The Right of Publicity: Recovering Stolen Identities under International Law

Emily Grant

Follow this and additional works at: https://digital.sandiego.edu/ilj

Part of the Comparative and Foreign Law Commons, Intellectual Property Law Commons, and the International Law Commons

Recommended Citation

Emily Grant, The Right of Publicity: Recovering Stolen Identities under International Law, 7 San Diego Int’l L.J. 559 (2006)
Available at: https://digital.sandiego.edu/ilj/vol7/iss2/13

This Comment is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in San Diego International Law Journal by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.
The Right of Publicity: Recovering Stolen Identities Under International Law*

TABLE OF CONTENTS

I. INTRODUCTION .................................................................................................. 560
   A. The American Right of Publicity ...................................................................... 562
   B. Comparative Rights of Publicity ..................................................................... 564

II. TRADEMARKS AND RIGHTS OF PUBLICITY ......................................................... 567
   A. Trademarks and Rights of Publicity ................................................................. 567
   B. Celebrity Recovery Under Trademark Law ..................................................... 569
   C. International Protection for Publicity Rights
      Under the TRIPS Agreement ........................................................................... 573
   D. Problems with the Parallel Approach ................................................................. 575
   E. Policy Goals ...................................................................................................... 575
   F. Tests of Infringement ........................................................................................ 576
   G. Identification Differences .................................................................................. 577
   H. Transfer Rules ................................................................................................... 579
   I. Prior Exploitation ............................................................................................... 580
   J. Conclusion ......................................................................................................... 581

III. RIGHTS OF PUBLICITY AND COPYRIGHT LAW IN INTELLECTUAL
     PROPERTY TREATIES ......................................................................................... 581
    A. Convergence of Rights of Publicity and Copyright Law .................................. 582
    B. Rights of Publicity Under International Copyright Law .................................. 582
    C. Diverging Doctrinal Rationale and Scope of Protection ................................. 584
    D. Conclusion ....................................................................................................... 587

IV. RIGHT OF PUBLICITY AND MORAL RIGHTS ....................................................... 587
    A. Similarities Between Rights of Publicity and Moral Rights .............................. 588
    B. Rights of Publicity and International Moral Rights Doctrine ......................... 588
    C. Problems with Arguing for Rights of Publicity Under Moral Rights Doctrine ......................................................................................... 594

* J.D. 2005, University of San Diego School of Law; B.S., 1998, University of Wisconsin-Madison. The author would like to thank her family and friends for their love and support.
In the 1970's, international supergroup Abba burst from the Swedish musical scene and ascended to international fame with their hit songs, flashy disco style and call to all "Dancing Queens" worldwide. In love with the hit musical group, fans clamored to adorn themselves with the band's logo and pictures. Unauthorized merchandisers scrambled to cash in on the band's success, selling trinkets and clothing depicting the band's logos and photographs without Abba's consent.

Imagine that Abba sued the rogue merchandisers. Contemporary standards would offer the band several theories with which to enjoin the defendants' misappropriation of the band's images and to collect profits rightfully belonging to the band. Abba could advance an unfair competition or a trademark law claim, arguing that the consumer would be confused about the band's sponsorship or approval of the merchandise. However, courts often look at the natures of the conflicting businesses and rule that, because the band is in the music business and a merchandiser sells items with various logos and graphics on it, there could be no confusion about the source of the merchandise. The band could also claim copyright infringement for both its exclusive right to use the photographs and develop its own fan gear, and for violation of its moral rights in its work as a musical group, including the right to integrity in its reputation and the display of the band's images. As often happens, other companies or parties may own the copyrights to photographs and albums, barring the copyright claims which must be based on authorship of literary or artistic works.

Finally, Abba could advance a claim for infringement of its right of publicity for damage to its reputation, and for misappropriation of its identity. Abba would argue that the merchants infringed the band's right to control dissemination of its likeness and persona by selling promotional goods without its permission. This final claim pertains most closely to what the band desires: to prevent the unauthorized use of the band's imagery for the pecuniary gain of an uninterested party. Current international intellectual property law, however, disappoints Abba—there is no protection for the band's right of publicity.

Consider another situation. The fiery young actress Angelina Jolie, whose first claim to fame—winning an Academy Award for her performance in Gia—falls far short of her more recent claim to notoriety as the woman who wore a vial of her former husband Billy Bob
Thornton’s blood around her neck. Jolie diplomatically plays a challenging role as a Goodwill Ambassador for the Office of the United Nations High Commissioner for Refugees. Her concern is not about her image; instead the prestigious position was given to her when she became concerned for the plight of refugees after visits with people living in impoverished conditions and escaping guerilla forces.

Her new role makes tremendous demands on her reputation. An unfortunate situation would arise if companies misappropriate Jolie’s persona—her name, likeness and identity—and use it to promote a service or product that, in her opinion, grossly violates human rights. If she pursued legal action against the company, her primary goal would be to stop another person from exercising her publicity rights. Her desired remedy, however, would not necessarily be for damages based on the commercial value of the company’s hijacking of her persona. The more important remedy in this case would be injunctive or other equitable relief, based on the damage to her reputation as a Goodwill Ambassador from the violation of her rights of publicity.

The Berne Convention prescribes a right to recovery for violation of moral rights, such that Jolie could attempt to claim infringement of her right to integrity, a moral right that protects her artistic integrity in her work. This hypothetical does not, however, involve any of her films or her copyrighted work and more appropriately focuses on the repugnant use of her persona. Under current international intellectual property law, Jolie would not be able to stop the company by enforcing her right of publicity. The damage she would suffer would not derive from an economic injustice or her rights as an artist. It would be more properly protected by her inherent rights in her celebrity and her right to control the use of her persona.

In recent years, the power of celebrity has become an important force in the international arena because it confers a unique ability to transcend the traditional entertainment market and spur growth of other industries with its cross-cultural influence. But, is it just the glamorous acting, rhythmic beats of international pop stars, or ubiquitous celebrity faces promoting products that deserve protection? An individual’s celebrity identity deserves protection too.

This article proceeds from the assumption that the claims just hypothesized ought to be universally recognized to entitle a celebrity to an action for infringement of his or her right of publicity. It surveys the possibilities for protection of the right of publicity under current
international intellectual property law. First, it briefly describes the American right of publicity doctrine as well as the policy shortcomings of the American doctrine and points out the lack of explicit protection for the right in other countries. It next explores the foundations of the right of publicity through a triptych of doctrines—including trademark law, hinged together with copyright and moral rights law. Analysis under each of these doctrines quickly illuminates the shortcomings in the current international protections of the right of publicity. As a result, this article urges the international community to create a right of publicity treaty so that the subject receives treatment as one solid doctrine by which other countries can begin to develop sound rights for the celebrity persona that are based on economic and social justifications.

A. The American Right of Publicity

The development of the right of publicity in the United States suggests the most complete and directed, though not perfect, set of laws and policy considerations to protect celebrity and persona through the right of publicity. To be most effective, a new internationally-recognized right of publicity must embrace both the traditional American economic rationales for the right, based on the commercial value of the persona, and the social values of the right which derive from the idea of personal autonomy and moral rights. By encompassing both of these policies it is more likely that different countries and cultures will accept and integrate the right of publicity into their existing intellectual property regime.

To see how the surrogate doctrines fail to safeguard the right of publicity, it is important to understand what the right of publicity entails. The right of publicity is unique to the United States. Celebrity rights receive protection in the United States pursuant to the right of publicity, defined as “the inherent right of every human being to control the commercial use of his or her identity.”¹ The right of publicity has been used to prevent advertisers from imitating Bette Midler’s distinctive voice and singing style,² to protect a baseball player’s right to publicize his photographs,³ and to punish a company that featured a blonde robot

---

2. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988). While many federal court decisions are cited in this article, they are based on state law of the right of publicity. This article illustrates and describes the right of publicity in terms of majority law. Not every state follows the same laws for the right of publicity, and, in fact, not every state recognizes the right of publicity.
mechanically turning letters of a faux game show set, just like hostess Vanna White’s role on “Wheel of Fortune.”

The American right of publicity grew out of an economic policy framework. In the beginning, the courts and commentators generally interpreted the right of publicity as a purely pecuniary right. Melville Nimmer’s seminal article recognized that “the public personality has found that the use of [a celebrity’s] name, photograph, and likeness has taken on a pecuniary value undreamed of at the turn of the century.” Nimmer considered two factors essential to the development of the right. First, he emphasized the importance of the economic aspect of the right: a business-like commodity or investment interest of the individual arising from the burgeoning modern communications and advertising industries. Second, he promoted the need for a separate and specific area of law to encompass the right because traditional legal doctrines neither provided adequate protection, nor a sufficient framework for further development. Nimmer also argued that the right of publicity “must be recognized as a property (not a personal) right.” Nimmer may have seen the right of privacy as the only other personal right option. He considered this an inadequate avenue for the right of publicity’s meaningful growth.

Scholars continued to shape the contours of the right of publicity by rigidly describing it in economic jargon and ignoring the moral or “social” attributes of the right, which may serve as an additional appropriate framework for analysis. Today, the Restatement of Unfair Competition recognizes the right of publicity as an appropriation of trade values, stating that, “One who causes harm to the commercial relations of another by appropriating the other’s intangible trade values is subject to liability to the other for such harm only if . . . the actor is subject to liability for an appropriation of the commercial value of the other’s identity.”

