Publicity Right: Whether it should be Recognized in Thailand

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Abstract

At present, celebrities in Thailand are being used broadly for commercial purposes without their consent. Thai existing laws such as defamation, passing off and copyright are insufficient to protect celebrities' interests, especially, their economic interests. Accordingly, this article will study the right of publicity, which emerged and was separated from the privacy right in the U.S., in order to protect celebrities' interests. In addition, the article will further explore other varying approaches in different countries such as the extended tort of passing off, misrepresentation and misappropriation of personality. Next, the publicity right will be emphasized as the best approach to protect celebrity rights. Then, it will discuss Thai existing laws before arguing that right of publicity should be recognized in Thailand. Moreover, this article will suggest some limitations of the publicity right in order to balance celebrities' interests with the public interest.

Keywords: Publicity Right, Passing Off, Copyrights, Defamation, Performing Right, Tort of Misrepresentation, Misappropriation of Personality

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1. Introduction

Nowadays, given a competitive environment, many companies tend to use celebrities in advertising to endorse their brands. They believe that the celebrity endorser, who enjoys public recognition and who uses that recognition on behalf of a consumer good appearing with it in an advertisement (McCracken, 1989)[2], could create more attention and increase more purchases than a non-celebrity endorser. However, in fact, not only the companies that may profit from celebrity endorsements, but the celebrity endorsers themselves should also benefit from the endorsements, as a source of income.[3]

Nevertheless, increasing celebrity endorsements could make celebrities vulnerable to unauthorized exploitation of their images, voices identities, or other personality characteristics.[4] The celebrities therefore propose that their interests, both economic and dignitary interests should be protected. They further argue that they should have exclusive rights to control the commercial use of their names, identities, likenesses, voices or other personality characteristics. Consequently, the right of publicity has emerged and separated from the right of privacy in several states of the U.S. as a way to protect celebrities' interests.[5]

In recent years, the right of publicity has been developed significantly in the U.S. due to several new avenues for celebrity branding, the growth of entertainment industry, and the expansion of social media and other new media. Moreover, in this digital age, there are various new means that use celebrities' name, identity, likeness, voice or other personality characteristic for commercial purposes Thus, the traditional laws are insufficient to protect the celebrities' interests, especially, their economic interests.

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[2] Grant McCracken, "Who Is the Celebrity Endorser? Cultural Foundations of the Endorsement Process," *Journal of Consumer Research* 16, no. 3 (1989): 310-321.

[3] Astrid Keel and Rajan Nataraajan, "Celebrity Endorsements and Beyond: New Avenues for Celebrity Branding," *Psychology & Marketing* 29, no. 9 (2012): 690.

[4] Stephen Boyd, "Does English Law Recognise the Concept of an Image or Personality Right?," *Ent. L.R.* 13, no. 1 (2002): 1-7.

[5] Huw Beverley-Smith, *The Commercial Appropriation of Personality, Cambridge Studies in Intellectual Property Rights* (Cambridge, UK: Cambridge University Press, 2002), 145.

As a result, publicity right has been adopted by several states in the U.S.

However, publicity right has not been recognized yet in Thailand, we use existing laws for protecting celebrity instead, such as defamation, passing off, copyrights and performing rights. Therefore, this article will study on the right of publicity to consider whether it should be recognized in Thailand.

Accordingly, part I of this article will study the development of the publicity right in the U.S. Then, part II will explore other different approaches in order to deliberate whether right of publicity is the best approach to protect celebrities' rights. After that, part III will look at the existing laws in Thailand and consider whether they are sufficient to protect celebrities' rights, in an attempt to decide whether we should have publicity rights in Thailand. Finally, before reaching a conclusion, part IV will discuss on the scope or limitations of publicity rights.

2. The Development of Publicity Right in the U.S.

Before this article will answer the question whether publicity right should be recognized in Thailand, this part of the article will study on the development of publicity right and explain the rationales which underpins it.

