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Squeezing "The Juice": Can the Right of Publicity Be Used to Satisfy a Civil Judgment?

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NOTES

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TABLE OF CONTENTS

I. INTRODUCTION ........................................... 144
II. BACKGROUND ............................................ 147
   A. THE ORIGIN OF THE RIGHT OF PUBLICITY ............... 148
   B. THE RIGHT OF PUBLICITY AS A PROPERTY RIGHT ............ 151
      1. Significance of the Property Label in Legal Contexts .............. 151
      2. Assignability of the Right of Publicity ....................... 154
   C. TREATMENT OF OTHER FORMS OF INTELLECTUAL PROPERTY:
      COMPETING INTERESTS .................................. 157
   D. PRINCIPLES OF TORT LAW ................................ 159
      1. Function of the Law of Torts ............................... 159
      2. Policy Considerations .................................... 160
III. DISCUSSION ............................................... 162
    A. THE DEBATE: PROPERTY OR PERSONA ........................ 162
    B. CONTOURS OF THE RIGHT OF PUBLICITY ...................... 163
       1. Property Label as Justification ............................ 163
       2. Assignability of Publicity Rights Cuts in Favor of Allowing Forcible 
          Transfers in the Civil System ............................ 164
    C. CREDITOR’S BILL PROVIDES THE LEGAL PATH ............... 166
    D. THE RIGHT OF PUBLICITY AND TORT LAW: POLICY, 
       PUNISHMENT AND DETERRENCE .............................. 167
IV. CONCLUSION ............................................. 169

143
I. INTRODUCTION

"It's one of those rare events in one's life when you know exactly where you were when it happened." The Nation watched as Orenthal James Simpson held a gun to his head while riding in the passenger seat of a white Ford Bronco. He led police officers on a slow-speed chase sixty miles along a highway in Southern California while his friend Al Cowling drove. The famous Bronco chase headed towards the Pacific Ocean and finally ended in the driveway of Simpson's home. Simpson emerged from the vehicle and surrendered, allowing Los Angeles police officers to take him into custody as media helicopters buzzed overhead. Although the chase was over, "the hunt for justice was just beginning."

O.J. Simpson's criminal trial for the murders of Nicole Brown Simpson and Ronald Goldman began on January 24, 1995. The eager prosecutorial team, led by Marcia Clark, faced off before Judge Lance Ito against Simpson's defense attorneys, a group that was later hailed as the "Dream Team" by the media. During the trial, assistant prosecutor Christopher Darden asked Simpson to put on a leather glove that was found at the crime scene. However, the glove was too small to fit over his latex-gloved hand. Defense attorney Johnnie Cochran used this instance to coin a phrase that he would later use in closing arguments: "If it doesn't fit, you must acquit." The jury did just that at 10 a.m. on October 3, 1995, after 133 days of televised testimony and three hours of deliberation.

1 See Daniel Petrocelli with Peter Knobler, Triumph of Justice: The Final Judgment on the Simpson Saga 19 (1998) (discussing public reaction to the famous car chase of ex-footballer O.J. Simpson, who was accused and later acquitted of murdering his ex-wife, Nicole Brown Simpson and her friend, Ronald Goldman).
3 Id.
4 Id.
5 Id.
6 Id.
8 See id. (outlining and providing details about each member of the "Dream Team," including F. Lee Bailey and Johnnie Cochran, among others).
10 See id. (discussing how Simpson wore a latex glove underneath the leather glove found at the crime scene so as not to contaminate the evidence).
Immediately following the verdict of "not guilty," the families of Nicole Brown Simpson and Ronald Goldman filed civil suits against O.J. Simpson alleging wrongful death. The civil trial would prove successful for the victims' families where the criminal trial was not. On February 4, 1997, the civil jury returned from deliberation to announce their verdict. They found Simpson liable for the wrongful deaths of Nicole Brown Simpson and Ronald Goldman.

The last phase in the Simpson saga was an accounting of Simpson's financial situation, which was necessary so the jury could determine the amount of punitive damages to assess against him. Expert forensic accountant Neill Freeman guessed that Simpson had a net worth of approximately $30 million prior to taxes. O.J. Simpson was not present for this stage of the trial, but the plaintiffs presented evidence that shortly after the murders Simpson had trademarked his name on hundreds of products, including "O.J. Knives." While delivering his last argument to the jury, Daniel Petrocelli, attorney for the Goldman family, emphasized to the jurors that Simpson would like them to believe "that he's broke and he'll never earn a dime again for the rest of his life. I guess he'd like you to believe that he'd be lucky to own a credit card." The civil jury heard Petrocelli's pleas and awarded the plaintiffs a total of $33.5 million in damages, including $25 million in punitive damages.

This should have ended the Simpson chronicle that gripped public attention for years, but one issue remains: O.J. Simpson has yet to pay the multi-million dollar civil judgment entered against him more than nine years ago. Now Fred Goldman, on behalf of his son Ronald, seeks an order from the Superior Court of Los Angeles County to transfer and assign to him O.J. Simpson’s rights of...
publicity so that he can attempt to satisfy the unpaid civil judgment.\textsuperscript{22} This petition is believed to be the first of its kind.\textsuperscript{23} Goldman contends that Simpson’s right of publicity is his most valuable asset and that California courts, just like courts in the rest of the United States, have recognized that the right of publicity is a property right.\textsuperscript{24} He maintains that courts have generally agreed that the right of publicity is transferable and assignable.\textsuperscript{25} Additionally, Goldman claims that the superior court has equitable authority to assign Simpson’s publicity rights.\textsuperscript{26} His theory is that publicity rights are proprietary in nature, making them subject to enforcement to satisfy a money judgment.\textsuperscript{27} According to Goldman, if the property is intangible or cannot be executed upon, a court in equity can order the transfer or assignment of the debtor’s rights or interests in the property.\textsuperscript{28} Finally, Goldman avers that the court should assign and transfer O.J. Simpson’s right of publicity to him in order to prevent injustice and effectuate the judgment against Simpson.\textsuperscript{29} He asserts that Simpson continues to profit by making public appearances and selling autographs and pictures.\textsuperscript{30} Moreover, he argues that Simpson is intentionally avoiding paying the judgment.\textsuperscript{31} By exploiting his name and likeness for fees paid to friends or for charity, Goldman alleges Simpson evades the order from the court.\textsuperscript{32} Ultimately, Goldman wants the court to order Simpson to “relinquish his property interest in his right to publicity to [Goldman] in partial satisfaction of the judgment.”\textsuperscript{33} As the owner of the proprietary interest in Simpson’s right of publicity, Goldman would acquire a direct cause of action against those who use Simpson’s name and likeness in commerce.\textsuperscript{34}

\textsuperscript{22} See id. n.1 (defining the right of publicity as the “right of individual, especially public figure or celebrity, to control commercial value and exploitation of his name or picture or likeness or to prevent others from unfairly appropriating that value for their commercial benefit” (citations omitted)).

\textsuperscript{23} See Erika D. Smith, Men Offer Twist to O.J. Simpson Case, INDIANAPOLIS STAR, Sept. 6, 2006, at 1, available at 2006 WLNR 15465705 (presenting differing points of view regarding the ability of the courts to forcibly take the right of publicity to satisfy a debt).

\textsuperscript{24} Motion, supra note 21, at 4.

\textsuperscript{25} Id.

\textsuperscript{26} Id. at 5.

\textsuperscript{27} Id.

\textsuperscript{28} See id. (citing Pac. Bank v. Robinson, 57 Cal. 520, 524 (1881)).

\textsuperscript{29} Id. at 8.

\textsuperscript{30} See id. (reporting that Simpson attended the NecroComicon convention in Los Angeles and sold various items with his autograph).

\textsuperscript{31} Id. at 9. In fact, Simpson once told journalist Caroline Graham that it would be “a cold day in hell before I pay a penny.” See Jones, supra note 13.

