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Invasion of Privacy—Recovery for Nonconsentual Use of Photographs in Motion Pictures Based on the Appropriation of Property

From the time Samuel D. Warren and Louis D. Brandeis wrote their article entitled "The Right of Privacy" in 1890, the thrust of most privacy suits has been for an injury to feelings. They suggested the right of privacy, although originating in property, should nevertheless be given separate and distinct recognition. Warren and Brandeis felt its basis should be on injury to feelings rather than injury to property. This theory was accepted by many legal authorities.

Twelve years after Warren and Brandeis' article was written, *Roberson v. Rochester Folding Box Co.* was decided in New York. The court denied recovery for a cause of action based on injury to the plaintiff's feelings. It stated any change in the law must come as a result of legislative action. Nevertheless, three years later a Georgia court in *Pavesich v. New England Life Insurance Co.* clearly established a right of privacy premised on the "injury to feelings." The court in recognizing this "new" right of privacy said:

It, therefore, follows from what has been said that a violation of the right of privacy is a direct invasion of a legal right of the indi-

1. 4 Harv. L. Rev. 199 (1890) [hereinafter cited as Warren & Brandeis].
2. Gordon, Right of Property In Name, Likeness, Personality and History, 55 Nw. U.L. Rev. 553 (1960) [hereinafter cited as Gordon]. The article is devoted to an extensive analysis of the invasion of privacy through the appropriation of property. Although there has been a large amount of litigation since its writing, including the passage of the California privacy statute, Cal. Civ. Code § 3344 (West Supp. 1971), it still is a good beginning for a thorough understanding of the concept.
3. Warren & Brandeis, supra note 1, at 204-05.
4. Gordon, supra note 2, at 554.
5. 171 N.Y. 538, 64 N.E. 442 (1902). The plaintiff argued that her feelings were injured by the defendant's conduct. The defendant had taken plaintiff's picture without her consent and used it on a calender advertising his flour mill. The court, while recognizing that an injury had occurred, still refused to grant this "new" right.
6. 122 Ga. 190, 50 S.E. 68 (1905). The defendant used the plaintiff's photograph without his consent in an advertisement. The plaintiff was depicted as a healthy person; below the photograph were the words, "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Company." Next to the plaintiff's picture was a photograph of a sickly person who, so it seemed, did not purchase an insurance policy.

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individual. It is a tort, and it is not necessary that special damages should have accrued from its violation in order to entitle the aggrieved party to recover. . . . In an action for an invasion of such a right the damages to be recovered are those for which the law authorizes a recovery in torts of that character, and, if the law authorizes a recovery of damages for wounded feelings in other torts of a similar nature, such damages would be recoverable in an action for a violation of this right.  

Pavesich clearly established a right of privacy based on injury to feelings and it has been cited frequently for its well-reasoned analysis. Since the creation of the right of privacy, it has become a "catch-all" tort which, consequently, has led to much confusion. In some cases plaintiffs have sued for injury to feelings when they should have based their cause of action on appropriation of their property. An example of this is O'Brien v. Pabst Sales Co. Plaintiff, a well-known college football player, was seeking nationwide publicity. The university for which he played openly sought publicity and sold his picture to defendant for one dollar not knowing it would be put on a calendar advertising beer. Plaintiff sued for invasion of privacy, basing his claim on "injury to feelings." Since the plaintiff and the university openly sought publicity, recovery of damages was denied. The court made it clear that had the plaintiff based his claim on the appropriation of his property they would have granted the relief sought. Thus, when one is considering a privacy suit it is important to ask upon which theory will recovery be sought. If there is no basis to claim injury to feelings, it would be foolish to bring suit on these grounds. Instead, a better theory would be appropriation of one's property. The right to control one's picture, likeness, and name could well be the property right involved.

7. Id. at 202, 50 S.E. at 73 (emphasis added).
8. Gordon, supra note 2, at 559.
9. 124 F.2d 167 (5th Cir.), cert. denied, 315 U.S. 823 (1941).
10. Justice Holmes, dissenting in O'Brien, argued relief could have been granted for appropriation, although it was not pleaded. He said: . . . the right of privacy is distinct from the right to use one's name or picture for purposes of commercial advertisement. The latter is a property right that belongs to everyone; it may have much or little, or only a nominal value; but it is a personal right which may not be violated with impunity.
Id. at 170.
11. It can be argued on the other hand that although one should have a property right to his photograph or image, since the image is incapable of being possessed, the right is not one of "property." For example, one could take another's picture and capture it on film. The film itself belongs to he who has taken the picture, yet the image is that of the subject of the photograph. If then anyone can capture another's image with "his" film, who "owns" the photograph? Can the subject go up to the photographer and
If someone has used another's photograph, image, or likeness without his consent, injury to feelings is not really applicable. The injury to the person's feelings might be very slight, or there may be none at all. For example, if he was a well-known chess player and a parlor game manufacturer used his name and likeness in connection with the advertisement of the game in order to enhance its marketability, his "feelings" have not really been injured. Rather, the injury in this case is to his "pocket"—he has lost money because the defendant has not paid him for the commercial use of his photograph. Someone has taken (appropriated) his name and likeness (property) without paying him. In this case, were he to bring suit against the game manufacturer for invasion of privacy it should be based on appropriation.

