was no actual use of Motschenbacher's likeness. The tobacco company had in fact used a picture of Motschenbacher and his car but it had been modified so that the driver's face was not recognizable. Several elements of the car had also been altered so that it looked different from the car Motschenbacher drove. There were however, a few distinctive markings on the car still present in the picture. Based on these, the court found there to be an infringement and held that: "[T]hese markings were not only peculiar to [Motschenbacher's] cars but they caused some persons to think the car in question was [Motschenbacher's] and to infer that the person driving the car was [Motschenbacher]". The court seemed to argue that the car was a symbol of the driver's identity[38].

Only once has the Right of Publicity been addressed by the Supreme Court of the U.S.[39] In 1977 the artist Huga Zacchini, performing the act of shooting himself out of a canon, filed a lawsuit against a TV station that had videotaped and broadcasted his performance[40]. In its reasoning the court used the term "Right of Publicity" repeatedly, thereby recognizing its existence[41]. The defendant in this case claimed that, even though their actions normally would violate the Right of Publicity, the First Amendment of the U.S. Constitution allowed them to use the performance in their news report[42]. The Supreme Court disagreed with this argument however, pointing out that the defendant could not use this defense when they had used the entire performance and not only a part

[38] Supra note 18 at 332.
[39] Supra note 4 at 66.
[40] Zacchini v. Scripps Howard Broadcasting Co., 433 U.S. 562 (1977).
[41] *Id.*
[42] *Id.*

of it. The court then rendered a judgment in favor of plaintiff, granting him the right to damages. After the Zacchini-decision everyone had to start taking the right of publicity seriously, as it had now been accepted by the Supreme Court. Since then the question no longer seems to be whether or not the Right of Publicity exists but rather who and what is protected by it, what defenses can be used against it, what theories of policy it is to be based on and how long protection lasts. This will be discussed later on.

2.4 The Right of Publicity today

The Right of Publicity is today recognized in some form by about 42 States but it can only be found in the Common Law of 35 of those and in State Statutes in 18[43]. The right was first recognized in the Restatement (Third) of Unfair Competition, Section 46, in 1995:

> "One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49[44]."

The fact that it is not a federally protected right causes some uncertainty as to when and how it will be applied and what right a person from a State recognizing the right will have in one that has not yet done so. In the American legal doctrine the

[43] Barbara A. Solomon, *Can the Lanham Act protect Tiger Woods? An analysis of whether the Lanham Act is a proper Substitute for federal right of publicity*, 94 Trademark Rep. 1202, 1205 (2004).
[44] Restatement (Third) of Unfair Competition § 46 (1995).

importance of granting protection in a uniform federal law has often been stressed[45]. There are four general criteria for a valid cause of action under the Right of Publicity. There has to be; 1) a use of plaintiff's identity, and this use has to constitute an 2) appropriation of the plaintiff's name, likeness, personal characteristics or anything else that can be used to identify him. Furthermore, the use has to have been done 3) without the plaintiff's consent and 4) have resulted in injury to him[46]. This injury must be of economic character[47].

2.4.1 Applicability of the Right of Publicity

The first issue we come across when looking at the grounds for a cause of action is; who can be a plaintiff? As mentioned earlier, the Right of Publicity was initially introduced as a way to protect the persona of celebrity. Today, there are diverse opinions on whether the Right of Publicity applies only to celebrities or to non-celebrities as well. One view holds that only celebrity should be granted protection under the Right of Publicity since they have invested time and money into creating a value in their persona. This is not always true however, as many celebrities become famous by chance, because of luck or by simply being born into it. Some have taken this argument even further and hold that only those who exploit their persona and the value in it can have a valid claim[48]. The validity of these arguments is very much dependent on which policy the Right of

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[45] Eric J. Goodman, *A National Identity Crisis: The Need for a federal right of publicity statute*, 9 DePaul-LCA J. Art & Ent. L. 227, 277 (1999).
[46] Vincent M. de Grandpre, *Understanding the market for celebrity: An economic analysis of the Right of Publicity*, 12 Fordham Intell. Prop. Media & Ent. L.J. 73, 80 (2001).
[47] Claire E. Gorman, *Publicity and privacy rights: Evening out the playing field for celebrities and private citizens in the modern game of mass media*, 53 DePaul L. Rev. 1247, 1249 (2004).
[48] Supra note 4 at 64.

Publicity is based on, which will be discussed later. The majority view appears to be that the Right of Publicity applies to everyone.

According to J. Thomas McCarthy[49] the status of the plaintiff only affects the amount of damages. An unknown person can probably not prove that his identity is very valuable and therefore the compensation for the use of it will not be very high. It is therefore possible that a person may not succeed with a claim at all if the court cannot see that the identity had any value that was misappropriated[50]. Without a value in the identity used, there could not have been an injury, which is one of the criteria given above. However, the mere fact that a company has used a person in its advertisement may be proof enough that they found his identity valuable. Another reason not to exclude some people from protection is that it will often be difficult to draw a line between who is considered celebrity and who is non-celebrity.

2.4.2 Scope of the right

The second issue when it comes to an infringement claim is what it is that is protected by the Right of Publicity; what type of use can constitute an infringement and what can be considered to be part of a person's persona? There are a number of ways in which a person's identity can be misappropriated. Besides the obvious use of a person's name and likeness there are other uses such as; appropriation by association, appropriation of a pseudonym, appropriation by similar appearance and voice

[49] *Id*. at 194.
[50] See e.g. Ali v. Playgirl, Inc., 447 F. Supp. 723, 728-729 (S.D.N.Y. 1978).

appropriation[51]. As new ways of exploiting people's identities are attempted, the courts are forced to expand the number uses that can constitute misappropriation.

The number of attributes protected by the Right of Publicity has expanded throughout the years and has come to include a person's voice, a character they play, and a combination of material things that are associated with a certain person[52]. One of the most significant cases dealing with the scope of the protection is the previously mentioned Motschenbacher case where the court found in favor of the plaintiff even though neither the likeness, the name or other personal characteristics had been appropriated. Today, just about anything that makes a person identifiable seems to be protected by the courts under the Right of Publicity. The outer lines of the right are not quite clear however, but are constantly being redefined through case law.

The main argument against a Right of Publicity is also the most commonly claimed defense against a claim based upon it; the protection of free speech in the First Amendment. Since there is no uniform legal rule, the courts settle cases on an *ad hoc* basis, and very often the situation will call for a weighing of different interests against each other[53]. This applies to the Right of Publicity as well as to the Right of Privacy. In some cases the right to free expression will outweigh the interest of a person to be left alone or to be able to make a profit from his own persona. The right to free speech will not always protect the use of someone's identity however. It is hard for example, to justify the application of the right when the exploitation of someone's identity is done in

[51] Supra note 18 at 331.
[52] *Id.* at 334-348.
[53] Julius C.S. Pinckaers, *The Right of Persona: A new Intellectual Property Right for the US and EU* 68 Copyright World 26, 28 (1997).

a commercial context or with a commercial purpose. In general, commercial speech has a very thin protection and this only applies when the commercial speech serves an informational function[54]. It is not always however, that an appropriation creating a profit for the exploiting party will be considered to be outside of the boundaries for free speech. For example, if a person's identity has been used because it is connected to something newsworthy, a profit to the user will most likely not make him liable for infringement of the Right of Privacy.

There are cases in which newsworthiness or free speech is not a sufficient defense. Two such situations are; 1) when there is not a sufficient connection between what is newsworthy and the appropriation of the identity or[55] 2) when it is obvious that the identity appropriated is the primary or sole reason why the activity, in which the identity has been appropriated, has been profitable[56]. These principles are intended to prevent attempts to go around the rules of the right of Publicity by pointing to the newsworthiness exception. Another commonly used defense against a Right of Publicity claim is parody. In the U.S. however, the parody defense is not as generous as it is in most European countries. In Copyright, to qualify as a non-infringing parody the use of someone else's work must be a commentary on that original work. When it comes to the Right of Publicity the situation is similar, but perhaps not as clear. One example is the Vanna White-case[57]. In this case, Samsung had used several well-known characteristics of the TV- personality Vanna White in their promotional campaign. The commercial that aired on TV contained a robot wearing a wig resembling the hair of the celebrity and a

[54] Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 562 (1980).
[55] Supra note 46 at 85.
[56] Supra note 47 at 1269-1270.
[57] Vanna White v. Samsung Electronics America, Inc., 971 F.2d 1395, 1396 (9th Cir. 1992).

dress identical to hers. The robot was also acting just as Ms. White does in the game show she is known from. The court found that even though the advertisement used elements of her character in humoristic way, it was not primarily a parody but a means to get through to the public with a message saying; "buy Samsung VCRs"[58].

An obvious defense to an infringement claim is consent from the person who's identity has been appropriated. Consent can also be achieved through a license, which is another way the public can get to use someone's identity while the "owner" of the identity can get the fair market value for it.

2.4.3 American policy and legal theories behind the Right of Publicity

The policy behind, and justification for, the Right of Publicity is another issue that is still unsettled and many different approaches have been expressed in the legal doctrine. To most people it may only seem rational that we should have the right to control our own identity and that we all have a natural right to prevent others from using it. This will probably not hold up as a sufficient basis for a legal right as there are many personal things that we actually do not control. One of those things is our own ideas, which can be used freely by anyone for any purpose[59]. The legislators usually see to what is best for society and try to balance different interests. In case law and law review articles on the subject there are natural rights theories and economic theories[60]. For the natural rights there are three main rationales; 1) The Labor Theory 2) The Unjust enrichment Theory and 3) The Personality Theory. The are also three main Economic policies; 1) The

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[58] Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 Marq. Sports L.J. 23, 49 (1999).
[59] Supra note 4 at 84.
[60] F. Jay Dougherty , *The Right of Publicity – Towards a comparative and international perspective,* 18 Loy. L.A. Ent. L.J. 421, 440 (1998).

Utilitarian/ Incentive Theory 2) The Consumer Protection Theory and 3) The Allocative Economic Theory[61]. Out of all of these rationales, three appear to be more commonly used to serve as basis for the Right of Publicity. These are The Labor Theory, The Utilitarian/ Incentive Theory and The Unjust Enrichment Theory. Several of the policies listed are very similar but have slightly different approaches to what they seek to protect.

Before going into the more dominant theories, the less applied theories should be described briefly. The Personality Theory considers the commercial aspects of the persona to be a type of property that is an extension of the creator's personality and thereby it is owned by that person. The Consumer Protection theory is a rationale that is concerned with the protecting consumers from deception. If anyone can use the identity of another in advertising, consumers may think that there is an endorsement deal between the advertising company and the person who has been used in the advertisement. Consumers may then buy certain goods because of this association. The Allocative Theory is based on the notion that by granting people a right to all aspects of their identity they can either hold on to it themselves or sell the right to it to someone else. This way, the value of the persona will effectively be allocated to whoever values it the highest. These policies may all apply to a certain extent they but have not been as commonly used as the three remaining theories.

The first out of the main policies is The Labor Theory. This rationale was supported by Nimmer who first defined the Right of Publicity as "the right of each person to control and profit from the publicity values which he has created or purchased[62]". The labor theory basically seeks to reward the efforts made by a person who has created a

[61] *Id*. at 440-447.
[62] Supra note 33 at 216.

value in his identity. In society and also in the legal field, the general consensus is that one should have the right to enjoy the fruits of one's labor. One problem with this theory is that it does not apply to non-celebrities or to people who have achieved their fame in some other way than through their "labor" such as lottery winners and children of royalty, etc. Looking at case law, it is not always those who have invested the most money or effort into their persona, who have been granted protection under the Right of Publicity by the courts.