\textsuperscript{32} Id. at 10.

\textsuperscript{33} Id.

\textsuperscript{34} Id. For example, Goldman would have direct causes of action against event promoters and
The purpose of this Note is to examine the facets of the right of publicity and determine whether this intellectual property right is an appropriate asset that can be seized by the courts and assigned in order to satisfy a civil judgment. Part II traces the birth of the right of publicity from its parent right to privacy to the current state of the law in the United States. This Part also characterizes the right of publicity as a property right and discusses the implications of this label in a variety of legal settings, including the right of publicity’s alignment with more established forms of intellectual property. This Part concludes by outlining the basic tenets of the American tort system and examining specific state statutory provisions regarding property subject to satisfaction of a money judgment. Part III posits that, although the right of publicity maintains ties with the right to privacy, it has sufficiently established itself as a separate and distinct intellectual property right. As a result, the right of publicity should be treated similarly to other forms of intellectual property that can be seized and utilized to satisfy a civil judgment. This Part further argues that, in light of strong policy considerations underlying tort law, any dignitary interest a tortfeasor might maintain in his right of publicity should be outweighed by the need to make the plaintiff whole.

II. BACKGROUND

The right of publicity is a relatively new form of intellectual property first recognized by federal courts in the early 1950s. Since then, courts have attempted to define the various features of this property right, a right still very much in its infancy, but the law governing the right of publicity remains largely unbounded. Although some jurisdictions in the United States have codified the right of publicity in statutes, the exact contours of this proprietary right have yet to be fully realized.

Because the right of publicity is still young, courts must often voyage into the unknown with regard to its placement in various legal settings. One aspect of the right of publicity that has never been considered is whether it is a suitable asset that can be seized by the courts in satisfaction of a civil judgment. Today, the right of publicity is recognized as “the inherent right of every human being to memorabilia manufacturers. Id. See Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (defining New York law with regard to rights of publicity). See CAL. CIV. CODE § 3344(a) (West 1997) (defining the right of publicity). The statute states, “[a]ny person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, . . . without such person’s prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.” Id. There is some discussion that section 3344 is preempted by federal copyright law based on the facts in Laws v. Sony Music Entertainment, Inc., 448 F.3d 1134 (9th Cir. 2006). However, such a debate is beyond the scope of this Note.
control the commercial use of his or her identity. In the era of celebrity promotions and endorsements, the right of publicity has been invoked to protect celebrities from the unauthorized use of their names and likenesses. Famous actors, models, artists, athletes, and musicians have been awarded hundreds of thousands of dollars for the misappropriation of their personas. If in fact the right of publicity is a property right that converts fame into a marketable commodity, then it is reasonable to conclude that this right can be forcibly taken by the courts to satisfy a civil judgment. However, before one can consider the right of publicity's place in the American civil system, it is necessary to trace its birth and subsequent legal development.

A. THE ORIGIN OF THE RIGHT OF PUBLICITY

Although the right of publicity is a comparatively new doctrine in American jurisprudence, scholars have generally traced its origin as an outgrowth from the right to privacy. In the beginning, the primary purpose of the right to privacy was to protect individuals from the indignity that arose when their identities were widely circulated in an unauthorized commercial use. However, courts struggled with employing the right to privacy to provide a remedy to celebrities who had had their likenesses misappropriated. For example, in O'Brien v. Pabst Sales Co., the Fifth Circuit denied relief to a famous football player whose photograph was

39 Id. For example, Frank Sinatra was awarded $350,000 in compensatory damages and $100,000 in punitive damages for the unlicensed use of his name when the National Inquirer published a false story that the singer had received treatment at a Swiss medical clinic. Sinatra v. Nat'l Inquirer, Inc., 854 F.2d 1191, 1194 (9th Cir. 1988).
41 See, e.g., State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 93 (Tenn. Ct. App. 1987) ("This right, now commonly referred to as the right of publicity, is still evolving and is only now beginning to step out of the shadow of its more well known cousin, the right of privacy."); see generally Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 193 (1890) (recognizing that historically the law provided remedy only for "physical interference with life and property, for trespasses vi et armis"). Later, an understanding of man's spiritual nature progressively expanded these rights to include the "right to be let alone." Id.
42 MCCARTHY, supra note 37, § 1:7.
43 See O'Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir. 1941) (holding that a famous athlete had no claim for invasion of privacy when his image was used without his consent). Famous plaintiffs began to complain that they wanted to control when and how their identity was used. MCCARTHY, supra note 37, § 1:7.
used in a calendar promoting beer.\textsuperscript{44} The court concluded that the plaintiff had exposed himself to the public eye and therefore had no claim for privacy protection.\textsuperscript{45} In addition, the court determined that the photo of the athlete was not used in a disparaging way that would damage his reputation.\textsuperscript{46} Increasingly, however, celebrities sought to protect the commercial interests in their names and likenesses rather than any personal or emotional connection with their image.\textsuperscript{47} Thus, in the middle of the twentieth century, a new legal theory was proposed to offer protection for the commercial value inherent in identity. The Second Circuit first recognized the right of publicity as distinct from the right to privacy in \textit{Haelan Laboratories v. Topps Chewing Gum, Inc.} as a way to protect prominent persons, such as celebrities, from the nonconsensual use of their likenesses.\textsuperscript{48} In \textit{Haelan}, the plaintiff and defendant were rival manufacturers of chewing gum.\textsuperscript{49} The plaintiff entered into a contract with a baseball player providing that the plaintiff would have the exclusive right to use the player's photograph on cards for a specific period of time to promote the sale of the plaintiff's gum.\textsuperscript{50} The ball player agreed not to allow any other gum manufacturer to use his likeness during the duration of the contract.\textsuperscript{51} Subsequently, the ball player gave permission to use his picture on the defendant's products, which ultimately resulted in litigation.\textsuperscript{52} The defendant argued that the contract between the plaintiff and the ball player was merely a release from liability for using the player's image.\textsuperscript{53} Furthermore, the defendant opined that since the athlete had a statutory right of privacy under New York law, the right was personal and not assignable, and thus precluded the plaintiff from having any vested property right or interest which could have been invaded by the defendant's conduct.\textsuperscript{54} Judge Jerome Frank rejected this contention and observed 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."\textsuperscript{55} The court called this a "right of

\textsuperscript{44} O'Brien, 124 F.2d at 170.
\textsuperscript{45} Id. See also Paramount Pictures, Inc. v. Leader Press, Inc., 24 F. Supp. 1004 (W.D. Okla. 1938) (holding that although Oklahoma law recognized a right of privacy, the right did not extend to motion picture stars because their names and likenesses were sold to the public).
\textsuperscript{46} O'Brien, 124 F.2d at 169-70.
\textsuperscript{47} See MCCARTHY, supra note 37, § 1:7 ("[The] real complaint [of famous plaintiffs] was damage to their 'pocketbook,' not to their 'pschye.'").
\textsuperscript{48} 202 F.2d 866, 868 (2d Cir. 1953).
\textsuperscript{49} Id. at 867.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 868.
publicity" and acknowledged that beyond bruised feelings from public exposure of their likenesses, prominent persons "would feel sorely deprived if they no longer received money for authorizing advertisements ...."56 The Second Circuit was the first court to recognize the economic value of identity and specifically separated this notion from the traditional dignitary interest located in the right to privacy. The right of publicity was born.57

In spite of the Haelan opinion, subsequent court decisions in New York and across the country reflected a strong hesitancy to adopt a separate doctrine of the right of publicity—one independent from the statutory right to privacy. With little guidance, judges were less than enthusiastic in adopting a shapeless and untested doctrine. For example, in Brinkley v. Casablanca,58 the court found that the right of publicity was subsumed in the New York statutory provisions for the right to privacy and that "the damages that flow from the confluence of these two events should be compensable whether the injury is to one's feelings or to his 'property' interest. Both injuries are caused by the same wrong and should be redressed by the same cause of action." 59 Likewise, in assessing a cause of action for invasion of privacy, a district court in California stated that "[t]his Court does not feel it wishes to blaze the trail to establish in California a cause of action based upon the right of publicity."60

