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How Much of You Do You Really Own - A Property Right in Identity

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HOW MUCH OF YOU DO YOU REALLY OWN?
A PROPERTY RIGHT IN IDENTITY*

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I. INTRODUCTION

An individual's identity is comprised of many different characteristics. The law has historically recognized the existence of a property right in certain characteristics of an individual, such as name and likeness.¹ This recognition was premised on the idea that these characteristics comprise the essence of a person's identity and therefore, should be protected against appropriation by others.²

A problem in this area, however, has been the confusion among property,³ privacy,⁴ and publicity⁵ rights. Each of these rights touches the area

* The author gratefully acknowledges the assistance of Professor John Makdisi, Cleveland-Marshall College of Law, Cleveland State University.

¹ See *Brown Chemical Co. v. Meyer*, 139 U.S. 540 (1891); *Minton v. Smith*, 276 Ill. App. 128 (1934) (court held plaintiff had a property right in her name which could not be appropriated by another in his business); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Pollard v. Photograph Co.*, 40 Ch.D. 345 (1888) (photographer restrained from exhibiting extra copies of a portrait he contracted to make).

² See *supra* note 1. See also RESTATEMENT (SECOND) OF TORTS § 652A (1976).

³ A property right is defined as "[a] generic term which refers to any type of right to specific property whether it is personal or real property, tangible or intangible; e.g. professional baseball player has valuable property right in his name, photograph and image, and such right may be saleable by him." BLACK'S LAW DICTIONARY 1096 (5th ed. 1983) (citation omitted).

⁴ A right of privacy is defined as "[t]he right to be let alone; the right of a person to be free from unwarranted publicity." *Id.* at 1075.

⁵ A publicity right is defined as "the right of a celebrity to control and profit from the use of his name and likeness." Sims, *Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453 (1981).

of personal characteristics; however, the focus of each right is on a distinct area.⁶ The confusion between these rights has inhibited the evolutionary development of property rights. Therefore, in order to clearly evaluate the evolution and interpretation of property rights, a preliminary discussion of these three rights and the context in which they arise is necessary.

The purpose of this note, however, is not the distinction among these three rights. Rather, it is an investigation into the history of property rights relating to personal characteristics. The object of this investigation is to determine whether property rights exist in certain discrete characteristics or whether property rights attach to the more nebulous concept of identity.

II. DISTINCTION BETWEEN PROPERTY, PRIVACY, AND PUBLICITY RIGHTS

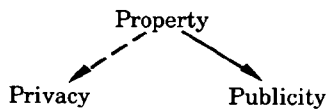
Considerable confusion exists among property, privacy, and publicity rights.⁷ Each of these rights has the potential to be used as the basis of a cause of action for the appropriation of personal characteristics. However, each right is generally pursued in a particular context.

The confusion among these rights arose primarily because legal scholars chose to develop privacy and publicity rights by mooring them in property.⁸ These rights, however, are distinct and serve particular func-

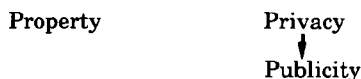
⁶ See *infra* notes 12-73 and accompanying text.

⁷ See *Colgate-Palmolive Co. v. Tullos*, 219 F.2d 617 (5th Cir. 1955) (court upheld judgment against defendant for use of plaintiff's photograph for advertising purposes); *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.W.2d 742 (1952); *McCreery v. Miller's Grocerteria*, 99 Colo. 499, 64 P.2d 803 (1936).

⁸ Legal scholars have traditionally propounded the theory that privacy and publicity rights developed from their initial mooring in property rights. See *infra* notes 12-73 and accompanying text. A diagram of the emergence of these three rights may appear as follows. The dotted arrow represents a right that has emerged as an independent right and the solid arrow indicates a sub-group of a right:



The emergence of these rights as depicted above, however, actually represents as faulty line of reasoning or an illegitimate marriage. The right of privacy was conceptualized as having its origins in the established right of property in order to give the newly developed right credibility. As two scholars once noted: "in the process of searching for this right [privacy], they [Warner and Brandeis] succeeded in inventing it." Felcher and Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L. J. 1577, 1581 (1979). See also *infra* notes 12-33 and accompanying text. A more accurate depiction of the status of these rights depicts property and privacy as separate rights:



tions. Privacy rights developed to protect the right to be let alone, and are premised upon an injury to feelings.⁹ Publicity rights are concerned with the right of a celebrity to control and profit from the use of his name and likeness.¹⁰ Property rights, however, are much broader in scope. They are based on the exclusive right to possess, enjoy, and dispose of a thing or characteristic.¹¹

The confusion among these three rights has hindered the development of a uniform theory regarding property interests in the area of personal characteristics and identity. In order to clearly discuss this area, a preliminary distinction among property, privacy, and publicity must be drawn.

A. Property Rights Versus Privacy Rights

1. Right of Privacy Defined

The right of privacy has been defined as “the right to be left alone, to have one’s personal feelings undisturbed and be free of emotional upset.”¹² The origin of this right is generally attributed to Samuel Warren and Louis Brandeis’s article, *The Right to Privacy*.¹³ Warren and Brandeis developed this right by suggesting that “the term ‘property’ had grown to comprise every form of possession — intangible, as well as tangible.”¹⁴ However, Warren and Brandeis recognized that property was “tied with the material rather than the spiritual,”¹⁵ and thus realized that property itself was an inadequate concept upon which to base privacy rights. They concluded that the right of privacy is based on the “right to be let alone” or the “inviolable personality” and the “more general right to the immunity of the person—the right to one’s personality.”¹⁶

Since its development by Warren and Brandeis, the legal concept of a right of privacy has gained acceptance in the common law and is now recognized in most jurisdictions.¹⁷ However, the right of privacy has often

⁹ W. PROSSER & W. KEETON, *PROSSER AND KEETON ON THE LAW OF TORTS* 851-869 (5th ed. 1984).

¹⁰ Felcher & Rubin, *supra* note 8, at 1588.

¹¹ See BLACK’S LAW DICTIONARY 1095 (5th ed. 1983).

¹² Sims, *supra* note 5 at 461.

¹³ The term “right to privacy” was first used in T. COOLEY, *LAW OF TORTS* 29 (2d ed. 1888). It was then quoted in Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). Privacy rights actually developed from the personal experiences of Mr. Warren. He became particularly upset by lurid newspaper accounts of his wife’s social life. He consulted with his long-time friend and law partner, Mr. Brandeis, regarding these invasions, and the result was their article detailing the right of privacy. *Id.* at 196.

¹⁴ Warren & Brandeis, *supra* note 13, at 193.

¹⁵ *Id.* at 197.

¹⁶ *Id.* at 207.

¹⁷ Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 N.W.U.L. REV. 553, 554 (1960). The right of privacy has developed not as a residual category but as an independent legal concept. Although the right is recognized in almost all jurisdictions, conflicts regarding when the right applies are frequent. “Specifically, it becomes necessary to explain why the right of privacy applies in

been confused with the right of property. Although Warren and Brandeis chose not to base the right of privacy on property rights, they did anchor privacy rights in property. This caused much confusion as privacy rights developed.¹⁸

Dean Prosser was instrumental in developing Warren and Brandeis's right of privacy. He used the right of privacy as a catch-all phrase to cover four distinct tortious causes of action.¹⁹ Prosser's four distinct torts are: (1) intrusion upon physical solitude; (2) public disclosure of private facts; (3) publicity that places someone in a false light; and (4) appropriation of one's name or likeness for another's benefit.²⁰

Although Prosser placed these four categories of torts under the catch-all rubric of privacy, he noted that the tort of appropriation was "quite a different matter"²¹ from the other three torts he set out due to its element of unauthorized commercial exploitation.²² That is, Prosser did not distinguish between privacy and property rights. Many courts, however, recognized that the appropriation tort is an aspect of property while the other three, which comprise the right of privacy, are based on something other than property.²³ Prosser also recognized this distinction, yet concluded that "[i]t seems quite pointless to dispute over whether such a right is to be classified as 'property'."²⁴

This conclusion, however, is not supported by the privacy right as developed by Warren and Brandeis.²⁵ When Warren and Brandeis developed the right of privacy by using property rights as the frame for privacy, one may conclude, as Prosser did, that the property analysis is now superfluous.²⁶ However, Warren and Brandeis did not have this in mind. They argued that privacy was based on expanded notions beyond, not instead of, the traditional confines of property.²⁷

certain situations, but must yield to the First Amendment in others. One common explanation is based on the idea of waiver; a public figure is viewed as having waived his right of privacy by virtue of his status." Felcher & Rubin, *supra* note 8 at 1586. This explanation later developed into the legal concept of a right of publicity. See *infra* notes 61-73 and accompanying text. This tension between rights is a primary reason to distinguish property, privacy, and publicity rights. This type of separation allows both private and public figures to maintain a cause of action when an aspect of their personality is appropriated.

