The Property Right of Publicity and the First Amendment: Popular Culture and the Commercial Persona

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INTRODUCTION

The right of publicity has grown in the decades since the famous baseball card case1 to a substantial property interest important to celebrities, politicians and aspiring public figures.2 The right to control the use of one's name, image or likeness is a relatively new legal development that owes its origins to tort law concepts and its current vitality to intellectual property notions. The growth of the media and entertainment industries has provided the impetus for the

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1. Haelan Laboratories v. Topps Chewing Gum, 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953). The phrase, “right of publicity”, was apparently coined in order to distinguish the interest obtained in compensation for and control of the commercial exploitation of celebrity attributes from the right of privacy and the right to be spared public scrutiny.

2. The definition of “right of publicity” is sometimes limited to the right to control only one's name and likeness. One scholar notes that “the definition of the right of publicity remains unclear, its theory is still evolving and its limits are uncertain.” Shipley, Publicity Never Dies, It Just Fades Away: The Right of Publicity and Federal Preemption, 66 CORNELL L. REV. 673, 675 (1981). Others have noted an apparent consistency in approaches to defining the right.

The right of publicity has been defined with surprising consistency by courts and commentators; it is generally conceived as comprising a person's right in the use of the name, likeness, activities, or personal characteristics. This amicable unanimity in defining the right is somewhat illusory, however, for there is considerable disagreement about what the definition means. Felcher & Rubin, Privacy, Publicity and the Portrayal of Real People by the Media, 88 YALE L. J. 1577, 1589 (1979). In INTIMATE STRANGERS, THE CULT OF CELEBRITY (1985), Richard Schickel suggests that our cultural fascination with images derives from their power to carry historical context. He notes that a celebrity “is, in fact, a walking context, perhaps not sufficiently self-nourishing to satisfy his own requirements (particularly if he likes to think of himself as an artist), but providing plenty of psychic vitamins for the fans.” Id. at 52. See infra text accompanying notes 161-172 for further discussion concerning the role of the celebrity personality in popular culture.
development of a legal doctrine that reflects, but does not replicate, other intellectual property and commercial law concepts. The development of a separately defined right to property in certain manifestations of personality has been due primarily to the fact that traditional legal theories gave inadequate protection to the economic value of a famous person’s name, image, photograph or likeness. The subject has been treated extensively by legal scholars and commentators because of the doctrinal confusion surrounding the develop-

3. In Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir. 1956), Judge Biggs articulated the doctrinal difficulties noting that
invasion of privacy, copyright infringement, trademark infringement and unfair competition.


6. The doctrinal origins are found in William Prosser’s influential 1960 law review article, Prosser, Privacy, 48 CALIF. L. REV. 383 (1960) which analyzed the privacy concept as four distinct torts. The last edition of Prosser’s treatise on torts, written before his death in 1972, contains an abbreviated version of that article. PROSSER ON TORTS, ch. 20 (4th ed. 1971). The current edition is PROSSER AND KEETON ON TORTS (5th ed. 1984) [hereinafter PROSSER & KEETON]. The RESTATEMENT (SECOND) OF TORTS (1977), adopted Prosser’s theories and in § 652C blends together the concepts of privacy and publicity:

It seems that the Restatement authors decided that the better part of discretion was to avoid taking a position on the debate over the difference between the rights of privacy and publicity. They simply did not mention the words “right of publicity” and blurred “appropriation privacy” by saying that it encompassed in some vague way an injury to both feelings and pocketbook.
ment of the rights of the famous who are the subject of the litigation. Thus, property values protected by the right of publicity are the commercial values embodied in a person's identity.

In formulating remedies for the unauthorized use of a name or likeness, courts have confronted varying doctrinal approaches to the exercise and function of the right of publicity. Using privacy, misappropriation, and commercial tort theories, courts have struggled to define the precise nature of the harm to a plaintiff claiming a property right in manifestations of personality, a property right that is similar but not the same as the rights protected by the copyright or trademark laws. The right of publicity can be understood as part of property law which is not established by a federal statute, but may be found in the common law or the statutory law (or both) of some states. The major premise of this article is the author's view that the right of publicity constitutes an exception to the free speech doctrine, even though there is a constitutional mandate to protect freedom of expression. There is, however, no counterbalancing constitutional protection for an individual's publicity rights. Therefore,

McCARTHY, supra note 4, § 1.5[E], at 1-27 (footnote omitted).

this article asserts that the constitutional protection of free expression must take precedence over property interests in all but the most carefully limited cases of commercial exploitation. In reconciling the competing interests of free expression and publicity rights, the space between the public domain and clearly delineated property rights must be preserved in order to protect the interests of the creative community.

This article will first review the development of the right of publicity as a property doctrine separate from its origins in the privacy tort, focusing on the emergence of the transferable and descendible aspects of this property interest. The second part of the article will discuss the tension between a descendible property right with the constitutional guarantee of free expression. The challenge for the next stage in the development of the right of publicity will be the creation of statutes that balance the interests of a celebrity's heirs and estate representatives against the entertainment media in the twentieth and twenty-first centuries. In this context, this article will critique the proposed New York Celebrity Rights Act and the current California statute on which it is modeled.

I. THE DEVELOPMENT OF THE RIGHT OF PUBLICITY

A. The Early Development: The Privacy Tort Origins

Before the legal concepts of commercial misappropriation or right of publicity were developed, a Harvard Law Review article by Samuel D. Warren and Louis D. Brandeis proposed a privacy interest which entitled non-public persons to relief from publicity about matters of a personal and non-newsworthy nature.8 In addition, this interest would protect public figures where purely personal matters were concerned because "[s]ome things all men alike are entitled to keep from popular curiosity, whether in public life or not. . . ."9

The theoretical basis for this common law right was the resultant injury to the individual's feelings and sensibilities. Warren and Brandeis reasoned that the common law should recognize interests other than material property concerns because "only a part of the pain, pleasure, and profit of life [lies] in physical things. Thoughts, emotions, and sensations [demand] legal recognition . . . ."10 The focus was on the emotional sensibilities of the individual whose pri-

9. Id. at 216.
10. Id. at 195.
vate life was made the subject of a publication without permission. The theory granted recognition to less tangible rights: claims that were grounded in tort, rather than property, concerns. The right was not based on commercial concerns, such as the potential value such revelations might have either to the person involved or to others who sought to capitalize upon the public's curiosity about the lives of others. The value of such information was not anticipated in a society that enjoyed fewer opportunities for media exploitation of lives of its celebrities. The Warren and Brandeis privacy tort sought protection from revelations in newspapers, editorials, books and photographs of the kind of information in which, the authors urged, there was no legitimate public interest.11

The nature of the privacy tort and the injury to the individual have been thoughtfully reconsidered in several recent analyses of the Warren and Brandeis formulation.12 These discussions emphasize that, of Prosser's four privacy torts,13 the appropriation of one person's name or likeness for another person's benefit is fundamentally different from the other three. The basis for the torts of public disclosure of embarrassing private facts, the intrusion upon a person's seclusion and the presentation of an individual in a false light in the public eye are basically the same, namely the Warren and Brandeis concern with emotional injury.14 In these three torts the emphasis is on the personal, rather than the commercial, harm to "sentiments, thoughts and feelings of individuals."15 Some commentators find these formulations "vague"16 or even "amorphous,"17 while others have argued persuasively that the constitutional dilemma created by treating truthful speech as tortious may render the privacy tort a

11. The events that motivated the publication of this most famous law review article have been the subject of a recent study reported in Barron, Warren & Brandeis, The Right to Privacy, Demystifying a Landmark Citation, 13 Suffolk U.L. Rev. 875 (1979); see McCarthy, supra note 4, § 1.3, at 1-8 to 1-14.


13. See Prosser & Keeton, supra note 6, at 851-66.

14. Id. at 853; see also Fealey, Privacy and Publicity, Then and Now, 3 Hofstra Prop. L.J. 15 (1989).


mere anachronism.\textsuperscript{18}

The right to privacy was a product of a society without the technical capacity to communicate widespread campaigns of celebrity promotion. One commentator suggests that a close reading of Prosser could support the argument that, had the right of publicity been an established legal doctrine at the time of his writing, Prosser might have been inclined to separate the misappropriation tort from the other privacy torts.\textsuperscript{19} Prosser noted in a 1960 article that the interest protected by the appropriation tort is not so much a mental as a proprietary one in the exclusive use of the plaintiff's name and likeness as an aspect of his identity.\textsuperscript{20} Thus, the origins of the right of publicity are found in the privacy doctrine. The judicial struggles which followed highlight the fundamentally distinct nature of the misappropriation tort and the need for clarification of the right to control public exhibitions of identifiable personal characteristics.

