

THE EMERGENCE OF HOLLYWOOD GHOSTS ON KOREAN TVS: THE RIGHT OF PUBLICITY FROM THE GLOBAL MARKET PERSPECTIVE

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Abstract: The Right of Publicity is both a cultural based property and a corresponding right that protects the entertainment industry in the worldwide market. Discussion of the Right of Publicity, as a preliminary matter, must separate the policy-based approach of the United States from the doctrinal approaches. In order for this discussion to be carried out, the author considers the Right of Publicity with two new approaches. First, it is the author's view that the Right of Publicity must be understood in the context of the entertainment market, considering the role of each player and their relationship to each other. Second, the Right of Publicity should also be discussed from a global market perspective. In order to discuss the publicity rights in a global market perspective, the comparative law approach is utilized, allowing the Right of Publicity to become more scientifically rational. The comparative law analysis of the Right of Publicity can provide a cornerstone for legal research on the subject, which can further enable the right to be widely accepted by different countries.

I. INTRODUCTION

Viewers of Korean television, in the past few years, often find themselves mistakenly thinking they are watching Hollywood movies from the 1950-60s. Audrey Hepburn walks up and down in front of a shop window, as if she wants to own a Korean-made cellular phone;¹ Marilyn Monroe appears in an engine oil ad, where she holds her skirt down to prevent it from flying up as she stands over a subway vent.² Much time has passed since James Dean made his first appearance with a popular Korean screen actor in an automobile commercial on Korean television.³ The use of celebrities to

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¹ The commercial is taken from the scene from the movie, "Breakfast at Tiffany's," in which Audrey Hepburn had a starring role. A cellular phone is placed where the jewelry actually appeared in the movie, which creates the false impression that Hepburn is gazing with desire for the phone.

² In addition to Marilyn Monroe appearing in the engine oil commercial, Michael Jackson, Sean Connery, and John Travolta endorse laptops; and Bush, Thatcher, Gorbachev, Queen Elizabeth, former Japanese Prime Minister Koizumi, and others have turned up in commercials for allergy medication in Korea. Some of these commercials have edited the scene from a movie classic, such as those incorporating Audrey Hepburn or Marilyn Monroe, and others—rather than using a real person—have used the likeness or other special feature of the celebrity. Michael Jackson's moonwalk dance, Sean Connery's beard, and John Travolta's extremely long side-burns in Samsung notebook commercials are some examples.

³ The automobile commercial was digitally re-mastered (computer graphic technology) to appear as if the seemingly alive James Dean and the Korean actor, In-Sung Cho, were together for the shoot. Contrary to

brand products is now widely employed as a marketing scheme in Korea. The reincarnation of celebrities in these commercials largely arose from the legal right to use such images established in a single 1992 case in Korea.

In that case, one of the heirs of James Dean, a famous American actor who died in 1955, brought an action in a district court in Korea against an underwear manufacturing company in Korea, seeking a prohibition on the use of the name and likeness of James Dean and damages arising out of the unauthorized use.⁴ The plaintiff based his cause of action on the allegation that the defendant company infringed upon the Right of Publicity of the deceased (James Dean), which was a novel cause of action in Korea at the time.⁵ In countries with a civil law tradition, such as Korea, a new right cannot be created without a statutory basis except in very exceptional cases, in contrast to common law countries, such as the United States.⁶ Notwithstanding this rigid structure of Korean law, the court in this case recognized the existence of the Right of Publicity based on customary law, which was very unusual.⁷ However, the court dismissed the plaintiff's claim on the grounds that the right, like a personality right, does not survive death or pass to heirs.⁸

Nearly ten years later Korean courts issued a contradictory decision that the Right of Publicity may survive death and pass to heirs.⁹ Thirteen

the case *infra* note 4, producers of this commercial reportedly entered into a valid license agreement with James Dean's representatives. See Hyun-Mok Chung, *James Dean Revived in CF*, JOONGLBO, Mar. 6, 2007, http://article.joins.com/article/article.asp?ctg=15&total_id=2652989 (last visited May 22, 2010).

⁴ Marcus D. Winslow Jr. v. Good People Inc., et al., (94Gahab13831) (Seoul Western Branch Ct., Aug. 29, 1997) [hereinafter *James Dean I*]. See discussion *infra* Part IV.A.2.

⁵ The plaintiff registered the trademark, "*James Dean*," with the Korea Industrial Property Office ("KIPO"). However, because the registration was not made under the designated class of apparel, infringement of the trademark right could not be the cause of action. In fact, the trademark registration, "*James Dean*," for the designated class of apparel was held by the defendant.

⁶ The Korean Civil Code provides as follows:

Article 1 (Source of Law): If there is no provision in the statutes regarding a civil matter, customary law shall apply, and if there is no applicable customary law, sound reasoning shall apply. MINBUP [The Korean Civ. Code] art. 1 (S.Kor.).

Article 185 (Types of Real Property Rights): A real property right may not be arbitrarily created other than in accordance with statute or customary law. MINBUP [The Korean Civ. Code] art. 185 (S.Kor.).

Intellectual property rights are similar in nature to real property rights in that they are an exclusive right of control, but are called an intangible property right because the object of these rights is intangible. If the Right of Publicity is classified as an intellectual property right, then it cannot be created (recognized) other than in accordance with statute or customary law in Korea.

⁷ *James Dean I*, *supra* note 4.

⁸ *Id.* There is still no statutory provision on the Right of Publicity in Korea. Meanwhile, in the last few years, some Korean courts recognized the right based on customary law, while other courts ruled that the right cannot be recognized without a statutory basis. Thus, there is a great deal of confusion in this area of Korean law.

⁹ Na-Mi Lee v. Secutec Inc., (2006Gahab6780) (Seoul Eastern Branch Ct., Dec. 21, 2006) [hereinafter *Hyo-Seok Lee* case]. See discussion *infra* Part IV.A.3.

years ago, the issue was whether the Right of Publicity should be recognized at all.¹⁰ Yet Korean courts now recognize the Right of Publicity as a property right, which is both assignable¹¹ and subject to inheritance.¹² Moreover, courts have even held (somewhat extraordinarily for a civil law country such as Korea) that the protection period of a descended publicity right is fifty years after death by a *mutatis mutandis* application of the Korean Copyright Act.¹³ Furthermore, the Korean courts have decided that the Right of Publicity is afforded by not only celebrities but by non-celebrities as well,¹⁴ and have expanded its scope of protection to include the latest popular phrases¹⁵ and likenesses¹⁶ in addition to the images and names of the subjects.¹⁷ Much has changed since discussion of the Right of Publicity started, and this can all be seen as a result of the influence of the novel *James Dean I* case.¹⁸ The Right of Publicity is no longer limited to a few countries such as the United States. Though the U.S. was the initial place of its birth, and some have called it an American right,¹⁹ it has now crossed the Pacific Ocean and become a topic of fierce debate in the courts and among scholars of Korea.²⁰

To address Western readers and scholars, this paper begins its discussion with a comparative law approach. Examining the Right of Publicity issue from a comparative law perspective is not just to invoke mere interest or to indulge scholarly extravagance, rather, it can assist in an understanding of the Right of Publicity and accommodate the formation of a social consensus in the respective territories of the U.S. and Korea. Moreover, it also serves as a basis of comparison between the Right of Publicity in two countries with very different legal systems—those of common and civil law.

¹⁰ See, e.g., *James Dean I*, *supra* note 4.

¹¹ Richardson-Vicks Inc. v. Beauty People Co., (99Na26339) (Seoul High Ct., Feb. 2, 2000) [hereinafter *Vidal Sassoon* case]. See discussion *infra* Part IV.A.3.

¹² *Hyo-Seok Lee* case, *supra* note 9.

¹³ *Id.*

¹⁴ Goryo Insam Line Co. v. Junhun Gigong Co., (2002Gahab3370) (Seoul Eastern Dist. Ct., Feb. 12, 2004) [hereinafter *Goryo Insam* case]. See discussion *infra* Part IV.A.4.

¹⁵ Jun-Ha Jeong v. Character Korea Inc., (2004Gadan235324) (Seoul Central Ct., Sept. 27, 2005) [hereinafter *Jun-Ha Jeong* case]; The Cult Entertainment Inc. v. SK Telecommunication Inc., (2006Gadan250396) (Seoul Central Ct.) Jan. 19, 2007 [hereinafter *Utchassa* case]. See discussion *infra* Part IV.A.5.

¹⁶ *Utchassa*, *supra* note 15; see also *Jun-Ha Jeong*, *supra* note 15.

¹⁷ *Jun-Ha Jeong* case, *supra* note 15.

¹⁸ *James Dean I*, *supra* note 4.

¹⁹ F. Jay Dougherty, *The Right of Publicity — Towards a Comparative and International Perspective*, 18 LOY. L.A. ENT. L.J. 421, 424-26 (1998).

²⁰ There are many scholars in Korea, such as Jae-Hyung Kim, Sung-Ho Park, and Jun-Seok Park, who have been interested in this field and written leading articles.

This paper thus promotes the shaping of an international model to set a standard in this area, which is discussed in Part II.

State jurisdictions within the U.S. offer different levels of protection for the Right of Publicity.²¹ In that respect, one cannot help asking whether the international protection of this right, first formed during the Twentieth Century, can be consistently applied in various countries in the international arena. One cannot deny that this right was developed on the basis of cases from the U.S., which was largely in support of U.S. industries, especially the entertainment industry. Criticism regarding such points is an indispensable process for the right to become generally accepted in the international setting. Previous discussions of the Right of Publicity mainly have been divided into two groups: the majority's view, which emphasizes the protection of the Right of Publicity; and the minority's view, which takes a passive approach to recognition of the right.²² This paper seeks to introduce a theory that the Right of Publicity should be regarded from a global market perspective, apart from those two points of view, and will be discussed in Part III.

Part II discusses the need for a comparative law approach, while Part III examines the Right of Publicity from the international perspective. These discussions to some extent deal with the general principles of the right. In order to make a strong argument, specific evidence and proofs are needed. For that reason, cases on the entertainment industry of Korea, which is one of the main trading partners of the U.S., require further investigation. Though Korea has a legal system entirely different from that of the U.S., there is an extensive cultural exchange, and Korea stands as a strong trading partner of the U.S. In that respect, examining the Right of Publicity cases of Korea, and the controversies the right has stirred in the process of settling into the legal systems of Korea, will hopefully provide background and facilitate some consistency in the international application of the Right of Publicity, which will be discussed in Part IV.

