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# Is Vanna White Really So Dangerous? An Empirical Assessment of the Impact of *White v. Samsung Electronics* on Parody and Advertising

Tom Bellamore

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**IS VANNA WHITE REALLY SO DANGEROUS? AN  
EMPIRICAL ASSESSMENT OF THE IMPACT OF *WHITE V.  
SAMSUNG ELECTRONICS* ON PARODY AND ADVERTISING**

BY: TOM BELLAMORE\*

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**I. INTRODUCTION**

In 1988, a magazine advertisement produced by a New York advertising agency prompted entertainer Vanna White to file a lawsuit contending that the advertiser, Samsung Electronics America, had violated her right of publicity. A relative newcomer among property rights, the common law right of publicity first emerged into its own in the 1950s. It blossomed over

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\* Candidate, Juris Doctor, Chapman University School of Law, Class of 2003; Senior Vice President, California Avocado Commission. The author thanks the senior advertising executives interviewed for their insights into the creative development process and Craig Anthony (Tony) Arnold, Professor of Law & Director, Center for Land Resources at Chapman University School of Law for the guidance and inspiration he provided to bring this project to fruition.

the next two decades, shaped by case law and statutory enactments that gave it definition and depth.

The doctrine's metamorphosis was still underway when *White* brought her case before the Court of Appeals for the Ninth Circuit. Celebrities seeking relief from the Ninth Circuit for right of publicity infringements found a judiciary willing to give expansive interpretation to the common law right of publicity to protect those in the entertainment industry from exploitation. *White v. Samsung Electronics America, Inc.*,<sup>1</sup> gave the court an opportunity to continue the trend and ply the uncharted waters at the confluence of the right of publicity and the First Amendment.

Drawing sharp criticism from legal scholars and commentators, the decision was dubbed a "landmark" one that trenched First Amendment rights of free speech and expression, undermined the predictability of prior publicity law, and posed significant dangers for advertisers.<sup>2</sup> In the most vociferous criticism of all, Judge Alex Kozinski, author of a blistering dissent in the Ninth Circuit's denial of rehearing en banc in *White*, declared "something very dangerous is going on here."<sup>3</sup> More than a decade after *White*, however, documentation validating or negating the predicted outcomes of the ruling largely remained absent from the legal literature. This research was undertaken to illuminate whether the zealous protection of celebrities' rights by the *White* court has caused advertising agencies to avoid the use of celebrities and parody in commercial advertisements, thereby stifling creativity and the creative process.

Results of the research show that *White* is significant not for its independent impact, but instead because it brought the advertising industry to a threshold, beyond which permissible uses of celebrity persona were no longer fully cognizable. As the crowning point in a series of increasingly nebulous decisions surrounding celebrity rights, *White* symbolized the morass that right of publicity law had become. Ordinarily, agencies might be expected to learn to navigate these unsettled waters. In the post-*White* years, however, the advertising industry itself was changing. External environmental influences and industry restructuring were making agencies more risk averse and, in the face of legal uncertainties, more likely to avoid right of publicity conflicts.

While the research disclosed that the creative process within advertising agencies remains robust, it is clear that the cumulative effect of publicity rights cases from the past decade has had some impact on creative concepts

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<sup>1</sup> *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992)[hereinafter, *White*].

<sup>2</sup> Steven W. Colford, *Vanna White case goes to trial, Samsung vows to appeal California 'likeness' ruling*, *Advertising Age*, Mar. 29, 1993.

<sup>3</sup> *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993).

ultimately flowing to the commercial marketplace of ideas. Whether these impacts amount to a deprivation of cultural enrichment is a highly subjective inquiry, and the research draws no conclusion on this point. Data collected during the study show that advertisers' reliance on celebrity endorsements in print advertising declined throughout the 1990s, and right of publicity law undoubtedly contributed to this phenomenon, either directly or indirectly in combination with other influences. This appears to hold true for the use of parody in print advertising as well. Interestingly, the data show a slight resurgence in parody in recent years, with the appearance of political figures and deceased personalities—uses less subject to challenge—in print advertising. The study concludes that right of publicity law has in fact had real world impacts on the advertising business and that further research is needed to gain a better understanding of the factors influencing agency behavior and the relative weight of right of publicity law vis-à-vis other business considerations.

This study primarily relies on qualitative methods to answer two main research questions: 1) the extent to which advertising agencies changed the way they do business following *White* and 2) whether there has been a decline in the use of parody as a means of creative expression in print advertising as a result of *White*. Several theoretical propositions are advanced, against which the data collected were analyzed. These are: 1) advertisers have been impacted by *White* and the line of publicity rights cases of which *White* is a part; 2) the creative process has been compromised or restricted by these decisions; and 3) the use of celebrity parody in print advertisements produced by advertising agencies in the U.S. has changed as a result of *White* and other right of publicity cases. The study utilizes a limited, quantitative component to illuminate the third proposition.

Study results are organized into five main sections. Background information on the right of publicity and prominent cases leading up to the *White* decision are laid down in Sections II and III, to place the study in context. Highlights of the *White* decision, including the dissenting opinion of Judge Alarcon and the Court's subsequent denial of Samsung's petition for rehearing *en banc*, appear in Section IV, along with selected cases that followed *White*. Next are descriptions of the issues presented and the research design and methodology (Sections V and VI). Results of the research, consisting primarily of excerpts from qualitative interviews and quantitative data drawn from archival research, are summarized in Section VII. The study concludes with an analysis of research results against the theoretical construct in Section VIII and closing remarks in Section IX.

## II. DEVELOPMENT OF THE RIGHT OF PUBLICITY DOCTRINE

The origin of the right of publicity can be traced to notions of privacy, expressed most fully for the first time by Samuel D. Warren and Louis D. Brandeis in 1890.<sup>4</sup> Among Warren and Brandeis' contentions was the concept that private individuals were entitled to protection against the unjustifiable infliction of mental distress resulting from the growing excesses of the press.<sup>5</sup> A New York court was the first to grapple with the idea that appropriation of a person's identity could be an invasion of privacy, and the result was highly controversial. In *Roberson v. Rochester Folding-Box Co.*,<sup>6</sup> the court refused to restrain the press, holding that there was no right to protection against the use of a woman's picture to advertise flour without her consent. This prompted the New York legislature to enact a statute making it a misdemeanor and tort to use a person's name, portrait or picture for advertising purposes without express written consent.<sup>7</sup> Later courts rejected *Roberson* and in due course the first form of invasion of privacy—appropriation of name or likeness by a defendant for his own advantage—became firmly established as precedent.

By the early 1940s, when the proliferation of radio and print advertising gave rise to actions involving the commercial use of photographs of well-known personalities without their consent, courts faced a different problem. Protection of privacy no longer seemed the proper rationale for deciding cases involving celebrities. By definition, fame is achieved through public exposure, and the widespread use of a well-known person's photograph in an advertisement would seem to further such interests. It soon became apparent that the real issue was exploitation of a person's identity by another for commercial gain and that the compromised right was that of a celebrity's exclusive control over the use of name or likeness as means of maintaining the value of the celebrity's persona.

The earliest decision expressly recognizing a right of publicity was a 1953 case involving the unauthorized use of a photograph of a baseball player on baseball cards that accompanied packages of bubblegum.<sup>8</sup> At the time, baseball cards were considered premiums used to promote chewing

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

<sup>5</sup> *Id.* at 196.

<sup>6</sup> *Roberson v. Rochester Folding-Box Co.*, 64 N.E. 442 (N.Y. 1902).

<sup>7</sup> Ira J. Kaplan, *They Can't Take That Away From Me: Protecting Free Trade in Public Images From Right of Publicity Claims*, 18 LOY. L.A. ENT. L.J. 37, at 47 (1997).

<sup>8</sup> Russell J. Frackman and Tammy C. Bloomfield, *The Right of Publicity: Going to the Dogs?*, available at <http://www.gseis.ucla.edu/iclp/rftb.html>.

gum sales—essentially a form of advertising.<sup>9</sup> In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,<sup>10</sup> the defendant chewing-gum manufacturer produced a baseball card and was challenged by a plaintiff who had been granted an exclusive license by the baseball player for the use of the player's picture to promote the sale of the plaintiff's products. The court held that the "right to grant exclusive privilege of using one's name or likeness for commercial purposes" was a person's "right in the publicity value of the photograph."<sup>11</sup> While the *Haelan* court stopped short of labeling the right as property, it clearly focused on the inherent economic value of a celebrity's identity.

With the advent of television in the 1950s, advertising changed dramatically, as did the number of celebrities. Over time, advertisers gained the ability to reach millions of households in virtually every part of the U.S., and product market share could be correlated with the number of viewers watching sponsored programs. The explosion in television penetration of nationwide households elevated the number of persons thrust into public view and abbreviated the time period necessary to achieve celebrity status. Coinciding with these developments, the *Haelan* decision easily served as a springboard for an increasing number of right of publicity cases.

The progeny of *Haelan* mark the evolution of the right of publicity doctrine as it completed its transformation from its privacy-oriented roots and the guarding against misappropriation of a person's name or likeness to a broader concept more closely aligned with property law. During the last four decades, the right of publicity has come to be generally defined as a prohibition on the use of a person's name, likeness, or identity for commercial purposes without that person's consent.<sup>12</sup> Expansion of the doctrine by the courts has extended protection to other aspects or indicia of a celebrity's identity, as explored more fully *infra* in this study's discussion of the *White* case. Other decisions provide for the right of publicity to be transferable and descendible.<sup>13</sup> Less fluid has been judicial interpretation of the distinction between commercial and non-commercial uses, although some cases that have tested the edges of this bright line rule have found it blurred. The courts generally uphold the use of a person's identity for

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<sup>9</sup> Mark Sableman, *Trademark laws underlie sports fortunes*, ST. LOUIS JOURNALISM REV. Oct. 1, 1998 at 14.

<sup>10</sup> *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867 (2d Cir. 1953), cert. denied, 346 U.S. 816 (1953).

<sup>11</sup> *Id.* at 868.

<sup>12</sup> Restatement (Third) of Unfair Competition § 46 (1995).

<sup>13</sup> O. Yale Lewis, Jr., *New Washington Publicity Rights Legislation*, Washington State Bar Association News, June 1998.

purposes of news, commentary, entertainment or information to safeguard First Amendment rights of free speech and expression.<sup>14</sup>

In addition to development of the common law doctrine through case law, many states have passed comprehensive right of publicity statutes.<sup>15</sup> Statutory protections for publicity rights vary by place and degree. For example, Washington and Indiana are considered to afford celebrities the highest degree of state law protection.<sup>16</sup> In addition to name and likeness, these states protect voice, signature, distinctive gestures and mannerisms, and biographical facts or statistical information about a person.<sup>17</sup> Washington goes further still by explicitly protecting the property right that "every natural person" has in the use of his or her name, voice, image or other specified indicia of his or her unique persona, even if without commercial value.<sup>18</sup> In California, the right of publicity is governed by section 3344 of the California Civil Code, which provides that "any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner . . . for purposes of advertising or selling . . . without such person's prior consent . . . shall be liable for damages sustained by the person or persons injured as a result thereof."<sup>19</sup>

In general, development of the doctrine by the courts has been justified by several rationales, two of which are rooted in property law. The labor-desert rationale reasons that the development of a commercially valuable persona is usually accomplished through the expenditure of large amounts of time, energy, and money. The resulting "identity," then, is the celebrity's exclusive property; only he or she is entitled to the rewards that flow from it.<sup>20</sup> Under this theory, someone who misappropriates the celebrity's identity for commercial gain—an advertiser, for example, who exploits the persona without paying for it—is unjustly enriched. The misappropriation has the effect of placing the advertiser at unfair advantage over those who pay for the use of a celebrity's identity because the cost of licensing is absent from the advertiser's production costs whereas the contrary is true for his competitors.<sup>21</sup>

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<sup>14</sup> Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 868 (1995).

<sup>15</sup> Lewis, *supra* note 13, at 3.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 2.

<sup>19</sup> Cal. Civ. Code § 3344 (West 2001).

<sup>20</sup> Fred M. Weiler, *The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT. L.J. 223, 240 (1994).

<sup>21</sup> *Id.* at 242.

Another rationale for protecting the right of publicity involves economic incentive. This theory holds that rewarding a celebrity for development of a public persona encourages creativity and achievement while promoting cultural enrichment.<sup>22</sup> Without means of pursuing pecuniary gain, a celebrity would have little reason to reach for stardom. Likewise, without the right of publicity, the economic engine referred to as the “reselling of Hollywood” would sputter and die.<sup>23</sup> In short, the mining of celebrity status is big business, as illustrated by the \$47 million in revenues in endorsement, licensing, royalty, and exhibition fees generated by basketball player Michael Jordan in 1997.<sup>24</sup>

### III. THE TREND IN CALIFORNIA BEFORE *WHITE*

California is recognized as being at the forefront of the evolving right of publicity. One year before *Haelan* was decided, a California court held that unauthorized advertising might deprive a celebrity of the exclusive control over the use of his name, voice, and likeness for commercial purposes necessary to maintain the value of the celebrity’s persona.<sup>25</sup> By 1971, the California Legislature passed its right of publicity statute, and subsequent judicial decisions established that misappropriation of a person’s name or likeness was an infringement of the right of publicity under both common law and statute.<sup>26</sup> Soon after, the U.S. Court of Appeals for the Ninth Circuit began a gradual broadening of the common law doctrine to provide protections extending beyond name and likeness.<sup>27</sup> The size and notoriety of California’s celebrity population and the economic importance of the entertainment industry are frequently cited as reasons for the Ninth Circuit’s expansion of the right of publicity doctrine.<sup>28</sup>

Two decisions prior to *White* illustrate the trend in the Ninth Circuit. In *Motschenbacher v. R.J. Reynolds Tobacco Co.*,<sup>29</sup> a popular race car driver claimed that a cigarette manufacturer’s use of a photograph of his car in a television advertisement for cigarettes violated his right of publicity.

<sup>22</sup> *Id.* at 243.

<sup>23</sup> *Over My Dead Body*, Hollywood Reporter, Feb. 9, 1999.

<sup>24</sup> Sableman, *supra* note 9.

<sup>25</sup> *Rogers v. Republic Prod., Inc.*, 104 F. Supp. 328, 343 (S.D. Cal. 1952).

<sup>26</sup> *Porten v. Univ. of San Francisco*, 134 Cal. Rptr. 839 (Cal. Ct. App. 1976), Cal. Civ. Code § 3344 (West 2001).

<sup>27</sup> David S. Welkowitz, *Catching Smoke, Nailing Jell-O to a Wall: The Vanna White Case and the Limits of Celebrity Rights*, 3 J. INTELL. PROP. L. 67, 71 (1995).

<sup>28</sup> David G. Savage, *Supreme Court Joins in ‘Barroom’ Brawl Copyright: Justices to decide venue for ‘Cheers’ case. At stake is ownership of popular characters.*, Los Angeles Times, Sept. 25, 2000 at A1.