In the U.S., publicity right first emerged in the case of *Haelan Laboratories Inc. v. Topps Chewing Gum Inc.*[6] In this case, the court had to decide which chewing gum company owned exclusive rights to use the photographs of baseball players. The plaintiff claimed he had exclusive rights to use the baseball players' photographs in his products, but the defendant also brought those same baseball players into the defendant's contracts to authorize the use of their photographs. The defendant, however, argued that the plaintiff's contracts were only waivers of the players' rights to sue for invasion of privacy. Thus, the plaintiff had no legal interests in the defendant's photographs of the baseball players.[7]

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[6] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953)

[7] Beverley-Smith, *The Commercial Appropriation of Personality, Cambridge Studies in Intellectual Property Rights,* 174-175.

Nonetheless, the court rejected the defendant's arguments and further explained that the right of privacy is an independent right[8] and an individual also has a "right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture."[9] In addition, the court acknowledged the fact that many famous persons, especially actors and sport players, are far from having their feelings bruised through public exposure of their likenesses. On the other hand, they would feel greatly deprived, if they no longer received money for authorizing advertisements, popularizing their countenances displayed in newspapers, magazines, busses, trains and subways.[10] As a result, the right of publicity was born separately and differently from the right of privacy, in order to protect the prominent person's economic interests. In other words, *the Haelan case* demonstrated that an economic right in one's persona was distinct from one's "right to be left alone".[11]

Many years later, Melville Nimmer, a distinguished scholar, noted that *the Haelan case* had indicated a judicial willingness to protect publicity values. He further argued and emphasized that traditional laws, such as the right of privacy, unfair competition, and other legal approaches, were not enough to protect a celebrity's commercial interests in his or her image[12] due to advances of technology and the modern culture.[13]

Aside from the development of publicity rights based on common law, right of publicity was first written as a statutory right in California which stated that "any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of

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[8] Christina Smedley, "Commercial Speech and the Transformative Use Test: The Necessary Limits of a First Amendment Defense in Right of Publicity Cases," *DePaul Journal of Art, Technology & Intellectual Property Law* 24, no. 2 (2014): 454.

[9] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d at 868

[10] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d at 868

[11] Samuel Warren andLouis Brandeis, "The Right to Privacy," *Harvard Law Review IV,* no. 5 (1890): 193-220.

[12] Garrett R. Rice, "Groove Is in the Hart": A Workable Solution for Applying the Right of Publicity to Video Games," Washington & Lee Law Review 72, no. 1 (Winter 2015): 317-324.

[13] Melville B. Nimmer, "The Right of Publicity," Law & Contemporary Problems 19, no. 2 (1954): 203-204.

advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, … shall be liable for any damages sustained by the person or persons injured as a result thereof…".[14] Similarly, many other states followed California by enacting the right of publicity statue.[15]

Although, in fact, publicity right is aimed to protect both celebrity and non-celebrity, almost all publicity right cases have been exclusively claimed by the celebrities because these famous persons face a high risk of economic exploitation of their personas.[16]

Moreover, there are three main justifications for publicity right.[17] Firstly, moral arguments justify publicity right believing that publicity right is a law to reward labor and prevent unjust enrichment since the celebrity invests his or her time and effort to create his or her likeness, personality and identity; so, the celebrity should benefit from its appropriation.[18] Secondly, there are economic arguments which argue that publicity right is an instrument to provide an incentive for celebrity to create his or her work, and thus promotes efficiency. Lastly, consumer protection arguments believe that publicity right could avoid consumer confusion.[19]

The courts applied publicity right in many cases involving unauthorized use of the celebrities' names, identities, likenesses, voices or other personality characteristics for commercial purposes. Therefore, in general, to consider whether the defendant violates the claimant's right of publicity, the claimant must show that the defendant (1) used the claimant's name, image or likeness (2) without the claimant's consent (3) for a commercial purpose.[20]

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[14] California Civil Code, section 3344(a)

[15] Smedley, "Commercial Speech and the Transformative Use Test: The Necessary Limits of a First Amendment Defense in Right of Publicity Cases," 456.

