



BULLETIN

The Right of Publicity and the New RESTATEMENT (THIRD) OF UNFAIR COMPETITION

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I. EXECUTIVE SUMMARY

1. On December 28, 1994, the American Law Institute officially published the RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995). In §§ 46-49 of the unfair competition RESTATEMENT (Topic 3 of Chapter 4), the ALI has for the first time recognized a full-blown commercial "right of publicity."
2. In contrast to the brief mention of "appropriat[ion] ... of name or likeness" as one branch of invasion of privacy set forth in § 652C of the RESTATEMENT (SECOND) OF TORTS, the new RESTATEMENT expansively recognizes the commercial and property aspects of the right of publicity, including support in the commentary for treating the right of publicity as a descendible interest. *See infra*, section III, p. 9.
3. The publicity sections of the unfair competition RESTATEMENT were the last to be drafted. They were released in tentative draft form in March 1993, and were approved by the American Law Institute in May 1993, apparently without significant revision or debate. Media and advertising groups thus had only limited opportunity to review and respond to the proposed RESTATEMENT. *See infra*, section II.A, p. 3.
4. A last-minute effort to seek improvements in the Comments and Reporter's Notes to the right of publicity draft was undertaken by leading media and advertising groups, with some useful revisions achieved. Joint media/advertising positions submitted to the RESTATEMENT Reporters are reviewed in section V.A, p. 22 and other association positions submitted in connection with the joint effort are reproduced in section V.B, p. 43. A section-by-section comparison of the tentative draft with the final text of the RESTATEMENT is presented in section V.C, p. 53.
5. Among the key features of the new right of publicity RESTATEMENT are:
 - a. **Commentary to the RESTATEMENT would recognize the descendibility of the right of publicity.** The tentative draft had strongly favored descendibility. The final commentary, while still favoring descendibility, offers a somewhat more balanced presentation of the issue. *See infra*, section III.A, p. 9.
 - b. **Commentary to the RESTATEMENT would reject a requirement of lifetime exploitation as a precondition to descendibility, notwithstanding the position of media and advertising groups that the substantial majority of jurisdictions favor such a requirement.** *See infra*, section III.B, p. 11.

- c. The RESTATEMENT would extend the right of publicity beyond name or likeness to "other indicia of identity." As to "soundalikes," while commentary to the tentative draft had uncritically cited *Bette Midler v. Ford Motor* as the leading case on the subject, the final RESTATEMENT makes clear that *Midler* was merely the leading case recognizing a soundalike. See *infra*, section III.C.1, p. 13. As to "lookalikes," in response to media/advertiser concerns, the final RESTATEMENT was supplemented to make clear the significant application of First Amendment constraints to non-trade or non-advertising uses such as satire, parody, and original theatrical productions. See *infra*, III.C.2, p. 14. As to the even more expansive concept of "character imitation," while the Reporters added a brief citation to Judge Kozinski's dissent in the *Vanna White* case, they declined to give equal time to such criticism of the Ninth Circuit majority's sweeping view of character protection. See *infra*, section III.C.3, p. 15.
 - d. Despite the expansiveness of the right recognized, the RESTATEMENT also recognizes broad First Amendment limitations on the right of publicity for "purposes of news reporting, commentary, entertainment, or in works of fiction or nonfiction." While the tentative draft was already reasonably good on this pivotal issue, commentary to the final RESTATEMENT is still better, leading off with a ringing reaffirmation — suggested by media and advertising groups — that "the right of publicity is fundamentally constrained by the public and constitutional interest in freedom of expression" (emphasis added). See *infra*, section III.D, p. 16.
 - e. First Amendment limitations are also recognized to some extent by the new RESTATEMENT in the borderline area between protected editorial and unprotected trade or advertising uses. By providing that the "nature and content" of the use, rather than "merely its physical form," will be controlling, the final RESTATEMENT should be of some assistance in future efforts to protect editorial matter from publicity claims even when presented in formats (e.g., a "calendar" or even a "poster") that might in other contexts have been considered a "trade" or "advertising" use. See *infra*, section III.E, p. 17.
 - f. Finally, the RESTATEMENT adopts broad remedies, in terms of damages and potential injunctive relief. See *infra*, section III.F, p. 20.
6. Overall it is clear that the new RESTATEMENT has made a variety of significant policy choices — many opting for an expansive approach to the right of publicity — in connection with a still-evolving body of law. Publicity rights have often divided user/publisher groups from those who represent models and celebrities — indeed New York as the center of publishing and California as the center of

entertainment have arguably come to represent opposite poles, not readily accommodated into a single, coherent body of law. Thus, this RESTATEMENT may remain a hotly controverted document — one presenting issues which practitioners and courts will be called upon to debate and resolve in the years ahead.

II. OVERVIEW: THE AMERICAN LAW INSTITUTE'S RIGHT OF PUBLICITY RESTATEMENT

A. BACKGROUND OF THE RESTATEMENT (THIRD) OF UNFAIR COMPETITION

On December 28, 1994, the American Law Institute officially released the final draft of its RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995). Topic 3 of Chapter 4 (§§ 46–49) of the new RESTATEMENT includes for the first time, as a free-standing adjunct to unfair competition law, a full-blown restatement of the law of the right of publicity. Because of the inherent interest in this development to LDRC BULLETIN readers, we present in this issue a detailed analysis of the ALI's treatment of this relatively recent and still evolving body of law.

The publication of a RESTATEMENT devoted solely to the law of unfair competition was the culmination of a lengthy project, first envisaged in 1977 when the ALI chose to omit coverage of the subject in the RESTATEMENT (SECOND) OF TORTS. Although unfair competition was covered in Chapters 34–36 of the RESTATEMENT OF TORTS, the ALI concluded that the topic had become a specialty in its own right, "largely divorced from [its] initial grounding in the principles of torts," and would thus be more appropriately treated in a separate RESTATEMENT than in the RESTATEMENT (SECOND) OF TORTS.¹

Work on the unfair competition RESTATEMENT began in 1987, with the appointment of the initial Reporter, Professor Robert C. Denicola, who was joined in 1989 by Dean Harvey Perlman, both of the University of Nebraska Law School. An initial draft, covering "The Freedom to Compete" and "Deceptive Marketing," was released in April 1988. Additional drafts covering "The Law of Trademarks," were published in 1990 and 1991. Not until March 1993 — with publication of Tentative Draft No. 4, covering "Appropriation of Trade Values" — were the sections covering right of publicity law completed. In May 1993, the Institute gave final approval to Tentative Draft No. 4, setting the way for publication of the completed RESTATEMENT this past December.

Prior to the release of the RESTATEMENT (THIRD) OF UNFAIR COMPETITION coverage of the right of publicity in previous RESTATEMENTS had been limited to its inclusion under the misappropriation prong of privacy in § 652C of RESTATEMENT (SECOND) OF TORTS, which emphasized the personal rather than commercial nature of the appropriation. *See infra*, section

¹See RESTATEMENT (THIRD) OF UNFAIR COMPETITION xv (Tent. Draft No. 1, 1988) (quoting Director's Introduction to Vol. 4. of RESTATEMENT (SECOND) OF TORTS (1977)).

II.B, p. 4. When media and advertiser groups reviewed the publicity sections of Tentative Draft No. 4, they expressed concern that the ALI was not only placing its imprimatur on a still-evolving body of law but that it was purporting to "restate" a number of contested issues that in fact were undecided in most jurisdictions. Fearing that the RESTATEMENT would result in a premature closure of such issues, between December 1993 and February 1994 several leading media and advertising groups presented a series of position papers proposing various changes to the final text of the right of publicity RESTATEMENT. *See infra*, section V.A, p. 22.

With publication of the final RESTATEMENT (THIRD) OF UNFAIR COMPETITION, it is appropriate to review the results of the media/advertising efforts, analyze the likely effect of the new right of publicity provisions on the law as previously but incompletely developed, and assess its potential future impact on the interests of advertisers and the media.

B. HISTORICAL DEVELOPMENT OF THE RIGHT OF PUBLICITY

Historically, the right of publicity is rooted in privacy law, which may be traced in this country to the 1890 law review article on "The Right to Privacy" by Samuel Warren and Louis Brandeis,² written in an effort to convince courts that invasion of one's personal privacy should be recognized as actionable. In 1903, in the first decision to address the issue, *Roberson v. Rochester Folding Box Co.*, the New York Court of Appeals refused to recognize such a common law "right of privacy."³ Narrowly (4-3) rejecting the plaintiff's claim for personal humiliation caused by the unauthorized use of her photograph to advertise the defendant's product, the court held that such a change in the law was more properly the province of the legislative branch. The following year, the New York State legislature accepted the invitation of the *Roberson* majority and enacted a statute providing a cause of action for the unauthorized appropriation of "name or likeness" for advertising or trade purposes.⁴

In 1905, agreeing with the *Roberson* dissent and the Warren-Brandeis article, the Georgia Supreme Court judicially recognized the right of privacy in *Pavesich v. New England Life Insurance Co.*⁵ Over the next half-century courts moved in the direction of the *Pavesich* view, but continued largely to view the right to privacy as a personal rather than commercial tort.⁶ Not until 1953 — when Judge Jerome Frank coined the phrase "right of publicity" in the *Haelan* case — was a commercial element separately identified and distinguished in such an

²4 HARV. L. REV. 193 (1890).

³171 N.Y. 538, 64 N.E. 442 (1902).

⁴N.Y. Sess. Laws 1903, chap. 132, §§ 1-2 (now codified as N.Y. CIV. RIGHTS LAW §§ 50-51).

⁵122 Ga. 190, 50 S.E. 68 (1905).

⁶*See* J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1.4[C], at 1-18.

appropriation of identity.⁷

Courts were reluctant to adopt either the new terminology of right of publicity or the commercial focus, however.⁸ And when Dean Prosser published his influential article setting up a four-pronged approach to privacy law in 1960, he did not emphasize the commercial element of the misappropriation tort.⁹ Nor did the RESTATEMENT (SECOND) OF TORTS (§ 652C) (1977), providing simply that "[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability . . . for invasion of privacy."¹⁰ Until publication of the new RESTATEMENT (THIRD) OF UNFAIR COMPETITION this had been the only coverage of the right of publicity in any RESTATEMENT.

By denominating the tort as a branch of privacy law, both Prosser and the RESTATEMENT (SECOND) OF TORTS perhaps further delayed the recognition of the commercial or property aspects of the right. In fact, in the years since the commercial aspects of the misappropriation tort were first articulated, it has been celebrities and their agents — rather than scholars at the American Law Institute — who have led the charge toward development the right of publicity. Now, however, the RESTATEMENT (THIRD) OF UNFAIR COMPETITION clearly distinguishes and recognizes the commercial aspects of the right of publicity.

C. STRUCTURE OF THE RESTATEMENT'S RIGHT OF PUBLICITY SECTIONS

Coverage of the right of publicity begins with § 46, entitled "Appropriation of the Commercial Value of a Person's Identity: The Right of Publicity," which identifies the protected interest as "the *commercial* value of a person's identity," broadly defined as encompassing an individual's "name, likeness, or other indicia of identity."¹¹ Limitations on the right of publicity, to advertising or merchandising uses, are addressed in § 47.¹² Remedies, in the form of injunctive and monetary relief, are provided in §§ 48 and 49, respectively.¹³

⁷See *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953) ("We think that, in addition to and independent of th[e] right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e, the right to grant the exclusive privilege of publishing his picture. . . . This right might be called a 'right of publicity.'")

⁸See MCCARTHY, *supra* note 6, § 1.9[A], at 1-36.

⁹See William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

¹⁰See RESTATEMENT (SECOND) OF TORTS (1977), § 652C.

¹¹RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995), § 46, at 528 (emphasis added) [hereinafter RESTATEMENT].

¹²*Id.* at 546.

¹³*Id.* at 559, 564.

1. *Section 46: Appropriation of the Commercial Value of a Person's Identity*

Section 46 states the general rule that the right of publicity is infringed by the appropriation, without consent, of a "person's name, likeness, or other indicia of identity for purposes of trade."¹⁴

Comment a distinguishes between the personal and commercial interests involved in an appropriation of identity and provides that the unfair competition RESTATEMENT covers only the commercial interests.¹⁵

Comment b discusses the relation of the right of publicity to other rules, including the privacy torts set forth in § 652 of the RESTATEMENT (SECOND) OF TORTS.¹⁶

Comment c addresses the rationales underlying right of publicity law, including protection of the commercial value of a person's identity, establishment of incentives such as are provided by copyright and patent law, and protection against false suggestions of endorsement.¹⁷

Comment d addresses the manner in which an appropriation of identity is effected, which necessarily involves discussion of the breadth afforded the right of publicity.¹⁸

Comment e address the issues of intent, concluding that while infringement of the right of publicity does not require intent, absence of intent may be a factor in determining relief.¹⁹

Comments f and *g* address consent and assignment/licensing, respectively.²⁰

Comment h considers descendibility and duration of the right of publicity.²¹

Comment i addresses the relation of the right of publicity to copyright, concluding that

¹⁴See RESTATEMENT, *supra* note 11, at 528.

¹⁵*Id.*

¹⁶*Id.* at 528-30.

¹⁷*Id.* at 530-31.

¹⁸*Id.* at 531-32.

¹⁹*Id.* at 532.

²⁰*Id.* at 532-33, 533-34.

²¹*Id.* at 534-35.

there is no preemption problem.²²

2. *Section 47: Use for Purposes of Trade*

Section 47 distinguishes between potentially actionable use "for purposes of trade" (i.e., advertising/merchandising uses) and "ordinarily" protected informational/editorial use (i.e., use "for news reporting, commentary, entertainment, or in works of fiction or nonfiction") of a person's identity.²³

Comment a analyzes uses in advertising, which are normally actionable.²⁴ Exceptions include use for the purpose of identifying the person as the creator of the goods advertised and use to promote — or in connection with — an editorial use.²⁵

Comment b provides that merchandising uses are "ordinarily" actionable and notes that attempts to defend such uses on First Amendment grounds "have generally been rejected," although conceding that "[i]n some circumstances, however, the informational content of the particular merchandise or its utility to purchasers as a means of expression may justify the conclusion that the use is protected under the first amendment."²⁶

Comment c provides that use in "news, entertainment, and creative works" is "not generally actionable."²⁷ Such uses are broadly defined and generally include publication of unauthorized biographies or the use of identity in fictional works or in connection with promoting such works.²⁸

Comment d, on "limits on liability," provides that in a few cases liability has been extended beyond the advertising and merchandising context and been imposed for such substantial appropriations of identity as a "sustained imitation" of a performing style or persona "that is marketed as a simulation of the plaintiff's performance."²⁹ The comment also recognizes, however, that such restrictions on editorial uses are limited by "significant public

²²*Id.* at 535–36.

²³*Id.* at 546–47.

²⁴*Id.* at 547–48.

²⁵*Id.* at 547.

²⁶*Id.* at 548–49.

²⁷*Id.* at 549.

²⁸*Id.*

²⁹*Id.* at 550.

and constitutional interests."³⁰

Comment e discusses "liability of retailers and publishers," providing generally that lack of intent is not a defense to liability but may limit plaintiffs to injunctive relief.³¹

3. *Section 48: Injunctive Relief*

Section 48 addresses the availability of injunctions for claimed violations of the right of publicity. In its list of factors to be assessed in determining the appropriateness of injunctive relief, the black letter of § 48 gives no special consideration to First Amendment principles.³²

Comment a provides that the principles generally governing injunctive relief in tort cases should be applied to right of publicity actions in which injunctions are sought.³³

Comment b, addressing the appropriateness of injunctive relief, provides that injunctions are "ordinarily" justified for infringements of the right of publicity.³⁴

Comment c, which covers the scope of injunctions, is the only portion of § 48 that recognizes the constitutional interests at stake, suggesting — at least in cases involving "noncommercial" speech — that it may be necessary to narrow injunctions, or perhaps to bar them entirely, in order to minimize the intrusion on free expression.³⁵

4. *Section 49: Monetary Relief*

Subject to consideration of a variety of factors, § 49 states the general rule that the measure of damages for infringements of the right of publicity is the greater of the defendant's gain or the plaintiff's loss. Among the factors to be considered are the certainty with which the damages have been determined, the extent and nature of the appropriation, the adequacy of alternative remedies, the defendant's intent, the plaintiff's delay (if any), and any related misconduct by the plaintiff.³⁶

³⁰*Id.*

³¹*Id.* at 551.

³²*Id.* at 559–60.

³³*Id.* at 560.

³⁴*Id.*

³⁵*Id.* at 561.

³⁶*Id.* at 564.

Comment a addresses the scope of monetary damages and *Comment b* considers the relationship of damages for violations of the right of publicity to damages available for other causes of action.³⁷ *Comments c* and *d* address the appropriateness and measure of monetary relief, respectively.³⁸ *Comment e* provides that punitive damages are "ordinarily available . . . under the general rules applicable to the award of punitive damages in tort actions."³⁹ *Comment f* addresses attorneys' fees, noting that most states do not provide for the award of attorneys' fees at common law but that some statutes do so.⁴⁰

III. ANALYSIS: KEY ISSUES IN THE RIGHT OF PUBLICITY RESTATEMENT

An appreciation of the breadth of the right of publicity recognized by the new RESTATEMENT, and of the concerns of media and advertising groups, can be gained by examining some key issues in right of publicity law and their treatment in the new RESTATEMENT. Among such key issues are whether the right of publicity should be considered a descendible property interest, whether it should extend beyond the traditional categories of name and likeness, and to what extent the First Amendment constrains its operation.

A. DESCENDIBILITY

In the past two decades, as the right of publicity began to emerge as a doctrine of potentially significant commercial value to celebrities, the issue of descendibility was litigated with increasing frequency. In particular, aggressive efforts by the estates of such celebrities as Elvis Presley to exploit identity after death led some courts to hold that the right of publicity is a descendible interest.⁴¹ In some other states, a descendible right of publicity was codified in legislation.⁴²

Although the black letter of § 46 of the RESTATEMENT did not address the issue of

³⁷*Id.* at 564, 565.

³⁸*Id.* at 567.

³⁹*Id.* at 569.

⁴⁰*Id.*

⁴¹*See, e.g.,* Tennessee ex rel. Presley v. Crowell, 733 S.W.2d 89 (Tenn. App. 1987); Estate of Presley v. Russen, 513 F. Supp. 1339 (D. N.J. 1981); Factors Etc., Inc. v. Pro Arts, Inc., 444 F. Supp. 288, aff'd, 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979); Factors Etc., Inc. v. Creative Card Co., 444 F. Supp. 279 (S.D.N.Y. 1977).