The economic incentive theory presents the idea of protecting a person's persona so that there will be an incentive for that person to "acquire the skills and talents that generate fame"[63]. Society may have an interest in some of these skills that a person acquires to become famous as they may be socially "useful or enriching"[64]. This theory is probably the most commonly used theory by the American courts and in the only case settled by the U.S. Supreme Court[65] the importance of an economic incentive was stressed in the holding for the plaintiff. There are however, problems also with this theory.

First of all, not all celebrities have worked hard for their fame. As mentioned earlier, many celebrities are famous by chance, they have won the lottery or are in a relationship with someone famous, or they may be famous for something that is not at all considered beneficial for society. Still, they will be granted the same protection as a great inventor, a famous athlete or a well-renowned actress. Also, one could question if there really is a need for an incentive to become famous. In today's society, being famous is a dream of many and people worked hard to become famous long before there ever was a

[63] Mark F. Grady, *A positive economic theory of the right of publicity,* 1 UCLA Ent. L. Rev. 97, 110 (1994).
[64] Supra note 4 at 97.
[65] Supra note 40 at 563.

Right of Publicity. Generally, the economic incentive, that has made someone strive to be famous, is not the Right of Publicity but the profit he can make from the activity that has made them so well-known[66].

The Unjust Enrichment theory is probably the most commonly used theory to justify the Right of Publicity. This theory was used in the courts' reasoning in important cases such as Zacchini[67]. In Ali v. Playgirl the court made it clear by stating that the "interest which underlies protecting right of publicity is the straightforward one of preventing unjust enrichment by the theft of good will[68]". The Unjust Enrichment theory seeks to prevent people from being able to enrich themselves on behalf of other people. The idea is that no one should get a "free ride" and that you have to compensate the person you use to make a profit off of[69]. Trying to apply this theory however, one faces the problem of determining what is "unjust". The theory can be used to explain why someone's identity should be protected from exploitation but not what is to be protected. What, how and when is a use unjust is not perfectly clear from the definition of the theory.

One thing that makes this theory suitable for the underlying policy is that it does not focus on celebrity. The previously mentioned theories both seem to focus on protection for a value created by someone who is now famous. As explained earlier however, the majority's view in the legal doctrine appears to be that the Right of Publicity actually applies to non-celebrity as well. These people have probably not invested anything into their persona and they have not contributed with anything

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[66] Cardtoons, LC. v. Major League Baseball Player's Association, 95 F.3d 959, 973-974 (10th Cir. 1996).
[67] Supra note 40 at 576.
[68] Ali v. Playgirl, Inc., 447 F. Supp. 723, 728-729 (S.D.N.Y. 1978).
[69] Supra note 63 at 110.

remarkable to society, as they are not known to the public. The unjust enrichment theory applies better to both categories of people as the purpose is not to promote the strive to become famous but to prevent somebody else from making a profit off of someone else, whoever he may be. Therefore, even though an individual may not have suffered any economic damage, this theory would still give him the right to sue when his identity has been appropriated by another for commercial gain.

There are also, a number of other reasons and policies that tie in with the previously mentioned theories. Some would claim that by giving up their Right to Privacy and becoming famous, celebrities should at least be given protection for the commercial value of their now famous persona[70]. Another view is that famous identities are to be considered as equal to Trademarks. By protecting them we could prevent consumer confusion and give the “owners” incentives to invest time, money and energy into it, and thereby becoming better at what they are famous for. This is also closely related to the prevention of false endorsement. Though there already exists a law on false endorsement, the Right of Publicity grants a more generous protection than the Lanham Act as there is no need to show proof of confusion in the marketplace, to prove infringement. In a Right of Publicity claim, it is sufficient that the plaintiff and a small number of people close to him recognize that his identity has been used.

2.4.4 Descendability and assignability of the right

As the Right of Publicity has been defined as an “"inherent right of every human being[71]” protection for a famous identity can be sought for as long as that person is

[70] Supra note 4 at 97.
[71] Id. at 3.

alive[72]. What happens when that person dies is not clear however. The issue of a post mortem right has not been settled upon and is constantly being argued in the legal doctrine[73]. It is obvious that the different views on the Right of Publicity, as a tort derived out of the Right of Privacy or a property right, has a great effect on the question of assignability and descendibility. Those who stress the fact that the Right of Publicity has developed out of the Right to Privacy, hold that the Right of Publicity is a personal right. As such it belongs only to the person concerned and it ceases to exist at the death of that person. The rights granted by the Right to Privacy cannot be assigned nor descended and the same could be true for the Right of Publicity.

From what has been described earlier, the Right to Privacy and the Right of Publicity protect different interest. The first one seeks to protect people's feelings and human dignity, which makes it very personal. The later, is mainly concerned with the commercial value of a person's identity, which is not as closely related to that person. If we regard a famous identity to be a value created by the famous person, then his family should be allowed to profit from it even after his death. This coincides with the theory of economic incentive, which would hold that people put more effort and money put into developing their identity if they can expect it to be a valuable asset also to their descendants.

It seems to be the most common view, that the Right of Publicity is actually a pure property right[74]. Whether viewed as Intellectual Property or simply property in

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[72] Traci S. Jackson, *How far is too far? The extension of the Right of Publicity to a form of Intellectual Property comparable to trademark/Copyright*, 6 Tul. J. Tech. & Intell. Prop. 181, 184 (2004).
[73] Vicky Gerl Neumeyer, *The Right of Publicity and its descendibility*, 7 U. Miami Ent. & Sports L. Rev. 287, 289-300 (1990).
[74] Jan Klink, *50 Years of Publicity rights in the United States and the never ending hassle with Intellectual Property and Personality rights in Europe*, 4 I.P.Q. 363, 385 (2003).

general, the right ought to be both assignable and descendible just as other types of property. Again, there is only case settled by the U.S. Supreme Court concerning the Right of Publicity but it is often cited to support this view. In Zacchini, the court made an analogy between the Right of Publicity and patent and copyright law. "As we later note, the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors[75]". If the view of the court is the one to follow, then it would not be reconcilable to take that right away just because the creator of it has passed away. Other types of property are freely assignable and descendible and the possibility of exploiting it is not extinguished at the death of the owner[76].

Another issue that has come up, is whether or not the identity has to have been exploited, for the descendants to have a Right of Publicity cause of action. Some courts have found this to be a middle way between not allowing protection after death and granting full protection to the descendants of a celebrity[77]. As with the previous question, classifying the right would be the easiest way to determine what should or should not be required. If the Right of Publicity is established as a property right, then there should be no such requirement. Nobody would claim that the owner of a piece of land has to prove that the previous owner exploited the land, for him to have a cause of action for trespassing. Furthermore, copyright, which is often considered similar to the Right of Publicity, exists in a work as soon as it is created and there is no need to exploit the work for it to be valid also for the descendants.

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[75] Supra note 40 at 573.
[76] Supra note 18 at 351.
[77] *Id*. at 350.

3. PRIVACY AND PUBLICITY RIGHTS IN EUROPE

In general, most countries in continental Europe recognize some type of right of privacy or right of personality. Most common is a protection for a person's name and likeness. Very often, however, other characteristics are also protectable, though they may not be specifically mentioned in a statute. These traditional rights are personal, privacy rights. Most countries grant them with the sole intent to protect people from intrusion into their private lives, libel and hurt feelings. Since they are based on this rationale, the rights are tied to the person, and therefore generally not assignable nor descendible. Some countries have however, also recognized the need to protect the commercial value in a person's persona. This is today only an emerging right and principles for how it should be applied and what it can cover are far from established. To understand what is going in this area in Europe right now, it is interesting to look at the different approaches that have been taken there. By comparing the legal status in a few different countries it may be possible to determine whether or not a common right, similar to the Right of Publicity, could be possible for the countries of the European Union. Though the status of rights of this kind varies from country to country, there are some common rules that apply to most European countries.

3.1 General rules for protection of privacy within the EU

For the countries that are part of the Council of Europe and that have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms[78], there is an obligation to protect certain rights and freedoms of its citizens[79]. Article 8 of the Convention contains a very broad protection for the individual's right to privacy and it states that:

1) Everyone has the right to respect for his private and family life, his home and his correspondence.
2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society and in the interests of national security, public safety and economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others[80].

Article 13 guarantees that each country should provide its people with an effective remedy before a national authority, in case of a breach of the articles of the Act. This makes the countries directly responsible for the enforceability of the rules and ensures

[78] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. Hereafter called the ECHR.
[79] Les P. Carnegie, *Privacy and the press: The impact of incorporating the European Convention on Human Rights in the United Kingdom*, 9 Duke J. Comp. & Int'l L. 311, 327 (1998).
[80] Supra note 78. Article 1.

that they actually implement them in their legislation[81]. The extent to which the rights have to be protected are not expressed however, and as long as there are remedies available, affording at least some degree of protection to the people, the State has probably fulfilled its obligation under the Act[82]. If there is doubt, whether or not a State has provided its citizens with sufficient remedies, the European Court of Human Rights in Strasbourg can try an individuals complaint of a breach committed by his own country.

The rights in the Act are not absolute and sometimes they have to be balanced against one another. This is often the case with Article 8 and Article 10. The latter grants all individuals the right to freedom of speech and holds that:

> 1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information

[81] *Id.* Article 13.
[82] Supra note 79 at 338.

received in confidence, or for maintaining the authority and impartiality of the judiciary[83].

One of the problems with the privacy right granted in the ECHR, is that it applies only to the relationship between and individual and the state. The duty to protect privacy, in accordance with the Convention has, however, sometimes been interpreted as invoking a duty upon the State and the courts of that State to ensure that the rights are also enforced between private parties. An application of the Articles in this way has been called the "horizontal effect" or the "indirect horizontal effect"[84]. As will be described later, this issue has been heavily debated in countries such as England and the significance of this will be further developed later on.

For the member countries of the European Union, there is a set of rules establishing a certain right of privacy for the citizens of the States. These rules are set forth in a European Directive from 1995, also known as the European Data Protection Act[85]. The Data Protection Act requires that all member countries enact laws that shall "protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data[86]". The purpose behind the rule is to protect people from having private information about them gathered and distributed without their permission "amongst commercial, governmental, or private

[83] Supra note 78. Article 10.
[84] Lauren B. Cardonsky, *Towards a meaningful right of privacy in the United Kingdom*, 20 B.U. Int'l L.J. 393, 404 (2002).
[85] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Hereafter called the EU Data Protection Directive.
[86] *Id*. Article 1(1).

information miners"[87]. The personal data, that can be protected, includes "any information relating to an identified or identifiable natural person[88]". Whenever a person can be directly or indirectly identified, through physical appearance or other factors that refer to him, he is and identifiable person. Because of this broad definition, it is reasonable to assume that a person's image that is transmitted electronically constitutes "personal data"[89]. The EU Data Protection Directive could apply to some cases where you have a claim based on the American notion of a right of privacy or publicity. Whenever a celebrity or private person finds that his name, image or other characteristics have been collected, processed and used for commercial purposes through an electronic transmission, they could have a claim under the Act[90].

There are however, limitations to the right in the Act itself that limit its applicability. Following Article 1(1) where the right is granted, Article 3 holds that the rule does not apply to non-automatic data processing or to processing by natural persons[91]. It is the collection and processing of data that is being focused on in the Act and not the subsequent use of it. Therefore, by adopting another way of gathering and using information, a company's intrusion into someone's privacy and appropriation of data may fall outside the frame of this right. In addition to the given limitations, there is also an exception for processing with a journalistic purpose[92]. This ensures a free flow of information in certain situations and has a strong resemblance with other rules attempting

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[87] Marie Clear, *Falling into the gap: The European Union's Data Protection Act and its impact on U.S. law and commerce*, 18 J. Marshall J. Computer & Info. L. 981, 985 (2000).
[88] Supra note 85. Article 2a).
[89] Peter M. Bryniczka, *Irvine v. Talksport Ltd.: Snatching victory from the jaws of defeat—English law now offers better protection of celebrities' rights*, 11 Sports Law. J. 171, 193 (2004).
[90] *Id.*
[91] Supra note 85. Article 3.1-3.2.
[92] James R. Maxeiner, *Symposium: Data protection law and the european union's directive: the challenge for the United State,* , 80 Iowa L. Rev. 619, 633 (1995).

to balance a right of privacy with the right to freedom of speech or information. Due to the restrictions on what kind of use is covered by the Act, there is only some degree of protection for people's privacy through the rules. In all instances, the Act appears to be concerned only with protection of the individual's privacy and nothing indicates that there is room to recognize a proprietary interest in the data[93].

