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Who Owns Kim Basinger? The Right of Publicity's Place in the Bankruptcy System

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NOTES

WHO OWNS KIM BASINGER? THE RIGHT OF PUBLICITY'S PLACE IN THE BANKRUPTCY SYSTEM

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In May of 1993, Kim Basinger, who starred in such movies as *L.A. Confidential*, *Batman*, and *Nine ½ Weeks*, filed for bankruptcy after a jury ordered her to pay an $8.9 million judgment. After Basinger failed to appear in the film *Boxing Helena*, Main Line Productions successfully sued the actress for breach of oral contract. After initially filing a Chapter 11, Basinger’s attorneys converted the case to a Chapter 7. According to Leslie Cohen, Basinger’s attorney, the conversion was necessitated by Main Line’s unreasonable demands, which included appointment of a third party to exercise control over whether or not Basinger should accept particular acting roles and forced disclosure of any plans Basinger had to have a baby. Cohen claimed the demands infringed upon Basinger’s constitutional rights and amounted to involuntary servitude. According to Cohen Main Line argued that the actress’s possible pregnancy would affect her ability to work and thus her ability to pay off her debts: a legitimate concern of her creditors. Could a creditor use the bankruptcy system to control a debtor’s ability to work and even begin a family? If so, who owned Kim Basinger?

I. INTRODUCTION

Unlike other forms of intellectual property such as copyrights and patents, the right to exclusive use of one’s persona is a relatively new property right in American jurisprudence. Whereas other forms of intellectual property rights have their origin in English statutes, the recognition of a celebrity’s right to the exclusive control and privilege of publishing his or her picture is barely fifty years old. Unfortunately, legislatures have been slow to codify the right of publicity leaving courts to wade the murky waters of the common law with little or no statutory guidance. Since persona rights were first introduced in the *Haelan* decision, courts have attempted to further define the exact contours of this property right. Court discussions of persona rights range from analysis of its

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1 Judy Brennan, *Is She the Villain—or a Victim?*, *L.A. TIMES*, Jan. 2, 1994, at Calendar 6. The dispute arose out of Basinger’s refusal to star in the movie *Boxing Helena*. Id.

2 Id.

3 Id.

4 Id.

5 Id.


7 See Statute of Monopolies of 1624, 21 Jac. I, c.3 (Eng.) (granting exclusive rights to “letters patent . . . for a term of 14 years . . . of the sole working or making of any manner of new manufactures within this realm”); Statute of Anne of 1710, 8 Ann. c. 19, § 1 (Eng.) (granting authors monopolies on their books for fourteen years).

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origin in the right to privacy to whether the property descends to the decedent's heirs upon death.9

While certain areas of persona rights have received extensive coverage and academic treatment, one facet that remains largely unexplored is the place of publicity rights in the American bankruptcy system. Because the right of publicity is classified as a property right, it seems intuitive that it would become part of the bankruptcy estate, subject to seizure and liquidation to a third party. Many scholars have suggested such an approach as the list of famous people who file bankruptcy grows.10 Although this approach initially has an orderly appeal, one must answer several questions before reaching such a conclusion. Is the right to publicity strictly a property right that is subject to seizure and liquidation by creditors of celebrities and public figures? If so, what exactly would the successful bidder on this property acquire? Does state law provide any grounds to exempt such property from the bankruptcy estate?

The purpose of this Note is to answer these questions and argue that contrary to the suggestion of case law, the right of publicity as "property" has not completely abandoned its foundational ties to the right of privacy. Furthermore, the complex nature of publicity rights, coupled with the policies and statutory rules of the Bankruptcy Code, prevents such a treatment. While only one state explicitly exempts the right to publicity from the bankruptcy estate,11 this Note suggests state law should find a place in its respective exemption statutes to protect the personal dignity and future earning capacity of the insolvent celebrity.

II. BACKGROUND12

A. UNITED STATES BANKRUPTCY LAW

1. Chapter 7 and Chapter 13. The Constitution of the United States empowers the federal government "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."13 Since 1898, a federal bankruptcy

12 Title 11 of the U.S. Code was amended in April 2005. Pub. L. No. 109-8 § 306(b), 119 Stat. 80 (2005). This Note was written prior to the amendments and reflects the law prior to the April 2005 changes.
13 U.S. CONST. art. I, § 8, cl. 4.
law has permanently been in effect. Today, bankruptcy cases are governed by Title 11 of the United States Code.

When an insolvent debtor seeks bankruptcy protection, the filing of the bankruptcy petition imposes a stay that prevents creditors from pursuing any activity toward the collection of a debt. Along with the petition, the debtor is required to file "a list of creditors, ... a schedule of assets and liabilities, current income and current expenditures, and a statement of the debtor's financial affairs." The trustee and creditors use these schedules to establish what property is part of the estate, the status of a creditor's claim (either secured, priority or unsecured), and which debts will be discharged at the end of the bankruptcy. All debts that remain unpaid at the conclusion of the cases are discharged, thus relieving the debtor of all debts and obligations that arose prepetition with certain notable exceptions.

In a typical consumer bankruptcy case, a debtor selects between a liquidation bankruptcy governed by Chapter 7 or a Chapter 13 rehabilitation case. In a chapter 7 liquidation case, the debtor's existing assets are placed under the control of the trustee, an officer appointed by the United States Trustee's Office to administer the bankruptcy estate. Upon taking control of the estate, the trustee is charged with liquidating assets of the estate and distributing the proceeds to creditors according to 11 U.S.C. § 726. After the estate is administered, the remaining debts are discharged unless reaffirmed or redeemed pursuant to Title 11.

An alternative to the liquidation of assets under Chapter 7 is Chapter 13's repayment plan. Unlike chapter 7, the debtor in a Chapter 13 case is able to retain possession of property and possesses all rights that the trustee would have under

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14 CHARLES JORDON TABB, THE LAW OF BANKRUPTCY 32-36 (The Found. Press, Inc. 1997) (noting the original Bankruptcy Acts were short-lived and the Bankruptcy Act of 1898 was the first permanent piece of bankruptcy legislation). The Bankruptcy Act of 1898 was amended several times and eventually repealed by the Bankruptcy Reform Act of 1978. Id.
16 11 U.S.C. § 362 (2000). Subsection b of this provision does recognize certain exceptions to the bankruptcy stay, including alimony and support payments as well as criminal prosecutions. Id.
17 Id. § 521(1).
18 See id. § 523(a)(3) (stating that a discharge under § 727 does not include debts not listed in the schedules).
19 See id. § 727. Most notably, subsection (a)(2) prevents the granting of a discharge if "the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with the custody of property ... has transferred, removed, destroyed, mutilated, or concealed" property. Id.
20 See id. §§ 701-702, 704.
21 See id. §§ 704, 726.
22 Id. §§ 524(c), 722.
Chapter 7. In a Chapter 13, debtors, in addition to a petition and schedules, must file a plan outlining their ability to contribute all disposable income to the repayment of creditors for a period of up to thirty-six months. Secured creditors are usually paid the value of the collateral securing the claim, with the balance paid as unsecured debt, typically cents on the dollar. Assuming a creditor or the trustee does not successfully object to the proposed plan, the debtor’s plan will be confirmed and the debtor will be obligated to tender plan payments to the trustee for distribution to creditors. At the conclusion of the confirmed plan and after all plan payments have been made, the remaining debt will be discharged.

