THE CELEBRITY'S RIGHT TO AUTONOMOUS SELF-DEFINITION AND FALSE ENDORSEMENTS: ARGUING THE CASE FOR A RIGHT OF PUBLICITY IN THE PHILIPPINES

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Abstract

With the Philippines being the top country in terms of social media usage, social media platforms have expanded opportunities for celebrities to profit from their fame. Despite the pervasiveness of celebrity culture in the country and the increasing number of unauthorised celebrity advertisements in such platforms, the right of publicity does not explicitly exist in Philippine law. This paper explains that the lack of an explicit statute-based right of publicity does not mean that it does not exist in common law or other statutory law. Centred on the minimalist path of law reform, the paper argues that the existing right to privacy in Philippine law can justify a right to publicity, anchored on the right to protect unwarranted publicity about oneself regardless of one's status in the public eye, as well as on the right to autonomous self-definition. The illustrative cases in this paper evidence the hurt feelings celebrities suffer from unwanted publicity. A publicity right also exists as a property right under local intellectual property laws on unfair competition.

I. Introduction

The opportunity to economically exploit one's name, likeness or identity, often through celebrity endorsements, is a perk that comes with being a celebrity.[1] The internet, particularly social media platforms like Facebook and Instagram, has expanded the opportunities for celebrities to profit from their fame, providing them with another channel by which they can endorse brands to a global audience,

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1 David Tan *The Commercial Appropriation of Fame: A Cultural Critique of the Right of Publicity and Passing Off* (Cambridge University Press, Cambridge, 2017) at 1.

without the limitations that characterise traditional mass media channels. The Philippines is perhaps one of the ideal examples: it is the top country in terms of social media usage, and with Filipinos working in different places around the world, celebrity endorsements on social media can have a particularly powerful effect.

The development of privacy law, consumer law and intellectual property law (areas of law that arguably intersect with the right to privacy) in the Philippines has left out any explicit reference to a right of publicity. Considering the pervasiveness of celebrity culture and popularity of celebrity endorsements in the Philippines,[2] it is curious that the right of publicity does not explicitly exist in Philippine law. The absence of right of publicity cases may perhaps be attributed to the Philippines' collectivist culture,[3] and, therefore, a hesitation to bring such cases to court. In any case, the failure to do so represents a gap in the Philippine common law system, made more apparent by the increasing number of unauthorised advertisements involving Philippine celebrities, as shown in three case studies below.

The lack of an explicit statute-based right of publicity, however, does not mean that aggrieved local celebrities cannot rely on another statute or common law cause of action in cases of unauthorised advertisements. The right of publicity has been defined as, in its simplest form, "the right to control the commercial use of one's persona";[4] a commentator explains that if this is understood to be the essence of the right of publicity, "then Australian law offers its own version by its laws on copyright, trademark, statutory misrepresentation, or passing off".[5] This paper proceeds along similar lines of analysis, and argues that Philippine law offers its own version of the right of publicity: one that may be developed from privacy tort and intellectual property law. The gap in an explicit right of publicity does not have to be filled by inventing new law. Instead, this paper explores the range of other possible techniques that could argue a right of publicity by making existing laws adapt to a changing environment.[6] The incrementalist approach of this paper aligns with the idea that:[7]

2 Anna Cristina Pertierra "In the Philippines, Celebrity, Melodrama and National Politics Are Deeply Entangled" The Conversation (25 January 2017) <www.theconversation.com>.

3 Jenny Jean Domino and Arvin Kristopher Razon "Open Book: An Analysis of the Celebrity's Right to Privacy" (2014) 87(4) Philip LJ 906 at 906.

4 George Smith II "The Extent of Protection of the Individual's Personality Against Commercial Use: Toward a New Property Right" (2002) 54 S Cal L Rev 1 at 4, as cited in David Caudill "Once More into the Breach: Contrasting US and Australian Rights of Publicity" (2004) 9 MALR 263, at 276.

5 Smith, above n 4.

6 Megan Richardson "Responsive Law Reform: A Case Study in Privacy and the Media" (2013) (1) EJLR 20 at 24.

7 At 24.

> ... the general preference should be for more minimalist techniques of law reform (including some very subtle methods), on the basis that they represent the safest, least burdensome, and least risky form of legal change [and that] ... [t]he extreme steps of invention of new law – as with other invention – may solve intractable problems, but is a high-cost, risky endeavour.

The paper proceeds as follows. Part II provides a contextual background: various cases of unauthorised advertisements in the Philippines, primarily involving unauthorised links between a product and a celebrity. Part III discusses how privacy tort can move towards a right of publicity, in the context of appropriation torts. It explores the argument raised by Jennifer Rothman that the best justifications for a right of publicity overlap with values that the right of privacy protects: personal liberty, dignity, and prevention of economic, reputational, professional, and emotional injuries to the aggrieved individuals – whilst recognising that state law in the United States may consider these rights separately.[8] Part IV discusses an incrementalist approach to developing the right of publicity in the Philippines, by exploring the various intellectual property (IP) laws that could protect the right of publicity, following the idea that certain IP laws, such as unfair competition and trademark law, could be a proxy for the right of publicity in false endorsement cases.[9]

II. Illustrative Cases Involving Filipino Celebrities and Unauthorised Advertisements

Out of the several instances of fake advertisements in the Philippines that have emerged recently, three cases stand out and are discussed in this part. First is the case of Maria Kendra Melendez, known as Aiko Melendez, a child actress in the early 1980s, who continues to appear in various television shows. On 22 June 2019, Melendez complained about the use of her name and photos, without her consent, in social media advertisements for a coffee brand.[10] She aired out her complaint on Facebook,

8 Jennifer Rothman "The Right of Publicity's Intellectual Property Turn" (2019) 42 Columbia Journal of Law and the Arts 277 at 317.

9 At 317.

10 Maria Kendra Melendez (22 June 2019) Facebook <www.facebook.com> (Translated from Filipino and English by the author).

incidentally the same social media platform where the false advertisement is found. To translate her Facebook post:[11]

> This is already a warning post. Please stop using my pictures to gain sales. You didn't ask permission for my pictures to be used in your networking business. I may have tried your product, but to claim that my weight loss was because of your product is not right, and definitely not true! It's especially offensive if no one from this brand approached me or my management team regarding the endorsement of its products. Please bring down these posts!

In her Facebook post, Melendez purports to warn the advertisers about the unauthorised use of her photos to "gain sales".[12] She complained that, although she tried the product, the claim that it caused her to lose weight was not true.[13] The unauthorised advertisements she complained about purport that the "secret" behind Melendez's weight loss in a "healthy way" is the coffee brand.[14]

Interestingly, she aired her grievance on Facebook, the same social media platform where the unauthorised advertisements are found, to complain about the unconsented use of her image.[15] In a post on the social media network, she shared how upset she was about paying for a product as a customer, only for her name and photos to be used for the product's promotion.[16] One of her posts translates as follows: [17]

> I am annoyed at how I pay for a product as a customer, only for my name and photo to end up being used by the brand for their promotions. I'm upset.

