Identity and the Law

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Although issues of 'identity' have frequently been the subject of legal regulation and legal decision making in legal areas as disparate as child law, contract law and criminal sentencing, the concept of 'identity' has not hitherto occupied a central place in English law. In contrast, in the United States, in particular, the idea that a person has property over their identity, including their image, name or voice, is one which is gaining increasing acceptance. Under these laws (which operate primarily at state level and vary in detail from state to state) a person may be able to object if their name is used on a product, or as a domain name, or their face on a poster, t-shirts, mugs, video games or memorabilia, or their voice in a television advertisement. Thus it has been held that a famous baseball player can prevent use of his image on baseball cards,[2] a famous athlete could prevent use of his nickname 'crazylegs' on shaving gel,[3] and a famous singer could prevent advertisers using vocal imitations in association with the sale of snackfood.[4]

Some commentators are suggesting that the European Convention on Human Rights now requires the United Kingdom to take a similar position. In this essay I want to argue that the United Kingdom is not obliged, as yet, to adopt such a law, and would be well-advised to think twice before doing so. Whereas other critics of identity rights have questioned the underlying justification for creation of such rights, I want to highlight some other potential problems with the idea of property in identity. I will suggest that 'identity' is a particularly problematic concept around which to build

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[2] *Haelen Laboratories. Inc v Topps Chewing Gum Inc* (1953) 202 F. 2d 866. See also *Newcombe v. Adolf Coors Co* 157 F 3d 686 (USCA 9th cir, 1998) (picture of pitcher on calendar)

[3] *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis 2d 379, 280 N.W. 2d 129 (S. Ct. Wisconsin, 1979) (appealed allowed from dismissing action by famous 40 and 50s footballer and basketball player Elroy Hirsch, nicknamed "Crazylegs", who objected to Johnson & Co's use of name on shaving gel for women). See also *John Doe, a.k.a. Tony Twist v TCI Cablevision*, 110 S.W. 3d 363 (Sup Ct Miss, 2003) (notoriously violent ice hockey player, Tony Twist, could succeed in action objecting to use of name Tony Twist as that of evil mafia don in comic book, Spawn, even though there was no physical resemblance). *McFarland v Miller et al* 14 F. 3d 912, 914 (USCA, 3d. cir., 1994) (actor who played 'Spanky McFarland' could bring action against restaurant using the name).

[4] *Midler v. Ford Motor Co*, 849 F. 2d 460 (9th Cir. 1988); *Waits v Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) cert. Denied 113 S.Ct 1047, 122 L. Ed. 2d 355 (1993). Cf *Booth v Colgate-Palmolive Co* 362 F. Supp. 343, 347 (USDC, SDNY, 1973) (right of publicity under New York law confined to name or likeness so did not cover sound-alike voice).

legal structures. The first reason is because it eludes definition, or, to the extent to which it can be defined, raises problems of subjectivity. The second is because, even as regard the core aspects of identity that have been subject of legal protection - name, image and voice - the nature of these attributes is contested and may, therefore, warrant different legal treatment. In particular, echoing Rosemary Coombe, I want to highlight the possibility that property in identity may well conflict with the legitimate freedoms of others to develop their identities.

Part 1: Comparative Legal Development of Property in Identity

1.1 The United States

The US protection of a person's identity has its origins in the development of a right of privacy. The story of the development of this right begins with "that most influential law review article of all",[5] written by Samuel D. Warren and Louis Dembitz Brandeis in the 1890 *Harvard Law Review*.[6] In this article, the authors sought to discover whether the common law offered any remedy to protect the privacy of an individual, "the desirability – indeed the necessity – of some such protection, there can, it is believed, be no doubt."[7] They argued there was such a remedy, not based, perhaps as one might have expected, through extension of the law of defamation's protection of 'reputation',[8] but rather through case-law which had protected authors and artists against unauthorised publication of their works. Using the classic methodology of searching for an "underlying principle" or "golden thread" to explain existing cases, the authors "discovered" that the common law sought to protect "the right to one's personality".[9] The relevant case law – as matters turned

[5] H. Kalven, Jr, 'Privacy in Tort Law –Were Warren and Brandeis Wrong?', 31 Law and Cont Probs 326, 327; *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis 2d 379, 280 N.W. 2d 129, 133 (S. Ct. Wisconsin, 1979) (Heffernan J.)

[6] 'The Right of Privacy' (1890) 4 *Harv. L.R.* 193-220. William L. Prosser, 'Privacy' (1960) *Cal. L. R.* 383 ("It has come to be regarded as the outstanding example of the influence of legal periodicals upon American law.")

[7] Warren & Brandeis, 'The Right of Privacy' at 196.

[8] Warren & Brandeis, 'The Right of Privacy', at 197-8.

[9] See James Q. Whitman, 'The Two Western Cultures of Privacy: Dignity versus Liberty' (2004) 113 Yale L.J. 1151, 1202 (arguing that the "Warren and Brandeis tort" is best thought of not as "a great American innovation" but as "an unsuccessful continental transplant." Whitman claims that the American conception of "privacy" concerns freedom in the home, particularly from interference by the state, whereas "continental" conceptions are grounded in notions of dignity and honour originally afforded only to an elite but in modern times generalised to the whole population. For Whitman, the

out, bizarrely, much English jurisprudence - was that recognising an author's right to decide on the publication of their unpublished manuscripts, artistic works.[10] For Warren and Brandeis these cases were not properly explained as cases of "property" in the products of one's labour, but were better seen as "instances and applications of a general right to privacy".[11] The cases protected private "thoughts, emotions, and sensations" and the authors argued "these should receive the same protection, whether expressed in writing, in conduct, in conversation, in attitudes or in facial expression."[12]

After some hesitation,[13] the Warren and Brandeis analysis was accepted in a case of use of an individual's image, without consent, in an advertisement. In *Pavesich v. New England Life Insurance Co*[14], the plaintiff was an artist who discovered his photograph (which, it seems, had been taken with consent) was being used by the defendant in an advertisement for its insurance services. The advert depicted the plaintiff along side a sickly looking man, and suggested that the plaintiff's comparative good health was attributable to the fact that he had insurance with the defendant, whereas the sickly-looking man did not. The plaintiff's action was for trespass on the plaintiff's right of privacy, caused by breach of confidence and trust reposed in the photographer. At first instance the claim was rejected, but on appeal the Supreme Court of Georgia allowed the appeal. Cobb J., for the Court, acknowledged that the Court had to determine whether an individual had a right of privacy which the courts would protect against invasion. Despite the fact that neither previous case-law nor commentary suggested there was such a right, the Court found that this did not suggest there was not such a right. The Court based its reasoning in 'natural law' arguing that the right of privacy 'has its foundation in the instincts of nature. It is

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Warren and Brandeis tort was grounded in this latter conception, specifically drawing on French and German law and scholarship.)

[10] *Prince Albert v Strange* (1849) 2 De G. & S. 652; *Nicols v Pitman* (1884) 26 Ch D 374; *Lee v Simpson* (mmm) 3 CB 871, 881; *Turner v Robinson* (xxxx) 10 Ir Ch 121. The authors also relied on implied contract and trade secret cases: (1890) 4 *Harv. L.R.* 193, 210-14.

[11] (1890) 4 *Harv. L.R.* 193, 198.

[12] (1890) 4 *Harv. L.R.* 193, 206.

[13] For the immediate case-law, see Prosser, 'Privacy', 384-5. Most important amongst these was a decision of the New York Court of Appeal, *Roberson v. Rochester Folding Box Co* 171 N.Y. 538, 64 N.E. 442 (1902), where a complaint concerning the use of a young woman's image in an advertisement for flour, with the caption 'The Flour of the Family', was rejected. Significantly, this prompted the New York legislature to introduce statutory protection to prevent the use of the name, portrait or picture of any person for "advertising purposes or for the purposes of trade" without consent.

[14] 50 SE 68 (1905) (Sup. Ct, Georgia).

recognized intuitively, consciousness being the witness that can be called to establish its existence.'[15] Just as a person had liberty to decide whether to expose their bodies to the public gaze (or to stay in seclusion), so they should have the power to decide whether their image was placed before the public eye.[16] For Cobb J, this right of privacy could be waived, but such waiver could be 'for one person, and still asserted for another; it may be waived in behalf of one class, and retained as against another class; and it may be waived at to one individual, and retained as against all other persons."[17] Moreover, the right would, where appropriate give way to competing interests in free speech.[18]

However, in the case in hand there was little difficulty in reconciling the two, often competing, interests of privacy and free speech. The 'form and features of the plaintiff are his own' and the defendants had 'no more authority to display them in public for the purpose of advertising the business in which they were engaged than they would have had to compel the plaintiff to place himself upon exhibition for this purpose.'[19] Such use in advertising involved 'not the slightest semblance of an expression of an idea, a thought or an opinion.'[20] The right of privacy, described in this way an extension of liberty of movement and self-determination, was thus violated.