²¹ At the present time, twenty-five States recognize some form of statutory or common law Right of Publicity. Among them, seventeen States protect the right by statute. These seventeen States can be divided into two categories based on the type of statute. States in the first category explicitly protect the Right of Publicity under independent statutes. These are California, Indiana, Kentucky, Nevada, Oklahoma, Tennessee, Texas, Washington, and recently Illinois. States in the second category protect the Right of Publicity under their "privacy" statutes. These are Florida, Massachusetts, Nebraska, New York, Rhode Island, Utah, Virginia, and Wisconsin. On the other hand, sixteen of the twenty-five States above recognize the common law Right of Publicity, and half of these sixteen States also have statutes recognizing the right.

²² The representative scholars of the majority's view are Melville Nimmer and Thomas McCarthy, and those of the minority's view are Michael Madow and Steven Hoffman.

II. THE COMPARATIVE LAW APPROACH

A. *The Need for a Comparative Law Analysis*

1. *Establishing an International Model Pursuant to the Increase of Commercial Transactions*

Useful law cannot exist outside of reality. In other words, law exists to resolve problems that occur in real life between real people. The expansion of international legal transactions increases the need for international standards and models. The need to establish standards or models in the international setting is exemplified by TRIPs (agreement on trade-related aspects of intellectual property rights). The requirement for an understanding of the laws of another country is no longer optional but necessary in the ever-expanding international transactional framework.²³ Some areas lend themselves more easily to international standards. For example, the transactional law governing trade in goods does not differ as greatly according to territoriality, and thus it is not impossible to establish some level of global standards. Property rights, on the other hand, are closely related to the traditions, customs, and cultures of each country; and the right, which has developed over long periods of time, is rarely similar in legal systems with different traditions and cultural backgrounds. From this standpoint, comparative analysis in the area of property law is more necessary than in transactional law. In order to form a basis in the international setting, a comparative law approach to the Right of Publicity, as a type of intellectual property right, and similar to those rights within copyright law, can be viewed as a pre-condition to the establishment of international standards.

2. *Scientific Rationalism*

A comparative analysis not only is necessary to establish a new standard or model, but also provides significant aid in understanding law that is already settled and recognized.²⁴ The Right of Publicity is also referred to

²³ See David S. Welkowitz & Tyler T. Ochoa, *Teaching Rights of Publicity: Blending Copyright and Trademark, Common Law and Statutes, and Domestic and Foreign Law*, 52 ST. LOUIS U. L.J. 905, 916-17 (2008); Alain J. Lapter, *How The Other Half Lives (Revisited): Twenty Years Since Midler v. Ford A Global Perspective on the Right of Publicity*, 15 TEX. INTELL. PROP. L.J. 239, 278 (2007); Dougherty, *supra* note 19, at 422.

²⁴ P. John Kozyris, *Comparative Law for the Twenty-First Century: New Horizons and New Technologies*, 69 TUL. L. REV. 165, 167-68 (1994). Kozyris argues that just as science cannot be applied to one particular country, comparative analysis in legal science is viewed as an indispensable tool for some areas of law to be supported by scientific rationality.

as the right of the 20th Century.²⁵ As a newly formed right, an intense discussion of the nature and scope of the right still continues even in the U.S. context. Whether one champions or opposes the right, in order to support one's argument, the use of comparative methods is beneficial because through such a discussion the Right of Publicity may become more scientifically rational.

This discussion not only benefits the readers in the U.S., but also provides guidance to Korean scholars on a topic that is seriously in need of explanation. Regarding the Right of Publicity, after its introduction to Korea, some decisions by the courts seemingly imply that Korean law is providing greater protection on particular issues.²⁶ Yet, from the historical aspects of the Right of Publicity in the U.S., the Right of Publicity has not always been expanded. Rather, in recent years, strong protection of the Right of Publicity has been criticized as exceedingly limiting freedom of expression. Some court decisions and scholars are arguing to cease the expansion of the scope of protection.²⁷ This may provide some guidance for cases in Korea or discussions among scholars that reflect a trend of expanding the Right of Publicity.

3. *Furnishing Information for Dispute Resolution of Specific Matters*

The comparative law approach is quite indispensable from the standpoint of information gathering for specific instances of dispute resolution. The names and images of U.S. celebrities are widely used throughout the world,²⁸ and in cases of dispute, understanding the laws of the country requesting protection is useful to experts in the field of entertainment law.²⁹ Though this approach is usually useful to law practitioners,

²⁵ The Right of Publicity is known as one of the newest rights of the twentieth century. See Larry Moore, *Regulating Publicity: Does Elvis Want Privacy?*, 5 DEPAUL-LCA J. ART & ENT. L. & POL'Y 1 (1994).

²⁶ See discussion *infra* Part IV.A.5.

²⁷ Recent cases include: *C.B.C. Distribution and Marketing Inc. v. Major League Baseball Advanced Media and Major League Baseball Players Association*, 443 F.Supp.2d 1077 (2006); *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915 (2003); *Cardtoons, L.C. v. Major League Baseball Players Association*, 95 F.3d 959 (1996). These decisions were influenced by the dissenting opinion of Judge Kozinsky in *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992), cert. denied, 113 S. Ct. 2443 (1993). On the other hand, representative scholars opposing the Right of Publicity and their best known publication include Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L.REV. 125 (1993); Steven J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y 111 (1980).

²⁸ Lapter, *supra* note 23, at 278.

²⁹ Dougherty argues that courts should apply the law of the protecting country in international disputes regarding the Right of Publicity as in copyright disputes. See Dougherty, *supra* note 19, at 432.

comparative law is also vital in the scholarly field because of the internationalization of transactions and the increasing applicability of foreign law.³⁰ As mentioned in the introduction of this paper, the initial point of the Korean Right of Publicity started with the *James Dean I* case. Although the dispute did not end up in the courts afterward, frequent appearances of images or likenesses of U.S. celebrities on Korean televisions, newspapers, and other media channels suggest that advertisers are frequently entering into licensing agreements of this sort. Yet, when research from a comparative law approach is not done in advance of these transactions or at least conducted simultaneously, serious discord may occur in the process of establishing a new right or transplanting the system of one country into another country.³¹ From the standpoint of international harmony, one nation's strong pressure over the legislation of another sovereign state to resolve specific cases is not desirable. This is especially true when it concerns a right that is based in cultural values. Hence, a rather cautious approach needs to be taken in dealing with such social values. From this perspective, the importance of understanding the culture and traditions of the country cannot be underemphasized when protection of a nation's celebrities is sought.³²

B. *Some Background Understanding of Korea*

Discussions of the comparative law approach to the Right of Publicity are not completely lacking. The problem, however, is that they have occurred on a very limited basis. The primary studies focus mainly on English speaking regions, the European Union, or the South American countries at most. Sporadic studies related to Japan as the general example for Asian countries have been conducted in order to provide an assortment of countries that have been the subjects of such discussions.³³ Until now, based on the

³⁰ See Kozyris, *supra* note 24, at 167-68.

³¹ LaFrance argues that the Right of Publicity takes root successfully or not depending on whether it is a right that has evolved naturally or a right enforced by external pressure, for example the FTA (free trade agreement). See Mary LaFrance & Gail H. Cline, *Identical Cousins?: On the Road with Dilution and the Right of Publicity*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 641, 679 (2007).

³² The goals of the comparative law research cannot be achieved only with research on the legal text. Kozyris's view on this point is as follows: "This requires understanding the legal culture that produced the laws, and more broadly, the social and economic structures and the ethical and political values that support them. Laws cannot be grasped in an idealized form outside the context of the society that created them. Before a legal model can be transplanted, the conditions in the two societies – the one from which it comes and the one to which it goes – must be taken into account." See Kozyris, *supra* note 24, at 168-69.

³³ Due to a lack of information on the Right of Publicity of Asian countries, these countries are rarely discussed. Furthermore, even the papers discussing a global perspective explain the exclusion of Asian countries from the paper. See Lapter, *supra* note 23, at 278-305. Those that occasionally employ the comparative analysis mainly discuss Japan. See Geoffrey R. Scott, *A Comparative View of Copyright As*

materials published from the U.S., no publication has ever dealt with the Right of Publicity in Korea utilizing comparative analysis. The next section provides further explanation of the need for comparative law analysis of the Right of Publicity.

1. *Structural Changes in the Korean Industry*

At the end of World War II in 1945, Korea, after 35 years of colonization by Japan, suffered another tragedy—the Korean War. These historical events led the country to quickly become one of the poorest countries in the world. Around this period, South Korea became culturally dependent on the United States, which exercised significant political influence over the country. American culture, with movies and music, were introduced to the Koreans as something ‘classy,’ and it is not much of an exaggeration to describe this generation of Koreans as a generation that grew accustomed to consuming American culture.

Korea, however, during the last forty years, has experienced remarkable economic growth that others have referred to as “the Miracle of the Han River,” quickly turning from the poorest into one of the wealthy countries of the world. Moreover, during the last fifteen years, because of the “Korean Wave,” (the spread of Korean pop culture overseas), referred to as the “*Hallyu* syndrome,”³⁴ Korea has partly escaped from being a developing country that relies heavily on its manufacturing industry. Rather, it is evolving into an advanced country which commercializes culture, and utilizes it as a vital initiative for economical growth. Therefore, Korea transformed itself from a country with the stigma of being labeled a pirate country, to a country that owns intellectual property rights and is steering in a direction to further protect such rights. In other words, in regard to intellectual property, Korea is no longer a country that infringes on others.

Similarly, Korea is strengthening the protection of intellectual property rights as part of government efforts to expand the copyright and culture industries as its main industry. This effort also is clearly affecting the decisions of Korean courts. On matters regarding the Right of Publicity, the topic of this paper, Korean courts quickly recognized the right after its initial discussions and have rapidly expanded the scope of recognized protection. This, in part, is certainly related to the changes made to the structures of

Cultural Property in Japan and the United States, 20 TEMP. INT'L COMP. L.J. 283 (2006); Dougherty, *supra* note 19, at 438-39.