Dean Prosser has divided the tort invasion of privacy into four classifications: intrusion, public disclosure of a private fact, placing plaintiff in a false light in the public eye, and appropriation.

Unlike the other classifications of privacy, appropriation finds its basis in property rights rather than injury to feelings. Because of this affinity to property rights, it is difficult to picture it as a tort. Nevertheless, since "privacy" encompasses so many different concepts it is not an injustice to so classify it. One must only refer to the torts of libel, misrepresentation, and slander. Privacy is in a sense a "catch-all" phrase and as a tort, appropriation continues to be a viable cause of action in privacy.

I. THE DEVELOPMENT OF THE THEORY OF APPROPRIATION

A. At Common Law

The basic premise of the Warren and Brandeis article was found in property, although they did propose a new theory on which to base it. They said:

take the image away from him? It is very hard to conceptualize an image as property. But, as can be seen in the development of the law, this is exactly what the courts have done.

13. Id. at 807.
14. Id. at 809.
15. Id. at 812.
16. Id. at 804. Dean Prosser in his discussion of appropriation does not point out that appropriation is divided into two areas, injury to feelings, and appropriation of property. Consequently, his superficial treatment causes a misconception about the nature of the theory of appropriation.
The right to life has come to mean the right to enjoy life—the right to be left alone. The right to liberty secures the exercise of extensive civil privileges; and the term property has grown to comprise every form of possession—intangible as well as tangible.18

In the early development of the law before injury to feelings was recognized, property rights were the basis of privacy suits.19 To say the least, it is not a new legal concept. Nevertheless, it has not been used very often since most suits are based on injury to feelings.20

One of the first courts to recognize a right of privacy in property was the Missouri court in Munden v. Harris21 where it said:

"We, therefore, conclude that one has an exclusive right to his picture, on the score of it being a property right of material profit. We also, consider it to be a property right of material value, in that it is one of the modes of securing to a person the enjoyment of life and the exercise of liberty, and the novelty of the claim is no objection to relief."

The litigant in Munden brought his action because the picture of an infant was used by the defendant to advertise his business. The advertisement had a photograph of the infant on the left side of a printed advertisement with the language describing where jewelry for one's "baby" could be purchased. The infant was plainly recognizable to the viewing public and the picture was used as an integral part of the whole advertisement.

Similarly, in Edison v. Edison Polyform & Manufacturing Co.,24 the court recognized that the famous inventor had a valuable property

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18. 4 HARV. L. REV. 193 (1890); see 73 N.J. Eq. at 141, 67 A. at 394. In Minton v. Smith, 276 Ill. App. 128 (1934), Edison was cited as the leading case involving the theory of appropriation.
19. See, e.g., Gordon, supra note 2, at 560-61.
20. Gordon has concluded through an analysis of the decided cases that much confusion and conflict arises because litigants choose to sue in almost every case for invasion of privacy premised on injury to feelings, rather than for the appropriation of property rights for commercial exploitation. Gordon, supra note 2, at 554.
22. Id. at 658, 134 S.W. at 1079. The court in its analysis of this right said, "Property is not necessarily a taxable thing any more than it is always a tangible thing. It may consist of things incorporeal, and things incorporeal may consist of rights common in every man. One is not compelled to show that he used or intended to use any right which he has, in order to determine whether it is a valuable property right of which he cannot be deprived . . . [i]f a man has a right to his own image as made to appear by his picture it cannot be appropriated by another without his consent . . ."
Id. at 657-58, 134 S.W. 1078.
23. Id. at 652, 134 S.W. at 1076.
24. 73 N.J. Eq. 136, 67 A. 392 (Ch. 1907).
right which could not be used without his consent. Edison was granted an injunction to prohibit the use of his name and photograph in the advertisement of the corporation's product.  

Edison did not claim injury to his feelings; rather his complaint alleged appropriation of his property rights in his name, likeness, and image. The court said where there is injury to property rights, equity will grant relief. The court, in its opinion, said:

If a man's name be his own property, and no less authority than the United States Supreme Court says it is (Brown Chemical Co. v. Meyer, 139 U.S. 542 (1891) it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner rather than to the person seeking to make an unauthorized use of it.

More recently, privacy cases have been decided using the appropriation of property concept. In Uhlaender v. Hendrickson, a well-known baseball player, Ted Uhlaender, sought to enjoin the use of his, as well as other ball players', names in a parlor game. The court, recognizing that the appropriation of property was not the same as injury to feelings, said these litigants had a right to free control of their names. They could not be used by the defendant in his parlor game without first obtaining the plaintiffs' permission.

Both Edison and Uhlaender involved famous people. Nevertheless, one need not be a famous person in order to recover for appropriation of his property in invasion of privacy. In Canessa v. J.I. Kislack, Inc., the defendant, a real estate company, helped the plaintiff find a house to buy. The plaintiff, a war veteran, experienced difficulty in locating a house to buy because of his large family. The defendant notified the Jersey Journal of its "good deed" and encouraged the newspaper to publish a story about Mr. Canessa and his plight in locating a home. The story was printed and appeared in the newspaper with the plaintiff's photograph. The defendant real estate company took reprints of the story and used it for advertisement purposes.