Pavesich recognised that privacy interests could be affected by unwanted exposure of ones image in association with advertising. However, *Pavesich* concerned an image of an unknown person, where the wrong was perceived in non-pecuniary terms: the publication was 'peculiarly offensive to him' and 'tends to bring plaintiff into ridicule before the world.'[21] Although the Court spoke in terms of 'liberty' and thus might have fore-shadowed a general right to control all uses of one's image, subsequent

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[15] 50 SE 68 at 69. See also at 71 ('the right of privacy…is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this state both by the Constitution of the United States and of the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law."
[16] 50 SE 68 at 70.
[17] 50 SE 68 at 72.
[18] 50 SE 68 at 73-74 ('The right of privacy is unquestionably limited by the right to speak and print').
[19] 50 SE 68 at 79.
[20] 50 SE 68 at 80.
[21] 50 SE 68 at 68. Jonathan Kahn, 'Controlling Identity: Plessy, Privacy and Racial Defamation' (2005) 54 *De Paul L. R.* 755, 767 (emphasising that *Pavesich* involved "a dignitary harm – and infringement of a personal interest—not a property right.")

courts declined to protect well-known personalities where claims of injury to solitude or feelings were implausible. In *O'Brien v. Pabst Sales Co*.,[22] for example, the plaintiff football player, Davey O'Brien, who had allowed Texas Christian University to take photographs for publicity purposes was held not entitled to prevent the use of his photograph in football strip on a calendar, the Pabst Blue Ribbon Football Calendar, 1939. The Court of Appeal for the Fifth Circuit held that a person who had courted celebrity could not complain of intrusion into their privacy when they received the very publicity the court said they had 'been constantly seeking and receiving'.

In *Haelen Laboratories. Inc v Topps Chewing Gum Inc*,[23] the US Court of Appeal for the Second Circuit extended the logic of *Pavesich* into a right to control not privacy but 'publicity'. In *Haelen*, the facts of which "were not too clearly found",[24] the plaintiff claimed the exclusive right to use photographs of famous baseball players in connection with the sale of its chewing gum, basing its claim on contracts entered with the players. The defendant, a rival chewing-gum manufacturer used the same players images on its cards. The plaintiff objected on the basis of both inducing breach of contract (a recognised tort) and the exclusive rights in the images. The defendant argued that the baseball players had only non-assignable rights of privacy, which they could waive vis-à-vis the plaintiff (or the defendant) so that its use of the images was non-infringing, but could not assign the right to the plaintiff. Judge Jerome Frank, held that "in addition to and independent of the right of privacy (which in New York derives from statute), a man has a right in the publicity value of his own photograph i.e., the right to grant the exclusive privilege of publishing his picture" which was assignable.[25] These rights of 'publicity' were particularly relevant to the 'many prominent persons' who objected to use of their images not because of 'bruised

[22] 124 F.2d 167 (5th cir 1941), cert. Denied 315 US 823, 62 S. Ct. 917, 86 L.Ed. 1220 (1942). *Pallas v. Crowley-Milner & Co*, 334 Mich 282, 54 N.W. 2d 595 (1952). See Melville B. Nimmer, 'The Right of Publicity' (1954) 19 *Law and Cont Probs* 203, 204-9 (explaining limitations of 'privacy'-based conception of right over name and likeness).

[23] (1953) 202 F. 2d 866. For background to the case, see J. Gordon Hylton, 'Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v Topps Chewing Gum' (2001) 12 *Marquette Sports Law Review* 273.

[24] (1953) 202 F. 2d 866 at 867.

[25] (1953) 202 F. 2d 866 at 868. Distinguishing *Pekas Co. Inc. v. Leslie*, (1915) 52 N.Y.L.J. 1864 on the basis that the judge's attention was directed purely at the New York statute protecting privacy.

feelings' from exposure of their likenesses but because they 'no longer received money for authorizing advertisements, popularising their countenances.'

Haelen inaugurated a second wave of cases (and statutes) in which famous plaintiffs were permitted to claim for misuse of their names or likenesses, particularly by their use, without authorisation, in advertising.[26] While *Pavesich* had recognised such actions might involve invasions into the privacy of relatively unknown individuals, *Haelen* recognised that public figures had similar rights. But while the two actions bore a superficial similarity, the exact relationship between them was to become a matter for debate. Dean William L. Prosser,[27] sought to incorporate the publicity right within the rubric of privacy.[28] Prosser asserted that 'privacy' comprised not a single cause of action, but instead "a complex of four" distinguishable strands. These "four distinct kinds of invasion of four different interests" were intrusions upon another's seclusion or solitude, public disclosure of embarrassing private facts, placing another in a false light and appropriation for the defendant's advantage of the plaintiff's name or likeness. Prosser argued that as regard the fourth tort "[t]he interest protected is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity." In contrast Edward Bloustein,[29] claimed that the publicity right lay outside the concept of privacy. Privacy, he said, protects "the individual's independence, dignity and integrity; it defines man's essence as a unique and self-determining being" and argued that Prosser's division into parts neglect this significant unifying characteristic. Bloustein denied that protection of one's name or image can be reduced to a proprietary interest, emphasising that cases such as *Pavesich* concern preservation of "individual dignity." For Bloustein, the "[u]se of a photograph for trade purposes turns a man into a commodity and makes him serve the economic needs and interests of others…" He denies that there is a "right of

[26]According to the National Conference of State Legislatures, there are 19 states with statutory publicity laws and 11 which recognise a right at common law only. In California, actions arise under Civil Code section 3344 and the common law. Section 3344(a) provides that 'any person who knowingly uses another's name, voice, signature, photograph or likeness, in any manner…for purposes of advertising or selling,…without such person's prior consent…shall be liable for any damages sustained by the person or persons injured as a result thereof.' In New York, the action is based on sections 50 and 512 of the Civil Rights Law.

[27] Dean of University of California School of Law, Berkeley.

[28] Prosser, 'Privacy', at 388.

[29] Edward J. Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 N.Y.U.L.R. 962. Bloustein, at 971.

publicity" and prefers to see commercial dealings as situation where a person abandons his or her privacy right.

Although Prosser's categorisation of 'four torts of privacy' has received widespread judicial acceptance,[30] the question of the relation between protection of 'identity' through rights of privacy and publicity has continued to engage scholars and law-makers.[31] Perhaps the most important development has been the 'Restatements' produced by the American Law Institute. Here the rules on commercial appropriation of identity are summarised in two restatements, both under rubrics of 'privacy' and 'unfair competition.'[32] The Restatement (Second) of Torts includes a rule imposing liability for an invasion of privacy against 'one who appropriates to his own use or benefit the name or likeness of another.'[33] The Restatement (Third) of Unfair Competition states that:

> 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 the purposes of trade is subject to liability for the relief appropriate under the rules states in sections 48 and 49.[34]

The Restatement explains that this parallels the provisions of the Restatement of Torts on privacy, which relate to the protection of personal interests that are affected by the appropriation of another person's identity. Thus "similar substantive rules govern the determination of liability" in privacy and unfair competition, the difference relating primarily to the nature of the harm suffered.[35]

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[30] J. Thomas McCarthy, 'Public Personas and Private Property: The Commercialization of Human Identity' (1989) 79 *Trademark Reporter* 681, 685-6. *White v. Samsung Electronics America Inc*., 971 F. 2d 1395 (9th Cir 1992), cert denied 113 S. Ct 2443, 124 L. Ed. 2d 660 (1993) ("one of the earliest and most enduring articulations of the common law right of publicity cause of action.")

[31] J. Kahn, 'Privacy as a Legal Principle of Identity Maintenance' (2003) 33 *Seton Hall Law Review* 371.

[32] The Restatement (Second) of Torts, section 652 (1977) and the Restatement (Third) of Unfair Competition (1995).

[33] Restatement (Second) of Torts, section 652 (1977). The commentary, written by Prosser, states that 'the interest protected by the rule stated in this Section is the *interest of the individual in the exclusive use of his own identity*, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or others.' (emphasis added)

[34] Section 46 of the Restatement (Third) of Unfair Competition.

[35] Restatement (Third) of Unfair Competition, Comment (b). The commentary to the Restatement also notes that "like the right of privacy, the right of publicity protects an individual's interest in personal dignity and autonomy."

The identity right is, of course, limited by various doctrines: incidental uses are not covered,[36] nor are non commercial uses, and artistic uses may benefit from exemption under the First Amendment

1.2. The UK Protection of Identity

As I mentioned at the outset, English law does not have a corresponding action for 'commercialization of identity.' The English Common law declined (until recently) to recognise a right of privacy and has not come close to accepting the idea of a right of publicity. Baroness Hale explained in 2004 that "[u]nlike in France and Quebec, in this country we do not recognise a right to one's own image",[37] and, as recently as May 2007, other members of the House of Lords reiterated the point. While recognising that "the position is different in other jurisdictions", in *Douglas v Hello*, Lord Walker stated that "under English law it is not possible for a celebrity to claim a monopoly in his or her image, as if it were a trademark or a brand."[38] Lord Hoffmann agreed that, while he and Lord Walker might differ as to the result of the case before them (which involved interpretation of the law of confidentiality), there was no question of creating "an 'image right' or any other unorthodox form of intellectual property.'[39]

Of course, to deny the existence of an image right (let alone an "identity right") is not to say that an aggrieved party cannot, in certain circumstances gain judicial assistance in preventing certain uses of his or her image or identity. Here, the claimants have sought to use any of a number of different legal bases for their claims (depending, in part, on the regulatory context, and the type of damage that the appropriation has brought about). Although claimants have used defamation,[40] contract,[41] copyright,[42] and other regulatory mechanisms (such as complaining to the

[36] *Preston v Bregman Productions* 765 F. Supp 116 (USDC, SDNY 1991) (inclusion of plaintiff, a prostitute, in opening titles for film, Sea of Love, for 9 seconds, with face showing for 4.5 seconds, was incidental use so not a violation of New York privacy statute).
[37] *Campbell v Mirror Group Newspapers* [2004] A.C. 457, 501, para 154.
[38] *Douglas v. Hello* [2007] para. 293. Lord Walker "Their claims come close to a 'character right' protecting a celebrity's name or image such as has consistently been rejected in English law"…(para 285). *See also Elvis* [1999] RPC 567, 580-2, 597-8; Brooke LJ [2001] QB 967 paras 74 & 75.
[39] *Douglas v. Hello* [2007] para. 124.
[40] *Tolley v J. S. Fry & Sons* [1931] AC 333 (amateur golfer's action for defamation succeeded when caricature included in plaintiff's advert having a bar of Fry's chocolate in his trouser pocket).
[41] *Pollard v Photographic* Co. (1888) 40 Ch D 345.