The implementation and application of the rules above, differ from country to country. Very often the rules granted in European Acts, such as those mentioned above, are excessive as the countries themselves have already well-developed rules to protect the same interests. This makes it difficult to identify a general, homogenous right in the countries within the EU. In order to determine, whether or not it would be possible to harmonize regulations in this area and what they would look like, it is important to look at the development in the individual countries. To understand what is going in this area and where the countries are heading, it is also essential to keep in mind the different approaches that have been governing in each country. By comparing the legal status in a few different countries and how it has come about, the possibility of to establishing a common right, similar to the American Right of Publicity, will be explored below.

[93] *Id*. at 629.

4. ENGLAND

In England, a specific right of privacy has never been recognized in the national law[94]. Other laws and principles have however been used by the courts, to protect people's privacy interest when it has been found necessary and possible. With the European Acts granting privacy to individuals of the States, it is now impossible for the British courts not to recognize the need for a protection of people's privacy. Still, the way this is to be accomplished is heavily debated in the UK and the strong concern for freedom of speech and freedom of information continues to be an obstacle for the development of a separate right of privacy[95].

4.1 Older rules protecting privacy and publicity interests

The national laws and regulations in England have not yet been extended to protect the privacy or the property interest people have in their identity. These interests have, nevertheless, been acknowledged to some extent and are in some instances protected by the Press Complaints Commission (PCC) and its Code of Practice. The problem with these rules however, is that they are only self-regulatory and that the decisions based on them cannot be appealed and have no actual force of law[96].

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[94] Supra note 79 at 317.
[95] Jörg Fedtke et al., *Concerns and ideas about the developing English law of privacy (and how knowledge of foreign law might be of help)*, 52 Am. J. Comp. L. 133, 152-153 (2004).
[96] *Id.* at 195.

With time, the British courts have found a need to protect individuals from certain uses of their persona. Still, judges have remained reluctant to create a new tort for privacy intrusion and have argued that the need can be met by developing and stretching current legal principles[97]. In other words, the protection had to be construed based on other, already existing torts in British law. This view is still prevailing today, even though criticism is now increasing. The available remedies for those who feel like their private life has been invaded or their persona has been commercially exploited need to base their claim on; passing off, malicious falsehood, false endorsement, defamation, libel, breach of confidence or some other tort[98]. Another possibility is to claim infringement of Intellectual Property rights[99]. In order to have a valid claim however, a person needs to prove that what he is trying to protect falls within the scope and meets the criteria for protection under these rules.

4.2 The new causes of action protecting a Right of Privacy

The British rules, described above, still apply in many cases but due to the ratification of EU directives other regulations now apply to cases involving privacy issues.

4.2.1 Privacy protection under The EU Data Protection Directive

With the new European regulations in this area, the ECHR and the EU Data Protection Directive[100], there has been a slight change in the application of a right to

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[97] *Id.* at 136.
[98] *Id.* at 133-134 .
[99] Hayley Stallard, *The Right of Publicity in the United Kingdom*, 18 Loy. L.A. Ent. L.J. 565, 566 (1998).
[100] Supra note 85.

privacy in the British courts. The notion of a right of privacy is now recognized but as the implementation of the rules is left up to the States, it is not certain that there has really been a dramatic change and that the right of privacy receives sufficient protection in the U.K. In July 1998 a new Data Protection Act[101], complying with the rules in the EU Data Protection Directive, was approved by the U.K. Parliament. The citizens of the U.K. can now rely upon this for protection of privacy in communications by means of "public telecommunications, networks, or services" [102]. The applicability of these rules in cases where someone's privacy has been invaded is restricted however. As there are only certain ways in which the use of someone's identity constitutes an infringement of these rules, there are still many ways in which personal data can be collected and exploited commercially.

4.2.2 Privacy protection under The European Convention on Human Rights

The ECHR was incorporated into British Law in 2001 through the enactment of the Human Rights Act[103]. The Act ensures that the rights granted in the ECHR will be enforced in the UK and thereby a right to privacy has been introduced to the British courts. As explained earlier, the ECHR only regulates the relationship between the public authorities and private individuals of a State. Only if a States decide to give the rules in the ECHR "horizontal effect" will they also apply to the relationships between the citizens of that State[104].

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[101] Data Protection Act 1998.
[102] Supra note 84 at 397.
[103] Human Rights Act 1998. Hereafter called the HRA.
[104] Clive Walker, Russell L. Weaver, *The United Kingdom Bill of Rights 1998: The modernization of rights in the old world.* 33 U. Mich. J.L. Reform 497, 540-541, (2000).

Section 6(1) of the HRA states that “it is unlawful for a public authority to act in a way that is incompatible with a Convention right” Since the British courts are such “public authorities” under the Act it imposes a duty on them to protect the right of privacy in the ECHR when settling cases between private parties. Thereby, even though the Convention does not apply to private parties directly, the courts may apply them indirectly to private relations. This application would then constitute an "indirect horizontal effect." Due to the fact that the Convention only applies indirectly, through interpretation and application of pre-existing law, private individuals still have to find a basis for their claims in the same torts as earlier[105].

4.2.3 Problems with the implementation of privacy rights under British torts

Just as with the attempts to stretch Intellectual Property protection to cover privacy claims, there are problems with construing that protection based on the existing torts. Two of the most commonly used torts used in privacy cases are the ones of passing off and breach of confidence[106]. Traditionally, a claim for breach of confidence requires a pre-existing confidential relationship[107]. As the tort has been used to protect privacy interests this requirement has been compromised in order to fit situations in which privacy interests have been at risk[108]. Instead of requiring a confidential relationship, it has been a focus on confidential information. Not all information that is private is confidential however, sometimes it may even be part of the public domain, and how that

[105] Supra note 84 at 404.
[106] Supra note 99 at 567.
[107] Supra note 95 at 143.
[108] Supra note 84 at 409.

type information is to be treated is still unclear[109]. This is not the only aspect of the tort that causes uncertainty as to its applicability. The purpose behind the breach of confidence tort for example, is to restrain publication when there has been a breach of confidential relationship. Privacy interest may have been violated without there being any publication. In such situations, it is not clear whether or not privacy can be protected under this cause of action.

The tort of passing off is intended to protect the property interest one would have in business goodwill[110]. Passing off is the tort that in privacy cases appears to protect the same values as the American Right of Publicity. Instead of focusing on protection for the integrity of individuals it has the economic value of the identity appropriated as its main concern. In the case of Reckitt & Coleman Products v. Borden, Inc. the given elements of the claim were; an established goodwill, misrepresentation by the defendant and damage, or likelihood of damage to the plaintiff[111]. Earlier, a plaintiff had to prove consumer confusion and for this to be possible there had to be a common field of activity[112] . This is no longer a criterion for applicability and the courts have modified several elements of the tort to adapt it to new causes of action[113]. The change in criteria is demonstrated in the famous case of Irvine v. Talksport Ltd. In this case the famous race car driver Edmund Irvine filed a lawsuit against a radio station using his image in a brochure that was part of the station's promotional campaign. In it's judgment the court held that passing off can occur simply through the unlicensed use of someone's reputation or goodwill [114]. The

[109] Supra note 95 at 162.
[110] Supra note 89 at 172.
[111] Reckitt & Coleman v. Borden, [1990] R.P.C. 341.
[112] McCulloch v. May, [1947] 65 RPC 58.
[113] Supra note 89 at 178.
[114] Irvine v. Talksport Ltd., 2002 WL 237124, [2002] 1 W.L.R. 2355 (Ch.).

plaintiff and the defendant did not have a common field of activity but the court still found in favor of the plaintiff emphasizing that the purpose of the passing off tort is to "vindicate the claimant's exclusive right to his goodwill and to protect it against damage, even if it was not immediate[115]". Furthermore, Judge Laddie stated that the damage covered by the passing off tort includes mere reduction of the exclusivity of the goodwill. He also noted the importance of allowing a cause of action for unauthorized use, in any field of activity. In society today it is very common that a famous person has an interest in exploiting the value of his persona outside his current field of activity[116].

As mentioned earlier, the tort of passing off has striking similarities with the American Right of Publicity, though the stretch of the tort is intended to cover a right to privacy. In Irvine v. Talksport Ltd., the court even went so far as to proclaim a property right for the plaintiff in his goodwill and reputation. Based on the reasoning in this case, passing off now encompasses false endorsement[117] and on appeal plaintiff was compensated for the value of what he would have charged for an endorsement deal[118]. The difference from the American Right of Publicity and the problem with using the tort in privacy cases is that it only covers cases where the basic element of misrepresentation is present.

Intrusion of privacy and misappropriation of someone's identity can occur in so many different ways that fall outside the frames of the passing off tort. Therefore, even with this cause of action, the British system does not seem to have full coverage for all the privacy issues that they may be faced with. On top of the question of finding a valid

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[115] *Id.* at 2357
[116] Supra note 89 at 183.
[117] Supra note 114 at 2369.
[118] Supra note 89 at 191.

cause of action in privacy cases, there is the issue of who can be protected. In Britain public figures have often been considered "fair game" and just as in the U.S., the view is that famous persons have given up their right to privacy[119]. With no Right of Publicity it could leave this category of people without any protection for their privacy or for the value of their persona. Recently, there appears to have been a shift in this view however and the need to protect the privacy of public figures has been acknowledged in case law dicta[120]. The protection for them may be significantly thinner than for private individuals but it is now at least in effect.

In addition to passing off and breach of confidence, there are a number of torts in British law, that have been used to fill the gaps where passing off or breach of confidence has not applied[121]. These various torts are all restrained by and dependent upon, certain requirements that, as will be demonstrated below, do not exist in the right of privacy of other countries. Due to these requirements, a person's right of privacy may not be protected if it does not fit under any of the existing torts[122]. Applying different torts in each case, without a separate, specific rule that establishes who and what is protected under the right of privacy, it is questionable if the U.K. really fulfills the requirements of the Human Rights Act. Many critics are therefore now pushing for the development of an independent tort of privacy, consisting of clear, unambiguous rules[123].

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[119] Supra note 95 at 144.
[120] *Id*. at 147.
[121] Supra note 99 at 567.
[122] Supra note 95 at 182.
[123] *Id*. at 183.

5. FRANCE

Although the development of a Right of Privacy began as early as1858 in France, when the first privacy tort was first recognized, it is in the last 30 years that the protection has developed and expanded rapidly[124]. Today the concept of a Right to Privacy is not only well established but also broad in its scope[125].

