**Article:**
Moosavian, R. and McConnell, L. (2024) Privacy Law and Commodification: The Influence of the Possessive Individual. Intellectual Property Quarterly, 2024 (4). pp. 257-296. ISSN 1364-906X

# Privacy Law and Commodification: The Influence of the Possessive Individual

Rebecca Moosavian* and Lee McConnell**

*This article examines the relationship between privacy and commodification, drawing on the historical treatment of the photographic subject in English law. It argues that contemporary privacy law provides ineffective protection against market-driven threats because it has been shaped by the commercial forces it seeks to restrain. Photography was a key stimulus to early privacy laws, which emerged to protect individuals from market-driven violations by enabling them to withhold their image from exposure. Yet despite its market-sceptic rhetoric, English privacy law has historically relied on liberal-capitalist notions of property and discreetly fostered the economic value of image. Post-Human Rights Act English law has amplified this tendency by introducing the fiction of the 'possessive individual' and embracing self-commodification as a means to protect privacy. Such strategies render individuals more susceptible to commodification by constructing the legal subject in explicitly market-based terms. This pro-market notion of privacy buttresses and legitimises the hyper-commodifying business models of contemporary digital industry.*

"*There is not* one *history of privacy*".[1]

"*The portrait is therefore a sign whose purpose is both the description of an individual and the inscription of social identity. But at the same time, it is also a commodity.*"[2]

## Introduction

Certain aspects of privacy are as old as human society, occurring across diverse cultures and extending beyond the human to the animal world.[3] But the modern, liberal-legal understanding of privacy has more recent origins, emerging as a distinct legal doctrine across Western liberal jurisdictions in the late-nineteenth to early-twentieth centuries. This article examines the neglected relationship between this liberal-legal privacy and commodification, the process by which things become objects capable of being freely traded on the market. It charts privacy law's historical extension of classical property notions integral to capitalist exchange in response to the rapid technological and social changes of the nineteenth century. In doing so, it exposes a dynamic in which privacy law purports to safeguard individuals from commodification while remaining subservient to a residual commodifying logic. Privacy law is – perhaps inevitably – an articulation of the market forces it claims to resist and has facilitated the commodification of the very individuals it was invoked to protect.

To uncover these dynamics, the history of private law's treatment of the photographed individual will be examined. Laws protecting the photographed subject or individual form an

* Rebecca Moosavian, Associate Professor, University of Leeds School of Law (email: r.z.moosavian@leeds.ac.uk)
** Dr Lee McConnell, Senior Lecturer, University of Bristol Law School (email: lee.mcconnell@bristol.ac.uk)
*** The authors would like to thank the following people for their invaluable and constructive comments on this research (in chronological order): Patrick O'Callaghan (PI of Law & the Inner Self Project, <https://www.lawinnerself.org/>), Steve Hedley, Adrian Aronsson-Storrier, Pete Coe, Tsachi Keren-Paz, Gavin Phillipson, Nicole Moreham, two anonymous reviewers and IPQ editor, Phillip Johnson. Thanks also to Subhajit Basu for some helpful data protection recommendations. The usual disclaimers apply.
[1] Beate Rossler, *The Value of Privacy* (Polity 2005), 4.
[2] John Tagg, *The Burden of Representation, Essays on Photographies & Histories* (Macmillan 1988), 37.
[3] Alan Westin, *Privacy & Freedom* (Ig Publishing 1967), Ch 1; Robert Murphy, 'Social Distance & the Veil' in *Philosophical Dimensions of Privacy: An Anthology* (ed: Ferdinand Schoeman) (Cambridge 1984), 34-55.

illuminating sub-category of privacy law for two reasons. First, photography helped instigate a shift towards a Western culture of visualisation, or 'the Graphic Revolution'.[4] As will be demonstrated, photographic technology drove the emergence of modern liberal privacy laws, and law's response to this new technology has salient parallels for contemporary debates about informational privacy in the social media age.[5] Second, privacy discourse and case law from this era provide the earliest statements of the legal and conceptual basis upon which privacy was founded, and any insights afforded resonate beyond image to informational privacy more generally.

Our approach follows the law and humanities tradition, which situates law in its wider political and social context. It understands law as a construction that reflects wider culture, and questions law's culturally specific narratives.[6] This methodology ensures that legal analysis is not limited by prevailing legal orthodoxies and that attention is paid to matters the law marginalises. As such, this article does not seek to propose reforms, or indeed dispense with privacy laws or the values they claim to protect. Rather, it seeks to highlight the limitations of conventional liberal-legal conceptions of privacy and demonstrate how legal responses to new technology are subtly shaped by industry needs and capitalist dynamics which may be at odds with their stated ideals.

Zuboff has provided a general account of the commodifying implications of new technology and the surveillance capitalism it sustains,[7] but the phenomenon of commodification and its relationship with privacy has not been afforded sustained examination by privacy scholars. The authors' previous work briefly touched upon this connection[8] but otherwise it is afforded only a passing acknowledgement in the literature.[9] Richardson's excellent analysis of privacy law covers commodification, but does so at an abstract philosophical level rather than focussing on the contribution of privacy doctrine.[10] Keren-Paz recently advocated for a property-based conception of privacy to strengthen the legal position of victims of image-based abuse. But his 'privacy' is a pragmatic response to existing commodifying practices, and it therefore necessarily neglects the law's wider role in fostering these practices.[11] Beyond these examples, propertisation has been debated in the specific context of data protection[12] and has received some attention in the U.S., though the detail of that link is not fully drawn out.[13] The

---

[4] Daniel Boorstin, *The Image* (Vintage 1992), 13. See also Peter Hamilton & Roger Hargreaves, *The Beautiful & The Damned, The Creation of Identity in Nineteenth Century Photography* (National Portrait Gallery 2001), 14.

[5] Other commentators make similar claims. Jurgenson claims that understanding the emergence of photography in the nineteenth Century can shed light on the present-day rise of social media. Elsewhere, Richardson argues that an appreciation of nineteenth century privacy law has much to tell us about contemporary privacy debates: Nathan Jurgenson, *The Social Photo: On Photography & Social Media* (Verso 2019), 1-2: Megan Richardson, *The Right to Privacy, Origins & Influence of a Nineteenth Century Idea* (Cambridge 2020), 118.

[6] Austin Sarat, Matthew Anderson and Catherine Frank, 'Introduction' in *Law & Humanities: An Introduction* (Cambridge 2010), 1-46; Steve Cammiss and Dawn Watkins, 'Legal Research in the Humanities' in *Research Methods in the Law* (eds: Dawn Watkins and Mandy Burton) (2nd edn, Routledge 2018), Ch 4.

[7] Shoshana Zuboff, *The Age of Surveillance Capitalism* (Profile Books 2019).

[8] Rebecca Moosavian, ''Stealing 'Souls'? Article 8 and Photographic Intrusion' (2018) 69 N.I.L.Q. 531 at 535-536.

[9] See, for example, Jonathan Kahn, 'Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity' (1990) 17 Cardozo Arts & Ent L.J. 213 at 216, 221; Jonathan Kahn, 'Privacy as a Legal Principle of Identity Maintenance' (2003) 33 Seton Hall L.R. 371 at 375-376, 410.

[10] Janice Richardson, *Law & the Philosophy of Privacy* (Routledge 2016), Chs 2-5.

[11] Tsachi Keren-Paz, *Egalitarian Digital Privacy, Image-Based Abuse & Beyond* (Bristol University Press 2023), Ch 5; also, the author's review at: (2023) 82 Cam L.J. 567.

[12] For example, see pro-property arguments in: Paul M Schwartz, 'Property, Privacy & Personal Data' (2004) 117 Harv L.R. 2056; Andreas Boerding and others, 'Data Ownership – A Property Rights Approach From a European Perspective', (2018) 11 J. Civ. L. Stud. 323; Vaclav Janecek, 'Ownership of Personal Data in the Internet of Things' (2018) 34 Computer Law & Sec Rev 1039. For criticisms of data as property, see, e.g.: Julie Cohen, 'Examined Lives: Informational Privacy and the Subject as Object' (2000) 52 Stanford L.R. 1373; Ignacio Cofone, 'Beyond Data Ownership' (2021) 43 Cardozo L.R. 501. An interesting analysis is also offered at: Sjef Van Erp, 'Ownership of Data: The Numerous Clausus of Legal Objects' (2017) 6 Kanner Property Rights Conference Journal 235.

[13] There is a fair body of US literature that touches upon an unspecified link between privacy and property, probably due to the role of property in early privacy caselaw. See, e.g.: Robert Post, 'Rereading Warren &

contribution made here is therefore three-fold. It provides the first detailed theoretical examination of the relationship between informational privacy and commodification. Secondly, it uncovers and analyses how notions of property and economic value are central to liberal-legal conceptions of informational privacy in English law. Finally, it articulates the implications of this history for contemporary privacy in the digital age.

The first part of this article defines commodification and evaluates the central cultural and commercial significance of the individual's image in the current hyper-commodified digital age. A prominent feature of Article 8 European Convention of Human Rights (ECHR) case law is a tension between the individual's 'inner self' or personality and threats posed by market forces, with Article 8 purporting to protect the former from the latter. Despite these claims, privacy does not effectively restrict the commodification of individuals. As will be revealed, the underlying reasons for this can be traced to the entwined historical emergence of photographic technology and privacy laws in the nineteenth Century.

The second part reviews the socio-economic history of photography's emergence in the nineteenth century. It establishes that, from inception, the photograph operated as a valuable commodity whose abundance sustained mass media industries. But photographs also had the capacity to commodify the individuals they depicted by enabling their appearance to be alienated and circulated against their wishes. Accordingly, photography contributed to the social conditions and disputes that prompted new legal protections for privacy. The third part then charts the advent of modern privacy discourse and laws in which photography played a pivotal role. Privacy laws constructed the individual as possessing a vulnerable 'interior' of sorts that required protection from commercially-driven violations. Privacy discourse thus envisaged an inherent conflict between market and 'inner self', enabling the individual to withhold their image from wider exposure by asserting its subjective value over its economic value. But despite its market-sceptic rhetoric, privacy law has been intrinsically entwined with the economic forces from which it claimed to protect individuals. This is because early privacy protections relied heavily on liberal-capitalist notions of property, a crucial component of market exchange. Furthermore, these laws protected private images while simultaneously fostering commodification by recognising the image as a source of economic value.

The final part reveals the enduring influence of this latent property logic in post-Human Rights Act 1998 privacy law, particularly through the introduction of the 'possessive individual' model and its notion of image as property or quasi-property. It argues that this propertised privacy ultimately renders individuals more susceptible to commodification by extending property and exchange further into the heart and mind of the legal subject. Article 8 has come to embrace self-commodification—the market exploitation of one's image—as a protective strategy. On this approach, market and 'inner self' no longer conflict, and dignitary and commercial interests in image merge. Privacy law paradoxically accommodates economic interests in image and can be deployed in service of the market. Ultimately, this propertised and pro-market notion of privacy buttresses and legitimises the hyper-commodifying business models of contemporary digital industry with disempowering consequences for millions of social media users drawn into the image economy.

## Commodification in the Digital Age

This section provides an account of commodification before explaining how the digital age is marked by technologies and a culture of intense commodification of private information and, in particular, individual image. It analyses the perceived risks that such commodification poses to personhood, and shows that such concerns take legal form through support for the Article 8 ECHR privacy right which purports to protect individual personality.

*Commodification introduced*

Brandeis: Privacy, Property & Appropriation' (1991) 41 Case Western Reserve L.R. 647; Michael B Kent, 'Pavesich, Property & Privacy: The Common Origins of Property Rights & Privacy Rights in Georgia' (2009) 21 John Marshall L.J. 1 at 17, 21-22; Lawrence Lessig, 'Privacy as Property' (2002) 69 Social Research 247.

The term 'commodity' was employed by classical economists such as Smith[14] and Ricardo[15] as an essential component of free-market capitalism. The term was later subjected to a sustained analysis by Marx, who claimed that the capitalist economy is based upon the production, exchange and 'immense accumulation of commodities'. A commodity is 'an object outside us' (such as paper or iron, but also labour) and it has two core characteristics: first, it is 'alienable', that is separable or 'external' to its holder;[16] secondly, it is capable of being freely traded in a market economy.[17] Law plays a central role in fostering these features. Liberal legal systems commonly employ the term 'property' to indicate that an object is freely alienable and to vest its 'owners' with extensive rights of access and control.[18] Market dealings are sustained by contract laws which enable parties to exchange, trade and otherwise deal with this 'property'.

In line with Smith and Ricardo, Marx noted that commodities have both a *use-value* and an *exchange-value*. A commodity's *use-value* is determined by its capacity to fulfil particular human needs, broadly construed.[19] In contrast, the *exchange-value* of a commodity arises when it is circulated in the market.[20] Marx emphasised the way in which exchange-value facilitates market transactions by establishing an economic equivalence between materially distinct things.[21] In doing so, it eclipses the particular qualities of a commodity (its use-value) and the labour expended its production, which Marx regarded as the real source of a commodity's exchange-value.[22] This led Marx to argue that commodities, as conceived under capitalism, possessed 'mystifying' qualities.[23] A commodity's exchange-value comes to appear as an inherent, objective attribute of a thing itself, rather than a product of labour under a particular, socio-historical mode of production.[24] At the same time, the *use-value* of a thing is made to appear as the subjective preference of the human user.[25] In short, the exchange-value of an object comes to be prioritised over its use-value. Accordingly, Marx argued that commodification obscured and inverted the true characteristics of things, and these tendencies served to naturalise and sustain capitalist production and exchange.[26]

Radin offers several further insights concerning commodification that are salient for our purposes. First, she highlights the inaccuracy of a binary distinction between commodification and non-commodification, noting that things can be partially or incompletely commodified, in that their market position is subject to some form of regulation.[27] Secondly, Radin provides a broad account of commodification, which extends beyond buying and selling objects to encompass:

> "market rhetoric, the practice of thinking about interactions as if they were a sale transaction, and market methodology, the use of monetary cost-benefit analysis to judge these interactions."[28]

---

[14] Adam Smith, *An Enquiry into the Nature and Causes of the Wealth of Nations* (University of Chicago Press, 1977) [1776], Ch 4.

[15] David Ricardo, *On the Principles of Political Economy and Taxation* (JM Dent & Sons Ltd, 1937) [1817], 5.

[16] Karl Marx, *Capital,* Vol 1 (Penguin, 1976) [1867], 125.

[17] Karl Marx, *Capital,* Vol 1 (Penguin, 1976) [1867], 131.

[18] Whilst outlining various complexities in the concept of 'property', Waldron notes that the object of property need not be tangible and that 'powers of alienation and free exchange along with exclusive use is perhaps characteristic of the modern Western notion of ownership': Jeremy Waldron, 'What is Private Property' 5 (1985) O.J.L.S. 313, 341-344. See also: Margaret Davies & Ngaire Naffine, *Are Persons Property? Legal Debates About Property & Personality* (Ashgate 2001), Ch 2.

[19] Non-commodities – e.g. natural resources necessary for survival such as air – can also have use-values: Karl Marx, *Capital,* Vol 1 (Penguin, 1976) [1867], 131.

[20] Karl Marx, *Capital,* Vol 1 (Penguin, 1976) [1867], 126.

[21] 'It is only by virtue of being exchanged that the products of labour acquire a socially uniform objectivity as values, which is distinct from their sensuously varied objectivity as articles of utility.': Karl Marx, *Capital,* Vol 1 (Penguin, 1976) [1867] 166.

[22] Karl Marx, *Capital,* Vol 1 (Penguin, 1976) [1867], 129.

[23] Karl Marx, *Capital,* Vol 1 (Penguin, 1976) [1867], 163.

[24] Karl Marx, *Capital,* Vol 1 (Penguin, 1976) [1867], 164-165, 168.

[25] Karl Marx, *Capital,* Vol 1 (Penguin, 1976) [1867], 177.

[26] Karl Marx, *Capital,* Vol 1 (Penguin, 1976) [1867], 138-139; also at 165.

[27] E.g., in the labour context, minimum wage, working conditions and collective bargaining requirements. Margret Jane Radin, 'Market-inalienability' (1987) 100 Harv L.R. 1917.

[28] Margret Jane Radin, 'Market-inalienability' (1987) 100 Harv L.R. 1849 at 1859.

This broader account of commodification is adopted here. As will be demonstrated below, this pervasive commodity-logic has shaped privacy law's response to photographic technology. Finally Radin identifies two diametrically opposing approaches to commodification. The first, encapsulated by the law and economics movement, is compatible with universal commodification and advocates free market exchange as the best means to distribute human goods. At the other end of the political spectrum, commodification is subject to Marxist critique on the basis it impoverishes life, engenders human alienation and therefore universal non-commodification is preferred.[29] Despite rejecting both positions, Radin acknowledges that liberal-legal constructions of property, person and negative liberty have tended to favour the economic view of universal commodification with problematic consequences. Our analysis of privacy law provides an example of this very dynamic in action.

*The Commodified Image in the Digital Age*

The technology and culture of the digital age has extended and intensified the commodification of private information and especially individual image. As this section argues, the photographic subject is central to our culture and—via surveillance capitalist business models—our economy. Furthermore, commentators have highlighted the threats such commodification poses to our unique 'inner' personhood.

