

# Constructing An Identity:

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## An Agent's Duties in an Artist's Public Image Management Strategy

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In today's world of twenty-four hour media coverage and online gossip sites, celebrities must be constantly aware of their public persona and how their actions and career choices affect their image. Since an artist's success largely depends upon the acceptance and approval of the public, a positive image can be an extremely valuable asset. For this reason, many celebrities and employ a team of professionals to help manage that image. They can have agents, entertainment lawyers, managers, business managers, public relations consultants, media consultants, and other specialists they believe are necessary to maintain a positive public image.

With all of these different individuals directly involved in the management of an artist's career, it raises the question of whether an artist really needs exceptional talent or just a clever marketing strategy or successful business model to make it in the entertainment industry. In reality, it is likely that both factors are required in order to reach star status, which is why an artist's public image is so important. In the midst of such an expansive group managing the career of just one artist, the responsibilities of the members of an artist's management team often overlap and can be confused. How is the decision making power allocated among these individuals and the artist? More specifically, what role does the agent play in the public image management strategy for the artist?

A common perception of talent agents is that they are smooth talking, hyper aggressive individuals who ruthlessly pursue their clients career interests without limitation. While some agents may fit this mold, that description is not indicative of the nature of the profession. Artists authorize agents to act in a representative capacity on their behalf, and the agent has a wide range of authority to negotiate contracts and otherwise, shape the artist's career path. Even though representation contracts usually do not contain provisions expressly allocating the decision-

making power between the artist and the agent,<sup>1</sup> as a representative, however, the agent is the artist's legal extension. Therefore, the agent is subject to the artist's control.

It is the agent's understood responsibility to pursue different career options and present them to artist. The agent also has a responsibility to advise and inform the artist how each of those options is likely to affect their public image. In ideal situations, the artist and agent make these critical decisions in collaboration with each other. Without contractual provisions detailing an agent's authority with regard to an artist's career and public image, what protects the artist from the agent making a decision and executing that course of action without consulting the artist in advance? Consider the following hypothetical situation:

Madison McHenry was an eighteen year old young woman from Overland Park, KS, a suburban town located in the Kansas City greater metropolitan area. She appeared to be a typical teenage girl who liked to go shopping on the weekends, spent countless hours on the phone talking or texting with her friends, and did not leave the house without her iPod<sup>®</sup>. Madison was not just another teenager, however. She was the star of a television show on The Family Broadcast Network ("FBN") called "Deanna Dakota," which chronicled the daily life a teen pop star as she attempted to balance her normal life with her career.<sup>2</sup> The show once garnered the highest ratings for FBN, but was cancelled because of declining ratings. Because of her strict Irish-Catholic upbringing, she was the unofficial poster-child for Midwestern values. She was often photographed walking out of Mass on Sunday mornings and volunteering at soup kitchens and animal shelters. She was the embodiment of the family-centered image that FBN tries to portray to its viewers.

Madison had been a client of Jerry Gold, a talent agent with the International Artist Management Group, LLC ("IAMG"), since he

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<sup>1</sup> This assertion is based upon review of a standard fixed compensation agreement of Columbia Artists Management, LLC., and an email exchange with Michael S. Diamond. Mr. Diamond completed the training program at United Talent Agency ("UTA"), a prestigious talent agency in Beverly Hills, CA. According to Mr. Diamond, representation contracts are very simple and uninvolved. The agreements contain provisions regarding the agent's compensation, but do not detail the decision-making power of the agent or dispute resolution. This is apparently all common place and understood between the parties to the agreement, and the agencies do not want to allude to the possibility of conflict. They want to portray an image of cooperation.

<sup>2</sup> The concept for this hypothetical show is based loosely upon the premise of "Hannah Montana,"© Disney Corp, a current television series airing on The Disney Channel. The situations arising in the hypothetical are not based on any factual occurrence involving Miley Cyrus, the star of "Hannah Montana," or her representation. The purpose of this hypo is strictly to portray a possible conflict between an agent and artist, and is not intended to resemble any actual person or occurrences.

discovered her at the age of twelve at a talent search exposé in downtown Kansas City. Madison didn't have any acting experience or formal training at the time, but she was an excellent singer. Because Jerry was convinced that Madison could become a dual-threat star with formal acting lessons and her existing singing talent, he executed a contract with Madison's parents on her behalf to be her agent. The contract was the standard representation contract that every agent at IAMG executes with first time clients. It was a fairly simple contract that authorized Jerry to serve in a representative capacity for Madison's career and stated the terms of compensation. There was no description of the agent's duties or a conflict resolution provision. Jerry and Madison independently renewed the contract on her eighteenth birthday.

After a just a few months of acting lessons, Madison got a small bit part on one of FBN's new shows. The show's producer and the network executives were so impressed with her scenes in her first episode that they decided to turn her character into a recurring role. The show often had the characters sing together, and Madison was by far the best vocalist on the show. This show was short-lived and cancelled after only one season. However, the network went into immediate development of "Deanna Dakota" starring Madison, as she had become the most popular child actor on the network, especially among teenage girls.

The show debuted when Madison was fourteen years old, and was an immediate success. After the immensely popular first season, the network launched a concert tour. The show and tour brought Madison to the forefront of teenage pop-culture, albeit for a very short period of time. The show continued its popularity through the second season and the second concert tour. During the third season, however, the show's ratings dip significantly and the next concert tour failed to sell out any of the arenas. It was evident that Madison's fan base had moved on from "Deanna Dakota," and the show could not capture the attention of the new emerging teen audience. The show was renewed for a fourth season, but it was to be its last.

Recognizing Madison's declining popularity among teenage girls, her prime source of fan support, Jerry began taking steps to increase her exposure and distance her from her role as Deanna Dakota. He set up interviews with fashion magazines, meetings with record companies and auditions for more mature roles. Despite Jerry's best efforts, Madison was not able to shake her image as the sweet, adorable high school girl. As the end of "Deanna Dakota" approached, Madison still had not lined up any future work, and she was contemplating taking a break from the industry and attending college. Jerry suggested that Madison employ the services of a personal trainer in order reshape her body to build muscle mass to appear older and more mature. She agreed and began training sessions shortly after her eighteenth birthday. This was a last ditch effort to salvage her career before going on hiatus and attending college.

