



The Publicity Right in Israel: An Example of Mixed Origins, Values, Rules, Interests and Branches of Law

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Preface

Personality rights are gaining force in Israeli law. The cluster of these rights – the right to reputation, privacy, the traditional moral right and the publicity right – which rests on a mixture of origins, interests and values, poses some very interesting questions. In this paper, I will try to analyze some of these questions, using a recent decision by Israel's Supreme Court on the publicity right as a helpful case study.

This cited court decision ended a long and widely publicized advertising battle waged between two hamburger chains and a basketball player named Ariel McDonald. After tracing the essence and origins of the interests protected by the publicity right, the court decided that Israeli law protects this right through the Unjust Enrichment Law¹ rather than the Protection of Privacy Law² despite explicit references in the later to circumstances of using someone's image, picture or voice for profit. The court's decision thus seriously handicapped and regrettably obscured this law in particular and the law of torts in general.

Israel's Supreme Court's decision in the McDonald case will be analyzed by applying two avenues of argumentation. First, "pure Israeli system-based" arguments relating to the inner logic of the structure of personality rights at large and the publicity right in particular as constructed by Israeli legislation will be applied to the history of the right's evolution from a 'non-existent' status to a debatable right at the crossroads of constitutional law, tort law and UJEL. Second, the comparative law perspective, which offers a wealth of academic research and a rich diversity of theoretical and practical legal tools for conducting such an examination, will be used to support the position taken.

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¹ Unjust Enrichment Law, 1979, S.H. 42 (hereinafter UJEL).

² Protection of Privacy Law, 1981, S.H. 128 (hereinafter PPL).

Apart from providing a close look at the way the publicity right developed – between legislation and case law, between pure theory and real life – this paper will also show how delicate the use of comparative law is and how vigilantly the findings of comparative research should be applied.

But first let me very briefly describe the core features of Israel's legal system, with greater detail devoted to the tort system. I shall try to focus on the features that will best serve us later, when dealing with this paper's specific issue.

I. General Aspects of Israel's Legal System and Tort Law

The origins of Israel's legal system lie in Ottoman Law (mainly the Ottoman civil law codex, the *Mejella*) which was heavily based on European law on the one hand and English law (Acts, Ordinances, common law and Equity) on the other. The Israeli system's "autonomy" began in 1948, yet left the bulk of pre-independence law untouched.³ Since then, the system has come a long way from those origins both in public and private law. The Ottoman heritage has almost completely vanished,⁴ massive legislation has systematically covered almost every aspect of life in Israel's modern democratic society and an original Israeli common law has emerged.⁵ However, contrary to expectations, the system still continues to reflect its mixed origins.

Social, economic and political issues have stalled enactment of an Israeli Constitution and Human Rights Bill. Instead, a series of Basic Laws has been enacted; from the very beginning, these were intended to form, when completed, the legal foundations of the state's future Constitution. These Basic Laws – 11 in number – cover most areas of traditional constitutional law and human rights. The most important of these is the Basic Law: Human Dignity and Liberty,⁶ which prohibits violation of the life, body, dignity and property of any person as such.

To date, Israel's democratic constitutional process still faces hurdles rooted in the country's highly complex social fabric; hence, some crucial fundamental human rights remain uncovered by Basic Laws. Free speech is one of the most prominent of those missing rights. Yet, lack of any specific protection of free speech in the Basic Laws does not seem to have held back Israel's Supreme Court in its campaign, apparently gaining in force, to enhance and strengthen this right – at least as long as doing so does not endanger state security.⁷

As in other jurisdictions, Israel's Basic Laws are addressed to the government and its servants. However, Israel's Supreme Court long ago established that even if Basic Laws do not directly apply to private litigants – the accepted view of most Israeli jurists – the respective principles and values nevertheless do apply – indirectly – in private litigation as well.

³ Law and Administration Ordinance, 1948, P.G. Supp. II 1.

⁴ The *Mejelle* was officially abolished when the Knesset passed the Abolishment of the *Mejelle* Law, 1984, S.H. 156.

⁵ Foundations of Justice Law, 1980, S.H. 163, mandates that lacunas in the law be answered with references to Israel's heritage and principles of freedom, justice, equity and peace.

⁶ Basic Law: Human Dignity and Liberty, 1992, S.H. 150.

⁷ H CJ 4804/94 Station Film Co. v. The Film Review Board [1997] IsrSC 50(5) 661.

It is important to note that private law in Israel has yet to be codified. Due to the legal system's mixed origins and the diverse, sometimes contradictory concepts and principles guiding the different fields of private law, the work of codification begun in the 1970s still awaits completion. When the code is finalized, some of the "mixed" features of the Israeli system will be eliminated, with many Continental and English law characteristics merged into an integrated Israeli system.

As to Israeli tort law, the major source of liability is the Civil Wrongs Ordinance,⁸ enacted by British Mandate authorities in 1947. It was – and to some extent still is – a reflection of the then-current English tort law. The Ordinance was replaced in 1968 by a formal Hebrew version.⁹ According to the Ordinance and the ensuing legislation, tort liability in Israel does not rest on one general rule or coherent set of protected interests. Rather, liability stems from specific provisions that expressly stipulate when and to what extent tort liability exists. This perception of tort law is so deeply entrenched in Israel that despite ongoing changes in Israeli private law – and irrespective of its gradual internal growth and transformation into "negligence law" – the system still reflects (at least formally) a law of torts rather than a tort law.

The torts included in the Ordinance and in other related tort acts are divided into two categories: general torts – negligence and breach of statutory duty – and specific or nominal torts, such as assault, conversion, passing off and breach of contract. These torts appear as a closed list. In consequence, general torts – with their open-endedness and the wide discretion they confer on the courts – became the main tools by which tort liability was expanded, adjusted and modified to protect the new interests that have arisen in Israel's dynamic cultural, social and political environment.¹⁰ The implications of the expanding domain of negligence regarding personality rights at large and the publicity right in particular will be explored later.

II. Personality Rights in Israeli Law

Personality rights in Israel developed in a manner resembling the course followed by Israeli private law in method as well as substance. The original Civil Wrongs Ordinance did not accommodate any reference whatsoever to either a privacy or a publicity right. The only remedy to personality abuse – given that the CWO dealt with remedies rather than rights – dealt with abuse of reputation.¹¹ Only in 1974 was a new remedy introduced therein – a remedy for damages caused by non-consensual use of a person's "name, image, or voice" in commercial contexts.¹²

⁸ Civil Wrongs Ordinance, 1944, Supp. I 129 (hereinafter: CWO).

⁹ Civil Wrongs Ordinance, 1968, N.H 266.

¹⁰ The history and development of the Israeli Tort in its formative era is best explained by GAD TEDESCHI, *THE LAW OF CIVIL WRONGS*, (Aharon Barak, Mishael Cheshin & IZHAK ENGLARD eds., 1969); ISRAEL GILEAD, *INTERNATIONAL ENCYCLOPAEDIA OF LAWS* 19–37 (Roger Blanpain ed., 2003).

¹¹ At the time, Criminal liability for libel was defined in the Criminal Code Ordinance, 1936, Supp. I 263; Civil liability was set in the Civil Wrongs Ordinance, §§ 16–22, 1944, Supp. I 129.

¹² § 34A was repealed by the Protection of Privacy Law, § 33, 1981, S.H. 128.