⁴²*See, e.g.,* Cal. Civ. Code § 990(h) (1985) (responding to California Supreme Court decision in Lugosi holding right of publicity nondescendible); Fla. S.A. § 540.08 (1967); Ky. R.S. § 391.170 (1984); Neb. R.S.A. §§ 20-208, 202 (1979); Nev. R.S.A. § 598.984(1) (1989); Okla. Stat. tit. 12 § 1448(H) (1985); Tenn. Code § 47-25-406, 25-1103 (1984); Tex. Prop. Code § 26.012(d) (1987); Va. Code § 8.01-40 (1977).

whether the right of publicity is descendible, the Comments and Reporters' Notes accompanying Tentative Draft No. 4 weighed in heavily in favor of descendibility of the right of publicity. *Comment h*, on "Duration of Rights," opened by suggesting a rationale for treating the right of publicity as descendible and then went on to suggest that there has been widespread agreement on the issue:

The owner of commercial assets including intellectual property are normally entitled to transmit the assets upon death to their heirs or legatees. The right of publicity has been recognized as descendible in a substantial majority of the jurisdictions that have determined the issue through legislation or common law adjudication.⁴³

Analogizing the right of publicity to intellectual property raises a number of issues, including whether such matters are more appropriately dealt with by legislative enactment, as in the areas of copyright and patent law, where protection depends upon compliance with an explicit statutory scheme and legislative judgments are required as to such discretionary issues as the duration of the grant. Media and advertising groups also questioned the tentative draft's suggestion that descendibility was generally recognized.

The accompanying Reporters' Notes cited twelve jurisdictions that were said to recognize a descendible right of publicity, by either statute or common law,⁴⁴ in contrast to only five that held the right of publicity to be nondescendible.⁴⁵ Media and advertising groups believed that the division was far closer, however, and provided the Reporters with four additional jurisdictions refusing to treat the right of publicity as descendible, bringing the final count to 12-9.⁴⁶ Indeed, in jurisdictions that had resolved the issue through their common law, the division was even, 4-4.⁴⁷

⁴³See RESTATEMENT (THIRD) OF THE LAW OF UNFAIR COMPETITION (Tent. Draft No. 4, 1993) [hereinafter Draft No. 4], *Comment h*, at 163.

⁴⁴California, Florida, Kentucky, Nebraska, Nevada, Oklahoma, Tennessee, Texas, and Virginia by statute, *id.* at 176, and Georgia, New Jersey, and Utah by judicial decision. *Id.* at 175.

⁴⁵Massachusetts, New York, Rhode Island, and Wisconsin by statute and Ohio by judicial decision. *Id.* at 176.

⁴⁶Additional jurisdictions supplied to the drafters included Arizona, Illinois, Louisiana, and Washington. See *Joplin Enterprises v. Allen*, 795 F. Supp. 349 (W.D. Wa. 1992) (free speech values in Washington State Constitution would prevent state court from recognizing descendible right of publicity); *Maritote v. Desilu Prod. Inc.*, 345 F.2d 418 (7th Cir. 1965) (invasion of privacy claim nondescendible under Illinois law); LDRC 50-STATE SURVEY 1994-95: CURRENT DEVELOPMENTS IN MEDIA LIBEL AND INVASION OF PRIVACY LAW (Henry R. Kaufman, ed.) 33 (by statute, Arizona bars descent of actions for libel and invasion of privacy); *id.* at 350 (Louisiana likely to require legislative action to extend rights to descendants).

⁴⁷California, Illinois, Ohio, and Washington courts would reject descendibility. See *Guglielmi v. Spelling-Goldberg*, 603 P.2d 454 (1979); *Maritote v. Desilu Productions Inc.*, 345 F.2d 418 (7th Cir. 1965) (Illinois law); *Reeves v. United Artists*, 765 F.2d 79 (6th Cir. 1979) (Ohio law); *Joplin Enterprises v. Allen*, 795 F. Supp. 349

Significantly, however, the tentative draft did not make clear that most jurisdictions had yet to consider the issue. Indeed, by the Reporters' own count, fewer than one third of all jurisdictions had even considered the issue. Given the persuasive authority of the RESTATEMENT, the media/advertiser groups noted, the suggestion of a "majority rule" favoring descendibility might become a self-fulfilling prophecy when those many undecided jurisdictions finally addressed the issue.

The final RESTATEMENT has adopted a more evenhanded position on the question, although it continues to favor treating the right of publicity as descendible. Not only has the analogy of the right of publicity to intellectual property been omitted from *Comment h*, but the text now opens with an explicit acknowledgment of the unsettled nature of the issue:

Many jurisdictions have not yet considered the descendibility of the right of publicity. Of those jurisdictions that have determined the issue through legislation or common law adjudication, the majority recognize the right as descendible...⁴⁸

As indicated, descendibility is no longer reported to be the rule in a *substantial* majority of jurisdictions. And although it is still reported as the majority rule, the unsettled nature of the issue is again acknowledged by shifting the qualifying phrase "*of those jurisdictions that have determined the issue*" from the end of the sentence in the tentative draft to the beginning of the sentence in the final RESTATEMENT.⁴⁹

B. LIFETIME EXPLOITATION

Media and advertising groups were less successful in convincing the Reporters to alter their treatment of the related issue of whether descendibility should be conditioned on lifetime exploitation of the right of publicity. Such a requirement would at least remove some uncertainty as to potential liability from post-mortem use of the names or likenesses of celebrities or others who may never have sought to exploit the commercial value of their identities. Although the tentative draft did not attempt to state a majority rule, it was dismissive of a requirement of lifetime exploitation, characterizing it as "creat[ing] needless uncertainty and

(W.D. Wash. 1992). Decisions in Georgia, New Jersey, Tennessee, and Utah support descendibility. See *Martin Luther King, Jr. Center for Social Change v. American Heritage Products, Inc.*, 296 S.E.2d 697 (1982); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); *Tennessee ex rel Elvis Presley International Memorial Foundation v. Crowell*, 733 S.W.2d 89 (Tenn. App. 1987); *Nature's Way Products, Inc. v. Nature-Pharma, Inc.*, 736 F. Supp. 245 (D. Utah 1990).

⁴⁸See RESTATEMENT, *supra* note 11, at 534.

⁴⁹Compare Draft No. 4, *supra* note 43, at 163 ("The right of publicity has been recognized as descendible in a substantial majority of the jurisdictions that have determined the issue...."), with RESTATEMENT, *supra* note 11, at 534 ("Of those jurisdictions that have determined the issue through legislation or common law adjudication, the majority recognize the right as descendible.")

ha[ving] been rejected in a number of decisions."⁵⁰

In fact, however, the clear weight of current authority favors a requirement of lifetime exploitation. Indeed the tentative draft cited only two opinions, one of them a dissent, that would have rejected a requirement of lifetime exploitation.⁵¹ By contrast, the Reporters cited four decisions,⁵² and the media/advertiser groups offered a fifth,⁵³ requiring lifetime exploitation. And although they did not reach the issue, those several jurisdictions that have by common law denied post-mortem rights in all instances must also be considered to have rejected absolute descendibility.

The tentative draft's treatment of statutory law offered a similarly skewed picture — *Comment h* to § 46 reported that "[s]tate statutes recognizing descendibility do not require exploitation prior to death, and several expressly repudiate such a requirement."⁵⁴ On this point, the accompanying Reporters' Notes cited only those four statutes that rejected such a requirement.⁵⁵ Media and advertising groups noted, however, that a total of nine other statutes were either silent on the issue⁵⁶ or would deny descendibility even in the presence of lifetime exploitation.⁵⁷

C. INDICIA OF IDENTITY

Although the right of publicity has traditionally protected against use of another's "name" or "likeness," in recent years celebrities have argued, at times successfully, for an expansion of these established categories to include a broad range of other aspects of a person's identity. Thus another key issue raised by the new RESTATEMENT is the appropriate breadth to be afforded the right of publicity.

⁵⁰See Draft No. 4, *supra* note 43, at 164.

⁵¹See Draft No. 4, *supra* note 43, at 177 (*citing* Martin Luther King Jr., Center for Social Change, Inc. v. American Heritage Products, Inc., 250 Ga. 135, 296 S.E.2d 697 (1982); *Lugosi v. Universal Pictures*, 25 Cal.3d 813, 160 Cal.Rptr. 323, 603 P.2d 425 (Cal. 1979) (Bird, J., dissenting).

⁵²*Id.* at 176–77 (*citing* Acme Circus Operating Co. v. Kuperstock, 711 F.2d 1538 (11th Cir. 1983); *Nature's Way Products, Inc. v. Nature-Pharma, Inc.*, 736 F. Supp. 245 (D. Utah 1990); *Sinkler v. Goldsmith*, 623 F. Supp. 727 (D.Ariz. 1985); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978).

⁵³See *Gleason v. Hustler*, 7 Med. L. Rptr. 2183 (D.C. N.J. 1983).

⁵⁴See Draft No. 4, *supra* note 43, at 164.

⁵⁵California, Nevada, Oklahoma, and Tennessee. *Id.* at 177.

⁵⁶Florida, Kentucky, Nebraska, Texas, and Virginia. *Id.*

⁵⁷Massachusetts, New York, Rhode Island, and Wisconsin.

In the view of the media/advertising groups, the tentative draft appeared to endorse an overly broad application of the right of publicity beyond "name and likeness." The black letter of § 46 defines the right of publicity as encompassing a person's "name, likeness, or other indicia of identity." Although conceding that appropriation of identity normally involves use of name or likeness, *Comment d* of the tentative draft went on to suggest that "[in] the absence of a narrower statutory definition, unauthorized use of other indicia of a person's identity can also infringe the right of publicity."⁵⁸

Among other potentially actionable uses identified in *Comment d* were "the use or imitation of the person's voice" (i.e., *soundalikes*), the "imitation of the person's performing persona" (e.g., *lookalikes*), and — even more broadly — "[t]he use of other identifying characteristics or attributes . . . [that] are so closely identified with the person that their use enables the defendant to appropriate the commercial value of the person's identity."⁵⁹

It was the view of media and advertising groups that the RESTATEMENT was not only precipitate in embracing a broader application of the right of publicity than is recognized under any current statutory formulation⁶⁰ but that it failed to adequately reflect the existing division of authority on such an extension.

1. *Soundalikes*

The tentative draft cited singer Bette Midler's claim for imitation of her voice in an automobile commercial,⁶¹ without qualification, as "the principal case on the appropriation of a voice for purposes of trade."⁶² It did not acknowledge, however, that *Midler* was the first case to sustain such a claim. Although recognizing that the *Midler* court had distinguished one

⁵⁸See Draft No. 4, *supra* note 43, *Comment d* to § 46, at 159-60.

⁵⁹*Id.* at 160. It is unclear how this — and other such potentially expansive interpretations of the right of publicity as are to be found elsewhere in the RESTATEMENT — can be reconciled with the statement, in *Comment c* to § 46, that "courts may be properly reluctant to adopt a broad construction of the publicity right." *Id.* at 159. In *Comment c*, the Reporters acknowledge that the rationales underlying the right of publicity are less compelling than those underlying protection of such interests as copyright, patent, trademark, and trade secrets. Although extension of a publicity right to other indicia of identity is not necessarily inconsistent with a recognition that the right of publicity is a weaker interest than such well-established rights as intellectual property, this concession should not be forgotten when policy choices regarding the breadth of the right of publicity must be made.

⁶⁰Of the 13 right of publicity statutes, none extend to such "indicia of identity" as *imitations* of voice or performing style. Eight statutes are limited to "name or likeness" (Florida, Kentucky, Massachusetts, New York, Rhode Island, Tennessee, Virginia, and Wisconsin), an additional four include "voice" as well (California, Nevada, Oklahoma, and Texas), and one extends to an individual's "personality" (Nebraska).

⁶¹See *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

⁶²See Draft No. 4, *supra* note 43, Reporter's Note to *Comment d* to § 46, at 170.

earlier contrary holding,⁶³ the Reporters failed to note that prior to *Midler*, courts had uniformly rejected such "voicealike" claims,⁶⁴ as well as related claims for appropriation of instrumental "sound."⁶⁵ Moreover, the tentative draft overlooked the fact that a federal district judge in Michigan had expressly declined to follow *Midler* in similar circumstances.⁶⁶

Although the drafters declined the recommendation of the media and advertising groups that this contrary precedent be cited, they did insert the slight qualification that "a number of cases" have extended the right of publicity to such "other indicia" of identity.⁶⁷ The Reporter's Note to *Comment d* to § 46 in the final RESTATEMENT also tempered its treatment of the *Midler* case by recognizing that it was not the "principal case" in the soundalike area but rather that it was merely the "leading case recognizing a claim" for such an invasion of the right of publicity.⁶⁸

2. Lookalikes

On the lookalike issue, the tentative draft noted that some cases had found imitations of a distinctive performing style to infringe the right of publicity.⁶⁹ In the view of media and advertising groups, however, the discussion of those cases failed to make clear the extent to which the First Amendment may act to limit such liability, not only as a general consideration but also as recognized in the very cases cited.

For example, although the Second Circuit's reversal in *Groucho Marx Productions, Inc. v. Day and Night Co. Groucho Marx* was based on the district court's error in applying New York rather than California law, Judge Newman noted in dictum that in a case involving an original theatrical production "substantial" First Amendment issues required greater consideration

⁶³*Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970).

⁶⁴*See, e.g., Lahr v. Adell Chemical Co.*, 300 F.2d 256 (1st Cir. 1962); *Davis v. Trans World Airlines*, 297 F. Supp. 1145 (C.D. Cal. 1969); *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343 (S.D.N.Y. 1973).

⁶⁵*See, e.g., Miller v. Universal Pictures Co.*, 11 A.D.2d 47, 201 N.Y.S.2d 632, 13 A.D.2d 473, 214 N.Y.S.2d 645 (1st Dep't 1960), *aff'd* 10 N.Y.2d 972, 224 N.Y.S.2d 662, 180 N.E.2d 248 (1961) (Glenn Miller); *Shaw v. Time-Life Records*, 38 N.Y.2d 201, 379 N.Y.S.2d 390 (1975) (Artie Shaw).

⁶⁶*See* *Levise a.k.a. Mitch Ryder v. Lintas*, No. 90 CV 70407 (E.D. Mich. Nov. 8, 1990) (unpublished opinion). ("I think the *Midler* case by the Ninth Circuit has created a relatively unprecedented cause of action ... *Midler* in no way controls my decision ... Our review of Michigan law does not indicate any support for this cause of action as an invasion of privacy, and it appears to me there is no basis whatever for this Court to recognize such a cause of action." *Id.* at 24.)

⁶⁷*See* RESTATEMENT, *supra* note 11, *Comment d* to § 46, at 531.

⁶⁸*Id.* at 540 (emphasis added).

⁶⁹*See* Draft No. 4, *supra* note 43, *Comment d* to § 46, at 160.

than had been given by the trial court.⁷⁰ Similarly, although the district court in *Estate of Presley v. Russen* ultimately rejected the defendant's argument that the First Amendment protected its slavish imitation of a stage performance of Elvis Presley under the title "The Big El Show," it not only acknowledged that "the scope of the right of publicity should be measured or balanced against societal interests in free expression," but devoted considerable attention to the First Amendment analysis.⁷¹

Other sections of the tentative draft did recognize First Amendment constraints that might be applied to lookalike claims. For example, *Comment d* to § 47 provided that "[i]n cases of imitation, the public interest in competition and in avoiding the monopolization of successful styles, together with the interest in the production of new works including parody and satire, will ordinarily outweigh any adverse effect on the plaintiff's market" and recognized that "significant public and constitutional interests" would be threatened by an overly broad application of the right of publicity to uses not involving the traditionally recognized core attributes of a person's identity.⁷² When this deficiency was pointed out by media and advertising groups, the Reporters added a cross-reference to *Comment d* in the discussion of lookalikes.⁷³

3. Character Imitation

Consistent with the generally expansive approach taken by the tentative draft to recognition of a modern right of publicity was its uncritical citation of the recent *Vanna White* case — a decision that many observers had considered among the most troubling in this area of the law. In that case, the Ninth Circuit protected Vanna White's alleged publicity interest in her game show persona by ruling actionable a satiric use of the image of a blond-wigged robot of the future posing alongside the Wheel of Fortune game board.⁷⁴

Media and advertising groups had urged that the Reporters at a minimum balance their citation to the *Vanna White* case with a discussion of Judge Alex Kozinski's thoughtful and widely praised dissent from the denial of a rehearing en banc by the Ninth Circuit. Decrying a proliferation of overbroad claims in this area, Judge Kozinski had warned that "[o]verprotecting intellectual property is as harmful as underprotecting it . . . [and] . . . stifles

⁷⁰See 689 F.2d 317, 320 (2d Cir. 1982), *rev'g*, 523 F. Supp. 485 (S.D.N.Y. 1981). ("We note, however, that any consideration of [the district court's interpretation of federal constitutional law] would have to examine closely defendants' substantial argument that their play is protected expression as a literary work, especially in light of the broad scope permitted parody in First Amendment law.")

⁷¹513 F. Supp. 1339, 1356 (D.N.J. 1981).

⁷²See Draft No. 4, *supra* note 43, at 183.

⁷³See RESTATEMENT, *supra* note 11, Reporter's Note to *Comment d* to § 46, at 541.

⁷⁴See *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2443 (1993).

the very creative forces it's supposed to nurture.⁷⁵ In Judge Kozinski's view, the "Orwellian notion" that it is tortious to merely "*remind* the public of a celebrity "conflicts with the Copyright Act and the Copyright Clause . . . [and] raises serious First Amendment problems."⁷⁶

Although the Reporters declined to discuss Judge Kozinski's rationale for more stringent limitations on the right of publicity in this area, the final RESTATEMENT was at least revised to include a citation to his dissenting opinion.⁷⁷

D. FIRST AMENDMENT CONSIDERATIONS

The tentative draft of the RESTATEMENT properly recognized that the right of publicity is subject to the "public and constitutional interest in freedom of expression."⁷⁸ Without explicitly mentioning the First Amendment, the black letter of § 47 provided that "the right [of publicity] does not ordinarily extend to the use of a person's identity in news reporting, commentary, entertainment, or in works of fiction or nonfiction."⁷⁹

Comment c to § 47 also acknowledged that First Amendment restrictions imposed on the right of publicity are not limited to news reporting but extend to uses in entertainment and other creative works, including the publication of unauthorized biographies.⁸⁰ Moreover, the same comment provided that commercial motives were by themselves insufficient to invalidate such protection unless the usage was designed "solely to attract attention to a work that has no relationship to the identified person."⁸¹ First Amendment restrictions on the right of publicity were also recognized in a variety of other sections of the tentative draft.⁸²

⁷⁵See *White v. Samsung Electronics America Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting from denial of reh'g en banc).

⁷⁶*Id.* at 1514.

⁷⁷See RESTATEMENT, *supra* note 11, Reporter's Note to *Comment d* to § 46, at 541.

⁷⁸See Draft No. 4, *supra* note 43, *Comment c* to § 47, at 181.

