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**A NATIONAL IDENTITY CRISIS:
THE NEED FOR A FEDERAL RIGHT
OF PUBLICITY STATUTE**

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A NATIONAL IDENTITY CRISIS: THE NEED FOR A FEDERAL RIGHT OF PUBLICITY STATUTE

INTRODUCTION

Crafting new legislation is like watching sausage being made – it isn't pretty.¹ But like it or not, the time has come to create a federal statute protecting one's right of publicity. What is the right of publicity? In its most basic form, the right of publicity is "the right to one's personality."²

Suppose, for example, a local contact lens manufacturer decides to market their new colored lenses under the name Ol' Blue Eyes. In creating an advertising campaign to promote the product, the manufacturer pays a photographer for the use of a Frank Sinatra photo in the ads. The lens manufacturer, however, fails to secure rights from Sinatra's estate for use of Sinatra's image. In bringing an action against the manufacturer, should it matter that Sinatra is now deceased? Should it matter when he died or where his last domicile was? What if instead of using Sinatra's photo in an advertisement, the new colored contact lens product was the topic of a news story which just happened to refer to Sinatra's famous blue eyes while featuring a photo of him?

Actually, all of these issues may affect the outcome of a suit for the unauthorized use of Sinatra's likeness depending upon which state the action is brought. For example, California protects Sinatra's rights for fifty years after his death, Indiana offers protections for one hundred years, and Tennessee allow rights to last in perpetuity. Some states, however, end protection upon death, while still others fail to recognize the right at all. Furthermore, most jurisdictions limit liability for certain First Amendment exceptions, such as news reporting.

1. Phillip D. Bostwick, *Civil Justice Reform Through Federal Legislation: Watching the House, the Senate, and the President Make Sausage*, CA27 ALI-ABA 317 (1995).

2. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 207 (1890).

The above hypothetical illustrates the lack of a clear standard for the right of publicity. Without a standardized federal law on the subject, challenges in licensing the national use of one's likeness requires careful and time consuming analyses of the various laws of the over twenty-five states that offer such protection. Inconsistencies in the various state laws make it both difficult and risky for lawyers and their celebrity clients. These are just a few of the reasons why the creation of a uniform federal right of publicity statute is an idea whose time has come.

The purpose of this Comment is to recognize the history and evolution of the doctrine, to identify the problems under the present patchwork of various state laws, and to propose a solution suitable to the various interests to the right of publicity.

First, Parts II.A and II.B will examine the development of the right of publicity by exploring its origins and tracing its application under the common law. Second, Parts II.C and II.D will examine the development of state publicity statutes and discuss the use of existing federal trademark law to protect the right of publicity. Third, Parts III.A and III.B will analyze the need for a federal publicity statute and identify specific provisions that should be addressed in the proposed federal legislation. Fourth, Part III.C will offer sample statutory language for the proposed federal statute. Finally, Part IV will conclude by reviewing the risks of leaving matters status quo.

BACKGROUND

To fully appreciate the need for a federal right of publicity statute, both the doctrine's history and its present status should be understood. This section of the Comment will therefore define and trace the origins of the doctrine, address the evolution of the common law, and then identify the use of state and federal statutes to prosecute infringers.

A. Right of Publicity

The right of publicity is a legal term of art without a general definition outside of the legal community. This Comment will first

consider the various sources of the doctrine. Then, the roots of the right of publicity will be traced by examining the origin of this uniquely personal right.

1. Defining the Right

Black's Law Dictionary defines the right of publicity as "[t]he right of individual, especially public figure or celebrity, to control commercial value and exploitation of his name or picture or likeness or to prevent others from unfairly appropriating the value for their commercial benefit."³ The doctrine is rooted in both privacy and property law, and as such, its definition can vary depending upon the source. Since its conception just over a century ago, the right of publicity has steadily evolved. Initially, it was simply suggested that the "law must afford some remedy for the unauthorized circulation of portraits of private persons."⁴ The doctrine has subsequently become widely recognized as the right of an individual to control the commercial value and exploitation of his or her likeness by preventing others from unfairly appropriating that value for their own commercial benefit. The U.S. Supreme Court has recognized the right of publicity as protecting "an economic incentive for [one] to make the investment required to produce a performance of interest to the public."⁵ In addition to being acknowledged by the U.S. Supreme Court, the right of publicity has been recognized in the Restatement of Torts and the Restatement of Unfair Competition. A majority of the states recognize the doctrine, either through court-made common law or statutory legislation.

Each of these sources for the doctrine has a slightly different definition. Most will agree, however, that the right of publicity is "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

3. BLACK'S LAW DICTIONARY 1325 (6th ed. 1990) (citing *Presley's Estate v. Russen*, 513 F. Supp. 1339, 1353 (D.C.N.J. 1981)).

4. Warren & Brandeis, *supra* note 2, at 195.

5. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977).

inherent human right of identity and which is not immunized by principles of free press and free speech.”⁶ The deviations in the various definitions of the right of publicity goes the heart of the need for a uniform federal statute.

2. *Origins of the Right*

To better understand the reasons for the difficulty in defining the right of publicity, it is meaningful to examine the conception of the doctrine. The right of publicity was originally rooted in the right of privacy. In an 1890 law review article addressing the right to privacy, Louis Warren and Samuel Brandeis first proposed the concept that privacy rights extend to the protection of one’s right of publicity. The article acknowledged what no English or American court ever had, that individuals have an inherent “right to be let alone.”⁷ Warren and Brandeis advocated that privacy rights include one’s right to ordinarily determine “to what extent his thoughts, sentiments, and emotions shall be communicated to others.”⁸ Until then, one’s right to control the publicity of his or her persona had not been clearly defined or expressed as an actionable right. While privacy rights prohibited one from unnecessarily looking into the privacy of another’s life, publicity rights would prohibit one from exploiting another’s life in public. Although Warren and Brandeis did not refer to this right as one of publicity, their article is credited with being the birthplace for the doctrine.⁹ Over the past century, the right of privacy and publicity have evolved far beyond the original article by Warren and Brandeis. Privacy rights have, however, been a regular source for enforcing one’s right of publicity, whether under common law or state statutes.¹⁰

6. J. THOMAS MCCARTHY, *THE RIGHT OF PUBLICITY AND PRIVACY* vii (Rev. 1993).

7. Warren & Brandeis, *supra* note 2, at 193.

8. *Id.* at 198 (citing Justice Yates, in *Millar v. Taylor*, 4 Burr 2303, 2379).

9. *Id.* at 193.

10. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1997).

B. Common Law

Common law right of publicity has evolved over the past hundred years. However, only in the last half century has the doctrine been referred to under its present name of the "right of publicity." Since then, recognition in two Restatements treatises has been realized. Today, the right of publicity is recognized as existing under the common law of sixteen states.¹¹ As such, the common law continues to be a critical source for many jurisdictions in recognizing this legal theory.

1. Evolution of the Common Law

The common law theory of the right of publicity evolved from breach of confidence and contract, to privacy rights, and then to property rights, eventually resulting in the modern doctrine of the right of publicity. Historically, "where protection [was] afforded against wrongful publication, the jurisdiction [was] asserted, not on

11. See, e.g., *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983) (California common law); *Jim Henson Prods. v. John T. Bradly & Assocs.*, 867 F. Supp. (S.D.N.Y. 1994) (Connecticut common law); *Genesis Publications, Inc. v. Goss*, 437 So. 2d 169 (Fla. Dist. Ct. App. 1983) (Florida common law); *Martin Luther King, Jr. Ctr. v. American Heritage Prods.*, 296 S.E.2d 697 (Ga. 1982) (Georgia common law); *Fergerstrom v. Hawaiian Ocean View Estates*, 441 P.2d 141 (Haw. 1968) (Hawaii common law); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985), cert. denied, 475 U.S. 1094 (1986) (Illinois common law); *Cheatham v. Paisano Publications, Inc.*, 891 F. Supp. 381 (W.D. Ky. 1995) (Kentucky common law); *Carson v. Here's Jonny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (Michigan common law); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970) (Minnesota common law); *Haith v. Model Cities Health Corp.*, 704 S.W.2d 684 (Mo. Ct. App. 1986) (Missouri common law); *Estate of Elvis Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981) (New Jersey common law); *Reeves v. United Artists Corp.*, 765 F.2d 79 (6th Cir. 1985) (Ohio common law); *The Eagle's Eye, Inc. v. Ambler Fashion Shop, Inc.*, 627 F. Supp. 856, 862 (E.D. Pa. 1985) (Pennsylvania common law); *Kimbrough v. Coca-Cola/USA*, 521 S.W.2d 719 (Tex. Civ. App. 1975) (Texas common law); *Nature's Way Prods., Inc. v. Nature-Pharma, Inc.*, 736 F. Supp. 245 (D. Utah 1990) (Utah common law); *Hirsch v. S.C. Johnson & Sons*, 290 N.W.2d 129 (Wis. 1979) (Wisconsin common law).

the ground of property, or at least not wholly on that ground, but upon the ground of an alleged breach of an implied contract or of a trust or confidence."¹² These theories were put forth to prohibit private letters from being wrongly publicized.¹³ "In searching for some principle upon which the publication of private letters could be enjoined, [the courts] naturally came upon the ideas of breach of confidence, and of an implied contract; but it required little consideration to discern that this doctrine could not afford all the protection required, since it would not support the court in granting a remedy against a stranger."¹⁴ Since a stranger's publication of private facts could not be prohibited under the theory of breach of confidence or breach contract, a new theory was needed. It was "therefore concluded 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."¹⁵

A new theory to protect one's publicity rights was presented in the 1890 right to privacy article by Warren and Brandeis.¹⁶ By advocating recognition of the common law right of privacy, they set the groundwork for an individual's right to publicity.¹⁷ In their article, Warren and Brandeis assert that common law protections enable one to absolutely control "the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all."¹⁸ The privacy rights set forth by Warren and Brandeis spawned the separate doctrine of the right of publicity. However, the right to privacy continues to be the basis of many right of publicity laws today.