The Defamation Law¹³ came next. It replaced the CWO's dual protection of reputation. However, it also combined civil and criminal liability under the same legal conceptual rules even though the elements of the two types of liability slightly differ.¹⁴ In 1981, the Israeli legislator – in a very independent and noteworthy action – introduced a new right into Israel's English-based tort law: the right of privacy. This right remains, to date, only partially protected in English law. Sec. 1 of Israel's Protection of Privacy Law clearly states that “no person shall infringe the privacy of another without his consent”. Sec. 2 enumerates and elaborates 11 ways by which the right can be infringed. These forms of infringement quite precisely reflect the monumental Warren & Brandeis¹⁵ combined privacy right, together with the 4 aspects of the right as delineated by Dean Prosser.¹⁶ Regarding the right that we now call the “publicity right”, sec. 2(6) of the PPL – which replaced sec. 34A of the CWO – clearly states that: “Infringement of privacy is using a person's name, appellation, picture or voice for profit.”¹⁷

The next and perhaps most important step taken toward protection of the personality right was enactment of the Basic Law: Human Dignity and Liberty in 1992.¹⁸ The law specifically states that “all persons have the right to privacy and to intimacy”, that their privacy right prohibits entry into private premises, search of their private premises and person in addition to violation of the confidentiality with respect to their conversation, writings or records.

It is important to note at this stage that although the Basic Law and the PPL both refer to the rights of “privacy”, these two pieces of legislation continue to differ slightly as to what “privacy” means and how it is to be protected. Although the PPL notes 11 ways of infringing privacy – while again remaining free of any explicit reference to a “right” – the Basic Law openly declares the official birth of such a right. However, it then goes on to refer to only selected aspects of the right as defined in the PPL. Thus, for example, the right to claim damages for nonconsensual use of a person's picture, voice or image is mentioned only in the PPL but is omitted from the Basic Law's reference to the newly born right. Although this mismatch between the two laws may well be regarded by some as an unintentional omission and by others as commonplace divergences rooted in the political craftsmanship underlying legislation of basic versus specific laws, the discrepancy can serve as an unfailing source of uncertainties, the most pressing of which is the following: among the many faces of privacy, are those mentioned in the Basic Law “better protected” than those mentioned only in the PPL? Do those omitted still enjoy the same umbrella-like constitutional-type protection provided by the Basic Law, explicit in the “protection-of-privacy” wording of its subsection (a)? If so, does this protection apply to private law litigation as well?¹⁹

These and other questions of the same order deserve a separate discussion. At the moment, we need only bear in mind that the publicity right – which appears only in the PPL and not in the Basic Law, is – to some extent – only remotely related to the right of privacy in its true sense; it does not in truth represent part of privacy's core essence or inner ethos.

¹³ Defamation Law, 1965, S.H. 240 (hereinafter DPL).

¹⁴ Mainly regarding the number of people addressed and the need for criminal intent (foreseeability is insufficient,) see CrimFH 9818/01 Bitton v. Sultan [2005] IsrSC 59 (6) 554.

¹⁵ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹⁶ William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

¹⁷ See *supra* text accompanying note 12.

¹⁸ Basic Law: Human Dignity and Liberty, 1992, S.H. 150.

¹⁹ On Basic Laws and Private Law see p. 3 para. 3; Aharon Barak, *Protected Human Rights and Private Law*, in KILINGHOFFER BOOK ON PUBLIC LAW (Itzhak Zamir ed., 1993).

The Israeli courts' gradual acceptance of the two somewhat "virtual" rights, specifically, the right to reputation and the right to privacy, followed similar paths. During the state's first decades, defamation cases were relatively rare whereas nowadays, numerous cases are filed every month. The same phenomenon has been witnessed in the last few years, although on a somewhat smaller scale, with respect to privacy claims.²⁰

The PPL itself, in offering a new defense for a new interest – the hitherto unprotected privacy right at large – was met with a mixture of suspicion and enthusiasm upon its enactment. However, the law was rarely called into action at first. When it was, the courts tended to interpret it very narrowly.²¹

In recent years, though, one can detect a change in attitude and a growing tendency toward expanding the protection given to privacy interests due, no doubt, to the impact of Basic Law: Human Dignity and Liberty.²² The gradual switch from the original meager protection to broader protection is echoed in the growing number of privacy cases litigated mainly in the magistrates' courts. The new "popularity" enjoyed by reputation and privacy may provide at least one reason for the continuing modifications observed in the respective Israeli judgments. Some of these are quite questionable, as we shall shortly learn.

Notwithstanding the parallels in the history and development of the PPL and the DPL, it should be noted that Israeli legislation and its interpretation – unlike other mixed legal systems such as those of South Africa and Scotland, where the issue is still being debated²³ – adopted a very clear-cut distinction between the interests protected by the DPL and those protected by the PPL.

The DPL protects only a person's interest in his reputation, i.e., the esteem in which society holds him. It does not protect self-esteem, or hurt feelings. Self-worth is protected only marginally by the PPL, as sec. 2 of the law clearly indicates. On the other hand, unlike the German formula,²⁴ the DPL's protection of reputation is broader in the sense that it not only accommodates the social aspect of reputation, meaning the assessment of the plaintiff as rendered by any "right-thinking man in society in general,"²⁵ it also covers the economic aspects of reputation, meaning the loss of personal economic goodwill or patrimony induced by the tarnishing of one's reputation. These two protections, as offered by the DPL, should help us analyze the protection of interests offered by the PPL, especially with respect to the publicity right.²⁶

²⁰ Omer Tene, *Israeli Data Protection Law: Conceptual, Constitutional and Regulatory Reform*, 7 KIRYAT HAMISPAT (forthcoming Aug. 2008).

²¹ HCJ 249/82 Vaknin v. The Military Court of Appeal [1983] IsrSC 37(2) 393; CrimFH 9818/01 Bitton v. Sultan [2005] IsrSC 59 (6) 554, 582–586.

²² Basic Law: Human Dignity and Liberty, 1992, S.H. 150.

²³ JONATHAN BURCHELL & KENNETH M. NORRIE, *Impairment of Reputation, Dignity and Privacy*, in MIXED LEGAL SYSTEMS IN COMPARATIVE PERSPECTIVE 545 (2004).

²⁴ See *Id.*

²⁵ The courts are sometimes ready to take into account a unique community's ideas and habits. This was the case in CA 466/83 Shaha v. Dardarian [1986] IsrSC 39(4) 734.

²⁶ For a comprehensive review on Israeli Defamation Law See: KHALID GHANAYIM, MORDECHAI KREMNIETZ & BOAZ SHNOOR, *LIBEL LAW: DE LEGE LATA and DE LEGE FERENDA* (2005); ORI SHENHAR, *DEFAMATION LAW* (1997); DAN HAY, *THE RIGHT to PRIVACY in ISRAEL* (2006).

This overview of the legal tools by which personality rights are protected in Israel would be incomplete without mentioning two other sources of such legal liability:

1. The Moral Right. This ancient right, based on diverse justifications and theories,²⁷ has been part of Israeli law since enactment of the Copyright Ordinance.²⁸ Similar to the Bern Convention,²⁹ which Israel signed, the Copyright Ordinance defends an author's right "to have his name stated with his work, to an extent and degree customary" (the proprietary interest) in addition to demanding "that no falsification, damage or other change be made on his work [...] in a manner liable to injure its author's honor or reputation" (the emotional interest). The Copyright Ordinance will soon be replaced by a modern Copyright law³⁰ that will include, *inter alia*, a crucial amendment: the open and explicit introduction of the defense of "fair use." This defense represents the free speech interest, now to be treated as a limitation of the author's moral right.³¹
2. The Tort of Negligence. Negligence, undoubtedly the star of the CWO but also of Israeli tort law in general, is in fact the main source of Israel's swelling tort law in all areas of human activity, including personality rights. This open-ended tort was the vehicle used by Israel's Supreme Court in a series of decisions, handed down during the last ten years, which culminated in the recognition of a new constitutionally based duty of care: the duty to protect personal autonomy in matters of physical integrity³² as well as financial decisions and actions.³³

There is no doubt that under the very broad liability regime associated with negligence, personality rights may flourish. Negligence, particularly when linked with human autonomy – which is still quite virtual in Israeli law³⁴ – especially when perceived as the pipeline through which constitutional principles should affect conceptual tort liability curbs – such as "reasonable" and "foreseeable" – may soon overwhelm all other specific or nominal torts, and may thus become the optimal cause of action even in defamation and privacy cases, where a nominal tort concurrently exists.³⁵

²⁷Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67 (2007); Leslie K. Treiger-Bar-Am, *The Moral Right of Integrity: A Freedom of Expression*, in 2 NEW DIRECTIONS IN COPYRIGHT LAW 127 (Fiona Macmillan ed., 2006).