⁷⁹*Id.* at 178.

⁸⁰*Id.* at 181.

⁸¹*Id.* at 182.

⁸²See, e.g., *Comment b* to § 47 (although merchandising uses normally not protected, "the informational content of the particular merchandise or its utility to purchasers as a means of expression may justify the conclusion that the use is protected by the first amendment"), *id.*; *Comment d* to § 47 (recognizing that "significant public and constitutional interests" limit the extension of the right of publicity beyond advertising and merchandising to "other substantial appropriations of a person's identity"), *id.* at 183; *Comment c* to § 48 (recognizing that "in some circumstances the constitutional right of free expression may also limit the scope of injunctive relief"), *id.* at 196.

Concerned about a recent proliferation of what they viewed as overreaching, constitutionally suspect claims,⁸³ however, media and advertising groups proposed inclusion of more expansive language explicitly recognizing the overarching significance of the First Amendment in determining the acceptable bounds of the right of publicity. Although not all of the revisions suggested by the media and advertising groups made their way into the final RESTATEMENT, the Reporters did include two passages that represent a major improvement. First, Comment c to § 47 now opens with the vitally important recognition that "The right of publicity recognized by state and common law is *fundamentally constrained* by the public and constitutional interest in freedom of expression."⁸⁴ Perhaps equally significant is the coordinate acknowledgment in the final RESTATEMENT that the "scope of activities embraced within [the news, entertainment, and creative works] limitation on the right of publicity has been broadly construed."⁸⁵

E. THE BORDERLINE BETWEEN PROTECTED EDITORIAL AND UNPROTECTED TRADE OR ADVERTISING USES

The comments to § 47 in the tentative draft established the basic framework for distinguishing normally protected "editorial" uses from generally unprotected advertising or merchandising uses. Thus, *Comment c* to § 47 acknowledged that although "use of a person's identity primarily for the purpose of communicating information or expressing ideas is not normally actionable," liability for merchandising or advertising uses may result in certain circumstances (e.g., when the use is solely for the purpose of attracting attention to an unrelated work or where the defendant is attempting to make use of the plaintiff's "commercial value as a model").⁸⁶ By contrast *Comment b* recognized that there are situations when otherwise unprotected "merchandising" uses may fall within the purview of the First Amendment.⁸⁷

Although not in disagreement with this typology, media and advertising groups were concerned that it did not sufficiently reflect the careful analysis involved in determining whether

⁸³See, e.g., *White v. Samsung Electronics America Inc.*, 989 F.2d 1512, 1512-13 (1993) (Kozinski, J., dissenting from denial of reh'g en banc) ("Saddam Hussein wants to keep advertisers from using his picture in unflattering contexts. Clint Eastwood doesn't want tabloids to write about him. Rudolf Valentino's heirs want to control his film biography. The Girl Scouts don't want their image soiled by association with certain activities. George Lucas wants to keep Strategic Defense Initiative fans from calling it 'Star Wars.' Pepsico doesn't want singers to use the word 'Pepsi' in their songs. Guy Lombardo wants an exclusive property right to ads that show big bands playing on New Year's Eve. Uri Geller thinks he should be paid for ads showing psychics bending metal through telekinesis. Paul Prudhomme, that household name, thinks the same about ads featuring corpulent bearded chefs. And scads of copyright holders see purple when their creations are made fun of.") (citations omitted).

⁸⁴See RESTATEMENT, *supra* note 11, at 549 (emphasis added).

⁸⁵*Id.*

⁸⁶See Draft No. 4, *supra* note 43, at 181-82.

⁸⁷*Id.* at 181.

a particular use was protected. It was their view that the First Amendment mandates a searching inquiry into the nature and content of the challenged publication rather than a mechanistic reliance on the manner in which a particular use was labeled.

Posters and calendars were suggested as examples of uses that fall into the gray area between "editorial" and "merchandising" or "advertising" uses. Calendars run a spectrum from pure marketing devices, containing little or no editorial content and distributed free of charge solely to advertise their sponsor, to essentially editorial publications that, although organized around a calendar presentation, are distributed through normal bookstore trade channels and contain no advertising.

Although the tentative draft had not addressed calendars, posters were mentioned in *Comment b* to § 47 as an example of an unprotected merchandising use: "An unauthorized appropriation of another's name or likeness for use on posters, buttons, or other memorabilia is thus ordinarily actionable as an infringement of the right of publicity."⁸⁸ As an example of a case "involving the unauthorized use of the plaintiff's likeness on [a] poster[]," the Reporter's Notes to *Comment b* cited *Titan Sports, Inc. v. Comics World Corp.*⁸⁹

The media and advertising groups noted that this citation conveyed the misleading suggestion that *Titan* had held defendant's publication of fold-out photographs in their wrestling magazine to be actionable as a merchandising use. In fact, and even though the defendants had themselves denominated these removable photographs as "posters," the Second Circuit ruled that neither its labeling nor its format was sufficient to support a finding that the use was unprotected as a matter of law: "We agree with the district court that 'the constitutional protection of the freedom of the press does not stop at 8" x 11'."⁹⁰ Providing a variety of factors to guide the district court in its deliberation, the Second Circuit then remanded for a determination of whether inclusion of the "posters" involved an unprotected use for the purposes of trade or a protected editorial use.⁹¹

The final RESTATEMENT has been amended in several ways to reflect the view of media and advertising groups that courts are constitutionally required to conduct a careful examination of the nature of the use when the challenged publication falls into the gray area between editorial and trade usages. First, the parenthetical following the citation to *Titan* in the Reporter's Note to *Comment b* was corrected to clarify the fact that there was no finding of infringement and that

⁸⁸*Id.*

⁸⁹*Id.* at 187 (citing 870 F.2d 85 (2d Cir. 1989)).

⁹⁰870 F.2d at 89.

⁹¹Among the distinguishing factors identified by the Second Circuit were "the nature of the item, the extent of its relationship to the traditional content of a magazine, the ease with which it may be detached from the magazine, whether it is suitable for use as a separate product once detached, and how the publisher markets the item." *Id.* at 89.

the case had been remanded for determination of whether the use had been for purposes of trade.⁹² Second, at the end of the same Reporter's Note the drafters accepted the recommendation that a sentence be added to the discussion of merchandising uses to underline the sensitive nature of the analysis: "In assessing first amendment interests, it is the nature and content of the use and not merely its physical form that is controlling."⁹³ Finally, an acknowledgment of the First Amendment limitations on the scope of the right of publicity was added to the discussion of protected editorial uses.⁹⁴

Presumably because the law is currently unsettled on the precise issue of "calendars" and the like, the final RESTATEMENT did not take a specific position on the status of such publications.⁹⁵ Nonetheless, the recognition of a content analysis may be of some assistance in future efforts to protect the publishers of "calendars," "date books," and similar items which may have substantial editorial content.⁹⁶

⁹²See RESTATEMENT, *supra* note 11, at 554.

⁹³*Id.* at 555.

⁹⁴*Id.* at 549.

⁹⁵In *Beverley v. Choices Women's Medical Center*, 78 N.Y.2d 745, 579 N.Y.S.2d 637, 587 N.E.2d 275 (1991), the New York Court of Appeals concluded that "taken in its entirety," the defendant's calendar was used for purposes of trade. 78 N.Y.2d at 749, 579 N.Y.S.2d at 639. Among the factors considered pertinent in *Beverley* were the fact that the calendar had been distributed free of charge to patients, doctors, and other health centers from whom defendant received referrals; its production costs had been listed as "advertising expenses"; the defendant's name, logo, address, and telephone number were featured at the bottom of every page; and plaudits as to the quality of the defendant's services were prominently displayed. *Id.* In contrast, in another right of publicity action pursued under the New York statute, this one involving the use of Babe Ruth's picture in the "1988 Macmillan Baseball Engagement Calendar," the Second Circuit's description of the calendar at issue strongly suggests that it would have viewed the use as essentially editorial rather than advertising in nature, although the claim was dismissed on the alternative ground that the right of publicity is nondescendible in New York. *Pirone v. Macmillan Inc.*, 849 F.2d 579 (2d Cir. 1990).

⁹⁶Unfortunately, the unsettled nature of the "calendar" issue had also been confused by an ambiguity in one of the leading treatises. See J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY OF PRIVACY § 7.7[C], at 7-25-7-26 (1993). Discussing the *Beverley* case, Professor McCarthy had reported that the New York Court of Appeals agreed with the lower appellate court that "a calendar is an advertising medium." *Id.* at 7-26. In fact, however, both courts had been addressing only the specific calendar at issue in the case and neither court purported to be making broad statements about calendars as a publication medium in general. Indeed, both courts engaged in a careful examination of the particular calendar at issue before concluding that it was being used for a predominantly advertising purpose. See 532 N.Y.S.2d 400, 404 (2d Dep't 1988); *accord* 579 N.Y.S.2d 637, 640 (1991). Professor McCarthy was advised of the potential for confusion and has revised § 7.7[C] of his treatise, in a looseleaf release scheduled for publication in the spring of 1995, not only to clarify that the *Beverley* holding applied only to the calendar at issue in that case but also to make clear that not all calendars are media for advertising. As McCarthy's revision will note, "[w]hile in some calendars advertising will predominate, in others, communicative aspects will predominate. Thus, some calendars may be a format for presenting editorial or communicative information."

F. DAMAGES AND INJUNCTIVE RELIEF

The black letter of § 48 offers a list of factors to be assessed in determining the appropriateness of injunctive relief for alleged violations of the right of publicity. Absent from this list — and largely absent from the commentary accompanying the tentative draft — was any specific reference to First Amendment concerns. Indeed, the availability and appropriateness of injunctive relief for publicity violations was generally assumed in the accompanying commentary.

For example, *Comment a* stated that the principles generally governing injunctive relief in tort cases are to be applied in right of publicity actions and *Comment b* provided that "[a] continuing or threatened infringement of the plaintiff's right of publicity *ordinarily justifies* an award of injunctive relief."⁹⁷ Although *Comment c* did conclusorily provide that "[i]n some circumstances, the constitutional right of free expression may also limit the scope of injunctive relief," the nature of such circumstances was not fully articulated.⁹⁸

The ready availability of injunctive relief was of particular concern to advertisers, who feared — especially when costly advertising materials had already been prepared and/or disseminated — that such relief might in some circumstances provide publicity plaintiffs with a tool to extract a settlement far in excess of the normal market value of the license.

Some in the advertiser community also expressed grave concern over the wide-ranging measure of monetary damages available under § 49 of the new *Restatement*, potentially including recovery of defendant's profits as an alternative to plaintiff's losses. In the view of these advertisers, such a recovery could also result in an unwarranted windfall wholly unrelated to — and potentially far in excess of — the recognized commercial value of a licensed use.

Since many plaintiffs in suits alleging infringement of the right of publicity are in the business of licensing such rights, the advertising community believed that a better basic measure of damages would be the price charged by that plaintiff, or other licensors of rights of similar value, for similar uses. Such a figure is readily available, in the form of a standard industry measurement (called a "Q-value") of a celebrity's notoriety that is used as a benchmark for license price negotiations. It was the view of advertisers that such a standard would provide a far more definite and therefore appropriate measure than would be an advertiser's income or profits somehow attributable to the use.

Although these concerns were brought to the attention of the Reporters, no changes made in the final *RESTATEMENT* with respect to damages and injunctive relief.

⁹⁷See Draft No. 4, *supra* note 43, at 195–196 (emphasis added).

⁹⁸*Id.* at 196.

IV. CONCLUSION: THE POTENTIAL IMPACT OF THE NEW *RESTATEMENT*, AS REVISED, ON ADVERTISERS AND THE MEDIA

Generally when one thinks of a "restatement" of the law one imagines an unexceptionable codification of well-established rules squarely recognized in a solid majority of jurisdictions. By contrast, in the area of right of publicity, it is apparent that such a wholly objective approach is not possible given the unformed and still evolving nature of this relatively recent body of law. Compounding this problem is the fact that the two most influential jurisdictions for the right of publicity — New York and California — have come to represent opposite poles, difficult if not impossible to accommodate into a single, coherent body of law.

In light of these unique factors, the process of analyzing the draft *RESTATEMENT*, seeking certain changes that media and advertising groups felt better reflected the current state of publicity law, has made plain that even the prestigious American Law Institute has not been able to avoid making a variety of policy choices that will perhaps inevitably remain subject to vigorous differences of opinion. In this process, some issues have been resolved in a manner acceptable to media/advertiser/"user" interests while a number of others have been resolved in a fashion markedly more favorable to the rights of celebrities and those who would seek to protect the right of publicity from exploitation. The overall tenor of these policy choices has been to expand publicity rights. At the same time, however, First Amendment limitations have also been significantly superimposed.

Now that the internal debate is over, and the new *RESTATEMENT* has been published, it remains to be seen how influential such a controverted *RESTATEMENT* can be. At a minimum, both practitioners and courts should be aware of the significant divisions of view that underlie this particular *RESTATEMENT*. Certainly it would be an error for practitioners to assume that the judgments reflected in this *RESTATEMENT* are written in stone or for courts to abdicate their responsibilities by uncritically looking to a document that has itself necessarily made policy choices that in the end must be determined by judges or legislators.

V. APPENDIX

A. JOINT MEDIA/ADVERTISING POSITION PAPERS

1. *Position Paper No. 1: Descendibility*

Although the black letter of the RESTATEMENT does not by its terms require descendibility, the comments and reporters' notes weigh in heavily in its favor. The justification for this position as a restatement of existing law is the assertion that "[t]he right of publicity has been recognized as descendible in a substantial majority of the jurisdictions that have determined the issue through legislation or common law adjudication." *Comment h*, p. 163 (citing to 12 jurisdictions that permit descent¹ and only 5 that deny it²).

In fact, however, our analysis of the jurisdictions that have addressed descendibility suggests a closer division. Overall, as we count both judicial and statutory positions on the issue, as many as nine jurisdictions would deny descent.³ The discrepancy is attributable to the omission, in the *Reporters' Note to Comment h* (pp. 175-77), of *Joplin Enterprises v. Allen*⁴ and *Maritote v. Desilu Prod. Inc.*,⁵ both of which clearly oppose descendibility. Additionally, according to the LDRC 50-STATE SURVEY, both Louisiana and Arizona would also deny descendibility. Louisiana is reported⁶ as likely to follow *Coulon v. Gaylord Broadcasting*⁷ in requiring legislative action to extend rights to descendants. In Arizona, descendibility is reported⁸ to be controlled by A.R.S. § 14-3110, which bars descent of actions for libel and invasion of privacy.⁹

The Reporters' tally of existing law is misleading in another respect, to the extent that it includes statutory treatments to yield a "majority" view. The fact of the matter is that even by the Reporters' count

¹California, Florida, Kentucky, Nebraska, Nevada, Oklahoma, Tennessee, Texas, and Virginia by statute (at p. 176) and Georgia, New Jersey, and Utah by judicial decision (at p. 175).

²Massachusetts, New York, Rhode Island, and Wisconsin by statute (at p. 176) and Ohio by judicial decision (*id.*).

³Arizona, Illinois, Louisiana, Massachusetts, New York, Ohio, Rhode Island, Washington, and Wisconsin.

⁴795 F. Supp. 349 (W.D. Wa. 1992) (predicting that free speech values in Washington State Constitution would prevent state court from recognizing descendible right of publicity).

⁵345 F.2d 418 (7th Cir. 1965).

⁶1993-94 LDRC 50-STATE SURVEY 436 (1993).

⁷433 So.2d 429 (La. App. 4th Cir. 1983) (defamation claim).

⁸1993-94 LDRC 50-STATE SURVEY 39 (1993).

⁹*Sinkler v. Goldsmith*, 623 F. Supp. 727 (D. Ariz. 1985) is not to the contrary, for that case is at best ambiguous on the issue of descendibility, resting its denial of the descendant's claim on a lack of lifetime exploitation without resolving the issue of descendibility.

only one third of all jurisdictions have yet to weigh in on the issue of descendibility, and a still lower percentage of the states have yet to address this issue judicially. Where so great a number of courts have yet to consider the issue, it seems inappropriate for a "Restatement" of the law to purport to state a majority rule based in large part on legislative judgments which may be inapposite to courts looking for guidance in their judicial rulemaking.

In fact, if one were to consider only those jurisdictions that have addressed the issue as a matter of common law, there would appear to be no "majority" rule, with California,¹⁰ Illinois,¹¹ Ohio,¹² and Washington¹³ courts opposing and Georgia,¹⁴ New Jersey,¹⁵ Tennessee,¹⁶ and Utah¹⁷ supporting descendibility.

Given this close division of jurisdictions on the issue and given the persuasive arguments in favor of a qualitative as opposed to a merely quantitative approach presented in the AAP and AAF letters, it would seem most appropriate for the Restatement to adopt a more even-handed position on the issue of descendibility.

Under the foregoing circumstances, we would suggest that the following passages from the current draft merit reevaluation:

1. *Comment h*, p. 163 (purporting to state majority rule).
2. *Reporters' Notes to Comment h*, pp. 175-77.

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¹⁰See *Lugosi v. Universal Pictures*, 603 P.2d 423 (1979), interpreted by the California Supreme Court in *Guglielmi v. Spelling-Goldberg*, 603 P.2d 454, 455 (1979), as clearly holding "that the right of publicity ... is not descendible and expires upon the death of the person so protected."

¹¹See *Maritote v. Desilu Prod. Inc.*, 345 F.2d 418 (7th Cir. 1965).

¹²See *Reeves v. United Artists*, 11 Med. L. Rptr. 2181 (6th Cir. 1985).

¹³See *Joplin Enterprises v. Allen*, 795 F. Supp. 349 (1992).

¹⁴See *Martin Luther King, Jr. Center for Social Change v. American Heritage Products, Inc.*, 296 S.E.2d 697 (1982).

¹⁵See *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981).

¹⁶See *Tennessee ex rel Elvis Presley International Memorial Foundation v. Crowell*, 733 S.W.2d 89 (Tenn. App. 1987).

¹⁷See *Nature's Way Products, Inc. v. Nature-Pharma, Inc.*, 736 F. Supp. 245 (D. Utah 1990).

