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## Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity

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Goodenough: Go Fish: Evaluating the Restatement's Formulation of the Law of P

# GO FISH: EVALUATING THE RESTATEMENT'S FORMULATION OF THE LAW OF PUBLICITY

*Oliver R. Goodenough\**

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\* Professor of Law, Vermont Law School, South Royalton, VT 05068. This article is based in part on a study by the author of the rights of publicity and privacy, entitled *PRIVACY AND PUBLICITY: SOCIETY, DOCTRINE AND THE DEVELOPMENT OF LAW*, to be published in London by the Institute of Intellectual Property, in the summer of 1996. Portions of that study, in turn, have previously appeared in the *EUROPEAN INTELLECTUAL PROPERTY REVIEW*, as *The Price of Fame: The Development of the Right of Publicity in the United States, Parts I and II*, 14 EUR. INTEL. PROP. REV. 55-60 and 90-95 (1992). The historical review in this article is particularly indebted to these other treatments. Particular thanks for assistance in the preparation of this article goes to Laura Gillen, for work over and above all standard notions of duty.

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## I. INTRODUCTION

The law is at heart a descriptive exercise. We attempt to pin down all-too elusive concepts of action and consequence in formulations of words. We are not alone in this kind of activity. Indeed, the very words we seek to use, as we commit law to writing, depend on the descriptive work of another branch of learning: they depend on spelling.

Now whatever may or may not be the problems with the legal system in the United States, we in the law can take some comfort from the manifest failings of the spelling of the English language in which most of our laws are written. Spelling is a very troublesome thing for English speakers. There is no reliable correspondence between the sounds pronounced and the letters used to represent them. An extreme example of the problem is George Bernard Shaw's suggestion that "ghoti" is a perfectly plausible English spelling for the word more normally spelled "fish": "gh" as in enough; "o" as in women, and "ti" as in notion.<sup>1</sup> Of course, "ghoti" has the advantage over "xqlap" as being a justifiable spelling for the aquatic animal. "Xqlap" is outright wrong. "Ghoti" is at least possible, even though it is subject to considerable misinterpretation, requires significant explanation, and, on the whole, is nowhere near as good as "fish."

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1. For a discussion of Shaw's obsession with improving the English alphabet and of the litigation which stymied his post-mortem attempt to work on the problem, see JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 607 (5th ed. 1995); see also Roger D. Colton, *The Use of Canons of Statutory Construction: A Case Study from Iowa or When Does "GHOTI" Spell "FISH"?*, 5 SETON HALL LEGIS. J., 149, 149 (1982) (applying this metaphor to problems of statutory construction).

How does English spelling have the potential to get so confused? Perhaps it is an accumulation of historical accident, change in the underlying speech being described, and outmoded conventions which no one has the authority to sort out and bring up to date.<sup>2</sup> The French are not so handicapped. They have appointed a central body to oversee the French language—the Academie Française.<sup>3</sup> This self-consciously august institution has been charged with overseeing the development of French, and has from time to time standardized spelling through the publication of the *Dictionnaire de l'Academie*.<sup>4</sup> Indeed, the ninth edition of this work has been in preparation since 1935; completion is hoped for by the end of the century.<sup>5</sup>

### A. *The Role of the ALI*

Whatever our lack in America in the realm of a broadly-recognized arbiter of spelling, we have just such an arbiter of law: The American Law Institute. The ALI, as it is widely known, came into existence in 1923.<sup>6</sup> A committee of the best and the brightest of the day, called “The Committee on the Establishment of a Permanent Organization for the Improvement of the Law,” had been convened at the instigation of the Association of American Law Schools.<sup>7</sup> Committee members included such luminaries as Elihu Root (Chairman), Benjamin N. Cardozo, Arthur L. Corbin, Learned Hand, William Draper Lewis (Secretary), Roscoe Pound, John H. Wigmore and Samuel Williston.<sup>8</sup>

The problem identified by the Committee has a perennial quality to it, although the added concern with class struggle and radical sedition gives it a dated flavor:

There is today general dissatisfaction with the administration of justice.  
The feeling of dissatisfaction is not confined to that radical section of the

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2. For a discussion of the failure to establish such an authoritative academy in England and the United States, and of the resistance to linguistic standardization generally, see Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992).

3. Dictionnaire Historique de L'Orthographe Française XIV-XV (Nina Catach ed., 1995).

4. 1 NINA CATACH, ET AL., OTHOGRAPHE ET LEXICOGRAPHIE 13 (1971).

5. Joseph Harriss, *Qu'est-ce que c'est? A Social Club or a Cultural Bastion? Academie Française*, SMITHSONIAN, January 1990 at 144, 152.

6. The key documents relating to the founding of the ALI are reprinted in THE AMERICAN LAW INSTITUTE 50TH ANNIVERSARY (ALI ed., 1973) [hereinafter ALI 50TH].

7. REPORT OF THE COMMITTEE ON THE ESTABLISHMENT OF A PERMANENT ORGANIZATION FOR THE IMPROVEMENT OF THE LAW PROPOSING THE ESTABLISHMENT OF AN AMERICAN LAW INSTITUTE, [hereinafter THE 1923 REPORT], reprinted in ALI 50TH, *supra* note 6, at 12.

8. *Id.* at 5.

community which would overthrow existing social, economic and political institutions. If it were, we as lawyers could afford to ignore it. But the opinion that the law is unnecessarily uncertain and complex, that many of its rules do not work well in practice, and that its administration often results not in justice, but in injustice, is general among all classes and among persons of widely divergent political and social opinions.<sup>9</sup>

How had this sorry state come about? "Two chief defects in American Law are its uncertainty and complexity."<sup>10</sup> Returning to the original premise, the report stated:

Perhaps, however, the most serious result of these defects is that they create a lack of respect for law. Their effect is the same as the effect of clear, certain but unjust law, and for the same reason; law to perform its functions must be adapted to the needs of life, and no such need was ever satisfied by uncertain and complex rules. . . . In our opinion the most important task that the bar can undertake is to reduce the amount of the uncertainty and complexity of the law. It is essential if an adequate administration of justice is to be had that lawyers awaken to the extent to which the law should be and may be simplified and clarified.<sup>11</sup>

The primary means to accomplishing this was to be a new kind of legal reference: "We are convinced therefore that the specific work which any organization created by the legal profession to improve the law should undertake on its formation is the production of such a 'Restatement of the Law.'"<sup>12</sup>

In addition to providing clarity and simplicity, the Restatements of the Law could also bring the substance of the law up to date.

We speak of the work which the organization should undertake as a restatement; its object should not only be to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the laws to the needs of life.<sup>13</sup>

The preparation of these Restatements was to be the work of the American Law Institute.<sup>14</sup>

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9. *Id.* at 11.

10. *Id.* at 15.

11. *Id.* at 16.

12. THE 1923 REPORT, *supra* note 7, at 21.

13. *Id.*

14. *Id.* at 42.

The ALI was incorporated the very same day that the 1923 Report was presented. Among its seven incorporators were the then serving Chief Justice of the United States Supreme Court, William Howard Taft, and one of his successors, Charles E. Hughes.<sup>15</sup> The Certificate of Incorporation reflected the role laid down in the 1923 report: "The particular business and objects of the society are educational, and are to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."<sup>16</sup> This language continues in force, and remains the stated goals of the ALI.

The formation of the ALI marks a general triumph of the "Langdellian" approach to the law in America. Certainly the mention of "scientific legal work" echoes Langdell's famous assertion "that the law is a science."<sup>17</sup> The premise is that by careful thought and analysis of the cases and statutes, underlying principles of law can be extracted and formulated into satisfactory rules of general applicability. This exercise is so familiar to most United States lawyers as to appear inevitable: it is, after all, the basic skill taught through the traditional "Langdellian" case method, a skill beaten into most of us, with greater or lesser painfulness, in law school.<sup>18</sup> Langdell's own work along this line included helping to define the very existence of a law of contracts.<sup>19</sup> "Courts had, of course, been deciding cases about contracts ever since there had been courts. But the idea that there was such a thing as a general law—or theory—of contract seems never to occurred to the legal mind until Langdell somehow stumbled across it."<sup>20</sup>

The Restatements have remained the pinnacle of this process of deliberative synthesis, so much so that they themselves take on the weight of binding authority, displacing the earlier material from which they have drawn their conclusions. Through this feedback loop, the law indeed becomes that which the case-reasoning method, practiced by the leading experts in the field, says

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15. *Id.* at 107.

16. ALI, THE AMERICAN LAW INSTITUTE'S ANNUAL REPORTS, SEVENTY-SECOND ANNUAL MEETING 57 (1995).

17. C. C. Langdell, Note, *Teaching Law as a Science*, 21 AM. L. REV. 123, 124 (1887).

18. See generally JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL ch. 2 (1978) (discussing the evolution of modern legal education); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s 52-53 (1983) (discussing Langdell's development of the case book method for legal instruction). For a discussion of the relationship between legal education and the process of developing a clarified and simplified body of legal doctrine, see TERRENCE C. HALLIDAY, LEGAL EDUCATION AND THE RATIONALIZATION OF LAW: A TALE OF TWO COUNTRIES—THE UNITED STATES AND AUSTRALIA, American Bar Foundation Working Paper No. 8711 (1982).

19. See C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (2d ed. 1880).

20. GRANT GILMORE, THE DEATH OF CONTRACT 6 (1974).

it ought to be. The chaos of the common law is tamed, and order and enlightenment reign with clarity and simplicity—or so the myth goes.

The purpose of this article is not to praise or criticize this process. Others have taken sides in the debate,<sup>21</sup> and pursuing it in adequate detail would require reliving much of the jurisprudential thought of this century. There is only room for one historical excursion in this article, and that excursion will be devoted to publicity itself. Rather, the mission of the ALI, in all its self-appointed glory, will be taken as a given. My goal instead will be to evaluate just how well the various scholars working under the banner of the ALI have performed their declared task with respect to a particular corner of doctrine: the right of publicity. Have they gotten to “fish” yet?

### *B. Restating Publicity*

Prior to publication of the *Restatement (Third) of Unfair Competition* (Restatement)<sup>22</sup> in 1995, the ALI had not previously addressed publicity as a separate doctrine in a Restatement. Now publicity has received four sections of its own. How did the ALI do? The exercise is welcomed, but it is by no means completely successful. While it represents a useful step toward a coherent body of rules for publicity, significant, unsolved problems remain. The opportunity for a real exercise in clarification and simplification has been missed.

Perhaps one shouldn't hope for too much. The very presence of the right of publicity in a Restatement demonstrates just how far a doctrine can come in a relatively short time. After all, publicity's first public appearance as an articulated right came in 1953, in an opinion authored by the noted federal appeals court judge and realist scholar,<sup>23</sup> Jerome Frank, in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>24</sup> Frank's bold exercise of activist jurisprudence enabled the law to circumvent limitations which had already begun to encrust the right of privacy, which itself at the time could claim less than fifty years of judicially recognized existence. When Frank made his leap to publicity in *Haelan*, it threw the whole field of rights in a person's identity into considerable turmoil. One court, trying to sort things out in 1956 in light of the *Haelan* decision, concluded with some exasperation: “The state of the law is still that of a haystack in a hurricane . . . .”<sup>25</sup> Since then, a number

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21. For a passionate attack on the ALI by a federal judge, see Paul A. Simmons, *Government by an Unaccountable Private Non Profit Corporation*, 10 N.Y.L. SCH. J. HUM. RTS. 67 (1992).

22. RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1993) [hereinafter RESTATEMENT].

23. This was a label he initially adopted for himself but eventually came to reject. JEROME FRANK, *LAW AND THE MODERN MIND* vii (1949).

24. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

25. *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 485 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

of America's leading legal scholars and some of its best judges have taken a shot at clarifying the field, with varying degrees of success.

Cumulatively, significant progress has been made in the job of sorting through the tangled pile of thought, and this progress is largely reflected in the new Restatement sections. That is the good news. The bad news is that there are still lingering areas of muddle and confusion in the doctrine of publicity, and the Restatement often reflects these as well. Returning to the spelling metaphor, the Restatement does get us past "xqlap," but perhaps only as far as "ghoti." It is to be hoped that courts and legislatures, in reaching for a clear formulation of rights in this area, will be able to sort out the strengths and weaknesses of the Restatement's position. For if future lawmakers, whether in the statehouse or the courthouse, become blinded by the good work of the ALI on the right of publicity, they will overlook the continuing problems, slowing the search for an even better formulation of the law of identity.

So, just what has the ALI done to deserve this faint praise? There are four Restatement sections on publicity. The first two, sections 46 and 47, are the most interesting and will receive the most attention in this article. Together they define the coverage of the right of publicity. The general rule is introduced in section 46, entitled "Appropriation of the Commercial Value of a Person's Identity: The Right of Publicity." It reads: "One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in [sections] 48 and 49."<sup>26</sup>

What constitutes a use for the purpose of trade receives separate treatment in section 47, entitled "Uses for Purposes of Trade:"

The name, likeness, and other indicia of a person's identity are used "for purposes of trade" under the rule stated in [section] 46 if they are used in advertising the user's goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user. However, use "for purposes of trade" does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.<sup>27</sup>

The latter two sections on publicity, sections 48 and 49, deal with remedies. Both contain a large number of non-exclusive and quite general factors to be weighed in an unquantifiable balancing test to be used in deciding what

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26. RESTATEMENT, *supra* note 22, § 46.

27. *Id.* § 47.



remedies are appropriate. Both sections 48 and 49 are so platitudinous, obvious and subjective as to deserve relatively little discussion.

In order to understand the nature of the Restatement's successes and failures, it is necessary to review both the societal context and the doctrinal history that shaped the formulations of publicity from which the Restatement authors started. Therefore, this article will first review the value of persona in our society, seeking useful categories for the ways in which attributes of identity are used. It will then present a history of the emergence of the right of publicity, a history that requires some detail in the telling. Much of the lingering confusion in the right derives from the definitional accidents of publicity's birth and development. Against this background, the new Restatement sections will be evaluated: how good is the work? Finally, I will suggest a somewhat different synthesis, an alternative Restatement, as it were, together with some specific suggestions for legislatures, courts, and commentators as they take the next steps in the development of the law of publicity within the context of a larger law dealing with attributes of identity.

## II. SOCIETAL BACKGROUND: THE VALUE OF PERSONA

The value of persona in our society has been fueled by economic and technological developments.<sup>28</sup> Among the many new phenomena sparked by

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28. The history and arguments presented here are built in large part from materials prepared by others who have worked in this field such as RESTATEMENT (SECOND) OF TORTS (1977) [hereinafter RESTATEMENT OF TORTS] and J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (1995). These two works will receive detailed discussion. Among the most helpful general resources are SHELDON W. HALPERN, *THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND "MORAL RIGHTS"* (1988); Frank G. Houdek, *Researching the Right of Publicity: A Revised and Comprehensive Bibliography of Law-Related Materials*, 16 HASTINGS COMM. & ENT. L.J. 385 (1994); Lisa A. Lawrence, *The Right of Publicity: A Research Guide*, 10 HASTINGS COMM. & ENT. L.J. 143 (1987). Important articles on the subject which have themselves figured in the development of the right include Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553 (1960); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954); William L. Prosser, *Privacy*, 48 CAL L. REV. 383 (1960); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Among recent treatments which have taken a broader view are ELLEN ALDERMAN & CAROLINE KENNEDY, *THE RIGHT TO PRIVACY* (1995); Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News and Social Change, 1890-1990*, 80 CAL. L. REV. 1133 (1992); Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199 (1986). The one-hundredth anniversary in 1990 of the Warren and Brandeis article led to a spate of articles and symposia, including those published in 41 CASE W. RES. L. REV. 643-928 (1991) and 10 N. ILL. U. L. REV. 387-542 (1990).

For an interesting treatment of publicity from a somewhat non-traditional economic perspective, see Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993). A more traditional economic analysis of the right appears in Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT.

the technical developments of the nineteenth century were the popular press and mass advertising. For some time, there had been newspapers, often limited to a particular political faction, and there had been the use of famous people's identities in naming inns and the like. With the spread of literacy and advances in mass printing technology, however, the scale of these activities changed dramatically. A new kind of newspaper came into being: one which focused less and less on inside political news and more and more on sensationalism, gossip, and crusading populism. In the United States, milestones in this process included Horace Greeley's founding of the *New York Tribune* in 1841, Joseph Pulitzer's acquisition of the *New York World* in 1883, and William Randolph Hearst's take-over of the *New York Journal* in 1895. Circulations exploded and newspapers multiplied, fueled in part by the advertising revenue from an equally explosive national economy.<sup>29</sup> As the source of goods moved from local, often personally known, manufacturers, to large companies with regional or even national distribution, mass advertising became the prime tool for introducing products to consumers.<sup>30</sup>

In order to be effective, both news and advertising need to attract and hold the interest and attention of people. They must, therefore, focus on the subjects that most interest humans. Chief among these are other humans. People, their faces, histories, and identities, captivate the interest of other people in ways that can be turned to commercial advantage and have economic value. While celebrities are of particular use in this way, the previously unknown have value as well. By the close of the nineteenth century, the identity of people, elements of their persona, and details about their lives had become widely usable, and therefore increasingly valuable, economic elements in both news and advertising. As one commentator wrote in 1890: "In all this, the advent of the newspaper, or rather a particular class of newspaper, has

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L. REV. 97 (1994). Madow is critical of the very existence of a publicity right. While he raises some interesting questions, there is a certain "if pigs could fly" counter-factuality to his arguments which ultimately renders them largely irrelevant to the actual development of the right, and so they will not be discussed here. A response to many of his arguments will appear in this author's *PRIVACY AND PUBLICITY: SOCIETY, DOCTRINE AND THE DEVELOPMENT OF LAW*. For the purpose of this article the justifications both for the publicity right and for the free speech factors which constrain it will be taken as generally accepted.

29. *Newspaper*, 8 THE NEW ENCYCLOPEDIA BRITANNICA, (15th ed. 1992) 661, 662. For a further description of the growth of the popular press, see DON R. PEMBER, *PRIVACY AND THE PRESS, THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT* 10-15 (1972); James H. Barron, *Warren and Brandeis, The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *Demystifying a Landmark Citation*, 13 SUFFOLK U.L. REV. 875, 888-891 (1979); Ken Gormly, *One Hundred Years of Privacy*, 1992 WISC. L. REV. 1335, 1350 (1992). For a discussion of the emergence of the "celebrity," see Madow, *supra* note 28 at 148-167.

30. For a description of the growth of personality-based advertising, see George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443, 457 (1991).

made a great change. It has converted . . . gossip into a marketable commodity."<sup>31</sup> If the mass reproduction and distribution of print and picture were the big media developments of the nineteenth century, the mass reproduction and distribution of sound and moving pictures have been the big developments of the twentieth century.<sup>32</sup> These developments have further fueled the massive rise in the value of human identity. One recent study notes:

Character merchandising is by no means a new science. The practice began way back in the nineteenth century, and indeed there are examples where Queen Victoria herself was used to endorse either one product or another. However, from its crude beginnings, the technique has developed tremendously and is no longer simply concerned with slapping the face of a top dignitary onto the product. Character merchandising is now rated as one of the most powerful weapons in the marketer's armory . . . .<sup>33</sup>

Throughout the twentieth century, the uses—and value—of a person's identity in the news, in fiction, in advertising, merchandising and the mass media generally, have only continued to grow. As one court recognized: "Television and other media create marketable celebrity identity value. Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit."<sup>34</sup> The value can be transferred by association.