B. Rejection of the Common Law Right to Privacy in New York

The Warren and Brandeis formulation led several courts in the early twentieth century to hold that there was a common law right to privacy.\textsuperscript{21} The protection granted was limited, however, to the unauthorized use of one's name or likeness in a commercial context, usually in advertising. New York chose not to follow these early leads and rejected the common law right in \textit{Roberson v. Rochester Folding Box Co.}\textsuperscript{22} A flour advertisement had featured a young woman's picture without her permission. The New York Court of Appeals held four to three that there was no common law right to privacy in New York which would permit the plaintiff to recover for misappropriation of her picture. The decision did not discuss privacy theory or the harm to the feelings of the individual. The court stated that the common law of New York had no precedents for such protection. In the majority opinion, Chief Justice Alton B. Parker wrote that "the right of privacy as a legal doctrine enforceable in equity has not


\textsuperscript{19} See Kwall, supra note 4, at 193.

\textsuperscript{20} See Privacy, supra note 6, at 389.

\textsuperscript{21} Id.; see also Savell, Right of Privacy - Appropriation of a Person's Name, Portrait or Picture for Advertising or Trade Purposes without Prior Written Consent: History and Scope in New York, 48 Albany L. Rev. 1, 5 nn.10, 19, & 21 (1983).

\textsuperscript{22} 171 N.Y. 538, 64 N.E. 442 (1902).
been established by decisions . . . . To adopt the privacy theory would be a step so far outside of the beaten paths of both common law and equity."^28

The Roberson decision was greeted with a chorus of protests.^24 One of the concurring judges made an unusual public response to the public criticism by publishing a law review article in defense of the decision, attacking the press as "not always a safe guide for either the bar or the public upon legal questions or with respect to the real scope and effect of judicial decisions."^25

Judge O'Brien's article failed to quell the controversy. The New York legislature responded to Roberson by establishing a statutory right to privacy in 1903.^26 This law narrowly limited the application of the privacy right to the appropriation of a person's name, portrait or picture for advertising or trade purposes without prior written consent. The original language of Civil Rights Law sections 50 and 51 remains in effect. Various proposals for expanding the scope of the statutory right to privacy in New York have been put forward in recent years but the law remains fundamentally as it was when it was passed in 1903.^27 The New York law has been strictly construed in most instances^28 for several reasons. First, the logical and statu-

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23. Id. at 539, 64 N.E. at 444.
24. See Savell, supra note 21, at 11-12. Judge Parker's opinion also reflected a concern that a broad common law privacy right might restrict the ability of the press to make legitimate first amendment comment and a string of horrifying possibilities were discussed including a claim for damages for comment on one's looks. The majority opinion concluded that they would not unleash a vast amount of litigation bordering upon the absurd. Id. at 545, 64 N.E. at 447. One commentator has demonstrated how Judge Parker's words came back to haunt him during his campaign for President against Theodore Roosevelt. See Savell, supra note 21, at 14 nn.59 & 60.
26. N.Y. CIV. RIGHTS LAW § 50 (McKinney 1990) (originally 1903 N.Y. LAWS 132). The current § 50 was enacted as § 1. The current § 51 was originally enacted as § 2, which contained only the first sentence of the current text.

The first exception was added by 1911 N.Y. LAWS 226, the second and third clauses were appended in 1921 N.Y. LAWS 501. Editorial changes were made in 1979 N.Y. LAWS 656. The provision immunizing those who sell to an eventual permissible user was added 1983 N.Y. LAWS 280.

In 1910 the statute was held to be constitutional in Rhodes v. Sperry & Hutchinson Co., 193 N.Y. 223, 85 N.E. 1097 (1908), aff'd, 220 U.S. 502 (1911); see B. SEVERN, THE RIGHT OF PRIVACY 21 (1973).
27. See supra note 26.
tory connection between the penal provisions of section 50 and the civil provisions of section 51 seems to require a narrow application to the types of situations presented in Roberson. Second, the statute is in derogation of the common law of New York. Finally, some courts have interpreted the narrow scope of the privacy right in New York as a careful crafting of a law which seeks to avoid conflict with the first amendment. On a few occasions courts have hinted at the possibility of a liberal interpretation. In Spahn v. Julian Messner, Inc., Judge Keating wrote for the majority that "over the years since the statute's enactment in 1903, its social desirability and remedial nature have led to its being given a liberal construction consonant with its over-all purpose." In Time Inc. v. Hill, Justice Brennan, writing one year later, held that section 51 applied to situations beyond Roberson. Quoting at length from Spahn, Brennan nevertheless acknowledged that the broader scope was necessarily limited by first amendment values. Federal courts have likewise submitted interpretations of New York law which would expand the scope of the right to privacy to include a more comprehensive set of rights. In 1984, the New York Court of Appeals settled the issue by conclusively rejecting a common law right of publicity in New York. The decision in Stephano v. News Group Publications plainly stated that the right of publicity in New York exists only by virtue of state statute. Thus, the right of publicity is subsumed by the right of privacy law. Because the right is exclusively statutory,

31. 18 N.Y.2d at 327, 221 N.E.2d at 544, 274 N.Y.S.2d at 879.
32. 385 U.S. 374 (1967).
33. Id. at 381-91.
34. Id. at 387-88. For a complete discussion of the New York cases on fictionalization, see McCARTHY, supra note 4, § 8.9(C) at 8-62.

plaintiffs could not invoke an independent common law right. The court noted that the statute does not explicitly mention the term "right of publicity" and reserved decision on the issue of whether the statute would also govern "assignment, transfer or descent of publicity rights." In 1990, the Court of Appeals for the Second Circuit held that Babe Ruth's heirs did not have a descendible right of publicity under New York law. In a footnote, the Circuit Court acknowledged that Stephano had created some uncertainty as to whether the statute could preempt a common law right of publicity claim, but stressed that recognition of such a right must come from the New York legislature.

C. The Recognition of the Right of Publicity

While a number of courts have recognized a right of publicity as distinct from the right to privacy, the basis for such a separate common law right has not always been clear. The first court to distinguish the right of publicity from the right of privacy was the Court of Appeals for the Second Circuit in Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., in 1953. In recognizing the right of a baseball player to grant an exclusive license for the use of his picture on bubble gum cards, the court asserted that a person has a right to control the publicity value of his likeness. The right to manage the dissemination of one's image in the form of a license to publish a photograph was based on the value conferred by exclusivity. A public person must be capable of limiting and controlling the terms under which his photograph may be published if he is to reap the economic benefits of his celebrity.

Judge Jerome Frank used the term "right of publicity" apparently for the first time to describe a proprietary interest in identity.

37. "Since the 'right of publicity' is encompassed under the Civil Rights Law as an aspect of the right of privacy, which, as noted, is exclusively statutory in this State, the plaintiff cannot claim an independent common-law right of publicity." Id. at 183, 474 N.E.2d at 584, 485 N.Y.S.2d at 224 (footnote omitted).
38. Id. at 183 n.2, 474 N.E.2d at 584 n.2, 485 N.Y.S.2d at 224 n.2.
40. Pilpel, supra note 4, at 253-54.
41. In Zacchini v. Scripps-Howard Broadcasting, 433 U.S. 562 (1977), the U.S. Supreme Court articulated the rationale for the right of publicity as "the straightforward one of preventing unjust enrichment by the theft of good will." Id. at 576 (quoting Kalven, supra note 16, at 331).
42. 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953).
43. See McCARTHY, supra note 4, § 1.6., at 1-31.
44. Before Judge Frank's use of the term, the Georgia court used "right of publicity" to
The right included not only protection against commercial exploitation without permission but also the corresponding ability to grant an exclusive license. Judge Frank recognized that a plaintiff in a right of publicity action is seeking to redress an economic and not a psychological injury. In his seminal 1954 article on the right of publicity, Melville Nimmer credited the Haelen court with prescience in its recognition of the contemporary needs of the entertainment and advertising industries. The needs of Broadway and Hollywood could not be met by the Warren and Brandeis tort which was meant only to fulfill "the demands of Beacon Street in 1890." Nimmer further emphasized that because the privacy tort was developed to remedy the unauthorized exploitation of a private person's identity, courts sometimes could consider that public persons had partially or completely waived their privacy rights. Because the privacy right was personal and nonassignable, the commercial need for enforcing exclusive licenses against third parties could not be met by applying privacy principles. In addition, the right of publicity could be descendible and thus create potentially infinite duration for the value of a performer's persona. Thus, Nimmer clarified Judge Frank's new tort by describing how the publicity right redresses a commercial taking, and provides an economic incentive for the expenditure of time, creativity, money and promotional efforts to establish an identity with market value.