However, a growing number of courts subscribed to the reasoning in Haelan and acknowledged that there were stark differences between the interests protected by the right to privacy and those guarded by the right of publicity.61 Ultimately, the United States Supreme Court examined this legal phenomenon in Zacchini v. Scripps-Howard Broadcasting Co. and found the right of publicity to be

56 Id.
57 While the Haelan decision is widely regarded as the birthplace of the right of publicity, Professor Nimmer is credited with providing the foundation for its growth. See McCarthy, supra note 37, § 1:27. In his landmark article, Nimmer opined that privacy law could not adequately protect the commercial interest in one's identity. See Melville B. Nimmer, The Right of Publicity, 19 Law & Contemp. Probs. 203, 203–12 (1954) (discussing the shortcomings of privacy law, as well as trademark and service mark law, with regard to the protection of the pecuniary value of one's name, photograph, and likeness).
59 Id. at 1012.
61 See, e.g., Ettore v. Philco Broad. Corp., 229 F.2d 481 (3d Cir. 1956) (holding that the use without plaintiff's permission of video footage of a boxing match featuring him violated his property rights in his name, photograph, and image); Uhlaender v. Henriksen, 316 F. Supp. 1277 (D. Minn. 1970) (holding that plaintiff baseball players, as celebrities, had a property interest in their names and likenesses that was violated by the defendants, who used the players' names, sporting activities, and accomplishments for commercial gain).
distinct from the right to privacy. In that case, the plaintiff sued a local Ohio news program for broadcasting his entire fifteen second "human cannonball" act, which he performed at a county fair. The Court validated the right of publicity and outlined the differences between the right to privacy and the right of publicity. The Court reasoned that

"[t]he interest protected" in permitting recovery for placing the plaintiff in a false light "is clearly that of reputation, with the same overtones of mental distress as in defamation." By contrast, the State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment.

The Zacchini Court further rationalized its holding by likening the right of publicity to the discussion of other forms of intellectual property, such as patent and copyright. In this context, the Court explained that the State's protection of an individual's right of publicity focuses on the right of the individual to reap the rewards of his efforts rather than the protection of feelings and reputation. Likewise, by offering protection in one's persona, the Court noted that entertainers would have economic incentive to make interesting performances for the public.

The percolation in the lower courts and the decision of the Supreme Court in Zacchini demonstrate the divergence of the right of publicity from its parent right to privacy. Courts began to recognize important interests in protecting the commercial rights in one's identity, such as the right of the individual to profit from his endeavors. To that end, courts aligned publicity rights with other established forms of intellectual property. Though these decisions marked a turning point in the life of the right of publicity, the task remained to shape the exact forms and features of this new right.

B. THE RIGHT OF PUBLICITY AS A PROPERTY RIGHT

1. Significance of the Property Label in Legal Contexts. As more and more courts began to accept the right of publicity, litigation arose that attempted to refine the

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63 Id. at 563-64.
64 Id. at 573 (quoting William L. Prosser, Privacy, 48 CAL. L. REV. 383, 400 (1960)).
65 Id. at 576.
66 Id. at 573.
67 Id. at 576.
doctrine. Courts across the country have generally followed in the footsteps of the Zacchini Court and have classified the right of publicity as a "property" right. For instance, the Tennessee Court of Appeals noted that "[u]nquestionably, a celebrity's right of publicity has value. It can be possessed and used. It can be assigned; and it can be the subject of a contract. Thus, there is ample basis for this Court to conclude that it is a species of intangible personal property." At present, state law governs the right of publicity, and the law varies widely from state to state. More than forty jurisdictions recognize the right of publicity through common law, statute, or both, and many of them expressly classify the right of publicity as a property right. The California Civil Code states that "the [publicity] rights recognized under this section are property rights, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents.

Additionally, many commentators, the Restatement of Torts, and the Restatement of Unfair Competition also recognize the right of publicity as a "property right." Noted legal theorist and law professor Melville Nimmer has stated that "[t]he right of publicity must be recognized as a property (not a personal) right, and as such capable of assignment and subsequent enforcement by the assignee." Furthermore, Judge Goldberg of the Fifth Circuit reasoned that the right of publicity had evolved into a new form of "property" right:

Once thought to be a personal, non-assignable right emanating from the right of privacy, the "right of publicity" evolved into a legally-protected, transferable interest . . . . An interest labeled

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68 See Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc., 270 F.3d 298, 325 (6th Cir. 2001) ("[t]he right of publicity, however, is a right that protects the pecuniary right and interest in the commercial exploitation of a celebrity’s identity," and further, "[t]hese interests reflect property rights, as opposed to dignitary rights, . . . ."); Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (stating that in California the “statute protecting the use of a deceased person’s name, voice, signature, photograph or likeness states that the rights it recognizes are ‘property rights’”).


71 CAL. CIV. CODE § 3344.1(b) (West 1999) (emphasis added).

72 See RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (1977) (recognizing that the interest of the individual in the exclusive use of his own identity is in the nature of a property right); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. g (1995) (stating “[t]he interest in the commercial value of a person’s identity is in the nature of a property right and is freely assignable to others”).

73 Nimmer, supra note 57, at 216.
"property" normally may possess certain characteristics; it can be transferred to others; it can be devised and inherited; [and] it can be levied upon to satisfy a judgment.\textsuperscript{74}

Professor Nimmer, Judge Goldberg, and other scholars point to the significance of designating the right of publicity as "property" to highlight its importance in specific legal contexts, such as federal tax laws, marital property law, and descendibility at death issues.\textsuperscript{75} Several courts have considered the question of whether publicity rights should have a postmortem duration.\textsuperscript{76} These courts have concluded that publicity rights can descend at death to heirs who may then transfer or license them to others, reasoning that publicity rights are analogous to other forms of intellectual property such as copyrights and trademarks.\textsuperscript{77} As a policy matter, courts have recognized that celebrities work hard during their lifetimes to develop and market their identities, and thus it makes little sense to allow a valuable property right to die with the celebrity.\textsuperscript{78} Otherwise, as one court noted, "the economic value of the right of publicity during life would be diminished because the celebrity's untimely death would seriously impair, if not destroy, the value of the right of continued commercial use."\textsuperscript{79} These and other court decisions illustrate that many jurisdictions recognized that the right of publicity is descendible upon a celebrity's death and acknowledge its place in the probate estate.

Additionally, legal commentators Melissa Jacoby and Diane Zimmerman opine that there are some instances in which publicity rights are currently treated as assets in other legal contexts.\textsuperscript{80} In Estate of Andrew v. United States, the Internal Revenue Service argued that the value of deceased author V.C. Andrew's name should be included in her taxable estate.\textsuperscript{81} This estate had arranged to have a ghost writer produce additional works coined by the author but did not include

\textsuperscript{74} See MCCARTHY, supra note 37, § 10:8 (quoting First Victoria Nat'l Bank v. United States, 620 F.2d 1096, 1103-04 (5th Cir. 1980) (emphasis added)).
\textsuperscript{75} Id.
\textsuperscript{76} See, e.g., State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 97-99 (Tenn. Ct. App. 1987) (finding that the right of publicity is descendible at death because it promotes policies that are ingrained in Tennessee's jurisprudence).
\textsuperscript{77} MCCARTHY, supra note 37, § 9:5.
\textsuperscript{78} See Martin Luther King, Jr., Ctr. for Soc. Change v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 705 (Ga. 1982) (recognizing that "the right of publicity survives the death of its owner and is inheritable and devisable").
\textsuperscript{79} Id.
\textsuperscript{81} See id. at 1338-39 (discussing the inclusion of V.C. Andrews' name in her taxable estate) (citing Estate of Andrews v. United States, 850 F. Supp. 1279 (E.D. Va. 1994)).
the value of her name in the estate. Following a trial the district court agreed with the IRS and found the author's name a taxable asset and further assigned a $703,500 valuation to it as of the date of her death. Courts have further extended the property label to the right of publicity and addressed whether the right could be considered a part of marital property subject to equitable division upon divorce. These cases have generally held that the non-celebrity spouse is entitled to an equitable distribution of the right of publicity to the extent that it was increased or obtained during the marriage and the non-celebrity spouse had aided in the development of the interest. For example, in *Piscopo v. Piscopo*, the court held that celebrity goodwill is a distinct asset that can be equitably distributed upon divorce if obtained during the marriage.