The product, Valentus Slim Roast, supposedly helps consumers "manage" their weight.[18] The unauthorised advertisements that Melendez complained of were made by independent online sellers.[19] As of 15 August 2019, the social media posts were still active, although they appear to have since been taken down. Whilst Melendez complained about these independent online sellers, she failed to realise that other Facebook pages with the names "Valentus Slimming Coffee" and "Valentus Coffee

11 Melendez, above n 10.
12 Melendez, above n 10.
13 Melendez, above n 10.
14 Melendez, above n 10.
15 Melendez, above n 10.
16 Melendez, above n 10.
17 Melendez, above n 10.
18 Melendez, above n 10.
19 Melendez, above n 10.

Philippines" had already posted similar advertisements on Facebook claiming that Melendez used the coffee product and — without diet, exercise, and just a cup of coffee a day – underwent an "amazing transformation". Unlike the posts by the independent online sellers, these social media posts remain active and were even posted at earlier dates (10 June 2019 and 22 February 2019, respectively).[20] Interestingly, the Valentus Slimming Coffee social media post, dated 10 June 2019, contains a Filipino statement that translates as: "Just send a private message if you are interested. Do not be ashamed to find a solution to your problem." The post somewhat implied that drinking a slimming product was something to be ashamed of and should not be openly admitted. The Valentus Coffee Philippines social media post, dated 22 February 2019, on the other hand, translates as: "Who wants to be like Aiko Melendez? With just one scoop a day of our coffee product, here is the result!"

Melendez is by no means the only subject of unauthorised advertisements on social media. Another example is Lea Salonga, who has a wider following, having played roles in Broadway productions such as *Miss Saigon* and *Les Miserables*.[21] On 8 June 2019, her post on the social media platform Instagram repudiated a fake news article alleging that she quit show business to pursue a skin care brand that she had started.[22] In her Instagram post, she said she would not quit show business, that she was under a contract with Facial Care Centre, and that she was not endorsing any other skin care product or service.[23] Commenters on Salonga's Instagram post provided links to the articles. The article, which was still active as of 15 August 2019 but has since been taken down as of the publication of this paper, claimed that she was leaving The Voice to promote a brand she supposedly developed, Auvela, an "anti-aging skin-care line".[24] The anger and offense that Salonga took from the fake endorsement are palpable, and she had chosen to air her grievance on social media, as did Melendez. [25]

A third and final example involving fake endorsements of celebrities is Judy Ann Santos, who is probably the most popular out of the three actresses, and was once known as the "Queen of the Philippine Soap Opera".[26] In her Instagram post, Santos warned the public of a fake advertisement claiming that she uses a weight loss product called Purple Mangosteen.[27] The fake advertisement was made under

20 Valentus Slimming Coffee (10 June 2019) Facebook <www.facebook.com>; and Valentus Coffee Philippines (22 February 2019) Facebook <www.facebook.com>
21 "Lea Salonga" IMDb <www.imdb.com>.
22 Lea Salonga (18 June 2019) Instagram <www.instagram.com>.
23 Salonga, above n 23.
24 Cody Cepeda "Lea Salonga Slams 'Fake Ads' Using Her Name" (19 June 2019) Inquirer.net <entertainment.inquirer.net>.
25 Salonga, above n 22.
26 James Patrick Anarcon "Judy Ann Santos Gives Update about Her Teleserye Comeback" (7 March 2019) PEP.ph <www.pep.ph>.
27 Judy Ann Santos (2 June 2019) Instagram <www.instagram.com>.

a fake Facebook account using her name.[28] The frustration of Santos was evident in her post, which translates as follows:[29]

> Once again [...] I am not endorsing "PURPLE MANGOSTEEN" [...] never saw this product, never tried [...] and never will [...] I don't know who the people behind this product are [...] and who did this [fake endorsement]. My team tried reaching out to them, but they did not reply. I DON'T HAVE ANY FACEBOOK ACCOUNT ANYMORE ... please.

From these three cases, a common theme emerges: the trend of using the name and image of female celebrities for fake endorsements relating to weight loss and cosmetic improvement. The implicit but pervasive message in all the fake advertisements is that by using the products being advertised (the coffee product for weight loss and skin care products for beautification), the public could look like these celebrities. The Philippine celebrities' reactions range from indignation to helplessness, and they could only resort to social media to clarify that they did not endorse the products, in turn only stoking public curiosity and generating additional publicity to the brands involved. Thus, going over these cases in the detail that this paper does is helpful in illustrating the point this paper makes: that the harms caused by unauthorised advertisements result in both hurt feelings and loss of economic opportunity.

III. Unauthorised Advertisements in the Spectrum of Appropriation of the Celebrity's Likeness or Identity

The challenge of arguing that a Philippine right of publicity exists is complicated by the fact that the Philippine legal system "is a unique blending of common law and civil law principles".[30] The main sources of Philippine law are the Constitution, laws or statutes, treaties and conventions, and judicial decisions.[31] The Civil Code expressly provides that judicial decisions applying to or interpreting the laws or the Constitution form a part of the legal system of the Philippines.[32] Thus, in arguing

28 Above n 27.
29 Above n 27.
30 Salvador Carlota "The Three Most Important Features of the Philippine Legal System that Others Should Understand" (IALS Conference, Philippines, 11 September 2009).
31 "Legal Systems in ASEAN: The Philippines – Sources of Law" ASEAN Law Association <www.aseanlawassociation.org>.
32 See Civil Code of the Philippines (Philippines) 18 June 1949, art 8 [Civil Code].

for a concrete right of publicity in the Philippines as a viable cause of action of local celebrities, this paper draws from several sources both from Philippine common law and civil law — with particular preference for minimalist techniques of law reform that Richardson has noted.

In the US, from which the Philippines' common law system is derived,[33] the right of publicity has existed for over 60 years, and has been defined as the "inherent right of every human being to control the commercial use of his or her identity".[34] Still, the right of publicity has not been explicitly recognised either in judicial decisions or in statutory law in the Philippines, even as Philippine common law draws heavily from legal principles and jurisprudence of the United States.