2. Property of the Estate and Exemptions. While the systems of Chapter 7 and Chapter 13 differ greatly, important threshold issues are the same; namely what property is included in the bankruptcy estate and to which exemptions, if any, the debtor is entitled under applicable law. Once the petition is filed, an “estate” is established by the operation of law. The estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case.” In analyzing this provision, courts have repeatedly found that intellectual property rights are legal and equitable interests in property and therefore property of the bankruptcy estate. While this might lead to an assumption that publicity rights should also fit neatly into the bankruptcy estate, § 521 contains one very important exception that precludes such an immediate conclusion.

The law exempts “earnings from services performed by an individual debtor after the commencement of the case” from the bankruptcy estate. This

23 Id. §§ 1303, 1306(b).
24 Id. §§ 1321-1322, 1325(b)(1)(B).
26 11 U.S.C. § 1325(a). Under this provision, creditors may object to the confirmation of the plan if the plan was not proposed in good faith, if the plan is not feasible given the debtor’s income and expenses, or if the plan fails to treat them appropriately. Id.
27 See id. § 1326(a)(2). Under chapter 13, the trustee’s primary duties are to serve as the disbursing agent for plan payments and monitor the debtor’s ongoing payment efforts. See TABB, supra note 14, at 82.
29 Id. § 541(a).
30 Id. § 541(a)(1).
exception implicitly recognizes that bankruptcy is a vehicle for a fresh start, and the product of post-petition human capital lies at the very core of that notion. Were a debtor’s post-petition labor subject to seizure and sale, the debtor would remain enslaved by the burden of a prior debt.

Once the property of the estate is determined, the debtor can claim the property as exempt. Both state and federal law contain exemption statutes, which list various pieces of property a debtor can exclude from the bankruptcy estate. These statutory exemptions further preserve certain pieces of property from liquidation to insure a debtor emerges from bankruptcy with some assets to enable a fresh start. It is important to note that each state’s exemption statute differs in some degree and reflects policy judgments about what a debtor needs for a successful “fresh start.” If property is labeled as exempt, the debtor will usually be able to retain the property or receive the value of the exemption upon liquidation. In both situations, the debtor can emerge from bankruptcy with some assets and attempt to start over.

3. Policy Considerations. The policies underlying United States bankruptcy law represent a balancing between the interests of the two parties involved in the dispute: the debtor burdened under the weight of insurmountable debt and creditors seeking to maximize the return on their investment. Any review and critical analysis of the bankruptcy law must not forget these two important principles as they are the driving force of the entire system.

From the debtor’s perspective, bankruptcy affords an opportunity to remove certain debts while retaining enough assets to begin with a fresh start. An important component in this fresh start is the right to keep the profits from future, post-petition labor. If bankruptcy law required the debtor to involuntarily forfeit such profits, the debtor would have less incentive to work. As Tabb argues, the lack of productive debtors following discharge would result in “a perpetual debtor underclass.”

33 TABB, supra note 14, at 285.
34 See, e.g., 10 DEL. CODE ANN. tit. 10 § 4914 (2005); TEX. PROP. CODE ANN. §§ 441.001, 42.001, 42.002 (Vernon 2004). See 11 U.S.C. § 522.
36 See, e.g., FLA. CONST. art. X, § 4(a)(1); FLA. STAT. ANN. § 222.01 (West 2004). The Florida homestead exemptions grant an unlimited exemption to secure the debtor’s homestead. Warren and Westbrook explain homestead exemptions as premised on the nature of home ownership as the only hold on a middle-class lifestyle. See WARREN & WESTBROOK, supra note 35, at 123.
37 TABB, supra note 14, at 3 (noting that the fresh start includes both the discharge of debts and the retention of some current property).
38 Id.
39 Id.
However, the creditors must not be forgotten. The bankruptcy court is required to protect the creditors' interests and facilitate efficient distribution of the estate. After all, debtors should not be able to abuse the system and avoid their obligations. Various sections of the Code guard against such abuse. The American bankruptcy system maintains the goal of carefully balancing competing interests, and discussions of the topic must be mindful that both interests deserve consideration.

4. Recent Trends and Celebrity Filings. Until recently, bankruptcy courts witnessed a gradual increase in the number of cases filed annually. Between 1999 and 2003, the total number of bankruptcy filings in the United States jumped from 1.39 million to just over 1.66 million. Chapter 7 cases constituted the largest area of growth, increasing by almost 300,000 filings between 2000 and 2003. While the current figures show the number of bankruptcies has declined, in the previous year more than 1.1 million individuals still filed for bankruptcy protection between September 30, 2003 and September 30, 2004.

Moreover, famous celebrities and public figures are not immune from the slings and arrows of insolvency. The list of celebrities who have filed bankruptcy is not only long, but also surprising given the commercial success of those celebrities. Included in the list are Burt Reynolds, Kim Basinger, Toni Braxton, Francis Ford Coppola, Mike Tyson, and Don Johnson. In most of these cases, the debtor's persona rights were never at issue. However, as the Kim Basinger example proves, the celebrity's exclusive right to control his or her public image and ability to work, the very essence of persona rights, may become the central issue in controversy.