5.1 Protection for Privacy under the French "personality rights"

The French right to privacy is one out of a whole bundle of "personal rights", including the right to protect one's honor and reputation, the right to one's image, etc.[126]. Even though France is a civil law country, the notion of a right to privacy was first recognized by the courts in a number of cases. Originally, there was no separate right of privacy and in the cases where a right of privacy was first recognized, the claims were based on different tort principles[127]. The first case in which an application of a tort was stretched to protect a privacy interest was the Rachel affair[128]. In this case the court gave the family of a deceased actress the right to prevent sketches of the actress, on her deathbed, from being sold to third parties. The sketches had been drawn based on private photographs that the artist had acquired from the photographer. What is interesting about

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[124] Jeanne M. Hauch, *Protecting private fact in France: The Warren & Brandeis tort is alive and well and flourishing in Paris*, 68 Tul. L. Rev. 1219, 1222-1223 (1994).
[125] *Id*. at 1300.
[126] Elisabeth Logeais, Jean-Baptiste Schroeder, *The French right of image: An ambiguous concept protecting the human persona* , 18 Loy. L.A. Ent. L.J. 511, 513 (1998).
[127] Supra note 124 at 1231-1232.
[128] Judgment of June 16, 1858,Judgement of June 16, 1858, Trib. Pr. Inst. De la Seine, 1858 D.P. III 62 (Fr.). (The Rahel affair).

this case is how the court seemed to disregard the criteria of negligence and recklessness in the tort, as it stated that the right to oppose the publication is absolute. Another noteworthy point in the holding is that the court granted the right to all inividuals, regardless of whether they are celebrity or not[129]. The basis for the claim in this case, though sought to protect a privacy interest, was the right of image, which will be discussed later on.

The real development in case law began in the 1950's and in 1954, a significant case was settled by the French courts. The Marlene Dietrich case[130] which gave Marlene Dietrich one of the largest damages ever awarded in a privacy case, also brought along other important changes in the French right of privacy. Dietrich had filed a law suit against publishers of a series of articles that were supposedly based on her life. The court found for the plaintiff and stated that "[T]he recollections of each individual concerning her private life are part of her moral property; ...no one may publish them, even without malicious intent, without the express and unequivocal authorization of the person whose life is recounted[131]". This statement made it clear that the story of one's life belongs to the individual and cannot be published without his consent. Furthermore, the court had now started moving the right of privacy closer to a property right[132] .

After developing the right of privacy, "droit de la personnalité", in case law for over a century and after a considerable increase in cases based on this principle, legislation recognizing the right was finally introduced in 1970[133] in the Code civil,

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[129] Supra note 124 at 1233.
[130] Judgment of Mar. 16, 1955, Cour d'appel de Paris, 1955 D.S.Jur. 295 (Fr.). (The Dietrich affair). (Translated in Hauch, supra note 7, at 1237- 38).
[131] *Id.*
[132] Supra note 124 at 1238.
[133] *Id.* at 1222.

article 9[134]. Article 9 states that "[e]ach individual has the right to require respect for his private life [or privacy]". More support for privacy rights can be found in Article 226-1 of the French Criminal Code[135]. This article holds that a person who violates the intimacy of one's privacy, "by fixing, recording or transmitting, through any device, the image of a person in a private place, without their consent, to penalties of imprisonment of one year and a fine of ¢¢300,000[136]". To balance this right against interests of the public, there are three exceptions established in French case law which protect certain acts from Right of Privacy claims. These exceptions are: (1) photographs taken in a public place; (2) uses involving freedom of speech and news information and (3) parody[137]. France has ratified the European Convention on Human Rights but as there already exists a strong protection for privacy in French law it appears as if it is generally article 10, protecting freedom of expression, that is being applied. With this principle incorporated, the French courts are, at least to some extent, forced to find a balance the interest between the public and private individuals[138].

What the right of privacy encompasses is not specifically defined, instead there is an enumeration of the different categories of information that is private[139]. The categories of private information cover family life, sexual activity and sexual orientation, illness, death, and even private leisure As opposed to the situation in the U.S. there is no distinction made between celebrities and non-celebrities. The Cour de cassation, France's highest court has expressed its position with the following words: "[e]ach individual,

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[134] Code cívil, (C. civ.). Art. 9.
[135] Code pénal, (C. pen.). Art. 226-1.
[136] Supra note 126 at 516.
[137] *Id*. at 526.
[138] Supra note 124 at 1254.
[139] *Id.* at 1246.

whatever his status, his birth, his wealth, his present or future position, has the right to require respect for his privacy[140]". The protection granted may be stronger when it comes to anonymous individuals but there is no exception for people who happen to be famous. What can be a problem for celebrities, is the fact that only private facts are protected. In other words, information regarding one's professional or public life cannot be protected[141]. Therefore, when a person is involved in something that involves the public or that could be of interest for the public, he may not be able to prevent that information from being used. This is very similar to the American exception for information that is "newsworthy"[142].

5.2 Property rights in the Right of Image

In recent years the French courts appear to have started to acknowledge a property interest and a "quasi-property" right in a person's image[143]. Originally, the right of image was considered as only a small part of the right to privacy. However, from the time France adapted its rules on privacy to comply with international standards, such as those set forth in the ECHR the right of image seems to have taken on a role of its own[144]. As with the right of privacy, the right of image was first developed in case law[145]. The previously mentioned case, involving the actress Rachel, is one examples of how this right was first recognized. While it is today an established principle, used in the French courts, it has yet not been recognized in statutory law[146]. Thought it has derived from

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[140] *Id.* at 1253.
[141] *Id*. at 1249.
[142] *Id*.
[143] Eric H. Reiter , *Personality and patrimony: Comparative perspectives on the right to one's image*, 76 Tul. L. Rev. 673, 673 (2002).
[144] Supra note 126 at 515.
[145] *Id*. at 513.
[146] *Id*. at 533.

French tort principles, just like the right of privacy, it is today not dependent on the tort requirements to be applicable[147]. The right of image has been developed and stretched out and today it covers such characteristics as a person's voice as a sound image[148]. Also, the situations to which the right applies has changed. The right of privacy, as well as the right of image, has traditionally been viewed as negative rights meaning that they give the owner of the right the possibility to protect his persona from being exploited. It's a right that is an inherent part of a person that can be used to prevent exploitation. With time however, some doctrinal writers claim that also a positive right has emerged for the right of image[149].

The new, positive right is not found inherent in the person but is based on the view that a person's image is a commodity[150]. The right thereby allows the owner alone to exploit the commercial value of it. The right of image has therefore in the legal doctrine been claimed to be split in two and include both a right to image and a right over/of image. The latter being the positive right[151]. It has been debated whether or not the right over ones image can exist and be applied independently or if it has to be connected to the right to one's image. It appears as if the trend is moving towards an application of the right even in situations where there is no privacy interest to protect and merely an interest in the commercial value of the image[152]. A good example of this is the Papillon case from 1970[153].

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[147] *Id*. at 516.
[148] Supra note 143 at 683.
[149] Supra note 126 at 512.
[150] Supra note 143 at 684-685.
[151] *Id.* at 685.
[152] *Id*. at 684.
[153] T.G.I. Paris, ord. réf., Feb. 27, 1970, JCP 1970, II, 16293, note Lindon (the Papillon case).

In this case an author had written a book about a former convict, known to the public as Papillon. The author had based the book on documents he had obtained from the court that had sentenced him to life imprisonment. Papillon then brought an action against the publisher. The court did not find the publication of the book to infringe Papillon's right to privacy as the documents were public and the picture was taken in a public situation. Nevertheless, the court held that the photo on the cover, which had been used without Papillon's consent, was an infringement of his right of image.

Another case showing the same tendency by the courts is the Alain Delon case[154]. Here, a comedian sued a tabloid that had published his picture along with a story on him. In the lower court his claim of illegitimate use of his image and private life was rejected but the Cour de Cassation reversed this judgment and held that when the lower court ruled based on the moral damage alone, it failed to take into consideration "the commercial prejudice suffered in the form of injury to Delon's career[155]". The more often we find cases in which a right of image has been violated, without it ever touching privacy concerns, the clearer it becomes that the right of image has now been allowed to protect mere property interests while the right of privacy still only protect the personal, moral interest of individuals[156].

Though the French right of privacy does not discern between famous and anonymous individuals, the French courts seem to make a distinction when it comes to the right to image. Only those who have commercially exploited their image, prior to the unauthorized use, can succeed with a claim of infringement of their right of image,

[154] Cass. 1e civ., Nov. 17, 1987, Bull. Civ. I, No. 301, 216, note M. Delon. (Delon v. Ici Paris).
[155] Supra note 143 at 685.
[156] *Id*. at 722.

without addressing any privacy concerns[157]. A property right in one's image does therefore only seem to exists here however. While it may be essential to have exploited one's persona commercially, in order to receive protection, a person who has successfully exploited this value is usually granted lower damages. The courts seem to reason that the less a persona has been exploited, the more valuable it is[158]. Whether or not such an assumption is true is probably left to be determined.

5.3 Legal rationale for protection of a commercial interest

It is clear to see that the new French right of image has a close resemblance with the American Right of Publicity. Even the reasoning behind the new right is similar to the rationale behind the Right of Publicity. As one French court expressed it:

> "[I]n the artistic field, fame stems from talent, work and lengthy, painstaking efforts along one's career, . . . a capital . . . the person enjoying it is the only one to decide how and when to exploit it . . . . Everybody is entitled to oppose any impairment of his or her persona, any prejudice to the representation which he or she may legitimately expect that people or the public will have of him or her[159]".

Just as with the Right of Publicity in the U.S., the right of image has grown out of the right of privacy. Today, this right protects proprietary values and not only the personal interest of the individual. Furthermore, other aspects, such as a person's voice

[157] *Id.* at 723.
[158] Supra note 126 at 535.
[159] T.G.I. Paris, 1e ch., Apr. 20, 1977, D. 1977, 610, note R. Lindon (Christian Alers v. Pierre unia).

can fall under this right and it generally applies to celebrities more than to non-celebrities. The distinction between protection for a privacy interest and a publicity interest, under the right of image, is not very clear in France but one can often tell from the amount of damages awarded, what interest the French courts are trying to protect. The higher the commercial value of the persona is the higher are the monetary damages[160]. Also, in the past, cases involving personality and privacy rights were often resolved using specific relief rather than damages[161]. Injunctions, for example, have been very common. As this new, parallel property right has developed, monetary damages are becoming increasingly more common and higher in amounts[162].

5.4 Transferability and descendibility of the new commercial right

Transfers of a Right of image are possible and the only thing that is required is consent of the owner of the right. Anyone can therefore bargain for the right to use the image in different contexts[163]. When it comes to descendibility, the situation is not as clear. Privacy rights were in the past considered descendible in case law but this view has now been overruled[164]. Personality rights are considered personal and as such they protect only the individual that they are tied to. Once the owner of the right passes away, he takes these rights with him. This reflects the view of privacy rights protecting a moral right rather than a commercial interest. The new right of image however, appears to protect both interests. An individual's right to prevent his image from being used in a context that brings him embarrassment is looked after and in recent case law, so is the

[160] Supra note 95 at 174.
[161] Supra note 124 at 1235.
[162] *Id*. at 1225.
[163] Supra note 126 at 532.
[164] Supra note 95 at 177.

proprietary interest a person has in his persona. As the value of the right is not only of personal nature but has actual monetary value, it has been accepted to pass on to the heirs of the deceased individual.

Gradually, the French courts seem to move towards recognition of the right of image as being a descendible right. One of the earliest cases where the heirs of a right of image were compensated for unauthorized use involved the famous actor Raimu[165]. Here, an advertising company had used a caricature of the deceased actor in a promotional campaign. The widow brought a law suit for "invasion of privacy and damage to the image, fame, and memory of her deceased husband"[166]. As in most cases involving the right of image where the plaintiff is an heir, the court did not grant her any compensation for damage to dignity. Nonetheless, it did award her damages to compensate her "for her lost share of the profits made from the advertising use of her husband's image"[167]. In its' holding, the court was very clear about it's position regarding descendibility:

> "The right to one's image has a moral and patrimonial character; the patrimonial right which allows the contracting of the commercial exploitation of the image for monetary compensation, is not purely personal and passes on to heirs[168]".

[165] T.G.I. Aix en Provence, Nov. 24, 1988, J.C.P. ed. G. 1989, II, 21329, note J. Henderycksen, affirmed, CA Aix en Provence, 2e ch., May 21, 1991, R.J.D.A. 8-9/91, 756.
[166] Supra note 126 at 537.
[167] Supra note 165.
[168] *Id.*

What is interesting about this new development, is that though the right of image has derived out of privacy and personality rights it can now be applied to situations where there has been no damage done to the feelings or integrity of an individual. For heirs, it is only in very rare cases that moral harm can be compensated.