That being the case, in arguing for the existence of the right of publicity in the Philippines and contextualising the violation involved in the three cases previously presented, David Caudill's taxonomy of the different types of appropriations of a celebrity's name, likeness, identity or "persona" is relevant.[35] Associative advertisements, or advertisements involving celebrity endorsements, are the applicable type of appropriation to the illustrative cases discussed in this paper. Unlike the other types, it is generally viewed as commercial speech, and is not protected as artistic or journalistic expressions.[36] In some states of the United States, the common law around associative advertisements has developed to grant protection to celebrities for the unauthorised appropriation of their image or likeness not only in the classical case involving the unauthorised use of a celebrity's photo but also to far more inventive uses, such as "reminders" of the celebrity's character (such as "Here's Johnny" from the Johnny Carson Show)[37] or a blond-haired robot dressed like the Wheel of Fortune hostess Vanna White.[38] The essence of protecting

33 Carlota, above n 30, at 1.

34 J Thomas McCarthy *The Rights of Publicity and Privacy* (Clark Boardman Callaghan, Minnesota, 2000) vol 1, pt 3 ch 1.

35 Caudill, above n 4, at 264. The taxonomy provides an understanding of where the cases of Melendez, Salonga, and Santos fall within the spectrum of the different types of appropriations of a celebrity's image that has been discussed in the US. The taxonomy includes: (a) primarily "transformative" or "creative" artistic representations (such as plays, parodies, biographical books or films, parodies and satirical drawings); (b) literal and somewhat creative representations of celebrities whose commercial value depend on the use of celebrity's image (such as baseball cards with photographs of athletes, or t-shirts with images of movie stars); (c) news, criticism, reporting and information in the public interest, about 'newsworthy' celebrities; and (d) associative advertising relating to advertisements that establish a link or association with, or an endorsement by, a celebrity.

36 At 264.

37 See *Carson v Here's Johnny Portable Toilets Inc* 698 F 2d 831 (6th Cir, 1983). This case involved the unauthorised use of a famous line from Carson's television show ("Here's Johnny"), which the court found to be a violation of right of publicity.

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

the right of publicity in celebrity endorsements lies in the associative value that the endorsement brings, by enhancing the appeal of the brand and its marketability.[39]

There is arguably little artistic or journalistic expression that celebrity endorsements protect. Had protections for this type more clearly existed in Philippine law, Melendez, Salonga and Santos would have been able to make a claim under it. However, because Philippine law has not developed a right of publicity, this type of appropriation continues to happen with alarming frequency in the Philippines — perhaps partly caused by how often Filipinos use social media, where most of these unauthorised advertisements are found.[40] Moreover, the message of the fake endorsements in the illustrative cases highlight the "associative value" of celebrity endorsements: by endorsing a brand or product, a celebrity is directly transferring his or her perceived attributes, such as success, glamour, beauty and talent, to the brand or product being endorsed.[41] In the case of fake endorsements involving Melendez, Salonga and Santos, the question is not only whether they want to be properly compensated for endorsing the products (which involves the property right aspect of the right of publicity), but also whether they would want to be associated with the products in the first place (which arguably involves the consent and privacy aspect of the right of publicity).

IV. Unauthorised Advertisements as a Privacy Violation Resulting in "Hurt Feelings"

The right of publicity in the United States is considered to have been derived from the right to privacy, with the former commonly regarded as protection to "injuries to the pocketbook", whilst the latter protects "injuries to the psyche".[42] Although intermingled,[43] the distinction between the two have been crucial in lawsuits.[44] The discussion of the commonalities and differences of these two rights are particularly important in the context of remediating unauthorised celebrity endorsements. Whilst this brief background does not attempt to provide detailed account of the history of the right of publicity in the US, it provides the context

39 Tan, above n 1, at 110.

40 Kyle Chua "PH Top in Social Media Usage for 3 Straight Years – Report" Rappler (2018) <www.rappler.com>.

41 Tan, above n 1, at 123.

42 At 147, citing Sarah Konsky "Publicity Dilution: A Proposal for Protecting Publicity Rights" (2005) 21 Santa Clara Computer & High Tech LJ 347 at 364.

43 Tan, above n 1, at 148, citing Claire Gorman "Publicity and Privacy Rights: Evening Out the Playing Field for Celebrities and Private Citizens in the Modern Game of Mass Media" (2004) 53 De Paul Law Review 1247, at 1259.

44 Oscar Franklin Tan "Articulating the Complete Philippine Right to Privacy in Constitutional and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio" (2007) 82 Philip LJ 78 at 148.

necessary to understand how its development may be relevant to the Philippines. The next section argues how certain values being protected by the right of publicity are central to the right to privacy, especially in the context of the Philippine right to privacy has developed.

A. Right of Publicity as an Outgrowth of the Right of Privacy

When Samuel Warren and Louis Brandeis wrote *The Right to Privacy*, they lamented the press's intrusion into people's private lives by publishing private facts or private photographs, and argued that the right to privacy, based on the individual's right to be "let alone", must be recognised.[45] Much of Warren and Brandeis's article discussed the conception of privacy directed at "hurt feelings": that aggrieved individuals clearly suffer emotional harm which must be compensated.[46]

The need for a cause of action that would protect the right of individuals to control publicity about themselves drove the adoption by courts in the United States of the right to privacy.[47] At the time that William Prosser wrote his article *Privacy*, he studied 300 privacy-related cases in the books, and discussed how the right to privacy comprises four torts:[48]

(a) intrusion into one's private affairs;
(b) disclosure of embarrassing private facts about one's self;
(c) protection against publicity placing one in a false light in the public eye; and
(d) appropriation of one's name and likeness for another's commercial advantage.

The appropriation of one's name and likeness, the fourth type, is considered to be the origin of the right of publicity.[49] Courts in the United States expanded the concept of privacy directed at hurt feelings, to cover appropriation claims by private individuals who might want to avoid attention. In such claims, the hurt feelings of non-celebrities became a central element of privacy claims, based on appropriation.[50]

45 Samuel Warren and Louis Brandeis "The Right to Privacy" (1890) 4(5) Harv L Rev 193 at 196.
46 Mark McKenna "The Right of Publicity and Autonomous Self-Definition" (2005) 67 U Pitt L Rev 225 at 228.
47 Kateryna Moskalenko "The Right of Publicity in the USA, the EU, and Ukraine" (2015) 1 International Comparative Jurisprudence 113 at 240.
48 William L Prosser "Privacy" (1960) 48(3) Cal L Rev 384 at 388–9.
49 Moskalenko, above n 49, at 114.
50 McKenna, above n 46, at 242–3.