2. *Position Paper No. 2: Lifetime Exploitation*

Most jurisdictions have yet to consider whether and to what extent commercial exploitation of the right of publicity during the lifetime of its original possessor should be a prerequisite to the assertion of any claim by his or her descendants. In contrast to their treatment of descendibility *per se*, the Reporters do not attempt to present a majority rule on this issue.¹ Instead, the Reporters' Notes simply cite four cases conditioning descendibility upon lifetime exploitation of the right² and two that would unconditionally permit descendibility.³ Nevertheless, and although the black letter does not take a position on the issue, the Comments weigh in heavily in favor of unconditional descendibility, suggesting broadly that a requirement of lifetime exploitation "creates needless uncertainty" and going so far as to assert that "the case law offers little explanation or justification for [such a requirement]..."⁴

In fact, by all objective measures the weight of judicial authority currently stands in opposition to permitting absolute and unconditional descendibility. Our analysis of the existing case law reveals that eight of the ten jurisdictions to consider the issue of descendibility of the right of publicity would either deny it entirely or, at a minimum, condition it upon some requirement of lifetime exploitation. In addition to the four cases cited in the Reporters' Notes as conditioning post-mortem exploitation on lifetime exploitation, a federal court interpreting New Jersey law has identified a similar requirement.⁵ The other courts that deny post-mortem rights in all instances must also be considered to have rejected absolute descendibility.⁶

Similarly, with respect to legislative treatment of the issue, the Reporters' Notes cite only the four statutes that expressly reject any requirement of lifetime exploitation.⁷ The Notes fail to add on this

¹See *Comment h*, at 164 (noting that "several" courts would require exploitation but that "a number of decisions" reject such a prerequisite).

²See Reporters' Notes, at 176 (*Acme Circus v. Kuperstock*, 711 F. F.2d 1538 (11th Cir. 1983) (interpreting California law), *Nature's Way Products v. Nature-Pharma*, 736 F. Supp. 245 (D. Utah 1990) (district court prognosticating likely treatment by Utah Supreme Court), and *Sinkler v. Goldsmith*, 623 F. Supp. 727 (D. Ariz. 1985); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978).

³*Id.* at 177 (*Martin Luther King Center v. American Heritage Products*, 296 S.E.2d 697 (Ga. 1982) and *Price v. Roach*, 400 F. Supp. 836 (S.D.N.Y. 1975). The Reporters' notes also refers to Chief Justice Bird's dissent in *Lugosi*, which offers a rationale for allowing descendibility, but this cannot be included as the position of a court.

⁴See *Comment h*, at 164. In making this suggestion, in combination with the position of the Restatement that there should be no distinction between public and private individuals with respect to the right of publicity, see *Comment b*, at 157, the Reporters appear to recognize absolutely no limitations on the descendibility of the right regardless of the status of the subject or his descendants.

⁵See *Gleason v. Hustler*, 7 Med. L. Rptr. 2183 (D.C. N.J. 1983).

⁶Illinois, Ohio, and Washington. See *Position Paper 1*, notes 11-13.

⁷Reporters' Notes, at 177 (California, Nevada, Oklahoma, Tennessee).

point⁸ that the nine other statutes addressing the issue either would deny descendibility even in the presence of lifetime exploitation⁹ or are silent on the issue.¹⁰

As to the Reporters' assertion that the case law offers little explanation or justification for requiring lifetime exploitation as a condition of descendibility, in fact the leading California case addresses this issue at some length.¹¹ In *Lugosi v. Universal Pictures*,¹² the wife and son of actor Bela Lugosi sought to assert a right of publicity claim in connection with the continued post-mortem use of Lugosi's likeness by the corporate producer of the "Dracula" movie in which Lugosi had starred. It was uncontroverted that Lugosi had not commercially exploited his likeness in connection with the Dracula character (or otherwise) during his lifetime. A majority of the California Supreme Court reasoned that it would be illogical to recognize a descendible right when the ancestor from whom they claimed descent had himself made no attempt to either claim or exercise the right during his lifetime.¹³ The majority also observed that awarding a monopoly on a previously unexploited right would have the undesirable effect of inhibiting the free flow of information without providing any countervailing benefit of encouraging the original artist.¹⁴

Considered arguments have thus been offered to support the requirement of lifetime exploitation. Moreover, the only two cases opposing such a requirement have confused, in so holding, the commercial (property) and personal (privacy) aspects of the right to control one's own image.¹⁵ In *Price v. Hal Roach*,¹⁶ the court contended that because the right of privacy protected an individual from commercial

⁸The Reporters do list, on page 176, those statutes that allow or disallow descendibility.

⁹Massachusetts, New York, Rhode Island, and Wisconsin.

¹⁰Florida, Kentucky, Nebraska, Texas, and Virginia.

¹¹Although the Reporters cite *Acme, supra*, for the proposition that California requires lifetime exploitation as a condition of descendibility, the Eleventh Circuit in *Acme* was merely interpreting California law as set forth in *Lugosi v. Universal Pictures*, 603 P.2d 423 (1979).

¹²603 P.2d 423, 5 Med. L. Rptr. 2185 (Cal. 1979).

¹³5 Med. L. Rptr. at 2188. ("It seems to us rather novel to urge that because one's ancestor did not exploit the flood of publicity and/or other evidence of public acceptance he received in his lifetime for commercial purposes, *the opportunity to have done so is property which descends to his heirs.*") (italics in original).

¹⁴*Id.* at 2189 ("If rights to the exploitation of artistic or intellectual property never exercised during the lifetime of their creators were to survive their death, neither society's interest in the free dissemination of ideas nor the artist's rights to the fruits of his own labor would be served.")

¹⁵This is ironic insofar as the property nature of the interest has been used to justify descendibility of a previously exploited right. See, e.g., *Nature's Way Products, Inc., v. Nature-Pharma, Inc.*, 737 F. Supp. 245, 252 (1990); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 844 ((S.D.N.Y. 1975); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1354 (1981). The failure to recognize the property aspect of the right of publicity has also been used to distinguish -- and criticize -- decisions that unconditionally denied descendibility. See *Lugosi*, 5 Med. L. Rptr. at 2198 n.20 (Bird, C.J., dissenting).

¹⁶400 F. Supp. at 846.

exploitation by others, it was not necessary to exercise the right of publicity in order to preserve it for one's heirs. In *Martin Luther King*,¹⁷ the court reasoned that "a person who avoids exploitation during life is entitled to have his image protected against exploitation after death just as much if not more than a person who exploited his image during life." In the absence of lifetime exploitation, however, both courts were protecting what was essentially a privacy and not a property interest, an interest that is no more descendible than an individual's interest in reputation or the other privacy rights. This failure to distinguish between the property and privacy aspects of the right of publicity is a flaw particularly notable in light of the careful effort elsewhere in the Restatement to separate these interests.¹⁸

Under the foregoing circumstances we would suggest the following modifications to the current draft:

1. Comment h to § 46, at p. 164:

"In several of the decisions recognizing the descendibility of the right of publicity at common law, post mortem rights are conditioned on commercial exploitation of the identity prior to death. Some of these decisions suggest that commercial exploitation in the person's primary profession is sufficient, while others appear to demand supplementary use in merchandising or licensing. The case law offers little explanation or justification for a requirement of lifetime exploitation. The rule creates needless uncertainty and has been rejected in a number of decisions. State statutes recognizing descendibility do not require exploitation prior to death, and several statutes expressly repudiate such a requirement. Although commercial exploitation prior to death can be relevant in establishing the value of the appropriated identity, it should not be required as a condition of descent."

We would suggest the following language (with proposed revisions in italics):

"Most jurisdictions have yet to consider whether and to what extent commercial exploitation of the right of publicity during the lifetime of its original possessor should be a prerequisite to the assertion of any claim by his or her descendants. In several of the decisions recognizing the descendibility of the right of publicity at common law, post mortem rights are conditioned on commercial exploitation of the identity prior to death. Some of these decisions suggest that commercial exploitation in the person's primary profession is sufficient, while others appear to demand supplementary use in merchandising or licensing. Other cases expressly reject any requirement of lifetime exploitation. Some state statutes recognizing descendibility expressly repudiate such a requirement, although several other statutes providing for descent are silent on the issue of lifetime exploitation."

¹⁷296 S.E.2d at 706.

¹⁸By contrast, the *Lugosi* majority *did* clearly distinguish between these interests, observing that absent exploitation during a person's lifetime, the "right to publicity" is nothing more than the "right to be let alone," which is clearly a personal right that expires at death. *See* 5 Med. L. Rptr. at 2188 ("There is good reason for the rule [that when the right invaded is a privacy right, that right is extinguished at death and is not exercisable by heirs] ... The very decision to exploit name and likeness is a personal one...")

With respect to the balance of the language in this portion of Comment h (see boldfaced material above), we would strongly urge that such conclusory — and in our view unsupported — material, if not entirely deleted, at a minimum be moved to the Reporters' Notes, where it should be made clear that the opinions stated are those of the Reporters and are not restatements of the law or reflective of the current weight of authority on the issue of lifetime exploitation. If any of this language is to be retained in the Reporters' Notes, we also strongly urge that it should at least be balanced by reference to the significant views of a majority of the California Supreme Court in the *Lugosi* case as set forth above.

2. Reporters' Notes to Comment h, at p. 176-77 (last paragraph)

Cases requiring lifetime exploitation.

- a. Add introductory sentence: "*The current weight of judicial authority supports at least a requirement of lifetime commercial exploitation as a condition to descendibility of the right of publicity.*"
- b. Add citation to *Lugosi* (majority opinion).
- c. Cite *Acme* as *see also*.
- d. Add cite to *Gleason v. Hustler*, 7 Med. L. Rptr. 2183 (D.C. N.J. 1983).

Statutory treatment of lifetime exploitation.

Add at end of paragraph: "*However, several other statutes providing for descendibility are silent on the issue of lifetime exploitation. See Fla. S.A. § 540.08; Ky. R.S. § 391.170; Neb. R.S.A. §§ 20-202, 208; Tex. Prop. Code Ann. § 26.001 et seq; Va. Code § 8.01-40.*"

1/3/94

3. *Position Paper No. 3: First Amendment Limitations*

The current draft of the Restatement commendably recognizes and reaffirms that the First Amendment places significant limitations on the right of publicity. Although the black letter of § 47 does not explicitly mention the First Amendment, it implicitly recognizes constitutional concerns by providing that the right of publicity "does not ordinarily extend to the use of a person's identity in news reporting, commentary, entertainment, or in works of fiction or nonfiction."¹ *Comment a* acknowledges that the use of another's identity for such editorial (as opposed to advertising or trade) purposes is "not ordinarily an infringement of the right of publicity"² and *Comment c* explains that the "public and constitutional interest in freedom of expression" ordinarily protects usages that are designed to communicate information or express ideas.³ *Comment c* further recognizes that this interest extends beyond news reporting to encompass entertainment and other creative activity, such as the production of fictional and nonfictional works, including unauthorized biographies, and that the user's commercial motives are by themselves insufficient to invalidate such protection unless the usage is designed "solely to attract attention to a work that has no relationship to the identified person."⁴ Finally, this same comment observes that while some courts have refused to extend First Amendment protection to editorial works containing substantial falsifications, such cases are more correctly analyzed under the law of defamation or false light privacy, with their corresponding constitutional protections, than under the right of publicity.⁵

Other sections of the current draft to varying degrees recognize First Amendment concerns in specific contexts. With respect to use on merchandise, *Comment b* to § 47 notes that although the unauthorized appropriation of another's name and likeness in "posters, buttons, or other memorabilia" is ordinarily not protected by the First Amendment, "the informational content of the particular merchandise or its utility to purchasers as a means of expression may justify the conclusion that the use is protected by the first amendment."⁶ *Comment d* provides examples of situations in which application of the right of publicity has been extended beyond advertising and merchandising uses to "other substantial appropriations of a person's identity" but underlines the fact that in the context of news and entertainment, "significant public and constitutional interests" have limited such application to relatively few instances.⁷ Finally, *Comment c* to § 48 recognizes that "the constitutional right of free expression may also limit the scope of injunctive relief."⁸

The foregoing are salutary and wholly appropriate provisions that are generally supported by

¹§ 47, at 178.

²*Comment a* to § 47, at 179.

³*Comment c* to § 47, at 181.

⁴*Id.* at 182.

⁵*Id.*

⁶*Comment b* to § 47, at 181.

⁷*Comment d* to § 47, at 183.

⁸*Comment c* to § 48, at 196.

judicial (and legislative) precedent. Nonetheless we believe that the current draft can and should be further strengthened both to emphasize the overriding importance of First Amendment limitations on publicity claims recognized in the case law as well as to forestall the confusion and overreaching that have all too frequently characterized constitutionally suspect right of publicity claims.

Current Law Recognizes the Overarching Effect of the First Amendment

First Amendment-inspired limitations on claims for misappropriation of name or likeness have been applied since the earliest recognition of such actions at common law.⁹ Although they have taken various approaches to accommodating society's interests in the free flow of information with the individual's interest in his or her identity, courts have almost universally recognized the vital and indeed overarching role of the First Amendment in such cases. Some courts have chosen to begin their analysis of publicity claims with a consideration of First Amendment protections.¹⁰ By narrowly construing either the common law or statutory right of publicity, other courts have sought to preclude the possibility of constitutional infirmity, adhering to the maxim that constitutional issues are to be avoided whenever possible.¹¹ Finally, some courts have adopted a balancing test analogous to fair use in copyright in order to exclude constitutionally-protected uses from the ambit of publicity claims.¹² The Restatement adopts the approach of implicitly incorporating First Amendment limitations by setting forth specific categorical exceptions to the rule of general liability for news or other public interest uses of the kind that have generally been recognized in case law and statutes as constitutionally protected.

References to the First Amendment, explicit or implicit, appear in various sections of the current draft. However, in light of the centrality of First Amendment limitations in the law of right of publicity, we believe it is essential to provide some language that would more clearly and forcefully state the controlling significance of such constitutional principles. To this end we would suggest the addition of language along the following lines at the beginning of *Comment c* to § 47.¹³

Although the right of publicity has developed through common law adjudication and statutory enactment, the scope of publicity law has been fundamentally constrained by overriding First

⁹See MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 8.7E, at 8-42 (citing *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905)).

¹⁰See, e.g., *New Kids on the Block v. News America Publishing, Inc.*, 745 F. Supp. 1540 (C.D. Cal. 1990), *aff'd on other grounds*, 971 F.2d 302 (9th Cir. 1992). See generally MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY, *supra*, note 9, § 8.6, at 8-33 to 8-38 (discussing direct incorporation of First Amendment in right of publicity cases).

¹¹See *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302 (9th Cir. 1992) (ability to resolve case on nonconstitutional grounds precludes consideration of constitutional issue); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271 (5th Cir. 1989); *Valentine v. CBS, Inc.*, 698 F.2d 430 (11th Cir. 1983). See also MCCARTHY, *supra*, note 9, § 8.6[B], at 8-34.1.

¹²See *Apple Corp. Ltd. v. Leber*, 12 Med. L. Rptr. 2280 (Cal. Super. 1986); *Groucho Marx Productions, Inc. v. Day and Night Co.*, 523 F. Supp. 485 ((S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982).

¹³At 181.

Amendment considerations. This Restatement is intended — as it must be — to reflect the full scope of First Amendment constraints that have been judicially and legislatively crafted. The precise boundary between advertising and trade uses found actionable on the one hand, and editorial uses found constitutionally protected on the other, has not always been perfectly clear. Nonetheless, a fair reflection of the contours and tenor of current publicity law necessarily requires that any Restatement not merely pay lip service to constitutional requirements, but that it fully accommodate and advance the central and consistent impetus toward First Amendment preservation that has characterized the development of this body of law. Various means have been crafted to effectuate such First Amendment limitations. While different approaches might also have been adopted, the one employed by § 47 is not in any fashion intended to foreclose any other appropriate avenues of protection. Rather § 47 is intended to encompass the full ambit of previously recognized constitutional limitations as well as to enable, and indeed to encourage, expansive application of the requisite First Amendment principles in future cases.

First Amendment Considerations Permit Only the Narrowest Construction of Asserted Exceptions to Protected Editorial Uses

Throughout § 47 and the accompanying comments and reporters' notes, the current draft qualifies the general exemption for usages involving "news reporting, commentary, entertainment, or in works of fiction or nonfiction" by providing that such uses are *ordinarily* not actionable.¹⁴ The current draft implicitly recognizes that such exceptions to the constitutional shield for editorial uses are extremely rare, however, as only two situations in which First Amendment protection may be abrogated are cited in the current draft. These are (1) when the purported editorial usage is in fact essentially unrelated to the underlying work, and serves merely as a pretext for an advertising or merchandising usage,¹⁵ or (2) when the usage involves an essentially total appropriation of the plaintiff's identity, as with the broadcast or imitation of substantially the entirety of a performance.¹⁶ Moreover, the scope and operation of these categories is equally restrictive, as the First Amendment severely limits the number of instances in which essentially editorial use could be unprotected.

Although the Reporters' Notes freely acknowledge these constitutional limitations,¹⁷ the comments are less explicit, and we are concerned that the word "ordinarily" may be subject to a broader interpretation than is either intended or can be supported in light of the extreme rarity of the exceptions that case law has recognized to the broad protection afforded by the First Amendment. Accordingly, we would strongly urge that language along the lines of the following italicized sentence be added after the

¹⁴§ 47, at 178; *Comment a* to § 47, at 179; *Comment c* to § 47, at 181.

¹⁵*Comment c* to § 47, at 182.

¹⁶*Comment d* to § 47, at 183; Reporters' Notes to *Comment d*, at 191-92.

¹⁷See Reporters' Notes to *Comment c*, at 190 ("because of the commitment to freedom of expression, the required relationship [between the usage of the name or likeness and the underlying work] is liberally construed"); Reporters' Notes to *Comment d*, at 193 (recognizing that statutory exemptions for news or related activities may permit such appropriations "without regard to the substantiality or market effect of the use").

first sentence of *Comment c* in the current draft:

Because of the public and constitutional interest in freedom of expression, the use of another's identity primarily for the purpose of communicating information or expressing ideas is ordinarily not actionable under the rule stated in § 46. *Indeed, due to First Amendment constraints, only in the rarest instances has liability been imposed for such activities. See Comment d.*¹⁸

First Amendment Considerations Indeed Mandate the Broadest Construction of Exempt Editorial Uses

Although *Comment c* offers some indication of the notable breadth of the First Amendment exemption for editorial and related usages, the presentation tends simply to list the protected activities rather than to articulate how broadly they are defined. The Reporters' Notes do indicate that the constitutional exemption for news and related usages is construed broadly with respect to the types of activities fairly characterized as news use¹⁹ and liberally with respect to the demarcation between *bona fide* informational as opposed to pretextual or unrelated advertising usages.²⁰ Again, however, the presentation does not, in our view, make sufficiently clear the sweeping implications of the First Amendment.

Accordingly, we would strongly urge that language along the lines of the following italicized clause be added to the discussion in *Comment c* of the scope of the exempt editorial uses, to be inserted as a replacement for the opening clause of the penultimate sentence on page 181:

Because of the paramount authority of the First Amendment, the activities protected under a general exemption for editorial communication of news or other public information uses must be broadly construed. The interest in freedom of expression extends beyond news to entertainment and other creative works, including both fiction and nonfiction....