A successful individual, such as an athlete, opera star, or media or sporting personality, has a valuable asset in his name and reputation, which is marketable in connection with products, and sometimes with services. The value depends on the public perception of the personality, and how established he has become in the "recognition factor" stakes.<sup>35</sup>

Curtis Management, Inc., a company located in Indianapolis, Indiana, squeezes \$125 million a year out of the publicity value of some 200 celebrities.<sup>36</sup> Famous people are not the only source of images useful to the media, advertising, and marketing worlds. As several of the cases discussed in this study will show, completely unknown individuals can be thrust into the public eye, bringing value in the process.

31. PEMBER, *supra* note 29, at 16 (quoting E.L. Godkin, *The Rights of the Citizen, IV: To His Own Reputation*, SCRIBNER'S MAGAZINE, July 1890 at 67).

32. For a description of the growth of these media, and in particular television, see HOWARD BLUMENTHAL & OLIVER R. GOODENOUGH, *THIS BUSINESS OF TELEVISION* xiii-xxiii (1991).

33. STEPHEN NOAKES & NICK TATE, *CHARACTER MERCHANDISING* 3 (1987).

34. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512 (9th Cir.), *cert. denied*, 113 S. Ct. 2443 (1993).

35. RICHARD BAGEHOT & GRAEME NUTALL, *SPONSORSHIP, ENDORSEMENT & MERCHANDISING: A PRACTICAL GUIDE* 130 (1990).

36. Jeff Barge, *Deceased Stars Haunting the Courtroom*, A.B.A. J., May 1995, at 33.

*A. Categorizing the Uses of Persona: Distinctions Useful and Confusing*

While the ways of turning humanity's innate fascination with personal identity to account are probably bounded only by humanity's ingenuity,<sup>37</sup> five principal modes of use can be fruitfully isolated as encompassing most of the current activity in the market place of the persona: (1) informational use, (2) creative use, (3) advertising use, (4) icon use, and (5) performance use. The first four are common to all of the modes of mass media; the fifth depends to a large degree on the electronic media born in the twentieth century.

*Informational* use involves the communication of purportedly factual information about a person to a wider audience. Implicit in this statement is a concern that the information so transmitted be in fact accurate. News is the classic case of such use, but history, biography, and other non-fictional presentations also fall into the informational category.

*Creative* use also involves the communication of information—but there is no longer the goal of factual accuracy. Rather, such use involves the construction of an admittedly fictional world of some kind. The inhabitants of this world, however, may be identifiably *real* people. Sometimes the fictional world containing recognizable people can aspire to a kind of hyper-reality, showing essential truths which might lie hidden in a more prosaically accurate depiction of the world. Sometimes the fictional world may be intentionally counterfactual, making some comment by contrast, through satire or lampoon. Often it seeks only to provide an escape from reality, rather than greater insight into it. Whatever the goal, all such worlds, to be at all intelligible to human readers, must draw to a greater or lesser extent on the world that actually exists and thus, to some extent, on the attributes and identification of actual people. As Justice Story, early in the history of the United States, summed up a similar point in copyright law:

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.<sup>38</sup>

The third use of personality, *advertising*, involves helping to sell products and services which are *not* themselves elements of the personality in question. This can involve endorsement: many people can be convinced to buy something which a familiar and respected figure actually or apparently uses herself. But endorsement is only the start of this kind of use. Almost any kind

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37. See *White*, 971 F.2d at 1398.

38. *Emerson v. Davies*, 8 F. Cas. 615, 619 (D. Mass. 1845).

of association with a venerated person can be helpful in sales, even if only to draw the attention of prospective buyers to the actual sales message. Professor McCarthy suggests an extreme example of this negated endorsement: "Famous football quarterback Ira Idaho may be the best in the league, but he has never tasted Double D beer. Why don't you?"<sup>39</sup> This outright admission that the person depicted is completely unaware of, let alone unassociated with, the product in question, is based on an actual ad which ran in England. A billboard sized picture of Ronald Reagan drew attention to an ad for Mansfield Beer, even though it admitted Reagan had never tasted the stuff.<sup>40</sup> Nor are celebrities the only source of power in this kind of image use. Otherwise anonymous people can provide images of value to wrap around products and services to draw attention and good associations to them.

Fourth, there is the trade in items where the thing of value being used is the persona itself. This *icon* use is clearest in the sale of pictures, figurines, and other pure representations of the person venerated. It also underlies the sale of T-shirts, lunch boxes, and other utilitarian items which bear the likeness of the venerated or desirable person. Eventually such a use can overlap into advertising, but there is enough clarity in the core difference to provide a usefully separate category.

Finally, there is the use of a person's identity as a *performer*, whether in her own right, as with a well-known singer or athlete, or as an actor portraying the role of another. Concerns over this use are the product of the electronic media. In the days when performance was of necessity live, the question of consent to the use of a performance was largely answered by the agreement to go on the stage or the playing field at all. Now performances, whether recorded and replayed, or transmitted live, can reach a national or international audience. The complexities of consent have increased considerably.

These five categories offer fruitful lines of demarcation. Another distinction, made by many statutes, courts and commentators, has been less helpful. This category revolves around words and phrases such as "commercial" or "for the purposes of trade." Such terms always need careful qualification and explanation when applied to any of the foregoing use categories in a medium of mass communication. All of these uses can be, and in the relentlessly for-profit world of America generally are, carried on as commercial activities, for the purposes of trade.<sup>41</sup> For instance, the decision of a popular news magazine to put Princess Diana or O.J. Simpson on the cover is very much influenced by the fact that such a picture will generally boost circulation. Indeed, if this journal were brought out by a popular

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39. MCCARTHY, *supra* note 28, § 5.4[A].

40. *Id.* at Fig. 5-2.

41. *See* MCCARTHY, *supra* note 28, § 7.1[B].

publisher, it would not be surprising for it to have a montage cover showing the Princess paired with Clint Eastwood, for reasons that will become clear later in this article. A set of distinctions which uses terms in such frequent conflict with their commonly understood meanings could probably use further clarification and simplification.

### III. THE HISTORICAL BACKGROUND I: THE DISCOVERY OF PRIVACY

#### *A. The Warren and Brandeis Article*

The best starting point for a history of the right of publicity, and the law of identity more generally, is an 1890 article in the Harvard Law Review entitled *The Right to Privacy*.<sup>42</sup> It was written by two formidable legal minds, Samuel Warren and Louis Brandeis. At the time the two were partners in a Boston law firm, and they had been first and second in the Harvard Law School class of 1877.<sup>43</sup>

Much myth has grown up around the inspiration for the article. The wedding of Warren's daughter, the story went, caused a frenzy of press attention which greatly annoyed Warren and inspired the article.<sup>44</sup> All of this has been convincingly disproved, not the least because Warren's daughter was no more than seven years old when the article was written.<sup>45</sup> Whatever the circumstance, there is a passion in the rhetoric which supports the idea of a personal experience with journalism at its most ravenous:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. . . . Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. . . . Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place

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42. Warren & Brandeis, *supra* note 28. There were of course antecedents to the Warren and Brandeis article, both in cases and commentary. See Barron, *supra* note 29, at 884-888, 922. Nevertheless, the ground-breaking effect of the article cannot be denied.

43. MCCARTHY, *supra* note 28, § 1.3[B]; Barron, *supra* note 29, at 909; Prosser, *supra* note 28, at 383.

44. This tale was promoted by no less prominent a legal scholar than William L. Prosser. See Prosser, *supra* note 28, at 383.

45. See Barron, *supra* note 29, at 893.

of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.<sup>46</sup>

The British Royal Family probably feels that little has changed since 1890.

Importantly, the focus of the Warren and Brandeis proposal is clearly on the *informational* uses of personality. In keeping with this, the harm they supposed is not economic, but related rather to reputation and “delicacy of feeling.” This approach had critical consequences for how they articulated their formulation of rights in identity. Warren and Brandeis argued that the right to prevent these supposed abuses already existed in the common law. The article derived the principle of “the right ‘to be let alone’”<sup>47</sup> largely from property law, citing a line of mostly British cases.<sup>48</sup> But Warren and Brandeis ultimately discarded the property model, in part because of theoretical concerns over the nature of a right whose very justification is to prevent exploitation,<sup>49</sup> in part to avoid unfavorable precedents,<sup>50</sup> but perhaps most importantly because Warren and Brandeis felt that non-economic, feeling-related harm underlay a right targeted at informational uses, where the law had traditionally shied away from property concepts.<sup>51</sup>

We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.<sup>52</sup>

Warren and Brandeis were not entirely consistent in jettisoning a property rationale. Their opening remarks were, “That the individual shall have full protection in person and in *property* is a principle as old as the common

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46. Warren & Brandeis, *supra* note 28, at 196.

47. *Id.* at 195 (quoting THOMAS M. COOLEY, COOLEY ON TORTS (2d ed. 1888)).

48. *Id.* at 201-12.

49. *Id.* at 200-01 (“But where the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property . . .”).

50. *Id.* at 202-04.

51. Warren & Brandeis, *supra* note 28, at 205.

52. *Id.* at 213.

law . . . .<sup>53</sup> and many of their citations were to cases that used a property rationale.<sup>54</sup> But while it starts with property notions, the article finishes with the focus on yellow journalism, improper revelation of information, hurt feelings, and the right to be left alone.<sup>55</sup> The ideas that “hurt feelings” were a prerequisite for protecting use of the persona and that the interests protected were not “property” profoundly shaped the initial development of the law governing rights in personal attributes. Like an outmoded or irregular spelling, a cogently articulated paradigm has its own durability in the law, even when it is a rather imperfect reflection of the unarticulated promptings of felt justice which it is used to describe.

### *B. The Trap of an Inappropriate Paradigm*

In creating new rights and duties, the law articulates rules of conduct in abstract terms, often attaching them to existing paradigms of explanation and definition. Unfortunately, these borrowings, like hand-me-down clothes, do not always fit as well as they might, particularly as the law grows. The borrowed definitions, rationales, and other attributes that seem to suit a legal principle in its youth can have unforeseen—and often negative—results as the realities with which the law is dealing develop and change.

There are, however, strong forces in the law that protect established paradigms from being modified or discarded. Holmes charted the glacial evolution which occurs in law and the tremendous durability of annunciated rules:

The customs, beliefs, or needs of a primitive time establish a rule or formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning it has received.<sup>56</sup>

Recognizing these tendencies, one contemporary writer has compared the development of intellectual property law to the panda's thumb: an evolutionary

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53. *Id.* at 193 (emphasis added).

54. *Id.* at 202-11.

55. *Id.* at 214-20. A useful discussion of the Warren and Brandeis article from the standpoint of the choice between tort and property theories appears in Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991).

56. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (1881).



development containing limitations which “stem from its remote accidental origins.”<sup>57</sup> The tort model proved just such a limiting start for privacy, so limiting in fact that it proved easier to “discover” a different paradigm—publicity—to deal with the new wrinkles, than to reshape the original. Benjamin Cardozo, while sitting on New York’s highest court, wrote: “Metaphors in the law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”<sup>58</sup> In the law, as in gardening and child-rearing, as the twig is bent so grows the tree. Paradigms not only empower, they also entrap.

### C. Roberson: *Privacy’s First Major Test*

Over ten years passed before the Warren-Brandeis privacy rule was significantly tested in the courts, first in New York and then in Georgia.<sup>59</sup> The first of these cases arose in New York State, and was decided by a closely divided Court of Appeals in 1902.<sup>60</sup> It involved the tribulations of Abigail Roberson, an attractive young woman whose face had been featured on widely distributed posters for a flour manufacturer paired with the slogan “Flour of the Family.” The problem was that Ms. Roberson had never agreed to this classic advertising use—her face had been pirated. According to her pleadings, she became the object of ridicule among her acquaintances. Sickened with mortification and shame, she took to her bed and pined. She also sued, basing her claim upon the right of privacy as advanced by Warren and Brandeis.<sup>61</sup>

Writing for the majority, Chief Justice Alton B. Parker allowed that the Warren and Brandeis article was “clever,”<sup>62</sup> but rejected its conclusions. Taking the article’s sweeping scope and anti-press, information-controlling pronouncements as the necessary baggage of privacy, Justice Parker feared that to recognize such a right would open wide Pandora’s box: “I have gone only far enough to barely suggest the vast field of litigation which would necessarily be opened up should this court hold that privacy exists as a legal

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57. Paul A. David, *Intellectual Property Institutions and the Panda’s Thumb: Patents, Copyrights, and Trade Secrets in Economic Theory and History*, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY 19, 22 (Mitchel B. Wallerstein et. al. eds., 1993).

58. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

59. The interim cases in and around the privacy right are discussed in Armstrong, *supra* note 30, at 454-455, and are cited in the New York and Georgia cases discussed below: *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902); *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

60. *Roberson*, 64 N.E. at 443.

61. *Id.* at 442-43.

62. *Id.* at 444.

right enforceable in equity by injunction, and by damages where they seem necessary to give complete relief.”<sup>63</sup>

Justice Parker was not wholly unsympathetic to Ms. Roberson’s predicament. Nonetheless, the scope of the Warren-Brandeis privacy right—explicitly targeted as it was to information uses—frightened him, and he was unprepared to act judicially.

[W]hile justice in a given case may be worked out by a decision of the court according to the notions of right which govern the individual judge or body of judges comprising the court, the mischief which will finally result may be almost incalculable under our system, which makes a decision in one case a precedent for decisions in all future cases which are akin to it in the essential facts.<sup>64</sup>

Rather, in a pattern familiar in such circumstances, he invited the legislature to act, and try to put the first spot on the canvas:

The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent. In such event no embarrassment would result to the general body of the law, for the rule would be applicable only to cases provided for by the statute. The courts, however, being without authority to legislate, are required to decide cases upon principle, and so are necessarily embarrassed by precedents created by an extreme, and therefore unjustifiable application of an old principle.<sup>65</sup>

Note that the invitation to the legislature is to act to limit *advertising* uses of the kind in fact at issue in this case, and not the *informational* uses on which Warren and Brandeis had focused. Indeed, part of what made the case inherently appealing was the lack of any informational value in the use of Ms. Roberson’s face.

The invited legislative sequel occurred in 1903, when New York State enacted a statutory “Right of Privacy”<sup>66</sup> aimed directly at the facts of the Roberson case and, on its face, dealing only with advertising, and perhaps icon, uses of identity. This right now appears at sections 50 and 51 of the New York Civil Rights Law.<sup>67</sup> Section 50, entitled “Right of Privacy,” is a criminal statute providing:

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63. *Id.* at 443.

64. *Id.* at 444.

65. *Roberson*, 64 N.E. at 443.

66. 1903 N.Y. Laws ch. 132, §§ 1-2.

67. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1992).

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.<sup>68</sup>

As a “common law” style pronouncement of general principle, section 50 is a fairly typical example. Section 51 provides a civil action for violations of the right, and authorizes injunctions and damages, including exemplary damages for knowing violations, as relief. By a process of accretion over the years, section 51 has come to contain some specifically tailored provisions one might expect in a statutory approach, such as exceptions for photo-shop advertising windows and for the display of photos of the author of a play at the theater.<sup>69</sup> In 1995, the New York legislature further amended section 51, adding the voice as a protected category.<sup>70</sup>

#### *D. The Roberson Dissent*

There was a vigorous dissent in *Roberson*, written by Judge John C. Gray. He maintained: “That the individual has a right to privacy, which he can enforce, and which equity will protect against the invasion of, is a proposition which is not opposed by any decision in this court, and which, in my opinion, is within the field of accepted legal principles.”<sup>71</sup>

In arguing for Ms. Roberson’s claim, Judge Gray asserted that she met the classic mental distress requirements of the Warren-Brandeis approach. He detailed the unwanted public exposure which the poster had brought on her:

We are bound to assume, and I find no difficulty in doing so, that the conspicuous display of her likeness in various public places has so humiliated her by the notoriety and by the public comments it has provoked as to cause her distress and suffering in body and mind, and to confine her to her bed with illness.<sup>72</sup>

But Judge Gray’s opinion also used the language of property in discussing Ms. Roberson’s claim. Concluding that the property approach had been too readily dismissed by Chief Justice Parker, he wrote:

I think that [the approach of the majority] is unduly restricted . . . by a search for some property which has been invaded by the defendants’ acts.

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68. N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992).

69. *Id.* § 51.

70. N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 1996).

71. *Roberson*, 64 N.E. at 449 (Gray, J., dissenting).

72. *Id.*

Property is not, necessarily, the thing itself which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law.<sup>73</sup>

He also indicated that intellectual property models existed and could be borrowed:

I think that this plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes as she would have if they were publishing her literary compositions. The right would be conceded if she had sat for her photograph; but if her face or her portraiture has a value, the value is hers exclusively, until the use be granted away to the public. Any other principle of decision, in my opinion, is as repugnant to equity as it is shocking to reason.<sup>74</sup>

The development of the law of privacy might have been quite different if the *Roberson* dissent, with its melding of property and personal dignity concepts, had been the majority. This difference would have opened up the scavenger hunt for a satisfactory articulation of the right to a different set of possible attributes—attributes that might have had an easier time in letting the courts adapt themselves to new conditions and grant relief against injuries made possible by the inventions and changing conditions of society. Although the *Roberson* dissent was extensively quoted by the majority in the next important right of privacy case, *Pavesich v. New England Life Ins. Co.*,<sup>75</sup> property aspects were not included as part of the argument and died as the law developed.<sup>76</sup>

#### E. Pavesich

Paolo Pavesich was an artist, living in relative obscurity, who suddenly found a picture of himself smiling out of a life insurance ad. The advertisement compared two photographs. One showed the happy, robust, but unnamed Mr. Pavesich, who, it stated, had thought to buy life insurance in good time. The other showed a decrepit and downcast person who had not and was now uninsurable. But Mr. Pavesich had never bought insurance from the company in question. The photographic negative was obtained from the photographer without Mr. Pavesich's consent. He sued, alleging both a violation of the right

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73. *Id.* at 450.

74. *Id.*

75. 50 S.E. 68 (Ga. 1905).

76. See Gordon, *supra* note 28, at 558.

of privacy and defamation.<sup>77</sup> The case was eventually heard by the Supreme Court of Georgia. Writing for a unanimous court, Justice Andrew J. Cobb squarely tackled the right of privacy question, even though he eventually granted relief on the defamation claim as well, and so could have ducked the issue.