As these cases and legal theorists illustrate, the right of publicity is currently functioning as a well-defined property right in a myriad of legal contexts. The courts have acknowledged various policy considerations for concluding that the right of publicity encompasses property interests in one's identity, such as the recognition that the right holds economic value both before and after a celebrity's death. In essence, courts have centered on the notion that publicity rights constitute something more than associational interests in one's identity. Publicity rights have value.

2. Assignability of the Right of Publicity. While the traditional rule as to privacy rights provides that such rights cannot be assigned, it is well-established that the right of publicity is freely assignable to persons other than the creator. Generally speaking, an "assignment" of rights includes the sale of all legal and equitable title to the assignee, whereby the assignee possesses all of the assignor's rights in the property sold and essentially "stands in the shoes" of the assignor. Many courts have embraced this rule, and three states have recognized the assignability of the right of publicity in their statutory codes. The Supreme Court of Georgia, for example, stated that "[t]he right of publicity is assignable during the life of the celebrity, for without this characteristic, full commercial

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83 *Id.* at 1295.
84 *See* Elkus v. Elkus, 169 A.D.2d. 134 (N.Y. App. Div. 1991) (finding that wife's opera singer career was part of marital assets to the extent her husband contributed to her success during the marriage); Golub v. Golub, 527 N.Y.S.2d 946 (N.Y. Sup. Ct. 1988) (holding that any increase in the wife's acting and modeling career was part of the marital assets subject to equitable distribution).
86 *McCarthy*, supra note 37, §§ 10:2, 10:10.
87 *Id.* § 10:10.
88 *See id.* § 10:13 (referring to California, Florida and Tennessee).
exploitation of one’s name and likeness is practically impossible . . . . [t]hat is, without assignability the right of publicity could hardly be called a ‘right.’”

Though it may seem peculiar to allow a celebrity to sell by assignment his rights to the commercial use of his persona and identity, there are several tenable reasons why he might desire to do so. First, a celebrity may want to transfer publicity rights to a corporation for income tax or estate planning purposes. Similarly, a celebrity might grant all his publicity rights to his spouse and children during life so they can avoid the pitfalls of probate court after his death. For instance, Clyde Beatty, a famous animal trainer, transferred all his publicity rights to his wife shortly before his death to accomplish this goal.

However, in most cases of outright transfer of publicity rights, the law assumes that the assignor will keep some legal or equitable interest in the activities of the assignee. The assignee could be a company owned by the assignor in which the assignor would clearly have a vested personal or commercial interest. However, even if the assignor has no direct control over the assignee’s use of the assignor’s publicity rights, if the assignee is a spouse or other trusted individual, the assignor has essentially created a trust relationship that should be honored by the courts. According to one commentator, given the extent that an assignor can maintain some control over his publicity rights once transferred, “the fear that a person is losing control over his own identity is not realistic.”

The fact that courts have recognized the right of publicity as a property right which can be partially alienable through licensing agreements, sales, or assignments has led to an enormous market for “fame.” Celebrities around the world exploit their images and likenesses to collect hundreds of thousands, even millions, of dollars. In 2003, LeBron James was named the USA Today basketball player of the year and signed a multi-year deal with Upper Deck trading cards and a seven year shoe contract with Nike. The contract with Nike is worth more than $90 million, and James is scheduled to earn $1 million a year for five years for the use of his image on Upper Deck trading cards. The deal with Upper

89 Id. (quoting Martin Luther King, Jr., Ctr. for Soc. Change v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 704 (Ga. 1982)).
90 Id. § 10:14.
91 Id. (citing Acme Circus Operating Co., Inc. v. Kuperstock, 711 F.2d 1538 (11th Cir. 1983)).
92 Id.
93 Id.
94 Id.
95 See id. (emphasis added).
96 Jacoby & Zimmerman, supra note 80, at 1330.
98 Id.
Deck is similar to past arrangements between the company and athletic prodigies Michael Jordan and Tiger Woods.\textsuperscript{99} Similarly, blonde bombshell Jessica Simpson made a name for herself in the advertising world by marketing brands and products such as DirecTV, Hershey’s Ice Breakers, Pizza Hut, and Proactiv Solution.\textsuperscript{100} In fact, Simpson earned $7.5 million alone for her endorsement of Proactiv Solution, a popular acne treatment.\textsuperscript{101} In 2006 an investor paid $50 million to acquire an eighty percent share of Muhammad Ali’s intellectual property rights in his identity.\textsuperscript{102} As a result of this transaction, the investor is free to grant licenses to merchandisers and advertisers to use Ali’s name, image, and likeness in commercial transactions.\textsuperscript{103}

Other celebrities have acknowledged the notion that the right of publicity is a valuable asset by securitizing the value of their identities. This new trend came to the forefront a few years ago when superstar singer David Bowie needed a lump sum of cash to buy out his manager’s interests in his music catalogue.\textsuperscript{104} Bowie sold the rights to future royalty payments stemming from his music, around three hundred copyrights, to Prudential Insurance Company.\textsuperscript{105} The transaction netted him $55 million.\textsuperscript{106}

Moreover, celebrities who are the victims of misappropriation of their identities receive enormous compensatory awards because of the economic loss they suffer as a result. For example, singer Tom Waits was awarded over $2.6 million, which included compensatory damages, punitive damages, and attorney’s fees, for the misappropriation of his voice in a radio commercial for SalsaRio Doritos that featured an imitation of his raspy voice.\textsuperscript{107} Likewise, singer and actress Bette Midler obtained a $400,000 judgment when her voice was used in a commercial without her consent.\textsuperscript{108} These and similar awards illustrate the economic value of this right and its importance to celebrities.

As more jurisdictions begin to acknowledge the right to freely assign one’s right of publicity and the various reasons for desiring to do so, courts are likely

\textsuperscript{99} Id.


\textsuperscript{103} Id.


\textsuperscript{105} Id.

\textsuperscript{106} Id.

\textsuperscript{107} Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992).

\textsuperscript{108} Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).
to explore whether or not they can forcibly seize and assign these rights to satisfy outstanding civil judgments. To that end, an examination of the treatment of other forms of intellectual property is instructive.

C. TREATMENT OF OTHER FORMS OF INTELLECTUAL PROPERTY: COMPETING INTERESTS

Early in American jurisprudence, courts immunized a debtor's intellectual property rights from seizure to satisfy a judgment debt. In so ruling, courts attempted to strike a balance between the interests of the debtor and the creditor's right to satisfy his judgment and found two justifications for prohibiting the simple execution of intellectual property rights.

First, intellectual property rights such as patents, copyrights, and trademarks were traditionally thought of as nonexistent or without physical composition, and as a result courts considered them unreachable by creditors to satisfy debt. For instance, in *Ager v. Murray* the Supreme Court recognized that a patent or copyright could be assigned to third parties but noted the difficulty in subjecting these forms to simple execution at law. The Court defined property ordinarily subject to levy as "property, or the rents and profits of property, that has itself a visible and tangible existence within the jurisdiction of the court and the precinct of the officer." The Court concluded that, although the debtor's patent rights were assignable, these rights did not fit within the category of property subject to simple execution. Second, courts reasoned that society has an interest in protecting the creations of artists, inventors, and writers. As such, patents, copyrights, and trademarks were generally sheltered from judicial execution because it was believed that this policy would encourage the broadest distribution of new ideas.