Similarly we would also urge that language along the lines of the following italicized sentence be added at the end of the first (carryover) paragraph of *Comment c*, on page 182:

....the defendant may be subject to liability for a merchandising use of the plaintiff's identity. See Comment b. In both instances, however, constitutional imperatives mandate that the requisite relationship between the use and the underlying work be liberally construed.

¹⁸That the use is "primarily for the purpose of communicating information or expressing ideas" precludes the limited exceptions for pretextually editorial uses that are deemed to be advertising or merchandising purposes, thus further confining the potential exceptions to those set forth in *Comment d*.

¹⁹See Reporters' Notes to *Comment c*, at 189 (citing cases defining protected "news" to include surveys of pop culture, fashion columns, rebroadcast of a performance in an award-winning advertisement, and poster of a mock presidential candidate).

²⁰*Id.* at 190 ("because of the commitment to freedom of expression, the required relationship [between name or likeness and underlying news or entertainment usage] is liberally construed").

**First Amendment Considerations Mandate Sensitive Analysis
to Distinguish Unprotected Advertising or Merchandising Uses
from Constitutionally Protected Editorial Uses**

In *Comment b*, the Restatement notes that while uses for the purpose of merchandising are ordinarily not protected, "in some circumstances ... the informational content of the particular merchandise may justify the conclusion that the use is protected by the first amendment."²¹ By contrast, in *Comment c*, the Restatement notes that although editorial uses are "ordinarily" protected, there may be circumstances in which such uses are "subject to liability for ... merchandising."²² The Reporters' Notes to *Comment b*²³ cite such cases as *Paulsen v. Personality Posters, Inc.*²⁴ for the proposition that uses that might generally be categorized as merchandising (e.g., posters) may nonetheless be protected in some circumstances. And the Reporters' Notes to *Comment c*²⁵ cite, *inter alia*, *Titan Sports, Inc. v. Comics World Corp.*²⁶ for the proposition that uses that might normally be categorized as editorial (e.g., magazines) may nonetheless be actionable if they are actually found to be merchandising uses.

Although these statements are unobjectionable as far as they go, we believe that the current draft should be revised to make more fully clear that, in order to adequately protect First Amendment rights, uses falling into the gray area between advertising or merchandising and editorial must be sensitively analyzed based on the nature and content of the publications or products, rather than mechanically based on the label under which they might be categorized.

For example, in *Titan*, the defendants published wrestling magazines that included removable photographs of wrestlers folded and stapled into the center of magazines. Although defendants had themselves denominated these oversized photographs as "posters" in their publication, the Second Circuit declined to decide the case on the basis of such simplistic designations. The court viewed the label of "poster" as insufficient to support a finding that such use was unprotected as a matter of law: "We agree with the district court that 'the constitutional protection of the freedom of the press does not stop at 8" x 11".'²⁷ Regardless of the form in which the challenged photographs appeared, the Second Circuit held that a proper approach required a careful analysis by the district court on remand to determine whether the posters included in the magazine were related to its editorial content (i.e., to their "public interest

²¹At 181.

²²At 182.

²³At 188.

²⁴59 Misc.2d 444, 299 N.Y.S.2d 501 (Sup. Ct. N.Y. Co. 1968).

²⁵At 191.

²⁶870 F.2d 85 (2d Cir. 1989).

²⁷870 F.2d at 89.

aspect") or whether the use was "merely incidental to [a] commercial purpose."²⁸

In addition to posters, calendars are frequently encountered examples of publications or products, not specifically mentioned in the current draft, that may fall into a gray area between advertising or merchandising and editorial uses. Some calendars are clearly nothing more than marketing devices. They are distributed free of charge to the recipient, solely to advertise their sponsor, and contain little or no editorial content or point of view. Other calendars arguably contain elements both of advertising and editorial content. Still others are no different than books in that they are media publications, they clearly contain editorial content, and, although organized around a calendar presentation, they neither contain advertising nor are distributed for that purpose.

In *Beverley v. Choices Women's Medical Center*,²⁹ the New York Court of Appeals was required to determine the status of a calendar containing many of the indicia of an advertisement but that also contained information and a "message of public interest."³⁰ In holding that the promotional content outweighed the editorial matter, the court pointed to the following factors: the calendar was distributed free of charge by the defendant medical facility to patients, doctors, and other health centers from whom the defendant received referrals; its cost of production was listed as part of defendant's "advertising expenses"; the defendant's name, logo, address, and telephone number were featured at the bottom of every page; and plaudits as to the quality of the defendant's services were prominently displayed.³¹ Although the Court of Appeals thus found that this multiplicity of advertising elements rendered the particular calendar actionable in that case, it would be incorrect to read *Beverley* as holding generally that prominent display of corporate identity or promotional use of otherwise editorial matter would remove constitutional protection in instances where the editorial use actually predominated. Nor do we suggest that a close case such as *Beverley* could not have come out the other way. Indeed, a strong dissent in the New York Appellate Division at an earlier stage of the case would have held nonactionable the incidental and nonpromotional use of the plaintiff's likeness in the context of editorial coverage of matters of legitimate public interest.³² It is because many of these gray area cases are so close that we have urged

²⁸Among the distinguishing factors identified by the Second Circuit were "the nature of the item, the extent of its relationship to the traditional content of a magazine, the ease with which it may be detached from the magazine, whether it is suitable for use as a separate product once detached, and how the publisher markets the item." 870 F.2d at 89.

²⁹78 N.Y.2d 745, 579 N.Y.S.2d 637, 587 N.E.2d 275 (1991).

³⁰78 N.Y.2d at 752, 579 N.Y.S.2d at 640.

³¹78 N.Y.2d at 749, 579 N.Y.S.2d at 639.

³²See 141 A.D.2d 89, 532 N.Y.S.2d 400 (2d Dep't 1988) (Brown, J., concurring in part and dissenting in part) ("The mere fact that the photograph and the calendar in which it appears have been sponsored and published by the defendant's enterprise should not serve to deprive the photograph of its protected public interest status. In order for the plaintiff's name or likeness to be considered as having been used for commercial purposes within the meaning of Civil Rights Law § 51, it is essential that there be some exploitation thereof either in, or as part of, the commercial announcement or in direct connection with the solicitation for business. In other words, unless there is some connection made between the plaintiff's name or likeness and the defendant's commercial message, the fact that the medium in which the plaintiff's name and photograph appear is commercially sponsored should not deprive the defendant of the public interest use exception as a defense") (citations omitted).

inclusion of language in the Restatement sufficiently recognizing that First Amendment limitations must be sensitively applied.

In contrast to *Beverley*, at the editorial end of the spectrum are publications that are "calendars" of one kind or another but that do not share any of these advertising indicia. For example, in *Pirone v. Macmillan Inc.*³³ the descendants of Babe Ruth complained of the use of his photograph by a leading New York book publisher in the 1988 *Macmillan Baseball Engagement Calendar*. *Pirone* did not need to decide the issue of whether that calendar was an editorial use, dismissing the action on the basis of nondescendibility of Ruth's right of publicity under New York law. It would nevertheless seem beyond dispute that Macmillan's *Engagement Calendar* would be held a protected editorial use because — like other "calendars" of this type — it lacked all of the advertising indicia present in *Beverley*. The calendar did not praise or promote its publisher's products or services and it was not distributed gratis solely to potential clients but was offered for sale to the general public like any other editorial work. While organized as a calendar, the Macmillan publication was simply one format for presenting information about the history of baseball. Just as Babe Ruth would not have had a claim against a pictorial biography containing the exact same 55 photographs as were contained in the *Baseball Engagement Calendar*, the inclusion of space to write daily appointments on a page facing each photograph would not in any way alter the information-conveying function of the work.

In sum, the critical determinant recognized in the cases for assessing whether any publication or product — including a poster or calendar — qualifies as protected expression is its nature and content and not simply its outward form. As one court aptly stated, in a somewhat different context,³⁴

It is not for a court to pass on literary categories, or literary judgment. It is enough that the book is a literary work and not simply a disguised commercial advertisement for the sale of goods or services.

Moreover — and for all of the reasons above stated — in order to avoid curtailing free speech, the First Amendment would seem to require a narrow construction of the advertising or merchandising category where the allegedly offending use is contained in arguably editorial content and a broad construction of the editorial category where there is a claim that an otherwise editorial use is actually advertising or merchandising in disguise.

Recommendations

Based on the foregoing, we would suggest the following modifications to the current draft:

1. Add the italicized language to *Comment b* at p. 181:

Attempts to defend the sale of such merchandise on First Amendment grounds through analogies to the marketing of books, magazines, and other traditional media of

³³849 F.2d 579 (2d Cir. 1990).

³⁴*Frosch v. Grosset & Dunlap*, 75 A.D.2d 768, 427 N.Y.S.2d 828, 829 (1st Dep't 1980).

communication (see Comment c) have generally³⁵ been rejected. *The determining factor is not, however, simply the labeling of a product or publication as "merchandise."* In some circumstances, the informational content of the particular merchandise or its utility to purchasers as a means of expression may justify the conclusion that the use is protected by the first amendment. A candidate for public office, for example, cannot invoke the right of publicity to prohibit the distribution of posters or buttons bearing the candidate's name or likeness, whether used to signify support or opposition.

2. Insert the italicized language before the last sentence of the carryover paragraph in the Reporters' Notes to *Comment b* at p. 189:

Other cases have noted in dicta that the sale of commercial merchandise bearing a person's name or likeness may sometimes be entitled to constitutional protection. See (citations omitted). *In assessing the first amendment interests, it is the nature and content of the use and not simply its form that has been recognized as controlling. See Titan Sports, supra, 870 F.2d at 88 ("In applying [the New York Civil Rights Law], a court must be ever mindful of the inherent tension between the protection of an individual's right to control the use of his likeness and the constitutional guarantee of free dissemination of ideas, images, and newsworthy matter in whatever form it takes.") (declining categorically to label as actionable an oversized photograph denominated as a poster and folded and stapled into a magazine).*

3. Insert the italicized language in the Reporters' Notes to *Comment b* at the end of the penultimate sentence of the first full paragraph on p. 188:

See McCarthy, *The Rights of Publicity and Privacy* § 7.6. See also *Beverley v. Choices Women's Medical Center*, 78 N.Y.2d 745, 579 N.Y.S.2d 637 587 N.E.2d 275 (1991) (holding that the promotional aspects of a calendar distributed for advertising purposes by a medical facility in that case outweighed its editorial content); McCarthy § 7.7 (discussing specific products, such as games, posters, and calendars, that "are in a position somewhere between traditional 'media' and traditional 'merchandise'"). Although no case has definitively so held, it would seem, absent predominating promotional and advertising indicia, that calendars containing editorial matter could well be analogized to books or other traditional media of communication that are subject to first amendment protection. See *Pirone v. Macmillan Inc.* 849 F.2d 579 (2d Cir. 1990) (engagement calendar containing biographical information on celebrated sports figures).

Miscellaneous Other Suggestions

1. On page 189 in the current draft, the initial sentence in the Reporters' Notes to *Comment c* opens as follows: "The right to appropriate another's identity for purposes of news

³⁵The word "regularly," as used in the current draft, suggests to us a derogation of the significance of potential constitutional claims that is inappropriate.

reporting is discussed in ..."³⁶ Because of what we believe is the unnecessarily pejorative tenor of the word "appropriate," we suggest the following revision (which would also track the language of *Comment c*³⁷):

"The use of another's identity for purposes..."

2. The final sentence of *Comment d* reads as follows: "Statutes in some states *may be interpreted to permit the use of another's identity in news reporting or other specified works without regard to the substantiality of the use or its effect on the plaintiff.*"

We believe that the implication that courts might not find an exemption is misleading given express language of such statutes. As long as an activity is bona fide news reporting, availability of exemption should not be at issue. We would therefore recommend eliminating the italicized phrase.

3. Although *Comment c* (p. 182) appropriately rejects incorporation of a falsity element into right of publicity claims, we believe that the accompanying Reporters' Note misleadingly overstates the significance of certain New York cases on this point. Accordingly we would propose the following (italicized) revisions to the first full paragraph on page 191:

Some cases interpreting New York law, which does not recognize a common law cause of action for invasion of privacy, have suggested an exception to the news and entertainment right under New York Civil Rights Law § 51 when the work contains substantial falsification This exception has been criticized and its current vitality is subject to question. See MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 8.9[C] at 8-66.5. The suggested exception also tends inappropriately to confuse publicity with false light privacy claims. See Comment c at 182. See also Zacchini ...

4. On p. 190, in the first full paragraph, we would recommend inserting a citation to *New Kids on the Block v. News America Publishing*, 971 F.2d 302 (9th Cir. 1992) following the sentence "However, because of the commitment to freedom of expression, the required relationship is liberally construed" and prior to the citation to *Rogers*.
5. On p. 191, at the end of carryover paragraph, we would recommend a citation to the leading treatise, as follows: "*A more detailed discussion of the many First Amendment limitations that have been recognized in right of publicity cases may be found in MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY, Chap. 8.*"
6. The first reference in the Reporters' Notes³⁸ to *Titan Sports, Inc. v. Comics World Corp.* may be misleading in suggesting that the "fold-out photographs" at issue were

³⁶At 189.

³⁷At 181 ("the use of another's identity primarily for the purpose of communicating....")

³⁸At 187.

definitively held to be posters that would be actionable as "infringing merchandise."³⁹ Of course, the Second Circuit in fact remanded for the case for a determination of whether or not the use was editorially protected. Accordingly, we suggest that this reference be revised as follows:

Cf. Titan Sports, Inc. v. Comics World Corp., 870 F.2d 85 (2d Cir. 1989) (*whether inclusion of fold-out photographs in defendant's magazine was an actionable merchandising use or a protected editorial use to be determined by district court on remand*). Other infringing merchandise has included buttons (citations omitted)...

7. Add the italicized language to the end of the carryover paragraph on p. 190 of the Reporters' Notes to *Comment c*:

The fact that a user obtains a financial benefit from a news or entertainment use is not sufficient to render the appropriation actionable. (Citations omitted.) *Corporate sponsorship and distribution of an otherwise clearly protected use will also not change the analysis. See Benavidez v. Anheiser Busch, Inc.*, 873 F.2d 102 (5th Cir. 1989) (*documentary film produced and distributed gratis by the beer manufacturer held not actionable*).

8. In view of the overarching significance of constitutional limitations on liability in right of publicity law, and the consequent delicacy of the line drawing process in many contexts, we believe it is important for the Restatement to make clear that such initial determinations of actionability *vel non* have traditionally been made by judges, most frequently on preliminary motions as matters of law.⁴⁰ Although the overwhelming body of precedent clearly supports this proposition, we do not find anywhere in the current draft a statement of this fundamental principle. Accordingly we would suggest the following italicized language be added at an appropriate point — preferably in the comments but at least in the reporters' notes.

Whether a name, likeness, or other indicium of a person's identity is used for "purposes of trade" is a question of law that is ordinarily decided by the court on preliminary motions. Distinctions under the rule stated in § 47 between protected editorial uses and unprotected advertising or merchandising uses would also be matters for preliminary determination by the court as a matter of law.

1/7/94; 1/19/94

³⁹*Id.* at 188.

⁴⁰This traditional approach parallels practice in related fields such as defamation where it has consistently been held that an "independent" judicial assessment of the proper line between protected and unprotected expression must always be assured, *see New York Times Co. v. Sullivan*, 376 U.S. 254, 284-85 (1964); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), and that an early judicial determination is required to avoid the chilling effects of unwarranted litigation over privileged activities, *see Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 545, 435 N.Y.S.2d 556, 563 (1980) ("[t]he threat of being put to the defense of a lawsuit ... may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.")

4. *Position Paper No. 4: Other Indicia of Identity*

In the black letter of § 46, the RESTATEMENT provides that the right of publicity reaches not only use of "name" and "likeness" but extends to "other indicia of identity."¹ *Comment d* to § 46 cites as examples of "other indicia" "the use or imitation of the person's voice," "imitation of the person's performing persona," and "[t]he use of other identifying characteristics or attributes ... if they are so closely identified with the person that their use enables the defendant to appropriate the commercial value of the person's identity."² *Comment d* also provides that use of a "likeness" may include a "physical look-alike."³ The Reporters' Note to *Comment d* recognizes that state statutes are restricted as to the enumerated characteristics of a person's identity that are actionable, with some statutes limiting these to "name and likeness" or similarly narrow formulations, and with other statutes including such additional enumerated characteristics as "voice," "signature," or, in one state, "personality."⁴ In fact, no statute adopts the open-ended formulation of § 46 — "other indicia of identity" — although the Reporters' Note observes that "the statutory formulations do not necessarily displace common law rights."⁵ Cases said to extend liability to other identifying characteristics or attributes, including "distinctive" phrases, objects, and props and gestures are cited in the Reporters' Note.⁶ At least with respect to imitation of a person's performing style, *Comment d* to § 47 recognizes that marketplace and constitutional considerations may prevent an overly broad application of the right of publicity to uses not involving the traditionally recognized core attributes of a person's identity.⁷

In our view, these provisions of the RESTATEMENT have too readily embraced an overbroad view of protected indicia of identity. Moreover, the cases cited in the Reporters' Note to *Comment d* of § 46 do not adequately reflect the division of authority with respect to extension of the right of publicity to such non-core attributes as performing persona or voice.

For example, as to voice, *Midler v. Ford Motor Co.*, cited in the Reporters' Note as the "principal" case on "sound-alikes," was in fact the first instance in which a court found liability for imitation of a vocal style. Prior to *Midler*, not only *Sinatra v. Goodyear Tire & Rubber Co.*,⁸ which is

¹§ 46, at 155.

²*Comment d*, at 160.

³*Id.* at 159.

⁴Reporters' Note, at 169-70.

⁵*Id.* at 170.

⁶*Id.* at 171-72.

⁷*Comment d* to § 47, at 183-84. ("In cases of imitation, the public interest in competition and in avoiding the monopolization of successful styles, together with the interest in the production of new works including parody and satire, will ordinarily outweigh any adverse effect on the plaintiff's market.")

⁸435 F.2d 711 (9th Cir. 1970).

cited in the Reporters' Note, but also *Lahr v. Adell Chemical Co.*,⁹ *Davis v. Trans World Airlines*,¹⁰ and *Booth v. Colgate-Palmolive Co.*¹¹ had declined to find such vocal imitation actionable. Moreover, subsequent to *Midler*, a federal district judge in Michigan expressly declined to follow *Midler* in extending the right of publicity to a similar "sound-alike" claim.¹² In addition to these "voice-alike" decisions, cases rejecting plaintiffs' claims of a property right in their instrumental "sound"¹³ are not cited in the Reporters' Note. Indeed the leading commentator on the right of publicity, who favors extension of rights to "sound-alikes," freely admits that prior to *Midler* the weight of judicial authority had rejected such extension.¹⁴

With respect to imitation of a person's performing persona, the Reporters' Note to *Comment d* of § 46 omits express discussion of potential limitations on liability imposed by First Amendment considerations. The citation to such decisions as *Groucho Marx Productions, Inc. v. Day and Night Co.*¹⁵ and *Estate of Presley v. Russen*,¹⁶ as extending liability to imitations of a distinctive performing style, does not make clear the extent to which the First Amendment may act to limit such liability, not only as a general consideration but also as recognized in these very cases. In *Groucho Marx*, for example, although the Second Circuit's reversal was based on the district court's error in applying New York rather than California law, Judge Newman noted in dictum that "substantial" First Amendment issues required greater consideration than had been given by the trial court.¹⁷ Similarly, although the district court in *Presley* ultimately rejected the defendant's First Amendment argument, it not only acknowledged that "the

⁹300 F.2d 256 (1st Cir. 1962).