[16] Garrett Rice R., "Groove Is in the Hart": A Workable Solution for Applying the Right of Publicity to Video Games," 317.

[17] Michael Madow, "Private Ownership of Public Image: Popular Culture and Publicity Rights," *Cal. L. Rev.* 81, no. 1 (1993): 125, 178.

[18] Nimmer, "The right of publicity," 216.

[19] Martin H. Redish and Kelsey B. Shust, "The Right of Publicity and the First Amendment in the Modern Age of Commercial Speech," *Willam & Mary Law Review* 56, no. 4 (2015): 1443, 1455.

[20] Smedley, "Commercial speech and the transformative use test: the necessary limits of a first amendment defense in right of publicity cases," 453-454.

To conclude, today, almost every state in the U.S. recognizes right of publicity through common law, state statue, or both, as a right to protect an individual from any unauthorized use of his or her personality or identity for commercial purposes and to guard against unjust enrichment. Although, there are differences between states, celebrities in America are likely to have more rights over their own images or personalities than the celebrities in other countries.

3. Other Varying Approaches

To explain why Thailand should follow the American approach, this part will look at several varying approaches in different jurisdictions to consider whether these legal approaches are more appropriate to protect celebrities' interests.

3.1 The Torts of Passing Off

Traditionally, there were no protections for the commercial value of one's own personality in England. The early approaches used by English courts to protect personality' interests were torts, such as passing off. However, there are three key elements of an action for passing off which the claimant must establish in order to succeed his claim. Firstly, the claimant must show that he has a certain reputation or goodwill. Secondly, the claimant must prove that the defendant creates a misrepresentation which probably misleads the public. Lastly, the misrepresentation must damage the claimant's goodwill.[21] For example, in *McCulloch v May*[22], the court clearly said that it was a compulsory requirement for an action of passing off that the claimant and the defendant must be involved in the same field of business activity, as it was the only way to mislead the public about the origin of the goods. As a result, in this case, the action was dismissed because it has no real possibility of public confusion. Accordingly, many subsequent actions of passing off failed due to the same field of business activity ground.

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[21] Lionel Bently and Brad Sherman, Intellectual Property Law, 4th ed. (Oxford: University Press, 2009), 828.

[22] McCulloch v May [1947] All ER 845

Nevertheless, the decision of English court was changed later in *Irvine v Talksport*[23] case, as the court demonstrated that it is not necessary for the parties to be engaged in the common field of business activity in order for an action of passing off to succeed. Therefore, the claimant must prove only that he has a certain reputation or goodwill and the defendant infringes and damages this position. Moreover, in this case, passing off was extended to protect individual's reputation or good will, as Laddie explained "if someone acquired a valuable reputation or goodwill, the law of passing off would protect it from unlicensed use by other parties."[24] Consequently, it seems that celebrities' rights in England could be protected by torts of passing off.

However, there is still a question of damages on the passing off ground. Since, the proof of common field of activity is no longer needed, the claimant might suffer direct damage if he has a reputation in one field but the defendant infringes his name in another field.[25] How might the court calculate economic loss when one's reputation is damaged become important.

3.2 Misrepresentation

Similarly, in Australia, the court extended the torts of passing off to the stage where mere association with a character is sufficient for an action, as the court in *Hogan v Dundee*[26], advocated that although, it was not likely to mislead the public that the claimant actually participated in the relevant advertisements, mere identification was enough to suggest an association and a misrepresentation.[27] In other words, the Australian court relaxed the test of misrepresentation. Therefore, action can be brought in respect of an image, including a name, which is unconnected with a business. As a result, the claimant could use the extended tort of passing off to protect his persona value in Australia.

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[23] Irvine v Talksport [2002] EMLR 32

[24] Irvine v Talksport [2002] EMLR 32, per Laddie J, at [38]

[25] Euan Cameron, "Major Cases," *International Review of Law Computers & Technology* 16, no. 2 (2002): 211-218.