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110 Id. For purposes of this Note, "simple execution" will refer to a "judicial enforcement of a money judgment, usually by seizing and selling the judgment debtor's property." *BLACK'S LAW DICTIONARY* 609 (8th ed. 2004).

111 Lieurance, *supra* note 109, at 376.

112 105 U.S. 126, 128-30 (1881). The first Supreme Court case to address whether intangible property could be seized to satisfy a judgment was *Stephens v. Cady*, 55 U.S. 528, 531 (1852), in which the Court noted that "the incorporeal right, secured by the statute to the author, ... being intangible, and resting altogether in grant, is not the subject of seizure or sale by means of this process—certainly not at common law."

113 Ager, 105 U.S. at 130-31.

114 Id. at 130-32.

115 Lieurance, *supra* note 109, at 376.

116 Id; see also United States v. Bily, 406 F. Supp. 726, 730 (D.C. Pa. 1975) (noting the importance...
However, as a matter of policy, the judgment creditor also has compelling reasons to take intellectual property rights to satisfy his judgment.\textsuperscript{117} As the victor in the legal dispute, a judgment creditor is entitled to levy upon or attach the debtor's assets, including monies and properties, to satisfy the debt.\textsuperscript{118} Nonetheless, because of the early immunization of intellectual property from judgments, a debtor could avoid paying the judgment by transferring all his assets into intellectual property.\textsuperscript{119} In \textit{Keightley v. Walls}, the Indiana Supreme Court noted that "[a] defendant might be worth millions, and yet, if his wealth consisted of choses in action, he could successfully defy his creditors."\textsuperscript{120}

For many years courts tipped the balance in favor of the debtor and protected intellectual property rights from satisfaction of judgments.\textsuperscript{121} However, courts later began to circumvent this prohibition and more widely acknowledge the rights of creditors in recouping their losses.\textsuperscript{122} Over the years, courts have created an assortment of ways in which creditors can reach debtors' intellectual property rights to satisfy their judgments.\textsuperscript{123} Although the Supreme Court held in \textit{Stephens v. Cady} that intellectual property rights were precluded from seizure and sale to satisfy a judgment, the Court commented that "[n]o doubt the property may be reached by a creditor's bill, and be applied to the payment of the debts of the author."\textsuperscript{124} Furthermore, the Supreme Court in \textit{Ager v. Murray} found that a patent could be seized by a court in equity to satisfy the debt of the patentee, declaring that "the provisions of the patent and copyright acts, securing a sole and exclusive right to the patentee, do not exonerate the right and property thereby acquired by him . . . from liability to be subjected by suitable judicial proceedings to the payment of his debts."\textsuperscript{125} The Court cited cases from the highest courts in New
York and California as standing for the proposition that, upon a creditor's bill, a court could order the assignment and sale of a patent to satisfy the patentee's judgment debts. The Court stated that in order to accommodate this, a suitable trustee would be appointed to execute an assignment if the debtor refused to do so himself.

Courts have acknowledged the powerful value of intellectual property rights to satisfy civil judgments. These principles inform the issue of whether rights of publicity, like other forms of intellectual property, can be taken to satisfy debt in the debtor-creditor system and, more specifically, to satisfy civil judgments where one party is compensated for the wrongdoing of another. In order to answer this question one must become acquainted with the tort system and its mechanisms for compensating the victim.

D. PRINCIPLES OF TORT LAW

1. Function of the Law of Torts. Tort law is governed by the respective states. A tort has been defined as "[a] civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another." A civil action in tort is commenced by an injured party, and its primary object is to compensate the victim for the damage caused by the wrongdoer. For instance, the families of Ronald Goldman and Nicole Brown Simpson sued O.J. Simpson for the wrongful deaths of their loved ones. At the conclusion of the civil trial the jury found Simpson liable for wrongful death and assessed $33.5 million in compensatory and punitive damages against him. Generally, a judgment debtor, in this case O.J. Simpson, would be forced to satisfy this judgment from any assets in the form of monies or property in his

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126 Id. at 131; see also Pac. Bank v. Robinson, 57 Cal. 520, 521 (1881) (affirming a court order requiring the patentees to transfer their interests in a patent to a judgment creditor); Gillett v. Bate, 86 N.Y. 87, 87 (1881) ("The right acquired by a patentee on the issue of a valid patent, is property, which is subject to the claims of creditors, and may be reached by creditors' bill, and applied to the payment of the debts of the patentee.").
127 Ager, 105 U.S. at 132.
128 BLACK'S LAW DICTIONARY 1526 (8th Ed. 2004). For example, a dignitary tort is one "involving injury to one's reputation or honor." Id. Defamation is one such example. Id.
130 PETROCELLI & KNOBLER, supra note 1, at 631. Compensatory damages are awarded to "to indemnify the injured person for the loss suffered," whereas punitive damages are "awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; specifically, damages assessed by way of penalizing the wrongdoer or making an example to others." BLACK'S LAW DICTIONARY 416, 418 (8th ed. 2004).
Each state statutory code delineates the property that can be seized in satisfaction of debt as well as certain property that is exempt from seizure. In California, all property of the judgment debtor is subject to enforcement of a money judgment unless an enumerated exception applies. Furthermore, the California Code allows for the levy upon a general intangible, which indicates that other forms of non-tangible property can be seized in satisfaction of a tort judgment. Finally, in 1982 California added section 708.510 to its statutory code, providing that “upon application of the judgment creditor on noticed motion, the court may order the judgment debtor to assign to the judgment creditor or to a receiver . . . (5) [p]ayments due from a patent or copyright.” This addition to the California Code allows judgment creditors to reach assets that are not subject to execution and gives a court the power to make absolute and outright assignments of specific properties.

Moreover, other state statutes outline similar sources for fulfillment of a civil judgment. Oregon provides that all property of the judgment debtor is subject to an execution, except where specific exceptions exist such as vehicles of a certain value, wearing apparel, jewelry and other personal items, among others. In Florida, a judgment debtor cannot be compelled to forfeit his home under a forced sale to satisfy his debt because of the homestead exemption that protects this valuable asset from seizure.

2. Policy Considerations. By and large, the law of torts is concerned with compensation for injuries sustained by one person as a result of the conduct of

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131 For purposes of this Note, a judgment debtor is “[a] person against whom a money judgment has been entered but not yet satisfied.” BLACK’S LAW DICTIONARY 861 (8th ed. 2004). Conversely, a judgment creditor is “[a] person having a legal right to enforce execution of a judgment for a specific sum of money.” Id. In the O.J. Simpson example, Simpson is a judgment debtor and Fred Goldman is a judgment creditor.

132 CAL. CIV. PROC. CODE § 695.010 (West 2006). Some examples of property exempt from seizure include, but are not limited to, alcoholic beverage licenses that are transferable, interests of a trust beneficiary, and the loan value of an unmatured life insurance. Id. § 699.720.

133 Id. § 700.170; see also BLACK’S LAW DICTIONARY 1253 (8th ed. 2004) (defining intangible property as “[p]roperty that lacks a physical existence,” including stock options and business goodwill).


135 OR. REV. STAT. ANN. § 18.345 (West 2006).

136 FLA. STAT. ANN. § 222.01 (West 2006). See also FLA. CONST. art. 10, § 4 (outlining the homestead exemption). O.J. Simpson took advantage of this law and moved to Florida to protect his home from liquidation to satisfy the $33.5 million judgment against him. Mark Reutter, Bankruptcy Loophole Lets Debtors Keep Mansions While Others Suffer, NEWS BUREAU: UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN, Apr. 1, 2001, available at http://www.news.uiuc.edu/biztips/01/04bankrupt.html.
SQUEEZING "THE JUICE"

Compensation is generally warranted when society deems the wrongdoer's conduct unreasonable. For example, in the O.J. Simpson case, the jury held Simpson liable for the wrongful deaths of both Nicole Brown Simpson and Ronald Goldman. The jury's verdict was a result of their determination that Simpson had committed a tortious act against the families of the deceased, and they mandated that Simpson pay monetary compensation to the families for the tragic loss of human life.