Because privacy laws failed to fully address issues of transferability, descendability, and purely economic damages, the theory of property was adopted in early publicity cases to provide

12. Warren & Brandeis, *supra* note 2, at 207.

13. *Id.* at 211.

14. *Id.*

15. *Id.* at 213.

16. *Id.* at 193.

17. Alan J. Hartnick, Intellectual Property for the Non-Specialist, *NYLJ* 5, col. 1 (1998).

18. Warren & Brandeis, *supra* note 2, at 200.

proper redress.¹⁹ It was suggested that the principle “that individuals should have full protection in person and in property [was] as old as the common law.”²⁰ Common law held that “a man ‘is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his.’”²¹ Although it was viewed as being “entirely independent of the copyright laws” and other intellectual property rights, the right of publicity was recognized as “the enforcement of a right of property.”²² This property right was seen as part of “the more general right of the individual right to be let alone.”²³ For the next several decades, the right of publicity continued to evolve as a unique hybrid of privacy and property rights.

The term “right of publicity” was first coined in 1953, in the now landmark case of *Haelan Laboratories, Inc. v. Topps Chewing Gum Inc.*²⁴ *Haelan* involved a chewing gum manufacturer that contracted with a professional baseball player for exclusive use of his photograph in connection with selling their chewing gum.²⁵ Although the baseball player agreed not to grant any other gum manufacturer such rights during a set term, a competing chewing gum company persuaded the baseball player to authorize them to use his photograph for similar advertising purposes.²⁶ Judge Jerome Frank held that a person “has the right in the publicity value of” his or her likeness.²⁷ In this first case to expressly recognize the doctrine, the court suggested that “[t]his right might be called a ‘right of publicity.’”²⁸ For two decades following *Haelan*, case law continued to refine the doctrine of right of

19. *Id.*

20. *Id.*

21. *Id.* at 205 (quoting Lord Cottenham).

22. Warren & Brandeis, *supra* note 2, at 200.

23. *Id.* at 205.

24. 202 F.2d 866, 868 (2d Cir. 1953).

25. *Id.* at 867.

26. *Id.*

27. *Id.* at 868.

28. *Id.*

publicity.²⁹ However, not all courts gave recognition to the newly named right.³⁰

2. *Recognition in Restatements*

The right of publicity presently has recognition in both the Restatement of Torts and the Restatement of Unfair Competition.³¹

In 1976, Dean William Prosser included the right to privacy in his Restatement (Second) of Torts.³² He divided the privacy tort into four distinct categories: 1) intrusion into one's physical solitude; 2) publicity placing someone in false light; 3) public disclosure of private facts; and 4) appropriation of one's name or likeness to another's advantage.³³ It is Prosser's fourth type of privacy tort that protects one's right of publicity.³⁴ Prosser's Restatement addresses an individual's claim that another appropriated his likeness for commercial gain.³⁵

In 1995, the American Law Institute published the Restatement (Third) of Unfair Competition defining the tort of "Appropriation of the Commercial Value of a Person's Identity: The Right of Publicity."³⁶ "This Restatement deals with rules affording relief against unfair methods of competition, and [therefore, limit redress to] commercial injuries."³⁷ The Restatement states that "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."³⁸

29. *Id.*

30. See *Strickler v. National Broadcasting Company*, 167 F.Supp. 68, at 70 (S.D.Cal. 1958) (court said, it did not wish "to blaze the trail to establish in California a cause of action based upon the right of publicity").

31. See RESTATEMENT (SECOND) OF TORTS (1977); RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995).

32. RESTATEMENT (SECOND) OF TORTS (1977).

33. Hartnick, *supra* note 17.

34. RESTATEMENT (SECOND) OF TORTS § 652C (1977).

35. *Id.* at § 652C cmt. b.

36. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

37. *Id.* at § 46 cmt. a.

38. *Id.* at § 46 (appropriate relief for the commercial use of one's likeness is established under sections 48 and 49).

Injunctive relief, as addressed in the Restatement, is based on the nature and extent of appropriation.³⁹ The interests of the parties involved are balanced along with the plaintiff's diligence in bringing the action.⁴⁰ Under the Restatement, monetary relief consists "of either compensatory damages measured by the loss to the plaintiff or restitutionary relief measured by the unjust gain to the defendant."⁴¹ The general rules relating to the recovery of compensatory damages in tort actions also apply under the Restatement (Third) of Unfair Competition.⁴²

For many states that have yet to codify the right of publicity, the Restatement of Torts and the Restatement of Unfair Competition have acted as primary sources in recognizing the right of publicity under the common law.

C. State Statutory Law

Recently, many states have codified the right of publicity through legislative statutes. Instead of waiting for the courts to fully develop this evolving area of law, state legislatures have created their own statutory laws to cover these issues. Statutes adopted by California and New York are often cited as among the first state laws to codify an actionable tort for misappropriation of one's persona.⁴³ In the 1970's, a flurry of statutory activity in the creation of publicity laws began. This movement has yet to end in various states like Indiana, where a right of publicity statute has just recently been enacted for the first time.⁴⁴ Other states continue to refine their existing statutes. For example, New York recently amended its right of privacy statute (which covers right of publicity) to include a cause of action for the misappropriation of one's voice. Likewise, California has led several other states in recognizing a statutory claim for a violation of the right of

39. *Id.* at 48.

40. *Id.*

41. *Id.* at § 49 cmt. a.

42. *Id.*

43. RICHARD RAYSMAN ET AL., *THE INTERNET AND ON-LINE SERVICES* § 10.06, MULTIMEDIAW (1996)

44. IND. CODE ANN. § 32-13-1 (West 1998).

publicity through the commercial use of voices, sound-alikes or signatures.⁴⁵

Today, at least fifteen states have passed similar laws in recognition of one's right of publicity.⁴⁶ The express language of the statutes differ from state to state regarding what is protected under the right of publicity, and some statutes fail to address important issues such as inheritability.⁴⁷ Although statutes vary from state to state, both the California and New York statutes turn on whether the likeness or name of a person is being used commercially.⁴⁸

1. California's Codification of Publicity Rights

California was among the earliest state to codify the right of publicity.⁴⁹ California first enacted the right of publicity statute under section 3344.⁵⁰ The statute was later amended with the addition of section 990 that included protection to deceased individuals.⁵¹ These statutes have been used as models for drafting similar laws in other states, and therefore, they offer good examples of the various provisions in the many state statutes.⁵²

45. RAYSMAN, *supra* note 43, at § 10.06.

46. See CAL. CIVIL CODE §§ 990, 3344 (West 1998); FLA. STAT. § 540.08 (1997); IND. CODE ANN. §§ 32-13-1-1 to 32-13-1-20 (West 1998); KY. REV. STAT. ANN. § 391.170 (Banks-Baldwin 1997); MASS. GEN. LAWS ANN. ch. 214, § 3A (West 1998); NEB. REV. STAT. § 20-202 (1997); NEV. REV. STAT. ANN. §§ 597.770-.810 (Michie 1997); N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976); OKLA. STAT. tit. 21, §§ 839.1-.3 (1983); R.I. GEN. LAWS § 9-1-28 (1997); TENN. CODE ANN. §§ 47-25-1101 to 47-25-1108 (1997); TEX. PROP. CODE ANN. §§ 26.001-.015 (West 1997); UTAH CODE ANN. §§ 45-3-1 to 45-3-6 (1998); VA. CODE ANN. § 8.01-40 (Michie 1998); WIS. STAT. § 895.50 (1997).

47. Both California and Tennessee's right of publicity statutes have been tailored to deal with unique issues concerning the right of publicity, including inheritability.

48. CAL. CIV. CODE § 3344(e) (West 1998); N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976).

49. CAL. CIV. CODE § 3344 (West 1998).

50. *Id.*

51. *Id.* at § 990.

52. *Id.* at § 3344.

Section 3344 of the California statute recognizes the right of publicity as the “unauthorized commercial use of name, voice, signature, photograph or likeness.”⁵³ The statute defines the cause of action as:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his [or her] parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.⁵⁴

California law defines statutory remedies as the actual damages resulting from the unauthorized use or \$750, whichever is greater.⁵⁵

A defendant's actual profits, as well as punitive damages, are available as money damages to a successful plaintiff.⁵⁶ The statute also permits the prevailing party to seek legal costs and attorney fees.⁵⁷

Immunity from liability for certain First Amendment uses of one's likeness is provided under section 3344 of the California statute.⁵⁸ The statute offers such protections by declaring that the “use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required.”⁵⁹

The California statute was originally adopted in 1972, and then significantly amended in 1985. At that time, California also enacted legislation to codify publicity rights for the identity of

53. *Id.* at § 990.

54. *Id.* at § 3344(a).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at § 3344(d).

59. *Id.*

deceased persons.⁶⁰ California Civil Code section 990 creates a descendible right of publicity as a personal property right. Absent consent of living transferees, a cause of action arises under this statute for unauthorized use of an individual's likeness when such use "has commercial value at the time of his or her death."⁶¹ Remedies for liability under this section are the same as under the "living" right of publicity statute.⁶²

A cause of action under this section can be brought for up to fifty years following the death of the personality.⁶³ As a condition precedent for bringing an action, however, the successor-in-interest to the decedent (or transferee) must pay a \$10 filing fee to register a claim of the decedent's persona with the Secretary of State of California.⁶⁴ Both section 3344 (the living section) and section 990 (the deceased section) are designed to protect the name, voice, signature, photograph and likeness of human beings.⁶⁵ These sections do not, however, protect fictitious "persons," such as corporations, partnerships, or other non-human entities.⁶⁶

2. *Comparing Other State Statutes*

Although other state statutes have similar provisions as to those in the California law, many provisions differ as well. Not all states have explicit publicity statutes. Some have instead relied on privacy or property statutes to protect one's right of publicity. For example, several proposed bills have been introduced in the New York State Senate in recent years to establish a true "right of publicity" section to New York's Civil Code.⁶⁷ This is because the New York does not currently have a specific right of publicity statute, and New York courts do not currently recognize the right of publicity under common law. New York has relied on a right of

60. *Id.* at § 990.