Advertising Standards Authority),[43] until recently the most promising option has seemed to be passing off.

1.2.1 Passing off

The central precept of the English law of passing off is that "no man has a right to sell his own goods as the goods of another." [44] Under conventional rules, to succeed a claimant would have to show that he was a trader and had a trading reputation (so called goodwill) and that another's use of his name or image operated as a misrepresentation that would damage the claimant's goodwill. While the mere use of the name or image of a private or public figure will not always amount to passing off, it might well do in cases where the person in question sold goods or provided services that had become associated with the particular name or image in such a way that the latter would be understood as indicating the origin of the goods or services. The actor Paul Newman, or celebrity Lloyd Grossman might for example take up manufacture of various foods, and, having done so, would be able to stop other traders 'passing their goods off' as 'Newman's Own' pasta sauce or Lloyd Grossman Madras curry Sauce.

However, claimants seeking to protect their names and images have frequently failed to establish relevant elements of the action for passing off. As early as 1848,[45] the Physician in Ordinary to the Queen, Sir James Clark, was denied an injunction against a defendant who was selling "Sir J. Clarke's Consumption Pills" because Clark was not himself "in the habit of manufacturing and selling pills" so there was no damage "to property by the fraudulent misuse of the name of another, by which his profits are diminished." Virtually one hundred years later Derek McCulloch, the presenter of the BBC's very popular radio broadcast programme, *Children's Hour*, was denied an injunction preventing the defendants from selling "Uncle Mac's Puffed Wheat."

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[42] *Merchandising Corporation v. Harpbond* [1983] FSR 32 (Pop star Adam Ant unable to protect new image as a painting.

[43] *Bedford*. Note also the decision of WIPO Arbitrator, David Perkins, in Winterson v Hogarth [2000] ETMR 783 (holding that English law recognised jeanette winterson was a trade mark for the purposes of the Uniform Domain Name Dispute Resolution Policy, that Hogarth's registration of, inter alia, jeanettewinterson.com, had been in bad faith, and a requiring transfer of the domain name to Winterson).

[44] (1843) 7 Beav 84, 88.

[45] (18511 Beav 112; 8 *Law Magazine* p. 236.

Passing off required that the defendant's misrepresentation damage the goodwill of the plaintiff's business and, given that McCulloch was "not engaged in any degree in producing or marketing puffed wheat", the court was unable to see how his business could be damaged.[46] In *Lyngstrad v. Annabas Products,*[47] the pop group ABBA complained that the defendant was selling paraphernalia that bore the name and image of the group. Refusing to grant relief, Oliver J said that he did not think anyone could reasonably imagine that the pop stars had given their approval for the paraphernalia. He also added that the defendants were not doing 'anything more than catering for a popular demand among teenagers for effigies of their idols'.[48]

Despite these precedents, in 2002 a celebrity finally succeeded with the decision of Laddie J. in *Irvine v. Talksport.*[49] In this case the famous Formula 1 racing driver brought an action against Talksport for using his image on a promotional brochure (used to attract advertising for the radio station). The brochure comprised a picture of Irvine, which had been modified so that he was listening to a radio bearing the Talksport logo. Irvine brought an action for passing off, and Laddie J found in his favour. Laddie J reviewed the cases on personalities and passing off, and held that they indicated that a person might be able to utilize passing off to prevent a misrepresentation by a trader that its products or services had been endorsed by the personality. (In so doing the judge made it clear that endorsement was a narrower notion than merchandising.) On the facts in front of him, Laddie J found that Talksport's brochure had given the impression that Irvine endorsed the radio station. In particular, Laddie J was impressed by evidence from an associate of Irvine to the effect that he sought a free radio from the racing-driver, an act which indicated that he believed Irvine had done a deal with the radio station. The Court of Appeal affirmed Laddie J.'s decision, emphasising, in particular, that the actual image of Irvine listening to the radio gave an impression of endorsement.

1.2.2 Privacy.

46 *McCulloch v May* (1848) 65 RPC 58.
47 [1977] *FSR* 62.
48 Ibid.
49 [2002] *FSR* 943.

While passing off has long seemed the most promising avenue for those seeking to prevent the commercial use of their name or image – not least because there was no common law of privacy - exciting new possibilities were presented for the development of the law of privacy in October 2000 when the Human Rights Act 1998 came into force. As is well known, the Act gave legal force within the United Kingdom to the European Convention on Human Rights, as well as the jurisprudence to the European Court of Human Rights ('the Strasbourg Court'). Importantly, Article 8 of that Convention states that "everyone has the right to respect for his private and family life, his home and his correspondence." Because of the wording relating to 'respect', Article 8 does not merely compel the State to abstain from interfering with private and family life but also requires the state positively to act to protect privacy, even in the sphere of the relations of individuals between themselves. In so doing, the state has 'a certain margin of appreciation.'

The impact of Article 8 on English law has not been straightforward, primarily because English law continues to deny the existence of a tort of invasion of privacy. Instead, the judiciary has acknowledged that it should develop existing causes action to provide protection sufficient to comply with Article 8. The most important decision so far is that of the House of Lords in *Campbell v MGN Ltd*.[50] As was widely reported in the media, this case concerned the famously irascible model, Naomi Campbell. The *Daily Mirror* had published articles relating to the fact that she was receiving treatment for drug addiction ("Naomi: I am a drug addict"), and these were illustrated with photographs of Campbell leaving meetings of narcotics anonymous ("Therapy: Naomi Outside Meeting").[51] Campbell sued claiming invasion of her privacy. The House of Lords held in her favour by three votes to two, though the disagreement was more about application of the principles than over what they were. The House indicated that Article 8 was to be given effect to through adaptation of the rules on breach of confidence.[52] The key question was whether the photographs related to matters with respect to which Campbell had a reasonable expectation of privacy.[53] Given that Campbell's medical treatment was a private matter, and that the newspaper

[50] [2004] A.C. 457; [2004] 2 All ER 995; [2004] 2 WLR 1232 (House of Lords).
[51] Published on 1 February 2001.
[52] [2004] A.C. 457, 465 per Lord Nicholls, para. 17 ("the values enshrined in Article 8 and 10 are now part of the cause of action for breach of confidence"). See also Lord Hoffmann, at para 51, referring to a "shift in the centre of gravity"

was aware of this, the majority held that the *Mirror* had breached an obligation of confidence.[54]

The *Campbell* case certainly indicates potential for the law of privacy to give a person control of their image, but that potential is limited to images over which a person has a reasonable expectation of privacy. The effect is thus limited to photographs that disclose private matter, or implicate the dignity of the subject. In *Campbell* itself, Lord Nicholls argued that (once it was accepted that the fact she was receiving treatment was in the public domain) the photographs contained no private information: she was shown in the street exchanging greetings with others and "there was nothing undignified or distrait about her appearance."[55] Lord Hoffmann too said that even where a photograph is taken of someone in a public place, its publication could be restrained if it revealed him or her "to be in a situation of humiliation or severe embarrassment" but that here there was "nothing embarrassing" as Ms Campbell was "neatly dressed and smiling."[56] Baroness Hale too agreed that had the picture been presented merely as one of Ms Campbell going about her daily business in a public street, there could have been no complaint (though she, and the majority, took the view that in the context of the disclosures about her medical treatment, there was a reasonable expectation of privacy).[57] The clear view that a public figure has no expectation of privacy when going about their business in public was applied in *Elton John vAssociated Newspapers.*[58] Here, Elton John sought to prevent the *Daily Mail* from publishing a photograph of him standing in the street outside his home wearing a baseball cap and tracksuit. Denying interim relief, Eady J explained that nothing in the photograph pertained to Mr John's health, or social, personal or sexual relationships, and thus there was nothing relating to which John could be said to have a reasonable expectation of privacy. While the Judge expected that the article would likely be dismissive or personally offensive, he said that as yet there is not "any doctrine operative in English law whereby it is necessary to demonstrate that to

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[53] [2004] A.C. 457, 466 para 21 per Lord Nicholls.
[54] Lord Nicholls said that Campbell had put the issue of whether she was addicted to drugs into the public domain, and that the photographs disclosed nothing further than that she was attending narcotics anonymous and so did not relate to material over which she had a reasonable expectation of privacy. Lord Hoffmann held that the Mirror's freedom of expression justified the publication of the photographs.
[55] [2004] A.C. 457, para. 31.
[56] [2004] A.C. 457, paras 75-6
[57] [2004] A.C. 457, para 154.
[58] [2006] Entertainment and Media Law Reports 772.

publish a photograph one has to show that the subject of the photograph gave consent."