Curious as to what effect the training sessions would have on her appearance, Madison wanted to take before and after pictures of herself to see the results. So, following her first workout session, she took a photograph of herself in the mirror after her shower with her digital camera that no one else used. She was wearing only underwear and had nothing covering her upper body. She was certain that this photo would remain private and in her sole possession.

The following week, Jerry had arranged to pick up Madison from her training session and bring her to an audition for a small role in an action movie. The session ran long, and they were running late. Once they reached the studio, as Madison hurriedly rushed out of the car, she yanked her purse out from underneath the seat causing her camera to fall on the floor. Without noticing that the camera had fallen out, Madison ran into the audition.

Seeing the camera on the floor, Jerry picked up the camera and began browsing through the photos, innocently wondering if there were any images of the two of them together. After a few photos, he stumbled upon the image of Madison in the bathroom. He was stunned and did not know how to react at that particular moment. Then it came to him: he could “leak” this image to the press, and then maybe Madison could be seen as a mature woman by the industry and the fans.

Every career move made thus far had been in collaboration between Jerry and Madison, but he was unsure of how she would react to this idea; so he did not consult her on the issue. Later that night, he contacted a celebrity gossip magazine about selling the exclusive rights to the image. In an effort to avoid legal liability for publishing the image, the magazine verified that they were in fact speaking with Madison’s agent, and agreed to purchase the image for \$100,000. Jerry accounted for this profit to Madison as a residual from FBN and took his agreed upon percentage under the representation contract.

Obviously, following the publication of the image, there was great media buzz surrounding Madison. There were rumors that she, personally, or someone in her camp leaked the photo but nothing was ever substantiated by the public. She was devastated by the event. She was suspicious that Jerry had sold the image but could not prove it. She did not want to accuse her agent who had been loyal to her for six years of wrongdoing.

After the initial frenzy had died down, studios were looking to capitalize on her recent media exposure. Madison was offered the female lead in the action movie for which she previously auditioned, instead of just the small supporting role. The record companies with which she had previously met wanted to talk to her about recording an album. Madison was offered lead roles in two small budget movies without even auditioning, and Jerry set up multiple auditions for roles in summer blockbusters to be released in the next few years. All in all, Jerry’s sale of the image had resulted in over \$2 million in guaranteed income for

Madison, plus millions more in accelerator clauses based on the performance of her album and movies and her appearance fees.

A few months later, after Madison had accepted numerous parts, a record deal, and up front compensation, a reporter from the magazine informed her that Jerry was the one who leaked the image. She was furious. She had suffered significant public embarrassment because of his actions, but her career outlook was stronger than ever. Madison looked to her contract to see if the conduct was within Jerry's legal authority. Since the contract was very simple and uninvolved, she was clueless as to what her rights were.

What legal actions can an artist in Madison's position take against her agent who represents her to the rest of the industry? Are there remedies available even if no physical or economic harm resulted from the agent's conduct? How much latitude do talent agents have when pursuing what they believe to be their client's best career interests?

A talent agent's conduct within the scope of his representation of the artist is governed by the common law of agency in the absence of express or implied agreements between the parties. Therefore, the agent is liable for harm resulting from any breach of fiduciary duty owed to the artist. Additionally, an agent's decision to allow publication of the artist's identity without her consent may render the agent liable under the artist's right to publicity or her right to privacy. This paper addresses these causes of action in relation to an agent's representation of an artist and considers the question of whether more detailed representation contracts can address such issues.

## I. Common Law of Agency

Because of the nature of the Jerry's representation of Madison McHenry and the fact that most representation contracts do not specifically state the duties of the agent, the common law of agency and the fiduciary duties that arise from it govern the agent's conduct during the course of his representation. Although there may not be any explicit agreement setting forth the scope of

the agency relationship, the agent is subject to the control and reasonable instructions of the artist.

### A. Definition

Before examining the possible causes of action and remedies that may be available to Madison with regard to her agent's conduct, it is necessary to explore the legal scope and definition of the agent's representative capacity. At common law, agency is defined as "the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."<sup>3</sup> Within this definition, an agent acts with the power to affect the principal's legal relationships by creating rights or obligations that are attributed to the principal.<sup>4</sup> This fiduciary relationship can arise in several different contexts, including relationships involving an employer and employees; master and servant; lawyer and client; and in the scope of this paper, talent agent and artist.<sup>5</sup>

An agent's power to affect the legal relations of the artist is manifested by main two types of authority: actual and apparent authority.<sup>6</sup> An agent acts with actual authority when "at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent

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<sup>3</sup> Restatement (Third) of Agency § 1.01 (2006).

<sup>4</sup> Deborah A. DeMott, *Disloyal Agents*, 58 Ala. L. Rev. 1049, 1051 (2007). [hereinafter "DeMott"].

<sup>5</sup> *Id.*

<sup>6</sup>The Second Restatement of Agency includes "inherent agency power" as another source of authority for an agent. "Inherent agency power is a term used in the restatement of this subject to indicate the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent." Restatement (Second) of Agency § 8A (1958). The Third Restatement excludes the doctrine of inherent agency power because of the Second Restatement's failure to clearly define the doctrine as well as confusion over its applicability. Thomas A. Simpson, Comment, *A Comment on an Inherently Flawed Concept: Why the Restatement (Third) of Agency Should Not Include the Doctrine of Inherent Agency Power*, 57 Ala. L. Rev. 1163, 1180 (2006). Additionally, many courts apply the apparent authority doctrine in situations where the Second Restatement calls for application of inherent agency power. *Id.*

so to act.”<sup>7</sup> The agent has actual authority to act in accordance with the artist’s implied or express manifestations to achieve the artist’s objectives, as the agent reasonably understands them.<sup>8</sup> The agent’s understanding of the artist’s goals is reasonable if a person in the agent’s situation would draw same inferences under similar circumstances.<sup>9</sup> Simply, the agent has the actual authority to act in a manner which he reasonably believes the artist would want him to act to achieve the career objectives upon which the relationship is based.

Apparent authority differs from actual authority in that it is manifested from the perspective of a third party dealing with the agent on behalf of the artist. The common law of agency includes this apparent authority to protect third parties who act on the belief that the artist has authorized the agent to act in a manner consistent with their agreement. Apparent authority is defined as “the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.”<sup>10</sup>

## B. Duties of an Agent

Once the agency relationship has been established, whether by express terms in writing or implied conditions leading to reasonable inferences of such a relationship<sup>11</sup>, the agent is required to conduct himself in accordance with several fiduciary duties to serve the artist’s best interest.