Additionally, in cases where the defendant's conduct has been particularly egregious or intentional and deliberate, most courts have allowed the jury to award punitive damages. These damages are awarded above and beyond what the plaintiff received as compensation for his injuries as a means of punishing the defendant and deterring others from committing the same act. To award punitive damages "[t]here must be circumstances of aggravation or outrage, such as spite or 'malice' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton."

Punitive damages serve two important functions in tort law: punishment and deterrence. Beyond the need to compensate the victim for the defendant's wrongdoing, courts have sought to admonish the tortfeasor for his misconduct. Shaded into this purpose is the desire to deter future occurrences of the harm by others or repetition of the conduct by the same defendant. Often the incentive behind imposing monetary punishment is to provide that motivation.

The functions and policies of tort law begs the question of whether the forceful taking of a celebrity tortfeasor's publicity rights would sufficiently compensate the victim and simultaneously punish and deter the wrongdoer.

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137 KEETON ET AL., supra note 129, § 1.
138 Id.
139 Jones, supra note 13.
140 See PETROCELLI & KNOBLER, supra note 1, at 631 (noting that the jury awarded $8.5 million in compensatory damages and $25 million in punitive damages against Simpson).
141 KEETON ET AL., supra note 129, § 2.
142 Id.
143 Id. For example, in Cherry-Burrell Co. v. Thatcher, 107 F.2d 65 (9th Cir. 1939), the court affirmed an award of punitive damages when a vehicle driven by the appellant recklessly attempted to pass another vehicle on the highway in a horrible storm.
144 See id. § 4.
145 Id. Furthermore, most courts have noted that evidence of the defendant's wealth can bear on the amount which will sufficiently punish the defendant for his wrongdoing. Id. § 3.
III. DISCUSSION

A. THE DEBATE: PROPERTY OR PERSONA

Commentators and scholars have voiced vigorous objections, based on philosophy and opinion, against treating publicity rights as property that can be seized to satisfy debt. For instance, Professor Margaret J. Radin offered a personhood theory for property that can be applied to publicity rights. This perspective, it has been argued, explains the dual nature of publicity rights, encompassing both economic and dignitary interests. While this theory provides the strongest objection to treating publicity rights as assets that can be seized in satisfaction of debt, there are strong reasons to counterbalance the dignitary interest dilemma in the American civil system.

First, case law, state statutes, and noted legal scholars classify the right of publicity as property, separate and distinct from its parent right to privacy. The property label is significant in that courts have allowed the right of publicity to descend to celebrity heirs at death and have recognized the right of publicity as part of marital property subject to equitable division upon divorce. In addition, many celebrities voluntarily assign their publicity rights and receive large sums of money for the ownership rights to their identities. By the same token, celebrities are frequently awarded substantial compensatory awards when defendants are found to have misappropriated their names and likenesses. If the right of publicity is merely a property right, just like a house or an automobile, why should it break free from its dignitary foundation in certain legal settings but not in others? Similarly, why should publicity rights benefit celebrities in their endeavors to quantify fame but at the same be shielded from judgment when they commit a tort?

The American tort system provides an ideal legal landscape for courts to seize rights of publicity and assign them in satisfaction of civil judgments. First, the primary object of the civil tort system is to compensate an individual for the

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148 See Jody C. Campbell, Note, Who Owns Kim Basinger?: The Right of Publicity's Place in the Bankruptcy System, 13 J. INTELL. PROP. L. 179, 196 (2005) (agreeing with Radin and concluding in part that the right of publicity cannot be included in the bankruptcy estate because of the "inability to perfectly sever the dignitary and economic aspects of the property interest").

149 See supra notes 68–74 and accompanying text.

150 See supra notes 75–85 and accompanying text.

151 See supra notes 86–106 and accompanying text.

152 See supra notes 107–08 and accompanying text.
SQUEEZING "THE JUICE"

damage suffered as the result of a wrongdoing. It logically follows that a court should be able to levy upon any available asset in an effort to "make the plaintiff whole." In addition, policy rationales underlying the tort system offer compelling reasons to seize a tortfeasor’s publicity rights. What better way to punish the famous wrongdoer and deter future harm than to forcibly take and assign his arguably most valuable asset.

B. CONTOURS OF THE RIGHT OF PUBLICITY

1. Property Label as Justification. The right of publicity has been consistently labeled as property. While some legal commentators have cautioned against the “tyranny of labels,” the classification has clear benefits in various legal settings. In fact, designating publicity rights as property provides useful guidance in shaping the exact facets of this young doctrine.

Courts have been amenable to treating the right of publicity as a property right in descendibility at death, divorce proceedings and for purposes of taxable estates. The Tennessee Court of Appeals advanced six justifications for allowing a celebrity’s publicity rights to descend to his heirs at death. Notably, most of the reasons were supported by the idea that converting the persona into a marketable commodity offered clear benefits to a celebrity’s successors or transferees.

Moreover, the tax and divorce decisions similarly acknowledged that former spouses and the IRS have real interests in the value of a celebrity’s fame. It is true that the tax and divorce contexts are different from the debtor-creditor situation such that a celebrity need not completely divest himself from control over his persona in the former. Rather, those cases assume that the asset would be shared, or in the case of marital dissolution, equitably distributed so that neither the former spouse nor the IRS could unilaterally decide how to use the celebrity’s identity in commercial transactions. However, even with these fine

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153 See supra notes 129–31, 137–40 and accompanying text.
154 See supra Part II.B.1 and accompanying notes.
155 See McCARTHY, supra note 37, § 10:8 (Judge Learned Hand warned that denoting the right of publicity as a property right did not solve “any and all problems of the shape and scope of the legal right”).
156 See supra notes 75–83 and accompanying text.
157 See State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 97–99 (Tenn. Ct. App. 1987) (stating that the descendibility of the right of publicity assumes that “one may not reap where another has sown nor gather where another has strewn” (citation omitted)). The court embraced the notion that a celebrity’s publicity rights are valuable capital assets. Id. at 98.
158 Id. at 97–99.
159 See supra notes 84–83 and accompanying text.

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legal distinctions, there is no reason to conclude that publicity rights could not be taken to satisfy judgments in the tort system. The law recognizes that ex-spouses as well as celebrity heirs have certain interests\textsuperscript{160} and by extension of this premise, so do other creditors. It is unjust for courts to assert an inability to disentangle persona rights from the commercial value found in rights of publicity in the debtor-creditor system while easily separating them in other contexts. Thus, if the right of publicity is treated as a property right in some legal settings, it is proper to treat it as a property right, subject to seizure by a creditor, in the tort system.

2. Assignability of Publicity Rights Cuts in Favor of Allowing Forcible Transfers in the Civil System. The assignability of the right of publicity provides further rationale for the forcible seizure of the asset to satisfy a civil judgment. A brief hypothetical illustrates this point. Suppose that O.J. Simpson has grown tired of living like non-celebrity persons. He is nostalgic for the days when he made millions playing football and was revered by the American people. His NFL pension does not provide the rich lifestyle he was accustomed to living before his retirement from football, and his legal battles resulting from the deaths of Nicole Brown Simpson and Ronald Goldman. Simpson consults with his attorney, who informs him that he can voluntarily assign the rights to his identity to the highest bidder, a process, in which he would sell all legal and equitable title to his personality. The assignee would then own all of Simpson’s publicity rights and would further have the ability to make merchandising agreements. Simpson’s price for this right could be $33.5 million.\textsuperscript{161}

In fact, celebrities increasingly employ rights of publicity to their benefit. As stated above, the rich and famous exploit their images in merchandising agreements and transfer and sell personality to receive astronomical amounts of money.\textsuperscript{162} It needs little explanation to consider why Jessica Simpson agreed to endorse Proactiv Solution even though she had to declare on national television that she had problems with acne.\textsuperscript{163} Ultimately, Jessica Simpson’s “dignitary interest” in her identity was outweighed by the $7.5 million paycheck for the commercial use of her persona. Furthermore, given that many state courts have recognized that celebrities have a large commercial interest in their identities by awarding them enormous judgments when someone misappropriates their image, it follows that those same courts could just as quickly take publicity rights away

\textsuperscript{160} See supra notes 76–85 and accompanying text.

