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You Are Not a Commodity: A More Efficient Approach to Commercial Privacy Rights

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YOU ARE NOT A COMMODITY: A MORE EFFICIENT APPROACH TO COMMERCIAL PRIVACY RIGHTS

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Abstract: United States common law provides four torts for privacy invasion: (1) disclosure of private facts, (2) intrusion upon seclusion, (3) placement of a person in a false light, and (4) appropriation of name or likeness. Appropriation of name or likeness occurs when a defendant commandeers the plaintiff's recognizability, typically for a commercial benefit. Most states allow plaintiffs who establish liability to recover defendants' profits as damages from the misappropriation under an "unjust enrichment" theory. By contrast, this Comment argues that such an award provides a windfall to plaintiffs and contributes to suboptimal social outcomes. These include overcompensating plaintiffs and incentivizing litigation where tortious conduct may improve the social good. Some scholars have already argued this point concerning trademark claims. This Comment is the first to apply this logic to appropriation of likeness claims.

Further, overprotecting a person's recognizability as though it is a sacred property right contributes to advertisers' appetite for commodifying consumer time. As an analogy, consider Ms. Moneybags, the owner of a shoe factory. Ms. Moneybags has no personal use for the 10,000 shoes generated by her factory every day; rather, she creates shoes to sell. She then uses sales revenue to purchase more equipment, hire more workers, and grow her business to make more money. By creating and commodifying shoes, Ms. Moneybags exploits natural resources and labor to increase her capital.

Through a similar analogy, consider Mr. Moviestar, a public personality who uses his recognizability to generate attention through media. While business models vary, he sells consumer attention to advertisers, thereby commodifying attention. Like Ms. Moneybags, Mr. Moviestar's use for the attention from the masses is limited. In turn, as consumers pay more attention to Mr. Moviestar, his recognizability grows; he then uses his recognizability to garner more consumer attention, which he continues to sell to advertisers. Ultimately, Mr. Moviestar increases his recognizability—his personal brand's value—by exploiting consumer time and attention.

Ample literature on law and economics suggests that overprotection of property rights leads to suboptimal outcomes. Likewise, if tort law overprotects public personalities' exclusive right to publicize their name or likeness, then the incentive to build their personal brand value may be inefficiently high. But public renown does not come from thin air. A personal brand is built by commodifying consumers' time and attention. Accordingly, overprotecting the exclusive right to publicize one's name or likeness may feed advertisers' appetite for consumer attention.

This Comment argues that tort damages in an appropriation of name or likeness action should be limited to the fair market value of the use. This would mitigate windfalls to plaintiffs,

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thereby easing the incentive to commodify consumer time and attention. Further, this Comment argues that, in rare instances where an excessive award might be merited, such actions are better suited for a different privacy tort.

INTRODUCTION

Suppose Sally owns a cosmetics company and seeks to increase shampoo sales. Sally adds a photo of Jennifer Aniston to the shampoo labels but never obtains Aniston's permission. Although legal doctrines vary by state, Aniston can likely sue Sally for appropriation of name or likeness.[1] Aniston would likely be able to recover the greater of (a) Sally's increased profits from the advertisement or (b) the measurable damage to Aniston's reputation that the labels caused.[2] If a jury finds that Sally's actions were particularly egregious, Sally may also owe Aniston for punitive damages (money awarded to punish Sally and deter others from similar conduct).[3] An award of the defendant's increased profits from impermissibly using the plaintiff's identity is often justified as "a means of deterring infringement and recapturing gains attributable to wrongful conduct."[4]

This Comment argues that awarding a plaintiff damages based upon a defendant's profits for an appropriation of likeness claim gives the plaintiff a windfall and contributes to inefficient outcomes. Generally, economists consider gain to be a "windfall" if it is "not foreseen by [the recipient] and are not in any degree due to efforts made, intelligence exercised, risks borne, or capital invested by them."[5] Accordingly, removing these gains should not harm the subject's incentive to engage in productive activity.[6]

In the example here, unless Sally's unpermitted picture paints Aniston in a false light[7] or reveals embarrassing details, it may not depreciate the value of Aniston's "likeness"—that is, her recognizability. Indeed, additional exposure typically feeds the attention-recognizability feedback loop, increasing the plaintiff's value.[8] As explained in more detail below,

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1. *See infra* section I.D. This hypothetical uses Sally, a fictional tortfeasor, and Jennifer Aniston, a celebrity known for cosmetic endorsements, as an arbitrary example.

2. *See infra* section I.D.2.

3. *See infra* sections I.B–D.

4. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. c (AM. L. INST. 1995).

5. A.C. PIGOU, A STUDY IN PUBLIC FINANCE 156 (3d ed. 1951); *see also Windfall*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An unanticipated benefit, . . . in the form of a profit and not caused by the recipient.").

6. *Id.*

7. That is, a false impression that harms Aniston's reputation. *See infra* section I.C.

8. As explained in more detail below, attention toward public figures fosters recognizability of

attention toward public figures fosters the recognizability of public figures.[9] Recognizability is directly related to brand value.[10] Public figures with higher brand value are then more likely to be selected into positions in which they will gain more attention, and therefore more recognizability.[11] This related cycle constitutes the attention-recognizability feedback loop.

Awarding damages measured by the defendant's profits may disproportionately and inequitably reward the plaintiff for value-added by the defendant.[12] For example, in the hypothetical above, Sally added value to the community by manufacturing, distributing, and marketing the shampoo. Because such windfall gains may be inequitable and create inefficient outcomes, damage awards should be limited to either (a) the market publicity value had the defendant negotiated with the plaintiff to use her likeness—known as "quantum meruit"[13]—or (b) the actual harm to the plaintiff's reputation if the plaintiff can demonstrate such harm.[14]

This Comment further seeks to establish that recognizability (i.e., a plaintiff's "likeness") should be conceptualized as economic capital. Under this model, recognizability is used to sell consumer attention to advertisers.[15] Thus, consumer attention is commodified for its exchange value. Additionally, market research suggests that consumer attention causes consumer attachment to public figures (e.g., celebrities and social media influencers).[16] Marketers commodify consumer attention, which leads to self-reinforcing concentrations of brand value in celebrities and, in recent years, the advent of social media "influencers."[17] Because the tort system awards overly high damages in appropriation of likeness claims, recognizability is protected too strongly, leading to suboptimal social outcomes.[18]

Part I provides an overview of the four primary privacy rights protected in United States tort law: (1) disclosure of private facts, (2) intrusion upon

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public figures. Recognizability is directly related to brand value. Further, public figures with higher brand value are more likely to be selected into positions in which they will gain more attention, and therefore more recognizability. *See infra* Part II.

9. *See infra* section II.C–D.1.

10. *See infra* section II.C–D.2.

11. *See infra* section II.D.

12. *See infra* section III.A.

13. *Quantum meruit*, BLACK'S LAW DICTIONARY (11th ed. 2019).

14. However, this Comment argues that personal brand value is rarely damaged by misappropriation. *See infra* section II.D.

15. *See infra* section II.B.

16. *See infra* Part II.

17. *See infra* section II.D.

18. *See infra* section III.A.

seclusion or private affairs, (3) publicity placing a person in a false light, and (4) appropriation of name or likeness. Part II discusses the classic "commodification" model, whereby things are produced for exchange value rather than for immediate use. Specifically, the commodification model conceptualizes money (i.e., capital, or "M") transforming into commodities ("C"), which are sold for more money ("M'" or "M Prime"). This creates an M-C-M' feedback loop, where the second M is larger than the first. Classical economists debated whether this increase in M should be conceptualized as exploitation of labor or land.[19]

Part II further discusses the attention economy as it relates to branding and how personal "brand" contributes to financial value. It then applies the commodification model to the attention economy in which public personalities build their "brand." In this application, recognizability ("R") yields attention ("A") through selection into favorable opportunities, which yields more recognizability ("R'" or "R Prime"). This creates an R-A-R' feedback loop, where the second R is larger than the first.

Part III argues that awarding defendants' profits to plaintiffs as damages in appropriation of likeness suits provides a windfall to plaintiffs, which leads to suboptimal and inefficient outcomes. Part III further explains how this problem is exacerbated by the overprotection of property rights. It seeks to establish that excessively protecting exclusive publicity rights likely benefits advertisers who wish to commodify consumer attention. Under this rationale, limiting damages to quantum meruit would lead to more efficient outcomes. However, Part III also identifies an exception to this solution. It argues that specific appropriation of likeness claims that might lead to inefficient outcomes under quantum meruit would better fit under the elements and justification of other privacy rights.

Part IV further discusses potential counterarguments against the solution proposed in Part III that damages in appropriation of likeness claims should be limited. For example, one counterargument is that, by limiting damages to the amount a defendant would have paid the plaintiff had the defendant negotiated to use the plaintiff's image, some defendants might be incentivized to take a "better to beg forgiveness than ask permission" approach. Because not all plaintiffs are willing to undergo expensive litigation, it might be profitable to never ask permission and wait until the plaintiff pursues litigation to negotiate a settlement. Many jurisdictions already address this problem by awarding punitive damages when the defendant acted intentionally or with reckless disregard to the

19. *See infra* section II.A. For example, the *value* of a pencil come both from extracting the wood, graphite, aluminum, and rubber from land and from the labor used to assemble the pencil. This grossly oversimplifies the discussion, but a more detailed discussion is outside the scope of this Comment.

plaintiff's rights. Another counterargument is that certain product endorsements may actively harm a plaintiff's reputation and forcing a plaintiff to quantify such reputational harm may be too burdensome. But this harm is usually more appropriately addressed through other privacy actions. This is not the first paper to argue that appropriation of likeness violates a commercial right rather than a privacy right.[20] However, this is the first Comment to conceptualize a plaintiff's likeness as "capital" and to argue that overprotection of the exclusive right to publicity contributes to attention commodification.

I. UNITED STATES LAW PROVIDES FOUR DISCRETE PRIVACY TORTS

United States common law generally allows four distinct tort actions for privacy invasion: (1) disclosure of private facts, (2) intrusion upon seclusion or private affairs, (3) false light, and (4) appropriation of name or likeness.[21] Privacy suits are generally governed by state law;[22] thus, the ways to establish liability, defenses, and damages vary by state.[23] Most states recognize these causes of action through statute or common law.[24] However, the rationales behind these actions are generally uniform across states, with few exceptions.[25] Rather than focusing on one state, this Comment addresses the rationale generally applicable to most states.

The following sections briefly describe the elements of these tort claims in most jurisdictions, the rationale behind each privacy tort, and the usual damage awards. Although this Comment focuses on the appropriation of name or likeness tort, this Part also gives an overview of

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20. *See, e.g.*, W. Mack Webner, *The Right of Publicity: A Commercial Property Right—Not a Privacy Right*, 84 TRADEMARK REP. 586, 603 (1994) ("The right of publicity is not the right of privacy. It should be recognized for what it is—a commercial property right, closely analogous to the trademark . . . .").

21. For a robust explanation of common law actions for invasion of privacy, see VINCENT R. JOHNSON, ADVANCED TORT LAW: A PROBLEM APPROACH 345–438 (2d ed. 2014).

22. *See id.* at 347.

23. For example, some states allow for minimum statutory recovery. *See, e.g.*, CAL. CIV. CODE § 3344(a) (West 2021) (describing the elements and remedies for misappropriation claims in California); NEV. REV. STAT. ANN. § 597.810(1)(b)(1) (West 2021) (describing the elements and remedies for misappropriation claims in Nevada); TEX. PROP. CODE ANN. § 26.013 (West 2021) (describing the elements and remedies for misappropriation claims in Texas). Others require proof of pecuniary loss. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. c (AM. L. INST. 1995).

24. *See* JOHNSON, *supra* note 21, at 347. *See generally* RESTATEMENT (SECOND) OF TORTS § 652A–E (AM. L. INST. 1977). Not all states have codified these actions through statute. *Compare* Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 234–35 (Minn. 1998) (sustaining a suit for privacy invasion based solely on common law even absent a statute), *with* Zinda v. La. Pac. Corp., 440 N.W.2d 548, 555 (Wis. 1989) (examining Wisconsin's statutory action for public disclosure of private facts).

25. *See* JOHNSON, *supra* note 21, at 345–438.

the other three privacy torts. This will facilitate later discussion of situations where appropriation claims would fare better if brought in conjunction with another privacy action.[26]

A. The Tort of Disclosure of Private Facts Directly Protects a Person from Exposure of Embarrassing Details

A defendant is liable for disclosure of private facts when the defendant "gives publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."[27] For such publicity to be actionable, the plaintiff must have a reasonable expectation of privacy concerning the publicized subject matter.[28] Additionally, the "publicity" requirement of a disclosure action differs from the "publication" required in a defamation claim;[29] while the latter merely requires a statement to be communicated to a third party, the former requires a matter to be made public "by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[30] For example,

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26. Specifically, the true interest hurt in some misappropriation claims might be one's right to be left alone or free from embarrassment. Accordingly, damages should be awarded for this actual harm, and not be awarded under the guise of a commercial interest. *See infra* sections III.C.1–3.

27. RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977). While the Restatement titles the tort as "Publicity Given to Private Life," numerous cases and texts use the more direct name of "disclosure of private facts" or use that term interchangeably with "publicity given to private life." *See, e.g.*, *id.* § 652D cmt. h; JOHNSON *supra note* 21, at 347 (titling its section on the tort as "Disclosure of Private Facts"; Doe v. Grp. Health Coop. of Puget Sound, 85 Wash. App. 213, 220–21, 932 P.2d 178, 181 (1997) ("[Plaintiff] asserted [Defendant] invaded his right to privacy by public disclosure of private facts."), *overruled by* Reid v. Pierce Cnty., 136 Wash. 2d 195, 961 P.2d 333 (1998); Judge v. Saltz Plastic Surgery, P.C., 367 P.3d 1006, 1011 (Utah 2016) (using "disclosure of private facts"); *Gill v. Snow*, 644 S.W.2d 222, 224 (Tex. App. 1982) (same), *abrogated on other grounds by* Cain v. Hearst Corp., 878 S.W.2d 577 (Tex. 1994). This Comment uses "disclosure of private facts" because it more directly speaks to the action for which a defendant is liable.

28. *See, e.g.*, Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 490 (Cal. 1998) ("The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source."); Pontbriand v. Sundlun, 699 A.2d 856, 865 (R.I. 1997) (explaining whether plaintiffs had a reasonable expectation of privacy in disclosed facts constitutes, in part, a question of fact that precludes summary judgment); Hoskins v. Howard, 971 P.2d 1135, 1141 (Idaho 1998) (holding that "[t]o establish a claim for public disclosure of private facts," the plaintiff must have some reasonable expectation of privacy in the material disclosed).

