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# NOT FOR JUST ANOTHER PRETTY FACE: PROVIDING FULL PROTECTION UNDER THE RIGHT OF PUBLICITY

JAMES M. LEFT\*

## I. INTRODUCTION

On a daily basis, we are so bombarded with advertising that it is virtually impossible to ignore the extent to which celebrities exploit their identities for commercial gain.<sup>1</sup> Celebrities promote every type of product, from beer<sup>2</sup> to shampoo<sup>3</sup> to automobiles.<sup>4</sup> These individuals can generate a great amount of revenue through endorsements,<sup>5</sup> and the potential rewards for the owners of the promoted products are even greater.<sup>6</sup> There are occasions, however,

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1. State *ex rel.* Elvis Presley Int'l Memorial Found. v. Crowell, 733 S.W.2d 89, 94 (Tenn. Ct. App. 1987).

2. See, e.g., Christine Ziaya, *Outtakes: Elvira vs. Vampira: Tale From the Crypt*, L.A. TIMES, Oct. 25, 1987, Calendar Section at 19 (Cassandra Peterson portraying Elvira to promote Coors).

3. See, e.g., *To the Loser, the Spoils*, NEWSWEEK, Oct. 5, 1992, at 79 (Olympic runner Suzy Hamilton endorsing Pert Plus shampoo).

4. See, e.g., Andrea Heiman, *Beyond Thinking Pink*, L.A. TIMES, June 2, 1992, at E1 (Lindsay Wagner promoting Ford automobiles).

5. A well-known individual, especially a popular athlete, can earn millions of dollars from endorsements. For instance, even though Michael Jordan has retired from basketball, he still earns about \$28 million per year from Nike, McDonald's, Gatorade, and other companies. David Greising et al., *The NBA May Feel a Void — But Jordan Inc. Will Play On*, BUS. WK., Oct. 18, 1993, at 38. Other top "sports endorsers" include senior golf pro Arnold Palmer, who earns an estimated \$11 million per year endorsing Cadillac, Textron, and Pennzoil, and pro football quarterback Joe Montana, who earns an estimated \$9 million per year endorsing Sara Lee, Upper Deck collector cards, and Sega video games. *Id.*

6. Two examples of this phenomenon occurred in connection with Pepsi's and Sprint's advertising campaigns. Over the past several years, Pepsi has recruited many celebrities to endorse its products. Bruce Horovitz, *Wishing on a Star*, L.A. TIMES, Nov. 7, 1993, at D1, D7. The most notable example was Pepsi sponsoring three Michael Jackson concert tours. *Id.* During that time frame, Pepsi's market share increased by two points, which translates into an estimated additional \$500 million in annual sales. *Id.* Also, Sprint executives credit their spokesperson, Candice Bergen, for a 2% increase in market share in the telecommunications industry. *Id.*

The effect of "star power" upon a given industry is not an entirely new occurrence. During one scene in the 1934 film *IT HAPPENED ONE NIGHT*, Clark Gable took off his shirt and he did not have on a T-shirt underneath. David Wharton, *The Boxer Rebellion*, L.A. TIMES, May 28, 1993, at E1. Consequently, undershirt sales took a dramatic turn for the

in which a company will attempt to invoke a celebrity's persona without compensating the individual in question. Courts look upon this type of action unfavorably because, as one court noted, "It is unfair that one should be permitted to commercialize or exploit or capitalize upon another's name, reputation or accomplishments merely because the owner's accomplishments have been highly publicized."<sup>7</sup> Thus, the courts employ the right of publicity<sup>8</sup> to protect a celebrity's right to exploit his identity.<sup>9</sup> In fact, the courts recognize the right regardless of whether the celebrity achieved fame because of "rare ability, dumb luck or a combination thereof."<sup>10</sup>

There is no consensus, however, regarding the scope of the right of publicity. Many jurisdictions protect only a person's name, likeness, or actual image,<sup>11</sup> while a few jurisdictions extend protec-

worse. *Id.*

7. *McFarland v. Miller*, 14 F.3d 912, 922 (3d Cir. 1994) (quoting *Palmer v. Schonhorn Enter., Inc.*, 232 A.2d 458, 462 (N.J. Super. 1967)).

8. The right of publicity arises exclusively under state law. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-68 (1977). The California Supreme Court defines the right as "the reaction of the public to name and likeness, which may be fortuitous or which may be managed or planned, [and] endows the name and likeness of the person involved with commercially exploitable opportunities." *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979); see also *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 530 (9th Cir. 1984).

Other jurisdictions define the right of publicity "as a celebrity's right to exclusive use of his or her name and likeness." *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 694 F.2d 674, 676 (11th Cir. 1983). *Accord Estate of Presley v. Russen*, 513 F. Supp. 1339, 1353 (D.N.J. 1981); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843 (S.D.N.Y. 1975).

However, someone who is not a well-known celebrity may also invoke the right. *J. Thomas McCarthy, Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 UCLA L. Rev. 1703, 1710 (1987); see also *Hooker v. Columbia Pictures Indus., Inc.*, 551 F. Supp. 1060, 1062-63 (N.D. Ill. 1982) (professional woodcarver); *Staruski v. Continental Tel. Co. of Vt.*, 581 A.2d 266, 266 (Vt. 1990) (telephone operator); *Winston v. National Broadcasting Co.*, 282 Cal. Rptr. 498, 499 (Cal. Ct. App. 1991) (game show contestant).

9. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 825 (9th Cir. 1974); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970). But see *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984) (holding that a separate common law right does not exist in New York; a cause of action can only be brought under statutory law).

10. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992), cert. denied, 113 S. Ct. 2443 (1993).

11. See, e.g., N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1992) (providing protection for only a person's name, portrait, and picture); TENN. CODE ANN. § 47-25-1103 (1992) (protecting the right of publicity in a person's name, photograph, and likeness); *Lavery v. Automation Management Consultants, Inc.*, 360 S.E.2d 336, 342 (Va. 1987) (recognizing a right of publicity in an individual's name and likeness); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983) (protecting against appropriation of a person's name and

tion to a person's identity in general.<sup>12</sup> Although most jurisdictions hold that the right of publicity is a property right,<sup>13</sup> they all do not allow the right to survive death.<sup>14</sup>

The purpose of this Comment is to redefine the right of publicity. Courts should view the right as a property right that protects a celebrity's identity and not merely certain characteristics. Furthermore, because the right of publicity is an intellectual property right, it should survive the celebrity's death regardless of whether the person exploited the right during his lifetime.

This Comment emphasizes California case law, both state and federal, because a large bulk of the law concerning the right of publicity comes out of this state.<sup>15</sup> Statutory and case law from New York and other jurisdictions, however, are discussed where appropriate.

Part II examines the traditional approach to the right of publicity adopted by the California courts, otherwise known as misappropriation. The California courts viewed misappropriation as a form of invasion of privacy that was actionable only when a defendant appropriated a person's actual name or likeness.<sup>16</sup>

Part III discusses the modern approach to the right of publicity. Several courts find a violation of the right when a defendant

likeness).

12. See *McFarland v. Miller*, 14 F.3d 912, 922 (3d Cir. 1994); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988), *cert. denied*, 112 S. Ct. 1513 (1992); *Carson*, 698 F.2d at 835; *Uhlaender*, 316 F. Supp. at 1282; *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137 (Wis. 1979).

13. See *infra* notes 241-45 and accompanying text.

14. See, e.g., *Reeves v. United Artists*, 765 F.2d 79, 80 (6th Cir. 1985); *Maritote v. Desilu Prods., Inc.*, 345 F.2d 418, 420 (7th Cir. 1965), *cert. denied*, 382 U.S. 883 (1965); *Heinz v. Frank Lloyd Wright Found.*, 229 U.S.P.Q. 201 (W.D. Wis. 1986); *James v. Delilah Films, Inc.*, 544 N.Y.S.2d 447, 451 (N.Y. Sup. Ct. 1989).

15. Judge Kozinski observed that millions of celebrities live within the Ninth Circuit's jurisdiction (California), and therefore, the Ninth Circuit is the Court of Appeals for "the Hollywood Circuit." *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1521 (9th Cir. 1993) (Kozinski, J., dissenting), *cert. denied*, 113 S. Ct. 2443 (1993). Judge Kozinski argued that federal courts have a greater concern over the right of publicity than state courts because state courts are not concerned with preemption. *Id.* at 1518 (Kozinski, J., dissenting). Also, the Supreme Court is unlikely to consider the right because it views the right as a matter of state law. *Id.* (Kozinski, J., dissenting); see also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-68 (1977). Therefore, Judge Kozinski concluded that the Ninth Circuit has the final say on the right of publicity. *White*, 989 F.2d at 1518 (Kozinski, J., dissenting).

This Comment also discusses Ninth Circuit decisions in detail because its decisions represent "the cutting edge" of right of publicity law. See Felix H. Kent, *California Court Expands Celebrities' Rights*, N.Y.L.J., Oct. 30, 1992, Advertising Law, at 3 (concluding that the Ninth Circuit expands the right beyond the borderlines established by any other court).

16. See *infra* notes 29-77 and accompanying text.

unlawfully appropriates anything associated with a person's identity.<sup>17</sup> The courts should examine the totality of the alleged appropriation to determine whether the public would likely believe that a celebrity is promoting the defendant's product.<sup>18</sup> The courts should also consider the defendant's state of mind<sup>19</sup> and should hold a defendant liable if the defendant knew or should have known that his actions created the appearance of a celebrity endorsement.<sup>20</sup>

Part IV discusses appropriation of a character portrayed by an actor. In these instances, the right of publicity exists only when the character is so closely associated with the individual that the public views the character as part of the person's actual identity.<sup>21</sup>

Part V examines the nature of the right of publicity. The traditional approach, as outlined in California case law, considered the right to be a personal one which was neither assignable nor descendible.<sup>22</sup> Most modern courts agree that the right of publicity is a property right that is freely transferable during a celebrity's lifetime.<sup>23</sup> Disagreement exists, however, as to whether the right survives a person's death.<sup>24</sup> Because the right of publicity is a valid intellectual property right, the right should survive death regardless of whether the individual exercised the right during his life.<sup>25</sup>

Finally, Part VI discusses defenses to the right of publicity. First Amendment issues of free expression and parody limit the scope of the right of publicity.<sup>26</sup> The courts will not allow the First Amendment to immunize a media defendant, however, when the media directly appropriates a celebrity's identity for its own commercial gain.<sup>27</sup> Also, the parody defense will not protect a work that is so similar to the celebrity's performance that the work is only an imitation and not a true parody.<sup>28</sup>

## II. HISTORICAL VIEW OF MISAPPROPRIATION

Misappropriation developed from the tort of invasion of pri-

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- 17. See *infra* notes 86-158 and accompanying text.
  - 18. See *infra* notes 165-77 and accompanying text.
  - 19. See *infra* notes 179-97 and accompanying text.
  - 20. See *infra* notes 179-97 and accompanying text.
  - 21. See *infra* notes 198-228 and accompanying text.
  - 22. See *infra* notes 235-37, 260-62 and accompanying text.
  - 23. See *infra* notes 241-45 and accompanying text.
  - 24. See *infra* notes 251-321 and accompanying text.
  - 25. See *infra* notes 322-46 and accompanying text.
  - 26. See *infra* notes 347-419 and accompanying text.
  - 27. See *infra* notes 365-98 and accompanying text.
  - 28. See *infra* notes 399-419 and accompanying text.

vacy. Samuel Warren and Louis Brandeis first proposed this tort in 1890,<sup>29</sup> asserting that increased abuses by the press required a remedy upon "a distinct ground essential to the protection of private individuals against outrageous and unjustifiable infliction of mental distress."<sup>30</sup> Warren and Brandeis suggested that the right of privacy protects a person's appearance, sayings, acts, and personal relations.<sup>31</sup> In 1931, California specifically recognized the right of privacy in *Melvin v. Reid*.<sup>32</sup> The court in *Melvin* defined the right of privacy as "the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short it is the right to be let alone."<sup>33</sup>

In 1960, Dean Prosser noted that invasion of privacy had evolved into four distinct categories:

1. Intrusion into a person's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.<sup>34</sup>

Both the federal and state courts employ Prosser's four categories when deciding issues involving invasion of privacy.<sup>35</sup> Unfortunately, several jurisdictions continue to improperly group misappropriation with the other three types of invasion of privacy.<sup>36</sup> The first three categories are personal rights that involve an injury to one's feelings<sup>37</sup> because the injury is personal and subjective.<sup>38</sup> On

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

30. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 384 (1960).

31. Warren & Brandeis, *supra* note 29, at 213.

32. 297 P. 91, 92 (Cal. Ct. App. 1931).

33. *Id.* at 92; see also *Gill v. Curtis Publishing Co.*, 239 P.2d 630, 632 (Cal. 1952).

34. Prosser, *supra* note 30, at 389.

35. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 493 n.22 (1975); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1279 (D. Minn. 1970); *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 (Cal. 1979); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 133 (Wis. 1979); *Alonso v. Parfet*, 318 S.E.2d 696, 698 (Ga. Ct. App. 1984).

36. See, e.g., N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1992) (protecting commercial interest in one's identity under "invasion of privacy"); *Crump v. Beckley Newspapers Inc.*, 320 S.E.2d 70, 85-86 (W. Va. 1984) (stating that appropriation is the most developed form of invasion of privacy); *Lugosi*, 603 P.2d at 428-29 (holding that the right of publicity is a personal right like the other types of invasion of privacy).

37. *Uhlaender*, 316 F. Supp. at 1280; Sheldon W. Halpern, *The Right of Publicity*:

the other hand, misappropriation involves an economic interest in the exploitation of a person's identity.<sup>39</sup> Nevertheless, the California Supreme Court held that protection from misappropriation is a personal right just like the other three versions of invasion of privacy.<sup>40</sup>

### A. California Case Law

In *Eastwood v. Superior Court*<sup>41</sup> the court recognized that California case law adopted a four-factor approach for pleading a right of publicity cause of action (hereinafter "the *Eastwood* factors"). These factors are:

1. The defendant's use of the plaintiff's identity;
2. The appropriation of the plaintiff's name or likeness to the defendant's advantage, commercially or otherwise;
3. Lack of consent; and
4. Resulting injury.<sup>42</sup>

Essentially, the California courts have recognized two different manners in which a potential defendant may appropriate another's name. The first manner involves a defendant using another's name for the defendant's own commercial advantage.<sup>43</sup> Usually, this type of appropriation addresses the use of the plaintiff's name as part of a commercial endorsement without the plaintiff's consent.<sup>44</sup> Also, because the California courts considered misappropriation to be a

*Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1206 (1986).

38. *Lugosi*, 603 P.2d at 437 (Bird, C.J., dissenting); *Gill v. Curtis Publishing Co.*, 239 P.2d 630, 632-33 (Cal. 1952); *Fairfield v. American Photocopy Equip. Co.*, 291 P.2d 194, 196-97 (Cal. Ct. App. 1955)).

39. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977); *Carson*, 698 F.2d at 834.

40. *Lugosi*, 603 P.2d at 428-29.

41. 198 Cal. Rptr. 342 (Cal. Ct. App. 1983).

42. *Id.* at 347; *Slivinsky v. Watkins-Johnson Co.*, 270 Cal. Rptr. 585, 589 (Cal. Ct. App. 1990); see also WILLIAM L. PROSSER, LAW OF TORTS § 117, at 804-07 (4th ed. 1971). Although the Ninth Circuit adopted the *Eastwood* factors, it does not strictly interpret the "name" and "likeness" factor. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992), cert. denied, 113 S. Ct. 2443 (1993).

43. See, e.g., *Eastwood*, 198 Cal. Rptr. at 347 (alleging an unauthorized appropriation of Eastwood's name and likeness to endorse the *National Enquirer*); *Johnson v. Harcourt, Brace & Jovanovich, Inc.*, 118 Cal. Rptr. 370, 381 (Cal. Ct. App. 1974) (alleging that defendant used plaintiff's name to sell textbooks).

44. See, e.g., *Fairfield v. American Photocopy Equip. Co.*, 291 P.2d 194, 196 (Cal. Ct. App. 1955) (defendant incorrectly claimed that plaintiff was a satisfied customer); *Stryker v. Republic Pictures Corp.*, 238 P.2d 670, 671 (Cal. Ct. App. 1951) (alleged appropriation of a war hero's name).

personal wrong, a plaintiff could properly file suit even if only the individual's reputation was damaged.<sup>45</sup>

The second manner in which a potential defendant can appropriate a celebrity's name is by using the celebrity's name as his own. For example, in *In re Weingand*,<sup>46</sup> Eugene Weingand, a struggling actor, sought to change his name to "Peter Lorie," but the actor Peter Lorre opposed the petition.<sup>47</sup> The evidence clearly showed that Weingand attempted to use Lorre's name to his own advantage.<sup>48</sup> The *Weingand* court ruled that the appearance of another actor with the name Peter Lorie "would directly affect the commercial and professional value of the services and performances of Peter Lorre both present and future."<sup>49</sup>

Misappropriation of a person's name generally applied to public figures because their personas have commercially exploitable value.<sup>50</sup> A person may become a public figure by his status in the entertainment industry<sup>51</sup> or by actions or events that generate public interest.<sup>52</sup> Earlier California cases, however, also held that

45. See, e.g., *Kerby v. Hal Roach Studios, Inc.*, 127 P.2d 577 (Cal. Ct. App. 1942). As part of a promotional campaign, Hal Roach Studios sent out 1,000 handwritten letters bearing Kerby's name and signature. *Id.* at 578-79. According to the appellate court, the letter's contents appeared to be a solicitation for an illicit rendezvous. *Id.* at 579. The court concluded, therefore, that the defendant invaded Kerby's privacy because "mortifying notoriety" damaged her reputation. *Id.* at 580.

46. 41 Cal. Rptr. 778 (Cal. Ct. App. 1964).

47. *Id.* at 779. Peter Lorre appeared in over 150 feature motion pictures. *Id.* at 780. One of Lorre's most famous roles was his portrayal of Cairo in the 1941 film, *THE MALTESE FALCON*. Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, 102 F. Supp. 141, 149 (S.D. Cal. 1951), *aff'd in part and rev'd in part*, 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955).

48. *Weingand*, 41 Cal. Rptr. at 780. Another example of a person attempting to profit from another's fame occurred in 1990. Bill English, a Tempe, Arizona grocery bagger, claimed he was Billy Thomas, the actor who played "Buckwheat" in the "Our Gang" and "Little Rascals" comedies. Steve Weinstein, '20/20' Producer Resigns Over Buckwheat Interview, L.A. TIMES, Oct. 12, 1990, at F25.

49. *Weingand*, 41 Cal. Rptr. at 782. The court's ruling is quite curious because the court protected Peter Lorre's name even though Lorre died before the proceedings had concluded. *Id.* at 779. When Lorre died, misappropriation was not a descendible cause of action. See, e.g., *James v. Screen Gems, Inc.*, 344 P.2d 799, 801 (Cal. Ct. App. 1959); *Kelly v. Johnson Publishing Co.*, 325 P.2d 659, 661 (Cal. Ct. App. 1958). It therefore appears that the *Weingand* court implied that misappropriation was a survivable cause of action. In 1984, however, the California Legislature decided to allow a cause of action for misappropriation after the person's death. See CAL. CIV. CODE § 990 (Deering 1992); *infra* notes 267-76 and accompanying text.

50. Leonard A. Wohl, Note, *The Right of Publicity and Vocal Larceny: Sounding Off on Sound Alikes*, 57 FORDHAM L. REV. 445, 445 n.3 (1988).

51. See, e.g., *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Cal. Ct. App. 1983) (actor); *In re Weingand*, 41 Cal. Rptr. 778 (Cal. Ct. App. 1964) (actor); *Kelly v. Johnson Publishing Co.*, 325 P.2d 659 (Cal. Ct. App. 1958) (professional boxer).