\textsuperscript{161} Recall that $33.5 million was the total judgment awarded against O.J. Simpson in the civil trial. See PETROCELLI & NOBLER, supra note 1, at 631. In Georgia, for example, Simpson could make such a transaction because the state recognizes that without the right to assign one’s right of publicity, “full commercial exploitation of one’s name and likeness is practically impossible.” Martin Luther King, Jr., Ctr. for Soc. Change v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 704 (Ga. 1982).

\textsuperscript{162} See supra notes 96–108 and accompanying text.

\textsuperscript{163} See supra notes 100–01.
when a famous individual commits a tort. It is grossly inconsistent to treat the
duty of publicity as a property right when it benefits the celebrity or their assignee
and exclude it from seizure when the celebrity has committed a tort.

Some commentators have offered justifications for rejecting a separate and
alienable right of publicity, which imply that the right has not fully divorced itself
from its birth alongside the right to privacy. Dean Alice Haemmerli urges that
a philosophical orientation of the right of publicity "permits us to reconceive the
right of publicity as a freedom-based property right with both moral and
economic characteristics..." Likewise, Professor Margaret J. Radin advances
the personhood perspective of property, a theory which could explain the dual
nature of the right of publicity, thus foreclosing any possibility that a celebrity
could ever be completely detached from his identity for purposes of commercial
gain.

Although these models lend credence to the argument that publicity rights are
not appropriate assets that can be seized in satisfaction of debt, they lose their
luster when one considers what actually happens when publicity rights are
assigned. In most cases of outright assignment, it is assumed that the assignor
would preserve some equitable or legal interest in the endeavors of the assignee.167
As an illustration, Fred Goldman could not make merchandising agreements with
adult film makers to use O.J. Simpson's name and likeness to endorse their
product. This would be casting Simpson in a "false light" and would give him
legal recourse against Goldman for his loss of reputation. Rather, a court could
tailor the assignment and compel Simpson to assign his rights of publicity to a
trustee, who would balance the competing interests between Simpson's reputation

164 See Alice Haemmerli, Whose Who? The Case For a Kantian Right of Pubhai, 49 DUKE L.J. 383
(1999) (discussing the right of publicity using Kantian philosophy and arguing that the right derives
from individual autonomy).

165 Id. at 422.

166 Radin, supra note 147.

167 See supra notes 92-94 and accompanying text.

168 See RESTATEMENT (SECOND) OF TORTS § 652E (1977) (defining the elements of a false light
claim). The Restatement provides:
One who gives publicity to a matter concerning another that places the other
before the public in a false light is subject to liability to the other for invasion of
his privacy, if
(a) the false light in which the other was placed would be highly offensive to
a reasonable person, and
(b) the actor had knowledge of or acted in reckless disregard as to the falsity
of the publicized matter and the false light in which the other would be
placed.

Id. Under the Restatement, Goldman could not market Simpson as an adult film star because this
would arguably harm his reputation and injure his dignitary interests associated with his rights of
publicity.
and Goldman’s desire to satisfy his outstanding civil judgment. As a result, the trustee could enter into contracts with athletic companies or sports’ drink manufacturers and allow them to employ Simpson’s likeness to partially satisfy the judgment. If a court controlled the assignment in this way, Simpson could not argue that his persona would be injured by the assignment.

In the alternative, a court could force Simpson to assign his publicity rights to Fred Goldman in satisfaction of the judgment. Subsequently, Goldman could make an outright transfer of the rights to a third party for a lump sum payment, just as Muhammad Ali did in 2006. If Simpson’s celebrity value really is worth $30 million, as one expert suggests, then it is possible that Goldman could recoup a large part of his judgment by selling Simpson’s publicity rights to a third party. A court could then consider the judgment satisfied or at least credit Simpson in the amount of the sale price.

C. CREDITOR’S BILL PROVIDES THE LEGAL PATH

The fact that other forms of intellectual property, such as copyrights and patents, have been seized under a creditor’s bill in equity to satisfy debt likewise supports treating the right of publicity in the same fashion. Though early decisions were marked with a hesitancy to liquidize such intangible assets for decades courts, including the Supreme Court, have noted that there is no tenable reason to immunize intellectual property from satisfaction of debt. Many courts have now tipped the scales to favor the creditor and rejected arguments favoring future labor and ingenious creation as compelling arguments to shield intellectual property from the debtor-creditor system altogether.

Although courts have limited the paths by which intellectual property can be seized and utilized in debt proceedings by prohibiting their use in simple execution, there is no strong justification for excluding the right of publicity from the group of assets available to creditors. Courts have uniformly classified the right of publicity as property and explicitly aligned it with other forms of intellectual property. Therefore, just as other forms of intellectual property can be levied upon by use of a creditor’s bill in equity, the right of publicity should also be subject to levy by a creditor’s bill in equity. Specifically, in California there is strong case law providing for this relief. In Pacific Bank v. Robinson, the court declared that a judgment creditor could invoke equity to require the transfer

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169 See supra notes 102–03 and accompanying text.
170 See supra note 17 and accompanying text.
171 See supra Part II.C and accompanying notes.
172 See supra Part II.C and accompanying notes.
173 See supra Part II.B.1 and accompanying notes.
and/or assignment of the debtor’s rights or interests in intangible property.\(^{174}\)

Since the patent in dispute was an intangible form of property, the court concluded that it had the power to compel its transfer and/or assignment upon receipt of a creditor’s bill.\(^{175}\)

In the O.J. Simpson case, Fred Goldman is a judgment creditor who submitted a request to the superior court in California asking for relief in equity.\(^{176}\) Based on the principles articulated by the highest court in California, it appears that the superior court in this case has the power to afford Goldman the relief he desperately seeks—ownership and control of O.J. Simpson’s rights of publicity.

D. THE RIGHT OF PUBLICITY AND TORT LAW: POLICY, PUNISHMENT AND DETERRENCE

Finally, compelling a celebrity debtor to assign his publicity rights to a tort creditor would fit neatly into contemporary notions of the purpose of tort judgments. In a system that tips the balances in favor of the victim, tort law provides the ideal structure for the exploration of how publicity rights might be utilized to satisfy an outstanding civil judgment. Taking into consideration the fundamental principle underlying tort law, namely the need to compensate individuals for the losses they have suffered at the hands of another,\(^{177}\) it is just and equitable to levy upon as many of the debtor’s assets as needed to satisfy the judgment. Otherwise, the essential goal of tort law—to make the plaintiff whole—would fail.

Many state statutes governing what property can be seized in satisfaction of a monetary judgment provide that *all* forms of property belonging to the judgment debtor are subject to seizure.\(^{178}\) California even goes as far as to state that “general intangibles” can be levied upon in satisfaction of debt.\(^{179}\) Although there is no express inclusion of publicity rights in the statutes, in the absence of specific language to the contrary, it is reasonable to conclude that the state legislatures that have passed such statutes intended for the courts to determine whether or not this right would be an appropriate asset to seize in satisfaction of a tort creditor’s obligation to his victim. Because this intellectual property right is still young, only one state prohibits the inclusion of the right of publicity as a form of property subject to forcible assignment to satisfy a civil judgment.\(^{180}\) The

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\(^{174}\) 57 Cal. 520, 524 (1881).