Concerns about image and commodification culture pre-date the digital age. The visual image was integral to Debord's seminal critique of commodification in late capitalism, *Society of Spectacle,*[30] which argued that the apparatus of 'spectacle' that sustained consumer culture now occupied a central position in society.[31] Through the mass media, illusive images had 'colonised' and transformed our lived reality such that '[e]verything that was directly lived has receded into a representation'. The spectacle bolstered the 'illusion' of commodities, in which exchange-value came to supplant use-value.[32] While earlier Marxists had charted a shift in emphasis from *being* towards *having* (i.e. accumulating), Debord argued that the 'society of spectacle' prompted a shift 'from *having* to *appearing*—all having must now derive its immediate prestige and its ultimate purpose from *appearances.*'[33]

Debord forcefully criticised this hypnotic, distracting, market-dominated, image-based society, where celebrity culture stimulates consumer desire.[34] He argued that the spectacle society reifies and replaces authentic social relations through its mass of mediating images, and this results in social alienation—a separation from one's self and wider relations.[35] Though Debord's thesis has been said to lack sophistication, his core concerns about image and commodification resonate strongly in the Instagram-era and are shared by non-Marxist scholars alike. For example, Boorstin recounts the proliferation of mass media 'pseudo-events', a 'new kind of synthetic novelty which has flooded our experience'. This culture emerged with the visual media technologies of the nineteenth century and was tied up with commodifying dynamics.[36] Debord's claims also accord with Radin's general criticisms of universal commodification, which engenders alienation and

[29] Margret Jane Radin, 'Market-inalienability' (1987) 100 Harv L.R 1849 at 1859.
[30] (1967) (Rebel Press 2004) (trans Ken Knabb) (first English translation 1970).
[31] Guy Debord, *Society of the Spectacle* (Rebel Press 2004) (trans Ken Knabb), [34] ('The spectacle is capital accumulated to the point that it becomes images'); also see ibid, [6].
[32] Guy Debord, *Society of the Spectacle* (Rebel Press 2004) (trans Ken Knabb), [1], [8]. [42], [46]-[47].
[33] Guy Debord, *Society of the Spectacle* (Rebel Press 2004) (trans Ken Knabb), [17] (emphasis added); see also ibid, [10] and on the appearance of public figures, ibid, [60]-[61].
[34] Chris Rojek, *Celebrity* (Reaktion Books 2001), 34.
[35] Guy Debord, *Society of the Spectacle* (Rebel Press) (trans Ken Knabb), [4], [8], [10], [18]-[21], [28], [30], [36]-[37], [42], [44], [67]-[68], [167].
[36] Daniel Boorstin, *The Image* (Vintage 1992 [1961]), 9-13, 179. For an account of 'pseudo-events', see: 1-12, 39-40.

> "transforms our world of concrete persons, whose uniqueness and individuality is expressed in specific personal attributes, into a world of disembodied, fungible, attribute-less entities possessing a wealth of alienable, severable 'objects'."[37]

Though these twentieth century critiques were rooted in understandings of commodity or image in the analogue mass media age, they presciently articulated general risks that untrammelled commodification posed to personhood, in particular, the risk that market-based forms and logic would progressively infiltrate and co-opt the actions of and relationships between unique individuals.

Contemporary commentators offer consistent analyses regarding the commodification of private information and image in the digital age. For instance, Zuboff has identified a new mode of 'surveillance capitalism' pioneered by companies such as Facebook and Google. This model entails the use of secret mass-scale methods of data extraction and collection to translate individual behaviour into raw data that can be traded. Zuboff demonstrates how the so-called 'behavioural surplus' yielded "was the game-changing, zero-cost asset that was diverted… toward a genuine and highly lucrative market exchange."[38]

Zuboff emphasises the commodifying nature of 'surveillance capitalism'. She invokes Polanyi's concept of 'commodity fictions', whereby phenomena such as human life, nature and exchange were re-cast in capitalist terms as the commodities of labour, land and money respectively.[39] Updating this notion, she argues that the new fiction is 'behaviour'. This behaviour (or rather, the alienated/transferrable data it generates) is now a highly lucrative commodity that sustains digital industries. But she warns of the raw material from which this informational commodity is extracted; capitalism's new greenfield site to be mined for economic value is human nature itself. Surplus value is 'plumbed from intimate patterns of the self. These supply operations are aimed at your personality, moods and emotions, your lies and vulnerabilities.'[40] In short, surveillance capitalism commodifies our behaviour and, in the process, our 'inner selves'. While Zuboff's critique of surveillance capitalism is not restricted to photographic or image-based data her account provides the wider background commercial context required to understand digital photography in the social media age.

Ilouz shares Zuboff's concerns, but highlights how social media has become a means through which individuals have come to *self*-commodify. For Ilouz, emotions have been central to capitalist modernity, and internet culture is merely another iteration of 'emotional capitalism.'[41] She attributes the contemporary commodification of self to several factors, including the psychology and self-help industries, liberal rights discourse and, crucially, internet technology where the 'process of making a self into an emotional and public matter finds its most potent expression'.[42] Through internet profiles:

> 'the private psychological self becomes a public performance. …[T]he self is externalised and objectified through visual … representations and language.'[43]

This process entails the contradictory co-existence of 'intense subjectivism' (introspection in order to capture one's 'unique essence') and objectivization, where the self becomes a publicly-displayed

---

[37] Margaret Radin, 'Market-Inalienability' (1987) 100 Harv LR 1849 at 1885 and 1907. See also ibid,1905, 1907.

[38] Shoshana Zuboff, *The Age of Surveillance Capitalism* (Profile Books 2019), 53 and 80-81. See also: Ari Ezra Waldman, *Industry Unbound, The Inside Story of Privacy, Data & Corporate Power* (Cambridge 2021), 3, and 75; Jose Van Dijck, *The Culture of Connectivity, A Critical History of Social Media* (Oxford 2013), 16-17, 158-159 and 169-171.

[39] Karl Polyani, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 2001), 75-77 and 138, 204.

[40] Shoshana Zuboff, *The Age of Surveillance Capitalism* (Profile Books 2019), 199, 94, 289, 514, 470 and 327. See also ibid, ch 9.

[41] Eva Ilouz, *Cold Intimacies, The Making of Emotional Capitalism* (Polity 2007), 4. Ilouz's core claim is that the 'making of capitalism went hand-in hand with the making of an intensely specialized emotional culture.' Berardi similarly argues that contemporary 'semio-capitalism' exploits human affect, desire, creativity and communication as a productive force: Franco Bifo Berardi, *The Soul at Work, From Alienation to Autonomy* (Semiotexte 2009), 115-116. See also ibid, 21, 107, 109.

[42] Eva Ilouz, *Cold Intimacies, The Making of Emotional Capitalism* (Polity 2007), 4-5, 37, 48, 108 (and ch 2 generally).

[43] Eva Ilouz, *Cold Intimacies, The Making of Emotional Capitalism* (Polity 2007), 78.

commodity.[44] Such self-presentation via photographs leads bodily appearances to assume greater significance. Like models or actors, individuals are made conscious of their appearance, publicly display it (often in a culture of competition) and their body becomes 'the main source of social and economic value'.[45]

Jurgenson discusses the impact this hyper-commodified online context has had upon contemporary photography. Though he acknowledges that the image 'profoundly dominated' the pre-digital age, camera phones and social media have generated a 'deeper and more intimate saturation of the image into how we see, speak and think.' Jurgenson focuses on the 'social photograph', the ubiquitous layperson's social media image that has been neglected by academics despite its social significance.[46] Several related features distinguish 'social photography' from its pre-digital counterpart. First, the proliferation of images and online sharing means that photography no longer entails individual objects or artefacts, but has become 'a stream, a flow, with an automatic audience', and therefore a more transient, ephemeral medium.[47] However, this departure from the photograph as a physical object is consistent with its commodity status; as Zuboff demonstrates, in the mass data flows of surveillance capitalism, the liquid, highly-mobile nature of the dematerialised image is essential.

Secondly, social photography fosters a new culture of documentation. Digital technologies facilitate – arguably even induce - the ongoing capture and *display* of everyday experiences to a degree previously unknown:

> 'this documentary habit burrows into consciousness. … Life is experienced as increasingly documentable, and perhaps also experienced *in the service of* its documentation, always with the newly accessible audience in mind.'[48]

This passage highlights the risk that life becomes instrumental or subordinate to the act of documentation—that it comes to be experienced *through* photographic capture and display—and that photography becomes an essential means of self-definition. This culture is essentially the practice of mass self-commodification; it ensures an abundance of user-generated content (or user-generated *commodities*) upon which the commercial prospects of social networking sites rely.[49]

Accordingly, commodification of image has intensified in the digital age. Individuals are co-opted into a culture of self-commodification and the individual's image has thus assumed an ever-greater commercial, cultural and personal significance. Commentators express concerns about the impacts of such developments on personhood, using 'interior' terminology that reflects an 'inner self', e.g. personality, emotions, essence etc.[50] As a result of these concerns for 'interior' elements of personhood, privacy laws are invoked as the primary mechanism to address this contemporary issue.

*Contemporary Article 8 and Commodification*

The concerns identified above are broadly reflected in contemporary jurisprudence on Article 8 of the ECHR as developed by the European Court of Human Rights (ECtHR) and the English courts. Protections for the individual in relation to photographic capture and publication have been strengthened since the Human Rights Act 1998 gave domestic effect to Article 8, ultimately prompting the creation of the common law tort of misuse of private information.[51] However, such protections rely

---

[44] Eva Ilouz, *Cold Intimacies, The Making of Emotional Capitalism* (Polity, 2007), 79. See also: Jose Van Dijck, *The Culture of Connectivity, A Critical History of Social Media* (Oxford 2013), 51.

[45] Eva Ilouz, *Cold Intimacies, The Making of Emotional Capitalism* (Polity 2007), 81

[46] Nathan Jurgenson, *The Social Photo: On Photography & Social Media* (Verso 2019), 8-11

[47] Nathan Jurgenson, *The Social Photo: On Photography & Social Media* (Verso 2019), 4, 16 and 46

[48] Emphasis added: Nathan Jurgenson, *The Social Photo: On Photography & Social Media* (Verso 2019), 12. See also, ibid, 27, 38.

[49] However, it must be noted that Jurgenson is relatively sanguine about the risks of such developments for reasons to be discussed below.

[50] Similar concerns about the potential limiting effects of digital technologies upon personhood are expressed by tech commentators, see e.g.: Jaron Lanier, *You Are Not a Gadget* (Alfred Knopf 2010), Chs 1 and 3; Jose Van Dijck, *The Culture of Connectivity, A Critical History of Social Media* (Oxford 2013), 20-21, 29 and 161.

[51] Rebecca Moosavian, ''Stealing 'Souls'? Article 8 and Photographic Intrusion' (2018) 69 N.I.L.Q. 531 at 537-541.

upon the individual having a reasonable expectation of privacy, a context-sensitive assessment based on multiple factors including the claimant's attributes, the nature of the activity in which they were engaged, the absence of consent and the nature of the intrusion.[52] Contemporary privacy discourse is often concerned with protecting an individual's 'inner self' from intrusion. This inchoate 'interior' is articulated in various forms, e.g. in terms of emotional harms; a spiritual interest; the inviolate personality; even occasionally the 'soul' or (more commonly) its modern secular counterpart, dignity.[53] Evidence of this concern is present at European level, where the Continental personality right tradition has informed the ECtHR's Article 8 jurisprudence.[54] This is epitomised by its comments in *Reklos,* a dispute concerning the photographic capture of a baby on a neo-natal ward without parental consent:

> 'A person's *image* constitutes one of the *chief attributes of his or her personality*, as it reveals the person's unique characteristics and distinguishes the person from his peers. The right of protection of one's image is thus one of the essential components of *personal development* and presupposes the right to control the use of that image.'[55]

This influential passage, cited in numerous subsequent photograph cases,[56] confirms that one's image is significant in privacy terms because it is a primary attribute— an external expression— of the individual personality that Article 8 seeks to protect. Though less influenced by the Continental personality right, English law nevertheless also features concern for 'interior' elements. Leading misuse of private information judgments have cited the *Reklos* passage with approval[57] and have repeatedly confirmed dignity as an important value underlying Article 8,[58] acknowledging claimants' feelings of intrusion and emotional harm.[59] Furthermore, privacy is occasionally depicted by judges as a shield or barrier protecting personality.[60]

As well as protecting the 'inner self', the ECtHR has also demonstrated a concern with commodification and wider commercial imperatives that can threaten privacy. For Whitman, the historical Continental suspicion regarding threats to dignity posed by the free market and free press has endured.[61] High-profile explicit recognition of this point was afforded at the cusp of the digital age by Council of Europe Resolution 1165 (1998), which acknowledged that:

---

[52] *Murray v Express Newspapers* [2008] EWCA Civ 446, [2009] Ch 481. For analysis of the 'reasonable expectation of privacy' requirement, see: Eric Barendt, 'Problems with the Reasonable Expectation of Privacy Test' (2016) 8 Journal of Media Law 129; Nicole Moreham, 'Unpacking the Reasonable Expectation of Privacy Test' (2018) 134 L.Q.R. 651.

[53] Rebecca Moosavian, ''Stealing 'Souls'? Article 8 and Photographic Intrusion' (2018) 69 N.I.L.Q. 531 at 537-541.

[54] Bart van der Sloot, 'Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of 'Big Data' (2015) 31 Utrecht J Int & Eur L 25 at 28 and 44.

[55] Emphasis added. *Reklos v Greece* (App 1234/05) [2009] ECHR 200, [40].

[56] *Rothe v Austria* (App 6490/07) [2012] ECHR 2008, [42]; *Bogomolova v Russia* (App 13812/09) [2017] ECHR 571, [52]; *Couderc v France* (App 40454/07) [2015] ECHR 992, [85]; *Von Hannover v Germany (No 2)* (App 40660/08) [2012] ECHR 228, [96]; *Hajovsky v Slovakia* (App 7796/16) (2021), [29]; *Dupate v Latvia* (Aop 18068/11) (2021) 72 E.H.R.R 34, [40].

[57] *JR38* [2015] UKSC 42, [40]; *Weller v Associated News* [2015] EWCA Civ 1176, [27]-[28]; *Stoute v News Group Newspapers* [2023] EWCA Civ 523, [25]-[26].

[58] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] A.C. 457, [50]-[51] (Lord Hoffmann); *PJS v News Group Newspapers Ltd* [2016] EWCA Civ 393, [34]; *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777, [2008] E.M.L.R. 20, [7], [214]-[216]; *Richard v BBC* [2018] EWHC 1837 (Ch), [2019] Ch 169, [350], [352]; *Ali v Channel 5* [2018] EWHC 298 (Ch), [2018] E.M.L.R, [148]-[151].

[59] *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] 1 A.C. 1081, [35] (Lord Mance) and [53] and [61] (Lord Neuberger); *Von Hannover v Germany (No 1)* [2004] E.M.L.R. 21, [59]; *Theakston v MGN* [2002] EWHC 137(QB), [2002] E.M.L.R. 22, [78].

[60] *R v Broadcasting Standards Commissioner ex parte BBC* [2000] EWCA Civ 116, [2001] QB 885, [48] (Lord Mustill); *AG's Ref No 3: Application by BBC to set aside or vary a Reporting Restriction Order* [2009] UKHL 34, [2010] 1 A.C. 145, [22] (Lord Hope); *Stoute v News Group Newspapers* [2023] EWHC 232(QB), [33].

[61] James Whitman, 'Two Western Cultures of Privacy: Dignity Versus Liberty' (2004) 113 Yale L.J. 1151 at 1176, 1190 and 1193.

> "personal privacy is often invaded… as people's private lives have become a highly lucrative commodity for certain sectors of the media"[62]

Although the Council notably restricted this observation to 'public figures', this influential passage is repeatedly quoted by the Court in leading Article 8 judgments concerning tabloid reportage and accompanying photographs.[63] The English courts have also explicitly and implicitly acknowledged the commercial pressures driving privacy intrusions, quoting Resolution 1165 in this context.[64] In *PJS*, Lord Mance explicitly stated that the commercial benefits of a news story could not justify invading the claimant's privacy.[65] In similar terms, the Leveson Report criticised sections of the British press for treating private lives as 'commodities' by publishing individuals' private information in disregard of their dignity and feelings.[66] More generally, commercial dynamics have forged the case law in that nearly all defendants are driven by commercial motives; they include blackmailers, 'kiss-and-tellers' and, most frequently, press defendants who have repeatedly argued that publication of disputed stories and accompanying photographs is essential for maintaining the readership upon which the sector's economic survival (and thus its public watchdog role) depends.[67]

These examples show contemporary Article 8 privacy jurisprudence managing a tension between an 'inner self' or personality threatened by market-driven violations. Article 8 purports to safeguard this interior by protecting the individual's image or information where there is a reasonable expectation of privacy. Yet these stated concerns about commodification of the person via their private information are restricted to the traditional mass media. Ever-greater formal protections for privacy in law co-exist alongside a wider technology and culture in which individuals are more visible, surveyed, their personal information and images more widely disseminated and exchanged than at any point in history. This apparent disparity between contemporary Article 8's efficacy and its market-scepticism is at least partly attributable to the long-standing, latent property logic in English law. To understand this propertised tradition, discussion now turns to the related emergence of photographic technology and privacy doctrine.

**Photography and Commodification: A History**

This section demonstrates how the nineteenth century emergence of photographic technology increased the economic, cultural and personal significance (i.e. exchange and use-values) of an individual's image. From the outset, photographic technology was implicated in commodification in two distinct, but related ways. First, each photograph represented a commodity whose abundance sustained various new, lucrative industries. But secondly, photographic portraits had the capacity to commodify the individuals they depicted. The problems caused by this second form of commodification prompted new legal protections for privacy.

*The Photograph as Commodity*

From the inception of photography, each individual photographic image was a potential commodity *per se*. The photograph was a distinct, portable item that sustained the growth of numerous industries over the late nineteenth to early twentieth centuries, including portrait studios, advertising and the press

---

[62] The passage continues '*The victims are essentially public figures, since details of their private lives serve as a stimulus to sales*.' Resolution 1165 (1998) Council of Europe Parliamentary Assembly, [6].