52. See, e.g., *Johnson v. Harcourt, Brace & Jovanovich, Inc.*, 118 Cal. Rptr. 370 (Cal.



protection from name appropriation extended to individuals with less name recognition than well-known celebrities. A lesser-known celebrity<sup>53</sup> or even a "private" individual<sup>54</sup> could bring an action. Also, the common law did not require deliberate appropriation<sup>55</sup> because "[i]nadvertence or mistake is no defense where the publication does in fact refer to the plaintiff in such a matter as to violate his right of privacy."<sup>56</sup>

Cases involving misappropriation of likeness<sup>57</sup> were not as common as cases involving misappropriation of one's name.<sup>58</sup> However, the likeness cases reflected a similar pattern in the California common law. A public figure,<sup>59</sup> an individual whose actions generated public interest,<sup>60</sup> or even a private individual could bring a cause of action.<sup>61</sup>

Earlier case law specifically addressed "likeness" in the inva-

Ct. App. 1974) (finding and returning \$240,000); *James v. Screen Gems, Inc.*, 344 P.2d 799 (Cal. Ct. App. 1959) (famous outlaw); *Stryker v. Republic Pictures*, 238 P.2d 670 (Cal. Ct. App. 1951) (war hero); *Metter v. Los Angeles Examiner*, 95 P.2d 491 (Cal. Ct. App. 1939) (suicide).

53. *Kerby v. Hal Roach Studios, Inc.*, 127 P.2d 577, 578 (Cal. Ct. App. 1942). Marion Kerby was an actress and concert singer with many years of experience in the United States and Europe. *Id.* At the time of the appropriation in question, however, Hal Roach Studios was not aware of Kerby's existence. *Id.* at 581.

54. *Fairfield v. American Photocopy Equip. Co.*, 291 P.2d 194, 196 (Cal. Ct. App. 1955) (plaintiff was an attorney).

55. *Id.* at 197 (stating that the defendant's motives for invading another's privacy were immaterial). See also *Kerby*, 127 P.2d at 581 (stating that the defendant's lack of intent to cause injury was no defense to the plaintiff's cause of action).

56. *Fairfield*, 291 P.2d at 197; *Kerby*, 127 P.2d at 581.

57. The Central District of California defines likeness as "an actual representation of a person, rather than a close resemblance." *Nurmi v. Peterson*, 16 Media L. Rep. 1606, 1607 (C.D. Cal. 1989). Although the *Nurmi* court defined likeness with respect to California statutory law, the court's definition is applicable to the common law as well. For example, Clint Eastwood could properly allege appropriation of his likeness because his picture appeared in an advertisement for the *National Enquirer*. *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 345, 349 (Cal. Ct. App. 1983). An advertisement that used a robot with an appearance similar to Vanna White, however, was not an appropriation of White's likeness. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

58. See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 823 n.6 (9th Cir. 1974) (only 5 out of the 20 decisions cited specifically addressed misappropriation of likeness); see *Gill v. Hearst Publishing Co.*, 253 P.2d 441 (Cal. 1953); *Gill v. Curtis Publishing Co.*, 239 P.2d 630 (Cal. 1952); *Leavy v. Cooney*, 29 Cal. Rptr. 580 (Cal. Ct. App. 1963); *Carlisle v. Fawcett Publications, Inc.*, 20 Cal. Rptr. 405 (Cal. Ct. App. 1962); *Metter v. Los Angeles Examiner*, 95 P.2d 491 (Cal. Ct. App. 1939).

59. See, e.g., *Carlisle*, 20 Cal. Rptr. at 407 (actress Janet Leigh).

60. See, e.g., *Metter*, 95 P.2d at 493 (woman who committed suicide).

61. See, e.g., *Gill v. Curtis Publishing Co.*, 239 P.2d 630, 631 (Cal. 1952) (husband and wife who owned an ice cream stand).

sion of privacy context.<sup>62</sup> The courts considered the use of a person's likeness to be an invasion of privacy if the damage to a person's feelings or reputation outweighed the public interest in the dissemination of news and information.<sup>63</sup> Additionally, the courts required appropriation of the individual's exact likeness or image.<sup>64</sup> The appearance of a merely close or suggestive resemblance was not sufficient.<sup>65</sup>

### B. California Statutory Law

In 1971, the California Legislature recognized the right of publicity by passing Civil Code section 3344.<sup>66</sup> Originally, section 3344(a) provided that any person who used another's name, photograph, or likeness for advertising purposes without the other person's consent would be liable for any injury sustained.<sup>67</sup> In 1984, the legislature amended section 3344 to also protect against the unconsented use of another's voice or signature.<sup>68</sup>

A section 3344(a) action is more burdensome to establish than a right of publicity action. In addition to proving that all the *Eastwood* factors are present,<sup>69</sup> the plaintiff must also prove that his

62. See, e.g., *Gill*, 239 P.2d 630 (Cal. 1952); *Metter v. Los Angeles Examiner*, 95 P.2d 491 (Cal. Ct. App. 1939).

63. Compare *Metter*, 95 P.2d at 496 (holding that a newspaper account of a woman's suicide was not an invasion of privacy because the publication was a matter of public concern) with *Gill*, 239 P.2d at 634-35 (holding that publication of a photograph that depicted a husband and wife in an affectionate embrace constituted an invasion of privacy because there was no legitimate public interest in the accompanying article).

64. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1402-03 (9th Cir. 1992) (Alarcon, J., concurring and dissenting), cert. denied, 113 S. Ct. 2443 (1993); see also *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Cal. Ct. App. 1983) (referring only to appropriation of name, photograph, or likeness).

65. *Nurmi v. Peterson*, 16 Media L. Rep. 1606, 1608-09 (C.D. Cal. 1989) (holding that no cause of action existed because Cassandra Peterson's character "Elvira" was not an exact copy of the 1950s television character "Vampira").

66. *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 n.6 (Cal. 1979); *Eastwood*, 198 Cal. Rptr. at 346.

67. 1971 Cal. Stat. ch 1595 § 1; *Eastwood*, 198 Cal. Rptr. at 346.

68. The current version of California Civil Code § 3344(a) states:

[a]ny 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 any damages sustained by the person or persons injured as result thereof.

Section 3344(b) defines "photograph" as meaning:

any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person such that the person is readily identifiable.

CAL. CIV. CODE §§ 3344(a),(b) (Deering 1992).

69. See text accompanying note 42.

persona was knowingly used and that there was a "direct" connection between the use and the commercial purpose.<sup>70</sup> Apparently, if a defendant proves that he unintentionally appropriated the plaintiff's identity, then the defendant defeats a section 3344(a) action, but this same claim would not fail under the common law.<sup>71</sup>

The courts strictly interpret California Civil Code section 3344(a).<sup>72</sup> Two examples of this strict interpretation appear in cases involving appropriations of likeness and voice.<sup>73</sup> Likeness refers to an individual's exact image.<sup>74</sup> A close facsimile is not sufficient.<sup>75</sup> The same reasoning also applies with respect to a person's voice.<sup>76</sup> The imitation of a person's voice, even a virtually exact imitation, does not constitute a cause of action under section 3344(a) because the actual voice was not appropriated.<sup>77</sup>

### III. DEVELOPMENT OF A RIGHT OF PUBLICITY IN ONE'S IDENTITY

Fortunately for many plaintiffs, recovery for misappropriation of name or likeness under California Civil Code section 3344 and similar statutes<sup>78</sup> is not the exclusive means of protecting a person's identity from unauthorized commercial appropriation.<sup>79</sup> A ce-

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70. *Eastwood*, 198 Cal. Rptr. at 347 (citing *Johnson v. Harcourt, Brace & Jovanovich, Inc.*, 118 Cal. Rptr. 370, 381 (Cal. Ct. App. 1974) (stating that reprinting a magazine article in a college textbook was not a commercial appropriation because the article was not directly connected with the sale of the textbook and the article was only used as an educational tool)).

71. See *infra* notes 179-97 and accompanying text (arguing that in a right of publicity action, the defendants should be held to a "knew or should have known" standard).

72. See, e.g., *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988), *cert. denied*, 112 S. Ct. 1573 (1992).

73. See *infra* notes 74-77 and accompanying text.

74. *Nurmi v. Peterson*, 16 Media L. Rep. 1606, 1607-08 (C.D. Cal. 1989) (holding that "likeness" means an exact copy of another's features and not a merely close or suggestive resemblance); see also *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992) (stating that a Vanna White-like robot is not her likeness), *cert. denied*, 113 S. Ct. 2443 (1993).

75. *Nurmi*, 16 Media L. Rep. at 1607-08.

76. *Midler*, 849 F.2d at 463 (discussing voice appropriation).

77. *Id.*; *Nurmi*, 16 Media L. Rep. at 1607.

78. See, e.g., FLA. STAT. ANN. § 540.08(1) (West 1991) (protecting a person's name, portrait, photograph, and other likeness); NEV. REV. STAT. ANN. § 598.790 (Michie 1994) (finding a right of publicity in a person's name, voice, signature, photograph, and likeness); VA. CODE ANN. § 8.01-40 (Michie 1992) (finding the right of publicity in a person's name, portrait, and picture only).

79. See, e.g., CAL. CIV. CODE § 3344(g) (Deering 1992). "The remedies provided for this section are cumulative and shall be in addition to any others provided for by law." *Id.* But see *People for the Ethical Treatment of Animals v. Bobby Berossini, Ltd.*, 867 P.2d 1121, 1136 (Nev. 1994) (concluding that a right of publicity cause of action can only be brought under statutory law); *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984) (same).

lebrity (or any other individual) may still file an action under the right of publicity.<sup>80</sup> While a defendant may appropriate an individual's actual name or likeness,<sup>81</sup> many courts do not confine the right of publicity to these traditional, strict boundaries. Several courts expand the right to include many different aspects of a celebrity's identity.<sup>82</sup>

### A. Cases in Support of Misappropriation of Identity

This subsection analyzes decisions that expanded the scope of the right of publicity. Cases in which the courts concluded that a defendant appropriated an aspect of a celebrity's identity fall into at least four categories: (1) Appropriation by Association;<sup>83</sup> (2) Voice Appropriation;<sup>84</sup> (3) Appropriation of a Pseudonym;<sup>85</sup> and (4) Appropriation by Similar Appearance.<sup>86</sup> These categories are not the only means of appropriation. They simply illustrate different cases in which the courts expanded the right of publicity beyond an individual's actual name or likeness. The courts expanded protection because "[i]t is not important how the defendant has appropriated the plaintiff's identity, but whether the defendant has done so."<sup>87</sup> These cases also illustrate the need to protect a celebrity's identity as a whole and not just certain personal traits.

#### 1. Appropriation by Association

"Appropriation by Association" concerns incidents in which the defendant associates a celebrity with images that appear in a commercial, but the actual celebrity does not appear in the advertisement. This type of appropriation first appeared in *Mot-*

80. See, e.g., *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992) (causes of action filed under California Civil Code § 3344 and the right of publicity), *cert. denied*, 113 S. Ct. 2443 (1993).

81. See, e.g., *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634, 638 (9th Cir. 1982) (using Cher's name to create the appearance of an implied endorsement), *cert. denied*, 462 U.S. 1120 (1983); *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 877 (S.D.N.Y. 1973) (superimposing Cary Grant's face onto another actor's body); *Eastwood v. Superior Court*, 198 Cal. Rptr. 345, 352 (Cal. Ct. App. 1983) (finding a possible cause of action because the *National Enquirer* used Clint Eastwood's name and likeness to promote sales).

82. See *infra* notes 88-158 and accompanying text.

83. See *infra* notes 88-110 and accompanying text.

84. See *infra* notes 111-29 and accompanying text.

85. See *infra* notes 130-41 and accompanying text.

86. See *infra* notes 142-58 and accompanying text.

87. *White v. Samsung Elecs. Am. Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

*schenbacher v. R. J. Reynolds Tobacco Co.*<sup>88</sup> Lothar Motschenbacher was an internationally known race car driver,<sup>89</sup> who, as part of his image, "individualized" his race car to set it apart from the other cars.<sup>90</sup> R.J. Reynolds produced a television commercial for Winston cigarettes that contained a slightly altered photograph of Motschenbacher's vehicle, giving the appearance that Winston sponsored the race car.<sup>91</sup>

Even though R.J. Reynolds did not use Motschenbacher's actual race car and the company did not identify Motschenbacher as the driver, the Ninth Circuit held that a cause of action under the right of publicity existed as matter of law.<sup>92</sup> The commercial created the appearance that Motschenbacher endorsed Winston cigarettes.<sup>93</sup> Because the race car represented a symbol of Motschenbacher's identity, the court held that misappropriation occurred.<sup>94</sup>

The New York state courts recognized a legitimate proprietary interest in an individual's public personality in *Lombardo v. Doyle, Dane & Bernach, Inc.*<sup>95</sup> Guy Lombardo was known as "Mr. New Year's Eve" because the public associated him with the combination of New Year's Eve, balloons, party hats, and the song "Auld Lang Syne."<sup>96</sup> In *Lombardo*, the defendants aired a television commercial that featured an actor conducting a band using the same gestures as Lombardo.<sup>97</sup> Additionally, the New Year's Eve party theme surrounded the actor.<sup>98</sup> Even though the commercial did not mention Lombardo's name and the actor did not resemble him, the court ruled that the determination of whether the likeness depicted Lombardo was a question of fact for the jury.<sup>99</sup>

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88. 498 F.2d 821 (9th Cir. 1974).

89. *Id.* at 822.

90. *Id.* Motschenbacher's car had a narrow white pinstripe, solid red decals, and an oval around his number "11" while all other drivers had a circle around their numbers. *Id.*

91. *Id.* R.J. Reynolds altered the photograph of the car by changing "11" to "71" and adding a spoiler to the back of the car on which the word "Winston" appeared. *Id.*

92. *Id.* at 827 (reversing the district court's summary judgment in favor of the defendant).

93. *Id.* at 822-23.

94. *Id.* at 824 (quoting WILLIAM L. PROSSER, LAW OF TORTS § 117, at 805-06 (4th ed. 1971) (pirating a celebrity's identity for another's commercial gain is misappropriation)).

95. 396 N.Y.S.2d 661 (App. Div. 1977).

96. *Id.* at 664.

97. *Id.* (Titone, J., concurring and dissenting). Justices Titone and Suozzi concurred with the majority on the third cause of action. *Id.* (Titone, J., concurring and dissenting). They agreed that Lombardo stated a cause of action for appropriation of his public personality for commercial purposes. *Id.* (Titone, J., concurring and dissenting).

98. *Id.* at 665 (Titone, J., concurring and dissenting).

99. *Id.* (Titone, J., concurring and dissenting); see also *Motown Record Corp. v.*

The Ninth Circuit further expanded the concept of appropriation by association in *White v. Samsung Electronics America, Inc.*<sup>100</sup> Vanna White is the hostess of "Wheel of Fortune," one of the most popular game shows in television history.<sup>101</sup> David Deutsch Associates prepared a humorous ad campaign for Samsung Electronics that depicted Samsung's products being used in the future.<sup>102</sup> The ad in question was for Samsung VCRs and depicted a robot wearing a blonde wig, a designer gown, and large jewelry.<sup>103</sup> Furthermore, the robot was posing like White on a game show set identical to the "Wheel of Fortune" set.<sup>104</sup> The underlying caption stated "Longest Running Game Show - 2012 A.D."<sup>105</sup> Samsung and Deutsch referred to the advertisement as the "Vanna White ad."<sup>106</sup>

The Ninth Circuit decided that White had stated a valid cause of action under the right of publicity.<sup>107</sup> The court determined that

George Hormel & Co., 657 F. Supp. 1236 (C.D. Cal. 1987). Motown filed suit over a television commercial for Hormel beef stew. *Id.* at 1237. The ad featured three black women singing "Dinty Moore," a parody of "Baby Love" by "The Supremes." *Id.* The court ruled that the plaintiff properly stated an action for trademark infringement due to a possible protected interest in the persona or likeness of "The Supremes." *Id.* at 1240-41.

100. 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

101. *Id.* at 1396.

102. *Id.* Each of the ads was designed to depict a Samsung product in a humorous manner. Debbie Seaman, *Samsung Has Seen the Future: Brace Yourself*, ADWEEK, Oct. 3, 1988, at 118. One ad for Samsung televisions depicted talk show host Morton Downey, Jr. as "Presidential Candidate. 2008 A.D." *Id.* An ad for Samsung microwaves featured a raw steak as "Revealed to be health food. 2010 A.D." *Id.* A third ad that promoted Samsung VCRs showed a videocassette of "Rambo XXIII" as "The summer's hottest rental. 2005 A.D." *Id.*

103. *White*, 971 F.2d at 1396.

104. *Id.*

105. *Id.* For an example of the ad in question, see Samsung advertisement, FORBES, Sept. 19, 1988, at 78-79. Some copies of the ad also contained an accompanying caption which began "In the next century, will 'she' still be America's favorite gameshow [sic] hostess?" *Vanna White Lawsuit Can Go to Trial*, THE GAZETTE (Montreal), July 30, 1992, at B7.

106. *White*, 971 F.2d at 1396.

107. *Id.* at 1399 (reversing the district court's summary judgment in favor of the defendants).

White also filed causes of action under California Civil Code § 3344(a) and the Lanham Act, which concerns trademark infringement. *Id.* at 1396, 1399. The Ninth Circuit concluded that the § 3344 claim failed because the robot was not White's likeness as required by statute. *Id.* at 1397. For a further discussion of California Civil Code § 3344, see *supra* notes 66-77 and accompanying text.

Surprisingly, the Ninth Circuit also determined that White stated a valid claim under the Lanham Act. *White*, 971 F.2d at 1401. The court examined the factors for determining whether "a likelihood of confusion" exists between an original trademark and an alleged infringing work. *Id.* at 1399. The court stretched the test to include a person's identity as an identifiable mark. *Id.* The Ninth Circuit's interpretation may expand trademark law beyond

the right is not strictly limited to the actual appropriation of a person's name or likeness.<sup>108</sup> "If the celebrity's *identity* is commercially exploited, there has been an invasion of [her] right whether or not [her] 'name or likeness' is used."<sup>109</sup> Thus, the Ninth Circuit expanded the right of publicity to protect a person's identity from unauthorized commercial exploitation.<sup>110</sup>

## 2. Voice Appropriation

Some jurisdictions specifically prohibit the unauthorized appropriation of an individual's voice.<sup>111</sup> Under the Ninth Circuit's

its intended objectives. *See id.* at 1405-07 (Alarcon, J., concurring and dissenting). Lanham Act issues, however, are beyond the scope of this Comment.

108. *Id.* at 1397-98. The Ninth Circuit discussed the right of publicity as stated in *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Cal. Ct. App. 1983). *White*, 971 F.2d at 1397. The court reasoned that because the *Eastwood* court did not consider the right of publicity beyond "name and likeness," the two categories were not the exclusive bounds of the right. *Id.*

109. *Id.* at 1398 (quoting *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) (emphasis added)).

110. *Id.* at 1399. *But see* *Nurmi v. Peterson*, 16 Media L. Rep. 1606, 1609 (C.D. Cal. 1989) (concluding that Nurmi failed to state a right of publicity claim because Nurmi did not allege that the character Elvira appropriated Nurmi's actual features).

Some critics argue that the *White* decision expands the right of publicity so far that it now hinders the creative ability of others. *See, e.g., White*, 971 F.2d at 1407-08 (Alarcon, J., concurring and dissenting); Gretchen A. Pemberton, *The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity*, 27 U.C. DAVIS L. REV. 97, 99-100 (1993).