29. A defendant is liable for defamation when the defendant makes "a false statement . . . concerning another" in "an unprivileged *publication* to a third party." RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977) (emphasis added). Defamation requires "publication." *Id.* This can be as simple as telling an untruth to one other person. *See id.* § 577 cmt. a ("Any act by which the defamatory matter is intentionally or negligently communicated to a third person is a publication.").

30. *Id.* § 652D cmt. a.

a creditor who writes a letter to the employer of a debtor, informing the employer that the debtor owes money is not liable because the information was not made public.[31] But oral communication "in a public restaurant with numerous customers" in attendance "satisfies any reasonable requirement as to publicity."[32] Further, the disclosure must be offensive to a reasonable person.[33] It is not sufficient that the information was confidential[34] or that the specific plaintiff felt humiliated[35]—the disclosure must be offensive or objectionable under an objective standard.[36] In other words, the disclosure must be "offensive and objectionable to the reasonable person."[37]

For example, *Cowles Publishing Co. v. State Patrol*[38] justified this tort as a way to prevent others from airing one's dirty laundry.[39] The court explained that everyone has phases or facts about themselves that they intentionally keep hidden from the public eye, such as sexual relations, family quarrels, unpleasant illnesses, personal letters, and a person's history that they prefer to leave behind.[40] "When these intimate details of [a person's] life are spread before the public gaze in a manner highly offensive to the ordinary reasonable [person], there is an actionable invasion of . . . privacy."[41]

Accordingly, one who has established liability for disclosure of private facts may be entitled to recover damages measured in two ways. First, a plaintiff may be able to recover damages measured by "the harm to [the

31. *See id.* § 652D cmt. a, illus. 1.

32. Biederman's of Springfield, Inc. v. Wright, 322 S.W.2d 892, 898 (Mo. 1959).

33. *Id.* at 896.

34. *See id.* at 896 (holding that, under Missouri law, this tort does not "depend for its validity upon a breach of confidence"); *see also* Bratt v. Int'l Bus. Machs. Corp., 785 F.2d 352, 359 (1st Cir. 1986) (despite the plaintiff's contention that the defendant "improperly apprised" others of private facts about the plaintiff, upholding a summary judgment dismissal because it was "not of such a personal nature that an intrusion upon privacy results from its disclosure").

35. Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993) (holding that this tort "requires . . . that the private facts publicized be such as would make a *reasonable* person deeply offended" (emphasis added)).

36. *See* Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 478 (Cal. 1998).

37. *Id.* (quoting Diaz v. Oakland Trib., Inc., 188 Cal. Rptr. 762, 768 (Ct. App. 1983)).

38. 109 Wash. 2d 712, 748 P.2d 597 (1988).

39. *See id.* at 721, 748 P.2d at 602. The elements and rationale of privacy torts are similar between states. *See generally* JOHNSON, *supra* note 21, at 345–438. Accordingly, an analysis of one state's regime will be generally applicable to others.

40. *Cowles Pub. Co.*, 109 Wash. 2d at 721, 748 P.2d at 602 (citing RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. L. INST. 1977)).

41. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. L. INST. 1977)).

plaintiff's] interest in privacy resulting from the invasion."[42] Alternatively, a plaintiff may be able to recover damages based upon "[the plaintiff's] mental distress proved to have been suffered if it is of a kind that normally results from such an invasion."[43]

B. The Tort of Intrusion upon Seclusion or Private Affairs Protects Plaintiffs from Offensive Disturbance

A defendant is liable for "intrusion upon seclusion" or private affairs when the defendant "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of [the plaintiff] or [the plaintiff's] private affairs or concerns, . . . if the intrusion would be highly offensive to a reasonable person."[44] To establish liability, a plaintiff must show three elements: (1) that the defendant intruded, (2) that the intrusion invaded the plaintiff's private affairs or concerns, and (3) that the intrusion was highly offensive to the reasonable person.[45] First, the plaintiff must show that the defendant intruded. For example, a photograph taken at an airport—a place open to the public—is not tortious because there is no intrusion.[46] This first element is key to the rationale behind the intrusion upon seclusion tort: this action protects the "right to be left alone."[47]

Second, the plaintiff must demonstrate that the defendant invaded "the solitude or seclusion of [the plaintiff's] private affairs or concerns."[48] As with disclosure of private facts, cases involving intrusion often upon seclusion emphasize that the defendant must have intruded into a place where the plaintiff had a reasonable expectation of privacy.[49] For example, one court held that a plaintiff had no expectation of privacy from her employer in her file storage system because it contained work files

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42. Reid v. Pierce Cnty., 136 Wash. 2d 195, 205 n.4, 961 P.2d 333, 338 n.4 (1998) (quoting RESTATEMENT (SECOND) OF TORTS § 652H (AM. L. INST. 1977)); *see also* Doe v. Methodist Hosp., 690 N.E.2d 681, 683 (Ind. 1997) ("As damages, he alleged that he suffered 'embarrassment, humiliation and mental distress.'").

43. *Reid*, 136 Wash. 2d at 205 n.4, 961 P.2d at 338 n.4.

44. RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977).

45. *See id.*

46. *See* Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1087 (E.D. Pa. 1980).

47. *See* Shorter v. Retail Credit Co., 251 F. Supp. 329, 330 (D.S.C. 1966) ("So the right to be left alone might be thought of as a complex of several torts . . . ." (internal quotation marks omitted)); *see also* L.A. Lakers, Inc. v. Fed. Ins. Co., 869 F.3d 795, 801 (9th Cir. 2017) ("This form of invasion of privacy has been described as 'the right to be let alone.'" (quoting Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 678 (Ct. App. 1986))).

48. RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977).

49. *Id.*

along with her private files.[50] Another held that an accident victim had a reasonable expectation of privacy in a hospital room.[51] Even though the "hospital patient does not own [their] hospital room . . . the patient [had] the exclusive right to occupy that room, at least as to hospital outsiders."[52] In short, the plaintiff bears the burden of demonstrating both a reasonable expectation of privacy and an intrusion.

Third, such an intrusion must "be highly offensive to a reasonable person."[53] For example, an appellate court in *Alderson v. Bonner*[54] upheld a judgment against a defendant caught in the driveway outside a home with a video camera and tapes of two residents "in various states of undress, engaging in everyday activities such as getting dressed, exercising and using the bathroom."[55] The court held that even though "standing on another's front porch and looking through a window in the door is not normally offensive[,] . . . [w]hen an uninvited man lurks at the front door at night, peering in the window at a young female, with video camera in hand . . . such conduct is objectionable."[56] The *Pendleton v. Fassett*[57] court allowed an intrusion upon seclusion claim against police officers and denied a motion for summary judgment because there was a factual dispute as to whether a search was highly offensive.[58] In that case, the officers forced the plaintiff to "bare her breasts as part of the search."[59] These cases provide examples of acts of intrusion that can satisfy this third element.

Unlike other privacy torts, which require some demonstration of publicity or publication,[60] this tort primarily protects a plaintiff's "right to be left alone."[61] For example, secretly filming one's neighbor getting

50. *See* Clark v. Teamsters Loc. Union 651, 349 F. Supp. 3d 605, 622 (E.D. Ky. 2018) ("[Plaintiff] does not have a reasonable expectation of privacy in the Dropbox account, which stored a mixture of work-related and personal documents and was tied to her work e-mail."). While specific rules vary by jurisdiction, these examples are representative of the law of most states.

51. Shulman v. Grp. W Prods., Inc., 59 Cal. Rptr. 2d 434, 455 (Ct. App. 1996), *aff'd in part, rev'd in part* 955 P.2d 469 (Cal. 1998).

52. *Id.*

53. RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977).

54. 132 P.3d 1261 (Idaho Ct. App. 2006).

55. *Id.* at 1264.

56. *Id.* at 1267.

57. No. 08–227–C, 2009 WL 2849542 (W.D. Ky. Sept. 1, 2009).

58. *Id.* at *15.

59. *Id.*

60. *Supra* section I.A–B.

61. *See* Shorter v. Retail Credit Co., 251 F. Supp. 329, 331 (D.S.C. 1966) ("'The right to be left alone' describes this category of invasion of privacy more accurately than it does any of the others, and it is the most difficult aspect of the action for the courts to deal with, as there are fewer tangible

dressed would probably not cause economic or reputational harm if the filmer has no intention of distributing the film.[62] But such an offensive, intrusive act can be intrinsically harmful enough to justify compensation.[63] In short, this tort does not necessarily protect an economic or reputational interest, but the right against being watched or observed without consent.

Concerning damages, some jurisdictions award the plaintiff for both compensatory and punitive damages if the defendant acted particularly egregiously.[64] Additionally, some courts have awarded merely nominal damages—a small, token dollar amount to recognize a legal wrong—where the plaintiff cannot prove actual damage.[65]

C. The Tort of Publicity Placing a Person in False Light Protects Plaintiffs when Defendants' Conduct Does Not Quite Rise to the Level of Defamation

A defendant is liable for publicizing information about a plaintiff that places the plaintiff in a false light if (1) the false impression publicized "would be highly offensive to a reasonable person," and (2) the defendant knew or recklessly disregarded that the impression was false.[66] This action is often used as an alternative when the defamation elements[67] are not quite met, or when plaintiffs are merely "made to appear before the public in an objectionable false light or false position, or in other words,

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factors upon which to base a decision."); *see also* L.A. Lakers, Inc. v. Fed. Ins. Co., 869 F.3d 795, 801 (9th Cir. 2017) ("This form of invasion of privacy has been described as 'the right to be let alone.'" (quoting Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 678 (Ct. App. 1986)).

62. *See* Alderson v. Bonner, 132 P.3d 1261, 1267 (Idaho Ct. App. 2006) (explaining that injury was to plaintiff was "primarily a mental one," rather than a reputational or economic harm (quoting Peterson v. Idaho Nat'l Bank, 367 P.2d 284, 287 (1961)).

63. *See id.* at 1267.

64. *See, e.g.*, Fletcher v. Price Chopper Foods of Trumann, Inc., 220 F.3d 871, 879 (8th Cir. 2000) (explaining lower court's overturn of punitive damages award as based on defendant's lack of "extraordinary conduct" or "malice or calloused indifference"); Reuber v. Food Chem. News, Inc., 899 F.2d 271, 277 (4th Cir. 1990), *rev'd en banc*, 925 F.2d 703 (4th Cir. 1991).

65. *See, e.g.*, Sabrina W. v. Willman, 540 N.W.2d 364, 371 (Neb. Ct. App. 1995) ("[I]n an action for invasion of privacy pursuant to [NEB. REV. STAT.] § 20–203, the damages that a plaintiff may recover are (1) general damages for harm to the plaintiff's interest in privacy which resulted from the invasion; (2) damages for mental suffering; (3) special damages; and (4) if none of these are proven, nominal damages.").

66. RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977).

67. Defamation elements are: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Id.* § 558.

otherwise than as [they are]."[68] While this action is similar to defamation, it does not require that the defendant expressed false statements of fact about the plaintiff.[69] Rather, it merely requires that the defendant "placed [the plaintiff] before the public in a false position."[70] Some states reject the action altogether due to concerns about its usefulness[71] or procedural safeguards.[72] Other states reject the false light claim as a distinct action to eliminate overlap with defamation.[73]

To bring a false light claim, a plaintiff must show three elements: (1) a false assertion, (2) that the assertion was publicized, and (3) that the false impression would be "highly offensive to a reasonable person."[74] A plaintiff must first show that a defendant made a false assertion of fact.[75] A plaintiff must then show "publicity"—as opposed to "publication"—just as one would in an action for disclosure of private facts.[76] Finally, a plaintiff must show the false impression was highly offensive to a reasonable person—an objective standard.[77] For example, a reasonable person would not find it highly offensive that a celebrity endorsed a

68. Roe *ex rel.* Roe v. Heap, No. 03AP–586, 2004 WL 1109849, at *22 (Ohio Ct. App. May 11, 2004).

69. Eastwood v. Cascade Broad. Co., 106 Wash. 2d 466, 471, 722 P.2d 1295, 1297 (1986) ("A plaintiff need not be defamed to bring a false light action: 'It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position.'" (quoting RESTATEMENT (SECOND) OF TORTS § 652E cmt. b (AM. L. INST. 1977)).

70. RESTATEMENT (SECOND) OF TORTS § 652E cmt. b (AM. L. INST. 1977).

71. *See* Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1113 (Fla. 2008) ("Although we acknowledge that a majority of the states have recognized the false light cause of action, we are struck by the fact that our review of these decisions has revealed no case, nor has one been pointed out to us, in which a judgment based solely on a false light cause of action was upheld.").

72. Cain v. Hearst Corp., 878 S.W.2d 577, 579–80 (Tex. 1994) ("We reject the false light invasion of privacy tort for two reasons: 1) it largely duplicates other rights of recovery, particularly defamation; and 2) it lacks many of the procedural limitations that accompany actions for defamation, thus unacceptably increasing the tension that already exists between free speech constitutional guarantees and tort law.").

73. *See* Cockram v. Genesco, Inc., 680 F.3d 1046, 1057 (8th Cir. 2012) (holding that, under Missouri law, a claim for false light should have been made under defamation law); Smith v. Stewart, 660 S.E.2d 822, 834 (Ga. Ct. App. 2008) (disallowing a false light claim under Georgia law when it was "encompassed" by the plaintiff's defamation claim).

74. *See* RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977).

75. Seaquist v. Caldier, 8 Wash. App. 2d 556, 565, 438 P.3d 606, 612 (2019); Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 742 F. Supp. 1359, 1372 (N.D. Ill. 1990).

76. Peacock v. Retail Credit Co., 429 F.2d 31, 32 (5th Cir. 1970) ("[N]o claim was shown for invasion of privacy because plaintiff failed to show any physical trespass or 'public' disclosure of private facts."); Devlin v. Greiner, 371 A.2d 380, 462 (N.J. Super. Ct. Law Div. 1977) ("One who gives publicity to a matter concerning another which places the other before the public in a false light is subject to liability to the other for invasion of privacy . . . ."); *see also infra* section I.A.