The entire absence for a long period of time, even for centuries, of a precedent for an asserted right should have the effect to cause the courts to proceed with caution before recognizing the right, for fear that they may thereby invade the province of the lawmaking power; but such absence, even for all time, is not conclusive of the question as to the existence of the right. The novelty of the complaint is no objection, when an injury cognizable by law is shown to have been inflicted on the plaintiff. In such a case, "although there be no precedent, the common law will judge according to the law of nature and the public good."<sup>78</sup>

Any exercise of legal authority has the possibility of opening Pandora's box. This possibility should not stop courts from acting; rather the process must be trusted to work as well in fashioning a right of privacy as it works in other contexts:

It may be said that to establish a liberty of privacy would involve in numerous cases the perplexing question to determine where this liberty ended, and the rights of others and of the public began. This affords no reason for not recognizing the liberty of privacy, and giving to the person aggrieved legal redress against the wrongdoer, in a case where it is clearly shown that a legal wrong has been done. . . . In regard to cases that may arise under the right of privacy, as in cases that arise under other rights where the line of demarkation is to be determined, the safeguard of the individual, on the one hand, and of the public, on the other, is the wisdom and integrity of the judiciary. . . . [T]here need be no more fear that the right of privacy will be the occasion of unjustifiable litigation, oppression, or wrong than that the existence of many other rights in the law would bring about such results.<sup>79</sup>

Unlike the New York majority in *Roberson*, Justice Cobb sought a workable way to contain the anti-information aspects of the doctrine as Warren and Brandeis first formulated it:

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77. *Pavesich*, 50 S.E. at 68-69; MCCARTHY, *supra* note 28, § 1.4[B].

78. *Pavesich*, 50 S.E. at 69.

79. *Id.* at 72.

The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy has been that the recognition of such a right would inevitably tend to curtail the liberty of speech and of the press. The right to speak and the right of privacy have been coexistent. Each is a natural right, each exists, and each must be recognized and enforced with due respect for the other.<sup>80</sup>

Indeed, in this case, where the use was an *advertising* one, the court clearly thought that the constraints being imposed on the “liberty of speech and of the press” would have little impact on the core informational concerns of society underlying that liberty.

What we have ruled cannot be in any sense construed as an abridgment of the liberty of speech and of the press guaranteed in the Constitution. . . . [C]ertain it is that one who merely for advertising purposes, and from mercenary motives, publishes the likeness of another without his consent, cannot be said, in so doing, to have exercised the right to publish his sentiments.<sup>81</sup>

#### *F. The Cases Collide With the Constraints of the Paradigm*

A very interesting, but at the time unappreciated, transformation in the right of privacy took place between its exposition by Warren and Brandeis and its application in Georgia by decision and in New York by statute. The language of the New York statute and the cases before the *Pavesich* court were not anti-gossip, anti-intrusion, or anti-press.<sup>82</sup> The statute punishes an entity “that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person.”<sup>83</sup> The *Pavesich* court concluded:

[T]he law recognizes, within proper limits, as a legal right, the right of privacy, and . . . the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right . . . .<sup>84</sup>

Rather, both the New York legislature and the Georgia courts acted against the *appropriation of the commercial value of identity for the purposes of trade*, which corresponds with the Restatement's definition of the right of *publici-*

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80. *Id.* at 73.

81. *Id.* at 80.

82. See, e.g., David Bedingfield, *Privacy or Publicity? The Enduring Confusion Surrounding the American Tort of Invasion of Privacy*, 55 MOD. L. REV. 111, 115 (1992).

83. N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992).

84. *Pavesich*, 50 S.E. at 80-81.

ty.<sup>85</sup> The real focus of these statements is on the *nature* of the use. Relatively few of the subsequent privacy cases fit the Warren-Brandeis “yellow-journalism-gone-mad” paradigm. This paucity reflects the clear tensions, alluded to in *Pavesich* and discussed more fully later in this article, between a right to suppress non-defamatory information and the First Amendment rights of free speech and a free press.<sup>86</sup> But whatever the facts, most cases were still entrapped in the rhetoric of the Warren and Brandeis article and in its non-commercial, tort-based rationale of personal distress as the articulated foundation for the claim. The formulation might have been inadequate, but it was the leading precedent of the time.

One later commentator on the process, arguing in support of a property approach by asserting that its abandonment was either a mistake or an exaggeration, has suggested that some of the blame should be laid on plaintiffs and their counsel, because they continued to frame their complaints in terms of mental anguish.<sup>87</sup> But this argument makes a fault of a necessity. All of the articulated rationales in *existing precedent* pointed them toward mental distress. The twisting of an existing doctrine to meet new facts is a familiar theme in the history of the law. The moment of clairvoyance when the accumulated irrationalities are recognized and dealt with is the rare exception.<sup>88</sup> Even ALI committees do not always rise to the occasion.

One inevitable consequence of the use of the tort paradigm to define privacy was an accretion of tort-like attributes. These borrowings produced holdings that seemed at odds both with “natural law” fairness and with the Lockean principles of an individual’s rights in her own person, particularly in a commercial context. For instance, courts held that public people, who were accustomed to being in the headlines, could suffer little embarrassment from the commercial pirating of their name and likeness, and so deserved little, if any, protection either under statute or various common-law formulations.<sup>89</sup>

85. RESTATEMENT, *supra* note 22, § 46; *see also* MCCARTHY, *supra* note 28 § 1.11[C].

86. *See* Barron, *supra* note 29, at 880-81; Gordon, *supra* note 28, at 558; *see also infra* section V.A.

87. Gordon, *supra* note 28, at 554.

88. *See generally* HENRY S. MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 29-39 (1883).

89. *See, e.g.,* O’Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941) (finding that the use of a frequently photographed all-American football player’s picture on a calendar did not violate his right of privacy), *cert. denied*, 315 U.S. 823 (1942); Venturi v. Savitt, Inc., 468 A.2d 933, 935 (Conn. 1983) (holding that a golfer did not have an appropriation claim because the unauthorized use of his picture in an advertisement did not cause him the requisite harm); Pallas v. Crowley-Milner & Co., 54 N.W.2d 595, 597 (Mich. 1952) (finding that a professional showgirl “had cast aside the cloak of privacy”); Miller v. Madison Square Garden Corp., 28 N.Y.S.2d 811, 813 (Sup. Ct. 1941) (holding that the use of a photograph of the plaintiff which had been published previously to promote his business did not violate his right of privacy); *see generally* MCCARTHY, *supra* note 28, §§ 1.6 & 10.7[B]. Interestingly, one of the prime examples

Another tort-like attribute limited the right of privacy to the period of the individual's life. If the justification for the right is to prevent embarrassment and personal distress, then death presumably removes the problem. Similar considerations have limited the right to sue for defamation under traditional common-law principles,<sup>90</sup> but have not limited the duration of the moral rights of authors in some countries.<sup>91</sup> Reflecting this principle, the New York privacy statute restricted protection to "any living person," and the jurisdictions which found privacy in the common law generally followed suit.<sup>92</sup>

A third characteristic shared with tort law was the view that the privacy right was only releasable, and not transferable.<sup>93</sup> Since privacy was only a personal right to be left alone, there was no piece of property to transfer to a third party—all that could be given was consent as to a particular use. The right to give other releases remained with the individual, subject only to any contractually based exclusivity that might have been given in connection with an earlier release.<sup>94</sup> And yet some kind of transferability seemed inherent in a regime aimed at regulating the advertising and icon uses of persona. What could be done? Judge Frank circumvented this conundrum in *Haelan* by invoking, for the first time, a right of publicity.

#### IV. THE HISTORICAL BACKGROUND II: PRIVACY BEGETS PUBLICITY

##### A. *Haelan: Publicity Is Born*

Haelan Laboratories and Topps Chewing Gum, Inc. were rival manufacturers of chewing gum baseball cards. For some time, young people and a surprising number of adults have been willing to pay for cards with pictures

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cited by Warren and Brandeis was Marion Manola, a noted comic opera star. Warren & Brandeis, *supra* note 28, at 195 & n.7; see Dorothy Glancy, *Privacy and the Other Miss M*, 10 N. ILL. U. L. REV. 401 (1990).

90. RESTATEMENT OF TORTS, *supra* note 28, § 560.

91. See generally Stig Strömholm, XIV INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW *Copyright and Industrial Property* § 3-181 (J.C.B. Mohr, Friedrich-Karl Beier & Gerhard Schnicker, eds. 1990).

92. See, e.g., Peter L. Felcher & Edward L. Rubin, Comment, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1127 nn.11-12 (1980) (citing cases which held publicity rights to be uninheritable, analogizing to privacy rights); Halpern, *supra* note 28, at 1215.

93. See, e.g., *Hendrickson v. California Newspapers, Inc.*, 121 Cal. Rptr. 429, 431 (Ct. App. 1975) (finding that the right can not be asserted by anyone other than the person whose privacy has been invaded), and the cases cited therein. In this it resembles the U.K. "performance right," other than that in audio recordings. See Copyright, Designs and Patents, 1988 Act § 192 (Eng.).

94. See, e.g., *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*, 78 F.2d 763, 766-67 (5th Cir.) (restricting the subsequent use of baseball players' names on bats where the players had given the exclusive right to another manufacturer), *cert. denied*, 296 U.S. 645 (1935).



of well-known players on them, together with some statistical information on the back of the pictures, even when packaged with stale sticks of almost inedible bubble gum. From one perspective, this is a classic icon use of the personality of celebrities.<sup>95</sup> Haelan attempted to get a lock on this business by assembling a package of player releases, backed by exclusivity agreements. The problem for Haelan was how to sue when Topps continued to bring out its competing cards. In cases where Topps had gone after its own releases, Haelan could at least make a claim that Topps tortiously induced the players to breach their exclusivity agreement with Haelan. In cases where Topps acquired player releases from an independent actor or where Topps simply used the pictures and names without getting permission, Haelan had no privacy or interference claim to make. There was no grant of rights to Haelan to sue on the players' behalf, and even if there were, the public character of a ballplayer's life might leave a tort-based privacy claim, depending on mental distress, without recourse.

Judge Frank cut right through the problem. There was no one in court to whom the mental distress model could apply, and yet there was a thing of value the rights to which needed to be established. If the mental distress formulation was too confusing, clearly a new model was necessary.

With regard to such situations, we must consider defendant's contention that none of plaintiff's contracts created more than a release of liability, because a man has no legal interest in the publication of his picture other than his right of privacy, *i.e.*, a personal and non-assignable right not to have his feelings hurt by such a publication.

A majority of this court rejects this contention. We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross," *i.e.*, without an accompanying transfer of a business or of anything else. Whether it be labelled a "property" right is immaterial; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth.

This right might be called a "right of publicity . . . ."

We think that New York decisions recognize such a right.<sup>96</sup>

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95. For a description of the importance of these cards, see *Eckes v. Card Prices Update*, 736 F.2d 859, 860 (2d Cir. 1984).

96. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.) (citations omitted), *cert. denied*, 346 U.S. 816 (1953).

Judge Frank took into account the market place reality that the use of the identity of a public figure was something valuable in a world of mass media and mass marketing:

[I]t is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.<sup>97</sup>

Thanks to Judge Frank, both the advertising and icon uses could now be governed by rules rooted in the market place, rules that might well be better served, notwithstanding Judge Frank's diffidence, by the linkage to existing formulations of property law.

### *B. The Commentators' Battle*

The new publicity right gathered some early support. Melville B. Nimmer, the noted copyright scholar, picked up on the approach right away. It reflected a previously unaddressed reality and solved a lot of problems that had been gathering around privacy. In his 1954 article, *The Right of Publicity*,<sup>98</sup> Nimmer pointed out the limitations of privacy and other possible theories in protecting what he called "publicity values." He showed how the publicity right, tied to a property approach, gave a sound theoretical basis to a market in publicity values that already existed: "The substance of the right of publicity must be largely determined by two considerations: first, the economic reality of pecuniary values inherent in publicity and, second, the inadequacy of traditional legal theories in protecting such publicity values."<sup>99</sup>

Judicial and legislative support was slower in coming,<sup>100</sup> in part because of pure confusion at the conflicting labels and rationales which were rapidly proliferating. Plaintiffs urged a grab-bag of theories on judges seeking to resolve the ever-broadening questions of who owned what aspect of identity in relation to the emerging media. It was at this point that one court used the summary already alluded to:

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97. *Id.* at 868.

98. Nimmer, *supra* note 28.

99. *Id.* at 215.

100. MCCARTHY, *supra* note 28, § 1.9.

The state of the law is still that of a haystack in a hurricane but certain words and phrases stick out. We read of the right of privacy, of invasion of property rights, of breach of contract, of equitable servitude, of unfair competition; and there are even suggestions of unjust enrichment.<sup>101</sup>

The march of a property-based right of publicity also slowed when the right of privacy finally received a systematic and widely respected treatment from the tort standpoint. William Prosser, the noted scholar and Reporter of the *Restatement (Second) of Torts* (Restatement of Torts),<sup>102</sup> published an article entitled *Privacy* in 1960.<sup>103</sup> Prosser was forced to acknowledge that the right had grown in several different, and not easily reconciled, directions. He argued, however, that the law of privacy could be most sensibly summarized as a loosely unified, common-law tort with four distinct branches.

What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, "to be let alone." Without any attempt to exact definition, these four torts may be described as follows:

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

It should be obvious at once that these four types of invasion may be subject, in some respects at least, to different rules; and that when what is said as to any one of them is carried over to another, it may not be at all applicable, and confusion may follow.<sup>104</sup>

Prosser's approach prevailed, albeit posthumously, in the Restatement of Torts, at sections 652A-652I, when it appeared in 1977. The successes and failures of this approach, as clarified in the Restatement of Torts, will be discussed below. For the purposes of the current historical summary, it is sufficient at this stage to note some general points about these four categories.

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101. *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 485 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

102. *RESTATEMENT OF TORTS*, *supra* note 28.

103. Prosser, *supra* note 28.

104. *Id.* at 389 (footnotes omitted).

The first, physical intrusion into an area of privacy, is more an elaboration of the law of trespass<sup>105</sup> than a restriction on intellectual expression. It is not so much a right in the persona as in personal space. It concerns us little if at all in this context, other than as an example of the difficulty the law experiences in finding clear labels for felt wrongs. The second and third categories, a right against the public disclosure of private, embarrassing facts and a right against being shown in a non-defamatory, yet still false, light in a public context, most closely follow in the original Warren-Brandeis tradition, constraining information uses. As Prosser himself admits, they are closely linked to the existing law of defamation.<sup>106</sup> In many ways they are best seen as modern glosses on this hoary cause of action, and limited ones at that. As will be argued below, the law has not favored controls over informational uses, and the second and third categories run directly into the face of the First Amendment. The kinds of free-speech concerns recognized as early as *Roberson* and *Pavesich* have severely limited their applicability by the courts.<sup>107</sup> There has also been consistent academic criticism over just what vitality these branches really have in the law, so much so that their demise has been predicted.<sup>108</sup>

It is the fourth right, the "exploitation of attributes of the plaintiff's identity,"<sup>109</sup> that most overlapped with the publicity concept, and which regulated activity not largely covered by pre-existing law. Prosser recognized that this right should be transferable, and referred with approval to the result in *Haelan*.<sup>110</sup> He even surmised that this right was hard to hold in the tort framework, but dismissed the point: "The interest protected 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. It seems quite pointless to dispute over whether such a right is to be classified as 'property.'"<sup>111</sup> Perhaps because of

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105. *Id.* at 390.

106. *Id.* at 390, 398, 400.

107. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

108. *See* Erwin Chemerinsky, *In Defense of Truth*, 41 CASE W. RES. L. REV. 745 (1991); Susan M. Gilles, *All Truths Are Equal, But Are Some Truths More Equal Than Others?*, 41 CASE W. RES. L. REV. 725 (1991); J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. 783 (1992); Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699 (1991); John P. Elwood, Note, *Outing, Privacy, and the First Amendment*, 102 YALE L.J. 747 (1992); Lorelei Van Wey, Note, *Private Facts Tort: The End Is Here*, 52 OHIO ST. L.J. 299 (1991); *see also* Bezanson, *supra* note 28, at 1172-75. *See contra* Ruth Gavison, *Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech*, 43 S.C. L. REV. 437 (1992).

109. Prosser, *supra* note 28, at 401.

110. *Id.* at 406-08.

111. *Id.* at 406.

his tort preoccupation, Prosser still insisted that all four aspects of the right, as recognized by American courts, were in the tort mold.<sup>112</sup>

Preserving the tort model, however, kept the legal formulations directed at mental distress models. Prosser's own continued acceptance of the mental distress model, particularly in the question of damages for celebrity plaintiffs, has been pointed out by McCarthy.<sup>113</sup> Those looking at the economic aspect of a taking of identity, on the other hand, were drawn to the property-publicity approach. Such a hurt-based split, however, was not really necessary baggage of a property/tort distinction—each of these regimes can deal both with economic loss and with the impact of mental distress. The owner of a piece of real estate (a property concept) can seek redress against another intentionally coming onto her land equally if the trespass (a tort concept) causes her mental irritation or economic loss.<sup>114</sup> Likewise, an action for a personal injury (a tort concept) can provide compensation both for lost wages<sup>115</sup> and for pain and suffering.<sup>116</sup> With uses of the persona, *both* kinds of harm can exist, and both kinds of interests, personal and pecuniary, can be damaged. A right that limits recovery to one or the other invites perjury about motivations that are inherently internal and subjective.

Notwithstanding its essential artificiality, this split in harms felt by the plaintiff has remained a durable, if inconsistent, touchstone for the distinction between privacy and publicity. One scholarly view from the 1960s, for example, emphasized that:

[n]o man wants to be "used" by another against his will, and it is for this reason that commercial use of a personal photograph is obnoxious. Use of a photograph for trade purposes turns a man into a commodity and makes him serve the economic needs and interest of others. In a community at all sensitive to the commercialization of human values, it is degrading to thus make a man part of commerce against his will.

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Thus, there is really no "right to publicity"; there is only a right, under some circumstances, to command a commercial price for abandoning privacy.<sup>117</sup>

A nearly contemporary view took a directly opposite approach:

112. *Id.* at 408.

113. MCCARTHY, *supra* note 28, § 5.8[A].

114. *See* 7 STUART M. SPEISER, ET AL., THE AMERICAN LAW OF TORTS § 23:11 (1990); *see generally* RICHARD R. POWELL, POWELL ON REAL PROPERTY ¶ 707.3[2] (1991).

115. *See* 2 MARILYN MINZER, ET AL., DAMAGES IN TORT ACTIONS § 10.10 (1986).

116. 1 *Id.* § 4.01.

117. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 988-89 (1964).

The rationale for [the appropriation line of cases], although the matter may be more complex than first appears, is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay. In the last decade this point has become fully apparent, and we have had to talk of the right to publicity.<sup>118</sup>

Notwithstanding its limitations, the Prosser article and its tort framework at least provided a systematic approach where chaos and hurricanes had previously reigned. It became widely quoted as an authoritative source of law. Still, it did not fully capture the emerging, if largely inchoate, feelings of society about how the use of the persona should be allocated and controlled. Although it sought to encapsulate the field, to provide the moment of synthesizing clairvoyance, it fell short. For instance, while Prosser's fourth tort may have allowed for assignability, and so incorporated one result of the *Haelan* publicity-property approach, it was still paradigmatically incompatible with descendibility of the right and with damages to a celebrity plaintiff, both of which a property approach could permit without internal contradiction. In the context of these two issues, the right of publicity continued to be asserted as an alternative to privacy, and slowly gained acceptance.