The Ninth Circuit, however, did not conclusively hold that the Samsung advertisement appropriated White's identity. *See White*, 971 F.2d at 1399. The court merely reasoned that White properly stated a cause of action under the right of publicity. *Id.* Thus, it was still up to a jury to determine whether Samsung invoked White's identity to imply a commercial endorsement. In fact, after remand to the district court, a jury found in White's favor and awarded \$403,000 in damages. Shauna Snow, *Jury Sides With Vanna*, L.A. TIMES, Jan. 21, 1994, at F2.

111. *See, e.g., CAL. CIV. CODE* § 3344(a) (Deering 1992); *NEV. REV. STAT. ANN.* § 598.790 (Michie 1994); *TEX. PROP. CODE ANN.* § 26.011 (Vernon 1992).

However, in New York, an individual may not file a cause of action based on an unauthorized appropriation or imitation of his voice. The Court of Appeals has ruled that a common law right of publicity does not exist in New York. *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984). A claim cannot be pursued under New York Civil Rights Law § 50 because the statute does not protect against voice appropriation. N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992) (referring only to appropriation of one's name, portrait, or picture); *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826, 837-38 (S.D.N.Y. 1990) (finding no cause of action under New York Civil Rights Law for using "sound alikes" in a television commercial). Furthermore, an individual cannot claim unfair competition due to voice imitation. *Booth v. Colgate Palmolive Co.*, 362 F. Supp. 343, 345-49 (S.D.N.Y. 1973).

For a further discussion of New York law regarding the right of publicity in general, see *infra* notes 300-321 and accompanying text. For a further discussion of New York law as it relates to voice imitation, see *Maxwell v. N.W. Ayer, Inc.*, 605 N.Y.S.2d 174, 176 (Sup. Ct. 1993).

approach in *Midler v. Ford Motor Co.*<sup>112</sup> and *Waits v. Frito-Lay, Inc.*,<sup>113</sup> a celebrity can properly invoke the right of publicity, even when a person imitates the celebrity's voice to such a degree that it sounds like the actual celebrity endorses the product.<sup>114</sup>

The fact patterns of *Midler* and *Waits* are very similar. In *Midler*, Ford launched a series of television commercials called the "Yuppie Campaign."<sup>115</sup> In an effort to emotionally connect with the Yuppies, Ford's advertisers attempted to hire the original singers of popular songs of the 1970s.<sup>116</sup> When Bette Midler<sup>117</sup> refused to sing "Do You Want to Dance?" to promote Ford, Ford hired another singer to sound exactly like Midler.<sup>118</sup>

In *Waits*, Frito-Lay hired Tracy-Locke to produce a radio commercial for a new brand of potato chips.<sup>119</sup> Tracy-Locke wanted to parody a Tom Waits<sup>120</sup> song, "Step Right Up,"<sup>121</sup> but Waits refused to perform commercial endorsements as a matter of principle.<sup>122</sup> Instead, Tracy-Locke made a commercial using a singer who could imitate Waits.<sup>123</sup> Despite reservations regarding possible legal implications, Frito-Lay aired the commercial that used the Waits "sound-alike."<sup>124</sup>

Even though these commercials did not include the actual voices of Midler and Waits, in both cases, the Ninth Circuit held that a jury could properly conclude that the defendant had appropriated the celebrity's identity.<sup>125</sup> When a seller deliberately imi-

112. 849 F.2d 460 (9th Cir. 1988), *cert. denied*, 112 S. Ct. 1573 (1992).

113. 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993).

114. *See infra* notes 125-29 and accompanying text.

115. *Midler*, 849 F.2d at 461.

116. *Id.*

117. Midler won the Grammy Award in 1973 for Best New Artist, and she continues to have a successful singing career. *Id.* at 461. Midler has also appeared in several films including *BEACHES*, *RUTHLESS PEOPLE*, and *DOWN AND OUT IN BEVERLY HILLS*. Kent Black, *Best Bette*, *NEWSDAY*, Nov. 21, 1991, § II, at 68.

118. *Midler*, 849 F.2d at 461-62.

119. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993).

120. Tom Waits is a songwriter and a professional singer with a unique, raspy style. *Id.* at 1097. He has recorded more than seventeen albums and has toured extensively in the United States and overseas. *Id.* In 1987, *Rolling Stone* magazine awarded Waits its Critic's Award for Best Live Performance. *Id.*

121. *Id.* Ironically, "Step Right Up" is an indictment of advertising. *Id.* at 1097 and n.1.

122. *Id.* at 1097.

123. *Id.* at 1097-98.

124. *Id.* at 1098.

125. *Id.* at 1102 (upholding jury verdict because the verdict was based on substantial evidence); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (reversing summary judgment in favor of the defendant and remanding the case for trial), *cert. denied*, 112 S.



tates a widely known professional singer's voice<sup>126</sup> to sell a product, the seller commits a tort.<sup>127</sup> The Ninth Circuit also concluded that "[a] voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested."<sup>128</sup> Therefore, impersonating a celebrity's voice for one's own commercial gain is the same as pirating the celebrity's identity.<sup>129</sup>

### 3. Appropriation of a Pseudonym

Another form of unauthorized appropriation occurs when a defendant appropriates a celebrity's recognizable pseudonym. In *Carson v. Here's Johnny Portable Toilets, Inc.*,<sup>130</sup> the identity trait at issue was the phrase "Here's Johnny," which was Johnny Carson's introduction to "The Tonight Show"<sup>131</sup> for thirty years.<sup>132</sup> Carson also used the phrase to promote a line of clothing apparel and a line of men's toiletries.<sup>133</sup>

The toilet company's founder was aware of Carson's famous introduction, but he still took advantage of the phrase by renting and selling "Here's Johnny" portable toilets without Carson's consent.<sup>134</sup> The Sixth Circuit reasoned that the right of publicity was a protected pecuniary interest in the commercial exploitation of a celebrity's identity.<sup>135</sup> Therefore, a potential defendant could improperly exploit a celebrity's identity without using the person's

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Ct. 1513 (1992).

126. The Ninth Circuit defines a "widely known professional singer" as a singer who is "known to be a large number of people throughout a relatively large geographic area." *Waits*, 978 F.2d at 1102 (quoting the district court's jury instruction). The Ninth Circuit did not address the possible situation in which a person imitates a relatively unknown singer's voice. While this type of scenario is unlikely, the courts may apply a "knew or should have known" standard to determine if a defendant is liable for voice appropriation. See *infra* notes 179-91 and accompanying text.

127. *Midler*, 849 F.2d at 460; see also *Waits*, 978 F.2d at 1098.

128. *Midler*, 849 F.2d at 463; see also *Waits*, 978 F.2d at 1102.

129. See *Midler*, 849 F.2d at 463 (citing *W. PAGE KEETON, ET AL., PROSSER & KEETON ON TORTS* § 117, at 852 (5th ed. 1984)).

Courts have allowed a cause of action for the unauthorized imitation of another's voice on grounds other than the right of publicity. In *Lahr v. Adell Chemical Co.*, 300 F.2d 256 (1st Cir. 1962), Adell Chemical hired an actor to imitate Bert Lahr's voice for a television commercial. *Id.* at 257. Because the imitation was performed without Lahr's permission, the First Circuit held that Lahr properly stated a claim for unfair competition. *Id.* at 259.

130. 698 F.2d 831 (6th Cir. 1983).

131. *Id.* at 832.

132. Carson hosted "The Tonight Show" from October 1, 1962 to May 22, 1992. See Rick DuBrow, *The Sun Sets on Johnny's Last Tonight*, L.A. TIMES, May 23, 1992, at A1.

133. *Carson*, 698 F.2d at 833.

134. *Id.*

135. *Id.* at 835.

full name or image.<sup>136</sup>

In *Hirsch v. S.C. Johnson & Son, Inc.*,<sup>137</sup> the Wisconsin Supreme Court reached a conclusion that parallels the Sixth Circuit's holding in *Carson*. The court in *Hirsch* addressed the appropriation of the name "Crazylegs," which was the nickname of Elroy Hirsch,<sup>138</sup> a famous professional football player.<sup>139</sup> S.C. Johnson used this nickname to promote its shaving gel even though the company knew that Crazylegs was Hirsch's nickname.<sup>140</sup> The Wisconsin Supreme Court ruled that the determination of whether Johnson appropriated Hirsch's identity was a question of fact. According to the court, the fact that Crazylegs "was a nickname rather than Hirsch's actual name does not preclude a cause of action. All that is required is that the name clearly identify the wronged person."<sup>141</sup>

#### 4. Appropriation by Similar Appearance

In both *Ali v. Playgirl, Inc.*<sup>142</sup> and *Allen v. National Video, Inc.*,<sup>143</sup> the New York federal court held that a celebrity may sustain a cause of action for misappropriation of name or likeness even if the defendant only employed an actor with a similar appearance.<sup>144</sup> New York statutory law provides that any instance in which a defendant appropriates an individual's name, portrait, or picture without the individual's consent is actionable.<sup>145</sup> Any recog-

136. *Id.* The Sixth Circuit reasoned that "a stage or other fictitious name can be so identified with the plaintiff that he is entitled to protection against its use." *Id.* at 836; see also Prosser, *supra* note 30, at 404. For example, Samuel Clemens would have a cause of action if either his true name or "Mark Twain" was used in advertising without Clemens' permission. *Carson*, 698 F.2d at 836; Prosser, *supra* note 30, at 404 n.172.

*Carson* also filed suit for unfair competition under § 43(a) of the Lanham Act. *Carson*, 698 F.2d at 833. However, *Carson* failed to show that the use of "Here's Johnny" established a likelihood of confusion which is necessary to sustain a § 43(a) action. *Id.* at 833-34.

137. 280 N.W.2d 129 (Wis. 1979).

138. *Id.* at 130.

139. *Id.* at 131. Hirsch was a 1942 All-American at the University of Wisconsin and a running back for the Los Angeles Rams from 1949 to 1957. *Id.* In 1970, he was named to the "All Time All-Pro Team" for the first 50 years of football. *Id.*

140. *Id.* at 130.

141. *Id.* at 137. But see *Marriot Corp. v. Ramada, Inc.*, 826 F. Supp. 726, 728 n.3 (S.D.N.Y. 1993). The district court concluded that the use of the surname "Marriot" in a television commercial did not violate the plaintiff's rights because the surname alone did not clearly identify J.W. Marriot. *Id.* (citing *Maggio v. Charles Scribner's Sons*, 130 N.Y.S.2d 574, 517-18 (Mag. Ct. 1954)).

142. 447 F. Supp. 723 (S.D.N.Y. 1978).

143. 610 F. Supp. 612 (S.D.N.Y. 1985).

144. *Id.* at 622-23.

145. New York Civil Rights Law § 50 states:

nizable likeness, not only similarity to the celebrity's actual image, will qualify.<sup>146</sup>

In *Ali*, Muhammed Ali<sup>147</sup> sued the magazine *Playgirl* over an unauthorized portrait which depicted a nude black man with a striking resemblance to Ali sitting in the corner of a boxing ring.<sup>148</sup> An accompanying verse to the portrait referred to the "Mystery Man" as "The Greatest."<sup>149</sup> The overall image that *Playgirl* created would probably have caused the public to mistake the "Mystery Man" for Ali.<sup>150</sup> Therefore, the district court held that *Playgirl's* portrait wrongfully appropriated Ali's likeness.<sup>151</sup>

In *Allen*, Woody Allen<sup>152</sup> sued over a print advertisement for National Video that depicted a look-alike masquerading as Al-

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person . . . is guilty of a misdemeanor.

New York Civil Rights Law § 51 states:

Any person whose name, portrait or picture is used . . . for advertising purposes or for the purposes of trade without the written consent first obtained . . . may maintain an equitable action . . . to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained . . . if the defendant shall have knowingly used . . . [in violation of section 50].

N.Y. Civ. Rights Law §§ 50, 51 (McKinney 1992).

146. The *Allen* court recognized a line of New York cases that held "any recognizable likeness, not just an actual photograph, may qualify as a 'portrait or picture'" under New York Civil Rights Law § 51. *Allen*, 610 F. Supp. at 622-23; see also *Ali*, 447 F. Supp. at 726 (concluding that a picture of an individual with features very similar to Muhammed Ali constituted a "portrait or picture" of Ali); *Onassis v. Christian Dior of N.Y., Inc.*, 472 N.Y.S.2d 254, 257 (N.Y. Sup. Ct. 1983) (holding that the appearance of a Jacqueline Onassis look-alike in a photograph with actual celebrities created the illusion that Onassis appeared in the advertisement), *aff'd*, 110 A.D.2d 1095 (N.Y. App. Div. 1985); *Young v. Greneker Studios, Inc.*, 26 N.Y.S.2d 357, 358 (N.Y. Sup. Ct. 1941) (holding that a mannequin made in the plaintiff's likeness was a "portrait or picture" of the plaintiff).

The foregoing cases reflect an expansive view of a "portrait or picture." However, a recognizable likeness must still be present. For example, in 1989, Timex aired a commercial that featured a psychic who could bend metal objects. Felix H. Kent, *California Court Expands Celebrities' Rights*, N.Y.L.J., Oct. 30, 1992, at 3. Alleged psychic Uri Geller claimed that the portrayal appropriated his identity. *Id.* However, a New York district court concluded that a claim did not exist under New York Civil Rights Law because the commercial did not use Geller's name or likeness. *Id.*

147. Ali is a three-time heavyweight boxing champion, and he is possibly the most recognizable athlete in the world. Bert Rosenthal, *Physical Ailments Have Done Little to Slow Down Ambassador Ali*, L.A. TIMES, Sept. 20, 1992, at C8.

148. *Ali*, 447 F. Supp. at 725.

149. *Id.* at 727. During his boxing career, Ali referred to himself as "The Greatest," and the media regularly identified Ali as such. *Id.*

150. *Id.* at 729.

151. *Id.*

152. Woody Allen became famous for his work as a writer, director, actor, and comedian. *Allen v. National Video, Inc.*, 610 F. Supp. 612, 617 (S.D.N.Y. 1985). His works include the films *ANNIE HALL*, *MANHATTAN*, *BANANAS*, and *THE PURPLE ROSE OF CAIRO*. *Id.*

len.<sup>153</sup> As in *Ali*, the evidence clearly showed that National Video had made a deliberate attempt to create the appearance of Allen endorsing the defendant's product.<sup>154</sup> National Video made virtually no effort to avoid any confusion between the "real" and "fake" Woody Allens.<sup>155</sup> Even though the defendant did not use Allen's actual image, the district court concluded that National Video could be liable.<sup>156</sup> The court determined that "most persons who could identify an actual photograph of [Allen] would be likely to think that this was actually his picture."<sup>157</sup> Therefore, by using a look alike, National Video violated Allen's right to privacy under statutory law.<sup>158</sup>

As the four categories of cases strongly suggest, protection from unwanted commercial appropriation should be extended to all aspects of a celebrity's identity. The courts should extend protection regardless of the form of the appropriation.<sup>159</sup> Partial protection for one's name, likeness, or other specified trait will not fully insulate a celebrity from unauthorized exploitation.<sup>160</sup>

The court should employ a more liberal approach to the right of publicity because a strict rule provides advertisers with the opportunity to associate a celebrity's persona with a particular prod-

153. *Id.*

154. *Id.* at 624. The district court considered several factors. First, the advertisement portrayed a customer in a video store, and the customer displayed very similar physical features. *Id.* at 617-18. The customer posed in a manner typical of Allen. *Id.* at 618. The store's counter top displayed video cassettes of Allen's films and films that Allen parodied in *PLAY IT AGAIN, SAM*. *Id.* Also, the woman behind the counter acted excitedly, as though she saw a celebrity. *Id.* Finally, the advertisement's headline read "Become a V.I.P. at National Video — We'll Make You Feel Like a Star." *Id.*

155. An advertisement that ran in *Video Review* contained a disclaimer in small print, but no disclaimers appeared in any other advertisement. *Id.* In a later decision, the district court ruled that even if a disclaimer is present, a celebrity could still maintain a cause of action under New York statutory law. See *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 369, 367 (S.D.N.Y. 1988).

156. *Allen v. National Video, Inc.*, 610 F. Supp. 612, 624 (S.D.N.Y. 1985).

157. *Id.*

158. *Id.* at 624. A similar line of reasoning may be developing in Louisiana case law. In *Prudhomme v. Proctor & Gamble Co.*, 800 F. Supp. 390 (E.D. La. 1992), New Orleans chef Paul Prudhomme sued Proctor & Gamble after the company aired a television commercial that depicted an actor with a striking resemblance to Prudhomme. *Id.* at 392. Although the district court held that Louisiana had not specifically adopted the right of publicity, the court acknowledged that it did not preclude the right either. *Id.* at 396. Therefore, the court allowed Prudhomme to proceed with his argument, but it did not make a final ruling as to whether it would recognize the right of publicity in the instant case. *Id.*

159. The Ninth Circuit reasoned that "the right of publicity does not require that appropriation of identity be accomplished through particular means to be actionable." *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

160. See *id.*

uct.<sup>161</sup> "A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth."<sup>162</sup> Therefore, the courts should protect celebrities' commercial interests in their *identities* rather than just their actual names or images.<sup>163</sup> Otherwise, an unauthorized exploitation may occur whenever the public mistakenly believes that a celebrity endorses a product.<sup>164</sup>

### B. *The Totality of the Circumstances Approach*

Because the right of publicity should protect one's identity as a whole, a court's inquiry into whether a violation occurred should not be limited to an examination of certain specified characteristics. Although not referring to its methods as such, many courts examine the "totality of the circumstances"<sup>165</sup> to determine whether a defendant has appropriated an individual's identity. The courts already apply the totality approach extensively in both civil<sup>166</sup> and criminal<sup>167</sup> contexts. As applied specifically to the right

161. *Id.*

162. *Id.* One example of clever advertising appears in the television commercials for California Grapes. One commercial featured a silver gloved, gyrating raisin who was singing "I Heard It Through the Grapevine" in a high falsetto voice. Lucy May, *Raisin Serial*, ST. PETERSBURG TIMES, Aug. 19, 1989, at 1D. Even though the commercial did not use his actual name, likeness, or voice, the raisin clearly represented Michael Jackson. *See id.*

163. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983); *see also Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (recognizing appropriation as an injury to one's identity), *cert. denied*, 112 S. Ct. 1513 (1992); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (holding that a celebrity's identity is the fruit of his labor and is entitled to legal protection); Prosser, *supra* note 30, at 401 n.155 (acknowledging the possibility of appropriating a plaintiff's identity without using either the plaintiff's name or likeness).

164. The Ninth Circuit concluded that "the specific means of appropriation are relevant only for determining whether the defendant has in fact appropriated the plaintiff's identity." *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

165. *See infra* notes 168-77 and accompanying text.

166. *See, e.g., Washington v. Davis*, 426 U.S. 229, 242 (1976) (arbitrary discriminatory purpose may often be inferred from the totality of relevant facts); *Clamp Mfg. Co. v. Enco Mfg. Co.*, 870 F.2d 512, 517 (9th Cir.) (using the totality approach to determine whether trademark infringement had occurred), *cert. denied*, 493 U.S. 872 (1989); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 387 (Cal. 1988) (examining the totality of the circumstances to determine the nature of a contract); *Baker v. Los Angeles Herald Examiner*, 721 P.2d 87, 90 (Cal. 1986) (using the totality approach to determine whether a defamatory statement was a statement of fact or of opinion), *cert. denied*, 479 U.S. 1032 (1987); *Isaacs v. Huntington Memorial Hosp.*, 695 P.2d 653, 661 (Cal. 1985) (discussing foreseeability in light of all circumstances to determine whether a civil defendant is liable for a criminal attack by a third party).

167. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 230-34 (1983) (applying the totality of the

of publicity, some courts using the totality approach examine the entire advertisement or endorsement in question to determine whether an appropriation occurred.<sup>168</sup> While in many instances the courts will examine a series of factors,<sup>169</sup> one factor alone may be so significant that it is enough to raise appropriation questions.<sup>170</sup> The courts determine whether the public will probably believe that the celebrity endorsed the defendant's product,<sup>171</sup> or whether the celebrity authorized, consented to, or approved of the use of his identity.<sup>172</sup>

Perhaps the best example of the totality approach appears in *White v. Samsung Electronics America, Inc.*<sup>173</sup> The Ninth Circuit examined several different factors that appeared in the Samsung advertisement.<sup>174</sup> The Samsung robot was wearing a designer gown, a blond wig, and large jewelry, features which are all associated

circumstances to determine the reliability of informant information); *Fare v. Michael C.*, 442 U.S. 707, 725-27 (1976) (examining the totality of the circumstances to determine whether a juvenile waived his Fifth Amendment rights); *Manson v. Braithwaite*, 432 U.S. 98, 104 (1976) (using totality approach to determine whether a suggestive pre-trial identification violated an accused's due process rights); *Schneckloth v. Bustamonte*, 412 U.S. 218, 223-25 (1973) (using totality approach to determine whether there was a voluntary consent to a search); *People v. Wharton*, 809 P.2d 290, 323-24 (Cal. 1991) (using totality approach to determine whether an emergency situation justified a warrantless search), *cert. denied*, 112 S. Ct. 887 (1992).

168. See, e.g., *Joplin Enters. v. Allen*, 795 F. Supp. 349, 351 (W.D. Wash. 1992) (examining the stage play as a whole); *Allen v. National Video, Inc.*, 610 F. Supp. 612, 617-18 (S.D.N.Y. 1985) (listing several factors which related to Woody Allen's identity); *Staruski v. Continental Tel. Co. of Vt.*, 581 A.2d 266, 271 (Vt. 1990) (stating that the advertisement must be viewed as a whole). A court may even consider an entire advertising campaign if it is relevant to the alleged appropriation in question. See, e.g., *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

169. See, e.g., *Allen*, 610 F. Supp. at 617-18 (listing several factors which relate to Woody Allen's identity); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1348-49 (D.N.J. 1981) (comparing the elements of the defendant's stage show with Elvis Presley's show); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 726-27 (S.D.N.Y. 1978) (comparing several features of a look-alike to Muhammed Ali).

170. See, e.g., *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 832 (6th Cir. 1983) (associating the phrase "Here's Johnny" with Johnny Carson).

171. See, e.g., *Allen v. National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985) (using an Allen look-alike); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978) (using an Ali look-alike); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137 (Wis. 1979) (using Hirsch's nickname "Crazylegs").

172. See, e.g., *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974) (concluding that the appearance of a similar race car led some people to believe that Motschenbacher endorsed Winston cigarettes); *Apple Corps Ltd. v. Leber*, 12 Media L. Rep. 2280, 2282-83 (Cal. Super. Ct. 1986) (finding a reasonable likelihood that the public would believe the Beatles authorized, consented to, or approved BEATLEMANIA's performance).

173. 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

174. *Id.* at 1399. For an analysis of the facts and holding in *White*, see *supra* notes 100-10 and accompanying text.

with Vanna White.<sup>175</sup> Also, the robot was on the "Wheel of Fortune" set and was posing like White.<sup>176</sup> By examining all of these factors, one could conclude that Samsung commercially appropriated White's identity.<sup>177</sup>

### C. *Knew or Should Have Known Standard*

Critics of the totality approach may argue that if the courts use this approach, they would be protecting a celebrity's identity irrespective of how remote the reference to the celebrity may be.<sup>178</sup> To belay these concerns, the courts may also examine the defendant's state of mind. A defendant may possess one of three possible states of mind when appropriating another's identity. An advertiser or seller either: (1) knew that it appropriated a person's identity; (2) should have known that appropriation occurred without authorization or consent; or (3) was unaware of the individual's existence, and any possible appropriation was only incidental.<sup>179</sup> Ac-

175. *White*, 971 F.2d at 1399.

176. *Id.*

177. *Id.* The totality approach also appears in Judge Goodwin's Michael Jordan hypothetical:

Consider a hypothetical advertisement which depicts a mechanical robot with male features, an African-American complexion, and a bald head. The robot is wearing black hightop Air Jordan basketball sneakers, and a red basketball uniform with black trim, baggy shorts, and the number 23 (though not revealing "Bulls" or "Jordan" lettering). The ad depicts the robot dunking a basketball one-handed, stiff-armed, legs extended like open scissors, and tongue hanging out. Now envision that this ad is run on television during professional football games. Considered individually, the robot's physical attributes, its dress, and its stance tell us little. Taken together, they lead to the only conclusion that any sports viewer who has registered a discernible pulse in the past five years would reach: the ad is about Michael Jordan.

*Id.*

178. See, e.g., *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 840 (6th Cir. 1983) (Kennedy, J., dissenting). Judge Kennedy asserted that the right of publicity confers monopoly power on the protected individual. *Id.* (Kennedy, J., dissenting). Because there is no statutory requirement, such as registration of a copyright or a trademark, the public is on little notice of the right being exerted. *Id.* (Kennedy, J., dissenting). Extending protection to anything merely associated with an individual provides virtually no notice as to what is being protected. *Id.* (Kennedy, J., dissenting).

Recent changes in copyright and trademark law, however, undermine Judge Kennedy's argument. For an author to receive copyright protection, notice is only required for works created before March 1, 1989. See 17 U.S.C. § 405(b) (1992) (stating that notice is only required for all works created before the effective date of the Berne Convention Implementation Act of 1988). Also, under certain circumstances, notice is not required under trademark law. See, e.g., *Two Pesos, Inc. v. Taco Cabana, Inc.*, 112 S. Ct. 2753 (1992) (holding that Lanham Act protection extends to common law trade dress).

179. The proposed standards regarding the defendant's state of mind in right of publicity cases are similar to the existing standards for defamation cases. With respect to public

cording to supporting case law, courts should hold a defendant liable under the "knew" or "should have known" standards,<sup>180</sup> but not under the "incidental appropriation" standard."<sup>181</sup>

Generally, advertisers and their clients attempt to gain endorsements from individuals who have "instant" name recognition,<sup>182</sup> believing that associating a product with a "big name" celebrity attracts greater attention and results in higher product sales.<sup>183</sup> Therefore, in most cases involving an alleged misappropriation of a celebrity's identity, the potential defendants are well aware of the possible perception of a celebrity endorsement.<sup>184</sup>

The "should have known" standard generally applies when a defendant appropriates a lesser known person's identity for commercial gain.<sup>185</sup> In these cases, a proper investigation would reveal that a significant portion of the public associates the individual in question with the product.<sup>186</sup> Sometimes a seller attempts to pro-

figures, the courts will hold a media defendant liable for publishing a defamatory statement if the defendant knew the statement was false or recklessly disregarded the truth. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967); *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). The courts will not hold a media defendant liable if the defendant innocently published the false statement. *See Time, Inc. v. Firestone*, 424 U.S. 448, 461 (1975) (holding that a defendant cannot be strictly liable for a defamatory statement).

180. *See infra* notes 182-91 and accompanying text.

181. *Cf. WILLIAM L. PROSSER, LAW OF TORTS* § 117, at 804-07 (4th ed. 1971) (stating that mere coincidental use of a name is not sufficient; plaintiff must show pirating of identity for another's gain).

182. *See, e.g., Phil Rabin & Carolyn Myles, Celebrity Soda Endorsements May Be Losing Their Pop*, WASH. TIMES, April 3, 1991, at C3 (using celebrity endorsements in soft drink commercials).

183. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1283 (D. Minn. 1970); *Lugosi v. Universal Pictures*, 603 P.2d 425, 438 (Cal. 1979) (Bird, C.J., dissenting).

184. For example, in *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993), Tracy-Locke hired an actor to sing exactly like Tom Waits, and advertising executives raised concerns regarding possible legal implications because of the near-perfect imitation. *Id.* at 1097-98. In *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), *cert. denied*, 112 S. Ct. 1513 (1992), Ford hired "sound-alikes" for its advertising campaign after the original singers would not employ their services. *Id.* at 461. Also, in *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983), the defendant was aware that "Here's Johnny" was Carson's introduction to "The Tonight Show." *Id.* at 833.

185. *See, e.g., Fairfield v. American Photocopy Equip. Co.*, 291 P.2d 194, 195 (Cal. Ct. App. 1955) (plaintiff was an attorney).

186. A good example appears in *Kerby v. Hal Roach Studios, Inc.*, 127 P.2d 577 (Cal. Ct. App. 1942). At the time the studio signed Marion Kerby's name onto letters that "promoted" a movie, the studio did not know that Kerby existed. *Id.* at 581. However, Kerby's name and address appeared in the Los Angeles city and telephone directories, and in each directory, there was only one "Marion Kerby." *Id.* at 579. Therefore, the court concluded that the letter "referred to [Kerby] in [a] clear and definite fashion and would be reasonably understood by anyone who knew of her existence." *Id.* at 581.



mote an individual as "another satisfied customer."<sup>187</sup> A seller should inspect its records before publication to determine whether this is really the case.<sup>188</sup>

Another way a potential defendant can avoid liability under the "should have known" standard is by conducting a market survey.<sup>189</sup> By taking a random sample of the general public, the potential defendant could determine whether its product promotion creates the appearance of a celebrity endorsement.<sup>190</sup> Although a market survey may be expensive, its cost is less than the potential legal expenses and an unfavorable damage award.<sup>191</sup>

Incidental appropriation will most likely occur when the plaintiff is a private individual, because the courts are more likely to conclude that the defendant was totally unaware of the plaintiff's existence. Perhaps the best example of incidental appropriation appears in *Hooker v. Columbia Pictures Industries, Inc.*<sup>192</sup> T.J. Hooker, a professional woodcarver in Illinois, claimed that the producers of the television show "T.J. Hooker" appropriated his name.<sup>193</sup> The show was about a fictional policeman in California.<sup>194</sup> The district court reasoned that a person may use another's name

187. See, e.g., *Fairfield*, 291 P.2d at 196 (advertisement stating that the plaintiff was a satisfied user of the defendant's photocopier).

188. See *id.* at 196 (holding a copier company liable for misappropriating the plaintiff's name because the company circulated an advertisement that incorrectly stated that the plaintiff was a satisfied customer); see also *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004, 1015 (App. Div. 1981) (Kupferman, J., concurring) (suggesting that there should be a duty to inquire as to whether the individual properly authorized the use of his identity in connection with the merchandise).

189. Cf. *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 400 (8th Cir. 1987) (stating that market surveys are a good way to show "likelihood of confusion" in trademark cases), *cert. denied*, 488 U.S. 933 (1988).

190. In trademark cases, sometimes plaintiffs use market surveys to show that the defendant created a "likelihood of confusion." See, e.g., *Academy of Motion Picture Arts & Sciences v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1455-56 (9th Cir. 1991) (70% of the white-collar professionals surveyed associated the Star Award with the Oscar); *Mutual of Omaha*, 836 F.2d at 400 (random survey showed that a significant percentage believed that Novak's post-holocaust Indian head was associated with Mutual of Omaha); *Quality Inns Int'l, Inc. v. McDonald's Corp.*, 695 F. Supp. 198, 205-06 (D. Md. 1988) (one third of those surveyed associated the name "McSleep Inn" with McDonald's); *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031, 1038 (N.D. Ga. 1986) (survey indicated that consumers associated the "Garbage Pail Kids" with the "Cabbage Patch Kids").

191. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1096 (9th Cir. 1992) (jury verdict in favor of the plaintiff for \$2.6 million in compensatory damages, punitive damages, and attorneys fees), *cert. denied*, 113 S. Ct. 1047 (1993); Shauna Snow, *Jury Sides With Vanna*, L.A. TIMES, Jan. 24, 1994, at F2 (jury verdict in favor of the plaintiff for \$403,000).

192. 551 F. Supp. 1060 (N.D. Ill. 1982).

193. *Id.* at 1061.

194. *Id.*

as long as he does not seek the values or benefits of that other person's identity.<sup>195</sup> A police drama could not be construed as availing itself to Hooker's reputation as a woodcarver.<sup>196</sup> Therefore, the court held that the defendant did not appropriate the name "T.J. Hooker."<sup>197</sup>

#### IV. APPROPRIATION OF CHARACTER

On rare occasions, a potential defendant will appropriate a role or character that is closely associated with a celebrity. In *White v. Samsung Electronics America, Inc.*,<sup>198</sup> Judge Alarcon, in his dissenting opinion, addressed this situation. Judge Alarcon argued that the majority confused Vanna White with the her role on the "Wheel of Fortune."<sup>199</sup> He stated that the Samsung advertise-

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195. *Id.* at 1062 (quoting WILLIAM L. PROSSER, LAW OF TORTS § 117, at 805-06 (4th ed. 1971)). The applicable section of the Second Restatement of Torts states:

It is not enough that the defendant has adopted for himself a name that is the same as that of the plaintiff, so long as he does not pass himself off as the plaintiff or otherwise seek to obtain for himself the values or benefits of the plaintiff's name or identity. Unless there is such appropriation, the defendant is free to call himself by any name that he likes . . . . Until the value of the name has in some way been appropriated, there is no tort.

RESTATEMENT (SECOND) OF TORTS § 652c, comment c (1976); *see also Hooker*, 551 F. Supp. at 1062.

196. *Hooker*, 551 F. Supp. at 1062.

197. *Id.* The Sixth Circuit addressed a similar problem in *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983). The court held that the defendant appropriated Johnny Carson's identity by using the phrase "Here's Johnny." *Id.* at 833, 835; *see also supra* notes 130-36 and accompanying text. If the defendant had used a version of Carson's legal name, such as John W. Carson, however, no violation would have occurred because Carson's legal name is not connected with his celebrity status. *Id.* at 837. Thus, the Sixth Circuit inferred that no violation would have occurred because the public does not perceive Johnny Carson as "John W. Carson." *See id.*

Perhaps a more clear-cut example of the Sixth Circuit's reasoning can be found in the following example. Suppose that an advertiser claims, without prior authorization, that Issur Danielovitch Demsky, Joyce Penelope Frankenberg, and Kirk Burrell endorse a certain product. No violation of these individuals' right of publicity would occur because the public does not associate these names with actor Kirk Douglas, actress Jane Seymour, and pop music star Hammer. *See Sam Lowe, What's in a Name? Ice T, Prince and Host of Others Dump Theirs*, THE PHOENIX GAZETTE, Aug. 10, 1993, at C2 (referring to the real names of celebrities).

198. 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

199. *Id.* at 1404 (9th Cir. 1992) (Alarcon, J., concurring and dissenting). Separating a role that a person plays from that person's actual identity is nearly impossible when the person essentially portrays himself. Asking the courts to separate the two "personas" would be like asking Orlando Cepeda to separate himself from his "role" of baseball player. *See Cepeda v. Swift and Co.*, 415 F.2d 1205 (8th Cir. 1969). Elroy Hirsch would have to separate his actual identity from his "role" as an NFL running back. *See Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979). Also, the courts would have to separate Johnny Carson from his "role" as a talk show host. *See Carson v. Here's Johnny Portable Toilets*,

ment<sup>200</sup> could only be associated with White's role and not her identity.<sup>201</sup> Judge Alarcon expressed his concern that under the majority's approach, any famous person could file suit based on any commercial advertisement depicting a character or role the person played.<sup>202</sup> Even if we could separate White from "her role," existing case law discredits Judge Alarcon's argument.

The courts hold a defendant liable for commercially exploiting a celebrity's character if the character is so closely associated with the individual that the public views the character as part of the celebrity's identity.<sup>203</sup> The first case that addressed this type of situation was *Chaplin v. Amador*.<sup>204</sup> In 1913, Charlie Chaplin created the "Little Tramp" character,<sup>205</sup> which came to be recognized as Chaplin himself.<sup>206</sup> Around 1921, two producers hired Charles Amador to portray the Little Tramp under the stage name "Charles Aplin."<sup>207</sup> The producers created, and then promoted, a movie starring Charles Aplin in "his famous character."<sup>208</sup>

The appellate court concluded that the defendant's fraudulent conduct caused injury to Chaplin and deceived the public.<sup>209</sup> Chaplin had a right to be protected against those who would injure him by fraudulent means, or essentially, had a right to be protected against "unfair competition in business."<sup>210</sup>

Inc., 698 F.2d 831 (6th Cir. 1983). Fortunately, no jurisdiction has adopted this line of reasoning.

200. See *supra* notes 103-09 and accompanying text.

201. *White*, 971 F.2d at 1404 (Alarcon, J., concurring and dissenting).

202. *Id.* at 1407 (Alarcon, J., concurring and dissenting). Judge Alarcon continued his argument in great hyperbole by stating:

Under the majority's view of the law, Gene Autry could have brought an action for damages against all other singing cowboys. Clint Eastwood would be able to sue anyone who plays a tall, soft-spoken cowboy, unless, of course, Jimmy Stewart had not previously enjoined Clint Eastwood. Johnny Weismuller would have been able to sue each actor who played the role of Tarzan. Sylvester Stallone could sue other actors who play blue-collar boxers. Chuck Norris could sue all karate experts who display their skills in motion pictures. Arnold Schwarzenegger could sue any body builders who are compensated for appearing in public.

*Id.* (Alarcon, J., concurring and dissenting).

203. See, e.g., *McFarland v. Miller*, 14 F.3d 912, 920 (3d Cir. 1994); see also *infra* notes 204-28 and accompanying text.

204. 269 P. 544 (Cal. App. 1928).

205. The "Little Tramp" consisted of a man with a comic mustache, ill-fitting clothes, a cane, and an old derby. Ralph Gardner, *Tramp Twosome: A Pair of Paperbacks Honor Charlie Chaplin's 100th Birthday*, CHI. TRIB., July 3, 1989, at C3.

206. *Chaplin*, 269 P. at 545.

207. *Id.*

208. *Id.*

209. *Id.* at 546.

210. *Id.*; see also *Nurmi v. Peterson*, 16 Media L. Rep. 1606, 1608 (C.D. Cal. 1989)

A character and a person's actual identity may merge even if the individual did not create the character in question.<sup>211</sup> An example of this type of merging appears in *McFarland v. E & K Corp.*<sup>212</sup> George McFarland played "Spanky" in the "Little Rascals" and "Our Gang" movies of the 1930s and 1940s.<sup>213</sup> McFarland continued to use the Spanky character for his own commercial gain.<sup>214</sup> E & K attempted, however, to operate "Spanky's Saloon" using Spanky's name and likeness.<sup>215</sup> E & K asserted that Spanky was only a character and not McFarland's identity, but the court held otherwise.<sup>216</sup> Because McFarland continued to portray himself as Spanky, the court considered the character as part of his persona.<sup>217</sup>

Appropriation of an individual's identity becomes easier to detect when the individual is portraying himself. For example, in *Price v. Hal Roach Studios, Inc.*,<sup>218</sup> the district court stated that appropriation of Laurel and Hardy's identities was much easier to discover because they portrayed themselves on the screen rather than portraying fictional characters.<sup>219</sup>

In most productions, however, an actor merely plays his given role, and the role itself does not create any property rights in the

(holding that an imitation of another's character is actionable if the defendant attempted to deceive the public into believing that the plaintiff was actually present).

211. See *McFarland v. Miller*, 14 F.3d 912, 920 (3d Cir. 1994). The Third Circuit reasons that the only key factor is whether the public associates the character with "the real life actor." *Id.* But see *Lugosi v. Universal Pictures*, 603 P.2d 425, 433 (Cal. 1979) (Mosk, J., concurring) (suggesting that a protectible interest only exists in a character created by the individual).