[63] *Von Hannover v Germany (No 1)* [2004] E.M.L.R. 21, [42]; *Mosley v UK* (App 480009/08) [2011] ECHR 774, [57]; *Von Hannover v Germany (No 2)* (App 40660/08) [2012] ECHR 228, [71]; *Axel Springer AG v Germany* (App39954/08) [2012] ECHR 227, [51]; *Couderc v France* (App 40454/07) [2015] ECHR 992, [43]; *Dupate v Latvia* (App 18068/11) (2021) 72 E.H.R.R 34, [26].

[64] *A v B (Flitcroft)* [2002] EWCA Civ 337, [11](xii); *Spelman v Express Newspapers* [2012] EWHC 355(QB), [49]; *TSE v News Group Newspapers* [2011] EWHC 1308(QB), [26].

[65] *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] 1 A.C. 1081 [21]

[66] *An Inquiry into the Culture, Practices and the Ethics of the Press, Report* (2012 HC Papers 780-I to IV) Vol II, Part F, Ch 6, Section 2 (especially 2.1, 2.44).

[67] For discussion, see: Gavin Phillipson, 'Leveson, the Public Interest and Press Freedom' (2013) 5 J Media Law 220 at 220 and 232-3; Rebecca Moosavian, 'Deconstructing 'Public Interest' in the Article 8 vs Article 10 Balancing Exercise' (2014) 6 J Media Law 234 at 255-258.

(magazines, periodicals and newspapers etc.). Even before photography, there was a growing demand among wealthy patrons for individual portraiture in the form of painted and engraved images.[68] But daguerreotype photography, introduced in France in 1839, marked a radical departure from traditional methods as it enabled 'nature's imprint'; high-fidelity copies of the captured subject matter could be made for the first time. Public demand for photographic images was immediate, and the need to protect and secure their burgeoning commercial value[69] drove calls from industry lobbyists for legal intervention. In the United Kingdom, this pressure came in the mid-nineteenth century from professional photographers who argued that, like paintings, photographs should be protected as a form of property by copyright law. Cooper recounts the surrounding debate as to whether photography was mere mechanical copying or was a subjective, creative expression.[70] Photographers emphasised the latter characterisation, calculating that photography would benefit from association with high-status fine art, and highlighting the creative labour of the photographer that resulted in the valuable image produced.[71]

These efforts resulted in the Fine Arts Copyright Act 1862 which protected photographs alongside other traditional creative works. It vested ownership in the photographer as author.[72] In doing so, the Act privileged mental labour by rewarding it with property rights, a rationale that informed other intellectual property laws of the era.[73] As Edelman has demonstrated, the 'mechanical copying versus creative art' debate also informed French legal responses to photography. Despite initially refusing to recognise photographers because they merely 'plagiarised nature', French law later reconfigured the photographer as an artist who vested their personality in the image, and whose creative labours entitled them to property rights.[74] But, crucially, Edelman claims this legal development was driven by the commercial needs of the industry:

> "The soulless photographer… [was] set up as an artist… since the relations of production [demanded] it."[75]

In 1865, the U.S. Congress amended the Copyright Act 1831 by adding photographs to the list of protected works.[76] Internationally, photographs remained unprotected until the Berlin Conference 1908 agreed an addition to the Berne Convention for the Protection of Literary and Artistic Works.[77]

Three technological developments across the second half of the nineteenth century enhanced the photographic image as a commodity. First, photographic technologies—including collodion-based and negative-positive processes—enabled multiple perfect copies to be drawn from a single capture,

---

[68] Peter Hamilton and Roger Hargreaves, *The Beautiful & The Damned, The Creation of Identity in Nineteenth Century Photography* (National Portrait Gallery 2001), 20-21

[69] For an interesting account of O.W. Holmes' metaphorical depiction of photographs as money, see: Allan Sekula, 'Traffic in Photographs' (1981) 41 Art Journal 15, 22-23.

[70] Elena Cooper, *Art & Modern Copyright, The Contested Image* (Cambridge 2018), 19-20 and 26-27, 105. See also: Jennifer Mnookin, 'The Image of Truth: Photographic Evidence & the Power of Analogy' (1998) 10 Yale J of Law & Hum 1.

[71] Elena Cooper, *Art & Modern Copyright, The Contested Image* (Cambridge 2018), 29,36 and 44-45; Alan Trachtenberg, *Reading American Photographs* (Hill & Wang 1989), 25-26.

[72] Section 1, Fine Arts Copyright Act 1962; *Nottage v Jackson* (1883) 11 Q.B. 627. See also: Elena Cooper, *Art & Modern Copyright, The Contested Image* (Cambridge 2018), 48, 13 and 20-21.

[73] Bently & Sherman track the emergence of modern IP law in the nineteenth century. A key feature of laws in the first half of the nineteenth century was the privileging of mental or creative labour over and above manual labour (reflecting a mind over body ethos). Mental labour was thus viewed as the source of property rights. Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (Cambridge 2000), 15-18, 35-42, ch.7.

[74] Bernard Edelman, *Ownership of the Image, Elements for a Marxist Theory of Law* (Routledge 1979), Ch. 3 and 43-52.

[75] Bernard Edelman, *Ownership of the Image, Elements for a Marxist Theory of Law* (Routledge 1979), 49. See also: John Tagg, *The Burden of Representation, Essays on Photographies & Histories* (Macmillan 1988), 111 and 113.

[76] Copyright Act Amendment 1865 13 Stat 540.

[77] Berne Convention (Berlin Act) 1908, art 3.

enabling increased production at lower cost.[78] Secondly, photographic technology spread, becoming increasingly affordable and accessible to the wider populace.[79] Photography became a popular pastime from the 1890s with the introduction of the portable, inexpensive Kodak Camera. Decoupling photography from professional studios enabled amateur 'Kodakers' to pursue photography as a leisure pursuit[80] and to document family and social life.[81] Photography thus enabled experience to be preserved, 'democratizing' and transforming 'the repeatable experience'.[82]

Third, photography combined with publishing technologies, contributing to the growth of newspapers, magazines and advertising, and becoming 'an active force in the beginnings of mass culture'.[83] The press had gradually increased their visual appeal by featuring engraved illustrations, but from the 1890s new 'halftone' technology replaced engravers with high-speed presses that printed photographic images alongside text, leading to cheaper illustrated newspapers across America and Europe.[84] Press coverage shifted to more images, less text and greater attention to 'human interest' and 'celebrity' news.[85] The popular print media thus relied upon a steady stream of images. By the turn of the twentieth Century, press photography influenced debates concerning copyright, emphasising their financial value as historical documents rather than artistic creations.[86] Photography also profoundly affected advertising as images were used across newspapers, periodicals, catalogues and posters to promote a burgeoning range of new consumer products.[87] As such, it made a key contribution to the 'era of spectacle', the emergence of mass consumer culture where the display of commodities became central and visual culture shifted to serve capitalist needs.[88]

*The Commodified Individual*

Photography also bolstered modern celebrity culture and became central to individual identity construction generally. Portraiture was a lucrative early application and dominant form of photography,[89] with professional daguerreotype studios spreading rapidly across major European and

---

[78] Andre Rouille, 'The Rise of Photography' in *A History of Photography* (eds Jena-Claude Lemagny & Andre Roille) (Cambridge 1987), 19-29 and 31; Michel Frizot, '1839-1840 Photographic Developments' in *A New History of Photography* (ed: Michel Frizot) (Koneman 1998), 22, 27.

[79] Alan Trachtenberg, *Reading American Photographs* (Hill & Wang 1989), 29-30.

[80] Robert Mensel, 'Kodakers Lying in Wait: Amateur Photography & the Right to Privacy in New York 1885-1915' (1991) American Quarterly, vol 43(1), 24-45, pp 28-30; Jessica Lake, *The Face That Launched a Thousand Lawsuits, The American Women Who Forged a Right to Privacy* (Yale, 2016) 26-34.

[81] Rune Hassner 'Amateur Photography' in *A History of Photography* (eds Jena-Claude Lemagny and Andre Roille) (Cambridge 1987), 80-82.

[82] Daniel J Boorstin, *The Americans, The Democratic Experience* (Phoenix Press 2000), 371 and 376.

[83] Along with 'popular fiction and newspapers, inexpensive lithographs, and engravings.': Mary Warner Marien, *Photography: A Cultural History* (4th ed, Lawrence King 2014), 95.

[84] Mary Warner Marien, *Photography: A Cultural History* (4th edn, Lawrence King 2014), 161 and 163; Rune Hassner 'Photography & the Press' in *A History of Photography* (eds Jena-Claude Lemagny & Andre Roille) (Cambridge 1987), 76, 77-78; Sylvie Aubenas, 'The Photograph in Print, Multiplication and Stability of the Image' in *A New History of Photography* (ed: Michel Frizot) (Koneman 1998), 225-231; Michel Frizot, Pierre Albert & Gilles Feyel, 'Photography & the Media, Changes in the Illustrated Press' in *A New History of Photography* (ed: Michel Frizot) (Koneman, 1998), 358-369 and 363-366

[85] Martin Conboy, *The Press and Popular Culture* (Sage, 2004) 140-143, 154-157, 159, 165, 168, 172, 174; Kevin Williams, *Read All About It! A History of the British Newspapers* (Routledge, 2010) ch 4; Joel H Wiener, *The Americanisation of the British Press, 1830s-1914* (Palgrave, 2011) 38-42, 45-48, 71-74, 129-150, 156, 205-206; Mary Warner Marien, *Photography: A Cultural History* (4th ed, Lawrence King 2014), 163-164

[86] Elena Cooper, *Art & Modern Copyright, The Contested Image* (Cambridge 2018), 69-71 and 96-97.

[87] Mary Warner Marien, *Photography: A Cultural History* (4th ed, Lawrence King 2014), 165; Michael Madow, 'Private Ownership of Public Image: Popular Culture and Publicity Rights' (1993) 81 Cal L.R. 125, 156-159.

[88] Thomas Richards, *The Commodity Culture of Victorian England, Advertising & Spectacle 1851-1914* (Stanford University Press 1990), 1, 3, 13 and 195, and Ch 1; John Tagg, *The Burden of Representation, Essays on Photographies & Histories* (Macmillan 1988), 37; Allan Sekula, 'Traffic in Photographs' (1981) 41 Art Journal 15, 16 and 21; Chris Rojek, *Celebrity* (Reaktion Books 2001), 187-189.

[89] Andre Rouille, 'The Rise of Photography' in *A History of Photography* (eds Jena-Claude Lemagny & Andre Roille) (Cambridge, 1987), 19-29, 45 and 51.

U.S. cities in the 1840-1850s.[90] For Boorstin, this technology was a seminal driver in the 'Graphic Revolution',[91] signalling a fundamental shift from traditional renown based on achievement, to manufactured fame marked by image, individuality and personality.[92] Elsewhere, Hamilton's study of nineteenth century photographic portraiture highlights the 'magnetic impulse' between fame and photography; fame relied upon the public 'display or proliferation' of images, and photography met this brief by making individuals visible to a wider audiences in ways hitherto impossible. [93]

This display culture was encapsulated by the popularity of *cartes de visite* across Europe and the United States in the 1850-1860s. These cheap, mass-produced cards bearing the images of public figures—including royalty, authors, actors and even murderers—could be purchased, collected and curated in albums.[94] As Hamilton writes, '[c]elebrity flourished and society's notables became both highly visible and valued commodities'.[95] Though the success of *cartes de visite* was relatively brief, celebrity photographs enjoyed continued popularity in the decades that followed through 'Men of Mark' compendia and postcards depicting actors in character.[96] Moreover, through the continued growth of newspapers in the mid-to-late nineteenth century, 'celebrity' emerged as a common cultural 'type' in Europe and the United States.[97] By the 1890s the illustrated press had become the primary format by which audiences accessed celebrity images.[98]

Hand in glove with the phenomenon of celebrity was the boom in professional studios and commissioned photographic portraiture, starting among the urban middle classes in the mid-nineteenth century but extending almost universally by the end of the century.[99] Such portraiture was influenced by a revival of interest in physiognomics, the notion that the individual's physical body, especially the

---

[90] Andre Rouille, 'The Rise of Photography' in *A History of Photography* (eds Jena-Claude Lemagny & Andre Roille) (Cambridge 1987), 19-29 and 20-22. See also: Mary Warner Marien, *Photography: A Cultural History* (4th ed, Lawrence King 2014), 23; Peter Hamilton & Roger Hargreaves, *The Beautiful & The Damned, The Creation of Identity in Nineteenth Century Photography* (National Portrait Gallery 2001), 34-35 and 42. See also: Andre Rouille, 'The Rise of Photography' in *A History of Photography* (eds Jena-Claude Lemagny & Andre Roille) (Cambridge, 1987), 19-29 and 25

[91] For Boorstin the Graphic Revolution involved an immense growth in our 'ability to make, preserve, transmit, and disseminate precise images … of men and landscapes and events': Daniel Boorstin, *The Image* (Vintage, 1992) 13

[92] Daniel Boorstin, *The Image* (Vintage 1992), 45-47, 48-49, 57-59, 64-65 and 198.

[93] Peter Hamilton and Roger Hargreaves, *The Beautiful & The Damned, The Creation of Identity in Nineteenth Century Photography* (National Portrait Gallery 2001), 18-19 and 21; Chris Rojek, *Celebrity* (Reaktion Books 2001), 14-15 and 125-128.

[94] Peter Hamilton and Roger Hargreaves, *The Beautiful & The Damned, The Creation of Identity in Nineteenth Century Photography* (National Portrait Gallery 2001), 44-47. See also: Andre Rouille, 'The Rise of Photography' in *A History of Photography* (eds Jena-Claude Lemagny and Andre Rouille) (Cambridge 1987), 19-29 and 38-40; Mary Warner Marien, *Photography: A Cultural History* (4th ed, Lawrence King 2014), 81; Jean Sagne, 'All Kinds of Portraits, The Photographer's Studio' in *A New History of Photography* (ed: Michel Frizot) (Koneman, 1998), 103-122 and 109-114.

[95] Peter Hamilton and Roger Hargreaves, *The Beautiful & The Damned, The Creation of Identity in Nineteenth Century Photography* (National Portrait Gallery 2001), 13-14, 19 and 44-47. Elsewhere the authors claim that '*photography aligned the commodification of personalities*'; at 18-19. See also: Andre Rouille, 'The Rise of Photography' in *A History of Photography* (eds Jena-Claude Lemagny and Andre Roille) (Cambridge 1987), 19-29, 39-40.

[96] Elena Cooper, *Art & Modern Copyright, The Contested Image* (Cambridge 2018), 200-201; Peter Hamilton and Roger Hargreaves, *The Beautiful & The Damned, The Creation of Identity in Nineteenth Century Photography* (National Portrait Gallery 2001), 50-51; Mary Warner Marien, *Photography: A Cultural History* (4th edn, Lawrence King 2014), 167-168.

[97] Edward Berenson and Eva Giloi in *Constructing Charisma, Celebrity, Fame and Power in Nineteenth Century Europe* (ed: Edward Berenson, Eva Giloi) (Berghahn 2013), 2, 6.

[98] John Tagg, *The Burden of Representation, Essays on Photographies & Histories* (Macmillan 1988), 56; Elena Cooper, *Art & Modern Copyright, The Contested Image* (Cambridge 2018), 74-75, 194.

[99] Peter Hamilton and Roger Hargreaves, *The Beautiful & The Damned, The Creation of Identity in Nineteenth Century Photography* (National Portrait Gallery 2001), 36; Timm Starl, 'A New World of Pictures, The Use & Spread of the Daguerrotype Process' in *A New History of Photography* (ed: Michel Frizot) (Koneman 1998), 32-57, 33, 37 and 41-42; Samantha Barbas, *Laws of Image, Privacy & Publicity in America* (Standford Law Books 2015), 46-48.

face, revealed their soul.[100] By apparently recording with perfect accuracy, photographic technology engendered the view that it could document the subject's inner character.[101] Portraits thus aimed to capture a physical but also 'moral' likeness of the sitter, and their staging was informed by popular physiognomic classifications of the day.[102] Studios carefully curated the subject's clothing, pose, background and props to suggest qualities such as intelligence, nobility, and prosperity and to display the sitter to maximum advantage.[103] According to Hamilton,

> "[i]n commodifying social identity the daguerreotype had evolved a new grammar of character and self-advertisement that would become the template for future processes."[104]

Two striking features of photography's application are apparent here: first, its use as a means of self-definition to construct the individual's image for display to intimate domestic or mass audiences; secondly, such staging was undertaken with an acute awareness of status and in pursuit of successful social standing.[105] Commentators have drawn out the racial and class-based dimensions of this standing, situating it within a wider racial capitalism which upheld an 'aesthetic of whiteness'.[106] Ultimately, through the interrelated emergence of portraiture and celebrity, the body became an 'object of consumption' used to manufacture desire, and 'the idiom and image of bodily presentation increase[d] in economic and social importance.'[107] Barbas also draws out this emerging concern with (visual) self-presentation, concluding that:

> "photography was perhaps the first American "social medium", a technology people used to depict and construct their social identities and communicate them to others."[108]

But with the immense proliferation of photographic portraits and mass media industries came new dilemmas, specifically, what Barbas terms 'the crisis of the circulating portrait'.[109] Photography's capacity to produce multiple, high-fidelity copies of the individual depicted led to concerns over a potential loss of control over one's image and self-presentation. Photographic copies were detachable from, and co-existed alongside the 'original' subject matter, underscoring photography's role as a

---

[100] Peter Hamilton and Roger Hargreaves, *The Beautiful & The Damned, The Creation of Identity in Nineteenth Century Photography* (National Portrait Gallery 2001), 34 and 63-65.