25. Id. at 144, 67 A. at 395.
26. Id.
27. Id. at 144, 67 A. at 395. Not only did the court say that the plaintiff can recover the pecuniary value for the use of his picture, but that the insignificance of the right from a pecuniary standpoint does not always bar relief. Id. at 142, 67 A. at 394.
29. Id. at 1285; accord, Palmer v. Schonhorn, 96 N.J. Super. 27, 292 A.2d 458 (Ch. 1967).
The Canessa court said there are really two aspects of a privacy suit based on appropriation. One is injury to feelings; the other property rights. The court said when the plaintiff's claim is based on the appropriation of his likeness and name for defendant's commercial benefit, it is an action for an invasion of his property rights and not for "injury to the person" (feelings). It should be noted that Mr. Canessa was not a person well-known to the public. Although his picture did not have the value of that of Edison or Uhlaender, it was worth something. "However little or much plaintiff's likeness and name may be worth, defendant, who has appropriated them for his commercial benefit, should be made to pay for what he has taken, whatever it may be worth."

This development of case law has firmly established appropriation of property as a valid premise for a privacy suit. One need not be a famous person to recover for invasion of his privacy based on appropriation, as evidenced by Canessa.

The logical extension of this concept is the "right of publicity." It has been held that the exclusive licensee of the right to exploit a celebrity's name, likeness, or personality owns a proprietary interest assignable in gross. In Haelan Laboratory, Inc. v. Topps Chewing Gum, Inc. a baseball player entered into a contract entitling another to exclusive right to use the player's name in connection with the sale of a commercial product. When the ball player tried to assign this same right to another company, the court held the first company held the "right of publicity." In addressing the "right" the court said:

... in addition to and independent of that right of privacy... a man has a right in the publicity value of his photograph... for it is common knowledge that many prominent persons (especially actors and ballplayers), far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money for authorizing advertisement... This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.
This is not to say the "ordinary man" is barred from recovering for the appropriation of his property in his image. The "right of publicity" is but an extension of the right to recover for the appropriation of one's property. 36

B. Privacy Statutes

In the year following the Roberson decision the New York legislature passed a privacy statute. 37 It authorized either injunctive relief or damages for the nonconsentual use of a person's portrait or picture in advertisement or for the purpose of trade. Ostensibly, the statute appears to be based on the theory of appropriation of property rights. However, this is not so. In fact, the New York courts have interpreted it to apply only to cases in which there is an injury to feelings. 38 This was made clear in Paulsen v. Personality Posters, Inc., 39 where a television comedian, who conducted a mock campaign for the Presidency, failed in his attempt to enjoin the marketing of a poster embodying

36. 316 F. Supp. at 1281; cf. Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969). The court held that the famous baseball star who granted a sporting goods manufacturer exclusive rights to manufacture baseballs bearing the player's name and to license others to do so could not recover damages from the manufacturer or meat processor when the meat processor used the tying in sale of meat products to giving away baseballs to increase its sales.

37. N.Y. Civ. Rights Law § 51 (McKinney 1948). Action for injunction and for damages. Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer, or artist in connection with his literary, musical, or artistic productions which he has sold or disposed of with such name portrait or picture used in connection therewith.

38. Gautier v. Pro-Football, Inc., 278 App. Div. 431, 106 N.Y.S.2d 553 (1951); Wrangell v. C.F. Hathaway Co., 22 App. Div. 2d 649, 253 N.Y.S.2d 41 (1964). It can be argued that even though New York has provided the public with a privacy statute based on injury to feelings, the common law basis of appropriation is still a viable cause of action. Nevertheless, all privacy suits in New York are brought under its privacy statutes.

his photograph. The court noted the plaintiff was not really interested in his feelings, but rather the financial benefits attached to his name and picture. This concept, known as the “right of publicity,” is not recognized in New York. The court said:

It has been made clear that the purpose of the statute is to redress injury for invasion of a “person’s right to be let alone,” with recovery being grounded on the mental strain, distress, humiliation, and disturbance of the peace of mind suffered by such person, hardly what plaintiff here seeks, and the statute was not enacted to fill gaps in the copyright law or to afford substitute relief for breaches of contract or violations of various other species of property rights.40

California, in 1971, became the second state to pass a privacy statute.41 It provides damages in the amount “no less than three hundred dollars for the knowing use [of] another's name, photograph, or likeness.”42 Unlike the New York statute which is premised on injury to feelings, it has been argued the California statute grants relief for invasion of privacy on an appropriation of property theory.43

40. Id. at 451, 299 N.Y.S.2d at 508 (emphasis added). Plaintiff's second argument was based on common law copyright. He claimed he had a copyright to his photograph. The court in considering this argument said whether this is true or not would have to be clarified at a later trial. The court then denied injunctive relief.