The Restatement (Third) of Agency establishes certain standards to which an agent is supposed to adhere and distinguishes between two main categories of fiduciary duties owed to

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<sup>7</sup> Restatement (Third) of Agency § 2.01.

<sup>8</sup> *Id.* § 2.02(1).

<sup>9</sup> *Id.* § 2.02(3).

<sup>10</sup> *Id.* § 2.03.

<sup>11</sup> *Id.* § 3.01.

the artist: the duty of loyalty and duty of performance.<sup>12</sup> An agent's duty of loyalty, in general, arises out of the obligation to act for the benefit of the artist in all matters relating to the relationship.<sup>13</sup> In addition to this general duty, the agent is further bound by more specific duties of loyalty.<sup>14</sup> An agent may not acquire material benefit from a third a party in connection with transactions or other actions taken on behalf of the artist;<sup>15</sup> the agent may not deal with the artist as or on behalf of an adverse party;<sup>16</sup> and the agent may not compete with the artist or assist the artist's competitors in any manner throughout the duration of the relationship.<sup>17</sup> Finally, the agent has a duty not use the artist's property for his own use and not to communicate the confidential information of the artist for his own use or the use of a third party.<sup>18</sup> The artist can consent to conduct that would otherwise be classified as a breach so long as the agent acts in good faith and discloses all material facts that the agent should reasonably know would affect the artist's decision to consent to the conduct.<sup>19</sup>

In addition to the duties of loyalty, the Restatement (Third) puts forth duties of performance by which the agent must abide. First, the agent has a duty to act according to both express and implied terms of any contract between the agent and artist.<sup>20</sup> Included within the duties of performance, the agent must act with care, competence, and diligence that agents normally would exercise in similar situations.<sup>21</sup> If an agent possesses special knowledge or skills, they will be taken into account in determining whether the agent exercised the required

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<sup>12</sup> DeMott, *supra* note 4, at 1052. This differs from the Second Restatement in that duties required of an agent are categorized as the duty of loyalty and the duties of service and obedience. Restatement (Second) of Agency, ch. 13, tit. B (1958). The specific duties are essentially the same under both the Second and Third Restatements, they are simply classified differently. *Id.*

<sup>13</sup> Restatement (Third) of Agency § 8.01.

<sup>14</sup> DeMott, *supra* note 4, at 1052.

<sup>15</sup> Restatement (Third) of Agency § 8.02.

<sup>16</sup> *Id.* § 8.03.

<sup>17</sup> *Id.* § 8.04.

<sup>18</sup> *Id.* § 8.05.

<sup>19</sup> *Id.* § 8.06(1)(a).

<sup>20</sup> *Id.* § 8.07.

<sup>21</sup> *Id.* § 8.08.

due care and diligence under the given circumstances.<sup>22</sup> The agent has a duty to act solely within the scope of the agent’s actual authority and representation of the artist, and must comply with all of the artist’s lawful instructions.<sup>23</sup> The agent is also held to a standard of good conduct in which the agent has a duty to act reasonably, within the scope of the agency relationship, and avoid any actions that are likely to cause harm to the artist’s “enterprise.”<sup>24</sup> Finally, the agent has a duty to keep accurate records and accounts of the artist’s money or property received or paid out connected with the agency relationship.<sup>25</sup>

### C. An Agent’s Breach of Fiduciary Duty

An agent’s breach or threatened breach of any fiduciary duties can create a cause of action in which the principal can recover monetary damages or other non-monetary relief.<sup>26</sup> The remedies available to an artist for an agent’s breach result from a contract law, tort law, restitution and unjust enrichment.<sup>27</sup> The breach may entitle the artist to receive such non-monetary relief as an injunction, or the ability to avoid or rescind a contract that the agent entered into with a third party during the course of the breach.<sup>28</sup> If the breach amounts to a material breach of contract or fiduciary duty, the artist may terminate the agency relationship.<sup>29</sup>

In terms of monetary relief, the agent may be liable to the artist for a breach whether or not the principal suffered an economic loss. Certainly, where the artist can prove an economic

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* § 8.09.

<sup>24</sup> *Id.* § 8.10.

<sup>25</sup> *Id.* § 8.12(3).

<sup>26</sup> *Id.* § 8.01 cmt. d(1).

<sup>27</sup> DeMott, *supra* note 4, at 1056.

<sup>28</sup> Restatement (Third) of Agency § 8.01 cmt. d(1).

<sup>29</sup> *Id.*

loss resulting from the breach, the agent will be liable for the harm that his conduct caused.<sup>30</sup> In order to prove such a loss, the artist does not need to satisfy a “but for” test that the agent’s conduct was the proximate cause of the harm; rather that it was a substantial factor.<sup>31</sup> This standard removes all incentives for an agent to breach his duties, instead of simply compensating the artist for his actual loss.<sup>32</sup> Additionally, although punitive damages are usually not permitted in breach of contract cases, an egregious breach may subject an agent to liability for punitive damages under tort law if the action meets the applicable standards for their imposition.<sup>33</sup>

When the artist cannot establish a loss suffered as a result of the breach, the law of restitution and unjust enrichment “creates a basis for agent liability.”<sup>34</sup> In the event that the agent received a material benefit as a result of the breach, the agent has duty to account to the artist the value or proceeds of that benefit.<sup>35</sup> Additionally, the agent may be required to forfeit commissions and other compensation paid or accrued during the period of the breach.<sup>36</sup> Forfeiture of compensation may be the only remedy available when the artist either did not suffer a loss from the breach or will have difficulty proving it, or when the agent did not receive a material benefit from the breach.<sup>37</sup>

#### D. Madison’s Breach of Fiduciary Duty Claims

Because the contract between the two parties authorized Jerry to act as Madison’s representative, he would be legally bound by the restrictions on authority and the fiduciary duties

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<sup>30</sup> Restatement (Second) of Torts § 874 (1979) (“One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.”).

<sup>31</sup> DeMott, *supra* note 4, at 1056.

<sup>32</sup> *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 996 (2d Cir. 1983).

<sup>33</sup> Restatement (Third) of Agency § 8.01 cmt. d(1). See Restatement (Second) of Torts § 908(2) for circumstances in which punitive damages may be awarded.