[26] Hogan v Koala Dundee Pty Ltd (1988) 83 Australian LR 187.

[27] Scott Ralston, "Australian Celebrity Endorsements: The Need for an Australian Right of Publicity," *Communications Law Bulletin* 20, no. 4 (2001): 9-12.

However, clearly, the Australian approach does not reach as far as publicity right. Misrepresentation is still necessary to be identified for an action of tort of passing off, while, the right of publicity does not require any misrepresentation for the cause of action.[28]

3.3 Misappropriation of Personality

In Canada, tort action for misappropriation of personality was recognized in the *Athans* case.[29] Athans, a famous water-skier, charged the defendant for using his distinctive photo, which was regarded as Athans' trademark, for a drawing used in a brochure to promote the defendant's camp. However, the action for passing off was dismissed in this case, as the court held that the public would not confuse and recognize that Athans endorsed the defendant's camp. Nonetheless, the court clarified the nature of tort in this case by introducing liability for appropriation of personality as stated that "Athans has a proprietary right in the exclusive marketing for gain of his personality, image and name, and that the law entitles him to protect that right, if it is invaded."[30] In other words, the tort of appropriation of personality protects an exclusive right to market his personality, while, the tort of passing off aims to protect goodwill of business. So, it is clear that tort of appropriation had been adopted to protect economic interests in personality. Still, there is a question, whether the approach could protect one's dignitary interests.[31]

Apparently, it can be seen from this part that tort laws, which were developed in several jurisdictions to protect celebrity and personality, still have some problematics and limitations because of the nature of torts. For example, there are questions relating to the basis of liability, damages, and dual purpose of economic and dignitary aspects.[32] Thus, this article argues that Thailand should rather follow the U.S. approach of publicity right, as it is a more mature and developed approach in comparison to the tort laws. Moreover, right of publicity could protect both economic and dignity interests of celebrities

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[28] Ibid.

[29] Athans v Canadian Adventure Camps Ltd (1977), 17 OR (2d) 425

[30] Athans v Canadian Adventure Camps Ltd (1977), 17 OR (2d) at 434

[31] Beverley-Smith, The Commercial Appropriation of Personality, *Cambridge Studies in Intellectual Property Rights*, 123-124.

[32] Ibid., 124.

in all situations that may occur since the claimant has to prove only that the defendant used his or her name, image or likeness without his or her consent for a commercial purpose.

4. The Existing Laws in Thailand

In Thailand, the existing laws such as defamation, passing off, copyright, or performing right have been used to protect celebrities' rights and interests since right of publicity has not been recognized yet in Thai jurisdictions. These traditional laws have some limitations and barriers in their protection of celebrities. Hence, this part of the article will discuss Thai existing laws and explain why publicity rights should be recognized under Thai law.

4.1 Defamation

Under Thai Criminal Code, "whoever imputes anything to the other person before a third person in a manner likely to impair the reputation of such other person or to expose such other person to be hated or scorned"[33] is held to commit defamation. In addition, Thai Criminal Code provides mean of defamation by publication in section 328.[34] Thus, in order to consider whether the defendant commits the offence of defamation or not, the court has to consider whether the claimant's reputation is likely to be impaired or likely to expose the claimant to be hated or scorned.[35]

Thus, celebrities in Thailand can protect themselves by the law of defamation. However, defamation laws in Thailand have some limitations as they are purposed to protect an individual's esteem, not the celebrities' economic interests.

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[33] Thai Criminal Code, Section 326

[34] Thai Criminal Code, Section 328 "If the offence of defamation be committed by means of publication of a document, drawing, painting, cinematography film, picture or letters made visible by any means, gramophone record or another recording instruments, recording picture or letters, or by broadcasting or spreading picture, or by propagation by any other means, the offender shall be punished…"

[35] Krairoek Sasemsarn, *Explanation of Thai Criminal Code Section 288 – 366* (Bangkok: The Institute of Legal Education Thai Bar Association, 2008), 186-188.