²⁸ Copyright Ordinance, 1924, LSI 364 (hereinafter Copyright Ordinance).

²⁹ Berne Convention for the Protection of Literary and Artistic Works, KA 737, 581.

³⁰ Draft bill amending the Copyright Ordinance, 2005, HH, 196.

³¹ *Id.* §19. Even though the moral right is quite an esoteric right when compared to reputation and privacy, a recent very famous case returned this right to the limelight. Nonetheless, *Mosinzon v. Efrati*, 1437/02, Nevo, CC(TA) (Mar. 26, 2003) and other Israeli cases have not triggered a similar depth of argumentation as the American cases, such as the famous *Gone with the Wind* case: *Suntrust Bank v. Houghton Mifflin Comp.*, 136 F.Supp.2d 1357 (GA. N.D. 2001); *Suntrust Bank v. Houghton Mifflin Comp.*, 268 F.3d (11th Cir. 2001) 1257. Hence, the entire issue of "special defamation", by which authors and other artists are protected from abuse, ridicule or defamatory use of their artistic creations, is still unsettled.

³² CA 2781/93 *Daaka v. Carmel Medical Center* [1999] IsrSC 53(4) 526; CA 1338/97 *Tnuva Food Industries Ltd. v. Rabi* [2003] IsrSC 57(4) 673.

³³ CA 9136/02 *Mister Money Inc. v. Reiz* [2004] IsrSc 58(3) 934.

³⁴ *Id.* at 946–47; *Daaka*, IsrSC 53(4) at 526; *Tnuva Food Industries Ltd.*, IsrSC 57(4) at 673.

³⁵ As to the use of Negligence in cases of Unfair Competition see: OFER GROSSKOPF, *Protection of Competition Rules via the Law of Unjust Enrichment* (2002). On use of negligence in defamation cases see CA 3199/93 *Crause v. Yediot Acharonot newspaper* [1995] IsrSC 49(2) 843; *Crause v. Yediot Acharonot newspaper*, 7325/95, Nevo, CFH (June 29, 1998); *Ghanayim*, *supra* note 26, at 212, 236.

All the previously mentioned working tools were handed to the courts by the Israeli legislator for the purpose of protecting personality rights. Yet, the growing tendency to use those tools to guard as well as enhance these rights seems out of step with other trends observed in the matter of the publicity right, to which we turn now.

III. Emergence of the Publicity Right

A. History

As we already know, the right now called the “publicity right” was originally introduced into Israeli tort law only in 1974, when sec. 34A of the CWO first gave recognition to a person’s right to control the physical characteristics of his image – his name, voice and picture – not only in cases where the use of these characteristics harmed his reputation but also in cases when their unauthorized use, even in non-defamatory situations, was profit-motivated.³⁶

The lack of a cause of action in cases of nonconsensual personality use prior to 1974 was strongly criticized by the Tel-Aviv District Court. For instance, in 1955, in a celebrated case whose facts closely resembled the famous English case of *Tolley v. Fry*,³⁷ the Israeli defendants were likewise a firm of chocolate manufacturers and the plaintiff a prominent theatrical star. The actor agreed to the defendant’s use of his picture – together with pictures of other famous actors from all over the world – in a commercial brochure. However, the defendant also used the picture on one of the firm’s chocolate bar wrappers. Here, the plaintiff failed to show a cause of action.³⁸ His defamation case failed because the court ruled that publication of the actor’s picture on the wrapper could not harm the actor’s reputation in the eyes of a “right-thinking man.” His privacy cause failed on two counts, which were indeed two sides of the same logical coin: first, the “personal tort” was not introduced into the CWO by the British Mandatory legislator because, *inter alia*, privacy was not recognized in English tort law at that time; second, the torts in the CWO belonged to a closed list – as the court indicated with great disapproval – which prohibited the court – even when he thought the case called for a remedy – from imposing liability.³⁹

In 1981, when the PPL was enacted, section 34A was transferred from the CWO to Sec. 2 of the new Law; it included 10 other ways of infringing the privacy right. As to constitutional protection, we should recall that the publicity right as a “privacy right component” was not mentioned in Basic Law: Human Dignity and Liberty.

Just like the case of moral right, here too, we witness importation of non-English tort liability into the Israeli system in a way typical of the “Israelization” of Israeli private law in general. Yet, while in the case of moral right the importation was European in origin⁴⁰ and the legal interpretation of the right remained essentially European, in the case of the publicity right,

³⁶ Draft bill amending the Civil Wrongs Ordinance (no. 5), 1974, HH 737.

³⁷ *Tolley v. Fry* [1931] A.C. 131 (H.L.)

³⁸ CC (TA) 144/55 *Yadin v. Z.D Ltd.* [1955] IsrDC 11 202.

³⁹ It is interesting to note that the Court attributes the fact that the legislator determined a closed list of torts to his desire not wanting to give Palestine’s courts too much freedom to exercise their own judgment regarding development of the law. See also CA 68/56 *Rabinovitch v. Michlin* [1957] IsrSC 11 1224.

⁴⁰ *Vinberg v. Vizoef*, 31376/05, Nevo, CC (TA) (Sept. 19, 2006); *Honey v. Adler Homski & Warshavsky Ltd.*, 6157/04, Nevo, CC(Jer.) (Nov. 7, 2006); Tamar Gidron, *The Era of Parody, On “Hasamba”, “Gone with the Wind”, “Peter Pan” and What Lies Between Them*, 10 *Hamishpat* 9 (2005).

even though the sources were of dual origin – European and American – comparative law tended to be mostly American.⁴¹

Since 1974, all the respective publicity right cases have been decided by the courts with no difficulty and with no hesitation as to the theoretical nature of the protected interest and the source of liability. Hence, most plaintiffs who could satisfy the “for-profit” claim were successful. Israel’s leading basketball player,⁴² its most popular “weather man” (whose image was used by a look-alike⁴³) and others⁴⁴ all won their cases in Israel’s various district courts without arousing special academic or social interest. The law seemed to be clear and settled.

B. The McDonald Case

Recently, however, the issue of the publicity right rose to prominence in the wake of a Supreme Court decision that, after a switch in theoretical approach, unexpectedly unsettled the right’s clear waters in a rather questionable manner.

The story is quite unique. Ariel McDonald was a very well-known basketball player playing on Israel’s leading basketball team. Burger King, the famous fast food chain, hired McDonald to do a video advertisement. It showed McDonald trying to get into a Burger King concession wearing his team’s yellow shirt with his name inscribed on its back. He was not allowed to do so until he took off his shirt due to the inscription. When he finally did enter, he announced while munching Burger King’s largest hamburger: “Listen to me. For me, it’s only Burger King.” One day after the clip was aired, the competing chain, McDonald’s, joined the video ad fight by airing a video quoting a story published the previous year in an Israeli newspaper that quoted McDonald as saying that he preferred to eat at McDonald’s.

Burger King promptly cancelled its contract with McDonald, who lost approximately \$65,000. McDonald then sued McDonald’s for compensation due to the lost contract while claiming his reputation had been tarnished. He also claimed that McDonald’s had infringed upon his right to privacy as well as been unjustly enriched by their use of his name.