1.2.3 Confidentiality

The recent decision of the House of Lords in *Douglas* indicates that, even without circumstances that give rise to a reasonable expectation of privacy, the law of breach of confidence can itself provide some protection against use of one's image. The case arose out of events following the wedding of Catherine Zeta Jones and Michael Douglas in New York in 2000. Ten days before the wedding, the bride and groom entered into an arrangement with OK! Magazine concerning photographs of the wedding, for which Douglas and Zeta-Jones each received £500,000. The Doulgases were to arrange security for the wedding (so that no publishers other than OK! could obtain images), to commission the photography and the select photos for publication by OK! (by November 22). The agreement purported to transfer "the exclusive right to publish…the photographs…from the date of the wedding and for nine months thereafter" and the Douglases undertook not to publish or authorise publication of any photographs during that period. There were some 350 guests at the wedding, all of whom had been informed that there was to be no photography.

OK!'s chief rival, Hello! obtained (for £125,000) six photos of the wedding taken by a paparazzo Mr Rupert Thorpe, and sought to publish them. Hello! was initially enjoined by Court order, but the Court of Appeal reversed on 23 November 2000, and it published the photographs that day. The, by now, not –so-'happy couple' and OK! – responded to these developments by rushing selection of the photographs and publication, so that OK! in fact was able to release its authorised coverage on 23rd November too. The Douglases and OK! sued for damages, claiming breach of confidence, invasion of privacy and delibrate interference with business relations. At first instance, before Lindsay J, they succeeded. The Douglases were awarded £3750 damages each for mental distress; and £7000 for inconvenience they suffered as a result of the wrongful publication. OK!, in contrast, were awarded what would be called in tabloid language a "whopping" £1, 026, 706 pounds for loss of profit. The defendants appealed. The Court of Appeal allowed the appeal in part – that is, the most financially significant part - as regards OK!s claim. Lord Phillips MR, giving

judgement for the Court, accepted that the photographs "plainly portrayed aspects of the Douglas's private life and fell within the protection of the law of confidentiality, as extended to cover private or personal information."[59] Moreover, the fact that the Douglases had entered a contract with *OK!* allowing the latter to exploit some of the information did not mean all details of the wedding were in the public domain. However, as regards OK!'s claim, the Court observed that this was wholly based on interests purportedly derived from the Douglases. Scrutiny of the agreement between the Douglases and OK! revealed that it did not claim to give any rights in the residual details of the wedding (other than that in the authorised photographs).[60] The agreement gave OK! the right to use the pictures of the wedding that the Douglases had selected, but the residual rights over all the other photos (including unauthorised ones) remained with the couple. Crucially, the unauthorized photos "invaded the area of privacy which the Douglases had chosen to retain. It was the Douglases, not OK!, who had the right to protect this area of privacy or confidentiality."[61]

On appeal the House of Lords reversed the ruling in respect of OK!. Lord Hoffmann, with whom Lord Brown and Baroness Hale agreed, took the view that photographic images of the wedding were regarded by the Doulgases and OK! as confidential, and observed that OK! had required the Douglases to use their best efforts to ensure that no-one else would take any photographs. Hello! knew that there was an exclusive arrangement between the Douglases and Hello! and the sort of provisions it would contain. Consequently, Hello! came under an obligation of confidence to OK! itself.[62] Lord Hoffmann described the key matter as the fact that "OK! had paid £1m for the benefit of the obligation of confidence imposed upon all those present at the wedding in respect of *any* photographs of the wedding."[63] Lords Walker and Nicholls had difficulty with this analysis. Lord Nicholls held that Hello!'s actions did not reveal any information not already made public when OK! published its authorised photographs.[64] Lord Walker emphasised that OK!'s right depended on establishing confidentiality, and he could not see any basis for treating hello's photographs of the event as confidential.

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[59] [2006] QB 125, 159 para. 94.
[60] [2006] QB 125, 168, para 132.
[61] [2006] QB 125, 169, para 136.
[62] [2007] UKHL, Para. 129.
[63] [2007] UKHL, Para. 117.

1.2.4 Summation

Although English law offers protection to persons for unauthorised use of their names and likenesses, it seems that at present this is only so where the effect of publication is to imply endorsement of a product, or where the photograph discloses matters in relation to which there exists a reasonable expectation of privacy, or are subject to obligations of confidence. What we should draw from this, however, is that while in specific contexts English law (or self-regulation) may provide remedies to those who find that their identities have been used for commercial purposes, English law has never done so on the basis that 'identity' is an attribute that deserves protection for its own sake. This leaves a number of circumstances where no such rights exist in England, but where protection would likely be available in the United States. For example, a depiction of a look alike, such as Jackie Onassis at a party on a Dior advertisement would not incur liability, absent a belief on behalf of consumers that Onassis endorsed the product. The same would be true had the picture been one of Onassis from a photo-library of publicly available images, or indeed of her standing in an unembarrassing manner in a public place.

1.3 Potential Implications of Case Law of the European Court of Human Rights

If English law currently contains large gaps compared to that in the US, there are some who argue that the logic of the European Court of Human Rights's decision in *Von Hannover v Germany* effectively demands that English law fill those gaps.[65] In this case, Princess Caroline of Monaco had sought to restrain the publication of various pictures of her in a number of German newspapers and magazines. The pictures included some in a courtyard restaurant, some on a beach, some horse-riding, some on a ski-ing holiday, some leaving her Parisian home, and some shopping. She had relied initially on the German Civil Code's provision protecting personality, as well as specific provisions in German copyright law enabling a person to protect their

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[64] Paras 257-9.

[65] Application No 59320/00, (2005) 40 E.H.R.R. 1. For reviews of *von Hannover*, see M.A. Sanderson, 'Is *Von Hannover v Germany* A Step Backward for the Substantive Analysis of Free Speech and Privacy Interests' [2004] 6 EHRLR 631; N.A. Moreham, 'Privacy in Public Places' (2006) 65(3) CLJ 606.

image.[66] The Hamburg Court had held that as a figure of contemporary society par excellence, Caroline had to tolerate this kind of publication, and this view was affirmed on appeal. The Federal Court of Justice allowed a further appeal in relation only to the pictures in the restaurant courtyard, since it was clear to third parties that she and her companion wanted to be alone. On further appeal, the Federal Constitutional Court also took the view that pictures with her children infringed her basic right to protection of her personality. Unhappy with the outcome under German law, Caroline took the German Government to the European Court of Human Rights, where it was held that the German law had not balanced appropriately the right to freedom of expression contained in Article 10 of the Convention with the right to respect for one's private life (in Article 8).

The Court's judgment began by considering the concept of private life in Article 8. It "extends to aspects relating to personal identity, such as a person's name, or a person's picture. Furthermore, private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person, with others, even in the public context, which may fall within the scope of 'private life.'" [67]

The Court said that there "is no doubt that the publication…of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life."[68] Effectively, Article 8 was engaged. The Court then went on to examine the inter-relationship between Article 8 and 10, the latter guaranteeing freedom of expression. The Court noted that although freedom of expression "extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the dissemination of 'ideas', but of images containing very personal or even intimate 'information' about an individual. Furthermore, photos appearing in the tabloid press

[66] German Basic Law, art 2 ('Everyone shall have the right to the free development of their personality provided that they do not interfere with the rights of others or violate the constitutional order or moiral law.") Section 22 of the Copyright (Arts Domain) Act (Images can only be disseminated with the express approval of the persons concerned).
[67] (2005) 40 E.H.R.R. 1, para.50.

are often taken in a climate of continual harassment that induces in the persons concerned a very strong sense of intrusion into their private life or even of persecution." [69] The Court also observed that the pictures in the case "show her in scenes from her daily life" and that the "accompanying commentaries relate exclusively to the details of the applicant's private life." The "sole purpose was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life".[70] As she was not exercising any official functions, and the photographs related exclusively to details of her private life there was no contribution "to a debate of general interest" such as to require their publication under article 10.[71]

Beverley-Smith, Ohly and Lucas-Schloetter, in their book, *Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation*, have argued that *Von Hannover* does seem to require recognition of a right to identity:[72]

> "In typical appropriation cases the case for the protection of privacy is even stronger. The use of a celebrity's picture or name in advertising or merchandising does not provide the public with socially useful information or contribute in any way to a debate of public interest. Following the ECHR's reasoning, article 8 of the Convention arguably imposes an obligation on the member states to protect individuals against any misappropriation of their personal indicia in advertising or merchandising. A free speech defence will only be available in exceptional cases."