<sup>34</sup> Restatement (Third) of Agency § 8.01 cmt. d(1).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* § 8.01 cmt. d(2).

<sup>37</sup> *Id.*

that arise out of the common law of agency in the context of his representation of Madison. She would therefore be entitled to damages or non-monetary relief for her claim that Jerry breached several fiduciary duties based on his conduct of selling the image to the gossip magazine. Madison can claim that Jerry breached the duty of loyalty by communicating confidential information that he obtained during the course of the agency relationship. Additionally, she can assert that he breached his duty of performance by failing to act with care and diligence and by failing to meet the standard of good conduct and reasonableness.

Even though Jerry's conduct actually helped Madison's career, he still breached his duty of loyalty by communicating confidential information to the gossip magazine. Confidential information is defined as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."<sup>38</sup> Additionally, the agent may obtain information about the artist that the agent should reasonably understand that the artist wishes to keep private.<sup>39</sup> An image portraying an artist's unclothed body should be considered confidential information and should not be exposed without her consent. When Jerry discovered the photo of Madison on her camera, he reasonably should have known that she wanted to keep it from the public because she never acknowledged its existence and had not sent or displayed it to anyone.

Madison could also assert that Jerry breached his duty of performance by failing to act with care and diligence and failing to meet the standard of reasonableness and good conduct. By not consulting with Madison with regard to his idea to release the image to the public, he failed to act as any other reasonable agent would have under the same circumstances. There was a chance that Madison would have consented to the publication of the photo, but Jerry never gave

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<sup>38</sup> Restatement (Third) of Unfair Competition § 39 (1995).

<sup>39</sup> Restatement (Third) of Agency § 8.05 cmt. c.

her the opportunity to do so. Although there were no instructions concerning this type of situation, Jerry should have collaborative with Madison as to how she wanted to proceed. He violated the standard of good conduct and reasonableness because his actions could just have as easily harmed her reputation and ended her career instead of bringing her good fortune and job opportunities.

Although, Madison did not suffer any economic harm, Jerry's conduct could subject him to forfeiture of the commission he received from the sale of the image as well as possible forfeiture of the commission he earned as a result of the many offers that came as a result of the publicity<sup>40</sup>. Since there were no express or implied terms of a contract or agreement, Madison should bring action in tort, and there is a good possibility that punitive damages would be awarded because Jerry's conduct could easily be classified as outrageous.<sup>41</sup> Additionally, Madison would have the option to terminate the agency relationship and search for new representation.

The common law of agency provides remedies in both contract and tort law which offer significant protection for artists in Madison situation against an agent's potentially detrimental conduct. Even in the absence of express or implied statements detailing the agent's authority in the context of his relationship with the artist, he is bound by the fiduciary duties of loyalty and performance. The remedies available to the artist as a result of any breach provide sufficient disincentive for the agent not to engage in conduct that could subject him to liability.

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<sup>40</sup> *Id.* § 8.01 cmt. d(1).

<sup>41</sup> See Restatement (Second) of Torts § 908 ((1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.)

## II. The Right of Publicity

An artist in Madison's situation may be able to assert a claim under the right of publicity, in addition to a breach of fiduciary claim, because this right gives individuals the power to control the use of their name or likeness for commercial purposes.<sup>42</sup> It is a somewhat controversial area of law, however, as courts struggle with its nature because it has influences in both privacy and property law.<sup>43</sup> This right applies to people whose identity has a commercial value, most often celebrities, and who would suffer a loss resulting from the unauthorized use of that identity. The right of publicity originated as a personal privacy right intended to protect people from the mental distress resulting from the misappropriation of their identity. Over time, it has transformed into a property right focusing more on the economic loss suffered, rather than on the initial privacy focus of rectifying emotional harm to the individual.<sup>44</sup> Today, when considering the merit of a claim of right of publicity, courts focus on the economic value of a celebrity's identity.<sup>45</sup>

### A. Origin in the Right to Privacy

The right of publicity has been described as a "descendant of the right to privacy."<sup>46</sup> The concept of the right to privacy first appeared in Justice Warren's and Justice Brandeis' article, *The Right to Privacy*, in 1890, which was an attempt to combat the increasing trend of media

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<sup>42</sup> Robert T. Thompson III, *Image as Personal Property: How Privacy Law Has Influenced the Right of Publicity*, 16 UCLA Ent. L. Rev. 155, 157 (2009). [hereinafter "Thompson"].

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. Pitt. L. Rev. 225, 226 (2005). [hereinafter "McKenna"].

<sup>46</sup> *Id.* at 227.

outlets publishing private facts and photographs about individuals.<sup>47</sup> Warren and Brandeis believed that everyone possessed the right “to be let alone,” which they believed was implicit in existing case law. They sought to create a protection of “the realm of solitude” where a person can be free from the public eye and scrutiny.<sup>48</sup> The article recognized that if an individual’s right to privacy had been violated there would be difficulty in indentifying economic harm to that individual, but believed that monetary damages were an important and necessary remedy.<sup>49</sup> Because of article’s focus on the emotional harm caused by the publication of private facts or photographs, courts assumed that “hurt feelings” were the “gravamen of a privacy claim.”<sup>50</sup>

Many years later, Professor William Prosser published an article, titled *Privacy*, that developed and refined the concept of the right to privacy.<sup>51</sup> In the article, Prosser identified four separate torts that arise out of Warren and Brandeis’s right to privacy: (1) intrusion upon seclusion; (2) public disclosure of embarrassing private facts<sup>52</sup>; (3) publicity placing a person in “false light” before the public eye; and (4) appropriation of name or likeness.<sup>53</sup> Prosser’s reasoning for including the tort of “appropriation, for the defendant’s advantage, of the plaintiff’s name and likeness” was that the person’s human dignity and personality were directly harmed by the misappropriation of their identity.<sup>54</sup> He further reasoned that this tort of appropriation was a privacy interest because it involved a person’s “unique individual qualities” and therefore needed protection from the unauthorized use of that persona.<sup>55</sup> It was from this privacy tort of

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<sup>47</sup> *Id.* (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)).

<sup>48</sup> McKenna, *supra* note 45, at 227-28 (citing Warren & Brandeis, *supra* note 47, at 196).

<sup>49</sup> McKenna, *supra* note 45, at 228.

<sup>50</sup> *Id.*

<sup>51</sup> See generally William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960).