41. CAL. CIV. CODE § 3344 (West Supp. 1971).

(a) Any person who knowingly uses another's name, photograph, or likeness, in any manner for purposes of advertising products, merchandise, goods or services, or for purposes of solicitation of purchases of products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition in any action brought under this section, the person who violates the section shall be liable to the injured party or parties in an amount no less than three hundred dollars ($300).

(b) As used in this section, “photograph” means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable. A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonable determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use.

(d) For purposes of this section, a use of a name, photograph, or likeness in connection with any news, public affair, or sports broadcast or account, or any political campaign, shall not constitute a use for purposes of advertising or solicitation.

(e) The use of a name, photograph, or likeness in a commercial medium shall not constitute a use for purposes of advertising or solicitation solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the complainant's name, photograph or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for purposes of advertisement or solicitation.

42. Id.
In effect the California statute has granted a "right of publicity" to each person in his name, photograph, and likeness.\textsuperscript{44}

II. LIMITATIONS TO RECOVERY IN NEW YORK AND CALIFORNIA

A. New York

While it is not expressly stated in the statute, there is a judicially imposed limitation to its application. A person cannot recover for the nonconsensual use of his photograph in advertisement or trade if it was used "incidentally."\textsuperscript{45} There must be a "purposeful" use of the photograph, name, or likeness if recovery is to be permitted.\textsuperscript{46}

This exception was carved out in Merle v. Sociological Research Film Corp.\textsuperscript{47} Plaintiff claimed an invasion of privacy when defendant photographed a building which happened to have the plaintiff's sign on it. In considering whether there was an invasion of privacy, the court said:

... where a man places his sign upon the outside of a building he cannot claim that a person who would otherwise have a right to photograph the building is precluded from using that picture because the sign also appears on the picture. To constitute a violation of the Civil Rights Law, I think it must appear that the use of plaintiff's picture or name is itself for the purpose of trade and not merely an incidental part of a photograph of an actual building ... [E]ven a use that may in a particular instance cause acute annoyance cannot give rise to a cause of action under the statute ... .\textsuperscript{48}

In order to trigger liability under the New York statute there must be a purposeful use; the picture must be used for the purposes of trade. In other words, the defendant must focus in on the picture, name, or likeness so it may enhance his trade or advertisement in some way. Plaintiff's picture need not be pivotal in that it is the most

\textsuperscript{43} Comment, Commercial Appropriation of an Individual's Name, Photograph, Or Likeness: A New Remedy For Californians, 3 PACIFIC L.J. 651 (1972).
\textsuperscript{44} Compare Haelan Laboratory, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953), with Cal. Civ. Code § 3344 (West Supp. 1971) (the California privacy statute).
\textsuperscript{47} 166 App. Div. 376, 152 N.Y.S. 829 (1915).
\textsuperscript{48} Id. at 379, 152 N.Y.S. at 832 (emphasis added).
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important aspect of the scene, but it must "add" something insofar as
the defendant's purpose of commercialization is concerned.

One obvious way to enhance a scene would be to use the name or
photograph of a famous person; but that is not the only way. A per-
son's photograph can enhance a scene not because he is famous but
because of his expression or pose. If a person's smile conveys the
precise feeling of happiness which is central to the defendant's com-
mercialization goals, the use of the picture should meet the "purpose-
ful" test.

A recent case exemplifies this point. In Negri v. Schering Corp., 49
plaintiff's photograph, nine inches high, full length, was used in a
magazine advertisement. The picture was used to catch the eye of the
reader and to focus his attention on the language of the advertisement.
The court felt it insignificant that the picture was taken 40 years
earlier. It was evident that the intended use was to catch the eye of
its readers. The court accordingly allowed recovery under the New
York statute. 50

B. California

California's statutory limitation is that the photograph must be
"directly connected" with the commercial use in order to obtain
relief. 51 There has been no judicial interpretation of this phrase, but
it would seem to be very similar to New York's "incidental use" ex-
ception. The phrase "... connected with the commercial sponsor-
ship..." 52 is one connoting a casual relationship. "Directly" was
used to insure recovery for uses which, in a significant way, are causes
of invasions of the property rights involved. Insignificant causes of
invasions are not within the scope of the statute. This limitation is, in
principle, then, the same as the one in the New York statute. The
direct connection with the commercial sponsorship or use means the
photograph, name, or likeness must "add" to the commercial goals of
the advertiser. By enhancing the scene the photograph is used purpose-
fully. Therefore, both New York and California limit recovery in the

50. The court said that unlike Moglen v. Varsity Pajamas, Inc., 13 App. Div. 2d 114,
213 N.Y.S.2d 999 (1961), the use by the defendant was far from incidental to what the
advertisement was trying to sell and so the purpose was within the reasonable interpre-
tation of the statute.
51. CAL. CIV. CODE § 3344(e) (West Supp. 1971).
52. Id.
same way. In both cases the use of the photograph, name, or likeness must be a significant contribution to the scene.

III. PROPOSED FORMS OF ACTION FOR APPROPRIATION

Although courts and legislatures have recognized a right against invasion of privacy through appropriating a property right, it has not been determined what cause of action should be used. Courts have not considered this question, yet it is imperative in order to analyze appropriation further. The cause of action chosen will have important consequences on the measure of damages applied.