The authors argue that the jurisprudence "will inevitably force English law to confront the issue of how best to develop a remedy for appropriation of personality."[73]

There are four aspects on *von Hannover* that seem, possibly, to point towards recognition of identity rights (or at the very least 'image rights.') The first is the occasional use of the language of image rights. For example, the Court refers to the "positive obligation under the Convention to protect private life and the right to control the use of one's image." (and, as we noted, the Court also said that "the

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[68] (2005) 40 E.H.R.R. 1, para. 53.
[69] (2005) 40 E.H.R.R. 1, para. 59.
[70] (2005) 40 E.H.R.R. 1, para. 65.
[71] (2005) 40 E.H.R.R. 1, para. 76.
[72] H. Beverley-Smith, A. Ohly and A. Lucas-Schloetter, in their *Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation* (Cambridge: CUP, 2005) 222-3.
[73] P. 225.

concept of private life extends to aspects relating to personal identity, such as a person's name, or a person's picture.") These comments could be taken to imply absolute rights of control over one's image (and identity) subject to contravening article 10 interests.[74]

The second is the implication, from the decision itself, that all photographs of an individual engage the Article 8 right, even mundane ones of a person shopping or horse-riding. In this respect the case went well beyond it previous holding in *Peck* (where the protected images were of *Peck* carrying a knife after attempting to commit suicide in public),[75] and *Campbell* (where, subject to a difference of opinion, the pictures were of the model outside the venue of a narcotics anonymous meeting which could be identified). If protection must also be provided over the mundane, one might ask, aren't all photographic images protected? Indeed, subsequent case-law of the Court indicates that "private life" was engaged in relation to publication by the press of a photo of a person taken for the purposes of an official file.[76]

The third is the heavy emphasis on the privacy interests in the balancing exercise between Article 8 and Article 10 (freedom of expression). It is this latter aspect, particularly, that seems to inform Beverley-Smith, Ohly and Schloetter's views. These commentators seem to treat *von Hannover* as suggesting that all uses of photographs impact on private life, and thus require justification under article 10.[77] Because there

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[74] A dissenting minority comprising Judges Spielmann and Jebens, interpret *von Hannover* as having established "the right to one's image" under Article 8. See *Vereinigung Bildener Künstler v Austria*, App No 68354/01 (25 January 2007), para 14 (explaining that "control of one's own image is one of the essential components of personal development, [and thus that] Article 8 may therefore be applicable simply on the ground that a person has not had the prior opportunity to challenge the reproduction of his or her image." On the facts of the case, the artist had used a photograph of the claimant, Meischberger, taken from a newspaper. Arguably, however, it was the mode of presentation, that is, in a sexually explicit collage, rather than its mere use, that caused the use of the image to implicate Meischberger's private life. See also the dissenting opinion of Judge Herndl in *Verlagsgruppe News GmbH v Austria (No 2)*, App No. 10520/02 (14 Dec. 2006), who would have held that the publication of *any* picture of Mr G, a businessman accused of tax evasion, would be "a gratuitous invasion" into his private life.

[75] *Peck v United Kingdom, Appn No. 44647/98* (1003) 36 EHRR (41) 719.

[76] *Sciacca v Italy*, Appn 50774/99 (11 January 2005).

[77] *White v Sweden*, App No 42425/02 (Sept 19, 2006) para. 19 may support this view, for in this case the European Court of Human Rights assumed, without examining either the circumstances in which the photographs were initially created or disclosed, that the publication of pictures of White in several Swedish papers engaged Article 8, with the critical issue being whether this was justified under Article 10.

is little such justification for merchandising or advertising uses, they argue that consent is needed for any use of any picture.

The fourth reason why *von Hannover* might be taken as indicating a requirement to recognise a right to identity lies in the justification offered for the protection of private life. Following earlier case-law, the Court twice refers to ensuring the development, without outside interference of the personality of each individual in his relations with other human beings" (para 50) and "the fundamental importance of protecting private life from the point of view of the development of every human being's personality."[78] Given the emphasis on self-determination, it might be argued, *von Hannover* does require that a person identified consent to any and every new use of the indicia of their identity (in particular, image, but also name or voice).

There are, I would suggest, two reasons to be sceptical about this understanding of *von Hannover*. Firstly, we should note that the language of the case, in particular the references to image rights, reflects the German legal provisions under consideration (Article 22 of the Copyright Act), which protects a person's image whether it relates to private life or not. German law, is of course, entitled to give individual greater protection than that required under article 8. The Court objected to the derogation from the German law on image rights (in Article 23), which applied to figures of contemporary society, and according to the Court seemed to deprive these persons of their rights under Article 8. Seen in this light, the Courts comments to "image rights" should be seen as part of the context of the decision, not statements as to the content of Article 8.

Secondly, while the *von Hannover* case does clearly cast doubt on the assumptions of English law present in *Campbell* and *Elton John* that 'ordinary photos taken of a famous person in a public place' are within the remit of Article 8, [79] it does not follow from the decision that all photographs, however made and whatever their content, contain private information. The images must engage 'private life' in a non-trivial

[78] Citing *Stjerna v Finland,* Appn No 18131/91 (1997) 24 EHRR 195 Commission para 56 (Article 8 ensures a sphere within which everyone can freely pursue the development and fulfilment of one's personality.)

way before Article 8 is engaged.[80] There must be some 'legitimate expectation' of protection and respect for the person's private life. In the *von Hannover* case, the images may have been essentially uninteresting in that Caroline was not doing anything controversial (carrying a knife, attending a meeting of NA), but as far as the Court was concerned it was exactly these sorts of quotidian, routine, actions that were private. They concerned her daily life. Moreover the images were created without Caroline's consent, and distributed well-beyond any audience to which she could have been taken to consent. As the Court said "the context in which these photos were taken – without the applicant's knowledge and consent—and the harassment endured by many public figures in their daily lives cannot be fully disregarded."[81]

Importantly, then, images such as those of Eddie Irvine in *Irvine v Talksport* or the base-ball players in *Haelen*, seem to fall well outside the scope of the *von Hannover* holding. For *von Hannover* to encompass such acts we would have to accept that photographs taken with the consent of the person depicted and distributed in public with their consent nevertheless involved aspects of the person's private life so that explicit consent was required whenever the image was further distributed to a distinguishable or different audience. This is, of course, not beyond the bounds of what a legal system might require, but it seems a long way beyond what either Article 8 of the Convention or *von Hannover* demand.

If *von Hannover* does require recognition of image rights, does it also require a general right to 'one's identity'? The statement that "the concept of private life extends to aspects relating to personal identity, such as a person's name, or a person's picture" might suggest so.[82] However, one should be very careful to draw a distinction between the concept of private life in Article 8 and the legal content of the

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[79] 'There is little doubt that *Von Hannover* extends the reach of article 8 beyond what had previously been understood…': *McKennitt v Ash* [2006] EWCA Civ 1714 (December 14, 2006) para 37 per Buxton LJ.

[80] See e.g. *Stjerna v Finland*, Appn No 18131/91 (1997) 24 EHRR 195, para 67 (inconveniences were not sufficient to implicate Article 8).

[81] (2005) 40 E.H.R.R. 1, at para. 68; see also para 59. The argument that *von Hannover* was a special case of persistent media intrusion or harassment was rejected in *McKennitt v Ash* [2006] EWCA Civ 1714 (December 14, 2006) para 41, on the basis that the ECHR had already indicated it was a principle of general application in *Sciacca v Italy* Appn 50774/99.

[82] (2005) 40 E.H.R.R. 1, para. 50. Note also, *PG and JH v UK*, Appn No 44787/98 (Sept 25, 2001) The Times, October 19, 2001, para. 56 ("Article 8 protects a right to identity and personal development…");*Bensaid v UK*, App No 44599/98 (2001) 33 E.H.R.R. 205 para. 47.

"right of respect" for one's private life in Article 8. The European Court has happily identified matters such as names,[83] sexual identity,[84] and so on as matters falling within private life. However, just because names come within the idea of private life, and so a person can object when their choice of name is limited in a discriminatory manner, does not mean that Article 8 requires recognition of an exclusive right over ones name. One might as well conclude that a person is to have exclusive rights in their own sexual identity, a self-evidently ludicrous proposition.

Some Court case law does suggest that rights over a person's "voice" might be included in the content of respect for "private life". In *PG and JH v UK*,[85] the applicants (who had been suspected of planning an armed robbery) were recorded while in police custody, in order to compare the applicants' voices with those on certain other recordings. They were both later convicted of conspiracy to rob Securicor and sentenced to fifteen years' imprisonment. As regards the recordings at the police station, which were primarily for use by voice experts, the Court held that there was violation of Article 8(1). The right to respect for one's private life included a right to prevent the recording of one's speech, even where the content of the speech was wholly anodyne, at least where this was done covertly. Since the police were not authorised to make these recordings under any express legislative framework, the act of recording and use of the fixations were not done "in accordance with law" and violated the applicants' Article 8 rights. However, by a majority,[86] the Court held that the use of the evidence in the applicants' trial did not violate their right to a fair trial

[83] Earlier case-law, which has recognised that matters relating to the regulation of names may fall within the concept of private life in Article 8 has concerned administrative regulation of the choice of surname, something quite different to recognition of property in one names. In those cases the Court has indicated that restrictions on a persons freedom to choose their own name may operate in a way that affect their private life, and be objectionable, in themselves or in combination with the prohibition against unjustified discrimination contained in article 14. So, for example, a person should not be prevented from changing their name from a name which is humiliating (*Stjerna v Finland*, Appn No 18131/91 (1997) 24 E.H.R.R. 195, particularly the Commission decision at para 64, pp. 205-6), nor should the rules on adoption of surnames after marriage operate to allow only adoption of the name of a particular gender (*Burghartz v. Switzerland*, Appn. No 16213/90 (1994) 18 E.H.R.R. 101;*Unal Tekeli v Turkey*, App No 29865/96 (2006) 42 E.H.R.R. 53.

[84] *Bensaid v UK*, App No 44599/98 (2001) 33 E.H.R.R. 205 para 47("Private life" is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8); *Van Kuck v Germany*, App No 35968/97 (2003) 37 E.H.R.R. 973, para 75(" a fundamental aspect of her right to respect for private life, namely her right to gender identity and personal development").

[85] Appn No 44787/98 (Sept 25, 2001).