For example, Nok Usanee, Thai actress, could file defamation charge against the author of Thai Hookers 101, a guidebook about sex and prostitutes in Thailand. Since, the author used her photograph as a cover of the book without her consent, and the text on the cover and contents of the book are likely to impair her reputation.[36] On the contrary, if the auther publishes a photograph of Nok Usanee, which is not likely to damage her reputation or expose her to be hated or scorned, she could not charge defamation against that alleged person in this situation, as it would fall outside the scope of Thai defamation laws. Moreover, under defamation laws, she could not demand compensation from the unauthorized use of her photograph for commercial purpose even though, obviously, the author intends to use her image for promoting the book.

As a result, defamation laws are not enough for protecting the celebrities' interests, especially their economic interests.

4.2 Passing Off

In fact, Thailand had accepted the torts of passing off, as stated in Thailand Trademarks Act that "the provisions of this section shall not affect the right of the owner of an unregistered trademark to bring legal proceedings against any person for passing off goods as those of the owner of the trademark."[37] However, unlike the torts of passing off in the U.K., the claimant does not need to prove that the defendant damages his or her goodwill or business's reputation.[38] Nevertheless, the claimant needs to prove solely that his or her trademarks are well-known and the defendant attempts to mislead the public that the defendant's products or services are those of the claimant.[39] Thus, in order to claim passing off, first, the celebrity has to show that his or her personality has recognized as his or her trademark and it is well-known to the public. For example, if a company uses a celebrity's sound-alike for a radio advertisement, the celebrity first has to show

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[36] Khaosod English, "Thai Celeb to File Charges over 'Hooker' Book," last modified May 6, 2014, accessed March 30, 2016, http://www.khaosodenglish.com/detail.php?newsid=1399379253

[37] Thailand Trademark Act B.E. 2534, section 46 paragraph 2

[38] Chaiyos Hemaratchata, *Characteristics of Intellectual Property Law,* 9th ed. (Bangkok: Nititham, 2012), 342.

[39] Ibid., 340-341.

that his or her voice is sufficiently unique and identifiable among the public as his or her trademark. Then, the celebrity has to demonstrate that the defendant misled the public that the defendant's voice is that of the celebrity.

Obviously, it is difficult to extend passing off for protecting celebrities, due to the nature of tort laws that the claimant has to establish the above elements of passing off. On the other hand, the celebrities do not have to demonstrate those elements for publicity right action. Consequently, it is likely that publicity right is more appropriate to protect the celebrities than the tort of passing off.

4.3 Copyright

Copyright protection is granted to reward authors for their skill and effort in creating a work, to induce desirable activities of creation and to encourage the author to give his or her work to the public.[40] Similarly, the purpose of publicity right is aimed to protect celebrities and encourage creativity[41], as the celebrities deserve to profit from their own created persona as the fruit of their skill and labour. Accordingly, it is arguable that as both copyright and publicity right serve the same purpose; thus, solely copyright is sufficient to protect celebrities.

Nevertheless, under Thai law, in order to receive copyright protection, the work must fall within categories of work under section 6 of Thai Copyright Act[42], and copyright protects only the owner of copyright work. In other words, copyright does not protect the celebrity's persona, but it rather protects the works of authorship. Consequently, copyright sometimes cannot be extended to protect an unauthorized use of celebrity's image, identity or personality if the celebrity's work falls outside the scope of copyright works or the celebrity is not the owner of a copyright. For example, Aum Patcharapa,

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[40] Ibid.

[41] Jennifer E. Rothman, "Copyright Preemption and the Right of Publicity," *UC Davis Law School Review* 36 (2002): 199-204.