It is important to note that Chapter 7 bankruptcies constitute the majority of bankruptcy filings and are two and a half times more frequent than Chapter 13

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40 Id. "[t]he core function of bankruptcy law is as a collective creditors' remedy that furthers the goals of efficiency and of distributive justice." Id.
41 See supra notes 19, 26.
43 Id.
44 Id.
46 Jacoby & Zimmerman, supra note 10, at 1325 (providing a more exhaustive list of filings before 2002).
47 Tyson Plans to Continue Boxing in Efforts to Pay off $38 Million of Debt, JET MAG., July 19, 2004, at 51.
49 See supra notes 1-6 and accompanying text.
Since these two approaches to bankruptcy differ so significantly, attempting to cover both in this Note would not do justice to the intricacies and policy decisions surrounding both chapters. In this Note, Chapter 7 will govern since Chapter 7 cases are both more common, and the administration and liquidation of assets provide the best example of the pitfalls of treating the right to publicity as an asset of the bankruptcy estate. Nevertheless, the analysis that follows is largely applicable to Chapter 13 cases as well and, where appropriate, such application will be noted.

B. THE RIGHT TO PUBLICITY

As stated above, the right to publicity is in a relative state of infancy with its more subtle aspects still being explored. However, before one can appreciate the finer points of the doctrine, one must understand the law's historical roots and the progress of the law to this point. While this section does not purport to be an exhaustive study of the right of publicity's historical tract, it provides enough background so that recurring themes, arguments, and dilemmas of publicity disputes may become more apparent.

1. The Haelan Decision and Its Offspring. Courts agree that the right to publicity developed as "a collateral outgrowth of the 'law of privacy.'" Most commentators and courts consider the Second Circuit Court of Appeals' decision of Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc. to be the birth of an independent right of publicity as separate and distinct from the right of privacy. Ironically, the celebrity whose rights were allegedly violated was not a party to the lawsuit.

In Haelan, the plaintiff and defendant were rival manufacturers of chewing gum baseball cards. The baseball player in question had granted the plaintiff an exclusive right to use his photograph on its cards. The defendant later obtained authorization from the baseball player to use his picture on its products. The

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50 Administrative Office of the U.S. Courts, supra note 45.
51 See supra text accompanying notes 8-9.
53 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, reporters' note cmt. b (1995); see, e.g., Jacoby and Zimmerman, supra note 10, at 1329-30.
54 Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867 (2d Cir. 1953).
55 Id.
56 Id.
subsequent publication resulted in litigation. The defendant alleged that the plaintiff's contract with the player was nothing more than a release from liability for violation of privacy rights because the only interest the athlete had in the publication of his picture was his right to privacy. Thus, the issue concerned what rights or property the plaintiff obtained when the celebrity granted the plaintiff the exclusive right to use his picture.

In rejecting the defendant's argument, the court noted 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. . . ." The court's conclusion rested on New York case law and rejected prior decisions focusing on the interpretation and application of New York statutory law. According to the Second Circuit Court of Appeals, New York law recognized a common law right of publicity because "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. . . ." The opinion characterizes publicity not as a dignitary interest, but rather as a valuable asset.

While the Haelan decision laid the groundwork for the right of publicity as a separate and independent doctrine from the right of privacy, the state courts of New York did not follow Haelan's lead. In later cases where celebrities sued for violation of privacy as well as violation of the right to publicity, courts were not receptive to Haelan. Specifically, courts held the right of publicity was not one separate and independent from the statutory right of privacy, but was rather part of the same statutorily protected interest identified in sections 50 and 51 of the New York Civil Rights Law. One commentator believed the Stephano decision "tied the conceptual knot between privacy and publicity." While Halperrn probably overstates the import of the Stephano case it is important to note that

57 Id.
58 Id. at 868.
59 Id.
60 Id. at 868-69.
61 Id. at 868.
62 See Stephano v. News Group Publ'ns, Inc., 474 N.E.2d 580, 584 (N.Y. 1984) (stating "the right of publicity" is encompassed under the Civil Rights Law as an aspect of the right of privacy, which, as noted, is exclusively statutory in this State, the plaintiff cannot claim an independent common-law right of publicity" (emphasis added)); Brinkley v. Casablancas, 438 N.Y.S.2d 1004, 1011-12 (N.Y. App. Div. 1981).
the right to publicity has struggled to break completely free of its historical moorings as an offshoot of the right of privacy.

2. *Haelan's Subsequent Influence.* While the state courts of New York were hesitant to create a new body of law based on the right of publicity, many courts seized on the reasoning of the *Haelan* decision and found the right of publicity protected different interests from the right of privacy. With the growing number of circuits recognizing the right to publicity, it was not long before the Supreme Court weighed in on the debate. After acknowledging a right to publicity separate from the right of privacy, Justice White explained:

The differences between these two torts are important. . . . 'The 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.

Beyond the traditional debate between privacy and publicity, the court went one step further and discussed the right to publicity in terms familiar to discussions of intellectual property. The Court stated that the purpose of giving legal protection to the right of publicity was to provide celebrities and entertainers with incentives to create and develop their personas and create publicized and recognizable works of entertainment. This decision and the dicta of the court illustrates the transition in both the case law and academic literature from the right of publicity as a subsection of the right of privacy to the right of publicity as a subsection of intellectual property.

As courts began to speak of the right to publicity as a property right, litigation began to address more focused questions, such as exactly how far the "property" label extended. Several decisions addressed the question of whether the right to publicity was descendible upon the celebrity's death. Logic dictates that one

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66 Id.


68 See supra note 9 and accompanying text.

cannot experience dignitary harm by unlicensed appropriation of his or her image after death. However, if a celebrity's image is a valuable property right, and a celebrity works hard in his or her lifetime to develop and market that property right, it seems antithetical that property rights extinguish at death. Thus, several courts have found the right to publicity is descendible upon death and becomes part of a celebrity's probate estate. However, the debate over the inheritability of a celebrity's publicity rights was only one facet of the judicial exploration into the nature of publicity rights.

In a series of decisions decided in the late 1980s, the courts addressed whether publicity rights could be considered marital property, subject to equitable division if the marriage ended in divorce. In each of these cases, the courts held that, to the extent the property interest in the spouse's celebrity persona was obtained or increased during the marriage and the non-celebrity spouse had aided in the development of the interest, the non-celebrity spouse was entitled to an equitable distribution of the property right. As these cases and the _Haelan_ decision illustrate, the right to publicity is not one permanently vested in the celebrity, but can be alienated both after and during the celebrity's life by either licensing and contractual negotiations or equitable forfeiture, as in the case of divorce settlements.

3. Statutory Formulations. While the foundations of both the right to privacy and, more specifically, publicity rights are found in the common law, thirteen state legislatures have passed legislation protecting a celebrity's right to the exclusive exploitation of his or her name and likeness. While each statute includes a basic core of commonly identified elements, each statute also has its own subtleties (a reflection of the multiple themes that have permeated the case law during the development of the right to publicity). A brief sampling of these statues is instructive.