³⁴ In recent years, hundreds of thousands of fans enjoyed Korean pop culture, especially in Japan, China, Taiwan and Vietnam.

industries in Korea. Therefore, Korea, one of the leading countries of the entertainment industry within the East Asian region, is continuing to adopt numerous policies in order to persistently maintain its position, and the decisions by the Korean courts support this tendency, as will be discussed in Part IV. As mentioned, a country that has rapidly transformed itself from a culture consumer nation to a culture manufacturing and export nation is relatively unique, and for this reason, Korea can be a very attractive subject of study in the field of entertainment law. From the entertainment industry perspective in particular, Korea stands as a consuming nation in relation to the U.S. but holds a position of exporting and distributing cultural contents into the East Asian region, i.e., China, Japan and Taiwan. Since countries with such dichotomous positions are not common, it is expected that the discussion of the Right of Publicity in Korea from an international standpoint can result in finding an objective and rational balancing point.

2. *Korea-U.S. FTA and the Entertainment Industry*

Recently the World Trade Organization (hereinafter WTO) has announced the failure of the Doha Development Round. Accordingly, the establishment of rules of trade between nations through the WTO now seems quite difficult. The failure of the WTO structure has put more emphasis on Free Trade Agreements (hereinafter FTAs); and as a result each country tends to place greater stress on the negotiations of the FTA, which are bilateral trade agreements.³⁵ The U.S. has already entered into FTAs with Australia, Bahrein, Morocco, Singapore, and others, and has already concluded its negotiations and is awaiting ratification of treaties with other countries, such as Panama and Peru.³⁶ It is true that Korea and the U.S. are both facing significant obstacles in obtaining ratification from each country's Assembly or Congress,³⁷ since Korea has one of the largest national economies among the nations with which the U.S. has entered into a trade agreement.³⁸

³⁵ See Jasim Ali, *Doha Round Hangs in the Balance*, FINANCIAL TIMES, July 15, 2006.

³⁶ See *Lobbyists React Cautiously To Pelosi Comments On Panama FTA*, INSIDE U.S. TRADE, Oct. 31, 2008 (copy on file with author).

³⁷ President Barack Obama has strongly demanded that Korea have a more open stance with regard to importing U.S. beef and U.S. cars, both during and after the presidential campaign. See *Korean Assembly Pauses On FTA Due To U.S. Congressional Stalling*, INSIDE U.S. TRADE, Oct. 31, 2008 (copy on file with author). On the other hand, Korea, compared with the U.S., has been experiencing delays in ratifying the KORUS FTA (Korea-U.S. FTA) at the National Assembly for a significantly different reason. The National Assembly is currently opposing the government's resumption of the import of U.S. beef, which in fact was among the four pre-requisite conditions for commencement of the negotiations for the KORUS FTA. This is in large part due to the Korean National Assembly's concern about mad cow disease, and the accompanying

Although the Korea-U.S. FTA has now been signed and is awaiting ratification, it faced just as much difficulty in the pre-negotiation stage as it did in the formal negotiations that lasted over a year. A curious diplomatic move happened on January 20, 2006, the day before the announcement of the commencement of negotiations by the authorities in the capitals of two countries, Seoul and Washington D.C. Prior to the commencement of the negotiations, the U.S. government presented four pre-requisite conditions to the Korean government. Of those four, it was later disclosed that Korea accepted three conditions, but initially rejected a reduced 'screen quota' condition,³⁹ which was fiercely negotiated by both parties up to the last minute before Korea finally accepted it. Though the U.S. government initially requested that the 'screen quota' system be lifted completely, firm opposition by the Korean government to such a demand resulted in both countries agreeing to reduce the quota by half. In other words, the two governments announced the commencement of the FTA negotiations as soon as the Korean government accepted a reduction of the screen quota.⁴⁰ In effect, the 'screen quota' was the key to commencing the negotiations for the Korea-U.S. FTA.

There are probably two reasons for the great interest of the U.S. in the screen (movie) industry of Korea, a country with a population of only fifty million. First, the movie industry is a symbol of the copyright industry, or so-called culture industry, and is a key export for the U.S.⁴¹ Second, the Korean culture industry is exercising increased influence, while the U.S. movie dominance is decreasing in East and Southeast Asia, where one-third of the world's population lives, backed by the *Hallyu* syndrome. From the

vigorous street protests and demonstrations in the early months of 2008. See Jun Kwanwoo, *South Korea, US to Hold More Negotiations in Beef Row*, AGENCE FRANCE PRESSE ENGLISH WIRE, June 12, 2008.

³⁸ South Korea, though relatively small in its size, ranks immediately after the United Kingdom, as the seventh largest trading partner for the U.S. U.S. CENSUS BUREAU, TOP TRADING PARTNERS – TOTAL TRADE, EXPORTS, IMPORTS, <http://www.census.gov/foreign-trade/statistics/highlights/toppartners.html> (last visited Apr. 19, 2010). If approved, the KORUS FTA would be the United States' most commercially significant free trade agreement in more than 16 years. See <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta> (last visited May 4, 2010).

³⁹ Screen quotas is a legislated system to enforce a minimum number of screening days of domestic films in the theater each year to prevent foreign markets from making inroads into the domestic film market. The film market in South Korea has increased rapidly for the last 20 years under the screen quota system. South Korea has accepted the U.S. offer to reduce the screen quota from 146 days to 73 days in 2006. Yang Sung-jin, *Korea: Filmmakers Begin Sit-in Against Screen Quota Act*, ASIA MEDIA ARCHIVES, UCLA ASIA INSTITUTE, (Feb. 2, 2006) <http://www.asiamedia.ucla.edu/article-eastasia.asp?parentid=38316> (last visited June 1, 2010).

⁴⁰ See Sung-Jin Kim, *Korea Seeks Screen Quota Reduction*, KOREA TIMES, January 21, 2006.

⁴¹ According to the statistics, the estimated value added for the total copyright industries rose to \$1,388.13 billion or 11.22% of U.S. GDP (\$12,487.10) in 2005. STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2006 REPORT, 2 (INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE) (2006).

U.S. government's standpoint, with countries such as Japan, China, and Taiwan competitively seeking trade in the U.S. market, announcing that the U.S. will engage in negotiations for an FTA with Korea before other countries could be seen as a form of U.S. favoritism. This is because once the Korea-U.S. FTA goes into effect, it is expected that Korea's exports to the U.S. will measurably increase and become a minimum template for future FTA discussions. The U.S. was able to grant such favors because it had a *quid pro quo* agreement in mind, and the aforementioned four pre-requisites to the FTA negotiations embedded conditions that would benefit the U.S. industry the most. Among such conditions, the one over which the two countries engaged in fierce negotiations until the very end was the screen quota reduction, and this exemplifies the importance of the culture industry to both countries.

The Right of Publicity is an essential legal right in protecting the entertainment industry. From this standpoint, the movie-related controversies regarding the U.S.-Korea FTA demonstrate why the study of Korean entertainment law, especially publicity rights in Korea, is relevant in the U.S. and elsewhere to anyone with an interest in the entertainment markets of Korea and East Asia, where Korea has growing influence.

3. *Distinct Legal Systems*

Though Korea is traditionally a civil law country, the significance of case law has been emphasized to a considerable extent, especially in the area of copyright law. Copyright law has undergone various changes at the international level, and the decisions of the U.S. courts greatly affect the Korean legal system. From this perspective, it is hoped that an examination of the Right of Publicity through comparative law analysis can inform the readers of both nations and offer new constructive possibilities. In fact, a comparative law approach between countries with different legal systems carries more significance than a comparison between countries with similar legal systems. From this standpoint, studies comparing the U.S. legal system with countries that have different legal systems and languages such as Japan, China and Korea could be more meaningful than comparisons between the U.S. and Canada, the U.S. and E.U. countries, or even the U.S. and Latin American countries. It is because the distance between the legal system of the U.S. and those of Japan, China and Korea is bigger than the distance between that of the U.S. and those of Canada, E.U. countries and Latin American countries. With regard to the Right of Publicity, though comparative studies of Japan have been published, none have explored the cases of China and

Korea by utilizing a comparative law approach. Thus it is expected that this paper, which compares the Right of Publicity in Korea and the U.S., will open new areas for study to connect legal rights to current cultural and commercial transactions.

III. THE RIGHT OF PUBLICITY IN THE GLOBAL MARKET

A. *The Need for a New Theory*

Disputes are inevitable among parties interested in Rights of Publicity, namely celebrities, the public, and the entertainment industry, with the names and likenesses of celebrities becoming increasingly more valuable and attracting a great deal of public interest. Since the opening of the twentieth century, several litigation disputes have been brought in American courts over the commercial use of celebrity identities. Some courts⁴² have recognized the right to exercise exclusive control over celebrities' names and likenesses as the "Right of Publicity." The first case to define the term "Right of Publicity" was *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*⁴³

In the half century since it was first recognized by a court, the Right of Publicity has developed immensely, so that there are discussions now about recognizing the right not only for celebrities but also for non-celebrities, as well as animals,⁴⁴ non-natural persons (corporations, groups and institutions),⁴⁵ and even for professional sports leagues.⁴⁶ Further, most commentators agree that the Right of Publicity is transferable to heirs, although the positions in the laws of individual states vary on this issue. In any event, the Right of Publicity is understood as a concept that continues to expand,⁴⁷ with some states going as far as arguing that the right should be recognized even for nicknames,⁴⁸ caller IDs,⁴⁹ stage names and pen names,⁵⁰

⁴² Throughout this article, the term "court" will mean the courts of the United States unless the context suggests otherwise.

⁴³ *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

⁴⁴ See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 4:35 (2006).

⁴⁵ *Id.* at § 4:38.

⁴⁶ Edwards, in her article, raises the issue of whether professional sports leagues, such as the NBA, also have their own Right of Publicity. See Pamela Edwards, *What's the Score?: Does the Right of Publicity Protect Professional Sports Leagues?*, 62 ALB. L. REV. 579, 584-86 (1998).

⁴⁷ According to Barnett, the Right of Publicity has been notably expanding in the subject matter of its coverage, from being initially limited to the use of the celebrity's "name and likeness," to "indicia" of the celebrity's "identity." See Stephen R. Barnett, *The Right of Publicity Versus Free Speech in Advertising: Some Counterpoints to Professor McCarthy*, 18 HASTINGS COMM. & ENT. L.J. 593, 595 (1996).