61. *Id.* at § 990(h).

62. Compare CAL. CIV. CODE § 990(a), with § 3344(a).

63. CAL. CIV. CODE § 990(g) (West 1998).

64. *Id.* at § 990(f)(2).

65. *Id.* at §§ 990(a), 3344(a).

66. RAYSMAN, *supra* note 43, at § 10.06.

67. *Id.*

privacy statute, which covers the right of publicity for living persons.⁶⁸ New York state law provides for a civil cause of action in both law and equity.⁶⁹ To state a claim under this section of the New York privacy statute, the plaintiff must show that: (1) defendant used his name, portrait or picture, (2) for purposes of trade or advertising (3) without his written consent.⁷⁰ The legislative intent of this section is to protect individuals against "selfish, commercial exploitation."⁷¹

Indiana has recently enacted possibly the most aggressive state statute to date on right of publicity.⁷² The statute expressly protects individuals under Indiana state law "regardless of a personality's domicile, residence, or citizenship."⁷³ With the pervasiveness of interstate commerce making so many activities fall within Indiana's jurisdiction, this statute reaches infringers for activities that questionably take place outside of Indiana.⁷⁴ Passage of this broad reaching statute was encouraged by a celebrity agency located in Indiana, CMG Worldwide, seeking maximum protection for their celebrity clients.⁷⁵

Other states have enacted similar specially tailored laws to help protect their local celebrities. For example, the Tennessee statute is affectionately referred to as "Elvis law" which is very favorable to a plaintiff like Graceland.⁷⁶ Likewise, Georgia's law is known as "King law," since it helps protect the publicity rights for the estate of Martin Luther King, Jr.⁷⁷ States without such special interests are less likely to have strong right of publicity laws.

68. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1997).

69. *See* N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1997); N.Y. GEN. BUS. LAW § 397 (McKinney 1997).

70. *Cohen v. Herbal Concepts, Inc.*, 472 N.E.2d 307, 308 (N.Y. 1984).

71. *Rand v. Hearst Corp.*, 298 N.Y.S.2d 405, 408-09 (N.Y. App. Div. 1969).

72. IND. CODE ANN. § 32-13-1-1 (West 1998).

73. *Id.* at § 32-13-1-1(a).

74. *Id.*

75. CMG Worldwide represents the publicity rights of both living and dead celebrities.

76. *See* TENN. CODE ANN. §§ 47-25-1101 to 47-25-1108 (1997); *Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987).

77. *See* *Martin Luther King, Jr., Ctr. For Social Change, Inc. v. American Heritage Prods., Inc.*, 694 F.2d 674 (11th Cir. 1983).

D. Existing Federal Statutory Law

Presently, no federal right of publicity exists.⁷⁸ However, the federal trademark statute⁷⁹ has recently been used to protect individuals' publicity rights from unauthorized commercial use constituting false endorsement.⁸⁰ In particular, it is section 43(a) of the Lanham Act that has provided this federal protection.⁸¹ Trademark law has deep roots in the state common law.⁸² However, Congress did not enact the first trademark statute until 1870.⁸³ In doing so, Congress relied on its Constitutional power to regulate Patents and Copyrights⁸⁴ to also regulate trademarks. Initially, the Supreme Court struck down the then new federal trademark law, holding that the Patent and Copyright Clause of the U.S. Constitution did not include the power to regulate trademarks.⁸⁵ Alternatively, Congress would find the power to regulate trademarks through the Commerce Clause⁸⁶ of the United States Constitution when it enacted another federal trademark law in 1881.⁸⁷ Although the initial federal trademark statute may have been constitutional, it proved to be a largely ineffective. The 1881 federal trademark law was superceded by subsequent acts in 1905,⁸⁸ and again in 1920.⁸⁹ Each of these federal trademark

78. JULIUS C.S. PINCKAERS, FROM PRIVACY TOWARD A NEW INTELLECTUAL PROPERTY RIGHT IN PERSONA 21 (1996).

79. 15 U.S.C. § 1125(a) (1998).

80. *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994).

81. 15 U.S.C. § 1125(a).

82. See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 4:3 (4th ed. 1997).

83. Act of July 8, 1870, ch. 230, 16 Stat. 198.

84. U.S. CONST. art. I, § 8, cl. 8.

85. *The Trade-Mark Cases*, 100 U.S. 82 (1870).

86. U.S. CONST. art. I, § 8, cl. 3 (stating that Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

87. Act of Mar. 3, 1881, ch. 138, 21 Stat. 502 (repealed 1946).

88. Act of Feb. 20, 1905, ch. 592, 33 Stat. 724 (repealed 1946).

89. Act of Mar. 19, 1920, ch. 104, 41 Stat. 533 (repealed 1946).

statutes were ultimately replaced with the Lanham Act⁹⁰ in 1946, named after Texan Congressman Fritz G. Lanham who introduced the law.

"The Lanham Act is founded on the principle that it is not equitable for a party to use a unique symbol and to trade on another party's goodwill and reputation to promote his or her own goods or services, when the other party has expended resources to develop an identification for his or her product."⁹¹ Congress amended the Lanham Act in 1988.⁹² Section 43(a) is now entitled "False designations of origin, false descriptions, and dilution forbidden," expressly stating:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation,

90. Trademark (Lanham) Act, ch. 540, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051-1127 (1998)).

91. Steven M. Cordero, Note, Cocaine-Cola, the Velvet Elvis, and Anti-Barbie: Defending the Trademark and Publicity Rights to Cultural Icons, 8 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 599, 613 (1998).

92. The Trademark Revision Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935 (effective Nov. 16, 1989). This act amended the original language of section 43(a) of the Lanham Act, which stated: "Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.⁹³

Some celebrities "have used section 43(a) to prevent the unauthorized use of their images or likenesses in advertising that constituted false endorsement, where state statutory law or common law rights of publicity were not available."⁹⁴

AUTHOR'S ANALYSIS

Having discussed the history and present status of the right of publicity, this Comment will now address the need for a uniform federal statute, the key provisions that should be included, and a model federal publicity statute.

A. The Need for a Federal Statute

In order to rectify the problems of uncertainties under the present patchwork of varying right of publicity laws, a new federal statute is needed. "Given the national scope of modern-day advertising campaigns, a federal scheme would better address the problem of

93. 15 U.S.C. § 1125(a)(1) (1998).

94. Cordero, *supra* note 91, at 624 (citing *Allen v. Men's World Outlet, Inc.*, 679 F.Supp. 360 (S.D.N.Y. 1988)).

commercial appropriation of celebrities' identities than would individual state legislation."⁹⁵ A basic maxim of American jurisprudence is that "legal certainty promotes commercial efficiency."⁹⁶ Negotiating licenses and pursuing infringers would be less costly and more predictable if the right of publicity was a single, national law rather than the present patchwork.⁹⁷ Eliminating the "inconsistent standards and decisions by state legislatures and courts, as well as forum shopping" will act to further stabilize the marketplace thereby encouraging transactions.⁹⁸ "Further, a federal statute would promote the establishment of a single body of federal case law governing the subject of commercial exploitation of an individual's persona; an area which is clearly deficient at present."⁹⁹ Unfortunately, the present sources of publicity law fail to provide adequate protection and predictability, either independently or in conjunction with one another.

1. Nothing Common About State Laws

A "primary need for federal right of publicity legislation is that state laws are a mess."¹⁰⁰ About half of the states recognize the right of publicity under common law or have codified the law as a state statute. Although there has been a trend for states to codify publicity rights over the past few decades, many states have states chosen to rely solely on court-generated common law.¹⁰¹ Several

95. Melissa M. Davis, Note, Voicing Concern: An Overview of the Current Law Protecting Signers' Voices, 40 SYRACUSE L. REV. 1255, 1276-77 (1989).

96. Oversight Hearing on "Celebrity" Imposters and a Federal Right of Publicity, Before the Subcomm. on Courts and Intellectual Property, 105th Cong. (May 21, 1998) [hereinafter *Celebrity Hearings*] (testimony of Frederick Mostert, President of the Int'l Trademark Ass'n).

97. *Id.*

98. Davis, *supra* note 95, at 1277.

99. *Id.*

100. Telephone Interview with Theodore Davis, Former Chairman of ABA Task Force on Federal Right of Publicity (Sept. 28, 1998).

101. *See, e.g.,* *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985), cert. denied, 475 U.S. 1094 (1986) (applying Illinois's common law

states recognize both statutory and the common law right of publicity,¹⁰² while other states fail to recognize the matter as actionable at all.

This major divergence in state law has led to a chronic problem of forum shopping. Forum shopping is a technique by which parties "shop" for states that have laws favoring their position. Whether in state or federal court, the question of which law to apply can quickly determine the outcome of a case or whether the matter will even be heard.¹⁰³ The problem of forum shopping is exemplified by what some consider to be potentially overreaching state long arm statutes. For instance, Indiana's publicity law applies to acts or events that occur within Indiana, regardless of a personality's domicile, residence, or citizenship.¹⁰⁴

It has become very difficult for lawyers to properly advise their clients on right of publicity matters because parties tend to forum shop. Lawyers may tell their clients how a particular matter might be ruled under Georgia law, for example, but there is no guarantee that they will be sued in Georgia. They may be sued in California or New York instead. There is also a question of whether an injunction issued under one state's law will have any effect on activities in another state. An injunction may easily be obtained in Tennessee, but it is not clear how far that injunction will reach. In New York, for example, courts have held that the state's publicity law does not extend to violations involving out-of-state sales.¹⁰⁵ Lawyers cannot give their clients anything even resembling an unqualified opinion under the current scheme of various state laws.

right of publicity); *Gee v. CBS, Inc.*, 471 F. Supp. 600 (E.D. Pa. 1979) (applying Pennsylvania's common law).