77. Lemon v. Harlem Globetrotters Int'l, Inc., 437 F. Supp. 2d 1089, 1108 (D. Ariz. 2006).

certain sports team's apparel.[78] However, falsely attributing authorship of a tabloid article or falsely ascribing quoted material may meet this objective standard.[79]

Concerning damages, plaintiffs in false light actions must show evidence of special damages, regardless of the type of false statement that the defendant made.[80] However, for courts to award punitive damages, the plaintiff must show that the defendant acted with "reckless disregard of the truth."[81]

D. Appropriation of Name or Likeness Protects the Value Associated with the Exclusive Right to Publicize One's Identity

The Restatement (Second) of Torts explains that a defendant "who appropriates to [the defendant's] own use or benefit the name or likeness of another is subject to liability to the other for invasion of [the plaintiff's] privacy."[82] Appropriation of name or likeness is the primary focus of this Comment. Damages vary by jurisdiction but can constitute either pecuniary gain to the defendant from the loss,[83] pecuniary damage to the

78. *Id.*

79. Dempsey v. Nat'l Enquirer, 702 F. Supp. 934, 937 (D. Me. 1989). At particular issue in this case, the Supreme Court held in *Time, Inc. v. Hill* that both defamation and false light claims under state law require the plaintiff to demonstrate actual malice if the plaintiff is a public official. 385 U.S. 374, 386 (1967).

80. Contrast this rule to defamation cases, in which certain types of defamation (e.g., statements that the plaintiff is a criminal) are defamatory "per se," and require no proof of special damages; this rule does not apply to false light claims. *See* Norris v. Moskin Stores, Inc., 132 So. 2d 321, 323 (Ala. 1961); Reed v. Real Detective Pub. Co., 162 P.2d 133, 136–37 (Ariz. 1945); Fairfield v. Am. Photocopy Equip. Co., 291 P.2d 194, 197 (Cal. Dist. Ct. App. 1955); Cason v. Baskin, 20 So. 2d 243, 250 (Fla. 1944); Flake v. Greensboro News Co., 195 S.E. 55, 59 (N.C. 1938); Sutherland v. Kroger Co., 110 S.E.2d 716, 722–23 (W. Va. 1959).

81. Cantrell v. Forest City Pub. Co., 419 U.S. 245, 245 (1974).

82. RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977).

83. *See, e.g.*, CAL. CIV. CODE § 3344(a) (West 2021) (allowing for $750 minimum statutory damages, harm from the unauthorized use, or from profits from the unauthorized use that are attributable to the use and not taken into account in computing actual damages); 765 ILL. COMP. STAT. ANN. 1075/40(a) (West 2020) (allowing for the greater of $1,000 statutory damages or actual damages, profits derived from the unauthorized use, or both); IND. CODE ANN. § 32-36-1-10(1) (West 2021) (allowing for the greater of $1,000 statutory damages or actual damages, including profits derived from the unauthorized use); TENN. CODE ANN. § 47-25-1106(d)(1) (West 2021) (allowing for actual damages suffered as a result of the infringement and profits attributable to such use); TEXAS PROP. CODE ANN. § 26.013(a) (West 2021) (allowing for the greater of damages sustained or $2,500, plus profits from unauthorized use, exemplar damages, and attorneys' fees); WIS. STAT. ANN. § 995.50(1) (West 2021) (allowing for injunctive relief, compensatory damages based on the defendant's profits *or* the plaintiff's harm, and attorneys' fees).

plaintiff's reputation, [84] or the market value of the unauthorized use.[85] Some treatises have compared the rationale behind such damages to that of trademark infringement.[86] Specifically, unlike other privacy torts that protect a person's reputation or personal comfort, appropriation of likeness claims protect the value of the exclusive right to publicize one's identity. [87]

1. The Elements of an Appropriation of Name or Likeness Claim

A plaintiff bringing an appropriation of name or likeness claim must demonstrate that a defendant (1) used the plaintiff's identity (2) for some purpose or benefit to the defendant.[88] First, although most cases describe appropriation of "name or likeness," they typically refer to the misuse of a plaintiff's identity.[89] One may freely change their name to Jonathan Van Ness, Tan France, Karamo Brown, or Bobby Berk.[90] But using those individual's *identities* for some benefit would be actionable.[91]

Second, the defendant's use must be for some purpose or benefit to the defendant. Most appropriation claims involve *commercial* benefits to the defendant.[92] A benefit is "commercial" if it advances some business or financial interest.[93] For example, New Jersey does not allow appropriation

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84. Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1103–04 (9th Cir. 1992) (awarding damages for both injury to goodwill and the current market value of the use), *abrogated on other grounds by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014); Big Seven Music Corp. v. Lennon, 554 F.2d 504, 512 (2d Cir. 1977) (awarding damages for value of injury to reputation from use with inferior merchandise); Clark v. Celeb Pub., Inc., 530 F. Supp. 979, 983–84 (S.D.N.Y. 1981) (awarding damages for the diminished value of plaintiff's services as a model resulting from defendant's use of her photograph in a pornographic magazine).

85. J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY 11-69 (2d ed. 2005).

86. *See, e.g.*, MCCARTHY, *supra* note 85, at 11-30 to -31 (appropriation of likeness is analogous to the body of law on measuring damages for the infringement of other forms of "intellectual property"); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. d (AM. L. INST. 1995) (citing directly to analogous rules to trademark damages).

87. *See* RESTATEMENT (SECOND) OF TORTS § 652C cmt. c (AM. L. INST. 1977); *see also* James v. Bob Ross Buick, Inc., 855 N.E.2d 119, 122 (Ohio Ct. App. 2006) (holding that the tort action for appropriation essentially affords a civil remedy for forgery).

88. JOHNSON, *supra* note 21, at 412, 432; *see also* RESTATEMENT (SECOND) OF TORTS § 652C cmt. a, b (AM. L. INST. 1977).

89. JOHNSON, *supra* note 21, at 413.

90. *See id.* Jonathan Van Ness, Tan France, Karamo Brown, and Bobby Berk are celebrity hosts of the Netflix reality show, *Queer Eye*.

91. *See* RESTATEMENT (SECOND) OF TORTS § 652C cmt. c (AM. L. INST. 1977); *see also James*, 855 N.E.2d at 123 (distinguishing "the mere incidental use of a person's name and likeness, which is not actionable, from appropriation of the benefits associated with the person's identity, which is" (quoting Zacchini v. Scripps-Howard Broad. Co., 351 N.E.2d 454, 458 (Ohio 1976))).

92. JOHNSON, *supra* note 21, at 432.

93. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. b (AM. L. INST. 1995).

claims unless the plaintiff can prove a commercial benefit to the defendant.[94] Indeed, *Jeffries v. Whitney E. Houston Academy P.T.A.*[95] held that an appropriation claim was not actionable when the defendant filmed students at an elementary school because there was no evidence that the defendant received a commercial benefit.[96] Generally, misappropriation actions that do not involve some commercial benefit to the defendant involve impersonating someone to induce others to disclose confidential information.[97]

Regardless of whether states require a personal or commercial benefit, the law treats the exclusive right to publicize one's identity like a property right. The Restatement (Second) of Torts, for example, explicitly treats the exclusive right to publicize one's identity like a property right.[98] For example, if an electronics company creates a television advertisement featuring a figure meant to resemble Vanna White on the set of Wheel of Fortune, then the electronics company has misappropriated White's likeness.[99]

The American Law Institute drafted its explanation of the right of publicity in 1977 to cover both commercial and noncommercial uses of a plaintiff's name or likeness.[100] Courts cite this rule in both instances. But the Restatement (Third) of Unfair Competition—a legal treatise that focuses specifically on commercial tort law—provides more recent guidance: "One who appropriates the commercial 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 for the relief [of injunctive relief and monetary relief]."[101]

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94. Jeffries v. Whitney E. Houston Acad. P.T.A., No. A-1888-08T3, 2009 WL 2136174, at *2 (N.J. Super. Ct. App. Div. July 20, 2009).

95. *Id.* at *4.

96. *Id.*; *see also* Rogers v. Grimaldi, 875 F.2d 994, 1004–05 (2d Cir. 1989) ("[Some] courts, citing their concern for free expression, have refused to extend the right of publicity to bar the use of a celebrity's name in the title and text of a fictional or semi-fictional book or movie.").

97. *See* RESTATEMENT (SECOND) OF TORTS § 652C cmt. b, illus. 3 (AM. L. INST. 1977).

98. *Id.* § 652C cmt. a (The right of publicity "is in the nature of a property right.").

99. This was the subject of an actual case in *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992). White's claim survived summary judgment because she alleged sufficient facts showing that Samsung appropriated her identity through its "Vanna White" ad. *Id.* at 1399. For further examples, see RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977).

100. *See* RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (AM. L. INST. 1977)

101. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995). For an explanation of damages, see *id*. §§ 48–49.

2. Damage Calculation in an Appropriation of Name or Likeness Claim

Generally, the appropriation tort protects the value of one's identity rather than the identity itself.[102] Accordingly, the Restatement (Third) of Unfair Competition describes damage awards in a commercial appropriation of likeness claim as (a) "the pecuniary loss to the other caused by the appropriation," or (b) the defendant's "own pecuniary gain resulting from the appropriation, whichever is greater."[103] Some states provide for minimum statutory recovery.[104] While some plaintiffs are awarded damages based on their pecuniary loss through the defendant's use,[105] most are awarded damages valued at the benefit to the defendant of the unauthorized use (i.e., the "market value" of the unauthorized use).[106]

a. The Rationale Behind Damage Calculation in an Appropriation of Name or Likeness Claim

Generally, the appropriation tort does not protect one's *identity* per se; it rather protects the *value* associated with that identity. [107] The defendant generally "must have appropriated to [the defendant's] own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness."[108] Accordingly, compensatory damage to the value of one's identity appears consistent with longstanding tort principles that compensate victims for harm.[109]

The defendant's increase in profits from impermissibly using the plaintiff's identity is often justified as "a means of deterring infringement and recapturing gains attributable to wrongful conduct."[110] Because the defendant's gains may not equal the plaintiff's pecuniary loss, "an award

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102. *See* Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1010 (N.H. 2003); *see also* Dwyer v. Am. Express Co., 652 N.E.2d 1351, 1355 (Ill. App. Ct. 1995).

103. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49(1) (AM. L. INST. 1995)

104. *See* sources cited *supra* note 23 and accompanying text.

105. *See* cases cited *supra* note 84.

106. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 (AM. L. INST. 1995) (citing Nat'l Bank of Com. v. Shaklee Corp., 503 F. Supp. 533 (W.D. Tex. 1980); Grant v. Esquire, Inc., 367 F. Supp. 876 (S.D.N.Y. 1973); Apple Corps Ltd. v. Leber, No. C 299149, 1986 WL 215081 (Cal. Super. Ct. June 3, 1986); Alonso v. Parfet, 325 S.E.2d 152 (Ga. 1985); Cabaniss v. Hipsley, 151 S.E.2d 496 (Ga. Ct. App. 1966)).

107. *Remsburg*, 816 A.2d at 1010; *see also Dwyer*, 652 N.E.2d at 1351.

108. RESTATEMENT (SECOND) OF TORTS § 652C cmt. c (AM. L. INST. 1977)

109. *See* Lugosi v. Universal Pictures, 603 P.2d 425, 438 (Cal. 1979) (en banc) (Bird, C.J., dissenting).

110. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. c (AM. L. INST. 1995).

of the defendant's profits can result in a windfall to the plaintiff."[111] But the fact that plaintiffs make no profit from their identity—either because they lack the desire or wherewithal to do so—may not justify denying plaintiffs damages for unjust enrichment.[112] Thus, plaintiffs have the option to recover for a defendant's profits.

b. Injury to the Plaintiff's Personal or Commercial Interests Caused by the Appropriation

Ordinarily, plaintiffs may recover for damage to both their commercial and personal interests caused by the defendant's misappropriation.[113] For example, after a publisher impermissibly used an actress's photographs in a "low quality and very explicit pornographic magazine," the court awarded the actress damages for both her mental anguish and economic injury to her proprietary interest in her identity due to the unauthorized use.[114] The court considered ridicule by friends and family, sleep loss, and mental anguish, as well as harm to her business associations and ability to work in her profession.[115] Similarly, when an automobile association used the identity of an accident victim (who was the wife of a well-known tire salesman) for sales purposes without the victim's permission, the victim was not barred from recovering for both commercial and emotional harm.[116]

Damage to the plaintiff's interests most commonly involves damage to the plaintiff's professional standing or publicity value.[117] For example, the defendant's service or product may be shoddy or inconsistent with the plaintiff's cultivated personal image; the plaintiff may have already licensed their identity for competing goods, and the defendant's use may foreclose that field from additional licensing opportunities; the defendant's use may dilute the plaintiff's reputation, depreciating any endorsement value; or the defendant may associate a plaintiff's name with

111. *Id.*

112. *See* MCCARTHY, *supra* note 85, at 11-82 to -83; *see also Lugosi*, 603 P.2d at 438 (Bird, C.J., dissenting) (noting that plaintiffs should be entitled to profits unjustly reaped by defendants in a misappropriation case, even where the plaintiffs may not have commercially exploited their likenesses themselves).

113. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. b (AM. L. INST. 1995).

114. Clark v. Celeb Pub., Inc., 530 F. Supp. 979, 981 (S.D.N.Y. 1981). In that case, Lynda Clark, a model and actress, sued Celeb Publishing, Inc., a "low quality and very explicit pornographic magazine." *Id.*

115. This case was complicated by the fact that the plaintiff suffered severe weight loss due to mental anguish after the defendant's actions, which likely further impaired her ability to model. *Id.*

116. Candebat v. Flanagan, 487 So. 2d 207, 209, 212 (Miss. 1986).

117. MCCARTHY, *supra* note 85, at 11-78.

a product or service that is socially or politically unpopular.[118] In one case, a plaintiff's ostensible association with inferior merchandise caused harm to the fair market value of the plaintiff's reputation; accordingly, the court awarded compensation for that harm.[119] In another case, a made-up endorsement or association with additional products diluted the market value of the plaintiff's identity, for which the court allowed compensation.[120] For example, the introductory hypothetical exemplifies how damage to Aniston's reputation could occur if Sally's shampoo is of low quality or damages consumers' hair. Damage to a plaintiff's professional standing or publicity value can thus be recoverable in most states.

c. Pecuniary Gain to the Defendant

Several states explicitly allow a plaintiff to recover a defendant's profits from the appropriation as an "ordinarily available" remedy.[121] States that have codified this remedy include California,[122] Illinois,[123] Indiana,[124] Tennessee,[125] Texas,[126] and Wisconsin.[127] Even in states where such recovery is not codified, recovering the infringer's profits is typically open to plaintiffs under state common law, as long as there is no double recovery with pecuniary loss.[128] Similar to copyright law, a plaintiff can often recover the defendant's profits (or "unjust enrichment") even if the defendant more efficiently uses the plaintiff's likeness than the plaintiff.[129] For example, when a business used an unauthorized poster of Elvis Presley to bolster sales, the court granted the plaintiff "an amount equal to the profits received by the defendant from the unauthorized sale of the 'IN MEMORY' poster," even though the award may have constituted "a windfall in the form of profits from the use of Presley's name and

118. *Id.* (citing Douglass v. Hustler Mag., Inc., 769 F.2d 1128, 1138 (7th Cir. 1985); Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129 (Wis. 1979)).