[101] Mary Warner Marien, *Photography: A Cultural History* (4th edn, Lawrence King 2014), 149-152; Alan Trachtenberg, *Reading American Photographs* (Hill & Wang 1989), 27-29; Linda Haverty Rugg, *Picturing Ourselves, Photography & Autobiography* (University of Chicago Press 1997), Ch II ('Photographing the Soul: August Strindberg') especially 83-90.

[102] Andre Rouille, 'The Rise of Photography' in *A History of Photography* (eds Jena-Claude Lemagny & Andre Roille) (Cambridge 1987), 19-29 and 40. Peter Hamilton and Roger Hargreaves, *The Beautiful & The Damned, The Creation of Identity in Nineteenth Century Photography* (National Portrait Gallery 2001), 34; Michel Frizot, 'Body of Evidence, The Ethnophotography of Difference' in *A New History of Photography* (ed: Michel Frizot) (Koneman, 1998), 259-271 and 259.

[103] Peter Hamilton and Roger Hargreaves, *The Beautiful & The Damned, The Creation of Identity in Nineteenth Century Photography* (National Portrait Gallery 2001), 32-33; Samantha Barbas, *Laws of Image, Privacy & Publicity in America* (Stanford Law Books 2015), 47; Mary Warner Marien, *Photography: A Cultural History* (4th edn, Lawrence King 2014), 62; For an account and analysis of Walter Benjamin's personal experiences within such studios, see: Walter Benjamin, 'Berlin Childhood around 1900: 1934 version' in Howard Eiland & Michael Jennings (eds) *Walter Benjamin: Selected Writings Volume 3* (Harvard 2006), 392; Kathrin Yacavone, *Benjamin, Barthes and the Singularity of Photography* (Bloomsbury 2012), 61-69.

[104] Peter Hamilton and Roger Hargreaves, *The Beautiful & The Damned, The Creation of Identity in Nineteenth Century Photography* (National Portrait Gallery 2001), 36

[105] Andre Rouille, 'The Rise of Photography' in *A History of Photography* (eds Jena-Claude Lemagny and Andre Roille) (Cambridge 1987), 19-29, 40. See also: Timm Starl, 'A New World of Pictures, The Use & Spread of the Daguerrotype Process' in *A New History of Photography* (ed: Michel Frizot) (Koneman 1998), 32-57 and 42-43.

[106] Monica Huerta, *The Unintended: Photography, Property & the Aesthetics of Racial Capitalism* (New York University Press 2023) 1-2 and 48-49; Eden Osucha, 'The Whiteness of Privacy: Race, Media, Law' (2009) 24 Camera Obscura 66.

[107] Chris Rojek, *Celebrity* (Reaktion Books 2001), 106.

[108] Samantha Barbas, Laws of Image, Privacy & Publicity in America (2015, Stanford Law Books) 47

[109] Samantha Barbas, *Laws of Image, Privacy & Publicity in America* (Stanford Law Books, 2015), Ch 3.

technology of alienability. The medium thus had the capacity to commodify the individual it captured —to '*transform subject into object*';[110] it is this form of commodification that privacy laws sought to address.

Images captured in professional studios for 'personal use' might later be publicly disseminated and/or used in unforeseen ways, e.g. in greetings cards[111] or newspaper adverts.[112] The Kodak exacerbated this concern as it bypassed the professional studio system that had been premised on a fixed space and sitter consent to capture. Now photographs could be captured anywhere surreptitiously, and indeed the marketing of these 'detective' cameras encouraged such uses.[113] Individuals' images came to be captured and published without their knowledge or permission, prompting widespread public anxieties.[114] The evolving illustrated mass press also played a role in this 'crisis' through regularly featured celebrity images, but this also entailed an aesthetic shift. Press photographs sought to document 'truth', using surreptitious capture where necessary, leading to potential conflict between photographers and subjects.[115] With its focus on gossip columns and 'real life' interest stories, the press became 'a vast industry of counterimage'[116] which offended traditional elite Victorian sensibilities.[117]

This historical account closely mirrors and pre-empts the commerce-driven risks facing the photographic subject in the digital age; it shows that the commercial imperatives and personal anxieties concerning the circulating portrait are as old as photography itself. From the late-nineteenth century, a steady stream of disputes concerning unauthorised use of the plaintiff's photographic image came before courts across Europe and America, along with calls for the law to address this new problem. As Braudy writes, 'reticence and resistance… [were] explicit responses to the onrushing commercial culture of the nineteenth century, with its emphasis on the commodification of practically everything, in particular, the human image.'[118] Such 'reticence and resistance' took the form of new privacy laws and discourse that developed across Europe and America.

**Saving 'Souls': Nineteenth Century Privacy Laws as Protection From Commodification**

This section traces nineteenth century privacy laws and wider discourse, revealing that image-based disputes dominated early case law and photographic technology was pivotal in instigating the emergence of legal protections. It shows that the privacy-based interests underlying early legal protection of the photographic subject were often inchoate and articulated imprecisely. Courts represented such interests through a range of interchangeable proxies; feelings, dignity, personality and/or reference to particular emotions. Accordingly, privacy law and discourse constructed individuals as possessing vulnerable 'interiors' in need of protection. Furthermore, the harms that photographed

[110] Author's addition. Roland Barthes, *Camera Lucida* (Vintage 2000), 13. See also: Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction' in Hannah Arendt (ed) *Walter Benjamin: Illuminations* (Schocken 1969), 217 and 231.

[111] *Pollard v Photographic Company* (1889) 40 Ch D 345.

[112] *Pavesich v New England Insurance Co* (1905) 122 Ga. 190.

[113] Jessica Lake, *The Face That Launched a Thousand Lawsuits, The American Women Who Forged a Right to Privacy* (Yale University Press 2016), 30-31.

[114] Robert Mensel, 'Kodakers Lying in Wait: Amateur Photography & the Right to Privacy in New York 1885-1915' (1991) 43 American Quarterly 24 at 29-30 and 32; Sarah Igo, *The Known Citizen, A History of Privacy in Modern America* (Harvard 2018), 29-30. Jessica Lake, *The Face That Launched a Thousand Lawsuits, The American Women Who Forged a Right to Privacy* (Yale 2016), 30-32.

[115] Elena Cooper, *Art & Modern Copyright, The Contested Image* (Cambridge 2018), 197-198, 194-195.

[116] Joel H Wiener, *The Americanisation of the British Press, 1830s-1914* (Palgrave, 2011) ch 6; Samantha Barbas, 'The Laws of Image' (2012) 47 New England L.R. 23 at 33-34; Samantha Barbas, *Laws of Image, Privacy & Publicity in America* (Stanford Law Books, 2015), 10-12, 32.

[117] Joel H Wiener, *The Americanisation of the British Press, 1830s-1914* (Palgrave, 2011) 10-24; James Barron, 'Warren & Brandeis, The Right to Privacy, 4 Harv L.Rev. 193 (1890): Demystifying a Landmark Citation' (1979) 13 Suffolk U L Rev 875 at 904, 913-916; Samantha Barbas, *Laws of Image, Privacy & Publicity in America* (Stanford Law Books 2015), 12; Sarah Igo, *The Known Citizen, A History of Privacy in Modern America* (Harvard 2018), 13, 18-19, 33, 53.

[118] Leo Braudy, 'Secular Anointings, Fame, Celebrity & Charisma in the First Century of Mass Culture' in *Constructing Charisma, Celebrity, Fame and Power in Nineteenth Century Europe* (ed: Edward Berenson, Eva Giloi) (Berghahn, 2013), 2.

plaintiffs complained of were, without exception, commercially motivated. Early privacy laws thus established a conflict between commercial forces and the individual's 'inner self' and purported to protect this interior from certain market-driven threats. Notably, these attributes were also echoed in privacy laws across the US and Europe.

*Legal Responses to Photographic Technology*

The United Kingdom was the first country to provide explicit statutory protection for the photographic subject's image, albeit through copyright law. Section 1 of Fine Arts Copyright Act 1862 vested photographic copyright in the photographer-author, except where the photograph had been commissioned for consideration in which case copyright vested in the commissioning party (unless otherwise agreed). Such a photograph could not be traded or used without the commissioning party's consent. This section reflected and entrenched a distinction in the studio portrait industry between 'public' portraits intended for commercial dissemination (e.g. via *cartes de visite*) and 'private' portraits to be withheld from circulation. As Cooper explains, privacy interests motivated this distinction, in particular, "the need to ensure that "private portraits" were not "improperly repeated and exhibited".' Furthermore, she draws together late-nineteenth Century parliamentary evidence indicating concern to protect family interests and 'sentiments' from 'painful' or 'dreadful' uses such as adverts or shop window displays.[119]

In subsequent decades, section 1 was primarily used by photographers to assert their rights over celebrity images they had taken,[120] but it was occasionally invoked by photographic subjects seeking to control or restrict the publication of their image. Plaintiffs' success turned upon the section 1 binary distinction between private commissioned portraits and celebrity images created for public dissemination. This is aptly illustrated by *Boucas v Cooke* (1903),[121] a copyright dispute concerning a portrait of Jack Cooke (known as the 'boy preacher'). The case turned on whether the portrait was commissioned (owned by the defendant, Cooke) or a public image (owned by the plaintiff photographer). The trial judge had viewed this as a celebrity image case, but the Court of Appeal disagreed, holding that this was an 'ordinary' private commission. The test it applied was whether the photo was 'taken (1) for the sitter (2) for a valuable consideration'. Both elements were present on these facts; the photo had been instigated by Cooke's visit and request to the photographer (whereas in celebrity shots the reverse occurred). While consideration had not been given due to the dispute, it was payable in accordance with the 'ordinary course' of things.[122]

Beyond copyright, the law of confidence was also emerging to protect privacy interests. Its first prominent application was in *Prince Albert v Strange* (1849), which concerned the planned unauthorised exhibition of family images of Queen Victoria and the royal children, albeit drawings rather than photographs.[123] Knight-Bruce VC's judgment made repeated references to the impact upon the plaintiff's feelings and privacy.[124] He deemed the defendant's actions an unlawful breach, especially because they constituted "an unbecoming and unseemly intrusion" and "a sordid spying into the privacy of domestic life – into the home (a word hitherto sacred among us)".[125] His judgment noted the right to

[119] Quoting various evidence given to Parliament, Elena Cooper, *Art & Modern Copyright, The Contested Image* (Cambridge 2018), 163-165, 8.

[120] *Ellis v Ogden* (1894) 11 T.L.R 50; *Ellis v Marshall & Son* (1895) 11 T.L.R 522; *Melville v Mirror of Life Company* (1895) 2 Ch 531

[121] [1903] 2 KB 227 (CA).

[122] Author's addition. *Boucas v Cooke & Others* (1903) 2 KB 227 at 326-238 (CA).

[123] It is noted in *Gurry* notes that *Prince Albert* was not a radical new case, but one that represented a culmination of existing principles and gradually developing body of case law: Tanya Aplin and others, *Gurry on Breach of Confidence: The Protection of Confidential Information* (2nd edn, Oxford 2012), [2.10] and [2.87].

[124] *Prince Albert v Strange* (1849) 2 DE G & SM 652, 64 ER 293. See references to 'offence … against manners' causing 'most serious discomfort, pain and affliction to individuals' and 'pain of sentiment and imagination': 688, 689-90.

[125] *Prince Albert v Strange* (1849) 2 DE G & SM 652, 64 ER 293 at 698.

withhold material from publication and the importance of this to maintaining one's reputation.[126] Lord Cottenham's judgment on appeal also made explicit and repeated references to the royal couple's privacy, claiming that "[i]n the present case… privacy is the right invaded."[127] Ultimately an injunction was granted to prevent the defendant from unauthorised exhibition and publication of the images because the defendant's actions constituted a breach of implied contract and breach of confidence.

These confidence principles were later applied in *Pollard v Photographic Company* (1889),[128] prompted when the plaintiff's portrait was used on a Christmas card without permission. The Fine Arts Copyright Act 1862 did not apply to this dispute as the copyright had not been registered (a requirement of the time). But the plaintiff's claims of breach of contract and confidence succeeded; a photographer who obtained information (e.g. a photograph) in the course of 'confidential employment' (i.e. commissioned work) must not 'abuse' that 'power' and put it to 'improper use'.[129] Despite making no explicit mention of privacy, North J briefly acknowledged that 'a lady's feelings are shocked' by the defendant's actions, thus alluding to the interior interests at stake.[130] For Richardson, privacy interests concerning individual dignity and self-fashioning had a background influence in *Pollard*, suggesting some parallels with European approaches.[131] *Pollard* demonstrates the English courts using a range of doctrines to protect privacy interests of photographed individuals; where copyright ended, confidence could apply. But legal protections were nevertheless limited: the 1862 Act did not cover surreptitious photography beyond the professional studio.[132] Furthermore, rather than protecting one's visual image *per se*, English law provided indirect protection via copyright ownership of each specific photograph.

The preceding developments in English law were by no means unique. The later decades of the nineteenth century saw similar developments across other Western countries, especially in the U.S. and Europe. Despite crucial differences between countries in the respective doctrinal bases of privacy protections, their shared cultural responses to the rise of photography and the cross-border pollination of legal and intellectual ideas informing early privacy rights have been noted.[133] In the U.S., Warren & Brandeis' famous 1890 article advocated the creation of a new common law privacy right to protect the 'intense intellectual and emotional life' and 'sacred precincts of private and domestic life' which were threatened by 'instantaneous photographs' and newspapers.[134] They extrapolated their proposed privacy right from existing property laws, specifically drawing upon copyright and English breach of confidence to argue that the 'inviolate personality' was the principle underlying such areas.[135] The authors claimed that in each of these legal areas 'there inheres the quality of being owned and possessed' despite their marked differences to 'property' in its conventional sense.[136] In a telling passage, they claimed that thoughts and emotions warranted 'the same protection, whether expressed in writing [as per copyright], or in conduct, in conversation, in attitudes, or in facial expression', and furthermore, protection should

---

[126] *Prince Albert v Strange* (1849) 2 DE G & SM 652, 64 ER 293 at 694 (via unauthorised publication a man 'may be ruined'); 697-698 (the defendant had intruded upon the plaintiff family of 'unquestionable title' and 'the most marked respect in this country').

[127] *Prince Albert v Strange* (1849) 1 Mac C. & G. 24, 41 ER 1171 at 1171-1173, 1179.

[128] (1889) 40 Ch D 345.

[129] *Pollard v Photographic Company* (1889) 40 Ch D 345 at 349, 353, 354.

[130] *Pollard v Photographic Company* (1889) 40 Ch D 345 at 352.

[131] Megan Richardson, *The Right to Privacy, Origins & Influence of a Nineteenth Century Idea* (Cambridge 2020), 56-57 and 72-7.

[132] The case report records North J asking about the position of surreptitious photography and plaintiff's counsel agreeing that the lack of contract and consideration would enable the photographer to make and sell copies; *Pollard v Photographic Company* (1889) 40 Ch D 345 at 346.

[133] Megan Richardson, *The Right to Privacy, Origins & Influence of a Nineteenth Century Idea* (Cambridge 2020), 6-8; James Whitman, 'Two Western Cultures of Privacy: Dignity Versus Liberty' (2004) 113 Yale L.J. 1151 at 1204-1207.

[134] Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 Harv L.R. 193 at 195, 205 and 213. On photography specifically, the authors refer to 'the latest advances in photographic art [that] have rendered it possible to take pictures surreptitiously' (p 211) and propose the privacy right would encompass 'the right of [a private individual] to prevent his public portraiture': ibid, 211, 213.

[135] These laws acted to protect expressed 'thoughts, sentiments and emotions' against publication. Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 Harv L.R. 193 at 205, 213.

[136] Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 Harv L.R. 193 at 205.

not be limited to 'conscious products of labour'.[137] In Post's terms, the authors 'disentangled' privacy from existing property-based interests, without developing the 'analytic relationship' between the two.[138]

With Warren & Brandeis's article as a catalyst and 'precedent',[139] American judges gradually developed the common law, culminating in *Pavesich v New England* (1905), where the first state supreme court upheld the privacy right of a plaintiff whose image had been used without his consent in a newspaper advert.[140] In a rich judgment which cited *Pollard* and drew heavily on Lockean theory, the Georgian Supreme Court acknowledged the detrimental impact such use of an individual's image would have on their emotions and dignity.[141] Furthermore, it expressed a clear scepticism to the market forces that had 'enslaved' Pavesich to a 'merciless master', disdainfully referring to the defendant's 'mercenary' profit-motive.[142] As Kahn suggests, the court viewed the misuse of Pavesich's image as commodifying – and thus threatening – his unique, individual persona.[143] Similarly in Europe, Richardson's study of early privacy laws and cases in the French and German systems of the period indicates that concerns for the dignity and personality of photographed individuals and the threats posed by commercially-driven uses of their images were also evident in those jurisdictions.[144]

Two key points emerge from these early privacy-protecting laws that enabled claimants to withhold images from public exposure and commercial circulation. First, the various laws and accompanying discourses did not always expressly use 'privacy' terminology. Instead, they adopted language of the 'interior' to represent the privacy interests at stake, whether termed 'personality', 'dignity' or cast as 'sentiments' or emotions.[145] Accordingly, they constructed the individual as having a single, unique personality or deeper 'inner self',[146] upholding the subjective use-value of image in terminology that epitomised this highly personal, unquantifiable interest in it. Secondly, the discourse sought to protect this spiritual interior generally, but from commodification specifically. Though only select cases articulate explicit concern about markets, intrusions were driven by commercial imperatives and the exchange-value of the individual's image.[147] Privacy doctrine and discourse thus constructed a fundamental conflict between the market and the individual's 'interior' life, arguably reflecting a broader conventionally-assumed dichotomy between a rational, transactional, economic public domain and an emotional, intimate private sphere.[148] Privacy laws purported to protect this 'interior' from market-driven intrusions by asserting the image's use-value over its exchange-value, albeit in certain circumstances.

---

[137] Author's addition. Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 Harv L.R. 193 at 206, 207.