US courts then assumed that celebrities do not suffer from the same hurt feelings of private individuals from the appropriation of their image or likeness for commercial purposes, and that they actively seek attention and profit from receiving publicity, regardless of its form.[51] Thus, courts and scholars generally considered the right of privacy as "ill-fitting for claims by famous people accustomed to receiving attention".[52] The idea was that many famous professional athletes and actors would likely prefer endorsement opportunities and licensing deals endorsement licenses over privacy.[53] Thus, the privacy tort of appropriation of one's image or likeness was considered by courts in the United States to be unavailable to celebrities.[54]

For example, in *O'Brien v Pabst Sales Co,* the United States Court of Appeals for the Fifth Circuit rejected the famous football player Davey O'Brien's privacy claim, based on the defendant beer distributor's use of O'Brien's photograph on a promotional football calendar.[55] The court believed that an action for the right of privacy in Texas was available only to a private person, who suffered hurt feelings, and not to a person who had been constantly seeking publicity — and who received it because of his inclusion in the promotional calendar.[56] In other words, the court believed that hurt feelings, as a basis for a privacy tort of appropriation, was an all-or-nothing proposition, and O'Brien could not have been hurt by the unauthorised use of his identity.[57] It has thus become a generally accepted proposition that the privacy doctrine was unavailable to redress unauthorised commercial uses of celebrities' identities.[58]

> The decision in *Haelan Laboratories Inc v Topps Chewing Gum Inc* was the first to expressly recognise a right of publicity, with the court explaining that the right of publicity existed independently of right to privacy and "was so named for the value generated by the publicity associated with a

51 At 228.
52 At 243.
53 Caudill, above n 4, at 267.
54 McKenna, above n 46, at 243.
55 *O'Brien v Pabst Sales Co* 124 F 2d 167 (5th Cir, 1941).
56 At 170.
57 McKenna, above n 46, at 243.
58 Several other cases are consistent with the doctrine in *O'Brien*, including *Paramount Pictures Inc v Leader Press Inc* 24 F Supp 1004, 1007 (WD Okla, 1938); and *Martin v FIY Theatre Co* 10 Ohio Op 338 (1938).

> person's likeness".[59] The court explained the basis of the right of publicity:[60]
>
> For it is common knowledge that many prominent persons ... far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money from authorizing advertisements [and] popularizing their countenances ... This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

Thus, the development of privacy law in the US, particularly appropriation claims, focused on private figures and their injured feelings resulting from unwarranted publicity, rather than its underpinning justification: as a right rooted in the individual's autonomy and dignity, which applies to both private and public figures.[61] As the right of publicity became the basis for appropriation claims of celebrities, courts did not consider that celebrities might suffer hurt feelings from certain types of publicity, even if they accepted or even actively courted publicity in other forms.[62] Because the privacy tort of appropriation was considered inapplicable to celebrities, the right of publicity then became justified by the economic value celebrities obtain from the use of their image or likeness, instead on emotional interests that they may have (similar to private individuals).[63] The idea that celebrities can claim a violation of their right of self-determination from the appropriation of their image seemed implausible to courts and commentators, considering:[64]

> ... [the] sharp internal contradiction in the position of a plaintiff who alienates and objectifies her image and simultaneously claims that it is integral to her very identity in the manner presupposed by the tort of appropriation.

Whether this should be the case as well in the Philippines is discussed in the following section.

59 Rothman, above n 8, at 282, citing Melville Nimmer "The Right of Publicity" (1954) 19 LCP 203 at 204, 218–23; *Haelan Labs Inc v Topps Chewing Gum Inc* 202 F 2d 866, 929 (2nd Cir, 1953) [*Haelan v Topps Chewing Gum*].

60 *Haelan v Topps Chewing Gum*, above n 59.

61 Rothman, above n 8, at 318.

62 McKenna, above n 46, at 229.

63 At 229.

64 McKenna, above n 46, at 244, citing Robert Post "Rereading Warren and Brandeis: Privacy, Property, and Appropriation" (1991) 41 Case W Res L Rev 647 at 659.

B. The Right of Publicity Protecting 'Hurt Feelings' from Unwarranted Publicity

Whether celebrities can claim a right to privacy from the use of their image or name in unauthorised or false endorsements is worth evaluating in the Philippines, considering how the Philippine right to privacy has developed. The purpose is neither to reshape the development nor alter the course of the right of publicity in the US, but to question whether hurt feelings could form some basis of publicity claims, specifically appropriation torts, in the Philippines. As Jennifer Rothman notes, both the right of publicity and the right to privacy further the same interests and protect the same values.[65] Firstly, the right of privacy was originally conceptualised as the right to control publicity about oneself. Secondly, the right to autonomous self-definition, as a basis of the right to privacy and a facet applicable to the right of publicity, is shared by celebrities and non-celebrities alike.

1. Protecting unwarranted publicity as the original conception of privacy

The right to privacy and right of publicity were used interchangeably starting in the mid to late 1800s.[66] Privacy has since encompassed various types, such as data privacy and informational privacy, and decisional and spatial privacy. In any case, its origin can be located in tort law,[67] as a source of action allowing individuals to control publicity about themselves and to stop "unwarranted publicity about oneself".[68] 1941, Prosser observed that a great number of privacy cases involve the "appropriation of some element of the plaintiff's personality for a commercial use", typically in an advertisement.[69] In such cases, two values are being protected: the protection of personal feelings (which Prosser notes to be of a highly important value), and the commercial value of plaintiff's personality.[70] The first cases to consider whether a privacy claim is warranted involved cases that would have been a basis for a right of publicity claim today.[71] In essence, the right of privacy conceptualised as a right to control "publicity" about oneself — including in cases of unauthorised advertisements — was a central factor in the adoption of the right of privacy, even before the decision in the *Haelan* case.[72]

65 Rothman, above n 8, at 317.
66 At 288.
67 At 288.
68 At 288, citing Note "The Right to Immunity from Wrongful Publicity" (1911) 11 Colum L Rev 566 at 566–68.
69 William Prosser *Handbook on the Law of Torts* (West Publishing, Minnesota, 1941) at 1056.
70 At 1056.
71 Rothman, above n 8, at 289.
72 At 289.

Moreover, Warren and Brandeis advocated for a right to privacy that would protect *all* persons, regardless of their position or station, from undesirable and undesired publicity, in matters that they would understandably prefer to keep private.[73] An illustration of their advocacy was how they then supported a lawsuit brought by Marion Manola, a stage performer, who sued when a photo of her was taken without her permission during one of her public performances. In the photo and in her performance, Manola was wearing tights, and her manager wanted to circulate the photo to increase attendance of the show. Along with public opinion squarely in her favour back then, a New York trial court issued an injunction preventing the publication of the photograph.[74]

As Rothman argues, from its inception in the US, the right to privacy provided the remedies and the justification for today's right of publicity.[75] She posits that the claim that the right to privacy was insufficient for celebrities to protect their identities, and that a new right was needed, is inaccurate: to be clear, the right to privacy, as originally conceptualised, aspired to protect unwarranted publicity, without taking into account the status of the individual as a public figure.[76] The view adopted by many courts and commentators in the United States that celebrities who have sought out publicity could not bring a privacy-based claim from an unauthorised appropriation of their image and could only suffer economic harm from lost endorsement deals somehow contradicts this original notion of privacy.[77] It is not difficult to imagine, as the illustrative cases in this paper show, that public figures likewise suffer emotional distress, and sustain injuries arising from the use of information relating to them that, whilst technically not secret, was not meant for public use and distribution.[78] This is highlighted by the case of Melendez, who admitted to using the product, but appeared disinterested in advertising it. She might have used the product herself, but she did so as a 'paying customer' and did not, as her posts suggested, aspire to gain publicity from it. The emotional distress in her posts cannot be denied. Thus, the illustrative cases support the position that even celebrities can seek relief because of unwarranted publicity that results in emotional distress and injured feelings.