[42] Copyright Act B.E. 2537, section 6 "The Copyright work by virtue of this Act means a work of authorship in the form of literary, dramatic, artistic, musical, audiovisual, cinematographic, sound recording, sound and video broadcasting work or any other work…"

[43] Manager Online, "Duan Could Make Profits as She Look Alike Aum," last modified June 2, 2015 accessed May 2, 2016, http://www.manager.co.th/Entertainment/ViewNews.aspx?NewsID=9580000062259

Thai celebrity, could not sue a rice company for using her lookalike in television advertising[43] because her likeness or identity is not protected work under section 6 of Copyright Act and she is not the copyright owner of her own likeness or identity. Accordingly, she could not seek any profit from the unauthorized use of her own likeness or identity. As a result, there are several advertisements that used lookalikes of celebrities without their consent, and there could never be a case in Thailand. Therefore, in Thailand, it seems that copyright is not enough to protect celebrities' likeness or identity.

Unlike in the U.S., the celebrities could claim for unauthorized use of their lookalikes based on publicity rights. For example, in *Tin Pan Apple v. Miller-Brewing*[44]*,* the rap group called the Fat Boy, sued the advertising agency for publicity rights infringement as the advertising agency used their lookalikes for television advertising without their consent. In this case, the court held that physical similarity between the Fat Boy and the defendant established a valid cause of action under section 50, 51 of New York's Civil Rights Law.[45] The defendant therefore violated the Fat Boy's rights of privacy and publicity.

In addition, in this century, due to advanced technology, there are various new forms of exploitation of celebrities' identities, for instance, video game characters now can accurately resemble famous actors or sportspersons' faces, features, and expressions.[46] Thus, it is difficult to protect the celebrity rights by the traditional copyright law. Furthermore, as social media and other new media have expanded rapidly, the celebrities are being used broadly for commercial purpose without their permission. For instance, recently, in Thailand, numerous shops have used images of celebrities on Instagram to promote their products without the celebrities' approval. However, in this case, it's likely that copyrights could not protect the celebrities' images because these celebrities might not own copyrights of their own images.

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[44] Tim Pan Apple, Inc., v. Miller Brewing Co., (S.D.N.Y. 1990)

[45] New York's Civil Rights Law, Section 50 "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.", Section 51 "Action for injunction and for damages…"

[46] Kevin L. Chin, "The transformative use test fails to protect actor-celebrities' rights of publicity," *Northwestern Journal of Technology and Intellectual Property* 13, no. 2 (2015): 197-198.

4.4 Performing Right

Performing right is a neighboring right that aims to protect the rights of performers. However, in international perspective, protected performances must be embodied in copyrightable medium and fixed in tangible medium. For this reason, performing right cannot protect all aspects of performances. Therefore, the right of publicity came to deal with these cases, in order to protect talent performances that fall outside the scope of performing right.

In Thailand, performing right includes in Thai Copyright Act. In section 4, "performer means a performer…who acts, sings, speaks, dubs a translation or narrates or gives commentary or performs in accordance with the scriptor performs in any other manner."[47] In this sense, "in any other manner" means performances in the same manner as the named performances in this section. As a result, some performances, such as modelling, might not be covered by this section. Moreover, the use of celebrity image for commercial purposes also falls outside the scope of Thai Copyright Act.[48] Accordingly, performing right is likely inadequate to protect Thai celebrity image and other interests.

In conclusion, apparently, Thai existing laws, such as defamation, passing off, copyright and performing right cannot protect Thai celebrities in many situations. Many celebrities may suffer from unauthorized use of their own identities. Accordingly, right of publicity should be recognized in Thailand to protect celebrity's rights. Furthermore, we should critically analyze publicity right that written in California Civil Code in detail so as to be adopted and implemented in the context of Thailand.

5. The limitations of Publicity Right

Although this article argues that publicity right should be recognized in Thailand as a right to protect celebrity interests, its limitations should be discussed. Therefore,

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[47] Copyright Act B.E. 2537, section 4

[48] Wuttipong Wedchayanon, "Copyright, Performing Right: A Case Study of Noi Bussakorn," last modified June 23, 2010, accessed January 21, 2016, http://www.bloggang.com/viewblog.php?id=boxxcatt&date=22-06-2010&group=1&gblog=5.

before reaching a conclusion, this part of the article will consider the limitations or scope of publicity right.