¹⁸ See *supra* note 8. The right of privacy developed to such a degree that it "now threatens to become a sort-of catch-all" phrase for any case involving infringements of one's personality. Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932). This is another facet contributing to the confusion between privacy and property.

¹⁹ W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971).

²⁰ *Id.* The American Law Institute later adopted these four types of privacy invasions in the Restatement (Second) of Torts. See RESTATEMENT (SECOND) OF TORTS §§ 652A, 652B, 652C, 652D, 652E (1976).

²¹ Prosser, *Privacy*, 48 CALIF. L. REV. 383, 406 (1960).

²² *Id.*

²³ Many courts have recognized the property right in the use of a person's name or likeness. See *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973); *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

²⁴ Prosser, *supra* note 21, at 406.

²⁵ Terrell & Smith, *Privacy, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue*, 34 EMORY L.J. 1, 10 (1985).

²⁶ *Id.*

²⁷ *Id.* at 10-11.

The distinct difference between classic invasion of privacy cases²⁸ and proprietary appropriations for commercial exploitation²⁹ illustrates the need to separate privacy and appropriation. There is some element of personality appropriation in every privacy case. However, the phrase commercial exploitation connotes appropriation for commercial use. This includes appropriating an aspect of personality to imply that a person is endorsing a product or consenting to the use of his or her personality.³⁰ It is recognized that the "right to be free from commercial exploitation, rather than the 'right to be let alone', constitutes a firmer basis for granting relief and for the assessment of damages."³¹ This is a major reason why the analyses of many scholars, including Prosser, are underinclusive.

The conclusion that classifying the appropriation tort as property is irrelevant has contributed to the confusion surrounding property and privacy rights.³² It must be recognized that privacy is only one of several aspects of personality that is subject to appropriation. As Dean Leon Green recognized: "To bring cases involving the appropriation of all

²⁸ Classic instances of invasion of privacy include the following: *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952) (invasion of a tenant's living room by a landlord upon non-payment of rent); *Walker v. Whittle*, 83 Ga. App. 445, 64 S.E.2d 87 (1951) (sheriff entering plaintiff's home without a search warrant); *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1931) (tapping plaintiff's telephone wires); *Itzkewitch v. Whitaker*, 115 La. 478, 39 So. 449 (1913) (police retaining finger prints of accused after acquittal). *Gordon*, *supra* note 17, at 556.

²⁹ There is some debate over whether the appropriation must be used for commercial exploitation. See *infra* notes 161-162 and accompanying text.

³⁰ *Gordon*, *supra* note 17, at 557; see also *W. PROSSER*, *supra* note 19, at 853-55.

³¹ *Gordon*, *supra* note 17, at 555. The harm that arises when a personal attribute is appropriated for the unauthorized endorsement of a commercial product is both personal and economic. The personal aspect of the injury arises from the false implication that a business relationship exists between the advertiser and the individual portrayed. This misrepresents the individual's transactions. In addressing this type of personal damages the court will only look to the advertisement itself to determine if it implies an endorsement. In the absence of a contrary finding a court will generally impose liability to support the public policy of encouraging honest commercial practices. *Felcher & Rubin*, *supra* note 8, at 1612-13. Economic injury arises when effect of the portrayal is to limit the person's ability to profit from his name, likeness, or characteristics. The key to this type of recovery is proving an economic loss due to the identifiability of the person portrayed. This may be proved by showing that the person was in the process of earning money from the particular attributes appropriated by the portrayal. *Id.* at 1613-14.

³² The recognition of the distinction between property rights and privacy rights will also clarify the rights of the next of kin of a deceased person. The right of privacy is a personal right and is therefore nonassignable. It rests in the individual during his lifetime and dies with him at his death. A property right, on the other hand, accrues to the deceased's estate for the benefit of his next of kin. Therefore, if an individual possesses a property right in his name or likeness, these rights do not pass into the public domain after death. They remain in the decedent's estate. See *Felcher & Rubin*, *supra* note 8, at 1593; see also *Maritote v. Desilu Productions Inc.*, 345 F.2d 418 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965); *Miller v. Universal Pictures Co.*, 18 Misc.2d 626, 188 N.Y.S.2d 388 (Sup. Ct. 1909).

phases of personality under this title [privacy] creates a disturbing sense of artificiality. The term is too narrow and too lacking in descriptive coloring."³³

2. Confusion Between Property and Privacy Rights

The confusion surrounding property and privacy rights arose primarily because litigants generally chose to sue under a privacy theory even though injury to feelings, upon which a privacy action is based, had little or only secondary application.³⁴ These litigants would have had a greater chance of success had they chosen to sue under a property theory based on the actual appropriation of the name or likeness for commercial exploitation.³⁵ An example of this situation is illustrated in *Roberson v. Rochester Folding Box Company*.³⁶ In *Roberson*, a flour company circulated Abigail Roberson's photograph without her consent in an advertising circular. Upon learning of this, Roberson claimed she was emotionally

³³ Green, *supra* note 18, at 239. Dean Green recognizes the need for more accurate classification in cases affecting interests of personality. He suggests that instead of using the catch-all of privacy, a classification of harms would clarify the situation:

Harms are of three general types — (1) physical harms, (2) harms of appropriation, (3) harms of defamation. In most cases the type of harm stands out clearly. In some they all may be present, or may be found in varied combinations. . . . The tort cases which courts most frequently bring under the "privacy" rubric, or else treat as anomalies, involve an interest of personality which has been subjected to the harm of appropriation. The appropriation of the personality or someone of its phases is not a familiar idea to the lawyer. Nevertheless, if the idea is descriptive of the cases, it has the advantage of being familiar in other connections, as, for example, the "conversion" cases and there is no good reason why it should not be employed here.

Id. Dean Green further recognized the interests of personality as: (1) physical integrity; (2) feelings or emotions; (3) capacity for activity or service; (4) names; (5) likeness; (6) history; and (7) privacy. *Id.*

³⁴ Gordon, *supra* note 17, at 554; *see also infra* notes 36-59 and accompanying text.

³⁵ *Id.* at 569 (citing *United States Life Ins. Co. v. Hamilton*, 238 S.W.2d 289 (Tex. Civ. App. 1951)). In this case an insurance company mailed soliciting letters to customers using a facsimile of the plaintiff's signature who was designated as "manager" after he had left their employment. The court held that the non-recognition by Texas of the right of privacy was of no importance to this case because the plaintiff had not based his cause of action on privacy rights. The court further held that:

[t]he use of an individual's signature for business purposes unquestionably constitutes the exercise of a valuable right of property in the broadest sense of that term. . . . In this broad sense, we have no doubt that the unauthorized use of appellee's name and signature by appellants, regardless of why it was so used, constitutes such wrongful conduct on their part as to entitle appellee to the receiving of nominal damages even though no actual damages were shown.

Id. at 292.

³⁶ 171 N.Y. 538, 64 N.E. 442 (1902). *See also* Gordon, *supra* note 17, at 557-59, for a general discussion of this case.

injured from the unauthorized use of her likeness for advertising purposes.³⁷ The New York Court of Appeals, in a 4 to 3 decision, reversed the trial court. The Appellate Court refused recovery because it could find no legal precedent for Warren and Brandeis's right to privacy upon which Roberson relied.³⁸

If, however, Abigail Roberson had based her claim on the unauthorized commercial appropriation of her property interest in her likeness rather than expressly for the injury to her feelings, the result of the case might have been different.³⁹ In dictum, the majority of the New York Appellate Court indicated that to succeed in her claim the plaintiff had to prove either a breach of trust or that the plaintiff had a property right in the subject of the litigation which the court could protect. In *Roberson* the court held that the plaintiff was unable to prove either of these two requirements.⁴⁰ The fundamental basis for this conclusion was the fact that the plaintiff sued for injury to her feelings.⁴¹ The court pointed out that there was no complaint that the plaintiff was libeled by the publication of her portrait and that the likeness was a good one recognizable by her friends and acquaintances.⁴² The court stated that a recognition of the right to sue for invasion of privacy for injury to one's feelings because of the publication of one's likeness would lead to litigation bordering on the absurd.⁴³

The *Roberson* decision has been widely criticized. Justice Gray's dissenting opinion has received almost universal support as the better law.⁴⁴ Justice Gray based his dissent on the need created for new legal concepts due to progress in the fields of arts and sciences⁴⁵ and "on the property rights of the plaintiff in her likeness."⁴⁶ He stated that:

Property is not necessarily the thing itself which is owned, it is the right of the owner in relation to it. The right to be protected in one's possession of a thing or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property . . . I think this plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes . . . if her face or her portraiture has a value, the value is hers exclusively, until the use be granted away to the public.⁴⁷

³⁷ Abigail Roberson claimed she was "greatly humiliated by the scoffs and jeers of persons who recognized her face and picture . . . and her good name had been attacked causing her great distress and suffering both in mind and body." *Id.* at 542-43, 64 N.E. at 442.

³⁸ Gordon, *supra* note 17, at 558.