Before we begin to discuss the various forms of action appropriation can take, it would be helpful to keep these hypothetical situations in mind:

(A) John Hood, a well-known underworld figure, was shot to death in an east-side New York restaurant. The police sent Bill Smith to the scene to investigate. During the course of his work, Smith is photographed by a U.P.I. photographer. The picture shows him standing over the body smiling. The next day his picture appears on the front page of every newspaper in the country. Fifteen years later Overmont Picture Corporation decides to produce a fictitious motion picture with the theme based on organized crime activity. The sole purpose of the movie is to produce profits for Overmont and its shareholders. The movie is never intended to be of newsworthy quality, or to disseminate public information.

In one of the scenes of the movie where a rival gang member is shot, Overmont injects the photograph of Bill Smith standing over a dead body. The photograph is before the movie audience for no longer than three seconds. It later comes to light that Overmont searched through 10,000 photographs before selecting the Smith picture. Overmont made no effort to obtain Smith's permission in using the photograph.

(B) X.Y.Z. Television in its broadcast of Saturday afternoon collegiate football games takes a panoramic picture of the west stands of a Rutgers University football game. This panoramic sequence is taken and used in a commercial film solely to produce revenue and not to inform the public in any way.

(C) Overmont Pictures Corporation, in its advertisement for one
of its movies, takes a photograph of Frank Sinatra and uses it in a 3-second sequence in its promotions for the film.

A. Trespass to Chattel

When there is a “minor” interference, not substantial enough to amount to a conversion, trespass to chattel is the proper cause of action on which to base one’s claim for appropriation of a person’s property. Dean Prosser calls trespass to chattel the “little brother of conversion.” In many aspects the two are similar, and in many ways they are not. Trespass to chattel, like conversion, is exclusively a wrong of intentional interference. The requisite intent requires no wrongful motive. So long as the defendant intentionally interferes, or intermeddles with a chattel in possession of another (actual or constructive) or to a chattel in which one has the immediate right to possession, there will be a trespass to chattel.

The major problem in applying the theory of trespass to the above examples is that the property involved is intangible. Theoretically, intangible property is incapable of being physically possessed. Nevertheless, a photograph captures the likeness of a person. If there is an immediate right to possess a photograph, it should be with the person of whom the picture is taken.

If the theory of trespass to chattel is applied to the hypotheticals, it can be seen that recovery will be imperative in each. In all the situations, the defendant interfered and intermeddled with the person’s exclusive right to control his image when it was used in the various commercial sequences. In the first example, the defendant interfered with the chattel by taking and putting it before the viewing public. The same interference exists in the Rutgers University football game example. Each and every person’s exclusive right to control his image

54. Prosser, supra note 12, at 77.
57. “A trespass to chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possessing of another.” ReSTATEMENT (SECOND) OF TORTS § 217 (1966); accord, Zaslow v. Kroenert, 29 Cal. 2d 541, 176 P.2d 1 (1946).
58. This is the position which most courts take when they discuss the rights involved with possession of a photograph.
has been interfered with, however, slightly. Again in the last example, there was an interference with the chattel by taking and putting it before the public in connection with an advertisement.

The theory of trespass to chattel is simply "too good" to use to determine liability for an invasion of privacy based on the appropriation theory. In each case, including the football example, the plaintiff technically has a cause of action. Whether anything can be recovered remains to be seen. Because of the absolute liability, the theory becomes unworkable. If every movie producer and television studio had to pay people for the use of their image every time it was flashed before the viewing public, the medium would be exposed to unreasonable liability. Consequently, this form of action cannot be seriously considered.

B. Conversion

The nonconsentual use of a person's photograph by another for purposes of advertisement of trade can be viewed as a conversion of a property right. The defendant, by using the person's image, name, and likeness, in his motion picture has converted the person's property for his own use and may have to pay for what he has taken.

Conversion is the intentional exercise of dominion or control over a chattel which so seriously interferes with the rights of another to control it that the actor may justly be required to pay the other full value of the chattel.59

Since plaintiff's property is intangible, it may not be susceptible to a conversion. Generally, things converted are tangible rather than in-

59. Restatement (Second) of Torts § 222 A (1966). The Restatement points out that in determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important:
(a) the extent and duration of the actor's exercise of dominion or control;
(b) the actors intent to assert a claim in fact inconsistent with the other's right of control;
(c) the actor's good faith;
(d) the extent and duration of the resulting interference with the other's right of control;
(e) the harm done to the chattel; and
(f) the inconvenience and expense caused to others.
In tentative draft No. 3 of the Restatement of Torts the Council by a vote of 13 to 11, wished to strike from subsection (1), and from subsection (2), the language dealing with "justly requiring the actor to pay full value of the chattel." This would leave conversion as an act of dominion or control over a chattel which "seriously interferes with the right of another to control it." Restatement of Torts, Explanatory Note § 222 A (Tent. Draft No. 3, 1958). See also Pearson v. Dodd, 410 F. Supp. 701 (D.D.C. 1969); Prosser, The Nature of Conversion, 42 Cornell L.Q. 168 (1957).
Nevertheless, there has been an expansion of the concept of conversion to include intangible rights. Rights merged with documents have been held to be convertible. Most cases, however, deal with the conversion of stock certificates. There is no reason, as Dean Prosser suggests, that there may not be conversion of a debt, goodwill of a business, or "any species of personal property which is the subject of private ownership." Another requirement which must be met is the element of intentional interference with possession or the immediate right to possession. Since the object of conversion is the plaintiff's image, the plaintiff himself has an immediate right of possession, in the sense that he alone has the right to control its use. So any interference would be with the plaintiff's right to immediate possession. Finally, and most importantly, it is necessary to find so serious an interference with the property right that the defendant should be required to buy the property.