6. GERMANY

In Germany, following the World War II, there was a desire to reinstate important values in society, such as human dignity and personal freedom[169]. As these values had been severely abused during the Nazi regime the German legislators now chose to protect them by incorporating them as fundamental parts of the new Federal Constitution of 1949 (Grundgesetz)[170].

6.1 The German Right of Privacy: a "right of personality"

Article 1 of the Constitution imposes a duty on all state authorities to respect and protect "the dignity of man". In Article 2 everyone is said to have "the right to the free development of his personality in so far as it does not infringe the rights of others or offend against the constitutional order or the moral code". On top of this, there are also rules in the German Civil Code, the Bürgerliches Gesetzbuch[171], that have been used by the courts to protect certain aspects of personality.

Section 826 states that: "A person who wilfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage". Furthermore, paragraph 1 of Article 823 provides:

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[169] Tilman Ulrich Amelung, *Damage awards for the infringement of privacy – the German approach*, 14 Tul. Euro. Civ. LF 15, 19 (1999).
[170] Grundgesetz. Hereafter called GG.
[171] Bürgerliches Gesetzbuch § 12 Hereafter called BGB.

"A person is obliged to pay compensation for either negligently or intentionally violating the life, health, freedom, property or any other right of another where:

(i) there has been an act that has violated an interest and caused damage;

(ii) the violation of the right is unlawful and not justified;

(iii) it was caused by intentional or negligent fault."

The enumeration of protected right ends with "or any other right", which leaves it open for the courts to make their own interpretation of what can be protected. Based on this Section of the BGB and Article 1 and 2 of the Constitution the German Federal Court, Bundesgerichtshof (BGH), has developed a "general right of personality" known as "allgemeines Persönlichkeitsrecht"[172]. The starting point for this development came in 1954 with the famous Schacht decision[173]. In this case a lawyer wrote the editor of a newspaper asking for corrections of an article that linked his client to the Nazis. The letter was later published in the same newspaper without the lawyers consent. The publication of the letter was neither defamatory nor violating any copyright but the plaintiff based his claim on a right of personality. Prior to this case such a right had never been recognized but here the German Federal Court created it by holding that "the general personality right must be regarded as a constitutionally guaranteed fundamental right[174]".

[172] Supra note 169 at 17.
[173] BGHZ 13, 334 (1954) (Schacht-Briefe).
[174] Supra note 143 at 689.

The extent of this new right was not defined in this case but in later decisions the contours of the right have become clearer. Under the "general right of personality" one can find a number of different rights such as the right to one's image, the right to one's name and the right to oppose publication of private facts[175]. There is no specific Right of Privacy recognized in German law but privacy rights are covered by this "general right of personality"[176]. Some of the rights protected under this principle are also protected by specific provisions in the law such as Section 22 of the Kunsturhebergesetz (KUG) granting a right to one's image[177]. The other rights of personality however, are only protected by the general principle established by the courts. Originally, the enumerated rights that exist in the legislation were supposed to be exhaustive and limit the scope of applicability[178]. With time a need for interpretations and expansion became apparent and the courts have therefore had to fill in the gaps themselves when found to be necessary. This way, new rights and new elements of the pre-existing rights have been able to develop[179].

Originally, the protection offered by the Grundgesetz only applied to the relationship between an individual and the State. In more recent case law however, the "general right of personality" has been given "horizontal effect" and thus applies to relationships between private individuals[180]. The remedies available for infringements of

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[175] *Id.*
[176] Susanne Bergmann, *Publicity rights in the U.S. and in Germany: A comparative analysis*, 19 Loy. L.A. Ent. L.J. 479, 480 (1999).
[177] Gesetz betreffend das Urheberrecht an Werkender bildenden Künste und der Photographie Kunsturhebergesetz (KUG), v. 9.1.1907 (RGBl.S.7).
[178] Supra note 176 at 501.
[179] *Id*. at 480.
[180] Supra note 169 at 45.

these rights range from counter-statements and injunction to damages[181]. For a very long time the German courts would not award damages in cases involving personality rights as these rights were considered extrapatrimonial, without any actual value[182]. The codifiers had rejected the idea of granting monetary compensation for injuries that were nonpecuniary. In section 253 of the BGB[183] the position becomes clear through the statement: "[f]or an injury which is not an injury to property, compensation in money may be demanded only as provided by law[184]". Furthermore, section 847 of the BGB[185]defines the type of nonpecuniary injuries that could be compensated with monetary damages. These are limited to injuries to body or health, deprivation of freedom and corruption of a woman. In 1958 however, a change in this position began to develop.

6.2 The development of a commercial personality right

The case in which a pecuniary value was first recognized in personality rights was the "Gentleman Rider" case[186]. In this case an amateur show jumper sued for compensation for the humiliation he had suffered as his picture had been used in an advertisement for an aphrodisiac improving sexual potency. The court could not find any pecuniary injury but awarded damages to the plaintiff based on a fictitious license agreement to use his image. The court's basis for this interpretation was that by violating a personality right there had been immaterial damage that could be compensated for

[181] *Id*. at 17.
[182] Supra note 143 at 690.
[183] § 253 BGB.
[184] Supra note 143 at 690.
[185] § 847 BGB.
[186] BGHZ 26, 349 (1958) (Herrenreiter).

through the award of damages[187]. It appears also as if the court found that without the availability of damages, the protection for these fundamental rights would in some instances be illusory[188]. The protection of the commercial aspects of personality rights has been very limited as the German Courts have been very determined to protect the interests of the public. As in France, England and the U.S. there are situations when the personality rights have to stand back in favour of another interest and a balance has to be found between the right of the individual and the rights of the public.

The principles that can override the personality rights are the right to free speech right to information, freedom of the press, etc[189]. In Germany these principles have often been given priority over the interest of a private individual, even when the violation seems motivated by a commercial interest rather than mere information of the public. One case where this attitude became obvious involved one of Germanys' famous soccer players. The image of the soccer player had been used in a calendar sold to the public[190], for the distributor's own commercial gain. The soccer player tried to stop the distribution of the calendar and was thereafter sued by the distributor. In spite of the distributor's clear commercial motive and the possible loss of the defendant's own commercial prospects, the court held that "the use of the image was connected to the informational needs of the calendar, rather than for strictly commercial ends[191]". The same conclusion was reached in a case from 1988 where the famous German tennis player Boris Becker

[187] Supra note 143 at 690.
[188] Supra note 169 at 20.
[189] Supra note 176 at 489.
[190] BGH NJW 1979, S. 2203 (Beckenbauer).
[191] *Id.* at 2204.

sued the distributor of a tennis instructional book, which had his picture on its dustjacket[192].

The German courts are still very protective of public interests but have gradually started recognizing the commercial interest a person may have in his own persona. By recognizing that, they have also granted it a stronger protection. In 1999, the daughter of Marlene Dietrich sued for damages because of the unauthorized use of her mother's image in the advertisement for a musical about her life[193]. The two main issues dealt with in this case concerned the protectability and inheritability of personality rights. The lower courts had rejected the protection of a simply commercial interest but the BGH overturned these rulings and held that patrimonial interests were also protactable, especially for famous individuals[194]. This commercial interest was, according to the court, to be protected regardless of whether or not there was any moral injury. Furthermore, unlike compensation for moral injury, compensation for commercial value was not to be dependent on the "the severity of the violation of the right[195]". The statements made by the court thereby made the commercial interest of individuals an absolute right just like any other right of personality.

In order to find a proper balance between the rights of the individual and the rights of the public, the life of a private person has been divided into three spheres, each granted different degrees of protection. The three spheres are 1) the intimate, 2) the private, and 3) the individual. While the intimate sphere cannot be compromised at all, the individual sphere, dealing with a person's professional life, etc, will most likely have

[192] Oberlandesgericht (OLG) (Court of Appeal) Frankfurt, NJW, 42 (1989), 402.
[193] BGHZ 143, 214 (1999) (Marlene Dietrich).
[194] Supra note 143 at 693.
[195] Supra note 193.

to give in favour of public interest. Most of the balancing will therefore take place when dealing with information in the private sphere. Here, the status of a person has great impact on the outcome. Public persons will be granted less protection for their privacy than anonymous individuals[196]. This distinction between individuals seems to be expressed in a statement by the Federal Constitutional Court:

> "there is no protection of the private sphere against public attention if a person has agreed to the publication of particular matters which are usually regarded as private, for example by entering into exclusive contracts concerning press coverage of events taking place in the private sphere[197]".

Though famous person's may not have as strong protection for their privacy, they are still protected by the personality rights and not exclude from this general provision as celebrities are in the U.S. Also, in Germany there is also a difference in the treatment of permanent public figures, such as famous politicians or scientists and those who only receive public attention for a limited time, such as victims of crime[198]. The people in the latter category are granted a stronger protection but the permanent public figures may be able to regain a stronger protection as their fame diminishes. The protection for the moral interest in the rights of personality applies to all people to different extents but the commercial interest, that has only recently been granted protection, seems to only apply those who have actively exploited the value of their persona.

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[196] Supra note 143 at 691.
[197] BVerfGE NJW 2000, 1021, 1023.
[198] Supra note 95 at 146.

6.3 Transferability and descendibility of a proprietary personality right

The second question dealt with in the Dietrich case was the inheritability of personality rights. As in most other countries recognizing privacy rights, the German rights of personality are considered absolutely personal and they are therefore not transferable, nor inheritable[199]. At the death of an individual his personal rights cease to exist. For at least a limited time after a person's death however, he is still protected from serious distortions of his persona[200]. The protection only allows the heirs to make defensive claims to prevent or repair moral injury and not for claims of compensation in damages. In the Dietrich case, the court recognized a patrimonial value in the actress's image. Such values, the court argued, are not highly personal but are more similar to a proprietary right and can thereby be inherited by a person's heirs[201].

6.4 German policy supporting protection for the commercial interest in a persona

The policy behind allowing inheritability here seems to be the Labor Theory, which may also serve as the general basis for the "right of personality". The value in a famous persona is considered to be created by that person through hard work. As such, it would not be fair to take this value away from him and his heirs at his death, for anyone to exploit freely thereafter. The BGH expresses this position by holding that:

> "Besides this, it seems unfair to surrender the financial value created by the achievements of the deceased and embodied in his picture, his

[199] *Id.* at 176.
[200] *Id.*
[201] *Id.*

> name or his other personality features after his death to the clutches of just any third party, instead of giving this financial value to his heirs or relations or other persons who were close to him when he was alive[202]"

It appears as if the commercial interest and the personal interest in information that is protected by the "general right of personality" are difficult to coincide. The desired characteristics for the right to the economic value does not fit with the right to keep information private or secret. The personal or moral aspects of a person's identity are inherent in the person and will live on for as long as the person does. The commercial value however, only exists for some people and is considered to be generated by efforts made by those people. As such, it might be worthy of protection for all times or at least for a few decades. With these two different views, the legal theories that apply are probably not the same and they have very distinct, contradicting standpoints.

[202] Supra note 195.

7. ITALY

In Italy, the development of a Right to Privacy seems to have been strongly influenced by the progress abroad, particularly the development in the United States. This is obvious as the legal meaning, as well as the English word for privacy has been imported into Italian law [203]. As will be discussed below, the same pattern can be observed regarding the Right of Publicity, which is an emerging and expanding concept in Italy today[204].