³⁹ *Id.*

⁴⁰ *Roberson*, 171 N.Y. at 543, 549, 64 N.E. at 445, 447.

⁴¹ *Id.* at 542-43, 64 N.E. at 447-48.

⁴² *Id.* at 542, 64 N.E. at 442-43.

⁴³ *Id.* at 545, 64 N.E. at 443.

⁴⁴ Gordon, *supra* note 17, at 558; see also *Canessa v. J.I. Kislak, Inc.*, 97 N.J. Super. 327, 235 A.2d 62 (1967); *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

⁴⁵ *Roberson*, 171 N.Y. at 561-65, 64 N.E. at 449-50.

⁴⁶ Gordon, *supra* note 17, at 558.

⁴⁷ *Id.* at 565, 64 N.E. at 450.

Justice Gray thus recognized the property rights in an individual's name or likeness and the viability of a claim when these attributes are appropriated by another.

Another example of the confusion of remedy that occurs when a suit is based on injury to feelings or a right of privacy rather than the actual appropriation of the property right is found in *O'Brien v. Pabst Sales Co.*⁴⁸ O'Brien, a well-known college football player, sued for the unauthorized commercial use of his picture on a calendar featuring a beer advertisement. The publicity department of the university which O'Brien attended had sought publicity for him by broadcasting his photograph throughout the country. The publicity department also sold a print for one dollar to the publishing company which had requested it for a calendar. The publishing company, however, did not mention the proposed beer advertisement that was to be featured on the calendar.⁴⁹ The court held that since O'Brien himself, through the university, was seeking publicity there was no invasion of privacy.⁵⁰

The court, in dictum, implies that its finding would have been different if O'Brien had based his action on the appropriation of his property right in his likeness, rather than basing his claim upon injury to feelings.⁵¹ If O'Brien had based his claim on the appropriation, he would have had to show that he had a property right in the characteristic appropriated and that this appropriation had been for the purpose of commercial exploitation. These elements are present in *O'Brien* and he would have likely succeeded had a case based on this property right been made.

Justice Holmes argued in his dissent that recovery could have been allowed for the proprietary appropriation even though this claim was not expressly made.⁵² Holmes recognized that the right of privacy is distinct from the right to use one's name or picture for the purpose of commercial advertisement.⁵³ He concludes that the latter, "is a property right that belongs to everyone."⁵⁴ This conclusion implies that since property rights belong to everyone, a litigant does not need to expressly claim the appropriation of his property rights in order to succeed on such a claim.

⁴⁸ 124 F.2d 167 (5th Cir. 1941), *cert. denied*, 315 U.S. 823 (1942). See also Gordon, *supra* note 17, at 564-65.

⁴⁹ 124 F.2d at 169.

⁵⁰ *Id.* at 170.

⁵¹ *Id.* No injury to feelings occurred from the publication of the picture due to the fact that O'Brien himself was seeking publicity.

⁵² *Id.* at 171.

⁵³ *Id.*

⁵⁴ *Id.* at 170. Justice Holmes's recognition of the right to use one's name for the purpose of commercial advertisement is similar to Prosser's appropriation tort. See *supra* notes 21-26 and accompanying text. Prosser, however, includes this tort under the umbrella of privacy. A more accurate distinction is to recognize that a property right exists in certain personal characteristics and a cause of action arises when these characteristics are appropriated for commercial purposes. This distinction allows a litigant to have a broader range of interests in which to maintain a cause of action. A public figure, such as O'Brien, will not succeed in a suit for invasion of privacy, yet could conceivably succeed in a suit based on the property aspect of the appropriation. This shows the over-inclusiveness that is inherent in Prosser's classification.

Much of the confusion between property and privacy rights arose because the litigant did not base his cause of action upon the appropriate right.⁵⁵ Holmes' theory of an implied cause of action for property rights would have eliminated much of this confusion. However, case law indicates that this theory has not been adopted. In order to succeed in an action regarding personal characteristics, the plaintiff must assert the appropriate right or rights.⁵⁶

The context in which a privacy or property right should be pursued is clear. If the central issue in the case is injury to feelings due to an invasion of privacy, a privacy action should be brought.⁵⁷ However, if the central issue is the appropriation of the litigant's name or likeness, a suit based upon property rights should be maintained.⁵⁸ These actions are not, however, mutually exclusive. A litigant may choose to bring both claims jointly.⁵⁹ To succeed on both claims, however, he must be prepared to show separate and conclusive evidence to support both claims.⁶⁰

B. Property Right Versus Right of Publicity

The right of publicity is defined as a right that allows a celebrity who has used his or her personality for commercial purposes to protect the value of the name or appearance.⁶¹ A celebrity or public figure is defined as someone whose identity would be recognized by a stranger.⁶² A non-public figure is one who would only be recognized by personal acquaintances.⁶³ There has been considerable controversy surrounding the issue of whether the right of publicity is peculiarly celebrity-based or extends to include non-public persons.⁶⁴ The majority of cases and commentators, however, suggest that the right is celebrity-based.⁶⁵

⁵⁵ See *supra* notes 34-51 and accompanying text.

⁵⁶ *Id.*

⁵⁷ See *supra* notes 36-59 and accompanying text.

⁵⁸ Gordon, *supra* note 17, at 556-565.

⁵⁹ See *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Ea. 136, 67 A. 392 (1907); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

⁶⁰ *Id.* There are, however, certain courts and commentators who consider the distinction between personal and property rights to be irrelevant. The Supreme Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) stated:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether property in question be a welfare check, a home or a savings account.

See also Reich, *The New Property*, 73 YALE L.J. 733 (1964).

⁶¹ Sims, *supra* note 5, at 453.

⁶² *Id.* at 467.

⁶³ *Id.*

⁶⁴ Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1200 n.3 (1986).

⁶⁵ *Id.* See also Felcher & Rubin, *supra* note 8, at 1589-90; *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products Inc.*, 250 Ga. 135, 296 S.E.2d 697 (1982).

The right of publicity is a legal concept that emerged from the law of privacy. The emergence of this right was justified by characterizing it as a property right.⁶⁶ The right of privacy was inadequate to cover all non-defamatory portrayals that caused injury to personal interests that are identifiable. For example, portrayals that cause injury to well-known people do not fit well within the privacy right because the celebrity's complaint "is not that they received publicity, but that they have failed to receive its benefits."⁶⁷ Therefore, the independent right of publicity subsequently emerged.

The first case that recognized the publicity right was *Haelan Laboratories, Inc. v. Topps Chewing Gum*.⁶⁸ The court in *Haelan* held that a celebrity has a right to damages and other relief for the unauthorized commercial appropriation of the celebrity's persona. The court held that there was a legally cognizable right to photograph a person. In reaching this conclusion, the court stated: "We think that, in addition to and independent of [the] right of privacy . . . 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 . . ."⁶⁹ The right of publicity gradually gained acceptance after the *Haelan Laboratories* decision. It is now judicially

⁶⁶ Nimmer, *Right of Publicity*, 19 LAW AND CONTEMP. PROBS. 201, 216 (1954).

⁶⁷ Felcher & Rubin, *supra* note 8, at 1588. The right of privacy is premised on the right to be let alone. However, this right seems contradictory when it is applied to public persons. A public figure often has difficulty in maintaining an invasion of privacy suit because he is often deemed as "having waived his right of privacy by virtue of his status." *Id.* at 1586. This, however, is a fictional legal conclusion. A legal waiver is defined as the intentional or voluntary relinquishment of such a right. See BLACK'S LAW DICTIONARY 1417 (5th ed. 1979). It has been recognized that:

[S]omeone has voluntarily agreed to publicity about his private life when he accepts a part in a motion picture [etc.]. . . . The concept of waiver involved in these cases . . . is a constructive waiver — in other words, it is merely a way of restating the conclusion that public figures have no right of privacy due to the countervailing and more powerful commands of the First Amendment.

Felcher & Rubin, *supra* note 8, at 1587.

Thus, when a public figure does maintain a suit for invasion of privacy, his complaint is generally that he has failed to receive the benefits of the publicity. *Id.* at 1588. It would be more accurate, however, for the public figure to bring a suit based on his property rights in the characteristic appropriated.

⁶⁸ 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953).

⁶⁹ *Id.* at 868. Professor Nimmer concurred in this conclusion in Nimmer, *supra* note 66, at 203. Nimmer recognized that:

The nature of the inadequacy of the traditional legal theories dictates in large measure the substance of the right of publicity. The right of publicity must be recognized as a property (not a personal) right, and as such capable of assignment and subsequent enforcement by the assignee. Furthermore, appropriation of publicity values should be actionable regardless of whether the defendant has used the publicity in a manner offensive to the sensibilities of the plaintiff Likewise, the measure of damages should be computed in terms of the value of the publicity appropriated by the defendant rather than, as in privacy, in terms of the injury sustained by the plaintiff.

Id. at 216.

recognized in a substantial number of jurisdictions⁷⁰ and has set the foundation for another cause of action.