<sup>29</sup> *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).



Although the photograph of the car was retouched and the driver behind the wheel was not identifiable, the Ninth Circuit held that the distinctively marked car in the advertisement uniquely identified the plaintiff, and that California law afforded legal protection to an individual's proprietary interest in his own identity.<sup>30</sup> *Motschenbacher* paved the way for *Midler v. Ford Motor Co.*,<sup>31</sup> a decision that resounded throughout the advertising business. The Ninth Circuit upheld entertainer Bette Midler's right to sue Ford after the car manufacturer used an impersonator to mimic her voice in a radio commercial, which featured a song popularized by Midler. Ford's use of the sound-alike singer to imitate Midler's distinctive voice was an unlawful appropriation of part of Midler's identity, the court found.<sup>32</sup> As with *Motschenbacher*, the decision turned on the distinctive quality of that aspect of the identity appropriated and its strong associative link to the plaintiff.

#### IV. *WHITE V. SAMSUNG* AND SELECTED SUBSEQUENT DECISIONS

In 1992, Deutsch/Dworin, New York, developed a series of advertisements for Samsung Electronics America.<sup>33</sup> The print campaign intended to convey the message that the useful life of Samsung products would extend well into the future. One of the ads featured a robot in a blond wig, jewelry, and evening gown positioned next to a board of large letters like that used in the "Wheel of Fortune" television game show.<sup>34</sup> The depiction obviously resembled Vanna White and the caption of the ad read, "Longest running game show. 2012 A.D.," implying Samsung would be around after a robot had replaced her.<sup>35</sup> At the time, "Wheel of Fortune" ranked among the top-rated television shows in the U.S., with an estimated 35 million viewers.<sup>36</sup>

White sued Samsung and Deutsch, claiming that the ad violated California Civil Code section 3344, California's common law right of publicity, and section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), which involves trademark infringement.<sup>37</sup> The U.S. District Court for the Central District of California granted summary judgment against White on all causes

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<sup>30</sup> *Id.* at 825-26.

<sup>31</sup> *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

<sup>32</sup> *Id.* at 461, 463.

<sup>33</sup> Colford, *supra* note 2.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> White, Vanna available at <http://search.biography.com> (last visited January 9, 2002).

<sup>37</sup> 971 F.2d 1396; Lanham Trade-Mark Act, § 43(a), 15 U.S.C. § 1125(a) (2001; Cal. Civ. Code § 3344 (West 2001)).

of action.<sup>38</sup> On appeal, the U.S. Court of Appeals for the Ninth Circuit agreed with the dismissal of White's section 3344 claim, finding that Samsung had not used her "likeness" within the meaning of that term as defined by the statute by depicting a "robot with mechanical features," however much it appeared like White.<sup>39</sup> The Ninth Circuit reversed the District Court's decisions on the common law right of publicity and false endorsement (Lanham Act) claims, however.<sup>40</sup> The Ninth Circuit found that the Samsung ad evoked an image of Vanna White such that her identity may have been appropriated, and that White raised genuine issues of material fact regarding the likelihood of consumer confusion, such that a Lanham Act claim could be brought.<sup>41</sup> The majority opinion was accompanied by a dissent prepared by Judge Alarcon. Samsung and Deutsch petitioned the Ninth Circuit for a rehearing, which was denied, but not without strong dissent from Judge Kozinski, who was joined by Judges O'Scannlain and Kleinfeld. On remand, a jury awarded White \$403,000 in January 1994 and the case was settled for that amount plus \$9,000 in costs.<sup>42</sup>

*White* establishes that a celebrity whose identity is evoked in a commercial advertisement without consent has a right to sue the advertiser under California's common law right of publicity and the Lanham Act to protect that person's right to exploit the value of their celebrity identity even when the advertisement does not make use of the celebrity's name or likeness.<sup>43</sup> The case has been viewed as a landmark decision because it significantly expands the boundaries of a celebrity's right of publicity within the Ninth Circuit, a property right which previously only allowed a celebrity to seek injunctive relief and damages when another party made commercial use of the celebrity's name, likeness, or other concrete appropriation of the celebrity's image without consent.<sup>44</sup>

Most pertinent to this study is the court's treatment of White's common law right of publicity claim. On that issue the court addressed several fundamental questions. First, it considered whether name or likeness were the *only* bases for pleading the common law right of publicity or, conversely, whether identity could be appropriated by evoking a person's image through a combination of elements that, by themselves, do not suggest the person's

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<sup>38</sup> 971 F.2d 1396.

<sup>39</sup> *Id.* at 1397.

<sup>40</sup> *Id.* at 1399, 1401.

<sup>41</sup> *Id.*

<sup>42</sup> *Vanna White Hits \$403,000 Jackpot in Court*, Chicago Tribune, January 20, 1994, at 2.

<sup>43</sup> *White*, 971 F.3d 1395.

<sup>44</sup> John R. Braatz, *White v. Samsung Electronics America: The Ninth Circuit Turns a New Letter in California Right of Publicity Law*, 15 PACE L. REV. 161, 163 (1994).

identity.<sup>45</sup> Second, the court weighed the relevance of the means of appropriation to determine if specific and enumerated means were necessary in order for a claim to be actionable or, if instead, the means served only to answer the question of whether the person's identity had been appropriated.<sup>46</sup>

In *White*, the Ninth Circuit decided that the common law right of publicity should be broadly construed to protect celebrities' rights to exploit the commercial value of their identities.<sup>47</sup> It did so by finding that the means of appropriation necessary to support a claim were not limited to name or likeness; in the court's view, evocation of a celebrity's identity may suffice.<sup>48</sup> In reaching its conclusion that the right of publicity was not restricted to the unauthorized commercial use of a celebrity's name or likeness, the court relied on *Motschenbacher*, *Midler*, and a Sixth Circuit decision, *Carson v. Here's Johnny Portable Toilets, Inc.*,<sup>49</sup> in which the court held that use of "Here's Johnny" on portable toilets by a manufacturer violated Johnny Carson's right of publicity because of the strong association between the phrase and the entertainer. It distinguished those cases from *Eastwood v. Superior Court*,<sup>50</sup> an action brought by actor Clint Eastwood following the unauthorized use of his photographic image and name. Samsung attempted to rely on *Eastwood* to show that a right of publicity action may be pleaded only by alleging an appropriation of name or likeness, but the White court rejected this argument.<sup>51</sup> Instead, the "name or likeness" formulation in *Eastwood* served to describe the types of cases in which a right of publicity cause of action had been recognized, according to the court.<sup>52</sup> In the view of Ninth Circuit, *Motschenbacher*, *Midler*, and *Carson* made clear that the right of publicity is not limited to the appropriation of name or likeness; "the common law right of publicity is not so confined," the court concluded.<sup>53</sup>

The Ninth Circuit recognized that individual elements of the advertisement, considered singly, did not rise to the level of an infringement of *White's* right of publicity.<sup>54</sup> The blond wig, large jewelry, long gown and shape of the robot, for example, were attributes held by many women.<sup>55</sup>

<sup>45</sup> *White*, 971 F.3d at 1398.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1399.

<sup>48</sup> *Id.*

<sup>49</sup> *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

<sup>50</sup> *Eastwood v. Superior Court*, (Cal. Ct. App. 1983).

<sup>51</sup> *White*, 971 F.2d at 1397.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1399.

<sup>55</sup> *Id.*

Taken together, however, these features, when placed next to a "Wheel of Fortune" style game board, clearly evoked the image of Vanna White, supporting a claim that her identity had been appropriated.<sup>56</sup> "It is not important *how* the defendant has appropriated the plaintiff's identity," the court held, "but *whether* the defendant had done so."<sup>57</sup>

In support of its broad interpretation of the right of publicity, the *White* court briefly examined policy considerations underlying the doctrine. Acknowledging the labor theory of property, the court reflected on the fact that celebrities expend "considerable energy and ingenuity" to achieve a celebrity value that can be commercially exploited.<sup>58</sup> Nonetheless, even where a public persona arises out of "dumb luck," the value inherent in the identity is the celebrity's sole right, and the law is intended to protect that right, the court held.<sup>59</sup> The court also expressed concern that clever advertisers wishing to promote their products would succeed at appropriating a celebrity's identity even if the means of doing so in order to support a right of publicity claim were specifically defined.<sup>60</sup> A broad construction of the concept of the right of publicity was necessary, the court reasoned, to prevent "the evisceration of the common law right of publicity through means as facile as those in this case."<sup>61</sup>

The commercial context in which *White's* claim arose evidently had great bearing on the court's position. Mention of the commercial aspects involved surfaces repeatedly throughout the opinion, arguably inferring that the court was chiefly concerned with prohibiting unjust enrichment. Other commentators have suggested that the court's real motive was protection of the entertainment industry.<sup>62</sup> A third reason for focusing on the commercial nature of the issue presented was judicial efficiency. Doing so enabled the court to make quick work of First Amendment concerns raised by the case and to establish a foundation for *White's* Lanham Act claim.

Prior to *White*, the U.S. Supreme Court had held that the First Amendment does not preclude a right of publicity claim.<sup>63</sup> Disputes over publicity rights implicate the First Amendment when parody is raised as a defense against claims of infringement. Samsung made such an attempt in the *White* case, relying primarily on *Hustler Magazine v. Falwell*<sup>64</sup> and *L.L.*

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<sup>56</sup> *Id.*

<sup>57</sup> *White*, 971 F.2d at 1398.

<sup>58</sup> *Id.* at 1399.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1398.

<sup>61</sup> *Id.* at 1399.

<sup>62</sup> Savage, *supra* note 28.

<sup>63</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

<sup>64</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

*Bean, Inc. v. Drake Publishers, Inc.*,<sup>65</sup> but the *White* court rejected the argument, reasoning that the parodies involved in the precedents cited were made for the purpose of poking fun at the plaintiffs.<sup>66</sup> By contrast, the primary message Samsung intended to convey in its advertisement, the court found, was “buy Samsung VCRs.”<sup>67</sup> Commercial advertising that relies on a celebrity’s fame differs from other expressive communication, such as parody, the court found; it is commercial speech, and is thus afforded less protection under the First Amendment.<sup>68</sup> The tension between the competing interests associated with a person’s right of publicity, the public’s right to a free exchange of ideas and information, and individual rights of free speech and expression is examined more closely, *infra*, and forms the foundation for the research questions posed.

Of secondary concern to the study is *White*’s Lanham Act claim. Section 43(a) of the Lanham Trade-Mark Act, 15 U.S.C. §1125(a) provides that “any person who shall . . . use, in connection with any goods or services . . . any false description or representation . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or designation.”<sup>69</sup> The *White* court was faced with deciding whether genuine issues of material fact existed regarding the likelihood of consumer confusion created by the Samsung advertisement. The court noted that *White* would have to prove that the Samsung ad confused the consuming public about *White*’s endorsement of the company’s VCRs if she was to prevail on a Lanham Act claim.<sup>70</sup> Applying a multi-factor balancing test from *AMF, Inc. v. Sleekcraft Boats*,<sup>71</sup> the court determined that the district court erred in rejecting *White*’s Lanham Act claim at the summary judgment stage.<sup>72</sup> The robot ad identifies *White*, the court found, and was part of a series of ads in which other celebrities participated and were paid for their endorsement of Samsung’s products.<sup>73</sup> *White* had indeed raised a genuine issue of material fact concerning a likelihood of confusion as to her endorsement, and the matter should be put to a jury, the court held.<sup>74</sup>

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<sup>65</sup> L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir. 1987).

<sup>66</sup> *White*, 971 F.2d at 1401.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1401 n.3.

<sup>69</sup> Lanham Trade-Mark Act, § 43(a), 15 U.S.C. § 1125(a) (2001).

<sup>70</sup> *White*, 971 F.2d at 1399.

<sup>71</sup> *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979).

<sup>72</sup> *White*, 971 F.2d at 1401.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

### A. *The Dissent*

Concurring in part and dissenting in part from the majority opinion in *White* was Judge Alarcon, who agreed with the majority's conclusion that a jury was not likely to find the robot in Samsung's advertisement to be a "likeness" of White within the meaning of section 3344(a), but took issue with the holdings rendered on the common law right of publicity and Lanham Act claims.<sup>75</sup> Additionally, Judge Alarcon found the majority's analysis of Samsung's First Amendment defense to be lacking.<sup>76</sup>

Judge Alarcon was particularly troubled by the majority's abandonment of precedent cases reciting California law and their universal conclusion—that a right of publicity cause of action requires proof of appropriation of a name or likeness.<sup>77</sup> He objected to the majority's reliance on federal cases decided after enactment of California's right of publicity statute in 1971, asserting that a decision based on *Motschenbacher*, *Midler*, and *Carson* is an undue extension of California common law, inconsistent with the express intent of the California Legislature.<sup>78</sup> Judge Alarcon also maintained that the majority misapplied the holdings of the three federal cases to the facts at hand. While it was clear that the commercial advertisements in *Motschenbacher*, *Midler*, and *Carson* used identifying attributes unique to each of the respective plaintiffs, Alarcon argued "no reasonable juror could confuse a metal robot with Vanna White."<sup>79</sup> Judge Alarcon believed that the identifying attributes in the Samsung advertisement were not unique to White and that the only element that evoked her identity was the imitation "Wheel of Fortune" set, something that was not an attribute of her identity.<sup>80</sup> According to Judge Alarcon, the fact that an actress became famous for playing a particular role was not sufficient "to give the performer a propriety interest" in that role.<sup>81</sup>

Regarding White's Lanham Act claim, Judge Alarcon wrote that application of the *AMF* test to determine the likelihood of consumer confusion was unnecessary.<sup>82</sup> The Lanham Act requires that White prove actual consumer deception by Samsung in order to prevail, he reasoned, and

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<sup>75</sup> *Id.* at 1402.

<sup>76</sup> *Id.* at 1407.

<sup>77</sup> *Id.* at 1402.

<sup>78</sup> *White*, 971 F.2d at 1402-03.

<sup>79</sup> *Id.* at 1404.

<sup>80</sup> *Id.* at 1405.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1406.

White presented no such evidence.<sup>83</sup> Additionally, the differences between a robot and Vanna White were so obvious, Judge Alarcon contended, that no consumer confusion could possibly occur.<sup>84</sup> Judge Alarcon asserted that the majority had wrongly looked to the *AMF* test to support a conclusion that the robot depicted in the advertisement identified Vanna White. In so doing, Judge Alarcon maintained that the fact finding function of the district court had been usurped.<sup>85</sup> Even if the *AMF* test was relevant, had it been applied correctly, Judge Alarcon stated, it would have pointed to a lack of consumer confusion, yielding no issue for trial on a Lanham Act claim.<sup>86</sup>

The last issue Judge Alarcon challenged was the majority's analysis of Samsung's parody defense. In Judge Alarcon's opinion, the majority's attempt to distinguish the facts of the *Hustler* and *L.L. Bean* cases from those presented in *White* was contrived, because there was sufficient similarity between the commercial purpose of magazines depicting parodies of Reverend Jerry Falwell and L.L. Bean and the Samsung advertisement.<sup>87</sup> His approach, instead, would be to look to precedent cases that allow the use of parody without infringement as long as it satirizes the original work and does not take more from the original than necessary to "conjure up" the original.<sup>88</sup> The approach borrows the "fair use" principle from the Copyright Act<sup>89</sup> and turns it into a legitimate defense against a right of publicity claim.