McDonald’s filed a counterclaim against the basketball player claiming his unauthorized use of its trademark. It won and was awarded the entire \$20,000 advance paid to Ariel McDonald by Burger King.⁴⁵ This amount was based on an unjust enrichment cause of action as the court ruled that McDonald’s had failed to prove any damages caused by the unauthorized use of its trademark. Ariel McDonald’s claim against the chain was primarily based on sec. 2(6) of the PPL, that is, his publicity right.

In its ruling, Israel’s Supreme Court reversed the District Court’s decision, which was consistent with previous district court decisions, and introduced a new interpretation to sec. 2(6) of the PPL. The court decided that this section, which explicitly relates to the use of a person’s “name, image and likeness” as an infringement of the right to privacy, is applicable only in cases where the plaintiff complains of being forced into the public eye against his wish.

⁴¹ CA 8483/02 McDonald v. McDonald (Alonial) Ltd. (No. 1) [2004] IsrSC 58(4) 314; McDonald v. McDonald Alonial Ltd. (No. 2), 4813/04, Nevo, CFH (Nov. 29, 2004).

⁴² CC (TA) Berkovitch v. Local Newspaper Ltd. [1991] IsrMC 12 385.

⁴³ CC (Jer.) 11049/90 Roop v. On Air-condition Engineering [1995] IsrMC 4 500.

⁴⁴ Amar v. Israel Post Comp., 667/97, Lawdata, CC (TA) (Mar. 3, 1999); Arenhaim v. Sportan Ramat Hasharon, 007290/02, Nevo, CC (KS) (July 3, 2003); Paz v. New Anplagad Ltd., 001096/06, CC (KS) (Nov. 11, 2006).

⁴⁵ *McDonald* (No. 1), *supra* note 41 IsrSC 58(4) at 314.

On the other hand, in cases like that of Ariel McDonald, when the plaintiff was prepared in principle to let his image be used for profit and was now complaining only of income lost due to the nonconsensual use of the economic value of his name, “privacy” is not the correct cause of action; hence, the PPL was inapplicable. The court further stressed that even if there was a privacy issue, the damages complaint was not of the type covered by the PPL, which only shields against emotional distress and grief, not economic loss and missed financial opportunities.

So, instead of the PPL in general and the explicit protection of “name, image and likeness,” the court sent Ariel McDonald to seek remedy under the UJEL, where sec. 1(1) states that: “Where a person obtains any property, service or any other benefit from another person without legal course, the beneficiary shall make restitution to the benefactor, and if restitution in kind is impossible or unreasonable, shall pay him the value of the benefit.” At the end of the day, the court denied liability here, too, due to the special circumstances of the case, concurrently justifying the McDonald’s use of Ariel McDonald’s name and image. By means of the same cause of action, the court awarded McDonald’s the \$20,000 that Burger King had paid Ariel McDonald, as noted above.

A petition for reconsideration of the case was denied by the Supreme Court, which noted that even though the case did establish some important precedents, mainly regarding trademarks law and privacy Law, the decisions issued were primarily influenced by the very special and unusual circumstances. It therefore chose to wait and see what impact the innovative issues would have on future cases and then reconsider the case if necessary.⁴⁶

This decision, which carries great theoretical weight, is also highly practical in nature, especially considering the growing number of similar cases currently reaching the courts on an almost daily basis. It was only a matter of time until a difficult case – in its presentation of borderline circumstantial facts – would require the courts to clarify the many associated questions.

C. The Publicity Right in Israel in Light of the McDonald Decision

The gist of the decision in the McDonald case can be stated as follows: the publicity right protects commercial and financial interests; the privacy right protects personal-emotional and social interests. The first right has been exported from the province of the PPL in particular and Tort Law in general to find shelter in the warm embrace of unjust enrichment, a sister branch of law. Only those who can convince the court that they consistently shun publicity are protected by the PPL.

As mentioned, the cited decision raises some difficult questions, the first of which relates to the substance of the arguments and the essence of the decision. It questions the “warm embrace” with which the Israeli court has welcomed the dichotomy – originating in other legal systems – between the privacy right and the publicity right, with each right protecting a distinct interest. The second question relates to the methodology applied in the McDonald case, especially regarding its use of comparative law, mainly American, on the one hand and Israeli law – or the absence of sufficient discussion in Israeli law – on the other hand. Each of these two questions invokes others that further complicate the effort to locate satisfactory answers.

⁴⁶ McDonald v. Alonial Ltd. (No, 2), 4813/04, Nevo, CFH (Nov. 29, 2004).

As to the theoretical issue, it is far too broad to be resolved here. In view of the huge amount of academic research on the subject – which still has not produced an adequate, satisfactory response – I shall restrict my discussion mainly to the Israeli system. Throughout this analysis I will refer to the foundations of the privacy v. publicity debate, which is as complicated today as it was when the publicity right began to attract judicial and academic interest.⁴⁷

Before presenting the conflicting arguments to the problematic decision delivered in the McDonald case, it may be useful to briefly think about two imaginary examples that will help focus the discussion. In the first example, Naomi Campbell, an international celebrity, famous model and, according to several publications, a woman with substance abuse problems, is photographed leaving a rehabilitation clinic. The same photo is consequently published, one in a daily newspaper accompanied by a story describing her as a drug addict, the other in a commercial advertisement for a new shelter in which elderly people can try to free themselves of long-life drug addiction. Campbell did not consent to the publication of either picture. Both situations may be categorized as privacy cases.⁴⁸

Now let's add a more hypothetical yet conceivable supposition: a few years earlier, Campbell herself had willingly taken part in a campaign against drugs and consented to the use of her picture in a commercial advertisement for a similar shelter for homeless addicted youngsters. In compensation for her participation in this campaign, she received a handsome fee.

Irrespective of the legal decision handed down by the House of Lords in a case bearing some resemblance to our example,⁴⁹ and notwithstanding the extremity of the two fictitious situations I have used to demonstrate the two ends of a scale covering multiple factual possibilities, it is clear that in light of the McDonald decision, the first publication – the newspaper story – is a privacy case whereas the other publication – the ad for the shelter – is a publicity case. But what if we eliminate from the example the fact that Naomi Campbell had once consented to the use of her picture in an ad for a rehabilitation facility? Where does the border lie now? Under such circumstances, where does privacy end and publicity begin, and *vice versa*?

The second example is a true story taken from recent Israeli case law: following their pool-side wedding ceremony on the grounds of a banquet hall, celebrated with hundreds of family members and guests, the bride and groom change into bathing suits and jumped in the pool while the entire crowd cheer and applaud. The whole scene is filmed with the knowledge and consent of the new couple. Two years later, the bride discovers that the owners of the hall had used the “swimming pool film” in a promotional campaign, screened to selected potential clients.⁵⁰ Now let's also assume – beyond the reported facts of the case – that the bride's dream is to become a professional model and that had she known that she was going to star in a sales campaign, she would have demanded a hefty consideration fee in return for consent to the use of her bikini-clad image.

⁴⁷ For a description of the birth and growth of the publicity right see David R. Ginsburg, *Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild Comment*, 22 UCLA L. REV. 1103 (1975); Kenneth E. Spahn, *The Right of Publicity: A Matter of Privacy, Property, or Public Domain?*, 19 NOVA L. REV. 1013 (1995).

⁴⁸ The first invites a good defence as being newsworthy. See: *Zeta-Jones v. Spice House*, 372 F. Supp.2d 568 (2005); *Campbell v. MGN Ltd*, [2005] 4 All ER 793 (H.L.).

⁴⁹ See *Campbell*, 4 All ER at 793.

⁵⁰ *Ploni v. Ploni*, 5425/06, Nevo, CC (Jer) (June 26, 2007).