102. States recognizing both statutory and common law right of publicity include California, Florida, Kentucky, Texas, Utah, and Wisconsin.

103. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

104. IND. CODE § 32-13-1-1 (1998).

105. *See Shamsky v. Garan, Inc.*, 632 N.Y.S.2d 930 (N.Y. Sup. Ct. 1995).

2. *Problematic Patchwork of State Statutes*

Presently, true publicity rights are only protected by state laws.¹⁰⁶ For an individual to control the use of his or her likeness in a commercial setting, they must work through a patchwork of state laws designed to protect them.¹⁰⁷ While many jurisdictions still rely on common law protections for the right of publicity, numerous state legislatures have enacted statutory laws.¹⁰⁸ Still other states have legislatively fine-tuned particular publicity laws to answer the concerns of local entertainment interests.¹⁰⁹

State codification of right of publicity laws have done little to clarify publicity rights from one jurisdiction to another. These separate and independent efforts to define the scope and protections of the right of publicity have resulted in confusion among those faced with assessing the potential impact of a nationwide advertising campaign. Even if each state judiciary or state legislature is willing to provide protection of individual personas, such a decentralized approach is inadequate because it will result in fifty different standards.¹¹⁰ Under this scheme, imagine the complexity involved in governing a single nationwide broadcast of an advertisement. "A federal statute, on the other hand, would create a uniform and cohesive standard under which both advertisers and [celebrities] would have their rights and limitations clearly defined."¹¹¹

106. See J. Eugene Solomon, Jr., Note, *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179 (1987) (discussing problems created by the divergence in the interpretation of the right of publicity among the states).

107. Sally M. Abel & Marilyn Tiki Dare, *Trademark Issues in Cyberspace: The Brave New Frontier*, 486 PLI/PAT 381, 413-14 (1997) (discussing growing jurisdictional problems with intellectual property issues cyberspace).

108. See *supra* note 46.

109. The Roger Richman Agency, in Beverly Hills, California, specializes in licensing right of dead celebrities. Mr. Richman was instrumental in drafting and seeing passage of California's deceased right of publicity statute section 990. Likewise, CMG Worldwide, in Indianapolis, Indiana, successfully lobbied for passage of Indiana's broad right of publicity statute.

110. Davis, *supra* note 95, at 1277.

111. *Id.*

Discrepancies exist between nearly every state statute. However, certain provisions, such as a fair use exception, address issues that reach beyond local state interests.¹¹² As a general rule, a person's right of publicity does not preclude others from incorporating a person's name, features or biography in a literary work, motion picture, news or entertainment story.¹¹³ Normally, it is only the use of an individual's identity in advertising that infringes on the right of publicity.¹¹⁴ A court's distinction between commercial use and a newsworthy exception will often determine whether one's right of publicity has been violated.¹¹⁵ This means that the newsworthy use of a private person's name or photograph will not give rise to a cause of action so long as the use is reasonably related to a matter of public interest.¹¹⁶

In cases involving the questions of the material's newsworthiness, courts have generally held that matters of public interest are to be broadly defined.¹¹⁷ An example of a court protecting the dissemination of news considered to have only "marginal public interest" is found in *Dora v. Frontline Video, Inc.*¹¹⁸ In *Dora*, the plaintiff was filmed in a surfing documentary and sued for misappropriation of his likeness.¹¹⁹ The court found that the public interest of expression protected the filmmaker because the documentary offered a view of American surfer legends.¹²⁰ "Although the court found that the social value of the film was limited, it concluded that the intrusion upon plaintiff was also limited."¹²¹ A significant concern in drafting a new federal

112. U.S. CONST. amend. I.

113. See *Rogers v. Grimaldi*, 695 F. Supp. 112, at 121 (S.D.N.Y. 1988), aff'd, 875 F.2d 994 (2d Cir. 1989).

114. See *id.*

115. See *Stern v. Delphi Internet Serv. Corp.*, 626 N.Y.S.2d 694 (N.Y. Sup. Ct. 1995).

116. See *id.* at 695.

117. See *Arrington v. New York Times Co.*, 434 N.E.2d 1319, 1322 (N.Y. 1982).

118. 18 Cal. Rptr. 2d 790 (Ct. App. 1993)

119. *Id.* at 791.

120. *Id.* at 793.

121. Robert L. Raskopf, *The Right of Publicity and the Internet*, 454 PLI/PAT 59, 67 (1996).

publicity statute is that careful consideration is paid to the balancing of one's publicity rights with the First Amendment protections of others.

In 1977, this very issue was addressed by the U.S. Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*,¹²² the Court's only case involving the right of publicity. In *Zacchini*, the Court interpreted Ohio's right of publicity law as it applies to First Amendment exceptions.¹²³ The Court held that the First Amendment of the United States Constitution does not permit a television program to broadcast the entire performance of a "human cannonball" act under the guise of news.¹²⁴ In making this determination, the Court considered several factors, including that 1) the defendant had aired the plaintiff's performance in its entirety, 2) the defendant could have accomplished its purpose by airing less than the entire act, and 3) the plaintiff was not attempting to prevent the public from seeing his act, he was just seeking damages from lost ticket sales for his live performances.¹²⁵

In drafting and enforcing an otherwise unique right of publicity statute, individual states can not escape such issues as First Amendment exceptions regardless of the other interests at hand.

3. *Limitations in using the Lanham Act*

When all else fails in asserting a right of publicity under state law, celebrities and their representatives use section 43(a) of the Lanham Act.¹²⁶ However, this federal trademark statute is presently insufficient to provide proper protection to individual publicity rights. The Lanham Act was designed to protect trademark owners and the public from unfair competition while preventing consumer confusion.¹²⁷ These goals of trademark law are not fully consistent with those of the right of publicity. Unlike most right of publicity laws, section 43(a) does not prevent

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

123. *Id.* at 578.

124. *Id.*

125. *Id.* at 577.

126. 15 U.S.C. § 1125(a) (1998).

127. Cordero, *supra* note 91, at 609.

C. Preemption of State Laws

A new federal publicity statute must preempt existing state laws, both statutory and common law.¹⁴⁵ Under the Commerce Clause of the United States Constitution, Congress has the power to regulate interstate commerce.¹⁴⁶ The broad interpretation of this power has given Congress virtually unlimited regulatory power over nearly all issues affecting interstate commerce.¹⁴⁷ The inherent nature of right of publicity violations effect interstate commerce through national advertising and distribution efforts. As a result, Congress can find the authority under the Commerce Clause to regulate the right of publicity.

The effect of a new federal publicity statute will be that it preempts existing state laws on the subject.¹⁴⁸ Regardless of the content of the new law, the resulting uniform standard will provide predictability among exploiters and defenders of the right. This is not to suggest that the value of predictability trumps the effects of the law. It simply means that the stability gained by a new uniform law will enhance the commercial interests that are being protected.¹⁴⁹

As with all federal preemption issues, uniformity is gained at the expense of superseding existing state laws. Of course, this would not pose a problem if the new federal law incorporated the exact provisions of each state's law, and nothing more. This could only be the case, however, if every state already had the exact same provisions in each of their laws. In that instance, existing uniformity among the states would prove that there is no significant purpose to be served by creating a new federal version of the same law. One goal in drafting a new federal publicity statute, therefore, is to preserve as many common existing state provisions as possible without burdening states with other provisions that may be contrary to their existing laws. In

145. Celebrity Hearings, *supra* note 96.

146. U.S. CONST. art. I, § 8, cl. 3.

147. *See, e.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

148. U.S. CONST. art. IV § 2.

149. *See supra* note 96 and accompanying text.

surveying the existing statutes and common laws of each state, a consensus of the various provisions should be harmonized into a new federal standard.

D. Harmonious Grandfather

To the extent practical, the divergent state laws must be harmonized into the single uniform federal publicity statute. This process should occur in a manner that recognizes the principles underlying the right of publicity and fairly balance competing public interests.¹⁵⁰ Attempts to accommodate every states' interest by incorporating each unique provision from existing statutes will likely prove disastrous.¹⁵¹ A case of "too many cooks in the kitchen" is a sure recipe for failure in passing effective legislation.

To be successful, the harmonization process must ultimately be a process of selecting the best provisions of the existing state laws, not just a collage of them.

Enacting a federal publicity statute that harmonizes various state laws runs the risk of preempting rights and interests that have already been established and relied upon under an existing state statute. The logical solution to this otherwise unjust scenario is to create a 'grandfather' clause protecting individuals that have already relied on existing state laws. Such a provision would recognize "prior user rights for the owners of names and marks consisting of an aspect of persona lawfully acquired before enactment of federal right of publicity legislation."¹⁵²

E. Justice for All

A new federal publicity statute must be available to all persons, famous or not. "Movie stars and athletes get paid millions of dollars for the use of their image in advertising. As in many

150. Celebrity Hearings, *supra* note 96.

151. Telephone Interview with Theodore Davis, Former Chairman of ABA Task Force on Federal Right of Publicity (September 28, 1998). Mr. Davis discussed reasons the efforts of the International Trademark Association to create a workable federal publicity statute were bogged down in 1997.