Judge Alarcon expressed grave concern about the cumulative effect of the majority's opinion and its potential consequences. After *White*, Alarcon feared celebrities could now sue an advertiser who depicts a role made famous by that celebrity, and the neutering of the consumer confusion requirement of the Lanham Act could lead to a spate of suits heretofore prohibited.<sup>90</sup> The proper posture for the court to strike, Judge Alarcon argued, would be a balance that protects the unique expression of a celebrity persona, but which stops short of granting exclusive control to celebrities, to allow for the "creative expressions of others."<sup>91</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> *White*, 971 F.2d at 1406.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1407.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Copyright Act, 17 U.S.C. § 107 (1988).

<sup>90</sup> See *supra* note 1.

<sup>91</sup> *Id.* at 1408.

B. *The Denial of Samsung's Petition for Rehearing En banc*

Following the Court of Appeals ruling on *White*, Samsung and Deutsch petitioned the Ninth Circuit for a rehearing and requested that the matter be heard *en banc*. The petition was denied on March 18, 1993; the single vote in favor of the petition was that of Judge Alarcon.<sup>92</sup> The petition provided an opportunity for Judge Alex Kozinski, joined by Judges O'Scannlain and Kleinfeld, to pen a blistering dissent, taking issue with what they viewed as the majority's creation of a sweeping new property right previously unknown in California law.<sup>93</sup>

Judge Kozinski's dissenting opinion began by acknowledging the importance of property rights, including those involving intellectual property, and creativity, before finding the majority guilty of overprotecting these rights to a point that "stifles the very creative forces [overprotection is] supposed to nurture."<sup>94</sup> Judge Kozinski expressed the view that the majority in *White* failed to strike the careful balance that characterizes much of intellectual property law.<sup>95</sup> Instead, Vanna White was granted an exclusive right in "what she does for a living" giving all celebrities, by extension, a right to control "anything that reminds the viewer of [them]."<sup>96</sup> Absent from this equation, the dissent argued, was the right to parody or a fair use exception as permitted under copyright law.<sup>97</sup> Judge Kozinski was convinced that these omissions not only unduly broadened the right of publicity, they also "decimated" the federal scheme that provides for fair use and authorized the creation or licensing of derivative works based on the original.<sup>98</sup> In the wake of the majority opinion, parodists would be "held hostage" by celebrities, Kozinski reasoned, in contravention of the fair use provisions of the Copyright Act.<sup>99,100</sup>

Judge Kozinski's dissent also charged that the majority failed to properly analyze First Amendment concerns presented by *White*. The majority's refusal to allow Samsung to raise a parody defense because the advertisement was commercial speech side-stepped a crucial analytical step, the dissent

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<sup>92</sup> *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993).

<sup>93</sup> *Id.* at 1515.

<sup>94</sup> *Id.* at 1513.

<sup>95</sup> *Id.* at 1516.

<sup>96</sup> *Id.* at 1515.

<sup>97</sup> *Id.* at 1516.

<sup>98</sup> *White*, 989 F.2d at 1518.

<sup>99</sup> *Id.*

<sup>100</sup> Copyright Act, *supra* note 89, at 14.



wrote, reminding the court that even commercial speech is afforded some level of constitutional protection.<sup>101</sup> The proper approach, according to the dissent, would have been to apply the test set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>102</sup> something the majority mentioned but quickly dismissed after finding that Samsung's parody of White was only tangentially related to the primary purpose of selling VCRs. In Judge Kozinski's view, the First Amendment is "about protecting the free development of our national culture," a culture in which parody, humor, and irreverence hold a place vital to the marketplace of ideas.<sup>103</sup>

### C. *Subsequent History of the White Case*

Following the Ninth Circuit's March 18, 1993 denial of Samsung's petition for rehearing, Samsung petitioned for a writ of certiorari seeking review of *White* by the U.S. Supreme Court. Samsung's petition was denied on June 1, 1993.<sup>104</sup> On remand from the Ninth Circuit Court of Appeals, the case went to trial and in January 1994, a Los Angeles federal jury awarded Vanna White compensatory damages of \$403,000.<sup>105</sup> The parties subsequently settled; agreeing not to appeal, Samsung and Deutsch paid the full amount of the verdict plus approximately \$9,000 in legal costs, in exchange for an agreement by White to end the litigation and let the judgment stand.<sup>106</sup>

### D. *Post-White Right of Publicity Law*

A number of interesting cases have dotted the judicial landscape in the years following *White*. Several speak to the use of the parody defense. Others grapple with the meaning of "identity." At least three explore how the First Amendment applies in the murky waters between commercial and non-commercial speech, which seem to ebb and flow depending upon the particular view of the deciding court. Although the cases described below were heard by a cross section of the country's courts, some state and some federal, they are all noteworthy. Interestingly, a federal court decided *White*. Presumably the application of state law by a federal court must comport with

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<sup>101</sup> *White*, 989 F.2d 1512, at 1519-20.

<sup>102</sup> *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

<sup>103</sup> *White*, 989 F.2d 1512, at 1519.

<sup>104</sup> *Samsung Elec. Am., Inc. v. White*, 508 U.S. 951 (1993).

<sup>105</sup> See e.g., *Vanna White Hits \$403,000 Jackpot in Court*, *supra* note 42.

<sup>106</sup> Michael E. Hartmann and Daniel R. Kelly, *Parody (Of Celebrities, In Advertising), Parity (Between Advertising and Other Types of Commercial Speech), and (The Property Right of) Publicity*, 17 HASTINGS COMMENT L.J. 633, at 646-47 (1995).

how the law has been interpreted by the state's highest court. Until recently, however, the California Supreme Court had not addressed the breadth of protection afforded by the common law right of publicity. The cases selected to show the evolution of the right of publicity are intended to be a sample of those decisions following *White* that are relevant to this research; the mentioned cases do not necessarily arise from *White*, nor do they form a comprehensive list of post-*White* decisions involving the right of publicity. The selected cases are set out below by category.

## 1. PARODY

In *Campbell v. Acuff-Rose Music, Inc.*,<sup>107</sup> the U.S. Supreme Court considered whether "shocking" lyrics as performed by rap music group 2 Live Crew were commercial parody of Roy Orbison's song, "Oh, Pretty Woman," fitting within the fair use meaning of the Copyright Act of 1976.<sup>108</sup> The case represented only the second time the U.S. Supreme Court had taken up the issue of whether parody may be a fair use. Although the decision involved copyright infringement, it provides interesting insight into how the Court might rule on use of a parody defense against a right of publicity claim. The Court ultimately held that the lyrics of 2 Live Crew were a legitimate commercial use of parody.<sup>109</sup>

In deciding *Campbell*, the Court acknowledged the importance of context and the need for a "sensitive balancing of interests"<sup>110</sup> as opposed to relying too heavily on the commercial or non-commercial nature of the use. Pulled in the direction of the First Amendment, the Court initially found that "if . . . commerciality carried a presumptive force against a finding of fairness, the presumption would swallow nearly all . . . uses . . . including news reporting, comment, criticism, teaching, scholarship, and research, since these activities are generally conducted for profit in this country."<sup>111</sup> A few paragraphs later, the pendulum arched the other way: "The use . . . of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the . . . fair use enquiry than the sale of a parody for its own sake."<sup>112</sup> Some commentators have suggested that this

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<sup>107</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>108</sup> Copyright Act, 17 U.S.C. § 101, 107 (1988).

<sup>109</sup> 510 U.S. at 594.

<sup>110</sup> *Id.* at 584 (citing *Sony v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 585.

statement was dictum illustrating the court's "lack of sympathy" for advertising's use of the parody defense.<sup>113</sup>

A Tenth Circuit decision involving the use of parody in a right of publicity action four years after *White* apparently did not find *White* to be persuasive. In *Cardtoons, L.C. v. Major League Baseball Players Ass'n*,<sup>114</sup> a baseball player's organization sued a company that produced parody trading cards featuring caricatures of baseball stars, claiming that the use infringed upon players' rights of publicity. The *Cardtoons* court found that the trading cards did more than advertise—they "expressed ideas through the use of player identities" and had value as social commentary "on an important social institution."<sup>115</sup> Such self-expression, in the view of the court, warranted protection. "Restricting the use of celebrity identities restricts the communication of ideas," the majority said.<sup>116</sup> The court refused to be swayed by arguments suggesting that the cards prohibited baseball players from reaping the rewards of their labors. Remarkably, the *Cardtoons* court reached its decision by reading a parody defense into Oklahoma's right of publicity statute, something the *White* court clearly chose not to do.

## 2. IDENTITY

Closely related to *White* are three cases involving judicial interpretation of the meaning of one's "identity." In *McFarland v. Miller*,<sup>117</sup> an actor known for his portrayal of "Spanky" in movie shorts and the classic "Our Gang" television show brought suit against a New Jersey restaurant operator claiming that the establishment's use of the actor's image and the name "Spanky McFarland's" was an appropriation of his identity. The Third Circuit held that a triable issue of fact existed as to whether the actor had become so inextricably identified with the name and image of Spanky McFarland that their use would invoke his identity.<sup>118</sup> In so holding, the *McFarland* court looked to *White* for support. The court noted that "[a]lthough *White* did not own the show that created the association [between celebrity and product], the [*White*] court held that she possessed the image invoked."<sup>119</sup> The majority interpreted the *White* decision as

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<sup>113</sup> See e.g., DOUGLAS J. WOOD, PLEASE BE AD-VISED, THE LEGAL REFERENCE GUIDE FOR THE ADVERTISING EXECUTIVE, Association of National Advertisers, (3d ed. 1999), at 34.

<sup>114</sup> *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996).

<sup>115</sup> *Id.* at 969, 972.

<sup>116</sup> *Id.* at 972.

<sup>117</sup> *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994).

<sup>118</sup> *Id.* at 923.

<sup>119</sup> *Id.* at 919.

recognizing that “without identification, the right of publicity is worthless.”<sup>120</sup> The *McFarland* court concluded, “The right of publicity is a proprietary right based on the identity of a character or defining trait that becomes associated with a person when he gains notoriety or fame. *McFarland* developed an exploitable interest to which he may lay claim if he can persuade a fact finder that he has become identified with the name Spanky.”<sup>121</sup>

In two more recent cases producing opposing outcomes, the Sixth Circuit refused to recognize an actor’s right of publicity while the Ninth Circuit favored the aggrieved performers. *Landham v. Lewis Galoob Toys, Inc.*<sup>122</sup> involved an actor’s claim against a toy manufacturer and a film production company for the appropriation of his identity without permission. The actor had appeared as “Billy, the Native American Tracker” in the movie *Predator*, and the film company had subsequently licensed the rights to develop a line of toys based on the movie to Galoob.<sup>123</sup> Galoob produced a “Billy” action figure, which Landham claimed violated his right of publicity under Kentucky law.<sup>124</sup> Statutory protection of the right of publicity in Kentucky extends to the “appropriation of some element of an individual’s personality for commercial exploitation.”<sup>125</sup> To decide the case, the Sixth Circuit looked extensively into the case law surrounding the right of publicity, on the basis that such cases are rare and doing so was necessary to maintain uniformity in intellectual property laws.<sup>126</sup>

For the *Landham* court, the claim came down to two fundamental questions. First was the issue of whether Galoob would gain significant commercial value by associating an item of commerce, i.e. the toy, with the plaintiff’s identity.<sup>127</sup> To establish this, Landham would need to present evidence that he was both known by the public and the public associated him with the role he played. The court held that Landham proved neither.<sup>128</sup> Furthermore, it was necessary that Landham show that the “Billy” toy invoked his persona.<sup>129</sup> The court found that the 1.5 inch tall toy, which had neither eyes nor mouth, did not bear any resemblance to

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<sup>120</sup> *Id.* at 920.

<sup>121</sup> *Id.* at 923.

<sup>122</sup> *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619 (6th Cir. 2000).

<sup>123</sup> *Id.* at 621.

<sup>124</sup> *Id.* at 622.

<sup>125</sup> Ky. Rev. Stat. § 391.170(1) (West 2001).

<sup>126</sup> *Landham*, 227 F.3d at 623.

<sup>127</sup> *Id.* at 624.

<sup>128</sup> *Id.* at 626.

<sup>129</sup> *Id.*

Landham.<sup>130</sup> Further, although exploitation of a fictional character was occasionally possible, the focus of a right of publicity analysis, the court asserted, must always be on the actor's own persona and not the character's.<sup>131</sup> Thus, the *Landham* court declined to follow *White*. *White* was distinguishable, the court reasoned, because Vanna White used her own name in her television role and produced evidence that her identity was invoked and had commercial value.<sup>132</sup> Landham lost his right of publicity claim on appeal. Siding with Judge Kozinski, the Sixth Circuit expressed its unwillingness to "give every individual who appears before a television or movie camera . . . the right as a matter of law to compensation for every subtle nuance that may be taken by someone as invoking his identity without first being required to prove significant commercial value and identifiability."<sup>133</sup>

A 1997 decision, *Wendt v. Host International, Inc.*,<sup>134</sup> underscores the tenacity of the Ninth Circuit in upholding the expansive approach to right of publicity law that earned it the designation of "court of appeals for the Hollywood circuit" by one columnist.<sup>135</sup> In *Wendt*, two actors of the 1980s television series "Cheers" sued Host International on the basis of its placement of a pair of animatronic robots modeled after the actors in its airport bars which were decorated in a motif made popular by the show.<sup>136</sup> Paramount Pictures Corporation, which owns the copyright to "Cheers" and its characters, had licensed the concept to Host International, but the two actors had not consented to the use of their likenesses, which they claimed were portrayed by the robots.<sup>137</sup> As the case unfolded, it became clear that the District Court and the Ninth Circuit held differing views about how California's common law and statutory rights of publicity should be interpreted. The District Court initially granted summary judgment to Host International after comparing photographs of the actors and the robots, finding no likeness between the two.<sup>138</sup> The Ninth Circuit reversed, holding that the District Court should have compared the "actual, three-dimensional" forms of the robots to the actors.<sup>139</sup> On remand, the District

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<sup>130</sup> *Id.* at 622.

<sup>131</sup> *Id.* at 625.

<sup>132</sup> *Landham*, 227 F.3d at 626.