212. 1991 U.S. Dist. LEXIS 1496 (D. Minn. Jan. 17, 1991).

213. *Id.* at \*1.

214. *Id.*

215. *Id.* at \*1-2. The defendants also sold hats, T-shirts, and other items displaying Spanky's name and image. *Id.* at \*2.

216. *Id.* at \*5.

217. *Id.*; see also *McFarland v. Miller*, 14 F.3d 912, 914 (3d Cir. 1994). The Third Circuit determined that if George McFarland's executor could prove that "the name Spanky McFarland has become so identified . . . with him as to be indistinguishable from him in public perception," then his executor could sustain a cause of action for a violation of McFarland's right of publicity. *Id.*

218. 400 F. Supp. 836 (S.D.N.Y. 1975).

219. *Id.* at 845. *Groucho Marx Prods. v. Day and Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982) contains a very similar holding. Julius, Leo, and Adolph Marx developed the Groucho, Chico, and Harpo characters, but the three brothers essentially portrayed themselves. *Id.* at 491. Therefore, a musical play that contained an unauthorized exploitation of Groucho, Chico, and Harpo violated the right of publicity of the Marx brothers and their designated heirs. *Id.*; see also *Lugosi v. Universal Pictures*, 603 P.2d 425, 432 (Cal. 1979) (Mosk, J., concurring) (commenting that Groucho Marx just playing Groucho cannot be exploited by others).

individual.<sup>220</sup> For example, Bela Lugosi did not have an exclusive property right in Count Dracula because other actors have also portrayed the role.<sup>221</sup> Also, Sir Laurence Olivier could not have prohibited anyone else from portraying Hamlet.<sup>222</sup>

A more modern example of the difference between an actor and his role is Michael Keaton and his portrayal of Batman. Keaton's right of publicity does not extend to include Batman. Other actors have played the role, and Batman has also been depicted as a cartoon character with no resemblance to Keaton's image.<sup>223</sup> Furthermore, Keaton has played other roles aside from Batman.<sup>224</sup> Thus, Keaton could not claim a right of publicity in Batman.<sup>225</sup>

With respect to Judge Alarcon's argument, suppose that the "Wheel of Fortune" game show hostess is a role. However, a role which includes a blond woman wearing designer clothes and turning block letters on a game show set conjures up the image of only one person<sup>226</sup> playing that role—Vanna White.<sup>227</sup> Furthermore, White is essentially a one-role celebrity who is exclusively known for her appearance on the "Wheel of Fortune."<sup>228</sup>

## V. THE RIGHT OF PUBLICITY, PROPERTY RIGHTS AND THE DEAD

An unsettled issue regarding the right of publicity is the extent of the commercial interest in an individual's identity. In 1960,

220. *Lugosi*, 603 P.2d at 432 (Mosk, J., concurring).

221. *Id.* at 432 (Mosk, J., concurring).

222. *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 845 (S.D.N.Y. 1975) (citing *Supreme Records v. Decca Records*, 90 F. Supp. 904, 909 (S.D. Cal. 1950)).

223. See generally Frank Lovece, *The Big Screen Batman Might Be Too Dark a Presence For Young Kids. But There's a Kinder, Gentler Caped Crusader in These Old Movies, TV Shows, and Cartoons on Video*, BPI ENTERTAINMENT NEWS WIRE, July 14, 1992.

224. In addition to BATMAN and BATMAN RETURNS, Keaton has appeared in several films including MR. MOM, PACIFIC HEIGHTS, and BEETLEJUICE. See *National Public Radio: President Ad Satire Teams Perot & Lucci* (National Public Radio broadcast, June 28, 1992).

225. See *McFarland v. Miller*, 14 F.3d 912, 921 n.15 (3d Cir. 1994). The court reasoned that Adam West's identity is not the same as Batman, and Johnny Weismuller is not exclusively known as Tarzan. *Id.* Neither actor, therefore, could claim a right of publicity in their characters because the public does not view them as being one and the same. See *id.*

226. Although Vanna White is the only woman the public thinks as the "Wheel of Fortune" hostess, there was one other. Susan Stafford was the hostess from the mid-1970s until White replaced her in 1982. Bob Greene, *That's How Wheel of Fortune Spins*, CHI. TRIB., Feb. 22, 1987, at C1. Arguably, it is public perception that determines if the person's actual identity and character merge, and not who invented the role.

227. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (stating that the Samsung robot's physical appearance and its placement on the "Wheel of Fortune" set refers only to Vanna White), *cert. denied*, 113 S. Ct. 2443 (1993).

228. *Id.* at 1404 (Alarcon, J., concurring and dissenting).

Dean Prosser acknowledged that a person has exclusive use of one's own identity, but he also argued, "It seems quite pointless to dispute whether such a right is to be classified as 'property.'"<sup>229</sup> Unfortunately, some decisions that addressed the right of publicity followed Prosser's line of reasoning.<sup>230</sup> Classification is irrelevant if the courts view the right of publicity as strictly personal.<sup>231</sup> However, if the courts view the right as a property interest, classification is significant.

If the right of publicity is only actionable in tort, any possible property interest is not assignable and extinguishes at death.<sup>232</sup> On the other hand, if the courts classify commercial exploitation of an individual's persona as a property right, the right of publicity adopts all the characteristics of property, including alienability and descendibility.<sup>233</sup> Thus, if a valid property interest exists, an individual's identity takes on a commercial nature that does not terminate at death.<sup>234</sup>

### A. Alienability

As previously stated, the right of publicity originally developed from the tort of invasion of privacy, a personal right.<sup>235</sup> Early California case law held that an action for misappropriation was purely a personal action and was not assignable to others,<sup>236</sup> even though the right of publicity involves an individual's right to exploit his identity for financial gain.<sup>237</sup> In 1979, the California Su-

229. Prosser, *supra* note 30, at 406. Prosser's conclusion was made at a time when only the Second Circuit recognized a person's right to transfer his right of publicity to a third party. *Id.* at 406-07.

230. See, e.g., *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 825-26 (9th Cir. 1974); *Haelen Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953); *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 (Cal. 1979).

231. See Prosser, *supra* note 30, at 408 (stating that all four types of invasion of privacy, including misappropriation, are personal rights).

232. *Id.*; see also *Lugosi*, 603 P.2d at 428-29 (citing WILLIAM L. PROSSER, *LAW OF TORTS* § 115, at 814-15 (4th ed. 1971)).

233. George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 *LA. L. REV.* 443, 462 (1991).

234. *Id.* at 464-65 (citing several cases which allow the right to be assigned and survive death).

235. See *supra* notes 29-33 and accompanying text.

236. See e.g., *Kelly v. Johnson Publishing Co.*, 325 P.2d 659, 661 (Cal. Ct. App. 1958); *Metter v. Los Angeles Examiner*, 95 P.2d 491, 495 (Cal. Ct. App. 1939).

237. The Ninth Circuit recognized that "[c]onsiderable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit." *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993); see also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977)

preme Court finally recognized a person's right to assign his right of publicity.<sup>238</sup> The court asserted that a celebrity had the right to commercially exploit his name or likeness in connection with the sale of any product or service.<sup>239</sup> Moreover, an individual could capitalize on this right by selling licenses to others.<sup>240</sup>

While the California courts struggled for years with whether the right of publicity was assignable, other jurisdictions readily accepted the notion. *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*,<sup>241</sup> the first case that specifically employed the term "right of publicity,"<sup>242</sup> held that the right is assignable because of its commercial nature.<sup>243</sup> Most other jurisdictions also hold that the right is a form of property<sup>244</sup> that is freely assignable.<sup>245</sup> It appears, therefore, that alienability is not an issue. As the following subsection indicates, however, the issue of descendibility remains

(analogizing the right of publicity to copyright law because in both cases, the individual should reap the benefit of his endeavors).

238. *Lugosi v. Universal Pictures*, 603 P.2d 425, 428-29 (Cal. 1979) (in dicta).

239. *Id.* at 428 (reasoning that the right of publicity should be protected under the laws prohibiting unfair competition).

240. *Id.* at 429.

241. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

242. See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 842 (6th Cir. 1983) (Kennedy, J., dissenting); *McCarthy*, *supra* note 8, at 1706; *Halpern*, *supra* note 37, at 1203.

243. *Haelen*, 202 F.2d at 868.

244. See, e.g., KY. REV. STAT. ANN. § 391.170 (Baldwin 1992) (recognizing that a person has a property right in his name and likeness); *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 489-94 (3d Cir.) (holding that the right of publicity is a property right), *cert. denied*, 351 U.S. 926 (1956); *Joplin Enters. v. Allen*, 795 F. Supp. 349, 350 (W.D. Wash. 1992) (stating the right of publicity is a property right); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1354 (D.N.J. 1981) (stating that an individual's name and likeness are property); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1281 (D. Minn. 1970) (recognizing a property right in the commercial value of one's name, likeness, and public personality); *Lavery v. Automation Management Consultants*, 360 S.E.2d 336, 342 (Va. 1987) (holding that the Virginia Legislature created a property right in an individual's name and likeness); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137 (Wis. 1979) (recognizing a commercial interest in the right of publicity); *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004, 1010 (App. Div. 1981) (recognizing the proprietary nature of the right of publicity).

245. See, e.g., NEV. REV. STAT. ANN. § 598.986(1) (Michie 1991) (stating that the right of publicity is freely transferable); TENN. CODE ANN. §§ 47-25-1103(a), (b) (1992) (stating that every individual has a property right in the use of his name, photograph, or likeness that is freely assignable); TEX. PROP. CODE ANN. §§ 26.002-.004 (Vernon 1992) (recognizing that a deceased individual has a property right in his identity that is freely transferable); *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 694 F.2d 674, 680 (11th Cir. 1983) (stating that the right of publicity is assignable during the celebrity's life); *Factors, Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 221 (2d Cir. 1978) (recognizing New York cases that have labeled the right of publicity as a valid transferable right), *cert. denied*, 440 U.S. 908 (1979); *Cepeda v. Swift and Co.*, 415 F.2d 1205, 1206 (8th Cir. 1969) (holding that the right of publicity is a property right that can be sold).

unresolved.

### B. Descendibility

While most cases involve the right of publicity for living celebrities, in some cases, the celebrity's "star power" survives the individual's death; the most prominent example is Elvis Presley.<sup>246</sup> Although Presley died in 1977, his estate continues to gross over \$15 million per year.<sup>247</sup> Other deceased celebrities who maintain their popularity include Marilyn Monroe,<sup>248</sup> James Dean,<sup>249</sup> and civil rights leader Malcolm X.<sup>250</sup>

The majority of jurisdictions that have considered a deceased individual's right of publicity have held that the right of publicity is a descendible property interest.<sup>251</sup> For example, the New York district court came to this conclusion because it considered the purely commercial nature of the right.<sup>252</sup> The Tennessee courts took this analysis one step further by concluding that descendibility "is consistent with a celebrity's expectation that he is creating a valuable capital asset that will benefit his heirs and assigns after his death."<sup>253</sup> To date, only case law in New Jersey,<sup>254</sup>

246. Litigation concerning Presley's right of publicity has resulted in six written opinions. See generally *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889 (6th Cir. 1991); *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977); *State ex rel. Elvis Presley Int'l Memorial Found. v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987). Actually, *Factors Etc., Inc. v. Pro Arts, Inc.* is the most prominent decision among seven written opinions concerning the same case. For a summary of *Factors I-VII*, see J. Steven Bingman, Comment, *A Descendible Right of Publicity: Has the Time Come for a National Standard?*, 17 PEPP. L. REV. 933, 955-61 (1990).

247. Woody Baird, 'Elvis Police' Track Impersonators, Collect Royalties For Singer's Estate, L.A. TIMES, March 15, 1992, at A36. In 1988, Elvis was one of the top ten money-makers among music pop stars. Robert Hilburn, *Eternal Revenue*, L.A. TIMES MAGAZINE, June 11, 1989, at 10.

248. *In Memory of the King and Norma Jean*, ST. PETERSBURG TIMES, Aug. 2, 1992, at 60 (stating that in license fees alone, Monroe's estate earns more than \$1 million annually).

249. Alan Hustak, *The Legend of James Dean*, THE GAZETTE (Montreal), Nov. 15, 1992, at F1 (stating that memorabilia sold by James Dean's estate has earned more than \$6 million).

250. Sheila M. Poole and Jeffrey Scott, *Firms Trying to Cash in on Malcolm X Sales of Merchandise Tied to His Memory May Hit \$100 Million*, ATLANTA J. & CONST., Nov. 18, 1992, at A2.

251. Sixteen states have considered whether the right of publicity survives death. See *infra* notes 261-321 and accompanying text. Only Arizona, Illinois, Ohio, Wisconsin, and New York do not allow the right to survive death. See *infra* notes 263-66, 312-21 and accompanying text.

252. *Price v. Hal Roach Studios*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975).

253. *State ex rel. Elvis Presley Int'l Memorial Found. v. Crowell*, 733 S.W.2d 89, 98



Georgia,<sup>255</sup> and Tennessee<sup>256</sup> allows a right of publicity for the dead. Eight other states have enacted statutes that allow descendibility.<sup>257</sup>

The jurisdictions that recognize an individual's right of publicity after death are inconsistent as to whether the person must exercise the right during his lifetime.<sup>258</sup> To further complicate mat-

(Tenn. Ct. App. 1987).

254. *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981) (interpreting New Jersey law).

255. *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 694 F.2d 674 (11th Cir. 1983) (after certification by the Georgia Supreme Court).

256. *Gracey v. Maddin*, 769 S.W.2d 497, 500-01 (Tenn. Ct. App. 1989); *State ex rel. Elvis Presley Int'l Memorial Foundation v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987); see also TENN. CODE ANN. § 47-25-1103 (1992).

257. The eight states that have enacted statutes that recognize a descendible right of publicity are California, Texas, Florida, Kentucky, Nebraska, Nevada, Oklahoma, and Virginia.

California Civil Code § 990(b) states that the right of publicity is a property right that is freely transferable before or after the individual's death. CAL. CIV. CODE § 990(b) (Deering 1992); see *infra* notes 267-76 and accompanying text. The Texas Property Code recognizes a property right in a deceased individual's persona. However, only a surviving family member or a person who received the right by transfer during the deceased's person's life may exercise the right. TEX. PROP. ANN. §§ 26.001-.015 (Vernon 1992); see *infra* notes 294-99 and accompanying text.

Florida law protects a person from an unauthorized commercial use of a person's name, portrait, photograph, or other likeness. FLA. STAT. ANN. § 540.08(1) (West 1991). In the case of a deceased individual, however, an entity authorized to license the deceased's name and likeness or a surviving family member must consent to any commercial exploitation. FLA. STAT. ANN. § 540.08(1)(c) (West 1991). Therefore, in *Southeast Bank, N.A. v. Lawrence*, 489 N.E. 2d 744 (N.Y. 1985), *Southeast Bank* could not sustain an action on behalf of *Tennessee Williams' estate* for an alleged appropriation of *Williams' name*. *Id.* at 745 (applying the law of decedent's domicile).

The Kentucky Legislature recognized that the right of publicity only survives death for public figures. KY. STAT. ANN. §§ 391.170(1), (2) (Baldwin 1992). The legislature did not, however, define who qualifies as a public figure. See *id.* In separating the right from other types of invasion of privacy, Nebraska statutory law allows the right to survive death. NEB. REV. STAT. § 20-208 (1991).

Nevada law states that a person has a right of publicity in his name, voice, signature, photograph, or likeness. NEV. REV. STAT. ANN. § 598.790 (Michie 1994). The right survives death regardless of whether the person exploited it during his lifetime. *Id.* A transferee, a surviving beneficiary, or a successor in interest may exercise a deceased person's right. NEV. REV. STAT. ANN. § 598.986 (Michie 1992).

In Oklahoma, a surviving spouse, a personal representative, or a majority of the adult heirs may exercise a deceased person's right of publicity. OKLA. STAT. tit. 21, § 839.1 (1991). Finally, in Virginia, only the surviving spouse or the next of kin may exploit a deceased's name, portrait, or picture. VA. CODE ANN. § 8.01-40 (Michie 1992).

258. For example, Georgia holds that the right does not need to be exploited during the person's life to survive death. See *Martin Luther King, Jr., Center For Social Change, Inc. v. American Heritage Prods., Inc.*, 694 F.2d 674 (11th Cir. 1983) (after certification by the Georgia Supreme Court); *infra* notes 289-93 and accompanying text. New Jersey, however, requires that the right be exploited during one's life. See *Estate of Presley v. Russen*,

ters, five states that recognize a descendible right are silent on this issue.<sup>259</sup> Therefore, there is no dominant opinion as to whether the right of publicity must be exploited prior to death for it to survive death.

California, Tennessee, Georgia, Texas, and New York law offer different approaches to the right of publicity for a deceased person. The court decisions and statutory law in these states reflect the lack of consistency in this area.

### 1. California

Although other jurisdictions defined the right of publicity as a property right,<sup>260</sup> the California courts adhered to their original position that the right is only a personal one and is strictly grounded in tort law.<sup>261</sup> In 1979, the California Supreme Court affirmed case precedent by holding that the right of publicity was a personal right that does not survive the individual's death.<sup>262</sup> Arizona,<sup>263</sup> Il-

513 F. Supp. 1339, 1355 and nn.9-10 (D.N.J. 1981) (interpreting New Jersey law); *see infra* note 311 and accompanying text.

259. *See* FLA. STAT. ANN. § 540.08(1)(c) (West 1991); KY. REV. STAT. ANN. § 391.170 (Baldwin 1992); NEB. REV. STAT. § 20-208 (1987); OKLA. STAT. tit. 21, § 839.1 (1991). The Virginia Code allows the right of publicity for a deceased individual. VA. CODE ANN. § 8.01-40 (Michie 1992). Neither the Virginia Code nor state case law, however, address the exploitation issue. *See id.*; Lavery v. Automation Management Consultants, Inc., 360 S.E.2d 336 (Va. 1987).

260. *See supra* notes 244-45 and accompanying text.

261. *Melvin v. Reid*, 297 P. 91, 94 (Cal. Ct. App. 1931) (holding that the right of privacy is based in tort law alone); *see also* *James v. Screen Gems, Inc.*, 344 P.2d 799, 801 (Cal. Ct. App. 1959); *Kelly v. Johnson Publishing Co.*, 325 P.2d 659, 661 (Cal. Ct. App. 1958).

262. *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 (Cal. 1979); *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 455 (Cal. 1979).

The dicta in *Lugosi* has been the source of confusion for other jurisdictions attempting to interpret California case law. For example, the Second Circuit stated that there are three possible interpretations of *Lugosi*. *Groucho Marx Prods., Inc. v. Day and Night Co.*, 689 F.2d 317, 321 (2d Cir. 1982). The first interpretation is that the heirs have no right of publicity. *Id.* The second interpretation is that the right of publicity is descendible only if the celebrity exploits his identity during his lifetime. *Id.* The third interpretation is that the heirs could bring a cause of action only under trademark law. *Id.* at 322. The Second Circuit determined that the second and third interpretations applied. *Id.* at 323.

The Eleventh Circuit experienced similar difficulties in interpreting *Lugosi*. *See Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538, 1541-44 (11th Cir. 1983). In *Acme*, the court determined that the right of publicity survives death if the celebrity exercises the right in conjunction with a specific business or product during his lifetime. *Id.* at 1544.

Despite the clear holding of *Guglielmi*, decided only two days after *Lugosi*, all the confusion and interpretations by the two circuits occurred. In *Guglielmi*, the court held "that the right of publicity protects against the unauthorized use of one's name, likeness, or personality, but that right is *not descendible* and *expires upon death* of the person so protected." *Guglielmi*, 603 P.2d 454, 455 (emphasis added); *see also* *Joplin Enters. v. Allen*, 795 F. Supp. 349, 351 (W.D. Wash. 1992) (citing the holding in *Guglielmi*).