2. Self-autonomy as a value protected by privacy, extendible to publicity

Moreover, privacy plays an important role in fulfilling and sustaining the values of liberty and self-autonomy – as pointed out by the Supreme Court of India in a

73 Warren and Brandeis, above n 45, at 214.
74 Rothman, above n 8, at 294.
75 At 278.
76 At 279.
77 At 282.
78 At 280–1.

landmark judgment that recognised privacy as a fundamental constitutional right under their constitution.[79] To understand how the functional relationship between privacy and self-autonomy likewise plays an important, albeit not a direct, role in protecting the right of publicity of celebrities, the volatile and unpredictable nature of fame must first be understood. As Graeme Dinwoodie and Megan Richardson accurately portray, individuals have a continuing personal interest in their name or likeness, and celebrities in particular may not want their personal attributes "referenced without their consent in certain kinds of advertising and trade".[80] Fame, an abstract notion from which celebrities profit and capitalise, can easily be undermined by unwarranted public discussions, brought about by, among others, unauthorised advertisements. Perhaps this is clearest in Salonga's case, where the advertisement, disguising itself as a news feature, claimed that she was quitting show business. The unauthorised advertisement created a narrative about herself that she would not have agreed to, no matter the compensation (as she herself said that she would never quit show business). The harm caused to her goes beyond the lack of compensation for the use of her name or image in a brand. Rather, it was in how her right to control how her image is projected to the public — her right to self-autonomy — was taken away from her, subsequently threatening her fame in a manner that she did not desire or could not control. The narrative that she would quit show business could have, in a way, decreased the fame or status she was trying to sustain, which fame was important to her livelihood. These are underlying interests that the right to privacy, rooted in self-autonomy, could protect.

As Mark McKenna argues, the unauthorised use of one's image or likeness for another's commercial advantage impinges on the person's autonomy "to choose the things and people to associate one's self with, and affects the way they are perceived by others".[81] This interest in autonomous self-definition, as a complement to the right to obtain relief from hurt feelings caused by unwarranted publicity, underscores the right of individuals, whether private or public, to define how they are portrayed to the public on the basis of voluntary associations they make or, in this case, brands they purport to advertise.[82] This reasoning is applicable in the illustrative cases, where the local celebrities Melendez, Salonga and Santos were clearly distraught, not so much because they were not paid by the brands for the use of their image and likeness, but mainly because of portrayal to the public that

79 *Puttaswamy v Union of India* (24 August 2017) (Supreme Court of India) unreported, Writ Petition 494/2012 109-110 [113] (Chandrachud J).

80 Graeme Dinwoodie and Megan Richardson "Publicity Right, Personality Right, or Just Confusion?" in Megan Richardson and Sam Ricketson (eds) *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar, Cheltenham, 2017) 425 at 425.

81 McKenna, above n 46, at 229.

82 *At 229.*

they use and actively associate with such products. Salonga and Santos said, in quite definitive terms, that they have never tried the products and would never consider trying it. Santos's case highlights the interest a celebrity may have in autonomous self-definition, especially when an unauthorised advertisement is likely to impact on the public perception, and necessarily, the celebrity's fame.[83]

The above cases show that celebrities may have well-founded evident personal objections to the use of their personal traits in certain forms advertising or trade, which far outweigh their commercial interests.[84] Even if celebrities have accepted and even profit from publicity in other forms, they might nonetheless suffer hurt feelings, because of the associations made in advertisements they did not authorise and would not have authorised.[85] People make inferences about a person's identity and values based on the choices made by that person; consequently, choices about the products and brands a celebrity associates or advertises reveal that celebrity's value system.[86] Celebrities may understandably want to avoid particular associations to protect the integrity of their identities.[87] With false endorsements, the third party (that is, the brand or product owner) takes at least partial control over the meanings associated with and presumably carefully selected by the celebrity.[88] Because of false advertisements making an unauthorised association between a brand and a celebrity, that choice to make associations and to select how one's values are exposed to the public is taken away. Worse, the public makes inferences about the celebrity's values in a manner beyond the celebrity's control and contrary to the right to self-autonomy.

To be clear, the arguments that unwarranted publicity protects the same values as the original conceptualisation of privacy, and that both privacy and publicity further the same underlying right to autonomous self-definition, are by no means universally accepted, much less the predominant state of law. The trajectory of the right of publicity in state law in the United States in a way attests to this: at least 20 states courts have recognised a common law right of publicity separate from privacy, while merely 10 states have privacy statutes that protect publicity rights.[89] Indeed, the dominant thought in state law in the United States appears to be that these rights are separate from one another.

Nonetheless, these arguments are particularly significant in the Philippine context, where the right of publicity had not yet developed as an outgrowth of the

83 At 285.
84 Dinwoodie and Richardson, above n 80, at 428.
85 McKenna, above n 46, at 229.
86 At 281.
87 At 282.
88 At 282.
89 Paul Czarnota "The Right of Publicity in New York and California: A Critical Analysis" (2012) 19(2) Jeffrey S Moorad Sports Law Journal 481 at 491.

right to privacy and there is therefore ample room for these arguments to find their place in Philippine common law jurisprudence. The lack of discussion about the theoretical basis of a Philippine right of publicity and its potential as a cause of action, at least in the case of false endorsements, is an opportunity to discuss how the protection of one's hurt feelings, and the right to autonomous self-definition and to determine one's personality can form the theoretical foundation of a Philippine version of a right of publicity before the courts, unorthodox as this approach may be.

C. The Philippine Privacy Tort Encompassing the Right to Publicity

The discussion thus far regarding how the original conceptualisation of privacy arguably provides a justification for the right of publicity, at least in the context of false endorsements, and how privacy fulfils autonomous self-definition consistent with what Philippine celebrities seek to protect, bring us to the discussion of the right to privacy in the Philippines.

The right to privacy in the Philippines finds its origin in Warren and Brandeis's conception of privacy as the right to be let alone. Specifically, in the 1968 case *Morfe v Mutuc*, the Philippine Supreme Court quoted the United States' Justice Brandeis, who stated that the right to be let alone is "the most comprehensive of rights and the right most valued by civilized men".[90] This marks the beginning of the Philippine Supreme Court's deliberate effort to engraft the right to privacy, conceptualised as the right to be let alone, into Philippine jurisprudence. In recognising its existence, the Philippine Supreme Court has accorded it constitutional status, arising from the Philippine Constitution's Bill of Rights.[91] The right against unreasonable searches and seizures (under s 2) and the right to privacy of communication and correspondence (under s 3) provide the foundation for a person's right to be let alone and the right to determine what, how much, to whom and when information about oneself shall be disclosed.[92] In particular, the Court has developed the right to privacy to focus on informational privacy: the right to control the collection, maintenance, use and dissemination of information about oneself.[93]

Although the Philippine constitutional right to privacy is framed as a protection against government interference by state agents, the framework likewise applies

90 *Morfe v Mutuc* (31 January 1968) (Supreme Court of the Philippines) GR No 20387, 22 SCRA 424 [*Morfe v Mutuc*] citing *Public Utilities v Pollak* 343 US 451, 467 (1952).