¹⁰297 F. Supp. 1145 (C.D. Cal. 1969).

¹¹362 F. Supp. 343 (S.D.N.Y. 1973).

¹²See *Levise a.k.a. Mitch Ryder v. Lintas*, No. 90 CV 70407 (E.D. Mich. Nov. 8, 1990) (unpublished opinion; copy attached). ("I think the *Midler* case by the Ninth Circuit has created a relatively unprecedented cause of action ... *Midler* in no way controls my decision ... Our review of Michigan law does not indicate any support for this cause of action as an invasion of privacy, and it appears to me there is no basis whatever for this Court to recognized such a cause of action." *Id.* at 24.)

¹³See, e.g., *Miller v. Universal Pictures Co.*, 11 A.D.2d 47, 201 N.Y.S.2d 632, 13 A.D.2d 473, 214 N.Y.S.2d 645 (1st Dep't 1960), *aff'd* 10 N.Y.2d 972, 224 N.Y.S.2d 662, 180 N.E.2d 248 (1961) (Glenn Miller); *Shaw v. Time-Life Records*, 38 N.Y.2d 201, 379 N.Y.S.2d 390 (1975) (Artie Shaw).

¹⁴See MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 4.14[D], at 4-93 ("One hopes the era of judicial hostility to identification by sound and voice is drawing to a close with the 1988 *Bette Midler* decision...") McCarthy heralds *Midler* as the "modern" trend -- his so called "early" cases date back only to the 1960s and 1970s -- but he fails to cite the contrary and subsequent *Mitch Ryder* decision.

¹⁵523 F. Supp. 485 (S.D.N.Y. 1981).

¹⁶513 F. Supp. 1339 (D.N.J. 1981).

¹⁷See 8 Med. L. Rptr. 2201, 2202 n.2. ("We note, however, that any consideration of [the district court's interpretation of federal constitutional law] would have to examine closely defendants' substantial argument that their play is protected expression as a literary work, especially in light of the broad scope permitted parody in First Amendment law.")

scope of the right of publicity should be measured or balanced against societal interests in free expression,"¹⁸ but devoted considerable attention to the analysis. Although the RESTATEMENT reflects these concerns elsewhere,¹⁹ we believe that the omission of any explicit recognition of these concerns, or any citation to those places in the RESTATEMENT where they are addressed, gives the impression that the finding of liability for imitative performances is a less complicated and less constitutionally sensitive matter than is the case.

The manifold commercial *and* constitutional dangers of too broadly extending the right of publicity to cover all manner of loosely defined "indicia of identity" are illustrated in a vigorous dissent from the denial of rehearing en banc in the *Vanna White* case.²⁰ Yet the current draft of the RESTATEMENT does not even cite, much less address, the dangers identified by Judge Kozinski.²¹ In his dissent, Judge Kozinski decried the proliferation of overbroad claims in this area²² in powerfully eloquent language:²³

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

The panel's opinion is a classic case of overprotection. Concerned about what it sees as a wrong done to *Vanna White*, the panel majority erects a property right of remarkable and dangerous breadth: Under the majority's opinion, it's now a tort for advertisers to *remind* the

¹⁸513 F. Supp. at 1356.

¹⁹*See, e.g., Comment d* to § 47, at 183 (although liability attaches for "substantial appropriations of a person's identity," broader restrictions "threaten significant public and constitutional interests"); Reporters' Note to *Comment d* to § 47, at 192 (noting Second Circuit's questioning of the district court's finding of infringement in *Groucho Marx*).

²⁰*See White v. Samsung Electronics America Inc.*, 21 Med. L. Rptr. 1330, 1332 (1993) (Kozinski, J., dissenting from denial of reh'g en banc).

²¹The only reference in this regard to the *Vanna White* case appears in the Reporters' Note to *Comment d*, at 171, which cites only the panel decision.

²²*Id.* at 1330-31. ("Saddam Hussein wants to keep advertisers from using his picture in unflattering contexts. Clint Eastwood doesn't want tabloids to write to write about him. Rudolf Valentino's heirs want to control his film biography. The Girl Scouts don't want their image soiled by association with certain activities. George Lucas wants to keep Strategic Defense Initiative fans from calling it 'Star Wars.' Pepsico doesn't want singers to use to word 'Pepsi' in their songs. Guy Lombardo wants an exclusive property right to ads that show big bands playing on New Year's Eve. Uri Geller thinks he should be paid for ads showing psychics bending metal through telekinesis. Paul Prudhomme, that household name, thinks the same about ads featuring corpulent bearded chefs. And scads of copyright holders see purple when their creations are made fun of. [Detailed citations to these and numerous other and similarly expansive right of publicity claims omitted.]")

²³*Id.* at 1332.

public of a celebrity. Not to use a celebrity's name, voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity's image in the public's mind. This Orwellian notion withdraws far more from the public domain than prudence and common sense allow. It conflicts with the Copyright Act and the Copyright Clause. It raises serious First Amendment problems. It's bad law, and it deserves a long, hard second look.

Based on the foregoing, and in addition to the suggestions separately proposed by the American Association of Advertising Agencies, we would suggest the following modifications (indicated in italics) to the current draft:

1. In *Comment d* to § 46, the final sentence on page 159, and the balance of that paragraph, carrying over to page 160:

In the absence of a narrower statutory definition, *some cases have held that* unauthorized use of other indicia of a person's identity can also infringe the right of publicity. Thus, the use or imitation of the person's voice or an imitation of the person's performing persona such as Charlie Chaplin's "Little Tramp" [...] ²⁴ can violate the right of publicity if used for purposes of trade under the rule stated in § 47. *Other cases have held to the contrary. In some cases* the use of other identifying characteristics or attributes *has also been held to* infringe the right of publicity if they are so closely identified with the person that their use enables the defendant to appropriate the commercial value of the person's identity, *while other cases have rejected extension of the right of publicity to other identifying characteristics or attributes.*

2. In the Reporters' Note to *Comment d*, the carryover paragraph on page 170:

The *leading case recognizing a claim for* the appropriation of a voice for purposes of trade is *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), which imposed liability for an imitation of the plaintiff's voice in a song used during a television commercial. The court distinguished a contrary holding in *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), cert. denied, 402 U.S.906 (1971), arguing that the plaintiff in the latter case had asserted rights in the performance of the song itself rather than in a distinctive voice as an attribute of identity. See also *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), cert. denied, 113 S.Ct. 1047 (1993). *Other cases have rejected such appropriation of voice claims, both before and after the decision in Midler. See Lahr v. Adell Chemical Co.*, 300 F.2d 256 (1st Cir. 1962); *Davis v. Trans World Airlines*, 297 F. Supp. 1145 (C.D. Cal. 1969); *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343 (S.D.N.Y. 1973); *Levise a.k.a. Mitch Ryder v. Lintas*, No. 90 CV 70407 (E.D. Mich. Nov. 8, 1990). See also *Tin Pan Apple Inc. v. Brewing Co.*, 737 F. Supp. 826 (S.D.N.Y. 1990) (New York privacy statute does not reach sound-alikes). *Cases have also rejected claims of a publicity right in instrumental sounds. See Miller v. Universal Pictures Co.*, 11 A.D.2d 47, 201 N.Y.S.2d 632, 13 A.D.2d 473, 214 N.Y.S.2d

²⁴We have suggested deletion of the reference to "Groucho," which is supported in the Reporters' Note by citation to the district court opinion in *Groucho Marx Productions, Inc. v. Day and Night Co.*, because the Second Circuit questioned whether the particular imitative use of the Marx Brothers would represent an actionable "trade" violation given the First Amendment considerations presented in that case. See *supra*, note 17.

645 (1st Dep't 1960), *aff'd* 10 N.Y.2d 972, 224 N.Y.S.2d 662, 180 N.E.2d 248 (1961); *Shaw v. Time-Life Records*, 38 N.Y.2d 201, 379 N.Y.S.2d 390 (1975).

3. In the first full paragraph on page 171:

Some cases have found infringement in the imitation of a distinctive performing persona. See, e.g., *Price v. Worldvision*; *Lombardo v. Doyle* ... Cf. *Nurmi* ... *The district court opinions in Groucho Marx Productions, Inc. v. Day and Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981) and *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981) both also upheld claims for infringement in the imitation of a distinctive performing persona; however, both the Second Circuit in *Groucho Marx* and the district court in *Presley* recognized that such claims must be balanced against substantial First Amendment considerations. See also discussion at Comment d to § 47.

4. At the end of the same paragraph on page 171:

But see White v. Samsung Electronics America, Inc., 21 Med. L. Rptr. 1330 (9th Cir. 1993) (Kozinski, J., dissenting from denial of reh'g en banc) (vigorously criticizing, as overprotective and constitutionally suspect, panel opinion's extension of right of publicity claim to indicia of identity merely suggestive of plaintiff or the television role she plays) ("Under the majority's opinion, it's now a tort for advertisers to remind the public of a celebrity. Not to use a celebrity's name, voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity's image in the public's mind. This Orwellian notion withdraws far more from the public domain than prudence and common sense allow. It conflicts with the Copyright Act and the Copyright Clause. It raises serious First Amendment problems. It's bad law, and it deserves a long, hard second look.")

5. Add at the end of the carryover paragraph on pages 171-72:

Other cases have rejected extension of the right of publicity to other identifying characteristics or attributes, particularly where the characteristics or attributes do not sufficiently identify the plaintiff. See, e.g., *Merz v. Professional Health Control Inc.*, 332 S.E.2d 333 (Ga. App. 1985) (film of plaintiff's home); *Rawls v. Conde Nast Publications, Inc.*, 446 F.2d 313 (5th Cir.), cert. denied, 404 U.S. 1038 (1971) (photograph of interior of plaintiff's home); *Branson v. Fawcett Publications, Inc.*, 124 F. Supp. 429 (E.D. Ill. 1954) (photograph of plaintiff's crashed racing car); *Brewer v. Hearst Publishing Co.*, 185 F.2d 846 (7th Cir. 1950) (photograph only of plaintiff's hands, legs, and feet). See also *White v. Samsung Electronics America, Inc.*, 21 Med. L. Rptr. 1330 (9th Cir. 1993) (Kozinski, J., dissenting from denial of reh'g en banc).

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B. ASSOCIATION COMMENTARY ON TENTATIVE DRAFT NO. 4

1. *Association of American Publishers*

Comments on the Restatement of the Right of Publicity
(Restatement of the Law of Unfair Competition (3rd), Chapter 4, Topic 3)
Letter of R. Bruce Rich, Weil, Gotshal & Manges, December 22, 1993, to Henry R. Kaufman

On behalf of the Association of American Publishers, Inc. ("AAP"), we would like to thank you for bringing to our attention Tentative Draft No. 4 of the Restatement of the Law of Unfair Competition (3rd); Chapter 4: Appropriation of Trade Values; Topic 3: Right of Publicity ("Restatement of the Right of Publicity" or "Restatement"). We also thank you for coordinating comments on the Restatement to be submitted to Dean Harvey Perlman, one of the two Reporters of this Restatement.

We submit these comments on behalf of AAP. AAP is the major national association of book publishers in the United States. AAP's more than 200 members include most of the leading commercial book publishers in the United States, as well as many smaller and non-profit publishers, university presses and scholarly associations. Together, AAP's members publish the majority of all books published in the United States.

We have reviewed the draft of the Restatement of the Right of Publicity on behalf of AAP, and find that it is a thoughtful and carefully-crafted work. The amount of effort which went into preparing the Restatement is obvious, and AAP respects both this effort and the scholarly quality of the draft. We have no doubt that a Restatement of this kind could be extremely influential in shaping the development of right of publicity law. It is precisely because of this potential influence, and because of the respect which AAP and the legal community have for the work of the American Law Institute, that these comments are being submitted.

We will not engage in a line-by-line critique of the entire Restatement. We understand that media and advertising interests, coordinating their efforts through your office, will be making suggestions for various revisions throughout the draft. While we have not been directly involved in the specifics of these submissions, we understand that they are consistent with the general views stated herein.

We would like to use this opportunity to comment on an overall flaw in the Restatement which, though subtle, is potentially quite troubling. We find that, in many instances, the Restatement perceptibly favors the broader application of the right of publicity over the narrower application, and, as a result, appears to favor the rights of potential claimants over the rights of potential defendants. This may, in part, be a result of the method used to set forth the more favored rule in any given instance, where virtually equal weight is apparently given to the statutes and case law of each jurisdiction. In some cases it may be true that, when the statutory and case law of the states dealing with a particular issue are mechanically tallied, broader applications might thus seem favored.

However, this majoritarian system fails to take a key point into account. There are, in reality, two equally important strains of right of publicity law in the United States today. California is the leading state in espousing the broader view, while New York is the leading state in favor of the narrower view. New York's leading role in shaping the law of right of publicity is unsurprising, given New York's status as a media, communications and entertainment capital. In this role, New York has contributed greatly to the right of publicity canon; the body of precedent under New York law, and the

exercise of legislative judgment, are the result of a careful balancing of competing policy concerns over a long period of time.

In short, a "one state, one vote" system cannot adequately account for this disproportionate influence. As a result, the Restatement at various points appears to give insufficient weight to the competing narrower applications of the right of publicity. Ultimately, this gives the impression that the narrower view is a disfavored view, rather than a well-considered and robust view, of the right of publicity.

Regardless of the reason for this imbalance, it is one that deserves correcting. Many states and many courts, both state and federal, have yet to deal with the right of publicity, in whole or in part, whether as a matter of statutory or case law. These jurisdictions have thus, in effect, abstained from the Restatement's tally. If the Restatement does not give a balanced picture of competing views of the right of publicity, it runs the risk of unfairly influencing these jurisdictions as they develop their laws of the right of publicity.

This imbalance is most apparent when the Restatement deals with the descendibility of the right of publicity. The narrower view of the right of publicity, as exemplified by New York law, holds that the right of publicity is not descendible. As the Restatement ultimately notes, the issue of descendibility has been carefully and explicitly dealt with by both state and federal courts applying New York law. It is also noteworthy that repeated legislative initiatives for a descendible right of publicity have been rebuffed in New York State.

The Restatement fails to convey the significance of the view that the right of publicity is not descendible. On pages 163-64, section h, the Restatement discusses "duration of rights" and states:

The right of publicity has been recognized as descendible in a substantial majority of the jurisdictions that have determined the issue through legislation or common law adjudication. . . . As a general matter, however, the dignitary and proprietary interests supporting the right of publicity are substantially attenuated after death. . . . Thus, although the right of publicity is recognized as descendible, the scope of permissible use by others may be greater in the case of post mortem publicity rights.

The foregoing may or may not be technically correct. However, its emphasis on the ostensible "majority" view obscures the fact that the "minority" (i.e., those states that hold that the right of publicity is not descendible) is not insignificant and it includes one of the most important jurisdictions for right of publicity law (i.e., New York). Furthermore, this approach obscures the fact that a very substantial majority of jurisdictions have not determined the issue of descendibility either way. Nowhere in this section is non-descendibility given serious consideration — it is not until pages 175-77 that substantial reference is made to non-descendibility.

We would recommend a more evenhanded approach in this section, with language such as the following:

A substantial majority of jurisdictions have yet to consider the descendibility of the right of publicity. In those jurisdictions that have determined the issue through legislation or common law adjudication, there is a difference of opinion on the issue; while the right of publicity has been recognized as descendible in a majority of these jurisdictions, a

substantial minority, including New York, have found that it is not descendible As a general matter, however, the dignitary and proprietary interests supporting the right of publicity are substantially attenuated after death in those jurisdictions where the right is descendible. . . . Thus, although the right of publicity may be recognized as descendible in certain jurisdictions, the scope of permissible use by others may be greater in the case of post mortem publicity rights in those jurisdictions.

We would also recommend a more explicit discussion of non-descendibility under New York law in Comment h (pages 175-76). This comment now reads as follows, in pertinent part:

The right of publicity was held to be descendible in several federal cases applying New York common law. [citations] The New York Court of Appeals ultimately held that privacy and publicity rights in New York are governed exclusively by N.Y. Civ. Rights Law § 50, which is limited to "any living person." *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 485 N.Y.S.2d 220, 474 N.E.2d 580 (1984). See *Pirone v. MacMillan, Inc.*, 894 F.2d 579 (2d Cir. 1990) (no post mortem rights under the New York statute).

By placing greater emphasis on the now-outdated federal cases which found the right to be descendible than on *Pirone v. Macmillan*, and by omitting citations to recent New York State court decisions on point, the Restatement does not fully convey the absolute nature of non-descendibility under New York law.

To avoid the appearance of ambiguity, we would recommend language explicitly stating that, under New York law, the right of publicity is non-descendible, such as the following:

Applying New York law, the Second Circuit recently held that the right of publicity was non-descendible. *Pirone v. Macmillan, Inc.*, 894 F.2d 579 (2d Cir. 1990). This decision was based on the New York Court of Appeals' long-standing view, recently reaffirmed, that privacy and publicity rights in New York are governed exclusively by N.Y. Civ. Rights Law § 50, which is limited to "any living person." *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 485 N.Y.S.2d 220, 474 N.E.2d 580 (1984). Recent New York State lower court decisions are in accord. See *James v. Delilah Films, Inc.*, 544 N.Y.S.2d 447, 451 (N.Y. Sup. Ct. 1989) (§ 50 is exclusive, and "statutory rights created by [§ 50] do not survive death"); *Antonetty v. Cuomo*, 131 Misc. 2d 1041, 502 N.Y.S.2d 902 (N.Y. Sup. Ct. 1986) (same). Prior to *Stephano*, the right of publicity had been held to be descendible in several federal cases applying New York common law. [citations]. As the right of publicity in New York has been found to be exclusively statutory, these cases are no longer controlling.

Later in this paragraph, after the citation to *Reeves v. United Artists*, we believe that it would be appropriate to include a citation to *Joplin Enterprises v. Allen*, 19 Med. L. Rptr. 2093 (W.D. Wash. 1991), *revised*, 795 F. Supp. 349 (W.D. Wash. 1992), which suggests in dictum that Washington state courts would not recognize a descendible right of publicity.