119. Big Seven Music Corp. v. Lennon, 554 F.2d 504, 509 (2d Cir. 1977).

120. *Hirsch*, 280 N.W.2d at 129; *see also* Lugosi v. Universal Pictures, 603 P.2d 425, 434 (Cal. 1979) (Bird, C.J., dissenting).

121. MCCARTHY, *supra* note 85, at 11-81.

122. CAL. CIV. CODE § 3344(a) (West 2021).

123. 765 ILL. COMP. STAT. ANN. 1075/40(a)(1) (West 2020).

124. IND. CODE ANN. § 32-36-1-10(1)(B) (West 2021).

125. TENN. CODE ANN. § 47-25-1106(d)(1) (West 2021).

126. TEX. PROP. CODE ANN. § 26.013(a)(2) (West 2021).

127. WIS. STAT. ANN. § 995.50(1)(b) (West 2021).

128. MCCARTHY, *supra* note 85, at 11-82.

129. *Id.* (citing Taylor v. Meirick, 712 F.2d 1112, 1120 (7th Cir. 1983)).

likeness."[130]

d. The Market Value of the Appropriation

Rather than compensating for the plaintiff's loss or defendant's gain, several courts have compensated plaintiffs based on the marketplace value of the property right that the defendant appropriated.[131] Specifically, these courts awarded the fair market value of using the plaintiff's image had the plaintiff and defendant negotiated for the right before the use.[132] For example, when an infringer falsely claimed that a celebrity endorsed her product, a court ascertained the market value of the endorsement through expert testimony as to the amount paid to comparable celebrities for comparable endorsements.[133] Hearkening back to the introductory example, if a court finds that Aniston could have demanded five-hundred thousand dollars in a deal to endorse Sally's shampoo, then the court would probably award Aniston five-hundred thousand dollars in damages under this regime.

Even for noncelebrities, one's persona value can be a quantifiable question for a trier of fact.[134] For example, one court awarded a three-year-old child $100 for misappropriation because a modeling fee for a child with a similarly "endearing appearance" would have received a similar sum.[135] As will be discussed in more detail below, this method of awarding damages contributes to the most optimal outcomes.

3. Comparison to Trademark Damages

Commentators often justify damage calculation in appropriation of likeness claims through comparison to trademark infringement actions.[136]

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130. Factors Etc., Inc. v. Pro Arts, Inc., 496 F. Supp. 1090, 1093–104 (S.D.N.Y. 1980), *rev'd on other grounds*, 652 F.2d 278 (2d Cir. 1981).

131. MCCARTHY, *supra* note 85, at 11-83.

132. *Id.*

133. *See, e.g.*, Nat'l Bank of Com. v. Shaklee Corp., 503 F. Supp 533, 546–47 (W.D. Tex. 1980) (explaining that plaintiff and defendant each presented expert testimony as to the commercial licensing value of plaintiff's persona); Grant v. Esquire, Inc., 367 F. Supp 876, 881 (S.D.N.Y. 1973) ("[T]he Court can take judicial notice that there is a fairly active market for exploitation of the faces, names and reputations of celebrities, and such market—like any other—must have its recognized rules and experts."); *see also* James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 651 (1973) (stating that a plaintiff can prove the value of their identity by reference to the current market rate for endorsements of celebrities of similar stature).

134. MCCARTHY, *supra* note 85, at 11-70 to -71.

135. Bowling v. Missionary Servants of Most Holy Trinity, 972 F.2d 346, *5 (6th Cir. 1992) (unpublished table decision).

136. *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. d (AM. L. INST. 1995)

In trademark cases, plaintiffs are statutorily entitled to a defendant's profits, yet courts imply a willfulness requirement to prevent inequitable windfall gains.[137] The Trademark Act of 1946[138] states that once a plaintiff proves infringement, "the plaintiff shall be entitled . . . subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action."[139] However, most courts will not award a defendant's profits unless the plaintiff can show that a defendant intentionally infringed the plaintiff's trademark.[140] These courts are concerned that awarding a defendant's profits "may overcompensate for a plaintiff's actual injury and create a windfall judgment at the defendant's expense."[141] As this Comment seeks to establish, these arguments against generous trademark infringement awards can and should be applied when awarding damages for misappropriation claims.

Windfall awards in trademark cases tend to occur when a money judgment is based on some proportion of the defendant's revenue rather than the plaintiff's injury.[142] Often the judgment amount in trademark cases depends more on "the efficiency of the infringing operation than the injury to the trademark owner or culpability of the infringer."[143] Accordingly, many courts expressly limit damages based on defendant profits when the defendant did not intentionally infringe the plaintiff's

("[I]t is widely assumed that the defendant's profits are an appropriate measure of relief in right of publicity cases under rules analogous to the recovery of profits in trademark, trade secret, and copyright cases."); MCCARTHY, *supra* note 85, at 11-80 to -81 (analogizing to the "large body of law on measuring damages for the infringement of other forms of 'intellectual property': patents, trademarks, copyrights, and trade secrets").

137. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 37 cmt. e (AM. L. INST. 1995); MCCARTHY, *supra* note 85, at 11-80 to -81; RESTATEMENT (FIRST) OF RESTITUTION § 136 cmt. a (AM. L. INST. 1937).

138. 15 U.S.C. §§ 1051–1127.

139. *Id.* § 1117(a).

140. George Basch Co. v. Blue Coral, Inc., 968 F.2d 1532, 1540 (2d Cir. 1992) (citing ALPO Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, 968 (D.C. Cir. 1990)); Frisch's Rests., Inc. v. Elby's Big Boy, 849 F.2d 1012, 1015 (6th Cir. 1988); Schroeder v. Lotito, 747 F.2d 801, 802 (1st Cir. 1984)).

141. *George Basch Co.*, 968 F.2d at 1540.

142. *See, e.g.*, Burger King Corp. v. Pilgrim's Pride Corp., 934 F. Supp. 425, 427 (S.D. Fla. 1996) (awarding $1,259,663 from the defendant's profits even though the plaintiff sought no actual damages); Sands, Taylor & Wood Co. v. Quaker Oats Co., No. 84 C 8075, 1993 WL 204092, at *7 (N.D. Ill. June 8, 1993) (exercising discretion under the Trademark Act of 1964 to award double royalties, totaling $26,656,822), *aff'd in part, rev'd in part*, 34 F.3d 1340 (7th Cir. 1994), *aff'd on reh'g*, 44 F.3d 579 (7th Cir. 1995) (per curiam) (affirming trial court's award of double royalties); Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 561 F.2d 1365, 1376 (10th Cir. 1977) (affirming award of over four million dollars based on a portion of the defendant's advertising costs).

143. Mark A. Thurmon, *Confusion Codified: Why Trademark Remedies Make No Sense*, 17 J. INTELL. PROP. L. 245, 248 (2010).

trademark.[144] As some commentators point out, courts impose this limitation for the sake of "equity," even though the statutory language does not—at least in express terms—allow for this limitation.[145]

Though judges and commentators often justify compensation for a defendant's profits in appropriation of likeness claims through comparison to trademark violation actions, this comparison is imperfect.[146] Admittedly, the exclusive right to a trademark is like the exclusive right to use one's name or likeness—the protected value comes from recognizability and associated goodwill.[147] However, trademark rights differ in important ways. First, entities typically create and use trademarks to develop and maintain goodwill.[148] In contrast, a person does not typically create a name or image from whole cloth.[149] Second, if a brand loses sufficient goodwill, the trademark holder can throw out the brand and use a different brand more easily than people can throw out and recreate their identity.[150] For example, after harsh criticism over destroying the environment, British Petroleum rebranded itself as "Beyond Petroleum" and replaced its more imposing logo with a green-tinted flower.[151] By contrast, a disgraced public figure may have more difficulty recouping goodwill by changing their name and appearance. Third, a trademark can theoretically last forever if its owner meets post-

144. *George Basch Co.*, 968 F.2d at 1540 (citing *ALPO Petfoods, Inc.*, 913 F.2d at 968; *Frisch's Rests., Inc.*, 849 F.2d at 1015; *Schroeder*, 747 F.2d at 802).

145. Thurmon, *supra* note 143, at 249; Danielle Conway-Jones, *Remedying Trademark Infringement: The Role of Bad Faith in Awarding an Accounting of Defendant's Profits*, 42 SANTA CLARA L. REV. 863, 864 (2002).

146. *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. d (AM. L. INST. 1995); MCCARTHY, *supra* note 85, at 11-80 to -81; RESTATEMENT (FIRST) OF RESTITUTION § 136 cmt. a (AM. L. INST. 1937).

147. *See* Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc., 456 U.S. 844, 854 n.14 (1982) (citation omitted) ("[T]he infringer deprives the owner of the goodwill which he spent energy, time, and money to obtain. At the same time, the infringer deprives consumers of their ability to distinguish among the goods of competing manufacturers.").

148. Philipp G. Sandner & Joern Block, *The Market Value of R&D, Patents, and Trademarks*, 40 RSCH. POL'Y 969, 970–71 (2011).

149. While a myriad of celebrities use stage names, an individual's *identity* may be more difficult to create from whole cloth than an inanimate product brand.

150. *See* Steve Olenski, *Nearly Four Years After Deepwater Horizon, Has BP's Brand Image Recovered?*, FORBES (Jan. 24, 2014, 12:54 PM), https://www.forbes.com/sites/steveolenski/2014/01/24/nearly-four-years-after-deepwater-horizon-has-bps-brand-image-recovered/?sh=74a1fb8561f6 [https://perma.cc/4XY7-CXHN].

151. *See* Scott Carpenter, *After Abandoned 'Beyond Petroleum' Re-Brand, BP's New Renewables Push Has Teeth*, FORBES (Aug. 4, 2020, 1:43 PM), https://www.forbes.com/sites/scottcarpenter/2020/08/04/bps-new-renewables-push-redolent-of-abandoned-beyond-petroleum-rebrand/?sh=e94023f1ceb3 [https://perma.cc/8ETM-8URU].

registration maintenance requirements.[152] In contrast, the right to exclusively use a person's likeness after death is limited in most states. For example, New York only protects the right of publicity for "any *living* person."[153] Other states only protect the right of publicity after a person's death if the person exploited that publicity during life.[154] States that allow the right of publicity to be inherited after one's death limit the right's duration.[155]

Some argue for limiting trademark damage awards for the defendant's pecuniary gain to instances in which the defendant intentionally appropriated the plaintiff's likeness.[156] Specifically, awarding a defendant's profits to the plaintiff may create a windfall gain for the plaintiff and such a windfall gain may only be useful to deter such conduct rather than compensate the plaintiff.[157] As will be explained below, this reasoning may apply to appropriation of likeness claims.

II. RECOGNIZABILITY SHOULD BE CONCEPTUALIZED AS "CAPITAL" THAT APPRECIATES RECIPROCALLY WITH ATTENTION

In the introductory example, if Sally misappropriates Aniston's "likeness" for commercial benefit, then what exactly is Aniston's asset that Sally capitalized upon? This Comment suggests that Aniston's "likeness" in a misappropriation claim is synonymous with Aniston's *recognizability*. Recognizability should be conceptualized as economic capital. Whereas traditional, tangible capital (such as equipment in a manufacturing plant) increases by creating goods and services to sell to create more capital, recognizability generates attention, which in turn generates more recognizability. As this Comment explains,

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152. *What Is a Trademark?*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/about-trademarks [https://perma.cc/6CEU-X9ZR].

153. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2021) (emphasis added).

154. *See, e.g.*, State *ex rel.* Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 98 (Tenn. Ct. App. 1987) (concerning the survivability of the exclusive right to Elvis Presley's publicity after the celebrity died).

155. *See, e.g.*, TENN. CODE ANN. §§ 47-25-1103, 1004 (West 2021) (limiting the exclusive rights of commercial exploitation after death to ten years). Because of the quantity of celebrities and public figures who live in California, California's law dealing with the descendability of the right to publicity is particularly important. California does not allow a person's heirs exclusive rights to her likeness unless she exercised the rights during her life, and even then state law limits the use to seventy years after death. CAL. CIV. CODE § 3344.1(g) (West 2021).

156. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 136 cmt. c (AM. L. INST. 2010) (citing George Basch Co. v. Blue Coral, Inc., 968 F.2d 1532, 1537 (2d Cir. 1992)).

157. For example, there could be situations where defendants make better use of plaintiffs' images or consumers would have purchased the defendants' products anyway.

overprotecting the exclusive right to publicize one's identity exacerbates companies' appetite for consumer attention and commodifies the consumer's time.

The classic model of commodification examines the dichotomy between an item's "use-value" and "exchange-value."[158] An item's use value describes the direct benefit to a person; an item's exchange value describes how much one can exchange the item for. The new field of "attention economics" describes the way that consumer attention is commodified; there is a finite amount of attention that the consumer can devote to entertainment sources that advertisers can then exploit.[159] Accordingly, time and attention become objects of exchange, rather than something valuable unto themselves. Further, consumers devote more attention to public figures the more recognizable these public figures are. Recognizability thereby directly contributes to a public figure's (e.g., a movie star, professional athlete, social media influencer) financial value. In turn, public figures with higher brand value secure greater opportunities that yield more consumer attention. This creates a recognizability-attention feedback loop similar to the capital-commodity feedback loop contemplated by classical economists.

A. The Classic Model of "Commodification" Conceptualizes the Production of Something for Its Exchange Value

Classic literature about commodification emphasizes the relationship between land, labor, and money.[160] In emphasizing the difference between "use value" (a thing's inherent benefit or use) and "exchange value" (what one can exchange for a thing), Adam Smith famously noted that "[n]obody ever saw a dog make a fair and deliberate exchange of one bone for another with another dog."[161] Smith argued that reducing goods to their exchange value allows workers to specialize and divide their labor, increasing efficiency and total productive output. [162] Vindicating Smith, many scholars in subsequent centuries noted that the market economy

158. ROBERT HEILBRONER, TEACHINGS FROM THE WORLDLY PHILOSOPHY 162–63 (1996) [hereinafter HEILBRONER, TEACHINGS].

159. *Infra* section II.B.

160. This Comment, in accordance with classical economic literature, refers to "commodities" as things produced for exchange rather than for immediate use. HEILBRONER, TEACHINGS, *supra* note 158.

161. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 15 (S.M. Soares ed., MetaLibri 2007) (1776).

162. *Id.* at 16–17.

"pushes towards the commodification of everything."[163] Further, the historical tendency for "*all* use-values to submit to the commodity-form and to convert simple commodity production to capitalist commodity production wherever and whenever it can" provides a useful model for the commodifying attention.[164]

Specifically, classical economists wrote about the surplus-value creation's seemingly contradictory nature.[165] For example, capital invariably takes the form at first as money; "money that is capital, is nothing more than a difference in their form of circulation."[166] An economic circulation model is broadly represented by commodities ("C") transforming into money ("M")—taking the form of either liquid assets or capital ownership—which transforms again into commodities. One can represent this progression as C-M-C.[167]"But alongside this form we find another specifically different form: M-C-M, the transformation of money into commodities, and the change of commodities back again into money; or buying in order to sell."[168] The surprising result is that the second M, or "M′" ("M prime"), in this M-C-M′ form of production is larger than the first M; entrepreneurs do not invest money into a business unless they expect a greater return than their initial investment.[169] However, where does the increase in M come from?

Classical economists were split between physiocracy, which emphasizes that the environment is the source of value, and the labor theory of value, which emphasizes that value is an embodiment of labor.[170] The former argued that "land alone yields a surplus because nature labors with man, whereas man working with machines can do no more than reshape the material that had originally been wrested from the fecund soil."[171] The latter argued that "[t]he value of a commodity, or the

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163. Immanuel Wallerstein, *Household Structures and Labour-Force Formation in the Capitalist World-Economy*, *in* RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 107, 107 (Verso 1991) (1988). Whether this outcome is ultimately desirable is far outside the scope of this Comment.

164. JACK RALPH KLOPPENBURG, JR., FIRST THE SEED: THE POLITICAL ECONOMY OF PLANT BIOTECHNOLOGY 25 (Univ. of Wis. Press 2d ed. 2004) (1988) (emphasis in original).

165. For perhaps the best description of classical economists and their contributions, see ROBERT L. HEILBRONER, THE WORLDLY PHILOSOPHERS (5th ed. 1980). For Robert Heilbroner's later work which captures useful literary excerpts of classical and modern economists, see HEILBRONER, TEACHINGS, *supra* note 158.

166. HEILBRONER, TEACHINGS, *supra* note 158, at 168.

167. *Id.*

168. *Id.*

169. *Id.* at 168–69.

170. A full explanation of the classical theory of value is not possible here. For a more useful and thorough explanation, see E.K. HUNT & MARK LAUTZENHEISER, HISTORY OF ECONOMIC THOUGHT: A CRITICAL PERSPECTIVE (M.E. Sharpe 3d ed. 2011) (1979).

171. HEILBRONER, TEACHINGS, *supra* note 158, at 35.

quantity of any other commodity for which it will exchange, depends on the relative quantity of labour which is necessary for its production, and not on the greater or less compensation which is paid for that labour."[172] Adequately discussing the source of this increase is outside this Comment's purview. But regardless of what causes the increase in M, "[t]he circulation of money as capital is . . . an end in itself, for the expansion of value takes place only within this constantly renewed movement. The circulation [and expansion] of capital has therefore no limits."[173]

Part III applies similar reasoning to the commercial growth of a person's brand value as more people pay attention to them.[174] Other authors have argued that the exclusive right to publicity encourages the commodification of fame.[175] By contrast, this Comment suggests that it is not *fame* or *recognizability* that is commodified, but *time* and *attention* that are commodified. Accordingly, fame and recognizability should be conceptualized as capital that seeks to grow in a limitless feedback look with time and attention.

B. The Field of "Attention Economics" Describes How Consumer Attention Is Commodified and Sold to Advertisers

"Attention economics" is an approach to information management that treats human attention as a scarce commodity and applies economic theory to solve information management problems.[176] As will be discussed in section II.D,[177] attention can be described as a commodity that increases the degree and value of a person's recognizability. Part III discusses the business of capturing consumer attention and the opportunity costs on the consumer's time.[178]

"Attention" in this field "is focused mental engagement on a particular item of information. Items come into our awareness, we attend to a

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172. DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 8 (Batoche Books 3d ed. 2001) (1817).

173. HEILBRONER, TEACHINGS, *supra* note 158, at 168.

174. *Infra* section III.B

175. *See, e.g.*, Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 177 (1993) ("In the last decade or two, as the 'celebrity industry' has grown in power, organization, and sophistication, and as the costs involved in celebrity production have soared, the pressure for legal commodification of personas has intensified." (footnote omitted)).

176. *See generally* THOMAS H. DAVENPORT & JOHN C. BECK, THE ATTENTION ECONOMY: UNDERSTANDING THE NEW CURRENCY OF BUSINESS 2 (2001) ("In this new economy, capital, labor, information, and knowledge are all in plentiful supply. . . . What's in short supply is human attention.").

177. *Infra* section II.D.

178. *Infra* Part III.

particular item, and then we decide whether to act."[179] Under this approach, attention is a scarce resource and becomes the limiting factor in information consumption. Herbert Simon, an early writer about attention economics, noted that "in an information-rich world, the wealth of information means a dearth of something else . . . . [A] wealth of information creates a poverty of attention and a need to allocate that attention efficiently among the overabundance of information sources that might consume it."[180]

Advertisers' seemingly limitless appetite for consumer attention is particularly salient when considering the business model of social media giants. For example, Facebook, YouTube, TikTok, and other major platforms are free to users because users are not the customers—they are the commodity. These platforms tend toward an infinite appetite for consumer attention because consumer attention is the commodity sold to advertisers.[181] As explained in more detail below, attention economics is relevant to social media influencers because they compete for user attention to sell that attention to marketers.[182]

C. Recognition and Attachment Contribute to Financial Value

Attention often leads to attachment. "Attachment theory" explains interpersonal bonds that connect the individual with a specific target.[183] As will be discussed in section II.D, attention can be described as a commodity that increases the degree and value of a person's recognizability. Section II.D discusses the mechanism by which this relationship occurs.

Attachment to a person or object impacts an individual's allocation of emotional, cognitive, and behavioral resources to that person or object.[184] Market researchers model the consumer-brand relationship as emotional

179. DAVENPORT & BECK, *supra* note 176, at 20.

180. Herbert A. Simon, Richard King Mellon Professor of Comput. Sci. & Psych., Carnegie-Mellon Univ., Designing Organizations for an Information-Rich World, *in* COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 40–41 (M. Greenberger ed., 1971).

181. JAMES G. WEBSTER, THE MARKETPLACE OF ATTENTION: HOW AUDIENCES TAKE SHAPE IN A DIGITAL AGE 1–5 (2014); *see also* JIM STERNE, SOCIAL MEDIA METRICS: HOW TO MEASURE AND OPTIMIZE YOUR MARKETING INVESTMENT 19–25 (2010) (discussing strategies for advertisers to maximize visibility through social media).

182. *Infra* section II.D.

183. *See* John Bowlby, *The Making and Breaking of Affectional Bonds*, 130 BRIT. J. PSYCHIATRY 201, 201 (1977).

184. John G. Holmes, *Social Relationships: The Nature and Function of Relational Schemas*, 30 EUR. J. SOC. PSYCH. 447 (2000).

attachment.[185] In the fan-celebrity context, "once a fan develops an attachment to a celebrity, [the fan's] proximity-seeking system will be activated as if [the fan] is in a relationship with a child or a romantic partner."[186] This is why "fans can spend hours looking at the celebrity's photographs and videos, collecting memorabilia, and becoming passionate consumers of the celebrity's work."[187] *Attention toward* a public figure may create a positive feedback loop with *attachment to* and *recognition of* that public figure.

Market research demonstrates a bilateral causal link between attention and attachment.[188] And when a consumer is attached to an individual or perceives a shared identity with an individual, this individual's opinion can influence a consumer's evaluation of and demand for a product or service.[189] Accordingly, marketers can hijack a consumer's attachment to a public figure (such as a celebrity or influencer) and create an attachment to a product.[190] For example, in an interview with National Public Radio (NPR), leading market researcher Americus Reed described his firsthand experience with the way marketers hijack attachment to a persona to create an attachment for a product.[191] Reed, a Lance Armstrong fan, purchased Armstrong's signature yellow bracelet, Armstrong's signature

185. Much literature is devoted to brand attachment and its influence on consumer purchases. *See, e.g.*, C. Whan Park, Deborah J. Macinnis, Joseph Priester, Andreas B. Eisingerich & Dawn Iacobucci, *Brand Attachment and Brand Attitude Strength: Conceptual and Empirical Differentiation of Two Critical Brand Equity Drivers*, 74 J. MKTG. 1 (2010) [hereinafter *Brand Attachment and Brand Attitude Strength*] (discussing brand attachment and its predictive value on consumer behavior); Alexander Fedorikhin, C. Whan Park & Matthew Thomson, *Beyond Fit and Attitude: The Effect of Emotional Attachment on Consumer Responses to Brand Extensions*, 18 J. CONSUMER PSYCH. 281 (2008) (showing that brand attachment contributes to consumers' behavioral reactions to brand extensions such as purchase intentions, willingness to pay, word-of-mouth, and forgiveness); Franz-Rudolf Esch, Tobias Langner, Bernd H. Schmitt & Patrick Geus, *Are Brands Forever? How Brand Knowledge and Relationships Affect Current and Future Purchases*, 15 J. PROD. & BRAND MGMT. 98 (2006) (showing that brand knowledge and brand relationship contribute to consumer purchase decisions).

186. Jinlin Wan, Yaobin Lu, Bin Wang & Ling Zhao, *How Attachment Influences Users' Willingness to Donate to Content Creators in Social Media: A Socio-Technical Systems Perspective*, 54 INFO. & MGMT. 837, 839 (2017) (citing Gayle S. Stever, *Fan Behavior and Lifespan Development Theory: Explaining Para-social and Social Attachment to Celebrities*, 18 J. ADULT DEV. 1 (2011)).

187. *Id.*

188. *Brand Attachment and Brand Attitude Strength*, *supra* note 185, at 1–3.

189. David B. Wooten & Americus Reed II, *Informational Influence and the Ambiguity of Product Experience: Order Effects on the Weighting of Evidence*, 7 J. CONSUMER PSYCH. 79, 80 (1998).

190. Americus Reed II, Mark R. Forehand, Stefano Puntoni & Luk Warlop, *Identity-Based Consumer Behavior*, 29 INT'L J. RSCH. MKTG. 310, 315 (2012).

191. Hidden Brain, *I Buy, Therefore I Am: How Brands Become Part of Who We Are*, NPR (July 1, 2019, 5:26 PM), https://www.npr.org/2019/06/28/736942500/i-buy-therefore-i-am-how-brands-become-part-of-who-we-are [https://perma.cc/5EDA-CUBS] (transcript available at https://www.npr.org/transcripts/736942500 [https://perma.cc/22JF-FJBN]).

cycling uniform, and even the bicycle brand that Armstrong used.[192] "[L]ike a lot of people, I connected with the Lance Armstrong brand. . . . I would be out there, and I would be channeling Lance Armstrong. I would think about Lance Armstrong in the mountains. And it was, for me, deeply emotional."[193]

Reed's research describes the relationship between identity, attachment, and personal brand.[194] Specifically, Reed describes how marketers use influential personalities to create a worldview around the products they sell and create attachment based on consumer attachment to these personalities.[195] Reed notes that harm to a public figure's reputation in any form can lead to harm to their brand value. For example, after news broke of Tiger Woods's infidelity, Woods's endorsement value dropped significantly.[196] While his infidelity did not have any effect on the use-value (i.e., the effectiveness in a game of golf) of the golfing equipment he endorsed, consumers had formed an attachment to Woods and felt betrayed by his actions. Accordingly, the value of Woods's endorsements dropped significantly overnight.[197] Similarly, Reed notes that when news broke of Lance Armstrong's doping, he experienced a feeling like losing a close friend: "I felt foolish. I felt like I was a fool in that relationship with his brand because I was trying to reinforce and express all of these values that turned out not to be true."[198] In short, consumer attachment to a persona can be deeply and causally connected to the products and services used by that persona. When capitalized, this attachment can have significant economic value.

D. Personal Branding Contributes to the Commodification of Attention and the Accumulation of Recognizability

The classic commodification model may be useful to analyze personal branding and what exactly is harmed when a tortfeasor appropriates a victim's identity. Three examples are discussed below. First, a highly recognizable actor is important to the funding and success of a movie or television show. Second, the popularity of a singer contributes to the

192. *Id.*

193. *Id.*

194. *See* Amit Bhattacharjee, Jonathan Z. Berman & Americus Reed II, *Tip of the Hat, Wag of the Finger: How Moral Decoupling Enables Consumers to Admire and Admonish*, 39 J. CONSUMER RSCH. 1167, 1168 (2013).

195. *Id.*

196. *Id.* at 1179–80.

197. *Id.*

198. Reed, *supra* note 191.

popularity of new songs. Such recognizability (which contributes to the market value of "likeness") grows as consumers pay more attention to these people through watching their films and listening to their music. Third, social media influencers build their recognizability and follower attention and sell that attention through product use or endorsement.

As recognizability grows, personal brands become more marketable for additional projects. As classic economics applied the M-C-M′ model to the accumulation of surplus-value, one can conceptualize the increase in recognizability ("R") from attention ("A") as "R-A-R′." But unlike the increase from M to M′ contemplated by commodification theory, the increase from R to R′ does not come from exploiting the environment or labor; this increase comes from exploiting consumer attention. The field of "attention economics" instructs that attention is a finite resource; cognitive resources are scarce, so consuming one unit of media necessarily means a dearth of something else. Accordingly, to exploit attention is to exploit the consumer's time.[199]

1. Celebrities' Audience-Recognition Positively Impacts the Success and Audience Attention of Their Work

Employing highly recognizable actors contributes substantially to a film's or television show's funding and success; thus, producers strongly prefer recognizable actors.[200] "The conventional wisdom is that one needs a well-known actor—a 'star'—for a successful deal."[201] After a film's release, some research suggests that "the director and actors/actresses involved in a film are the most important factors to its success or lack thereof."[202] This is not to suggest that cast recognition is the most important variable in determining box-office success; indeed, some research suggests that other factors impact film success more than cast recognition.[203] But highly recognizable actors contribute to a film's initial

199. This Comment does not use "exploit" pejoratively. Workers presumably consent to their employment, so to "exploit" labor does not necessarily mean to take advantage of the laborer or to make her worse off. Moreover, (recent neuroscientific insights concerning attention economics aside) consumers presumably consent to and benefit from the time they spend consuming media.