[138] Robert Post, 'Rereading Warren & Brandeis: Privacy, Property & Appropriation' (1991) 41 Case Western Reserve L.R. 647 at 648,

[139] Ben Bratman, 'Brandeis & Warren's 'The Right to Privacy' and the Birth of the Right to Privacy' (2002) 69 Ten L.R. 623 at 650.

[140] *Pavesich v New England Insurance Co* (1905) 122 Ga. 190.

[141] *Pavesich v New England Insurance Co* (1905) 122 Ga. 190, 218, 214.

[142] *Pavesich v New England Insurance Co* (1905) 122 Ga. 190, 219-220, 214-215.

[143] J Kahn, 'Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity' (1990) 17 Cardozo Arts & Ent Law Journal 213 at 216-217, 221, 233-4.

[144] Megan Richardson, The Right to Privacy, Origins & Influence of a Nineteenth Century Idea (Cambridge 2020), Ch 3, 145-153 and 159-161.

[145] Perhaps mirroring the nineteenth century emergence of 'emotion' as a psychological category for systematic investigation: Thomas Dixon, *From Passions to Emotions, The Creation of a Secular Psychological Category* (Cambridge 2006), 4-6, 21, Ch 7.

[146] Jeffrey Malkan, 'Stolen Photographs Personality, Publicity & Privacy' (1997) 75 Tex L.R. 779 at 781-782, 787-789, 796-798. Though note that Malkan's discussion focuses solely on U.S. law. See also: Sarah Igo, *The Known Citizen, A History of Privacy in Modern America* (Harvard 2018), 38.

[147] See e.g., *Prince Albert v Strange* (1849) 2 De G & SM 652, 64 ER 293 at 698, where Knight-Bruce VC claimed that profit was the key motive behind the defendant's attempts to exhibit and publish a catalogue of etchings by Queen Victoria and Prince Albert.

[148] Eva Ilouz, *Cold Intimacies, The Making of Emotional Capitalism* (Polity 2007), 4. Note that despite identifying this prevailing distinction, Ilouz questions it.

*The Central Role of Property in Privacy Laws*

Despite the apparent market scepticism of privacy discourse, this section shows that early privacy-protecting laws were heavily reliant on liberal-capitalist constructions of property. Furthermore, while upholding the personal use-value of individual image, these laws simultaneously fostered its commodity status in two ways. First, they recognised image as a source of economic value. Secondly, despite enabling subjects to *withhold* their image from dissemination, privacy-protecting laws simultaneously had the potential to facilitate their choice to commercially *exploit* it.

Via Section 1 of the Fine Arts Copyright Act 1862, copyright law was the key vehicle used to protect the photographic subject's privacy. Nevertheless, copyright's core purpose is to reward the creative labours of authors by protecting their works to enable commercial exploitation, and in this context, the Lockean labour justification has been highly influential.[149] English law vested the copyright of specific private photographs in the commissioner, protecting select portraits within the remit of the professional studio. But English courts have firmly resisted the proposition that copyright can protect one's image *per se*; in *Merchandising Corporation of America v Harpbond* (1983), the Court of Appeal decisively rejected an attempt to obtain copyright protection for Adam Ant's face by protecting his facial make-up as an artistic work.[150]

Property notions also subtly infiltrated equitable breach of confidence through judicial use of property-based language and the doctrine's overlap with the common law copyright in unpublished works.[151] Defendants arguing that no property rights were at stake were repeatedly unsuccessful. In *Albert v Strange* (1849), the defendant argued that property rights were not engaged because the plaintiff had not authored all of the sketches and, furthermore, privacy did not constitute property.[152] And in *Pollard* (1888), the defendant photographer argued that '[a] person has no property in their features'.[153] Both courts rejected these arguments, claiming the court's intervention did not depend on the presence of property rights.[154] In *Albert v Strange* the court held that breach of confidence could apply where a party 'obtained knowledge' of a 'matter or thing' that was 'the exclusive *property* of the owner'.[155] Similarly in *Pollard* the court placed obligations on an individual who obtained and misused confidential 'information' in breach of their obligations.[156] Rather than expressly extending property rights to the person as US courts did,[157] English courts extended confidence doctrine by creating obligations on a defendant where information (including photographic information) had an 'owned' or controlled quality. Yet this more restrained judicial approach also entailed the deployment of property-based terminology.[158]

---

[149] See, e.g.: Carys Craig 'Locke, Labour & Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law' (2002) 28Queens L.J. 1; Peter Drahos, *Philosophy of Intellectual Property* (Dartmouth 1996), Ch 3; Lawrence Lessig, *Free Culture, The Nature & Future of Creativity* (Penguin 2005), Chs 6-10.

[150] *Merchandising Corporation of America v Harpbond* [1983] F.S.R. 32 (CA).

[151] *Albert v Strange* (1849) 2 De G & SM 652, 64 ER 293 at 693-698, 716; *Macmillan & Co v Dent* (1907) 1 Ch 107 at 121. See also: Tanya Aplin and others, *Gurry on Breach of Confidence: The Protection of Confidential Information* (2nd edn, Oxford 2012), [2.39-2.57] and [2.91-2.110].

[152] *Prince Albert v Strange* (1849) 1 Mac. & G. 24, 41 ER 1171 at 1174-5

[153] *Pollard v Photographic Company* (1889) 40 Ch D 345 at 346, 353.

[154] Emphasis added. *Prince Albert v Strange* (1849) 1 Mac. & G. 24, 41 ER 1171 at 1179. The court also held unequivocally that the plaintiff held a property right (copyright) in the etchings, though this was not essential. It later stated that 'privacy is the right invaded' and that the court's intervention 'does *not* depend upon any *legal* right: 1177, 1178-1179. See also: *Pollard v Photographic Company* (1889) 40 Ch D 345 at 352.

[155] The court provided the analogous example of a clerk passing on information about his employer's accounts. *Prince Albert v Strange* (1849) 1 Mac. & G. 24, 41 ER 1171 at 1178-1179. For a discussion of the influence of property in *Prince Albert* and *Pollard*, see: Megan Richardson and Julian Thomas, *Fashioning Intellectual Property, Exhibition, Advertising and the Press 1789-1918* (Cambridge 2012), Chs 3-4.

[156] *Pollard v Photographic Company* (1889) 40 Ch D 345 at 349, 353, 354.

[157] *Pavesich v New England Insurance Co* (1905) 122 Ga. 190; *Munden v Harris* (1911) 153 Mo. App. 652.

[158] A full discussion of the debate regarding whether confidence is 'intellectual property' is beyond the scope of this article. It is noted *in Gury* that property has played a less prominent role in breach of confidence than equity and contract, and further claims that confidence does not have a doctrinal basis in property: Tanya Aplin and others, *Gurry on Breach of Confidence: The Protection of Confidential Information* (2nd edn, Oxford 2012),

Thus, property played a central role in privacy law's protections albeit through copyright and confidence. Narrow privacy safeguards were provided for photographed individuals by granting limited protection for select images in particular circumstances. This scepticism towards viewing one's image as an object of property *per se* persisted- even in relation to passing off and trade mark protection- until the turn of the twenty-first Century.[159]

*Exchange-value and Economic Interests Recognised*

As well as protecting privacy in property-based terms, English law also subtly recognised the economic value of the subject's image. This issue recurred in cases concerning the 1862 Act. Whilst primarily protecting private commissioned portraits, section 1 simultaneously fostered the celebrity 'face' industry and, as Cooper claims, can be seen as an early (commercial) publicity right.[160]

Cooper discusses an unreported case concerning a poorly-taken, commissioned photograph of a tailor, *Muller* (1864), who later aroused public attention as a murder suspect. The court held that ownership of this private portrait rested with Muller,[161] and wider commentary agreed that its economic value stemmed from his likeness rather than the photographer's labour. For Cooper, this and other unreported cases 'reinforced the creation of pecuniary interests in the "face"' and supplanted the photographer's authorship which was central to copyright.[162] Similar dynamics are evident in *Melville* (1895)[163] and *Ellis v Marshall* (1895).[164] In both cases, defendant magazines published celebrity photographs that had been given to them by the famous subjects depicted. Facing copyright infringement claims brought by the photographers of those images, the magazines maintained they were private portraits under the 1862 Act. The defendants argued that the mere sitting of a subject satisfied the section 1 requirement for consideration *in itself*.. Though both defendants were unsuccessful, the courts nonetheless implicitly recognised an economic value in one's image. In *Melville*, Kekewich J accepted that the subject's sitting did amount to 'good and valuable consideration', but placed more emphasis on who instigated the sitting, finding that the disputed image had not been 'executed for or on [the sitter's] behalf'.[165] In contrast, Charles J in *Ellis* rejected the defendant's argument solely on pragmatic grounds; if subjects' images amounted to consideration *per se* 'there would be no means by which copyright could ever be left in the photographer excepting the case of a surprise photo.'[166] These examples highlight the first legal recognition that the economic (exchange) value of a photograph could flow not from the traditional Lockean (and indeed Marxian) source of creative labour, but somehow from the subject's appearance itself.[167]

Furthermore, early privacy protections were occasionally used by plaintiffs to discreetly accommodate and safeguard commercial interests in image. In such cases their concern was to *manage*

---

[4.09], [4.101-4.102], [4.108]. But this does not detract from our claim that property terminology has played a key role in the doctrine's historical development and expansion. Furthermore, the following uncontroversial points can be noted: (1) confidence is invariably included within the remit of IP doctrine and syllabi; (2) Confidence has been judicially deemed a form of 'IP' for certain purposes: *Coogan v News Group* [2012] EWCA Civ 48, [45]-[52].

[159] See, for instance, trade mark law: *Elvis Trade Mark* [1999] R.P.C. 567 (CA); *Diana Trade Mark* [2001] E.T.M.R. 25. In passing off law: *McCulloch v May* (1947) 65 R.P.C. 58; *Lyngstad v Anabas* [1977] F.S.R. 62. See also: Hazel Carty, 'Advertising, Publicity Rights & English Law' [2004] I.P.Q. 209.

[160] Elena Cooper, *Art & Modern Copyright, The Contested Image* (Cambridge 2018), 174,

[161] *The Times* (30 September 1864) 9; *The Times* (8th October 1864) 11.

[162] Elena Cooper, *Art & Modern Copyright, The Contested Image* (Cambridge 2018), 185-186, 189.

[163] *Melville v Mirror of Life Company* (1895) 2 Ch 531.

[164] *Ellis v Marshall & Son* (1895) 11 T.L.R 522.

[165] *Melville v Mirror of Life Company* (1895) 2 Ch 531 at 536. The Court of Appeal in *Boucas v Cooke* (1903) 2 K.B. 227 (CA) later cast doubt upon the *Meville* court's interpretation of s.1, though not specifically the 'consideration in image' point and it agreed the outcome of Melville had been correct on its facts.

[166] *Ellis v Marshall & Son* (1895) 11 T.L.R, 522 at 523.

[167] This feature was also more explicitly present in US image privacy caselaw of the period that extended Lockean notions of self-ownership: *Pavesich v New England Insurance Co* (1905) 122 Ga. 190; *Munden v Harris* (1911) 153 Mo. App. 652. See also: *Robertson v Rochester Folding-Box Co* (1902) 171 N.Y. 538 at 564 (Grey J, dissenting).

the public circulation of their image, rather than *withhold* it. Despite the private/celebrity portrait binary distinction created by 1862 Act, the privacy proviso could be used to (indirectly) protect commercial interests. *Boucas v Cooke*,[168] the 'boy preacher' case discussed above, is one such example. Although the Court of Appeal found the portrait to be a private commissioned image with copyright vesting in the defendant sitter, this was certainly no portrait for his parlour wall. Instead, this image of a popular preacher was created to disseminate to his congregation and beyond.[169] Similarly, in *Ellis v Ogden*, the court held that disputed photographs of an actress were privately commissioned as she had paid for copies and was captured wearing her own clothes, despite the images being taken immediately after some publicity shots of her in character and costume.[170] Yet, these 'off-stage' photographs were not to place in a private album; the actress later provided them to the defendant magazine for publication, leading to the litigation.

Accordingly, mixed commercial-dignitary motives were present in image-based privacy disputes from the outset.[171] The section 1 distinction fostered 'the celebrity image as an object of property',[172] while the privacy proviso simultaneously enabled public figures such as the 'Boy Preacher' and *Ellis* actress to control their public image for career-advancing (i.e. commercial) purposes. These early cases highlight the difficulty of maintaining a clear distinction between the subject's dignitary and commercial interests in their image.[173] Thus, the categories of private and celebrity-public portrait were not always as mutually-exclusive as they appeared.

Though English privacy law was ostensibly concerned with protecting dignitary rather than commercial interests, it was shaped by discreet commercial dynamics from the outset. It fostered the economic value of a sitter's image in two ways. First, by enforcing the subject's decision to withhold their image from circulation in certain circumstances it contributed to an artificial scarcity of portraits.[174] In doing so, privacy law broadly echoed IP laws that work by producing artificial scarcity, thereby increasing market value.[175] Second, whilst upholding the use-value of a photographed sitter's image, the courts also implicitly recognised its exchange-value, despite refusing to find against photographers on policy and/or factual grounds. In recognising the commercial value of image, English courts were arguably merely responding to the emerging mass media and culture industries trading in portraits as commodities outlined earlier. Yet, the propertisation of image was '*both a consequence of and a stimulus to* market exchange.'[176] Moreover, these developments aligned with wider changes in domestic IP law in the late-19th Century, in particular the shift in focus from the economic value of mental labour (such as that expended by photographers) towards the economic value of the IP object itself (the image).[177] The extension of property terminology thus mirrored changing notions of economic value. As Vandervelde argues, understandings of 'property' transformed during the late-19th

---

[168] *Boucas v Cooke & Others* (1903) 2 K.B. 227 (CA).

[169] Though this is not a 'commercial' interest in the strictest sense of the word, we do not know whether the pictures were sold to raise revenues (for individual or church) or to attain influence or standing. Did the religious aspect to this case make the court reluctant to categorise it as a public portrait?

[170] *Ellis v Ogden* (1894) 11 T.L.R. 50. It should be noted that this case report is brief and merely summarises the judgment. There was a dispute between the parties as to who instigated the plain clothes sitting but court held that it was 'not material' to the case.

[171] Elena Cooper, *Art & Modern Copyright, The Contested Image* (Cambridge 2018), 174-5.

[172] Elena Cooper, *Art & Modern Copyright, The Contested Image* (Cambridge 2018), 182.

[173] This point is well-noted in U.S. law and literature: Dorothy Glancy, 'Privacy and the Other Miss M' (1990) 10 Northern Illinois L.R 401 at 401-19; Jonathan Kahn, 'Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity' (1999) 17 Card Arts & Ent L.J. 213 at 233-242, 263-270; Edward Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 N.Y.U. L.R. 964 at 989; Huw Beverley-Smith, Ansgar Ohly and Agnes Lucas-Schloetter, *Privacy, Property & Personality, Civil Law Perspectives on Commercial Appropriation* (Cambridge 2005), 52.

[174] Edward Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) vol 39 New York University Law Review 964, 989.

[175] Tom G Palmer, 'Are Patents & Copyrights Mortally Justified? The Philosophy of Property Rights & Ideal Objects' (1990) Harvard Journal of Law & Public Policy vol 13(3) 817-865, 860-861

[176] Emphasis added. George Armstrong, The Reification of Celebrity Persona as Property (1991) 51 Louisiana Law Review 443, 463-464, 457, 448.

[177] Brad Sherman & Lionel Bently, *The Making of Modern Intellectual Property Law* (Cambridge, 2008) 173-4, 194-5, 199-204.

Century, when emphasis shifted from the Blackstonian model of dominion over tangible objects to a de-physicalised understanding concerned instead with protecting economic value.[178] However, although early English law treated certain specific photographs as property or quasi-property, it did not construct the individual's image as a distinct commodity *per se*. At least, not until a new privacy right entered UK law.

**The Influence of Property upon Article 8**

Despite privacy's apparent anti-market rhetoric, historical privacy laws were intrinsically entwined with the commercial culture from which they claimed to protect individuals because they paradoxically relied heavily upon liberal-capitalist constructions of property. This part returns to English jurisprudence concerning Article 8 of the ECHR to examine the contemporary implications of this tradition. It demonstrates that the latent property logic in English law has combined with Article 8 to fashion a notion of image (and private information more generally) as property or quasi-property. The 'possessive individual' model that the courts have discreetly introduced into English law is identified and critiqued. Under the influence of this model, Article 8 has come to embrace self-commodification, thus sustaining and legitimating new digital media industries and ultimately serving contemporary capitalism.

*The 'Possessive Individual' enters privacy law*

A crucial property-based metaphor is highly influential in liberalism and operates across various legal doctrines, including copyright and early-US privacy law. This is the 'possessive individual', as articulated by John Locke.[179] Locke claimed that every individual exclusively 'owns' their person and their labour.[180] Individual labour forms the basis of private property entitlement because of the economic value it creates.[181] Early US image-privacy cases extended this possessive individual reasoning; 'owning' one's body also necessarily entailed 'owning' the body's appearance.[182] Thus, by developing Lockean property as the basis for a privacy right, US privacy law constructed one's image as a distinct reified, possessable object.[183]

Despite English law's historical scepticism to rights in image *per se*, giving legal effect to Article 8 led to the introduction of this possessive individual construct hitherto absent in English privacy law. This propertised strategy is encapsulated by the ECtHR's influential *Reklos* judgment which depicts image as a discrete object, and advocates the individual's right to control it.[184] Further examples are evident in English cases such as *Wood v Metropolitan Police Commissioner* (2009) where the Court of Appeal unanimously held that police photographs of the claimant engaged Article 8(1) and a majority found their retention a disproportionate violation of Article 8(2). Regarding Article 8, Laws LJ (partially dissenting) stated:

> "an individual's personal *autonomy* makes him—should make him—*master of all those facts about his own identity*, such as his name, health, sexuality, ethnicity, his *own image*… He is

[178] Kenneth Vandervelde, 'The New Property of the Nineteenth Century: The Development of the Modern Concept of Property, (1980) 29 Buffalo Law Review 325, 328-335. See also: Margaret Davies & Ngaire Naffine, *Are Persons Property? Legal Debates About Property & Personality* (Ashgate, 2001) 38-39, 42, 85.