⁴⁸ See Harriet F. Pilpel, *The Right of Publicity*, 27 BULL. COPYRIGHT SOC'Y 249, 258 (1980).

⁴⁹ Seeof argues that sale of people's name and telephone number through caller identification (Caller ID) violates their Right of Publicity because they have a property interest in their name and numbers.

computer-animated celebrities,⁵¹ personae in roles or characterizations,⁵² voices and sounds,⁵³ and personae identified by objects associated with persons.⁵⁴

With active arguments among scholars and a positive trend in courts, Thomas McCarthy, one of the most enthusiastic supporters of the new right, argues that it is meaningless now to say whether the Right of Publicity should be recognized.⁵⁵ However, Michael Madow, who is representative among scholars who are very critical of the mainstream Right of Publicity scholars such as McCarthy, warns against the excessive speed at which the right is developing and argues that discussions on the substance of the right should be reconsidered.⁵⁶ With this scholarly objection by Madow, expansion of the Right of Publicity, which had not previously faced many obstacles, appears to be somewhat on hold. Nevertheless, it is still the majority view that the Right of Publicity should be afforded strong protection as a property right to use the persona of an individual separately from the personality itself, and the underlying rationale of this view is that this right is an important part of American culture and tradition.⁵⁷

Meanwhile, the persona of celebrities, including names and likenesses, are a form of commodity or service in the sense that they can be an independent object of transactions such as with assignments or licenses. With the arrival of new media, such as the satellite broadcasting system, and the rapid development and distribution of the Internet,⁵⁸ the industry for

Benjamin R. Seecof, *Caller Identification: Stealing Your Name and Number*, 13 HASTINGS COMM. & ENT. L.J. 791, 809 (1991).

⁵⁰ MCCARTHY, *supra* note 44, §§ 4:54-4:56.

⁵¹ Kunath maintains that a computer-animated celebrity should also have the Right of Publicity. See Pamela Lynn Kunath, *Lights, Camera, Animate! The Right of Publicity's Effect on Computer-Animated Celebrities*, 29 LOY. L.A. L. REV. 863, 902-06 (1996).

⁵² MCCARTHY, *supra* note 44, §§ 4:67-4:71.

⁵³ *Id.* §§ 4:72-4:80.

⁵⁴ *Id.* §§ 4:82-4:85.

⁵⁵ *Id.* § 1:34.

⁵⁶ See Madow, *supra* note 27, at 134.

⁵⁷ Kwall, a mainstream scholar who is critical of Madow, candidly admits that the reason why the Right of Publicity should be protected is because it is an important part of American history and culture: "It has been shown that the Right of Publicity is entirely consistent with our history and the very essence of our cultural fabric. The Right of Publicity reflects values that, as a culture, we embrace. From a doctrinal as well as a sociological perspective, the Right of Publicity is justifiably treated as a property right in our society." Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 57 (1997). It seems to me, however, that it would have been more accurate for Kwall to say that the reason is to protect the American industry. The term "sociological perspective" that Kwall uses here as the counterpart of the "doctrinal" concept is essentially the same as the "policy-based approach" that I have stressed throughout this article.

⁵⁸ Regarding the appropriation of a celebrity's name and likeness on the Internet, see generally RICHARD RAYSMAN ET AL., *EMERGING TECHNOLOGIES & THE LAW: FORMS & ANALYSIS* § 9.05[5] (2008).

commercial use of a celebrity's image (i.e., the entertainment industry) is being formed at a quick pace with the world as a single market, rather than being limited to specific countries or regions. Transactions involving the Right of Publicity are frequently conducted on a transnational basis, partially due to the nature of the commodity (service) as an intangible property; and because of changes in the market, many international disputes arise.⁵⁹ The frequency of such disputes is expected to increase in the future.

Since property rights are very much intertwined with the culture and mores of each country or region, there is inevitably a strong resistance where a right that is largely influenced by the cultures and mores of one country is protected to the same degree in another country with different cultures and mores. Such resistance and friction become even stronger where the right to be protected is closely related to industries in which projecting countries occupy a clearly superior and more competitive market than in other countries, subject to the projection of new rights.

The entertainment industry has already secured its place as a major industry of the United States, and the entertainment industry of the United States consumes half of the world market.⁶⁰ Meanwhile, most of the celebrities that create the publicity values that are the cause of such frictions and conflicts are either American or celebrities managed by the American entertainment industry, and therefore, in this paradigm, the United States is the supplier and other countries are consumers for most current transactions involving the Right of Publicity. This market structure has created a gap between the United States and the other countries that is difficult to close. From this perspective, it is submitted that a reconsideration of the nature and scope of the Right of Publicity, a discussion that has been led by the United States, would be very meaningful and timely for the purposes of attempting to mediate and resolve such friction and clarify points of legal confusion.⁶¹

It may help to distinguish between a doctrinal approach and a policy-based approach of the legal methodology in defining the substance of a right, like the Right to Publicity, and discussing the scope of the right. The latter approach may not have as much significance in the national market as in the worldwide market, because any difference in views within the given

⁵⁹ A good example is the *James Dean I* case from Korea mentioned above.

⁶⁰ For a discussion on the United States entertainment industry and its weight and role in the world market, see discussion *infra* Part III. B.

⁶¹ I do agree with Madow in his conclusion warning against the rapid development of the Right of Publicity and suggesting that the fundamental issues be reconsidered, but I do not think that Madow made this argument from a global market perspective, as this article does.

nation⁶² may be integrated or unified to meet the objectives that are considered important on a national level. In the case of a property right, which is heavily influenced by culture and tradition, it would be unreasonable to impose a rationale stemming from the policies of one country upon another country that does not share the same culture and tradition, i.e., such attempt would meet the cultural resistance of the other country. The problem arises when such a rationale is disguised as being based on the very nature of the right, i.e., having a doctrinal basis, when in fact it is based on the policy considerations of the imposing country, so as to evade such resistance. This problem may not be very serious when the Right of Publicity is an issue only in the United States, but it should be considered significant when it comes to the Right of Publicity in the global market.

B. The Right of Publicity in the Global Market: The Entertainment Industry Led by the United States

The global entertainment and media industry has grown continuously for the last few decades.⁶³ In the case of the United States, the decline in the manufacturing industry has been counterbalanced by growth in the entertainment industry. It is not an exaggeration to say that the entertainment industry is one of the few industries of the United States that has recorded a net trade profit.

Moreover, the United States has been leading the world market very successfully in this area. Trade data shows that from 1987 to 1998, total sales of film entertainment to foreign buyers increased from 13 billion to 17 billion dollars.⁶⁴ Furthermore, in 1999, the MPAA (Motion Picture Association of America) determined that foreign sales of rights to U.S. films accounted for just over 42% of total revenues of all U.S. film companies.⁶⁵ Thus, the international market is gaining more and more importance for the United States' entertainment industry.⁶⁶ The structure and trends in both the global

⁶² For instance, Madow and Kwall hold conflicting views on the effect of the Right of Publicity on American society. Madow argues that the right severely limits the freedom of expression and is therefore harmful to society. On the contrary, the opponents of Madow, including Kwall, take the position that there is no harm done to society by recognizing the Right of Publicity and argue that the right should be given protection, as it has given the American society greater wealth and benefits. See Madow, *supra* note 27, at 194-96; Kwall, *supra* note 57, at 3, 57.

⁶³ See SAUL J. BERMAN, *IBM BUSINESS CONSULTING SERVICES, VYING FOR ATTENTION THE FUTURE OF COMPETING IN ENTERTAINMENT AND MEDIA: OUR INDUSTRY PERSPECTIVE 2001-2005* (2001).

⁶⁴ BARRY LEONARD, *MIGRATION OF US FILM AND TELEVISION PRODUCTION: THE IMPACT OF RUNAWAYS ON WORKERS AND SMALL BUSINESS IN THE US FILM INDUSTRY* 24 (2001).

⁶⁵ *Id.*

⁶⁶ *Id.*

and United States entertainment markets show that United States' monopoly is becoming increasingly more prevalent in terms of the Right of Publicity, which is a major element of revenue.

As properly pointed out by Dougherty, the United States is perhaps the only net exporting country with respect to value created by celebrities.⁶⁷ Of course, within specific regions such as East Asia and Europe, the countries are differentiated into net exporters and net importers. However, at least as far as the publicity value of celebrities is concerned, where the United States is a party to the transaction, the other country is almost invariably the importer and the United States is the exporter. This has always been and continues to be the reality of the market.⁶⁸ This phenomenon is not solely attributable to the fact that celebrities with higher product values are commonly American. For example, CMG Worldwide and the Roger Richman Agency, competing publicity agents based in the United States, respectively protect the lucrative postmortem Rights of Publicity for Princess Diana (who is British) and Albert Einstein (who is German by birth, but acquired Swiss and later U.S. citizenship).⁶⁹ Furthermore, companies that manage foreign players in Major League Baseball and the National Basketball Association are also most commonly United States companies. These companies do not create publicity value, but only purchase or license it and are thus part of the entertainment industry in the broad sense. Because companies in other countries that can compete with United States entities are not likely to surface in the short run, the monopolistic position of the United States in the publicity market is likely to be maintained at least for the short term.

Taking into account various circumstances, including the market strength of the entertainment industry within the United States, the continued profitability of that industry in the world market, and the large-scale mergers and acquisitions within the United States entertainment industry, it seems that

⁶⁷ The United States is probably a "net exporter" of celebrity. See Dougherty, *supra* note 19, at 425, n.27.

⁶⁸ Korea may be described as the exporter, while Japan and Southeast Asian countries can be described as importers, as far as products relating to the *hallyu syndrome* is concerned. However, in terms of the relationship between Korea and the United States, the total amount of movie exports by Korea to the United States is less than US \$10 million per year. Considering that the Hollywood movies, on the other hand, control about 50% of the Korean film market, there is clearly a serious trade imbalance between the two countries as far as the entertainment industry, especially publicity value of celebrities, is concerned. See Asian Economy website, <http://www.asiae.co.kr/news/view.htm?idxno=2010010310375147713> (last visited May 22, 2010); see also Korean Film Council website, http://www.kofic.or.kr/mail_form/kofic/2010_kor/278/278.html (last visited May 22, 2010).