<sup>52</sup> Currently referred to as “Publicity Given to Private Life.” See Restatement (Second) of Torts § 652D.

<sup>53</sup> Thompson, *supra* note 42, at 162.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

appropriation that courts later derived the right of publicity to meet the challenges that were presented by cases involving celebrities.

In the early cases involving privacy claims, courts were reluctant to recognize a “stand alone right to privacy,” but accepted as legitimate, claims that involved the unauthorized commercial use of a person’s identity.<sup>56</sup> In what is considered to be one of the landmark cases involving privacy law, *Pasevich v. New England Life Insurance Co.*,<sup>57</sup> the court first recognized a person’s right to control the commercial use of their identity, specifically in commercial advertising.<sup>58</sup> This case involved an insurance company using the plaintiff’s picture, which was taken from a negative obtained by the defendant, in an advertisement for the company.<sup>59</sup> Pasevich did not consent to the use of his picture for the advertisement, which contained statements attributed to him regarding the quality of the insurance company’s services.<sup>60</sup> He had never procured any services from the company.<sup>61</sup> Pasevich found the advertisement particularly offensive.<sup>62</sup> The court held that Pasevich was entitled to receive mental distress damages for the defendant’s conduct.<sup>63</sup> The court focused on the fact that Pasevich’s picture was “displayed in places where he would never go to be gazed upon, at times when and under circumstances where, if he were personally present, the sensibilities of his nature would be severely shocked.”<sup>64</sup> The court stated that the right to privacy and to control the use of one’s own image is derived

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<sup>56</sup> McKenna, *supra* note 45, at 240.

<sup>57</sup> *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

<sup>58</sup> McKenna, *supra* note 45, at 240.

<sup>59</sup> *Pasevich*, 50 S.E. at 68-69.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 69.

<sup>63</sup> Thompson, *supra* note 42, at 162.

<sup>64</sup> *Pasevich*, 50 S.E. at 80.

from natural law, and each individual should be protected from unnecessary encroachment upon that privacy.<sup>65</sup>

Although the court in *Pasevich* recognized the right to control the commercial uses of one's identity, courts' application of privacy law, particularly the appropriation tort, rarely permitted celebrities to succeed in their invasion of privacy claims.<sup>66</sup> Courts recognized the need to protect the privacy of "private" people, but celebrities were deemed to have sought out fame and publicity, and could not be offended by any further public exposure.<sup>67</sup> Courts came to adopt the view that "hurt feelings" were a critical element of any privacy claim, including the misappropriation of a person's identity for commercial uses.<sup>68</sup> In adhering to this view of the invasion of privacy, courts were not able to grant remedies to celebrities when they brought claims for the unauthorized commercial use of their personas because, generally, their feelings could not be harmed by the publicity because they were not "private" persons.<sup>69</sup> A common perception at the time was that celebrities, in effect, forfeited their right to privacy in terms of appropriation because "[t]here is sharp internal contradiction in the position of a plaintiff who alienates and objectifies her image and simultaneously claims that it is integral to her very identity in the manner presupposed by the tort of appropriation."<sup>70</sup>

## B. Emergence of the Right of Publicity

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<sup>65</sup> *Pasevich*, 50 S.E. at 69-70.

<sup>66</sup> Thompson, *supra* note 42, at 163.

<sup>67</sup> *Id.*

<sup>68</sup> McKenna, *supra* note 45, at 243.

<sup>69</sup> *Id.* See *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941) (rejecting Davey O'Brien's, a well known college football player's, invasion of privacy claim based on a beer producer's use of his picture in a promotional calendar because he actively sought out publicity through his football career, and his feeling could not be hurt as he was accustomed to this type of exposure.)

<sup>70</sup> Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 Case W. Res. L. Rev. 647, 677 (1991).

Celebrities were consistently denied the opportunity to successfully assert claims of appropriation as courts continued to apply the privacy theory.<sup>71</sup> During the mid 1900s, however, the right to control the use of one's own image underwent a fundamental transition from "protecting the person and the integrity of the individual to protecting the dehumanized economic value that could be derived from the person's identity."<sup>72</sup> Courts began to emphasize that a celebrity's purported right to control the use of his identity should be based on property principles instead, which produced the separate cause of action of the right of publicity.<sup>73</sup>

It is critical to note the differences between the privacy and the property analysis. Under privacy law, the right to control one's image appropriation is available to any private person and is based upon that person's right to be left alone. An infringement upon this right is one that cause mental harm to the victim. The property right, more specifically the right of publicity, involves a celebrity's or a well-known person's right to profit from the commercial use of their identity. In contrast to a privacy right violation, a violation of the right of publicity results in damage to the person's economic interest. The creation of the right of publicity as a cause of action "definitively separated a person's personal privacy interests from his or her economic interests."<sup>74</sup>

The Second Circuit is considered to be the first to recognize the right of publicity as a separate cause of action from the privacy tort of appropriation in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>75</sup> Haelan held exclusive rights to use certain professional baseball players' photographs, and sued Topps for producing playing cards with images of the same

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<sup>71</sup> Thompson, *supra* note 42, at 160-61.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 157.

<sup>74</sup> *Id.* at 163.

<sup>75</sup> *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

players covered by Haelan's exclusivity agreement.<sup>76</sup> The players had granted Topps the right to use their photographs on the playing cards, in violation of the contract they already had with Haelan.<sup>77</sup> Without the right of publicity as a property right, Haelan would not have succeeded in its claim because the players' identities would have been protected by the right to privacy, which is a personal right that cannot be assigned.<sup>78</sup> In that situation, the agreement between Haelan and the players only would have been a waiver of the players' right to privacy against Haelan.<sup>79</sup> By enjoining Topps from using the player photographs on the baseball cards, the court distinguished the right of publicity from privacy by emphasizing the commercial value of a celebrity's identity.<sup>80</sup> In issuing its decision, the court stated, "[f]or it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways."<sup>81</sup> "This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures."<sup>82</sup>

In the years after the *Haelan* decision, the right to publicity became widely accepted by courts and legislatures as a distinct cause of action based in property.<sup>83</sup> This shift away from the privacy origins gave a celebrity's identity substantial economic value and allowed the right of publicity to be fully alienated, assigned, and even inherited in some instances.<sup>84</sup> The damages

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<sup>76</sup> *Haelan Laboratories*, 202 F.2d at 868-69.