When the U.S. Supreme Court considered its only case concerning the right of publicity, Zacchini v. Scripps-Howard Broadcasting Co., it declared the basis for the protection to be the prevention of "unjust enrichment by the theft of goodwill." Thus, by the mid-1950's the distinct forms of injury arising from the privacy tort and the publicity tort were recognized, and the potential commercial loss as a basis of publicity rights was distinguished from psychological loss.
distress as a basis for a privacy tort action.\textsuperscript{53}

Both federal\textsuperscript{54} and state courts\textsuperscript{55} followed \textit{Haelan} and Nimmer in recognizing the right of publicity as a separate common law concept,\textsuperscript{56} although there were some variations in application. For example, in New York the perception of the federal courts differed from that of the state courts about whether New York recognized the common law right of publicity.\textsuperscript{57} In an early Georgia Supreme Court decision\textsuperscript{58} the rationale of the \textit{Roberson} dissent was adopted to support a right of publicity grounded in the constitutional guarantee of individual liberty.\textsuperscript{59} The right of the individual to control the time, place and manner of exposure to "the public gaze"\textsuperscript{60} was asserted without limitation.\textsuperscript{61}

The right of privacy has been recognized either at common law or by statute in most jurisdictions.\textsuperscript{62} In contrast, the right of publicity has been recognized under the common law of fourteen states,
some of which have supporting statutes, and by privacy statutes in eight states. In most jurisdictions, the nature and scope of the right has been expanded from name and likeness to include a broad range of actionable appropriations. For example, the modern right of publicity has been interpreted to include style of performance, use of a phrase, vocal quality, and the depiction of an object commonly associated with a celebrity. The statutory approach has been the favored means of clarifying the distinctions between privacy and publicity actions. There may, however, remain a role for common law jurisprudence.

The right of publicity has come of age in response to the commercial possibilities of expanding media for the exploitation of a performer's personalities. The legal recognition of this separate property right has stimulated debates about the need for and the appropriate functions of a right to personality. One legal scholar has suggested that a more accurate term would be "right of identity" and that the elements of both mental distress and commercial loss

63. McCarthy, supra note 4, §§ 6.2-3[B], at 6-10 to 6-16 includes charts analyzing the various statutory patterns. The following sections include a detailed analysis of each of the state laws. Id. at §§ 6.4-6.15, at 6-16 to 6-84.


66. "[W]hen a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California." Midler v. Ford Motor Co., 849 F.2d 461, 463 (9th Cir. 1988); cf. Sinatra v. Goodyear Tire & Rubber, 435 F.2d 711 (9th Cir. 1970), cert. denied, 402 U.S. 906 (1971); Booth v. Colgate Palmolive, 362 F. Supp. 343 (S.D.N.Y. 1973); Davis v. Trans World Airlines, 297 F. Supp. 1145 (C.D. Cal. 1969). But see McCarthy, supra note 4, §4.14[C], at 4-85, discussing how several judges have been hostile to the concept of identifiability by reason of vocal style alone. See generally Casenote, Advertisers Beware: Bette Midler Doesn't Want to Dance, 9 Loy. Ent. L. J. 43 (1989).


69. In 1960, one scholar commented that "[t]he innovators of the privacy doctrine could not have foreseen the advent of radio, television and motion pictures, and the concomitant scope and variety of commercial exploitations of names, likenesses and personalities of individuals." Gordon, Right of Publicity In Name, Likeness, Personality and History, 55 Nw. U.L. Rev. 553, 554-55 (1960) (footnote omitted). A recent student note considers the challenges for protection of intellectual property presented by digital sound sampling technology with specific reference to possible publicity claims. Note, Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds, 87 Colum. L. Rev. 1723 (1987).
would be included in the measurement of damages. The current versions of this right have emerged as unique and evolving legal creations that borrow from, but are distinct from, commercial torts, copyright, trademark and unfair competition actions. It remains for practitioners, judges and scholars to develop modes of analysis which will accommodate the interests of a wide spectrum of parties. The early developments focused concern on the nature of the plaintiff's interest and injury. The challenge for contemporary legal scholars is to formulate a publicity right that survives the owner's death which is clear as well as constitutional. The post-mortem publicity right embodies the assumption that fame should continue to produce fortune after death.

D. The Descendibility Problem

Whether the right of publicity survives an individual's death has been one of the most provocative issues raised by the emergence of the commercial persona. Included in this issue are the questions of means and time limits for exploitation by the decedent's heirs. Case law and law review analysis have generated three approaches to the question and statutory solutions are appearing which reflect some of these positions. The central concern is sometimes obscured by the administrative detail that descendibility would require. If it were determined that intangible property rights to the use of a deceased person's name or image should be available (even for a limited time) after the person's death, there would need to be a careful articulation of the interests that are at stake. Clearly the deceased individual no longer experiences either financial or emotional distress. Should relief for misappropriation or misrepresentation of a deceased person's image be secured for the decedent's assignees? How are the other interests of artists, photographers and writers affected by the expansion of the right to exploit the personality of individuals who are no longer available to negotiate?

The history of the descendibility debate has been chronicled and

70. McCarthy, supra note 4, § 1.11[C], at 1-47 (1987 ed.). "If the law had such a separately entitled category, things would be considerably easier to sort out compared to our present world of separate rights of privacy by appropriation and a Right of Publicity." Id. A proposal for an English statute protecting against commercial appropriation of indicia of personality was made recently. See Frazier, Publicity, Privacy and Personality, 6 EUR. INTELL. PROP. REV. 139 (1983).

71. Nimmer detailed the inadequacies of these theories earlier in this discussion. See supra, note 4, at 204-15.

72. See Kwall, supra note 4, at 210.
analyzed extensively\textsuperscript{73} with similar results in most instances. The desirability of making the right descendible is questionable, but the momentum in favor of descendibility seems to have prevailed. In the words of one commentator, "[a] freely descendible right of publicity for all individuals is the only approach which truly vindicates the primary interests protected by the right of publicity."\textsuperscript{74} Only practical concerns of duration and definition remain for future analysis.

In the early efforts to construct a judicially recognized descendibility component of the publicity right, the courts asked whether the post-mortem right should be conditioned upon the existence and extent of the person's lifetime commercial exploitation of his personality.\textsuperscript{75} The subjects of the cases reflect the diversity of talents the post-mortem right would protect. The jurisprudence generated by the estates of Elvis Presley, Laurel and Hardy, the Marx Brothers, Agatha Christie, Martin Luther King and Tennessee Williams\textsuperscript{76} illustrates the wide range of questions generated by recognition or creation of post-mortem rights.

The 1982 decision in \textit{Martin Luther King Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.},\textsuperscript{77} found the right of publicity to be descendible and transferable. The estate and certain assignees wished to prevent the defendant from marketing plastic busts of the late Dr. King. The court first determined that Georgia recognized a right of publicity distinct from the right of privacy and concluded that public figures have a right of publicity similar to that of celebrities.\textsuperscript{78} Then the court determined that the right was inheritable and devisable.\textsuperscript{79} The reasoning centered on the \textit{Haelan}\textsuperscript{80} approach which held that a celebrity may assign the right of

\begin{itemize}
\item \textsuperscript{74} See \textit{Kwall, supra} note 4, at 207-09.
\item \textsuperscript{75} See \textit{Commercial Exploitation, supra} note 73; see \textit{McCarthy, supra} note 4, § 9.3 [B][1], at 9-17 to 9-22.
\item \textsuperscript{76} See \textit{supra} note 7.
\item \textsuperscript{77} 250 Ga. 135, 296 S.E.2d 697 (1982).
\item \textsuperscript{78} Id. at 143, 296 S.E.2d at 703.
\item \textsuperscript{79} Id. at 145, 296 S.E.2d at 705.
publicity during his lifetime. The next logical step was to recognize that "without this characteristic, full commercial exploitation of one's name and likeness is practically impossible . . . without assignability, the right of publicity could hardly be called a 'right.'"81

California has resolved the descendibility issue by statute,82 but only after two famous decisions which reflected the difficulties that the recognition of new economic interests entails.83 In the Dracula decision, Lugosi v. Universal Pictures,84 the heirs of Bela Lugosi sought to enjoin the merchandizing of the Count Dracula character using Bela Lugosi's picture and recover profits made by the defendant movie company. The court denied relief, stating that "there is no common law right of action for a publication concerning one who is already dead."85 Chief Justice Bird's dissenting opinion urged recognition of a descendible right of publicity. In addition, the dissenting opinion urged that the right should exist regardless of whether the deceased had exploited one's identity during life.86 In Guglielmi v. Spelling Goldberg Productions,87 the same question was posed and the same response was given in language that interpreted Lugosi as holding that the right of publicity is "not descendible and expires upon death of the person."88 The flurry of critical comment89 and the judicial confusion90 that followed was perhaps generated by the

New York leaves open the question of assignability and the continuing validity of Haelan. The rationale in Haelan for distinguishing privacy and publicity was the need in the latter case for assignability.

81. 250 Ga. at 143, 296 S.E.2d at 703.
82. CAL. CIV. CODE § 990 (West Supp. 1988).
85. Id. at 823, 603 P.2d at 429, 160 Cal. Rptr. at 327.
86. "The right of publicity protects the intangible proprietary interest in the commercial value in one's identity. Like other intangible property rights, its value often cannot be reaped if the individual may not transfer all or part of that interest to another . . . ." Id. at 845, 603 P.2d at 445, 160 Cal. Rptr. at 343 (1979) (Bird, J., dissenting).
88. Id. at 861, 603 P.2d at 455, 160 Cal. Rptr. at 353.
89. See, e.g., Karlen, supra note 5: Property Rights in the Wake of Lugosi, supra note 82; Felcher & Rubin, supra note 72.
90. In Groucho Marx Prods. v. Day & Night Co., 689 F.2d 317 (2d Cir. 1982), the court struggled to interpret Lugosi.