<sup>133</sup> *Id.*

<sup>134</sup> *Wendt v. Host Int'l, Inc.*, 125 F.3d 806 (9th Cir. 1997).

<sup>135</sup> Savage, *supra* note 28.

<sup>136</sup> Carolyn L. Hann, "Cheers" Characters as Airport Robots—Where Everybody Knows Their Name?,

AdLaw Newsletter, Hall, Dickler, Kent, Goldstein & Wood, LLP, Los Angeles, CA (2000).

<sup>137</sup> Savage, *supra* note 28.

<sup>138</sup> Hann, *supra* note 131.

<sup>139</sup> *Id.*

Court once again found no similarity other than the fact that one of the robots was heavy and the other slight, as were the plaintiffs; the defendant's motion for summary judgment was granted for a second time.<sup>140</sup> On appeal, the Ninth Circuit rejected the lower court's assessment of whether a likeness existed between the robots and plaintiffs. Remanding the case for second time, the Ninth Circuit ordered a jury trial.<sup>141</sup> Host International petitioned for review by the U.S. Supreme Court, which declined to hear the case.<sup>142</sup> The case, first filed in 1993, was finally settled in June 2001 for an undisclosed amount.<sup>143</sup>

### 3. FIRST AMENDMENT

Tension between the right of publicity and the First Amendment rights of free speech and expression continued to surface in the years following *White*. Over the last three decades, the U.S. Supreme Court has vacillated on the amount of protection that should be afforded commercial speech. Chief Justice Rehnquist has protected it only grudgingly, and Justices Stevens and Thomas have come down on the side of protecting it to the same degree as editorial speech.<sup>144</sup> In general, the Court has struck a balance between these two perspectives using the *Central Hudson*<sup>145</sup> test, which provides limited protection for commercial speech. *Central Hudson* lays out a four-prong test that must be met if a restriction of commercial speech, such as that imposed by the right of publicity, is to pass First Amendment scrutiny. The requirements are: 1) the speech must be neither misleading nor unlawful; 2) the government must assert a substantial interest in support of the restrictive regulation; 3) the restriction must directly and materially advance the government's interest, and 4) the restriction must be narrowly drawn.<sup>146</sup> The test still provides a fair amount of latitude for judicial interpretation, however, and in some cases a finding that the speech involved was noncommercial blocks its application entirely. An example of this is *Comedy III Productions, Inc. v. Gary Saterup, Inc.*,<sup>147</sup> which stands apart as one

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<sup>140</sup> Wood, *supra* note 113.

<sup>141</sup> Hann, *supra* note 136.

<sup>142</sup> Brooks Bolick, *Supreme Court won't belly up to 'Cheers' case*, Hollywood Reporter, Oct. 3, 2000, at 4.

<sup>143</sup> See e.g., *Paramount settles lawsuit by "Cheers" actors*, Agence France-Presse, June 19, 2001.

<sup>144</sup> Felix H. Kent, *Advertising Law in the Millennium*, N.Y.L.J., Oct. 15, 1999.

<sup>145</sup> *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 47 U.S. 557 (1980).

<sup>146</sup> Kent, *supra* note 144.

<sup>147</sup> *Comedy III Prod., v. Gary Saterup*, 25 Cal.4th 387 (2001).

of the few cases where a court attempted to reconcile the right of publicity with First Amendment rights.

a. The *Comedy III* Case

In *Comedy III*, an artist sold lithographs and T-shirts bearing a likeness of The Three Stooges, which were reproduced from his own original, charcoal drawings, without the consent of Comedy III Productions, the registered owner of the former comedy act.<sup>148</sup> Comedy III brought an action for violation of the publicity rights of the deceased personalities and prevailed. The artist appealed, contending that enforcement of the judgment against him would violate his First Amendment rights of free speech and expression. On review, the California Supreme Court found the artist's portraits of The Three Stooges to be expressive works rather than an advertisement or product endorsement, and noted that "[an expressive activity] does not lose its constitutional protection because it is undertaken for profit."<sup>149</sup> Commercial speech was not implicated, the court held, thereby placing the lithographs and T-shirts in a category afforded substantial First Amendment protection.<sup>150</sup> It did not automatically follow, though, that the right of publicity had been trumped. The court said, "[B]ut having recognized the high degree of First Amendment protection for noncommercial speech about celebrities, we need not conclude that all expression that trenches on the right of publicity receives such protection."<sup>151</sup> In fact, the Court ultimately held for Comedy III Productions, holding that "depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment."<sup>152</sup>

To reach its decision, the California Supreme Court formulated a balancing test between the right of publicity and the First Amendment. The test borrowed from copyright law, adopting the first factor in the "fair use test"—the purpose and character of the use—which the Court found "particularly pertinent" in resolving the tension between the two competing doctrines.<sup>153</sup> In so doing, the Court looked to *Campbell*, and embraced the concept of transformative use. For a finding of fair use, the court held, the inquiry should center on "whether a product containing a celebrity's likeness

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<sup>148</sup> *Id.* at 393.

<sup>149</sup> *Id.* at 396 (citing *Guglielmi v. Spelling-Goldberg Prod.*, 25 Cal.3d 860, 868 (1979)).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 399.

<sup>152</sup> *Id.* at 400.

<sup>153</sup> *Comedy III*, 25 Cal.4th at 404.

is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."<sup>154</sup> Applying the new test, the *Comedy III* court found that the artist's work was not sufficiently transformative to be protected by the First Amendment.<sup>155</sup> In effect, the decision introduces a new criterion into a right of publicity case—the inquiry into whether a work containing a celebrity image is “transformative” enough to warrant protection under the First Amendment.<sup>156</sup>

b. The *Hoffman* Case

Several months later, the Ninth Circuit Court of Appeals decided *Hoffman v. Capital Cities/ABC, Inc.*,<sup>157</sup> in which a celebrity sought to recover in a right of publicity action against a magazine and its publisher claiming that his photograph was used to create a computer-generated image of him fashionably dressed in designer women's clothes, which appeared in Los Angeles Magazine. A central issue of the case was whether the magazine's use of the plaintiff's image constituted commercial speech; on this point the district court and the Court of Appeals disagreed.<sup>158</sup> The image in question was a still photograph from the movie “Tootsie” featuring actor Dustin Hoffman. The magazine had retained the actor's head but substituted the body of a male model wearing a silk evening dress and high-heeled sandals.<sup>159</sup> The Ninth Circuit held that since the use was not in a traditional advertisement printed to sell a particular product, it was not pure commercial speech.<sup>160</sup> The magazine's editorial expression was therefore entitled to “full First Amendment protection.”<sup>161</sup> The *Hoffman* court distinguished *White* as a case where “the defendant used an aspect of the celebrity's identity entirely and directly for the purpose of selling a product.” In this instance at least, the right of publicity had given way to the First Amendment despite the fact that the “Shopper's Guide” in the magazine issue with the actor's image provided store locations and prices for the gown and sandals worn by the plaintiff.<sup>162</sup>

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<sup>154</sup> *Id.* at 406.

<sup>155</sup> *Id.* at 409.

<sup>156</sup> Felix H. Kent, *Another Wrinkle to the Right of Publicity*, AdLaw Newsletter, Hall, Dickler, Kent, Goldstein & Wood, LLP, Los Angeles, CA (June 11, 2001).

<sup>157</sup> *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).

<sup>158</sup> *Id.* at 1189.

<sup>159</sup> *Id.* at 1183.

<sup>160</sup> *Id.* at 1185-86.

<sup>161</sup> *Id.* at 1186.

<sup>162</sup> *Id.* at 1185.



c. The *Montana* Case

A California Court of Appeal case, *Montana v. San Jose Mercury News, Inc.*,<sup>163</sup> also involved the gray area between commercial and noncommercial uses, the right of publicity, and the First Amendment. In *Montana*, a football player brought an action against a newspaper for the commercial misappropriation of his name, photograph, and likeness.<sup>164</sup> Newspaper pages depicting the player had been reproduced for sale in poster form, and the plaintiff argued that the newspaper had used his identity solely to extract commercial value from it.<sup>165</sup> The Court of Appeal held that the First Amendment protected the posters “because the posters themselves report newsworthy items of public interest . . . and . . . because a newspaper has a constitutional right to promote itself by reproducing its originally protected articles or photographs.”<sup>166</sup> In a footnote, the Court explained that the fact that the posters were sold was not significant; “[t]he First Amendment is not limited to those who publish without charge,” the Court said.<sup>167</sup>

## V. RESTATEMENT

Another significant post-*White* development was the American Law Institute’s adoption of a broad definition of the right of publicity. Restatement (Third) of Unfair Competition § 46 states “[o]ne who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability . . .” (emphasis added).<sup>168</sup> Comment (d) explains, “whether the plaintiff is identified by the defendant’s use is a question of fact. In the absence of a narrower statutory definition, a number of cases have held that the unauthorized use of other indicia of a person’s identity can infringe the right of publicity.”<sup>169</sup> Some commentators have expressed concern that the Restatement “creates a cause of action in virtually any situation where something featured in advertising reminds the public of a celebrity,” and that while long on effect, it is short on guidance, giving no indication of “how much, if any, of a celebrity’s identity may be used

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<sup>163</sup> *Montana v. San Jose Mercury News, Inc.*, 34 Cal.App.4th 790 (1995).

<sup>164</sup> *Id.* at 793.

<sup>165</sup> *Id.* at 794.

<sup>166</sup> *Id.* at 797.

<sup>167</sup> *Id.* at 797 n.2.

<sup>168</sup> Restatement, *supra* note 12.

<sup>169</sup> *Id.*

without permission.<sup>170</sup> Like the *White* decision, the Restatement makes no provision for the use of a parody defense. To the extent courts find the Restatement persuasive, an expanded view of the right of publicity may gain a firmer foothold in case law.

## VI. THEORIES AND ISSUES PRESENTED BY *WHITE*

The *White* decision prompted an outpouring of criticism beginning with the dissenting opinions of Judges Alarcon and Kozinski. It was not long before it percolated throughout the legal community; in the decade following *White*, commentators characterized the Ninth Circuit ruling as a landmark decision, taking issue with it for a variety of reasons.<sup>171</sup> Much of the criticism fits neatly into four main categories.

Drawing the most fire was the *White* court's abbreviated treatment of First Amendment concerns raised by the case. As the court approached a major intersection between the right of publicity and First Amendment rights of free speech and expression, it accelerated, even though the light was changing from yellow to red. Commentators rebuked the Ninth Circuit by asserting that a "fair use" parody defense should have been allowed or that the *Central Hudson* test should have been applied.<sup>172</sup> At the heart of the First Amendment arguments are: 1) the distinction between commercial and noncommercial speech, and 2) the amount of constitutional protection afforded to each. While many proponents of First Amendment rights argue that an evocable right of publicity is an impermissible restriction on commercial speech, others are less convinced.<sup>173</sup> Some commentators find the focus on commercial and noncommercial speech to be somewhat misplaced, arguing for an examination of underlying policy considerations and judicial balance.<sup>174</sup> To these individuals, the relevant question is how to protect personalities from appropriation while preserving expression in the form of parody, satire, and self-conscious impersonation.<sup>175</sup>

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<sup>170</sup> Wood, *supra* note 113.

<sup>171</sup> Stephen R. Barnett, *First Amendment Limits on the Right of Publicity*, 30 Tort & Ins. L.J. 635 (1995). See also, e.g. Linda J. Stack, *White v. Samsung Electronics America, Inc.'s Expansion of the Right of Publicity: Enriching Celebrities at the Expense of Free Speech*, 89 NW. U. L. Rev. 1189 (1995); Fred M. Weiler, *The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity*, CARDOZO ARTS & ENT. L.J. 223 (1994); and Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control*, 45 U. KAN. L. REV. 329 (1997).

<sup>172</sup> Hartmann, *supra* note 106.

<sup>173</sup> Stack, *supra* note 171; but see Halpern, *supra* note 12, at 868.

<sup>174</sup> Halpern, *supra* note 14.

<sup>175</sup> *Id.*

In a practical sense, arguments over the type of speech involved and the degree of protection warranted can logically be extended to encompass control and suppression of information and ideas. *White* was cast, therefore, as being overprotective, giving celebrities too much control over the use of their identities.<sup>176</sup> Shortchanged in the process were creativity, creative expression, and cultural richness and vitality, according to legal scholars, commentators, and members of the advertising industry.<sup>177</sup> When this issue is examined more narrowly, some commentators maintain that context is important in deciding whether artistic expression and the communication of ideas have been compromised. Many transactions between buyer and seller, they conclude, contribute little, if anything, to the marketplace of ideas. Under this reasoning, purely exploitative uses such as identity-backed merchandising should not be given First Amendment protection. Other uses of celebrity identity may offer entertainment value. The extent to which a particular use is "creative" or has "entertainment value" ultimately is in the eye of the beholder. The most controversial aspects of the *White* decision, then, may be attributable to the nature of the rights involved, diverging views about the social value of a particular use and the manner in which it is conveyed, and the uncertainty that swirls in the wake of the Ninth Circuit's ruling.

Clearly, many view the *White* decision as being too open-ended, leaving future courts without sufficient guidance. Opponents of the ruling argue that celebrity "identity" is now without limits and that it is impossible to predict those "indicia" of a person's identity that potentially could be found evocative of their persona.<sup>178</sup> Further, advertisers must now attempt to discern where the line is drawn between mere evocation of identity and appropriation of the associative value of that identity to avoid violating a person's right of publicity.<sup>179</sup> In a few short pages, *White* shatters the predictability and guidance of prior publicity law, some commentators claim.<sup>180</sup> It does this by simultaneously expanding the property defined by the right of publicity, which some argue now extends beyond name or likeness to include what a celebrity "does for a living," while eroding the requirements necessary to show that a celebrity's identity has been evoked.<sup>181</sup>

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<sup>176</sup> Stack, *supra* note 171.

<sup>177</sup> Barnett, *supra* note 171; Braatz, *supra* note 44.

<sup>178</sup> Langvardt, *supra* note 171.

<sup>179</sup> Weiler, *supra* note 20, at 270. Uses that rely on associative value have been defined as those that "transfer the feelings engendered in the public mind by the celebrity to the advertised product or service."

<sup>180</sup> Langvardt, *supra*, note 171.

<sup>181</sup> 989 F.2d 1512, 1514. According to Judge Kozinski, after *White* it is "now a tort for advertisers to remind the public of a celebrity."