<sup>77</sup> *Id.* at 867.

<sup>78</sup> *Id.* at 869.

<sup>79</sup> McKenna, *supra* note 45, at 244.

<sup>80</sup> Thompson, *supra* note 42, at 164.

<sup>81</sup> *Haelan Laboratories*, 202 F.2d at 868.

<sup>82</sup> *Id.*

<sup>83</sup> Thompson, *supra* note 42, at 164.

<sup>84</sup> *Id.*

that courts could award celebrities for a meritorious claim were now based of actual economic harm from the loss of profits instead of being based upon the mental distress the plaintiff suffered.<sup>85</sup>

Currently, the right of publicity is recognized in roughly seventy-five percent of states and is codified at the federal level. Eighteen states have codified the right by statute,<sup>86</sup> and at least another eighteen have recognized the right through common law.<sup>87</sup> Federally, the right of publicity is codified in the Lanham Act.<sup>88</sup>

Although different jurisdictions have different elements that a plaintiff must satisfy in order to succeed in the cause of action, they usually include some form of the following elements: 1) the plaintiff must be a celebrity or a well known person; 2) an identifying feature of that person must be used; and 3) the use damages that person's public persona.<sup>89</sup> At common law, the elements are slightly different but they encompass the same concepts. The plaintiff must show 1) the defendant's use of the plaintiff's identity; 2) the appropriation of the plaintiff's name or likeness for to the defendant's commercial advantage; 3) lack of consent; and 4) resulting injury.<sup>90</sup> These common law elements are almost identical to the elements of the

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<sup>85</sup> *Id.*

<sup>86</sup> *Zoe Argento, Applying Genericide to the Right of Publicity*, 10 Vand. J. Ent. & Tech. L. 321, 325 (2008). See Cal. Civ. Code § 3344-3344.1 (West 1997 & Supp. 2007); Fla. Stat. Ann. § 540.08 (West, Westlaw through 2007 amendment); 765 Ill. Comp. Stat. Ann. 1075/10 (West 2001); Ind. Code Ann. § 32-36-1-1 (LexisNexis 2001); Ky. Rev. Stat. Ann. § 391.170 (LexisNexis 1999); Mass. Gen. Laws Ann. ch. 214, § 3A (West 2005); Neb. Rev. Stat. § 20-202 (1999); Nev. Rev. Stat. Ann. § 597.790 (LexisNexis 2004); N.Y. Civ. Rights Law § 50 (McKinney 1992); Ohio Rev. Code Ann. § 2741.02 (West 2006); Okla. Stat. Ann. tit. 21, § 839.1 (West 2002); R.I. Gen. Laws § 9-1-28.1 (1997); Tenn. Code Ann. § 47-25-1103 (West 2001); Tex. Prop. Code Ann. § 26.002 (Vernon 2000); Utah Code Ann. § 45-3-3 (2005); Va. Code Ann. § 8.01-40 (West, Westlaw through 2007 legislation); Wash. Rev. Code Ann. § 63.60.010 (West 2005); Wis. Stat. Ann. § 995.50 (West, Westlaw through 2007 legislation).

<sup>87</sup> Argento, *supra* note 85, at 326. These states include Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, New Jersey, Ohio, Pennsylvania. *Id.* at FN 17.

<sup>88</sup> Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2000).

<sup>89</sup> Argento, *supra* note 85, at 326.

<sup>90</sup> *Wendt v. Host Intern, Inc.*, 125 F.3d 806, 811 (9<sup>th</sup> Cir. 1997) (reversing summary judgment against plaintiffs, actors from the television show "Cheers," who sued based upon the defendant's conduct of creating robotic figures based upon the their likeness without their consent and placing them in airport bars).

privacy tort of appropriation,<sup>91</sup> but the difference between the two causes of action lies with who can assert the right and the type of harm that the person suffered.<sup>92</sup> To succeed under the Lanham Act, a celebrity must also show that the defendant's use of the celebrity's name or likeness is likely to confuse consumers as to "the affiliation, connection, or association" of the celebrity and the defendant, or as to the celebrity's involvement in the "origin, sponsorship, or approval" of the defendant's "goods, services, or commercial activities."<sup>93</sup> There is no such requirement to show actual consumer confusion to satisfy the elements of a right to publicity cause of action under common law. As a result, the common law affords greater protection against a wider range of abuses. The Lanham Act and state statutes preserve a right to control the use of one's own image for commercial uses, but the public is generally free to use the celebrity's likeness for entertainment and informational purposes.<sup>94</sup>

Stemming from the public's permitted use of a celebrity's identity for entertainment and informational purposes as well as the First Amendment's protection of free speech, there is a newsworthiness exception that a defendant can raise as an affirmative defense to a right of

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<sup>91</sup> William Prosser, *Law of Torts* § 117, 804-07 (4th ed. 1971).

<sup>92</sup> A recent Supreme Court of Missouri decision described a common view regarding the distinction between the two causes of action. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003) (en banc). In its decision, the court stated:

The interest protected by the misappropriation of name tort "is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or others." Recently, development of the misappropriation of name tort has given rise to a separate yet similar tort termed the "right of publicity," which is said to "protect a person from losing the benefit of their [sic] work in creating a publicly recognizable persona." Though facially similar, the protections afforded by each tort are slightly different: "the [misappropriation of name tort] protects against intrusion upon an individual's private self-esteem and dignity, while the right of publicity protects against commercial loss caused by appropriation of an individual's [identity] for commercial exploitation."... Despite the differences in the types of damages that may be recovered, the elements of the two torts are essentially the same. *Id.*

<sup>93</sup> Lanham Act § 43(a)(1).

<sup>94</sup> Argento, *supra* note 85, at 326.

publicity claim. This exception allows members of the press and the media to report and comment on topics that are of public interest.<sup>95</sup>

### C. Has the Right of Publicity Gone Too Far?

Even with the widespread acceptance of the right of publicity at both the state and federal level, some academics and legal commentators criticize its prominence.<sup>96</sup> Many believe that the right is too expansive; while some believe that the right is unnecessary and should not exist at all.<sup>97</sup> The fact that in recent years courts have expanded the right of publicity by including use of a catchphrase,<sup>98</sup> voice,<sup>99</sup> and even images that simply evoke a celebrity's identity<sup>100</sup> with a celebrity's likeness. There are several major critiques of right of publicity. Two of which are that the expanded right further "imbalance the distribution of power and money,"<sup>101</sup> and that the public gives a celebrity's identity its value so it has a more substantial right to use that identity than the celebrity does.<sup>102</sup>

The argument that the current right of publicity causes a further imbalance of the power and money focuses on an economic competition theory and the status of celebrity's who are able

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<sup>95</sup> See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (ruling that the newsworthiness exception did not apply to the situation the plaintiff's human cannonball act was broadcast on the news because airing the entire act undermined the plaintiff's ability to earn a living).