We conclude that Lugosi is subject to two interpretations. It may mean that California does not recognize any descendible right of publicity and that the heirs of a celebrity must rely on trademark law to protect the good will that the celebrity brought to a product during his lifetime. Alternatively, Lugosi might mean that, wholly apart from trademark law, California recognizes a descendible right of pub-
It may also explain why commentators continue to decry the statutory approach which selects certain interests for protection and leaves the development of the common law and the theory which might support it unresolved. For example, the California law at section 990(h) defines a “deceased personality” as a person whose “name, voice, signature, photograph or likeness has commercial value at the time of his or her death.” This language could limit post-mortem rights to persons who have exploited the commercial value of their persona during their lifetime. The statute could be read as a means of protecting only the famous or the infamous, but the more reasonable interpretation of the statute as a whole would hold that everyone’s identity has some commercial value during life and at the time of death. The task is then to ascertain what that value might be and who becomes the owner upon death.

The proposed Celebrity Rights Act in New York is more specific than the California statute. Included within this proposal is a

licity that enables the heirs to prevent the use of a celebrity’s name and likeness on any product or service the celebrity promoted by exploiting his right of publicity during his lifetime.

Id. at 323. The Eleventh Circuit adopted the latter interpretation in Acme Circus Operating Co. v. Kuperstock, 711 F.2d 1538 (11th Cir. 1983).

91. CAL. CIV. CODE § 3344 (West Supp. 1988). Effective January 1, 1985, § 990 created a descendible right of publicity in California with specific reference to name, voice, signature, photograph or likeness of a “deceased personality.”

92. California’s piecemeal attack on the problem of descendibility and exploitation will make it both less necessary and more difficult for the courts and legislatures effectively to articulate the values and interests around which this area of the law must function and thus will generate the ‘bad law’ that inevitably flows from ‘hard cases’.

Halpern, supra note 4, at 1223.


95. The proposed amendment to the New York Civil Rights Law would add the following:

§ 5B.1. Right of Publicity. The right of publicity is a property right that every natural person has in his identity. Such right of publicity is descendible and is freely transferable. The right of publicity created herein shall last for fifty years after death, regardless of whether or not the deceased person commercially exploited the right of publicity during his or her lifetime.

2. The legal representative or successor-in-interest of any deceased person whose name, voice, signature, photograph or likeness is used, for profit or not-for-profit, by any person, firm or corporation for advertising purposes or for the purposes of trade, without having first obtained written consent from such legal representative or successor-in-interest may maintain an equitable action in the supreme court of this

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PROPERTY RIGHT OF PUBLICITY

definition of right of publicity:

State against such person, firm or corporation, to prevent and restrain such use; and may also sue and recover a civil penalty of not less than seven hundred fifty dollars for any injuries sustained by reason of such use and if the defendant shall have knowingly used such name, voice, signature, photograph or likeness in such manner as is prohibited by this section, the jury, in its discretion, may award exemplary damages. The prevailing party or parties in any action under this section shall also be entitled to reasonable attorneys' fees and costs.

3. The use of a name, voice, signature, photograph or likeness in a commercial medium shall not constitute a use for which consent is required under this section solely because the material containing such use is commercially sponsored or contains paid advertising, unless it shall be shown that the use was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required.

4. The rights recognized under this section are property rights, freely transferable, in whole or in part, by contract, license, gift, conveyance, assignment or by means of trust of testamentary document, whether the transfer occurs before the death of the person, by that person or his transferees, or, after the death of that person, by the beneficiary or beneficiaries in whom such rights vest pursuant to the provisions of the estates, powers and trusts law or to the transferees of such beneficiaries.

5. The consent required by this section shall be exercisable by the person or persons to whom such right of consent, or portions thereof, has been transferred or upon whom it has developed in accordance with subdivision four of this section.

6. If any deceased person has not transferred his rights under this section by contract, license, gift, conveyance, assignment or by means of a trust or testamentary document, and there are no surviving beneficiaries in accordance with the provisions of the estate, powers and trusts law, then the rights set forth in subdivision two of this section shall terminate.

7. a. A successor-in-interest to the rights of a deceased person under this section or a licensee thereof may not recover damages for a use prohibited by this section that occurs before the successor-in-interest or licensee registers a claim, pursuant to paragraph b of this subdivision, of the rights created by subdivision two of this section.

b. Any person claiming to be a successor-in-interest to the rights of a deceased person under this section, or a licensee thereof, may register that claim along with legal documentation supporting the right to the claimed interest with the secretary of state on a form prescribed by the secretary of state and upon a payment of a fee of ten dollars. The form shall be verified and shall include the legal and professional name or names and date of death of the deceased person, the name and address of the claimant, the basis of the claim and the rights claimed.

c. Claims registered under this section shall be public records.

8. Nothing in this section shall apply to owners or employees of any medium size advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards; and transit ads, by whom a use constituting a violation of this section is published or disseminated, unless it is established that such owners or employees had actual knowledge of the unauthorized use of the name, voice, signature, photograph or likeness as prohibited by this section. . . .

10. Regardless of the testamentary domicile of the person, this section shall apply to any use of the deceased person's name, voice, signature, photograph or likeness arising within this state.

§2. This act shall take effect on the first day of September in the year next succeeding the date on which it shall become a law.
The right of publicity is a property right that every natural person has in his or her identity. Such right of publicity is descendible and is freely transferable. The right of publicity created herein shall last for fifty years after death, or for fifty years from the date this statute takes effect, whichever is longer, regardless of whether the deceased person commercially exploited the right of publicity during his or her lifetime.  

This amendment would create a descendible right of publicity in New York that is not limited to persons who exploited their persona during life.

The conflict between those who acquire rights of publicity by descent and those who wish to use some attributes of a deceased personality raises questions which range from first amendment and public domain concerns to family interests in a clear posthumous right to the commercial value of the fame of the deceased. This issue has yet to be further refined by the courts or legislatures considering the limits of descendibility. While it is agreed generally that the recognition of a lifetime property right without some component of assignability and descendibility is incongruous, the balance that needs to be reflected in the post-mortem provisions has not been fully articulated. The right of the public to use the persona of a public figure or a private person after death may require the recognition that some unjust enrichment will occur. The goals of free expression, and promotion of creativity versus the protection of the pecuniary interests of heirs may not be capable of complete reconciliation. The analytic tools needed to define the interests of all parties must first be agreed upon. Only then may the economic value of identity which may be assigned or devised be clarified. The issue is not what is or should be descendible but what uses of a decedent's identity should be permitted to the public, be they fine artists or crass commercial opportunists. The existence of a property right in identity has been recognized in the last two decades as distinct from rights of privacy in many states. The more troublesome that question remains is how to reconcile the post-mortem interests in publicity rights with the public interest in the forms of free expression which use the identity or personality attributes of persons who were or may become famous.

II. Free Expression Issues: The Demands of Popular Culture

The term popular culture is used in this discussion to refer to the myriad of uses in product or service creation, entertainment, and works of art that might be made of personality or identity characteristics. The amorphous nature of popular culture is due, in part, to the rapidly changing technologies used by artists and other creative communities and, in part, to the evolving expressive possibilities suggested by works of performance art, digital sampling, video montage, and photocopier art.

Today there is enhanced marketability for goods or services or works of art that use the identities of the famous. The value of that enhanced commercial potential needs to be weighed against the impact on creative or literary endeavors. This section will review the cases that have explored the meaning of the constitutional protection of freedom of expression in the context of popular culture, literary and artistic works. The right of publicity also will be examined from the point of view of these constitutional values. Other approaches to balancing property interests and free speech values have applied fair use criteria in copyright law.

A. First Amendment Values

In 1927, Justice Brandeis made the classic statement of the underlying goals of the first amendment in Whitney v. California.

97. In this article the term will be used with extravagant imprecision because the potential uses for the persona of a deceased celebrity are so various and unpredictable that the term would require constant redefinition.

98. ‘Popular Culture’ is an indistinct term whose edges blur into imprecision. Scarcely any two commentators who try to define it agree in all aspects of what popular culture really is. Most critics, in fact, do not attempt to define it; instead, after distinguishing between it and the mass media, and between it and ‘high’ culture, most assume that everybody knows that whatever is widely disseminated and experienced is ‘popular culture’.

Browne, Popular Culture: Notes Toward a Definition, in Popular Culture and Curricula 3 (1970).

See also Schickel, Intimate Strangers, The Culture of Celebrity (1985); Harris, Who Owns Our Myths? Heroism & Copyright in an Age of Mass Culture, 52 Soc. Res. 2 (Summer 1985). Harris suggests that the growth of intellectual property rights may constrain the development of modern myths and restrict our fundamental collective consciousness to a few franchised, for-profit images used to sell. “Lives have become texts, organized for public consumption.” Id. at 241.