Lastly, *White* has been viewed as undermining intellectual property rights and contradicting federal copyright law. Copyright law specifically gives the world at large the right to make “fair use” of the original work, uses that don’t borrow too much from the original.<sup>182</sup> It also gives the copyright owner the exclusive right to create (or license the creation of) derivative works, which include parodies that borrow too much to qualify as “fair use.”<sup>183, 184</sup> The essential limitations found in intellectual property law were wrongly omitted from the expanded property right created by *White*, it has been argued, and doing so “impoverishes the public domain to the detriment of future creators and the public at large.”<sup>185</sup> Without a fair use exception or right to parody, property covered by the right of publicity is essentially overprotected, thwarting one of the goals of the intellectual property system. Copyright law strikes a balance between protecting original expressions and encouraging others to freely build upon ideas conveyed by the original work. By contrast, the *White* decision provides no such encouragement, but rather provides celebrities with the means to keep socially enriching uses of identity out of the public domain.<sup>186</sup>

The *White* decision poses several interesting research issues, two of which are addressed by this study. Broadly, the research objective was to examine the real world impact of *White*, to determine if the predicted outcomes—either those advanced by the court or by legal scholars—were eventually realized. The fact that nearly a decade has elapsed since the court ruling in *White* facilitates such an analysis. Research issues selected for investigation center around the effect of *White* on the advertising community and the claim that the expansion of publicity rights would be accompanied by a restriction of creativity. Specifically, the first question probed is the extent to which advertising agencies changed the way they do business following *White*. Subparts to this issue include investigating the amount of attention the decision received by advertising executives and eliciting their view on whether the creative process has been stifled by the decision. The second question probed is whether there has been a decline in the use of parody as a means of creative expression in print advertising as a result of *White*. The scope of the inquiry on this second question has been limited because an exhaustive review of print advertising in the U.S. before and after 1992 would exceed the time available for the conduct of this study.

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<sup>182</sup> 17 U.S.C. § 107 (1988).

<sup>183</sup> *Id.*

<sup>184</sup> 989 F.2d 1512, 1517.

<sup>185</sup> *Id.* at 1516.

<sup>186</sup> Braatz, *supra* note 44.

In part, the research was undertaken to test theoretical propositions that: 1) advertisers have been impacted by *White* and the line of publicity rights cases of which *White* is a part; 2) the creative process has been compromised or restricted by these decisions; and 3) the use of celebrity parody in print advertisements produced by advertising agencies in the U.S. has changed as a result of *White*. Together, these hypotheses form a template for the analysis of the data collected. Empirical results are compared with the propositions advanced, and a combination of inductive and deductive analysis is used to conduct the evaluation.

## VII. RESEARCH DESIGN, METHODS, DATA SOURCES AND ANALYTICAL APPROACH

The primary purpose of this empirical research study is to gain insight into how typical members of the advertising community in the U.S. reacted to the decision by the *White* court. To accomplish that objective, the research relies on a mix of measurement, design, and analytical approaches. The research design is largely a naturalistic inquiry into a real world situation using qualitative methods.<sup>187</sup> Some methodological triangulation is achieved, however, through incorporation of a quantitative component. Design of the study is longitudinal; both the qualitative and quantitative segments of the study examine events and behavior before and after the *White* decision, covering a period from 1980 to 2002. The analytical approach is principally a holistic/inductive one, but some deductive analysis is included to permit closer focus on data emerging due to the study's partially open-ended design.

Qualitative methods form the backbone of the study. Multiple forms of data are used to improve reliability and provide cross-data validity checks. The bulk of the data come from qualitative interviews. Here, the units of analysis are advertising agency executives, and a "typical case" sampling strategy is used.<sup>188</sup> Purposeful sampling that targets individual advertising executives with substantial industry experience enables the study to rely on relatively small sample size. Sampling technique consisted of telephone and in-person interviews approximately 20 minutes in length using four types of non-standardized open-ended questions: 1) knowledge; 2) experience; 3) opinion; and 4) background.<sup>189</sup> Interviews were conducted with seven different senior advertising executives having a collective total of 124 years

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<sup>187</sup> MICHAEL QUINN PATTON, QUALITATIVE EVALUATION AND RESEARCH METHODS (Sage Publications 1990).

<sup>188</sup> *Id.* at 182.

<sup>189</sup> *Id.* at 290-93.

of industry experience.<sup>190</sup> Small, medium, and large advertising agencies were represented by the sample.<sup>191</sup> A personal interview was also conducted with an attorney at the firm that represented Vanna White in her action against Samsung.<sup>192</sup> Other qualitative data sources used in the study included newspaper articles, related stories appearing in trade publications, and published legal reference materials aimed at the advertising industry. Documentary material covering a period from 1980 to 2002 was reviewed to illuminate advertising industry awareness of right of publicity issues. Electronic news and information service databases were searched, as were media and communication databases, which included the advertising industry's leading publications, such as *Advertising Age* and *Adweek*.

The quantitative component of the study primarily relied on archival research. To compare the relative prevalence of print advertisements featuring celebrities before and after the *White* decision, and the use of parody in print advertising, a comprehensive review of two electronic print advertising repositories was conducted. Adflip L.L.C. maintains "the world's largest searchable database of classic print advertisements" in electronic format. Advertisements in the Adflip database are catalogued by decade, facilitating a review of 1,128 magazine ads from the 1980s (pre-*White*) and 532 from the 1990s (post-*White*). In addition, custom research was undertaken with AdForum, which maintains a repository of over 15,000 print advertisements. A search of the AdForum database produced 15 examples of the use of parody in recent print advertising campaigns. Secondarily, an informal review of the catalogued contents of The Sandra & Gary Baden Collection of Celebrity Endorsements in Advertising was conducted to gain an appreciation for the number and type of endorsements occurring in high end print magazines between 1897 and 1979.<sup>193</sup>

The study as constructed has several inherent limitations. The small sample size, for example, makes it difficult to generalize the interview

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<sup>190</sup> Included in the sample were: Vinnie Picardi, Deutsch LA, Inc., Los Angeles, CA; Rich Siegel, TBWA/Chiat/Day, Los Angeles, CA; John Hage, Publicis/Hal Riney, San Francisco, CA; Rick Colby, Colby & Partners, Santa Monica, CA; Dan Consiglio, Vitrorobertson, San Diego, CA; Paul Izenstark, Colby & Partners, Santa Monica, CA, and Bob Sutter, DDB, Chicago, IL.

<sup>191</sup> As measured by annual billings. Classified as small agencies are Colby & Partners, with annual billings of \$125 million and Vitrorobertson, with annual billings of \$40 million. In the medium-sized category are Deutsch/LA, Inc., with billings of \$400 million annually, and TBWA/Chiat/Day, Los Angeles, with billings of \$500 million annually. The two largest agencies are Publicis/Hal Riney, San Francisco, with annual billings of \$850 million, and DDB Chicago, with billings of \$1.4 billion annually.

<sup>192</sup> John Genga of Paul, Hastings, Janofsky & Walker, LLP, Los Angeles, CA, practices in the areas of copyright, entertainment, intellectual property litigation and general business litigation.

<sup>193</sup> The collection is housed at the Smithsonian Institution's National Museum of American History, 14th Street and Constitution Avenue, N.W., Washington, D.C.

results. Although the executives interviewed were located at agencies of various sizes, their industry experience often was accumulated across multiple employers, thereby preventing any correlation between agency size and changes in company policy with respect to right of publicity issues following *White*. Additionally, the use of nonstandardized questions raises the possibility of inadvertent introduction of bias during interviewing, despite best attempts by the interviewer to maintain objectivity.

There were other limitations associated with the quantitative data collected. The archival advertising databases reviewed were extensive but not complete. As a result, inferences drawn were based on a representative sample of print advertisements that appeared in magazines between 1980 and 2002, as opposed to the known universe of all such ads during this period. Undoubtedly, significant variability exists between collections with respect to the amount of celebrity advertising they contain, depending upon the source, and this could potentially bias the study results. Similar issues arise with respect to the documentary materials reviewed. Electronic searches for news and trade articles cautioning against evocation of celebrity identities were conducted via Westlaw, and results were obviously limited by the breadth of publications contained in those databases and the availability of pre-1990 information in electronic format.

Custom research on the use of parody in print advertising was largely based on a search of the AdForum database conducted by the company's employees between January 10-23, 2002. Before conducting the research, AdForum explained that their archives did not have a classification for "parody." Search techniques were random, guided only by employee recall, and this, too, may have introduced bias with respect to the occurrence of celebrity parody during the time period examined. Although the quantitative and custom research shed some light on the incidence of parody in print advertising, the study stops short of determining whether such use occurred with or without authorization by the person who was the subject of the parody.

### VIII. RESEARCH RESULTS

The first step in gauging the impact of the *White* decision on the advertising industry was to assess the level of industry awareness and knowledge about right of publicity issues generally, in the decade preceding the decision. A review of the pre-*White* electronic media was the primary means used to establish a baseline, and information gleaned from interviews with advertising executives, many of whom have had an extended career in the industry, was used to supplement these findings.

The research findings show that the right of publicity—while not highly publicized—received periodic press coverage throughout the 1980s, and that this coverage came to the attention of advertising executives. A marketing campaign for personal computers conducted by IBM serves as a prominent example from this period. In May 1984, the *Wall Street Journal* took note of the issues raised by IBM's use of a Charlie Chaplin look-alike in its advertising campaign, reporting that right of publicity law was "still fuzzy," particularly with respect to whether the right passed to survivors of celebrity entertainers.<sup>194</sup> At the time, the California Legislature was considering amendment of the State's right of publicity statute to extend protection to the families of deceased personalities.<sup>195</sup> Other articles, prompted by similar legislative activity in New York and court actions elsewhere, peppered the press throughout the mid to late 1980s.<sup>196</sup> An example of fairly extensive coverage of this topic is a *Newsday* story of March 31, 1988.<sup>197</sup>

The *Midler* case in 1989 substantially elevated the right of publicity among advertising agencies, positioning it prominently on their radar screens. News reports at the time characterized advertisers as being "wary" of copying popular singers' styles in the wake of *Midler*, but noted, "the attraction to the familiar is hard to break."<sup>198</sup> As a result, agencies face the choice of "rein[ing] in their creativity or playing "jingle roulette," the report suggested.<sup>199</sup> In open-ended questioning about their awareness of the scope of the right of publicity, advertising executives invariably made unprompted mention of the *Midler* case. *Back Stage* magazine observed that the sound-alike trend had peaked in 1985, some four years before *Midler*, as "ad agencies and their clients turned to sound-alikes after they saw that popular

<sup>194</sup> Ronald Alsop, *Items Portraying Dead Stars Produce Profits, Controversy*, WALLST. J., May 10, 1984.

<sup>195</sup> *Id.*

<sup>196</sup> *Wells Fargo Sues Over Clark Gable*, The San Francisco Chronicle, June 6, 1987, at 55; William Power, *Say You Want Some Litigation? Beatles Do What They Can: Fab Four's Firm Sues Nike Over Campaign Using 'Revolution' Song in Ad*, The Wall Street Journal, July 29, 1987; Diane Leenheer Zimmerman, *When the Dead Are Box Office*, *Newsday*, Mar. 31, 1988, at 76; Ron Ostroff, *Publicity rights live on after famous people die*, Houston Chronicle, Dec. 11, 1988.

<sup>197</sup> Diane Leenheer Zimmerman, *When the Dead Are Box Office*, *Newsday*, March 31, 1988, at 76. Zimmerman characterizes the "propertization" of personality as a serious threat to freedom of speech, noting that "[w]hile it is widely agreed that celebrities should be paid when their names and faces are used by advertisers . . . some uses, which happen to generate profits, cannot be burdened by a similar duty to pay and be consistent with the Constitution. Personality as property, carried too far, runs head-on into the constitutionally protected rights of the rest of us to communicate with one another about what we see, hear, and think."

<sup>198</sup> Donald A. Jeffrey, *Music Houses & Agencies Play "Jingle Roulette" in Wake of Bette Midler Soundalike Lawsuit*, *Back Stage*, Apr. 21, 1989, at 7.

<sup>199</sup> *Id.* Richard Kurnit, Frankfurt, Garbus, Klein & Selz advised readers "If you have the rights to a song, hire a singer to sing it. But don't copy."



music, especially rock, was an acceptable and effective way to tap into the consciousness of their target demographic groups."<sup>200</sup> "The [*Midler*] decision surprised a lot of people," one advertising executive observed, "it changed advertising dramatically."<sup>201</sup> Other interviewees echoed this opinion.<sup>202</sup>

The *Midler* case once again drew the attention of the media when a verdict of \$400,000 was upheld in 1992.<sup>203</sup> In reporting the *Midler* outcome, news accounts summarized other successful right of publicity actions brought by celebrities including the Beatles, Tom Waits, Carlos Santana, and Chris Isaak.<sup>204</sup> The message to advertisers and their clients seemed unmistakable. One entertainment law attorney put it this way "[t]he Bette Midler ruling is a clear and logical extension of the direction that the law protecting the intangible rights of celebrities has been heading for the last decade. But what the entertainment community is waiting to see is how far the court is prepared to go in expanding the concept."<sup>205</sup> The entertainment community did not have to wait long; just months following the announcement of Midler's verdict, the Ninth Circuit issued its decision in *White*.

The *White* case was followed by the general media as well as the advertising trade press, undoubtedly keeping the right of publicity in the peripheral vision of ad agencies and their clients.<sup>206</sup> Interestingly, interspersed throughout this period are trade reports of Vanna White's professional activities, including a \$25,000 deal with cellular telephone manufacturer NEC for the use of her hands in a print advertisement with the theme line "Designed for the greatest hands in the world: Especially

<sup>200</sup> Jeffrey, *supra* note 198. The article went on to say "young people identify with pop music celebrities, who were being viewed by advertisers as great potential pitchmen. If you couldn't get an actual celebrity to sing on your spot, you could hire someone who sounded like him or her and hope to create the same kind of emotional connection the artist had with his audience."

<sup>201</sup> In-person Interview with Paul Izenstark (Jan. 8, 2002) [hereinafter Izenstark Interview]. Mr. Izenstark has 20 years of experience in advertising and formerly was with the New York office of Young & Rubicam, the agency that was a co-defendant with Ford Motor Company in *Midler*, when the case was decided (the Ford account was handled by Y&R, Detroit).

<sup>202</sup> Vinnie Picardi and Dan Consiglio, *supra* note 190, share this view.

<sup>203</sup> David G. Savage, *Supreme Court Upholds Midler Copycat Ruling Law: Widespread significance seen in verdict awarding the singer \$400,000 from an advertising agency that used a vocal impersonator in a 1986 TV commercial*, L.A. Times, Mar. 24, 1992.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> See Colford *supra* note 2; Richard Carelli, *Wheel of Justice Spins Vanna's Way*, Chicago Sun-Times, June 2, 1993 at 6; David G. Savage, *Letter of the Law: Court Says Vanna's Fame is Her Fortune Publicity: Justices let stand ruling that the game show hostess has sole right to profit from her identity. Electronics firm said use was protected as parody*, L.A. Times, June 2, 1993, at 19; *Vanna White Hits \$403,000 Jackpot in Court*, Chicago Tribune, Jan. 20, 1994, at 2.

yours"<sup>207</sup> and the \$20 million in sales resulting from her endorsement of Perfect Smile tooth whitener.<sup>208</sup> Not only were ad agencies reading about the court's expansive interpretation of the right of celebrity, they were being reminded of just how valuable that right was worth to Vanna White.