Illinois,<sup>264</sup> Ohio,<sup>265</sup> and Wisconsin<sup>266</sup> also have determined that the right of publicity extinguishes at death.

In 1984, however, the California Legislature decided to protect the right after death by enacting Civil Code section 990.<sup>267</sup> Section 990(a) states that any person who uses a deceased personality's name, signature, photograph, or likeness for advertising purposes without prior consent is liable for any resulting injury.<sup>268</sup> The legislature also specifically recognized that the right of publicity is a property right that survives death, regardless of whether a person exercised the right during his lifetime,<sup>269</sup> and ceases fifty years after the individual's death.<sup>270</sup>

263. ARIZ. REV. STAT. ANN. § 14-3110 (1992) (stating that invasion of privacy does not survive death). Arizona case law has not directly addressed the question of whether the right of publicity survives the decedent. *Heinz v. Frank Lloyd Wright Found.*, 1992 U.S. Dist. LEXIS 10688, at \*43 n.4 (N.D. Ill. July 16, 1992).

But see *Sinkler v. Goldsmith*, 623 F. Supp. 727 (D. Ariz. 1985). The district court inferred that the right of publicity may survive an individual's death if assigned to another during the person's life. *Id.* at 733. The court based its decision, however, on case law in other jurisdictions and did not directly address Arizona law. See *id.*

264. *Maritote v. Desilu Prods., Inc.*, 345 F.2d 418, 420 (7th Cir. 1965) (holding that according to Illinois law, an alleged unauthorized use of Al Capone's name was based on invasion of privacy, and no privacy rights exist for a deceased person), *cert. denied*, 382 U.S. 883 (1965); see also *New Era Publications Int'l v. Henry Holt & Co.*, 873 F.2d 576, 588 n.4 (2d Cir. 1989) (recognizing that a person's privacy right terminates at death), *cert. denied*, 493 U.S. 1094 (1990).

265. *Reeves v. United Artists Corp.*, 765 F.2d 79, 80 (6th Cir. 1985) (holding that according to Ohio law, the right of publicity is part of privacy law and lapses upon death).

266. Wisconsin statutory law states that invasion of privacy includes the commercial use "of the name, portrait or picture of *any living person*, without having first obtained the written consent." WIS. STAT. ANN. § 895.50(2)(b) (West 1990) (emphasis added); see also *Heinz v. Frank Lloyd Wright Found.*, 229 U.S.P.Q. 201 (W.D. Wis. 1986) (stating the right of privacy does not survive death).

267. CAL. CIV. CODE § 990 (Deering 1992).

268. The applicable part of § 990 states:

Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner . . . for purposes of advertising or selling . . . without prior consent . . . shall be held liable for any damages sustained by the person or persons injured as a result thereof.

CAL. CIV. CODE § 990(a) (Deering 1992). Compare § 990(a) with CAL. CIV. CODE § 3344(a). See *supra* note 68.

269. Civil Code § 990(b) states:

The rights recognized under this section are *property rights*, freely transferable, in whole or in part . . . whether the transfer occurs *before the death* of the deceased personality, by the deceased personality or his or her transferees, or, *after the death* of the deceased personality, by the person or persons in whom the rights vest under this section or the transferees of that person or persons.

CAL. CIV. CODE § 990(b) (Deering 1992) (emphasis added).

270. CAL. CIV. CODE § 990(g) (Deering 1992). The possible origin of the 50 year limitation appears in Chief Justice Bird's arguments for a descendible right of publicity. See *Lugosi v. Universal Pictures*, 603 P.2d 425, 447 (Cal. 1979) (Bird, C.J., dissenting); *Guglielmi v.*

The legislature's passage of California Civil Code section 990 did not resolve the issue of whether a descendible right of publicity existed in California. A superior court judge ruled section 990 *per se* unconstitutional,<sup>271</sup> but the case was later dismissed and the opinion was never published.<sup>272</sup> One district court judge also doubted the statute's constitutionality.<sup>273</sup> Even if Civil Code section 990 survives constitutional attack, another outstanding problem exists. The statute strictly concerns misappropriation of name and likeness and not the common law right of publicity.<sup>274</sup> It is possible, therefore, for a person to appropriate a deceased individual's identity without violating section 990.<sup>275</sup> For example, suppose an advertiser uses Elvis Presley as part of an ad campaign. If the advertiser uses Presley's actual name or likeness, Presley's estate could sue under section 990. If the advertiser only uses an "Elvis robot,"<sup>276</sup> however, the advertiser could successfully invoke Presley's identity without being subject to liability.

## 2. Tennessee

Tennessee initially followed California's common law approach by not allowing the right of publicity to survive death.<sup>277</sup> In *Memphis Development Foundation v. Factors, Etc., Inc.*,<sup>278</sup> the Sixth Circuit considered the descendability issue and held that the right of publicity was not descendible, and shifted to the public domain after the celebrity's death.<sup>279</sup> The court reasoned that making the right inheritable "would not significantly inspire the creative en-

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Spelling-Goldberg Prods., 603 P.2d 454, 457 (Cal. 1979) (Bird, C.J., concurring).

For the statute of limitations in other jurisdictions, see FLA. STAT. ANN. § 540.08(4) (West 1991) (40 years after death); KY. REV. STAT. ANN. § 391.170(2) (Baldwin 1984) (50 years after death); NEV. REV. STAT. ANN. § 598.790(1) (50 years after death); TENN. CODE ANN. § 47-25-1104(a) (1992) (10 years after death); TEX. PROP. CODE ANN. § 26.012(d) (Vernon 1992) (50 years after death); VA. CODE ANN. § 8.01-40(b) (Michie 1992) (20 years after death).

271. See Bingman, *supra* note 246, at 965-66.

272. *Id.*

273. Hughes v. Plumsters, Ltd., 17 Media L. Rep. 1186, 1188 (N.D. Cal. 1989) (remarking that § 990 was probably unconstitutional if the defendant successfully established his work as a parody).

274. Joplin Enters. v. Allen, 795 F. Supp. 349, 351 (W.D. Wash. 1992) (interpreting California law).

275. Halpern, *supra* note 37, at 1222-23 and n.131 (speculating as to the outcome of *Motschenbacher* if the action had been brought after the race car driver's death).

276. Referring to the Samsung robot, see *supra* notes 102-04 and accompanying text.

277. See *infra* notes 278-81 and accompanying text.

278. 616 F.2d 956 (6th Cir.), cert. denied, 449 U.S. 953 (1980).

279. *Id.* at 957.

deavors of individuals in our society.”<sup>280</sup> Furthermore, the court determined that making the right of publicity descendible would not change an individual’s expectations or increase the quality of goods and services provided by a celebrity.<sup>281</sup>

In 1984, the Tennessee Legislature recognized that an individual has a property interest in his name and likeness.<sup>282</sup> Moreover, the legislature stated that the right was freely assignable and descendible regardless of whether the individual exploited the right during his life.<sup>283</sup>

Later, the Tennessee state courts recognized the statutory right in *State ex rel. Elvis Presley International Foundation v. Crowell*.<sup>284</sup> The court in *Crowell*, however, reasoned that a separate descendible right of publicity existed at common law.<sup>285</sup> The court attacked the Sixth’s Circuit’s reasoning in *Memphis Development* by arguing that property includes all rights that have value and all interests capable of being possessed to the exclusion of others.<sup>286</sup> The court further stated that property includes intangible personal

280. *Id.* at 959. The Sixth Circuit also reasoned that the right of publicity was a product of a person’s fame. *Id.* The court held that fame was similar to reputation because “it is an attribute from which others may benefit but not own.” *Id.* The court then stated that the laws of defamation were designed to protect a person’s reputation, and there is no right of action for defamation after death. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 560 (rev. ed. 1977)). Therefore, the Sixth Circuit concluded that a descendible right of publicity would be contrary to legal precedent. *Id.*

Unfortunately, the Sixth Circuit confused personal fame with the commercial nature of the right of publicity. A person may be famous and still have virtually no commercial value in her identity. For example, Shannen Doherty became famous for her role on “Beverly Hills, 90210.” She is also known for having a terrible temper, problems in her social life, and previous brushes with the law. See David Kronke, *After Brenda, Whither Shannen? Will ‘90210’ Remain the Pinnacle of Doherty’s Career? Not if She Reads This*, L.A. TIMES, Dec. 23, 1993, at F1 (commenting on Doherty’s “bad girl” image). Given Doherty’s reputation, it is highly unlikely that any company would want one of their products associated with her.

281. *Memphis*, 616 F.2d 959-60.

282. Section 47-25-1103(a) of the Tennessee Code states, “Every individual has a property right in the use of his name, photograph, or likeness in any medium in any manner.” TENN. CODE ANN. § 47-25-1103(a) (1992); *Gracey v. Maddin*, 769 S.W.2d 497, 501 n.3 (Tenn. Ct. App. 1989).

283. Section 47-25-1103(b) of the Tennessee Code states:

The individual rights . . . shall not expire upon the death of the individual so protected, whether or not such rights were commercially exploited . . . during the individual’s lifetime, but shall be descendible to the executors, assigns, heirs, or devisees of the individual so protected by this part.

TENN. CODE ANN. § 47-25-1103(b) (1992); *Gracey*, 769 S.W.2d at 501 n.3.

284. 733 S.W.2d 89, 99 (Tenn. Ct. App. 1987).

285. *Id.* at 97-99.

286. *Id.* at 97 (citing *Watkins v. Wyatt*, 68 Tenn. 250, 255 (1987); *Townsend v. Townsend*, 7 Tenn. (Peck.) 1, 17 (1821)).

property, and it defined the right as such.<sup>287</sup> The *Crowell* court, therefore, held that “[i]f a celebrity’s right of publicity is treated as an intangible property right in life, it is no less a property right at death.”<sup>288</sup>

### 3. Georgia

Although California and Tennessee struggled with the descendibility issue, Georgia case law clearly holds that the right of publicity survives death in all cases. In *Martin Luther King, Jr., Center For Social Change, Inc. v. American Heritage Products, Inc.*,<sup>289</sup> B & S Enterprises attempted to exploit Dr. King’s name and image by developing a plastic bust as “an exclusive memorial” to him.<sup>290</sup> During his lifetime, Dr. King did not take commercial advantage of his persona.<sup>291</sup> However, the Eleventh Circuit stated that Dr. King’s right of publicity remained intact,<sup>292</sup> and his heirs could exercise the right to “preserve and extend his status and memory and to prevent unauthorized exploitation thereof by others.”<sup>293</sup>

### 4. Texas

The Texas Legislature recognizes a property right in a deceased individual’s identity.<sup>294</sup> A surviving family member or a per-

287. *Crowell*, 733 S.W.2d at 97; see also *Gracey*, 769 S.W.2d at 500 (stating that the right of publicity is a species of intangible personal property).

288. *Crowell*, 733 S.W.2d at 97-98 (citing *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975)). However, the court refused to consider whether a descendible common law right exists. *Crowell*, 733 S.W.2d at 99 n.11.

289. 694 F.2d 674 (11th Cir. 1983) (after certification by the Georgia Supreme Court).

290. *Id.* at 675.

291. *Id.* at 683.

292. *Id.* at 682 (citing *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 846 (S.D.N.Y. 1975) (stating that there cannot be a necessity to require exploitation during life to preserve any rights for one’s heirs)). The Eleventh Circuit also reasoned that Dr. King did not exploit his identity because exploitation would have impaired his ministry. *Id.* at 683. The court concluded that a person who refused to exploit his image in life is entitled to the same protection after death even more so than a person who exploited his image. *Id.*

293. *Id.* Contrary to other opinions, the Eleventh Circuit’s decision appears to protect Dr. King’s personal reputation instead of any property right in his right of publicity. See *id.*

294. TEX. PROP. CODE ANN. § 26.002 (Vernon 1992) (“An individual has a property right in the use of the individual’s name, voice, signature, photograph, or likeness after the death of the individual.”). The section of the property code concerning a deceased person’s right of publicity was enacted in 1987. See *id.* §§ 26.001-015. However, the Texas courts first recognized a cause of action for the unauthorized appropriation of a person’s name or likeness in *Kimbrough v. Coca-Cola/USA*, 521 S.W.2d 719, 721-722 (Tex. Ct. App. 1975). See *Diamond Shamrock Ref. & Mktg. Co.*, 844 S.W.2d 198, 205 n.4 (Tex. 1992) (Gonzalez, J., concurring & dissenting).

son to whom the right was transferred during the celebrity's life may exercise the deceased's right of publicity.<sup>295</sup> To exercise the right within the first year of the celebrity's death, the owner must register his claim.<sup>296</sup> After the first year, no registration is required.<sup>297</sup> Nevertheless, if no transferee or surviving family member exists one year after the celebrity's death, the right of publicity terminates.<sup>298</sup> Also, the Texas Legislature does not require an individual to exercise the right of publicity during his lifetime; the statutes specifically recognize a property right in the deceased individual's persona.<sup>299</sup>

## 5. New York

Originally, the New York federal courts held that the right of publicity should be descendible.<sup>300</sup> However, the state courts did away with the common law right entirely, including any possible descendible right.<sup>301</sup>

The descendibility issue first appeared in *Price v. Hal Roach Studios, Inc.*<sup>302</sup> The district court recognized that New York statutory law protected a celebrity from commercial exploitation during his life.<sup>303</sup> The statute did not require the celebrity to exploit his persona in order to receive protection.<sup>304</sup> The court, therefore, did not require exploitation to preserve the right after death.<sup>305</sup>

Later, the federal courts addressed a deceased's right of publicity in *Factors Etc., Inc. v. Creative Card Co.*<sup>306</sup> and *Factors Etc., Inc. v. Pro Arts, Inc.*<sup>307</sup> The court in both cases agreed that the right survives death.<sup>308</sup> The court reasoned that if the right of publicity did not survive the celebrity's death, a windfall would be granted to those who wished to exploit the celebrity's persona but

295. TEX. PROP. CODE ANN. § 26.005 (Vernon 1992).

296. *Id.* § 26.008(b).

297. *Id.* § 26.009.

298. *Id.* § 26.010.

299. *Id.* § 26.002.

300. See *infra* notes 302-10 and accompanying text.

301. See *infra* notes 312-21 and accompanying text.

302. 400 F. Supp. 836 (S.D.N.Y. 1975).

303. *Id.* at 846 (referring to NEW YORK CIVIL RIGHTS LAW §§ 50 and 51); see *supra* note 145.

304. *Price*, 400 F. Supp. at 846; see also *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 880 (S.D.N.Y. 1973) (concluding that Cary Grant's failure to exploit his name and likeness for commercial value did not preclude a cause of action for a violation of the right of publicity).

305. *Price*, 400 F. Supp. at 846.

306. 444 F. Supp. 279 (S.D.N.Y. 1977).

307. 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

308. *Pro Arts*, 579 F.2d at 221; *Creative Card*, 444 F. Supp. at 284.

did not pay for the right while the celebrity was still alive.<sup>309</sup> However, the court would only protect the right after death if the celebrity exploited the right during his lifetime.<sup>310</sup> When the same issue appeared in New Jersey, the federal district court also allowed the right to survive death if first exploited during the celebrity's lifetime.<sup>311</sup>

The New York Court of Appeals completely turned around the right of publicity's status in *Stephano v. News Group Publications, Inc.*<sup>312</sup> The *Stephano* court initially examined the origin of commercial appropriation in New York.<sup>313</sup> Originally, a claim for unauthorized appropriation could only be brought under New York Civil Rights Law and not under the common law.<sup>314</sup> Later decisions went beyond statutory law and found a right of publicity at common law.<sup>315</sup> Despite an established precedent, the *Stephano*

309. *Pro Arts*, 579 F.2d at 221; *Creative Card*, 444 F. Supp. at 284.

310. *Pro Arts*, 579 F.2d at 221; *Creative Card*, 444 F. Supp. at 284. In both *Pro Arts* and *Creative Card*, Elvis Presley was the deceased personality at issue. *Pro Arts*, 579 F.2d at 216; *Creative Card*, 444 F. Supp. at 280. Presley clearly exploited his identity during his lifetime outside the scope of his employment. *Pro Arts*, 579 F.2d at 216-17; *Creative Card*, 444 F. Supp. at 281.

Two months after the Second Circuit's decision in *Pro Arts*, however, the district court stretched the grounds for proper exploitation in *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978). The court ruled that because Agatha Christie licensed her name for movies and plays based on her books, Christie sufficiently exploited her identity. *Id.* at 429-30. The district court further diluted the exploitation requirement in *Groucho Marx Prods. v. Day and Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982). The court ruled that the Marx brothers' right of publicity survived death because they had exploited their characters of Groucho, Chico, and Harpo. *Id.* at 491-92.

311. *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1355 and nn. 8-10 (D.N.J. 1981) (citing *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 222 n.11 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 284 (S.D.N.Y. 1977); *Lugosi v. Universal Pictures*, 603 P.2d 425, 446 (Cal. 1979) (Bird, C.J., dissenting)).

In a later decision, the Third Circuit concluded that the right of publicity is also a survivable cause of action under New Jersey law. *McFarland v. Miller*, 14 F.3d 912, 917-18 (3d Cir. 1994).

312. 474 N.E.2d 580 (N.Y. 1984).

313. *Id.* at 583-84.

314. *Id.* at 583. In 1902, the Court of Appeals handed down its decision in *Roberson v. Folding Box Co.*, 171 N.Y. 538 (1902). *Id.* A young woman sued a flour company because her picture appeared in the company's print advertisement. *Id.* The court rejected her claim because the right of privacy did not exist at common law. *Id.* In response, the New York Legislature passed Civil Rights Law §§ 50 and 51 to provide appropriate protection. *Id.*

315. See, e.g., *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 220 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *Haelen Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728-29 (S.D.N.Y. 1978); *Southeast Bank, N.A. v. Lawrence*, 483 N.Y.S.2d 218, 223 (App. Div. 1984), *rev'd on other grounds*, 489 N.E.2d 744 (N.Y. 1985); *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004, 1011 (App. Div. 1981); *Lombardo v. Doyle, Dane & Bernach, Inc.*, 396 N.Y.S.2d 661, 664 (App. Div. 1977).



court held that New York statutory law encompassed the right of publicity.<sup>316</sup> Therefore, the right could not exist as an independent common law cause of action.<sup>317</sup>

New York Civil Rights Law does not allow a statutory right of privacy for deceased individuals.<sup>318</sup> Section 50 specifically provides protection for only living persons.<sup>319</sup> Although the Court of Appeals found that a common law right of publicity does not exist, on two occasions the court refused to decide whether a descendible right exists.<sup>320</sup> A lower court, however, ruled that the right of publicity does not exist in any context.<sup>321</sup>

### C. *The Right of Publicity Should Survive Death in All Cases*

The most logical view of the right of publicity is that it is a form of intellectual property that survives the individual's death in all circumstances. The right is not a personal one that protects one's feelings or emotional well-being.<sup>322</sup> Rather, it has a purely commercial nature<sup>323</sup> because "the gravamen of the harm from an unauthorized commercial use . . . is the loss of potential financial gain."<sup>324</sup>

316. *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984).

317. *Id.*

318. New York Civil Rights Law § 50 states in part, "A person, firm, or corporation that uses for advertising purposes . . . the name, portrait or picture of *any living person* . . ." N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992) (emphasis added).

319. *Id.*

320. *Stephano*, 474 N.E.2d at 584 n.2; *Southeast Bank, N.A. v. Lawrence*, 489 N.E.2d 744, 745 (N.Y. 1985).