100. 274 U.S. 357 (1927).
The three reasons for safeguarding free speech are: the enlightenment function; the self-fulfillment function; and the safety valve function. These three functions reflect certain values that should be weighed before limiting free expression. In this section the limits on speech imposed by the right of publicity will be evaluated in light of the functions of free speech.

The enlightenment function encompasses news as well as entertainment. It includes the full range of subjects in the marketplace of ideas. Indeed, the recent popularity of television shows which have a newscast format but serve the same entertainment functions as certain tabloids, illustrates the difficulty of separating information from entertainment. The Supreme Court has recognized that "entertainment itself can be important news." The impact of popular culture was acknowledged in a recent opinion by Justice Brennan, noting that "the choices we make when we step into the voting booth may well be the products of what we have learned from the myriad of daily economic and social phenomenon that surround us." The bulk of constitutional doctrine has developed under this first prong of the Brandeis formula.

The notion that free expression is an end in itself is enunciated in the less well developed but clearly stated self-fulfillment function. The first amendment serves not only the political needs of a democracy but also the needs of the human spirit. Justice Brandeis sug-

100. Id. at 375 (Brandeis, J., concurring); see NIMMER ON FREEDOM OF SPEECH, §§ 1.02-04 (1984) [hereinafter FREEDOM OF SPEECH]. While some commentators have argued that the only protected speech is core, political speech, the Supreme Court has recognized that the line between entertaining and informing is illusive. Id. at § 3.01 and cases cited therein.

101. The first amendment in my view protects not only political but artistic expression. But its primary concern must be political speech, because in some measure the "core purpose" of the amendment relates to self government. . . . But that definition produces an irony. [The definition of public figure in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), for purposes of constitutional malice in defamation cases.] The best known public figures in this country, those most likely to fall into the Court's all-purpose category, are movie stars — and what do they have to do with the central meaning of the First Amendment?


104. Justice Marshall wrote the following:

The First Amendment serves not only the needs of the polity but also those of the human spirit — a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and
gested that freedom of speech is an end in itself because it serves to validate the humanity of the speaker. It has also been noted that self-expression plays a vital role in the development of political and social ideas. This link between the self-fulfillment function and the enlightenment function has not been fully developed in the decisions. Scholars have suggested that the suppression of belief and opinion does as much violence to the dignity of the citizen as does suppression of information.\(^{105}\)

The freedom to create works of popular appeal may include both the constitutional value of protecting the speaker as well as the interest the listener (or consumer) may have in free access to the work. The first amendment could thus be interpreted to serve a dual self-fulfillment function in protecting both speakers and listeners.

The safety valve function has not played a part in the development of the right of publicity, probably because the factors at work are more exclusively political. Brandeis formulated this branch as a means of preventing violence in the pursuit of political goals, suggesting that speech advocating these goals would release the emotions in a non-violent setting. The right of publicity must be crafted so as to facilitate these important constitutional values, while providing the breathing space necessary for free speech rights to flourish. The restrictions on the use of one's personality must be clearly delineated to accommodate the enlightenment and self-fulfillment functions. As one court urged in an early right of publicity case, "[o]ne must never lose sight of the purpose behind the decisions implementing the First Amendment."\(^ {108}\) This section will review the decisions which have addressed how these functions relate to, and provide guidance for, the imposition of the right of publicity.

1. News and Editorial Comment

In the only United States Supreme Court decision concerning the right of publicity, \(Zacchini v. Scripps-Howard Broadcasting Co.\),\(^ {107}\) an Ohio television newscast of a fifteen second human cannonball circus act prompted a claim for violation of Hugo Zacchini's
dignity.

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common law right of publicity.108 In a 5-4 decision, the Supreme Court reversed the Ohio Supreme Court and held that the first amendment did not protect the station's right to broadcast the act as part of a news program. The majority opinion was narrowly worded and focused on the commercial appropriation of an "entire act."109

The dissent distinguished this brief glimpse of the central part of a performance from the wholesale reproduction of a theatrical or sporting event.110 The dissent would have required a strong showing that the news broadcast was a subterfuge for private or commercial exploitation. The majority assumed that the news feature would pose "a substantial threat to the economic value"111 of the plaintiff's act.

While this test of the economic impact of permitting free speech protection may be useful in other contexts, its application in this highly unusual situation could have resulted as easily in a finding that the newscast enhanced the market for the plaintiff's act. The reproduction of the act on tape, on a small home screen without the usual suspense and excitement of the circus setting could have been found to create an inducement for audiences to see the real thing.

In this limited factual context, the decision provides guidance for determining when an otherwise newsworthy event will be considered an appropriated performance. The Zacchini decision does not delineate the first amendment limitations on the right of publicity in any other context. The decision is at best unclear about the scope of first amendment values involved in right of publicity claims and has been misread by some courts to say that there is very little first amendment protection in the area of publicity rights.112

The majority in Zacchini emphasized the narrow scope of its decision by noting that the case did not involve the classic type of use of identity in advertising. Some courts have recognized the potential of the commercial misappropriation tort to undercut free expression.113 At first glance, it may appear that the use of a name or

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108. 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976). The Supreme Court of Ohio based its decision on the plaintiff's "right to the publicity value of his performance." 351 N.E.2d at 455.

109. "Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent." Zacchini, 433 U.S. at 574-75.

110. Id. at 580.

111. Id. at 581.


113. See Cher v. Forum Int'l Ltd, 692 F.2d 634 (9th Cir. 1982), cert. denied, 462 U.S.
likeness in a news story, book or play is an advertising or "trade" use since the creator is motivated, at least in part, by a desire to call attention to his work to increase sales. The need for strict limitations on the misappropriation tort were recognized by a number of courts. The exceptions have been called the "newsworthiness rule" and the "incidental use" rule. The newsworthiness rule was articulated in Lahiri v. Daily Mirror, which held that there was no liability under the New York privacy statute for the use of a photograph in connection with an article of current news or immediate public interest. The rule included any article of educational or informative character so long as the photograph bore a legitimate relation to the article and was not being used solely to promote the sale of the publication. The public policy basis was stated to be the protection of "unhampered channels for the circulation of news and information." In a number of cases construing the scope of the right to privacy, those seeking relief for the improper use of public personalities have been denied relief. In Ann-Margret v. High Society Magazine, the publication of nude photos taken from a film prompted a claim for violation of the New York privacy statute. The court stated that the fact that the actress had performed unclad is a matter of great interest to many people. And while such an event may not appear overly important, the scope of what constitutes a newsworthy event has been afforded a broad definition and held to include even matters of "entertainment and amusement,

1120 (1983).
115. See Prosser, Privacy, 48 CALIF. L. REV. 383 (1960), Nimmer, supra note 4; McCarthy, supra note 4, §§8.8[B][2].
117. Id. at 782, 295 N.Y.S. at 389.
118. In 1940, the Court of Appeals for the Second Circuit discussed the "newsworthiness" rule stating that:
It is clear that "for purposes of trade" does not contemplate the publication of a newspaper, magazine or book which imparts truthful news or other factual information to the public. Though a publisher sells a commodity and expects to profit from the sale of his product, he is immune from the interdict of §§ 50 and 51 so long as he confines himself to the unembroidered dissemination of facts.

119. Lahiri, 162 Misc. at 782, 295 N.Y.S. at 388.
concerning interesting phases of human activity in general.\textsuperscript{123}

The freedom of expression value appeared to be so compelling that the court declined to define newsworthiness, noting that it is “not for the courts to decide what matters are of interest to the public.”\textsuperscript{123}

The “incidental use” exception was recognized in Booth v. Curtis Publishing Co.,\textsuperscript{124} where a newspaper advertisement for a magazine reprinted a news-related photograph from one of the magazine’s earlier issues. The court held that commercial misappropriation claims under New York’s Civil Rights Law, section 51, cannot be based on republication of editorial material if it is used to advertise the publication and if the reproduction merely illustrates the quality and content of the periodical.\textsuperscript{126} The court recognized that the advertising was “incidental” to the original, newsworthy publication. Other courts have followed Booth and held that the use of a name or likeness, republished from an earlier publication in order to promote the sale of the periodical is not actionable under section 51.\textsuperscript{126}

Thus, under the newsworthiness and incidental use rules, courts have recognized that constitutional free speech requires restrictions on the scope of commercial misappropriation claims. Typically, such claims are permitted in the narrow context of advertising and promotional uses. The plaintiff usually argues that the intellectual property interest she has in her identity may not be used without her permission by the defendant to disseminate any message, whether commercial, political or artistic. In short, the first amendment should not permit the defendant to misappropriate the plaintiff’s identity. This argument gives priority to property interests over free speech interests and ignores the first amendment values of enlightenment, self-expression and social catharsis. The proper approach acknowledges the constitutional interests first. The characterization of plaintiff’s interests in her identity as property should not change the fundamental constitutional analysis which requires careful consideration of the content, function and purpose of the defendant’s speech. Chief Justice Bird of the California Supreme Court stated the approach in 1979:

\textsuperscript{122} Id. at 405 (citing Paulsen v. Personality Posters, 59 Misc.2d 448, 299 N.Y.S.2d 506 (N.Y.Co. 1968); Sidis v. F-R Pub. Corp., 113 F.2d 1809 (2d Cir. 1940)).