7.1 Italian Privacy Rights

The most fundamental source of law in Italy is the Italian Constitution[205]. In addition to the Constitution there are five distinct Codes that make up the Italian body of law[206]. Under Articles 6-10 of the Italian Civil Code[207] and Articles 96 and 97 of the Italian Copyright Law[208], a number of personality rights are protected. These rights are similar to the privacy rights in other countries and include the right to one's name, to pseudonym and to one's image. Rights protected by statute are very specific about what they protect, and they are therefore called "typical rights"[209]. "Typical rights" are based

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[203] Guido Alpa, *The Protection of Privacy in Italian Law: Case Law in a codified legal system,* 12 Tul. Euro. Civ. LF 1, 2 (1997).
[204] Silvio Martuccelli, *Symposium: International Rights of Publicity, The Right of Publicity under Italian Civil Law,* 18 Loy. L.A. Ent. L.J. 543, 545 (1998).
[205] Constituzione 1948
[206] Supra note 191 at 545.
[207] Codice civile.
[208] Codice Civile sec. 2578, Law No. 633 of Apr. 22, 1941, as amended through July 29, 1989.
[209] Supra note 16 at 109.

on interests that the legislators have found worthy of protection and the language of the Articles makes it clear that it is only these interests and nothing else that is protected under them. This does not mean however, that other rights of personality are left without any possibility of receiving recognition and protection by the courts. In Italy, the judges have been granted freedom to engage in judicial creation when they find it necessary to resolve legal matters that no law applies to. This creation of new principles is performed through "reasoning by analogy" upon the already existing legal rules and general principles. Depending on whether it is a legal rule or general principle that has been used as basis for the analogy, this type of practice is known "analogia legis" or "analogia iuris"[210].

7.2 The Italian Right of Publicity

Based on this given freedom, or this power, the courts have developed a new sort of rights; so called "un-enumerated rights". These are rights that the judges have found both worthy of, and in need of, protection. They also have similarities with the enumerated "typical rights", both in their nature and in their economic and social functions[211]. One of the "un-enumerated rights" is the Italian Right of Publicity, which was first recognized in the case Dalla v. Autovox.[212]. Dalla, a famous Italian singer, sued a company producing audio equipment for misappropriation of his persona. In its advertisement the company had placed the two most distinctive elements of the singer's appearance; a woolen cap and a pair of small round glasses on a poster. Dalla did not base his claim on an infringement of his right to name nor an infringement of his right to

[210] Supra note 204 at 548.
[211] Supra note 16 at 110.
[212] Pret. Di Roma, 18 apr. 1984, Foro It. 1984, I, 2030, Giur. It. 1985, I, 2, 453.

image or portrait because neither his name nor his picture had been used on the poster[213]. Instead, the singer argued that by using the cap and the glasses in the advertisement the company had "misappropriated the commercial value of his personal identity"[214].

The company had not misappropriated Dalla's image but had used other indicia allowing the public to identify the singer. Using its freedom to reason by analogy the court thereby found the rules for right of image to be applicable to the case. As there had not really been an infringement of the right of image but rather of the artists commercial value of his persona, the court held that the infringement was actually of Dalla's Right of Publicity. This was the first time an Italian court protected a person's identity when there had been no misappropriation of name or image and also the first time the Right of Publicity was recognized[215]. Following this case, the courts have continued to uphold the idea of protecting the commercial value of a person's identity through an extension of the right of image[216].

7.3 Requirements for a cause of action under the right

From the cases invoking such an application of the right of image, some conclusions can be drawn regarding the requirements for a Right of Publicity claim. For there to be a valid cause of action the case has to involve a public figure and not just any anonymous individual, the defendant has to have appropriated identifying characteristics of the plaintiff, the use has to have spurred by commercial gain and it must have caused

[213] Supra note 204 at 549.
[214] Supra note 16 at 109.
[215] *Id.*
[216] See e.g. Vitti v. Doimo SpA, Pret. di Roma, 6 july 1987, Il diritto di autore 1987, 570.

immediate damage for the person being exploited[217]. The protection for privacy and publicity is not absolute and must be balance against the interest of the public. On the international level, Italy has ratified the ECHR and must thereby protect such rights as the freedom of speech. Furthermore, Italy has its own national regulations protecting these interests. In a law from 1941 one can find this balance regarding the use of a person's image:

> "The reproduction of the portrait is justified by his [or her] notoriety or his [or her] holding of public office, or by the needs of justice or the police, or for scientific, didactic, or cultural reasons, or when reproduction is associated with facts, events and ceremonies which are of public interest or have taken place in public[218]".

7.4 Transferability and descendibility of the Right of Publicity

When it comes to transferability and descendibility, there appears to be no established principle in Italian law. In the legal doctrine it has been argued that the characteristics protected by the Right of Publicity are separable from the celebrity for commercial purposes and therefore, the Right of Publicity should be transferable[219]. Regarding the descendibility of the Right of Publicity on the other hand, there appears to exist three different dominant views. One view completely opposes descendibility, a second holds that the right ought to survive the death of the owner but cease to exist after the same time as a normal copyright. The third view, similar to what has sometimes been

[217] Supra note 204 at 557.
[218] Codice Civile sec. 2578, Law No. 633 of Apr. 22, 1941, as amended through July 29, 1989, art. 96.
[219] Supra note 204 at 562.

argued in the American legal doctrine, stresses that the right can only be descended to the heirs if the owner himself has commercially exploited his persona while still alive[220]. Though it seems unclear which view will prevail in court, the development of the Italian Right of Publicity has closely followed the progress of the American right and therefore it is likely that it will take after the governing view in the U.S.[221]

7.5 Legal theories behind the new right

In addition to what has already been mentioned, the Italian Right of Publicity is similar to the American one in many aspects. Besides being created through judicial interpretation of privacy rights and sharing some traits with the American protection, there are also parallels in the legal reasoning behind the right[222]. The Italian right of Publicity is intended to grant people the right to be left alone and to protect the personal dignity and autonomy of individuals. It also seeks to prevent unjust enrichment and consumer confusion -two of the most prominent rationale's behind the American Right of Publicity[223]. The right is also intended to protect a person's identity from being diluted by excessive exploitation. This is the same argument that has been used in case law the United States, one example being the Zacchini v. Scripps- Howard Broadcasting case[224].

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[220] *Id.*
[221] Supra note 16 at 115.
[222] Supra note 204 at 555.
[223] *Id*. at 556.
[224] *Id*.

8. THE NETHERLANDS

In the Netherlands, there is no specific right of privacy recognized in the law. There are however, rules that can protect a person's identity in the Dutch Copyright Act, the Auteurswet[225]. Other rules that may apply in some cases can be found in the Dutch Trademark Law[226] for example, as will be demonstrated below.

8.1. Protection of identity

When it comes to publicity interests, it is the right to portrait and name in the Auteurswet that is of particular significance. In the Act, three articles concern the use of portraits, Artcle 19, 20 and 21. In Article 21, the privacy of individuals who have not consented to their picture being taken and used is being protected[227]. Factors that may cause a use to be considered unlawful are privacy, danger, dishonour, etc. Theses factors have been defined in court rulings and based on them, one can conclude that commercial value has not been a factor in the court's opinion[228]. The consideration for people's privacy is obvious in case law and the Supreme Court has in one case supported its decision by referring to the protection of privacy granted in the ECHR[229] . Although there is no specific Right of Publicity in Dutch law, case law below shows that the need for protection of commercial interests in different aspects of the persona has already received

[225] Auteurswet 1912.
[226] Benelux Convention on Trade Marks, 704 L.N.T.S. 342.
[227] Fritz Oppenoorth, *Facets of Dutch Portrait Law*, 28 Copyrightworld 38, 39 (1993).
[228] *Id.*
[229] HR 1 juli 1988, NJ 1988, 1000.

some recognition by the courts. As Dutch judges are permitted to interpret the legal rules as they see fit, in order to reach just decisions, the introduction of a concept similar to the American Right of Publicity is not unlikely in the future[230].

8.2 Characteristics and criteria of the Dutch Portrait right

Though several of the rules mentioned above could be used to prevent the use of someone's name or portrait, they may also fail to apply, due to their specific requirements. One example of this is present in the Ja zuster/ nee zuster judgement[231]. In this case, famous TV-personalities had been imitated and sold as dolls on key rings. The court established that though the personalities would be definitely be associated with these dolls by the general public the use was not unlawful. The dolls constituted depictions of the actors but not portraits as the law requires for a cause of action since "one cannot talk of a portrait if the face depicted on an object does not correspond with the facial features of the person portrayed[232]". A change in this attitude is emerging however and in a later case the Supreme Court held that "for a portrait it is not necessary that the person looking at it should know the person depicted, nor that the person looking should recognize the person depicted, nor that the person looking should be able to get a (clear) representation of the depiction of the face[233]". In case law, other features than the face have no been considered sufficient to make a person recognizable and to fall under the regulations for portraits[234]. A photograph of the marathon skater Yep Kramer was

[230] Supra note 227 at 38.
[231] HR 16 januari 1970, NJ 1970, 220 (Ja zuster/nee zuster).
[232] IAN S. BLACKSHAW, ROBERT C. R. SIEKMANN, SPORTS IMAGE RIGHTS IN EUROPE, 14 (2005).
[233] HR 30 oktober 1987, NJ 1988, 277 (Naturiste).
[234] Sub District Court Harderwijk, 19 May, 1991, p. 1001, No. 3507.

used in an advertisement for gas boilers. The District Judge argued that not only the facial features in the picture but also the characterizing posture of the skater, made him identifiable by people who saw the advertisement. It appears as if today any image or object making someone identifiable can be considered a "portrait"[235]. The use of look-alikes has not yet been considered to fall within the frame of the portrait regulation however[236].

8.3 Protection of the commercial interest in an identity

The Dutch rules do not only protect privacy interests but also seeks to protect the commercial values in people's identity. This is obvious from the requirements set up for a violation of the portrait right. In order to prohibit the use of someone's portrait, the plaintiff has to show the court a "legitimate reason", a reasonable interest[237]. This interest may be either a privacy interest or commercial interest. The privacy interest is, as mentioned earlier, supported by Article 8 of the ECHR. The commercial interest is supported by the rationale that achievements deserve protection from exploitation[238]. The first case where this principle was established involved the singer Teddy Scholten[239]. The court held that a famous singer, such as Scholten, may have a desire to exploit her portrait through, for example, licensing agreements . Such an interest was considered reasonable and legitimate for a cause of action. It was not until 1979 that the Supreme Court settled a case regarding the commercial interest in a portrait, and at that time two criteria were laid

[235] Supra note 227 at 39.
[236] Supra note 232 at 15.
[237] Supra note 227 at 43.
[238] Supra note 232 at 17.
[239] Hof Den Haag, 13 april 1960, NJ 1961, 160 (Teddy Scholten).

down[240]. First of all, there had to be "popularity acquired in the exercise of their profession" and second; "a commercial exploitation of that popularity" (by the unauthorized user). With time, the requirement of having acquired popularity through one's profession has been somewhat compromised and now people who are famous for other reasons appear to have a chance of protection as well[241].

8.4 Issues of transferability, descendibility and underlying legal theories

For the use of a person's name, the situation is the same as for the use of his portrait and whatever does not fall under Copyright law may be covered by other regulations such as the Dutch Trademark law, which sometimes can fill the gaps[242]. It has been argued in the legal doctrine however, that the development of the commercial rights is being held back by the close connection to the personality rights, as they both constitute actionable "reasonable interests"[243]. One of the problems that arise because of the two rights falling under the same principle, is the issue of transferability and descendibility. As the personality rights are being denied transferability, due to their personal nature, so are the commercial rights. This is the consequence even though the same underlying rationale does not apply to both interests. Remedies available for infringements of the right to portrait and name are such as a prohibition of use and damages equal to the price for a license[244].

In conclusion, the monetary value of a person's identity and the need to protect that value is obviously recognized in the Netherlands, even though there is no explicit

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[240] HR, 19 January 1979, NJ 1979, 383.
[241] Supra note 232 at 20.
[242] *Id*. at 21.
[243] Supra note 227 at 43.
[244] Supra note 232 at 25 f.