91 *Sabio v Gordon* (17 October 2006) (Supreme Court of the Philippines) GR No 174340.

92 *Sabio v Gordon*, above n 91.

93 Graeme Hancock "California's Privacy Act: Controlling Government's Use of Information?" (1980) 32(5) Stan L Rev 1001 at 1001, cited in *Ople v Torres* (23 July 1998) (Supreme Court of the Philippines) GR No 127685, 293 SCRA 143.

in cases of privacy violations by private actors.[94] For example, in the cases of *Ayer v Capulong*[95] and *Lagunzad v Vda de Gonzales*,[96] the complainants invoked their right to privacy against private actors, and the Philippine Supreme Court based their analysis on the constitutional right to privacy. The Court saw no issue with deciding tort cases based on the constitutional right to privacy analysis, rooted from the right to be let alone from the US. The question now is whether this privacy tort framework can be applied to cases of unauthorised advertisements involving Philippine celebrities.

Philippine law incorporated a substantial portion of American tort law.[97] In the case of privacy torts, Justice Antonio Carpio notes that they find statutory basis in art 26 of the Philippine Civil Code:

Every person shall respect the dignity, personality, privacy and peace of mind of his neighbours and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention and other relief:

(1) Prying into the privacy of another's residence;
(2) Meddling with or disturbing the private life or family relations of another;
(3) Intriguing to cause another to be alienated from his friends; or
(4) Vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition.[98]

The Philippine Supreme Court has clarified that the violations mentioned under art 26 are not exclusive but are mere examples of possible torts framed as privacy and personality violations, without precluding claims for similar or analogous acts.[99] Justice Carpio even referenced Prosser's enumeration of privacy torts, and considered them to be possible causes of action under art 26 of the Civil Code.[100] He likewise observed that the lack of judicial precedents on privacy torts at that time (even until now) means that American jurisprudence on privacy torts could provide guidance as to what privacy torts could be filed in the Philippines.[101] In his separate opinion in a Philippine Supreme Court case, Justice Lucas Bersamin likewise looked to Prosser's four privacy torts and thereby incorporated them in the Philippine

94 Oscar Tan, above n 44, at 213.
95 See *Ayer v Capulong* (29 April 1988) (Supreme Court of the Philippines) GR No 82380.
96 See *Lagunzad v Vda de Gonzales* (6 August 1979) (Supreme Court of the Philippines) GR No 126466.
97 Antonio Carpio "Intentional Torts in Philippine Law" (1972) (5) Philippine Law Journal 649 at 669.
98 Civil Code, art 26.
99 See *Concepcion v Court of Appeals* (31 January 2000) (Supreme Court of the Philippines) GR No 120706.
100 Oscar Tan, above n 44, at 139.
101 Carpio, above n 97, at 686.

jurisprudence.[102] He recognised that Prosser's four privacy torts may potentially be the source of remedies in the Philippines.[103] What is important for making a claim of privacy tort under art 26 is that damages are granted for the violation of a person's dignity, personality, privacy and peace of mind.[104]

The fourth privacy tort discussed by Prosser is the appropriation of one's name and likeness for another's commercial advantage. Whilst Philippine jurisprudence is at least clear that appropriation is a privacy tort that may claimed under art 26 of the Civil Code, the question remains as to whether this could be the source of a right of publicity by Filipino celebrities. In this regard, the Philippines is a clean slate: it does not have a Philippine right of publicity that has developed in the manner that it did in the US. Such a clean slate, however, provides space to argue that Philippine celebrities' right to privacy had been violated by unauthorised advertisements appropriating their image, name and likeness. Article 26 of the Civil Code provides a viable cause of action to protect the personality and privacy aspect that is considered to be an underpinning principle of a right of publicity. As previously discussed, unlike the varied paths that the right to privacy and of publicity have taken depending on state law of the United States, there is an opportunity to argue in the Philippine context that the right to privacy can protect against false endorsements involving celebrities by going back to the original conceptualisation of privacy that protects all persons without distinguishing whether that person is a celebrity or actively courts publicity in other ways, and by emphasising the relationship between privacy, liberty and autonomous self-definition. This argument is less difficult to accept when the hurt feelings of Melendez, Salonga and Santos are taken into consideration; their reactions appear to connote shame, disappointment, and hurt feelings from how they were portrayed in the false endorsements or the suggestion that they would even want to be associated with such brands, than a wasted opportunity for them to earn income from the use of their image. In all three cases, the unauthorised advertisements intrude on the celebrities' right to control how the public views them, and the celebrities themselves have made clear in their social media posts how offended they were by the unwarranted publicity and unwanted associations with the products. This proposed approach is also more realistic than expecting Philippine courts to move from a right to privacy to a right of publicity in the manner that Frank J did in *Haelan Laboratories Inc*, and treat them separately. For one, the illustrative cases support the notion that Filipino celebrities suffer from hurt feelings and a violation of their right to privacy (or at least their right to define their personality), anchored on its original conceptualisation. Besides, the

102 See *Pollo v Constantino-David* (18 October 2011) (Supreme Court of the Philippines) GR No 181881.
103 *Pollo v Constantino-David*, above n 102.
104 *Concepcion v Court of Appeals*, above n 99.

Philippine right to privacy had not yet been thoroughly dissected and differentiated from the right of publicity in the manner that the United States' state law had done so.

If appropriation torts anchored on privacy are used by Filipino celebrities in false endorsement cases, what could perhaps prevent them from succeeding in their claims is the public figure doctrine. Because of their accomplishments, fame or particular profession, such public figures are considered to have a generally decreased expectation of privacy and would naturally be the subject of public discussion.[105] However, the Philippine Supreme Court has qualified that being a public figure does not automatically destroy or supersede a person's right to privacy.[106] To determine whether the celebrity's claim would prevail, despite his or her public figure status, the question that must be asked is whether the interest sought to be protected by the right to privacy is "the right to be free from unwarranted publicity, from the wrongful publicising of private affairs and activities of an individual which are outside the realm of legitimate concern".[107] On this basis, Philippine celebrities clearly have not lost their right to file privacy claims against false endorsements, if the publicised matters are outside the realm of legitimate concern and refer to private affairs. Clearly, untruths — that a celebrity is endorsing a product or a service when that is clearly not the case — are outside the realm of legitimate concern and should be protected by the right to privacy.

V. The Celebrity's Image as a Property Right

Privacy torts may not be the Filipino celebrity's only remedy in cases of false endorsements, as in other jurisdictions, unfair competition laws are also a source of remedy.[108] This part discusses whether Philippine unfair competition laws may be expanded to provide a source of action in cases of unauthorised advertisements of celebrities.