Section 46 of the Restatement defines the cause of action for a right to publicity. It states that, “One who appropriates the commercial

4. White v. Samsung Electronics America, Inc., 989 F.2d 1512 (9th Cir. 1993). Additional examples of the right of publicity will be illustrated throughout this article.
6. Id. at 215.
7. Id.
value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability. . . .”

Today, progressive scholars advocate for the expansion of the underlying rationale of the right of publicity. They characterize the right as a combination of personal rights, intellectual property rights, and rights against unfair competition. This formulation takes into consideration both economic and social or personal justifications for allowing rights of publicity claims. For example, it allows a celebrity to enjoin activities that damage his or her reputation and to receive monetary compensation for misappropriation of identity. The celebrity then has a property right (to recover lost profits) and a personal right (to stop use which the celebrity finds repugnant). The future of the right of publicity under international law is explored later in this article to reveal the importance of incorporating the economic and social values into a contemporary treaty.

B. Comparative Rights of Publicity

Most western countries acknowledge the concept of publicity rights and recognize "some legal protection against the unpermitted use of their identifying elements in connection with advertisements for commercial merchandise, services, or companies." Not all countries recognize the right of publicity. Perhaps most notable are Great Britain and Australia, which do not allow claims for infringement of publicity rights. Other countries, such as Germany, France, Italy, Spain, and the Netherlands, recognize some form of personality rights, which protect "a person's commercial interest in having protection against the unauthorized commercial use of identifiable characteristics." However, the scope of the right is narrow in many of these countries. They generally do not recognize a right of publicity for the person, but merely characteristics

10. Restatement (Third) of Unfair Competition § 46 (1995) (emphasis added). The next section of the Restatement further refines the cause of action, expanding the definition's uses for purposes of trade as "advertising the user's goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user" and limiting liability to exclude "the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses." Id. § 47.

11. McCarthy, supra note 1, § 1:7 (referring to S.J. Hoffman, Limitations on the Right of Publicity, 28 Bull. Copyright Soc'y 111, 112 (1980)).


13. Id. Attempted recovery in England for rights of publicity is discussed in this article, infra notes 83-84 and accompanying text.

such as name or likeness.\textsuperscript{15} This absence of uniformity among nations reinforces the need for an international treaty that mandates countries recognize the young right of publicity.

Canada formally recognizes "a form of" the right of publicity. However, the right is not fully developed because it is relatively new to the Canadian legal system.\textsuperscript{16} The right was first recognized in a 1973 case, when a Canadian company, without permission, used photographs of a football player in its advertisements. A Canadian court found that "Canadian law recognized a proprietary right to the commercial use of a person's identity, personality, and name, separate from "passing off" claims."\textsuperscript{17} Later decisions, however, appeared to limit this right to claims growing out of endorsement controversies. Further, like in the United States, the scope of the right of publicity varies from province to province.\textsuperscript{18}

Japan also recognizes a right of publicity.\textsuperscript{19} Mark Lester, a British film star who became popular in Japan, signed a publicity agreement to advertise one film with a Japanese film company.\textsuperscript{20} When the company used Lester's film clips for unrelated and unauthorized candy advertisements, he sued for "property damage to his commercial identity as well as for mental suffering."\textsuperscript{21} In a case of first impression, the Japanese court elaborated on its new cause of action which derived from traditional Japanese rights in one's name and portrait. The Japanese Court integrated both moral and economic interests to its expression of the right of publicity:

When an actor's name and portrait are used in the advertising of certain products, his social reputation contributes to the promotion of such products. Thus, an actor, because of his reputation, has an interest to give an exclusive license to a third party to use his name and portrait for consideration. Here, the actor possess an economic interest which is different from the moral interest described . . . An actor, even where he does not suffer any mental pain from an unauthorized use of his name or portrait, may be entitled to a legal protection against infringement of such economic interest.\textsuperscript{22}

\textsuperscript{15} id.
\textsuperscript{16} MCCARTHY, supra note 1, § 6:157.
\textsuperscript{17} Id.
\textsuperscript{18} Id. § 6.158. Professor McCarthy provides a chart detailing the laws of four Canadian provinces in this section.
\textsuperscript{19} Id. § 6:159. (referring to Mark Lester v. Tokyo Daiichi Film (1976) Hanreijioho (No. 817) 23, Tokkyoto Kigyo, September 1976, at 47 (Tokyo District Court, June 29, 1976)).
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
The court awarded damages for the infringement of Lester's right to publicity and an additional compensation for "mental suffering" and damage to his reputation.\(^{23}\)

This brief survey shows that the laws for publicity rights are generally scarce, and that those in existence are inconsistent. Countries that provide little or no protection for the right of publicity force celebrity litigants to phrase their claims in language that makes up a different cause of action; these may include traditional passing off and trademark claims that turn on a "likelihood of confusion" test. The test is problematic because it "ignores the principle of personal autonomy" which is essential to publicity claims and disappoints a celebrity who cannot prove consumer confusion.\(^{24}\) Alternatively, litigants can mold their claims in terms of personality rights, but these do not protect the whole persona.\(^{25}\) These countries force celebrity litigants to fit the proverbial square peg into a round hole when it comes to enforcing the rights of the celebrity persona. Thus, a treaty dealing with publicity rights would help alleviate this problem.

The two intellectual property treaties which most closely approximate protection for the right of publicity fail to adequately address infringement of the celebrity persona. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) requires its members to enact laws with an array of intellectual property rights, including service marks.\(^{26}\) Although many right of publicity claims coincide with infringement of the celebrity's service marks or trademarks, the two doctrines ultimately serve two distinct sets of rights. This forces litigants to convolute and shape their claims in order to recover damages or injunctive relief.

Celebrities do not fare any better under the Berne Convention for Protection of Literary and Artistic Works when faced with violations of their rights of publicity. The Berne Convention covers copyrights and moral rights which, like service marks, often arise tangentially to rights of publicity claims.\(^{27}\) However, the Berne Convention protects copyrightable "works of authorship" subject to narrow interpretations incongruent with the persona. Though the underlying rationales are

\(^{23}\) Id.

\(^{24}\) PINCKAERS, supra note 12, at 423.

\(^{25}\) Id.


\(^{27}\) Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (last revised at Paris, July 24, 1971) [hereinafter "Berne Convention"].
The Right of Publicity

similar, the protection of copyrights do not legally encompass the right of publicity.

II. TRADEMARKS AND RIGHTS OF PUBLICITY

Without a rights of publicity treaty, litigants may resort to international trademark doctrines in order to bring their claims. This section sets out generally accepted trademark law. It explores the similarities and differences between rights of publicity and service marks. This is significant because celebrities are likely to have valid service mark protection for their entertainment services. American courts tend to exploit the overlap between trademark law and rights of publicity in favor of the celebrity persona, and similar claims may be made under the TRIPS Agreement. However, the significant doctrinal differences between service marks and rights of publicity result in the need for a distinct rights of publicity treaty.

A. Trademarks and Rights of Publicity

The function of trademarks in society has evolved as business and society have changed, yet the area of the law continues to serve many of the same values as the right of publicity. Initially, trademarks "identified the original manufacturers as goods passed from them through the hands of middlemen to the ultimate purchasers." Later in their evolution, trademarks signaled to a consumer the general source of the product he or she purchased. Also, "the emergence of licensing and franchising contributed to undermine trademarks' 'origin' function." Nonetheless, trademarks continued to serve a "quality function" identified by Frank Schechter as giving the public a sort of guarantee of the quality of a product as opposed to simply indicating its origin. Trademarks also provide direct advertising on a good, making it more perceptible and unique to consumers. Trademarks portray the goodwill of a business and distinguish one good from the next.

29. Id.
30. Id. at 17.
31. Id. (quoting F.I. Schechter, The Rational Basis of Trademark Protection, 40 HARV. L. REV. 813, 820 (1927)).
32. Id. at 18.
33. Id. at 18-19.
All of these functions of trademarks indicate the importance of protecting the economic goodwill of a company and investment in its brand and products. Further, they serve as a self-preservation tool for companies to protect profits. Similarly, and for the same economic incentives, celebrities nurture aspects of their persona which trademark laws protect. Melville B. Nimmer developed this economic foundation for the functions of the rights of publicity by identifying the substance of the right as “the economic reality of pecuniary values inherent in publicity [rights]”\(^{34}\) in a name, likeness and persona. He suggested protection against misappropriation of identity, which can occur in similar ways that trademarks are misused in commerce today.\(^{35}\)

For this reason, many see trade and service mark law as a “temporary fix” to protecting the right of publicity until it is established as an important right and used by courts to protect against misappropriation.\(^{36}\) As the law on the right of publicity develops in the United States, celebrities alternatively seek protection for the persona through service mark infringement actions.\(^{37}\)

Celebrities build goodwill through their name, likeness, and persona. These traits are protected under United States trademark law as service marks. Service mark protection extends not to the mark itself, but to what it symbolizes: the goodwill of the mark.\(^{38}\) Under traditional trademark analysis, goodwill represented by the mark represents the consumer’s view of the quality of the product or service, which differs from the celebrity as the source of the goods, since a celebrity does not make “things.” An alternative view of the “source” of the good, however, is the idea that the celebrity’s reputation is connected to the good. If the consumer appreciates the celebrity’s endorsement of a product to represent the celebrity’s judgment about the product or company, the use of the goodwill developed by the celebrity’s entertainment services should be protected.