200. *See* John Yudelson, *The Impact of Actors and Producers in Studio-Financed Movie Deals*, 3 J. BEHAV. STUD. BUS. 4, 12 (2011), https://www.aabri.com/manuscripts/10698.pdf [https://perma.cc/42J9-TQPA] (applying centering resonance analysis, Yudelson concludes that producers are more important to a film being produced, but that actors play a key role).

201. *Id.* at 1.

202. M. Saraee, S. White & J. Eccleston, *A Data Mining Approach to Analysis and Prediction of Movie Ratings*, *in* DATA MINING V 343, 343 (A. Zanasi, N.F.F. Ebecken & C.A. Brebbia eds., 2004).

203. Steven Albert, *Movie Stars and the Distribution of Financially Successful Films in the Motion Picture Industry*, 22 J. CULTURAL ECON. 249, 250–51 (1998) (using multiple regression analysis,

funding and its eventual box-office success. This leads to more attention toward these actors, fostering a feedback loop of increasing recognizability.

Additionally, this relationship between recognition and attention impacts the music industry. It is not surprising that a musician's popularity contributes substantially to album sales.[204] And "the amount of talk on Facebook about the band around the time of album release"—that is, the amount of attention already accumulated on social media—is a strong indicator of album sales.[205] Attention begets recognition, which begets more attention.

Admittedly, consumer attention is not a one-dimensional variable. For example, an actor who is prolific in raunchy comedy films may have difficulty breaking into historical dramas. And this difficulty may stem from the actor's reputation and recognizability. However, there is a generally positive correlation between an actor's recognizability and ability to demand a high salary, notwithstanding the actor's niche.[206] And notwithstanding a musician's difficulty in breaking out of a niche, the musician's recognizability at least contributes to further album sales.[207] In general, attention toward a public figure leads to recognition of that public figure; recognition of a public figure contributes to that public figure's capacity to garner attention.

2. The Rise of Social Media Influencers Contributes to the Commodification of Attention

Influencers are people who use their knowledge, position, or relationship with their audience to affect consumers' purchasing decisions; influencers have impacted the media landscape and developed new ways to commodify consumer attention.[208] Influencer marketing is a type of social media marketing in which individuals with a dedicated social following sell "mentions"[209] or endorsements of products and

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Albert finds that actor recognition provides some predictive value of a film's success, but that other factors have greater predictive value).

204. Marc van der Meulen, Important Indicators in Determining Future Album Sales Success: Designing a Model to Predict Future Album Sales (July 7, 2018) (M.B.A. thesis, Radboud University) https://theses.ubn.ru.nl/handle/123456789/6780 [https://perma.cc/YA2C-EVBA].

205. *Id.* at 43.

206. *See* Yudelson, *supra* note 200, at 4.

207. *See* van der Meulen, *supra* note 204, at 42.

208. *See* Werner Geyser, *What Is an Influencer?—Social Media Influencers Defined*, INFLUENCER MKTG. HUB (Aug. 17, 2021) [hereinafter *Influencer Marketing*], https://influencermarketinghub.com/what-is-an-influencer/ [https://perma.cc/X4PE-ECB8].

209. "Mentions" refer to referencing products in the influencer's content.

services.[210] While paid endorsements are not new, social media platforms have enabled a substantial increase in the practice; marketers paid influencers an estimated eight billion dollars in 2019, and some estimates expect that amount to increase to fifteen billion dollars by 2022.[211]

The number of people following an influencer determines, in large part, how much money advertisers pay the influencer. [212] The price per post can vary dramatically: reality TV personality Kylie Jenner, with 112 million Instagram followers in 2018, made over $1 million per sponsored post; pop star Beyoncé, with 116 million followers in 2018, made $700,000 per sponsored post; actor Dwayne Johnson, with 111 million followers in 2018, made $650,000 per sponsored post.[213]

Admittedly, follower quantity is not the sole variable that determines brand value—other variables impact brand value based on consumer engagement and likelihood of connected purchases. For example, marketers categorize influencers' value through their "reach" and "niche" in relation to the attention they receive from their followers.[214] "Reach" refers to an influencer's number of followers and the followers' engagement with the influencer's material.[215] "Niche" refers to the specificity of an influencer's target audience.[216] For example, makeup and style influencer Jeffree Star[217] likely commands more reach than sport and

210. Jenn Chen, *What Is Influencer Marketing: How to Develop Your Strategy*, SPROUT SOC. (Sept. 17, 2020), https://sproutsocial.com/insights/influencer-marketing/ [https://perma.cc/47H3-P7UE].

211. Chemi Katz, *How E-Commerce Brands Should Capitalize on Traffic from Social Media Influencers*, FORBES (May 5, 2021, 9:00 AM) https://www.forbes.com/sites/forbestechcouncil/2021/05/05/how-e-commerce-brands-should-capitalize-on-traffic-from-social-media-influencers/?sh=4216ba4e66b8 [https://perma.cc/5AME-44A4]; *see also Influencer Marketing: Social Media Influencer Market Stats and Research for 2021*, INSIDER INTEL. (July 27, 2021), https://www.businessinsider.com/influencer-marketing-report [https://perma.cc/8BGH-XCLS]. While every social media platform attracts influencers to some degree, Instagram is particularly known for product placement and endorsement activity. *Id.*

212. Braveen Kumar, *6 Ways to Make Money on Instagram (Whether You Have 1K or 100K Followers)*, SHOPIFY BLOG (July 22, 2021), https://www.shopify.com/blog/make-money-on-instagram [https://perma.cc/C6C7-B8RY].

213. Zameena Mejia, *Kylie Jenner Reportedly Makes $1 Million per Paid Instagram Post—Here's How Much Other Top Influencers Get*, CNBC (Aug. 1, 2018, 10:33 AM), https://www.cnbc.com/2018/07/31/kylie-jenner-makes-1-million-per-paid-instagram-post-hopper-hq-says.html [https://perma.cc/R3SX-QWRU].

214. *See Influencer Marketing*, *supra* note 211.

215. *Id.*

216. *Id.*

217. *See* Jeffree Star (@jeffreestar), INSTAGRAM, https://www.instagram.com/jeffreestar/?hl=en (last visited Oct. 16, 2021); Jeffree Star (@JeffreeStar), TWITTER, https://twitter.com/jeffreestar (last visited Oct. 16, 2021).

fitness influencer Massy Arias,[218] but it would be more effective for a company that sells running shoes to market with the latter due to her niche. And while influencers in different niches ostensibly do not compete for attention, they are not drawing from an infinite resource.[219] In theory, there is an upward limit to the amount of attention that a set number of consumers can give.[220]

Like Ms. Moneybags, the factory owner who turns money into capital, and capital into more money, influencers turn their recognizability into attention, which contributes to more recognizability (R-A-R′). There is no such thing as a free lunch—recognizability does not exist without an audience to give its attention. Accordingly, influencers exploit attention to increase their recognizability and commodify attention by selling it to advertisers.

III. AWARDING DEFENDANT PROFITS AS DAMAGES LEADS TO SUBOPTIMAL INCENTIVES AND ENCOURAGES ATTENTION COMMODIFICATION

Awarding plaintiffs who bring appropriation of likeness actions with the defendants' profits provides windfall gains to plaintiffs. This disincentivizes otherwise efficient uses of publicity, overcompensates plaintiffs, and thereby leads to inefficient outcomes. Further, overprotecting the right to exclusive publicity likely aids advertisers in commodifying consumer attention. Specifically, public personalities sell consumer time and attention to advertisers; public personalities can do this in part because of their recognizability. Overprotecting their recognizability thereby encourages attention commodification. Finally, instances in which misappropriation *should* be more generously compensated are better brought under different privacy claims.

A. Awarding Defendant Profits as Damages Provides Windfall Gains to the Plaintiff, Which Leads to Inefficient Outcomes

Many courts have recognized that awarding damages based on defendants' profits may result in windfall gains to plaintiffs.[221] Generally,

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218. *See* Massy Arias (@massy.arias), INSTAGRAM, https://www.instagram.com/massy.arias/?hl=en (last visited Oct. 16, 2021); Massy Arias (@mankofit), TWITTER, https://twitter.com/mankofit?lang=en (last visited Oct. 16, 2021).

219. DAVENPORT & BECK, *supra* note 176, at 2.

220. *See id.*

221. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. c (AM. L. INST. 1995); *see also* Factors Etc., Inc. v. Pro Arts, Inc., 496 F. Supp. 1090, 1093–1104 (S.D.N.Y. 1980), *rev'd on*

economists consider gain to be a "windfall" if it is "not foreseen by [the recipient] and are not in any degree due to efforts made, intelligence exercised, risks borne, or capital invested in them."[222] Accordingly, removing these gains should not harm the subject's incentive to engage in productive activity.[223]

In trademark cases, plaintiffs are statutorily entitled to defendants' profits, but courts have implied additional equitable requirements to prevent windfall gains.[224] This is because generally awarding such profits can lead to an inequitable windfall gain.[225] This reasoning also applies to misappropriation claims. However, rather than awarding a defendant's profits if a certain element is met, awarding exemplary damages (damages intended to punish the wrongdoer and deter future bad behavior) would lead to more efficient outcomes.

Suppose that Sally, the sole proprietor from the introductory hypothetical, earns one million dollars per year producing shampoo.[226] Further, suppose an endorsement deal with Aniston would cost Sally five-hundred thousand dollars but could increase net sales to two million dollars.[227] Such a deal would be rational for Sally because the resulting increase in profits would be five-hundred thousand dollars.[228] But what if Sally added Aniston's image to the shampoo bottles without Aniston's permission? Aniston could then sue Sally for appropriation of name or likeness because Aniston could demonstrate that Sally used Aniston's

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other grounds, 652 F.2d 278 (2d Cir. 1981); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 838 (6th Cir. 1983) (Kennedy, J., dissenting); Smith v. NBC Universal, 524 F. Supp. 2d 315, 331 (S.D.N.Y. 2007); Miller v. Collectors Universe, Inc., 72 Cal. Rptr. 3d 194, 207 (Cal. Ct. App. 2008) (concerning minimum statutory damages where actual damages were otherwise unavailable); Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 207 (1942) (applying similar logic in the case of trademark infringement).

222. PIGOU, *supra* note 5, at 156; *see also Windfall*, *supra* note 5 ("An unanticipated benefit, usu[ally] in the form of a profit and not caused by the recipient"); *Economics A-Z Terms Beginning with W*, ECONOMIST [hereinafter *Economics A-Z*], https://www.economist.com/economics-a-to-z/w#node-21529317 [https://perma.cc/S4ZF-SW9Z] (defining "windfall profit" as something "earned unexpectedly, through circumstances beyond the control of the [subject] concerned, and is thus deemed undeserved").

223. *Economics A-Z*, supra note 222.

224. *See supra* section I.D.

225. *See supra* section III.A.

226. It's unlikely that a shampoo manufacturer with one million dollars in annual profits would be structured as a sole proprietorship, but I ask the reader to humor this oversimplified model.

227. This hypothetical estimate is likely conservative based on Aniston's 2012 endorsement deal with Aveeno. *See* Arielle Tschinkel, *Jennifer Aniston Is Worth a Reported $240 Million—Here's How She Built Her Fortune*, INSIDER (Jan. 2, 2019, 7:34 AM), https://www.insider.com/jennifer-aniston-net-worth-2018-12#a-lot-of-her-income-reportedly-comes-from-lucrative-endorsement-deals-5 [https://perma.cc/9WZV-ALKK].

228. One million dollars increase in sales minus the five-hundred-thousand-dollar deal.

identity for some purpose or benefit.[229] In many jurisdictions, Aniston could recover from Sally the greater of (1) pecuniary damage to Aniston's reputation or (2) Sally's increase in profits from Aniston's use.[230] If Aniston chooses the latter, then Aniston will receive one million dollars.[231] However, this yields a five-hundred-thousand-dollar windfall to Aniston.[232] Further, Sally's additional work to provide the additional shampoo to customers—economies of scale notwithstanding—would go uncompensated.

By contrast, in jurisdictions that limit appropriation of likeness damages to quantum meruit,[233] Aniston would only be entitled to the five-hundred thousand dollars she would have otherwise earned had she negotiated an endorsement deal. Sally would retain the five-hundred thousand dollars in increased profits. Just as if Sally had negotiated with Aniston, such a situation would economically benefit both Sally and Aniston.[234] Further, by allowing Sally to retain an additional five-hundred thousand dollars for Sally's efforts, Sally is appropriately awarded for producing additional shampoo. Even aside from incentivizing Sally for shampoo-production efforts, there is no reason that Aniston should reap the windfall if one must be assigned. Nor should Aniston be forced to share her advertising income with the screenwriters, directors, or stagehands from whose work Aniston benefited—any public figure in the rise to fame likely experienced some windfall gains already.[235]

Admittedly, there may be instances where Sally's use damages Aniston's brand value. Further, one might find it intrinsically undesirable (economic wellbeing notwithstanding) to allow another to use Aniston's image without her permission. Section III.C below addresses these situations.[236]

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229. *See supra* section I.D. Further, if the reasonable consumer is duped into thinking that Aniston actively endorses Sally's shampoo, and Aniston can demonstrate personal harm, Aniston may have an additional claim for false light. *See supra* section I.C.

230. *See supra* section I.D.

231. This is the difference in Sally's profit before and after the use.

232. One million in increased profits less the five-hundred-thousand-dollar market value of Aniston's endorsement.

233. Quantum meruit here refers to the market value had Sally negotiated an endorsement deal with Aniston.

234. This ignores harm to Aniston's autonomy and dignity through controlling the use of her own identity. This further ignores reputational or "brand" harm to Aniston if, for example, Sally's shampoo is faulty or of low quality. These are discussed in the final section.

235. *See* Madow, *supra* note 175, at 195–96.

236. In the introductory hypothetical, there are not enough facts given to determine whether Sally would be liable for other privacy torts or whether Sally should be liable for exemplary damages.

B. Overprotecting the Right to Exclusive Publicity Likely Aids Advertisers Who Commodify Consumer Attention

Some courts and commentators have argued that treating intangible rights (e.g., the right to publicity, patents, copyrights) like a property right most effectively incentivizes desirable behavior, including incentivizing producing new material.[237] The right of publicity should—according to this argument—incentivize enterprise, creativity, and achievement. Indeed, this view has received considerable support from both courts[238] and commentators.[239] However, this assumes that such enterprise, creativity, and achievement will not materialize without the opportunity to market one's publicity. This assumption is flawed.