<sup>96</sup> Argento, *supra* note 85, at 326-27.

<sup>97</sup> *Id.* at 327.

<sup>98</sup> See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6<sup>th</sup> Cir. 1983) (ruling that the phrases "Here's Johnny" and "World's Foremost Comedian" used for portable toilets violated Johnny Carson's right of publicity because they slogans were considered an integral part of his identity).

<sup>99</sup> See *Midler v. Ford Motor Co.*, 849 F.2d 460 (9<sup>th</sup> Cir. 1988); see also *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9<sup>th</sup> Cir. 1992) (holding that a singer's voice must be distinctive and well-known to invoke liability for misappropriation under the right of publicity).

<sup>100</sup> See *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9<sup>th</sup> Cir. 1992) (holding that Samsung's was liable for using a image of a robot with a blonde wig standing at a game board similar to that of "Wheel of fortune" because it invoked Vanna White's identity in the minds of the public without her consent).

<sup>101</sup> Argento, *supra* note 85, at 327-28.

<sup>102</sup> *Id.* at 328-30.

to assert the right.<sup>103</sup> According to this argument, only large corporations can afford to pay the endorsement fees to purchase the rights to use a celebrity's identity for advertising and merchandising.<sup>104</sup> Smaller companies do not have the resources to gain access to the use of a celebrity's identity, and therefore, cannot compete with the corporations in this manner.<sup>105</sup> Additionally, the people who are able to assert this right of publicity are already wealthy, and most likely do not need additional revenue streams.<sup>106</sup> Further, these wealthy celebrities who are able to capitalize on their image increase the value of their identity by being the sole owner of the rights to its publicity which essentially creates a monopoly.<sup>107</sup>

Proponents of the "cultural studies movement" suggest that the public has a greater right to a celebrity's value because it is the public that gives the identity value.<sup>108</sup> This argument contends that a celebrity has no right to her public image because it is created by the public.<sup>109</sup> The cultural studies argument is based on the premise that the public doesn't just consume information as the media provides it.<sup>110</sup> Instead, consumers "'recode' cultural and even industrial commodities in ways that better serve their particular needs and interests."<sup>111</sup> Because the public interprets what the media produces rather than accepting the information at face value, consumers are the ones who assign meaning and value to celebrities, and deserve the right to use those public images as they see fit.<sup>112</sup>

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<sup>103</sup> *Id.* at 328-30.

<sup>104</sup> *Id.* at 328.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 329.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* (quoting Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 Cal. L. Rev. 125, 139 (1993)).

<sup>112</sup> Argento, *supra* note 85, at 329-30.

While the right of publicity in its current form, with the inclusion of voice and catchphrases, may be too far-reaching, it is still a necessary cause of action to protect a celebrity's economic interest. According to John Locke's labor theory, "the economic value of identity is should be allocated to the celebrity because the value is the primary result of the celebrity's labor."<sup>113</sup> Additionally, by allowing a celebrity to claim the right to control the publication of her image and enjoy the "fruits of her labor," it creates incentives for the celebrity to "expend labor productively" by recognizing the right to exclude others from profiting from a celebrity's image.<sup>114</sup> In theory, this will increase overall social welfare because celebrities have an incentive to produce quality work that will gain favor with the public.<sup>115</sup> The public will also receive a benefit by enjoying the product of the celebrity's labor.

While the cultural studies movement correctly asserts that the public is directly involved in assigning meaning and value to a celebrity's identity, there would be nothing to which the public could assign value without the celebrity's labor in creating that identity. The decreased competition argument overlooks the fact that the market for the use of celebrities' identities is a specialized market with a distinct set of suppliers and purchasers. Within that market, competition exists both for the use of a celebrity's identity and among those celebrities willing to provide the rights for that use. The right of publicity is seemingly over-inclusive in its current state, but celebrities should be entitled protect their economic interests against unauthorized uses of their identities.

#### D. Madison's Right to Publicity

Because Madison is a celebrity or a well known person, she is entitled to the right to control the appropriation of her identity for commercial purposes. Madison could attempt to

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<sup>113</sup> McKenna, *supra* note 45, at 230.

<sup>114</sup> *Id.* at 251.

<sup>115</sup> *Id.*

assert her right to publicity, but most likely she will not be successful because she did not suffer any economic harm as a result of the appropriation. The fact that she actually benefitted financially from Jerry's conduct weighs heavily against her.

In order for Madison to establish a prima facie case asserting her right to publicity, she would have to show 1) that Jerry used her identity 2) for his commercial advantage 3) without her consent, and 4) that she suffered an economic loss.<sup>116</sup> Madison will be able to satisfy the first and third elements of this cause of action without controversy. The image that the magazine published was readily identifiable as Madison, and at no time did she give her consent to Jerry to sell the image to the media. However, she will have difficulty satisfying the second element and certainly will fail to satisfy the fourth element of economic loss. Most of the cases that celebrities have litigated involving a right of publicity focus on the use of their identities for advertising or merchandising purposes. The right is not limited only to those purposes, and can protect against any activity from which the defendant can derive a commercial advantage from the use of the celebrity's identity. While Jerry did receive a percentage from the sale of the image, he did not gain a separate commercial advantage. Whether these facts would support a finding of commercial advantage to satisfy the second element would be an issue left to the trier of fact, but based on the existing case law, Jerry's compensation for the sale probably would not qualify as a commercial advantage. In either case, Madison would fail in her cause of action for the right of publicity because she did not suffer economic harm or a loss of profit. If anything, she benefitted from the publicity more than she was harmed.