Some cases illustrate how international trademark law could arguably provide a sort of parallel protection for publicity rights, since “both generally afford the aggrieved plaintiff the same relief—an injunction

---

35. *Id.*
37. *Id.* at 115.
38. Angelo Genova, *Why the United State was Right: The Brief for “Use in Commerce” as the Standard*, 12 J. Contemp. Legal Issues 420 (2001). Similarly, “one economic interest encompassed by the right of publicity is the right to authorize the use of elements of one’s name or likeness as a trademark.” William M. Borchard, *Trademarks and the Arts* 8 (1989).
which will halt the defendant’s misappropriation of a person’s name, symbol, likeness, image or words.\textsuperscript{39}

\textit{B. Celebrity Recovery Under Trademark Law}

Under American law, a service mark infringement claim was a successful avenue of recovery for the Estate of Elvis Presley when the courts refused to enforce claims of the right of publicity.\textsuperscript{40} In \textit{Estate of Elvis Presley v. Russen}, the “King’s” estate sued to enjoin the defendant from producing and staging “The Big El Show,” featuring an Elvis impersonator who performed using the hip-gyrating, rock-and-roll style of the infamous singer.\textsuperscript{41} The Estate brought causes of action for infringement of the right of publicity and service mark rights. The court dismissed the right of publicity claim based on plaintiff’s failure to demonstrate injury to the Estate,\textsuperscript{42} but entertained the claim for service mark infringement. The Estate needed to prove that they “owned the marks, that the marks were valid and protectable, and that the defendant’s use of a similar mark was likely to confuse members of the consuming public as to the source of the defendant’s services.”\textsuperscript{43}

The court concluded that the Estate owned the marks for “Elvis,” “Elvis Presley,” and “Elvis in Concert,”\textsuperscript{44} and that the marks were indeed protected in connection with the singer, his concerts and promotional goods.\textsuperscript{45} The evidence demonstrated a likelihood of confusion resulting from the defendant’s use of similar marks.\textsuperscript{46} Thus, the Estate was able to stop “The Big El Show” from “piggybacking on the plaintiff’s goodwill.”\textsuperscript{47} When enforcing publicity rights is not a viable option, cases like \textit{Presley’s Estate} show that service mark infringement claims present “viable alternatives” in order to enjoin defendants who misappropriate aspects of protected personas.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{39} Heneghan & Wamsley, \textit{supra} note 36, at 115.
\item \textsuperscript{40} Estate of Elvis Presley v. Russen, 513 F. Supp 1339 (D.N.J. 1981).
\item \textsuperscript{41} \textit{Id.} at 1348-49.
\item \textsuperscript{42} \textit{Id.} at 1379.
\item \textsuperscript{43} Heneghan & Wamsley, \textit{supra} note 36, at 139.
\item \textsuperscript{44} \textit{Estate of Elvis Presley}, 513 F. Supp. at 1363.
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id.} at 1372.
\item \textsuperscript{47} \textit{Id.} at 1382.
\item \textsuperscript{48} Heneghan & Wamsley, \textit{supra} note 36, at 142.
\item \textsuperscript{49} \textit{Id.}
\end{itemize}
Another case, *Wendt v. Host International*, illustrates the courts' willingness to allow service mark recovery where the primary claim is for infringement of the right of publicity. In *Wendt*, the court addressed the right of publicity under California common law. It also reviewed service mark protection for George Wendt and John Ratzenberger's personas, an entertainment-based service which each had developed in conjunction with their acting roles on the popular 1980's television sitcom "Cheers." The "Cheers" actors were offended that defendant Host International attracted customers to "Cheers" airport bars, modeled after the television show set, with "animatronic robotic figures" based upon Wendt and Ratzenberger's characters in the television series. The robots did not just personify the television characters but also conjured Wendt and Ratzenberger's physical likenesses. Plaintiffs Wendt and Ratzenberger claimed that the robots: (1) violated their rights of publicity under California common law and (2) infringed plaintiffs' right under §43(a) of the Lanham Act, which protects service marks from false endorsements and misleading use.

Even though the copyrights in the characters were held by the television show producer, the court found that there was enough evidence that the robots may have symbolized the actors' likenesses and personal characteristics as an element of protected service marks. The court used language describing the actors' claims under federal trademark laws, the "imitation of their unique physical characteristics," that was nearly identical to the language describing the common law right of publicity claims that "an actor or actress does not lose the right to control the commercial exploitation of his or her likeness by portraying a fictional character." The *Wendt* case acknowledges courts' willingness to view the right of publicity in a persona as a protectable service mark, despite formal legal distinctions between the two claims.

---

51. Id. at 809.
   Any person who, on or in connection with any goods or services... uses in commerce any word, term, name, symbol, or device, or any combination thereof... which—(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services or commercial activities by another person... shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.
53. Wendt, supra note 50, at 812.
54. Id. at 811 (emphasis added).
In Australia, the right of publicity must be couched in terms of alternative trademark infringement claims, such as “passing off” laws or unfair competition.55 Down-under movie star Paul Hogan, for example, successfully used a passing off claim to stop advertisements for Australian leather shoes which misappropriated the likeness of himself and his character in the blockbuster movie “Crocodile Dundee.”56 The Australian court held that the public would likely believe that Hogan agreed to the advertising when in fact he did not, and found the defendant liable for passing off. The court acknowledged that the character Hogan played in the film “is another extension or exaggeration of Mr. Hogan’s own personality.”57 In the past, Hogan had been selective about products he chose to endorse in his “Crocodile Dundee” persona, and the court recognized that defendant’s unauthorized commercial use “would tend to damage the reputation which Mr. Hogan has because it would suggest that he was endorsing yet another product, although in a way different from the way in which his well-known advertising campaigns had been conducted.”58

Hogan’s case provides additional support for celebrities seeking protection for their persona in trademark law and unfair competition, though they may really seek enforcement of their right of publicity. The court was receptive to addressing aspects of the persona and personal autonomy which are central to the right of publicity. Under Australian law, there is “greater protection . . . against unpermitted use of personal identity in advertising and commercial promotion.”59

The connection between the right of publicity and service mark cases is further co-mingled by courts60 in Carson v. Here’s Johnny Portable Toilets, 12 J. CONTEMP. LEGAL ISSUES 596, 599 (2001). The case brings to light the possible problems associated with conflating rights of publicity with traditional trademark rights. It grants celebrities a possible “monopoly” advantage over their likeness in the public domain, courts may not specifically identify what makes celebrity likeness identifiable enough to deserve protection, and junior users will not necessarily be on notice of celebrity takeovers. Id. “Ever since Carson, the circuits—and particularly the Ninth Circuit—have busily expanded rights of publicity so far that it can be said today to cover mere evocation of a celebrity’s identity.” Id. at 600.

55. McCARTHY, supra note 1, § 6:156. For additional information on Australian passing off, see D.R. Shanahan, AUSTRALIAN TRADEMARK LAW AND PRACTICE 312 et seq. (1982).
56. Id.
58. Id. at 563.
59. McCARTHY, supra note 1, § 6:156.
Toilets, Inc.. The defendant company in Carson, named “Here’s Johnny,” sold portable toilets, playing off of the popular comedian’s “trademark” phrase from the introduction of “The Tonight Show with Johnny Carson.”

This case demonstrates yet another angle of parallel protection between the right of publicity and trademark law. The court denied Carson’s “trademark” claims, but found infringement of his right of publicity. Carson’s trademark phrase “Here’s Johnny!” was “part of [Carson’s] identity and that defendant should be enjoined from exploiting for its commercial gain.” This case represents expansive publicity rights now covering service marks as part of the persona. Some may think that this doctrinal meshing is troubling, but it illustrates the close proximity in which the two doctrines operate.

The distinction between service marks and rights of publicity is further blurred in the protection of musical band names. A band’s name “serves as a service mark for entertainment services rendered by the group.” U.S. federal trademark law protects against infringement and allows for registration of band names as service marks, even if the name does not qualify as a trademark. Professor McCarthy believes that “[a] person may obtain and federally register rights in his or her identity as a service mark for personal services, such as personal entertainment services,” and additionally as a group. When a celebrity or a musical group claims for infringement of their service mark, it may accompany a claim for infringement of their right of publicity.

Names and other aspects of the persona are best protected under rights of publicity. However, courts have confused the issues and granted protection to rights of publicity aspects of the persona under trademark law. Ultimately, however, the purposes of protecting rights of publicity and trademarks are sufficiently different than recovery based on service marks. This is why service mark law ultimately will not adequately protect the rights of publicity. These cases in the United States show courts’ willingness to grant service mark protection to celebrities whose

62. Gillespie, supra note 60, at 597.
63. Id. at 599.
64. Id.
68. Id. § 5:14. In 1984, the Lanham Act was amended to include “unique” services in the definition of “service mark,” which effectively concluded any debate as to whether service marks were registrable for entertainment services.
names and personas represent an economic entertainment services value. The extent of service mark protection under international intellectual property treaties provides litigants with a way to protect this economic aspect of the right of publicity.

C. International Protection for Publicity Rights
Under the TRIPS Agreement

International trademark law mandates similar rules under which celebrities can carefully craft and argue their claims of publicity right infringement. The predominant treaty addressing substantive trademark protection, the TRIPS Agreement, protects entertainment-related marks and thus provides parallel protection for rights of publicity.