Were our imaginary cases to be litigated, the McDonald decision would require the court to draw the line between privacy and publicity. However, the attempt to create a sharp dichotomy between emotional distress and the disappointment caused by failed financial expectations has proven to be tricky both theoretically and practically. The rejection of a cause of action by the law of torts on the one hand and the recognition of a cause of action according to the UJEL on the other hand seems to be exceptionally troublesome.

Following are some considerations – each served in a nutshell and each condensing a much lengthier discussion – to be taken into account when approaching the overall theoretical problem of the origins and nature of the publicity right, especially in light of Israel’s legal position on the issue.

1. The Interaction of the Publicity, Privacy, and Defamation Laws

The “easiest” category of publicity right cases covers those in which publication of the plaintiff’s name, picture, voice, etc., is likely to lower that person’s esteem in the eyes of fellow “right-thinking men” or expose that person to hatred, contempt or ridicule, thus leading to a defamation cause of action. Other cases involving publication of a person’s picture in circumstances likely to humiliate him or arouse contempt might lead to either a defamation or privacy cause of action.⁵¹ In many cases, both actions are appropriate; in others, it is either one or the other. Notwithstanding the difference in the protected interest and the nature of the damage,⁵² it is clear that both emotional distress and financial loss will be compensated in these types of cases. The fact that the publication may have been motivated by anticipated profit will change neither the cause of action nor the amount of damages granted via tort law. Such motivation is likely to affect only the defense against liability according to each law. The respective plaintiff will also be entitled to an action based on the UJEL.

Israeli case law is an unfailing source of such examples: the case of the hippie girl whose picture was taken on a London street and published in the Israeli edition of Time Out magazine without her knowledge or permission in a context that appeared to associate her with London’s homo-lesbian community;⁵³ the overweight female engineer whose picture was taken in the street and used as a backdrop for a television show dealing with diets and obesity;⁵⁴ the kindergarten teacher who used kerosene, an old-fashioned remedy, on some children’s heads to fight lice and was ridiculed in the newspapers;⁵⁵ the religiously observant father of four whose personal contact details were published in the lonely hearts section of a newspaper;⁵⁶ and the picture of the religious-looking Jew standing in front of a shop window displaying a poster of a very sexy girl, a picture later published in one of Israel’s most popular dailies.⁵⁷ In most of these cases, the PPL and the DPL were applied; the publicity right and unjust enrichment were rarely mentioned.

2. Publicity and Privacy: Different Theoretical Justifications and Considerations

⁵¹ See CrimFH 9818/01 Bitton v. Sultan [2005] IsrSC 59 (6) 554.

⁵² Gidron, *supra* note 40, at 48.

⁵³ Ezra v. I.S.R Fashion Import & Export Ltd., 33165/06, Nevo, CC (TA) (Aug. 6, 2007) (the plaintiff succeeded); Rachel v. Time Out Magazine Israel Ltd., 12603/05, Nevo, CC (TA) (June 28, 2007) (the plaintiff succeeded); Amar v. Israel Post Comp., 667/97, Lawdata, CC (TA) (Mar. 3, 1999).

⁵⁴ Anna v. Channel 10 News, 026243/05, Nevo, CC(TA) (July 22, 2007) (plaintiff lost).

⁵⁵ Bitton, IsrSC 59 (6) 554.

⁵⁶ CC (TA) Shmuel v. Walla Communications Ltd., 68845/06, Nevo, (July 19, 2007).

⁵⁷ CA (TA) “Ha’Aretz” Ltd. v. Tsadik, 1978/04, Takdin, (June 6, 2006) (plaintiff lost). For the interesting question regarding pictures posted on an internet site and later on used as commercial advertisement see: <http://www.nytimes.com/2007/10/01/technology/01link.htm>.

There are many theoretical justifications for the publicity right. This right is regarded primarily as a component of the right of privacy; as an off-shoot and independent, somewhat distinct branch of personality-based rights; more commonly, it is treated as a property right resting on a theoretical basis similar to that of copyrights and/or trademarks. Yet, most of the accepted notions regarding the origins and features of the privacy right at large can well accommodate a theoretical justification for the publicity right as well. These begin with Prosser's definition of privacy as a composite of four distinct torts, each protecting a distinct interest,⁵⁸ move on to the "dignity theory" of privacy that, according to some commentators, reflects the instrumental approach in securing other social ends whilst according to others it embodies the Kantian perception of privacy as an end in itself,⁵⁹ go on to the "overlapping cluster theory," according to which most of the interests protected by privacy are simultaneously protected by other clusters of rights;⁶⁰ and conclude with other accepted academic theories explaining the right to privacy.⁶¹ Alternatively, the competing theories usually called upon to justify protection of the publicity right, such as Lockean labor theory, the "incentive" justification and the economic aspects of the right; all likewise fit nicely into the broad agenda covered by the privacy right.⁶²

The coincidence in theoretical justifications of publicity and privacy rights have prompted a growing number of researchers and practitioners, American and European,⁶³ to clearly stress the dual nature of the related interests – emotional and financial – covered by the respective rights. Those authors who have strongly contested the dichotomy between the "emotional aspect" of the privacy right and the "economic aspect" of the publicity right have rightly suggested that both rights accommodate both types of interests.

3. The History and Language of Israeli Legislation

As we already know, the publicity right made its way into Israeli law gradually but consistently. Born in 1974, it was formally inserted, by means of legislation, into the closed list of torts found in the CWO and then changed lodgings – but not essence – upon its incorporation in the newly enacted PPL. The subject of privacy/publicity was thus effectively and coherently covered by dedicated laws, with the legislator's dealings with the issue – at least until McDonald – seemingly clear and comprehensive. Hence, unlike the case in other jurisdictions, the Israeli Supreme Court had no apparent reason to look beyond the language of the law or turn for help – mainly from American legal systems, as it did in McDonald. This position is supported by sec. 4 of the PPL, which states that "an infringement of privacy – including the unconsented use for profit – is a civil wrong and the provisions of the CWO

⁵⁸ Prosser, *supra* note 16, at 389.

⁵⁹ Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); Raymond Wacks, *The Poverty of "Privacy"* 96 L.Q. Rev. 73; Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383 (1999).

⁶⁰ Judith J. Thomson, *The Right to Privacy*, 4 Phil. & Pub. Aff. 295 (1975); Ruth Gavison, *Should We Have a "General Right to Privacy" in Israel?*, 12 ISR L. REV. 155 (1977); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L. J. 421 (1980).

⁶¹ A cogent summary can be found in Amy L. Peikoff, *The Right to Privacy: Contemporary Reductionists and their Critics*, 13 VA. J. SOC. POL'Y & L. 474 (2006).

⁶² Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1210 (1986). On the multiplicity of interests in personality see also Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343 (1915); Melville B. Nimmer, *The Right of Publicity*, 19 Law & Contemp. Probs 203.

⁶³ Tim Frazer, *Appropriation of Personality - A New Tort?*, 99 LAW Q. REV. 281 (1983); Compare to Margaret J. Radin, *Property and Personhood*, 34 STAN L. REV. 957 (1982); Tali Sperber, *The Right of Publicity, Clarifications and Notes on McDonald v. McDonald's (Alloniel) LTD et al.*, 33(3) 693, 697 (2003).

shall apply.” Thus both history of the law and this explicit statement provide the basis for our argument that the decision pronouncing the publicity right as beyond the range of the Ordinance or tort law and the financial damage to the plaintiff as a form of unjust enrichment remains puzzling and unconvincing. Even the most pressing problem of the publicity right in practical terms – it being a “personal right,” a label that signifies problematic assignability and descendibility potential – was absent from the McDonald case as both McDonalds – plaintiff and defendant – were the original holders of the competing rights. Hence, the case’s very special circumstances could have been properly handled within the language and spirit of the PPL.