If Madison attempted to bring suit for violation of her right of publicity against the magazine, she would again fail to meet the criteria for a successful cause of action. In addition to the fact that she was compensated for the picture and suffered no economic loss, the magazine

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<sup>116</sup> See *Wendt*, 125 F.3d at 811.

could argue that Madison consented to the publication of the picture by means of her agent operating under apparent authority. The magazine verified that Jerry was in fact Madison's agent, and negotiating the sale of the rights to an image falls within the scope of his duties as an agent, even if he was authorized to sell this particular picture. They could make a reasonable argument that they consummated the deal with an understanding Madison consented. Additionally, they could raise a defense of newsworthiness, but whether an image of a naked public figure is of legitimate public concern is questionable.<sup>117</sup>

The right of publicity gives celebrities and public figures substantial protection from unauthorized uses of their identities. While the right in its current form maybe over-inclusive as to what constitutes a person's likeness, it is necessary to protect celebrities' economic interests in their public persona. Perhaps the most important aspect of the right to publicity is that it protects against economic harm, rather than just hurt feelings. Without a showing of economic harm or loss of profit, a celebrity will not be able to successfully assert this right.

### III. Publicity Given to Private Life

Although Madison could not successfully bring a cause of action for invasion of privacy under the tort of appropriation because she is a celebrity, the Restatement (Second) of Torts leaves open the possibility of bringing suit under the privacy tort of publicity given to private life. "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the

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<sup>117</sup> See Restatement (Second) of Torts § 652D cmt. e. Also consider the discussion of the tort of publicity given to a private life immediately below in Section III.

public.”<sup>118</sup> If a person voluntarily places herself in the public view, she cannot succeed in a claim under this tort for receiving the publicity that she has sought.<sup>119</sup> Additionally, the public’s legitimate interest in the public figure may extend beyond those matters which the person places in public eye, and “to some reasonable extent may include information as to matters that would otherwise be private.”<sup>120</sup>

The Restatement gives the example of a motion picture actress and states that matters of her home and personal life may indeed be of legitimate interest because her occupation makes her extremely visible to public.<sup>121</sup> However, the legitimate interest in her daily habits is not unlimited.<sup>122</sup> Even celebrities are allowed to keep matters of an intimate nature, such as sexual relations, private.<sup>123</sup> “In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community.”<sup>124</sup>

As with Madison’s claim of the right of publicity regarding the images published in the gossip magazine, she most likely would not be able to bring action against the magazine because they could raise the defense of consent because Jerry was operating with apparent authority of his representation of Madison. She might be able to successfully bring action under this tort against Jerry because he allowed the publicity to happen. There is no question that the unauthorized publication of a one’s naked body would be highly offensive to an ordinary reasonable person. Whether Madison would be successful in asserting this right of privacy would depend upon whether a court would determine that the image was of legitimate public interest. Madison voluntarily placed herself in the public eye as an actress and a recording artist,

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<sup>118</sup> Restatement (Second) of Torts § 652D.

<sup>119</sup> *Id.* § 652D cmt. e.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* § 652D cmt. h.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

but she did not seek to place her naked body within the public's view. If a public figure is permitted to keep certain intimate details of her daily habits private, the image of her unclothed body would certainly fall within this category of protected matters. If a court would determine that the image is within a celebrity's right to privacy, Madison could recover for mental distress damages, as well as any punitive damages that a jury might award.

#### IV. Contractual Protection

Because of the common industry practice of executing fairly simple and uninvolved representation agreements between the agent and the artist, it would be in the best interest of the artist to negotiate a more explicit contract that expressly states the rights and duties of each party.

Below are examples of provisions that would be extremely beneficial to an artist:

“The artist shall have the right to approve the contents of all photographs, marketing materials, news articles, and press releases that the Agent intends to publish as part of the Agent's public image management strategy for the Artist.

Any failure to comply with or obtain the Artist's approval shall result in forfeiture of the Agent's compensation during the period of the breach and render the agent liable to the Artist for any economic or other damages resulting from said action. The conduct would subject the Agent to termination.”

Several issues arise with the inclusion of such contractual provisions in the representation agreement between the artist and the agent. First, and most importantly, there is a substantial imbalance of the relative bargaining powers between the two parties. When most artists sign these agreements they are just happy to have the opportunity to get representation and begin a career as an entertainer. Emerging artists are at a significant disadvantage in terms of leverage because they do not have a product that is proven to be successful. They possess potential as their only leverage. If the artist tries to forcefully negotiate a more favorable, express contract,

the agent may rescind the offer to represent her. Additionally, as previously stated, talent agents, especially those located in Hollywood, do not want to give any impressions that there is even a potential for conflict or that agent will engage in conduct unsatisfactory to the artist.<sup>125</sup> Given that it is essentially standard industry practice to execute such simple contracts, it would be extremely difficult for an artist to negotiate provisions, such as those above, into representation agreements.

Despite the lack of contractual provisions included in representation agreements that govern the conduct of talent agents, the common law of agency sufficiently fills in any holes with regard to an agent's specific and implied duties. Although the artist may not be aware of every right she possesses, the law of agency more than adequately protects her from any of the agent's conduct that may result in injury.

## V. Conclusion

Now, more than ever, an artist needs to be constantly aware of the public's perception of her. A positive public image is a valuable asset because much of an artist's success in the entertainment industry is derived from acceptance and support from the public. The artist's agent has the responsibility of being cognizant of the artist's public image and pursuing appropriate options on behalf of the artist to achieve her career objectives. Ideally, the agent and artist would then collaborate to determine which career path would be in the artist's best interest. Although an agent's specific authority is often not detailed in the representation agreement, the agent is bound by the fiduciary duties of loyalty and performance that arise out of the common law of agency. If the agent steps outside his actual authority and unilaterally decides to release images of the artist's likeness to public attempting to improve or alter the artist's image, he could

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<sup>125</sup> Information obtained through email exchange with Michael S. Diamond, *supra* note 1.

be in breach of his fiduciary duties. Additionally, the agent's conduct may render him liable through the artist's right of publicity, if the artist can show that she suffered economic harm as a result of the agent's actions. If the artist suffered no economic loss, she may be able to assert a right to privacy, even though she is public figure, if a deeply intimate matter is involved. The artist may attempt to negotiate a more favorable representation agreement expressly stating the authority and duties of each party, but given the great disparity in bargaining power, the artist most likely will not succeed. Even in the absence of specified duties, the artist has adequate protection from an agent's potentially detrimental conduct. The remedies available to the artist through applicable torts and breach of fiduciary duty claims provide sufficient disincentive for the agent not to engage in conduct that could subject him to liability.