152. Celebrity Hearings, *supra* note 96.

[cases], so do the estates of [famous] dead people.”¹⁵³ The right of publicity is often seen as an obscure doctrine, even within the legal community. Some view the doctrine as being reserved for advocates seeking to protect the publication rights of an elite class of celebrities. However, the right of publicity must be extended to every individual, not only to “those persons from a particular segment of the entertainment industry, as some have suggested.”¹⁵⁴

The minority view is that the persona of a non-celebrity lacks commercial value, and therefore, should not be entitled to the protection of the right of publicity. This principle is familiar to federal intellectual property law, where the Dilution Act of 1995 discriminates against non-famous trademarks, only protecting famous ones.¹⁵⁵ The federal dilution statute considers several factors in determining which marks are “famous.”¹⁵⁶ Publicity cases prescribing to the minority view have required “some minimum degree of fame or notoriety as a prerequisite for relief.”¹⁵⁷ The majority view, on the other hand, recognizes that “the identity of even an unknown person may possess commercial value.”¹⁵⁸ Jurisdictions proscribing to this latter theory have found

153. David Brenner, *A Web of Intrigue*, PUGET SOUND BUS. J., Oct. 17, 1997, at 32.

154. *Celebrity Hearings*, supra note 96 (Mr. Mostert testified that the INTA has consistently had a “long-standing policy of opposing any special interest ... legislation”).

155. 15 U.S.C. § 1125(c) (1998).

156. *Id.* at § 1125(c)(1). In determining whether a mark is distinctive and famous, the Dilution Act of 1995 directs the “court to consider factors such as, but not limited to: (A) the degree of inherent or acquired distinctiveness of the mark; (B) the duration and extent of use of the mark in connection with the goods or services with which the mark is used; (C) the duration and extent of advertising and publicity of the mark; (D) the geographical extent of the trading area in which the mark is used; (E) the channels of trade for the goods or services with which the mark is used; (F) the degree of recognition of the mark in the trading areas and channels of trade used by the marks' owner and the person against whom the injunction is sought; (G) the nature and extent of use of the same or similar marks by third parties; and (H) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.”

157. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995).

158. *Id.*

non-famous people to suffer economic injury from appropriation of likeness.¹⁵⁹ This prospective supports the theory that anyone's publicity value can be appropriated regardless of whether they are famous.¹⁶⁰

In reconciling these two views, it should be settled that all individuals are entitled to protection of their publicity rights while allowing the marketplace to determine the persona's value, if any.¹⁶¹ The "damages which a person may claim for infringement of the right will depend upon the value of the publicity appropriated."¹⁶² This will in turn depend "upon the degree of fame attained by the plaintiff." In other words, there should be a presumption of value in every persona, however, damages should be based on each individual persona's value in the marketplace.

Fame or the previous exploitation of one's persona must not be a condition precedent for bring a cause of action under a new federal publicity statute. In enacting new federal publicity legislation, "Congress should resist [any] kind of piecemeal approach"¹⁶³ that would limit protection to celebrities only. Such narrow legislation "will only hinder the process of developing a comprehensive solution."¹⁶⁴

F. Commercial v. Fair Use

In creating a federal publicity statute, there must be "protection of the public's interest by exempting from liability uses of persona that meet fair use [and] First Amendment standards for uses such as ... news, biography, history, fiction, commentary and parody."¹⁶⁵ Careful attention must be placed in drafting a fair use

159. *Canessa v. J. I. Kislak, Inc.*, 235 A.2d 62 (N.J. Super. L. 1967).

160. Solomon, *supra* note 106, at 1197-98.

161. See *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904, 909 (D.N.J. 1986) (Judge Ackerman did "not find that New Jersey law limits the cause of action of misappropriation to famous individuals").

162. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 217 (1954).

163. *Celebrity Hearings*, *supra* note 96.

164. *Id.*

165. *Id.*

exception that distinguishes certain uses from being purely commercial. The various uses of one's persona can be categorized as distinct and separate types. These include public interest, artistic expression, and commercial.¹⁶⁶ The first of these two uses must fall under a fair use exception and would, therefore, be exempt from liability. Single works of fine art, live performances, literary works, artistic expressions have all been held as protected from right of publicity liability under the fair use exception. Commercial use, the last of the three types, amounts to exploitation of one's likeness and should therefore be actionable if appropriated without prior consent.

A new federal publicity statute must ultimately pass First Amendment constitutional muster, just as existing state laws have.¹⁶⁷ Many states have codified a First Amendment exception to their right of publicity statutes.¹⁶⁸ These exceptions usually provide that a "newsworthy use of a private person's name or photograph does not give rise to a cause of action ... as long as the use is reasonably related to a matter of public interest."¹⁶⁹ Regardless of whether First Amendment rights trump one's right to publicity, the presumption is that a newsworthy use is not a strictly commercial use. However, newsworthy use and commercial use are not necessarily mutually exclusive. News reporting outlets, whether by television broadcast or printed newspapers, draw high advertising revenues through advertisements that are sold to run alongside "public interest" stories. As a legal fiction, however, the law sees a use as either newsworthy or commercial, but not both. Some jurisdictions have likened the fair use standard for the right of publicity to that in federal trademark law.¹⁷⁰ The Trademark Dilution Act provides fair use exceptions to liability:

166. Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 *YALE L.J.* 1577 (1979).

167. U.S. CONST. amend. I.

168. *See, e.g.*, FLA. STAT. ANN. § 540.08(3)(a) (1997); IND. CODE § 32-13-1-1(b) (1998); NEV. REV. STAT. § 597.790(c) (1997).

169. *Stern v. Delphi Internet Serv. Corp.*, 626 N.Y.S.2d 694, 698-99 (N.Y. Sup. Ct. 1995).

170. 15 U.S.C. § 1125(c)(1) (1998).

The following shall not be actionable under this section: (A) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark; (B) Noncommercial use of a mark; (C) All forms of news reporting and news commentary.¹⁷¹

Even when a use is seen as commercial, many jurisdictions have recognized an exception for incidental use.¹⁷² Suppose a record company has the legal right under a license agreement to sell music created by Frank Sinatra. The record company's use of Frank Sinatra's name and samples of the music featuring Sinatra's voice in their effort to sell their music product would be an incidental use. The advertising use of Sinatra's likeness would be incidental to the primary purpose of selling music. The issue becomes a little less certain, however, when the record company uses Sinatra's photo and other unique feature of his persona for purposes of advertising their music product. Nevertheless, this use would likely be considered incidental as well.

When it comes to advertising, "[t]here's no such thing as commercial parody."¹⁷³ While almost any newsworthy use of one's likeness will certainly exempt any simultaneous commercial use, the same is not true for parody. Parody does not cast as wide of an exemption net as does newsworthiness. The thought behind the limitations to the parody exception is that "[t]here are no jokes when it comes to advertising. It's all sell, sell, sell."¹⁷⁴

For a use to be considered commercial, most courts have held that a plaintiff must be recognizable in the alleged appropriation of their persona. For instance, the plaintiff must be identifiable in the advertisement in question. The issue is whether there was

171. *Id.* at § 1125(c)(4).

172. *See, e.g.*, NEV. REV. STAT. § 597.790 (1997).

173. Hamilton, *supra* note 142, at 214 (panelist William M. Hart citing 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, 131 (1995)).

174. *Id.*

reasonable consumer confusion or belief that the persona somehow offered an endorsement of the product or service promoted.

G. Transferability of Right

The transferability of one's right of publicity may hinge on whether it is seen as a highly personal right to privacy, or as a general property right. "The right to privacy is purely personal and not assignable."¹⁷⁵ As a tort violation, the right to privacy has no legitimate commercial value. A fundamental principle under the right to privacy is one's "right to be let alone."¹⁷⁶ Had Frank Sinatra assigned away his right to privacy, the legal doctrine preventing others from invading Sinatra's privacy would be of little personal use to the assignee. Furthermore, such invasions of Sinatra's privacy would still have an adverse effect on Sinatra himself regardless of the assignment. Assignability of privacy rights defies logic because, as illustrated above, invasion of one's privacy is something experienced only firsthand. Therefore, if the right of publicity is viewed as a privacy right, transferability would naturally be limited.

On the other hand, the right of publicity should be viewed as a property right. Under this perspective, the right of publicity is considered transferable as are other property rights. Early on, the right of publicity was defined as the right "to control and profit from the publicity values which [one] has created or purchased."¹⁷⁷ This definition recognizes one's own publicity right as well as those purchased or assigned by others.

Today, "most courts have assumed that the right of publicity is transferable."¹⁷⁸ This view follows the recognition of transferability and assignability in other intellectual property interests.¹⁷⁹ The reasoning for such recognition is sound. "Transferability promotes economic creation incentives by

175. PINCKAERS, *supra* note 78, at 21.

176. Warren & Brandeis, *supra* note 2, at 195.

177. Nimmer, *supra* note 162, at 216.

178. Solomon, *supra* note 106, at 1205.

179. See Assignee Rights in Patent or Trademark, 37 C.F.R. § 3.1 (1998); 17 U.S.C. § 204 (1998) (transferability of Copyright interests).

allowing those who hold the right to exploit it to their advantage.”¹⁸⁰ In many instances, the value of a publicity right may be greatly diminished if the right were not transferable.

For purposes of economic efficiency, the right of publicity must be transferable as property. Resolution of issue will also provide certainty to the problematic area of descendibility.¹⁸¹

H. Dead or Alive

Not all states recognize a descendible right of publicity. In other words, some jurisdictions have held that the interest in one's publicity dies with the individual. Of those states that do recognize it as a descendible right, some make the right contingent upon “whether the right was exploited during a person's lifetime.”¹⁸² In other words, some states have limited relief for unauthorized use of a deceased individual to those whose images were exploited while alive. The question is essentially, “who has a right of publicity?”¹⁸³

In defining a uniform federal statute, recognition of publicity rights after death must not be conditioned upon whether the right was exploited during a person's lifetime.¹⁸⁴ Conditioning the right upon whether it was exercised while a person was alive serves little purpose to society, but places a heavy burden on individuals and their estates. In viewing the right of publicity as an inherent interest in property, it must be inheritable regardless of whether it was exploited while alive.