The Massachusetts statute is a simple and basic formulation of the typical statute. Specifically, Massachusetts protects the celebrity's "name, portrait or picture... used... for advertising purposes or for the purposes of trade" unless the user first obtains the written consent of the celebrity. The statute also gives

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70 See _Martin Luther King, Jr., Ctr. for Soc. Change_, 296 S.E.2d at 703-06; _Crowell_, 733 S.W.2d at 97-99.


72 California, Florida, Kentucky, Massachusetts, Nebraska, Nevada, New York, Oklahoma, Rhode Island, Tennessee, Texas, Virginia, and Wisconsin all have statutory formulations of the right to publicity. _RESTATEMENT (THIRD) OF UNFAIR COMPETITION_ § 46, Statutory Note (1995).

73 _MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2005)._
plaintiffs the possibility of obtaining treble damages if the defendant knowingly used the persona in a manner that is prohibited or unlawful.\textsuperscript{74}

The Massachusetts statute provides a middle ground or starting point for comparing other states’ approaches. Some states have allowed protection of a celebrity’s name or likeness after the celebrity is deceased.\textsuperscript{75} The California statute covers additional expressions of persona including “a deceased personality’s name, voice, signature photograph, or likeness, in any manner, on or in products, merchandise, or goods.”\textsuperscript{76} Still other statutes are more expansive than the Massachusetts approach. Florida legislation protects “the name, portrait, photograph, or other likeness of any natural person”\textsuperscript{77} but makes a special provision that “[t]he remedies provided for in this section shall be in addition to and not in limitation of the remedies and rights of any person under the common law against the invasion of her or his privacy.”\textsuperscript{78} Other statutes do not explicitly cover the right to publicity, but judicial interpretation has found that the statutory protection of the right to privacy subsumes and includes the right to publicity.\textsuperscript{79}

While this review is only a cursory survey of various statutory language, the purpose of this section is not to explain the nuances of the statutes’ application, but rather to highlight two constantly recurring themes and how these themes explain subtle differences between each state’s approach. Each statute and case must address two foundational questions before applying the law to each factual setting. The court must confront the constant tension between the right to publicity’s historical roots as a subsection of the right to privacy and the right as a freestanding property right. Furthermore, the court or legislature must choose what subject matter the property right protects (such as pictures, names, voice?), and whose persona is protected (deceased or living celebrity?).

4. Conclusions. While still in its infancy, the right of publicity has provided a rich area of debate for legal scholars and judges. Nevertheless, two recurring themes and inquiries constantly appear in most articles and the majority of the case law.

The first of those themes is the intellectual justification for the right to publicity and its relationship with its parent doctrine: the right to privacy. Various authors interpret the status of the law in different ways in this regard. On the one hand, some claim, “courts have now come to recognize that the two rights are clearly separable and rest on quite different legal policies.”\textsuperscript{80} Still, other scholars do not

\begin{itemize}
  \item \textsuperscript{74} Id.
  \item \textsuperscript{75} See, e.g., TENN. CODE ANN. § 47-25-1103 (2004); CAL. CIV. CODE § 3344.1 (West 2004).
  \item \textsuperscript{76} Id. § 3344.1(a)(1).
  \item \textsuperscript{77} FLA. STAT. ANN. § 540.08(1) (West 2004).
  \item \textsuperscript{78} Id. § 540.08(6).
  \item \textsuperscript{79} See 4 MCCARTHY, supra note 67, § 28:6 and accompanying text.
  \item \textsuperscript{80} Id. (emphasis added).
\end{itemize}
regard the division between privacy and publicity as clear and regard the right of publicity as merely "a variety of the tort of invasion of privacy." 81

The bulk of contemporary case law considers publicity rights as a property right rather than a privacy issue. 82 This position makes intuitive sense considering that some characteristics of the right to publicity lend themselves more toward a classification of property. 83 Yet to conclude that the right of publicity is exclusively a proprietary interest would be overly simplistic and lack an appreciation of the larger picture. Modern courts continue to use privacy as a foundation for a publicity infringement suit. 84 Thus, it is more intellectually appropriate to see the right of publicity and the right of privacy not as mutually exclusive, but rather as protecting different interests originating from the same wrong. As the Supreme Court stated in Zacchini, violation of the right to privacy and misappropriation of persona rights are two separate causes of action, which protect different interests: the right of privacy protects a dignitary interest; the right of publicity protects a commercial interest. 85 Nevertheless, some states explicitly allow a right of publicity claim to stand together with a common law breach of privacy claim. 86

A brief hypothetical illustrates this relationship. Suppose a photographer obtained nude photographs of Kim Basinger and sold them to a publisher at a considerable profit. Certainly, Basinger would experience a very personal, dignitary harm resulting from the invasion of her privacy. At the same time, Basinger’s picture is a valuable commodity that is capable of commercial exploitation. Thus, the misappropriation has robbed her of a valuable property interest. The same action that gave rise to an infringement of the right to publicity may also give rise to a cause of action for a violation of privacy. While commentators and scholars may have been quick to signal the independence of the right of publicity from its intellectual ancestor, it is conceptually more appropriate to see these independent causes of action as protecting different legal interests.

Once the right to publicity is recognized, scholars consider the extent of those rights. Does the right allow celebrities to devise exclusive control of their rights? 87

81 62a AM. JUR. 2D Privacy § 17 (2004); see also RESTATEMENT (SECOND) OF TORTS § 652A (1977) (classifying the violations of one’s publicity as one of four types of privacy invasions).
82 See, e.g., Crowell, 733 S.W.2d at 97.
83 See supra notes 69-71 and accompanying text.
84 Wendt v. Host Int’l, Inc., 125 F.3d 806, 811, 44 U.S.P.Q.2d (BNA) 1189, 1192 (9th Cir. 1997) (“The protection of name and likeness from unwarranted intrusion or exploitation is the heart of the law of privacy.”) (quoting Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979)).
86 See, e.g., FLA. STAT. ANN. § 540.08(6) (West 2002).
 personas to their heirs? Can creditors of the estate access those rights to satisfy debts? As the following sections will illustrate, defining the scope of persona rights with precision is difficult. While publicity rights in many situations fit neatly into traditional frameworks for tangible property such as estate law, other areas of the law, such as debtor-creditor law, pose unique problems to such easy classifications.\textsuperscript{87} For now, the inability of commentators and courts to define how the property right would exist in the debtor-creditor system is a significant barrier to its inclusion in the bankruptcy estate.