As mentioned above, both copyright and publicity right goals are to reward the artist for his or her work, skill and effort, and to encourage creativity. Consequently, the public will benefit from that creativity. In other words, copyright and publicity right both intend to promote creativity for the common good. Thus, if publicity right is accepted in Thailand, there should be a good balance between celebrity's interests and public interests.

Moreover, there are tensions between publicity right and free speech in the U.S. For example, there is an argument in *White v. Samsung Electronics America*[48] that the court overprotected celebrity interests as it rejected a parody defense which established a protection of free speech.[50] Therefore, in order to decrease these tensions, many courts have developed balancing tests. For example, the court applied the predominant use test in *Doe v. TCI Cablevision*[51], and stated that if the predominant purpose of the work was commercial, that work would violate the right of publicity and would not be protected by free speech doctrine.[52] In Cher v Forum, the court held that Forum will be protected by constitution if it uses Cher's picture and her name "truthfully in subscription advertising for the purpose of indicating the content of the publication."[53] Additionally, in *Comedy III Productions v. Gary Sanderup, Inc.*[54], the court adopted the transformative use test to balance publicity right with free speech, in this balancing test, the publicity right would prevail if elements of creativity of the work is not enough. In other words, to claim the protection of free speech, the work in question must be transformed into something more than a mere celebrity likeness or imitation.[55]

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[49] White v. Samsung, 971 F. 2d 1395 (9th Cir. 1992).

[50] William M. III Heberer, "The Overprotection of Celebrity: A Comment on White V. Samsung Electronics America, Inc.," *Hofstra Law Review* 22, no. 3 (1994): 729.

[51] Doe V. TCI Cablevision, 110 S.W.3d 363, 374

[52] Smedley, "Commercial Speech and the Transformative Use Test: The Necessary Limits of a First Amendment Defense in Right of Publicity Cases," 462-463.

[53] Cher V Forum international (629 F. 2 d634)

[54] COMEDY III PRODUCTIONS, INC. v. GARY SADERUP, INC., 25 Cal. 4th 387 (2001)

[55] Smedley, "Commercial Speech and the Transformative Use Test: The Necessary Limits of a First Amendment Defense in Right of Publicity Cases," 465.

Accordingly, if publicity right is recognized in Thailand, it should be balanced with free speech in the context of Thailand.[56]

In addition, publicity right claim should be preempted if it is in the scope of copyright law.[57] For example, in *Fleet v. CBS*[58], the court held that the claimer's performances were dramatic works fixed in a tangible medium of expression, which fell within the scope of copyright; so, the publicity right was preempted in this case.

In conclusion, although, publicity right should be recognized in Thailand, the scope of publicity right should not be too wide that it would impede creativity; thus, it should be limited by public interests, free speech and copyrights preemption.

6. Conclusion

As, today, celebrities are being used widely for commercial purposes, without their consents, several countries have attempted to protect the celebrities with their own existing laws or developed traditional laws. For example, the English courts extended the tort law of passing off to protect celebrity's interest, Australia had used a misrepresentation approach, and Canada had applied the misappropriation of personality approach. Similarly, Thailand has applied the existing law such as defamation, passing off, copyright, and performing right to protect the celebrity. Nevertheless, these approaches are likely insufficient for celebrity protections as there are some limitations and obstructions due to the nature of the approaches. Therefore, this article has argued that the publicity right approach, which has been developed in America, is the best means to protect celebrities and it should be adopted in Thailand. However, for the common good, this article proposes that publicity right should be limited by public interests, free speech, and copyrights preemption.

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[56] Boonyarat Chokebandanchai, "The Report of Media Interfering with the Administration of Justice," *Naresuan University Law Journal* 6, no. 1 (2013): 107.

[57] Breanne Hoke, "My Online Me: Why Gamers Should Turn to California's Right of Publicity Laws in Protecting Their Online Avatars," American UNIV. *Intellectual Property Brief* 6, no. 1 (2015): 38.

[58] Fleet v. CBS Inc. 50 Cal. App. 4th 1911 (1996)

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