Coverage of other right of publicity actions continued in the industry press in the decade following *White*. Many of the articles that appeared carried words of caution to agencies and advertisers, not unlike the warnings that accompanied press accounts of the *Midler* case. Advertisers were told "the threat of lawsuits is real,"<sup>209</sup> there was "no poaching on celebrities,"<sup>210</sup> and that "sound-alike was a bad word in adland."<sup>211</sup> The message regarding the right of publicity, while perhaps no more pronounced in the post-*White* years, had certainly become more refined. Trade publications often advised agencies to obtain consent from celebrities and to check with counsel before attempting to use a celebrity's name, image or likeness.<sup>212, 213</sup> A legal reference guide for advertising executives published in the mid-1990s devoted a chapter to the rights of privacy and publicity.<sup>214</sup> Celebrity rights were characterized as "murky waters" where the law was "fuzzy" and "inconsistent."<sup>215</sup> Still, "every aspect of a personality's image is controllable" advertisers were warned<sup>216</sup> and agencies should buy insurance to protect themselves and hire attorneys to screen proposed ads.<sup>217</sup> Added to the line of cases meriting the industry's attention were right of publicity actions brought by well-known celebrities such as Dustin Hoffman, actors George Wendt and John Ratzenberger of the *Cheers* television show, sports star Kareem Abdul-Jabbar, and other noteworthy personalities.

By 2001, the court's willingness to side with the entertainment industry on right of publicity issues appeared to wane slightly, and the press took note

<sup>207</sup> Cleveland Horton, *NEC touts its handiwork, Print ads for cellular phone use famous fingers*, *Advertising Age*, Mar. 23, 1992.

<sup>208</sup> Melina Gerosa, *White stuff. (Vanna White visits dental hygiene aisle of drug store)*, *Entertainment Weekly*, Dec. 17, 1993, at 14.

<sup>209</sup> Pamela S. Helyar and Gregory M. Doudnikoff, *Walking the labyrinth of multimedia law*, *Technical Communication*, Nov. 1, 1994, at 662.

<sup>210</sup> *No Poaching on Celebs*, *Advertising Age*, Sept. 11, 1995, at 24.

<sup>211</sup> *Id.*

<sup>212</sup> Helyar and Doudnikoff, *supra* note 209.

<sup>213</sup> Maxine Lans Retsky, *Celebrities' rights of publicity are limited to first sale*, *Marketing News*, Sept. 14, 1992, at 17.

<sup>214</sup> Wood, *supra* note 113.

<sup>215</sup> *Over My Dead Body*, *supra* note 23.

<sup>216</sup> *Id.*

<sup>217</sup> Alice Z. Cunco, *Of contracts and claims: Agencies face liability issues*, *Advertising Age*, Jan. 31, 2000, at 25.

of the change. When *Hoffman v. Capital Cities/ABC, Inc.*<sup>218</sup> was overturned, attorneys on both sides of the issue acknowledged the decision as “quietly sensational” and “a sea change in where the law has been.”<sup>219</sup> Although *Hoffman* was viewed by one commentator as a “great victory for the media and the 1st Amendment against efforts by celebrities to control how they are depicted or referred to in the media,” the researcher was unable to locate any reports at the time suggesting that the courts might reverse the trend that began with *Midler* and *White*.

Quantitative data was collected to gain insight into the use of celebrity personalities in print advertising throughout the 1900s, but particularly during the 1980s and 1990s (pre- and post-*White*) and the relative occurrence of parody as a communications technique during the past two decades. A review of the catalogued contents of The Sandra & Gary Baden Collection of Celebrity Endorsements in Advertising showed that the use of celebrity personalities in print advertising has a rich history.<sup>220</sup> A total of 1429 print ads appear in the collection, gleaned from high-end magazines such as *Fortune*, *McCalls*, *Playbill*, and *Vogue* between 1897 and 1979. There is a wide variation in the product endorsed, but cigarettes, beauty products, and electronics figure prominently in the collection. Although the ads contained in the collection were noted and tallied, the review does little more than confirm that celebrity personalities have long been valued by advertisers utilizing print media to convey their message.<sup>221</sup>

A comprehensive review of all print advertisements from the 1980s and 1990s contained in Adflip’s searchable electronic database supplemented these general observations. Of the 1128 print ads in Adflip’s database from the 1980s, five percent or 59 ads featured celebrities. Six of the 59 advertisements were parodies. Examples of celebrity endorsements include the appearance of football player Joe Theismann and tennis star John Newcombe in advertisements for Canon cameras, and the use of parody is illustrated by a print advertisement Reggie Jackson did for Panasonic car stereos.<sup>222</sup> The most well known example of parody in print advertising from this period, however, is IBM Corporation’s use of a Charlie Chaplin

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<sup>218</sup> 255 F.3d 1180 (9th Cir. 2001).

<sup>219</sup> Henry Weinstein, *Use of Altered Celebrity Photo OK, Court Says Law: L.A. magazine's doctored image of Dustin Hoffman in a dress is allowed because it appeared in an article, not an ad, a federal appeals panel rules*, Los Angeles Times, July 17, 2001, at B1.

<sup>220</sup> Alsop, *supra* note 193.

<sup>221</sup> The print advertising medium does not appear to be declining in importance. According to the Publishers Information Bureau, more than 286,000 advertising pages ran in the 248 consumer magazines tracked by the bureau during 2000, up from more than 255,000 pages in 1999. See [www.magazine.org/resources/fact\\_sheets/adv3\\_8\\_00.html](http://www.magazine.org/resources/fact_sheets/adv3_8_00.html) (last visited Jan. 10, 2002).

<sup>222</sup> Refer to collection of ads on file w/atuhor.

look-alike to introduce its new line of personal computers in the early 1980s.<sup>223</sup> By comparison, a review of all of the print advertisements contained in the Adflip database covering the 1990s—532 in total—yielded only four celebrity endorsements, or less than one percent of those in the collection. Interestingly, there were no parodies in the 1990s collection of print ads maintained by Adflip. Nonetheless, the use of parody is still alive and well in print advertising in the new millennium. Custom research performed by AdForum produced 15 current print ads utilizing parody to convey the advertiser's message, 10 of which ran in the U.S.; all but one of the ads, however, featured either political figures or deceased celebrities.<sup>224</sup>

The apparent decline of celebrity endorsements in print advertising coincides with a "boom" in advertising during the 1990s attributable to the rise of the technology industry. "A vast amount of the investment capital that was thought to be pumping up the new economy ended up instead pumping up the revenues of billboard owners, broadcasters and publishers," according to one writer, who continued "all you had to do was pick up any of the new business economy magazines . . . to notice where a lot of venture capital was ending up."<sup>225</sup> Despite conflicting reports that magazine advertising has taken a recent downturn, not in dispute is the health of the magazine industry, which continued to flourish during the 1990s.

The principle body of research findings derives from qualitative interviews conducted with senior advertising industry executives. The seven interviewees had an average of 17.7 years of experience in the advertising industry, and agency size ranged from \$40 million to \$1.4 billion in annual billings. Three small firms, two medium-size firms, and two large firms were represented by the sample.<sup>226</sup>

Results from the interviews can be combined into five broad categories: 1) awareness of *White* and related right of publicity issues; 2) characterization of risks associated with celebrity campaigns or parodies; 3) the right of publicity's infringement upon agency creativity; 4) the use of parody and celebrity personas in advertising; and 5) the impact, if any, of *White* on how the agency operates. Obviously, there is considerable overlap between categories and interviews did not address each topic independent of the

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<sup>223</sup> See *id.*

<sup>224</sup> See *id.* Five of the ten advertisements were newspaper ads produced by Crispin, Porter & Bogusky Advertising for the Fifth Avenue Stamp Gallery. The exception was a magazine ad produced by Grey Worldwide for Hawaiian Tropic that was a parody of entertainer Michael Jackson.

<sup>225</sup> Andrew Cassel, *What did boom years of the '90s add up to? Lots of ads, Dot-coms poured cash into "branding" rather than into tangible assets. When the bottom fell out, little was left*, *The Philadelphia Inquirer*, May 14, 2001.

<sup>226</sup> See *supra* note 191.

others; classification here is simply the means chosen to present the findings in an orderly fashion.

The interviews revealed that awareness of right of publicity issues was high among senior advertising executives, but four of the seven interviewees were only vaguely acquainted with the *White* case despite having extensive advertising industry experience. By contrast, each of the interviewees was familiar with the *Midler* decision. In fact, voice impersonations or the use of a particular piece of music made popular by a famous vocalist often surfaced as examples of business issues most frequently associated with the right of publicity. All of those interviewed had some interaction with celebrities or their agents. One interviewee offered that working with celebrities is “a nightmare” primarily because of the egos involved. “They are used to being treated with kid gloves and are not afraid to walk all over an idea,” he said, “many of them look down at advertising as the weaker media.”<sup>227</sup> Another executive had a different view. “People invest a lot of money in developing their personalities, and they need to protect it [sic]” he said, using Martha Stewart as an example of someone who has created a persona over time, eventually becoming “a corporation.”<sup>228</sup>

Experience with celebrity right of publicity or copyright issues had left an indelible mark on each of the parties interviewed. In general, all admitted to being wary of any use of a celebrity’s identity that might be construed as an infringement on the right of publicity. One interviewer noted, “in any type of creative production you always have the risk of being sued by someone... [it is said that] there are only seven stories out there. But Y&R probably felt the risk [of Bette Midler suing] was low when they developed the Ford ad.”<sup>229</sup> Smaller agencies may have little to lose, another executive suggested, which may embolden them. “If they receive a cease and desist letter [after encroaching upon someone’s publicity rights], they just pull the ad,” he said.<sup>230</sup> For companies like DDB Chicago or TBWA/Chiat/Day, the pockets are much deeper. Executives interviewed from these two agencies had both been involved in lawsuits arising out of advertising campaigns they developed. “Chiat has been burned,” one interviewer said, referring to its use of a Barbie look-alike in a television commercial that prompted toy

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<sup>227</sup> Telephone Interview with John Hage (Feb. 15, 2002)[hereinafter Hage Interview]. John Hage has been in the advertising business for 12 years. He is presently with Publicis/Hal Riney in San Francisco, CA. Annual billings of Publicis/Hal Riney San Francisco are \$850 million.

<sup>228</sup> Izenstark Interview, *supra* note 201; Colby & Partners, Santa Monica, CA, is a subsidiary of Dentsu. Annual billings of Colby & Partners are approximately \$125 million.

<sup>229</sup> *Id.*

<sup>230</sup> In-person Interview with Rick Colby (Jan. 17, 2002)[hereinafter Colby Interview]. Mr. Colby has been in the advertising business for 25 years and presently holds an ownership interest in Colby & Partners, Santa Monica, CA.

manufacturer Mattel to take legal action.<sup>231</sup> DDB Chicago found itself alongside client McDonald's in a copyright infringement action brought by a famous fashion photographer that arose from one of its ads.<sup>232</sup> Each individual interviewed recalls a situation involving the use of a piece of music, image, or aspect of a celebrity's persona that necessitated risk mitigation in the production phase of advertising. The words of one interview seem to sum it up well: "over time we've become more wary, with more people looking at it [ad production] saying "Can we do that?"<sup>233</sup>

Unlike opinions about risk, there was no consensus among those interviewed regarding the extent to which, if at all, the right of publicity stifled agency creativity. Four of the participants<sup>234</sup> stated that the creative process was not compromised out of concern over the potential infringement of someone's right of publicity, two<sup>235</sup> maintained that celebrity power to control the message was definitely limiting, and one found the threat of right of publicity actions to be somewhat stifling.<sup>236</sup> It is noteworthy that all of the interviewees spoke with considerable conviction on this topic. Those who felt that agency creativity remained unfettered in the decade following *White* were as firmly entrenched in their position as those who opined that the right of publicity was a constraint on creativity. For example, one executive emphatically stated "it [concern about publicity rights] doesn't stifle us at all"<sup>237</sup> and another said, "I can't think of one time that it has hampered us."<sup>238</sup> Two executives who generally felt unconstrained offered a slightly more qualified perspective. "I don't think it [publicity rights] ever inhibits us creatively," one person observed, "a campaign may end up somewhat different than where you thought it was going [during the creative process], but that doesn't mean it is less strong,

<sup>231</sup> Telephone Interview with Rich Siegel (Feb. 15, 2002)[hereinafter Siegel Interview]. Mr. Siegel is with TBWA/Chiat/Day, Los Angeles, CA. He has been in advertising for 19 years. Annual billings of TBWA/Chiat/Day, Los Angeles are approximately \$500 million.

<sup>232</sup> Telephone Interview with Bob Sutter (Jan. 16, 2002)[hereinafter Sutter Interview]. Mr. Sutter is with DDB Chicago, a firm with annual billings of \$1.4 billion. He has 21 years of advertising industry experience.

<sup>233</sup> See *supra* note 227.

<sup>234</sup> These were Paul Izenstark, Vinnie Picardi, John Hage, and Don Consiglio.

<sup>235</sup> These were Rick Colby and Rich Siegel.

<sup>236</sup> Bob Sutter Was hesitant on the issue.

<sup>237</sup> Telephone Interview with Vinnie Picardi, Deutsch LA, Inc. (Jan. 29, 2002) [hereinafter *Picardi Interview*]. Mr. Picardi has been in the advertising business for 17 years. Deutsch LA has annual billings of approximately \$400 million.

<sup>238</sup> Telephone Interview with Don Consiglio (Feb. 15, 2002) [hereinafter *Consiglio Interview*]. Mr. Consiglio is with the small, San Diego based firm of Vitrorobertson, a company with annual billings of \$40 million. Mr. Consiglio has been in advertising for 10 years.

creatively.<sup>239</sup> This was echoed in other interviews. "As far as concepting, I don't find it limiting," one interviewee reported.<sup>240</sup> Another offered "I will not restrict the creatives [team members] that work with me; I let them come up with any idea, but we might weed it out later."<sup>241</sup>

Several of the interviewees unequivocally asserted that celebrities' publicity rights confined the creative process. "Any time we think of using a celebrity's name or likeness, the lawyers put the kibosh on it very quickly. It gets very stifling," one executive stated.<sup>242</sup> "I will shut it [a creative idea that potentially infringes on the right of publicity] down before it even gets to the attorneys. We all have limited time, so you have to edit yourself. I'm not about to take an idea all the way through the creative process, including testing it out with focus groups, to have a problem develop," he continued.<sup>243</sup> As an example, the executive described a documentary style television commercial that his agency filmed that relied on "off the cuff" interviews with ordinary people. When one person said, "living in a tree house makes me feel like Tarzan," the spot was scrapped. "We couldn't use it," he explained. "It wasn't demeaning, and it is unlikely that it would have been an infringement, but one could argue that Tarzan might have a claim."<sup>244</sup> Another executive observed, "we used to do it [create advertising that derived something from a celebrity's persona] a lot, but we stopped. It is definitely stifling."<sup>245</sup>

One of the interviewees found the right of publicity to be an obstacle only in certain circumstances. "It is a function of how much the idea is dependent upon the celebrity himself, instead of just overall tonality. If the celebrity is integral to the advertisement, we often have to make 180 degree turns," he said.<sup>246</sup> "Actually, it is somewhat stifling," the executive concluded.<sup>247</sup>

Few of those interviewed expressed much enthusiasm for the use of parody as an advertising technique. Reasons for this were mixed. One executive found parody to be "difficult to pull off in print," explaining that the process involved "taking a message developed by a well-polished ad agency and putting a spin on it by another well polished ad agency."<sup>248</sup> "For

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<sup>239</sup> *Izenstark Interview, supra* note 201.