Right of Publicity. The existing laws may not cover all the aspects of an individual's identity but there appears to be a development in that direction. For there to be a right of publicity similar to the one in the U.S., it may however be necessary to separate the personal and commercial interests under two different principles of law.

9. SWEDEN

In Sweden, there is no specific Right of Privacy or Right of Publicity. There are, nevertheless, several rules in the legislation that will protect both of these interests. Regulations governing how marketing and advertisement is to be conducted can be found in the Marketing Act. The rationale behind this Act is however to prevent consumer confusion and not to protect the interests of those used in the advertisements[245]. There are also established rules for photographs[246], Trademarks[247] and for Copyright[248]. These can all be used in certain situations when it comes to personal data and the commercial use of it. Protection of privacy and publicity interests is however not their main purpose and their applicability is therefore very limited. For protection of privacy and publicity concerns there are instead two other laws that will be applied primarily; the Act on Use of Name and Picture in Marketing[249] and the Personal Data Act[250]. Both of these Acts aim at protecting people's privacy but there are slight differences between them. The Personal Data Act is an implementation of the European EC Directive on Data Protection (Directive 95/46/EC). The intention is to prevent any unauthorized gathering, processing and publication of personal data. Any information closely related to an individual could probably fall under this Act but not all uses are covered by it [251]. Several exemptions exist

[245] Prop. 1978/79:2, 8.
[246] Lagen (1960:730) om rätt till fotografisk bild.
[247] Varumärkeslagen 1960:644.
[248] Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk.
[249] Lag (1978:800) om namn och bild i reklam.
[250] Personuppgiftslag (1998:204).
[251] Supra note 232 at 295-296.

to the rules. If there is a violation of this Act, a person is entitled to damages for the injury inflicted on him and for the violation of his personal integrity but not for the commercial value that has been misappropriated[252].

9.1 The Right to one's Name and Picture

The Act on Use of Name and Picture in Marketing on the other hand is based on the Intellectual Property Acts. The definition of the Act's purpose is to:

> "protect an individual's integrity as well as to provide the individual with the right to decide to what extent his/her name and picture may be used in marketing and afford him a reasonable compensation for such use[253]".

The last part of this definition resembles the American Right of Publicity in that it does not only protect people's integrity but also guarantees them compensation in case of a misappropriation. One Swedish case addressing this issue is NJA 1999 s 749. Here, the picture of a famous Swedish actor had been published on the back of a men's magazine. The court awarded the actor 125.000 SEK (equal to about $ 16.000), 50.000 as general damages and 75.000 as equitable compensation for the use of his picture[254]. Even though this case concerned a celebrity, the rules apply to anonymous individuals equally[255]. In its judgment, the court had to balance the right of the actor with the publisher's freedom of press. Freedom of press as well as freedom of speech are two of the public's interests that

[252] Supra note 232 at 296.
[253] *Id.* at 293.
[254] *Id*. at 294.
[255] *Id.*

the courts need to take into consideration when looking at these situations. Sweden has ratified the ECHR and has national rules protecting these fundamental principles[256].

9.2 Applicability and scope of The Act on Use of Name and Picture

As the name of the Act indicates, it was originally only applied to the name and picture of individuals. Today, however, an increasing number of identifying characteristics are covered by the Act and nicknames as well as jersey numbers of famous athletes fall in the same category[257].

9.3 Protection for the commercial interest in an identity

When awarding damages, the court will look at the personal injury suffered but it can also grant the plaintiff fair compensation for the unauthorized use[258]. Furthermore, when the court finds the unauthorized use to be made with negligence or intent, circumstances that are of other than economic character can be also taken into account[259]. The commercial value of the persona is consequently recognized as deserving protection and will be estimated from person to person. Celebrities will thereby, in general, receive higher amounts of damages than an anonymous individual. Nonetheless, the Act appears to only apply to cases where a person has been used in marketing. Other forms of uses fall outside the scope of this Act[260]. Legal experts have however suggested that the Act

[256] See e.g. Tryckfrihetsförordning (1949:105) and Yttrandefrihetsgrundlag (1991:1469).
[257] Supra note 232 at 294.
[258] *Id.*
[259] *Id.*
[260] *Id.*at 293.

should deal with all kinds of uses and that the name of it should simply be The Act on Use of Name and Picture[261].

It appears as if the Swedish legislators have set out to protect both the privacy and commercial interests of people but the present rules, though still developing, are not yet as broad and generous as the American Right of Publicity.

[261] Malin Thorngren, *Kränkning av personlig integritet i media – en skadeståndsrättslig och immaterialrättslig aspekt*, Examensarbete, Juridiska fakulteten vid Lunds Universitet, 55, (2005), see also http://www.jur.lu.se/Internet/Biblioteket/Examensarbeten.nsf/0/3346D2230C190786C1257019005A09DE/$File/exam.pdf?OpenElement

10. ANALYSIS

Though several of the European countries do not recognize a Right of Privacy as such, let alone a Right of Publicity, there still appears to be a general movement towards protecting commercial interests in the persona. Most European countries have incorporated the ECHR into their legislation, which guarantees at least a certain amount of protection of privacy. This is balanced against other interests such as freedom of speech, which can also be found in the ECHR. For a country such as England, that prior to the incorporation of the ECHR did not see the need for protection of privacy, this concept is now rapidly emerging and developing. In other countries, privacy has been a fundamental right, inherent in each and every individual. Some have given the right a place in their constitution while others have simply seen it as a basic underlying principle in their legal system. However countries have chosen to go about it, it seems like the general consensus for many decades has been that the integrity of the individual is worthy of protection and that this protection is guaranteed for all people, independent of their status, wealth or fame. In all countries analyzed here, alongside with privacy rights there are coexistent rights balancing interests such as freedom of speech, freedom of press, and freedom of information. These rights seem essential for all democratic countries today.

10.1 Current problems with privacy rights protecting the persona

No matter in what form the rights of privacy have come about, whether they are statutory rights or common law principles, they appear to be viewed similarly in all of these countries. The right is privacy protects aspects of the persona that are considered part of the person. As we are legally protected against bodily harm being inflicted upon us, so are we in many situations protected against mental harm caused by others. Only the person who actually suffers these injuries can file a law suit based on these rights, no one else. Also, when a person passes away, he or she can no longer be hurt physically and cannot suffer any subsequent mental damages. Due to these almost self-evident elements the privacy rights can generally not be transferred to another person nor descend to his or her heirs. When there has been an infringement of a privacy right, the common remedies available show an intent to stop the act that causes the mental injury. Examples are injunctions, prohibitions of a publication, or public corrections of previous publications. In some countries, damages can be granted for this violation of privacy and for any direct economic injury suffered. Often however, the courts cannot put a price on integrity and therefore dislike granting monetary compensation. Also, when what has been appropriated is not private or when the appropriation only causes an indirect economic loss and no mental distress, privacy rights most often do not apply at all.

10.2 Publicity rights in the EU

The existence of rights of publicity is harder to characterize generally. As opposed to the privacy rights, the commercial value in a person's identity has not been a fundamental, protected interest in any legal system. The monetary value that lies in being

able to prohibit others from exploiting one's persona has not existed as long as the idea of a right to be let alone. Also, people have not always been able to make money off of their name and image and it has not been such an important part of the sports and entertainment industry as it is today. Most countries seem to be moving towards recognition of a value attached to people's persona and the importance of being able to protect this value. It is important that each country develops clear rules and a fairly clear rationale behind them, in order to be able to define a right and the scope of it. Furthermore, as we are moving towards globalization it is essential for the rule to be efficient, that it will be protected in other countries as well. The optimal situation would be a common rule and within the EU this may be possible. The harmonization of rules has already begun and it ought to be less complicated to establish a common rule regarding an issue that no country already has steadfast principles on.

10.3 Creating a harmonized right for the EU

In an article from 1997, Julius C.S. Pinckaers suggests that there should be a creation of a general "right of persona"[262], replacing the Right of Publicity in the U.S. and the comparable rights existing in Europe. Pinckaers categorizes this right as an Intellectual Property Right, similar to Copyright. Drawing parallels from IP rights is something that is already frequently done in the countries that recognize protection for commercial aspects of personas. Some of the desirable elements of a European right of persona, described below, are accepted and established in most of the European countries. Others are more uncertain and still being developed. The name "right of persona", suggested by Pinckaers is very fitting. The Right of Privacy protects, as the

[262] Supra note 53 at 26.

name implies, the privacy interest of individuals. It therefore only seems natural to call the protection for the commercial aspects of a persona the Right of Persona. This would be more appropriate than calling it the Right of Publicity since it is not simply the publicity interest that is to be protected but all aspects of the persona that are valuable and that can be exploited.

10.3.1 Outlining the basic elements of a harmonized right

Naturally, the most fundamental part of a new right protecting the value of a person's identity is just that, protection for the commercial value in the persona. In England such a right is still a stretch, as the privacy rights only recently were established in their system. To simplify the process of developing a protection for the commercial value, privacy rights should be kept separate and have their own set of rules. Though it may be both from and because of privacy rights that this new right has emerged, they are so fundamentally different in what they protect and why, that there should be a clear differentiation between them.

10.3.2 Characteristics that should be protected

In some countries, where there is a recognized right in the commercial value of persona, only the name and image are granted such protection. The common trend however, shows a shift in this attitude and more and more aspects of the persona are now being protected.

There are many ways of trying to get around a rule prohibiting from exploitation of someone else's identity, one of them being exploitation by association. Without using

the actual name or picture of a well-known person, other characteristics that identify a person are used to create the impression of endorsement or to simply draw attention. It is not the name or image in themselves that are considered protectable but the value that lies in the identity of famous people. Therefore, it seems natural that all aspects of the persona that will allow the general public to identify a specific person ought to be covered by the new right. To decide whether there has been a misappropriation, the courts could use polls where a number of people are asked if they associate characteristics used in a certain context with a specific person. If protection is limited to only the most fundamental elements of a person, that would give room for too many ways of getting around the prohibition. Also, in some instances distinct characteristics such as unique clothing and combinations of colors and numbers will create a stronger association with an individual than the actual name and picture of that person. Examples of such situations are when the name is very common and not specifically associated with one person or when an athlete, who is most often covered up by his gear or equipment, is easier identified by his jersey number than by a picture of his face.

10.3.3 Who should be granted protection?

In some countries where there is a principle protecting commercial values in a persona, only celebrities are considered to be able to sue for a misappropriation of their persona. One reason for this is that only celebrities are considered to have a value to protect. Ordinary people could, according to this view, not profit from their identity and therefore they do not need protection for it. Another reason for excluding anonymous people stems from the common use of Intellectual Property Rights as a basis for

comparison. Intellectual Property Rights are often based on a Utilitarian/Incentive Theory and a Labor Theory. These theories are similar and strive to reward people for their work and to give them incentives to make efforts that will benefit society. Celebrities could be considered to have put in a lot of work and to have contributed something valuable to society, as they may be famous for an invention or sports accomplishment. In line with this argument, ordinary people should not be granted protection as they obviously have not put in the work to accomplish something like that or done anything else for society to become known for. Only famous people have created a value in their persona and are granted the right to sue for misappropriation. As illustrated earlier, there are several flaws with this argument.

Many celebrities have attained their fame in a way that has not involved any work or creativity on their behalf and they should therefore not be entitled to protection under the Labor Theory. Also, the need to give incentives for people to strive towards becoming famous is highly questionable. Some countries give all people a right to sue for the unauthorized use of their persona but only if they have tried to exploit it before the alleged misappropriation occurred.