[179] Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property & Personality* (Ashgate, 2001), 4-5 and185.

[180] John Locke, *Two Treatises of Government*, (Everyman's Library 1989), Book II, [27], [44] and [173].

[181] John Locke, *Two Treatises of Government*, (Everyman's Library 1989), Book II, [39]-[49]. The previous contributions of Hobbes and the Levellers to the notion of ownership of self and labour is set out in C.B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford [1962] 2011), 57-68, 145-154.

[182] *Pavesich v New England Insurance Co* (1905) 122 Ga. 190; *Munden v Harris* (1911) 153 Mo. App. 652. See also: *Robertson v Rochester Folding-Box Co* (1902) 171 N.Y. 538, 564 (Grey J, dissenting).

[183] George Armstrong, 'The Reification of Celebrity Persona as Property' (1991) 51 Louisiana L.R. 443. For an analysis of this Lockean reasoning in Pavesich, see: Rebecca Moosavian, 'Pavesich v New England (1905)' in *Landmark Cases in Privacy* (eds: Paul Wragg and Peter Coe) (Hart 2022), Ch. 3.

[184] *Reklos v Greece* (Ap 1234/05) [2009] ECHR 200, [40].

> *the presumed owner of these aspects of his own self*; his control of them can only be loosened, abrogated, if the state shows an objective justification for doing so."[185]

Two notable points emerge from this widely-quoted passage.[186] First, the rights-bearer is conceived as a possessive individual—a 'master' and 'owner'. The objects this individual possesses are 'all facts' about their identity including (but not restricted to) image; these are informational components fundamentally linked to one's person and identity. Second, this property terminology is deployed to advance individual autonomy, a key justification for privacy articulated across case law[187] and wider literature.[188] Propertised terms are also commonly employed in informational privacy disputes beyond image. For example, according to the Court of Appeal, the second stage of the misuse of personal information test asks whether 'in all the circumstances the interest of the *owner* of the information must yield to the right to freedom of expression conferred on the publisher',[189] a formulation that has been widely cited.[190]

In select cases the courts have explicitly found claimants to be owners of personal information as private property. In *McKennitt*, a dispute concerning an unauthorised biography of the claimant, the Court of Appeal rejected the defendant's claim to have property in the information. Instead, it found that the book contained the specific 'experiences of and the property of the first claimant', Buxton LJ claiming '[i]f information is *my private property*, it is for me to decide how much of it should be published.'[191] Similar reasoning appears in *OPO* (2014), a child's misuse of private information claim against his famous father who had written an autobiography which included details of the author's abusive childhood. The defendant couched their arguments in propertised terms, claiming the father 'owned' the private information and that the claimant did not. The Court of Appeal, finding no misuse, deemed it insufficient for publication to merely affect family life; the information needed to 'belong' to the claimant.[192]

Consequently, Article 8 marked a shift in privacy law by introducing the possessive individual model present in early-US privacy case law. The law has come to construct the body and, by extension, its image as property or quasi-property in order to protect individual dignity and autonomy – though in

---

[185] Emphasis added. *Wood v Metropolitan Police Commissioner* [2009] EWCA Civ 414, [21].

[186] In misuse of private information, see: *HRH Duchess of Sussex v Associated Newspapers* [2021] EWHC 273 (QB), [86]; *Hutcheson v News Group* [2011] EWCA Civ 808, [24]; *AVB v TDD* [2014] EWHC 1442 (QB), [60]. In public law, see: *R (on the application of AB) v Secretary of State for Justice* [2009] EWHC 2220 (Admin), [39] (transgender prisoner successfully challenging ongoing detention in male prison); *Malcolm v Ministry of Justice* [2010] EWHC 3389 (Admin), [94] (prisoner challenge to imprisonment conditions); *SXH v Crown Prosecution Service* [2014] EWCA Civ 90, [2014] WLR 3238, [49] (asylum seeker unsuccessfully challenged punishment for using a false identity document at border); *Re JR 38* [2013] NIQB 44, [59] (police publication of images of youths involved in public order offences); *R (on the application of C) v Secretary of State for Work & Pensions* [2016] EWCA Civ 47, [6] (dispute regarding gender recognition certificate); *Jay v Secretary of State for Justice* [2018] EWHC 2620 (Fam), [72] (dispute regarding gender recognition certificate).

[187] References to Article 8's role in protecting the individual's autonomy or 'informational autonomy' are present in: *Campbell v MGN Ltd* [2004] UKHL 22, [51] (Lord Hoffmann), [134] (Baroness Hale); *Murray v Express Newspapers* [2008] EWCA Civ 446, [31]; *Douglas v Hello!* [2005] EWCA Civ 595, [81]; *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [7] and [214]; *Gulati v MGN* [2015] EWHC 1482, [110]-[111], [124]-[125]; *HRH Duchess of Sussex v Associated Newspapers* [2021] EWHC 273 (QB), [86].

[188] Alan Westin, *Privacy & Freedom* (Ig Publishing 1967); James Rachels, 'Why Privacy is Important' (1975) 4 Philosophy & Public Affairs 323; C. Bryant, 'Privacy, Privatisation and Self-Determination' in *Privacy* (ed: JB Young) (John Wiley, 1978), Ch 3, 80; Beate Rossler, *The Value of Privacy* (Polity Press 2005), Ch 1.

[189] *Murray v Express Newspapers* [2008] EWCA Civ 446, [27]. This second stage test was also stated in almost these exact terms in *McKennitt v Ash* [2006] EWCA Civ 1714, [11].

[190] See, e.g.: *Spelman v Express* [2012] EWHC 355 (QB), [31]; *AAA v Associated Newspapers Ltd* [2012] EWHC 2103 (QB), [63]; *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) [42]; see also: *Theakston v MGN* [2002] EWHC 137 (QB), [78].

[191] *McKennitt v Ash* [2006] EWCA Civ 1714, [32], [28] and [55]. Later quoted in *RocknRoll v News Group* [2013] EWHC 24 (QB), [18].

[192] *OPO v MLA* [2014] EWCA Civ 1277, [39], [43] and [45]. The terminology of 'belong' (albeit in quotation marks) is also used in: *HRH Duchess of Sussex v Associated Newspapers* [2021] EWHC 273 (QB), [75].

private law, 'ownership' requires a reasonable expectation of privacy in relation to the relevant information.[193] The rhetoric of self-ownership features strongly in commercial image rights law,[194] yet it is similarly influential in privacy doctrine. But this judicial strategy further commodifies the individual by conceiving individual freedom in distinctly market-based terms, thus inserting property and exchange deep into the 'heart and mind' of the legal subject. To understand how requires a closer examination of the possessive individual model.

The Possessive Individual Examined

Protecting personality by propertising an aspect of it, namely one's image, is beset by contradiction. It entails creatively re-deploying as a defence the very liberal-capitalist notion of 'property' that, as established above, facilitated the commodifying activities of capitalist culture industries. Commentators have debated whether this strategy effectively protects individuals, or whether it renders them *more* susceptible to commodification by others.[195] Proponents include Radin, who advocates propertising close personal attributes as a means to resist commodification.[196] In the privacy context, defenders have identified pragmatic benefits to drawing upon 'property' concepts; this established terminology has formed a convenient basis to address novel claims concerning feelings and image.[197] For example, Keren-Paz cogently deploys this strategy to bolster the privacy rights of subjects of non-consensual image-based abuse.[198] As Beverley-Smith has claimed, 'property' in this context is a mere metaphorical label without 'inherent significance'; furthermore,

> "[t]he manipulation of a well-established concept such as property, its gradual stretching, is one of the familiar common law techniques of embracing new rights."[199]

In contrast, as Davies & Naffine note, the proposition that 'the person must become the property of themselves in order to avoid becoming the property of others' entails a 'paradox'.[200] This strategy does indeed have significant paradoxical consequences; presenting a liberal-capitalist construction of property as an essential attribute of the individual extends and intensifies a market logic, thereby rendering them *more* susceptible to commodification. The historically-specific metaphor of the self-possessive individual shows us precisely why.

The rhetorical effects of the possessive individual have been subjected to insightful analysis, revealing limitations that have profound consequences in the privacy context. As Pateman claims, self-

---

[193] *Murray v Express Newspapers* [2008] EWCA Civ 446.

[194] Even non-US systems where persona is not formally 'owned' (such as the UK) show a strong quasi-proprietary connection between a person and their image via legal features of excludability and alienability: Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property & Personality* (Ashgate, 2001), 126-127.

[195] Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property & Personality* (Ashgate 2001), 10, 12, 14-15.

[196] Margaret Radin, 'Property & Personhood' (1982) 34 Stan LR 957 at 957-1015. Though it must be noted that Radin's personhood-based thesis seeks to find a middle ground between the universal commodification of economics and the universal non-commodification of Marxists, with safeguards for things most important to personhood: Radin, 'Market-Inalienability' (1987) 100 Harv LR 1849.

[197] G. Alex Sinha, 'A Real-Property Model of Privacy' (2019) 68 DePaul L.R. 567; Lawrence Lessig, 'Privacy as Property' (2002) 69 Social Research 247 at 253-254, 264-265. See also, Michael B Kent Jr, 'Pavesich, Property & Privacy: The Common Origins of Property Rights & Privacy Rights in Georgia' (2009) 2 John Marshall L.J, 1.

[198] Tsachi Keren-Paz, *Egalitarian Digital Privacy, Image-Based Abuse & Beyond* (Bristol University Press 2023), Chs 4-5, 10.

[199] Huw Beverley-Smith, Ansgar Ohly and Agnes Lucas-Schloetter, *Privacy, Property & Personality, Civil Law Perspectives on Commercial Appropriation* (Cambridge 2005), 213, 52. See also: Tanya Aplin and others, *Gurry on Breach of Confidence: The Protection of Confidential Information* (2nd edn, Oxford 2012), [4.74]-[4.75]; Michael B Kent Jr, 'Pavesich, Property & Privacy: The Common Origins of Property Rights & Privacy Rights in Georgia' (2009) 2 John Marshall L.J. 1.

[200] Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property & Personality* (Ashgate 2001), 146.

ownership is a 'political fiction' 'with a powerful political force'.[201] Davies and Naffine note the traditional binary divide between person or subject (i.e. owner) and object or thing (i.e. property); the law has predominantly viewed property and personhood status as mutually-exclusive.[202] They argue that the possessive individual entails a divided self; the self is both subject (owner) and object (property) simultaneously. This divide rests on a Cartesian dualism that privileges mind over body, assuming the essential person (subject-owner) resides in the mind whilst the body is alienable (object-property), reduced to external housing for the mind.[203] All three authors view self-propertisation as a means of asserting individual autonomy. [204]

But the 'dark side' of possessive individualism's appealing rhetoric of individual freedom and universal natural rights has been examined by Macpherson. He argues that this model constructs a possessive market society in which '[e]veryone is a possessor of something, if only his capacity to labour; all are drawn into the market'.[205] Here, the freedom (or autonomy) of individuals derives from self-ownership.[206] The ability to alienate their labour coupled with a Lockean natural right to 'dispose of their possessions and persons as they think fit' was central to this construction.[207] In short, freedom was reduced to an economic freedom to facilitate a range of orderly market relations between 'sole proprietors'.[208] For MacPherson, possessive individualism (particularly Locke's) was, at heart, a justification of wage-labour, bourgeois appropriation and emerging capitalist material inequality that remains influential in modern liberalism.[209] Developing MacPherson's analysis, Pateman claims the self-ownership model treats individual labour as 'property' that is separable (alienable) from the person when in reality it is not. This fiction privileges the individual's autonomous decisions to enter contracts and trade their labour as they choose. But it obscures the wider undermining of individual autonomy fostered by wage-labourer subordination.[210] This critique is endorsed by Richardson who argues that the Lockean possessive individualist view of oneself as an enterprise has underpinned the neo-liberal extension of markets into new aspects of human life.[211]

Despite its Marxist theoretical basis and focus on French law's early response to photography, Edelman's critique of possessive individualism shares two significant similarities with the preceding

---

[201] Carole Pateman, 'Self-Ownership & Property in the Person: Democratisation and A Tale of Two Concepts' (2002) 10 Journal of Political Philosophy 20, 21

[202] Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property & Personality* (Ashgate 2001), 2, 24-25, 51; see also Lee McConnell, 'When is it Right to Speak of Animal Rights?' Canadian Journal of Law & Jurisprudence (forthcoming).

[203] Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property & Personality* (Ashgate 2001), 41, 75-78. As well as privileging mind over body, the authors claim self-ownership rests upon actual possession and the right to control and exclude: ibid, 26. See also: John Frow, 'Elvis' Fame: The Commodity Form and the Form of the Person' (1995) 7 Cardozo Studies in Law & Literature 131 at 155.

[204] Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property & Personality* (Ashgate 2001), 6; Carole Pateman, 'Self-Ownership & Property in the Person: Democratisation and A Tale of Two Concepts' (2002) 10 J Pol Philosophy 20 at 23-24.

[205] 'John Locke, *Two Treatises of Government* (Second Treatise) (Everyman, 1989), Bk II, [40]. C.B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford [1962] 2011), 16, 48-49, 54-55, 62, 142, 148 and 220. Furthermore, the individual who owes nothing to society for their person or capacities: ibid. 231, 263.

[206] C.B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford University Press [1962] 2011) 57, 264, 270.

[207] John Locke, *Two Treatises of Government* (Second Treatise) (Everyman, 1989) section 4. C.B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford [1962] 2011) 219, 264, 269, 271-272.

[208] C.B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford [1962] 2011) 271-272, 264, 269-270. In Radin's terms, it 'assumes that alienation itself is an act of freedom': Radin, Market-Inalienability' (1987) 100 Harv LR 1849 at 1899. See also: John Frow, 'Elvis' Fame: The Commodity Form and the Form of the Person' (1995) 7 Cardozo St Law & Lit 131 at 147.

[209] C.B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford [1962] 2011), 217, 221, 251, 257 and 270-271. MacPherson's point is supported by Radin who argues, more generally, that the commitments of liberal thought – particularly its key features such as negative liberty and property - pull it towards universal commodification: Radin, 'Market-Inalienability' (1987) 100 Harv LR 1849 at 1887-1903.

[210] Carole Pateman, 'Self-Ownership & Property in the Person: Democratisation and A Tale of Two Concepts' (2002) 10 J Pol Philosophy 20 at 24, 26-27, 33, 36, 47 and 50.

[211] Janice Richardson, *Law & the Philosophy of Privacy* (Routledge 2016), 4-5 14-15, 69-70 and 80-88.

analyses.[212] First, for Edelman, the free and equal, labouring, self-possessive individual is presented as expressing pre-existing, fundamental qualities of human nature that the law merely recognises or passively reflects. But on the contrary, this legal fiction or metaphor 'is produced by *and* is necessary to generalised commodity exchange and production based on wage labour'.[213] The law actively constructs this legal subject with attributes that are essential to capitalist production.[214] Secondly, Edelman shows how possessive individualism supports capitalist conceptions of property and exchange. In their depiction as self-proprietors free to alienate their labour, individuals resemble a fungible commodity.[215] In this sense, the possessive individual directly facilitates market circulation as individuals are 'empowered' to freely dispose of their possessions; indeed, 'freedom consists in putting [oneself] into circulation.'[216] This construction of legal subjectivity expresses an inherent contradiction, portraying the individual – in Benjamin's words – as 'seller and sold in one'.[217]

These wider politics of the possessive individual cast significant light on the privacy protections analysed in preceding sections. Early privacy cases recognised that the economic value of a photograph was not limited to traditional Lockean sources – i.e. the creative labour of photographer – but also inhered in the subject's appearance. Law thus acknowledged (and constructed) a new 'source' of economic value beyond labour: an aspect of the individual's personality – their image. In doing so the law met Warren and Brandeis' claim that protection should extend beyond products of labour.[218] Like labour before it, image is understood as a discrete, economically valuable commodity 'belonging' to the photographic subject. Image thus became a new resource ripe for commodification, a development consistent with capitalism's relentless drive to extend commodification into ever more spheres.[219] Yet, as established above, whilst fostering the commodification of the individual's image, early privacy laws chiefly sought to uphold (in certain circumstances) the subject's autonomous decision *not* to commodify their image. Liberty or autonomy was construed as the capacity to *withhold* one's image from public display and market circulation. However, once this choice to withhold one's image from circulation is legally upheld, the market-oriented, possessive individualist construction of freedom also necessitates upholding the subject's alternative choice to legally alienate and exploit their image on the market. In adopting possessive individualism to protect interior interests in one's image, privacy laws also import the model's wider political agenda of buttressing capitalist mechanisms and drawing individual 'self-proprietors' into market exchange. It is therefore perhaps inevitable that privacy law's concern to foster individual autonomy would evolve to accommodate market dealings with image as per labour before it. This development reflects the 'enabling and productive' potential of the 'commodity form'.[220]

Paradoxically then, despite privacy law's stated concern with protecting interior interests, its propertising strategy paved the way for commodification to more extensively penetrate the body and mind of the legal subject as ever more aspects of its 'essence' are 'decomposed' into 'possessions'.[221]

---

[212] Edelman does not use the 'possessive individual' term, preferring to speak of the legal 'subject', but for consistency, this article will maintain the 'possessive individual' terminology. Furthermore, his interest in the possessive individual has Continental Hegelian rather than Lockean roots. But, as this article shows, his analysis is nevertheless pertinent to both.