321. *James v. Delilah Films, Inc.*, 544 N.Y.S.2d 447, 450-51 (N.Y. Sup. Ct. 1989); see also Halpern, *supra* note 37, at 1233 (stating that in New York, the heirs or assignees of a deceased celebrity may not maintain an action for the commercial exploitation of the celebrity's name or likeness); Alan J. Hartnick, *California Addresses Publicity Rights*, N.Y.L.J., April 24, 1992, at 5 (stating that no protectible interest for a dead personality exists in New York).

322. *Lugosi v. Universal Pictures*, 603 P.2d at 438-39 (Cal. 1979) (Bird, C.J., dissenting); see also *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 (9th Cir. 1974) (reasoning that injury to one's feeling occurs in only the first three types of invasion of privacy and not misappropriation).

323. *Motschenbacher*, 498 F.2d at 824 n.10 (reasoning that it would be unrealistic to deny that a person's identity has commercial value); *Lugosi*, 603 P.2d at 445 (Bird, C.J., dissenting) (recognizing the right protects an intangible proprietary interest in the commercial value of one's identity); *State ex rel. Elvis Presley Int'l Memorial Found. v. Crowell*, 733 S.W.2d 89, 97 (Tenn. Ct. Ann. 1987) (concluding that the right of publicity is a form of intellectual property).

324. *Lugosi*, 603 P.2d at 438-39 (Bird, C.J., dissenting) (footnote omitted); see also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977) (stating that the right of publicity focuses on the individual's right to reap the reward of his endeavors and

Often, a celebrity expends considerable money, time, and energy to sufficiently develop public visibility that will permit an economic return through commercial exploitation.<sup>325</sup> As such, protecting the right of publicity after death provides an increased economic incentive for the individual.<sup>326</sup> A descendible right is consistent with a person's expectation that he is creating a valuable asset to benefit his family after his death.<sup>327</sup> To hold otherwise would create a windfall for advertisers who wish to exploit a celebrity's identity, but did not pay for the right while the celebrity was alive.<sup>328</sup>

If the right of publicity is a freely transferable property right, then there is no logical reason to terminate the right upon death.<sup>329</sup> Since other property rights do not extinguish at death, the right of publicity should not either.<sup>330</sup> Some courts, however, conclude that the right is descendible only if exploited during a person's lifetime.<sup>331</sup> This means that some courts protect all celebrities during their lifetimes, but only some celebrities after death.<sup>332</sup> Additionally, the courts protect a living celebrity even if the person chooses not to commercially exploit his identity.<sup>333</sup> Therefore, there is no reason to require exploitation as a prerequisite to protecting a deceased celebrity's identity.<sup>334</sup>

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has little to do with personal feelings).

325. *Lugosi*, 603 P.2d at 438 (Bird, C.J., dissenting); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 350 (Cal. Ct. App. 1983).

326. *Lugosi*, 603 P.2d at 446 (Bird, C.J., dissenting).

327. *Crowell*, 733 S.W.2d at 98.

328. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 221 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *Lugosi*, 603 P.2d at 446 (Bird, C.J., dissenting).

329. *Martin Luther King, Jr., Center For Social Change, Inc. v. American Heritage Prods., Inc.*, 694 F.2d 647, 683 (11th Cir. 1983); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 846 (S.D.N.Y. 1975).

330. For example, copyright in a work created after January 1, 1978 exists for the duration of the author's life and for 50 years after his death. 17 U.S.C. § 302(a) (1992).

331. See, e.g., *Factors*, 579 F.2d at 222; *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1355 and nn.9-10 (D.N.J. 1981).

332. Halpern, *supra* note 37, at 1235.

333. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (protecting Waits' right of publicity even though Waits refused to participate in commercial endorsements), *cert. denied*, 113 S. Ct. 1047 (1993); *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 880 (S.D.N.Y. 1973) (concluding that Grant's failure to exploit his name and likeness for commercial gain did not preclude a right of publicity claim).

334. *Martin Luther King, Jr., Center For Social Change, Inc. v. American Heritage Prods., Inc.*, 694 F.2d 674, 683 (11th Cir. 1983) (holding that a person who avoids exploitation during his life should be entitled to have his image protected after death just as much, or more, than a person who exploited his image); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 846 (S.D.N.Y. 1975) (stating that "non-use" of a celebrity's identity is not a proper ground for refusing to allow a descendible right).

Moreover, there is no reasonable method to determine whether a celebrity sufficiently exploited his right of publicity to warrant a valid descendible right.<sup>335</sup> The traditional forms of commercial exploitation are: (1) exploiting one's identity outside the scope of one's profession; and (2) making an *inter vivos* transfer of one's publicity rights.<sup>336</sup> The commercial exploitation requirement, however, is ambiguous and can be stretched to fit any given situation.<sup>337</sup>

Furthermore, several courts, including the United States Supreme Court, reason that the right of publicity is a form of intellectual property analogous to copyright law.<sup>338</sup> Both copyright and the right of publicity reward the time and effort invested in creating a property interest and the public benefit derived from it.<sup>339</sup> Copyright gives authors the exclusive rights in their creative works while the right of publicity gives individuals exclusive rights in the commercial value of their personas.<sup>340</sup>

Copyright law protects authors who create original works in a

335. *Lugosi v. Universal Pictures*, 603 P.2d 425, 447 (Cal. 1979) (Bird, C.J., dissenting).

336. *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429 (S.D.N.Y. 1978); Note, *An Assessment of the Commercial Exploitation Requirement as a Limit on the Right of Publicity*, 96 HARV. L. REV. 1703, 1709 (1983).

337. See, e.g., *King*, 694 F.2d at 676 (plaintiff argued that Dr. King exploited his identity by receiving honorariums); *Hicks*, 464 F. Supp. at 429-30 (concluding that Agatha Christie fulfilled the exploitation requirement by licensing her name in connection with movies and plays about her books); *Groucho Marx Prods. v. Day and Night Co.*, 523 F. Supp. 485, 491 (S.D.N.Y. 1981) (holding that the Marx brothers' exploitation of their characters was sufficient to fulfill the exploitation requirement), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982).

338. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977) (analogizing the right of publicity to patent and copyright law); *Baltimore Orioles v. Major League Baseball Players Ass'n*, 805 F.2d 663, 677-79 (7th Cir. 1986) (holding that copyright law preempts the right of publicity with respect to baseball players' performance rights), *cert. denied*, 489 U.S. 941 (1987); *Lugosi*, 603 P.2d at 441 (Bird, C.J., dissenting) (following the Supreme Court's reasoning in *Zacchini*); *Apple Corps Ltd. v. Leber*, 12 Media L. Rep. 2280, 2282 (Cal. Super. Ct. 1986) (same); see also Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836, 849-54 (1983) (comparing the economic interests of copyright and right of publicity); David E. Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673, 682-84 (1981).

339. *Zacchini*, 433 U.S. at 573; Samuelson, *supra* note 338, at 849.

340. Marc J. Apfelbaum, Note, *Copyright and the Right of Publicity, One Pea in Two Pods?*, 71 GEO. L.J. 1567, 1572 (1983).

The Supreme Court reasons, however, that the "primary objective of copyright is . . . '[t]o promote the Progress of Science and useful Arts.'" *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (quoting U.S. CONST., art. I, § 8, cl. 8). Nevertheless, this statement is not inconsistent with the Court's previous opinion that authors deserve the economic benefit of their labor. See *Zacchini*, 433 U.S. at 573. Otherwise, there would be no cause of action for wrongfully exploiting another's original work.

tangible medium of expression.<sup>341</sup> Copyright protection endures for the duration of the author's life and for fifty years after his death.<sup>342</sup> Copyright protection exists regardless of whether the author exploited the work.<sup>343</sup>

Likewise, the right of publicity exists in a person's identity because it contains commercial value.<sup>344</sup> The courts protect an individual's right of publicity regardless of whether the person chooses to exploit the right.<sup>345</sup> Thus, because of the similarities between the two forms of property, the courts should not impose an exploitation requirement on the right of publicity either.<sup>346</sup> For the foregoing reasons, therefore, a descendible right of publicity with no conditions would be the most logical and reasonable policy.

## VI. DEFENSES

According to the Supreme Court, "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."<sup>347</sup> The courts protect the press and other forms of mass communication from liability under the First Amendment.<sup>348</sup>

341. 17 U.S.C. § 102(a) (1992).

342. 17 U.S.C. § 302(a) (1992).

343. Under the 1909 Copyright Act, federal copyright protection began at the moment of publication and not at the time of creation. *See* CRAIG JOYCE, ET. AL, COPYRIGHT LAW 11 (2d ed. 1991). Under 1976 Copyright Act, however, protection extends when the work is created. *See* 17 U.S.C. § 102(a) (1992).

344. *See supra* notes 241-45 and accompanying text.

345. *See, e.g.,* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (protecting Waits's right of publicity even though he refuses to participate in commercial endorsements), *cert. denied*, 113 S. Ct. 1407 (1993); *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973) (protecting Grant's likeness even though he did not commercially exploit it).

346. Some courts and commentators reason that the right of publicity is analogous to trademark law. *See, e.g.,* *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399-1401 (9th Cir. 1992) (holding that as a matter of law, White properly stated a claim under the Lanham Act), *cert. denied*, 113 S. Ct. 2443 (1993); *McFarland v. E & K Corp.*, 1991 U.S. Dist. LEXIS 1496, at \*6 (D. Minn. Jan. 17, 1991) (concluding that the Lanham Act protects a wide variety of deceptive practices including unauthorized use of a celebrity's identity); *Allen v. National Video, Inc.*, 610 F. Supp. 612, 620 (S.D.N.Y. 1985) (reasoning that for an appropriation of Allen's likeness, the Lanham Act provides a more appropriate remedy); *Halpern, supra* note 37, at 1240-42 (arguing for the expansion of the Lanham Act to cover right of publicity claims). The Supreme Court, however, concluded that the right of publicity is similar to only copyright and patent law. *See* *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977).

347. *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988); *Time, Inc. v. Hill*, 385 U.S. 374, 382 (1967).

348. The Supreme Court stated that the First Amendment was a "constitutional safeguard that 'was fashioned to assure unfettered interchange of ideas for the bringing about political and social changes desired by the people.'" *New York Times v. Sullivan*, 376 U.S.

The rights granted, however, are not absolute; a celebrity may still protect himself from unauthorized commercial appropriation.<sup>349</sup> This section examines the defenses of “newsworthiness” and parody with respect to the right of publicity.

### A. Newsworthiness

The courts insulate the media from liability as long as the media publishes or broadcasts matters that are “newsworthy” or “in the public interest.”<sup>350</sup> When the media reports or comments on matters concerning celebrities, the First Amendment provides broad discretion.<sup>351</sup> The courts do not hold the media liable for defamation of a well-known individual unless the celebrity can prove “actual malice.”<sup>352</sup> The courts do not allow a cause of action

254, 269 (1964) (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)).

See also CAL. CIV. CODE §§ 990(n), 3344(d) (Deering 1992) (exceptions to misappropriation of name or likeness for news and entertainment); FLA. STAT. ANN. § 540.08(3)(a) (West 1991) (exception to misappropriation for news reports); NEV. REV. STAT. ANN. § 598.790(2)(c) (Michie 1994) (exempting written consent when using a person’s identity in connection with a news, public affairs, or sports broadcast or publication); *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 404 (S.D.N.Y. 1980) (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 382 (1967) (recognizing the narrow interpretation given to New York Civil Rights Law § 51 to allow for the free dissemination of newsworthy events and matters of public interest)).

349. The First Amendment does not immunize the media from liability when the media infringes on the celebrity’s right to commercially exploit his identity. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575 (1977); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 350 (Cal. Ct. App. 1983).

350. *Eastwood*, 198 Cal. Rptr. at 349; see also Peter J. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1602 (1979).

The Fifth Circuit defines “newsworthiness” and “of the public interest” in the following manner:

This broad constitutional privilege recognizes two . . . distinct privileges. First is the privilege to publish or broadcast facts, events, and information relating to public figures. Second is the privilege to publish or broadcast news or other matters of public interest . . . [T]he first privilege focuses on the person assuming a role of special prominence . . . or . . . thrusting himself to the forefront of a particular controversy . . . [T]he second privilege . . . is not merely limited to the dissemination of news . . . . Rather, the privilege extends to information concerning interesting phases of human activity . . . .

*Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980) (citations omitted).

351. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Court reasoned that in matters concerning public figures, the First Amendment guarantees “the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.” *Id.* at 382 (quoting *Spahn v. Julian Messner, Inc.*, 221 N.E.2d 543, 544-45 (N.Y. 1966)).

352. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 160 (1967); *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). The Court defines “actual malice” as the publishing of a false statement knowing that the statement was false or with a reckless disregard for the truth. *New York Times*, 376 U.S. at 279-80. Originally, the actual malice standard only ap-

against a media defendant if the media's comments are only statements of opinion.<sup>353</sup> Published opinions that are outrageous and offensive to the general public are also protected.<sup>354</sup> Furthermore, the courts even protect undesired or embarrassing publicity as long as the reporting of the incident is in the public interest.<sup>355</sup>

The courts liberally interpret what is considered newsworthy or in the public interest. The scope of newsworthiness includes matters of "entertainment and amusement, concerning interesting phases of human activity in general."<sup>356</sup> First Amendment protection, therefore, extends to wide varieties of expression including books,<sup>357</sup> magazines,<sup>358</sup> television,<sup>359</sup> and motion pictures.<sup>360</sup> Protec-

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plied to public officials. *Id.* at 279. Later, the Court expanded the standard to include public figures. *Curtis*, 388 U.S. at 162; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 (1974). When the alleged defamation concerns a private individual involved in a public interest, however, the plaintiff needs only to prove that the media defendant acted negligently. *Gertz*, 418 U.S. at 347-48.

353. The Supreme Court stated, "The First Amendment recognizes no such thing as a 'false' idea." *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988); *Gertz*, 418 U.S. at 339.

354. *Hustler*, 485 U.S. at 55 (reasoning that society finding speech offensive is not a sufficient reason to suppress it). The First Circuit noted that First Amendment protection does not warrant an inquiry into the reader, listener, or viewer's level of offensiveness. *L.L. Bean, Inc. v. Drake Publishing, Inc.*, 811 F.2d 26, 34 (1st Cir. 1987) (citing *United States v. Guarino*, 729 F.2d 864, 867 (1st Cir. 1984) (en banc)), *cert. denied*, 483 U.S. 1013 (1987). Even sexually explicit but nonobscene materials are entitled to the same protection as other expression forms. *Id.* at 34 (citing *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1126 (1st Cir. 1981)).

355. See, e.g., *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 405 (S.D.N.Y. 1980) (concluding that Ann-Margret appearing nude in a movie was in the public interest); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 350 (Cal. Ct. App. 1983) (stating that Clint Eastwood's personal life was a legitimate public interest). Cf. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1974) (holding that no invasion of privacy occurred when the defendant published a deceased rape victim's name because the name appeared in the public record).

According to one California appellate court, an individual can remain in the public interest for an extended period of time even if the person intentionally avoids public attention. See *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790 (Cal. Ct. App. 1993). Mickey Dora was a famous Malibu surfer during the 1950s. *Id.* at 791. In 1987, Frontline Video made a documentary about several famous surfers, including Dora. *Id.* Dora claimed that Frontline appropriated his identity without permission. *Id.* Even though Dora had not been a highly visible person for about 30 years, and he intentionally avoided "the limelight," the appellate court determined that Dora was still a limited public figure. *Id.* at 791-94. Thus, the public interest rests with what the public deems to be interesting and is not dependent on the actions or wishes of the individual. See *id.* at 792 (citing *Carlisle v. Fawcett Publications, Inc.*, 20 Cal. Rptr. 405, 414 (Cal. Ct. App. 1962)).

356. *Ann-Margret*, 498 F. Supp. at 405 (citing *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 506 (N.Y. Sup. Ct. 1968)); see also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977) (holding that entertainment, as well as news, enjoys First Amendment protection).

357. See, e.g., *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978) (novel about Agatha Christie); *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828 (App. Div. 1980)

tion extends whether the medium portrays an accurate account,<sup>361</sup> a work of fiction,<sup>362</sup> or a combination of both.<sup>363</sup> Also, the mere fact that a publication is sold for profit does not strip away First Amendment protection.<sup>364</sup>

While the First Amendment grants the media broad discretion in news reporting and other matters of public interest, the courts do not immunize the media when they infringe upon a person's right of publicity.<sup>365</sup> In a First Amendment analysis, courts balance society's interest in the protection of free speech and expression against the rights of the individual.<sup>366</sup> The balance tips in favor of

(biography of Marilyn Monroe).

358. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989); *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401 (S.D.N.Y. 1980).

359. See, e.g., *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 457 (Cal. 1979) (Bird, C.J., concurring) (fictional TV movie about the life of Rudolph Valentino); *Cohn v. National Broadcasting Co.*, 3 Media L. Rep. 1999 (N.Y. Sup. Ct. 1978) (fictionalized television account of the McCarthy period).

360. See, e.g., *Rogers v. Grimaldi*, 875 F.2d 994 (9th Cir. 1989) (fictional movie referring to Ginger Rogers and Fred Astaire); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978) (fictional movie about Agatha Christie).

361. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (news broadcast); *Cher v. Forum Int'l Ltd.*, 692 F.2d 634 (9th Cir. 1982) (interviews published in magazines), *cert. denied*, 462 U.S. 1120 (1983); *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828 (N.Y. App. Div. 1980) (biographies).

362. See, e.g., *Rogers v. Grimaldi*, 875 F.2d 994 (9th Cir. 1989) (fictional movie); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978) (fictional movie and book); *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454 (Cal. 1979) (fictional TV movie).

363. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (fictionalized account of a family held hostage); *Wojtowicz v. Delacorte Press*, 43 N.Y.2d 858 (N.Y. 1978) (fictionalized account of a Brooklyn bank robbery).

364. *Time*, 385 U.S. at 396-97 (holding that the First Amendment applies to newspaper publications and motion pictures and not just to mediums that do not directly charge their patrons). *Accord Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 895 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989); *New Kids on the Block v. News Publishing Am., Inc.*, 745 F. Supp. 1540, 1546 (C.D. Cal. 1990), *aff'd on other grounds*, 971 F.2d 302 (9th Cir. 1992); *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 406 (S.D.N.Y. 1980).

Also, the opinion that news broadcasts are "free" is misguided. Network news divisions are always attempting to increase their Nielson ratings in an effort to attract more advertising revenue. See, e.g., *Brendon Murphy, The Week in Business*, UPI, June 15, 1990, at Financial Section; *John McCosh, Atlanta's Gladiator Journalism*, ATLANTA BUS. CHRON., July 6, 1987, at 1A. The only true difference between the news and other publication forms is whether the consumer pays directly for the information or indirectly through the purchase price of advertised products.

365. *Felcher & Rubin, supra* note 342, at 1606; see also *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 42 (Cal. 1971); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 350 (Cal. Ct. App. 1983) (reasoning that the rights guaranteed by the First Amendment do not require a total abrogation of the right of privacy).

366. *Hicks v. Casablanca Records*, 464 F. Supp. 426, 431 (S.D.N.Y. 1978) (generally citing *Miller v. California*, 413 U.S. 15 (1973); *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

the individual when the speech in question commercially exploits the individual's identity.<sup>367</sup>

The Supreme Court addressed the conflict between the First Amendment and the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>368</sup> Without Zacchini's consent, a local television station broadcasted his entire human cannonball act, which lasted only fifteen seconds.<sup>369</sup> Zacchini claimed the broadcast unlawfully appropriated his personal property.<sup>370</sup> The Court ruled that states have an interest in protecting a person's proprietary interest to encourage entertainment.<sup>371</sup> The Court reasoned that the First Amendment does not immunize the media because the broadcast posed a substantial threat to Zacchini's economic livelihood.<sup>372</sup> If the television station had reported only about the event, however, First Amendment protection would have applied because entertainment is considered important news.<sup>373</sup>

The problem with *Zacchini* is that the case had a very narrow holding.<sup>374</sup> The Court ruled only that appropriation occurred because the defendant commercially exploited the performer's "entire act."<sup>375</sup> However, the lower courts generally implement a less restrictive approach, not providing First Amendment protection when the media directly appropriates<sup>376</sup> the celebrity's identity for

367. Felcher & Rubin, *supra* note 350, at 1606. The balance between the First Amendment and the right of publicity is similar to the application of the fair use doctrine in copyright law. For an analysis of the right of publicity and copyright in a fair use context, see generally Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836 (1983).