Confusion has been generated in this area by the similarity between the right of publicity and the proprietary appropriation of one's name or likeness.⁷¹ The right of publicity, however, "rests on the idea of damage to property of demonstrated economic worth."⁷² Therefore, "it does not extend to the misappropriation of a person's name or likeness when that person has not previously exploited these attributes in some commercial manner."⁷³

C. Inadequacy of Privacy and Publicity Rights

The emergence of privacy and publicity rights has not eclipsed the viability of property rights. An individual's rights are not fully protected under either privacy or publicity theories. The existence of a property action must be recognized in the area of personal characteristics.

Property rights are necessary to fill the gaps left by privacy and publicity rights. For example, an individual whose likeness is appropriated and used in an advertisement may maintain a privacy action if he can show this appropriation invaded his privacy and injured his feelings.⁷⁴ If

⁷⁰ The right of publicity has been explicitly recognized in such cases as *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St.2d 224, 351 N.E.2d 454 (1976), *rev'd on other grounds*, 433 U.S. 562 (1977); *Lugosi v. Universal Pictures*, 70 Cal. App.3d 556, 139 Cal. Rptr. 35 (1977).

⁷¹ Some courts and commentators have even concluded that the distinction between property and publicity rights is irrelevant. Judge Frank in *Haelan Laboratories* regarded the characterization of the right as a property right to be an arbitrary exercise in classification. He wrote that "[w]hether [the right] is labelled a 'property' right is immaterial; for here, as often elsewhere, the tag simply symbolizes the fact that courts enforce a claim which has peculiar worth." *Haelan Laboratories*, 202 F.2d at 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). However, distinguishing property and publicity rights is of vital importance in eliminating the confusion between these rights. See *infra* notes 74-77 and accompanying discussion.

⁷² *Felcher & Rubin*, *supra* note 8, at 1591 n.78. Property that is generally regarded to have demonstrated economic worth is comprised of those attributes that a public person uses to make a living. *Id.* at 1615. There are several underlying rationales for protecting publicity rights: (1) such protection "provides an economic incentive . . . to make the investment required to produce a performance of interest to the public." *Id.* at 1615. See also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). The *Zacchini* court upheld a right of publicity claim against a first amendment attack where the defendant television station had broadcast the entirety of plaintiff's human cannonball act; (2) such protection prevents "unjust enrichment by the theft of good will." *Id.* There is no social purpose served by having the defendant take some aspect of the plaintiff that ordinarily has market value, for free. See also *Kalven, Privacy in Tort Law — Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROBS. 326, 331 (1966); (3) protection of publicity interests guards the public against such deceptions as the false endorsement of products. See *Felcher & Rubin*, *supra* note 8, at 1600.

⁷³ *Felcher & Rubin*, *supra* note 8, at 1591 n.78.

⁷⁴ See *supra* notes 13-60 and accompanying text. See also *Sims*, *supra* note 5, at 465-67.

this individual is a public person he may be able to assert his publicity rights.⁷⁵ However, in each instance if this plaintiff could not show the requisite elements for privacy⁷⁶ and/or publicity⁷⁷ rights he would be left without a cause of action. Recognizing the existence of property rights would allow the individual to assert a claim based on the violation of his ownership in his identity.

III. ESTABLISHED PROPERTY RIGHTS

A person's identity is captured by many different characteristics. The best known characteristics by which an individual is recognized, however, are his name and/or likeness. The common law has recognized the importance of these characteristics and has accorded protection to them through the recognition of property rights in name and/or likeness.⁷⁸

A. *Property Rights in Name and Likeness*

A property right in one's name and likeness is well established in the common law.⁷⁹ This protection is supported by public policy considerations

⁷⁵ See *supra* notes 61-73 and accompanying text. See also Sims, *supra* note 5, at 465-67.

⁷⁶ See *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902) (the court held the likeness of the plaintiff appropriated by the defendant was a good one and could not have injured the plaintiff's feelings).

⁷⁷ Several courts and commentators have held that a non-public person may not assert publicity rights. This considerably narrows the scope and application of publicity rights. See Halpern, *supra* note 64, at 1200-02.

⁷⁸ W. PROSSER & W. KEETON, *supra* note 9, at 852-54.

⁷⁹ Gordon, *supra* note 17, at 611-12; see also Green, *supra* note 18, at 243-48. It must also be recognized that certain states have enacted statutes that give an individual a cause of action when his name or likeness is appropriated. An example of such a statute is the New York Civil Rights Law. It has been recognized that "New York cases, even though based on statute, have often been regarded as leading precedents and have become part of the common law tradition." Felcher & Rubin, *supra* note 8, at 1582 n.31. This statute states, in pertinent part:

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

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

These statutes are often premised on a right of privacy, however, they actually come closer to Prosser's appropriations tort and the common law property right.

See *supra* notes 15-32 and accompanying text.

such as the interest in controlling the effect on one's reputation, controlling the use of one's personality, and the prevention of unjust enrichment of those who appropriate the value of another's identity.⁸⁰

Various courts have recognized the property interests in one's name and likeness.⁸¹ For example, in *Edison v. Edison Polyform Manufacturing Co.*,⁸² Thomas Edison sought to enjoin a company which sold medicinal preparations from using the name and picture of Edison as part of its corporate title or in connection with its business. Edison also sought to enjoin the defendant from using his name, picture or endorsement on the label of defendant's product or as part of defendant's advertising.⁸³ The court granted the injunction holding that a man's name and features are his property.⁸⁴ The court realized that the essence of an individual is captured in his name and likeness and therefore, these characteristics must be protected against unlawful appropriation.⁸⁵

Although many cases dealing with the appropriation of one's name or likeness involve public figures,⁸⁶ this interest is not limited to such individuals. It extends equally to both public and non-public⁸⁷ figures.⁸⁸ This is a crucial difference between privacy and publicity rights. Courts have been reluctant to uphold invasion of privacy claims made by public

⁸⁰ Treece, *Commercial Exploitation of Names, Likeness, and Personal History*, 51 TEX. L. REV. 637 (1973).

⁸¹ *Uproar v. National Broadcasting Co.*, 8 F. Supp. 358 (D. Mass. 1934), *modified*, 81 F.2d 373 (1st Cir.), *cert. denied*, 298 U.S. 670 (1936) (where property rights were recognized in the name "Graham McNamee," a well-known radio announcer); *United States Life Ins. Co. v. Hamilton*, 238 S.W.2d 289 (Tex. Civ. App. 1951) (where an insurance company mailed soliciting letters using a facsimile of plaintiff's signature in which plaintiff was designated "manager" after he had left their employment); *Munde v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911) (where plaintiff was held to have a property interest in his picture).

⁸² 73 N.J. Eq. 136, 67 A. 392 (1907).

⁸³ *Id.*

⁸⁴ The court concluded that:

If a man's name be his own property as no less an authority than the United States Supreme Court says it is . . . it is difficult to understand why the peculiar cast of one's features is not also one's property and why its pecuniary value if it has one, does not belong to its owner rather than to the person seeking to make unauthorized use of it.

Id. at 141, 67 A. at 394.

⁸⁵ *Id.*

⁸⁶ A public figure is defined as one who has "arrived at a position where public attention is focused upon him as a person." BLACK'S LAW DICTIONARY 1106 (5th ed. 1979) (citation omitted).

⁸⁷ A non-public figure is one who has not thrust himself into the limelight of public attention nor sought recognition or fame. *See Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974), *New York Times v. Sullivan*, 376 U.S. 254 (1954); *Scott v. News Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

⁸⁸ This is an example of the essential reason to distinguish the right of property from publicity rights. *See supra* notes 62-74 and accompanying text; *see also Kunz v. Allen*, 102 Kan. 883, 172 532 (1918) (where plaintiff was in defendant's store and the defendant took some motion pictures of plaintiff without her knowledge and exhibited them in a local theatre as advertising for his store). The court held that this was an unlawful appropriation of plaintiff's property right in her picture.

figures.⁸⁹ On the other hand, only public figures may make a claim based on publicity rights. Property rights, however, extend equally to both private and public figures.

The main difference between appropriating the name or likeness of a public figure and that of a non-public individual is the measure of damages. To determine the measure of damages for a public figure some elements to consider are the fame of the public figure,⁹⁰ the value of his personality in the market place,⁹¹ and the profits earned by the defendant from the unauthorized commercial exploitation of the public figure.⁹² In the case of a non-public figure, "there is no pecuniary or market value in the name, likeness, etc., of such a person until the defendant, by unlawfully appropriating the property rights in these aspects of plaintiff's personality, establishes a pecuniary value and a market for them. In such a case, the damages would be measured by the value to the defendant."⁹³

Therefore, both public and non-public individuals have a property interest in their name or likeness.⁹⁴ A cause of action arises for both when this interest is appropriated for commercial exploitation.⁹⁵ A public figure, however, may be able to claim greater damages because the worth of appropriating a public figure's name or likeness is often greater to the defendant than the appropriation of a private individual's characteristics. This value is greater because when a defendant appropriates the characteristics of a public figure he is also appropriating the publicity and recognition that the public figure has achieved.