III. STATE V. FEDERAL BANKRUPTCY EXEMPTIONS

Before making a specific proposal for protecting a celebrity’s persona rights or addressing the intellectual justifications behind treating the right of publicity as exempt under bankruptcy law, the optimal mechanism must be selected. As mentioned above, both state and federal law include provisions exempting property from the bankruptcy estate.\textsuperscript{88} Thus, a threshold issue is to decide between either state or federal exemptions.

At first glance, federal legislation seems appropriate and preferable to provide an exemption for publicity rights. Most forms of intellectual property receive protection from federal legislation.\textsuperscript{89} Moreover, as the Haelan decision, the subsequent reaction of various state courts,\textsuperscript{90} and the differences between statutory embodiments\textsuperscript{91} demonstrate, each state’s approach is slightly different in both the extent of protection and legal reasoning for said protection. This divergence has led some commentators to call for federal legislation protecting the right of publicity.\textsuperscript{92} Commentators stressed the importance of the preemptive nature of federal legislation and the need to create uniformity amongst the states.\textsuperscript{93} While the need for uniformity is important and cannot be overstated, bankruptcy and property exemptions provide unique forums that are not conducive to federal preemption.

In federal bankruptcy, not all debtors have access to both federal and state exemption statutes. This dilemma arose from a legislative compromise dating to

\textsuperscript{87} See Crowell, 733 S.W.2d at 97-99 (discussing publicity rights in the estate law context).
\textsuperscript{88} See supra text accompanying notes 34-36.
\textsuperscript{90} See supra text Part I.B.1.
\textsuperscript{91} See supra text Part I.B.3.
\textsuperscript{93} See Haemmerli, supra note 92, at 410; Robinson, supra note 92, at 206.
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the passage of the Bankruptcy Code of 1978. While a history of the exemption dilemma is not necessary, the controversy centered on whether debtors in bankruptcy would be entitled to a federally created exemption, state based exemptions, or both. According to the compromise position, debtors would be allowed to choose between the state and federal exemptions outlined in 11 U.S.C. § 522(d) unless the state where the debtor resides passed a law prohibiting the use of the federal exemptions. As of 2004, thirty-nine states have taken advantage of the opt-out provision leaving most debtors with access only to state exemptions laws. This opt-out provision rendered the federal exemptions dead letter in much of the nation.

Because the overwhelming majority of states have selected to opt out of the federal exemption scheme, a federal exemption for the right to publicity would be essentially powerless. Thus, although the goals of uniformity are most efficiently served by federal preemption, the only chance of attaining uniform protection in the bankruptcy context would be for each state to adopt an unlimited exemption for the right to publicity.

IV. THE PERSONHOOD JUSTIFICATION OF INTELLECTUAL PROPERTY

A. TRADITIONAL THOUGHT

Why is a celebrity allowed to claim a property interest in his or her name or likeness? Before discussing persona rights, most commentators and casebook authors begin with the theoretical justification of intellectual property. Indeed, a philosophical discussion of the right to publicity is a Shibboleth for any examination of the topic. However, these intellectual discussions are more than required introductory material. Rather, they serve important paradigm setting goals that create the foundation for practical discussions and approaches. The particular paradigm from which one views property is particularly important in the right to publicity.

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94 TABB, supra note 14, at 643.
95 Id.
96 Id. at 644.
97 WARREN & WESTBROOK, supra note 35, at 207.
98 TABB, supra note 14, at 644.
99 See, e.g., ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 1-19 (3d ed. 2003) (discussing the various philosophical perspectives that have been offered to justify the creation and protection of intellectual property).
Generally speaking, the most frequently adopted philosophical foundation for intellectual property in the United States is that of incentive creation. A condensed version of this argument begins with the premise that society benefits from intellectual property through enjoyment of creative works and the advancement of science. In order to promote invention and creation of useful works, the law must provide economic incentives in the form of property rights for inventors to invest the time and resources into creating those works.

To many observers and judges, the incentives rationale applies with equal force to the right to publicity. Madow notes, "[the right of publicity ... induces people to expend the time, effort, and resources necessary to develop talents and produce works that ultimately benefit society as a whole." As Chief Justice Bird noted in her dissent in *Lugosi v. Universal Pictures,* "providing legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition .... Their performances, inventions and endeavors enrich our society...." While some commentators have used the incentive justification to support publicity rights, most scholars rely on other theories to recognize and protect persona rights.

Traditionally, proponents and critics of the right of publicity have relied on the Lockean labor theory to justify protection. Labor theory differs slightly from the incentive-based rationale. Labor theory focuses on the actual labor performed rather than the motivation for such labor. Lockean labor theory argues that property is the natural product of a person's labor. The labor that a person expends on an object fuses with that object creating something that is appropriately called the property of the laborer.

Since its early history, the right to publicity has been explained, justified, and protected under the Lockean labor paradigm:

102 Id. at 11.
103 Id.
104 Madow, supra note 100, at 206. "We give celebrities a legal entitlement to the economic value of their identities ... because we thereby encourage socially valuable activities and achievements." Id.
106 Haemmerli, supra note 92, at 388.
107 Id.
108 Id.
109 JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 17 (Thomas P. Peardon ed., Bobbs-Merrill (1952) (1690)). Locke states "this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to ...." Id.
It is also unquestionably true that in most instances a person achieves publicity values of substantial pecuniary worth only after he has expended considerable time, effort, skill, and even money. It would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations. Yet, because of the inadequacy of traditional legal theories...persons who have long and laboriously nurtured the fruit of publicity values may be deprived of them, unless judicial recognition is given to what is here referred to as the right of publicity.

Moreover, courts also frequently adopt the Lockean labor theory as a justification for protecting a celebrity’s right to publicity. While intellectual property such as copyrights and patents are predominately the product of the incentive rationale, most courts and scholars have based their understanding of the right to publicity upon Locke’s theory of property.

B. A FORGOTTEN PARADIGM: PRIVACY AND PERSONHOOD

As previously noted, the right to publicity has never completely broken free from its conceptual and intellectual roots in the right to privacy. Given this foundation, the Lockean labor theory and incentives rationale both suffer a critical shortcoming. While these two philosophies explain the economic motivations and the economic loss a celebrity would experience, neither theory appropriately incorporates the privacy interests each person has in his or her persona. If the right of publicity was merely a physical commodity without personal attachment, then economic damages in an infringement suit would be sufficient.