### C. Zacchini

A major step in this process came in 1977 with the United States Supreme Court review of the case of *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>119</sup> Hugo Zacchini was a circus artist whose act involved being shot from a cannon. A local television news reporter videotaped the entire cannon shot, which was broadcast on the eleven o'clock news program. Mr. Zacchini sued, alleging a breach of his common-law right of publicity under Ohio law.

The main focus of the Supreme Court opinion was the applicability of press freedom concepts: was this an information case or a performance case? The holding will be discussed more fully below in that context. What is important at this stage is that the claim was explicitly stated to be in publicity and not in privacy. The opinion of the Court was written by Justice Byron R. White. He adopted the emerging orthodoxies about the harm-based differences between the two rights, although in adherence to the Prosser model he characterized them both as torts:

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118. Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966) (footnote omitted).

119. 433 U.S. 562 (1977).

The differences between these two torts are important. First, the State's interests in providing a cause of action in each instance are different. "The interest protected" in permitting recovery for placing the plaintiff in a false light "is clearly that of reputation, with the same overtones of mental distress as in defamation." By contrast, the State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment. As we later note, the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.<sup>120</sup>

At the level of the Ohio Supreme Court, the assertion of a "publicity" claim was necessary to clear the hurdles which might still have tripped up a "privacy" claim brought by a "public" plaintiff. After all, Mr. Zacchini made his living getting shot from a cannon daily in front of a paying audience. It was difficult to see how he could have suffered from mental distress over having his act seen by television viewers, unless the source of that distress was the loss of potential paying customers. The publicity claim circumvented the obstacle of mental anguish as articulated in the Warren-Brandeis approach. As the Ohio court put it:

It seems, of course, somewhat anomalous for the plaintiff, who regularly performs in public before large crowds, to claim a right of privacy. The very purpose of a performer is to lure people to come watch him, and certainly the plaintiff hoped not for privacy, but for a crowd of thrilled spectators. But there is no real anomaly; the "privacy" which the performer seeks is personal control over commercial display and exploitation of his personality and the exercise of his talents. In other words, performers and other public figures wish to keep the benefits of their performances private, or at least wish to retain control over them, in much the same way that any individual would wish to keep control over his name and face. Judge Jerome N. Frank has aptly called this aspect of privacy "the right of publicity" . . . .<sup>121</sup>

Although the Court's decision in *Zacchini* had no direct effect on the state law issue of the existence of the right of publicity, it nonetheless gave the right a national recognition and set in sharper focus the other major debate that publicity was being invoked to settle: descendibility.

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120. *Id.* at 573 (citations and footnote omitted).

121. *Zacchini v. Scripps-Howard Broadcasting Co.*, 351 N.E.2d 454, 459 (Ohio 1976), *rev'd*, 433 U.S. 562 (1977).

For instance, the descendibility issue in the privacy-publicity divide was squarely faced by a federal district court in Manhattan in 1975.<sup>122</sup> The case involved Stan Laurel and Oliver Hardy, the famous stars of many film comedies. The control over the post-mortem value of their personas was the subject of a suit brought by their widows (who were also the sole beneficiaries of their estates) and the widows' licensee against the Hal Roach Studios, holder of the copyrights in many of the films, and its licensee.

The court, in deciding for the widows, followed the lead of the *Haelan* court, finding that a New York common-law right of publicity existed and continued as an inheritable item of *property* after the death of the individual. In the opinion, Judge Charles E. Stewart, Jr. acknowledged the confusion over the privacy-publicity split, only to dismiss it as settled:

Many courts have recognized, as a property right, a person's use of his or her name and likeness. The commercial value of such a right stems from a person's ability to control its use. . . .

While much confusion is generated by the notion that the right of publicity emanates from the classic right of privacy, the two rights are clearly separable.<sup>123</sup>

The different characteristics of the two rights were taken as a given and then used to justify a further difference: descendibility.

In arguing for termination of the right, defendants appear to confuse the two essentially different concepts, that is, the traditional right of privacy which clearly terminates upon death of the person asserting such a right and the right of publicity which we think does not terminate upon death.

Since the theoretical basis for the classic right of privacy, and of the statutory right in New York, is to prevent injury to feelings, death is a logical conclusion to any such claim. In addition, based upon the same theoretical foundation, such a right of privacy is not assignable during life. When determining the scope of the right of publicity, however, one must take into account the purely commercial nature of the protected right. Courts and commentators have done just that in recognizing the right of publicity as assignable. There appears to be no logical reason to terminate this right upon death of the person protected. It is for this reason, presumably, that this publicity right has been deemed a "property right."

If it is not "a matter of dispute that plaintiff has a valuable property right in his name, photograph and image and that he may sell these

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

123. *Id.* at 843 (footnotes and citations omitted).



property rights," then what policy should operate to cut off this right at death?<sup>124</sup>

This is circular reasoning. The assurance with which it was put forward would be breathtaking, were it not that a system which requires precedent for innovation is doomed to circularity. Nonetheless, the desired result was achieved, or was it? The next major challenge to descendibility came in a California case involving the heirs of Bela Lugosi, but even in New York, thanks to the complexities of the federal system, the question remained to be visited again by the authoritative state court system.

*D. Lugosi, Valentino, and the California Statute*

At about the same time as Laurel and Hardy's widows were staking their claim to inheritable publicity values, the widow and son of Bela Lugosi, the most famous of the many actors to play Count Dracula on the screen, sued Universal Pictures in the hope of sharing in some of the image value which still flowed from that portrayal.<sup>125</sup> Universal had begun to license the image of Lugosi as Dracula for use in merchandising products with little, if any, relationship to the film itself. These included "plastic toy pencil sharpeners, soap products, target games, candy dispensers and beverage stirring rods."<sup>126</sup> Although the studio had a contract with Lugosi covering his performance in the film itself, the heirs argued that the rights transferred did not include the kind of image licensing, disassociated from the film itself, that was now occurring.<sup>127</sup>

Before reaching the contract question, however, it was necessary to decide whether there was any right under which the heirs could claim in the event that the contract was defective on the point. The plaintiffs pointed to a common-law right of publicity, which was creeping into the California legal world through the federal courts.<sup>128</sup> But this reliance was at least partially premature, for the California Supreme Court confirmed on appeal that the defendants must prevail.

Although California had for some years recognized a common-law right of privacy, it was cast in the Prosser tort mold, and so terminated at death.<sup>129</sup> In an unattributed decision of the California Supreme Court, which

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124. *Id.* at 844 (footnotes and citation omitted).

125. *Lugosi v. Universal Pictures*, 603 P.2d 425, 427 (Cal. 1979).

126. *Id.* at 449.

127. *Id.* at 427.

128. *Id.* at 429-31; *see Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 826 n.15 (9th Cir. 1974).

129. *Lugosi*, 603 P.2d at 428; *see also Hendrickson v. California Newspapers, Inc.*, 121 Cal. Rptr. 429, 431 (Ct. App. 1975) (holding that the right of privacy was purely personal and died

simply restated the opinion of the court of appeals and represented a bare four to three majority, the Lugosi family's claim was denied. The court based its decision on the necessity of use, a concept borrowed from yet another related body of law—trademark. The court would not recognize a descendible right of publicity where Lugosi himself had not exploited his impersonation of Dracula during his lifetime: "It seems to us rather novel to urge that because one's immediate ancestor did not exploit the flood of publicity and/or other evidence of public acceptance he received in his lifetime for commercial purposes, *the opportunity* to have done so is property which descends to his heirs."<sup>130</sup> Although other jurisdictions have adopted the lifetime use requirement,<sup>131</sup> some commentators have criticized it,<sup>132</sup> and many states which accept a descendible right of publicity have abandoned it altogether.<sup>133</sup>

The *Lugosi* court distinguished the right of publicity cases in other jurisdictions by the fact that lifetime exploitation had occurred. Although the negative implication remained that a lifetime right was possible, and that once exploited it might be followed by a post-mortem right, the opinion, in a time-honored pattern, threw the burden of creating a truly general right of publicity onto the legislature.<sup>134</sup>

In a concurring opinion, Justice Stanley Mosk muddied the waters further by basing his denial of the Lugosi claims on the fact that Lugosi was an actor in the Dracula role. Mosk concluded that the icon value now being exploited derived from the underlying character Dracula, rather than from Lugosi's role as the performer. The fact that Universal Pictures was licensing the Dracula bearing Lugosi's distinctive features, instead of a generic one, rather undercut the argument, although given the public domain status of the underlying

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with the individual).

130. *Lugosi*, 603 P.2d at 430.

131. See, e.g., *Martin Luther King, Jr., Ctr. for Social Change, Inc. v. American Heritage Prods., Inc.*, 508 F. Supp. 854, 863-65 (N.D. Ga. 1981) (finding no evidence that Dr. King commercially exploited his "right to privacy" during his lifetime), *rev'd and remanded* 694 F.2d 674 (11th Cir. 1983); *Hicks v. Casablanca Records*, 464 F.Supp. 426, 429 (S.D.N.Y. 1978) (holding that author Agatha Christie "exploited" her name during her lifetime); RESTATEMENT, *supra* note 22, § 46 cmt. h and reporters' note to cmt. h (stating that several of the jurisdictions recognizing a right of privacy after death require commercial exploitation prior to death).

132. See, e.g., MCCARTHY, *supra* note 28, § 4.1[C] (maintaining that the exploitation requirement erroneously limits the right of publicity to celebrities); Note, *An Assessment of the Commercial Exploitation Requirement as a Limit on the Right of Publicity*, 96 HARV. L. REV. 1703 (1983) (arguing that the commercial exploitation requirement is irrational and in conflict with the public policy of the right of publicity).

133. See, e.g., *Martin Luther King, Jr., Ctr. for Social Change, Inc.*, 296 S.E.2d at 706 (Ga. 1982) (protecting Dr. King's right of privacy after death, even when he did not commercially exploit it during his lifetime); MCCARTHY, *supra* note 28, § 4.3[C] (discussing cases in which the court ruled that non-celebrities had a right to control commercial use of their identity, notwithstanding the fact that it was unexploited).

134. *Lugosi*, 603 P.2d at 431.

Dracula novel, the Lugosi-featured Dracula was probably all Universal plausibly had to sell.<sup>135</sup> Perhaps the correct answer was that rights necessary to exploit the Lugosi Dracula in fact were divided between Universal and the Lugosi estate, and only in concert could they market the products in question.

The possibility of such an intermingling—and the essentially factual nature of the question—was more clearly recognized by the Third Circuit Court of Appeals in a 1994 decision, *McFarland v. Miller*.<sup>136</sup> Be that as it may, Justice Mosk asserted that Lugosi had no rights in himself as the Dracula character, whatever his rights to his own persona might have been.<sup>137</sup>

*Lugosi* also contained an eloquent dissent by Chief Justice Rose E. Bird. Following the accepted wisdom of the time, she argued that *Lugosi* was not a classic privacy case, but something different:

The appropriation of an individual's likeness for another's commercial advantage often intrudes on interests distinctly different than those protected by the right of privacy. Plaintiffs in this case have not objected to the manner in which Universal used Lugosi's likeness nor claimed any mental distress from such use. Rather, plaintiffs have asserted that Universal reaped an economic windfall from Lugosi's enterprise to which they are rightfully entitled.<sup>138</sup>

What justified the new and different claim was the emergence of the business of merchandising, which she recognized as involving both advertising and icon uses: "Today, it is commonplace for individuals to promote or advertise commercial services and products or, as in the present case, even have their identities infused in the products."<sup>139</sup> The value of this new kind of economic activity should belong to the individual, as the prime investor in his or her own image. As Chief Justice Bird stated: "An unauthorized commercial appropriation of one's identity converts the potential economic value in that identity to another's advantage. The user is enriched, reaping one of the benefits of the celebrity's investment in himself."<sup>140</sup>

The dissent went on to examine the parameters of the right, and concluded that it is indeed descendible. Chief Justice Bird even set a time period for its duration after death. In the absence of legislation, she analogized

135. *Id.* at 431-34 (Mosk, J., concurring).

136. 14 F.3d 912, 920-21 (3rd Cir. 1994) (commenting on Justice Mosk's concurrence and holding that a material issue of fact existed regarding whether the actor's identity was "inextricably identified" with the character).

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

138. *Id.* at 437 (Bird, C.J., dissenting).

139. *Id.* (Bird, C.J., dissenting).

140. *Id.* at 438 (Bird, C.J., dissenting).

to the Copyright Act of 1976,<sup>141</sup> and opined that the term should be life plus fifty years.<sup>142</sup>

In *Guglielmi v. Spelling-Goldberg Productions*,<sup>143</sup> a decision handed down only two days after *Lugosi*, Chief Justice Bird wrote a concurring opinion that articulated further the parameters of the right of publicity, this time treating a fictionalized creative use with far greater tolerance than she showed to the icon uses in *Lugosi*. This case involved a television film made about the life of Rudolf Valentino. His purported nephew brought suit for a violation of the common-law right of publicity. The *Guglielmi* court simply cited *Lugosi* for the proposition that the right of publicity was not descendible.<sup>144</sup> Justice Bird concurred in the result, agreeing that there was no violation of the plaintiff's rights, but not because of the descendibility question. Instead, she focused on the value of the *creative* use to society and on the leeway appropriately granted for such a use.

Film is a "significant medium for the communication of ideas." Whether exhibited in theaters or on television, a film is a medium which is protected by the constitutional guarantees of free expression. A film is presumptively protected and will forfeit that protection only if it falls within "narrowly limited classes" of cases.<sup>145</sup>

It seems reasonable to conjecture that she hoped to combine this concurrence with her dissent in *Lugosi* in order to establish what she perceived to be the proper basis of the California right of publicity. When the California legislature acted a few years later, she pretty well got her wish.

In 1985, as part of a general overhaul of its right-of-privacy legislation, California enacted a statutory post-mortem right of publicity.<sup>146</sup> It adopted the life-plus-50 approach, and made it clear that the right was available "whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise or goods, or for the purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods or service."<sup>147</sup> The inclusion of the lifetime right of publicity was made clear in changes to the lifetime right of privacy statute.<sup>148</sup> It is worth noting the broad freedom

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141. Copyright Act of 1976, 17 U.S.C. §§ 101-914 (1994).

142. *Lugosi*, 603 P.2d at 446 (Bird, C.J., dissenting); see 17 U.S.C. § 302(a) (1994).

143. 603 P.2d 454 (Cal. 1979) (en banc) (per curiam).

144. *Id.* at 455.

145. *Id.* at 457 (Bird, C.J., concurring) (citations omitted).

146. CAL. CIV. CODE § 990 (West Supp. 1996).

147. *Id.* § 990(h).

148. *Id.* § 3344 (West Supp. 1996).

which both of these statutes granted to informational uses,<sup>149</sup> and the somewhat more narrow freedom granted to creative uses of a deceased person's identity.<sup>150</sup> The shift away from use of the term "commercial," or some similar word, as a catch-all summary and toward recognizing somewhat different treatments among the different uses provided a refreshing change. The failure to give an open ended definition to identity,<sup>151</sup> however, coupled with the preservation of the common-law causes of action for living people,<sup>152</sup> put the subsequent focus of creative judges back on the common-law rights.<sup>153</sup>

#### E. Stephano: *The New York State Courts Answer Haelan*

The next step in this survey of the development of the law of privacy and publicity leads us back to New York State. The common-law right of publicity was invented in *Haelan* by a federal court trying to predict what a New York court would decide on the issue. But publicity got a mixed reception in the lower state courts in New York,<sup>154</sup> and doubts grew about the validity of the *Haelan* holding. Finally, in 1984 the Court of Appeals, New York's highest tribunal, rejected the notion that a separate right of publicity was a part of the New York common law in *Stephano v. News Group Publication, Inc.*<sup>155</sup>

In *Stephano*, a model brought suit against a magazine for publishing a picture of him when he had not signed a release. The statute required a *written* consent for a waiver. Although the decision turned on the newsworthiness of the use, rather than on the nature of the claim, the New York Court of Appeals at least partially clarified the question of a New York right of publicity. It reconfirmed that the sole source of law in this area was the New York privacy statute—sections 50 and 51 of the New York Civil Rights Law.<sup>156</sup> The court went on, however, to deal in the "privacy" context with at least some of the limits which had led to the invention of the right of publicity. It pointed out that the statute was not designed just "to protect the

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149. *Id.* §§ 990(j), 3344(d).

150. *Id.* § 990(n).

151. CAL. CIV. CODE §§ 990(a), 3344(a) (West Supp. 1996).

152. *Id.* § 3344(g).

153. *See infra* part III.C.

154. *Compare* Rosemont Enters., Inc. v. Random House, Inc., 294 N.Y.S.2d 122 (Sup. Ct. 1968) (holding that an action for the right to publicity lies only when one party commercially exploits another's right), *aff'd*, 301 N.Y.S.2d 948 (App. Div. 1969) with Paulsen v. Personality Posters, Inc., 299 N.Y.S.2d 501 (Sup. Ct. 1968) (holding that a public figure is not entitled to benefit from every commercial use of his name).

155. 474 N.E.2d 580 (N.Y. 1984).

156. *Id.* at 583-84.

sentiments, thoughts and feelings of an individual.”<sup>157</sup> “Commercial” interests were also protectable, and for this aspect of the statutory right the label of “publicity” was appropriate:

The statute . . . is not limited to situations where the defendant’s conduct has caused distress to a person who wishes to lead a private life free of all commercial publicity.

By its terms the statute applies to any use of a person’s picture or portrait for advertising or trade purposes whenever the defendant has not obtained the person’s written consent to do so. It would therefore apply, and recently has been held to apply, in cases where the plaintiff generally seeks publicity, or uses his name, portrait, or picture, for commercial purposes but has not given written consent for a particular use. . . . In this respect the statute parallels the common-law right of privacy which generally provides remedies for any commercialization of the individual’s personality without his consent. 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.<sup>158</sup>

This approach solved one of the privacy problems, the rights of celebrities. The decision left the two other main questions—transferability and descendibility—expressly open: “In view of the fact that the plaintiff is asserting his own right of publicity we need not consider whether the statute would also control assignment, transfer or descent of publicity rights.”<sup>159</sup>

The transfer issue is not clearly dealt with in the statute, and has not been treated authoritatively since *Stephano*.<sup>160</sup> If the commercial realities are given due weight in any subsequent review of the issue, the *Haelan* approach—if not its rationale—may still be good law. Descendibility, however, is another matter. Section 50 expressly mentions “the name, portrait or picture of any living person” and section 51 gives a civil cause of action for violations of section 50.<sup>161</sup> There seems little reason to think that a post-mortem right could exist within these bounds. In a decision handed down less than a year after the *Stephano* opinion, the court confusingly reserved the issue of “whether a common-law descendible right of publicity exists in this State.”<sup>162</sup> The federal courts, where the issue of publicity initially arose,

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157. *Id.* at 584 (quoting *Flores v. Mosler Safe Co.*, 164 N.E.2d 853, 855 (N.Y. 1959)).

158. *Id.* at 584 (citations omitted).

159. *Id.* at 584 n.2.

160. MCCARTHY, *supra* note 28, § 6.9[F][4].

161. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1992 & Supp. 1996).