B. *Expansive Interpretations of Name and Likeness*

Various aspects of modern living such as radio, television, and satellite communication have increased man's exposure to the world. This increase in exposure has caused increased infringement upon one's common law

⁸⁹ See *Ann-Margaret v. High Society Magazine, Inc.*, 498 F. Supp. 401 (1986). In that case, the defendants published a photograph of actress Ann-Margaret partially nude. The photograph was taken from a scene in the motion picture *Magic*. The plaintiff agreed to do the scene nude on the condition that few people would be present during the filming and that no still photographs would be made. *Id.* at 403 n.2. The plaintiff's claim alleged that defendant's unauthorized publication of the photograph violated § 51 of the New York Civil Rights Law. The trial court granted defendant's motion for summary judgment and held the publication did not invade plaintiff's privacy. The court recognized that a celebrity does not, simply by virtue of his or her notoriety, lose all rights to privacy but the court noted that "such right can be severely circumscribed as a result of an individual's newsworthiness." *Id.* at 405.

⁹⁰ Gordon, *supra* note 17, at 610-611.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 611.

⁹⁴ See *supra* notes 79-93 and accompanying text.

⁹⁵ W. PROSSER & W. KEETON, *supra* note 9, at 853-54. However, there is some controversy regarding whether the element of commercial exploitation is necessary when property rights are violated. See *infra* notes 161-62 and accompanying text.

rights. The common law established property rights in name and likeness. These characteristics were protected because they were the essence of recognition at the time. However, to combat increased technology the courts have had to interpret common law property rights more expansively and incorporate various intangible aspects of an individual's identity. In fact, it has been recognized that "[p]roperty is not necessarily a taxable thing. It may consist of things incorporeal, and things incorporeal may consist of rights common in every man."⁹⁶

1. Name

Courts have liberally interpreted what constitutes a name and therefore what is protected under a property right in one's name. For example, in *Orsini v. Eastern Wine Corp.*⁹⁷ the court concluded that the defendant's use of the plaintiff's coat of arms and his surname on the defendant's wine labels was tantamount to the unauthorized appropriation of the plaintiff's name.⁹⁸ The court held that use of the coat of arms and surname presented a method of identification of the plaintiff which was as effective as the use of a full name.⁹⁹

Another example of this type of liberal interpretation is seen in *Hirsch v. S.C. Johnson & Sons, Inc.*¹⁰⁰ The court held that the defendant unlawfully appropriated plaintiff's well known nickname, "Crazylegs," to market women's shaving gel. The court recognized the fact that an individual's full or actual name does not have to be appropriated to maintain a cause of action. All that is required is that the nickname used clearly identify that person.¹⁰¹

Once it is shown that a certain manifestation of an individual's name is protected under the established property right in the name, the individual must also show that the name was appropriated for commercial exploitation. If this is not shown, as was the case in *Rand v. Hearst Corp.*,¹⁰² no recovery for the appropriation of the plaintiff's name will be allowed. In *Rand*, on the back cover of a book which the defendant published, an excerpt of a critical review comparing the book to the work of well-known author, Ayn Rand, was reproduced.¹⁰³ The *Rand* court held that the plaintiff could not recover because the use of her name was merely incidental to the right of the publisher to inform the public of the nature of the book.¹⁰⁴ Therefore, it seems clear that one may use another's name for reference but must be careful not to overstep the bounds and commercially exploit that name for profit.

⁹⁶ *Munde v. Harris*, 153 Mo. App. 652, 134 S.W. 1076, 1078 (1911).

⁹⁷ 190 Misc. 235, 73 N.Y.S.2d 426 (1947).

⁹⁸ *Id.*

⁹⁹ *Id.* at 427.

¹⁰⁰ 90 Wis. 2d 379, 280 N.W.2d 129 (1979).

¹⁰¹ *Id.* at 382, 280 N.W.2d at 137.

¹⁰² 31 A.D.2d 406, 298 N.Y.S.2d 405 (1969).

¹⁰³ *Id.* at 408, 298 N.Y.S.2d 407.

¹⁰⁴ Although Ayn Rand possessed common law property rights in her name, these rights were not appropriated in this instance for the main purpose of benefiting the defendant. See also Gordon, *supra* note 17, at 582.

2. Likeness

Property rights in one's likeness have also been expanded to include indicia of identity other than the well-established property right in one's picture.¹⁰⁵

Recovery has been allowed for the appropriation of one's likeness when the defendant used a parody¹⁰⁶ of a person in a commercial context.¹⁰⁷ In the case of *Ali v. Playgirl*,¹⁰⁸ the defendant published a portrait of a nude black man seated in a boxing ring. The plaintiff, Muhammad Ali, claimed this portrait was unmistakably recognizable as himself. The court held that any representation which is recognizable as the likeness of the complaining party is sufficient to sustain a cause of action for the appropriation of one's picture.¹⁰⁹ The court allowed recovery in this instance because the composite drawing was clearly identifiable as the plaintiff.¹¹⁰

A cause of action for the appropriation of one's likeness has also been sustained when the appropriation involved the use of a look-alike. In *Onassis v. Christian-Dior New York, Inc.*¹¹¹ a look-alike model of Jacqueline Kennedy Onassis was hired and used in a Christian Dior advertisement. This advertisement was produced without Onassis's consent. The New York Supreme Court granted Onassis's request and ordered an injunction restraining the defendants from further use of this advertisement.¹¹² Justice Edward J. Greenfield stated: "If we truly value the right of privacy in a world of exploitation, where every mark of distinctiveness becomes grist for the mills of publicity, then we must give it more than lip service and grudging recognition."¹¹³ This extension by the *Onassis* court upholds the rationale behind the recognition of a property right in one's likeness. The use of a look-alike to appropriate a person's likeness is as intrusive and violative of that person's identity as the appropriation of an actual likeness.

¹⁰⁵ See *infra* notes 106-16 and accompanying text.

¹⁰⁶ See *Hustler Magazine & Larry Flynt v. Falwell*, 485 U.S. 46 (1988). A parody "makes use of another's attributes as part of a larger presentation, in which a considerable amount of the content is provided by the parodist." Felcher & Rubin, *supra* note 8, at 1605. Generally, parody tends to be protected due to this input of creativity. However, if a parody "actually appropriates substantial amounts of the original material, and thus relies on the original rather than its own contributions for its appeal, it will not be protected no matter how humorous its intent." *Id.* at 1605.

¹⁰⁷ *Ali v. Playgirl*, 447 F. Supp. 723 (S.D.N.Y. 1978).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 726-27.

¹¹⁰ *Id.*

¹¹¹ 122 Misc.2d 603, 472 N.Y.S.2d 254 (Sup. Ct. 1984), *aff'd*, 110 A.D.2d 1095, 488 N.Y.S.2d 943 (1st Dept. 1985).

¹¹² *Id.* Although *Onassis* was decided pursuant to *N.Y. Civ. Rights Law* § 50 and 51 (McKinney 1983), the case is supportive of the liberal interpretation that has been granted to likeness. See *supra* note 79.

¹¹³ *Onassis*, 122 Misc.2d at 610, 472 N.Y.S.2d at 261. In this decision, Justice Greenfield uses the phrase "right of privacy" loosely and combines it with the right of property.

Although courts have liberally construed an individual's right in his or her likeness, they have been somewhat reluctant to expand this to include the events of one's life. The case of *Melvin v. Reid*¹¹⁴ involved a motion picture entitled "The Red Kimono" based on incidents in a former prostitute's life who had been tried for murder and acquitted while a prostitute. The plaintiff alleged that the film was released eight years after she had "abandoned her life of shame and became entirely rehabilitated."¹¹⁵ The plaintiff filed her suit alternatively on grounds of invasion of privacy and the appropriation of property rights in her name and incidents of her life. The court refused to include the incidents of one's life under the protection of property rights in one's likeness.¹¹⁶ The court did not find that plaintiff's personality was appropriated by the defendant's imitation of her dress, walk, thoughts, and emotions. However, it seems that this is a clear appropriation of plaintiff's identity. Recognizing a property right in one's history when a depiction of that history clearly identifies the person is clearly in line with the rationale given for recognizing property rights in one's name and likeness.¹¹⁷

Thus, the property rights in name and likeness established in the common law have expanded to encompass various appropriations that courts have considered tantamount to name and likeness. Courts have liberally construed common law property rights to include various other manifestations of identity.

C. Property Rights in Voice

1. Protectability of Voice

The human voice is one of the most palpable ways an individual is recognized.¹¹⁸ It is as central to the essence of one's identity as name or likeness. As the Court stated in *Midler v. Ford Motor Co.*,¹¹⁹ "[I]t has been observed that with the sound of a voice, the other stands before me."¹²⁰ A central issue currently being raised with the advent of the mass media and advances in sound technology is the protectability of one's voice and the availability of a cause of action when it is appropriated.¹²¹

¹¹⁴ 112 Cal. App. 285, 297 P. 91 (1931).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 292, 297 P. at 93. Cf. *Toscani v. Hersey*, 65 N.Y.S.2d 814 (1946). The court, however, held that publication of incidents in the past life of a reformed prostitute was actionable as an invasion of her right under the California Constitution to pursue and obtain happiness.