<sup>240</sup> *Hage Interview, supra* note 227.

<sup>241</sup> *Picardi Interview, supra* note 237.

<sup>242</sup> *Siegel Interview, supra* note 231.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Colby Interview, supra* note 230.

<sup>246</sup> *Sutter Interview, supra* note 232.

<sup>247</sup> *Id.*

<sup>248</sup> *Hage Interview, supra* note 227.

it to work, you have to split the communication message," he said, "you have to devote some energy to establishing context, before you can put the spin on it."<sup>249</sup> Citing parodies targeting the tobacco industry as examples, the executive noted that parodies are often "strong and, by their nature, cynical," a means of communication having limited application.<sup>250</sup> Parody often pokes fun at public officials, one executive observed, recalling an advertisement for Infinity that mimicked the voice of former President Bill Clinton.<sup>251</sup> "[When I heard it] I remember thinking: I wonder how they did that?," he reflected, "or are people in public office fair game?"<sup>252</sup> The interviewee characterized this as a "grey area" noting that a parody might draw more attention and possibly a lawsuit, "particularly if it is in bad taste."<sup>253</sup>

Several of those interviewed had experiences with parody-based advertising that seemed to go poorly. "It has been the thorniest area in my career," one executive admitted, recalling a failed attempt to use a sound-alike impersonator to parody a well-known celebrity.<sup>254</sup> Another executive acknowledged parodying a genre—public service announcements—but said that in general, "we've tried to steer away from that kind of stuff [parodies]."<sup>255</sup>

Interestingly, one interviewee thought that parody was "safer" than the direct appropriation of a celebrity's persona.<sup>256</sup> "Parody happens all of the time," he observed, "ad agencies often adopt an ultra-conservative approach, but some clients don't care [about taking risks]."<sup>257</sup> "The risk involved depends on the celebrity's status. Those who are less well known, like cable network personalities on low rating shows, are less likely to sue. [They know that] in court, the first thing they would have to prove is their celebrity status," the executive said.<sup>258</sup>

According to several of the interviewees, the use of celebrities in print advertising has declined.<sup>259</sup> "Broadcast media still rely on celebrity spokespersons to create a brand image," one executive observed, "but in print you could take the same money and put it against your brand and get more out of it. Before, all you needed was a sports figure, but that doesn't

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Picardi Interview, supra note 237.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Sutter Interview, supra note 232.*

<sup>255</sup> *Siegel Interview, supra note 231.*

<sup>256</sup> *Izenstark Interview, supra note 201.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> Both Dan Consiglio and Rick Colby hold this view.



always work today. Advertising has become more sophisticated.<sup>260</sup> Accounting for the movement away from celebrities in situations where advertising budgets are limited, is in part, the fact that “you never know what you will get. Joe Namath isn’t perfect.”<sup>261</sup> The interviewee went on to explain that an advertiser could create a strong association between a celebrity and the advertised product, only to find later that some incident that tarnished the celebrity’s image had a negative impact on product sales. “I’m not a big fan of using celebrities in advertising,” another executive said, “although we’ve had some successful celebrity campaigns for major clients, such as Apple Computers.”

Generally, the interviewees suggested that instances where an advertising agency contemplated using some aspect of a celebrity’s identity or persona without ever attempting to secure that person’s permission are relatively rare. Several executives pointed to campaigns conducted in limited markets for local clients as examples. In one case, Wieden & Kennedy produced an outdoor advertisement for a small Oregon bank that was pulled after three weeks following receipt of an objection from Martha Stewart.<sup>262</sup> The interviewee explained: “You must ask yourself, what is the likelihood that a person [whose rights may have been infringed] is going to find out? In California, anything put in the L.A. market is sure to be seen by a celebrity or that person’s agent, whereas in a satellite area, perhaps not. You must also look at the celebrity’s history. Some may never consent to advertising in the states, but will agree to uses of their persona in overseas markets.”<sup>263</sup> “Today, the internet has changed everything with respect to exposure,” another executive noted.<sup>264</sup> “Before, you had tight control over where your message appeared. Now it [your ad] can show up on the internet and be downloaded, giving millions of people access to what you’ve created.”<sup>265</sup> “Even video from a rip-o-matic [an in-house piece of creative work intended to convey the “look and feel” of a finished ad] or footage shot for a trade show convention can wind up on the internet,” the executive continued, “providing another source for potential litigants.”<sup>266</sup>

Many of those interviewed noted that popular music, advertising, and publicity rights can form a volatile mixture. Most advertising on broadcast media has a music component and advertisers often utilize vocalists.

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<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Izenstark Interview, supra note 201.*

<sup>263</sup> *Id.*

<sup>264</sup> *Sutter Interview, supra note 232.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

Sometimes the song is central to the message and success of the advertisement, other times it is merely background accompaniment. In either case, advertisers must be careful not to use an original piece of music without obtaining consent of the vocalist. One executive explained, "when we create an idea we might pick up an existing piece [of music] that has a vocalist, but when it gets down to the nitty gritty, we know we can't mimic her. That's when we go to the musicologists."<sup>267</sup> A familiar example of the work of musicologists can be found in the H&R Block advertisement currently airing on network television. The spot features the song "Tax Man," but not the version originally produced by the Beatles. "This is what musicologists do," one executive said. "They are part lawyer and part musician. They change a musical score or voice so that it comes close to [but does not infringe upon] the original work."<sup>268</sup> For some agencies, it is just not the same. "Compared to real [original] music, it feels like [what you would hear in] an elevator," an interviewee said, "it lacks the emotional context of the original song. With larger accounts, like Mitsubishi or Cadillac, the client usually says: 'let's just buy the music.'"<sup>269</sup> If a celebrity is unwilling to consent to the use of his or her voice, just looking into licensing such use may "leave you more vulnerable" in the view of one interviewee, because the celebrity is more likely to direct an agent to watch or listen for the spot.<sup>270</sup>

The final area probed in the interviews was the impact of *White*, if any, on the manner in which advertising agencies conduct business. None of the advertising agency executives interviewed suggested that the *White* decision, by itself, had a direct, identifiable effect on their business operations. "It was really a cumulative effect, not the Vanna White case alone, but the weight of all of the decisions at the time that changed our business," one interviewee remarked.<sup>271</sup> Others attribute greater significance to the *Midler* case. For example, one person explained, "in *Midler*, Y&R only used a person's voice. Think about how many people sound similar. Previously, everyone [agencies] was always aware that a physical association [with a celebrity] was not allowed. But now, a voice, a non-visual representation. No one expected it."<sup>272</sup> This seemed to fit with the view offered by an entertainment law attorney that *White* "did not have the dire consequences people thought

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<sup>267</sup> Picardi Interview, *supra* note 237.

<sup>268</sup> Hage Interview, *supra* note 227.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> Colby Interview, *supra* note 230.

<sup>272</sup> Izenstark Interview, *supra* note 201.

it would.<sup>273</sup> “Most studios are more conservative than they need to be in clearing uses,” he said.<sup>274</sup> Such caution seems widespread in the advertising business. “We’re always concerned,” an ad executive said, “we don’t want to put our clients in a compromising position.”<sup>275</sup>

Caution is a common thread connecting specific practices adopted by advertising agencies post-*Midler* and *White*. Approaches mentioned during the interviews ranged from “giving our clients a heads-up, alerting them as to possible ramifications [of pursuing an authorized and possibly protected use]”<sup>276</sup> to “having more people look at the advertising as it is developed”<sup>277</sup> to “editing yourself [and thus rejecting potentially problematic ideas].”<sup>278</sup> One interviewee summed it up this way: “our attorneys have told us to be as safe as possible. This wasn’t always the case. In the late 1970s and early 1980s, the bottom line was not even looked at. The world of Hollywood is flaky. We all just assumed that a production company [involved in recording voices, images, or music] would have the necessary experience to keep agencies out of trouble. But instead, agencies had to learn over time. Today, all agencies have become more concerned with the company’s financial position,” making clear that there is little room for error and increased liability.<sup>279</sup>

## IX. ANALYSIS

The question of whether the *White* decision changed the way advertising agencies conduct business is not a novel one. Many commentators have examined the intersection between the First Amendment and the right of publicity, but a survey of recent law review articles relating to the *White* case revealed only one instance where empirical research was used to determine if the commercial speech of advertisers has been “chilled” by the Ninth Circuit’s decision.<sup>280</sup> The commentator concluded, “advertisers are reacting to the *Vanna White* case by steering away from the kind of ads that it involved, ads that refer to popular culture in such a way as might be found

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<sup>273</sup> Interview with John Genga, Entertainment Law attorney, Paul, Hastings, Janofsky & Walker LLP, Los Angeles, CA (Jan. 3, 2002)[hereinafter *Genga Interview*].

<sup>274</sup> *Id.*

<sup>275</sup> *Izenstark Interview*, *supra* note 201.

<sup>276</sup> *Picardi Interview*, *supra* note 237. Even still, some clients may decide “let’s go for it,” Picardi said, especially high profile accounts like Mitsubishi.

<sup>277</sup> *Hage Interview*, *supra* note 227.

<sup>278</sup> *Siegel Interview*, *supra* note 231.

<sup>279</sup> *Sutter Interview*, *supra* note 232.

<sup>280</sup> Barnett, *supra* note 171.

to “appropriate,” without consent, a celebrity’s “identity.”<sup>281</sup> The results of this study are generally in accord with that statement, but they fail to find such a direct effect. Instead, the study results indicate that: 1) the cumulative effect of *White* and the publicity rights cases that preceded it was to cause uncertainty about the law among advertising executives; 2) this uncertainty coincided with significant changes within and external to the advertising industry that raised the risk averseness of agencies and induced avoidance behavior with respect to celebrity dealings; and 3) despite this avoidance, the creative process within advertising agencies remains robust, but right of publicity considerations, alone or in combination with other factors, have had some impact on creative concepts ultimately flowing to the commercial marketplace of ideas.

The research results strongly suggest that *White*, by itself, had little effect on advertisers. Many of the senior advertising executives interviewed had not even heard of the *White* case, and the advertising industry was already on alert over the right of publicity by the time the Ninth Circuit handed down its decision. This is evident from the considerable amount of press coverage of publicity rights issues documented from the decade preceding *White*. Nonetheless, the case came to symbolize how far the right of publicity doctrine had diverged from the protection of a person’s name and image. *White* and the handful of publicity rights cases that recently preceded it had shrouded the doctrine in mystery and uncertainty—only the courts knew for sure what uses of a celebrity’s identity were permissible, and even then, the rules seemed to be changing with each new decision, at least from the perspective of the advertising industry.<sup>282</sup>

Of particular import in raising advertising industry awareness of right of publicity issues was *Midler*. Research interviews showed that the decision in *Midler* caught the advertising industry by surprise, and the outcome of the decision spread quickly throughout the industry because virtually all agencies engaged in some form of advertising via broadcast media which, by definition, requires a voice or music component.<sup>283</sup> Knowledge that the right of publicity might be subject to broad judicial interpretation, particularly within the Ninth Circuit, and subsequent encounters with publicity rights issues during ad production involving vocalists or musicians fueled fears of increased liability due to ad content.<sup>284</sup>

The fears and uncertainties that pervaded the advertising business in the late 1980s and early 1990s were amplified and augmented by substantial

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<sup>281</sup> *Id.* at 658.

<sup>282</sup> *Colby Interview*, *supra* note 230.

<sup>283</sup> *Izenstark Interview*, *supra* note 201.

<sup>284</sup> *Colby Interview*, *supra* note 230.

changes that were occurring both internally and externally to the advertising business. A merger and acquisition trend among agencies developed in the 1980s, and industry consolidation continued well into the following decade.<sup>285</sup> By the mid-1990s, economic growth in the U.S. was over three percent,<sup>286</sup> contributing to increase advertising spending.<sup>287</sup> The share of market of the top ten global agencies, however, remained relatively stable.<sup>288</sup> Industry analysts speculated that agencies were likely finding the profitable management of networks to be more difficult than the formation of alliances.<sup>289</sup> This led to a renewed focus on the “bottom line,” a shift that was confirmed by several of the executives interviewed.<sup>290</sup>

Industry consolidation, competition, and stalled market shares undoubtedly narrowed the margin of error for many advertising agencies. As agencies became more risk averse, company policies—especially those having fiscal impact—turned more conservative. The research found this to be particularly true in mid- to large-size advertising agencies.<sup>291</sup> Creative directors and account executives were being told that clients and revenue must be preserved, and in light of this edict, pushing the limits of the creative envelope with respect to the use of celebrity identity surely must have seemed unwise for all but the small, financially solvent “hot” shops that operated in local markets.<sup>292</sup> Smaller agencies may be on equal footing with larger ones with respect to the receipt of “cease and desist” letters, but they are less likely to be the target of lawsuits because they lack the “deep pockets” that make them attractive to celebrity plaintiffs.<sup>293</sup> For this reason, smaller shops may be inclined to shoulder more risk. The exception may be where the client agrees to contractually indemnify a large advertising agency, but even this practice may not embolden an agency to develop “cutting edge” creative material that is inherently more risky.<sup>294</sup>

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<sup>285</sup> Marye Tharp and Dilara Moran, *A Snapshot of Global Advertising Trends: The Nineties*, University of Texas, Austin, TX (Presented at the American Academy of Advertising, Apr. 1997).

<sup>286</sup> *Id.* As measured by Gross Domestic Product.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Sutter Interview, supra* note 232. *Izenstark Interview, supra* note 201.

<sup>291</sup> *Sutter Interview, supra* note 232, at 36. *Hage Interview, supra* note 227, at 36.

<sup>292</sup> Tharp & Moran, *supra* note 285, at 44. Primarily tasked with designing creative strategy, these “hot” shops could rise to prominence or disappear almost overnight. Many were loosely formed associations of individuals that drew heavily on the work of freelance writers, artists, and production people.