Under the TRIPS Agreement, a trademark "consists of any sign, or any combination of signs, capable of distinguishing the goods or services of one person from those of another, including personal names, designs, letters, numerals, colors ... Trademarks shall include service marks and collective marks."69 Registries created by international conventions include marks for entertainment services.70 The International Classification of Goods and Services (Nice Classification) allows registration of "entertainment" and "sporting and cultural activities" as services, which covers many celebrities exercising the right of publicity.71

Service marks are specifically protected within the subject matter of the TRIPS Agreement. Article 15.1 states that, "Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those or other undertakings, shall be capable of constituting a trademark. Such signs, in particular including personal names ... shall be eligible for registration as trademarks."72

Similarly, Article 16 of the TRIPS Agreement elaborates on the protection of well-known marks. The first section of Article 16 of the TRIPS Agreement follows the lead of the Paris Convention in adopting a "likelihood of confusion" test for infringement of well-known marks:

---

69. TRIPS Agreement, supra note 26, art. 15.1.
71. Id.
72. TRIPS Agreement, supra note 26, art. 15.1.
The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner’s consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion.  

More specifically, the next section incorporates services not previously protected under international trademark law.

TRIPS’ structure allows celebrities to enforce publicity rights in trademark law against those who misappropriate their marks even in noncompeting goods or services. This is an important and powerful way for celebrities to use trademark law to their advantage because those who seek to capitalize on celebrity’ marks often use them in conjunction with consumer goods or services, rather than in the entertainment world in which the marks originated. “A well-known mark will, in some instances, require protection against unauthorized use on noncompeting goods or services which are nonetheless so related to the owner’s goods or services that a risk of confusion of business connection or sponsorship is imminent or apparent.” In addition, bad faith on the part of the misappropriator may also be taken into consideration.

Since claims for mark infringement often go hand-in-hand with infringement of publicity rights, the extension of protection to service

73. TRIPS Agreement, supra note 26, art. 16.1.
74. TRIPS Agreement, supra note 26, art. 16.2. This section brings services into the ambit of a previous intellectual property agreement, the Paris Convention for the Protection of Industrial Property. Article 6bis of the Paris Convention created trademark protection for goods by providing:

The countries of the Union undertake, ex officio if their legislation permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of the Convention and used for identical or similar goods.

76. Id. at 130. Mostert recommends that well-known marks should be protected under two conditions. First, there must be a connection between the use of the marks despite their use on noncompeting goods. In the case of the celebrity mal-endorsement, there would not be misappropriation if the user did not think that his or her consumers would identify the new product or service with the endorsement of that celebrity, for whatever marketing reason. Second, Mostert acknowledges that there must be injury to the interests of the trademark owner. Besides economic reasons why trademarks are protected, there will be damage to reputation that will be the most immediate injury felt by any celebrity’s false endorsement.
77. Id. at 131.
78. Paris Convention art. 6bis § 3. See also Mostert, supra note 75, at 122.
marks under international law provides celebrities with an important tool for enforcing their rights. Protection of service marks approximates the protection that publicity rights receive in TRIPS Member States.

D. Problems with the Parallel Approach

Trademark treaties provide options for celebrities drafting complaints to fit right of publicity claims under the umbrella of unfair competition or trademark causes of action. Intellectual property treaties encompass these carefully-crafted claims and then protect the persona as a service mark. The problem with this approach is that in many respects, publicity rights and trademark doctrines are not coextensive. The next section of this article examines the ways in which rights in mark and publicity rights diverge and argues that international trademark law leaves publicity rights wanting. Demonstrated by the Abba hypothetical raised in the introduction, the final disparity between protection for marks and rights of publicity provokes the necessity for an independent publicity rights treaty.

The underlying policy goals of trademarks and rights of publicity protect significantly different interests. Further, Professor McCarthy says that rights of publicity are only analogous to trademarks despite their many similarities. He identifies four major categories of differences between rights of publicity and trademarks: 1) identification, 2) prior exploitation, 3) tests of infringement, and 4) transfer rules. Ultimately, the question rests on whether the differences are substantial enough to warrant separate protection for rights of publicity in international law.

E. Policy Goals

The policy underlying a claim of trademark or service mark infringement ultimately aims to protect a distinctly different set of rights than a claim for infringement of the right of publicity. “While the key to the right of publicity is the commercial value of a human identity, the key to the law of trademarks is the use of a word or symbol in such a way that it identifies and distinguishes a commercial source.”

80. Id.
81. Id.
Service mark protection generally aims to avoid confusion as to the source of the service, as opposed to the commercial misappropriation goals of the right of publicity.82

British law perhaps best demonstrates the difficulty of the parallel protection theory. First, British law does not recognize a right of publicity—and some claim that British law never will because it does not recognize the same rights of privacy as U.S. law.83 Even more importantly, British law seems reluctant to recognize celebrity rights to the same extent that U.S. law does. Plaintiffs must frame their claims in terms of libel or “passing off,” a claim that is similar to a trademark infringement claims under the Lanham Act in the United States.84 "However, the usefulness of ‘passing off’ was for many years quite limited for, unlike the U.S. concept of likely confusion as to sponsorship, affiliation or connection” it has been “unable to accommodate itself to the modern commercial realities of licensing and merchandising.”85

F. Tests of Infringement

Trademark infringement is based upon a likelihood of confusion test, both under U.S. law and under the international trademark treaties. However, the test for publicity rights is based on “identifiability.”86 The “right of publicity ‘identifiability’ is not the same as the ‘likelihood of confusion’ test of trademark law.”87 The primary difference between these tests is explained by Professor McCarthy:

[W]hile trademark infringement is a trespass on the “secondary meaning” in a personal name, right of publicity infringement is a trespass on the “primary meaning” in a personal name. The personal name as a symbol of plaintiff as a person is addressed by right of publicity law. The personal name as a symbol of good will of a commercial enterprise is addressed by trademark law.88

82. Heneghan, supra note 36, at 127.
83. MCCARTHY, supra note 1, § 6:153. When it was recommended to Parliament to begin considering recognition of a right to privacy, the notion was “met with resistance and inaction.” Id. However, because some human rights treaties recognize a right of privacy, English courts may begin to recognize the right. Id. The court did not take the occasion to recognize a right to privacy in Michael Douglas’ wedding pictures case. (2003 WL 1822887) With respect to the right of publicity, the courts may be concerned about “inroads on its tradition of almost complete press freedom.” Id. § 6:155.
84. MCCARTHY, supra note 1, § 6.155. In Dastar Corp. v. Twentieth Century Fox Film Corp., the United States Supreme Court succinctly describes the essence of a “passing off” claim by example as forbidding “the Coca-Cola Company’s passing off its product as Pepsi-Cola or reverse passing off Pepsi-Cola as its product.” Dastar Corp. v. Twentieth Century Fox Film Corp. (2003), 539 U.S. 23, 32, 123 S. Ct. 2041, 2047.
85. MCCARTHY, supra note 1, § 6.155.
86. Id. § 5.11.
87. Id.
88. Id.
In the end, however, these identification differences may be semantic and technical. A celebrity may more easily recover under the right of publicity than under the trademark infringement’s likelihood of confusion test, because the identification test is simpler. But, when a celebrity’s name is used without permission in conjunction with a product or service, the use inherently draws on the goodwill created by the celebrity—whether that goodwill is physical, athletic ability, trustworthiness, or humor—in his or her endeavors. The celebrity stands for something, which is being misappropriated not just in a primary “name-recognition” manner, but also in a way that conjures the image, perception or previous work of that celebrity. Such misappropriation creates a likelihood of confusion about the aspect of the celebrity’s goodwill and its connection to the product or service offered.

A rights of publicity treaty should recognize the definitional difference between infringement tests and allow celebrities to recover for misappropriation of their persona without having to prove the requisite secondary meaning of a commercial enterprise required under traditional trademark law. However, in the absence of a rights of publicity treaty, celebrities should be able to frame claims for infringement of their publicity rights by pointing to the symbolic aspect of their identity which has been misappropriated.

G. Identification Differences

There is a difference between “what” is identified in the right to publicity and a trademark right. “While a trademark identifies a single commercial source, the right of publicity involves identification of the ‘persona’ of a single human being.” A persona is “a label to signify the cluster of commercial values embodied in personal identity as well as to signify that human identity ‘identifiable’ from defendant’s usage.” It can be found in a name, nickname, voice, image, performing style, and other indicia which identify the “persona” of a celebrity. Based on this definition, one persona may generate opportunities for many different commercial sources. Trouble between the two doctrines arises when celebrities must bring trademark-based claims arguing that

89. Id.
90. McCarthy, supra note 1, § 5:9.
91. Id. § 4:45.
92. Id.
the persona is the commercial source, rather than arguing that the commercial source is the idea behind whatever is being produced.

To consider the stark difference between these two different rights, reconsider the issues the band Abba faced in the introduction, an actual case brought in Great Britain. Though this was not a trademark case per se, it illustrates the difficulty in attempting to litigate rights of publicity cases on unfair competition theories and the equally unfair decision that resulted. In the *Abba* case, the band appealed to the court to enjoin a merchandiser from passing off various items, like t-shirts, with the Abba band pictures and insignia on them. In their passing off charge, the band primarily claimed that they had "built up a reputation which is associated in the public mind with the name and image of the [band], and that defendants [were] exploiting that reputation for their own commercial purposes." In ruling on the claim, the court focused on the unlikelihood that "anyone reading the advertisements ... or indeed receiving the goods ... could reasonably imagine that all the pop stars named ... were giving their approval to the goods offered or that the defendants were doing anything more than catering for a popular demand among teenagers for effigies of their idols."

In order for Abba’s passing off and confusion argument to succeed, the band and the merchandiser would have had to be in “a common field of activity,” which they were not. As to the issue of identification, the court pointed to the goods produced by the merchandiser as the commercial source, noting that the band made music, not merchandise, so there could be no confusion.