¹¹⁷ See Gordon, *supra* note 17, at 591. See also notes 79-93 and accompanying discussion.

¹¹⁸ *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988).

¹¹⁹ 849 F.2d 460 (9th Cir. 1988).

¹²⁰ *Id.* (citing D. IHDE, LISTENING AND VOICE 77 (1976)).

¹²¹ Singer-actor Tom Waits filed a \$2 million suit on November 1, 1988, against Frito-Lay, Inc. and its advertising agency, Tracy Locke, claiming Frito-Lay's radio advertisement imitated his voice so that it appeared Wait was endorsing their product. Trial is set for February 1990 at the time of publication of this Note.

In *Midler*, Ford Motor Company and its advertising agency, Young and Rubicam, Inc., used an actress to imitate Bette Midler's voice in a 1985 television advertisement for the Ford Lincoln Mercury.¹²² Midler sued for the appropriation of her voice. The United States Court of Appeals reversed the trial court and held that the defendants tortiously appropriated part of Midler's identity for their own profit in selling their product.¹²³

In reaching this conclusion the court relied on *Motschenbacher v. R.J. Reynolds Tobacco Co.*¹²⁴ In *Motschenbacher*, the defendant used a photograph of plaintiff's famous race car for a cigarette commercial. Although the characteristics of the car were somewhat altered,¹²⁵ the plaintiff was seated in the car. However, his features were not visible and he could not be recognized in the photograph. The court held that the defendant invaded plaintiff's property interest in his own identity.

The key element in both *Midler* and *Motschenbacher* that gave rise to a cause of action for the appropriation of the plaintiff's identity was the defendant's appropriation of some aspect of the plaintiff's identity to convey the impression that the plaintiff was endorsing the defendant's product. In *Motschenbacher*, although the plaintiff could not be seen, the ad suggested that it was him by emphasizing signs or symbols associated with him.¹²⁶ In *Midler* the defendants used a sound-alike to convey the impression that Midler was singing for them.¹²⁷

The *Midler* court found no reason to distinguish the fact that voice, rather than likeness, was used as the symbol of identity. In fact, the court recognized that "a voice is as distinctive and personal as a face."¹²⁸ The court apparently could find no reason not to expand the common law property right in name and likeness to include voice.¹²⁹ The court correctly

See Tom Waits v. Frito-Lay, Inc. et al. Case No. CU88-06478-JM1 (filed Nov. 1, 1988, Dt. Ct., Los Angeles); see also Goldstein, *Pop-Eye: Waits - Is Frito a Bandito?* Los Angeles Times, Oct. 23, 1988, at p. 85, for a general discussion of Waits's claim. Other celebrities also have claims pending regarding the protectability of their voice. For example, comedian-actor Rodney Dangerfield has sued Park Inns International, Inc. alleging that it has used an imitation of his voice in its commercials. See Shapiro & Olson, *Encore Performances: Do You Want to Sue? Climbs the Charts*, Legal Times, January 15, 1990, at p. 27.

¹²² Ford Motor Company and Young & Rubicam, Inc., contacted Midler's agent and asked if Midler would be interested in doing the television commercial. When the offer was declined they hired Ula Hedwig, a former back-up singer for Midler. They directed Hedwig to sing the Bette Midler song "Do You Want To Dance." Hedwig was directed to "sound as much as possible like the Bette Midler record." *Id.* at 461.

¹²³ *Id.* at 463.

¹²⁴ 498 F.2d 821 (9th Cir. 1974).

¹²⁵ The number of the car was changed and a wing-like device known as a "spoiler" was attached to the car. However, the car's features of white pinpointing, an oval medallion and solid red covering were retained. *Id.* at 822.

¹²⁶ *Id.* at 827.

¹²⁷ *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988).

¹²⁸ *Id.* at 463.

¹²⁹ See *contra* Davis v. Trans World Airlines, 297 F. Supp. 1145 (C.D. Cal. 1969). In this case, the musical group, "The Fifth Dimension," brought suit for the unauthorized imitation of its unique vocal sound, particularly associated with its song "Up, Up and Away." The defendant appropriated this unique sound in its use of a song in a television commercial. The court granted summary judgment in favor of the defendants. In doing so, the court held that the defendants had not violated any privacy or personal rights of the plaintiffs. *Id.* at 1147.

recognized that one's voice is as central to the essence of one's identity as is name or likeness.¹³⁰

A similar recognition was reached in *Alistair Sim v. H.J. Heinz Co.*¹³¹ The plaintiff, a well-known British actor, brought suit to enjoin the defendant from using an alleged imitation of his voice in a television commercial endorsing defendant's product. Although the application for an injunction was denied on appeal,¹³² Justice Hodson expressed some doubt, stating: "[i]t would seem a grave defect in the law if it were possible for a party, for the purpose of commercial gain, to make use of the voice of another party without his consent."¹³³

Case law regarding the protectability of one's voice suggests that recognition of such protection hinges upon the cause of action brought. For example, in *Sinatra v. Goodyear Tire & Rubber Co.*,¹³⁴ Nancy Sinatra sued Goodyear Tire & Rubber Company and its advertising agency, Young & Rubicam, Inc., on the basis of an advertising campaign featuring the song "These Boots Are Made For Walkin'" which is closely identified with her. The female singers of the song were alleged to have imitated her voice and style of singing.¹³⁵ The basis of Sinatra's complaint, however, was unfair competition. She claimed the song and the arrangement had acquired a secondary meaning which was protectable.¹³⁶ The court affirmed summary judgment for the defendants. In doing this the court recognized that the defendants "had paid a very substantial sum to the copyright proprietor to obtain the license for the use of the song and all of its arrangements."¹³⁷

The outcome of the *Sinatra* case may have been different if the plaintiff had brought her claim under an appropriation theory. Nancy Sinatra was claiming relief under a copyright theory.¹³⁸ However, a voice is not "copyrightable."¹³⁹ The sounds are not "fixed."¹⁴⁰ In fact, it has been recog-

¹³⁰ *Midler*, 849 F.2d at 463.

¹³¹ W.L.R. 313 (1959).

¹³² A prime reason for the denial of an injunction was the fact that the plaintiff included a count for libel in his complaint. The court then let the entire decision rest on the rule that equity will not enjoin a libel. *Id.*

¹³³ W.L.R. 313 at 317.

¹³⁴ 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).

¹³⁵ *Id.* at 712.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988).

¹⁴⁰ *Id.* The 1976 Copyright Act protects works "fixed in a tangible medium of expression." 17 U.S.C. § 102 (1982). The Copyright Act § 102 provides that:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works; and

nized that an individual's voice is more personal than any work of authorship.¹⁴¹

*Lahr v. Adell Chemical Co.*¹⁴² is another example where the protectability of voice was avoided due to the cause of action maintained. Comedian Bert Lahr brought suit against the defendant for selling Lestoil using a television commercial featuring a cartoon film of a duck accompanied by an imitation of Lahr's voice. The First Circuit Court of Appeals held that Lahr had stated a cause of action for unfair competition because it could be found that the defendant's conduct saturated Lahr's audience and curtailed his market.¹⁴³ To maintain an action for unfair competition, competition in the same market must exist between the plaintiff and defendant.¹⁴⁴ No such requirement is necessary in a property action.

The *Lahr* court did not decide this case on the grounds of appropriation of voice, yet the court did recognize that the defendant was stealing the plaintiff's thunder by using a sound-alike.¹⁴⁵ The court also recognized that the defendant's commercial had greater value because its audience believed it was listening to the plaintiff.¹⁴⁶ These are all elements of the tortious appropriation of one's identity, yet the court did not address this issue.¹⁴⁷

These cases indicate that courts do recognize the uniqueness of one's voice¹⁴⁸ and will equate it with an individual's identity. This recognition, along with the history of liberal interpretations regarding what constitutes name or likeness, suggests that a property right in voice should exist and be judicially recognized or protected.

There are, however, certain public policy reasons for restricting the enlargement of property rights to include voice. For example, it is argued that performances would have to be policed.¹⁴⁹ This task, however, would be difficult, if not impossible. It is also argued that the prevention of others from imitating a performer's voice, sounds, or mannerisms may impede, rather than "promote the Progress of . . . useful Arts."¹⁵⁰

(7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Id.

¹⁴¹ *Midler*, 849 F.2d at 462.

¹⁴² 300 F.2d 256 (1st Cir. 1962).

¹⁴³ *Id.* at 259.

¹⁴⁴ *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 714 (9th Cir. 1970).