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237. *See, e.g.*, Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 Yale L.J. 1125, 1129 (1980) (observing that the right of publicity provides an incentive for enterprise and creativity by allowing individuals to benefit from their personal efforts); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 282–85 (1970) ("Without copyright protection a copying publisher could avoid many of the costs of the original publisher . . . by photographing the printed pages of a published book. If competition then forced book prices down to the copier's cost, the first publisher and the author could not obtain adequate compensation.").

238. *See, e.g.*, Carson v. Here's Johnny Portable Toilets, Inc. 698 F.2d 831, 837 (6th Cir. 1983) (Cornelia, J. dissenting) ("[T]he right of publicity fosters the production of intellectual and creative works by providing the financial incentive for individuals to expend the time and resources necessary to produce them." (citations and quotation marks omitted)); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576–77 (1977); Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 287 (2d. Cir. 1981) (Mansfield, J., dissenting) ("[T]he public policy of providing incentives for individual enterprise and investment of capital and energy argues for allowing an individual to pass the fruits of his labors along to others after his death."); Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 705 (Ga. 1982) ("Recognition of the right of publicity rewards and thereby encourages effort and creativity. If the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished . . . ."); Lugosi v. Universal Pictures, 603 P.2d 425, 441 (Cal. 1979) (Bird, C.J., dissenting) ("Similarly, providing legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition and assures that the individual will be able to reap the reward of his endeavors . . . ." (citations and quotation marks omitted)).

239. *See, e.g.*, Felcher & Rubin, *supra* note 237, at 1128 ("The social policy underlying the right of publicity is encouragement of individual enterprise and creativity by allowing people to profit from their own efforts."); Steven J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y U.S.A. 111, 118 (1980) ("Like the copyright and patent regimes, the right of publicity may foster the production of intellectual and creative works by providing the financial incentive for individuals to expend the time and resources necessary to produce them."); David E. Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673, 681 (1981) ("Protecting the right of publicity provides incentive for performers to make the economic investments required to produce performances appealing to the public."); D. Scott Gurney, Note, *Celebrities and the First Amendment: Broader Protection Against the Unauthorized Publication of Photographs*, 61 IND. L.J. 697, 707 (1986) (stating that the right of publicity serves to "maximize incentive to develop and maintain skills and talents that society finds appealing").

Despite arguments to the contrary, mitigating public figures' exclusive right of publicity is unlikely to negatively impact the entertainment industry. "Actors and musicians . . . will certainly not cease making movies or record albums if their images are freely available for use on T-shirts and the like."[240] Take the example of Jennifer Aniston, whose wild success in the '90s sitcom, *Friends*, generated much renown. Would *Friends* have never been created but for the opportunity for Aniston to make vast monetary gains endorsing cosmetics? Neither Lisa Kudrow, Courtney Cox, nor Matt LeBlanc command anywhere near Aniston's endorsement income, so what incentivized them to bring their enterprise, creativity, and achievement to the show? Indeed, very few actors from similarly situated shows could have reasonably expected to demand *any* endorsement value well after the shows' conclusions. And what of the writers and directors,[241] costume designers,[242] composers,[243] and producers[244] who made the show a success? These contributors would be intrinsically incentivized by their own paychecks or financial stakes in the show's success, but these contributors had little opportunity to develop the recognizability protected by misappropriation claims. If the driving policy argument behind the right of publicity is the incentive to provide quality entertainment, then perhaps *Friends* costume designer Debra McGuire should be entitled to some percentage of Aniston's income from her Aveeno endorsements. [245]

As discussed above, recognizability grows with attention, which grows with recognizability.[246] A business that produces widgets exploits land and labor to grow as a business; a celebrity or influencer exploits consumers' time and attention to increase recognizability and commercial value. Thus, if protecting publicity as a property right incentivizes anything, then it incentivizes exploiting time and attention. As Richard Posner famously explained, overprotecting a property right incentivizes less-than-ideal outcomes.[247] Accordingly, when a plaintiff enjoys the opportunity for substantial windfalls in a misappropriation action, and the

240. Madow, *supra* note 175, at 204.

241. For example, David Crane and Marta Kauffman.

242. Costume designer Debra McGuire was instrumental in creating each character's style and persona.

243. Michael Skoff and Allee Willis.

244. For example, Kevin Bright, Michael Borkow, and Shana Goldberg-Meehan.

245. For more details on Aniston's 2012 deal with Aveeno, see Tschinkel, *supra* note 227.

246. *See supra* section II.D.

247. *See generally* Richard A. Posner, *Do We Have Too Many Intellectual Property Rights?*, 9 MARQ. INTELL. PROP. L. REV. 173 (2006). Richard Posner is an American judge and law and economics scholar.

"right of publicity" is strongly protected, incentives to build a personal brand will rise.

Even if one takes the moral stance that people should be rewarded for their efforts, then celebrities and influencers are not the right people to reward: consumers are. Returning to the R-A-R′ fame model, the recognizability increase derives from the attention exploitation. And as attention economics teaches us, attention is finite. Cognitive resources are scarce; thus, consuming one unit of media necessarily means a dearth of something else.[248] Consumers who spent their six o'clock hour watching *Friends* on a Thursday in 1999 did so at the expense of watching *The Sopranos*, reading a book, calling their grandmother, or going for a walk.

If, *morally*, someone ought to be compensated when a person's likeness is misappropriated, then perhaps it should be the consumer. For example, a consumer may purchase Sally's shampoo with the belief that it is endorsed by Aniston. If anyone is to receive Sally's excess profits (other than Sally), perhaps it should be returned to the duped consumer. In short, courts and commentators alike argue that strong protections for the exclusive right to publicity encourage creative and productive capacity, but this argument is flawed and directly counter to real-world experience.

C. Claims in Which Awarding Defendant Profits Would be Equitable or Efficient Should Be Brought Under Different Privacy Actions

There may be instances in which awarding more generous damages in a misappropriation claim might be efficient or equitable; however, such damages are more appropriate for another privacy tort, either in lieu of or in addition to the underlying appropriation claim. Indeed, plaintiffs who sue for privacy invasion commonly do so under multiple claims.[249] Courts are then tasked with parsing out damages between various violated interests and verifying that a plaintiff is not doubly compensated for the same interest. If the instances in which awarding defendant profits or reputational harm were brought squarely under a different privacy action, courts may have an easier time ensuring that plaintiffs are not doubly indemnified for the same interest and preventing inequitable windfalls.

For example, when misappropriation of a person's likeness embarrasses that person or harms that person's reputation by disclosing private facts, additional damages are more appropriately sought under a disclosure of private facts suit. When misappropriation harms a person's reputation or embarrasses them by mischaracterizing facts, additional damages are more appropriately sought under a false light suit. When

248. DAVENPORT & BECK, *supra* note 176.

249. *See* MCCARTHY, *supra* note 85, at 11-78 to -79.

publicizing facts about a person's life are harmful by virtue of the intrusion, then additional damages are more appropriately sought under a suit for intrusion upon seclusion. Finally, when consumers are harmed by the misappropriation, many other non-privacy-related actions could be taken to compensate them (including consumer protection claims, which are not addressed in this Comment).

1. When the Appropriation Is Embarrassing

A plaintiff harmed when the misappropriation reveals the person's private affairs is more appropriately compensated under a Disclosure of Private Facts action, as is exemplified in *Chryssikos v. MCC Radio, LLC*.[250] Peter Chryssikos owned an alarm-monitoring company and enjoyed a contract with the city of Desert Hot Springs, California.[251] Lee Rayburn, a local radio talk show host, began a smear campaign in which he falsely accused Chryssikos of, among other things, being investigated by the FBI for child pornography, committing credit card fraud and identity theft, making death threats, defrauding the city, and physically abusing his former partner.[252] Chryssikos, who was not previously well-known in his community, lost 90% of his business, his children were bullied at school, and he received death threats.[253] Chryssikos sued Rayburn and Rayburn's employer, MCC Radio, for defamation, disclosure of private facts, appropriation of name for a commercial purpose, and intentional infliction of emotional distress.[254]

The California Court of Appeals held that Chryssikos presented a viable case of misappropriation because the defendants ran "a promotional campaign for their radio station in which Rayburn stated 'all you have to do is stop by and ask, "[w]ho is Pete Chryss?" . . . [W]e've got a complimentary buffet for two for . . . anybody who stops by and asks, "[w]ho is Pete Chryss?"'"[255] The court further held that Chryssikos made a prima facie case for disclosure of private facts because the defendants publicly disclosed details about Chryssikos's relationship twenty years earlier, including details about a child out of wedlock.[256] And, unsurprisingly, the court finally held that Chryssikos's defamation

250. No. G049831, 2014 WL 6992909 (Cal. Ct. App. Dec. 11, 2014).

251. *Id.* at *1.

252. *Id.*

253. Joe Harris, *Character Assassination for Sport*, COURTHOUSE NEWS SERV. (Dec. 9, 2011), https://www.courthousenews.com/character-assassination-for-sport/ [https://perma.cc/83GD-XB4W] (describing the context of the suit).

254. *Id.*

255. *Chryssikos*, 2014 WL 6992909, at *4.

256. *Id.*

claim was merited. [257]

If Chryssikos won all his claims in the subsequent trial, how should a court have calculated damages? Should Chryssikos be entitled to the radio station's increased profits from Rayburn's smear campaign? One's first moral intuition may be a resounding *yes*. Why should Rayburn be able to keep any increased profits from using his business to bully private citizens? But one's moral intuition about equity in this case strongly conflate Rayburn's acts of misappropriation with his acts of defamation and disclosure of private facts. For a defamation claim in California, Chryssikos can recover for harm to his reputation and harm to his business.[258] He can also recover "exemplary" damages if he can prove that Rayburn harbored ill will toward Chryssikos.[259] While this Comment leaves out much of the case's history, such a finding is likely. [260] For Chryssikos's intrusion upon seclusion claim, he can recover for reputational or business harm, specifically for disclosing details about his relationship twenty years prior.[261]

It seems unlikely that, before the smear campaign, Chryssikos intended to commercialize his own likeness. Indeed, during the smear campaign, Chryssikos lived with city councilman Karl Baker, and the case facts suggest that Chryssikos and Baker just wanted to be left alone.[262] Accordingly, the rationale of protecting against unjust enrichment may not be appropriate for this case. Chryssikos should be compensated for the irreparable reputational harm, the shame, and the humiliation that Rayburn caused. And because Rayburn used Chryssikos's name to promote his show, Rayburn should be forced to compensate Chryssikos for the advertisement value. But Chryssikos did not have a prior interest in MCC Radio's revenue; he just wanted to be left alone.[263]

As exemplified here, where publicity harms a plaintiff through broadcasting private affairs, the plaintiff should be able to seek compensation for misappropriation of likeness. However, additional damages for embarrassment or harm to reputation are probably more appropriately brought through a suit for disclosure of private facts. This

257. *Id.*

258. CAL. CIV. CODE § 48a(a)–(b), (d) (West 2021).

259. *Id.* § 48a(b).

260. *See* Harris, *supra* note 253.

261. *See generally* Briscoe v. Reader's Digest Ass'n, Inc., 483 P.2d 34 (Cal. 1971), *rev'd on other grounds by* Gates v. Discovery Commc'ns, Inc., 101 P.3d 552 (Cal. 2004).

262. *Chryssikos*, 2014 WL 6992909, at *1.

263. For a similar case involving details disclosed about a former gang member, see Doe v. Gangland Prods., Inc., 802 F. Supp. 2d 1116, 1118 (C.D. Cal. 2011), *aff'd in part, rev'd in part and remanded*, 730 F.3d 946 (9th Cir. 2013).

is particularly true where, as is often the case, the plaintiff had no desire to monetize their identity anyway.

2. When the Misappropriation Makes the Victim Look Bad

A plaintiff whose reputation is harmed through publicity misappropriation is more appropriately compensated under a false light action. This is particularly exemplified by *Dice v. X17, Inc*.[264] One sunny afternoon, Peter Dice, a "sobriety coach" who helps others get sober and instructs on sober living, went to a Venice Beach restaurant with Lindsay Lohan and an unidentified man.[265] Photographers from X17, a celebrity news agency, filmed the exchange from nearby.[266] The video showed Lohan and the unidentified man inspecting a plastic bag, as the photographers whispered "cocaina" and "droga" into the camera.[267] In reality, the bag contained "healing crystals" used in alternative medicine, not illegal drugs.[268] X17 published the video on its website with the text "Lindsay Lohan Makes Purchase in Venice" in bold above a smaller caption that said "Lindsay makes purchase on the street in Venice."[269] An accompanying article, titled "EXCLUSIVE VIDEO—LINDSAY LOHAN MAKES A PURCHASE ON VENICE STREET," strongly implied that Lohan purchased illicit drugs. [270]

Dice sued X17 for defamation, misappropriation, false light, and intentional infliction of emotional distress.[271] Further, Dice presented evidence that X17 published the video and article either knowing that it falsely implied a drug transaction, or recklessly disregarding whether the implication was true.[272] Accordingly, Dice established a prima facie case for defamation and false light.[273] Dice further established a prima facie case of commercial misappropriation because X17 used his identity for a commercial benefit.[274]

Although the settlement was not disclosed, this Comment argues that

264. No. B243910, 2014 WL 99074 (Cal. Ct. App. Jan. 10, 2014).

265. *Id.* at *1.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* at *2.

270. *Id.*

271. *Id.* The opinion describes the "false light" claim generically as "invasion of privacy," but the parties' briefs specify that this claim was for "invasion of privacy–false light." Brief for Defendant-Appellant at 4, Dice v. X17, Inc., No. B243910, 2014 WL 99074 (Cal. Ct. App. May 14, 2013).

272. *Dice*, 2014 WL 99074, at *8.

273. *Id.*

274. *Id.* at *8–9.

Dice should not be entitled to X17's profits from the offending video and article. Even without explicitly saying so, X17 strongly implied that Dice was a party to a drug transaction. Accordingly, the court correctly allowed Dice's defamation and false light claim. And X17 indeed profited by using Dice's identity, for which he should be compensated.[275] But Dice did not create the website, create the video hosting platform, or directly contribute to X17's readership. Awarding Dice X17's profits would therefore constitute a clear windfall, and such a windfall would lead to suboptimal outcomes.