Privacy, as we have seen, has many faces. This special characteristic therefore calls for a much wider interpretation than that guiding the McDonald Court, especially as the Israeli legislator has indicated no cause for such imitated and narrow interpretations.

4. Basic Law and Private Law/ Basic Law and the Privacy Protection Law.

Privacy is protected not only by the PPL but also by Basic Law: Human Dignity and Liberty. Privacy is usually interpreted as pertaining to dignity and honor, yet the Israeli legislator was unsatisfied with this implicit protection; he paid additional honor to this right by relating to it in the same manner and with the same fortitude as to the rights to life, body, dignity and property. Moreover, sec. 7 of the Basic Law specifically names some aspects of privacy as well as several ways of their infringements. Sec. 7 does not, however, mention the entire list of infringements of the right to privacy; these remain enumerated in sec. 2 of the PPL.

The difference between the infringements detailed in the PPL and the much shorter list stipulated in the Basic Law was previously referred to. Here it is important to add only one significant addition to the protections offered by the Basic Law, elaborated in one the last decision handed down by Chief Justice Aharon Barak before his retirement from the Supreme Court. In a case dealing with a family dispute, Justice Barak, one of the pivotal legal authorities to have shaped Israel’s legal system, openly declared that the infringements listed in sec. 2 of the PPL do not represent a closed list. Other privacy interests, although not listed in sec. 2, may still find protection under Israeli common law and within the boundaries of the Basic Law’s sec. 7.⁶⁴

This issue, although poignant, remains outside the realm of this paper. As to the publicity right, it seems safe to conclude that none of the mentioned problems directly affect categorization of this right as a feature of the privacy right. On the contrary, privacy is a cluster of rights. The core rights qualify for explicit reference by the Basic Law. The remainder, found in the second tier, is those referred to only by the PPL but not by the Basic Law; they can also be divided into two categories according to the hierarchy of the interests they represent. Publishing a person’s photograph under circumstances that are likely to cause humiliation is a good example of the first. Using a persons’ name or picture for profit is a good example of the second. Of these two categories, the commercial interests protected by the publicity right are least qualified for protection by the Basic Law. Yet, in spite of the ruling in the McDonald case, it seems inappropriate to conclude that publicity rights protect only commercial and financial interests. On the contrary, it is clear that the right deserves some protection by the PPL, albeit less than higher-order emotional and social interests. Still,

⁶⁴ Ploni v. The Rabbinical Court, 6650/04, Nevo, (May. 14, 2006); General Medical Care v. Minister of Security, 8825/03, Nevo, (Apr. 11, 2007). For a general overview see Tene, *supra* note 20; Amar v. Israel Post Comp., 667/97, Lawdata, CC (TA) (Mar. 3, 1999).

the McDonald decision does not supply an adequate explanation for the publicity right's total exclusion from the PPL and from tort law protection.

5. *Comparative Law*

Sixty years ago, an American court, when trying to sort out the privacy/publicity debate, exclaimed in frustration that “the state of the law is still that of a haystack in a hurricane”.⁶⁵ Today, after heaps of salient academic studies and court decisions, it seems that the hurricane still rages.

Broadly speaking, Israeli's approach to personality rights in general and publicity rights in particular more closely resembles civil law jurisdictions than common law systems. In the former, personality rights are protected by Basic Laws and civil codes whereas in the latter, bundles of statutes and common law concepts sometimes correspond and sometimes leave gaps regarding protection of defamation-privacy-publicity interests. When faced with a “difficult story”, as in the case of McDonald, the Israeli comparativist has a broad range of philosophical, theoretical and practical tools to work with: the continental approach of the German, French and Quebec Codes;⁶⁶ mixed legal systems such as the South African and the Scottish systems, where Roman Law and civil law have left their marks;⁶⁷ and the complex American system,⁶⁸ which displays a variety of state laws mixing statutory and common law protection.⁶⁹ All these differ considerably from the approach offered by the New York State legislature, where publicity is governed by the privacy law.⁷⁰ The diversity displayed by the said and other well-known national jurisdictions⁷¹ remains intact. These systems continue to sharply contrast with the meager protection offered by the English system, which still consistently limits the law's recognition of the publicity right to common law torts of misappropriation of personality, passing off, malicious falsehood and defamation.⁷² This remains true even after implementation of the Human Rights Act⁷³ and the very famous cases involving celebrities like Naomi Campbell⁷⁴ and Michael Douglas–Catherine Zeta- Jones⁷⁵ that, at the end of the day, provoked no real change in overall attitudes toward the publicity right per se in England.

⁶⁵ *Ettore v. Philco Television Broadcasting Corporation*, 229 F.2d 481,485 (3th Cir. 1956).

⁶⁶ Grundgesetz [Basic Law], May 23, 1949 BGBl. I at 1 arts. 1 & 2 (F.R.G.) which refers to personality rights as “other rights”; Fr. C. civ. art. 9 (1970); Civil Code of Quebec art. 3 (1991). For comparative view see RAYMOND YOUNGS, ENGLISH, FRENCH and GERMAN COMPARATIVE LAW 413-20 (1998).

⁶⁷ BURCHELL & NORRIE, *supra* note 23, at 545–575.

⁶⁸ For an overview see Restatement (Third) on Unfair Competition §§ 46-49 (1995); Oliver R. Goodenough, *Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity*, 47 S.C.L. REV 709.

⁶⁹ CAL. CIV. CODE § 3344.1 (1971); IND. CODE ANN. § 32-36-1-8 (2002); TENN. CODE ANN. §§ 47-25-1105–1108 (1984).

⁷⁰ Where publicity right is part of the right to privacy – N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 1992) – solely govern the issue. See *Stephano v. News Group Publications Inc.*, 474 N.E.2d 580 (1984); *Pirone v. Macmillan Inc.*, 894 F.2d 579 (2th Cir.1990) (the Court clearly stated that the statutory right to privacy does not survive death as NY state does not recognize a Common Law right to privacy).

⁷¹ For a review of the legal systems of Germany, Italy, Spain, France, Holland, Canada, Australia, Japan and Hong Kong see SMITH SIMON, IMAGE, PERSONA and the LAW 27–43 (2001). HUW B. SMITH, ANSGAR OHLY and AGNES L. SCHLOETTER, PRIVACY, PROPERTY and PERSONALITY: CIVIL LAW PERSPECTIVES on COMMERCIAL APPROPRIATION (2005).

⁷² See Youngs, *supra* note 66, at 413.

⁷³ Human Rights Act, 1998 (Eng.).

⁷⁴ *Campbell v. MGN Ltd.*, [2002] EWCA Civ 1373 (A.C.).

⁷⁵ *Douglas v. Hello! Ltd.*, [2003] All E.R. 110 (Ch.); *Douglas v. Hello! Ltd.*, (A.C.).