In practice, however, courts have recognized that the damages to celebrities through the infringement of their persona rights are not purely economic. For example, the court in Brinkley v. Casablancas held that the injury was both to

111 See, e.g., Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661, 664 (N.Y. App. Div. 1977) (emphasizing the length of time the celebrity plaintiff spent developing the commercial worth of his name); Uhlaender v. Henricksen, 316 F. Supp. 1277, 1282 (D. Minn 1970) (“A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status.”).
112 See supra Part I.A.4.
113 Haemmerli, supra note 92, at 388.
feelings—a dignitary interest—and a property interest. This outcome makes intuitive sense. As an earlier example demonstrates, if a photographer sold the picture of a naked Kim Basinger to a tabloid, the resulting injury would not be merely economic. Not only would Basinger be unable to commercially exploit her nude image, she would also suffer and most likely seek damages for the dignitary wrong of having her unclothed figure on public display. As this example indicates, a simple economic rationale cannot completely encapsulate all the intricacies of the right to publicity.

Because of this unique aspect of publicity rights, alternative intellectual justification is needed. The personhood theory of property provides that justification. The theory was first introduced by Professor Margaret J. Radin. Drawing heavily on the philosophies of Hegel, Radin argued that the will of individuals is embodied in the things they possess, and the entity we know as a person cannot exist without maintaining relationships with portions of his or her surrounding environment. Put another way, an individual’s embodiment or self-constitution is defined in terms of “things” that the person owns or possesses. Radin continues, “one may gauge the strength or significance of someone’s relationship with an object by the kind of pain that would be occasioned by its loss. . . . An object is closely related to one’s personhood if its loss causes pain that cannot be relieved by the object’s replacement.”

The personhood justification of property helps explain the dual nature of publicity rights. The economic-based rationales account for the monetary losses a celebrity suffers, but the dignitary harm a celebrity endures from infringement is better understood as an encroachment on his or her personhood. In the above hypothetical, the harm felt by Basinger cannot be cured simply by the return of the nude photographs because her privacy and personhood have been invaded. Thus, while it is important to appreciate the economic rationales for publicity rights, a complete understanding, and therefore a complete discussion of the right to publicity, requires an appreciation for its unique and powerful personhood-based foundations.

116 Id. at 977. See also Haemmerli, supra note 92, at 418. An oversimplified version of Kant’s argument states that “property is inseparably associated with one’s ‘personhood’ because property grows out of freedom and freedom is essential to personhood.” Id.
117 Radin, supra note 115, at 958.
118 Id. at 959.
C. THE BANKRUPTCY FORUM

Returning to the realm of bankruptcy, an important question remains unanswered. If the right to publicity is treated as an asset of the estate and sold to the highest bidder, what does the purchaser obtain? Jacoby and Zimmerman argue that the purchaser would obtain the right to commercially exploit that person’s name or likeness, and the celebrity would be barred from entering into contracts to make advertisements and future marketing endorsements. From a personhood perspective, such an approach would only lead to a constant conflict between a celebrity’s dignitary interest and the economic interest in the commercial exploitation of a famous person’s persona.

It is not hard to imagine celebrities objecting to the use of their name or likeness. In the extreme example, a third-party purchaser wants to publish risqué photos of a celebrity. Certainly celebrities would suffer extreme emotional distress and experience a violation of their privacy in such a situation. More realistically, there are any number of political, religious, or personal reasons celebrities might wish to deny associating their name and likeness with a product. For example, Don Newcombe, a former pitcher for the Los Angeles Dodgers and a recovering alcoholic, brought suit against Coors Brewing Co. for an advertisement in *Sports Illustrated* that included his likeness. Newcombe, as a recovering alcoholic and spokesperson for drug and alcohol abuse awareness groups, alleged that the ad was defamatory since it implied his endorsement of alcohol. The court ultimately rejected Newcombe’s emotional distress and defamation claims, but the court stopped short of finding that the dignitary harm Newcombe alleged was non-existent. This case provides a moderate example of the dignitary harm celebrities might experience if their likeness and persona were subject to forced sale.

Proponents of liquidation argue that dignitary interests are protected even after forced sale of their persona rights through such mechanisms as defamation suits or unfair competition claims under the Lanham Act. However, as the *Newcombe* case illustrates, such remedies are often insufficient to protect the dignitary interests of the celebrity. Additionally, commentators provide no

119 Jacoby & Zimmerman, supra note 10, at 1355-56.
121 Id. at 694.
122 Id. at 694-95. The court dismissed the claim on the grounds that it was not libelous on its face, i.e., the reader would not know Newcombe was a recovering alcoholic, and Newcombe did not satisfy the statutory definition of “special damages,” which were defined as damages relating to the plaintiff’s “property, business, trade, profession or occupation.” Id.
123 Jacoby & Zimmerman, supra note 10, at 1362-63.
124 Newcombe, 157 F.3d at 694-95.
framework for how such claims would be evaluated in light of the defendant owning the right to commercially exploit the celebrity persona. Furthermore, such an approach would significantly limit the third-party purchaser’s ability to exploit the property they purchased. If, at the trustee’s liquidation sale, a third-party purchases a car, the buyer is not restricted in using that car. The purchaser of a celebrity’s publicity right, by contrast, would be restricted to such uses that are not defamatory or do not unfairly compete with the rights the debtor retains. This supposed division of the property creates complicated and unworkable boundaries, a trait that would be unique to this property in bankruptcy.

D. EXEMPTIONS AND PERSONHOOD

The ultimate problem that proponents of inclusion of publicity rights in the bankruptcy estate face is the inability to perfectly sever the dignitary and economic aspects of the property interest. Radin recognized that property exists on two levels: “personal and fungible.”125 No framework for understanding publicity rights that incorporates both aspects of this unique property exists. Critics are quick to push aside this dignitary interest dilemma by arguing that bankruptcy law has never bothered itself by worrying about such things.126 However, this argument has little support in statutory law.