\textsuperscript{123} Id.


\textsuperscript{125} Id. at 349, 223 N.Y.S.2d at 743.

[T]he right of publicity has not been held to outweigh the value of free expression. Any other conclusion would allow reports and commentaries on the thoughts and conduct of public and prominent person to be subject to censorship under the guise of preventing the dissipation of the publicity value of a person's identity.\textsuperscript{127}

The use of a person's identity as part of editorial commentary has presented a slightly different context in which first amendment values have been tested. The New York appellate court in \textit{Stephano v. News Group Publications},\textsuperscript{128} sought to determine whether the public interest aspect of an article was "merely incidental to its commercial purpose."\textsuperscript{129} The plaintiff was a model who appeared in a picture accompanying an article about trends in men's fashions. He had consented to the use of the picture in the original advertisement in which it appeared. The court determined there was a factual issue as to whether the article was "for purposes of trade" or whether the use of the picture was permitted as incidental to a "public interest presentation," and that "[t]he real question presented in this case [was] whether the public interest aspect of the . . . article [was] merely incidental to its commercial purpose."\textsuperscript{130} The court denied the defendant's motion for summary judgment and suggested that "[t]he plaintiff should be given the opportunity to explore . . . whether the magazine received indirect remuneration in the form of advertising space purchased by the merchants or others mentioned in the story."\textsuperscript{131} The court of appeals reversed,\textsuperscript{132} holding that the publisher of a prima facie newsworthy article should not have to meet "general and insubstantial accusations of disguised advertising."\textsuperscript{133} The purpose and function of the model's picture was central to the finding of editorial use. "It is the content of the article and not the defendant's motive . . . to increase circulation which determines whether it is a newsworthy item."\textsuperscript{134}

In another case involving an arguable editorial use of a celebrity image, the federal district court in New York enjoined the publica-

\textsuperscript{129} Id. at 292, 470 N.Y.S.2d at 380.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{133} Id. at 186, 474 N.E.2d at 586, 485 N.Y.S.2d at 226.
\textsuperscript{134} Id. at 185, 474 N.E.2d at 585, 485 N.Y.S.2d at 225.
tion of the picture. In *Ali v. Playgirl, Inc.*, the former heavyweight boxing champion claimed that the cartoon illustration of a nude black man sitting in the corner of a boxing ring, captioned "Mystery Man" and accompanied by a verse referring to "the Greatest" was identifiable as Ali. The federal court granted the injunction based on the determination that he was likely to prevail on the merits under New York's section 51. The court reasoned that even though the picture was clearly not used to advertise any product and was incidental to the editorial content it was actionable because the picture was "clearly included in the magazine solely 'for purposes of trade— e.g., merely to attract attention.'" Although the court cited several earlier cases on the newsworthiness rule, it failed to recognize that the rule has been held to include items of "entertainment and amusement, concerning interesting phases of human activity in general." Apparently, the image was not considered newsworthy because the court found the presentation distasteful, and the first amendment cases concerning the protection of even repulsive speech and the related actual malice standard for libel of public figures were not considered. The first amendment should preclude

136. *Id.* at 727.
137. *Id.*
138. *Id.* at 727 (quoting Grant v. Esquire, Inc., 367 F. Supp. 876, 881 (S.D.N.Y. 1973)).
141. A recent example of the constitutional protection accorded even repulsive speech is demonstrated in Dworkin v. Hustler Magazine, 867 F.2d 1188 (9th Cir.), *cert. denied*, 110 S. Ct. 59 (1989). The depiction of several women's rights and anti-pornography activists in the magazine was alleged to cause actual damages by causing women to fear exercising their political rights on behalf of women lest they be made the subject of ugly and pornographic representations in such magazines. The principle that the first amendment exists to foster robust public debate was held to protect material that had no serious literary, artistic or scientific value.
142. One of the most recent of the public figure cases applying an actual malice standard is Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990) in which a high school wrestling coach sued a local newspaper for alleging that he had perjured himself in job-related testimony. Citing New York Times v. Sullivan, 376 U.S. 254 (1964), the court noted that a public official should be prevented from "recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or
any liability for commercial misappropriation or right of publicity claims when editorial, literary or humorous materials, as distinct from advertisements, make use of the images of public figures. The merits of the work should not be one of the criteria in the court's determination of content and function of the publication.

2. Entertainment and the Creative Component Criteria

Theatrical, dramatic or other entertainment forms which are usually presented live or as recordings of live performances present another type of tension between the first amendment and publicity claims. The artists who create, or recreate the performances of famous entertainers or the lives and thoughts of deceased public or historical figures are protected by the first amendment freedom of expression values. The question presented by celebrity imitators cannot usually be formulated as a political or editorial exception issue but requires a closer examination of the content of the performance. The entertainment and literary expressions fulfill both the enlightenment and self-expression functions of the first amendment. The examination of content may reveal some informational attributes, but does not always reflect the value of the work to the creator for expressing thoughts and ideas in a popular, as opposed to academic or scientific market. What amount or degree of skill, talent or perspicacity on the part of the creator is necessary to give the presentation legitimacy as a protected form of speech, even though it is in the entertainment rather than editorial mode? When does a work entertain only because it exploits another's characters or style of performance?

A federal court in New Jersey considered the distinction between entertainment and commercial exploitation in Estate of Presley v. Russen. The estate sought an injunction against a theatrical presentation in the form of a concert imitating an Elvis Presley performance. The court determined that a separate right of publicity had evolved from the right of privacy in New Jersey and that the right was descendible. Accepting the assertion that media portrayals are entitled to first amendment protection, the court determined
that the content of the show was not primarily information or entertainment but was substantially a vehicle designed "primarily to commercially exploit the likeness of Elvis Presley without contributing anything of substantial value to society." On that basis, the court determined that the show was not entitled to constitutional protection and violated Presley's right of publicity.

The crucial determination in Russen was that the show did not have "its own creative component" and therefore lacked "significant value as pure entertainment" sufficient to provide free speech protection against a right of publicity claim. The court did not discuss the criteria for determining what constitutes adequate creative content or how to quantify the exploitation effect in comparison to the entertainment effect. Important questions remained unanswered. Are imitators successful entertainers only because of the subjects they choose to mimic or are they entertaining because they possess an ability to perform impressions that is in itself unique? Is the cosmetic art of facial transformation adequate creative content? Is vocal and musical quality essential to the calculus of creativity? Would it be sufficiently creative to imitate Elvis singing the greatest hits of Kate Smith?

A federal court in New York considered the issue of the creative component in a case involving a Broadway show that replicated the Marx Brothers' movies. In Groucho Marx Productions v. Day & Night Co., the show "A Day in Hollywood/A Night in the Ukraine" was analyzed by the court. The first act of the play was original material. The second act was a parody of the Marx Brothers movie "A Day at the Races." The court held, using the words of Russen, that the play did "not really have its own creative component." The producers had argued that the play was a parody of the Marx Brother's movies, but the court found that it was merely an imitation of the Marx Brothers' own parody and was not a "parody of their parody." The court's analysis of the content turned on the absence of anything other than the replication of the Marx Brothers' performance. "Although literary commentary may have been the intent of the playwright, any such intent was substantially overshadowed in the play itself by the wholesale appropriation of the
Marx Brothers characters.\textsuperscript{150} The court granted partial summary judgment on the grounds that the play infringed the rights of publicity under New York common law held by the assignees of the Marx Brothers. The court of appeals reversed\textsuperscript{151} on the ground that California law governed the plaintiff's rights and that the right was not descendible in California.\textsuperscript{152} The protection accorded parody is justified, in part, because the attributes of another are used as a part of a larger presentation in which a substantial amount of new material is contributed by the creator of the parody. An imitation is not protected when it is merely a duplication of the work of others for the purpose of deluding the public or to compensate for a lack of talent or creativity. A parody is protected in part because it may enlighten by holding up to public scrutiny certain features of our popular culture or political organizations which have been ignored by other media.\textsuperscript{153} Both the information function, as well as the entertainment and self-fulfillment functions are served by the creation of a parody that does more than merely duplicate the work of another.