The huge academic literature indicates the legal importance of the right of publicity and at the same time poses a warning to the comparative scholar. One has to be careful when comparing systems that have nothing in common only for the sake of the comparison. Identifying what is to be compared and for what purpose remains imperative, and one of the weakest points in the McDonald's decision. As we have already noted, Israeli's protection of the publicity right is based on Statute Law – Basic Law: Human Dignity and Liberty, the CWO and sec. 2 of the PPL. Although there may be some lacunas in the overall protection of this right, the legislator has quite clearly informed us how and to what extent he recognizes and protects the interests specified in sec. 2. The problematic questions – especially those regarding the nature of the right, the nature of the cause of action and the right's assignability – must be dealt with by means of an appropriate interpretation of the legislation involved, its history, common legal rules⁷⁶ and, of course, comparative law. Nevertheless, the wisdom and ways of other legal systems do not and should not substitute for the legislator's original intention. That intention should be carefully and skillfully woven into the delicate fabric of the system in general and the specific rules in particular. Thus, the assistance of comparative law must be sought only where some basic resemblance is enjoyed by the systems to be compared and when at least some common features and inherent logic have been found. This logic was partly overlooked by the Supreme Court's judgment in the McDonald's case.⁷⁷

6. *Tort Law and Unjust Enrichment Law*

Israel's UJEL, which reflects mixed origins and perceptions,⁷⁸ has been gradually gaining force. Following several years of dormancy, it was decided that the law can be used in cases of breach of contract⁷⁹ and concurrent tort action;⁸⁰ it can also substitute for tort law and intellectual property laws when the latter cannot be applied due to missing features such as goodwill in passing off and registration in trademark law.⁸¹

Notwithstanding the ongoing debate regarding the conceptual structure and essence of restitution for wrongs,⁸² the case of the publicity right clearly falls within the dual application of tort law and UJEL in Israel. This is especially true as the legislator in Israel – which differs from legal systems where the existence of the privacy/ property/publicity right is still under debate – has fully and explicitly acknowledged this right. Thus, recognition of the “property interest” in the name, nickname, image and voice of a person is no longer questioned. It is clear that tort law and UJEL, both being “essentially remedial branches,”⁸³ can be applied in suitable circumstances to right those wrongs caused by infringement of the publicity right when that infringement was intended to – and indeed induced – profit for the defendant. Such concurrence can be found in circumstances where, for example, the conversion of goods,

⁷⁶ As specified in the Foundations of Justice Law, 1980, S.H 163.

⁷⁷ The Court relied mainly on American Case Law and philosophy yet it did not stress the similarity between the legislation in Israel and NY.

⁷⁸ 1 Daniel Friedmann, *The Law of Unjust Enrichment* 40–60 (2d ed., 1998).

⁷⁹ CFH 20/82 Edress Building Materials v. Harlo [1988] IsrSC 42(1) 221; See *id.* at 117–125.

⁸⁰ CA 290/80 SH.G.M. Parkings v. The State of Israel [1983] IsrSC 37(2) 633; Friedmann, *supra* note 78, at 125–29.

⁸¹ CA 5768/94 A.SH.I.R v. Forum Accessories & Commodities [1998] IsrSC 52(4) 289. Compare with Friedmann, *supra* note 78, at 442–50. For an interesting argument on the whole issue of expanding Unjust Enrichment see GROSSKOPF, *supra* note 35, at 213–60.

⁸² For an up-to-date overview of the debate on these issues see Craig Rotherham, *The Conceptual Structure of Restitution for Wrongs*, 66(1) Cambridge L.J 172 (2007).

⁸³ Daniel Friedmann, *The Protection of Entitlements via the Law of Restitution – Expectancies and Privacy*, 121 L.Q.R. 400 (2005).

actionable in tort law according to the CWO, can be coupled with a claim brought by the plaintiff for disgorgement of the defendant's gain, based on the UJEL.

The conclusion is, therefore, very clear: The decision of the Supreme Court in McDonald, whereby the publicity right was declared as protected only by the UJEL and not by the PPL, went too far. There was no need to rule out the second cause of action in order to accept the first, even in light of the unique circumstances of the case. The tort action and the unjust enrichment action clearly protect dissimilar interests and different damages; their concurrent and complementary use has long been accepted in the practice of Israeli private law as the McDonald court itself indicates.⁸⁴ The court erred when it declared that the incident's circumstances were such that "privacy" cannot properly be applied.

The fact that the PPL has been recently amended⁸⁵ to enable award of compensation without proof of damage in cases of infringement of the privacy right – including the privacy right in sec. 2(6) – at the same time that the UJEL obviously does not do so given that the basis of liability there is rooted in the defendant's "enrichment" – seems to provide sufficient reason to rethink the entire issue of the interests and damages covered by the explicit wording of the tort-based publicity right found in the PPL and the way it was applied in the McDonald case.

7. *Transference Problems*

The key trigger to most academic reflection regarding the judicial nature of the publicity right – at least in those systems where the courts embrace a positive approach – was the problem of the right's transference, especially its descendability. Some of the more conspicuous cases regarding this right were cases in which the plaintiff was not the original owner of the right, i.e., he was not the person whose voice, image or picture was used for profit.

The Bela Lugosi case⁸⁶ was one of the first where this issue was raised as the plaintiffs were the actor's surviving widow and son. The court noted that maximizing the extent of exploitation of the actor's name or likeness – in this case, the image of Count Dracula – required that use of his name, voice or likeness be transferable – licensed, assigned and descended.⁸⁷ Assignability, both *inter vivos* and as a bequest or descent, represented the interest's force and the strength of the protection that the law was ready to provide its owner. Prominent cases such as those of Agatha Christie,⁸⁸ Elvis Presley⁸⁹ and others⁹⁰ have intensified the theoretical arguments regarding this right and its descendability.

Assignment during the owner's life is somewhat easier to settle but still poses hardships in cases where the assignee is entitled to pass profitable use to a third party. The owner in this type of case can, of course, enter a claim against the unauthorized user – and then indemnify

⁸⁴ CA 8483/02 McDonald v. Alonial Ltd. (No. 1) [2004] IsrSC 58(4) 314, 370.

⁸⁵ This amendment was passed after McDonald was decided.

⁸⁶ Lugosi v. Universal Pictures, 603 P.2d 425 (Cal. 1979).

⁸⁷ Kevin S Marks, *Assessment of the Copyright Model in Right of Publicity Cases*, 70 CAL. L. REV. 786, 786-788 (1982); Peter L. Felcher & Edward L. Rubin, *The Descendability of the Right of Publicity: Is There Commercial Life after Death*, 89 YALE L. J. 1125, 1127-32 (1980); Spahn, *supra* note 37, at 1013.

⁸⁸ Hicks v. Casablanca Records, 464 F.Supp. 426 (N.Y. S.D. 1978).

⁸⁹ The State of Tennessee *ex rel.* The Elvis Presley International Memorial Foundation v. Crowell, 733 S.W.2d 89 (Tenn. Ct. App. 1987). For a different view see Lee Goldman, *Elvis Is Alive, But He Shouldn't Be: The Right of Publicity Revisited*, 138 BYU L. REV. 597, (1992).

⁹⁰ Groucho Marx Productions Inc. v. Day & Night Co. Inc. 523 F. Supp 485 (S.D. N.Y. 1981), *rev'd*, 689 F.2d 317 (1982); Also, notice Spahn, *supra* note 37, at 1036-38.

the third party – but this solution is complicated, awkward and imprecise, especially regarding the amount of damages to be awarded to the third party. Assignment after death also raises the complex question of the duration of such a legacy. However, we should stress that problems of assignability in the area of publicity rights do not stem from the nature of the cause of action protecting those rights. Both tort and unjust enrichment claims evoke the same quandaries if the right has been transferred from its original owner.

Comparative law can produce a large variety of common law and statute law solutions to the assignability problem. As to Israeli law, one has to recall that we are dealing with a right specifically referred to by the legislator, albeit in a somewhat problematic manner. On the one hand, sec. 34A of the CWO explicitly granted a cause of action to some designated relatives of the deceased owner; on the other, the PPL has entirely – even though implicitly – ignored the respective relatives' cause of action.⁹¹ Interpretation of the legislative history of the right's descendibility can be expected to generate a number of equally logical outcomes.⁹²

The issue of assignability has rarely been referred to by Israeli academics. There seems to be an understanding that the publicity right is not descendible, and that assignability during the owner's life can be achieved only through other means, such as contract and subrogation.⁹³ Relocation of the right in the realm of the UJEL does not solve the problem.