Frequently, state exemptions protect personhood connections in property and exempt such property from the bankruptcy estate. In her dissertation of personhood connections, Radin argues home ownership is toward the “personal end of the continuum” and thus closely tied to one’s personhood.127 State law seems to recognize a homestead’s importance in one’s concept of self.128 The amount of a homestead exemption therefore represents a policy judgment made by a state legislature. Some states such as Florida, whose unlimited homestead exemption has been the target of critics who argue it favors wealthy debtors and denies creditors maximum return,129 recognize that the homestead exemption is needed for an effective reorganization under bankruptcy and may also recognize that property so uniquely tied to a debtor’s personhood and self-image deserves complete protection. This recognition would explain other property exemptions on personal items such as wedding rings, family photographs, and family heirlooms.130 Thus, state exemption statutes are not only mechanisms for

125 Radin, supra note 115, at 987.
126 Jacoby & Zimmerman, supra note 10, at 1347.
127 Radin, supra note 115, at 987.
128 See supra note 36. See also TEX. PROP. CODE ANN. § 41.001(a) (Vernon 1999 & Supp. 2000).
129 See, e.g., Jacoby & Zimmerman, supra note 10, at 1363-64.
130 See, e.g., VT. STAT. ANN. tit. 12, § 2740(3) (2002) (granting an unlimited exemption for wedding rings); see also TEX. PROP. CODE ANN. § 42.002(a)(1) (Vernon 2000).
insuring a debtor emerges with a minimum level of assets, but also are a powerful tool for insuring that the debtor does not endure the loss of important dignitary interests. As legislatures and courts continue to examine the right to publicity, and as more celebrities file bankruptcy, policy makers must ask themselves what could be a more crushing blow to a person's dignity and sense of self than losing the ability to govern his public image.

V. ECONOMIC AND CONSTITUTIONAL OBJECTIONS

Separate and independent of any theoretical discussion, inclusion of the right of publicity in the bankruptcy estate poses significant economic and constitutional dangers. Assuming the personhood justification is not an appropriate rationale for the right to publicity and accepting the incentives and labor theory as the proper paradigm, as most scholars have, the forfeiture would still strip the debtor of a property interest in future work, remove incentives to create entertaining works, and potentially tread upon constitutional protections.

A. LOSS OF FUTURE LABOR AND CREATING NEGATIVE INCENTIVES

The bankruptcy filing is like a photograph: it creates a picture fixed in time. All property the debtor possesses at the time of the bankruptcy petition not subject to exemption becomes part of the bankruptcy estate. The estate is then used to satisfy to the fullest extent the debtor's past obligations. However, after the bankruptcy picture is taken, the debtor is left with an unencumbered fresh start, and no creditor can use future assets to satisfy pre-bankruptcy debts. A very important component of that unburdened future is the statutory protection afforded to a debtor to retain earnings from services performed after the commencement of the case. Unfortunately, including the right to publicity in the bankruptcy estate would severely infringe upon that statutory protection.

This statutory violation stems from two sources. The first is the inability of courts and commentators to explain exactly what a purchaser would acquire from a liquidation sale. Is the debtor obligated to pose for future endorsements or attend promotional events? In order to prevent purchasers from depriving

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131 See supra notes 101-11 and accompanying text.
132 See supra text Part I.A.2.
134 As the only proponents thus far of such an approach, Jacoby and Zimmerman do not offer a specific proposal for selling the right to publicity. Jacoby & Zimmerman, supra note 10, at 1365. At various points in their discussion, the authors instead propose several different approaches to accommodate objections by skeptics. Id. Unfortunately, Jacoby & Zimmerman do not condense the possibilities into one optimal approach or framework. See id.
debtors of their future work, these cannot be included. Yet until commentators are able to explain what the purchaser is acquiring, the right to publicity can never fit neatly into the bankruptcy estate. The second source of this dilemma is the dynamic nature of the right to publicity. Celebrities' future actions significantly impact the value of their persona. In this regard, the right of publicity is a dynamic property right. A brief hypothetical illustrates this point. Suppose on January 1, a moderately known television actor files bankruptcy. His right of publicity is auctioned off and sold to a third party. The discharge is entered on June 1. On October 1, the actor lands a supporting role, playing opposite the biggest movie star in the United States. For this role, the actor gains universal appeal and commendation, wins numerous awards, and is cast as the lead in numerous upcoming motion pictures. He is approached by several fashion designers and other advertisers seeking his endorsement of a product. Meanwhile, the third-party purchaser holds the exclusive right to exploit the actor's commercial image. This factual dilemma begs the question, what does the third-party own?

It seems apparent from the hypothetical that by not possessing the exclusive right to market his image, the celebrity is denied the fruits and rewards of his future labor and destined to forfeit post-petition earnings. Even worse, such a framework would significantly diminish the celebrity debtor's incentive to produce new and creative works of entertainment after bankruptcy. Society would lose the enjoyment of future works because the law failed to provide the appropriate incentives needed to foster such development.  

Traditional bankruptcy principles do not solve this problem. When a dispute over the value of postpetition appreciation occurs, courts have frequently turned to the Supreme Court's seminal decision in Segal v. Rochelle. The Segal test regards property as part of the bankruptcy estate if it is "sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupt's ability to make an unencumbered fresh start." In evaluating the right of publicity, the two prongs of the Segal test are in tension.

First, the property will be excluded from the estate if it is not sufficiently rooted in the pre-bankruptcy past. In Segal, the Court found that a tax refund based on a business's prior taxable years was property since the right to the refund existed at the time of the bankruptcy filing. Problems may arise if the

135 See MERGES ET AL., supra note 99, at 11.
137 Id. at 380.
138 Id.
139 Id. Accord Kokoszka v. Belford, 417 U.S. 642, 648 (1974) (holding an accrued tax refund was property of the estate because the taxes were on prior personal earnings).
persona rights were already commercially exploited and valuable before the bankruptcy. If subsequent acts increase the value of the publicity rights by a marginal amount, the previously exploited property may be so rooted in the pre-bankruptcy past that the future value is simply transferred to the party who acquires the persona rights.

On the other hand, the second prong seems to allow debtors to retain their persona rights. The second prong of Segal focuses on whether the property is entangled with the bankrupt’s ability to make a fresh start. While this standard seems to give a court a great deal of discretion in deciding what the debtor needs to make a fresh start, commentators have taken a more narrow reading. Tabb argues that the fresh start goals of the Segal test are protected primarily by the operation of § 541(a)(6). Under that section, postpetition proceeds of estate property will come into the estate unless they are attributable to the postpetition services of the individual debtor. Thus, any individual act or service performed by celebrities that results in an increase in the value of their persona would not be part of the estate and would be part of the debtor’s fresh start.

The most efficient and thorough way of resolving this tension is to exempt persona rights from the bankruptcy estate. Courts and legislators can insure that a debtor’s fresh start and future labor is protected. The legal system can provide the necessary incentives to actors and celebrities to create movies, songs, and public works. The most efficient manner of doing so is to use state exemption law to create an unlimited exemption in the debtor’s right to commercially exploit his or her likeness, voice, photograph, or other expressions of persona.