(under Article 6). Each was awarded £1000 compensation for "feelings of frustration and invasion of privacy".[87] It must be right that covert recording of a person in a private space (or a space in which they have a reasonable expectation of privacy) is as much an invasion of privacy as the use of a telephoto lens to take photographs of a person in private. However, when viewed in the light of some of the more expansive readings of *von Hannove*r, this holding that respect for private life extends to covert recording of voice (including taping a celebrity in a public place) raises the possibility that Article 8 could be invoked to require prevention of the recording of lectures and performance.[88]

Part 2: Why Britain, Europe – and the United States – should think twice before Making Identity into Property

Even if, as I have argued, the UK is not obliged to develop a notion of property in identity, there will doubtless be pressure to do so. Everyone who works in the field of intellectual property law is conscious of the tendency of legal norms to expand and, in areas of harmonization, to gravitate toward the most protective regime. Although there is no international framework that requires harmonisation of 'identity rights' between the UK and US, wherever foreign developments present greater levels of protection, they come to be cited as standards to which domestic law should aspire and models against which it should be judged. The use of the names, images and voices of film, TV and sports stars in advertising and in merchandising is already big business: those who invest in exclusive dealings with these figures, and the celebrities who benefit from such transactions, will doubtless press for the recognition of property in identity.[89]

I am unpersuaded that such recognition would be desirable. For one thing, I share the views of other commentators that the philosophical and policy justifications for such

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[86] Judge Tulkens dissented, arguing that evidence obtained in breach of a human right should not be admissible at trial.
[87] Appn No 44787/98, para 92.
[88] The European Union has an elaborate regime for protecting rights in performances: Council Directive 92/100/EEC of 19 November 1992 on rental and lending right and on certain rights related to copyright in the field of intellectual property.
[89] Hazel Carty, 'Advertising, Publicity Rights and English Law' (2004) IPQ 209-258.

protection have not been made out.[90] Neither arguments based on natural rights, nor those based on economics, which justify protection of intellectual property in intellectual creations, seem to apply satisfactorily to the names, voices or images or individuals. In most cases, one's name, face or voice is not a creation requiring labour, skill, ingenuity or inventiveness. Why then should it be made a property? To echo one English appellate judge,[91] "monopolies should not be so readily created."

This is not to say that aspects of identity should never be the subject of legal protection. Misuse of identity can be a vehicle for all sorts of wrongful activities and transactions. A person can defraud another by pretending to be someone else;[92] impersonation can undermine the validity of consent to sexual intercourse; [93] and adopting a person's image in advertising one's goods may deceive consumers into believing that the person featured endorsed the goods.[94] In each case, use of attributes associated with another person is the vehicle for fraud, rape or passing off. But the wrong, in my view, is not use of "someone else's identity" *per se*. Rather it is use of someone else's identity in a way which deceives another person and thereby allows the deceiver to gain something they would not have otherwise achieved (money, sex or custom). Other unauthorized uses of 'identity' may also justify legal intervention under the associated rubric of privacy.

Because the arguments relating to justifications of "identity rights" have been rehearsed at length by others (more able than myself) elsewhere, I do not want to interrogate them here. Instead, I want to make two broader points about the suitability

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[90] M. Madow, 'Private Ownership of Public Image: Popular Culture and Publicity Rights' (1993) 81 *California Law Review* 125; M. Lemley & S. Dogan, 'What The Right of Publicity Can Learn from Trademark Law' (2006) 58 *Stanford Law Review* 1161 (critiquing "a slew of sometimes sloppy rationalizations"). For other justifications, See Alice Haemmerli, 'Whose Who? The Case for a Kantian Right of Publicity' (1999) 49 *Duke L.J.* 383; Mark McKenna, 'The Right of Publicity and Autonomous Self-Definition' (2005) 67 *University of Pittsburgh Law Review* 225; and, on the same lines as McKenna, M. Spence, "The Mark as Expression/The Mark as Property" (2005) 58 *Current Legal Problems* 491.

[91] *Elvis Presley Trade Marks* [1997] *RPC* 543; [1999] RPC 567, 598 per Simon Brown LJ (There should be no a priori assumption that only a celebrity may ever market his own character).

[92] *R v Odewale* [2004] EWCA 145 (where 'identity theft' is described as 'a particularly serious form of conspiracy to defraud').

[93] Sexual Offences Act 2003, s.76 (no consent, and thus rape, where the defendant 'intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant'). In contrast, case law holds that there is no criminal assault when a person pretending to be a dentist gives dental treatment: a person's professional status or qualifications is not, in general part of their 'identity'. *R v Richardson* (1998) 43 B.M.L.R. 21 (Court of Appeal).

[94] See *Irvine v Talksport*, already discussed.

of human identities as legal properties – points I hope that will make policy-makers and judges think twice before. One concerns the meaning of 'identity'. The second relates to the coherence of the category of identity.

2.1 Definition

My first concern with the idea of giving legal protection over 'identity' is one of definition. To date the United States statutes have mostly talked about 'name, image, likeness' etc,[95] and it is the commentators,[96] and judges,[97] that have replaced these specific notions with the broader category of 'identity.'[98] In fact, while it seems that Prosser first deployed the notion of identity to limit the scope of protection, stating for example that it was not a name *per se* which was protected so much as a name as an indicator of identity,[99] the conceptual shift that it inaugurated has resulted in an expansion of protection. The Californian courts, for example, granted protection Bette Midler when an imitation of her rendition of *Do You Wanna Dance* was used in an advertisement for the Ford Lincoln Mercury, Circuit Judge Noonan explaining that "to impersonate her voice is to pirate her identity ."[100] In other cases, the shift to

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[95] New York Civil Rights Act, s. 50 ("name, portrait or picture"); Florida Statute s. 540.08 ("name, portrait, photograph or other likeness")

[96] Prosser, 'Privacy' at 403 explained that "[i]t is the plaintiff's name as a symbol of his identity that is involved here, and not his name as a mere name." At 401 n. 155, Prosser also acknowledged that "It is not impossible that there might be appropriation of the plaintiff's identity, as by impersonation, without the use of either his name or likeness, and that this would be an invasion of his right of privacy." J. Thomas McCarthy, 'Public Personas' at 687 (the privacy tort concerns 'damage to human dignity' while the unfair competition action concerns 'commercial damage to the business value of human identity.') See also Kahn, 'Privacy as a Legal Principle'; D. J. Hetzel, 'Professional Athletes and Sports Teams: The Nexus of Their Identity Protection' (2004) 11 *Sports Law Journal* 141; Rosina Zapparoni, 'Propertising Identity: Understanding the United States Right of Publicity and Its Implications -- Some Lessons for Australia' (2004) 28 *Melbourne University Law Review* 690.

[97] *Motschenbacher v. R.J. Reynolds Tobacco Co*, 498 F. 2d 821, 824 (9th Cir 1974) (Judge Koelsch); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F. 2d 831, 835 (6th circ. 1983); *Onassis v. Christian Dior New York, Inc*, 472 N.Y.S. 2d 254, 260 (S. Ct. N.Y., 1984) (in a privacy case based on the New York statute which refers to "name, portrait or picture", the New York supreme Court explained that "[w]hile the statute may not, by its terms, cover voice or movement, characteristics or style, it is intended to protect the essence of the person, his or her identity or persona"); *White v. Samsung Electronics America* 971 F.2d 1395, 1398 (USCA, 9th Cir 1992); *McFarland v. Miller* 14 F. 3d 912, 919 (USCA, 3d. cir., 1994) ("Unauthorized use of an individual's name is nothing short of an 'appropriation of the attributes of one's identity");.*Abdul-Jabbar v. General Motors Corp* 85 F. 3d 407, 414 (USCA, 9th Cir. 1996).

[98] *Carson* (USCA Sixth Circuit).

[99] 49 *California Law Review* 383, 403 (1960).

[100] *Midler v. Ford Motor Co*, 849 F. 2d 460 (9th Cir. 1988). See also *Waits v Frito-Lay, Inc*., 978 F.2d 1093 (9th Cir. 1992) cert. Denied 113 S.Ct 1047, 122 L. Ed. 2d 355 (1993) where Tom Waits successfully complained when Frito-Lay used an imitation of him singing the song *Step Right Up* to advertise its snackfood, 'SalsaRio Doritos' on the radio. Waits had consistently refused to do commercials and had rejected numerous lucrative offers. He was awarded $375,000 in compensatory

"identity" has facilitated decision protecting matter "associated" with celebrities: an image of a distinctive racing car, normally driven by the claimant;[101] protection to Johnny Carson in relation to his catch-phrase 'Here's Johnny';[102] and most remarkably of all, to the dress style of a game show host. In *White v. Samsung*, the Court of Appeals for the Ninth Circuit allowed an appeal by Vanna White, hostess of TV game-show 'Wheel of Fortune' against a finding that an action by her against Samsung was bound to fail: Samsung had advertised its video cassette recorder with a depiction of a robot, dressed in a blond wig, long gown and wearing large jewelry designed to resemble White's, standing by a game board instantly recognizable as the Wheel of Fortune set, and turning over letters. The caption read 'Longest-running game show.2012 AD', and was designed to suggest that the VCR was so good it would still be in use long into the future. While the Appeals Court agreed that the robot was not a 'likeness' of White, it found that the common law right of publicity encompassed any indicator of 'identity' and that White had alleged facts such that if proved could justify a finding of appropriation of her identity.