\(^{175}\) Id.

\(^{176}\) Motion, *supra* note 21, at 1.

\(^{177}\) See *supra* notes 129–31; *supra* notes 137–40 and accompanying text.

\(^{178}\) See *supra* notes 132–36 and accompanying text.

\(^{179}\) See *supra* note 133 and accompanying text.

\(^{180}\) See 765 ILL. COMP. STAT. ANN. 1075/15 (West 2007) (giving an expansive exemption to
foundation of tort judgments could provide a starting point for courts to affirmatively apply the "property" label to the right of publicity and finally shed the underpinnings of privacy law that link this interest to the persona. The tort system, in which judgments are entered against a wrongdoer, provides the perfect paradigm for experimentation with the right of publicity minus the persona.

Recall the O.J. Simpson case once again. Because Simpson took advantage of Florida’s homestead exemption and because creditors cannot reach his $20,000 per month NFL pension, Simpson claims he is unable to pay the $33.5 million judgment against him.181 Yet, an expert on celebrity names and likenesses guessed that Simpson’s celebrity value was worth $30 million at the time of the civil trial.182 Furthermore, Simpson has been earning wages in the years since the civil judgment by signing autographs and making appearances. One such incident was a shocking entrance at NecroComicon, a Halloween-themed comic book convention, on the tenth anniversary of Simpson’s acquittal from the criminal charges.183 At this convention, Simpson sold photographs, t-shirts, football helmets, and jerseys.184 Moreover, a few months before that, Simpson arrived unannounced in Chicago and sold his autograph to fans at the National Sports Collectors Convention.185 Most recently, and perhaps the most offensive method Simpson has employed to evade the order of the court, was his offer to write a book entitled If I Did It, in which he would give an account of how he would have killed Ronald Goldman and Nicole Brown Simpson.186 Simpson’s compensation from the book for his notoriety as the supposed murderer of two innocent people was to be two to three and a half million dollars.187 If publicity rights are

publicity rights by providing that “the rights under this Act are not subject to levy or attachment and may not be the subject of a security interest”). However, a creditor in Illinois is not prevented from levying upon the income earned from exploiting publicity rights. Id.

181 Jones, supra note 2. Under California law, Simpson’s NFL pension is protected from judgment. Id. Similarly, Simpson’s residential home in Florida cannot be seized to satisfy his debt. Id.

182 PETROCELLI & KNOBLER, supra note 1, at 631.

183 See Motion, supra note 21, at 8 (citation omitted).

184 Id.


187 Id. Judith Regan, the publisher who authorized the book and Fox special, commented, “[T]hough it might sound a little strange, Nicole and Ron were in my heart. And for them I wanted him to confess his sins, to do penance and to amend his life. Amen.” Id. at 2. In a strange turn of events, in late July, 2007, a federal bankruptcy judge awarded ninety percent of the proceeds from the book to Ron Goldman. See O.J.’s Book Proceeds Will Go To Goldman Family, CNN.COM, July 30,
precluded from inclusion in a debtor’s assets that can be used to satisfy civil judgments, tortfeasors such as Simpson would be encouraged to convert most of their assets into property exempt from seizure, such as homes in Florida, while simultaneously continuing to earn wages via celebrity appearances and licensing agreements. It makes little sense to allow a tortfeasor to profit from his wrongdoing while the victim remains uncompensated.

Perhaps the most persuasive rationale for compelling tort debtors to assign their rights of publicity to satisfy outstanding civil judgments, however, is the policy justifying punitive damages. When a defendant has behaved with malice or his conduct is particularly egregious, punitive damages can be awarded to punish him. Furthermore, courts also acknowledge the importance of punitive damages in deterring future conduct by others or preventing the same conduct by the defendant. As courts expand the limits of publicity rights by giving more protection to celebrity personalities, these same courts can use tort law to punish the famous wrongdoer by striking at his pocketbook. If potential wrongdoers knew that they could lose their most valuable asset—the value of the persona—perhaps they would think twice before committing injurious acts against others. Additionally, the message would ring loud and clear to those who might have a propensity towards tortious conduct. The lesson to O.J. Simpson and others would be that a person cannot profit from his wrongdoing while his victims ultimately bear the loss.

IV. CONCLUSION

Public interest in the O.J. Simpson story piqued again in November of 2006 when Superior Court Judge Linda Lefkowitz rejected Fred Goldman’s petition to assign to him O.J. Simpson’s rights of publicity. Citing Simpson’s “privacy rights” as one indicia of her decision, Judge Lefkowitz commented that it “mitigate[s] against court-enforced transfer of the (publicity) right to obtain commercial profit from [Simpson’s] likeness.” Although this chapter of the Simpson tale is closed, the door is still open for future decisions in favor of court-ordered assignment of the right of publicity.

2007, http://www.cnn.com/2007/US/law/07/30/simpson.book/index.html. Although Goldman obtained these rights, his judgment still stands. Id. However, he agreed to drop his claim to the bottom of the list which means that other creditors will be paid before he is. Id.

See supra notes 141–46 and accompanying text.


Id. Judge Lefkowitz did state, however, that “[i]t may be that the case may be subject to perceptions of equity that appeal to a contrary outcome.” Judge: O.J. Simpson to Keep His Right of Publicity, CBS2.COM, Nov. 2, 2006, http://cbs2.com/local/local_story_306171925.html.
The American civil system, and tort law in particular, is designed to "make whole" individuals who have suffered due to the wrongdoing of another. In order to do this, courts see fit to compensate these persons monetarily for their losses. At times when a defendant's conduct is particularly egregious, juries have full authority to award punitive damages in order to punish and deter future harm. Celebrity tortfeasors have one significant asset that differentiates them from others: the right of publicity, which today can be worth millions of dollars. One aspect of this form of intellectual property that remains uncharted is whether or not this right can be forcefully assigned in satisfaction of an outstanding civil judgment.

Some scholars argue that the right of publicity cannot be disentangled from its parent in privacy law. However, upon closer examination, there are significant reasons to conclude to the contrary. First, the right of publicity has been uniformly classified as a property right by noted legal commentators, case law and state statutory codes. Likewise, it is well-established that one can freely assign his interests in the right of publicity to others. Celebrities have made excellent use of this right by (a) employing their images and personas in multi-million dollar merchandising campaigns, and (b) recouping exorbitant amounts of money when someone uses their image without their consent. It is inconsistent for courts to categorize the right of publicity as property when it benefits the celebrity but as a right that cannot be separated from the persona in other contexts.

Second, other forms of intellectual property, such as patents and copyrights, have been seized in equity to satisfy debt. Since the right of publicity has been classified as intellectual property, it logically follows that it can be taken to satisfy debt as well. Although the courts have restricted the legal paths by which intellectual property can be seized, there is no reason to exclude publicity rights entirely from the group of assets available to creditors.

Finally, the policies underlying tort law make the civil court system a perfect framework for the seizure of publicity rights to satisfy a judgment. Because the primary aim of tort law is to compensate the victim for harm, as a matter of fairness, courts should be able to levy upon as many assets as needed to fulfill that goal. Furthermore, when punitive damages are awarded, there is an even stronger case for seizing the right of publicity because punitive damages seek to punish the defendant and deter others from engaging in similar conduct. The best way to achieve this purpose is to take the right of publicity, arguably a celebrity's most precious asset.

Though O.J. Simpson won the battle, all is not lost. The right of publicity is still young, and courts have discretion in shaping the exact contours of this proprietary right. Allowing a court-ordered assignment of the right of publicity to satisfy a civil judgment is the equitable course to follow for all parties involved. As long as a neutral party, such as a trustee, keeps dignitary interests in mind...
when supervising the use of one’s publicity rights to satisfy a judgment debt, there is little if any other justification for precluding this theory from succeeding. Perhaps in the future courts will see the appeal in this proposal so that tort creditors such as Fred Goldman are not left uncompensated for their losses.

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