Persons that achieve little recognition or notoriety while alive will likely have minimal value in their likeness once deceased. Subsequent potential exploiters will likely find little public recognition value in the deceased's likeness if it had not been exploited during his life. Therefore, anyone's likeness worth

180. Solomon, *supra* note 106, at 1205.

181. Andrew B. Sims, Right of Publicity: Survivability Reconsidered, 49 *FORDHAM L. REV.* 453 (1981).

182. Celebrity Hearings, *supra* note 96 (INTA's position is to provide for a descendible and transferable right of publicity for a fixed term after death regardless of exploitation while alive).

183. See MCCARTHY, *supra* note 6, at ch. 4.

184. Celebrity Hearings, *supra* note 96.

exploiting after death must have exercised their publicity enough while alive to have warranted such a right. "The federal right of publicity [must] be survivable,"¹⁸⁵ allowing the marketplace to determine the true value of a deceased image without condition of exploitation during life.

I. Eternally Hereafter

Many state statutes have set the duration of one's right of publicity as a fixed number of years after death.¹⁸⁶ This approach follows the federal copyright law scheme and provides clear predictability as to the duration of the right.¹⁸⁷ Although this position is supported by many seeking a federal publicity statute,¹⁸⁸ such a bright line approach of setting the duration protection after death may well prove problematic. Presently, there is great disparity from the various state laws in the number of years after death that the right continues.¹⁸⁹ Harmonizing the duration provisions of existing state laws is undoubtedly one of the most challenging endeavors in drafting federal publicity legislation.

The better approach is to incorporate principles from Lanham Act where trademark protection is perpetual so long as the owner uses it.¹⁹⁰ Tennessee's publicity statute has successfully combined a minimum set number of years after death with the "use it or lose it" principle from the Lanham Act.¹⁹¹ Tennessee's law maintains the right in the successor-in-interest "until such rights is terminated ... by proof of non-use ... for a period of two years subsequent to

185. Solomon, *supra* note 106.

186. *See, e.g.*, CAL. CIVIL CODE §§ 990 (West 1998).

187. 17 U.S.C. § 302 (1998) (duration of Copyright is author's life plus 70 years).

188. Celebrity Hearings, *supra* note 96.

189. *See, e.g.*, CAL. CIVIL CODE § 990 (duration of 50 years); FLA. STAT. § 540.08(c)(4) (1997) (duration of 40 years); IND. CODE ANN. § 32-13-1-8 (West 1998) (duration of 100 years); NEV. REV. STAT. ANN. § 597.790 (Michie 1997) (duration of 50 years); OKLA. STAT. tit. 12, § 1448(G) (1983) (duration of 100 years).

190. 15 U.S.C. § 1125 (1998).

191. Compare TENN. CODE ANN. § 47-25-1104 (1997), with 15 U.S.C. § 1051.

the initial ten year period following the individual's death."¹⁹² In other words, Tennessee's right of publicity runs for a minimum of ten years after death, and then is only terminated if not used for commercial purposes for a period of at least two years. The policy behind this approach is that the owner of the right must exercise diligence in exploiting the right or forfeit it to the public domain.

A strict "use it or lose it" approach to descendible rights may place an unfair burden on both the successors-in-interest as well as potential exploiters of dead celebrity images. Such a rule would require a successor-in-interest to properly exploit the deceased's likeness while preventing others from diluting the image. Likewise, the potential exploiters may share the public's knowledge that a celebrity is dead, but he may not be clear whether a successor-in-interest has claimed rights to the deceased's likeness. Conversely, states that protect publicity rights for a fixed number of years after death make the duration of protection very clear. Such state statutes base the duration of the right on the year of death followed by a set number of years expressed in the statute. California's statute,¹⁹³ for example, protects Frank Sinatra's likeness for fifty years following his death in 1998. Therefore, under California law, commercial use of Sinatra's likeness without consent is prohibited through the year 2048.¹⁹⁴ By applying Tennessee's "use it or lose it" approach, however, it is not entirely clear how long use of Sinatra's likeness would be restricted. It is only certain that Tennessee law would provide protection for the first ten years after one's death, or in Sinatra's case, until 2008. Potential users of his likeness are therefore burdened by not knowing whether someone has claimed rights to his likeness beyond that date.

The solution to this quandary is to require the successor-in-interest to file a claim under a national registry system as a condition precedent for bringing a publicity action. Such a federal registry would operate similarly to systems currently being used to filing claims for other intellectual property interests for copyrights,

192. TENN. CODE ANN. § 47-25-1104.

193. CAL. CIV. CODE § 990.

194. *Id.*

patents and trademarks.¹⁹⁵ Similar registration systems are presently used by various states to acknowledge successors-in-interest of publicity rights for deceased individuals.¹⁹⁶ Following this approach would overcome potential uncertainties created by the adoption of a straight section 43(a) “use it or lose it” rule under federal trademark law. By requiring claims to be filed as public records through a federal registry system, constructive notice would be provided to potential exploiters before infringement occurs.

Ideally, a new federal publicity statute will follow the trend set by California’s law that initially provides fifty years of protection after death.¹⁹⁷ However, a federal statute must also incorporate the potentially perpetual protection presently provided by section 43(a) of the Lanham Act.¹⁹⁸ In order to be entitled to this additional level of potentially perpetual protection, the successor-in-interest must be required to file a claim with a federal registry prior to expiration of the initial fixed period of protection. In other words, the successor-in-interest must register his interest before the fixed period of fifty years has passed.

By employing a “use it or lose it” principle to commence upon the expiration of an initial fifty year period of protection, a new federal right of publicity could be extended indefinitely. Such perpetual protection would require the successor-in-interest to 1) file a timely claim with a federal registry, 2) continue exploiting the deceased’s image, and 3) diligently police others from misappropriating the image.

J. Remedies

Presently, existing state laws providing various forms of relief are available to victims of right of publicity infringement. As with typical common law tort claims, the right of publicity relief comes

195. 17 U.S.C. § 205 (1998); 35 U.S.C. § 111 (1998); 15 U.S.C. § 1127 (1998).

196. *See, e.g.*, CAL. CIV. CODE § 990(f) (West 1998); NEV. REV. STAT. § 597.880 (1997).

197. CAL. CIV. CODE § 990.

198. 15 U.S.C. § 1051.

in the form of declaratory judgments, injunctions, and monetary damages.¹⁹⁹ In some cases, punitive damages, legal costs, and lawyer's fees are also awarded.²⁰⁰ Several states have set minimum damages by statute,²⁰¹ while others have created criminal sanctions for violators.²⁰² A new federal publicity statute must clearly define the available forms of relief under the law.

Declaratory relief can be of significant value in simply determining whether rights exist. As with most declaratory judgment matters, parties to right of publicity actions ask the court to declare which party is entitled to the property interest (use of image) at hand.²⁰³ This form of relief can be useful in resolving licensing disputes, and disputes where multiple parties claim exclusive rights to a deceased persona.

If a defendant infringes one's right of publicity, the remedy is usually a permanent injunction.²⁰⁴ This is because monetary damages alone are often an inadequate remedy in such cases.²⁰⁵ Relief should be limited to an injunctive order when infringers acted without knowledge or malice, and where no measurable damages are found.²⁰⁶ Injunctive relief under the present regime of state laws has raised jurisdictional problems.²⁰⁷ Such unsettled jurisdictional issues further demonstrate the need for a unified federal statute. For instance, New York courts have held that

199. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 48, 49 (1995).

200. *See, e.g.,* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), cert. denied, 506 U.S. 1080 (1993).

201. *See* CAL. CIV. CODE § 3344(a) (statute sets monetary damages at \$750 or the actual damages, whichever is greater).

202. *See* OKLA. STAT. tit. 21 § 839.1 (1998) (criminalizes the right of publicity as a misdemeanor).

203. *See* FED. R. CIV. P. 57.

204. PINCKAERS, *supra* note 78, at 64.

205. *See, e.g.,* *Ali v. Playgirl, Inc.*, 447 F.Supp. 723 (S.D.N.Y. 1978); *Uhlaender v. Henricksen*, 316 F.Supp. 1277 (D. Minn. 1970).

206. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. e (1995).

207. *See, e.g.,* *Elvis Presley Enterprises, Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889 (6th Cir. 1991); *Estate of Presley v. Russen*, 513 F.Supp. 1339 (D.N.J. 1981); *Joel v. Various John Does*, 499 F.Supp. 791 (E.D. Wis. 1980); *Price v. Hal Roach Studios, Inc.*, 400 F.Supp. 836 (S.D.N.Y. 1975); *Palmer v. Schonhorn Enterprises, Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967); *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004 (1981).

violations of the right of publicity apply to activities only within the state and, therefore, out-of-state sales are not enjoined.²⁰⁸ In contrast, Michigan law has been used to enjoin infringement activities in any state regardless of whether the other states recognize the right of publicity.²⁰⁹

The appropriateness of injunctive relief for the right of publicity must be determined by weighing all the factors in a case.²¹⁰ Such an approach of 'comparative appraisal' acts to balance the interests of the parties.²¹¹ This method should be adopted by the new federal statute for determining the applicability of injunctive relief.

Monetary damages in publicity actions must be reversed for cases where the defendant knowingly misappropriates the plaintiff's likeness, or where actual damages are proven. Under current state laws, the plaintiff is entitled to the fair market value of the unauthorized use of plaintiff's likeness.²¹² The fair market value of one's likeness can be measured by the reasonable fee the infringer should have paid to obtain authorized use of the plaintiff's likeness. This method of measuring fair market value is appropriate in cases where showing the plaintiff's loss or the defendant's gain proves difficult.²¹³ The fair market value essentially represents the loss of compensation to the plaintiff or the unjust enrichment to the defendant in using the plaintiff's likeness.²¹⁴

The plaintiff may recover some or all of the profits resulting from the unauthorized use of the plaintiff's likeness.²¹⁵ In addition to recovery of plaintiff's own losses and damages, net profits attributable to the unauthorized use of the plaintiff's likeness can

208 See *Shamsky v. Garan, Inc.*, 632 N.Y.S.2d 930 (1995).

209. See *Carson v. Here's Johnny Portable Toilets, Inc.*, 810 F.2d 104 (6th Cir. 1987).

210. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 48(2) (1995).