⁶⁹ Mark Lewis, *Earnings From The Crypt: Agents Of The Dead*, FORBES, http://www.forbes.com/2002/08/12/0812cmg_print.html (last visited Mar. 7, 2010).

the United States' monopoly in the world market for the publicity values of celebrities will continue for many years to come.

This reality of the publicity market is likely to encourage the United States to make distortions in devising its policies for solidification of the Right of Publicity—as if such solidification of the right is based on doctrinal justifications and the very nature of the right (i.e., that it is a property right), when in fact such policies are based only on the interests of the United States.

IV. APPLICABILITY OF SOME ISSUES ON THE RIGHT OF PUBLICITY IN KOREA

A. *Case Research*

1. *The Beginnings of the Right of Publicity*

The *Benjamin Lee* case⁷⁰ is the first case in Korea in which the Right of Publicity was mentioned in the decision, although the remedy was not awarded on the basis of this right.⁷¹ The wife and daughter of the late *Benjamin Lee*⁷² brought a lawsuit against the author of a novel about *Benjamin Lee*.⁷³ The cause of action was infringement of *Lee*'s right of privacy and Right of Publicity.

This is a landmark case because it was the first case in which the court defined the Right of Publicity in Korea, stating that the Right of Publicity is a right to the commercial appropriation of a celebrity's name and likeness for economic value. The significance of the *Benjamin Lee* case is that it triggered a debate among Korean scholars on the Right of Publicity.⁷⁴ In that sense, this

⁷⁰ Marianne Sim Lee et al. v. Jin-Myung Kim, (94Kahab9230) (Seoul Dist. Ct., June 23, 1995) [hereinafter *Benjamin Lee* case], KOREA COPYRIGHT CASEBOOK [3], 200-215.

⁷¹ The case number for the action on MERITS of the *Benjamin Lee* case is (94Gahab97216) (Seoul Dist. Ct., July 31, 1998), KOREA COPYRIGHT CASEBOOK [3], 260-268.

⁷² *Benjamin Lee* is well known among Koreans as a scientist who was very close to receiving a Nobel Prize.

⁷³ This is a best-selling novel entitled, *The Rose of Sharon has Blossomed*, with the following storyline: the former President Park secretly invited Lee to Korea in order to develop nuclear weapons, in preparation for the withdrawal of the United States Army from Korea. Lee was willing to assist in the development of nuclear weapon, and return to Korea, giving up on the opportunity to receive the Nobel Prize out of patriotism. However, Lee was assassinated under the guise of a car accident by the CIA, which did not want Korea to retain nuclear weapons.

⁷⁴ For example Jae-Hyung Kim of Seoul National University School of Law published an article *Model Novel and the Right of Personality*, which is a commentary on this case. I have also published an article "*The Right of Publicity from a Global Perspective: Publicity Rights Regime as Effective Guardian of Property Rights Associated with Hallyu Syndrome*", in which I have debated with Prof. Kim. See Jae-Hyung Kim, *Model Novel and the Right of Personality*, 255 HUMAN RTS. & JUST. 44 (1997); Hyung Doo Nam, *The Right of Publicity from a Global Perspective: Publicity Rights Regime as Effective Guardian of Property Rights Associated with Hallyu Syndrome*, 86 THE JUSTICE 87 (2005).

case is the Korean equivalent of the *Roberson* case.⁷⁵ Although the New York State court did not recognize the Right of Publicity in the *Roberson* case, the New York State legislature recognized the Right of Publicity as a statutory right following the decision in that case.⁷⁶ Likewise, although the Korean court did not award a remedy on the basis of the Right of Publicity in the *Benjamin Lee* case itself, this case did have a great effect on subsequent cases and proposed legislation.

2. *The Developmental Stage of the Right of Publicity*

The plaintiff⁷⁷ brought a lawsuit on behalf of the *James Dean* Foundation, which was established for the purpose of managing *James Dean's* commercial identity.⁷⁸ The defendant, "*Good People Inc.*,"⁷⁹ manufactured underwear products in Korea. The basis of the claim was that the defendants had used the name and likeness of *James Dean* as a trademark and logo to promote defendants' products without authorization.⁸⁰ Since the foundation had not registered the name as a trademark for clothing items with the Korea Industrial Property Office, the cause of action was not trademark infringement but infringement of the Right of Publicity.⁸¹ The Seoul Western

⁷⁵ *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902). The plaintiff Abigail Roberson was a young woman who alleged that defendant flour mill used a photograph of her in advertisements for its flour. The advertisements included the double-entendre slogan "Flour of the Family," along with "Franklin Mills Flour," and the address of the company. The complaint alleged that 25,000 of these posters were displayed in "stores, warehouses, saloons and other public places." Roberson alleged that as a result, she was "greatly humiliated by the scoffs and jeers of persons who have recognized her face." Plaintiff asked for an injunction and recovery of \$15,000 on grounds of nervous shock and physical illness which confined her to bed under a physician's care. *Id.* at 542-43. This case was dismissed in the court, which led the New York Legislature to enact a statute in 1903 to make it both a misdemeanor and a tort to use the name, portrait, or picture of any person for advertising purposes or for the purposes of trade without written consent. N.Y. Civil Rights, § 50; Oliver R. Goodenough, *Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity*, 47 S.C. L. REV. 709, 721-29 (1996).

⁷⁶ MCCARTHY, *supra* note 44, § 1:16.

⁷⁷ Winton Dean, father of *James Dean*, was the sole heir of *James Dean* under Indiana State law. Winton Dean assigned the right to use the name and likeness of *James Dean* to the *James Dean* Foundation. The plaintiff, a cousin of *James Dean*, is a trustee of the Foundation. As Elvis Presley contributed significantly to the development of the Right of Publicity in the United States, *James Dean* served that role in Korea through the multiple number and types of cases heard before various courts.

⁷⁸ *James Dean I*, *supra* note 4. This is the first decision that expressly recognized the Right of Publicity in Korea. I, as an attorney at law, have represented the defendant in this case as well as in the *Benjamin Lee* case above.

⁷⁹ This company was established and managed by the defendant, Byung-Jin Joo, who was one of the most famous comedians in Korea in the 1980s and 1990s.

⁸⁰ See *James Dean I*, *supra* note 4.

⁸¹ The plaintiff's allegations were as follows: (i) the Right of Publicity is a typical property right independent of personality; (ii) since the Right of Publicity is a kind of property right, it is assignable and descendible; and (iii) the Right of Publicity should be protected for at least 50 years after death, analogous to the protection of copyrights under the Copyright Act. *Id.*

Branch Court confirmed that the Right of Publicity should be recognized even in Korea, but that the postmortem Right of Publicity could not yet be recognized in Korea.⁸²

This was the first case in Korea in which the Right of Publicity was discussed in earnest and is significant in two respects: first, it recognized the existence of the Right of Publicity and based the rationale for the right on customary law.⁸³ As will be discussed in Section 6, this invited criticism of the creation of an exclusive property right based on customary law in a civil law jurisdiction where statutes are the supreme source of law. Second, the decision recognized the Right of Publicity but not the descendibility thereof on the grounds that this right cannot be independent from the right of personality.⁸⁴ Thus, the court still regards the Right of Publicity as a hybrid between a property right and a personality right. Another *James Dean* case⁸⁵ (hereinafter “*James Dean II*”) was brought to the court, which was the same as the first *James Dean* case in all respects other than that the defendant was a department store that sold products bearing the “*James Dean*” trademark.⁸⁶ As in the *James Dean I* case, the court recognized the Right of Publicity as a property right but denied descendibility of the right.⁸⁷ This case is also significant in two respects. First, by stating that “it is difficult to recognize descendibility in this case . . . [u]nlike the case in which the celebrity is actually exercising the Right of Publicity or where the right had been particularized by use during the celebrity’s lifetime,” the court in dicta appears to raise the lifetime exploitation requirement for descendibility.⁸⁸ Second, the court ruled that the provisions on the survival period of copyrights under the Copyright Act cannot apply to the Right of Publicity by analogy.⁸⁹ The plaintiff’s argument was that it has been forty-two years since James Dean’s death, and thus the right should be protected by analogy to the Copyright Act, which provides for a fifty-year protection period; but the court stated, “even assuming that descendibility is recognized, the Right of Publicity is different from copyright in terms of the requirements for vesting

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Marcus D. Winslow Jr. v. Hanwha Inc. et al.*, (97Gahab5560) (Seoul Dist. Ct., Nov. 21, 1997) [hereinafter *James Dean II*], KOREA COPYRIGHT CASEBOOK [5], 48-56.

⁸⁶ *Id.* at 52.

⁸⁷ *Id.* at 55-56.

⁸⁸ *Id.* at 55.

⁸⁹ *Id.*

of the right, objectives of protection, effect, etc., and therefore such analogy is not appropriate.”⁹⁰

In cases following the *James Dean* cases, the Korean court continually recognized the right for a person to have the exclusive right to control the use of his or her persona for commercial purposes—in other words, the Right of Publicity. Among those new claims is the *Chan-Ho Park* case,⁹¹ where the Korean applicant, *Chan-Ho Park*, then successfully playing for the LA Dodgers and one of the high-scoring players in Major League Baseball, filed an injunction against the respondent, a former journalist, who authored a 320-page book entitled *The Major League and the Conquer Chan-Ho Park*.⁹² In addition, a 53 cm (width) by 78 cm (height) sized poster was provided as a supplement to the book.⁹³ Images of *Chan-Ho Park* pitching and running were on the front and back, respectively.⁹⁴ The book contained contents that seem to be quoting from an interview with *Chan-Ho Park* that even used quotation marks.⁹⁵ It also discussed *Chan-Ho Park*'s private life using false facts.⁹⁶ The court ruled that the book could be categorized as a critical biography, and since the applicant's image or name was not used exceedingly or inappropriately to an extent that goes beyond a level that a public figure must endure and the use itself was not for commercial purpose separately, the author did not infringe upon *Park*'s rights.⁹⁷ However, the poster provided as a supplement to the book was not an indispensable part of the book, and since it was a separate part, there was the possibility that the poster was used for commercial purposes.⁹⁸ Therefore, the court accepted that if it were to be used for such commercial purposes, the producing and distributing of the poster would then infringe on the applicant's Right of Publicity or rights of images.