162. *Southeast Bank, N.A. v. Lawrence*, 489 N.E.2d 744, 745 (N.Y. 1985).

have since concluded that there is no post-mortem right in New York.<sup>163</sup> The door was more firmly closed by the New York Court of Appeals in the 1993 case *Howell v. New York Post Co.*:<sup>164</sup> “While the courts of other jurisdictions have adopted some or all of these [other Prosser] torts, in this state the right to privacy is governed exclusively by sections 50 and 51 of the Civil Rights Law; we have no common law of privacy.”<sup>165</sup> Bills to amend or supplement the privacy statute to clarify these issues have been introduced in the New York legislature, but so far have not been acted upon.<sup>166</sup>

By the early 1990s, on the verge of its inclusion in the Restatement, the trend of the law towards recognizing the publicity right was well advanced. Nonetheless, in some states publicity was not yet a fully settled issue. McCarthy, in the June 1995 revision of his treatise, listed twenty-five of the fifty states as having recognized the right at common law, having enacted a statute that covers it, or both.<sup>167</sup> But in places like New York where the twig was bent early into a tort-like shape, and particularly where the approach was made statutory, the old articulations of privacy were still hard to break. McCarthy’s conclusion, with the benefit of hindsight, was that the distinction between privacy and publicity, at least in the appropriation area, was artificial and a source of unnecessary confusion.<sup>168</sup>

## V. THE HISTORICAL BACKGROUND III: AREAS OF AGREEMENT

Whatever the theoretical distinctions between privacy and publicity, in practice they have proved indistinguishable in many of their attributes. On these common issues the statutes can read identically, and the courts swap precedents freely. Two illustrative aspects are discussed in this section: free speech and the indicia of identity.

### A. Free Speech vs. Privacy and Publicity

As far back as the *Pavesich* case, courts and legislatures have recognized that free speech concerns must be balanced against individual rights in regulating uses of the persona. “The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy

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163. *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 586 (2d Cir. 1990).

164. 612 N.E.2d 699 (N.Y. 1993).

165. *Id.* at 703.

166. See MCCARTHY, *supra* note 28, § 6.9[D]; Alison Sachs, *It's Up to You, New York—It's Time for a Statutory Right of Publicity*, 20 COLUM.-VLA J.L. & ARTS 59 (1995).

167. MCCARTHY, *supra* note 28, § 6.1[B] (counting New York as one of the statutory jurisdictions).

168. See *infra* note 267 and accompanying text.

has been that the recognition of such a right would inevitably tend to curtail the liberty of speech and of the press."<sup>169</sup>

Our society has generally chosen to make the information and creative values of a person's identity a common good, relatively free for all to use. This commonality, and the free exchange of information which it permits, have deep roots in a liberal democracy and are broadly reflected in our law.<sup>170</sup> Such an approach underlies the First Amendment of the United States Constitution, and has been upheld by American judges of all political stripes.<sup>171</sup> In a passage in which the irony is palpable when compared to his prose in *Privacy*, Justice Louis Brandeis of the United States Supreme Court wrote:

The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it.<sup>172</sup>

Creative uses have also been given considerable license, as Justice Bird's attitudes in *Guglielmi* exemplify.<sup>173</sup>

Far less protected have been advertising, icon and performance uses. Reflecting a deeply felt distinction, advertising has always been the poor stepchild of the law of freedom of the press, and the first amendment protection of "commercial speech" has sometimes been awarded grudgingly or in a somewhat diluted form.<sup>174</sup> Courts have also made some distinction

169. *Pavesich*, 50 S.E. 68, 73 (Ga. 1905).

170. *See, e.g.*, the Court's discussion of free speech in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (maintaining that the opportunity for free speech is a fundamental principle to be considered "against the background of a profound national commitment").

171. *See, e.g.*, *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991) (finding that New York's Son of Son Law was an obvious content-based infringement on First Amendment rights); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (finding that absent actual malice, ad parody is protected as a free flow of ideas and opinions).

172. *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

173. *See supra* notes 143-45 and accompanying text.

174. *See, e.g.*, *Rubin v. Coors Brewing Co.*, \_\_\_ U.S. \_\_\_, 115 S. Ct. 1585 (1995) (finding that the Federal Administration Act provision prohibiting beer labels from displaying alcohol content did not advance the government's interest sufficiently to justify the commercial speech restriction); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding that the commission's restriction of commercial speech was greater than necessary to meet the government's interest); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (recognizing that commercial speech is unprotected by the First Amendment where its restriction is in furtherance of a substantial governmental interest);



between the informational aspect of advertising and its rather more purely manipulative trappings of image and puffery.<sup>175</sup> Thus, the threshold question for a free speech challenge is what kind of use is being challenged? If it is an informational or creative use, the free speech argument will weigh much more heavily; if it is an advertising, icon or performance use, far less so.

Even with a purported informational use, however, the free speech interest is not absolute. Little positive societal value, and often even considerable negative harm, exists in the dissemination of false information. The traditional law of defamation recognized this by immunizing truth but punishing falsehood.<sup>176</sup> However, by 1964 this pure truth standard was recognized to be too rigorous. Its application would inhibit society from enjoying all of the benefits available from a stream of information. After all, as James Madison observed: "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press."<sup>177</sup>

Therefore, in the classic case of *New York Times v. Sullivan*, the United States Supreme Court gave license to the disseminator of information to be wrong, at least about public figures, provided the disseminators did not act with "actual malice," defined for this purpose as knowledge of falsity or reckless disregard for truthfulness.<sup>178</sup> With respect to private figures, not acting in a sphere that makes them at least temporarily public, a somewhat more rigorous standard, akin to negligence, can be applied to defamation claims for false informational uses.<sup>179</sup>

These concerns about the kinds of use and about the truthfulness of the use have informed the law of privacy and publicity at both the state and federal levels. When the states have looked at the truthfulness issue, however, they have often confusingly proposed a test that uses a vocabulary of "commerciality." Commerciality is not normally synonymous with "falsehood." Furthermore, as previously noted, most media ventures in the United States involve the desire to make money, and can therefore be characterized

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*Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 384-87 (1973) (holding job advertisements in a newspaper "to be purely commercial advertising and unprotected"); *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (holding municipal ordinance forbidding distribution in the streets of printed handbills of commercial advertising matter constitutional). See generally P. Cameron DeVore & Robert D. Sack, *Advertising and Commercial Speech in COMMUNICATIONS LAW* 1995, at 51 (PLI Pats., Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. 422, 1995); MCCARTHY, *supra* note 28, § 8.3.

175. See, e.g., *Friedman v. Rogers*, 440 U.S. 1, 12 (1979) (finding that a trade name was "a form of commercial speech [with] no intrinsic meaning").

176. RESTATEMENT OF TORTS, *supra* note 28, § 581A.

177. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876)).

178. *Id.* at 280.

179. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974).

for the distinction to which they were being linked, but such terms were also being used elsewhere in free speech debates to distinguish informational and creative uses from advertising, icon and performance uses. The commercial terminology was not particularly helpful in making either set of distinctions, and its use in both more than doubled the confusion. Rather, "commercial" has served as a label, attached after the fact, for uses that do not fall within that sphere of responsible journalistic or artistic practice that are protected by a particular court's largely unarticulated vision of free speech.

In New York, for instance, advertising uses and informational uses have become associated, respectively, with the phrases "for advertising purposes" and "for the purposes of trade," both of which are controlled under sections 50 and 51.<sup>180</sup> As the trial judge described these terms in *Paulsen v. Personality Posters, Inc.*:<sup>181</sup>

Where the unauthorized use of name or picture has been purely for "advertising purposes," in the sense of promoting the sale of a collateral product, stringent enforcement of the statutory prohibition has presented comparatively little difficulty and relief from such "commercial exploitation" has been liberally granted even to those who might be characterized "public figures." A far more restrictive treatment, however, has been accorded the proscription against use "for the purposes of trade," particularly where the use has been in furtherance of the business of a communications medium. Consonant with constitutional considerations, it has consistently been emphasized that the statute was not intended to limit activities involving the dissemination of news or information concerning matters of public interest and that such activities are privileged and do not fall within "the purposes of trade" contemplated by Section 51, notwithstanding that they are also carried on for a profit.<sup>182</sup>

Nor do such definitional settings provide clear guidance for establishing the boundary between advertising and informational uses. The placement of this boundary arose in *Stephano*, which involved the use of photos in a magazine article concerning where to shop.<sup>183</sup> The court stated: "The only question then is whether the defendant used the plaintiff's picture for trade or advertising purposes within the meaning of the statute when it published his picture in the 'Best Bets' column without his consent."<sup>184</sup> The *Stephano* court held that the information content predominated:

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180. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1992 & Supp. 1996).

181. 299 N.Y.S.2d 501 (Sup. Ct. 1968).

182. *Id.* at 505-06 (citations omitted).

183. *Stephano*, 474 N.E.2d 580, 584-86.

184. *Id.* at 584.

The plaintiff does not dispute the fact that the information provided in the article is of legitimate reader interest. Indeed, similar information is frequently provided in reviews or news announcements of books, movies, shows or other new products including fashions. Nor does the plaintiff contend that it is uncommon for commercial publishers to print legitimate news items or reviews concerning products by persons or firms who have previously advertised in the publisher's newspaper or magazine. In short, the plaintiff has not presented any facts which would set this particular article apart from the numerous other legitimate news items concerning new products. He offers only his speculative belief that in this case the information on the jacket was included in the defendant's column for advertising purposes or perhaps, more vaguely, to promote additional advertising. That, in our view, is insufficient to defeat the defendant's motion for summary judgment. The rule exempting articles of public interest from the operation of the Civil Rights Law would, as a practical matter, lose much of its force if publishers of articles which are at least *prima facie* newsworthy were required to incur the expense of a trial to meet such general and insubstantial accusations of disguised advertising.<sup>185</sup>

This resolved the particular case, but little general guidance was given on drawing the line in future cases.

"Commerciality" versus "newsworthiness" has sometimes turned on the freshness of the items reported. The early cases, perhaps sharing some of the Warren-Brandeis vision of the news media run mad, were sympathetic to reformed felons whose sordid pasts were truthfully dredged up some years later with terrible results to their attempts to lead new and respectable lives. For instance, in the 1931 case *Melvin v. Reid*,<sup>186</sup> the plaintiff was a former prostitute who had been tried for murder and acquitted. After she had forsaken her wicked ways and married happily, a movie entitled "The Red Kimono" was produced based on her story, revealing her shocking past and using her real name. This disclosure of admittedly true information was too much, felt the court, for "[e]ven the thief on the cross was permitted to repent during the hours of his final agony."<sup>187</sup> Over time, however, courts have generally become less sympathetic to the reformed criminal alleging stale news and more and more protective of the disclosure of true, if embarrassing, information.<sup>188</sup>

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185. *Id.* at 586 (citation omitted).

186. 297 P. 91 (Cal. Dist. Ct. App. 1931).

187. *Id.* at 93.

188. *See, e.g.,* *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817 (D.D.C. 1955) (holding that a television program based on the plaintiff's past criminal activity, but not using his name, did not violate his right of privacy); *Leopold v. Levin*, 259 N.E.2d 250 (Ill. 1970) (holding that a fictionalized version of the plaintiff's prior criminal activity did not violate his

Rather than worrying about time factors, the analysis has come to turn on the level of public interest and the truthfulness of the report. Although truthfulness is a prime factor in the constitutional analysis, it also enters at the state level in the "commerciality" analysis. For instance, the ever-reclusive Howard Hughes tried to use New York's privacy statute to suppress the publication of a book about him by exclusively selling his rights of privacy and publicity to a friendly corporation. This company then sued the publisher of the unauthorized biography. Although the court also relied on constitutional free speech grounds, it held:

The allegation that the book was published for "purposes of trade" and profit does not as plaintiff seeks to imply, alter its protected status. The publication of a newspaper, magazine, or book which imparts truthful news or other factual information to the public does not fall within "the purposes of trade" contemplated by the New York statute, even though such publication is sold for a profit.

The remaining ground on which plaintiff seeks to justify this suit is the assignment to it of Hughes' "right of publicity". . . . The publication of a biography is clearly outside the ambit of the "commercial use" contemplated by the "right of publicity" and such right can have no application to the publication of factual material which is constitutionally protected.<sup>189</sup>

This brings us to the impact of the First Amendment on the law of privacy and publicity.

### *B. The First Amendment Standard*

The First Amendment standard restricting the right of privacy was established in 1967 by the Supreme Court in *Time, Inc. v. Hill*.<sup>190</sup> The case involved a family which had been held hostage in their home by a criminal. The incident had been widely reported, and formed the basis of a novel and play, both called *The Desperate Hours*. The production of the play was publicized through an article in *Life* magazine, which took actors from the play to the actual house where the Hill family had been held, and then staged

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right of privacy); see also *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir.) (finding that *New Yorker* article did not violate past child prodigy's right to privacy), *cert. denied*, 311 U.S. 711 (1940). But see *Briscoe v. Reader's Digest Ass'n, Inc.*, 483 P.2d 34 (Cal. 1971) (finding that the publication of plaintiff's name in connection with criminal activity eleven years after plaintiff's involvement created a cause of action). See generally Gordon, *supra* note 28, at 590; Prosser, *supra* note 28, at 396.

189. *Rosemont Enters., Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122, 128-29 (Sup. Ct. 1968) (citations omitted).

190. 385 U.S. 374 (1967).

fictionalized incidents from the play in the house, with the false implication that they reenacted the Hills' actual experience.<sup>191</sup> Richard Nixon, during his time in private practice in New York City and ever in conflict with the press, argued the case for the Hills.

The courts in New York state had followed the mixed fiction versus fact and advertising and trade versus newsworthiness approach:

Although the play was fictionalized, Life's article portrayed it as a reenactment of the Hill's experience. It is an inescapable conclusion that this was done to advertise and attract further attention to the play, and to increase present and future magazine circulation as well. It is evident that the article cannot be characterized as a mere dissemination of news, nor even an effort to supply legitimate newsworthy information in which the public had, or might have a proper interest.<sup>192</sup>

In a case involving similar issues that had been winding its way through the New York courts at the same time, the New York Court of Appeals made it clear that truthful reporting was privileged while fictionalized reporting was not.<sup>193</sup>

The United States Supreme Court held, however, that the standard of fictionalization versus truthfulness was too exacting for the First Amendment right of free speech. Rather, in his majority opinion Justice William J. Brennan borrowed the "malice" standard from the Court's analysis in defamation cases, and most notably from *New York Times v. Sullivan*.<sup>194</sup> Statements about public figures, even though false and harmful, were privileged unless they were made with "malice," defined again as actual knowledge of falsity or a reckless disregard for the truth. This standard is best explained in reverse: a news organization or other media entity will not be held liable if it has acted at all responsibly in its fact-gathering about a public figure, even if in the end it is wrong about what it publishes to the world. The Supreme Court in *Time v. Hill* applied this approach to privacy claims, and remanded the case for further proceedings at the state level to evaluate the behavior of *Life*'s reporters.<sup>195</sup>

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191. *Id.* at 378-79.

192. *Hill v. Hayes*, 240 N.Y.S.2d 286, 290 (App. Div. 1963).

193. *Spahn v. Julian Messner, Inc.*, 221 N.E.2d 543 (N.Y. 1966) (involving a "biography" of a well-known sports figure where the author simply made up much of the book).

194. 376 U.S. 254 (1964).

195. *Time, Inc.*, 385 U.S. at 391-97. The later case of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) upheld the media's constitutional right to publish the name of a deceased rape victim in the face of a state "privacy" statute aimed at keeping such victims anonymous, confirming the constitutional privilege for truthful reporting. See also Jon E. Grant, Note, "Outing" and Freedom of the Press: Sexual Orientation's Challenge to the Supreme Court's Categorical Jurisprudence, 77 CORNELL L. REV. 103, 117-18 (1991).

Although the *Time v. Hill* holding applied to a claim that had been characterized as belonging to the “false light” branch of the right of privacy, most courts presumed that it also provided the answer for appropriation privacy and right of publicity cases: a true, informational use in the media would be immunized. But the 1977 decision of the Supreme Court in *Zacchini* made it clear that the constitutional rules on appropriation privacy and publicity have some wrinkles of their own.<sup>196</sup>

The basic facts of the *Zacchini* case have been outlined above. The key to the constitutional discussion at the state level was that there was no falsehood in the news report of a matter of legitimate public interest: the television station showed all of Mr. Zacchini’s act exactly as it occurred. The Ohio Supreme Court, applying the *Time v. Hill* approach, thought that this was the end of the matter: an informational use, no falsehood, therefore immunity.<sup>197</sup> But a one-vote majority of the Supreme Court viewed the case differently. Justice White’s opinion analogized the property aspects of the right of publicity to copyright law, and made the distinction between reporting the facts of the performance and broadcasting the performance itself.

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. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner . . . .<sup>198</sup>

Thus, in Justice White’s view, a *performance* use had predominated, overcoming any *informational* aspect and bringing a totally different calculus to bear.

Four justices dissented. Justice Louis F. Powell, Jr., in an opinion joined by two others, focused on the television station’s actions: the broadcast was a “regular news program,” not “a subterfuge or cover for private or commercial exploitation.”<sup>199</sup> Notwithstanding the different results, the analytic approaches of Justices Powell and White are in fact quite similar. For both, the goal was to allow informational use while preventing someone from inappropriately getting something for nothing in the business of performance.

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196. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 569-79 (1977).

197. *Id.* at 565.

198. *Id.* at 574-75 (citations omitted).

199. *Id.* at 581 (Powell, J., dissenting). Of course this very distinction, although common, disregards the private and commercial nature of regular news programs.

They simply disagreed over the nature of the use of Mr. Zacchini's act in the local newscast: did its performance or informational attributes predominate?

Lower courts continue to give relief to personalities suffering from image rip-off in a purported informational context, notwithstanding the First Amendment, and they continue to describe both the falsehood and the nature of use questions under labels of "commerciality." For instance, in a 1983 California decision, the California Court of Appeals reviewed a claim that the *National Enquirer*, a notoriously sensational weekly tabloid newspaper, had wrongly appropriated Clint Eastwood's celebrity appeal when it ran a story headlined "Clint Eastwood in Love Triangle with Tanya Tucker."<sup>200</sup> Eastwood argued that the story was a complete fabrication and, therefore, a violation of his rights of privacy and publicity. The *National Enquirer* sought dismissal of the case, largely on constitutional grounds. Overturning the lower court, the court of appeals allowed the case to go forward, pointing out that if the article were a fabrication, it would not be privileged under *Time v. Hill*. Tying the two constitutional strands back together, the court stated:

Finally, Enquirer contends that falsity is the predicate, not for commercial appropriation, but for false light claims. We disagree.

As noted earlier, all fiction is literally false, but enjoys constitutional protection. However, the deliberate fictionalization of Eastwood's personality constitutes commercial exploitation, and becomes actionable when it is presented to the reader as if true with the requisite scienter.<sup>201</sup>

Free speech and publicity had another balancing session in a recent case involving Vanna White, the widely recognized performer on the game show *Wheel of Fortune*.<sup>202</sup> Ms. White has achieved a high level of celebrity in her role as a generally silent letter-turner, and the name "Vanna" standing by itself is widely recognized as referring to her. Samsung, a manufacturer and distributor of electronic goods, prepared a series of advertisements that showed the fate of celebrities and other popular culture symbols in the twenty-first century, comparing their longevity to that of Samsung products. One ad showed a picture of a robot, with hair and dress very much like that of Ms. White, standing in a familiar Vanna pose in front of a *Wheel of Fortune* style game board. The caption read "Longest running game show. 2012 A.D." While Samsung and its advertising agency had gotten the permission of the celebrities actually depicted in other ads in the series, they had not gotten the

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200. *Eastwood v. Superior Ct.*, 198 Cal. Rptr. 342, 345 (Ct. App. 1983).