There is one further ambiguous statement regarding descendibility which could be improved. On page 184, the Restatement states: "Since the personal and proprietary interests underlying the right of publicity (see § 46, Comment c) diminish after death, . . ." This gives the impression that it is settled

law that such interests exist, although in a diminished capacity, after death. This is certainly not the case where, as in New York, such interests are extinguished after death. We would recommend that a caveat be added so that the phrase reads: "Since the personal and proprietary interests underlying the right of publicity (see § 46, Comment c) diminish after death in those jurisdictions that recognize a descendible right of publicity, . . ."

Our focus on descendibility in the above discussion was intended to be illustrative rather than exclusive. Descendibility has sparked perhaps the greatest controversy in the development of right of publicity in recent years; as such, it is an issue which greatly deserves an evenhanded approach. However, it is not the only issue in controversy, nor is it the only area of the Restatement which would benefit from an examination of the emphasis afforded to differing viewpoints. We would point to the discussions of the scope of coverage beyond name and likeness, if any; the requirement for lifetime exploitation in those jurisdictions where the right is descendible; and the scope of coverage for private persons and celebrities, as areas where balance may be lacking.

One further area whose treatment is worthy of further review is the relationship between the right of publicity and the First Amendment. We observe in many portions of the current draft a welcome sensitivity to First Amendment concerns. However, we feel that the fragmented manner in which this relationship is discussed does not do complete justice to the important issues involved. Instead of dedicating a section to the right of publicity/First Amendment relationship,²⁵ the Restatement's discussion of First Amendment issues is scattered throughout the discussion of affected uses (see pages 181-3, 186-8, 190 and 199), and often does not refer explicitly to the First Amendment. This treatment fails to delineate clearly the complex relationship between the right of publicity and the First Amendment. Furthermore, these discussions fail fully to convey the tension that exists between the two. The proper balancing of the right of publicity and First Amendment interests is of special concern to AAP members, as well as to others who engage in constitutionally protected expression. Although we appreciate that extensive redrafting may not be possible at this late date, the discussion of First Amendment issues would certainly benefit from a sharper if not more concentrated treatment.²⁶

The tension between the right of publicity and the First Amendment should receive special emphasis when discussing injunctive relief, given the strongly disfavored status given to prior restraints. The present discussion on page 199, consisting of a citation to Zacchini v. Scripps-Howard Broadcasting Co., does not provide such emphasis. We would suggest a short discussion of the concerns raised by injunctions, such as the following:

Where the acts to be affected implicate "speech" protected by the First Amendment, injunctions should be strongly disfavored as "prior restraints." The leading case on prior restraints is Near v. Minnesota, 283 U.S. 697 (1931). See McCarthy, § 11.6[C]. If an injunction is to issue at

²⁵Cf. McCarthy, The Rights of Publicity and Privacy, which accords this relationship an entire chapter (Chapter 8).

²⁶We would like to suggest the following specific addition: on page 190, in the first full paragraph, we would add a citation to New Kids on the Block v. News America Publishing, 971 F.2d 302 (9th Cir. 1992) following the sentence "However, because of the commitment to freedom of expression, the required relationship is liberally construed." This case is particularly instructive since, unlike Rogers, Finger, and Murray, it interprets the California statute.

all, it must be the "least restrictive alternative"; i.e., it must be narrowly crafted to embrace only the illegal conduct and must not unnecessarily impinge upon the protected "speech." Id., § 11.6[A].

Finally, we would like to note the absence of a discussion of the choice of law for the application of right of publicity. As jurisdictions sharply differ on application of the right of publicity, choice of law can have a decisive effect on the outcome of a right of publicity claim. Thus, choice of law may be of considerable importance in understanding the rights implicated in any particular situation. You may wish to consider making reference to this issue.

We would like to leave you with words of praise for the drafters' efforts to date. We believe that consideration of our comments, along with the others that we understand you will be presenting to Dean Perlman can only make a strong work even stronger, more trustworthy and more influential. We welcome the opportunity to discuss any of these issues with you further. Please convey our thanks to Dean Perlman for his consideration in accepting these comments.

2. *American Advertising Federation*

Letter of Lawrence R. Miller, Senior Vice President and Deputy General Counsel,
Young & Rubicam, Inc., December 22, 1993, to Henry R. Kaufman

This letter represents the views of Young & Rubicam and the American Advertising Federation with respect to Tentative Draft 4 of Chapter 4, Topic 3, of the ALI's Restatement (Third) of Unfair Competition. The AAF is the umbrella organization representing all segments of the advertising industry, including advertisers, advertising agencies, media companies, and approximately 50,000 advertising professionals across the United States.

Although we have great respect for the work of the Reporters and the ALI, we wonder whether the entire effort to issue a Restatement of the Right of Publicity is not premature, perhaps by decades. There are only a small number of states whose courts have ever addressed these issues with any significant body of jurisprudence. In several places, the editors admit that the case law is "meager," p. 204, and there is little of it, e.g., p. 210. To seek to "restate" and codify nationally with respect to a legal subject matter which has never first been stated at all in the vast majority of the jurisdictions across the country is to seek improperly to legislate judicial opinion. Indeed, where an area of the law is as undeveloped as this one, it is far wiser to let "the laboratories of the states" gradually develop doctrines that fit the prevailing commercial realities rather than to attempt to homogenize the law from a single point of view.

Not surprisingly, the two states with the most developed law of the right of privacy are California, where there is the largest concentration of celebrities, and New York, where there is the largest concentration of licensees of such rights, in the form of advertisers and advertising agencies. And it is equally not surprising that California, which typically leads the country in the articulation and acceptance of new theories of torts, often unrecognized in other jurisdictions, should be the primary source of new claims in this area. Similarly, it is unremarkable that New York is the leading jurisdiction in rejecting many of the very doctrines originated in California.

Although it is quite appropriate that several states have chosen to go their own way, generally speaking, the views of California and New York, and thus of the Ninth and Second Circuits, tend to represent opposite poles. Unfortunately, the draft Restatement, instead of acknowledging those poles forthrightly, minimizes them, and seeks to homogenize the law. Still more unfortunately, from the view of a New York lawyer representing commercial licensees of such rights, the draft has embraced the broadest view and seeks to promulgate it nationally as the "better view."

The commercial reality out of which the great majority of these cases arises is the production of advertising. Advertisers seek to interest consumers in the purchase of their goods and services by creating fleeting commercial messages, which must, to be effective, instantly engage the viewer and efficiently create a mental image communicating the message. To do so, it is typically essential that the advertisement rely upon elements currently embedded in the popular culture. Resonances are sought between the commercial and the cultural elements to reinforce the message.

A perfect example was presented in *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992). There, Samsung sought to advertise its home electronics products through a television commercial which sought to depict their use in a home of the future. To communicate the message

effectively, the future was not to be portrayed in too alien a fashion. Some aspects were to suggest the future, while others were to suggest that not everything had changed between now and then. In their commercial, Samsung sought to create such familiarity by showing a television of the future showing a future game show in which a robot turned letters on the screen. While the robot was shaped in a sort of female fashion, its most recognizable characteristics were its motions, turning the letters and clapping, the things that Vanna White does on *Wheel of Fortune*. All Samsung was trying to do was evoke a resonance to the current show. No case prior to *White* would have held Samsung liable for this use, nor would any court outside of California. To mandate the adoption of such extreme protection of perceived rights of publicity chills the production of creative and effective advertising, and thus has a negative commercial impact.

It also permits plaintiffs unfairly to reap bonanzas at the expense of legitimate commercial activity. The editors of the Restatement should understand the commercial realities involved in the assertion of the rights they are seeking to expand nationally. Especially when what is sought is the posthumous enforcement of rights of publicity, the parties seeking the recovery are very frequently unscrupulous.

A personal anecdote in this connection may prove illuminating. Several years ago, Young & Rubicam produced a television commercial for a client which included about three seconds of stock footage of a famous deceased baseball player hitting a home run. The point was to quickly communicate the notion of a victory. Other footage used in the commercial included a rocket taking off and the first step on the moon by an astronaut.

When the Legal Department received the storyboard of the commercial, we checked a licensing book which disclosed that the estate of the deceased player had registered its claim of right to exploit his rights with the State of California pursuant to its statutory scheme. We contacted the estate's licensing agent and negotiated a license for the use of the baseball player's likeness for a one year term, with an option to renew at a higher price for a second year.

Substantially prior to the elapse of the first year, the licensing agent contacted us and asked us to renew the license. Just as we were about to renew the license, we serendipitously discovered a newly reported court decision in a case in which the same licensing agent had unsuccessfully sought to enforce its rights relating to the same baseball player under California law. The district court, in an unreported case, had granted summary judgment, dismissing the case, and applying New York law. The licensing agent had lost at the district court level before the original license with us was entered into. Just before the licensing agent contacted us about renewal, it lost its appeal to the circuit court of the dismissal below, in a reported opinion.

The question of whether the estate, and thus the licensing agent, had any rights at all to license to us and our client had thus been adversely determined prior to the issuance of the original license to us. The licensing agent sought a renewal of the license term. As you might imagine, we had a vigorous donnybrook over this when we tumbled on to the truth.

This is what this business is about. It is not protecting widows and orphans from cruel exploitation by heartless commercial barons who misappropriate their beaming, innocent countenances. Many of these cases simply boil down to the sale of releases by some who claim a right to sue — often where the celebrity had not sought to assert such claims prior to death. That in our view is a business which does not require legal encouragement.

Beyond these overarching conceptual concerns, we have more particular problems with various of the specific provisions in the current draft. Consistent with the very practical perspective of the advertising industry, which does business in this field every day, many of our problems relate to bread and butter issues such as the necessary limitations on recoverable damages and the appropriately limited availability of injunctive relief. I have reviewed these with you in some detail and, therefore, do not feel it is necessary to further extend our written comments at this time.

I would simply add in closing, that we view the draft Restatement as inappropriate. We would view the adoption of a model statute — if along similar lines — as an even greater mistake.

3. *American Association of Advertising Agencies*

Letter of Richard Kurnit, Frankfurt, Garbus, Klein & Selz, February 4, 1994 to Henry R. Kaufman

At the request of the Legal Affairs Committee of the American Association of Advertising Agencies, I am writing to note the Committee's concern with three aspects of the Restatement: (1) an apparent favoring of descendibility, which is in fact an open issue in the majority of states and not warranted as a matter of proper balancing of property interests and free speech interests; (2) an apparent assumption that a presumption of injunctive relief is proper, which again fails to consider free speech interests and the fact that publicity rights (as opposed to the original narrow scope of privacy interests) are very much compensable in dollars; and (3) overstates the scope of "indicia" of identity in the absence of use of name or likeness.

The first two issues have been addressed by others who have responded to you. I will focus, therefore, on the portion of *Comment d* to § 46 on pages 159-60 and the Reporter's Note to *Comment d* at pages 171-72.

The carryover paragraph on pages 159-60 contains the following sentence, which is not supported by law: "Thus the use or imitation of the person's voice or an imitation of the person's performing persona such as Charlie Chaplin's 'Little Tramp' or Julius Marx's 'Groucho' can violate the right of publicity if used for purposes of trade under the rule stated in § 47." This is incorrect. First, both references are to copyrightable characters, and copyright should pre-empt the individual from making a claim under state law based on copying or imitating the character. The only case supporting the assertion was reversed on other grounds, and the weight of authority supports the Reporters' observation (p. 171) that ordinarily the actor does not obtain publicity rights in the character. This sentence should, therefore, be deleted. In our view, it only confuses the meaning of the paragraph.

Comment d fails to clearly state the salient point: there must be a depiction of the plaintiff which is identifiable as the plaintiff. Mere identification without a depiction is not sufficient. Thus, the portrayal of a character associated with a specific actor, such as the King in "The King and I," while conjuring up Yul Brenner, is not sufficient absent a depiction of Yul Brenner. Similarly, mere depiction which is not identifiable as plaintiff is not actionable. Thus, a long distance photograph of a stadium full of people is not actionable by someone who is somewhere in the crowd of a hundred thousand visible only as a mass of unidentifiable blurs. There must be a depiction which is identifiable as being plaintiff. Thus, the use of a fully disclosed "look-alike" where it is clear that it is not the celebrity, but someone who only looks like someone famous is not a violation of the celebrity's publicity rights because the celebrity is not depicted. *Allen v. National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985).

The carryover paragraph on pages 171-72 is incorrect. There is no competent authority holding that "the right of publicity can be infringed through the use of other subject matter that serves to identify the plaintiff." The most that can be supported is that subject matter or context may provide the identifiability of an individual whose name, picture, or likeness is used in an unclear or ambiguous manner. See *Carson v. Here's Johnny-Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (use of name "Johnny" identified with plaintiff Johnny Carson); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (photograph of plaintiff in silhouette identifiable by his distinctive racing car). The only case suggesting that context alone may be sufficient is only a refusal to dismiss a common law claim under New York law based on claimed uniqueness of context, props, and gestures. *Lombardo, supra*; and New York does not allow any common law claims.

In sum, in order to establish a publicity rights claim plaintiff must establish that she has been depicted in some manner where she is identifiable as the person depicted. Mere imitation is not sufficient and neither is mere association with the context, character, or role that is presented. *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971). As long as it is clear by statement, context, or clear and conspicuous disclaimer that what is depicted is not the celebrity who might otherwise be assumed from the context or other subject matter there is no violation of publicity rights of the celebrity who is otherwise identified with the context or subject matter. *Allen v. National Video, inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985).

C. COMPARISON OF FINAL RESTATEMENT WITH TENTATIVE DRAFT NO. 4¹

1. *Results of Position Papers 1-2 on Descendibility*

**Redlined RESTATEMENT
(pertinent provisions)**

~~§ 46, Comment h. Duration of rights. The owners of commercial assets including intellectual property are normally entitled to transmit the assets upon death to their heirs or legatees. The right of publicity has been recognized as descendible in a substantial majority of the jurisdictions that have determined the issue through legislation or common law adjudication. Many jurisdictions have not yet considered the descendibility of the right of publicity. Of those jurisdictions that have determined the issue through legislation or common law adjudication, the majority recognize the right as descendible, while in others the assertion of post-mortem rights is precluded by statute or case law.~~

Recognition of a postmortem descendible right of publicity may also increase the value of the right during life by securing the expectations of potential licensees and assignees. As a general matter, however, the dignitary and proprietary interests that support the recognition of a right of publicity become substantially attenuated after death. Post mortem uses are also less likely to create a false suggestion of endorsement or sponsorship. Thus, ~~although the right of publicity is recognized as descendible, in jurisdictions recognizing the right of publicity as descendible,~~ the scope of permissible use by others may be greater in the case of post mortem rights. See § 47, Comment d. The practical duration of post mortem rights is ordinarily limited in the period after death. In addition, the enforcement ~~exercise~~ of post mortem rights

Media/Advertising Suggestions

Position paper no. 1 offered no specific replacement language on descendibility of the right of publicity but suggested that the Reporters consider redrafting in light of our research showing that less than a third of jurisdictions addressed the issue at all, and that among these, there was no clear majority rule. Of the additional cases cited supporting nondescendibility, the Reporters added one, i.e., *Joplin*; see *infra*, p. 55.

Redlined passage at left is taken substantially from position paper 2 (see first redlined passage, see *infra*, p. 54).

¹Reflecting those excerpts of the Right of Publicity RESTATEMENT questioned in the joint media/advertising position papers and the specific suggestions made by those media and advertising groups for revision to Tentative Draft No. 4. Strikeouts indicate language deleted in the final text of the RESTATEMENT and redlined text material that was added.

by heirs or legatees is also subject to the traditional equitable principles of laches and estoppel. Statutory formulations typically limit the duration of post mortem publicity. Statutes recognizing descendibility typically limit the duration of post mortem rights to a fixed term of years.

In several of the decisions recognizing that recognize the descendibility of the right of publicity at common law, post mortem rights are conditioned on commercial exploitation of the identity prior to death. Some of these decisions suggest that commercial exploitation in the person's primary professional is sufficient, while others appear to demand supplementary use of the identity in merchandising or licensing. The case law offers little justification for such a requirement. The rule creates needless uncertainty and has been rejected in a number of decisions. State statutes recognizing descendibility do not require demand exploitation before death, and several statutes expressly repudiate such a requirement. Although commercial exploitation prior to death can be relevant in establishing the value of the appropriated identity, it should not be required as a condition of descent.

Reporters' Notes to Comment h

Descendibility of the right of publicity at common law is recognized in *Nature's Way Products, Inc.*...; *Estate of Presley v. Russe*...; *Martin Luther King*.... Although the right of publicity was initially held to be descendible in several federal cases applying New York common law, The the New York Court of Appeals ultimately held that privacy and publicity rights in New York are governed

Position Paper No. 2

Most jurisdictions have yet to consider whether and to what extent commercial exploitation of the right of publicity during the lifetime of its original possessor should be a prerequisite to the assertion of any claim by his or her descendants. In several of the decisions recognizing the descendibility of the right of publicity at common law, post mortem rights are conditioned on commercial exploitation of the identity prior to death. Some of these decisions suggest that commercial exploitation in the person's primary profession is sufficient, while others appear to demand supplementary use in merchandising or licensing. The case law offers little explanation or justification for a requirement of lifetime exploitation. The rule creates needless uncertainty and has been rejected in a number of decisions.

State statutes recognizing descendibility do not demand exploitation before death, and several statutes expressly repudiate such a requirement.

Other cases expressly reject any requirement of lifetime exploitation. Some state statutes recognizing descendibility expressly repudiate such a requirement, although several other statutes providing for descent are silent on the issue of lifetime exploitation. Although commercial exploitation prior to death can be relevant in establishing the value of the appropriated identity, it should not be required as a condition of descent.

Reporters' Notes to Comment h

The current weight of judicial authority supports at least a requirement of lifetime commercial exploitation as a condition to descendibility of the right of publicity. Descendibility of the right of publicity at common law is recognized in *Nature's Way Products, Inc.*...; *Estate of Presley v. Russe*...; *Martin Luther King*.

exclusively by N.Y. Civ. Rights Law § 50, which is limited to "any living person." Stephano... See *Pirone*. Subsequent cases have held that the right of publicity is not descendible under New York law. See, e.g., *Pirone v. James v. Delilah Films*. The leading case rejecting descendibility at common law is *Memphis Development v. Factors Inc.*.....See also *Reeves*...; *Joplin Enterprises v. Allen*...(refusing to extrapolate a descendible right of publicity from a state right to privacy tort) (dictum)

.....The requirement of lifetime exploitation is also specifically rejected in (citing statutes).

.....The requirement of lifetime exploitation is also specifically rejected in (citing statutes). However, several other statutes providing for descendibility are silent on the issue of lifetime exploitation. See Fla. S.A. § 540.08; Ky. R.S. § 391.170; Neb. R.S.A. §§ 20-202, 208; Tex. Prop. Code Ann. § 26.001 et seq; Va. Code § 8-01-40.