3. *The Recognition of Assignability and Descendibility*

Generally speaking, if the Right of Publicity is a property right, the assignability and descendibility of the right can be recognized. Prior to

⁹⁰ *Id.*

⁹¹ *Chan-Ho Park v. Jin-Gook Kim et al.*, (98La35) (Seoul High Ct., Sept. 29, 1998) [hereinafter *Chan-Ho Park* case], KOREA COPYRIGHT CASEBOOK [5], 344-352.

⁹² CHANG-WOONG KIM, *THE MAJOR LEAGUE AND THE CONQUER CHAN-HO PARK* (Mudang Media 1997).

⁹³ *Chan-Ho Park* case, *supra* note 91.

⁹⁴ *Id.* at 347.

⁹⁵ *Id.* at 348.

⁹⁶ *Id.* at 350.

⁹⁷ *Id.* at 349.

⁹⁸ *Id.* at 350.

further examination of the topic, the standing of a plaintiff becomes a central issue for discussion. In other words, if the plaintiff, who was assigned the Right of Publicity from the owner of such a right, brings an infringement action seeking to enjoin further infringement or to recover damages, the question of the eligibility or standing of the plaintiff must be considered.

The defendant in the *Vidal Sassoon* case,⁹⁹ was a beauty academy (Beautiful People Co.) that placed a sign that read “*Vidal Sassoon*” on the outer wall of the academy building and large pictures containing the portrait and signature of *Vidal Sassoon* in the interior of the building. The plaintiff, the publicity agent of the world-famous hairdresser *Vidal Sassoon*, brought the action alleging infringement of *Sassoon*’s Right of Publicity and seeking an injunction against the allegedly infringing acts.¹⁰⁰ The court ruled in favor of the plaintiff.¹⁰¹

Thus, in this decision, the court recognized the Right of Publicity as a clearly assignable property right separate from the right of personality.¹⁰² Along these lines, a decision that addressed the issue of assignability quite extensively came from a case related to a Korean golfer who was playing in the LPGA.¹⁰³ The plaintiff brought an action against the defendant who used a picture and autograph of the plaintiff in a catalog for golf-putting machines and argued that the defendant infringed on the plaintiff’s right of portrait.¹⁰⁴ In this case, the court strictly differentiated between the right of portrait as a personality right and the right of portrait as a property right. It stated that only emotional damage can be awarded with respect to the former, while the latter may be assigned, and upon assignment, only the assignee has a right of claim for property damage, thus providing a clear and succinct distinction between the right of portrait as a personality right and the Right of Publicity.¹⁰⁵ This decision not only recognized the assignability of the Right of Publicity but also ruled that the assignor does not have the right after the assignment, thereby confirming the nature of the Right of Publicity as an exclusive property right.¹⁰⁶

⁹⁹ *Vidal Sassoon* case, *supra* note 11.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² For cases that addressed the existence and assignability of the Right of Publicity, see *Chan-Ho Park* case, *supra* note 91; *Mi-Yon Lee et al. v. Music Deign Co.*, (2001Gahab31184) (Seoul District Ct., Dec. 21, 2001); *Young-Im Kim v. Eui-Byung Park*, (99Gahab83250) (Seoul Dist. Ct., Sept. 29, 2000).

¹⁰³ *Jeong Jang v. Sportec Korea, Inc.*, (2001Gahab5032) (Sungnam Branch Ct., Aug. 30, 2002) [hereinafter *Jeong Jang* case].

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

In the Right of Publicity cases descendibility is as important as recognition of the right. Furthermore, the duration of the right is also important under the assumption of descendibility. Since these aspects are not reflected in Korean statutory legislation, these have been established through case law, but in Korea's civil law tradition this right is certainly unaccustomed, meaning that a judge must determine whether to accept the legal theory that such a right exists and then establish the scope of the right. In the *James Dean I* and *II* cases the plaintiff argued for a duration of postmortem rights to extend fifty years after death inferred from the copyright law, but the court denied such postmortem rights because general personality rights are not descendible.¹⁰⁷

Ten years later, in the *Hyo-Seok Lee* case, the court took a different approach to the postmortem rights of publicity and viewed the right as similar to copyrights and thereby accepted the descendibility and decided the postmortem duration to be 50 years after death.¹⁰⁸ Hyo-Seok Lee is a famous Korean author, mostly known for his novel, *When the Buckwheat Flower Blossoms*.¹⁰⁹ In *Hyo-Seok Lee*'s case, a descendant of Hyo-Seok Lee brought an action against the issuers of gift certificates for infringement of publicity rights and sought compensation for damages and injunctive relief as well.¹¹⁰ This particular gift certificate, "star gift certificates" that was issued by the defendant company, displayed Hyo-Seok Lee's image, his signature and the title of the novel, *When the Buckwheat Flower Blossoms*.¹¹¹ This case was the first case in which the Korean court recognized the descendibility of publicity rights with a postmortem duration being 50 years after death analogous to the protection of copyrights under the Korean Copyright Act.¹¹² In this particular case, however, the plaintiff's damages request was denied due to the fact that Hyo-Seok Lee had died more than fifty years ago, beyond the legal duration recognized.¹¹³

¹⁰⁷ *James Dean I*, *supra* note 4; *James Dean II*, *supra* note 85.

¹⁰⁸ *Hyo-Seok Lee* case, *supra* note 9. In this case, plaintiff is the descendant, the daughter of Hyo-Seok Lee, who was one of the famous novelists in Korea.

¹⁰⁹ This is a very well known novel among Koreans written in the 1930s.

¹¹⁰ *Hyo-Seok Lee* case, *supra* note 9.

¹¹¹ *Id.*

¹¹² Copyright Act of Korea, art. 39, sec. 1 (2006) (S. Kor.).

¹¹³ Hyo-Seok Lee, the father of the plaintiff, died in 1942.

4. *Expansion of the Protected Subjects*

The *Young-Ae Lee* case,¹¹⁴ involved defendant's use of the portrait of the plaintiff, a top television actress in Korea, for advertising purposes beyond the term of the advertising model contract.¹¹⁵ The court upheld the plaintiff's claim for damages based on an infringement of her Right of Publicity.

As to the claim for emotional damage arising out of the infringement of the Right of Publicity, however, the court held that unlike non-celebrities, celebrities are protected by the Right of Publicity, which is a property right,¹¹⁶ and therefore cannot be deemed to also incur emotional damages arising out of the infringement of their right of portrait, absent special circumstances.¹¹⁷ Thus, the court clearly set out the principle that in the case of an unauthorized use of portrait, celebrities are protected by the Right of Publicity, while non-celebrities are protected by the right of personality. This decision makes it clear that the Right of Publicity is a property right and is a right that is conferred only on celebrities and not on ordinary persons.

Meanwhile, there is an exceptional case in which the court held that the Right of Publicity can be recognized not only in a celebrity but also in a non-celebrity.¹¹⁸ In that case, the court recognized the Right of Publicity in a housewife-advertising model, who certainly cannot be considered well known, and also recognized assignability of the right.¹¹⁹ Although the claim was dismissed due to the plaintiff's failure to prove the amount of damage, this is the first and only precedent in Korea that recognized the Right of Publicity in a non-celebrity.¹²⁰

5. *Expansion of the Elements of Persona*

The elements of persona have expanded to include not only portraits and names, but trendy-words and likenesses as well. This is particularly interesting since the development of the Right of Publicity in Korea seems to be following in the United States' footsteps. For instance, phrases that are

¹¹⁴ *Young-Ae Lee v. Dodo Cosmetic Inc.*, (2004Gahab16025) (Seoul Dist. Ct., Dec. 10, 2004) [hereinafter *Young-Ae Lee* case], KOREA COPYRIGHT CASEBOOK [10], 134-142.

¹¹⁵ *Id.* at 136-37.

¹¹⁶ *Id.* at 139.

¹¹⁷ It is an established principle under Korean jurisprudence that if damages are awarded based on the infringement of a property right, any emotional damage also arising out of such infringement is deemed to have also been compensated thereby, absent special circumstances. See 96Da38971, (Gong 1998.8.15.(64), 2054) (Supreme Ct., July 10, 1998).

¹¹⁸ *Goryo Insam* case, *supra* note 14.

¹¹⁹ *Id.*

¹²⁰ *Id.*

associated with a comedian were accepted as elements of the comedian's persona,¹²¹ which is similar to the holding in the *Johnny Carson* case.¹²² Additionally, cases recognizing the Right of Publicity in the wax-figure exhibitions of celebrities¹²³ and the caricature on cellular phone backgrounds¹²⁴ exhibit similarities to *White* in the United States.¹²⁵ The *White* case was widely discussed even in the States in relation to freedom of expression. This raises concerns, especially now, when the expansion of the scope of the publicity rights is occurring disproportionately in Korea.

Such concerns are involved in the *KBO Players* case. The 123 baseball players representing eight baseball teams that were members of the Korean Baseball Organization ("KBO") sought injunctive relief and monetary damages against the company that used the names and statistics of players in a fee-paid simulation game.¹²⁶ The court held that the baseball players' Right of Publicity had been violated.¹²⁷

The case ruling is similar to *Uhlaender v. Henrickesen*,¹²⁸ which was decided during a period when U.S. courts were favoring the strengthening of the protection of the persona of athletes. In this case, the game company used the names of Major League players on cards for baseball games.¹²⁹ Though the defendants argued that the names and scores of the athletes were already widely disseminated and belonged to the public domain, which offered no protection for athletes, the federal court held that although the dissemination

¹²¹ The phrase word known by many in relation to *Jun-Ha Jeong*, a popular comedian, was used as screen backgrounds on cellular phones. This usage was viewed as infringement of his publicity rights. See *Jun-Ha Jeong* case, *supra* note 15. Also, in the *Utchassa* case, the company that changed and used the popular phrase words in the comedy show, *Utchassa*, was found to have infringed the Right of Publicity as well. See *Utchassa* case, *supra* note 15.

¹²² *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir.1983) (recognizing opening phrase, "Here's Johnny," from the Johnny Carson Show as within the scope of publicity right).