B. CONSTITUTIONAL DILEMMAS AND WASTE

The second flaw in inclusion of the right of publicity in the bankruptcy estate is that such forced association raises constitutional issues concerning the freedom of association and involuntary servitude. While the freedom of association argument suffers major flaws, forcing celebrities to submit their image and endorsement to a product or forcing them to pose for a photograph session appears facially unconstitutional as a violation of involuntary servitude. Jacoby and Zimmerman avoid the involuntary servitude dilemma by stating purchasers of the right of publicity would never expect that they could require a celebrity to

140 TABB, supra note 14, at 280.
142 Jacoby & Zimmerman, supra note 10, at 1363 (stating the freedom of association argument lacks development).
143 See id. at 1363 n.202.
144 See U.S. CONST. amend. XIII, § 1.
travel and promote a particular product.\textsuperscript{145} This conclusory statement, however, is insufficient to avoid the practical quandary.

First, Jacoby and Zimmerman fail to explain how the purchaser would be able to exploit the celebrity's persona without requiring the personality to endorse the product in the form of future statements or actions.\textsuperscript{146} Furthermore, assuming for argument's sake that the right to commercially exploit a celebrity's persona is limited only to items such as pictures, likeness, or recordings that were made before the bankruptcy, that would limit the creative ability of the celebrity as well as the economic value of the item purchased. The proponents of liquidation concede that celebrities would be barred from entering into contracts to make advertisements or participate in future marketing endorsements, as doing so would put themselves into competition with the purchaser rendering the celebrity "an infringer of her own publicity right."\textsuperscript{147} The end product of this framework would be that the purchaser of the publicity right would retain past images, performances, and other embodiments of personal rights, and neither the celebrity nor the property owner would be able to commercially exploit future publicity rights. This arrangement would inevitably lead to a waste of future work and diminish any incentive for the celebrity to create future work.

VI. PROPOSAL

Mindful of the policy interests served by the U.S. bankruptcy system and the growing list of celebrity filers, reform is needed to protect celebrities' privacy and future earning capacity. Each state should adopt a special exemption excluding a celebrity's persona rights from the bankruptcy estate. These state exemption statutes should completely exempt from bankruptcy proceedings any property right or interest in a celebrity's name, likeness, voice, or photograph. Such statutes should be modeled after Illinois's statute, which exempts any property interest in a celebrity's persona from levy, attachment, or security interest.\textsuperscript{148}

Two aspects of the right to publicity demand that a celebrity retain full rights to the commercial exploitation of his or her persona. First, the right to publicity is inextricably linked to a celebrity's personhood and dignitary interests. Rather than an assurance that the debtor retains a minimal level of assets, such an exemption is an important protection to the debtor's personhood. Second, the

\textsuperscript{145} Jacoby & Zimmerman, supra note 10, at 1351.
\textsuperscript{146} Id. at 1361-63.
\textsuperscript{147} Id. at 1355-56.
\textsuperscript{148} 765 ILL. COMP. STAT. ANN. 1075/15 (West 2001). This exemption, however, does not prevent a creditor from levying, attaching or taking a security interest in any proceeds the celebrity derives from the exercise of those rights. See id. Allowing the creditors to levy on the revenue stream from such rights presupposes that the insolvent celebrity has not filed for bankruptcy.
ability to commercially exploit the right of publicity is a critical and significant source of income for the debtor following the debtor’s discharge.

VII. CONCLUSION

The increase in celebrity bankruptcy filings has not gone unnoticed. Citing the bankruptcy of Kim Basinger, Senator Charles Grassley of Iowa introduced legislation in 2001 to change bankruptcy laws to promote the use of Chapter 13 as opposed to Chapter 7. As the number of celebrities who file bankruptcy grows, the call by members of the political system will only strengthen. “There are people that have the ability. . . . They’re not paying their bills,” said Senator Grassley. Most of the American populace would agree that the bankruptcy system should not be used by debtors to escape obligations rightfully incurred. In the case of celebrity debtors, there is a natural skepticism to their bankruptcy filings. In an age where movie stars make millions of dollars for each movie and thousands for a single photo shoot, it is hard to understand how celebrities can end up bankrupt and seeking forgiveness for their debts. But as the list of famous bankruptcies grows, the law should not let that skepticism become an overzealous call to force repayment at all costs.

The American bankruptcy system is a system designed to balance the interests of the debtors seeking a reprieve from their debt-ridden past with the interests of creditors seeking to realize a return on their legitimate investment. Celebrity debtors often have assets significantly more valuable than the traditional debtor. One asset celebrity debtors possess that is unique to their celebrity status is the right to publicity. Recently, scholars have suggested that a celebrity’s persona rights provide a potentially significant source of income that can be used by the bankruptcy courts to satisfy antecedent debts.

While the idea has initial appeal, such a treatment of persona rights would inflict two distinct harms upon the celebrity debtor. First, the right to publicity, while undeniably a form of property, has never broken free of its roots in the right to privacy. If the personhood theory of property is the accepted paradigm, there are few pieces of property with such strong personhood ties as a person’s name, likeness, or image. As such, to force actors or celebrities to sacrifice the right to market their face and likeness may operate as a significant infringement on a celebrity debtor’s privacy and dignitary interests.

150 Id.
151 See, e.g., Jacoby & Zimmerman, supra note 10.
Second, even assuming the right of publicity is a property interest free from personhood attachments, forced sale of the celebrity's persona rights would still violate basic bankruptcy principles including the right against forfeiture of future labor and wages. Stripping celebrities of the right to commercially exploit their likeness would remove critical incentives for celebrities to create new works of entertainment value to the American people. Such an approach also raises questions of a constitutional dimension and possible involuntary servitude problems.

So who owns Kim Basinger and other celebrity debtors? Unfortunately, the courts have not answered that question. However, if a creditor can regulate the actions of celebrity debtors including their ability to have children and select how and when to work, what, if anything, is off limits to creditors? The proponents of including the right to publicity in the bankruptcy estate have not proposed a working framework for such a treatment that will preserve the important economic and dignitary interests of the debtor. In order to prevent these pitfalls, states should individually adopt laws that exempt the right to commercially exploit a person's name, likeness, voice, or other recognized persona rights from the bankruptcy estate. Modeling the law after the Illinois statute that currently prevents creditors from attaching, levying, or subjecting persona rights to a security interest would be ideal. This approach would provide a powerful protection for celebrity debtors' privacy rights and foster the continued growth of the intellectual property in American jurisprudence.

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