¹⁴⁵ *Lahr*, 300 F.2d at 259. Lahr based his complaint primarily on the grounds that the imitation caused a mistake in identity. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ The *Lahr* court recognized that: "Plaintiff here alleges a peculiar style and type of performance, unique in a far broader sense. Before going further into this matter . . . we think plaintiff's adjectival allegations should be tested in the crucible." *Lahr v. Adell Chemical Co.*, 300 F.2d 256, 259 (1st Cir. 1962).

¹⁴⁹ See *Booth v. Colgate Palmolive Co.*, 362 F. Supp. 343, 347 (S.D.N.Y. 1973).

¹⁵⁰ *Id.* (citing U.S. CONST. art. I, 8). Although these arguments against expansion of the right of property to include voice are valid, they are overly conservative. The same arguments can be made on behalf of restricting the recognition of property rights in name and likeness, yet these rights exist and are viable.

2. Extent of this Protection: Entertainment Value Versus Commercial Advertising Value

Once the existence of a property right in an individual's voice is judicially recognized, the additional problem of the extent to which protection should be provided invariably will arise. The issue remains whether this protection should extend to the realm of comedy and prohibit the act of comedians such as Rich Little, whose entire act is focused around his recreation of famous persons.

A central element in the maintenance of a cause of action for the appropriation of identity, whether it be name, likeness, or voice, has been proving that the appropriation was for the purpose of commercial exploitation.¹⁵¹ There is a distinction between the good faith imitation of another's voice or performance for entertainment purposes and the appropriation of them for commercial advertising.¹⁵² A person's imitation of another for entertainment purposes actually produces a new creation. The imitator is not using the characteristics as his own. He is embellishing the characteristics with his own creativity as a type of art form.

The test in making the distinction between good faith imitation and appropriation is whether the impersonator is "flying under his own banner."¹⁵³ An example of this is *Murray v. Rose*.¹⁵⁴ In *Murray*, the plaintiff sought to enjoin the defendants from staging vaudeville imitations of her act. The court denied relief stating:

[I]t is a matter of common knowledge that skilled performers have become famous and successful financially as "imitators." Veteran theater goers will recall Elsie Janis and Cissie Loftus. When they gave due credit to the persons imitated, the latter were pleased with the compliment involved. There is no claim here that the imitation is other than fair. It is not charged that it aims to ridicule or to provoke anything but admiration for the skill of the plaintiff and her imitators. The public is not in any measure deceived.¹⁵⁵

¹⁵¹ See *supra* notes 79-124 and accompanying text. Although the cases discussed all contained the element of commercial exploitation, the necessity of this requirement is questionable. See *infra* notes 161-62 and accompanying text.

¹⁵² Netterville, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary*, 35 S. CAL. L. REV. 225, 253 (1962). Netterville states, however, that "[t]he right to be free from commercial exploitation of one's personality attributes does not require either a 'property' right in those attributes nor any palming off." *Id.* at 253. This assumption, however, contributes to the confusion surrounding property, privacy and publicity rights. Before a cause of action for commercial appropriation can be made, property rights in the attribute appropriated must be recognized. Any other conclusion confuses the distinguishable rights of property, privacy and publicity. See *supra* notes 6-61 and accompanying text.

¹⁵³ Netterville, *supra* note 152, at 250, citing *Supreme Records v. Decca Records*, 90 F. Supp. 904 (S. D. Cal. 1950).

¹⁵⁴ 30 N.Y.S.2d 6 (1941).

¹⁵⁵ *Id.* at 7.

The good-faith imitation of a famous person to achieve humor or to effect criticism is supported by the public interest in entertainment. However, a distinction must be drawn between the entertainment use of imitation of an individual's voice on a sporadic basis and use of it on a continuing basis.¹⁵⁶ The use of imitation on a continuing basis, such as using a famous actor's voice as the basis for a cartoon figure, may be actionable. This use comes closer to the requirement that the appropriation be for commercial exploitation. That is, appropriating another's valuable attributes on a continuing basis "may divest the actor of his ability to realize the full fruits of the labors he has expended in developing his performance and bar him from employment which otherwise might be available."¹⁵⁷

Thus, protection of one's voice should be limited. Although it is true that entertainers imitate famous people as part of their livelihood and for financial gain, the distinction between imitation for sporadic entertainment value and imitation for commercial advertising is clear.

IV. PROPERTY INTEREST IN IDENTITY

A. Ownership of Identity as Opposed to Characteristics

Courts have recognized the existence of property interests in various characteristics. This recognition has extended to such characteristics as name, likeness, and voice. However, the better view is a recognition that a person has a property interest in his identity, rather than the discrete components of that identity. This view is supported by the fact that the majority of decisions recognizing property interests in characteristics did so because these characteristics constituted the essence of the individual's identity.¹⁵⁸

¹⁵⁶ *Netterville*, *supra* note 152, at 254. See also *Supreme Records v. Decca Records*, 90 F. Supp. 904, 909 (S. D. Cal. 1950). There is also a difference between using an imitation or a portrayal for information and non-information purposes. If a portrayal is used for purposes of entertainment by depicting real people, it will generally be protected by the first amendment. A non-informative entertainment portrayal, on the other hand, must rely on its own creative elements as the basis of its claim of social value. If the portrayal is the product of some observable creative effort, it will often be deemed worthy of protection. For example, a fictitious work may use names or attributes of real people, provided the resulting portrayal is clearly presented as fiction. *Felcher & Rubin*, *supra* note 5, at 1596-98. See also *Hicks v. Casablanca Records & Filmworks*, 464 F. Supp. 426 (S.D.N.Y. 1978) (film based on entirely fictionalized incident in Agatha Christie's life protected by first amendment); *Leopold v. Levin*, 45 Ill.2d 434, 259 N.E.2d 250 (1970) (fictionalized film based on the lives of Leopold and Lolb was protected by the first amendment). However, a work that merely capitalizes on the attributes of another without contributing anything substantially unique or new will likely be subject to liability. See *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *appeal dismissed*, 393 U.S. 1046 (1969) (deliberately false account of baseball player Warren Spahn's life presented as a factual biography incurred liability).

¹⁵⁷ *Netterville*, *supra* note 152, at 254.

¹⁵⁸ See *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Onassis v. Christian Dior-New York*, 122 Misc.2d 603, 472 N.Y.S.2d 254 (Sup. Ct. 1984), *aff'd*, 105 A.D.2d 1095, 488 N.Y.S.2d 943 (1st Dept. 1985); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974); see also *Halpern*, *supra* note

Once this property interest in identity is recognized, it must be established what characteristics manifest the identity of the person. The appropriation of certain recognized characteristics such as name, likeness, and voice is sufficient to constitute the manifestation of identity.¹⁵⁹ However, there are certain instances where the appropriation of a combination of characteristics (that alone would be insufficient to constitute identity) has been held to be tantamount to the appropriation of one's identity. For example, in *Motschenbacher v. R.J. Reynolds Tobacco Co.*,¹⁶⁰ the court held that the appropriation of a racing car similar to the plaintiff's, with similar markings and a fuzzy image of an unidentifiable man seated in the car, was sufficient to evoke the identity of the plaintiff.¹⁶¹ Therefore, the crucial determination is not what characteristics have been appropriated, but rather, whether the characteristics, alone or in combination, are sufficient to serve as a conduit through which the identity of the plaintiff is evoked.

The intent necessary to violate one's property interest in identity may be likened to a conversion action. The tort of conversion occurs when there is an interference with an individual's property so severe that it constitutes a forced sale to the defendant.¹⁶² Similarly, a violation of one's property interest in identity will occur when the defendant appropriates the plaintiff's identity in such a way as to constitute a forced sale. The appropriation of one's identity for commercial exploitation is an example of interference so severe as to constitute a forced sale. However, commercial exploitation is simply one example of when the requisite interference will be satisfied.¹⁶³

This analogy to conversion will also help determine the applicable measure of damages for a violation of one's property right. In a conversion action the defendant must pay the full value of the property converted.¹⁶⁴ Similarly, when the defendant violates one's property interest in identity he is responsible for restoring the value that was lost. This must be distinguished from the applicable damages in a publicity action where the damages encompass the restitution of gain the defendant derived from the appropriation.¹⁶⁵

63, at 1243-45 for a discussion of identity in the context of celebrities and the right of publicity.

¹⁵⁹ See *supra* notes 79-149 and accompanying text.

¹⁶⁰ 498 F.2d 821 (9th Cir. 1974).

¹⁶¹ *Id.* at 822, 825.

¹⁶² W. PROSSER & W. KEETON, *supra* note 9, at 80-93.

¹⁶³ In determining whether a forced sale has occurred in a conversion action, all of the relevant factors in the case are to be considered. These include the extent and duration of the defendant's control over the property, his intent to assert a right which is inconsistent with the plaintiff's right of control, the defendant's good or bad faith intentions, the harm done to the chattel, and the expense and inconvenience the plaintiff incurred. *Id.* at 90. These same elements can be considered to determine if there was sufficient interference to violate the plaintiff's property right in identity.