¹²³ *Yong-Jun Bae, et al. v. Miracle Sports and Entertainment Inc.*, (2006La229) (Seoul High Ct., June 14, 2006). The plaintiffs, stars of *Hallyu*, were granted their injunction request where the defendant in this case made wax figures of the plaintiffs without their prior approval, exhibited such figures and earned admission fees based on the exhibition.

¹²⁴ *Jun-Ha Jeong* case, *supra* note 15. A caricature of the face of Jun-Ha Jeong, a well-known comedian, was installed as the background on cellphones, and the court ruled that telecommunication companies infringed on his Right of Publicity.

¹²⁵ See *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992).

¹²⁶ *Chong-Beom Lee, etc v. The Sports and Culture Inc., et al.* (2005Gahab80450) (Seoul Central Ct., Apr.19, 2006) [hereinafter *KBO Players* case]. Defendant, an online game company made a fantasy game, "Korean Professional Baseball 2005," without plaintiffs' permission and provided a fee-paid game service through a mobile telephone company. This is a simulation game wherein if a mobile phone user chooses one of eight teams, the names and scores of the players of the chosen team are provided on the screen background of the user's cellular phone.

¹²⁷ *Id.*

¹²⁸ *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970).

¹²⁹ *Id.* at 1278.

of scores and names could be understood as waiving such right in regard to privacy right infringement lawsuits by athletes, such a right does not apply in the context of publicity right infringement lawsuits.¹³⁰ As the ruling and reasoning of this case exemplify, it is identical to the *KBO Players* case.

After the *Uhleander* decision, U.S. courts have favored protection of the freedom of expression through the fantasy sports game cases.¹³¹ Though the history of the Right of Publicity in Korea is relatively short and the sports and entertainment industry size is extremely small compared to that of the U.S., the Right of Publicity in Korea is too protective of the persona of athletes, and whether this is desirable is doubtful. Of course, the *Cardtoons*¹³² and *C.B.C.*¹³³ decisions, both limiting the publicity rights for protection of freedom of expression in the fantasy games, resulted in a favorable ruling for the fantasy sports industry.¹³⁴ Yet as a consequence, these cases could affect Right of Publicity cases in Korea, which are ever expanding.

6. *A Time for Reflection and Solidification*

In recent years, with an increase in the number of Korean judges and lawyers studying in the United States, and easy access to U.S. case law and publications on legal theories through the Internet (particularly through Lexis and Westlaw), there is a tendency for rapid appropriation of American precedents and legal theories into Korean law unlike before. For this reason, the U.S. court precedents and commentaries have been frequently cited in Korean court decisions in recent years. At the same time, some people are

¹³⁰ *Id.* at 1282–83.

¹³¹ See *Cardtoons, L.C. v. Major League Baseball Players Association*, 95 F.3d 959 (10th Cir. 1996). The *Cardtoons* Company, established in 1992, made parody trading cards featuring caricatures of Major League baseball players without prior approval of the Major League Baseball Players' Association (MLBPA). *Id.* at 963. The cards had caricature of the baseball players on the front and humorous comments about their careers on the back. *Id.* The Court of Appeals held that Cartoon's freedom of expression outweighed the publicity rights of MLBPA. *Id.* at 976.

On the other hand, the federal court in the *C.B.C.* case, in which the producers of the fantasy major league baseball games sought declaratory judgment, held that the players' rights of publicity were not violated and the names and statistics of players used were not within the scope of protection. *C.B.C. Distribution and Marketing Inc. v. Major League Baseball Advanced Media and Major League Baseball Players Association*, 443 F.Supp.2d 1077, 1107 (2006). This implies that the names and statistics of players are in the public domain, which anyone has the right to use.

¹³² *Cardtoons*, 95 F.3d at 959; *C.B.C. Distribution and Marketing Inc.*, 443 F. Supp.2d at 1077.

¹³³ See *Cardtoons*, 95 F.3d at 959; *C.B.C. Distribution and Marketing Inc.*, 443 F. Supp.2d at 1077.

¹³⁴ Fantasy sports are estimated to generate \$500 million in revenue per year from more than 19 million participants, according to the Fantasy Sports Trade Association. David G. Savage, *FantasyLeague Plays On; U.S. Justices Refuse To Review Case Over MLB's Attempts To Require Licensing for Statistics*, L.A. TIMES, June 3, 2008, <http://articles.latimes.com/2008/jun/03/sports/sp-fantasy3> (last visited Apr. 15, 2010).

concerned that there may be an inappropriate transplant of American legal theories into Korean law, despite the difference in the two legal systems.

Although the plaintiff differs from the *James Dean I* and *II* cases, the *James Dean III* case, which was quite similar in substance, was brought to the Korean court.¹³⁵ This case involved the same claims as the *James Dean I* and *II* cases, but was brought by a different plaintiff because the previous cases were dismissed on the grounds of a lack of evidence showing that the plaintiff in those cases had been entrusted with the rights of the James Dean Foundation, which controls and manages James Dean's Right of Publicity. Quite unusually, the District Court in this case held that the Right of Publicity is a form of property right that does not belong exclusively to the persons, unlike the personality right, and is therefore descendible.¹³⁶ On appeal,¹³⁷ the Seoul High Court ruled that the Right of Publicity could not be recognized in Korea without a statutory basis,¹³⁸ as in the *Roberson* case in which the New York State court dismissed the plaintiff's claim while indirectly urging codification of the right.¹³⁹ Thus, the *James Dean III* case is significant in its conclusion that the Right of Publicity cannot be recognized in Korea without legislation of a statute for such recognition, thereby offering a solution to this issue through legislation.

In fact, the appellate decision in the *James Dean III* case put a brake on the rapid expansion of the scope of the Right of Publicity. It should also be noted that the Right of Publicity has in the past been seriously considered and disputed in only a handful of cases such as the *James Dean* cases and the *Vidal Sassoon* case, where one party was American. However, with the rapid development in the fields of sports and entertainment in Korea in the past few decades, disputes relating to the Right of Publicity between Korean parties are increasing. This is another reason why there is an urgent need to address the issue of the Right of Publicity by statute rather than customary law or case law.

7. Summary

In light of the development of the Right of Publicity in the United States, it may be said that it took a relatively short period of time for the Right

¹³⁵ *James Dean Inc. v. Good People Inc. et al.*, (99Gahab84901) (Seoul Dist. Ct., July 14, 2000) [hereinafter *James Dean III* case], KOREA COPYRIGHT CASEBOOK [12], 17-27.

¹³⁶ *Id.* at 22.

¹³⁷ *James Dean Inc. v. Good People Inc. et al.*, (2000Na42061) (Seoul High Ct., Apr. 16, 2002) [hereinafter *James Dean III Appealed* case], KOREA COPYRIGHT CASEBOOK [12], 11-17.

¹³⁸ *Id.* at 16-17.

¹³⁹ *But cf.* *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902).

of Publicity to be recognized in Korea, from the time when it was considered an element of the right of privacy.¹⁴⁰ This is perhaps because American celebrities with high commercial value such as famous actors, singers, and sports stars are no longer cultural icons exclusively in the United States, but also in Korea. This recognition is also due to both the expansion of the news media, including the Internet, and the adoption of American jurisprudence by the Korean legal system.

Although the Korean courts have recently been cautious about recognizing the Right of Publicity and its expansion based on customary law without legislation,¹⁴¹ it would be proper to consider a demand for speedy codification of the right, which will likely be developed and expanded in the future. Meanwhile, it appears that the issues of the postmortem Right of Publicity and the recognition of the right in non-celebrities will also continue to be debated in the future, although these issues are also likely to be resolved through legislation.

B. The Doctrinal Approach

1. Review on Custom and Tradition

Since Korea is not a common law jurisdiction, the organ that creates a new right in principle is the legislature, not the judiciary. However, new rights are sometimes created by customary law as an exception. The Korean legislature should discuss the doctrinal approach that the United States courts have taken in creating and developing the Right of Publicity. However, since the Right of Publicity has not yet been codified as a statutory right in Korea, there has not yet been enough discussion in the Korean legislature on this issue.¹⁴² Therefore, if a doctrinal analysis takes place, the reasoning would have to be found in the court decisions that recognize the Right to Publicity based on customary law as an exception.

¹⁴⁰ See Byung-Lin Lee, *The Right to Portrait should be Recognized*, BEOBRYUL-SINMUN, Mar. 1, 1965, at 3 (a Korean legal periodical). This article, in which Lee sets forth arguments in favor of the right of privacy, may be compared to the article by Warren and Brandeis. Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890). The article by Warren and Brandeis is recognized as the first article to discuss the right of privacy in the U.S.

¹⁴¹ See *James Dean III Appealed* case, *supra* note 137.

¹⁴² In an effort to enact legislation regarding the Right of Publicity, the Korean government gathered expert opinions, and a few members of the Assembly also drafted a proposal to amend the copyright law. The proposals, however, were repealed and presently there is no statute that deals with the Right of Publicity. I have participated in numerous public hearings as an expert witness and have given opinions to expedite the creation of legislation on the Right of Publicity.

The representative theories that have been offered so far in Korean courts as a justification for the recognition of the Right of Publicity as a property right are theories such as “consumer attraction value,”¹⁴³ and “prevention of unjust enrichment.”¹⁴⁴ No discussion has taken place regarding “Lockean Labor theory,” the “Economic Incentive theory,” or the “Hegelian Personality theory.” This, however, is not necessarily a reflection of the poverty of legal theories and philosophy in Korea. Since property rights are very closely related to the culture, mores, politics, and economy of each country,¹⁴⁵ it is not necessary to rely on Western philosophy, such as the Lockean and Hegelian theories, to create a new property right in Korea.

On the contrary, there are countervailing factors to the Right of Publicity under Korean philosophy, especially its legal philosophy. According to William P. Alford, common possession and use of knowledge have been considered virtues in East Asian countries, including China and Korea, and a monopoly of knowledge by particular individuals was not considered virtuous for intellectuals (nobility and scholars).¹⁴⁶ This tradition has its roots in the belief that teaching is, strictly speaking, a process by which the teacher enlightens the student of knowledge, rather than endowing the student with knowledge, which is premised on the assumption that anyone can be a saint.¹⁴⁷ As such, a teacher did not accept payment from the student on principle.¹⁴⁸ This is because one who has first been enlightened has a duty to enlighten others, rather than a right to teach the knowledge.¹⁴⁹

This tradition is prevalent in art as well. Unlike in the Western world, the names of artists and architects of famous structures and artistic works of East Asian countries are mostly unknown.¹⁵⁰ These artists thought of their works mostly as a means of transferring what they have learned to the next

¹⁴³ *Vidal Sassoon* case, *supra* note 11.