At the time of the recording, X17 boasted two-hundred thousand users per day, and over one million weekly visitors to its website.[276] When the suit was filed, the record suggested that X17's coverage of Lohan "generates tremendous public interest and brings millions of users and drives licensing of photos to other organizations."[277] The record does not indicate the utility to readers for reading about Lohan, or how much the settlement ended up being in *Dice v. X17*. But suppose that each of X17's weekly users gained five dollars worth of utility from watching a scandalous video about Lohan. Further suppose that X17 earns two dollars for every user who viewed the video, either through ad revenue or aggregated subscription revenue. Under this model, X17's consumers gained an aggregate five-million-dollar benefit (five dollars multiplied by one million weekly users), and X17 gained an aggregate two-million-dollar benefit (two dollars multiplied by one million users). To measure social utility, we do not add these numbers because users pay for the video either through subscription or by watching ads. Further suppose that, between reputational, emotional, and business harm, Dice suffered two million dollars in losses. These numbers were selected arbitrarily, but the logic still applies if one dramatically dials the variables up or down.

In this model, X17 created a three-million-dollar social benefit by posting the video; a five-million-dollar benefit to its consumers less the two million dollars in harm to Dice. As described above, Dice can recover for his pecuniary losses under either the defamation, false light, or misappropriation claims. However, in California, Dice can also recover X17's increased profits under his misappropriation claims. But because Dice congruently brought multiple claims, should he be able to recover two million dollars in harm for his defamation claim, and then five million dollars in unjust enrichment? If a court allows this, then Dice would enjoy

275. Although in this case, the story would not likely have been published if not for Lohan's presence. It seems unlikely that a celebrity tabloid or its readership would care much about a random life coach from Los Angeles purchasing drugs on a beach.

276. Transcript of Oral Argument, *Dice*, 2014 WL 99074, at 7.

277. *Id.*

a five-million-dollar windfall gain (a seven-million-dollar award less two million dollars in actual harm). Even if his defamation and false light claims were somehow unavailable to him (e.g., if Dice were a public figure who failed to prove actual malice), Dice will enjoy a three-million-dollar windfall gain if the court merely grants him X17's increased profits, as allowed under California statute. Even if a windfall is not intrinsically undesirable, the tort system should, whenever possible, encourage efficient outcomes. A three-million-dollar social benefit is an efficient outcome, but X17 would not have published the video under this regime despite a socially optimal outcome because it would either reap zero dollars in profits or lose two million dollars, depending on how the court awarded damages.

Would limiting damages to quantum meruit lead to an efficient outcome? Measuring quantum meruit in a case like this sounds strange because a "sobriety coach" would probably not consent to star in a video in which he is ostensibly a party to a drug transaction. However, if Dice's total harm from the publication is two million dollars, then an economically rational Dice would willingly allow the video to be published if paid any amount higher than two million dollars. If the social benefit here is higher than the harm to Dice, then X17 could theoretically raise prices enough to compensate Dice while keeping a marginal profit. Accordingly, X17 would still publish the video, and society at large would enjoy the three-million-dollar benefit.

Suppose that the hypothetical above grossly overestimated scandalous celebrity videos' social benefits, and grossly underestimated Dice's reputational harm. Specifically, suppose that X17's users each derive only one penny's worth of utility from watching a scandalous celebrity video, X17 earns only one penny's worth for each user, and Dice suffered ten million dollars in harm from the misappropriation. Here, the social benefit would be merely ten thousand dollars, whereas the social cost would be ten million dollars. Posting a video in this scenario would not be socially optimal. Additionally, even under California's current misappropriation regime, Dice would rationally choose to recover only for his own damages, not the mere ten thousand dollars in unjust enrichment. If X17 is rational, then it would not have published the video in this scenario, and not publishing the video would be the socially optimal outcome. If X17 is not rational, then courts can at least compensate its victims for the harm it causes, albeit under a different privacy tort.

Note, however, that in this case, Lohan's reputation was also harmed, and she presumably had similar claims against X17. While the model complicates as more entities and variables are added, the socially optimal outcome is still reached only through quantum meruit. Further,

hypothetical economic models often assume that agents are rational—that is, they act in ways that maximize their own well-being. This assumption may not be true for all defendants. Further, defendants and plaintiffs may measure harm differently; courts may be commonly put in a position of measuring "objective" dollar amounts between parties with competing interests. And tort law's deterrence effect may not apply to irrational defendants, compensation regime notwithstanding.

As exemplified here, where publicity harms a plaintiff through broadcasting mischaracterizing facts, the plaintiff should be able to seek compensation for misappropriation of likeness. However, additional damages for embarrassment or harm to reputation from the mischaracterization are more appropriately brought through a suit for false light. This is commonly the case where the plaintiff is a celebrity and the defendant is a tabloid or celebrity news outlet, and the defendant mischaracterizes facts about the celebrity's life in order to maximize audience engagement. Where social welfare is increased by misappropriation, then it would be tautologically a suboptimal outcome to discourage such misappropriation.

3. When the Victim Just Wants to Be Left Alone

A plaintiff who simply wanted to be left alone or avoid unwanted publicity when a defendant misappropriated the plaintiff's likeness is more appropriately compensated under an intrusion upon seclusion claim. Suppose that in *Dice*, X17's photographers had instead climbed a fence to film Dice while he was sunbathing in his backyard. If X17 posted the video on its website, Dice would have a claim for misappropriation for the same reason he did in the actual case: X17 used Dice's recognizable identity without his permission to derive commercial benefit.[278] But would appropriating a commercial interest be the real harm to Dice? Does the economic opportunity cost cause a reader to recoil when reading about such "peeping Tom" cases? No. Such cases are repulsive because the defendant intruded, offensively, into the plaintiff's seclusion. Accordingly, plaintiffs should be compensated (as they are in intrusion upon seclusion cases) for emotional harm. If the plaintiff acted intentionally, courts duly award punitive damages to deter this behavior. And even when a plaintiff cannot prove actual damages, courts appropriately award nominal damages to recognize that the defendant violated the plaintiff's right. Considering such cases as an economic

278. An important issue in *Dice* was whether the video was a legitimate matter of public interest, and therefore protected by the First Amendment. It was not, and privacy law cases have repeatedly held that "peeping Tom" defendants are not entitled to First Amendment protection.

opportunity tort under misappropriation misses the forest for the sterile, commercial trees.

IV. COUNTERARGUMENTS AND POTENTIAL COSTS TO LIMITING MISAPPROPRIATION DAMAGES TO QUANTUM MERUIT

Limiting damages in a misappropriation claim to quantum meruit may mitigate windfall gains to plaintiffs, mitigate extreme commodification of consumer attention, and contribute to more efficient outcomes. However, adopting such a damage calculation regime may come with some risks. For example, marketers may be incentivized to use public personas without permission, and then negotiate a settlement after the fact. If damages are limited to the market value of using an identity, why would a malevolent marketer bother seeking consent when there is a chance that the would-be plaintiff would not file suit? Relatedly, there may be instances in which people do not consent to use their identity because such use would offend or harm their image. Would such a regime disempower people from choosing when, where, and how their identity is used? The following sections address those risks.

A. Limiting Damages to Quantum Meruit May Incentivize Malevolent Marketers to Beg Forgiveness Rather than Ask Permission

Suppose that Sally, rather than selling shampoo, sells hair growth supplements. Suppose further that Sally reaches out to Aniston to seek an endorsement for Sally's product. Fearing reputational harm from associating with a hair loss product, Aniston promptly refuses. If the applicable jurisdiction limits misappropriation damages to quantum meruit, and if Sally is not bound by ethical considerations, then why should Aniston's objection stop Sally?

Such an argument ignores exorbitant litigation costs and other damages awarded. For example, when one model sued a nutritional supplements retailer for misappropriation of likeness, the court reduced the model's claim for actual damages to a fraction of what he sought because the retailer defeated his demand for unauthorized profits.[279] However, because the model was the "prevailing party" in that claim, California statute awarded him attorney's fees, for which he asked for

279. Olive v. Gen. Nutrition Ctrs., Inc., 239 Cal. Rptr. 3d 617, 631–32 (Cal. Ct. App. 2018), *vacated*, 242 Cal. Rptr. 3d 15 (Cal. Ct. App. 2018).

$7.3 million.[280] If the retailer could efficiently use the model's image,[281] a rational retailer would have negotiated a contract with the model before using his image.

Further, when the defendant's misappropriation is intentional, courts will award punitive damages to deter future wrongdoing.[282] As economist Steven Shavell notes, excessive punitive damages can create excessive incentives to avoid liability risk, and generally inefficient outcomes.[283] To achieve the most efficient outcome, punitive damages should be set as a multiplier that represents the probability that a plaintiff will fail to sue the wrongdoer.[284] For example, in the analogy above, if Aniston fails to sue Sally for her misappropriation, Sally would reap an additional five-hundred thousand dollar windfall. If policymakers estimate that 20% of would-be misappropriation plaintiffs fail to sue, then an efficient level of punitive damages would represent an additional 20% of damages awarded.[285]

An accurate measure of quantum meruit would usually encapsulate harm to the plaintiff's persona value. For example, models and celebrities consider "dilution" as they make additional deals for using their image.[286] Accordingly, they consider brand value deterioration in valuing their contracts.[287] Thus, the fair market value of the contract that should have been negotiated will fairly compensate a plaintiff for reputational harm. In short, if discouraging misappropriation would decrease overall social welfare, then discouraging misappropriation tautologically leads to suboptimal outcomes.

B. Limiting Damage Awards to that Which Defendants Would Have Paid Anyway Had They Contracted for the Plaintiffs' Image Disempowers Would-be Plaintiffs

Limiting damages in a misappropriation claim to quantum meruit or actual reputational harm may lead to more efficient outcomes when "efficient" merely refers to maximizing total social commercial value.

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280. *See id.*; Brief for Plaintiff-Appellant at 67, Olive v. Gen. Nutrition Ctrs., Inc., No. B279490, 2017 WL 6496550 (Cal. Ct. App. Dec. 14, 2017).

281. I.e., if the retailer could benefit from using the image more than model was harmed.

282. *See supra* section I.D.

283. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 272–73 (2004).

284. *Id.*

285. *See generally id.* at 272.

286. Paula B. Mays, *Protection of a Persona, Image, and Likeness: The Emergence of the Right of Publicity*, 89 J. PAT. TRADEMARK OFF. SOC'Y 819, 821–22 (2007).

287. *Id.*; *see also* Puja Khatri, *Celebrity Endorsement: A Strategic Promotion Perspective*, 1 INDIAN MEDIA STUD. J. 25, 29–32 (2006).

However, this view may overlook any intrinsic value to a would-be plaintiff in controlling how her image is used. For example, in the hypothetical above, if Sally estimates that her increased revenue in hair growth products will be greater than the reputational harm to Aniston for the ostensible endorsement, then it may be economically "efficient" for Sally to use Aniston's identity without her consent. However, this disregards non-economic costs, including harm to Aniston's dignity and autonomy in controlling how and when her image is used.

As described above, limiting compensatory damages to quantum meruit would not likely incentivize additional misappropriation because courts often award punitive damages and attorney's fees. Even without such an award, litigation is prohibitively expensive. Further, if a plaintiff suffers actual harm through association with a certain product, they should be able to bring an action under a different cause of action. In the hypothetical above, if Sally places Aniston before the public in a false light—through the implication that Aniston is losing her hair—Sally would be liable to Aniston for false light. Specifically, implying that Aniston is losing her hair would be offensive to the reasonable person.[288]

C. Awarding Damages Based on Defendant Profits More Generously Compensates Plaintiffs for Potential Reputational Harm

If a defendant's profits from misappropriation are greater than the market value of the plaintiff's likeness, then limiting damages to quantum meruit would less generously compensate plaintiffs. But in either case, awarding damages based on provable harm to a plaintiff's reputation is still available. Because reputational damage might be difficult to prove, one might argue that courts should err toward a more generous compensation regime.

Oftentimes, that a plaintiff's commercial value was harmed is intuitively obvious.[289] But sometimes, the damage amount might be hard to calculate. Plaintiffs have tools to demonstrate the value of reputational harm; these include expert testimony from industry insiders and forensic economists.[290] Further, if a plaintiff claims damages based on quantum

288. *See supra* section I.C; RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977).

289. *See, e.g.*, Clark v. Celeb Pub., Inc., 530 F. Supp. 979 (S.D.N.Y. 1981) (awarding damages for the diminished value of plaintiff's services as a model resulting from defendant's use of plaintiff's photograph in a pornographic magazine).

290. *See, e.g.*, Nat'l Bank of Com. v. Shaklee Corp., 503 F. Supp 533, 546–47 (W.D. Tex. 1980) (both the plaintiff and defendant used expert testimony to show commercial licensing value of the plaintiff's persona); Grant v. Esquire, Inc., 367 F. Supp. 876, 881 (S.D.N.Y. 1973) ("[T]he Court can take judicial notice that there is a fairly active market for exploitation of the faces, names and

meruit or increased profits, they would still need to provide expert testimony to demonstrate either the fair market value of an endorsement or the portion of the defendant's increased profits attributable to the misappropriation. Thus, an argument in favor of more generous damages based on a lack of information or provability is flawed.

CONCLUSION

Considering attention economics and commodity theory, the current regime of awarding misappropriation damages based on increased profits for the defendant leads to suboptimal inefficient outcomes. Further, overprotecting the right of publicity likely contributes to the extreme commodification of consumer attention. Advertisers have an infinite appetite for consumer attention, and public figures market and sell this attention. By overprotecting the vehicle by which public figures can do this—their recognizability and brand value—overprotection of recognizability facilitates such commodification. This Comment has argued that, under an attention commodification model, limiting damages to quantum meruit would lead to more efficient outcomes. Additionally, specific appropriation of likeness claims which might lead to inefficient outcomes under quantum meruit would better fit under the elements and justification of other privacy rights.

If Sally's misappropriation of Aniston's likeness yields desirable social outcomes, then tort law should not discourage Sally's misappropriation. In her appropriation of likeness claim, Aniston should be compensated for the fair market value of the use of her image; not one dollar more or one dollar less. If Aniston's brand value is harmed by Sally's use,[291] she should seek compensation under a different privacy tort. Further, public figures generally benefit from an attention-recognizability feedback loop, whereby consumer attention is increasingly devoted to a shrinking number of individuals. For example, is Mark Wahlberg so highly sought after in movie roles because of some combination of a striking appearance and abundant talent? Or is Wahlberg so sought after because he skillfully markets his brand? Indeed, because public figures like Aniston use their recognizability to sell consumer attention to advertisers, overprotecting such recognizability contributes to attention commodification. In short, limiting damages in an appropriation of likeness claim will lead to more socially beneficial outcomes, and mitigate attention commodification.

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reputations of celebrities, and such market—like any other—must have its recognized rules and experts."); Treece, *supra* note 133, at 651 (describing how plaintiff can prove the value of their identity by reference to the current market rate for endorsements of celebrities of similar stature).

291. However, the brand value would probably not be harmed. *See supra* section IV.C.2.