The shift in language, from protection of 'name or likeness' to 'identity' has gone largely unremarked (though it appears to have been widely adopted).[103] As we have noted, it clearly broadens the potential scope of the action so as to encompass all manifestations of identity. David Westfall and David Landau have suggested that this has occurred because the courts see no principled basis for confining protection to only particular attributes such as 'name' and 'likeness'.[104] Unfortunately, in so doing

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damages ($100,000 the value of his services; $200,000 for injury to peace, happiness and feelings; $75,000 injury to goodwill, professional standing and future publicity value) and $2 million in punitive damages ($1.5 million against Tracy-Locke, the advertising agency, $500,000 against Frito-Lay).

[101] *Motschenbacher v. R.J. Reynolds Tobacco*, 498 F. 2d 821 (9th cir 1974).

[102] *Carson v. Here's Johnny Portable Toilets, Inc*., 698 F. 2d 831 (6th circ. 1983).

[103] *Newcombe v. Adolf Coors Co* 157 F 3d 686, 692 n. 3 (USCA 9th cir, 1998) (referring to "more broad, flexible identity standard"). However, to the extent that the rights are regarded as exclusively statutory, as in New York, the terms of the statute may be determinative: *Booth v. Colgate-Palmolive* 362 F. Supp 343 (SDNY, 1973); *Stephano v News group Publications, Inc*., 64 N.Y. 2d 174, 485 N.Y.S. 2d, 474 N.E. 2d 580 (1984); *Tin Pan Apple, Inc v. Miller Brewing Co*., 737 F. Supp. 826 (SDNY 1990) (plaintiffs, civic-minded rappers, known as *Fat Boys*, complained that Miller advertised beer on TV using three look-alikes performing in distinctive Fat Boy style and defendants moved to dismiss. Relying on sections 55 and 51 New York statute does not cover sound-alikes). *See also Matthews v. Wozencraft et al* (1994) 15 F. 3d 432, 438 (USCA 5th Cir 1994) (Texas misappropriation law does not give protection to 'general incidents from a person's life').

[104] D. Westfall & D. Landau, 'Publicity Rights as Property Rights' (2005) 23 *Cardozo Arts & Ent L.J.* 71, 94 (arguing judges see no logic in limiting right to name or likeness); S. Halpern, 'Trhe Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality' (1995) 46 Hastings Law Journal 853 (approving the shift to 'identity', arguing that the means used for appropriation should be irrelevant); Lee Hetherington, 'Direct Commercial Exploitation of Identity: A

the courts have shied away from providing a firm definition of identity.[105] When is something a manifestation of identity? Is a person's voice, make up, wedding ring, tattoos, hairstyle, gloves, pet, car, bicycle, part of their identity? Must something be a permanent feature or can temporary attributes be manifestations of identity? Must the feature go to their very essence, or can trivial aspects of a person's appearance be protected? If the legal system is to create exclusive rights in relation to 'identity' it is clearly important that there be some common understanding of what identity is, and when particular manifestations of identity are exclusively owned. The legal system demands then a clear definition of subject matter that itself has relatively clear borders.

One way to define identity, previously used in English contract law, would be to distinguish identity (which concerns ones essence) from attributes. In a series of well-known cases, courts have been asked to decide whether misrepresentation by a purchaser as to his name, status, character or address rendered the contract of sale void or voidable.[106] Early case-law suggested that mistake as to 'identity' means a contract is void, whereas a mistake over the 'attributes' of a person renders the contract voidable.[107] In *Lewis v Averay*, for example, Lewis sold a car to a fraudster X, purporting to be Richard Greene, a minor television celebrity, not void but

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New Age for the Right of Publicity' (1992) 17 *Col-VLA Jo. L. and Arts* 1, 42-43 (arguing that reference to identity removes 'artificial distinctions' and suggesting test of "all recognizable incidents of one's identity, whether now known or later developed" but seeming in the same breath to require that the features be distinctive of the personality in the market place and unique); Lemley & Dogan, 'What The Right of Publicity Can Learn', at 1162 (attributing expansion to absence of any clear theoretical foundation).

[105] Dissenting in the *Carson* case, 698 F. 2d 831, 837 (6th circ. 1983) Circuit Judge Cornelia Kennedy would have confined the common law right of publicity to "an individual's name, likeness, achievements, identifying characteristics or actual performances" but said it could not encompass "phrases or other things which are merely associated with the individual."

[106] *J. Cundy v Lindsay* (1878) LR 3 HL 459 (where L, based in Belfast, believed he was dealing with Blenkiron when he was in fact dealing with Blenkarn, the House held there was no contract for sale of handkerchiefs, the property in which remained with L); *Lake v. Simmons* [1927] AC 487 (no bailment where jeweller handed over jewels to customer, EE, who tricked him into believing she was Mrs V and was taking them for inspection to Mr V); *Ingram v Little* [1960] 1 QB 31 (sale by I of car to X, purporting to be H, void, so I recovered from L to whom X had transferred); *Lewis v Averay* [1972] 1 QB 198 (sale by L of car to X, purporting to be RB, not void but voidable, so L could not recover from A) (at 206Lord Denning rejected a purported distinction between identity and attributes as "a distinction without a difference", though Megaw LJ adopted this, describing L's mistake as being one regarding the creditworthiness rather than the identity of D); *Shogun v Hudson* [2004] 1 AC 919 (hire-purchase sale of car to X, believing him to be P, void because no contract existed.

[107] The classic contrast is between *J. Cundy v Lindsay* (1878) LR 3 HL 459 (mistake as to identity) and *King's Norton Metal Co Ltd v. Edridge, Merrett & Co Ltd* (1897) 14 TLR 98 (mistake as to size of defendant's business rendered contract voidable). See *Ingram v Little* [1960] 1 QB 31, 69*; Shogun Finance Ltd v. Hudson* [2004] 1 AC 919, 931 per Lord Nicholls of Birkenhead (paras. 2-5).

voidable, so L could not recover from A. Megaw LJ adopted this, describing L's mistake as being one regarding the creditworthiness rather than the identity of D.[108] Nevertheless, the judiciary has seemed uncomfortable with drawing such a distinction, recognising immediately the problem of differentiating between identity and attributes. In the same case, Lord Denning called the purported distinction between identity and attributes as "a distinction without a difference".[109] Lord Nicholls recently described the distinction as "unconvincing", and "a reproach to the law".[110] Lord Millett referred to the "equivocal nature of a person's 'identity'", agreeing that "it is often difficult to say whether [a mistake] should be classified as a mistake of identity or of attribute" and that the consequences of drawing such a distinction for third parties are "indefensible." The lesson from English contract law is that, whatever a philosopher might say, the courts are not comfortable drawing a distinction between 'attributes' and 'identity'.

An alternative strategy would be to look outside law, to the social sciences, to locate a definition of identity. The definition of identity employed in social psychology, one of the fields in which more general discourses of identity find heir roots,[111] treats identity as equivalent to a person's perception of their own character over time. As Burke says, identity comprises the "sets of meaning that people hold for themselves that define "what it means" to be who they are as persons, as role occupants and as group members." [112] Such a definition of 'identity' seems to get to the very nub of what social psychologists are interested in: why do person behave as they do? Why

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[108] [1972] 1 QB 198.

[109] Id. at 206. "A man's very name is one of his attributes. It is also a key to his identity…These fine distinctions do no good to the law." Most commentators have tended to agree: Glanville Williams, ''Mistake as to Party in the Law of Contract'' (1945) 23 Can. B.R. 271 ("If every 'thing', and therefore every person, can be reduced verbally to a bundle of attributes, it follows that 'error of identity' (i.e. error of person) can be reduced verbally to error of attributes; also error of personal attribute can be reduced verbally to error of person."); Treitel, G. H. *The Law of Contract.* (11th ed London: Sweet & Maxwell, 2003) **(**a person may be identified by any one of his attributes, if a mistake is made as to that attribute there can then be a mistake of identity); Karen Scott, 'Mistaken Identity, Contract Formation and Cutting the Gordian Knot' (200x) xx *Lloyds Maritime and Commercial Law Quarterly* 292, 294 refers to the distinction between identity and attributes as "illusory" and "specious." For an exception, see R. Bronaugh, 'The Place of Identity in Contract Formation' (1979-80) 18 *University of Western Ontario Law Review* 185 (defending the distinction between identity and attributes on philosophical grounds)

[110] *Shogun Finance Ltd v. Hudson* [2004] 1 AC 919, 931 per Lord Nicholls of Birkenhead (paras. 2-5). See also Lord Millett (para. 59).

[111] Stryker & Burke, 'The Past, Present and Future of an Identity Theory' (2000) 63(4) *Social Psychology Quarterly* 284.

[112] P.J. Burke, 'Identities and Social Structure' (2004) 67(1) *Social Psychology Quarterly 5*

do they have the attitudes they do? How far are behaviours and attitudes related to concepts of the self? And, applying their insights, what possibilities are there to make them feel happier? Such matters might be relevant, too, to questions that call for decision in courts. A court might well take notice of the importance accorded by psychologists to a name as a key factor in identity-formation.[113] But it is quite a different thing to suggest that a person's beliefs about their own "selves" can become property. The social psychologist's understanding of identity is too elusive, fluctuating, and subjective to constitute the basis of a property right which third parties are expected to appreciate and respect.

2.2 The Components of Identity

Even if the legal concept of identity can be adequately defined, my second concern with its deployment as a legal category derives from the fact that different elements of 'identity' seem to have very different characteristics.