211. *Id.*

212. See, e.g., CAL. CIV. CODE § 3344(a) (West 1998); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 (1995).

213. PINCKAERS, *supra* note 78, at 65.

214. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. d.

215. PINCKAERS, *supra* note 78, at 66.

be recovered so long as it does not amount to double recovery.²¹⁶ Plaintiff bears the burden of establishing the defendant's sales,²¹⁷ while the defendant has the burden of establishing any deductible expenses.²¹⁸

In publicity cases of knowing infringement involving egregious behavior by a defendant, torts principles providing punitive damages should be applied.²¹⁹ "A majority of states' statutes that recognize the right of publicity expressly authorize the award of enhanced or punitive damages, often upon proof that the defendant 'knowingly' used the plaintiff's identity in a prohibitive manner."²²⁰ A new federal statute must allow the awarding of punitive damages in right of publicity cases where there is evidence of malice or conscious disregard for the plaintiff's rights.²²¹

Recovery of attorney's fees and legal costs in right of publicity actions must also be expressly provided for in a new federal statute. Several states currently allow such fees and costs to be awarded to the prevailing party.²²² Such a provision is essential in a new federal statute so long as the plaintiff is burdened with high costs of policing unauthorized uses of his interest to satisfy a diligence requirement. An award of fees and costs to the prevailing party may act as an incentive to encourage respect for the right of publicity, while also serving to prevent the bringing of frivolous claims.²²³ If costs and fees are not recoverable, many individuals

216. *Id.*

217. *Id.*

218. *See* CAL. CIV. CODE § 3344(a) (West 1998).

219. RESTATEMENT (SECOND) OF TORTS § 908 (1977).

220. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. e (1995).

221. *See* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), cert. denied, 506 U.S. 1080 (1993).

222. *See, e.g.*, CAL. CIV. CODE § 3344(a); OKLA. STAT. tit. 12, § 1449(A) (1983); R.I. GEN. LAWS § 9-1-28.1 (1985); TEX. PROP. CODE ANN. § 26.013(a)(4) (West 1997); WIS. STAT. § 895.50(1)(c) (1983).

223. Richard S. Robinson, Preemption, the Rights of Publicity, and a New Federal Statute, 16 CARDOZO ARTS & ENT. L.J. 183, 203 (1998).

may be unable to afford litigation to prevent the dilution of their likeness.²²⁴

K. Proposed Statutory Language

In this section of the Comment, statutory language is offered as a proposal for the adoption of a new federal the right of publicity statute. The significant issues concerning the scope of a new federal publicity statute, as discussed *supra* in section III.B, are taken into account in setting forth this proposal. Although not all provisions of the following draft will satisfy all interests, the proposed statute should be viewed a model to address the principles most common to all states. If adopted, the proposed statute would uniformly serve the diverse interests of the individual states in a harmonized manner. The new federal statute is proposed as follows:

§ 101 Infringement of the Right of Publicity

Any person who uses or infringes upon another individual's likeness for commercial use without prior consent from the individual or the individual's successor-in-interest, shall be liable to a civil action.²²⁵

§ 102 Inherency, Purpose, Preemption, and Grandfather Clause

(a) Every individual has an inherent property right in the use of his or her own likeness in any medium in any manner²²⁶ regardless of whether the right exploited during one's lifetime.

224. Interview with Roger Richman, CEO of the Roger Richman Agency, Inc., in Beverly Hills, Cal. (Oct. 23, 1998).

225. See 15 U.S.C. § 1125(a)(1) (1998); CAL. CIV. CODE §§ 990(a), 3344(a); TENN. CODE ANN. § 47-25-1105(a) (1997).

226. See TENN. CODE ANN. § 47-25-1103(a).

(b) This statute is intended to standardize protection of public identity rights nationwide.²²⁷ This statute applies to an act or event that effect interstate commerce, regardless of the parties' domicile, residence, or citizenship.²²⁸ This statute does not affect the rights or privileges recognized under the United States Constitution or any other existing federal law.²²⁹ Violation of this statute shall constitute liability in a civil action.²³⁰

(c) To the extent that any state statute or common law covers the subject matter of this right of publicity statute, and is not based on invasion of privacy, slander, libel, emotional distress, such state laws is expressly preempted by this federal statute.²³¹ A finding that any portion of this title violates the United States Constitution shall not invalidate any other portion of this statute.²³²

(d) Existing state laws may continue to apply to publicity rights for a successor-in-interest where individual being protected died before enactment of this statute. A successor-in-interest of an individual who died within 50 years prior to the enactment of this statute may rely on the protections herein. This statute shall have no effect on the publicity rights of individuals that died more than 50 years before enactment of this statute.

§ 103 Scope, Ownership, Transferability, Descendibility, Duration, Registry, and Termination

227. See Robinson, *supra* note 223, at 207 n.136.

228. See IND. CODE § 32-13-1-1(a) (1998).

229. See *id.* at § 32-13-1-1(b).

230. See 15 U.S.C. § 1125(a)(1).

231. See Robinson, *supra* note 223, at 207 n.136.

232. *Id.*

(a) The individual rights provided for in this statute constitute property rights and are freely assignable and licensable, and do not expire upon the death of the individual so protected regardless of whether the right is commercially exploited during the individual's lifetime, but shall be descendible to the executors, assignees, heirs, or devisees of the individual.²³³

(b) The rights provided under this statute shall be deemed exclusive to the individual, subject to the assignment or licensing of such rights, during the individual's lifetime and to the successor-in-interest for a period of no less than fifty (50) years after the death of the individual.²³⁴

(c) The rights provided for in this statute constitute property rights and are freely transferable, in whole or in part, by contract or by means of trust or testamentary documents, whether the transfer occurs before the death of the deceased individual, by the deceased individual or his or her transferees, or, after the death of the deceased individual, by a successor-in-interest or the transferees of that person or persons.²³⁵

(d) After the death of any individual, the rights under this statute shall belong to the successor-in-interest.²³⁶ The right of publicity of the deceased shall be divided and exercisable in the manner provided under the applicable state law where the

233. *See* TENN. CODE ANN. § 47-25-1103(b) (1997).

234. *See id.* at § 47-25-1104(a).

235. *See* CAL. CIV. CODE § 990(b) (West 1998).

236. *See id.* at § 990(d).

deceased last resided.²³⁷ If any deceased individual does not transfer his or her rights under this section by contract, or by means of a trust or testamentary document, and there are no surviving persons, then the rights set forth in this statute shall terminate.²³⁸ In no instance, should the right of publicity escheat to the state.

(e) The rights provided for in this statute shall last for the lifetime of the individual plus a period of fifty (50) years after the death of the individual,²³⁹ and thereafter, until such time as the identity rights have not been commercially exploited for two consecutive years.²⁴⁰ Commercial use or exploitation of the publicity right by any executor, assignee, heir, or devisee of the a deceased individual shall maintain the right as an exclusive property until such right is terminated as provided in this statute.²⁴¹

(f) (1) Any person claiming to be a successor-in-interest to the rights of a deceased individual under this statute or a licensee thereof may register that claim with the United States Patent and Trademark Office (PTO) on a form prescribed by the PTO and upon payment of a fee of one hundred dollars (\$100). The form shall be verified and shall include the name and date of death of the deceased individual, the name and address of the claimant, the basis of the claim, and the rights claimed.²⁴²

237. *See id.* at § 990(d)(4).

238. *See id.* at § 990(e).

239. *See* TENN. CODE ANN. § 47-25-1104 (a).

240. *See* Robinson, *supra* note 223, at 207 n.138.

241. *See* TENN. CODE ANN. § 47-25-1104 (b)(1).

242. *See* CAL. CIV. CODE § 990(f)(2).

Claims registered under this subdivision shall be public records.²⁴³

(2) A successor-in-interest to the publicity rights of a deceased individual or a licensee thereof may not recover damages for an unauthorized use of the deceased's likeness that occurs before the successor-in-interest or licensee properly registers a valid claim of the rights under this statute.²⁴⁴

(3) To maintain valid title of a deceased individual's right of publicity, successor-in-interest claim must be initially registered with PTO within two years after individual's death.²⁴⁵ Subsequent successors-in-interest must file an additional claim with PTO within one years of date of transfer. Failure for successor-in-interest to file timely claim PTO will waive all future publicity rights and terminate the interest.

(g) (1) The exclusive right to commercial exploitation of the publicity rights is terminated by proof of the non-use of the name, likeness, or image of the persona for commercial purposes by an executor, assignee, heir, or devisee to such use for a period of two (2) years subsequent to the initial fifty (50) year period following the individual's death.²⁴⁶

(2) The rights set forth in this statute terminate if (A) a deceased individual has not transferred the deceased person's rights under this chapter by contract, license, gift, trust, or testamentary

243. *See id.* at § 990(f)(4).

244. *See id.* at § 990(f)(1).

245. *See Robinson, supra* note 223, at 207 n.139.

246. *See* TENN. CODE ANN. § 47-25-1104(b)(2).

document, and (B) the individual dies intestate and without heirs leaving no surviving persons.²⁴⁷

(3) Upon termination of the right of publicity, the protected likeness shall enter the public domain permitting all persons to exploit the likeness without risk of civil liability to prior holders of the interest.

§ 104 Commercial use, Fair use, Newsworthiness, Incidental, Consent, Media Outlets, and Group Infringement.