[213] Bernard Edelman, *Ownership of the Image, Elements for a Marxist Theory of Law* (Routledge 1979), Ch 4. See also Paul Hirst and Elizabeth Kingdom, 'On Edelman's Ownership of the Image' (1979) 20 Screen 135, 136; John Tagg, *The Burden of Representation, Essays on Photographies & Histories* (Macmillan 1988), 106; Jane M Gaines, *Contested Culture, The Image, The Voice & The Law* (University of North Carolina Press 1991), Chs 1-2.

[214] Bernard Edelman, *Ownership of the Image, Elements for a Marxist Theory of Law* (Routledge 1979), Ch 4.

[215] Paul Hirst, 'Introduction' in Bernard Edelman, *Ownership of the Image, Elements for a Marxist Theory of Law* (Routledge 1979), 3.

[216] Authors' addition. Paul Hirst and Elizabeth Kingdom, 'On Edelman's Ownership of the Image' (1979) 20 Screen 135 at 136; Bernard Edelman, *Ownership of the Image, Elements for a Marxist Theory of Law* (Routledge 1979), Ch 4.

[217] Walter Benjamin, *The Arcades Project* (Harvard 2002), 10.

[218] Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 Harv L.R. 193 at 206-207.

[219] John Frow, 'Elvis' Fame: The Commodity Form and the Form of the Person' (1995) 7 Cardozo St Law & Lit 131 at 133-134.

[220] John Frow, 'Elvis' Fame: The Commodity Form and the Form of the Person' (1995) 7 Cardozo St Law & Lit 131 at 136.

[221] Paul Hirst and Elizabeth Kingdom, 'On Edelman's Ownership of the Image' (1979) 20 Screen 135 at 138.

By embracing the very market forces they emerged to constrain, privacy laws facilitated individual self-commodification under the banner of 'freedom'. In the US this development occurred via privacy law's spawning of a separate publicity right,[222] but in English law it has taken a different form.

*Article 8 embraces commodification*

By adopting the possessive individual model, Article 8 has embraced the commodification of image. As established below, English courts now accept that privacy can be protected not only by withholding images from circulation, but also via their market exploitation. Accordingly, privacy law renders dignitary and commercial interests in image (i.e. use and exchange-values) inseparable. It sanctions a market-based solution to market-driven privacy threats, thus supporting the very forces it initially emerged to resist. Article 8's accommodation of controlled exploitation of image is more fitting for the digital age, but has problematic consequences for millions of social media users. Privacy so-rendered buttresses the social media industry premised on the assumption of user autonomy or consent. The economic value of image comes to dominate its use-value; image thus becomes a commodity for the individual, albeit in the ultimate service of new media. As such, Article 8 strengthens and legitimises hyper-commodifying business models of contemporary digital industry, with disempowering consequences for millions of users drawn into the image economy.

Article 8's capacity to accommodate commercial interests generally is recognised by the ECtHR. In *Denisov* it stated:

> ''the notion of a private life'… does not exclude in principle activities of a professional or business nature. It is after all, in the course of their working lives that the majority of people have a significant opportunity to develop relationships with the outside world.'[223]

Furthermore, despite enduring English judicial disdain towards a free-standing image right, Article 8 has been used to indirectly protect commercial interests in image as demonstrated by *Douglas v Hello!*[224] Though *Douglas* is noted for explicitly rejecting a personality rights-based approach to image, this claim is at odds with judicial reasoning concerning Article 8 across *Douglas,* which treats images as both alienable, commercially valuable object *and* protectable private information. In *Douglas*, the defendant magazine published unauthorised, surreptitious paparazzi photographs of the claimants' high-security wedding, frustrating their $1 million exclusive deal with competitor magazine *OK!*. In contrast to the purely commercial interests of their co-claimant, *OK!*, the Douglases brought a hybrid claim, arguing that the images were personally *and* commercially valuable to them.[225] This hybrid claim prompted judicial divergence over two related issues: first, whether and how commodifying personal information might undermine privacy interests; second, whether property interests were at stake.

The Commodify-to-Protect Strategy

On this first issue, the Douglases argued that the exclusivity deal had been 'the best way to control the media and protect [their] privacy'.[226] They stressed the importance of such image control in personal

[222] *Haelan Labs v Topps* (1953) 202 F.2d 866 (2d Cir 1953); *Zacchini v Scripps-Howard Broadcasting Co.* 433 U.S. 562 (1977). For academic works that contributed to this development see: Melville Nimmer, 'The Right of Publicity' (1954) 19 Law & Cont Prob 203; William Prosser, 'Privacy' (1960) 48 Cal L.R. 383.

[223] *Denisov Ukraine* (App 76639/11) [2018] ECHR 1061, [100]; approved in *ZXC v Bloomberg* [2022] UKSC 5 [115]-[117].

[224] The *Douglas* case entailed arguments based in breach of confidence and Article 8. It occurred in the earliest stages of the post-Human Rights Act 1998 era before misuse of private information had emerged as a fully distinct tort, though reference is made to misuse at select points: *Douglas v Hello!* [2007] UKHL 21, [251]; [2005] EWCA Civ 595, [51], [77].

[225] [2005] EWCA Civ 595, [33] and [34]; *Douglas v Hello!* [2003] EWHC786 (QB), [227]. For an account of the 'uncertain' relationship between privacy and publicity in *Douglas*, see: Gillian Black, *Publicity Rights & Image, Exploitation & Control* (Hart 2011), 25-27.

[226] *Douglas v Hello! Ltd* [2005] EWCA Civ 595, [4],

terms (to maintain privacy) *and* commercial terms (to maintain a successful career).[227] Accordingly, they advanced a novel, wider understanding of privacy; that privacy could be protected by enabling individuals to manage their public image via market exploitation, and furthermore, this self-commodifying strategy should be protected by Article 8 *as well as* commercial confidence laws. The Douglases' argument merged the use and exchange-values of their images, advancing the notion that exchange-value can *serve* use-value. It therefore departed from traditional privacy doctrine discussed above, which framed market exploitation and personality/dignity as fundamentally conflicting. On this reasoning, the market offers a solution to the threat of commodification by external forces: self-commodification on one's own terms. The trial judge and Court of Appeal accepted this exploit-to-protect argument as a legitimate strategy to preserve privacy which did not destroy privacy or reduce the defendant's liability.[228] A consistent line of argument was later accepted in *Duchess of Sussex v Associated Newspaper* (2021) where the Court of Appeal stated that an intention to publish private information in the future - in the claimant's case, for image-control and commercial reasons – was not fatal to a misuse of private information claim concerning that same information.[229]

Yet this rationale has been met with scepticism. Lord Walker in the House of Lords was a lone critic of the Douglases' commodify-to-protect strategy. He pointedly noted that the '"victims" were themselves cashing in their "valuable trade asset"'.[230] Unlike his colleagues, he quoted the Douglases' evidence to support his finding that the Douglases' were asserting a 'specialised commercial' right akin to a character right, which was far removed from privacy.[231] Ultimately, for Lord Walker, the Douglases' commercial and dignitary interests were incompatible; once privacy had been sold, only commercial interests could be harmed.[232] Beyond the judiciary, select commentators have expressed concern that the developments in *Douglas* risk indirectly expanding intellectual property rights, representing a drift towards a U.S.-style publicity right.[233]

The 'commodify-to-protect' strategy endorsed in *Douglas* reflects a similar shift in the regime of Continental personality rights. Such rights historically focused on shielding the inviolate personality from 'invasion' and remedying harms to dignitary interests. Prevailing wisdom in contemporary personality discourse still assumes that dignitary and commercial interests are easily distinguished and fundamentally incompatible.[234] But Resta argues this assumption is flawed. With the marketisation of nearly all aspects of life, contemporary personality rights now focus on commercial exploitation of personality, e.g. via compensation for unauthorised use. Consequently, economic and dignitary interests

---

[227] Interestingly, though both of the first claimants set out commercial and privacy motives for the deal, Catherine Zeta Jones's justification places stronger emphasis on importance of image to career (and does so in gendered terms) whilst Michael Douglas's evidence suggests privacy motives were stronger than commercial ones: *Douglas v Hello!* [2003] EWHC 786 (QB), [195], [52].

[228] Lindsay J accepted that this offered the 'best strategy' for maintaining privacy and 'the certainty of fair [media] coverage': *Douglas v Hello! Ltd* [2003] EWHC 786 (QB), [52], [201], [216]. Later, the Court of Appeal stated 'We agree that the Douglases were entitled to complain about the unauthorised photographs as infringing their privacy on the ground that these detracted from the favourable picture presented by the authorised photographs and caused consequent distress': *Douglas v Hello!* [2005] EWCA Civ 595, [109] (Lord Phillips). Here the court accepted the Douglases' distress could be directly linked to negative impact on image. Consistent remarks were made by Sedley LJ at interim stage. Sedley denied there was 'a bright line between the personal and the commercial' and indicated that English law was capable of protecting privacy, even where it 'is being turned to commercial ends.' *Douglas v Hello!* [2001] Q.B. 967 (CA), [142], [140].

[229] *HRH Duchess of Sussex v Associated Newspapers* [2021] EWHC 273, [86] and [90]-[91].

[230] *Douglas v Hello!* [2007] UKHL 21, [281]. See also: ibid, [275], [295].

[231] *Douglas v Hello!* [2007] UKHL 21, [284]-[285]. [Such criticisms seem to broadly anticipate similar criticisms made of the Sussex's arrangements with the media.]

[232] *Douglas v Hello!* [2007] UKHL 21, [275], [281] and [295]

[233] Tanya Aplin, 'Commercialising Privacy and Privatising the Commercial: The Difficulties Arising From the Protection of Privacy via Breach of Confidence' in *Intellectual Property, Unfair Competion and Publicity-Convergences and Development* (eds Annette Kur and others) (Edward Elgar 2014), 1, 11; David Welkowitz, Privatizing Human Rights? Creating Intellectual Property Rights From Human Rights Principles' (2013) 46 Akron L.R. 675 at 678, 686 and 693.

[234] Giorgio Resta, 'The New Frontiers of Personality Rights and the Problem of Commodification: European & Comparative Perspectives' (2011) 26 Tulane European and Civil Law Forum 33 at 42 and 61.

are entwined and frequently merge, personality and property rights increasingly 'converge' and their boundaries 'tend to be blurred'.[235]

Yet the commodify-to-protect strategy did marginally limit the Douglases' privacy claims in relation to remedies. First, the hybrid interests led the Court of Appeal to refuse an interim injunction to restrain publication of the illicit photographs. The court acknowledged that the claim involved image or publicity management, distinguishing it from traditional privacy claims.[236] No injunction was necessary because 'the greater part of privacy has *already been traded* and falls to be protected, if at all, *as a commodity* in the hands of [OK!].'[237] Accordingly, any loss of privacy could 'be readily translated into general damages'.[238] Secondly, Lord Phillips later indicated that the commercial deal would limit the level of damages awarded, as any distress caused by publication would be reduced.[239] In short, the commodify-to-protect strategy led to the finding that, like commercial harms, dignitary harms were remediable in financial terms and furthermore, those harms would be less severe.

A Property Right?

Despite judicial disagreement across the Douglas litigation, overall, the courts treated the wedding photographs as a valuable commodity and property or quasi-property. The judges who expressly denied property issues were at stake found against *OK!*. For example, the Court of Appeal held that the Douglases' right was not proprietary and did 'not fall to be treated as property that [could] be owned and transferred' to *OK!*, whose status was exclusive licensee rather than co-owner.[240] On appeal, Lord Walker (dissenting) agreed. Yet, interestingly, both conceded the difficulty of dealing with this dispute without resorting to property-based terminology such as 'ownership'.[241] Ultimately, *OK!*'s confidence claim succeeded in the House of Lords. Though Lord Hoffmann's majority opinion avoided explicit discussion of property issues, it approved Lindsay J's original conclusion[242] which had resolved the dispute in propertised terms, viewing the images as a 'commodity' and all claimants 'co-owners'.[243]

Though technical issues of property were ultimately glossed over, the economic value of the images featured prominently across the courts' reasoning. Throughout the early stages of the litigation, the courts explicitly deemed the wedding images a valuable 'commodity'.[244] As with 'property, this 'commodity' terminology was discarded in later stages of the litigation, but the underlying market logic remained a background influence. For example, though not formally adopted by the Court of Appeal,[245] the court indirectly endorsed the term when approving the trial judge's findings in favour of the Douglases' hybrid claim, stating there was 'no reason' why confidence should not protect 'the

---

[235] Giorgio Resta, 'The New Frontiers of Personality Rights and the Problem of Commodification: European & Comparative Perspectives' (2011) 26 Tulane European and Civil Law Forum 33 at 42-43, 47 and 61. See also: Gillian Black, *Publicity Rights & Image, Exploitation & Control* (Hart 2011), 88-96 and 116.

[236] *Douglas v Hello!* [2001] Q.B. 967, [169] (CA).

[237] Emphasis added. *Douglas v Hello!* [2001] Q.B. 967, [144] (CA).

[238] *Douglas v Hello!* [2001] Q.B. 967, [142] (CA). See also ibid, [171].

[239] *Douglas v Hello!* [2005] EWCA Civ 595, [107]

[240] It claimed that trial judge, Lindsay J, had erred in treating the wedding information 'as if it were property', in particular, as transferrable (i.e. alienable): *Douglas v Hello!* [2005] EWCA Civ 595, [119], [126] and [128].

[241] *Douglasv Hello!* [2007] UKHL 21, [282] and [276] (Lord Walker). Discussing confidence cases Lord Phillips referred to individuals who have information to which they can deny access to third parties as 'owner', adding the caveat 'We have used the term 'the owner' loosely': *Douglas v Hello! Ltd* [2005] EWCA Civ 595, [118].

[242] *Douglas v Hello!* [2007] UKHL 21, [117] and [127]. Approved at: ibid, [302] (Baroness Hale) and [325], [327] (Lord Brown). Though this may have been because *OK!*'s confidence-based arguments before the House of Lords were not couched in proprietorial terms, a likely response to the Court of Appeal judgment: *Douglas v Hello!* [2007] UKHL 21, [277] and [287].

[243] [2003] EWHC 786 (Ch), [187]. Note that this aspect of Lindsay J's judgment was later expressly criticised as erroneous by the Court of Appeal.

[244] *Douglas v Hello!* [2001] Q.B. 967, [195], [196], [227] and [271] (CA). See also: *Douglas v Hello!* [2003] EWHC 786 (QB), [195] [196], [227] and [271] ("Here it is difficult to deny the title of commodity to that which the two rival magazines each bid a £1m or more to obtain").

[245] Its use of 'commodity' merely consisted of quoting the earlier courts: *Douglas v Hello! Ltd* [2005] EWCA Civ 595, [31], [33] and [252].

opportunity to profit' from confidential private information as it does for confidential trade secrets.[246] Lord Hoffmann's majority opinion in *OK!*'s favour went further; although he did not use the term 'commodity', the economic value of the images was central to his reasoning.[247] Thus, the upper courts side-stepped 'commodity' terminology (and its connotations of alienability and exchange) but nevertheless recognised the images' exchange-value, upholding *OK!*'s confidence claim primarily on this basis. Aplin notes this circular reasoning, suggesting it is reducible to the maxim 'information that is worth paying for is worth protecting.'[248]

Ultimately, by acknowledging the images' exchange-value and upholding an overall outcome that legitimated both the commodify-to-protect strategy and the related commercial interests of the co-claimants, *Douglas* demonstrates Article 8's capacity to accommodate and bolster commercial, property-like interests in image. Indeed, Lord Walker's dissent claimed that the majority's confidence finding in OK!'s favour effectively bestowed property or quasi-property rights upon the claimants. The outcome created a 'monopoly', a 'quasi-copyright' and went 'some way to creating an unorthodox and exorbitant form of intellectual property',[249] a criticism that Lord Hoffmann briefly but explicitly denied.[250]

*Douglas* should nevertheless be viewed in the light of the limits of Article 8-based protection for commercial interests. In *Terry v Persons Unknown* (2010) the claimant footballer's application for an interim injunction to prevent publication of a story and accompanying photograph regarding his extra-marital affair was unsuccessful because Tugendhat J claimed that the 'nub' of Terry's complaint was 'the protection of reputation, and not of any other aspect of private life.' He noted that Terry had made 'no mention of personal distress', and his concern for the privacy of other interested parties did not appear 'altruistic'. For Tugendhat J, the claim was:

> 'essentially a business matter… the real basis for the concern of [Terry] is likely to be the impact of any adverse publicity upon the business of earning sponsorship and similar income.'[251]

Similar issues arose in *YXB v TNO* (2015) where Warby J refused to renew an injunction preventing the publication of information concerning the claimant footballer's sexual relationship. The claimant had failed to provide evidence about the effect of publication on him and his agents had played a primary role in bringing the application. The court thus concluded there was 'strong ground for inferring' that 'commercial motives play[ed] a considerable role' in bringing the action.[252] Yet such motives did not undermine the strength of YXB's privacy claim in relation to intimate photos and footage of his genitals, and these were protected by copyright in any event. Thus, the tort of misuse of private information will not protect *solely* commercial interests; feelings or personality must also be adversely affected. The requirement that commercial interests be linked to dignitary harms will thus determine how claims are pleaded; the dignitary-emotional impacts upon the claimant will be emphasised, even where commercial interests are at stake.

Ultimately, though the *Douglas* reasoning could be regarded as restricted to its specific facts—in particular high-status claimants with high value images—it has a wider resonance, especially when

---

[246] In doing so, the Court of Appeal accepted that recognising the Douglases' right to commodify their private information 'breaks new ground' and 'has echoes of' the continental image right. *Douglas v Hello! Ltd* [2005] EWCA Civ 595, [112]-[113].