Relevant to the serious interference element is the "incidental use—directly connected" test of the New York and California statutes. It will be remembered that to have the statutes apply there must be a purposeful use by the defendant. If there is a purposeful use of the photograph by the defendant it can be said there is also a serious interference with the chattel. The plaintiff has the right not to have his image projected across the movie screen or placed in an advertisement without his consent. When the photograph is so used and it results in an enhancement of the scene this right is disturbed. Because this right is disturbed, the use of the photograph amounts to a serious interference by the defendant. Dean Prosser gives a good example of serious interference. If a person takes another's car, runs it for 4 miles, and brings it back, there is no conversion. But if someone takes another's car, runs it for 2,000 miles and brings it back, there is a conversion.

In the first case, running the car for 4 miles is not a serious interference.
ference; while in the second case, running the car for 2,000 miles is a serious interference.

Applying the "serious interference" test to the hypotheticals, it can be seen the Smith example will result in a conversion. When the defendant movie company put Mr. Smith's photograph in one of its film sequences, it did so with a purpose—the purpose being to convey a particular meaning from Mr. Smith standing over the dead body of a gangster, and consequently "add" this meaning to the sequence. When there is a purposeful use of the chattel, a serious interference exists and there is a conversion. Nevertheless, "purposeful use" is not determined solely by the exposure time.

In the second example, the panoramic shot of the football game, there is no serious interference. The images of the various people are all but unrecognizable. The picture projected is of a crowd at a football game, not "John Doe" or "Bill Pierce" attending the football game. In other words, while collectively there is a purpose—to show a crowd at a football game, the broadcasting company does not care if John Doe is in the crowd or not. If he is, the intrusion on his right is so insignificant that it does not amount to a serious interference. It is like Prosser's example of driving a car 4 miles.

In the last example, there is a conversion. There is a purposeful use; linking the name and face of a well-known movie star would certainly enhance the marketability of the film. Consequently, there is a serious interference and a conversion by the defendant.

In order to recover for appropriation, a serious interference must take place. This requirement makes conversion a workable concept. Not everyone will be able to recover for the appropriation of their image, name, or likeness. Only those who have had his rights seriously infringed upon will be able to recover.

C. Unjust Enrichment—Restitution

Restitution at law may provide another way to recover damages for an invasion of privacy based on appropriation of a property right. Where the commission of a tort results in the unjust enrichment to the defendant at the plaintiff's expense, the plaintiff may disregard, or "waive," the tort action and sue for restitution of the benefits conferred on the defendant.67

67. See Corbin, Waiver of Tort and Suit in Assumpsit, 19 YALE L.J. 221 (1910) [here-
Restitution, in quasi-contract at law, looks to what in good conscience should belong to the plaintiff.\textsuperscript{68} The amount the defendant should pay may be more or less than what the plaintiff has lost.\textsuperscript{69} Restitution cannot be used in all cases of tortious conduct. Its application is restricted to those cases in which the court can imply, at law, a contract.\textsuperscript{70} The remedy is limited to situations in which the wrongdoer has been unjustly enriched by his tort, and "is under an obligation from the ties of natural justice to refund," so the law implies a debt and gives this action, as if a contract had been in existence.\textsuperscript{71} When the defendant takes (appropriates, converts, commits a trespass to chattel) the defendant's likeness and image without the plaintiff's consent, he will have to pay the plaintiff for the benefit conferred upon him.

If the primary cause of action was trespass to chattel, each of the plaintiffs in the hypotheticals could "waive" this tort and sue for the benefit conferred. Since the tort itself is unworkable, the subsequent waiver and suit in restitution would also be unworkable because hardly a benefit has been conferred. Nevertheless, were the court to take this approach, each and every one of the plaintiffs could recover for the benefit conferred in the various hypotheticals.

If the plaintiff's primary basis for his action for appropriation is conversion, he will be able to waive the tort and sue in restitution for the benefit conferred. Unlike trespass to chattel, recovery will not occur in all the examples. As pointed out previously, there will be a conversion only in the first and third hypotheticals. Those two plaintiffs can "waive" the tort and sue for restitution. In the second example, since there is no tort, there cannot be the subsequent waiver. Thus, recovery in restitution will be denied.

IV. DAMAGES

After liability for invasion of privacy premised on appropriation has been established, and the form of action chosen, it remains to apply the proper measure of damages.