Had Abba been able to claim infringement of their rights of publicity, then the band’s persona would have controlled the situation, and the unauthorized use of the photos and band’s likeness would have been an unlawful misappropriation of their identity. Clearly, the band’s primary concern rested on the impact to its reputation and the ability for defendant manufacturers to make money based on the band’s popularity at the time. Traditional unfair competition law, however, is unjust to rights of publicity claims in situations where the parties are not involved in the same activity (playing in a band versus selling t-shirts), and courts can justify a finding of a lack of customer confusion. A rights of publicity

94. *Id.* at 64-65.
95. *Id.* at 65.
96. *Id.* at 67-68.
97. *Id.* at 66.
98. *Id.* at 65.
treaty would eliminate the need for celebrity plaintiffs to plead unfair competition on facts that simply show an unauthorized use of persona.99

H. Transfer Rules

According to McCarthy, the difference between the identification function of trademarks and rights of publicity also plays an important role in the difference between transfer rules of the two rights. Free transferability accompanies the right of publicity—celebrities may assign or license rights in their persona as they see fit.100 Trademarks, however, are subject to more stringent transfer rules. Courts adhere to a traditional rule against assignments of trademarks “in gross,” which prohibits transfer of the rights in a mark “without the accompanying goodwill symbolized by the mark.”101 Similarly, traditional trademark rules prohibit “naked licenses,” where the owner of the mark takes no steps to ensure “quality control” in order to make sure that the mark continues to stand for the same quality good that the consumer is familiar with.102 The purpose of the stringent trademark and service mark assignment rules enforces the importance of the disparity between the mark and the product or service.103 Under the traditional rules, it is believed that “if a mark cannot exist apart from its goodwill, the mark could not be assigned without it.”104

A modern trend, however, may save the proposition that transfer rules leave rights of publicity unprotected by trademark doctrines. According to Irene Calboli, courts increasingly allow trademark assignment “de facto without goodwill” and do not immediately declare such trademark assignments invalid.105 Similarly, in contrast to traditional U.S. law, Article 21 of the TRIPS Agreement does not impose the same stringent transfer rules on trademarks. The Agreement provides that, although

99. Note that unauthorized use would likely be moderated in a rights of publicity treaty by provisions for fair use and other limiting doctrines that generally apply to these types of rights.

100. McCarthy, supra note 1, § 5:12. An assignment is the sale of all rights and title of the property interest. See id. § 10:10, at 466. A license, however, only gives permission to use the owner’s interest in the rights involved. Id.

101. Id. § 10:11, at 467.

102. Id. § 10:11, at 466.


105. Id.
member states have freedom to determine the conditions of trademark licenses and assignment, "[t]he owner of a trademark shall have the right to assign the trademark with or without the transfer of the business to which the trademark belongs."

Thus, the differences in transfer rules do not necessarily impose a barrier to recovery for infringement of the right of publicity under trademark law. Where aspects of the right of publicity and trademark rights converge (for example, where the identity also symbolizes the services of an entertainer), even Professor McCarthy acknowledges that traditional trademark laws apply. Especially considering the relaxed standards under the TRIPS Agreement and the possibility of U.S. violation of the agreement by requiring trademark transfers with goodwill, formalistic barriers between transfer rules do not frustrate the parallel approach.

1. Prior Exploitation

The final significant difference between the right of publicity and trademark law lies in rules about prior exploitation. "To acquire trademark rights in name, likeness or any type of symbol, that work or symbol must be used as a trade or service mark." On the other hand, the majority rule for rights of publicity is that "prior 'use' or 'exploitation' is not a condition precedent to its existence and possession."

Generally, this does not affect the dichotomy between trademarks and the right of publicity. If a celebrity brings an action for misappropriation of their identity but frames the claim in terms of unfair competition or trademark, some aspect of the persona will likely qualify as an entertainment services mark. Thus, the celebrity would have already used the persona as a mark. Equating trademark and publicity rights becomes problematic when a celebrity fights misappropriation of their persona in a way which does not relate to their current entertainment services.

For example, the Lyngstad court, which decided the Abba case, concentrated on the formal differences between the merchandiser and the band. One can imagine that the court might have extended its "no confusion" reasoning between the band and the merchandiser to the

106. TRIPS Agreement, supra note 26, art. 21.
107. MCCARTHY, supra note 1, § 5:12, at 405.
108. Id. § 5:10, at 398.
109. Id.; see also Abdul-Jabbar v. General Motors Corporation, 85 F.3d 407, 415 (9th Cir. 1996) (stating that California's right to publicity statute's "reference to 'name or likeness' is not limited to present or current use" for basketball player who changed his name mid-career).
"prior use of the persona" prong. Since Abba had only used the band's persona to make music and not to distribute goods in the U.K., the band would not have had a protected trademark in its persona for distribution of novelty items.

Similarly, returning to the hypothetical example involving Angelina Jolie, regardless of whether Jolie acquired service mark rights in her persona as an actress, this would not necessarily translate into service mark rights in her persona as a promoter of another, non-entertainment good or service that she could exercise against a company that borrows her identity.

Under the traditional rights of publicity analysis, the celebrity recovers against misappropriation regardless of prior use or exploitation of their persona. This helps the celebrity maintain control over their identity in a way which is not provided in traditional trademark doctrines. A treaty specifically addressing rights of publicity should note this important difference between the two rights.

J. Conclusion

In the end, there are formal distinctions between the right of publicity and marks, but the overall goals of both doctrines serve an economic interest in the persona that make it possible to include many aspects of the right of publicity in international trademark law. The best way to address the divergence between the doctrines is for the international community to adopt a separate treaty for publicity rights.

III. RIGHTS OF PUBLICITY AND COPYRIGHT LAW IN INTELLECTUAL PROPERTY TREATIES

This section explores opportunities for celebrities to construct rights of publicity claims in copyright infringement terms, the similarities and differences between the doctrines, and the result under international law of arguing for parallel protection. In the end, "the right of publicity is not "equivalent to . . . copyright law.""10 Similar to the trademark analogy, the right of publicity serves distinct policy goals and supports elements of infringement claims which the international community better supports by creating an independent right of publicity treaty.

110. McCarthy, supra note 1, § 5:38, at 474.
A. Convergence of Rights of Publicity and Copyright Law

In summary, copyright law is "a bundle of five exclusive rights giving the copyright owner the exclusive right to reproduce the work in copies or phonorecords; to prepare derivative works; to distribute copies or phonorecords to the public; to perform the work publicly; and the right to display the work publicly." The right of publicity closely resembles copyright law in situations where copyrights "impact upon legal rights which focus on the right of the person to control the use of his or her identity or performance values in marketing and in the advertising media." The persona protected by the right of publicity incorporates copyrightable traits such as name, likeness, and voice. When celebrities face infringement of such elements of their persona, they may frame claims against defendants in copyright terms.

To illustrate an example of the parallel protection offered by copyright law to the right of publicity, return to the Abba case introduced earlier in this article. If Abba owned the copyrights in the photos used for the unauthorized promotional t-shirts (which they did not), the band would have been able to frame a claim for infringement of their right to reproduce the photographs used, or possibly for infringement of their exclusive right to prepare derivative works based on the band's pictures. This would have accomplished their ultimate publicity-oriented goal of stopping the merchandiser from distributing Abba paraphernalia without permission.

B. Rights of Publicity Under International Copyright Law

Celebrity claims constructed under copyright law also benefit from the protections of international laws on the subject. The Berne Convention mandates protection and redress for celebrities facing infringement of copyrightable elements of their persona. The scope of the treaty's protection addresses "literary and artistic works," defined as "whatever may be the mode or form of expression," including traditional forms of expression like books, choreographic works, art and photography. The economic rights granted by the Berne Convention pertinent to the right of publicity include the exclusive rights of reproduction of works, performance of the work, broadcasts and other public

111. Id. § 5:39, at 475-77.
112. Id. § 5:30, at 446; id. § 5:41, at 477.
113. Id. § 5:40, at 477.
114. Berne Convention, supra note 27, art. 2.
115. Id. art. 9.1 ("Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.").
communications, and preparing derivative works. Thus, under international law, though subject to the specific laws of member states, celebrities may exercise rights in artistic and literary works, which may include aspects of the creatively-developed persona.

The Berne Convention applies to works of authorship. However, the definition of what constitutes a work of authorship changes as technology inundates and transforms traditional areas of literary and artistic works. Some courts allow expansion of copyright law into new areas such as computer programs not considered traditionally protected works. The area of law now spans historic works like books as well as abstract intellectual property. This flexibility allows copyright law to entertain a broad interpretation of "works" and the right of publicity's constructed persona as an emerging art form. Under this theory, many scholars closely align copyright and the right of publicity and argue that copyright law ought to provide protection for the right of publicity, classifying the persona as a "work of authorship."

The convergence of the right of publicity and copyright law elevates the persona to the level of protection afforded to a "work" under

116. Id. art. 11.1 ("Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing: (i) the public performance of their works, including such public performance by any means or process; (ii) any communication to the public of the performance of their works.").

117. Id. art. 11bis.1 (Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcast of the broadcast of the work, when this communication is made by an organization other than the original one.).