8. *Intellectual Property: Dual Protection*

Much has been said about the common origins of intellectual property protection theory and the publicity right. Much has also been said about the differences in theory and practice of the publicity right as compared to its more established stepsisters.⁹⁴ In Israeli law, infringements of rights protected by the Patents Law, the Copyright Ordinance and Law and the Trademark Ordinance are also protected by tort law.⁹⁵ Issues relating to the property aspects of these rights – definition, ownership, registration, duration, assignability, etc. – are settled according to special provisions in the relevant law, while a tort-based action is offered for use in cases of damages caused by violation and infringement. Moreover, the Copyright Ordinance – just like the PPL – states that the plaintiff is entitled to a certain sum of money even when no damage has been proved.⁹⁶ Furthermore, the moral right owner, whom the Ordinance directs to the CWO,⁹⁷ is entitled to compensation according to the circumstances of the case even when no pecuniary damage was proved.⁹⁸ In cases where intellectual property laws do not apply and tort law does not supply a sufficient answer, an unjust enrichment claim can be used.⁹⁹ The

⁹¹ Friedmann, *supra* note 67, at 457.

⁹² The Supreme Court has already stated that the privacy right survives after its owner death. LCA 1917/92 [1993] Scoler v. Jerabi IsrSC 47(5) 764.

⁹³ Friedmann, *supra* note 67, at 454–58; Tali Sperber, *The Right of Publicity: Clarifications and Notes on McDonald v. McDonald (Alonieli) Ltd.*, 33(3) MISHPATIM 693.

⁹⁴ THOMAS J. MCCARTY, *THE RIGHTS OF PUBLICITY & PRIVACY* ch. 5 (2002–2003); 4 *THE COMMERCIAL APPROPRIATION OF PERSONALITY* 32–48 (CAMBRIDGE INTELLECTUAL PROPERTY and INFORMATION LAW, 2002).

⁹⁵ Apart from special sections in each Law: Patent Law, §§ 178, 183, 1967, S.H. 148; The Patent & Design Ordinance, § 37, 1924, 2 Laws of Palestine 1653; Trademarks Ordinance, §§ 57, 59, 1972, N.H 511; The Copyright Act, § 6, 1911 (Extension to Palestine) Order, 1924. The act also applies to the Performance and Broadcasting Rights Law, 1984, S.H. 157; Copyright Ordinance, § 3A, 1924, LSI 364. A different Supreme Court decision stated that the plaintiff can initiate a Tort action based on Breach of Statutory Duty according to sec. 63 of the CWO. See CA 817/77 Beecham Group Ltd. v. Bristol Mayers [1979] IsrSC 33(3) 757.

⁹⁶ Copyright Ordinance § 3A.

⁹⁷ See *id.* § 4A. Compare to § 14.

⁹⁸ See *id.* § 4A (5).

⁹⁹ CA 5768/94 A.SH.I.R v. Forum Accessories & Commodities [1998] IsrSC 52(4) 289.

publicity right is entitled to similar overall protection despite the said differences in theory and legal approach.

IV. Conclusion

So, what action did the anonymous bathing suit bride take with respect to the use of her image in a profit-motivated promotional campaign? Was there really any difference between her action and the famous Ariel McDonald's action, irrespective of the amount of damages? Does her action lie within the domain of tort law whereas his lies within that of unjust enrichment? Does Israeli privacy law deny limelight lovers and celebrities protection against unauthorized profitable personality use? If so, when does someone become a celebrity ("The celebrity is a person who is known for his well-knownness"¹⁰⁰) and thus lose his privacy-based publicity right? Where exactly do we draw the line between the publicity-seeking celebrity who opposes certain uses of his image, to whom the McDonald case denied liability in privacy law, and the celebrity who never wants to stand in the limelight?¹⁰¹ And what of the non-celebrity who is already doing commercials or the would-be star who is taking her first steps in the world of fame and fortune?

In an age of "universal commodification,"¹⁰² publicity rights are becoming increasingly more important. These questions must therefore be settled not only for theoretical reasons but for practical ones. Consider the celebrity known for her dedication to animals who finds her image on an advertisement for furs, or the public figure known for his devotion to environmental causes who realizes that his image is being used to promote a huge factory and proven polluter: how do they oppose this use, assuming they had profited from their images in the past? Can they initiate a privacy-based action or an unjust enrichment action¹⁰³?

The following conclusions seem to flow from the preceding discussion:

- 1) Although the publicity right was regarded as worthy of protection by the Israeli legislator as early as 1974, the nature of the right and its theoretical foundations remain unclear.
- 2) The interests protected by the publicity right cannot be clearly labeled as personal – as opposed to commercial – interests, especially when it comes to the right to make personal, financial and social decisions. The focus in Israeli law on human autonomy in its broadest connotation and multiple implications makes this categorization particularly difficult.
- 3) The publicity right does not belong to "pure" or "core" privacy interests.¹⁰⁴ This may explain why it was not mentioned in Basic Law: Human Dignity and Liberty. Yet, according to the Israeli legislator, it does represent a privacy interest.

¹⁰⁰ Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993).

¹⁰¹ *Onassis v. Christian Dior – New York, Inc.* 472 N.Y.S2d 254 (1984).

¹⁰² Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1852-55 (1987); Madow, *supra* note 91, at 239.

¹⁰³ Compare with the opinion by Aharon Barak regarding the Protection of Privacy Law, § 2(4), 1981, S.H. 128 in CrimFH 9818/01 Bitton v. Sultan [2005] IsrSC 59 (6) 554. See also CA (TA) Haaretz Ltd. v. Tsadik, 1978/04, Takdin, (June 6, 2006).

¹⁰⁴ Daphne Barak-Erez & Israel Gilead, *Human Rights in Contract Law and Tort Law: The Quiet Revolution*, 7 KIRYAT HAMISPHAT (forthcoming Aug. 2008).

- 4) On the other hand, Israeli law has granted free speech, which balances the publicity right, weak protection in comparison to commercial speech.¹⁰⁵
- 5) The protection of the publicity right by tort law – first by the CWO and later by the PPL – does not necessarily indicate its true nature, nor does it characterize the right as either a “personal” or a “property” right.
- 6) The protection rendered by tort law does not rule out protection by unjust enrichment Law.
- 7) There is nothing in the PPL to uphold the exclusion of celebrities’ publicity right from the protection of tort law.
- 8) There is no reason to differentiate between a celebrity’s publicity right and a budding celebrity’s publicity right, other than its value.
- 9) Protection of the publicity right should reflect the same multi-based protection provided by intellectual property law in spite of some differences in their nature, essence and public interests. Protection of moral right may serve as a good although partial example.
- 10) This overall protection can only be achieved through appropriate legislation, which will refer to assignability issues and length of protection as well.
- 11) The decision in McDonald should be narrowly construed to fit only the very unique circumstances of the case. In all other circumstances, a tort cause of action should be recognized irrespective of who the plaintiff may be and notwithstanding his “craving” or “shunning” of publicity.
- 12) Upcoming changes, introduced by codification, should be borne in mind as tort law and unjust enrichment will be included whereas intellectual property and privacy will not.
- 13) The prospect of using negligence as a source of liability should be further explored. Going back to where we began, Israeli tort law has come a long way since 1947, when it was a mere reflection of the English tort system. At present, a new, modern private law is being constructed, based on independent legal evolution and rules adapted from comparable legal systems. The introduction of the privacy right as well as the publicity right, still alien to English law, into the carefully woven fabric of Israeli private law exemplifies the progress to be made when both the dwarf and the giant on whose shoulders it stands combine experience, wisdom and independent thinking.¹⁰⁶

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¹⁰⁵ HCJ 606/93 Kidum Ltd. v. Israel Broadcasting Authority [1994] 48(2) 1.

¹⁰⁶ On the history and background of the aphorism “If I have seen farther, it is by standing on the shoulders of others” see ROBERT K. MERTON, ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT (2nd ed., University of Chicago Press, 1993). On the Talmudic interpretation and Greek Origins, *supra* 233–43.