368. 433 U.S. 562 (1977).

369. *Id.* at 563-64.

370. *Id.* at 564.

371. *Id.* at 573. The Court discussed the right of publicity in relation to invasion of privacy. *Id.* at 571-72. The Court distinguished the right by asserting that "the State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment." *Id.* at 573.

372. 372. *Id.* at 575; see also *Eastwood V. Superior Court*, 198 Cal. Rptr. 342, 350 (Ct. App. 1983) (stating that absolute protection of the press would sacrifice Eastwood's competing interest in his right of publicity).

373. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977); see also *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 506 (N.Y. Sup. Ct. 1968) (commenting that the media is exempt from liability when using a person's name or picture in connection with a newsworthy event).

374. *Zacchini*, 433 U.S. at 579 (Powell, J., dissenting).

375. *Id.* (Powell, J., dissenting); see also Samuelson, *supra* note 338, at 857-58 and n.81 (stating concerns regarding *Zacchini's* narrow holding).

376. Incidental use of a celebrity's identity in an advertisement or promotion does not violate the right of publicity. See, e.g., *New Kids on the Block v. News Publishing Am., Inc.*, 745 F. Supp. 1540, 1546 (C.D. Cal. 1990) (using a 900 telephone number to conduct a poll about the New Kids on the Block was not a violation because the revenue generated was



its own commercial gain.<sup>377</sup> *Cher v. Forum Int'l Ltd.*,<sup>378</sup> *Ali v. Playgirl, Inc.*,<sup>379</sup> and *Ann-Margret v. High Society Magazine, Inc.*<sup>380</sup> are examples of lower courts' approaches.

In *Cher*, Cher<sup>381</sup> gave a taped interview to Fred Robbins, a radio talk show host, with the understanding that *US* magazine would publish the interview, but Cher later asked that the story be killed and paid a "kill" fee.<sup>382</sup> Robbins sold the story to the *Star*, a weekly tabloid, and to *Forum* magazine, and both magazines published the interview.<sup>383</sup>

The Ninth Circuit ruled that the First Amendment protected the *Star's* publication of the story because the statements attributed to Cher were not false or published with a reckless disregard for the truth.<sup>384</sup> Even the *Star's* claim that Cher gave an exclusive interview did not meet the knowing or reckless falsity requirement.<sup>385</sup>

When *Forum* published the same interview, however, an accompanying subscription "tear out" stated, "There are certain things that Cher won't tell *People* and will never tell *US*. She tells *Forum*."<sup>386</sup> The Ninth Circuit ruled that *Forum's* solicitation falsely created the appearance of an implied endorsement by

only incidental to news gathering), *aff'd on other grounds*, 971 F.2d 302 (9th Cir. 1992); *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10 (App. Div. 1975) (using Joe Namath's likeness as part of a subscription request was not a violation because the picture only showed the magazine's quality and content), *aff'd*, 352 N.E.2d 584 (N.Y. 1976).

377. Samuelson, *supra* note 338, at 876-78. *Cf. Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 759 (9th Cir. 1978) (holding that the First Amendment does not protect the direct appropriation of Disney cartoon characters in an adult "counter culture" comic book), *cert. denied*, 439 U.S. 1132 (1979).

378. 692 F.2d 634 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983).

379. 447 F. Supp. 723 (S.D.N.Y. 1978).

380. 498 F. Supp. 401 (S.D.N.Y. 1980).

381. Cher originally became famous as Sonny Bono's partner on the *Sonny and Cher Comedy Hour*, which launched her singing career. Wayne Robbins, *Cher - Honest and Full of Herself*, *NEWSDAY*, Oct. 29, 1992, § II at 66. Cher also won an Academy Award for her performance in the film *MOONSTRUCK*. *Id.* Additionally, she appeared in *SILKWOOD*, *MASK*, and *THE WITCHES OF EASTWICK*. *Id.*

382. *Cher*, 692 F.2d at 636.

383. *Id.*

384. *Id.* at 637-38. Apparently, the Ninth Circuit did not believe that the appearance of Cher giving an interview to *Star* constituted defamation under the actual malice standard set out in *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). *See Cher*, 692 F.2d at 637-38. The court did not discuss any right of publicity action against *Star*. Arguably, the mere fact that the magazine gave the appearance of an exclusive interview did not amount to a commercial endorsement. *See id.* at 639.

385. *Id.* at 638.

386. *Id.* *Forum's* solicitation also said, "So join Cher and *Forum's* hundreds of thousands of other adventurous readers today." *Id.* at 639.

Cher.<sup>387</sup> The unauthorized use of Cher's name and likeness, therefore, was an actionable misappropriation that was not protected by the First Amendment.<sup>388</sup>

In *Ali v. Playgirl, Inc.*,<sup>389</sup> *Playgirl* magazine depicted a portrait of a nude black man with a striking resemblance to Muhammed Ali.<sup>390</sup> The district court determined that because the portrait contained no informational or newsworthy dimension,<sup>391</sup> *Playgirl* wrongfully appropriated Ali's likeness.<sup>392</sup>

Contrary to *Ali*, the court protected the publication at issue in *Ann-Margret v. High Society Magazine, Inc.*<sup>393</sup> During a scene in the 1978 motion picture "Magic," Ann-Margret<sup>394</sup> appeared nude from the waist up.<sup>395</sup> A still photo, which was lifted from the particular scene, appeared in the defendant's magazine.<sup>396</sup> According to the district court, Ann-Margret was a public figure, and because she chose to appear half nude in a movie, the matter was in the public interest.<sup>397</sup> Therefore, the magazine was entitled to constitutional protection because the picture constituted a newsworthy event.<sup>398</sup>

387. *Id.* at 638-39.

388. *Id.* at 639.

389. 447 F. Supp. 723 (S.D.N.Y. 1978).

390. *Id.* at 725. For the district court's opinion regarding the violation of Ali's right of publicity, see *supra* notes 148-51 and accompanying text.

391. *Ali*, 447 F. Supp. at 726.

392. *Id.* at 729.

393. 498 F. Supp. 401 (S.D.N.Y. 1981).

394. Over the past 30 years, Ann-Margret has appeared in nearly 50 motion picture and television films. Blake Green, *Ann-Margret Keeps 'em Guessing*, *NEWSDAY*, Oct. 21, 1991, Fanfare, at 6. Incidentally, one of her more famous movies was *CARNAL KNOWLEDGE*. *Id.* Ann-Margret appeared nude in a scene in this film as well. The controversial scene resulted in the Supreme Court defining the limits of constitutionally protected pornography. See generally *Jenkins v. Georgia*, 418 U.S. 153 (1974).

395. *Ann-Margret*, 498 F. Supp. at 403.

396. *Id.* at 404.

397. *Id.* at 404-05. The district court also noted that Ann-Margret chose to appear partially nude in a movie. *Id.* at 405. The court concluded that when a person consents to being viewed in a certain manner in one type of public performance, the person cannot object to a subsequent faithful reproduction. *Id.*

398. *Id.* at 405. But see *Davis v. High Society Magazine, Inc.*, 457 N.Y.S.2d 308 (App. Div. 1982). One issue of *Celebrity Skin* magazine featured a photograph of two topless women boxing. *Id.* at 311. The caption next to the picture incorrectly referred to the plaintiff as one of the boxers. *Id.* The court ruled that the defendant did not violate Davis' right of publicity because the First Amendment protects newsworthy events including those with little informational value. *Id.* at 313, 315. However, the court allowed Davis to proceed with a cause of action for defamation. *Id.* at 316.

## B. Parody

Parody is a "composition in which the characteristic turns of thought and phrase of an author are mimicked to appear ridiculous, especially applying them to ludicrously inappropriate subjects."<sup>399</sup> Parody is also an expressive activity that receives First Amendment protection<sup>400</sup> because such works "constitute an important and creative activity that our society values very highly."<sup>401</sup> Parody receives less protection in a commercial setting because it can be perceived as an endorsement.<sup>402</sup> Also, the courts protect only works that are clear parodies and not mere imitations.<sup>403</sup> A parody uses another's attributes as part of a larger presentation in which the parodist contributes a considerable amount of content.<sup>404</sup> Imitation is only an attempt to duplicate another person's characteristics.<sup>405</sup> Therefore, parody is constitutionally protected speech while imitation is not.<sup>406</sup>

One form of parody occurs when the celebrity's performance is the basis for artistic interpretation. The courts protect another's parody if the entire work is more than just an imitation of the ce-

399. *L.L. Bean, Inc. v. Drake Publishing, Inc.*, 811 F.2d 26, 28 (1st Cir. 1987) (quoting OXFORD ENGLISH DICTIONARY), cert. denied, 483 U.S. 1013 (1987). Another court defined parody as "'a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule.'" *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440, 446 n.12 (N.D. Ill 1991) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 857 (1984)).

400. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1401 n.3 (9th Cir. 1992), cert. denied, 113 S. Ct. 2443 (1993); *L.L. Bean*, 811 F.2d at 33; see also *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (reasoning that the First Amendment fully protects expressions on philosophical, social, artistic, economic, literary, and ethical matters).

401. *Felcher & Rubin*, *supra* note 350, at 1598 (listing parody among other types of artistic works that receive First Amendment protection).

402. *L.L. Bean*, 811 F.2d at 32 n.3; see also *Groucho Marx Prods. v. Day and Night Co.*, 523 F. Supp. 485, 492 (S.D.N.Y. 1981) (stating that the First Amendment does not protect the defendant's use of a celebrity's identity if the use is largely for commercial purposes), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982).

403. See *Groucho Marx*, 523 F. Supp. at 493. The district court stated that parody, burlesque, satire, and critical review may be immune from the right of publicity because of their contributions as entertainment and as a literary form. *Id.* A mere imitator who uses another's work solely for commercial gain, however, will not be entitled to any protection. *Id.*

See also *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1356 (D.N.J. 1981). The court stated that if a portrayal contributes to the public debate of social or political issues or contributes to society's cultural enrichment, the portrayal will be immune from liability. *Id.* If the portrayal is only a means of commercial exploitation, however, the courts will not grant immunity. *Id.*

404. *Felcher & Rubin*, *supra* note 350, at 1605.

405. *Id.*

406. *Id.*

lebrity's performance.<sup>407</sup>

For example, in *Groucho Marx Productions v. Day and Night Co.*,<sup>408</sup> the defendants claimed that their musical play, "A Day in Hollywood/A Night in the Ukraine," was only a parody of the Marx brothers,<sup>409</sup> but the play imitated their humor and style only using different lines.<sup>410</sup> The court stated that a parody may conjure up the original only if something new is contributed for humorous effect or commentary.<sup>411</sup> Because the play lacked any creative component, it was an unauthorized appropriation of the Marx brothers' identities.<sup>412</sup>

In *Joplin Enterprises v. Allen*,<sup>413</sup> however, the district court determined that the play *Janis* did not infringe on Janis Joplin's<sup>414</sup> rights.<sup>415</sup> Act I of *Janis* was a fictional portrayal of a day in Joplin's life, and Act II simulated a concert performance by Joplin.<sup>416</sup> The plaintiffs claimed that Act II violated Joplin's right of publicity.<sup>417</sup> The district court, however, examined the play as a whole.<sup>418</sup>

407. See *infra* notes 408-12 and accompanying text.

408. 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982).

409. *Id.* at 492.

410. *Id.* at 493.

411. *Id.* at 493 n.9 (quoting *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980)).

412. *Groucho Marx*, 523 F. Supp. at 492. Cases similar to *Groucho Marx* appear in New Jersey and California. In *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981), Bob Russen produced THE BIG EL SHOW, a stage performance that featured an Elvis impersonator. *Id.* at 1358. The court held that the stage show only imitated Presley's performance, and therefore, it commercially exploited Presley's likeness "without contributing anything of substantial value to society." *Id.* at 1359.

In California, the parody issue arose in *Apple Corps Ltd. v. Leber*, 12 Media L. Rep. 2280 (Cal. Super. Ct. 1986) (interpreting New York law). BEATLEMANIA was a stage performance that imitated the Beatles' look and sound as closely as possible. *Id.* at 2281. The superior court stated that the primary purpose of the show was the commercial exploitation of the Beatles' persona, goodwill, and popularity. *Id.* at 2282. Therefore, the show appropriated the Beatles' identity. *Id.*

413. 795 F. Supp. 349 (W.D. Wash. 1992) (applying California law through choice of law rules).

414. Joplin was a 1960s blues singer whose songs included *Me and Bobby McGee* and *(Take a) Piece of My Heart*. John Balzar, *Who Owns Janis Joplin?*, *Playwright, Heirs Fight For a Piece of a '60s Icon*, L.A. TIMES, Sept. 12, 1991, at F1. In 1970, Joplin died of a heroin overdose at age 27. *Id.*

415. *Joplin*, 795 F. Supp. at 352.

416. *Id.* at 350.

417. *Id.* at 350-51.

418. *Id.* at 351. The court reasoned that California Civil Code § 990 contemplated examining the use of the celebrity's persona in the total context in which it appears. *Id.* The Civil Code specifically exempts the use of a deceased person's name, voice, signature, photograph, or likeness in a play and other entertainment forms. CAL. CIV. CODE § 990(n) (Deering 1992).

As a result, the court determined that *Janis* was a theatrical production, and no violation of Joplin's right of publicity occurred.<sup>419</sup>

## VII. CONCLUSION

Most courts and commentators agree that the right of publicity is a form of intellectual property,<sup>420</sup> but there is little agreement as to the right's scope of protection. Some jurisdictions extend protection beyond name and likeness to include other traits such as a person's voice,<sup>421</sup> signature,<sup>422</sup> or stage performance.<sup>423</sup> A few jurisdictions extend protection to a celebrity's identity as a whole.<sup>424</sup>

Recognizing a right of publicity in one's identity is the most certain way of protecting celebrities from unauthorized commercial exploitation.<sup>425</sup> Courts should consider, as the determining factor, whether a potential defendant created the appearance of a celebrity endorsement.<sup>426</sup> The only true requirement for finding a violation of the right of publicity is for the defendant to invoke the celebrity's identity without permission.<sup>427</sup> This includes wrongfully appropriating a character so closely associated with the celebrity that the public views the character as part of the person's actual

419. *Joplin*, 795 F. Supp. at 351. After the court's ruling, the plaintiffs argued that the decision opened the door for anyone to imitate a celebrity's concert performance so long as the defendant included some extra material. *Plaintiffs Respond to Court Ruling in Joplin v. Allen*, PR NEWswire, Dec. 17, 1991. Arguably, a play in which half of the performance is pure imitation may be the limit for allowing the imitation of a celebrity's performance without infringing on the right of publicity.

420. Gretchen A. Pemberton, *The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity*, 27 U.C. DAVIS L. REV. 97, 113 n.56 (1993) (citing J. THOMAS MCCARTHY, *THE RIGHT OF PUBLICITY AND PRIVACY* §§ 10-7 to 10-8 (1993)).

421. See, e.g., CAL. CIV. CODE § 3344(a) (Deering 1992); NEV. REV. STAT. ANN. § 598.790 (Michie 1994); TEX. PROP. CODE ANN. § 26.011 (Vernon 1992) (providing protection after death).

422. See, e.g., CAL. CIV. CODE § 3344(a); NEV. REV. STAT. ANN. § 598.790 (Michie 1994); TEX. PROP. CODE ANN. § 26.011 (Vernon 1992) (providing protection after death).

423. See, e.g., *Groucho Marx Prods. v. Day and Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982); *Estate of Presley v. Russen*, 513 F. Supp. 1399 (D.N.J. 1981); *Apple Corps Ltd. v. Leber*, 12 Media L. Rep. 2280 (Cal. Super. Ct. 1986).

424. See *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988), *cert. denied*, 112 S. Ct. 1513 (1992); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137 (Wis. 1979).

425. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

426. See *supra* notes 150-51, 156-57, 164, 168-72 and accompanying text.

427. *White*, 971 F.2d at 1398; *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983).

identity.<sup>428</sup> If the courts fail to protect all aspects of a celebrity's identity, an advertiser could still find a way to create the appearance of a celebrity endorsement and not be held liable.<sup>429</sup>

In determining whether a right of publicity violation occurred, the courts should examine the totality of the alleged appropriation. The totality approach is the best method for determining whether the defendant deceived the public into believing that the celebrity in question endorses the defendant's product.<sup>430</sup> The courts should also consider the defendant's state of mind; liability should exist when the defendant knew or should have known that it created the appearance of a celebrity endorsement.<sup>431</sup>

Because the right of publicity protects individuals from unauthorized commercial exploitation,<sup>432</sup> it is clearly a property right.<sup>433</sup> Most jurisdictions conclude that the right of publicity is freely alienable,<sup>434</sup> and thus, there is no logical reason to impose restrictions on the right after the individual's death.<sup>435</sup> A descendible right is consistent with a person's expectations regarding other forms of property.<sup>436</sup> Furthermore, if the right of publicity is fully protected during a person's life, the courts should not impose artificial restrictions after the person's death.<sup>437</sup>

Even under the proposed expanded form of property, the right of publicity is not without restrictions. Because celebrities are public figures, they are subjects of great public interest.<sup>438</sup> The First Amendment extends protection to a wide variety of expression<sup>439</sup> including those forms that report, comment, and criticize on matters concerning celebrities.<sup>440</sup> The First Amendment does not, however, immunize a media defendant when the defendant creates the

428. See *supra* notes 203-19 and accompanying text.

429. *White*, 971 F.2d at 1398 (stating that protecting against nine different methods of infringement only encourages someone to come up with a tenth method).

430. See *supra* notes 165-77 and accompanying text.

431. See *supra* notes 179-97 and accompanying text.

432. See, e.g., *Haelen Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953).

433. See *supra* note 244 and accompanying text.

434. See *supra* note 245 and accompanying text.

435. See *supra* notes 322-46 and accompanying text.

436. *State ex rel. Elvis Presley Int'l Memorial Found. v. Crowell*, 733 S.W.2d 89, 98 (Tenn. Ct. App. 1987).

437. See *supra* notes 329-34 and accompanying text.

438. See, e.g., *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 415 (S.D.N.Y. 1981); *Davis v. High Society Magazine, Inc.*, 457 N.Y.S.2d 308, 315-16 (App. Div. 1982).

439. See *supra* notes 357-64 and accompanying text.

440. *Time, Inc. v. Hill*, 385 U.S. 374, 382 (1967).

appearance of a celebrity endorsement.<sup>441</sup> A defendant's commentary on a celebrity may also take the form of a parody, but the courts will not protect a parody performance if the performance is only an imitation.<sup>442</sup>

Given the foregoing analysis, the right of publicity should protect a celebrity's complete identity and not just certain aspects of identity. The right should also protect both living and deceased celebrities. If the courts fully adopt these two concepts, a potential defendant who attempts to commercially appropriate a celebrity's identity will be gambling against the odds. The defendant's unauthorized appropriation would result in financial losses instead of the expected gains from the illusion of a celebrity endorsement.

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441. See *supra* notes 365-67, 381-98 and accompanying text.

442. See *supra* notes 407-19 and accompanying text.