118. Id. art. 12 ("Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.").

119. Id. art. 1 (The Convention provides "protection of the rights of authors in their literary and artistic works.").

120. Jane C. Ginsburg, Moral Rights in a Common Law System, 4 ENT. L. Rev. 121, 126 (1990). Professor Ginsburg notes that "the 'work' is a much more abstract concept. If the 'work' is a symphony, it exists independently of any sheet music in which copies may be created. If one such copy is destroyed, or if the symphony receives a mangled performance, the symphony itself still persists." Id. This is readily comparable to the person identified and protected under the right of publicity.

copyright law and "protects the value of a person's effort in creating an intellectual or artistic work, not any particular physical embodiment of that work."122 The "constructed" persona receives protection on the ground that the creativity and work that goes into the development of the persona—often through an investment in the self through extensive marketing, styling, or other image consulting—is as important as the skill and effort put into writing a book.123 Contemporary culture appreciates celebrity as an art form in and of itself, analogous to the way that history reveres artists and writers for their creations.124 Others agree that copyright law does not necessarily follow an "old regime," formalistic style when it comes to confronting contemporary problems. One scholar notes:

Although the term 'copyright' is highly descriptive in one sense, it is a misnomer in another. Today's copyright goes much farther in protecting works against copying in the strict sense of the word. Much of what we protect in copyright law today, such as performance rights, display rights, and derivative work rights, are more akin to rights to use a work rather than to copy it.125

Based on these modern views of expansive copyright law and protection for literary and artistic works, celebrities can bring claims of infringement of their exclusive rights to exercise interests in their constructed persona under the Berne Convention.

C. Diverging Doctrinal Rationale and Scope of Protection

One fundamental problem with arguing for parallel protection of the right of publicity within copyright laws rests in the differences between the policy goals of the two rights. Copyright law can be traced as far back as the 1710 English Statute of Anne, which declared a primary purpose of the law to be encouragement of the creation of new works.126

The United States Constitution also includes the Patents and Copyrights Clause, "To promote the Progress of Science and the useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."127

122. Byers, supra note 121, at 53. See also Kwall, supra note 121, at 154. Kwall argues that "a constructed persona should be considered a 'writing' within the meaning of the Constitution." Id. at 160.

123. Kwall, supra note 121, at 162. Kwall notes that "virtually all branches of the modern mass media engage in this complex celebrity packaging and its cumulative effect is what gives celebrity status its current impact." Id.

124. Id. (describing the role of celebrity in American culture).

125. MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 3 (3d ed. 1999).

126. Ginsburg, supra note 120, at 122.

Similar to the original English purpose of protecting authors’ rights, courts and scholars view the U.S. Constitution as serving two interests. The goals are to promote the public’s interest in the creation of new works and provide the author with economic incentives to produce new works. The right of publicity also focuses on the economic interests of celebrities in their persona.

The policies underlying copyright law apply equally to protection against misappropriation of the persona. While copyright protection “encourages intellectual and artistic creation by assuring the creator that only he or his heirs will benefit from the fruits of his labor . . . [s]o, too, the rationale behind the right of publicity is that a person who has struggled to create a ‘persona’ should be entitled to the exclusive benefits of that effort.” Society benefits from the development of these personas.

In the final analysis, however, the goals of publicity rights step away from the incentive-based goals of rewarding artists for their work and encouraging continued creativity. Abba, for example, did not seek an injunction against the merchandiser for stealing photographs and depriving the band of economic rewards based on their own ability to sell publicity photos. Instead, the band sought to enjoin the merchandiser from stealing its identity along with reaping the rewards of the band’s overall success.

Further, celebrities constantly “reinvent” themselves, but to support the right of publicity based on the changing tide of celebrity trends does a disservice to the fundamental goals of encouraging artists to create new works. Equating the incentive-based policy goal of copyright law and the personal autonomy-based economic goals of publicity rights is disingenuous and does not recognize the significant differences between the two intellectual property doctrines.

Another problem with equating the doctrines is that international copyright law under the Berne Convention protects “works of authorship.” The debate over allowing any celebrity’s misappropriation claims to fall

129. See supra notes 1, 5-7 and accompanying text, for a general discussion of the right of publicity.
130. Byers, supra note 121, at 54.
131. Id.
132. MCCARTHY, supra note 1, § 5:43, at 478-79.
under copyright law focuses on whether the "work" in the right of publicity, the persona, qualifies for protection. For example, "copyright in a photo can protect against 'any authorized use' of the likeness of the photo. . . . [t]he difficulty then becomes one of defining exactly what it is that is the 'subject' of copyright sought." Although there are theoretical arguments for the view that the persona is an authored work, Professor McCarthy finds that "it is hard to see [how a face or body part] constitutes an 'original work of authorship.' One is not the 'author' of one's face, no matter how much cosmetic surgery has been performed. Either God, fate, or our parents' genes 'authored' this 'work.'" Furthermore, McCarthy finds a more elemental and formalistic distinction; substituting copyright law for the right of publicity is difficult because of the differences in scope that the rights are constructed to give.

One formalistic barrier to parallel protection is that copyright laws often require fixation of the work. Neither the Berne Convention, nor the Universal Copyright Convention prescribe fixation as a threshold requirement for its members. The persona, in its unadulterated state, would not meet various fixation requirements, since the persona, though directly related to a human being, is a somewhat ephemeral concept. The fixation requirement also presents difficulty for the persona because the works often ought to be registered with bureaucratic offices in member states, perhaps with a photo or image or actual copy of the work to be protected. Bringing the persona from the ether and to the U.S. Copyright Office would present a unique challenge to celebrities seeking protection.

Other problems with equating the right of publicity and copyright law involve individual aspects of the persona which may or may not be afforded copyright protection. Personal names are often not afforded

133. See Downing v. Abercrombie & Fitch Co., 265 F.3d 994 (9th Cir. 2001). Clothing company used surfers' photos in an advertisement, and when the surfers sued for infringement of publicity rights, the court held that "the subject matter of Appellants' statutory and common law right of publicity claims is their names and likenesses. A person's name or likeness is not a work of authorship within the meaning of 17 U.S.C. §102." Id. at 1004. Similarly, McCarthy argues that the persona is not fixed in the manner required at least under the U.S. Copyright Act. See also McCarthy, supra note 1, § 5:43, at 479.
134. McCarthy, supra note 1, § 5:43, at 479.
135. Id.
136. Id. § 5:44, at 482.
137. 17 U.S.C. § 102 ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium . . .") (emphasis added). Roberta Kwall notes that the fixation requirement is not a constitutional requirement. Kwall, supra note 121, at 163.
138. Kwall, supra note 121, at 163.
139. Byers, supra note 121, at 54. See also Kwall, supra note 121, at 166 ("[A] system of 'persona' registration would also need to be established.").
copyright protection.\textsuperscript{140} Holding copyright in a name protects the words in the name, but not the persona standing behind them.\textsuperscript{141}

Similarly, infringement of copyright in celebrity photographs only violates the celebrity's rights for the substance of the photograph as a "work" and not for the identity portrayed in the picture.\textsuperscript{142} Additionally, in the case of all "works" like photographs, the celebrity must be the author of the work or have taken the picture in order to hold copyright in the work.\textsuperscript{143} The Abba case illustrates these concepts. The band in that case did not own the copyrights to the photographs used on the t-shirts. Even if they did, only the subject of the photos would be protected, not the band’s identity. This may be one reason why they pursued passing off claims instead of copyright infringement.

Voice protection extends only to fixed sounds, like songs in a record, as opposed to the voice of a particular celebrity.\textsuperscript{144} Imitating a celebrity's distinctive crooning voice or style does not violate copyright laws unless it invokes another aspect of a protected work.\textsuperscript{145} Thus, many aspects of international copyright law do not offer solid protection to the right of publicity.

\textit{D. Conclusion}

In order for the right of publicity to survive under international intellectual property law, a new treaty must address the significant flaws with celebrity claims under copyright law. The treaty must address the persona as the \textit{res} with primary protection, instead of requiring claimants to craftily frame their persona infringement cases as extensions of protected fixed works of authorship. It must account for the central economic tenets of the right of publicity doctrine, but allow for personal autonomy to carry equal weight as an underlying policy rationale.

\textbf{IV. RIGHT OF PUBLICITY AND MORAL RIGHTS}

A third intellectual property doctrine provokes thought on additional opportunities for the right of publicity to be cradled by existing international

\textsuperscript{140} McCarthy, supra note 1, § 5:42, at 478.
\textsuperscript{141} Id.
\textsuperscript{142} Id. § 5:43, at 479.
\textsuperscript{143} Id.
\textsuperscript{144} Id. § 5:44, at 482.
\textsuperscript{145} Id.
law alternatives. Laws protecting moral rights often encompass many important aspects of the right of publicity. Because the rights standing alone—like the trademark and copyright doctrines—do not serve rights of publicity in a holistic manner, important moral rights concepts ought to be incorporated into a new right of publicity treaty.

A. Similarities Between Rights of Publicity and Moral Rights

Both moral and publicity rights serve the celebrity and artist by protecting their creative endeavors from unauthorized use. Moral rights, the literal translation of the French term “droit moral,” took root in Europe and acknowledge that, “The work [of an author] incorporates the personality of the author because the authorial persona permeates and pervades the work. Therefore, when an unauthorized person deforms or mutilates a work, the act constitutes an attack on the person or the personality of the author herself.”

In discussing moral rights, Kwall noted that:

Just as the right of publicity safeguards the rights of celebrity personas to control the commercial contexts in which their images are used and allows them to decide how their images are presented to the public, moral rights allow creators of artistic works a comparable measure of control regarding the substantive presentation of their works.