201. *Id.* at 352.

202. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512 (9th Cir.), *cert. denied*, 113 S. Ct. 2443 (1993).

permission of Ms. White. She sued.<sup>203</sup> Here, the free speech issue was whether the creative use of parody predominated over the advertising context.

Although such parody aspects can prevail in a classic First Amendment free speech analysis under copyright law,<sup>204</sup> they failed here in light of what was seen by the majority as a cold-blooded taking of identity for use in an advertisement under a thin veil of humor.<sup>205</sup> The majority felt that the use was not at its heart a creative one, but rather advertising. The dissent argued against the extension of the common-law right to a case where the actual person is patently not being used.<sup>206</sup>

The passions ignited by this case were not limited to the actual litigants. The judiciary of the Ninth Circuit became sufficiently interested that a vote was requested by an active judge on the question of a rehearing en banc. The rehearing was denied by a majority of the judges voting, and Ms. White's victory, at least in surviving summary judgement, was confirmed.<sup>207</sup> One of the minority, Judge Kozinski, was moved to write a long dissent. *White* was a *creative use* case, he argued, and the majority's extension of the right of publicity seriously tipped the societal balance between intellectual property rights and free expression.

Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.<sup>208</sup>

Parody, Judge Kozinski argued, has long been recognized as a defense against copyright infringement—why should it not apply here to the commercial with the blonde robot?<sup>209</sup> The *White* case has engendered much commentary, and some scholars suggest that the case goes too far.<sup>210</sup>

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203. *Id.* at 1396-97.

204. *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1164 (1994) (holding that the commercial nature of a rap group's parody of a copyrighted song did not prevent a claim of "fair use").

205. *White*, 971 F.2d at 1401.

206. *Id.* at 1402-08 (Alarcon, J., concurring in part, dissenting in part).

207. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512 (9th Cir.), *cert. denied*, 113 S. Ct. 2443 (1993).

208. *Id.* at 1513.

209. *Id.* at 1517-21; *see also* Gretchen A. Pemberton, *The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity*, 27 U.C. DAVIS L. REV. 97 (1993).

210. *See* Michael E. Hartmann & Daniel R. Kelly, *Parody (of Celebrities, in Advertising), Parity (Between Advertising and Other Types of Commercial Speech), and (the Property Right of) Publicity*, 17 HASTINGS COMM. & ENT. L.J. 633, 647-54 (1995); Pemberton, *supra* note 209,



### C. *Indicia of Identity*

The question of just what aspects of a person's identity are protected has been the point of contention in many of the reported cases, and is a point of great similarity between privacy and publicity.<sup>211</sup> In most of these cases, there is no dispute over the nature of the use—they are clear examples of advertising. Rather, the question is to whom does the use refer, and in what manner is it made? By and large, courts and juries have been able to look beyond the limits of prior formulations to keep pace with the imagination of would be users.

In *Cohen v. Herbal Concepts, Inc.*<sup>212</sup> the New York State Court of Appeals faced the complaint of an irate woman who claimed that a picture of her and her daughter had been used to market a cosmetic product without her consent. What was unusual about the case was that the photo in question did not show the face of the two individuals, but instead a rear view, nude. They had been bathing naked in a secluded spot when a photographer had intruded with his prying lens. The husband (and father) had chased the intruder away, but not before the offending photograph had been taken. The case demonstrates how images of quite anonymous people can bring value to an unrelated product if they and the setting provide attractive images.

New York cases had previously established that a section 51 claim requires the use of an *identifiable* likeness. Truly generic images, even if inspired by a real person, are unrecoverable. The defendants in *Cohen* argued that the posterior view used here was not identifiable. The husband argued otherwise. He, at least, recognized his wife from the photo, and not just because he was present when the photo was taken.<sup>213</sup> Cases like this one, involving nudity and sex, often arouse judicial sympathy. Here, the court accepted the husband's assertion at face value and awarded damages to the plaintiff.

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at 98-100; John F. Hyland & Ted C. Lindquist, III, Note, *White v. Samsung Electronics America, Inc.: The Wheels of Justice Take an Unfortunate Turn*, 23 GOLDEN GATE U. L. REV. 299 (1993).

211. See generally Seth E. Bloom, *Preventing the Misappropriation of Identity: Beyond the "Right of Publicity,"* 13 HASTINGS COMM. & ENT. L.J. 489 (1991) (discussing the scope of publicity); Steven T. Margolin, Comment, *From Imitation to Litigation: Expanded Protection for Commercial Property Rights in Identity*, 96 DICK. L. REV. 491, 498-502, 504-508 (1992) (stating that the cases show a trend towards protecting a person's style and characteristics); Leonard A. Wohl, Note, *The Right of Publicity and Vocal Larceny: Sounding Off on Sound-Alikes*, 57 FORDHAM L. REV. 445 (1988) (discussing the adoption of Prosser's privacy doctrine as a source for publicity law and the expansion of publicity rights).

212. 472 N.E.2d 307 (N.Y. 1984).

213. *Id.* at 309-10.

The plaintiff in *Motschenbacher v. R.J. Reynolds Tobacco Co.*<sup>214</sup> faced a different problem in proving a taking of his identity. Lothar Motschenbacher was a famous race car driver who drove a car with distinctive markings. Reynolds manufactures the Winston brand of cigarettes. Reynolds based an advertisement for Winstons on a photo of Motschenbacher's car, pictured in the foreground with several others in the middle of a race. The driver's features, however, were indistinguishable. A "balloon" appeared from the car which declared, "Did you know that Winston tastes good, like a cigarette should?" The picture had been doctored to cloud identification. All of the numbers on the cars had been changed, and a spoiler had been added to the rear of Mr. Motschenbacher's car. Nonetheless, distinctive colors, pinstriping and an unusual oval shape encircling the car's number remained. The federal court, applying its view of California common law and Prosser's appropriation tort in its economic incarnation, held that these factors were sufficient to warrant relief. "We need not decide whether [the California courts] would do so under the rubric of 'privacy,' 'property,' or 'publicity.'"<sup>215</sup> Notwithstanding the alterations made by Reynolds, knowledgeable people would recognize the car and its driver and presume the rest.

A different wrinkle came up in *Onassis v. Christian Dior-New York, Inc.*<sup>216</sup> Christian Dior had created as part of its advertising a fictional trio known as "the Diors"—one female, two males, the whole menage a little ambiguous. In the campaign, the Diors turn up in a variety of chic spots, including the wedding of two of the three. In the picture of the wedding, the guests include a number of real-life minor celebrities and one fake—a woman who bears a striking resemblance to Jacqueline Kennedy Onassis. The resemblance was heightened by the dress and make up which the fake, a secretary named Barbara Reynolds, had put on for the occasion.<sup>217</sup> Ms. Onassis sued in New York under section 51 of the Civil Rights Law. The defendants argued that her claim must fail. Quite literally, they had not used Ms. Onassis' picture or portrait, they had used the picture of someone else.<sup>218</sup> The court was not persuaded: it held that a real face can be used to create a portrait of someone else altogether, as was exactly the intent in the advertisement.<sup>219</sup>

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214. 498 F.2d 821 (9th Cir. 1974).

215. *Id.* at 825-26 (notes omitted).

216. 472 N.Y.S.2d 254 (Sup. Ct. 1984), *aff'd*, 488 N.Y.S.2d 943 (App. Div. 1985).

217. Ms. Reynolds carried on a regular sideline in this impersonation, handled by Ron Smith Celebrity Look-Alikes, a company which has figured in more than its share of privacy and publicity litigation. *Id.* at 257.

218. *Id.* at 258.

219. *Id.* at 263.

A further extension of the idea of identity took place in *Carson v. Here's Johnny Portable Toilets, Inc.*,<sup>220</sup> in which the court ruled on the use of the name "Here's Johnny" to identify a portable toilet service. John W. Carson, better known by the nickname "Johnny," objected to the double pun behind the choice of this name. The manager of the portable toilet company admitted that the use of "Here's Johnny" in the name of his firm was inspired by its connection with the entertainer and his distinctive "Here's Johnny" introduction on *The Tonight Show*. In case anyone missed the point, the firm's slogan was "The World's Foremost Comedian."<sup>221</sup> The question was whether such a connection could prevent the use of the phrase "Here's Johnny." Carson had been active in promoting products associated with his name, but he had never been active in the portable toilet line, so there was little likelihood of confusion. Therefore, a trade name or unfair competition claim could not stand.<sup>222</sup> The privacy and publicity issue, however, remained.

The federal appeals panel divided on the issue two to one. The majority applied Michigan common law rights of privacy and publicity, presuming that Michigan would recognize the publicity right,<sup>223</sup> and citing Prosser's *Handbook of the Law of Torts* in support of publicity's general acceptance.<sup>224</sup> The court held for Mr. Carson, stating: "The right of publicity, as we have stated, is that a celebrity has a protected pecuniary interest in the commercial exploitation of his identity. If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used."<sup>225</sup> In so holding, the court made reference to the identification of Mr. Motschenbacher through his car and also cited a case involving Muhammad Ali, where use of the phrase "The Greatest," in connection with an offensive, nude caricature of a boxer,<sup>226</sup> had been sufficient to establish identity.<sup>227</sup> The dissent protested that the majority approach would result in the removal of standard phrases from the language by their mere association with a public figure.<sup>228</sup> Again, the basic difference is in the perception of the nature of the use. The dissent treats *Carson* as an *information* case, but that position really misses the boat. For anyone in touch with American culture, what was intended and achieved was a taking of the value of an aspect of a famous person's personality for advertising purposes - the classic right of

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220. 698 F.2d 831 (6th Cir. 1983).

221. *Id.* at 833.

222. *Id.* at 834.

223. *Id.* at 836.

224. *Id.* at 834 n.1 (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971)).

225. *Carson*, 698 F.2d at 835.

226. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

227. *Carson*, 698 F.2d at 835.

228. *Id.* at 837 (Kennedy, J., dissenting).

publicity infringement which has been actionable since the time of Mr. Pavesich.

Two further cases are worthy of mention on the identification issue. In the "sound alike" case of *Midler v. Ford Motor Co.*,<sup>229</sup> an advertising company wanted to use the song "Do You Want to Dance," which the singer Bette Midler had made a hit, in a commercial for Ford cars. The license for the song itself was available, but Ms. Midler turned down the request for permission to use her version. Not willing to abandon a good idea, the agency contacted Ula Hedwig, a singer who had been a back-up vocalist for Ms. Midler, and asked her to sing the song for a new recording, with instructions "to 'sound as much as possible like the Bette Midler record.'"<sup>230</sup> Ms. Hedwig's success in this performance led Ms. Midler to sue under California law when the commercial aired on television.

The defendants pointed out that they were in literal compliance with the California statute because they had not used the "name, voice, signature, photograph or likeness" of Ms. Midler,<sup>231</sup> but rather had used the voice of Ms. Hedwig. The Ninth Circuit Court of Appeals rejected this argument. Noting that section 3344 of the California Civil Code did not repeal the California common law of privacy and publicity, the court reasoned by analogy to paragraph (b) of Civil Code section 990 that the common-law publicity right of living people was also one of property. The court held that the common-law right of publicity protected against "an appropriation of the attributes of one's identity,"<sup>232</sup> and that what the defendants had clearly sought by using a sound-alike in these circumstances was the commercial association with "an attribute of Midler's identity."<sup>233</sup> The *Midler* decision also helped to provoke the addition of voice as a protected category under the New York privacy statutes.<sup>234</sup>

Identity was also an important question in the *Vanna White* case, discussed above in the information and free speech context. Ms. White was unsuccessful in her suit at the district court level, as District Judge Ronald

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229. 849 F.2d 460 (9th Cir. 1988), *cert. denied*, 503 U.S. 951 (1992); *see also* Sharon Chester-Taxin, *Will the Real Bette Midler Please Stand Up? The Future of Celebrity Sound-Alike Recordings*, 9 U. MIAMI ENT. & SPORTS L. REV. 165 (1992); Glancy, *supra* note 89; Wohl, *supra* note 212.

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

231. *Id.* at 463 (quoting CAL. CIV. CODE § 3344 (West Supp. 1996)).

232. *Id.* (quoting *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 (9th Cir. 1974)).

233. *Id.* Ms. Midler's triumph spilled over to help another singer, Tom Waits. He won a similar sound-alike case, also in the Ninth Circuit, even though the song used in the commercial was only inspired by a well known Waits hit, and was not the hit itself. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993).

234. *See* note 70 and accompanying text.

S.W. Lew granted summary judgment to the defendants in an unreported decision.<sup>235</sup> Applying the statutory articulation with some literalness, he found that the advertisement had not used Ms. White's "likeness" within the meaning of the California's Civil Code section 3344.<sup>236</sup> For similar reasons, he held that the advertisement had not infringed her common-law right of publicity. The robot simply was not a likeness of the performer.<sup>237</sup> Judge Lew also found against a claim based on the law of unfair competition.<sup>238</sup>

On appeal the Ninth Circuit Court of Appeals disagreed.<sup>239</sup> On the publicity question, it held that the California common-law right must be construed more broadly. In light of the never-ending quest of commercial enterprises to borrow the associative value of celebrities, it would be a mistake to adopt too narrow a concept of what attributes of personality should be protected.<sup>240</sup> The majority noted:

[These cases] teach the impossibility of treating the right of publicity as guarding only against a laundry list of specific means of appropriating identity. A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.<sup>241</sup>

Implicit in this approach is the recognition that the articulated rule can never fully cover all instances of a taking recognized by some other cognitive process. A good judge or jury will know a violation when presented with one and must be trusted to do so.

In the end, Ms. White won a pyrrhic victory. On January 19, 1994, a Los Angeles jury awarded her \$403,000 in damages, down from her original request of \$6.9 million. Attorneys for Samsung, perhaps somewhat self-servingly, called the verdict a "win."<sup>242</sup>

What generalizations can be drawn from these cases? In almost all of them there was an admitted or patent desire to gain advertising value for an unrelated product through an association with a well-known figure. These were not coincidences. The fact that the association was by use of an unusual attribute did not prevent the courts from cutting through the technicalities.

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235. *White v. Samsung Elecs. Am., Inc.*, No. CV-88-06499-RSWL (C.D. Cal. 19\_\_).

236. *White*, 971 F.2d at 1397.

237. *Id.*

238. *Id.* at 1399.

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

240. *Id.* at 1397-99 (citing *Carson*, *Motschenbacher*, and *Midler*).

241. *Id.* at 1398.

242. Shauna Snow, *Morning Report*, LOS ANGELES TIMES, January 21, 1994, at F2, Entertainment Desk; see Ellen J. Pollock, *Vanna White Wins Suit*, WALL ST. J., January 27, 1994, at B2.

Basically, the defendants were trying to get something for nothing, and both the express law and the promptings of fairness and justice recognized that the something belonged to someone else.<sup>243</sup> Notwithstanding the concerns of the *Carson* and *White* dissents, judges and juries have been able to readily identify examples of actionable behavior and remain unlikely to let the principle run amuck. They seem to justify the confidence expressed by Justice Cobb in *Pavesich*.<sup>244</sup>

VI. THE RESTATEMENT OF TORTS AND THE MCCARTHY TREATISE:  
TWO MORE ATTEMPTS AT CLARITY

Before leaving the doctrinal history underlying the *Restatement (Third) of Unfair Competition*, it is worth examining two other attempts to bring a clear, workable definition to the law of identity: the ALI's work on Privacy in *The Restatement (Second) of Torts*,<sup>245</sup> and J. Thomas McCarthy's treatise, *The Rights of Publicity and Privacy*.<sup>246</sup> As the only prior ALI effort in this area, the Restatement of Torts sections on privacy deserve particular attention.

A. *The Restatement (Second) of Torts*

The Restatement of Torts formulation followed Prosser's four torts, although somewhat reordered and reorganized. The four, as listed in section 652A, consist of:

- (a) unreasonable intrusion upon the seclusion of another . . . ;
- (b) appropriation of the other's name or likeness . . . ;
- (c) unreasonable publicity given to another's private life . . . ; and
- (d) publicity that unreasonably places the other in a false light before the public . . .<sup>247</sup>

The right against the appropriation of name or likeness sweeps into its grasp most of what the right of publicity would also cover. Its more complete Restatement of Torts formulation reads:

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243. See generally Margolin, *supra* note 211.

244. See *supra* note 79 and accompanying text.

245. RESTATEMENT OF TORTS, *supra* note 28.

246. MCCARTHY, *supra* note 28.

247. RESTATEMENT OF TORTS, *supra* note 28, § 652A(2).

§ 652C. Appropriation of Name or Likeness.

One who appropriates to his own use or benefit the name or likeness of another is subject to liability for the other for invasion of his privacy.<sup>248</sup>

One immediately apparent problem with this formulation is the overly narrow use of “name or likeness” to describe the non-appropriable indicia of identity covered by the rule. Other problems emerge in the comments, and the potential overlap with the publicity approach becomes clear. Comment a reads:

The interest protected by the rule stated in this Section is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others. Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it.<sup>249</sup>

Mental distress baggage, while mentioned in a bow to history, is *not* made a necessity. The distinction is made, then declared essentially irrelevant. Likewise, while still definitionally a tort, the right “is in the nature of a property right,” which may be transferred to third parties. In these two ways, the note baldly recognizes the inadequacies of a tort formulation for this branch of Prosser’s approach, but nevertheless leaves the identification of the right as a tort intact.

In the next comment, the Restatement of Torts at least tries to liberate itself from the trap posed by the word “commercial.” By citing, however, “a commercial purpose” as part of the “common form” of this branch of the tort, the Restatement continued to perpetuate use of this confusing term:

*How invaded.* The common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff’s name or likeness to advertise the defendant’s business or product, or for some similar commercial purpose. Apart from statute, however, the rule stated is not limited to commercial appropriation. It applies also when the defendant makes use of the plaintiff’s name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one. Statutes in some states have, however, limited the liability to commercial uses of the name or likeness.<sup>250</sup>

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248. *Id.* § 652C.

249. *Id.* § 652C cmt. a.

250. *Id.* § 652C cmt. b.

This same problem appears in comment d, where the distinction between for-profit advertising, icon, and performance uses, on the one hand, and for-profit information and creative uses, on the other, is properly made, but where the "commercial" label in opposition to "incidental" is confusingly perpetuated to describe the split.

*Incidental use of name or likeness.* The value of the plaintiff's name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities; nor is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity. No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded. The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness. Thus a newspaper, although it is not a philanthropic institution, does not become liable under the rule stated in this Section to every person whose name or likeness it publishes.<sup>251</sup>

A strength of the more generalized approach of the Restatement of Torts to an appropriation tort is the broad recognition that identity has value, and that it is the taking of such value that must be regulated.