¹⁴⁴ Dae-Chul Shin et al. v. Intermuz. Inc., (2001Na30680) (Seoul High Ct., Oct. 24, 2001) [hereinafter *Shinawi* case]. “Shinawi” is the name of a hard rock band popular with young Koreans.

¹⁴⁵ See Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 413 (1999).

¹⁴⁶ See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 30–55 (1995). William P. Alford is an American writer who accurately understood and pointed out that the perspective on intellectual property in China, Taiwan, and Korea is entirely different from that of the Western world including the United States.

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*

¹⁵⁰ For most artifacts, sculptures, and paintings designated as national treasures of Korea, such as the Goryeo Dynasty celadon and the Statue of Buddha of the Shilla Dynasty, there are no records of the artists’ name.

generation, rather than their own creation.¹⁵¹ This system of thought about intellectual property is closer to the idea of a common heritage than private property, and therefore it would not be an exaggeration to say that the legal protection of intellectual property was traditionally an almost entirely non-existent concept in Korea.

Moreover, traditional Korea had a deeply rooted caste system in which people were classified as intellectuals, farmers, artisans, and merchants. Entertainers, such as musicians and dancers, were considered low class. It follows naturally that the protection of the entertainers' performance or personal identity as a commodity has traditionally been a foreign concept. Of course, the image of entertainers and sportsmen has significantly improved in recent decades, especially among the younger generation, but it remains true that they were traditionally not a socially respected group.¹⁵²

Although there is an old Korean proverb that says "*tigers leave their skins, and men leave their names, upon death*," which suggests that the identities of people, including their names, have been very highly valued, this notion is focused on becoming successful and becoming famous for the honor of the individual's clan or family, and has little to do with commercial protection of the name. In fact, if a person is successful and famous in life, and his name is commercially used after his death, as in the *James Dean* cases, such use would be considered dishonorable.

In view of these traditions and mores of Korea, the protection of the Right of Publicity as a property right separate from the right of personality seems quite difficult.

2. *Review of the Possible Analogy to Current Statutes*

Although none of the existing Korean precedents has found a basis for recognizing the Right of Publicity in the current statutes rather than through customary law, an attempt may be made to find a basis for the Right of Publicity in the current statutes through analogy.

First, the Korean Constitution guarantees all citizens human dignity, worth, and the right to pursue happiness.¹⁵³ Further, the Constitution

¹⁵¹ Even Confucius said that he is transmitting knowledge rather than teaching what he has created in teaching his disciples. See ALFORD, *supra* note 146, at 9 (quoting THE ANALECTS OF CONFUCIUS, bk. 7, ch. I.) ("The Master [Confucius] said: I transmit rather than create; I believe in and love the Ancients.")

¹⁵² See Chung Hwan Choi, *Protection of Artists' Rights Under the Korean Copyright Law*, 12 PAC. RIM L. & POL'Y J. 179, 179–80 (2003).

¹⁵³ HUNBUP [SOUTH KOREAN CONST.] art. 10 ("All citizens shall be assured of human dignity and worth and have the right to pursue happiness. It is the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.")

guarantees the right of privacy¹⁵⁴ and the right to a life worthy of human beings.¹⁵⁵ These provisions may be used as a basis for the protection of the right of personality, but are not sufficient by themselves as bases for protecting the Right of Publicity. Meanwhile, the Korean Constitution also provides that the rights of writers and artists are to be protected by statute.¹⁵⁶ Since the Right of Publicity is within the scope of rights of writers and artists, this provision could serve as the Constitutional basis for the Right of Publicity. However, these Constitutional provisions are not sufficient by themselves as bases for protection of the right, and thus a proper legislation for protection of the right is necessary.

Second, it is possible to consider the neighboring rights of copyrights under the Korean Copyright Act as a basis for protection. Article 64 of the Copyright Act provides that performance is protected as a neighboring right,¹⁵⁷ and therefore performance, which is a type of copyright model for the Right of Publicity that may be protected based on that provision.¹⁵⁸ However, name, likeness and image, which are byproduct models for the Right of Publicity, cannot be protected even under this provision.¹⁵⁹ Accordingly, the reproduction, broadcast, or transmission of a performance, without permission of the holder of the Right of Publicity with respect to such performance, is an infringement of the right.

Third, under the Korean Civil Code, there is no provision that directly provides for the Right of Publicity. In fact, infringement of the right of personality and the right of portrait has been recognized as a tort through precedents, but such recognition was without a clear statutory basis. For this

¹⁵⁴ *Id.* art. 17 (“All citizens shall enjoy an inviolable right of privacy in life.”).

¹⁵⁵ *Id.* art. 34, para. 1 (“All citizens shall be entitled to a life worthy of human beings.”).

¹⁵⁶ *Id.* art. 22, para. 2 (“The rights of authors, inventors, scientists, engineers and artists shall be protected by statute.”).

¹⁵⁷ Copyright Act of Korea, art. 64 (2006) (S. Kor.) ((Neighboring Rights) Performances, phonograms, and broadcasts falling under any of the following subparagraphs shall be protected as neighboring rights under this Act:

Stage performances:

Stage performances conducted by nationals of the Republic of Korea (including juristic persons established under the Acts of the Republic of Korea and foreign juristic persons maintaining their principal offices in the Republic of Korea; hereinafter the same shall apply);

Stage performances protected under the international treaties to which the Republic of Korea has acceded or which it has ratified;

Stage performances fixed in phonograms as referred to in subparagraph (2); and

Stage Performances transmitted by broadcasts as referred to in subparagraph (3) (except those included in sound or visual recordings before transmission)).

¹⁵⁸ There are two models in the Right of Publicity cases: a *copyright model*—publicity rights to performance; and a *byproduct model*—publicity rights to the performer’s image and name. See Kevin S. Marks, *An Assesment of the Copyright Model in Right of Publicity Cases*, 70 CAL. L. REV. 786, 787 (1982).

¹⁵⁹ See *id.*

reason, there have been disputes on the basis of the prohibition of the infringement and the scope of damages in relation to disputes on the right of privacy, right of portrait, right of personality, and defamation.¹⁶⁰ Recognizing this problem, a revision bill for the Civil Code had recently been prepared but was repealed automatically with the expiry of the session of the National Assembly.¹⁶¹ The revision bill added Article 1-2, entitled “Human Dignity and Freedom,” providing that “[p]ersons shall enter into legal relationships by their own free will on the basis of dignity and worth as human beings” (Section 1),¹⁶² and “The personality rights of human beings shall be protected” (Section 2).¹⁶³ Upon enactment of this revision bill, it was expected that there would be significant advances in jurisprudence with regard to disputes relating to personality rights. However, even with these draft provisions, they provide only for personality rights and therefore would not be a basis for protection of the Right of Publicity, which is a property right independent of the right of personality.

For these reasons, it is fair to say that the provision for neighboring rights under the Copyright Act is the only current statutory provision based on which the Right of Publicity can be recognized. However, as discussed, this provision may serve as a basis for only the right to performance, which is a copyright model type of the Right of Publicity and not all types of the Right of Publicity.

V. CONCLUSION

The Right of Publicity has developed considerably in only half a century after it was first recognized by a court in the United States.¹⁶⁴ On the assumption that the Right of Publicity is an intellectual property right, there can be no doubt that the right has developed from recognition to full expansion in a very short period of time, especially when compared to that of other areas of intellectual property law, such as patents, trademarks, and copyrights, which developed over a hundred years.¹⁶⁵ Patents, trademarks,

¹⁶⁰ 93Da40614(Gong1996Sang, 1486) (Supreme Ct., Apr. 12, 1996).

¹⁶¹ Nat'l Assemb. of the Republic of Korea website, http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=028850 (last visited May 4, 2010).

¹⁶² *Id.* at 12.

¹⁶³ *Id.*

¹⁶⁴ *Haelan Laboratories, Inc.*, 202 F.2d 866 (2d Cir. 1953).

¹⁶⁵ See e.g., HA-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE* 85 (2002). In his published work, Professor Chang, a Professor of Economics and Politics at the University of Cambridge, criticizes the economic pressure placed by developed Western nations on developing nations, and particularly their high-handed attitude in relation to frictions involving intellectual property rights. For this purpose, he generally discusses the legal histories of intellectual property laws in

and copyrights are not only protected by federal law in the United States, but a considerable degree of international order has been established thereon among interested nations through various international treaties and conventions over the past two centuries.¹⁶⁶ On the other hand, the Right of Publicity has not yet been fully established as a statutory right at the federal level even in the United States. Additionally, differing standards have been adopted at the State level, so it is difficult to expect protection or regulation of this right through international conventions at present. Meanwhile, as the rapid dissemination of the Internet facilitates communication, the worldwide market for the Right of Publicity is fast being consolidated into a contemporaneous unit market, and the need for a new world order to govern the Right of Publicity in this unified global market is clearly not any less pressing than other intellectual property rights.

The Right of Publicity by its nature is inextricably linked to American tradition and culture. U.S. policies regarding the Right of Publicity appear to conflict with the interests of other countries. However, the establishment of an international legal regime for the Right of Publicity can no longer be delayed. Ultimately, the recognition and scope of protection of the Right of Publicity are issues that will probably have to be settled through a compromise between the United States and other countries. I hope that this comparative law article will contribute toward the establishment of such an international legal regime on the Right of Publicity. Recognizing the problem is the beginning of its solution. The establishment of an international legal regime on the Right of Publicity is feasible so long as such problems are recognized, and a solution to such problems is sought from a global market perspective.

these western countries to show that it has not been long since patents, trademarks and copyrights first began to be protected by these countries. Whatever Professor Chang's intentions may be, even such a "*short period*" can be said to be long compared to the history of the Right of Publicity, whose history is the period from recognition of the right to expansion in scope of application and solidification by court (emphasis added).

¹⁶⁶ See HA-JOON CHANG, GLOBALISATION, ECONOMIC DEVELOPMENT AND THE ROLE OF THE STATE 275-80 (2003).