B. Rights of Publicity and International Moral Rights Doctrine

Substantive moral rights are best analyzed directly through provisions in the Berne Convention. Moral rights often grow out of copyright doctrines—in fact, France and Germany regard “moral rights as the heart and soul of copyright law.” The Berne Convention binds all signatories to recognize and provide redress for violations of the moral rights of artists and authors. Article 6bis of the Berne Convention states:

---

146. Ginsburg, supra note 120, at 122.
147. Kwall, supra note 121, at 158. See also Pinckaers, supra note 12, at 433 (“Insofar as the right of persona also recognizes the right to claim moral damages for mental distress caused by a violation of the right of persona, and the right to revoke an assignment on moral grounds, the right of persona also encompasses non-assignable moral rights.”).
149. Berne Convention, supra note 27.
Independently of the author's economic rights and even after the transfer of the said rights the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the said work, which would be prejudicial to his honor or reputation.\textsuperscript{150}

Moral rights have always been an important driving force behind the Berne Convention because of the international desire to "harmonize the protection of artistic, intellectual property throughout the world,"\textsuperscript{151} and to acknowledge the "author's continuing interest in his or her work."\textsuperscript{152} The Berne Convention is "animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works,"\textsuperscript{153} which includes the moral rights of those creating the works. This is analogous to aspects of personal autonomy in publicity rights.

The "right to claim authorship of the work" prescribed in the Berne Convention refers to an author's moral right of attribution, while the phrase allowing for objection to distortions and mutilations refers to the right of integrity authors have in their works.\textsuperscript{154} Article 6bis does not require its members to provide the exact same moral rights provisions in their national laws.\textsuperscript{155} The members of the Convention included an attribution requirement, "finding that it had a greater resemblance to the familiar common law concepts of defamation and unfair competition," although the original article's draft would have instead addressed "moral interests."\textsuperscript{156} The flexibility of moral rights is coextensive with the goals of global publicity rights, and since the right of publicity is relatively

\begin{itemize}
  \item \textsuperscript{150} Id. art. 6bis.
  \item \textsuperscript{151} Monica E. Antezana, \textit{The European Union Internet Copyright Directive as Even More than it Envisions: Toward a Supra-EU Harmonization of Copyright Policy and Theory}, 26 B.C. INT'L & COMP. L. REV. 415, 420 (2003).
  \item \textsuperscript{152} Id. at 424.
  \item \textsuperscript{153} Berne Convention, supra note 27. While TRIPS is the dominant intellectual property treaty in force today, the Berne Convention is still the source for international protection of moral rights since, after "strenuous objection" by the United States, the moral rights provisions of Berne were not incorporated into the TRIPS Agreement. P\textsc{aul G}\textsc{oldstein}, \textsc{International Copyright: Principles, Law and Practice} 55 (2001); TRIPS Agreement, supra note 26, art. 3, § 1.
  \item \textsuperscript{154} Ginsburg, supra note 120, at 121.
  \item \textsuperscript{155} Gunlicks, supra note 128, at 617. \textit{See also} Berne Convention, supra note 27, art. 6bis.
  \item \textsuperscript{156} Id.
\end{itemize}
young, countries may develop laws which accommodate each distinct legal system.¹⁵⁷

Both of the moral rights included in the Berne Convention, the rights of attribution and integrity, stem from the paradigm of authorship, a traditional form of intellectual property receiving treatment and protection under international law. In recent years, the concept of authorship is not judged by strict definitional confines. Professor Ginsburg comments, "[I]ndeed, even in France, 'mere des arts,' the notion of moral rights, has become somewhat more flexible in the light of the erosion of the paradigm of single authorship."¹⁵⁸ The right of attribution stems from this traditional paradigm and fulfills the author’s right to be credited for his or her own creations.¹⁵⁹ In some contexts, the right of attribution readily extends beyond the traditional realm of the visual arts, and the modern view is that it does not make sense “to confine the creator’s right to receive recognition for his work, and the public’s right to be informed about the source of his work."¹⁶⁰ In this sense, publicity rights are related because they operate to maintain the connection between the celebrity as an individual and control over the celebrity persona as a controlled commodity valued for its perceived persuasive attributes.

The right of integrity “promotes the public interest perhaps most strongly in the context of conservation of works of visual arts, but it also plays an important role to the extent that it avoids misrepresentation of deformed or altered works as those of an aggrieved author or artist.”¹⁶¹ The right of publicity also incorporates integrity rights by allowing celebrities to maintain control of the ways in which their identities are used,¹⁶² which reflects the public’s perception of the celebrity.

Although both moral rights traditionally embraced authors in the strictest sense, the meaning has slowly expanded to protect other types of authors and their works. Some scholars argue that the moral rights doctrine should be expanded to works of information technology and multimedia, arguing that,

¹⁵⁷.  Id.
¹⁵⁸.  Ginsburg, supra note 120, at 127.
¹⁵⁹.  Id. at 122.
¹⁶⁰.  Id. at 127.
¹⁶¹.  Id. at 122.
¹⁶².  See supra notes 1, 5-7 and accompanying text, for a general discussion of the right of publicity.
The logic of extending copyright to these new forms of intellectual and technological creation follows a long tradition of bringing diverse kinds of intellectual, or simply, immaterial work into the ambit of copyright law. Copyright doctrine, from which moral rights grew, proves to be a flexible and adaptable instrument of social policy, able to accommodate many of the new aspects of knowledge.\textsuperscript{163}

Just as information technology adapts and scholars accept it into the ambit of copyright law, the right of publicity encompasses a personality right aspect that fits squarely within the moral rights provisions of the Berne Convention.\textsuperscript{164} This allows moral rights to act as a surrogate for the celebrity “author” who constructs a “persona” in place of a traditional work.

Arguing for protection of publicity rights in the moral rights provisions of copyright treaties has two advantages.\textsuperscript{165} First, the focus returns to the,

\begin{quote}
[d]amage to a performer’s reputation and/or personality, thereby eliminating the need to struggle with the extent to which a given use is commercial...second, this approach would allow copyright law’s inherent mechanisms—such as the fair use doctrine—to cabin the application of this protection in situations where countervailing interests exist.\textsuperscript{166}
\end{quote}

Focusing on the reputation of the celebrity through moral rights laws allows the right of publicity to return to principles of personal autonomy, and results in each person getting to decide how their persona will be used and presented to the world.\textsuperscript{167} Analysis moves away from traditional economic justifications for the right of publicity toward rationales that focus on creative control. This is a rightful shift because “no specific amount of labor, prior exploitation or creativity is required for protection under the right of persona.”\textsuperscript{168} The two moral rights protected under the Berne Convention do not ascribe to rigid economic rationales, but instead protect social values of literary and artistic rights, more in line

\begin{footnotes}
\textsuperscript{163} Rajan, supra note 148, at 34.
\textsuperscript{164} See Rajan, supra note 148, at 35 (proposing that information technology benefits from receiving attention in part as a personal right).
\textsuperscript{165} Kwall, supra note 121, at 159.
\textsuperscript{166} Id. at 159-60.
\textsuperscript{167} PINCKAERS, supra note 12, at 425.
\textsuperscript{168} Id. Viewing the right of publicity through a moral rights lens is different from American schemes which require plaintiffs to “prove that his persona has a commercial value.” Id. at 426. Similarly, under Dutch portrait rights, the closest laws to the right of publicity, the plaintiff must also show “a professional popularity which can be exploited.” Id.
\end{footnotes}
with notions of personal autonomy and control over the persona justified by the right of publicity.  

Return again to the hypothetical involving Angelina Jolie presented in the introduction of this article. When companies misappropriate her identity and use it to advertise or promote products manufactured in a manner particularly offensive to a human rights advocate—a U.N. Goodwill Ambassador at that—that position presents a more urgent reason for Jolie to pursue equitable action rather than monetary damages for the impermissible use of her persona. She would certainly present pecuniary-based claims to the court, but damage to her reputation, meaning her right to maintain control over the use and integrity of her identity, would be the thrust of her claim against the manufacturers. The close parallel between moral rights of attribution and integrity and publicity rights would put Jolie a step closer to recovering for the right reason in a country that does not recognize rights of publicity. Ultimately, a separate right of publicity treaty must address the social value of publicity rights based in ideas of personal autonomy.

Even the right of publicity doctrine as developed in the United States arguably finds some “social” or moral roots in its early foundation. Warren and Brandeis’ famous article cradled the birth of the right of publicity as well as the right of privacy, or the “right to be let alone.” In articulating the stem of the right of publicity, Warren and Brandeis did not just recognize that it grew out of privacy, but “of man’s spiritual nature, of his feelings and intellect.” First officially recognized in

---

169. Ginsburg, supra note 120, at 121. This is analogous to Prosser’s conception of the right of publicity as encompassing two separate types of rights, one which relates to the misappropriation of the right, and the other for the offense to the rights of the personality.


171. Id. The Warren and Brandeis article continues to plead for protection of “pain, pleasure, and profit,” and from those sentiments they urged protection against “unauthorized circulation of portraits of private persons.” Id. at 195. While the authors advocated specifically for protection of private persons, if the right of publicity derives from this influential article, then the article’s acknowledgement of the more private and humiliating aspects of misappropriation of the persona, then those policies should equally factor into courts’ protection of the right of publicity—not just economic factors. This is not “compensation for mere injury to feelings,” it simply acknowledges that there are many reasons for supporting the right to publicity. Id. at 197. “[P]rotection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, as far as it consists in preventing publication, is merely an instance of enforcement of the more general right to be let alone.” Id. at 205. What is being protected is not property but “inviolable personality.” Id. “[N]ow that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must have a broader foundation.” Id. at 211. Warren and Brandeis even refer to France as already having similar rights to privacy. Id. at 214.
1953 in *Haelen Laboratories v. Topps Chewing Gum, Inc.*, the court articulated a right of publicity distinct from the right of privacy. The court elaborated on the new cause of action, and despite hints of sarcasm, laid out both economic and social rationales for supporting a right of publicity. Nevertheless, economic rationales prevail in American jurisprudence.