Earlier cases had considered the claims of other beloved comedians or their representatives and granted relief for imitations of their style and the characters that they had created. The imitation of Chaplin's Little Tramp\textsuperscript{154} and the Laurel and Hardy team\textsuperscript{155} provided occasions for courts to consider the creative component criteria. These decisions were based on a general finding that infringement of style, costume and distinctive mannerisms would work a fraud on the public and the plaintiffs. The primary concern was the potential for deception rather than the dangers of diluting the impact of a famous persona's act.\textsuperscript{156} The contributions, if any, of the imitators were not discussed. The interest(s) of the public, the audience or the entertainer were not discussed. In 1986 the Los Angeles Superior Court, applying New York law, granted the largest right of

\begin{itemize}
\item \begin{enumerate}
\item \textbf{150.} Id.
\item \textbf{151.} 689 F.2d 317 (2d Cir. 1982).
\item \textbf{152.} In an aside, the court of appeals referred to the first amendment issue stating that the producers had a "substantial argument that their play is protected expression as a literary work, especially in light of the broad scope permitted parody in First Amendment law." \textit{Id.} at 319, n.2.
\item \textbf{153.} \textit{See} Elsmere Music Inc. v. NBC, 623 F.2d 252 (2d Cir. 1980); 3 M. \textsc{nimmer on Copyright} § 13.05[C].
\item \textbf{156.} \textit{See} Price, 400 F. Supp. at 845.
\end{enumerate}
\end{itemize}
publicity damage award to that date in the Beatlemania case.\(^{157}\) The defendants had created a live stage performance imitating the Beatles singing twenty-nine Lennon-McCartney songs. The show had been touring for three years and was the subject of a film. The court found that the show so accurately imitated the Beatles performance that the audience actually came to believe it was watching a Beatles concert.\(^{158}\) The court rejected the first amendment defense that the show was a social and political overview of the 1960's. For this “massive appropriation of the Beatles persona”\(^{159}\) the court awarded damages of $7.5 million. The court also found that the act constituted unfair competition because the audience was likely to be confused into believing that the Beatles had sponsored the performance.

The importance of celebrity imitations to the celebrity has not been studied quantitatively. One celebrity might tolerate an impersonation as proof of the adage that imitation is the sincerest form of flattery. Another celebrity might argue that the imitation dilutes or tarnishes her work. While it seems unlikely that in most instances an imitation could be substituted for the original, confusion of sponsorship and the dangers of deception may be of concern. The interests of the imitator are in practicing an art that uses the work of others as a basis for his imitative talent. If the original celebrity is not recognizable, the impersonator has failed in his purpose. The impersonator would argue that his work is not causing economic loss to the celebrity because there is no market for officially licensed or sponsored, as opposed to unofficial imitators. There is no difference between the authorized and the unauthorized imitation market. Each impersonator presumably rises or falls on the basis of his ability to entertain. His performance might be judged boring or offensive by the audience, but the celebrity who is the subject of this impersonation is probably not the party who is economically injured.\(^{160}\)

3. Merchandise That Exploits Personality

Products may serve as a means of self-expression. This has been demonstrated by the growing popularity of “merchandising proper-


\(^{158}\) Id. at 1017.

\(^{159}\) Id.

ties" and the licensing business that has flourished as a result.¹⁶¹ A range of intellectual property laws may be involved in the management of the production and sale of these products, from trademark and unfair competition laws to copyright.¹⁶² When the right of publicity comes into play, the question of confusion or deception is not central. The interests of the public are less apparent when compared to the celebrities' concern with preventing unjust enrichment or the appearance of an endorsement. Thus, the rationale for protecting the right to freedom of expression by means of posters, buttons, T-shirts and bumper stickers may be more difficult to articulate. What social purpose is served by the use of a famous face on any of those items? Usually, these items of memorabilia derive their market value almost entirely from the fame of the person portrayed and are not frequently purchased for the informational or cultural message they convey. The associative value¹⁶³ of the items is the basis of their commercial value. In Memphis Development Foundation v. Factors Etc.,¹⁶⁴ the district court considered the expressive value of a statuette of Elvis Presley. The plaintiff had commissioned a sculptor to create a large bronze statue of Presley for the center of Memphis. This tribute was to be financed by contributions, which would be stimulated by the distribution of pewter replicas of the statue to donors giving more than twenty-five dollars.¹⁶⁵ The plaintiff sued to enjoin the assignees of the singer's right of publicity from interfering with the promotion of the memorial. The court allowed the plaintiff to build the statue in tribute but prohibited the manufacture, distribution and sale of the statuettes.¹⁶⁶ Although the first amendment analysis was not explicit, the decision rests on the assumption that the statuettes served no informational or cultural purpose.¹⁶⁷ The unauthorized use of a celebrity persona to create a product triggers the equitable arguments concerning reaping what one has not sown. The function of the item is regarded as exploitation of another's identity


¹⁶³ Halpern, supra note 4, at 1242.


¹⁶⁵ Id. at 1324-28.

¹⁶⁶ Id.

¹⁶⁷ Id.
rather than expression of the creator’s ideas about politics, entertainment or fame. Framing the question in another way, why should the creation of a sculpture of a particular person be treated differently from the creation of a play concerning that person?

In a recent Second Circuit decision concerning the right of a magazine publisher to include oversized color posters of wrestling stars in its publication, the use of a celebrity’s image for “purposes of trade” under the New York Civil Rights law was considered. In *Titan Sports v. Comics World Corp.*, the court remanded for a determination of whether the public interest aspect of the publication was merely incidental to the commercial purpose of selling unauthorized posters. While the magazine was a bona fide newsstand publication, the items included within could have value for purposes of trade. “An item physically attached within the covers of a magazine is not automatically exempt from the scope of ‘purposes of trade’ nor automatically entitled to first amendment protection.” The factors to be considered upon remand include “the nature of the item [contained in the publication], the extent of its relationship to the traditional content of a magazine, the ease with which it [might] be detached . . . whether it [would be] suitable for use as a separate product once detached and how the publisher markets the item.”

The *Titan* case illustrates the sensitivity necessary to a determination of publicity rights in products that may be part of a publication. Most products that exploit celebrity images do not appear in this context. The first amendment values of informational or educational purpose may not be as readily apparent in the sale of three-dimensional images, T-shirts, toys and other memorabilia.

4. Advertising and Endorsement Functions

The first amendment values served by commercial speech have been recognized as limited and subject to content-based regulation

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168. 870 F.2d 85 (2d Cir. 1989).
169. See id.
170. Id. at 88.
171. Id. at 89.
172. See *Smith, Elvis Merchandisers Are All Shook Up*, Wall St. J., June 30, 1988, § 1 at col. 4. In *Elvis Presley Enter. v. Elvisly Yours, Inc.*, 817 F.2d 104 (6th Cir. 1988), the circuit court reversed the district court’s decision to deny a preliminary injunction, holding that a seller of Elvis T-shirts must rebut the presumption that a holder of a federally registered trademark does not have an exclusive right to use the Elvis logo on clothing, and the mere fact of Elvis’ death does not rebut this presumption because a descendible right to publicity exists under Tennessee state law.
that would not be appropriate for other forms of political or philosophical speech.\textsuperscript{179} The unauthorized use of any person's name or image in an advertisement may be redressed by a number of privacy statutes in addition to right of publicity laws.\textsuperscript{174} The freedom of expression values inherent in social policies which encourage free enterprise and the free flow of public information do not extend generally to encompass the appropriation of a name, image or likeness for commercial messages.

Some elements of deception actions are found in the cases which have dealt with the issue of unauthorized use of a name or likeness. In \textit{Onassis v. Christian Dior-New York, Inc.},\textsuperscript{170} the New York Civil Rights law was invoked to protect the plaintiff, Jacqueline Kennedy Onassis, from the use of a look-alike model to give the impression that the plaintiff had modeled for the photo used in the advertisement.\textsuperscript{176} The advertiser did not claim a right to use the images of famous persons to create an aura of elegance and elitism in its promotions. Even the rights of non-celebrities have been protected where pictures that might be recognizable only to the family were used in advertisements without permission.\textsuperscript{177} The assumptions underlying the bulk of these cases involving advertising are that the advertiser would not have used the image if it had not had commercial value and that therefore the plaintiff has an economic as well as a privacy interest which requires either protection or compensation, or sometimes both. The freedom of expression values which the advertiser might offer are tenuous at best in the context of such apparent misappropriation. The argument that the advertiser's message is a mixture of social commentary and product promotion suggests a level of fine-tuned analysis of commercial speech that courts are increasingly unwilling to perform.\textsuperscript{178}

The recent decision concerning the use of a sound-alike, the vo-


\textsuperscript{174} See infra text accompanying notes 175-77; see also Annotation, \textit{Invasion of Privacy by Use of Plaintiff's Name or Likeness in Advertising}, 23 A.L.R.3d 865 (1989).


\textsuperscript{176} Id.


cal imitation of Bette Midler,\textsuperscript{179} gave little consideration to the cultural message such stylistic vocal elements might convey. The issue was simply whether the voice was sufficiently distinctive and therefore recognizable.\textsuperscript{180} A recent decision in a federal court in Michigan refused to follow the Midler case and dismissed a suit by the singer Mitch Ryder.\textsuperscript{181} The singer sued Molson Breweries and its advertising agency over an ad featuring a rock hit once recorded by Ryder, "Devil With a Blue Dress."\textsuperscript{182} The decision may be based on lack of similarity and lack of proof of deliberate imitation sufficient to confuse the public rather than free speech values in vocal imitation.