(a) This statute shall not apply to the use of an individual's likeness, in any of the following instances:²⁴⁸ (1) All forms of news reporting, news commentary,²⁴⁹ and material that is of political or newsworthy value;²⁵⁰ (2) Entertainment from literary works,²⁵¹ theatrical works,²⁵² musical compositions,²⁵³ films,²⁵⁴ radio or television programs;²⁵⁵ (3) Single and original works of fine art;²⁵⁶ (4) Promotional material or an advertisement for a news reporting or an entertainment medium that (A) uses all or part of a past edition of the medium's own broadcast or publication, and (B) does not convey or reasonably suggest that an individual endorses the news reporting or

247. See IND. CODE § 32-13-1-19 (1998).

248. See *id.* at § 990(n).

249. See 15 U.S.C. § 1125(c)(4)(C) (1998).

250. See CAL. CIV. CODE § 990(n)(2); IND. CODE § 32-13-1-1(c)(1)(B).

251. See IND. CODE § 32-13-1-1(c)(1)(A).

252. See *id.*

253. See CAL. CIV. CODE § 990(n)(1).

254. See IND. CODE § 32-13-1-1(c)(1)(A).

255. See CAL. CIV. CODE § 990(n)(1).

256. See *id.* at § 990(n)(3); IND. CODE § 32-13-1-1(c)(1)(C).

entertainment medium;²⁵⁷ and (5) Other noncommercial uses that event or topic is of general or public interest.²⁵⁸

(b) The unauthorized use of an individual's likeness where the primary purpose is not commercial, but instead connected with any news, public affairs, sports broadcast, political campaign, or matter of public interest, shall neither constitute a use for which consent is required nor liability.²⁵⁹

(c) (1) The use of an individual's likeness in a commercial medium shall not constitute a use for which consent is required under this statute solely because the material containing the use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether use of the likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required.²⁶⁰

(2) Where the likeness of an employee of the person using the likeness appears in an advertisement or other publication prepared by or on behalf of the user is only incidental, and not essential, to the purpose of the publication in which it appears, there shall arise a rebuttable presumption affecting the burden of producing evidence that the failure to obtain the consent of the employee was not a knowing unauthorized use of the employee's likeness.²⁶¹

257. *See* IND. CODE § 32-13-1-1(c)(1)(D).

258. *See* 15 U.S.C. § 1125(c)(4)(B) (1998); IND. CODE § 32-13-1-1(c)(3).

259. *See* CAL. CIV. CODE §§ 3344(d).

260. *See id.* at § 990(k).

261. *See id.* at § 3344(c).

(d) The consent required by this statute shall be exercisable by the individual whose likeness is to be exploited.²⁶² A person may not use an aspect of an individual's likeness for a commercial purpose until the rights have terminated without having obtaining previous written consent from the individual.²⁶³ In the case of a minor, the prior consent of such minor's parent or legal guardian, or in the case of a deceased individual, the consent of the successor-in-interest.²⁶⁴

(e) Nothing in this statute shall apply to the owners or employees of any medium used for advertising, including, but not limited to, the Internet, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads, by whom any advertisement or solicitation in violation of this statute is published or disseminated, unless it is established that such owners or employees had knowledge of the unauthorized use of the person's name, voice, signature, photograph, or likeness as prohibited by this statute.²⁶⁵

(f) It is no defense to the unauthorized use of an individual's likeness that the use is of a definable group consisting of more than one (1) individual, provided that the individual or individuals complaining of the use shall be readily identifiable in the use.²⁶⁶

262. *See id.* at § 990(c).

263. *See* IND. CODE § 32-13-1-8.

264. *See* TENN. CODE ANN. § 47-25-1105(a) (1997).

265. *See* CAL. CIV. CODE §§ 990(l), 3344(f).

266. *See* TENN. CODE ANN. § 47-25-1105(c).

§ 105 Remedies, Damages, Injunctions, Punitive Damages, Costs and Fees.

(a) A person who violates this statute may be liable for: (1) Damages in the amount of (A) the actual damages, including profits derived from the unauthorized use,²⁶⁷ or (B) five thousand dollars (\$5,000), whichever is greater; (2) Treble or punitive damages, as the injured party may elect, if the violation is knowing, willful, or intentional;²⁶⁸ and (3) Legal costs and reasonable attorney fees. The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.²⁶⁹

(b) (1) An individual is entitled to recover the actual damages suffered as a result of the use or infringement of such individual's rights and any profits that are attributable to such use or infringement which are not taken into account in computing the actual damages. Profit or lack thereof by the unauthorized use or infringement of an individual's rights shall not be a criteria of determining liability.²⁷⁰

(2) In establishing these profits, the injured party or parties shall be required to present proof only of the gross revenue attributable to the use and the person who violated the section is required to prove his or her deductible expenses.²⁷¹

267. See CAL. CIV. CODE §§ 990(a), 3344(a); IND. CODE § 32-13-1-10(1)(B); TENN. CODE ANN. § 47-25-1106(d).

268. See IND. CODE § 32-13-1-10(2).

269. See CAL. CIV. CODE §§ 990(m), 3344(g); TENN. CODE ANN. § 47-25-1106.

270. See TENN. CODE ANN. § 47-25-1106(d).

271. See CAL. CIV. CODE §§ 990(a), 3344(a).

(3) In addition, the person who violated the statute shall be liable to the injured party or parties in an amount equal to the greater of five thousand dollars (\$5000) per violation or the actual damages suffered by the injured party or parties, as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages.²⁷²

(c) (1) The court may grant injunctions on such terms as it may deem reasonable to prevent or restrain the unauthorized use of an individual's likeness.²⁷³

(2) The holder of publicity rights may be limited to injunctive relief unless (A) the person against whom the relief is sought willfully intended to infringe the publicity rights of the individual seeking relief,²⁷⁴ or (B) actual damages are suffered.

(3) At any time while an action under this statute is pending, the court may order the impounding, on such terms as it deems reasonable, of all materials or any part thereof claimed to have been made or used in violation of the individual's rights, and such court may enjoin the use of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such materials may be reproduced.²⁷⁵

272. *See id.* at §§ 990(a), 3344(a).

273. *See* TENN. CODE ANN. § 47-25-1106(a).

274. *See* 15 U.S.C. § 1125(c)(2) (1998).

275. *See* TENN. CODE ANN. § 47-25-1106(b).

(4) If an unauthorized use of an individual's likeness is by means of products, merchandise, goods or other tangible personal property, all such property is declared contraband and subject to seizure by, and forfeiture to, the state in the same manner as is provided by law for the seizure and forfeiture of other contraband items.²⁷⁶

(5) As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all materials found to have been made or used in violation of the individual's rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such materials may be reproduced.²⁷⁷

(d) If willful intent of infringement is proven,²⁷⁸ the holder of the right of publicity may also be entitled to punitive damages, subject to the discretion of the court and the principles of equity.²⁷⁹

(e) The prevailing party or parties in any action under this statute may be entitled to legal costs and reasonable attorneys' fees.²⁸⁰

§ 106 Definitions

As used in this statute, unless the context otherwise requires:

(a) "Individual" means any living or dead human

276. *See id.* at § 47-25-1105(d).

277. *See id.* at § 47-25-1106(c).

278. *See* 15 U.S.C. § 1125(c)(2).

279. *See* CAL. CIV. CODE §§ 990(a), 3344(a) (West 1998).

280. *See id.*

being.²⁸¹

(b) "Person" means any living or dead human being,²⁸² partnership, firm, corporation, or unincorporated association,²⁸³ joint stock company,²⁸⁴ including any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this statute in the same manner and to the same extent as any non-governmental entity.²⁸⁵

(c) "Likeness" means the name, voice, signature, photograph, image, distinctive appearance, gesture, or mannerism of a living or deceased individual.²⁸⁶

(d) "Name" means the actual, assumed, or nickname of a living or deceased individual that is intended to identify the individual.²⁸⁷

(e) "Photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, in which the individual is readily identifiable.²⁸⁸

(f) "Identifiable" photograph shall be deemed identifiable when one who views the photograph

281. See TENN. CODE ANN. § 47-25-1102(2).

282. See *id.*

283. See IND. CODE § 32-13-1-5 (1998).

284. See TENN. CODE ANN. § 47-25-1102(4).

285. See 15 U.S.C. § 1125(a)(2) (1998).

286. See CAL. CIV. CODE § 990 (h) (West 1998); IND. CODE § 32-13-1-6; TENN. CODE ANN. § 47-25-1102(3).

287. See IND. CODE § 32-13-1-3.

288. See CAL. CIV. CODE §§ 990(i), 3344(b); TENN. CODE ANN. § 47-25-1102(5).

with the naked eye can reasonably determine that the individual depicted in the photograph is the same individual who is complaining of its unauthorized use.²⁸⁹

(g) "Successor-in-interest" means one or more executors, heirs, assignees, or devisees that holds lawful title to an individual's right of publicity.

(h) "Commercial use" or "commercial purpose" means the use of an aspect of an individual's right of publicity: (1) on or in connection with a product, merchandise, goods, services, or commercial activities; (2) for advertising, selling, or soliciting purchases of products, merchandise, goods, services, or for promoting commercial activities; and (3) for the purpose of fundraising.²⁹⁰

(i) "News reporting" or "entertainment medium" means a medium that publishes, broadcasts, or disseminates information in the normal course of its business including, but not limited to the Internet, newspapers, magazines, radio and television, networks and stations, cable television systems.²⁹¹

CONCLUSION

The need for a federal statute has become more evident as technology and interstate commerce continues to grow.²⁹² Various proposals have been suggested over the years, however, the time is right for passage of this unique intellectual property right. Adoption of a uniform federal law is necessary to overcome the inconsistency of the various state statutes and court-made common

289. See CAL. CIV. CODE §§ 990(i), 3344 (b)(1).

290. See CAL. CIV. CODE § 990(a); IND. CODE § 32-13-1-2.

291. See IND. CODE § 32-13-1-4.

292. Abel & Dare, *supra* note 107, at 411.

law, as well as eliminate the issue of forum shopping. Passage of a federal statute will promote the establishment a single body of federal case law governing one's right of publicity. Finally, a federal statute would promote economic and judicial efficiency through a cohesive standard for all to follow.

Eric J. Goodman