¹⁶⁴ *Id.* at 89-90.

¹⁶⁵ Halpern, *supra* note 63.

Although this analogy to conversion is useful to illustrate when an individual's property right in identity is violated, this property right is not a conversion action. In a true conversion action the defendant actually takes the property away from the plaintiff. However, the identity of a person can never be removed. Therefore, a cause of action for the appropriation of one's identity must rest in property.

B. Limits on Which Characteristics Constitute Identity

Certain characteristics such as name, likeness, and voice serve as the conduit of one's identity. However, there are other characteristics that are insufficient to manifest one's identity.

A prime example of this type of characteristic is found in *Shaw v. Time-Life Records*.¹⁶⁶ Artie Shaw, a band leader from the "swing era," brought an action against a music publisher, asserting that the publisher's "swing era" series of recordings invaded his privacy, made unauthorized use of his name, damaged his reputation, and unfairly competed with his own phonographic records. The New York Court of Appeals held that the plaintiff did not have a property interest in the Artie Shaw "sound."¹⁶⁷

A similar issue was raised in *Miller v. Universal Pictures Co.*¹⁶⁸ In *Miller*, the defendant imitated the sounds of original Glenn Miller orchestral renditions for use in a photoplay of the leader's life. The defendant was licensed to simulate these sounds for the film but was not authorized to make recordings from the track, which was ultimately done. The New York Supreme Court reversed the trial court. The court held that there is no property right in the distinctive sound of a band which the plaintiff could claim had been appropriated.¹⁶⁹

In these cases, the issue was not the appropriation of an individual's voice. It was the alleged appropriation of musical arrangements that were popularized by a certain band. Both courts concluded that a property right does not exist in this instance. These cases illustrate situations where the appropriation of an identifying feature which may cause the thought of a person to be evoked is insufficient to constitute a manifestation of that identity.¹⁷⁰

¹⁶⁶ 379 N.Y.S.2d 390 (1975).

¹⁶⁷ *Id.*

¹⁶⁸ 11 A.D.2d 47, 201 N.Y.S.2d 632 (1960), *aff'd*, 10 N.Y.2d 972, 180 N.E.2d 248 (1961).

¹⁶⁹ *Id.*

¹⁷⁰ Another example of an instance in which the thought of a person may be evoked by the appropriation of certain characteristics but where these are insufficient to sustain a cause of action is *Maila Nurmi aka Vampira v. Cassandra Peterson aka Elivra*, 1989 U.S. Dist. Lexis 9765 (1989). In this case the plaintiff claimed that the defendant, a horror movie hostess called Elvira, appropriated certain props, clothes and mannerisms that were similar to those used by plaintiff in the 1950's when she performed a character called vampira. *Id.* at 1. The court held that plaintiff had no cause of action under either a privacy or publicity theory. In all probability the plaintiff would not have succeeded even if she had brought her action based upon a privacy right because the defendant created "merely a suggestive resemblance" of the plaintiff. *Id.* The plaintiff's identity, as expressed through her character, Vampira, was not evoked.

A similar issue regarding the use of sound as a characteristic manifesting identity has recently been raised in the field of sound recordings. Certain unusual tonal qualities have become associated with an individual performer and claims have recently been made that these musicians are recognizable upon hearing only a very few notes.¹⁷¹ This claim has laid the foundation for the issue regarding the protectability of discrete sounds.

For example, percussionist David Earl Johnson is well known in music circles for the unique drum sound he achieves when playing a set of rare African instruments.¹⁷² Jan Hammer, producer, sampled¹⁷³ this sound, which later appeared in a number of recordings and broadcasts including the introductory music to the television show *Miami Vice*.¹⁷⁴

The technology of sound sampling has led to the appropriation of certain distinctive musical sounds that are not "copyrightable."¹⁷⁵ Since the sounds are not copyrightable a musician often has great difficulty in sustaining a claim when "his" sound has been sampled. This difficulty arises because sound sampling appropriates the underlying tonal qualities of a sound rather than the phrasing of the sound.¹⁷⁶ In addition, it is

¹⁷¹ See DeCurtis, *Who Owns a Sound?*, Rolling Stone 13 (Dec. 4, 1986); see also, *Dissonant Issues of Sound Sampling*, N.Y. Times, Oct. 16, 1986, at C23, col. 4 (reporting that singer Chris Squire's voice was sampled and used on the album *The Art of Noise*).

¹⁷² DeCurtis, *supra* note 171.

¹⁷³ Sound sampling is a way of "appropriating the distinct tonal qualities of a particular vocal or instrumental sound so that it may be used in a different musical context." Note, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1724 (1987). The process of digital sound sampling appropriates the underlying tonal qualities of a sound. Although various components of a sound such as note selection, rhythm and phrasing may be altered by an engineer using a synthesizer, the underlying sound that has been appropriated is still the sound of the musician whose recordings or live performance has been sampled. *Id.* at 1725. This technique of sound sampling has wide economic repercussions. A sound that has been sampled can be exploited in a variety of ways. If a successful record features a distinctive instrumental sound, that sound can be cloned and used on a different record. *Id.* at 1726. Also, buying and selling the sounds of a sampled musician creates a type of black market. *Id.* This has the effect of putting instrumental musicians out of work. Since the sounds can be easily sampled there is little reason to employ all the instrumental musicians who formerly would have been necessary to achieve the desired sound. *Id.*

¹⁷⁴ DeCurtis, *supra* note 171. Earl Johnson allowed a keyboardist to "sample" some of his rare instruments and distinctive sounds. Johnson then heard these sounds featured on the *Miami Vice* (NBC) theme song. He subsequently went to a copyright lawyer and tried to get the musician's union to define a payment standard for sampling sessions and the use of sampled performances on recordings. *Id.*

¹⁷⁵ Copyright protection does not extend to the most frequent instance in which sampling occurs: when a performer is sampled live rather than off a record. See Note, *supra* note 173, at 1727-29. This is because "live performances are not themselves 'fixed in any tangible medium of expression'" as required by the Copyright Act of 1976. Note, *supra* note 173, at 1727 (citing 17 U.S.C. § 101 (1982)). In this instance it is similar to the copyright problems regarding the protection of voice. See *supra* notes 139-41 and accompanying text.

¹⁷⁶ See Note, *supra* note 173, at 1740. Most instrumentalist musicians are recognizable primarily because of their distinctive phrasing rather than the tonal qualities of a sound, which is another reason for the difficulty in maintaining an action when their sound has been sampled. *Id.*

common in the music industry for musicians to copy another's playing style, and "protection against mere imitation of another's playing style, without more, would be impractical and impossible to administer."¹⁷⁷

This difficulty in sustaining a claim when sound has been appropriated¹⁷⁸ may be overcome if the musician bases his claim upon a property right in his identity. If the appropriation of a sound is sufficient to cause the image of the performer to be evoked, the musician's identity, as expressed through sound, has been appropriated.¹⁷⁹ This situation must be distinguished, however, from cases such as *Shaw v. Time-Life Records*¹⁸⁰ and *Miller v. Universal Pictures Co.*¹⁸¹ In these cases, all that was imitated was a playing style. This imitation may have caused one to be reminded of the imitated; however, this mere fleeting impression of the performer is insufficient to evoke the identity of the performer.¹⁸²

V. CONCLUSION

Historically, courts have recognized property rights in certain personal characteristics. This recognition was premised on the theory that those characteristics constituted the essence of one's identity and therefore, should be protected. Initially, protected characteristics were limited to name and likeness. Gradually, property rights were found in manifestations of these characteristics, such as nicknames, symbols, and look-alikes. Recently, questions regarding the existence of common-law property rights in voice and sound have been raised.

As property rights in name and likeness expanded to include other indicia of identity it became evident that the true property right exists in the more nebulous concept of identity. Characteristics serve merely as a conduit of this identity.

A violation of one's property right in identity occurs when characteristics that evoke this identity are appropriated. In order for the identity of a person to be evoked, the characteristic or combination of characteristics must create a personification of the one imitated. The mere recollection of the person is insufficient.

This recognition of a property right in identity will eliminate the existing confusion among property, privacy, and publicity rights. It will also give an individual whose identity has been appropriated by another a sounder legal basis to assert a cause of action.

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¹⁷⁷ *Id.* at 1740 n.109.

¹⁷⁸ See generally Note, *supra* note 173, for a general discussion of the musician's difficulty in maintaining a cause of action when his sound has been sampled.

¹⁷⁹ See generally Soocher, *License to Sample*, Nat'l L.J., February 13, 1989, at 1.

¹⁸⁰ 379 N.Y.S.2d 390 (1975); see also *supra* notes 166-67 and accompanying text.

¹⁸¹ 11 A.D.2d 47, 201 N.Y.S.2d 632 (1960), *aff'd*, 10 N.Y.2d 972, 180 N.E.2d 248 (1961); see also notes 168-69 and accompanying text.

¹⁸² See *supra* note 170 and accompanying text.