[247] *Douglas v Hello!* [2007] UKHL 21, [117], [123] and [127]; endorsed at: ibid, [302] (Baroness Hale); [325], [327] (Lord Brown).

[248] Tanya Aplin, 'Commercialising Privacy and Privatising the Commercial: The Difficulties Arising From the Protection of Privacy via Breach of Confidence' in *Intellectual Property, Unfair Competion and Publicity-Convergences and Development* (eds Annette Kur and others) (Edward Elgar 2014); Tanya Aplin and Judith Skillen, 'Douglas v Hello! Ltd (2005)' in *Landmark Cases in Privacy Law* (Hart 2023), Ch 10, p 221; David Welkowitz, 'Privatising Human Rights? Creating Intellectual Property Rights From Human Rights Principles' (2013) 46 Akon L.R. 675 at 678, 686, 693.

[249] *Douglas v Hello! Ltd* [2007] UKHL 21, [296]-[297], [300].

[250] This decision did not create an 'image right or any other unorthodox form of intellectual property': *Douglas & Another v Hello! Ltd* [2007] UKHL 21, [124].

[251] Authors' addition. *LNS (Terry) v Persons Unknown* [2010] EWHC 119 (QB), [95].

[252] *YXB v TNO* [2015] EWHC 826 (QB), [49]-[50] and [61](c)-(d).

viewed in the context of the possessive individual-influenced case law outlined earlier. *Douglas* perpetuates this propertised, market-compatible conception of privacy in favourable, even aspirational, terms. This is significant because, in short, we are all Douglases now, exchanging our personal images online in way that engages both their subjective use-value and their commercial value. But crucially, this model plays out rather less favourably for the online masses, with our less lucrative images and weaker bargaining power.

Problematic Implications: Privacy & the Image Economy

Our historical account of privacy law shows that the traditional conflict between external, market-driven intrusions and individual personality was discreetly undermined from the outset by the deployment of property concepts to protect privacy interests, and privacy laws to protect commercial interests in image. Such blurring is exacerbated by difficulties in identifying litigants' motives, which may be dignitary, commercial or hybrid.[253] Thus, the wider understanding of privacy-as-commercial-exploitation upheld in *Douglas* merely reflects a latent dynamic in legal doctrine, but does so explicitly, providing legal recognition that in some contexts dignitary and commercial interests have merged. Privacy, which emerged to protect the dignitary use-value of image, comes to encompass and facilitate its exchange-value.

In one sense, this shift from 'privacy-as-withholding-image' to 'privacy-as-controlled-exploitation' arguably renders it more fitting for the digital age.[254] Rossler, for example, claims that informational privacy is crucial because an individual's autonomy requires:

> "*control over their self-presentation*, that is control of how they want to present or stage themselves, to whom they do so and in which contexts."[255]

Furthermore, she notes the gap between private person and public identity, questioning the degree to which they correspond.[256] Elsewhere, Warner denies that publicity and privacy constitute a binary opposition, claiming publicity can 'enable privacy, providing resources for interiority and contexts for self-elaboration.'[257] Analogous claims are made by Jurgenson in the context of online 'social photography'. He doubts publicity and privacy are 'inversely related' in a 'zero-sum' manner, regarding them instead as 'more subtly entwined, even mutually reinforcing'.[258] Indeed, due to pervasive online publicity, privacy is not 'dead' but on the contrary more 'cherished' and 'fetishized' than ever. Summarising an approach to privacy in terms consistent with *Douglas*, Jurgenson claims:

> '[s]elf-documentation is not pure exhibitionism but more like the fan dance, a game of reveal and conceal. No matter how much "oversharing" occurs, all is not revealed. More is always hinted at'.[259]

Across these commentators, there is acceptance that self-management of one's public image can form an important aspect of privacy maintenance. Self-presentation inherently entails a privacy-protecting function, or in Malkan's terms, the 'personality both presents the self to the world *and* protects the self

---

[253] As the authors have argued elsewhere, ascertaining whether a plaintiff's interests in image are commercial or dignitary can be difficult, especially in early cases. Though motive is not always articulated, it can be inferred from the case facts, in particular the status of the plaintiff, and the language used to depict the harms they suffered. Rebecca Moosavian, 'Public Image (Un)Limited: Privacy Rights of the Photographic Subject in England and New York Compared' in *Comparative Privacy & Defamation* (ed: Andras Koltay & Paul Wragg) (Edward Elgar 2020), Ch 9, 150.

[254] This is aptly illustrated by calls for the UK to introduce a US-style publicity right rooted in *Reklos* and autonomy and dignity-based justifications: Gillian Black, 'Exploiting Image: Making a Case for the Legal Regulation of Publicity Rights in the UK' [2011] E.I.P.R 413 at 416-418.

[255] The passage continues by claiming that without this, diversity of relations is not possible. Bette Rossler, *The Value of Privacy* (Polity Press 2005), 116-117. The view that privacy/publicity are not mutually exclusive binary is also held by Kirsty Hughes: 'The Public Figure Doctrine and the Right to Privacy (2019) 78 Cam L.J. 7 at 90.

[256] Bette Rossler, *The Value of Privacy* (Polity Press, 2005), Ch 7.

[257] Michael Warner, *Publics & Counterpublics* (Zone Books 2005), 30-31

[258] Nathan Jurgenson, *The Social Photo: On Photography & Social Media* (Verso 2019), 100-101.

[259] Nathan Jurgenson, *The Social Photo: On Photography & Social Media* (Verso 2019), 101-104.

from the world'.[260] Accordingly, privacy necessarily entails an external, self-presentational aspect. This understanding was recently acknowledged in *Stoute v News Group,* where claimants photographed by paparazzi on a public beach were held to have no reasonable expectation of privacy. One factor was the 'demonstrative and performative element to their arrival';[261] the photographs revealed nothing behind the image the claimants had presented to the world. By acknowledging image management as an aspect of privacy (even while refusing to uphold the claim in *Stoute*), Article 8 merely reflects the social subtleties of privacy and the inherent nuances of the photographic medium. It also reflects concerns for public image and status that have been a background influence in modern privacy discourse from its origins. Despite the enduring prominence of Warren and Brandeis's 'right to be let alone' terminology, academics suggest the authors had a slightly narrower interest; namely a right to control one's public identity,[262] rooted in wider class- and race-based concerns to maintain social standing.[263]

The claim here is not necessarily that this *Douglas*-style understanding of privacy is mistaken, or that a traditional, 'purist' conception is preferable. Rather, the position presented is two-fold. First the latent potential for liberal privacy doctrine to encompass market dynamics was present from the outset despite its commerce/inner-self binary opposition and its implicit anti-market rhetoric. Secondly, the problematic consequences of this extend far beyond celebrity elites in an era when millions actively manage their image on social media, effectively commodifying their self-presentation. Online, the autonomous development and presentation of one's self becomes indistinguishable from its commodification. But, as Ilouz states, 'even if the… commodification of selfhood remain[s] irrevocably fused with its emancipation, we cannot confuse one with the other.'[264] In particular, it is salient to ask, who primarily benefits from privacy rights so-constructed?

Privacy law's fiction of the empowered possessive individual whose image (and other private information) is an alienable object capable of being withheld or exchanged according to their autonomous choice buttresses the business models of contemporary digital media platforms such as Instagram, Snapchat and Facebook. As Waldman's critique of privacy practices in surveillance capitalist technology firms establishes, despite the 'superficially empowering rhetoric' of the privacy-as-control model, 'its chief beneficiaries are companies that want to extract and profit from our data.'[265] This industry is premised upon the notion of possessive individuals autonomously contracting their private information, particularly images, in return for 'free' online platform services. Yet critics argue that this privacy self-management model is flawed in three related ways.

First, it validates user terms and conditions that give platforms wide license to collect, use and control user data, including photographs, undermining laws that prevent online misuse of images.[266]

---

[260] Jeffrey Malkan, 'Stolen Photographs Personality, Publicity & Privacy' (1997) 75 Tex L.R. 779 at 779. See also: Thomas Nagel, 'Concealment & Exposure' (1998) 27Philosophy & Public Affairs 3 at 4 and 17

[261] *Stoute v News Group Newspapers* [2023] EWHC 232 (QB), [34]; upheld at [2023] EWCA Civ 523, [60].

[262] Samantha Barbas, *Laws of Image, Privacy & Publicity in America* (Stanford 2015), 26, 32; Sarah Igo, *The Known Citizen, A History of Privacy in Modern America* (Harvard 2018), 23. Similarly, Osucha notes that Warren & Brandeis's privacy does not entail retreat from publicity but instead '*represents a very particular way of doing publicness*'; Eden Osucha, 'The Whiteness of Privacy: Race, Media, Law' (2009) 24 Camera Obscura 66 at 72.

[263] Monica Huerta, *The Unintended: Photography, Property & the Aesthetics of Racial Capitalism* (N.Y.U 2023), 120-121, 131-132, 137-138, 141, 187; Eden Osucha, 'The Whiteness of Privacy: Race, Media, Law' (2009) 24 Camera Obscura 66; James Barron, 'Warren & Brandeis, The Right to Privacy, 4 Harv L.Rev. 193 (1890): Demystifying a Landmark Citation' (1979) 13 Suffolk U L Rev 875 at 904, 913-916; Amy Gadja, 'What if Samuel D Warren Hadn't Married A Senator's Daughter: Uncovering the Press Coverage That Led to the Right of Privacy' (2008) 2008 Mich St L Rev 35. On the influence of gender-, race- and class-based power imbalances on privacy more generally, see: Janice Richardson, *Law & the Philosophy of Privacy* (Routledge 2016), Ch 2.

[264] Authors' addition. Eva Ilouz, *Cold Intimacies, The Making of Emotional Capitalism* (Polity 2007), 109-110.

[265] Ari Ezra Waldman, *Industry Unbound, The Inside Story of Privacy, Data & Corporate Power* (Cambridge 2021), 47 and 57.

[266] Though they are subject to periodic change, a summary of platform user terms and conditions is outlined and discussed at: Eugenia Georgiades, 'Reusing Images Uploaded Online: How Social Networks Contracts Facilitate the Misuse of Personal Images' [2018] E.I.P.R. 435. For discussion and criticism of wider the role of contract – or the 'uncontract' – in entrenching and deepening power/knowledge inequalities between users and tech companies, see: Shoshana Zuboff, *The Age of Surveillance Capitalism* (Profile Books 2019), 48-50, 217-220, 235-237

Secondly, this model fails to provide individuals with meaningful control over their information because it does not account the wide range of entities individuals must engage with online, informational asymmetries, or the complexities of gauging potential future harms.[267] Thirdly, it falsely assumes that users act autonomously and rationally when making information-sharing choices online, ignoring platform design that covertly manipulates privacy choices.[268]

These points illustrate a clear contradiction between the liberal-legal depiction of privacy choices in narrow rational-economic terms and the online reality where autonomous choices about privacy 'are demonstrably impossible to make in the manner imagined.'[269] They lend credence to Pateman's criticism that, despite its surface claims, the self-ownership fiction acts to undermine individual autonomy by facilitating a 'distinctively modern form of subordination created through contract'.[270] In constructing individuals as empowered, self-possessive, and free to disseminate their images and information via attention (and profit) generating platforms, privacy law not only co-exists with the current technologies and culture of hyper-commodification, it also undertakes a crucial legitimating function. As a result, greater legal protections for privacy co-exist with a wider technology and culture in which individuals' private information is extensively disseminated and exchanged.

The privacy that claims to protect us in this environment is permeated by notions of ownership, economic value and freedom to alienate. Like labour before it, all are drawn into the image market. This dynamic is exemplified, for example, by fast-fashion brands' tactics of co-opting aspiring influencers to post images advertising their products. As this phenomenon indicates, touting one's image in the online gig economy replicates aspects of casual wage labour in the factories of the industrial revolution.[271] Through commodification 'the characteristics of the thing are inverted' and the exchange-value of one's image comes to dominate its use-value. Against this backdrop, the Council of Europe Resolution 1165's much-cited concerns about private information becoming a commodity for 'certain sectors of media' seem somewhat quaint in an era when such information is a commodity for individuals themselves, albeit in the ultimate service of new media and related industries.

## Conclusion

In historicising privacy law's treatment of the photographic subject, this article has demonstrated that it represents a culturally-specific response to new technology, showing how commercial dynamics have shaped this response in ways that undermine its stated ideals. Revealing these internal contradictions brings to light the limitations of conventional conceptions of privacy, prompting us to look beyond such constructions to re-imagine how law might contribute to meaningful privacy protection and values. In service of that endeavour, it offers two related conclusions; one regarding the evolving conceptions of privacy and the other concerning the subtle but important influence of commercial forces upon these conceptions.

First, two distinct—though by no means mutually-exclusive—models of privacy emerged from our historical account of privacy law and discourse. The first traditional view dominated nineteenth

---

[267] Daniel Solove, 'Privacy Self Management and the Consent Dilemma' (2013) 126 Harv L.R. 1880 at 1880-1882; Gordon Hull, 'Successful Failure: What Foucault Can Teach Us About Privacy Self-Management in a World of Facebook & Big Data' (2015) 17 Ethics & Information Technology 89 at 91-94; Ignacio Cofone, 'Beyond Data Ownership' (2021) 43 Cardozo L.R. 501 at 524-538.

[268] Ari Ezra Waldman, *Industry Unbound, The Inside Story of Privacy, Data & Corporate Power* (Cambridge 2021), 52-57, 60, 163-166, 170-171 and 197-205; Jose Van Dijck, *The Culture of Connectivity, A Critical History of Social Media* (Oxford 2013), 32-34 Gordon Hull, 'Successful Failure: What Foucault Can Teach Us About Privacy Self-Management in a World of Facebook & Big Data' (2015) 17 Ethics & Information Technology 89 at 93-96.

[269] Gordon Hull, 'Successful Failure: What Foucault Can Teach Us About Privacy Self-Management in a World of Facebook & Big Data' (2015) 17 Ethics & Information Technology 89 at 90. See also: Janice Richardson, *Law & the Philosophy of Privacy* (Routledge, 2016), 67-72.

[270] Carole Pateman, 'Self-Ownership & Property in the Person: Democratisation and A Tale of Two Concepts' (2002) 10 Journal of Political Philosophy 20 at 33, 47, 50.

[271] Indeed, as Brown documents, exploitation of individuals via this 'image'-based gig economy goes hand-in-hand with exploitation of the workers in the fast-fashion garment factories who make the clothes they promote: Symeon Brown, *Get Rich or Lie Trying, Ambition & Deceit in the New Influencer Economy* (Atlantic 2022), Ch 1.

century privacy laws whilst the second newer, more expansive view manifests in modern privacy law. Traditional privacy envisages control of image as withholding it from circulation, whereas the new model is wider, also casting it as controlling the terms upon which one's image is publicised and commercially exploited. The traditional model is also implicitly market-sceptic, seeking to protect the individual's interior life by restraining market-driven intrusions such as unauthorised circulation of one's image. In contrast, the new model casts personality or the 'inner self' and the market as compatible, enabling individuals to self-commodify their image and/or information *as a means to* protect privacy. Finally, the traditional model views commercial and dignitary interests in image as discrete and in conflict, whereas the new model accepts that economic and dignitary interests in one's image are merged, capable of aligning and therefore co-existing. Consequently, the traditional model advocates a clear separation between privacy and commercial image rights, whereas on the new model privacy can accommodate economic interests. Yet despite these crucial differences, the traditional privacy model always contained the latent potential to yield the emergence of the new model because it utilised liberal-capitalist notions of property; both models share this key feature.

This leads to the second finding; despite privacy's lofty concern to protect the individual's 'interior' interests, historically it has relied heavily upon market-based mechanisms, particularly property laws, terminology and metaphors, whose extension has mirrored judicial recognition of the economic value of individual image. From inception, image-based privacy was cast in distinctly market-based terms as a form of property or quasi-property, ultimately developing to construct the image as a reified, alienable object (with exchange-value) distinct from the individual owner.

The problem with such strategies is that, in Radin's terms, such unreflective use of market rhetoric produces 'an inferior conception of personhood.' In particular,

> "[u]niversal commodification undermines personal identity by conceiving of personal attributes, [and] relationships … as monetizable and alienable from the self."[272]

Despite the laudable aims of privacy discourse and rights to protect the individual's personality, feelings or 'interior' from market-driven intrusions, the 'person' on which this discourse is based is cast in narrow, impoverished market-based terms. We are so much more than mere self-proprietors seeking to exchange our images and/or information on the market. Yes, the superficially-empowering possessive individual model can provide greater protection for privacy by justifying both the withholding or trading of one's image. It affords public figures more ongoing control of privacy even where they exploit their image commercially, and it provides protections to individuals who suffer traditional market-driven intrusions such as unauthorised publication of private information by mass media defendants. But we should not be wholly satisfied with it, and should be keenly aware of its shortcomings. This possessive individual model is less effective for the majority of the populace seeking to connect, socialise or simply make our way in the digital age and, despite appearances, it disempowers individuals more generally. This is because the fiction of the autonomous individual managing their image and personal information 'property' is not equipped to address (and indeed obscures) the wider technological, cultural and commercial realities of self-commodification online, in particular the business models of the contemporary digital industry. Ultimately, this research demonstrates the profound shortcomings of propertised privacy in our hyper-commodified digital era where the personal *is* the commercial. Despite its apparent market-sceptic rhetoric, privacy so-constructed contributes to making this so.

[272] Author's addition. Margaret Radin, 'Market-Inalienability' (1987) 100 Harv L.R. 1849 at 1936, 1905. For an account of how the introduction of a market changes the perception of a thing, altering human motives and behaviour, see: Janice Richardson, *Law & the Philosophy of Privacy* (Routledge 2016), 120-128.