A. The State-Based Right of Publicity

The 1977 decision in *Zacchini v Scripps-Howard Broadcasting* is considered to have "cemented the right of publicity's break from the right of privacy and its placement into the intellectual property framework".[109] The case involved a reporter who filmed Hugo Zacchini's human cannonball routine, consisting of about 15 seconds, which

105 *Ayer v Capulong*, above n 95.
106 *Lagunzad v Vda de Gonzales*, above n 96.
107 *Ayer v Capulong*, above n 96, citing *Smith v National Broadcasting Co* 292 P 2d 600 (1956).
108 Rothman, above n 8, at 317.
109 At 302; and *Zacchini v Scripps-Howard Broadcasting Co* 433 US 562 (1977).

was then broadcast on the nightly news.[110] The Supreme Court of the United States in this case established the right of publicity with a particular view that at that time had not yet been widely considered:[111] that the "State's interest in permitting a right of publicity is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment".[112] Instead of focusing on the mental distress that Zacchini might have suffered, the Court considered the State's interest as analogous to patent and copyright law, focusing on Zacchini's right to reap the rewards from his economic endeavours.[113] In this context and, as applied in succeeding cases, the independent right of publicity assures that the commercial exploitation of an individual's fame properly belongs to the famous individual concerned.[114]

The marked shift of the publicity right from its roots in privacy torts to an intellectual property right can be attributed to the American veneration of intellectual property to foster innovation and enterprise, extending this idea to the commercialisation of a celebrity's personal attributes.[115] The right of publicity has been defined as a remedy that grants damages and injunctive relief if an individual's name, likeness, image, voice or other indicia of identity without that individual's permission and usually for commercial purposes.[116] An all-encompassing definition, however, is difficult to make, considering the wide variation, differences in scope and lack of uniformity among states that provide for its protection.[117]

For example, New York does not recognise a common law right of publicity, but a limited one based on privacy statute: New York Civil Rights Law ss 50 and 51 limit protection against the unauthorised use of a person's name, portrait, picture and voice for advertising or trade purposes.[118] California's right of publicity is set out in s 3344 of the California Civil Code.[119] In common law, the right of publicity has expanded and has been applied in cases involving a celebrity's distinctive voice

110 *Zacchini v Scripps-How*ard, above n 109, at 579.
111 Rothman, above n 8, at 302.
112 *Zacchini v Scripps-Howard*, above n 109, at 586.
113 At 586.
114 McCarthy, above n 34, at vol, 1 pt 3, ch 1.
115 Dinwoodie and Richardson, above n 80, at 427.
116 Jennifer Rothman "The Inalienable Right of Publicity" (2012) 101 Geo LJ 185 at 187.
117 Jennifer Rothman "The Other Side of Garcia: The Right of Publicity and Copyright Preemption" (2016) 39(3) Colum JL & Arts 441 at 446.
118 The New York Civil Rights Law s 51 provides that: "[a]ny person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action ... against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages."
119 The California Civil Code s 3344 allows any living person to sue anybody else who, without prior consent, knowingly uses his or her name, voice, signature, likeness, or still or moving photograph in any manner on or in merchandise, or to advertise or sell products or services.

being simulated, the use of a famous phrase associated with a famous personality, and even an iconic character the celebrity is known to have portrayed.[120] McKenna argues that the expansion of the right of publicity to cover these broad examples was a predictable consequence of the singular focus of the publicity right on protecting the economic value of commodified identity.[121]

Whilst enacting a statutory right of publicity appears a straightforward solution to this legal gap, it is a high-risk undertaking in the general scheme of responsive law reform,[122] and may be unnecessary if there are current laws that may be mobilised. Moreover, the problem in enacting a right of publicity statute is that the well-founded privacy-related justifications to the right of publicity risk being dismissed. The task for arguing for a property right in the commercial exploitation of one's personality thus falls on the existing intellectual property laws in the Philippines. The celebrity may assert this property right if the basis of the violation is not hurt feelings and a violation of the right to self-determination, but economic losses that would have been earned had the false advertisement been authorised.

B. False Endorsement and Unfair Competition as a Remedy against False Endorsements

The property right in the commercial exploitation of one's personality can be protected by false endorsement and unfair competition, which typically require the concurrence of certain elements: a misrepresentation on the part of the defendant, the goodwill of the claimant and damages caused to the claimant because of the misrepresentation.[123] By way of example, the statutory language of s 43(a) of the Lanham Act, the federal trademark law of the United States and federal equivalent to the right of publicity, is broad enough to include false endorsement claims.[124] The relevant provision refers to false designations of origin, or false descriptions or representations:[125]

> Any person who, on or in connection with any goods or services ... uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact,

120 McKenna, above n 46, at 233.
121 At 233.
122 Richardson, above n 6, at 25.
123 Moskalenko, above n 47, at 115.
124 *ETW Corporation v Jireh Publishing Inc* 322 F 3d 915 at 923 (6th Cir, 2003), citing Bruce Keller "The Right of Publicity: Past, Present, and Future" (2000) 1207 PLI Corporate Law and Practice and Handbook 159 at 170.
125 Trademark Act of 1946, 15 USC § 43(a).

> or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person … shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

A false endorsement claim under the Lanham Act can be a cause of action in cases where the celebrity's identity is associated or connected with a product or service in a manner that is likely to mislead consumers that the celebrity endorsed or approved it (the likelihood of confusion).[126] Celebrities have been able to make false endorsement claims for the unauthorised use of their image and likeness in commercial advertisements, when such use suggests celebrity endorsement.[127] The likelihood of confusion test for a false endorsement claim, however, understandably has its limitations. In the case of artistic works, it will prevail only if the public interest in avoiding consumer confusion is greater than the public interest in free speech.[128] A balancing test between freedom of expression (artistic relevance) and consumer confusion is involved: the first hurdle is whether the level of artistic relevance is at least above zero, and that being the case, the false endorsement claim could win only if the use explicitly misled consumers about the source or content of the work.[129] False endorsement claims under the Lanham Act may raise conflicts with copyright law, particularly by limiting the production or licensing of derivative works, among others,[130] and by interfering with the right to display lawfully purchased works.[131]

C. Unfair Competition and Passing Off under Philippine Law

Caudill observed that in the US, the "so-called right of publicity is often protected by less controversial doctrines of false endorsement and unfair competition".[132] This is an important observation that could make the unfair competition law of the Philippines a remedy for protecting the celebrity's property right of a celebrity

126 *ETW Corporation v Jireh Publishing Inc*, above n 129.
127 William Seiter "A Celebrity's Map to Rights of Privacy, Publicity, and Trademark in the United States" (2010) The Licensing Journal 7 at 12.
128 *Rogers v Grimaldi* 875 F 2d 994, 999 (2d Cir, 1989), cited in Caudill, above n 4, at 272.
129 Seiter, above n 132, at 15.
130 Rothman, above n 117, at 444.
131 At 445.
132 Caudill, above n 4, at 266.

in false endorsement cases. The equivalent of s 43(a) of the Lanham Act in the Philippines is s 169.1, the provision on passing off, of the Intellectual Property Code of the Philippines (IP Code).[133] The caption (false designation of origin; false description or representation) and language of the two provisions are the same, with s 169.1 of the IP Code specifying that the violator shall be liable to a civil action for damages and injunction. Whilst the Philippine Supreme Court has not applied s 169.1 in the context of false endorsements, the specific question of whether it does has reached the Philippine Court of Appeals.