<sup>293</sup> *Sutter Interview, supra* note 232, at 36.

<sup>294</sup> WOOD, *supra* note 113.

Factors external to the advertising business were also having a profound effect on agency assessment of the risks associated with ad production during the 1990s and beyond. Chief among these was a remarkable revolution in communications media, driven by technology. Along with such change came the possibility of increased exposure of virtually any advertising work product, finished or unexecuted. This possibility added to the fears of advertising agency executives, who immediately recognized the pitfalls of instantaneous, electronic communications.<sup>295</sup>

The rise of the personal computer in the early 1990s and the growth of the internet that followed literally transformed the sharing and dissemination of information, raising the stakes on risk for advertising agencies. Gone was the limited distribution safety net that protected agencies choosing to implement advertising campaigns locally or regionally. In its place was instantaneous electronic transmission of images, text, and music. On the sending end were advertisers,<sup>296</sup> web gurus and anyone who could load a file onto a computer. On the receiving end, potentially, were millions of viewers located in virtually every corner of the world, including potential litigants. The technology explosion had vaporized the idea that local campaigns would only be seen by those locally situated. Advertisements that formerly carried a low risk of infringing upon someone's publicity rights could now be, with a few keystrokes, on the desks of agents and in the homes of celebrities.

The research suggests that shifting right of publicity law, industry consolidation, and technology advancements collectively induced behavior modification on the part of risk-sensitive advertising agencies, which took steps to minimize legal conflicts involving celebrities in the decade following *White*. Evidence of behavior change can be found in the decline of celebrity endorsements in print advertising during the 1990s when compared to the previous decade, as shown by the quantitative data collected. The data reflect a similar downward trend in the use of parody as a communications technique in print advertising when the two periods are compared. Although the trend is clear, ascertaining the specific reasons for the shift and the relative weight of each contributing factor is somewhat speculative.

In some instances, right of publicity law undoubtedly played a primary role in the decision not to utilize celebrity talent. There is even evidence of cross-contamination between different types of advertising media. One interviewee explained that a negative agency experience with sound-alikes,

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<sup>295</sup> Colby Interview, *supra* note 230, at 36.

<sup>296</sup> Sutter Interview, *supra* note 232 at 36. Although often done innocuously, some executives recall instances of clients placing rip-o-matic footage (preliminary creative designs intended for internal use by an agency) up on their websites, even though the videos contained celebrity images or original music.

for example, might be transferred to other contemplated uses of celebrity talent, even in instances where unauthorized uses might be deemed permissible.<sup>297</sup> Legal action or the threat of litigation resulting from production of a radio advertisement may have the broad effect of causing an agency to back away from using celebrity talent in other types of advertising media.

In other cases, uncertainty about right of publicity law may have a more indirect effect on an agency's ultimate decision regarding the use of celebrity talent. Several interviewees mentioned that dealing with a celebrity's ego can be difficult, and past experiences of this nature may cause an agency to refrain from recommending creative strategies that involve celebrities when pitching clients.<sup>298</sup> On its face, such a decision appears driven by concerns about the celebrity's temperament, but a fear of litigation undercurrent may be at work as well. Agencies or advertisers may also make a conscious choice against associating a product with a celebrity to avoid the possibility of having the product become tainted should the celebrity fall from public favor.<sup>299</sup> Again, the link to right of publicity is an indirect one. If the advertiser pays a premium for the use of a celebrity's identity and that image is not as it appeared to be, a double loss may be sustained—the investment and the value of lost product sales. When legal uncertainty and high investment costs for celebrity talent combine, the risks may outweigh the potential benefits. A decision may also turn on the most efficient application of an advertiser's resources, and relying on the associative value of a celebrity to do the tough work of building product sales again, in light of the legal uncertainties, may not make strategic sense for the agency or the client.

In sum, as the risk averseness of advertising agencies increased in the decade following *White*, the unpredictability of publicity rights law must certainly have been amplified. There is little doubt that court decisions like those in *Midler* and *White* figure significantly in an agency's calculations when the use of celebrity talent is being contemplated. Right of publicity concerns may be at work below the surface, too, during the exploratory stages of creative development, as indicated by the research interviews.<sup>300</sup> These direct and indirect effects are manifested in the reduced reliance on celebrities in print advertising, and a noted reluctance to push the edges of the creative envelope with breakthrough, high-risk advertising campaigns.

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<sup>297</sup> Izenstark Interview, *supra* note 201, at 31.

<sup>298</sup> Hage Interview, *supra* note 227, at 36. Sutter Interview, *supra* note 232, at 36.

<sup>299</sup> Consiglio Interview, *supra* note 238, at 37.

<sup>300</sup> Izenstark Interview, *supra* note 201, at 31. Colby Interview, *supra* note 230, at 36.

Despite the documented avoidance behavior occurring in the post-*White* years, the research revealed that the creative process within advertising agencies remains robust. Although research results were mixed on the matter of whether the creative output of advertising agencies has been negatively affected—that is, constrained or limited—by the *White* decision, virtually all of the executives interviewed maintained that the creative process itself was intact, vibrant, and effective. Close analysis of their comments showed that in the concept stage, creativity is rarely confined by right of publicity concerns. This speaks to the tremendous power of creative development, which, the interviewees suggested, is difficult to stifle by law.

*White* and the right of publicity cases that followed clearly had some effect on the final product of the creative process—in this case, print advertising. Even where this occurred, however, advertisers did not retreat from the use of celebrity identity entirely. In some instances, creative expression was redirected and channeled into ‘safer’ uses, as found during the review of parody in print advertising conducted for this study.

Parody has been recognized as a unique form of expression deserving of constitutional protection in some contexts. Judge Kozinski worried that, after *White*, parodists would be “held hostage” by celebrities<sup>301</sup> and some commentators feared that agencies would abandon the use of parody as an advertising tool.<sup>302</sup> Although this study made no attempt to examine the incidence of parody in broadcast advertising, it did incorporate a limited review of advertising appearing in magazines before and after the *White* decision. Study results show that the use of parody as a print communications technique was fairly limited even before *White*, and that it declined further still in the 1990s. These results conform to the general trend regarding the appearance of celebrity endorsements in print advertising.

More recently, however, there has been a point of departure from this trend. The research revealed that a resurgence in the use of parody in print advertising occurred over the last few years. Interestingly, current print advertisements utilizing this technique have almost wholly relied on either political figures or deceased celebrities. That interviewees suggested such uses fall into a “gray area” of the law and are thus perceived as being less risky is one means of accounting for this phenomenon.<sup>303</sup> At the core of this resurgence is the notion that if one creative outlet becomes obstructed in

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<sup>301</sup> 989 F.2d at 1518.

<sup>302</sup> Stephen R. Barnett, *The Bill Chill: Free Speech in Advertising*, *Legal Times*, Dec. 19, 1994, at 21.

<sup>303</sup> *Picardi Interview*, *supra* note 237, at 37. *Izenstark Interview*, *supra* note 201, at 31. *Sutter Interview*, *supra* note 232, at 36.



some way, legally or otherwise, another one opens up. This idea surfaced repeatedly during the interviews. To a person, none of those interviewed believed that the final product of creative development by their agency—the finished advertisement—was second rate, even where there was an earlier decision to abandon a certain idea as being too risky. This faith in the quality of the end product of creative development poses some interesting theoretical questions, with which this analysis concludes.

First, if an advertisement is effective and represents a satisfactory end product to the client, it seems difficult to assert that the creative process is shortchanged, as some commentators fear.<sup>304</sup> Ultimately, judgment on the creative content of a finished advertisement rests with the advertiser. It is the advertiser who pays for the message and measures how effectively the message reaches and generates a response by the target audience. To the advertiser, the measurement is tangible and real, as reflected in product sales. Implicit in the measurement is the degree to which a “connection” was made with individual members of the target audience—one that compelled a consumer response and triggered purchase behavior. The creativity of the advertisement plays a prominent role in the success of this connection. If, in the eyes of the advertiser, the creativity of the advertising message is valuable, is there an argument that an agency’s avoidance of celebrity talent makes the commercial less entertaining, thus depriving the public of cultural enrichment? It depends.

The debate over the chilling effect of right of publicity law on creative expression and free speech is largely one that arises because of the pervasiveness of advertising in our culture. When an advertisement is broadcast or appears in print there is an unintended effect—it reaches collateral consumers not within the target audience. Unlike product sales or advertising recall surveys of target consumers, impacts on secondary audiences are usually not measured. Viewers, listeners, and readers are not shy about offering an opinion about a particular advertisement, however, or critiquing its entertainment value. This leads to some interesting questions about the role of advertising in modern society.

Although some commentators prescribe that buyer-seller transactions contribute little, if anything, to the marketplace of ideas, advertising holds a special place in the world of communication. It has been called “a medium of information”<sup>305</sup> and “clearly art.”<sup>306</sup> Its elevated status over other forms of communication can be attributed, in part, to its presence in our everyday

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<sup>304</sup> Barnett, *supra* note 106, at 16; Braatz, *supra* note 44, at 9.

<sup>305</sup> DAVID OGILVY, *OGILVY ON ADVERTISING* 7 (Vintage Books 1985).

<sup>306</sup> MICHAEL SCHUDSON, *ADVERTISING, THE UNEASY PERSUASION: ITS DUBIOUS IMPACT ON AMERICAN SOCIETY* 222 (Basic Books 1984).

lives. Whether welcomed or despised, advertising reaches us, allowing the American economic system to function.<sup>307</sup> The marketplace of ideas, then, would seem to thrive on infusions of advertising. But this doesn't comport with the view that "there are only seven stories out there" expressed by several of those interviewed.<sup>308</sup> If all communications messages were simply iterations of messages already told then, theoretically at least, it would not be possible to deprive the public by avoiding celebrity endorsement or parody. Advertising giant Leo Burnett wrote, "the secret of all effective originality in advertising is not the creation of new and tricky words and pictures, but one of putting familiar words and pictures into new relationships."<sup>309</sup> As pure entertainment, advertising may indeed contribute to the enrichment of culture. To argue that advertising should be protected against excessive control by celebrities, however, one must first embrace the view that advertising has value outside of a commercial context, at which point the distinction between commercial speech and other forms of expression is effectively discarded. The opposing view holds that the advertising industry exists for a separate purpose, and should not be saddled with fulfilling societal desires for unbridled speech. In the end, the value of advertising and the contribution it makes toward enriching our culture is highly subjective.

Second, assuming *arguendo* that advertising does play an appropriate part in cultural enrichment, is this role more deserving of protection than the rights of celebrities? Or is the deprivation of cultural enrichment that presumably results from the overprotection of celebrities substantially outweighed by the entertainment value they provide? Some theorists would look to the economic incentive theory that underlies the right of publicity to answer those questions. Simply put, the theory posits that rewarding celebrities encourages creativity and promotes cultural enrichment. If the tension between celebrity rights and the entertainment value of advertising is viewed as a zero sum game, then the gain in creativity realized through the legal enhancement of one activity occurs at the expense of creativity lost as a result of the other activity, which is afforded fewer protections. With this in mind, a strong argument could be made that deconstructing economic incentives for celebrities does more to diminish the marketplace of ideas than "limiting" the creative breadth and scope of advertising. The primary purpose of advertising, after all, is selling, not entertainment, rendering cultural enrichment an indirect consequence of a commercial advertisement.

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<sup>307</sup> JOHN O'TOOLE, *THE TROUBLE WITH ADVERTISING* 3 (Chelsea House 1981).

<sup>308</sup> *Izenstark Interview*, *supra* note 201, at 31. *Hage Interview*, *supra* note 227, at 36.

<sup>309</sup> LEO BURNETT, QUOTED IN *100 LEO'S* 26 (McGraw-Hill Trade 1995).

By contrast, celebrity performances are directly and irrefutably a component of our national culture.

Reconciling the two competing views may not be possible. To the extent that the doing so depends upon the subjective assessment of the relative contribution of each activity—the value of celebrity performances and the value of advertising—on the measuring scale of cultural enrichment, the debate could long endure.

## X. CONCLUSION

The common law right of publicity and the protection it affords against misappropriation of a person's name or likeness is an eminently rational extension of the privacy doctrine, particularly when those aspects of persona have economic value and are wrongly exploited for commercial gain. It is rational, too, that the doctrine should evolve over time to engender a property right with dimension and depth. When Vanna White's right of publicity case came before the U.S. Court of Appeals for the Ninth Circuit in 1992, however, expansion of the doctrine to encompass other indicia of a person's identity seemed less than judicious. Concern arose among legal scholars and commentators that *White* would stifle the creativity of advertising agencies, causing them to avoid the use of celebrities and parody in commercial advertisements, ultimately depriving them of cultural richness and vitality.<sup>310</sup>

This study tested several theoretical propositions presupposing that *White* had an impact on the advertising business. In a narrow sense, research results showed that *White*, by itself, was rarely mentioned as the reason for the reduction in the use of celebrity talent by advertising agencies that characterized the 1990s. As a symbol of the judiciary's willingness to broadly construe the meaning of identity, however, *White* had significant impact. Advertising agencies could no longer discern with certainty which elements of a celebrity's persona were legally protected. For instance, *White* and the publicity rights cases that preceded it seemed to engender more questions than answers. At the same time, changes within and external to the advertising industry were causing advertising agencies to become more risk averse. Uncertainty about the law and intensified risk sensitivity induced a response in the advertising community, particularly with respect to their dealings with celebrities.

The response disclosed by the research has been characterized as "avoidance behavior," but in reality, this expression may go too far. The

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<sup>310</sup> Barnett, *supra* note 106 at 16; Braatz, *supra* note 44, at 9.

appearance of celebrity endorsements and parody in print advertising declined in the 1990s over levels seen in previous decade but—knowing a good thing when they see it—advertising agencies certainly did not forsake the time-proven practice of blending brands and celebrities into winning ad campaigns when it made strategic sense to do so. Instead, they exercised more caution, in large part because of right of publicity law.

Heightened caution in celebrity dealings during the post-*White* decade led advertising agencies to conduct business differently, and effects on the creative development process were noticeable. Creativity in advertising was not about to yield to celebrity control; however, the creative force is not so easily tamed. As the law discouraged advertisers from pursuing certain creative channels, alternative ones opened up, and the research clearly indicates that the creative development process remains innovative and robust even in the wake of *White*, as evidenced in the recent resurgence in parody.

Right of publicity law is still undergoing change within California. The California Supreme Court, in its ruling in *Comedy III*, recently signaled that only works that sufficiently transform a celebrity's likeness warrant protection under the First Amendment. Whether this amounts to a check on the Ninth Circuit's expansive interpretation of the common law right of publicity remains to be seen. Even if it does, advertising agencies are not likely to return to the unfettered creative development process of the 1960s. For now, the *Comedy III* decision is the final word on the breadth of protection afforded by the doctrine within California, and *White* remains a major milestone in the line of cases that define the property rights of celebrities.