Commercial speech is recognized as a protected form of speech because it promotes the accurate dissemination of objective product and price information. Commercial speech has not been accorded constitutional protection because it serves as a medium for artistic expression. Some advertising may promote goods or services as well as express the advertiser's opinions about social or political conditions. Most advertising aspires to some level of entertainment. The limited degree of first amendment protection given to commercial speech under recent United States Supreme Court decisions\textsuperscript{183} does not seem to encompass entertainment or artistic expression as a primary value protected by the commercial speech doctrine.

\section*{B. Statutory Means of Balancing the Interests}

The question addressed in this section is how best to accommodate first amendment principles in a state statutory scheme calculated to establish a property right in some attributes of personality. One approach adopted by several courts has been to avoid conflict by narrowly construing the scope of common or statutory law to avoid conflict. Another approach is to incorporate first amendment principles directly into the state law definition of the right of publicity. A third proposal has involved the adoption of the concept of fair use in the copyright law as the means of accommodating free expression

\begin{thebibliography}{99}
\bibitem{179} Midler v. Ford Motor Co, 849 F.2d 460 (9th Cir. 1988).
\bibitem{181} King, Ruling Allows Ads that Imitate Pop Stars, Wall St. J., Nov. 12, 1990, \S\ B, at 6, col. 3.
\bibitem{182} Id.
\bibitem{183} See cases cited supra note 173.
\end{thebibliography}
interests. While each of these approaches has certain advantages, the fundamental tension remains because the relevant free speech values are not articulated. These three approaches have been analyzed by Professor McCarthy and found wanting. "In some cases of media use of human identity, there is indeed a conflict with the first amendment...[t]here is no neatly packaged general rule that can be waved like a magic wand to make the solution any easier. The balance must be laboriously hacked out case by case." Notwithstanding the wisdom of a flexible standard for protecting free expression, there is an understandable desire for some predictability in planning the media uses of human identity. A recently proposed amendment to section 50 of the New York Civil Rights Law reflects the need for guidance in a statute which limits the scope of the property interest. The proposed law mirrors the California statute in many respects and provides an example of how legislation may be structured to accommodate some of the first amendment concerns voiced by scholars and commentators.

The proposed Celebrity Rights Act would create a property right in the "name, voice, signature, photograph or likeness" of "every natural person," a right which would be descendible and freely transferable. The intention of the new Article 5-B would be to extend to all persons, living and deceased, a right of publicity based on the statutory description of the right rather than a recognition of a common law right. The interest would then fall within a narrowly drawn statutory scheme for accommodating first amendment principles.

The first difficulty presented by this Act is the duration of the right for "fifty years after death, regardless of whether or not the deceased person commercially exploited the right of publicity during his or her lifetime." The protection afforded could result in a claim of publicity rights up to one hundred years after the person's...
death. The fifty year period was apparently introduced to provide a term of protection comparable to the copyright term of life of the author plus fifty years. There is no justification for extending the right based on the effective date of the legislation. The potential for chilling free expression over such a long term is not counterbalanced by the interests of the heirs or assigns of the deceased in having more than fifty years to exploit the fame of the deceased.

In contrast, section 990(g) of the California statute limits the duration of the right to fifty years from the date of death of the "deceased personality." The potential for confusion and chilling free speech is reduced by this shorter term. The California statute defines "deceased personality" as "any natural person whose name, voice, signature, photograph or likeness has commercial value at the time of his or her death, whether or not during the lifetime of that natural person the person"191 exploited his personality in advertising or merchandising. The New York proposal attempts to achieve the same goal by requiring a good faith effort to identify the deceased who is portrayed and to locate successors in interest. The method by which that burden is to be met by persons seeking to comply with section 7(c) is not set forth in the statute. This omission could result in the statute being overbroad and vague. This sort of provision creates special hardships for the owners of photograph libraries who sell or license old photographs for advertising or promotional purposes. The rights of the heirs of those portrayed could be impossible to ascertain with certainty. Some guidance as to what efforts constitute good faith diligence in these instances is needed in the proposed New York statute. The necessity of identifying the subjects of old photographs is eliminated in the California statute.

The New York proposal addresses the needs of creators by providing a registration scheme which requires that successors in interest register before they are eligible to recover damages.192 Thus, the representatives bear the burden of identifying for the public record which person's rights are to be subject to post-mortem protection or exploitation. Such a registration scheme might seem to aid the photographer who has a record of the names and other identifying information of her subjects. The purpose of the registration provision is to provide some means of protection for the owners of such photos. Without a record of an heir's claims, the work of photographers and

191. CAL. CIV. CODE § 990(h) (West 1988).
192. See supra note 95.
the owners of photographic archives may be subject to claims by heirs of unidentified subjects of older photos. Many older photographs are used to illustrate historical and educational works. The value in the market for archival photographs is not generally based on the identity of the particular persons pictured. The use of these works in advertisements is not an exploitation of the individual depicted. The notice provided by a registry could provide an opportunity for some protection of photographer's interests but only where the persons in the photographs are identified by name.

The Act lists several exceptions in section 9 for works of particular types. The list includes "live performances" of impersonation or imitation which are "accurate and/or entertaining." 193 News, public affairs and sports broadcasts are excluded. Likewise excluded are portrayals in a "play, book, magazine article, newspaper article, musical composition, film, radio or television program" which are not "directly connected with commercial sponsorship or paid advertising." 194 Finally, single, original works of art, excluding multiple editions, are exempted and advertisements for any of the four above permitted uses. In addition, section 3 includes the same phrases as the New York privacy statute, creating a right to maintain an action when the deceased's image is used "for advertising purposes or for the purposes of trade." 195 These limitations are intended to address many of the first amendment issues, but should not be construed to be exclusive. The need for case by case determinations will still arise, especially if an advertiser uses techniques which are less indicative of personality than directly involving a name, signature, portrait or voice. 196 An article of clothing, an object, a color, a musical phrase or a sound might also be sufficient to evoke the image of a particular performer. Although these attributes of style may all be subsumed under the statutory term "likeness," they might also be viewed by some creators as the raw material of popular culture which should be in the public domain. The proposed act provides a point of departure for the analysis but does not provide a definitive line of demarcation between property rights and free speech rights.

The requirement that impersonations be accurate raises free

193. Id.
194. Id.
195. Id.
196. See, e.g., Carson v. Here's Johnny Portable Toilets, Inc., 698 F. 2d 831 (6th Cir. 1983) (where the use of phrases "Here's Johnny" and "The Greatest" were held sufficient to identify a celebrity).
speech concerns. A live performance which is a parody of another's act is by necessity not accurate. The free expression values served by such parody may be compromised by the accuracy requirement. Inviting the courts to determine how faithful the imitator has been to his subject's performance risks involving the judiciary in determinations usually best left to theatre critics. A comparison of the California statutes and the few cases that have been decided interpreting the descendibility provisions gives little guidance for New York courts. The first amendment concerns that have been raised have been in the context of multiple copies of works of art. The Los Angeles Supreme Court recently determined that California's "single and original work of art" provision violates the first amendment.\textsuperscript{197} The New York bill is based on that provision. The burdens these provisions impose on artists and advertisers may include a duty to inquire into the identity and status of those portrayed. These statutes may require the courts to make assessments of the value of certain works of art. Even though "fine art", "products," "merchandise or goods," "politician," "news" and "public affairs" are not defined in these statutes, such terms are the basis for the first amendment protections embodied therein.

Any right of publicity case will call for the assessment by the court of three issues: the status of the plaintiff as celebrity, public figure or private citizen; the nature of the alleged infringing depiction of that person, news, entertainment, art object, advertisement or product; and the motive of the defendant that these media may reveal. As discussed in the previous section, these variables have been weighted in different ways by different courts. The first amendment has provided some guidance in a few cases. With the right of publicity expanding into the realm of post-mortem property interest, the courts will be asked to address these issues anew. Lawsuits harassing media and artists may be the most immediate result of creating post-mortem publicity rights. The scope of the rights protected does not contain descriptive guidance for those who wish to use certain indicia of personality or style of performance in new types of expression. The organic and derivative nature of popular culture requires that the creation of new property rights does not also establish extensive monopolies in all intangible features of personality. The need for careful crafting is a reflection of the delicate nature of social com-

mentary, artistic expression and satire. The new statutory protection of a persona may be so broadly drawn as to impose unconstitutional limits on the free access to the material of popular culture.

III. CONCLUSION

The right of publicity has evolved from a privacy-based interest to a property right of many dimensions. It may soon reach the limits of constitutional free expression. While the free speech tensions between any use of human identity in the media have been regularly noted, the current move to legislate post-mortem protection in New York provides an opportunity for renewed reflection on the self-fulfillment function of the first amendment. Our cultural and entertainment icons have varied attributes of personality, such as like name, photograph or voice may be readily identifiable and protectible. Other less concrete manifestations of persona, such as style of performance, dress, vocal intonation or speech patterns, may not be sufficiently distinctive or may function in other contexts to conjure less readily identifiable associations. The needs of the creative community are not served by overly inclusive post-mortem publicity rights. The requirements of an evolving culture in art and media may be recognized and accommodated by a narrowly drawn property right that includes first amendment values in the legislative history of its provisions.