Professor Ginsburg recognizes that while moral rights are not pervasive in English and American law, introducing them does not disrupt controlling economic or pecuniary-based doctrines. While the goal of copyright law generally is to promote the creation of works, moral rights compliment economic rights by offering protection for the author’s “non-pecuniary” interests of her personality, thereby creating additional incentives to create. Just as Professor Ginsburg argues that the United States ought to incrementally adopt moral rights, so too should the international community begin its acceptance of the right of publicity as an economic and moral right. Adoption of the right of publicity through the Berne Convention’s moral rights provisions accomplishes the

172. *Haelen Laboratories v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). The court in this case distinguishes the right of publicity from the right to “not have [your] feelings hurt.”

173. *Id.* at 868 (For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.)

Thus, the court’s first elaboration of the right incorporates three distinct ideas. First, it leaves “bruised feelings,” to the more traditional right of privacy, not integrating it with the right of publicity. Next, the court lays out two separate notions important to the right of publicity—first, the “sore deprivation” that one *feels* from the loss of pecuniary value from their persona’s misappropriation, and second, the distinctly economic loss important to infringement of the right of publicity.

174. See supra notes 1, 5-7 and accompanying text.

175. Ginsburg, supra note 120, at 122. See also, Gunlicks, supra note 128, at 604-05. Gunlicks recognizes that many Americans “fear” moral rights, but emphasizes that “moral rights are clearly defined and limited.” *Id.* at 605.

176. Ginsburg, supra note 120, at 122. Ginsburg suggests that protection of artists’ and authors’ moral rights will create environments “more conducive to creative activity,” and that protection of the persona in this way “may be more important than immediate material gain.” She says that “adoption of moral rights sends a message that society cares about creation, and about authorship.”
introduction of an important 21st century right through an age-old common law system.  

C. Problems with Arguing for Rights of Publicity Under Moral Rights Doctrine

Similar to the formalistic barrier, works of authorship challenge the parallel protection theory because national copyright laws often require fixation of the work, despite the fact that neither the Berne Convention, nor the Universal Copyright Convention require fixation as a threshold requirement for their members. The persona may not meet this fixation requirement according to member states' specific copyright laws. For example, despite the similarities between moral and publicity rights goals, Jolie's identity claim, discussed above, would not be recognized under moral rights doctrine because they may not stem from a traditional work of authorship in which she owns rights. A right of publicity treaty would primarily protect the persona and provide redress to Jolie.

Second, though the United States does not generally recognize moral rights, U.S. law on rights of publicity is vital to the doctrine's development. Many contemporary scholars address moral rights for the specific purpose of their adoption through the common law of the U.S. copyright law system. The United States has taken steps to comply with the Berne Convention's moral rights provisions, but as long as it does not completely and officially take action regarding moral rights, the country "continues to leave the door open for other nations to refuse American initiatives to improve international protection for American authors."

Finally, while the TRIPS Agreement may arguably be the international treaty that the contemporary legal world looks to for guidance before the Berne Convention, it excludes protection for moral rights and leaves celebrity litigants wanting. An international treaty could alleviate this problem by recognizing the importance of personal autonomy in publicity rights.

177. Id. at 128.
178. See discussion of copyright fixation requirement, supra note 137.
179. Kwall, supra note 121, at 163.
180. Gunlicks, supra note 128, at 606.
181. Rajal, supra note 148, at 37 (noting that since Article 9.1 of the TRIPS Agreement does not address moral rights, the Berne Convention remains the source of law on the subject).
D. Conclusion

Moral rights doctrines can theoretically act as a surrogate to publicity rights claims. The rights of attribution and integrity are driven by forces that offer interesting, policy-based alternatives for celebrities seeking to enforce their publicity rights. In the end, scholarship reveals that, although moral rights are conventionally understood as protecting a creator's personal interests, and the right of publicity is generally viewed as an economic right, a careful look at right of publicity litigation reveals that many decisions are more concerned with redressing rights of integrity over the images of the celebrity.182

Litigants face the same barriers presented by copyright law, in addition to the challenges in countries which offer sparse, if any, protection for moral rights. Creating a publicity rights treaty incorporating moral rights concepts grounded in personal autonomy would allow celebrity litigants to enforce underlying social aspects of their publicity rights against misappropriation.

V. WIPO PERFORMANCES AND PHONOGRAMS TREATY

Recently, the international intellectual property community took steps to recognize the importance of publicity rights by creating a new treaty which specifically protects performance rights of artists. Many countries acceded to the World Intellectual Property Organization's (WIPO) Performances and Phonograms Treaty (WPPT),183 which holds out some promise for protecting publicity rights of many performers, many of which exercise that right in the United States. This may signal a coming-of-age for rights of publicity in international law.

The treaty, signed in 1996, specifically addresses the intellectual property rights of performers and producers of phonograms, including the contemporary issue of the "development of digital technology that makes it possible to transmit, receive and manipulate performances with an ease that would have been unthinkable a few years ago."184 As far as

182. Kwall, supra note 121, at 158.
184. OWEN MORGAN, INTERNATIONAL PROTECTION OF PERFORMERS' RIGHTS 196 (2002). See also PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT 42 (2001) (noting that
publicity rights are concerned, the treaty raises many of the same issues as are raised by the surrogate doctrines of copyrights and moral rights.

Article 5 of the WPPT creates a safe haven for moral rights independent from the performer’s economic rights by mandating that the performer shall have “the right to claim to be identified as the performer of his performances,” known as a right to attribution, and “to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation,” known as the right to integrity.文章 The treaty does not specify how the rights are to be exercised, the article does limit interpretations of expansive rights.文章

The WPPT’s moral right provision provides protection to “performers,” defined as “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.”文章 One place where the orbits of protection between copyright law and the right of publicity cross paths is in performances and performance values, but even then this protection is very different.文章

Some scholars note the similarities between performance and publicity rights.文章 Ultimately, the same issues confront the right of publicity under this treaty as other surrogate doctrines. The treaty does not recognize the right of publicity explicitly, and may only protect sound performances.文章 It does not address the persona underlying the performance, whatever form it takes. “Performance” itself is not defined in the WPPT, but in other treaties the performance of a “literary or artistic work” is crucial to determining whether the persona will attach to the work.文章 Thus, arguing that this treaty protects the right of publicity and the persona may be incongruent with the treaty’s original purpose,

the concern addressed by the WPPT was “preventing illicit dissemination of creative productions with development and ease of use for new media”).

185. WPPT, supra note 183, art. 5.1.
186. Morgan, supra note 184, at 198. For example, the right of attribution in the WPPT is “dictated by the manner of use of the performance,” which Morgan suggests applies to radio broadcasts or other situations in which a requirement to identify each performer in an orchestra performing a symphony, for example, might create a substantial burden on the broadcaster. The language of the treaty does not contain language about derogatory actions, which are included in the Berne Convention, arguably narrowing the scope of the WPPT treaty.
187. WPPT, supra note 183, art. 2.
188. MCCARTHY, supra note 1, § 5:46.
190. Kwall, supra note 121, at 156.
191. GOLDSTEIN, supra note 184, at 199. According to Professor Goldstein, a “work” protected under the Rome Convention must qualify as a “work” under the Berne Convention.
which is to protect performance works. The future of the right of publicity under international law turns on specific protection of the persona as opposed to the work, and the interests of artists and celebrities as distinct from their rights in traditional literary and artistic endeavors.

One noteworthy point is that the WPPT expands international intellectual property protection that was originally offered only to rights of reproduction in copyright law. It aims to provide protection against broadcasting, "mechanical reproductions of musical works," and now performers' rights. 192 This article previously discussed scholarly theories about the ability of courts to broaden the scope of traditional copyright doctrines. The WPPT suggests that the international community is ready to put these ideas into action. This trend may signify an opportunity for advocates to bring publicity rights to the forefront of the intellectual property agenda.

VI. CONCLUSION

The right of publicity, though a newcomer to intellectual property law, exists as an important way for celebrities to enforce rights relating to the development of their famous personas and control against misappropriation which damages their reputation and deprives them of its commercial value. Traditional doctrines of trademark, copyright and moral rights, which are protected under international intellectual property law, allow celebrities to craft their right of publicity claims in careful language so that they lie within the scope of existing law. However, as this article has demonstrated, the surrogate doctrines fall short of protecting the important right in its entirety.

While alternative avenues exist for claims of infringement of publicity rights, often the result does not comport with the celebrity's ultimate purpose. A celebrity may recover under trademark doctrines, but really seek to vindicate the social value of the persona. Alternatively, the celebrity may argue for protection under a moral rights doctrine, but must stretch to define the persona as an authored work of art.

The international community needs to create a new treaty or add an amendment to an existing intellectual property treaty which deals specifically with the misappropriation of the persona for the commercial

192. Id. at 246.
benefit of another. A new treaty should recognize the important elements of the rights of publicity claim developed under common and statutory law in the United States. In addition, it should account for both economic and social values which drive the celebrity to recover against those who usurp their rights.

EMILY GRANT

---

193. Either a separate treaty or an amendment to an existing, substantive intellectual property treaty like the TRIPS Agreement would establish publicity rights as an important force in the global market.