*Appropriation.* In order that there may be liability under the rule stated in this Section, the defendant must have appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness. It is not enough that the defendant has adopted for himself a name that is the same as that of the plaintiff, so long as he does not pass himself off as the plaintiff or otherwise seek to obtain for himself the values or benefits of the plaintiff's name or identity. . . . Until the value of the name has in some way been appropriated, there is no tort.<sup>252</sup>

The Restatement of Torts deals with descendibility in section 652I. True to its tort mold, the right is viewed generally as dying with the individual depicted. It does make a grudging exception for the descendibility of the

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251. *Id.* § 652C cmt. d.

252. RESTATEMENT OF TORTS, *supra* note 28, § 652C cmt. c.



appropriation right, although there is an arguable implication that this can only be accomplished by statute, and not in a common-law formulation.

#### § 652I. Personal Character of Right of Privacy

Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded.<sup>253</sup>

The comments explain further:

The right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded. The cause of action is not assignable, and it cannot be maintained by other persons such as members of the individual's family, unless their own privacy is invaded along with his. The only exception to this rule involves the appropriation to the defendant's own use of another's name or likeness.<sup>254</sup>

In the absence of statute, the action for the invasion of privacy cannot be maintained after the death of the individual whose privacy is invaded. In a few states particular statutes permit the survival of an action for invasion of privacy that has occurred before death. In a smaller number of states there is statutory authorization for an action on the part of surviving relatives for invasion of the privacy of one who is already deceased, with the invasion occurring after his death. Since appropriation of name or likeness is similar to impairment of a property right and involves an aspect of unjust enrichment of the defendants [sic] or his estate, survival rights may be held to exist following the death of either party.<sup>255</sup>

The Restatement of Torts made some progress from the original Prosser approach, but the tort formulation was still too confusing. Only by outright denial of several of its expected attributes could it begin to deal with identity more broadly. Essentially, it was a well-explained continuation of "ghoti."<sup>256</sup>

#### *B. The McCarthy Treatise*

J. Thomas McCarthy, a professor of law at the University of San Francisco, has devoted considerable attention and clarity of thought to the rights of privacy and publicity. His treatise, *The Rights of Publicity and Privacy*,<sup>257</sup> was first published by Clark Boardman in 1987 and has been

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253. *Id.* § 652I.

254. *Id.* § 652I cmt. a (citation omitted).

255. *Id.* § 652I cmt. b.

256. *See supra* note 1 and accompanying text.

257. MCCARTHY, *supra* note 28.

updated periodically since. It provides in many ways the clearest examination of the issues discussed here, as well as an appropriately exhaustive state-by-state survey of the law and treatment of the day-to-day issues of practice and procedure. The overall quality of McCarthy's text has greatly simplified work in the area, and this article owes much to the insights of his work. For all its virtues, however, the treatise doesn't get us to "fish" either.

As to coverage, the book is quite comprehensive. As to bringing cohesiveness "and structure to a disorganized body of law,"<sup>258</sup> it takes significant steps but remains bound to some extent by the confusing definitions of the past. The work is very clear in tracing the emergence of publicity from privacy and in untangling their heavily intertwined natures,<sup>259</sup> a point the importance of which McCarthy expressly underlined:

To my knowledge, this is the first legal treatise to place primary focus on the Right of Publicity. . . . While the main focus of this treatise is the Right of Publicity, the various forms of "privacy" rights are highlighted and compared with the Right of Publicity throughout the book. When I began the research for this book, I blithely assumed that I could confine it strictly to the Right of Publicity. I quickly found that because of the close historical and practical links between privacy rights and the Right of Publicity, both required detailed discussion. . . . The exact shape and contours of both the Right of Publicity and the various types of privacy are still not widely understood. I found the best way to describe the content of these rights was to compare them with each other and with other related and more familiar legal concepts.<sup>260</sup>

One failing of his discussion is the continued use of the term "commercial," with all of its confusing baggage, as a term of operative distinguishing power. To his credit, however, his use is internally more consistent than most. For instance, the term appears in his most basic definition of publicity:

The Right of Publicity is simply this: the inherent right of every human being to control the commercial use of his or her identity. This legal right is infringed by unpermitted use which damages the commercial value of this inherent human right of identity and which is not immunized by principles of free press and free speech. Neither the false implication of an endorsement, nor likely confusion as to commercial source, nor celebrity status of the person is required to trigger potential liability.<sup>261</sup>

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258. *Id.* at vii.

259. *Id.* at ch. 1.

260. *Id.* at viii.

261. *Id.* at vii.

While “commercial use” itself is not expressly defined, care is taken to define use in a “commercial setting” that “denotes use of personal identity in advertising or promotion or in connection with the actual goods and services themselves”<sup>262</sup>—what this article calls advertising and icon uses. He contrasts this use with what he calls “media,” which he defines as “a use of personal identity which has a reasonable relationship with the normal content of the ‘media’: news, commentary on public issues, fiction, and entertainment.”<sup>263</sup> His media use thus covers both informational and creative uses in the definitional structure of this article.

While McCarthy thus gets the distinctions largely right, he is still using potentially confusing terms, a problem he himself recognizes: “Of course, the bare labels ‘media’ and ‘commercial setting’ are not necessarily mutually exclusive. Media are always ‘commercial’ in a free enterprise economy, and advertising usually appears in the ‘media.’”<sup>264</sup> In his favor, the law frequently bends terms from their common meanings, converting them into terms of art, and McCarthy is at least quite explicit about what he is doing. Where a term of art has so manifestly been a source of confusion, however, it would perhaps be best to jettison it in a discussion that is intended to bring coherent structure to a disorganized subject. Still, McCarthy at least sorts out the different values given in society and the courts to information and creative uses, on the one hand, and advertising and icon uses on the other.<sup>265</sup>

McCarthy recognized that further development in the law is inevitable:

[T]he history of the Right of Publicity is hardly over. Like a statue emerging from the formless block of stone, it is still rough-hewn. Much work remains before we will have a legal right of polished contours. And like any legal right, it will never be “finished.” It remains for each generation to adapt it to their own society and values.<sup>266</sup>

As an avowed publicity scholar, he also showed an admirable willingness to meld the tunes of privacy and publicity:

Undoubtedly, the law today would be more coherent and neat if it had developed such that courts would recognize a *sui generis* legal right labeled something like a “right of identity” with damages measured by *both* mental distress and commercial loss. If the law had such a separately entitled category, things would be considerably easier to sort out compared to our

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262. McCarthy, *supra* note 28, § 7.1[A].

263. *Id.*

264. *Id.* (footnote omitted).

265. *Id.* at chs. 7 & 8.

266. McCarthy, *supra* note 28, § 1.11[B].

present world of “separate” rights of privacy by appropriation and a Right of Publicity.<sup>267</sup>

All too often in the history of these rights, scholars have gotten irretrievably committed to their paradigm of particular passion. Prosser, for instance, stepped confidently into this trap with his “four torts” formulation. McCarthy clearly sees the limitations of the chopped up right that the accidents of history have produced.

It is unfortunate that in this moment of greatest insight McCarthy does not go the next step and actually propose, in some detail, a formulation for such a sui generis right. The problem is clearly delineated; the solution is withheld. To his credit, this failure of boldness is intentional. His restraint is rooted in a modest realism about the role of a scholar and not in timidity:

I have tried clearly and consistently to label my personal opinions as *Author's Comments*, so that the reader is not misled by the difference between “the law” and my own view of what the law should or could be. I strongly believe that it would do a disservice to attorneys if the author were to confuse the reality of the law with the author’s subjective views. Author’s opinions are ubiquitous in this work, largely because the treatise covers many areas of relatively new and untested legal concepts. Of course, my own comments are not “law” and can become law only if they have sufficient persuasiveness to influence practitioners and judges:

[P]rofessors are not “lawmakers” in the same sense as judges: Judges can make law by the stroke of a pen; they have power because they have authority. Academics, by contrast, have influence measured only by the force of their ideas. If those ideas persuade judges, lawyers, and other scholars, then professors will have influence on doctrine; if their ideas are unpersuasive, then the academics are powerless.

Apart from my *Comments*, I have endeavored to make the legal discussions objective and pragmatic, keeping in mind Justice Holmes’s simple definition, “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the Law.”<sup>268</sup>

Nonetheless, in order to progress beyond outworn formulations, the law needs a template, a new articulation around which the workings of the courts can coalesce, a new metaphor to liberate the thinking. McCarthy declined to offer

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267. *Id.* § 1.11[C] (footnote omitted).

268. *Id.* at viii (quoting A. Douglas Melamed & David Westin, *Anti Intellectual History*, 90 YALE L.J. 1497, 1507 (1981) and Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1896)).

such a template in his treatise.<sup>269</sup> The drafters of the *Restatement (Third) of Unfair Competition* got the next chance.

## VII. EVALUATING THE RESTATEMENT APPROACH TO PUBLICITY

The Restatement's approach to publicity is deceptively simple. There are only four sections for the whole topic. Only two sections are necessary to define the basic right, albeit with considerable elaboration in the comments and notes. The remaining two are devoted to remedies.

### A. Section 46

The topic is introduced in section 46, entitled "Appropriation of the Commercial Value of a Person's Identity: The Right of Publicity." It reads:

One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in [sections] 48 and 49.<sup>270</sup>

This statement has three principal components. The first declares that the subject matter of the right is "the commercial value of a person's identity." A violation only takes place, however, if there is use of "the person's name, likeness or other indicia of identity" (the second part) "for purposes of trade" (the third). Under this formulation, the right may be characterized in the first part, but it depends on the combination of the second and third for its operation. As a logical matter, this structure leaves open the question of whether the appropriation of commercial values of identity through some means *other* than a use for the purposes of trade might be possible and even permissible. As a practical matter, this is a quibble, but it does suggest a certain looseness in the structure of distinctions.

The two operative parts beg clarification. What are "indicia of identity?" What are "purposes of trade?" Of the two, only "for the purposes of trade" gets a full definitional treatment, which is discussed with section 47 below. The "indicia of identity" concept relies on the comments to section 46 for elaboration. Comment d provides some concrete examples: "In most cases an appropriation of identity is accomplished through the use of a person's name

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269. Indeed, in his 1995 Manges Lecture at Columbia University, he even allowed himself to slip back into repeating the tired old mental distress-commercial injury differences between privacy and publicity. J. Thomas McCarthy, *The Spring 1995 Horace S. Manges Lecture—The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 134 (1995) [hereinafter McCarthy Speech].

270. RESTATEMENT, *supra* note 22, § 46.

or likeness. The person can be identified by a real name, nickname, or professional name, or by a likeness embodied in a photograph, drawing, film, or physical look-alike.”<sup>271</sup> Comment d goes on to point out that imitation of a distinctive voice or performing persona can also violate the right of publicity. Representing an advance over many statutes and the Restatement of Torts, the indicia are not limited to name and likeness. Along the lines of the *Carson*, *Motschenbacher*, and *Vanna White* cases, the comment leaves open a finding of an infringement in the use of other identifying characteristics or attributes, “but only if they are so closely and uniquely associated with the identity of a particular individual that their use enables the defendant to appropriate the commercial value of the person’s identity.”<sup>272</sup> In trying thus to limit other such possible characteristics, however, the comment falls back on circularity: it uses the end result of appropriating commercial value as a part of the definition of how one appropriates commercial value. While we probably know what the Reporters mean, particularly in light of the application in prior cases, such a direct resort to tautology in defining one of the two key elements in the operation of the right is hardly encouraging.

More fundamentally, the comments to section 46 address the similarity to privacy and set forth a purported basis for a distinction. Comment a explains:

*Scope.* This Topic addresses the common law and statutory rules that protect the commercial value of a person’s identity. The appropriation of another’s identity for purposes of trade can result in injury to both commercial and personal interests. This Restatement deals with rules affording relief against unfair methods of competition, and the rules stated in this Topic are therefore limited to the redress of commercial injuries. The interest protected by these rules is often described as the “right of publicity.” Relief is also generally available under the law of torts for injuries to personal interests caused by the unauthorized commercial use of another’s identity. The protection of these personal interests is often described as an aspect of the “right of privacy.”<sup>273</sup>

Comment b adds: “The distinction between the publicity and privacy actions, however, relates primarily to the nature of the harm suffered by the plaintiff; similar substantive rules govern the determination of liability.”<sup>274</sup> The difference then, at least as expressed here, goes back to the old distinction between personal harm and interests, on the one hand, and “commercial” harm and interests on the other. The comment ignores the key problems with this distinction: How does one tell these two definitional poles apart in the

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271. *Id.* § 46 cmt. d.

272. *Id.*

273. *Id.* § 46 cmt. a.

274. *Id.* § 46 cmt. b.

subjective experience of the plaintiff, and why should they be divided between two causes of action?

The comments to section 46 undercut their case for maintaining a distinction between privacy and publicity by recognizing the largely common attributes of the two supposedly distinct rights. In addition to the recognition in comment b that "similar substantive rules govern the determination of liability," comment a notes: "Although not directly applicable, the rules stated here may be useful by analogy in evaluating claims under the right of privacy arising from an unauthorized commercial exploitation of a person's identity."<sup>275</sup> Furthermore, the Restatement authors are fully aware that the division of personal and commercial interests is at odds with the Prosser formula for appropriation privacy adopted in the Restatement of Torts: "The 'appropriation' tort as described by Prosser and the Restatement, Second, of Torts subsumes harm to both personal and commercial interests caused by an unauthorized exploitation of the plaintiff's identity."<sup>276</sup>

Nonetheless, citing the prior history of the tort-based limitations that gave publicity its original impetus, and ignoring the explicit efforts of the Restatement of Torts to address this, the comment declares that the privacy-publicity distinction was made by courts along the harms-to-interests line, and that it is worth maintaining.

Classification of the tort as an aspect of the right of privacy, however, led some courts to deny relief to well-known personalities whose celebrity precluded the allegations of injury to solitude or personal feelings normally associated with an invasion of privacy. The historical connection with personal privacy also impeded the transfer of rights in the commercial value of a person's identity. Courts in a number of jurisdictions eventually came to distinguish claims for injury to personal feelings caused by an unauthorized use of the plaintiff's identity from claims seeking redress for an appropriation of the commercial value of the identity. The latter claim was sometimes denominated a "right of publicity" to distinguish it from the protection available to personal interests under the "right of privacy."<sup>277</sup>

Awkward and artificial though it may be, the privacy-publicity split remains in the Restatement, with privacy pushed back into the domain of "personal" and not "commercial" harms. The casting of privacy in its most restrictive, pre-Restatement form is at least consistently applied. For instance, comment g to section 46 states that "the personal interests protected under the

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275. RESTATEMENT, *supra* note 22, § 46 cmt. a.

276. *Id.* § 46 cmt. b.

277. *Id.*

right of privacy are not transferable,”<sup>278</sup> even though comment a to section 652I of the Restatement of Torts expressly permitted transferability for appropriation privacy.<sup>279</sup>

### B. Section 47

The second operational element, “use for the purpose of trade,” gets direct definitional treatment in section 47, appropriately enough entitled “Uses for Purposes of Trade:”

The name, likeness and other indicia of a person’s identity are used “for purposes of trade” under the rule stated in [section] 46 if they are used in advertising the user’s goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user. However, use “for purposes of trade” does not ordinarily include the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.<sup>280</sup>

The first part of this definition is the affirmative inclusion of advertising and icon uses in the potentially actionable activity. While there are still some lines to be drawn, this is a relatively unequivocal statement that is fairly congruent with the distinctions made in the application of the law to prior cases. Less clear, however, is the imperfect exclusion of news, fiction, etc. from “purposes of trade.” Such uses are “not ordinarily” included as a use “for the purposes of trade,” but are not categorically excluded. Here, we see once again the old problem of using a commercial-trade definition to mean “actionable.” It is true that icon, advertising and performance uses are most frequently actionable; and that information and creative uses most frequently are not. But by using “for purposes of trade” as the operative language, it is necessary to leave the door open to the fact that information and creative uses *might* be for the purpose of trade, thus denying the characterization any consistently applicable distinguishing value.

This is somewhat clarified by the comments. Comment c, for instance, repeats, once again, the caution that just because an informational or creative use is *for profit*, it is not necessarily “for purposes of trade,” sensible though such a conclusion might be based on normal understanding of the phrase.<sup>281</sup>

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278. *Id.* § 46 cmt. g.

279. RESTATEMENT OF TORTS, *supra* note 28, § 652I cmt. a.

280. RESTATEMENT, *supra* note 22, § 47.

281. *Id.* § 47 cmt. c (“The fact that the publisher or other user seeks or is successful in obtaining a commercial advantage from an otherwise permitted use of another’s identity does not render the appropriation actionable.”).



It also suggests that essentially *no* informational use will invade the right of publicity. Because “[t]he right of publicity as recognized by statute and common law is fundamentally constrained by the public and constitutional interest in freedom of expression,”<sup>282</sup> the Restatement simply puts all informational, and most creative, uses outside of an action under the right of publicity. The often mentioned falsehood exception is dealt with by allocating it to another right altogether, back into “false light” privacy.

Some cases indicate that the right to use another’s identity in news reports and similar works may be forfeited if the work contains substantial falsifications. Such cases, however, are more appropriately regarded as actions for defamation or for invasion of privacy by placing the plaintiff in a false light rather than for infringement of the right of publicity. When the imposition of liability turns on the truth or falsity of the defendant’s statements, the defendant is also entitled to the constitutional safeguards that have been incorporated into the law of defamation and false light privacy.<sup>283</sup>

This definitional side-step thankfully does not include the word “commercial,” and it may solve the short term problems coming from the categorical exclusion of informational uses from publicity. However, it does so by contradicting the Restatement’s original premise for separating publicity from privacy—*i.e.*, the nature of the *harm* or *protected interest*. Here, in contrast, the distinction is expressly one of use, without regard to the nature of the harm. This kind of internal contradiction reflects yet again the basic unworkability of the privacy-publicity distinction.