As regard protection for identity under the rubric of privacy, it is easy to see that uses of one's image or name can implicate one's autonomy or dignity (the protection of which constitute the main justifications for privacy laws). But it is not obvious that the use of one's name infringes one's privacy in the same circumstances as use of one's image. One of the chief characteristics of names, that is, that they are rarely unique, means that they rarely refer to a particular person.[114] In contrast, at least on some views, one's physical attributes are unique.[115] If a person claims that a

[113] *In re L* [2007] 1 F.C.R. 804, para 37 (considering an application to change a child's surname from that of its absent father to its grandparents, the Court of Appeal said it thought the 'identity' of the child would best be stabilised by 'keeping her circumstances as faithful to reality and the truth of her situation as possible.')

[114] As Lord Phillips explained in *Shogun v Hudson* [2004] 1 AC 919, 963, "[w]henever a name is used, extrinsic evidence, or additional information, will be required in order to identify the specific individual that the user of he name intends to identify by the name."

[115] In a case awarding Jackie Onassis injunctive relief against Dior with respect to an advert featuring a look-alike, Justice Greenfield observed that "For some people, even without their American Express Cards, the face is total identification, more than a signature or coat of arms." *Onassis v. Christian Dior New York, Inc*, 472 N.Y.S. 2d 254 (S. Ct. N.Y., 1984). Note also Learned Hand J in *Yale Electrics Corp v Robertson* 26 F 2d 972, 974 (2d cir 1928) ("a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask"). Copyright discourse has often alluded to the fact that the expressive form of a literary work reflects the individuality of its author as much as his face: it is, "as singular as his countenance". See *Jefferys v Boosey* (1854) 4 HLC 814, 869; 10 ER 681, 703 (per); Francis Hargrave, *Argument in Defence of Literary Property* ("a literary work really original, like the human face, will always have some singularities, some lines, some features, to characterize it, and fix it and establish its identity".

photograph of them was featured in an advertisement or commercial publication, it should be possible to tell whether that was so.[116] As a result a law relating to privacy thus needs to establish different criteria concerning when use of a names invades privacy and when use of an image does so.[117] Moreover, while 'names' and 'images' may be uncontroversial subject matter for privacy laws, it is less obvious that look-alikes or sound-alikes,[118] let alone use of associated objects or catch-phrases involve invasions of privacy or the underlying interests which privacy laws are seen as protecting.

The problem seems more complex still when we consider protection of 'identity' as property. Even the core examples of identity - names, images and voice –present a diversity of qualities that makes me sceptical whether it makes sense to treat them as a single category. One common justification for private property concerns one's natural rights in the products of one's labour: where a person produces something through their own labour, there is a prima face claim to property, as long as the recognition of such property does not diminish the capacity of other to create property through their labour.[119] It is possible that in some circumstances a case can be made out that one's physical appearance, one's image is 'created'. A natural rights argument might justify property in one's tattoos, make-up, hair style and, in extreme cases, other aspects of one's appearance. Given the possibility of voice training, a natural rights argument might justify protection of one's voice (as long as the boundaries of one's vocal property could be clearly defined). However, it is difficult to argue that one's name

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[116] *Cohen v. Herbal Concepts, Inc.*, 63 N.Y. 2d 379, 384, 482 N.Y.S. 2d 457, 459; 472 N.E. 2d 307, 309 (C.A. of New York, 1984) (claim under section 51 New York Civil Rights Law objecting to use of photograph of non-celebrity plaintiff bathing nude in advert for product to help eliminate cellulite, the photograph having been taken without permission, but revealing only her back. The Court held that the plaintiff must be capable of identification from the objectionable material itself").

[117] *T.J. Hooker v. Columbia Picture Industries, Inc.*, 551 F. Supp. 1060 (N.D. Ill. 1982) (professional woodcarver of international renown, specialising in ducks, objected to broadcast of show about fictional policeman in California who was coincidentally named T.J. Hooker, under common law tort of appropriation of plaintiff's name. The claim was rejected because of lack of evidence that there was "appropriation" or "piracy of identity". There was no reason to think that the TV character was the same person as the woodcarver. See also *John Doe, a.k.a. Tony Twist v TCI Cablevision*, 110 S.W. 3d 363 (Sup Ct Miss, 2003).

[118] Although the sound-alike cases are based heavily on 'dignitarian' claims, for example, that the singers refused ever to allow their recorded sound to be used in advertisements, it is not obvious why one person's privacy should entitle them to prevent others exploiting what, evidently, are also *their own* attributes.

[119] There is not space in what follows to discuss the application of other theories of property to the various attributed of identity.

(as opposed to one's goodwill, or reputation – interest protected by the laws of passing off and defamation) is a product of one's labour.

Moreover, in each case there are distinct questions outstanding as to whether such property leaves sufficient room for others to create and exploit their own attributes. As long as the attributes being claimed are "unique", as judges have in some cases held appearance and voice to be,[120] there may be no objection to transforming them into properties. But, given the limited powers of human recognition, one cannot help wondering whether creating property rights in such matters would not, in practice, affect the freedoms of others to exploit their own attributes. As one early Massachussetts case said, when denying a claim to protection of voice, "[w]e might hesitate to say that an ordinary singer whose voice, deliberately or otherwise, sounded sufficiently like another to cause confusion was not free to do so…"[121] Moreover, we know that names are rarely unique: anything approaching a property right in a name needs to be very severely circumscribed to ensure that it does not inhibit the freedom of others to adopt the name, to use it in building their own reputation or practising their own trades. The law of passing off developed a restricted system of protecting names from misuse in trade that, for more than one hundred and fifty years has required that the person themselves be a trader, and that the allegedly infringing use of the name damage their trade reputation, particularly by diverting custom. No persuasive case has yet been made that such a restricted view is anything other than optimal.

3. Conclusion

Today, in the writings of legal scholars, the most common use of the term 'identity' is not to refer to potential proprietary interests discussed here, but rather as a rubric under which to describe the operation of various aspects of the law concerning discrimination. Contemporary commentators are concerned with how modern law operates (or fails) to redress centuries of discrimination against particular groups which focused on specific aspects of their identity: most obviously, race, gender,

[120] *Midler v. Ford Motor Co*, 849 F. 2d 460 (9th Cir. 1988) per Circuit Judge Noonan remarking that "A voice is as distinctive and personal as a face. … We are all aware that a friend is at once known by a few words on the phone… To impersonate her voice is to pirate her identity."
[121] In Lahr, 259,the Court of appeals for the First Circuit.

sexual orientation and disability. Some of these commentators are concerned with the way discrimination law itself constructs particular identities, and marginalizes others. Drawing on this scholarship, legal anthropologist Rosemary Coombe has expressed real concern over the potential for private, exclusive properties in identity (of the sort discussed in this paper) to limit the ability of marginalized groups to develop and explore their own identities. For example, she observes that "celebrity images provide the cultural resources which those in marginalized groups us to construct alternative gender identities."[122] Echoing this, Michael Madow has observed that

> "When the law gives a celebrity a right of publicity, it does more than funnel additional income her way. It gives here…power to deny to others the use of her persona in the construction and communication of alternative or oppositional identities or social relations."[123]

The extent to which these criticisms are well-made depends, of course, on the breadth of any proprietary rights in identity,[124] as well as the manner in which they are policed and enforced. What is useful about these criticisms, however, is to remind us that we should be careful before giving in to any instinct or intuition that our identities are 'our own' and thus should be regarded as properties. Such property rights may have unforeseen impacts well outside the 'easy' cases of use of name, likeness, voice and imagery in advertising.

Not long after the English courts declined to recognise a property right in a name, the case of *Belisle Du Boulay v Jules Réné Herménégilde du Boulay* came before the Privy Council.[125] In this case, the claimant was a member of a family long resident in St Lucia which for many generations had been known by the name Du Boulay. The defendant was the son of a former slave named Rose, who on being freed in 1831 adopted the name Du Boulay. The defendant, in turn, on attaining the age of sixteen,

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[122] 69 *Tex Law Rev* 1853, 1877. Rosemary Coombe, Publicity Rights and Political Aspiration: Mass Culture, Gender Identity, and Democracy (1991-2) 26 *New England LR* 1221, 1224.
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[124] It should be recalled that, at least in the United States, the right of privacy and publicity frequently give way to the right of free expression. Moreover, where rights exist in Europe, they are constrained by Article 10 of the European Convention on Human Rights. For a recent example, see *Vereinigung Bildender Künstler v. Austria*, App No 68354/01 (25 Jan. 2007) (breach of Art. 10 where court restrained exhibition of collage, Apocalypse, by Otto Mühl depicting many public figures, including the claimant Mr Meichberger, former General Secretary of the Austrian Freedom Party, naked and involved in sexual activities with, amongst other Jor Haider).
[125] (1869) LR 2 PC 430.

began using the same surname. The claimant called on the defendant to abandon the use of its surname. The claimant succeeded at first instance (in the Royal Court of St Lucia), the defendant successfully appealed (to the Court of Appeal for the Winward Islands), and the claimant finally sought vindication in the Privy Council. The Council, however, found that though the law applicable to St Lucia included French law, various French laws concerning names had never been brought into force in the island. Moreover, Sir Robert Phillimore added that

> "In this country we do not recognise the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a Stranger. The right to the exclusive use of a name in connection with a trade or business is familiar to our Law...But the mere assumption of a name, which is the patronymic of a family, by a Stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our Law affords no redress."

The case seems to me a salutary lesson. Property rights in 'identity', unless heavily circumscribed, have the potential to curtail the liberties of those who wish to build their own identities, in whatever way, and for whatever reason. The English legal system should think very carefully before recognising a property in name, likeness or other aspects of identity.