The Philippine Court of Appeals has considered a passing off claim in the context of a false endorsement in the case of *Andres Sanchez v Honorable Judge Ramon Paul Hernando*.[134] It involved Emmanuel Pacquiao, a famous boxing sports athlete, filing a case for passing off under s 169.1 of the IP Code against G2K Corporation and In-A-Jiffy Enterprises. He alleged that the corporations, without his permission, misrepresented to the public that he is endorsing a karaoke product called Magic Sing.[135] At a 2006 boxing match between Pacquiao and Erik Morales, the corporations purchased more than 3,000 copies of Pacquiao's music album with the intention of giving the copies for free to customers who purchased the products. Pacquiao filed a case before the trial court, arguing that s 169.1 of the IP Code, which mirrors s 43(a) of the Lanham Act, should protect his image rights. The trial court used the statutory construction principle that, where local statutes are patterned after a foreign country, the interpretation of the foreign law by that country of origin is entitled to great weight. On this basis, Pacquiao's right of publicity based on the s 169.1 of *the IP Code was* recognised.[136] When the case was appealed to the Court of Appeals, the defendant corporations sought to dismiss Pacquiao's complaint on technical grounds, in that it failed to allege the material elements required for a false endorsement claim under s 169.1.[137] The Court of Appeals denied the motion to dismiss, paving the way for the case to be litigated in court.

Since the Court of Appeals ruling on this interlocutory motion, though, there has been no update on the progress of the case, and more importantly, whether the false endorsement claim under s 169.1 of the IP Code succeeded. Still, despite the non-precedential nature of its ruling, it provides a glimpse into the national appellate court's tolerance for recognising the existence of this right.

133 Intellectual Property Code of the Philippines (Philippines) 6 June 1997, s 1691.1 [IP Code].

134 "CA Gives "Green Light" on Pacman's Case vs Wow Magic Sing" (8 July 2009) Balita.ph <balita.ph>.

135 Augusto Bundang "It's a Knockout! Publicity Rights in the Philippines" (10 January 2012) World Intellectual Property Review <www.worldipreview.com>.

136 Bundang, above n 135.

137 Balita.ph, above n 134.

Interpreting s 169.1 of the IP Code to include false endorsements, based on how s 43(a) of the Lanham Act has been interpreted and following the statutory construction principle that statutes copied from another country are construed based on how courts in that country have interpreted them, has basis in Philippine law. In some of its earliest cases, the Philippine Supreme Court has ruled that foreign statutes that have been adopted in the Philippines form part of the legislative history of the local law.[138] Further, the decisions of the court of the country from which the foreign statute originates are entitled to great weight, and will generally be entitled to great weight if they are found to be reasonable and consistent with justice, public policy and other local laws on the subject.[139]

Perhaps an additional point that the Philippine Supreme Court may consider in interpreting s 169.1 of the IP Code as including false endorsements is the provision's emphasis on what it considers as the "true test" of unfair competition: proof of fraudulent intent, and whether the defendant's acts were calculated to deceive an ordinary buyer making a purchase under the ordinary conditions of the particular trade to which the controversy relates.[140] Without precluding what would surely be an interesting discussion of the Philippine Supreme Court on how s 169.1 of the IP Code can accommodate false endorsement claims, proof of fraudulent intent seems clear in the illustrative cases of Melendez, Salonga, and Santos. The product brands and the advertisers, in appropriating the images of these celebrities, were riding on their fame and hoping to gain commercial advantage from what appears to be enduring efforts on the part of Melendez to maintain a certain image, or for Salonga and Santos to sustain their popularity and online presence.

Should the limitations of false endorsement claims (as elaborated in the US) be applied in the illustrative cases, the balancing test should not constrain false endorsement claims that Melendez, Salonga and Santos could make. The messages of the unauthorised advertisements, as shown by the illustrations above, provide little by way of artistic value, and make bold claims about their effectiveness, supposedly backed by the celebrities themselves. For example, in Melendez's case, the advertisement claimed that she used the coffee product and underwent an "amazing transformation" that the consumer could likewise go through, with "no diet, no exercise, [but] just a cup of coffee a day". In Santos's case, the false endorsement was even written as a testimonial, with Santos herself supposedly saying that after using the product for just two weeks, she lost 11 kg.

138 *US v Guzman* (1915) (Supreme Court of the Philippines) 30 Phil 416; and *Kepner v US* (1904) (Supreme Court of the Philippines) 11 Phil 669.

139 *Wise & Co v Meer* (1947) (Supreme Court of the Philippines) 78 Phil 655; and *Carolina Industries Inc v CMS Stock Brokerage Inc* (17 May 1980) (Supreme Court of the Philippines) GR No 46908.

140 *Coca-Cola Bottlers Inc v Quintin Gomez* (2008) (Supreme Court of the Philippines) 571 SCRA 18.

VI. Conclusion

In arguing that a right of publicity merits recognition in Philippine law without the invention of a new law, this paper has followed the hypothesis that "law reform [should] generally follow a minimalist path with more radical steps reserved for exceptional cases where more minimalist approaches have proved unsuccessful".[141] The right to privacy in Philippine law is in a state undeveloped enough to accommodate a right of publicity, by using its justification to protect unwarranted publicity about oneself regardless of one's status in the public eye, as well as its value in fulfilling the autonomous self-determination. True enough, the cases here illustrate that celebrities can suffer hurt feelings when their name, image, and likeness are used in false endorsements — the right to privacy protects this, and a strictly tailored right of publicity may overlook this. Thus, when this matter is to be decided upon, Philippine courts must not be so quick to dismiss such hurt feelings, as they are evidently not unique to private individuals. As a complement, the commercial exploitation of a celebrity's personality as a property right is protected in Philippine law by its unfair competition law under s 169.1 of the IP Code.

The conceptualisation of a right of publicity in the Philippines is forthcoming. This paper has laid down the necessary groundwork for addressing the legal arguments to justify the privacy and property dimensions of a right of publicity in Philippine law. Because the Philippines is a clean slate in terms of expressly recognising a right of publicity, it is uniquely positioned to consider the equally compelling merits of both the privacy and property dimensions inscribed in the right of publicity, without necessarily valuing one as more deserving of protection than the other. That both causes of action may ultimately result in the same award of damages does not mean that one should readily be valued over the other, as human motivations are unsurprisingly complex; certain celebrities may value the vindication of their privacy and their hurt feelings over the vindication of their economic rights.

141 Richardson, above n 6, at 26.