Comment c makes a sensible distinction between a true informational or creative use and an advertising or icon use in disguise:

However, if the name or likeness is used solely to attract attention to a work that is not related to the identified person, the user may be subject to liability for a use of the other’s identity in advertising. Similarly, if a photograph of the plaintiff is included in the defendant’s publication merely for the purpose of appropriating the plaintiff’s commercial value as a model rather than as part of a news or other communicative use, the defendant may be subject to liability for a merchandising use of the plaintiff’s identity.<sup>284</sup>

Returning to the core operational language of section 47, there is some history, particularly in New York, concerning the phrase “for the purpose of

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282. *Id.*

283. *Id.*

284. *Id.* (citations omitted).

trade," which may confuse matters. The use of this same phrase in section 51 of the New York Civil Rights Law<sup>285</sup> has been relied upon by some courts to provide an avenue for including "media," *i.e.*, informational and creative uses, in actionable territory. Recall the language in the *Paulsen* case: "A far more restrictive treatment, however, has been accorded the proscription against use 'for the purposes of trade,' particularly where the use has been in furtherance of the business of a communications medium."<sup>286</sup> If it is necessary to remove for-profit media uses via the comments, it is equally necessary to point out that "for purposes of trade" also *includes* non-profit uses, which by most normal definitions would *not* constitute "trade": "Unauthorized use of a person's identity in solicitations for contributions or memberships by non-profit entities such as charitable, educational, governmental, fraternal, and religious organizations also constitutes a use for purpose of trade."<sup>287</sup>

Even after including only advertising and icon uses in the ordinary meaning of "purpose of trade," and then grudgingly including, then largely excluding, information and creative uses as potentially extraordinary meanings, a further problem with this definitional structure remains. It leaves undiscussed the use that was held actionable in the only United States Supreme Court case directly on publicity: the performance use at issue in *Zacchini*.<sup>288</sup> Once again the comments deal with this issue, grouping performance, at least by implication, with information and creative uses as a seldom-actionable category:

The right of publicity has been extended in a few cases beyond advertising and merchandising uses to other substantial appropriations of a person's identity. Liability has been imposed, for example, in connection with an unauthorized broadcast of the plaintiff's performance or a sustained imitation of the plaintiff's performing style or performing persona that is marked by the defendant as a simulation of the plaintiff's performance.<sup>289</sup>

This treatment of performance is at odds with the fact that in *Zacchini*, the operative distinction between the majority and minority positions was whether performance or information attributes predominated. In dealing with performance, the comments do recognize the potential usefulness of analogies to copyright law in fleshing out the right in this area.<sup>290</sup> The *Zacchini* court also noted this analogy: "The Constitution no more prevents a State from

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285. See *supra* notes 67-70 and accompanying text.

286. *Paulsen*, 299 N.Y.S.2d at 505-06.

287. RESTATEMENT, *supra* note 22, § 47 cmt a.

288. See McCarthy Speech, *supra* note 269, at 133.

289. RESTATEMENT, *supra* note 22, § 47, cmt. d.

290. *Id.*

requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner . . . ."<sup>291</sup>

### *C. Remedies: Sections 48 and 49*

The Restatement contains two sections on remedies, sections 48 and 49, addressing the award of injunctive and monetary relief, respectively. Both contain fairly similar lists of multiple, relatively obvious, non-exclusive factors to be balanced in some unquantifiable comparison in determining what relief may be appropriate. As checklists of what might be considered by a court arriving at an essentially subjective result, they are somewhat useful. As guides to predicting results, they are severely limited.<sup>292</sup>

One interesting omission from the main text of section 49 is punitive damages of any kind, although this gap is closed in comment e, which refers to the Restatement of Torts section 908 and to the various statutes which allow for a punitive awards.<sup>293</sup> More problematic, the comments to the remedy sections bring explicit tort references back to the characterization of publicity. In the language of sections 46 and 47, the drafters, mindful in comment b to section 46 of the tort baggage inflicted on privacy, avoided any express mention of publicity as a tort. In the comments to sections 48 and 49, however, not only are numerous references made to tort rules for guidance, but most tellingly, explicit reference is made in comment b to section 49 to "[t]he history of the *publicity tort* and its relationship to other causes of action."<sup>294</sup> As the Restatement itself recognized elsewhere, the baggage that comes with viewing publicity as a tort is potentially great. It further recognized that some of the difficulties with the tort characterization led to the first articulation of publicity in *Haelan*. The Restatement distanced the whole unfair competition concept from torts in its introduction.<sup>295</sup> Why should the drafters drag torts back into the Restatement via the remedies sections? This phenomenon is perhaps explained by sloppiness and a failure to coordinate among the drafters. It is to be hoped that courts will be cautious at taking such a tort characterization too seriously. Publicity should follow its own logic, and should no longer be forced into conformity with pre-existing doctrinal structures which do not necessarily suit it. Nonetheless, for those looking to re-import tort attributes into publicity, the door has been left open.<sup>296</sup>

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291. *Zacchini*, 433 U.S. at 575 (citations omitted).

292. RESTATEMENT, *supra* note 22, §§ 48-49.

293. *Id.* § 49 cmt. e.

294. *Id.* § 49 cmt. b (emphasis added).

295. *Id.* at XI ("it was eventually decided that the law of unfair competition had evolved to the point that it was no longer appropriate to treat it as a subcategory of the law of Torts").

296. In the Foreword appearing at the beginning of this volume, Robert C. Denicola and

*D. Avoiding Confusion With Other Unfair Competition Concepts*

Happily, the Restatement treatment of the right of publicity has sought to slam the door on borrowing unhelpful attributes from one possible neighboring field of law—unfair competition. Publicity, after all, appears in the *Restatement (Third) of Unfair Competition*. The infection of publicity by elements from other doctrines in the same book has an almost parasitic inevitability to it. Nonetheless, the publicity drafters have gone to considerable length to negate two of the most likely suspects for such infection: prior use and likelihood of confusion. Regarding prior use, comment b to section 46 implicitly denies the need for it by citing the protection due non-celebrities:

Some decisions suggest that an unauthorized use of a person's identity for purposes of trade injures only commercial interests if plaintiff is a celebrity and only personal interests if the plaintiff is not well known. However, celebrities are not precluded from establishing cognizable injury to personal interests in addition to commercial loss, nor are less well-known plaintiffs precluded from establishing commercial loss in addition to injury to personal interests, whether recoverable through a single or companion causes of action.<sup>297</sup>

Comment d is similar:

*Appropriation of identity.* The right of publicity protects the commercial value of a person's identity. The right is most often invoked to protect the value associated with the identity of a celebrity, and a few cases appear to require some minimum degree of fame or notoriety as a prerequisite for relief. However, the identity of even an unknown person may possess commercial value. Thus, an evaluation of the relative fame of the plaintiff is more properly relevant to the determination of appropriate relief.<sup>298</sup>

In Comment b to section 46, the question of confusion as to origin is dealt with expressly, and the contrast to trademark and other related branches of unfair competition made explicit.

Proof of deception or consumer confusion is not required for the imposition of liability under this [s]ection. However, a person's name or likeness may be protectable as a trademark if it has become distinctive of

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Harvey S. Perlman, the Reporters for the Restatement, at footnote 28 offer the reminder that even if a right is classified in property, its violation may constitute a tort. While I believe that this distinction is not a necessary implication of the use of the term "publicity tort" in the Restatement, the clarification implicit in footnote 28 is nonetheless welcome.

297. *Id.* § 46 cmt. b.

298. RESTATEMENT, *supra* note 22, § 46 cmt. d (citations omitted).

the goods or services emanating from a particular commercial source. Unauthorized use of such a trademark in a manner likely to cause confusion regarding the source or sponsorship of goods or services will subject the user to liability for trademark infringement under the rule stated in [section] 20. Similarly, the unauthorized use of another's name or likeness in marketing goods or services can subject the user to liability for deceptive marketing under the rule stated in [section] 4 if the use is likely to cause prospective purchasers to believe that the identified person endorses or is otherwise connected with the goods or services.<sup>299</sup>

Hopefully, future judges, legislators and commentators will take to heart these clear warnings against careless importation of the broader concepts of unfair competition law into publicity, notwithstanding their appearance in the same Restatement.

### *E. Descendibility*

Another topic handled well by the Restatement is the question of descendibility. Comment h to section 46 notes the still somewhat unsettled nature of the question:

*Duration of rights.* Many jurisdictions have not yet considered the descendibility of the right of publicity. Of those jurisdictions that have determined the issue through legislation or common law adjudication, the majority recognize the right as descendible, while in others the assertion of post-mortem rights is precluded by statute or case law.<sup>300</sup>

Even where descendibility is recognized, the Restatement suggests that the post-mortem right may be a bit less restrictive, thus permitting a broader latitude in creative use, for instance, such as under the California statute.<sup>301</sup>

As to the length of a post-mortem right, the Restatement is quite perceptive. Absent a statute fixing some relatively bright-line, and necessarily arbitrary, term of years, the ever diminishing nature of the values provides a kind of internal and automatic period: "The practical duration of post mortem rights is ordinarily limited by the diminishing commercial value of a person's identity in the period after death. In addition, the exercise of post mortem rights by heirs or legatees is subject to the traditional equitable principles of laches and estoppel."<sup>302</sup> If the persona is still worth taking and fighting over, perhaps the right still exists.

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299. *Id.* § 46 cmt. b (citation omitted).

300. *Id.* § 46 cmt. h.

301. CAL. CIV. CODE § 990(n) (West Supp. 1996).

302. RESTATEMENT, *supra* note 22, § 46 cmt. h.

*F. Justifications*

The Restatement, in comment c to section 46, recites a series of rationales, largely culled from the cases cited in the accompanying reporters' note, for the protection of the right of publicity. They include: (1) the "individual's interest in personal dignity and autonomy;" (2) recognizing the commercial value of fame and preventing unjust enrichment; (3) preventing excessive use that might dilute the value of the identity; (4) preventing confusion about endorsement; and (5) providing an incentive to cultivate fame and image-desirability.<sup>303</sup> The list is taken with a grain of salt, however: "The rationales underlying recognition of a right of publicity are generally less compelling than those that justify rights in trademarks or trade secrets. . . . Thus, courts may be properly reluctant to adopt a broad construction of the publicity right."<sup>304</sup> This kind of tepid endorsement of underlying justifications is intriguing in the context of a first inclusion of the right in a Restatement.

*G. The Evaluation: Is It "Fish" Yet?*

So how did the Restatement drafters do? They have at least gotten a relatively clear statement of traditional publicity concepts into a Restatement. Nonetheless, there are still too many internal contradictions and unhelpful definitions at the core of the enterprise to call it a real success. Returning to the opening analogy, the drafters keep on trying to spell fish using the old, largely unsatisfactory, definitional structures: the legal equivalents of "gh," "o," and "ti." With enough explanation and a certain generous inattention to consistency, that kind of spelling can work, more or less. It is, to be sure, an improvement over "x," "ql," and "ap." The Restatement drafters, to their credit, make their approach to publicity work, at least internally, by using the comments to clarify the inadequacies of their operative definitions. What they missed was the chance to step back and try out some new letters, some new descriptive and operational distinctions, which might have fit the history and aspirations of the doctrine with less bending, tearing, and gluing back together. They also missed the chance to rise to McCarthy's challenge of building a sui generis right. Caution prevailed; the old metaphors still enslaved their thoughts.<sup>305</sup>

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303. *Id.* § 46 cmt. c.

304. *Id.*

305. In the Foreword, the Reporters explain that "given a clean slate, we too might have selected a different linguistic formulation . . . ." The Reporters recognize, in effect, their lack of boldness, but suggest that such boldness was not theirs to exercise. It is exactly in this limited conception of the role of a Restatement that they and I disagree.

But it is not enough simply to recite this opportunity lost. A completed critique of the Restatement's efforts must suggest how a better job might be done. Having complained of repeated failures to provide a new descriptive template, I now propose such a description. Of course, my efforts are open to criticism and improvement. Still, I may be able to get close enough to "physch" to remind courts, legislators, and scholars that a better job still waits to be done.

#### VIII. AN ALTERNATIVE APPROACH: "PHYSCH?"

In proposing a new "Restatement of the Right of Identity," a number of factors have informed my approach. My starting point is McCarthy's idea that a *sui generis*, unified right of identity is needed.<sup>306</sup> In fleshing out such a right, however, it is wise to seek greater specificity within smaller, more numerous categories, rather than a small number of overarching generalities. The "Langdellian" approach could always be tempted by a conclusory, catch-all phrase that could then lead to confusion (just think of the emphasis given to "consideration" in the contract formulation which Langdell himself helped to put together).<sup>307</sup> Rather, I take to heart a piece of the "realist" program, summed up by Karl N. Llewellyn in 1931: "There is a strong tendency to think it wiser to narrow rather than to widen the categories in which concepts and rules *either about judging or for judging* are made."<sup>308</sup>

Instead of broad concepts of interests and harms, I start with the five use distinctions laid out at the beginning of this article: information, creative, advertising, icon and performance. While not an exhaustive list of the possible uses of the persona, they do cover much of the current territory. Definitional space can be left for further growth to cover uses yet to be devised. A corollary is an attempt to avoid "commercial" or "purposes of trade" in the definitional structure, for all of the reasons repeatedly given above. Topics whose treatment appears consistent across the different uses receive a general definition. One such area is remedies, where I have accepted the generality of the Restatement and gone it one better. One might just as well be hung for a sheep as for a lamb.

In unifying the privacy-publicity divide, the subjective and largely irrelevant distractions among "interests protected" and "types of harm" may be ignored. They have not really helped in sorting out the law. They reflect half-baked historical ideas, borrowed from pre-existing categories, which

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306. See McCarthy, *supra* note 28, § 2.1; *supra* notes 268-69 and accompanying text.

307. See LANGDELL, *supra* note 19, at 58-122.

308. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1255 (1931). A variant of this formulation appears in KARL N. LLEWELLYN, JURISPRUDENCE, REALISM IN THEORY AND PRACTICE 73 (1962).

provoked equally arbitrary counterreactions to fix. Although ubiquitous, they are basically useless noise, and they can be happily discarded without much affecting the desired results. If these notions have any place in the discussion, it is in determining appropriate remedies, not up front in defining the contours of the right itself.

Descendibility should be permitted for all rights in the identity, for periods consistent with marketplace realities. Information and creative uses will largely be permitted anyway, and when not permitted, then let the heirs sue. The heirs may in reality be just as harmed as the original person depicted.<sup>309</sup> On the indicia to be covered, the breadth of human ingenuity should be respected, and the standards left flexible. In the end, it does boil down to trusting judges and juries to make good decisions on these issues, as the *Pavesich* court predicted. So far, the results reached by courts have justified this confidence.

Finally, I believe that this is a clarifying and simplifying exercise and not a generally improving one. Thus, my approach is to reproduce the most common results under the current doctrine, rather than to "correct" them according to my own notions of justice.<sup>310</sup>

With these factors in mind, I propose the following:

#### RESTATEMENT OF THE RIGHT OF IDENTITY

1. Every real person has a limited right to control the use and value of the attributes of his or her personality and identity, to the extent hereafter set forth.
2. In the case of uses in a news, biography, history, politics or other factually informational context, such control shall apply only in cases of:
  - (a) the dissemination of actually false information, in the case of a public figure, either with knowledge of the falsehood or with a reckless disregard for the truth, or, in the case of a private figure, with negligence as to its truth or falsehood;
  - (b) the dissemination of damaging information about a person that is so hurtful, so intensely personal in nature, and so gratuitous and

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309. See, e.g., *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905); ALDERMAN & KENNEDY, *supra* note 28, at 176 *et seq.*

310. For instance, as a matter of personal conviction, I share the concern that the Reporters expressed in the Foreword about the free speech implications of section 2(b) of my proposal. In my reading, however, the courts have not always demonstrated a similar sensitivity. Perhaps I should, in turn, be chided for a lack of boldness in failing to make *substantive* improvements, particularly in light of my enthusiasm for making *descriptive* ones. A mandate for making substantive improvements in Restatements can be claimed from the founding of the ALI. See *supra* note 13 and accompanying text. Nonetheless, it is a mandate that I intentionally decline, at least for the purpose of this exercise.



inherently lacking in interest to the persons to whom it is communicated, as to shock the conscience of a civilized society.

In light of the importance of free debate and information exchange in a democratic society, embodied in the First Amendment of the United States Constitution, courts should grant relief grudgingly for uses of this kind.

3. In the case of uses in a fictional or other creative context, such control shall apply only to uses which:
  - (a) are not clearly identified, either explicitly or implicitly beyond reasonable question, as fictional or other creative uses, (such a disclaimer may be general in nature, provided it is clear); or
  - (b) even though so labeled, (i) so distort the person in question as to render the presentation, taken as a whole, materially and harmfully inconsistent with the basic nature of the person so depicted, and (ii) are presented in a way that people will be likely to believe them to be reflective of the truth, and not a parody, fantasy or humorous or satirical use; or
  - (c) are so incidental to the overall thrust of the work within which the use occurs as to constitute, in fact, an advertising use, icon use or performance use under sections 4, 5, and 6, respectively, below.
4. In the case of advertising uses, including endorsement and other forms of association with goods and services not constituting the identity itself, such control shall extend broadly. Such control shall not apply to advertising which directly promotes a use otherwise permitted under this Restatement or to advertising which more generally promotes the specific medium of information through which such permitted use is made.
5. In the case of icon uses, such control shall extend broadly, but not to uses in which the information or creative component of the use predominates over the icon use.
6. In the case of the use of a person's performance, such control shall extend broadly, but not:
  - (a) to uses in which the information or creative component of the use predominates over the performance, or
  - (b) to "fair uses," the existence of which shall turn on factors similar to those applicable to the fair use of a copyrighted work.
7. The attributes of identity subject to control shall include the name, nickname, or other generally used verbal or written identifier, the visual or vocal likeness, including those created by look-alikes or sound-alikes, and such other attributes which taken together and in the context of their use would lead knowledgeable persons hearing, seeing or otherwise experiencing such attributes reasonably and positively to identify the person whose attributes are being used. The intent of a user to establish an association with the person shall be evidence in favor of such an identification being made.

8. In the case of any use of identity subject to control hereunder made without consent or license, the injured party may seek equitable relief, including injunctions, and monetary damages, including punitive damages, for harms of all recognized kinds, including personal distress and monetary loss. The award of any such relief shall be made when appropriate, in light of the general principles of law applicable to the selection of remedies and the totality of the facts in the specific case.
9. Consent by a person to a use otherwise subject to control hereunder shall be a complete defense for such use. Consent may either be explicit, as in a signed writing or public declaration, or may be implied from deliberate conduct which would be clearly inconsistent with a failure to have given consent.
10. The control of an individual over his or her personality and identity hereunder shall not terminate at such individual's death, but shall continue to be exercised by any inter vivos transferees or, in the absence of such an inter vivos transfer, by the legatees or heirs of the individual. The duration of such rights shall either be set by statute, or shall continue as long as there is sufficient value in the particular identity used to have caused an intentional appropriation by the user.
11. The control of an individual over his or her personality and identity may be licensed, assigned or otherwise transferred, in whole or in part, to another entity. Any such transfer of the right to control must be made explicitly by a signed writing. The transferee shall have all of the rights of enforcement and relief with respect to the rights transferred which the person whose rights were transferred would otherwise have had.
12. Although additional categories of control shall not be added lightly, with the inevitable changes of society and its uses, the need for such additional control may become manifest, and additional categories may be added by legislation or judicial recognition.

## IX. CONCLUSIONS

The sections on publicity in the *Restatement (Third) of Unfair Competition* have not fully accomplished the goals set out by the ALI for bringing simplicity and clarity to the law. Rather, they have continued many of the old sources of confusion, most notably the largely artificial distinction between privacy and publicity, the confusing use of "commercial" and "for purposes of trade" as operative terms, and the lingering baggage of a tort approach. This effort, therefore, is unlikely to be the last word in the ongoing process of describing the law of privacy and publicity. Perhaps the states will act,<sup>311</sup>

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311. See, e.g., Sachs, *supra* note 166 (discussing the need for a right of publicity statute in the state of New York).

or perhaps there will at long last be federal legislation in the area.<sup>312</sup> Whatever the next step, courts, legislators and commentators should feel free to “go fish” for new approaches and formulations that can explain this area of the law with ever increasing simplicity and clarity.

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312. See McCarthy Speech, *supra* note 269, at 141-42; J. Eugene Salomon, Jr., Note, *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179 (1987).