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{68} Felder v. Reeth, 34 F.2d 744 (9th Cir. 1929); accord, In re Baker, 5 W.W. Harr. 198, 162 A. 356 (Del. 1932).
\item\textsuperscript{69} Id.
\item\textsuperscript{70} See Corbin, supra note 67.
\item\textsuperscript{71} Id.
\end{itemize}
\end{footnotesize}
A. Trespass to Chattel

As suspected, this form of action will give the plaintiff the least amount of recovery. When there is not a substantial interference with possession so as to constitute a conversion, but yet there still is an intermeddling with the property, it has been held the plaintiff can only recover actual damages suffered.\textsuperscript{72}

In \textit{Pearson v. Dodd},\textsuperscript{73} a United States senator claimed a trespass to chattel had been committed against his documents, which were photocopied and returned to his files undamaged. The court said "the measure of damages in trespass is not the whole value of the property interfered with, but rather the diminution in its value caused by the interference."\textsuperscript{74} Actual damages to the chattel must be shown where liability for trespass to chattel exists; without the showing of actual damages only nominal damages can be given.\textsuperscript{75}

Where the courts talk of actual damage, they speak of it in terms of physical injury and diminution in the value of the chattel. Since in all of the hypotheticals the chattel was not physically damaged or reduced in value, only nominal damages could be given.

B. Conversion and Restitution

Unlike trespass to chattel, a plaintiff who sues in conversion, since it is a "forced sale," can get the value of the item "sold." The value of property acquired by conscious tortious conduct is:

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\ldots \text{the value of the property at the time of its improper acquisition, retention, or disposition, or a higher value if this is required to avoid injustice where the property has fluctuated in value } \ldots .\textsuperscript{76}
\]

If a plaintiff sues under conversion he can get the value at the time of the conversion.\textsuperscript{77} The recovery can be depicted as the price at which

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\item \textsuperscript{72} See generally 1 F. Harper & F. James, The Law of Torts § 2.36 (1956).
\item \textsuperscript{73} 410 F.2d 701 (D.C. Cir. 1969).
\item \textsuperscript{74} Id. at 707.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Restatement of Restitution § 151 (1937); accord, Foley v. Wasserman, 319 Pa. 420, 179 A. 595 (1935).
\item \textsuperscript{77} Restatement of Restitution § 151 (1937). But see Restatement of Restitution § 154 (1937):
\item \textsuperscript{78} where a person is entitled to restitution from another because of an innocent conversion, the measure of recovery for the benefit thus received is, at the election of the claimant, the value of the property
\item \textsuperscript{79} (a) at the time of the conversion, or
\item \textsuperscript{80} (b) except to the extent that its value has been increased by the converter, its
\end{itemize}
a willing seller in that situation under the circumstances would sell goods to a willing buyer. In some instances, this would not be much at all, since in our first example a willing seller in Smith's position might sell his photograph for relatively little money. In light of the ultimate amount of money the movie would gross, and the fact that the defendant used the photograph without Smith's consent, this would be unfair. Because of the fluctuation in the market value, the picture is worth much more than at the time of the conversion. Under these circumstances, a court would be justified in awarding Smith damages measured by this later value.  

But plaintiff does not have to sue for conversion, he can sue in restitution. In that case the damages would be the benefit conferred upon the defendant. This approach affords the plaintiff in the first hypothetical no better relief since the measure of damage is not plaintiff's losses, but the benefit defendant has received. A proper measure of these damages would be the price at which a willing seller would sell goods to a willing buyer. In the first hypothetical this would be a small amount of money perhaps based on the going rate for an "extra." In the third example, since Frank Sinatra is a famous person, it would be considerably more. Then the only way a plaintiff who is not a famous person could recover anything more would be if the court imposed punitive damages on the defendant. These damages are given over and above the full compensation for the injuries sustained. They are given, in the discretion of the court, when the defendant's conduct is malicious, fraudulent, or evil. Defendant must exhibit a conscious and deliberate disregard of the interests of others so his conduct may be regarded as wilful or wanton. Mere negligence on the defendant's part is not enough; even gross negligence is in-

value at the time of a subsequent demand if the converter has property at such time, or

i. at the time of its disposition, if the converter disposes of it.


79. The nature of the remedy is not what the plaintiff has lost as a result of defendant's actions, but what benefit the plaintiff has conferred upon the defendant.

80. Scott v. Donald, 165 U.S. 58, 88 (1896); see Prosser, supra note 12, at 9. See also 70 Harv. L. Rev. 517 (1957).


83. Esheleman v. Rawalt, 298 Ill. 192, 131 N.E. 675 (1921).

84. Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1921).

sufficient.\textsuperscript{86} There must be wilful and wanton conduct.\textsuperscript{87} Nevertheless, typical torts which do lead to punitive damages are libel and slander,\textsuperscript{88} intentional interference with property such as trespass,\textsuperscript{89} and conversion.\textsuperscript{90} It may be difficult to prove wilful and wanton conduct in some cases; but once it can be shown, the plaintiff will get the additional relief sought.