There are several reasons why restrictions regarding who can file a law suit are inconvenient and inappropriate. First of all, ever so often, anonymous people and semi-famous individual have a commercial interest in their persona and can prove that there is a value to protect. Second, if the right to exploit one's persona is granted only to celebrity or to those who have actually tried to exploit it themselves, all cases will be decided on an ad hoc basis. As fame and status is difficult to measure and proof of attempts to profit from one's identity may be hard to obtain, it would make it easier and more predictable to

grant the right to all people. Countries that do not see a need to protect the general public do not have to be concerned either, since damages will only be awarded to those who have an actual value to protect in their persona. For this reason, there will not be an incentive for ordinary people to file law suits.

10.3.4 Descendibility and transferability

In order to fulfill the purpose of a new commercial right the first necessary step seems to be to separate it from the privacy rights and give it its own separate rules. This way the problems with protecting a proprietary value instead of a personal one can be avoided. As a property right, the characteristics of it should most likely follow those of property in general. The consequences this would have appear to be in line with the development in the U.S. and in most countries Europe. For example, as with land or real estate, a person should be able to sell it or lease the right to his persona and make a profit from it. If people cannot make a profit off of their persona but only prevent others from doing so, the right will be more of negative and defensive character than positive. Furthermore, when the owner of the right passes away, the value of it should not simply be there for anyone to exploit but the right ought to pass on to the owner's heirs. That is what normally happens with property and it should apply also to this new right.

By making the right of persona similar to Intellectual Property Rights, Pinckaers argues that it ought to be both assignable and descendible. In fact, it is very common for the owner of a copyright to grant licenses to use his work in return for monetary compensation. Basing the new rules on Copyright however, the right would cease to exist a number of years after the owner's death. This means that contrary to property in

general, the right would not be eternal. It is questionable if protection in perpetuity is necessary but it has to be left to the legislature to determine if the duration of the right should be shortened or extended to match Copyright duration. Though a Copyright can only be protected for a certain number of years after the original owner passes away, others will be protected indefinitely under certain requirements. Applying specific requirements for descendability and transferability may be one solution for the new right.

10.3.5 Limitations of the protection

Though there may be problems with applicability of the rules, there are still many advantages with drawing parallels to Intellectual Property rules for this new right of persona. First of all, just as with Intellectual Property rights, the new right would be limited by rights protecting interests of the public. In democratic systems the freedom of speech, freedom of press, freedom of information, etc. are considered fundamental and essential rights granted to all people. Therefore, all the countries studied in this article balance the rights of privacy as well as the new right in one's identity with these principles. When protecting the valuable, commercial aspects of a persona, these basic rights should not be superseded and just as with Intellectual Property rights, certain uses should therefore be allowed. For the purpose of informing the public in news reporting, parody and in several other situations, the use of a person's name, picture other elements of the persona will not constitute an infringement of the right.

Using Intellectual Property rules as basis for the new right seems more suitable than those of other forms of property as it will provide a better balance of different interests in society. There is, for example, no "fair use" of another person's house or car.

Also, in European Copyright laws one will often find moral rights attached to the protected work. By applying these to the new right, a person who has granted permission to use his identity can under certain circumstances revoke this permission on moral rights grounds[263]. This could be beneficial when the intended use does not infringe his privacy rights but still would cause damage to his or her persona.

10.3.6 Remedies for infringement of the new right

Just as with the other Intellectual Property rights the available remedies for infringement of the commercial right of persona should include injunctive relief and damages. Another advantage with these rules is that the damages be set at the fair market value of the use of the plaintiff's identity. In other words, the courts could impose a sort of fictional license fee, a concept already applied in some countries. Another type of remedy available under these rights is injunction. This remedy is sometimes preferred by the plaintiff in order to be able to avoid the predicted damage rather than receiving compensation for it afterwards. Sometimes the monetary damages will not fully compensate for the injury cause by the infringement of the right. Another possibility when that is the case, is to award the plaintiff specific relief. This takes place after the damage is done but it could mean a lot to the owner of the right to be able to demand that for example an advertisement is recalled or destroyed. By making the analogy to Intellectual Property Rights the possibility of allowing recovery for mental damages would also be available, if the legislature would find such a remedy appropriate. A very significant aspect of why it is particularly important for some countries to develop a separate set of rules for the commercial interest in the persona is the fact that they still

[263] Supra note 53 at 30.

rely on tort rules for protection of this value. By separating the new right from these rules and establishing that it is in fact a property or a "quasi- property" right, one will not have to show intent nor neglect in order to prove infringement. When it comes to property, no such elements are present when it comes to claims of trespassing, for example.

10.3.7 Underlying rationale for the new right

The extent to which the characteristics of property rights can be applied to the new right depends not only on the categorization of the right but also on the underlying theory applied to it. The underlying theories for the Intellectual Property rights have been discussed above. As have also been mentioned earlier, these theories have problems justifying a commercial right for anonymous people and sometimes also for celebrities. Pinckaers recognizes this problem and holds that the policy behind the "right of persona" should instead be "The Allocative Economic Theory"[264]. This policy has never been used by the American courts however, and in Europe the reasoning of this theory does not seem to have much support either[265]. To determine what policy provides the best basis for a commercial right in a persona it seems appropriate to look at the other commonly used theories for the Right of Publicity in the U.S. These are reflected to different extents also in the European countries. The Personality Theory has sometimes been applied as basis for the developing right in France. The problem with this theory is that it upholds the connection between the proprietary interest in the persona and the individual's personality. By maintaining this bond, the issues of differentiating between rights of

[264] Supra note 53 at 28 f.
[265] Supra note 60 at 445.

privacy and a commercial right remains. As argued earlier, descendibility and assignability are examples of elements that would then be hard to justify.

Consumer Protection is an interest that many countries are keen on preserving. In some situations it would be a good theory to utilize as basis for the right to prevent unauthorized exploitation of someone's identity. The new right does not however, seem to have the interests of consumers as its primary concern but rather the economic interest of the individual whose persona has been misappropriated. Moreover, the American Right of Publicity, as well as the equivalent European rights, applies to situations where there are no goods or services offered to consumers. If the main rationale for the right was to prevent consumer confusion or "passing off" these types of uses would fall outside the scope of the right. Also, most countries already have a set of rules that control and prohibit this kind of behavior. The last theory to be analyzed is The Unjust Enrichment Theory.

The concept of an Unjust Enrichment Theory exists in Europe and many European countries seem to be influenced by the development of the Right of Publicity in the U.S. As was mentioned earlier, the theory most commonly applied to support this right is the Unjust Enrichment Theory[266]. According to this theory, the main concern is to prevent people from trying to profit at the expense of another. There is no requirement of a certain status of the plaintiff, nor of labor or efforts creating the value in the persona. This theory does not either call for consumer confusion or economic damage caused to the plaintiff. The theory only focuses on the unjust exploitation and appropriation of a value that belongs to somebody other than the exploiting party. The intent of this theory is not give incentives to people to act in a particular way but to prevent a certain behavior

[266] Supra note 60 at 440.

that generally is considered unfair by society. Though there may be some issues that remain unsolved in this theory, such as the definition what is considered to be “unjust”, these are not issues that cannot be overcome or that make the theory inapplicable to a commercial right of persona. The problems lie in the interpretation and not in the suitability of using the theory as rationale for the new right. To put it simply, the Unjust Enrichment Theory aims at preventing “theft” of a value that may not be protected by other rules or that has been committed in a way hat does not fall under definition of theft in criminal law. When somebody exploits the value of someone’s identity, without his consent, this has a close resemblance to theft. The owner of the right does not lose his identity but he loses out on the profit he could have made if the appropriator had bought a license or compensated him for the use.

In addition, some people argue that when a person’s identity is too frequently used it loses its value as it will not be considered as unique anymore. To allow anyone to take advantage of a value of such personal character must appear highly unjust by the general public. The Unjust Enrichment theory seems to be the one theory out of those discussed here that does not exclude any category of people that ought to be granted protection. Moreover, it does not put up limitations or requirements that exclude any of the characteristics that seem desirable in a commercial right for a person’s identity.

11. CONCLUSION

A right very similar to the American Right of Publicity seems to be developing in Europe. Though this progress appears to take place simultaneously in most countries within the EU, the rules are different from country to country and in the individual countries there are still unresolved questions regarding the emerging right. This lack of clear and harmonized rules is the main problem for the Right of Publicity in the U.S. For the countries within the European Union the best solution would therefore be a clearly defined set of harmonized rules protecting the commercial right in a persona. Not only would this solve questions of the scope and applicability of the right on the national level but it would simplify the legal processes on an international level. Today, as a result of the ongoing globalization, a celebrity in one country is often famous also in other parts of the world.

For the celebrity to be able to protect his identity from being exploited there needs to be rules protecting it in those other countries where there may be a possibility of making a profit from it. The European countries have been influenced by the development of the Right of Publicity in the U.S. to different extents but in general most countries follow the American model. There is however, reluctance in many countries to fully adapt the view and the arguments behind the Right of Publicity for their own rules. Because of this, it seems appropriate to give the European right its own name, unrelated to the American right. The “right of persona” would be an appropriate name for the new

right as it defines what is being protected and leaves the word publicity out, so that this does not necessarily have to be an element of the right protected.

To avoid problems in developing a new commercial right, the best solution seems to be to separate it altogether from privacy rights and develop a completely separate set of rules for the Right of Persona. Looking at the different rules that could serve as basis for the new right, the Intellectual Property rights appear have the closest resemblance with the characteristics desirable in a European Right of Persona. Using Intellectual Property rules as a parallel and basis for the new right also serves the purpose of giving it several advantageous characteristics that other rules, such as general property rules, will not.

In order to avoid problems with determining who has a cause of action, all people ought to be protected under this new right. This will not only make it easier for the courts but it will also fill two purposes of the right; it will both grant protection for every individual who has a valuable identity and it will prevent others from trying to go around the rules and exploit the identity of those who are not obviously famous or who have not tried to exploit their own persona. Such behavior can not be desirable in society. In order to properly satisfy the purpose of the right, the rules should allow transferability and descendibility. Only that way can the owner of the right fully take advantage of the value inherent in his persona. Also, damages ought to include monetary damages, injunctions and other types of specific relief. That way, the courts can choose how to best protect the interests of the owner of the right. Having established the scope and the characteristics of the Right of Persona it becomes obvious what legal theory or theories can be used to back up these rules. The most appropriate theory currently applied is that of Unjust

Enrichment. This theory does not only comply with the desirable elements in a Right of Persona but it also aims to protect the same interest. The core of the right of persona is not to protect consumers or to promote certain behavior in society but to give the rightful owner of a value the right to exploit it and to prevent others from doing the same. There are certainly other theories that may also support a Right of Persona but as of today, the Unjust Enrichment appears to be the most prominent one.

It is obvious that protection for the commercial aspects of a persona is a concept that is becoming acknowledged by more and more countries throughout the world. Thereby, the need to recognize a right for this interest is also increasing. To provide the best protection for people within the European Union, harmonized rules are essential. In this article the most beneficial characteristics of a new Right of Persona have been discussed. Though they may be recommendable, not all of them would necessarily have to be imposed on the member states. In order to make it easier to implement a Right of Persona, only a minimum degree of protection needs to be forced upon the different countries. As long as this minimum of protection is met in the national rules, each country should be allowed to apply its own rationale for the right and allow its courts to make their own assessments of damages, etc.

The Right of Publicity in the U.S. is likely to have a strong influence on the European Right of Persona but in order to create the most ideal new right for the European Union it is important not to copy too much from the American development. The American Right of Publicity is still in a developing stage itself and there are many uncertainties regarding the right that still need to be addressed and clarified by the American courts. Once a Right of Persona or a right of similar character is established in

Europe, the next step will be to conform the rules of both systems to make them compatible. With the whole world as their market, athletes, actors and entertainers of today need protection for their identity to be established universally. By conforming the European rules we will be one step closer to meet this need and to protect an interest that is starting to receive recognition all over the world.

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