V. PRIVILEGE AS A DEFENSE

In 1964, the United States Supreme Court deciding the most important case in the area of defamation, \textit{New York Times Co. v. Sullivan},\textsuperscript{91} held that the first amendment conferred a qualified privilege, which was not limited to comment or opinion. This privilege extended to false statements of facts, unless actual malice could be proved.\textsuperscript{92}

Three years later this privilege was extended to include the tort of privacy in \textit{Times Inc. v. Hill}.\textsuperscript{93} The Hill home had been invaded by three escaped convicts in 1952. The family was held prisoner for 19 hours. The next year a novel with several fictionalized scenes was written about the incident. Later the novel was made into a play. In 1955 Life Magazine published an article about the play, and included pictures of the play with the names of the members of the Hill family. The New York courts held there was liability because there was a misstatement of fact.\textsuperscript{94} The Supreme Court, applying the \textit{Sullivan} holding, said misstatements were privileged unless it was found to be made with knowledge of falsity or in reckless disregard of the truth. Nevertheless, it is important to note the plaintiff's cause of action in \textit{Hill} was based on "placing the plaintiff in a false light in the public eye" and not appropriation.\textsuperscript{95}

When appropriation is discussed, constitutional privilege is not a

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\item \textsuperscript{86} Eatley v. Mayer, 9 N.J. Misc. 918, 154 A. 10 (Cir. Ct. 1932).
\item \textsuperscript{87} Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1921).
\item \textsuperscript{88} Reynolds v. Pegler, 223 F.2d 429 (2d Cir. 1955).
\item \textsuperscript{89} Huling v. Henderson, 161 Pa. 553, 29 A. 276 (1894); \textit{accord}, Sperry v. Seidel, 218 Pa. 16, 66 A. 853 (1907).
\item \textsuperscript{90} Watkins v. Layton, 182 Kan. 702, 324 P.2d 130 (1958); \textit{accord}, Jones v. Fisher, 42 Wis. 2d 209, 166 N.W.2d 175 (1969).
\item \textsuperscript{91} 376 U.S. 254 (1964).
\item \textsuperscript{93} 385 U.S. 374 (1967).
\item \textsuperscript{94} Hill v. Hayes, 15 N.Y.2d 986, 207 N.E.2d 604, 260 N.Y.S.2d 7 (1965).
\item \textsuperscript{95} 385 U.S. at 378. It is interesting to note that the \textit{Hill} case was brought under the New York privacy statutes where recovery is based on injury to feelings.
\end{itemize}
Comments

defense.\textsuperscript{96} By the nature of the cause of action itself the plaintiff in a suit for appropriation attempts to recover for a purely commercial exploitation, without any purpose on the part of the defendant to "inform" the public by his actions. \textit{Time, Inc. v. Hill}\textsuperscript{97} would apply if the purpose of the film was to inform the public about a newsworthy topic. Typical of this situation are news stories, news magazines, newsreels, or documentaries. The purpose is to inform the public on a public issue or news item. Even a "private" person involved in a public issue would not recover for the use of his name, image, or photograph.\textsuperscript{98}

On the other hand, when the nature of the use involves private commercial exploitation of a person's property (photograph) there is no privilege which can be asserted.\textsuperscript{99} If a public figure's photograph is used in a commercial film, there is no privileged use, and the plaintiff can recover his damages.\textsuperscript{100} Even the President of the United States could sue for appropriation if his photograph was used on a tee-shirt or poster. In the context of commercial use, there is no defense of privilege which can be asserted by the defendant.

CONCLUSION

Since 1890 the tort of invasion of privacy has been widely discussed. But in the area of appropriation there is much work to be done. To stop and call the tort appropriation is not enough; further refinement in the concept is needed. Once it is determined what form of action appropriation will take, movie companies will know the limits within which they can act.

If the form of action follows trespass to chattel, the movie medium will become too restricted and the companies will be subject to many


\textsuperscript{97} 385 U.S. 374 (1967).


\textsuperscript{99} Gordon, \textit{supra} note 2, at 562.

\textsuperscript{100} Id.

The statement often found in opinions of the courts that public characters lose their immunity of privacy in the exploitation sense is not well founded. The public man is protected against the exploitation of his personality for profit as is anyone else. Of course, he is more frequently the subject of "news" and against news exploitation he has no protection.

legal actions. Even the slightest interference is a trespass. Plaintiff would still recover nominal damages if he wished. In light of this, the form of action of trespass to chattel is unworkable and will have to be discarded.

On the other hand, if the courts allow a cause of action for conversion, they will have taken a logical approach. Conversion gives fair recovery to the plaintiff, because the defendant has to pay for what he has taken. Yet, this form of action has the proper safeguards to "weed out" frivolous suits. The plaintiff has to show a serious interference to the right to control the use of his image. Arguably this determination will follow the New York-California "incidental use-directly connected test." If the plaintiff's photograph, name, or likeness has been used purposefully, the defendant should pay for his use of it. If it is then determined that the defendant's conduct was wilful or wanton, he should also be made to pay over and above the value of the benefits conferred; for it is true he has invaded the plaintiff's privacy.

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