2. *Results of Position Paper 3 on First Amendment Limitations*

**Redlined RESTATEMENT
(pertinent provisions)**

Media/Advertising Suggestions

§ 47, *Comment a. Use in advertising.*

* * *

~~The prohibition against unauthorized use of another's identity in advertising does not extend to the~~ In some circumstances the use of another's identity in advertising may not be actionable because of consent or other privilege. See § 46, *Comment f*. For example, use of a person's name or likeness for the purpose of identifying that person as the author or creator of the advertised goods is ordinarily permissible. Thus a bookstore, for example, may include in its advertising the name and photograph of the author of an advertised book, and a movie theater may display the names and photographs of the actors appearing in the advertised motion picture. Use of another's name for the purpose of responding to statements made by that person about the user or the user's goods or services is also permissible.

The use of a person's identity in news reporting, commentary, entertainment, or works of fiction or nonfiction is not ordinarily an infringement of the right of publicity. See *Comment c*. ~~The prohibition against unauthorized use in advertising does not extend to advertisements announcing or otherwise soliciting purchasers for such permitted uses.~~ Use of the person's identity in the advertisement or promotion of such uses is also not actionable. Thus, the use of a celebrity's name or photograph in an advertisement for a biography of the celebrity or for a magazine containing an article about the celebrity will not subject the advertiser to liability for infringement of the celebrity's right of publicity. The rule allowing use of a person's identity to advertise a permissible use of the identity has been extended beyond advertisements for the particular work or issue in which the identity is used to general

advertising for the medium in which the use appears. A magazine soliciting subscriptions, for example, may refer to a past article about a particular celebrity as an illustration of the magazine's customary content. Use of another's identity in a manner that falsely suggests an endorsement by the identified person, however, will subject the user to liability for deceptive marketing under the rule stated in § 4. * * *

b. Use on merchandise. The sale of merchandise bearing a person's name or likeness is ordinarily ~~constitutes~~ a use of the identity for purposes of trade under the rule stated in § 46. An unauthorized appropriation of another's name or likeness for use on posters, buttons, or other memorabilia is thus ordinarily actionable as an infringement of the right of publicity. Attempts to defend the sale of such merchandise on first amendment grounds through analogies to the marketing of books, magazines, and other traditional media of communication (see Comment *c*) have ~~regularly~~ ~~typically~~ been rejected. In some circumstances, however, the informational content of the particular merchandise or its utility to purchasers as a means of expression may justify the conclusion that the use is protected under the first amendment. A candidate for public office, for example, cannot invoke the right of publicity to prohibit the distribution of posters or buttons bearing the candidate's name or likeness, whether used to signify support or opposition.

c. Use in news, entertainment, and creative works. ~~Because of the public and constitutional interest in freedom of expression, the use of another's identity primarily for the purpose of communicating information or expressing ideas is not ordinarily actionable under the rule stated in § 46. Such use is also less likely to interfere with the person's ability to exploit the commercial value of the identity~~

Attempts to defend the sale of such merchandise on First Amendment grounds through analogies to the marketing of books, magazines, and other traditional media of communication (see Comment *c*) have ~~regularly~~ ~~generally~~ been rejected. ~~The determining factor is not, however, simply the labeling of a product or publication as "merchandise."~~ In some circumstances, the informational content of the particular merchandise or its utility to purchasers as a means of expression may justify the conclusion that the use is protected by the first amendment. A candidate for public office, for example, cannot invoke the right of publicity to prohibit the distribution of posters or buttons bearing the candidate's name or likeness, whether used to signify support or opposition.

c. Use in news, entertainment, and creative works. Although the right of publicity has developed through common law adjudication and statutory enactment, the scope of publicity law has been fundamentally constrained by overriding First Amendment considerations. This Restatement is intended — as it must be — to reflect the full scope of First Amendment constraints that have been judicially and legislatively crafted. The precise boundary between advertising and trade uses found actionable on the one hand, and editorial uses found constitutionally protected on the other, has not always been perfectly clear. Nonetheless, a fair reflection of the contours and tenor of

than is an unauthorized use in advertising or merchandising. The right of publicity as recognized by statute and common law is fundamentally constrained by the public and constitutional interest in freedom of expression. The use of a person's identity primarily for the purpose of communicating information or expressing ideas is not generally actionable as a violation of the person's right of publicity. The scope of the activities embraced within this limitation on the right of publicity has been broadly construed. Thus, the use of a person's name or likeness in news reporting, whether in newspapers, magazines, or broadcast news, will not infringe the right of publicity. The interest in freedom of expression beyond news also extends to use in entertainment and other creative works, including both fiction and nonfiction. The use of a celebrity's name or photograph as part of an article published in a fan magazine or in a feature story broadcast on an entertainment program, for example, will not infringe the celebrity's right of publicity. Similarly, the right of publicity is not infringed by the publication dissemination of an unauthorized print or broadcast biography. Use of another's identity in a novel, play, or motion picture is also not ordinarily an infringement. The fact that a publisher or other user has sought or obtained seeks or is successful in obtaining a commercial advantage from an otherwise permitted use of another's identity does not render the appropriation actionable. However, if the name or likeness is used solely to attract attention to a work that has no relationship is not related to the identified person, the user may be subject to liability for a use of the other's identity in advertising. See Comment a. Similarly, if a photograph of the plaintiff is included in the defendant's publication merely for the purpose of appropriating the plaintiff's commercial value as a model rather than as part of a news or other communicative use, the defendant may be subject to liability for a merchandising use of the plaintiff's identity. See Comment b.

current publicity law necessarily requires that any Restatement not merely pay lip service to constitutional requirements, but that it fully accommodate and advance the central and consistent imperus toward First Amendment preservation that has characterized the development of this body of law. Various means have been crafted to effectuate such First Amendment limitations. While different approaches might also have been adopted, the one employed by § 47 is not in any fashion intended to foreclose any other appropriate avenues of protection. Rather § 47 is intended to encompass the full ambit of previously recognized constitutional limitations as well as to enable, and indeed to encourage, expansive application of the requisite First Amendment principles in future cases.

Because of the public and constitutional interest in freedom of expression, the use of another's identity primarily for the purpose of communicating information or expressing ideas is ordinarily not actionable under the rule stated in § 46. Indeed, due to First Amendment constraints, only in the rarest instances has liability been imposed for such activities. See Comment d. Such use is also less likely to interfere with the person's ability to exploit the commercial value of the identity than is an unauthorized use in advertising or merchandising. Thus, the use of a person's name or likeness in news reporting, whether in newspapers, magazines, or broadcast news, will not infringe the right of publicity. Because of the paramount authority of the First Amendment, the activities protected under a general exemption for editorial communication of news or other public information uses must be broadly construed. The interest in freedom of expression extends beyond news to entertainment and other creative works, including both fiction and nonfiction. However, if the name or likeness is used solely to attract attention to a work that has no relationship to the identified person, the user may be subject to liability for a use of the other's identity in advertising. See Comment a. Similarly, if a photograph of the plaintiff is included in the defendant's publication merely for the purpose of appropriating the plaintiff's commercial value as a model rather than as part of a news or other communicative use the defendant may be subject to liability for a merchandising use of the plaintiff's identity. See Comment b. In both instances, however,

constitutional imperatives mandate that the requisite relationship between the use and the underlying work be liberally construed.

Comment d. Limits of liability. ...

Since the personal and proprietary interests underlying the right of publicity (see § 46, Comment c) diminish after death, more substantial appropriations may be permissible when the appropriation of identity occurs after the death of the identified person individual even in jurisdictions recognizing the right as descendible. Statutes in some states may be interpreted to permit the use of another's identity in news reporting or other specified works without regard to the substantiality of the use or its effect on the plaintiff.

Reporter's Notes to § 47
(pertinent provisions)

Comment b. Cases involving the unauthorized use of the plaintiff's likeness on posters include, e.g., *Factors Etc., Inc. v. Pro Arts, Inc.*, *Brinkley v. Casablancas*. See also *Titan Sports, Inc. v. Comics World Corp.*, foldout photographs included in defendant's magazine (remanding for a determination of whether foldout photographs contained in defendant's magazine were a merchandising use). Other infringing merchandise has included buttons, see *Bi-Rite Enterprises, Inc. v. Button Master*, trading cards, see *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, photographs, see *Mendonsa v. Time Inc.*, T-shirts, see *Winterland Concessions Co. v. Sileo*, *Rosemont Enterprises, Inc. v. Choppy Productions, Inc.*, busts, see *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*, and games, see *Uhlaender v. Henricksen*, *Palmer v. Schonhorn Enterprises, Inc.*, *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*

Many of the merchandising cases expressly reject attempts to invoke a first amendment defense. See, e.g., *Factors Etc.*,

Comment d. Limits of liability. ... Since the personal and proprietary interests underlying the right of publicity (see § 46, Comment c) diminish after death, more substantial appropriations may be permissible when the appropriation of identity occurs after the death of the identified individual. Statutes in some states may be interpreted to permit the use of another's identity in news reporting or other specified works without regard to the substantiality of the use or its effect on the plaintiff.

Reporter's Notes to § 47

Cf. Titan Sports, Inc. v. Comics World Corp., 870 F.2d 85 (2d Cir. 1989) (fold-out photographs included in defendant's magazine) (whether inclusion of fold-out photographs in defendant's magazine was an actionable merchandising use or a protected editorial use to be determined by district court on remand). Other infringing merchandise has included buttons....

Inc. v. Pro Arts, Inc., *supra* (distinguishing an Elvis Presley "In Memory" poster from political campaign posters); *Winterland Concessions*, (distinguishing T-shirts from newspapers); *Factors Etc., Inc. v. Creative Card Co.*, ("There is no constitutional protection for selling posters of Elvis Presley as Elvis Presley."); *Lugosi v. Universal Pictures*, (Bird, J. dissenting, finding no first amendment implications in the sale of pencil sharpeners, soap, target games, candy dispensers and stirring rods bearing the likeness of Bela Lugosi as Count Dracula); *Palmer*, (distinguishing games from magazines and biographies); *Rosemont* (same). See also *Hicks v. Casablanca Records*, (distinguishing use in a motion picture from the merchandising cases); *Guglielmi v. Spelling-Goldberg Productions*, (Bird, J., concurring) (same). See *McCarthy, The Rights of Publicity and Privacy* § 7.6.

In *Paulsen v. Personality Posters, Inc.*, the court refused to enjoin distribution of a "For President" poster depicting a comedian who had initiated a mock presidential campaign, emphasizing the traditional deference to political commentary. Other cases have noted in dicta that the sale of commercial merchandise bearing a person's name or likeness may sometimes in some circumstances be entitled to constitutional protection. See *Guglielmi*, (Bird, J., concurring); *Martin Luther King, Jr.*, (Weltner, J., concurring); *Rosemont* (weighing the media used, the subject matter, and the extent of the appropriation). In assessing first amendment interests, it is the nature and content of the use and not merely its physical form that is controlling. See also *Titan Sports* ("In applying [the New York Civil Rights Law], a court must be ever mindful of the inherent tension between the protection of an individual's right to control the use of his likeness and the constitutional guarantee of free dissemination of ideas, images, and newsworthy matter in whatever form it takes.").

Comment c. The right to use appropriate another's identity for purposes of

..... See *McCarthy, The Rights of Publicity and Privacy* § 7.6. See also *Beverly v. Choices Women's Medical Center*, 78 N.Y.2d 745, 579 N.Y.S.2d 637 587 N.E.2d 275 (1991) (holding that the promotional aspects of a calendar distributed for advertising purposes by a medical facility in that case outweighed its editorial content); *McCarthy* § 7.7 (discussing specific products, such as games, posters, and calendars, that "are in a position somewhere between traditional 'media' and traditional 'merchandise'"). Although no case has definitively so held, it would seem, absent predominating promotional and advertising indicia, that calendars containing editorial matter could well be analogized to books or other traditional media of communication that are subject to first amendment protection. See *Pirone v. Macmillan Inc.* 849 F.2d 579 (2d Cir. 1990) (engagement calendar containing biographical information on celebrated sports figures).

..... Other cases have noted in dicta that the sale of commercial merchandise bearing a person's name or likeness may sometimes be entitled to constitutional protection. See... In assessing the first amendment interests, it is the nature and content of the use and not simply its form that has been recognized as controlling. See *Titan Sports, supra*, 870 F.2d at 88 ("In applying [the New York Civil Rights Law], a court must be ever mindful of the inherent tension between the protection of an individual's right to control the use of his likeness and the constitutional guarantee of free dissemination of ideas, images, and newsworthy matter in whatever form it takes.") (declining categorically to label as actionable an oversized photograph denominated as a poster and folded and stapled into a magazine).

Comment c. The right to appropriate use of another's identity for purposes of news reporting is discussed in, e.g., *Titan Sports*,

news reporting is discussed in, e.g., *Titan Sports, Inc. v. Comics World Corp.*, *Jackson v. MPI Home Video*; *Mendoza v. Time Inc.*; *Ann-Margret v. High Society Magazine, Inc.* Cases involving interviews include, e.g., *Cher v. Forum International, Ltd.*; *Falwell v. Penthouse International, Ltd.*; *Current Audio, Inc. v. RCA Corp.* Biographies are also outside the scope of the publicity right. E.g., *Frosch v. Grosset & Dunlap, Inc.*; *Rosemont*. But cf. *Hogan v. A.S. Barnes & Co.*, (liability imposed for the use of plaintiff's name and photographs in a golf instructional book, but also finding passing off). The breadth of the news right is evident in e.g., *New Kids On The Block v. News America Pub., Inc.*, (newspaper survey of readers); *Dora v. Frontline Video, Inc.* (surfing documentary); *Stephano v. News Group Publications, Inc.* (fashion column); *Welch v. Group W Productions, Inc.*, (rebroadcast of a performance during an awards program); *Paulsen* (poster of a mock presidential candidate). The first amendment limitations on the scope of the right of publicity are discussed in McCarthy, *The Rights of Publicity and Privacy* ch. 8.

A more detailed discussion of the many First Amendment limitations that have been recognized in right of publicity cases may be found in McCarthy, *The Rights of Publicity and Privacy* ch. 8.

State right of publicity statutes frequently contain express exemptions for news reporting. See Cal. Civ. Code; Fla. Stat.; Neb.Rev.State.; Okla. State. tit.; Tenn. Code Ann.; Tex. Prop. Code Ann.; Wis. Stat. The constitutional right of free speech extends to entertainment and other expressive works, including fiction.

* * * * *

The fact that the user obtains a financial benefit from a news or entertainment use is not sufficient to render the appropriation actionable. E.g., *Falwell, supra*; *Stephano, supra*; *Guglielmi, supra* (Bird, J. concurring). See also Ca.Civ.Code; Okla.Stat.tit.; Tenn.Code Ann.

.....The fact that a user obtains a financial benefit from a news or entertainment use is not sufficient to render the appropriation actionable... Corporate sponsorship and distribution of an otherwise clearly protected use will also not change the analysis. See *Benavidez v. Anheiser Busch, Inc.*, 873 F.2d 102 (5th Cir. 1989) (documentary film produced and distributed gratis by the beer manufacturer held not actionable).

Use of a name or likeness in connection with news or entertainment may be actionable if

the use is not sufficiently related to the underlying work. See, e.g., *Lerman v. Flynt Distributing Co.*; *Leverson v. Curtis Pub. Co.*; *Grant v. Esquire, Inc.* However, because of the commitment to freedom of expression, the required relationship is liberally construed. See, e.g., *New Kids on the Block, supra*; *Rogers, supra*; *Finger v. Omni Publications International, Ltd*; *Murray v. New York Magazine Co.*

The Some cases interpreting New York law, which does not include a common law cause of action for invasion of privacy, have created recognize an exception to the news and entertainment right under New York Civil Rights Law § 51 when the work contains substantial falsifications

However, because of the commitment to freedom of expression, the required relationship is liberally construed. *New Kids on the Block v. News America Publishing*, 971 F.2d 302 (9th Cir. 1992).

The Some cases interpreting New York law, which does not recognize a common law cause of action for invasion of privacy, have created suggested an exception to the news and entertainment right under New York Civil Rights Law § 51 when the work contains substantial falsification This exception has been criticized and its current vitality is subject to question. See MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 8.9[C] at 8-66.5. The suggested exception also tends inappropriately to confuse publicity with false light privacy claims. See Comment c at 182. See also *Zacchini* ...

3. *Results of Position Paper 4 on Indicia of Identity*

**Redlined RESTATEMENT
(pertinent provisions)**

§ 46, *Comment d. Appropriation of identity.*

* * * *

In the absence of a narrower statutory definition, a number of cases hold that unauthorized use of other indicia of a person's identity can also infringe the right of publicity. Thus, the use or imitation of the person's voice or an imitation of the person's performing persona such as Charlie Chaplin's "Little Tramp" [...] can may violate the right of publicity if used for purposes of trade under the rule stated in § 47. The use of other identifying characteristics or attributes can may also infringe the right of publicity but only if they are so closely identified with the person that their use enables the defendant to appropriate the commercial value of the person's identity.

Reporter's Note to Comment d.

* * * *

The principal case on leading case recognizing a claim for the appropriation of a voice for purposes of trade is *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), which imposed liability for an imitation of the plaintiff's voice in a song used during a television commercial. The court distinguished a contrary holding in *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), cert. denied, 402 U.S.906 (1971), arguing that the plaintiff in the latter case had asserted rights in the performance of the song itself rather than in a distinctive voice as an attribute of identity. See also *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), cert. denied, 113 S.Ct. 1047 (1993).

Media/Advertising Suggestions

In the absence of a narrower statutory definition, some cases have held that unauthorized use of other indicia of a person's identity can also infringe the right of publicity. Thus, the use or imitation of the person's voice or an imitation of the person's performing persona such as Charlie Chaplin's "Little Tramp" [...] can violate the right of publicity if used for purposes of trade under the rule stated in § 47. Other cases have held to the contrary. In some cases the use of other identifying characteristics or attributes can also has also been held to infringe the right of publicity if they are so closely identified with the person that their use enables the defendant to appropriate the commercial value of the person's identity, while other cases have rejected extension of the right of publicity to other identifying characteristics or attributes.

Reporter's Note to Comment d.

The principal case on leading case recognizing a claim for the appropriation of a voice for purposes of trade is *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), which imposed liability for an imitation of the plaintiff's voice in a song used during a television commercial. The court distinguished a contrary holding in *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), cert. denied, 402 U.S.906 (1971), arguing that the plaintiff in the latter case had asserted rights in the performance of the song itself rather than in a distinctive voice as an attribute of identity. See also *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), cert. denied, 113 S.Ct. 1047 (1993). Other cases have rejected such appropriation of voice claims, both before and after the decision in *Midler*. See *Lahr v. Adell*

Chemical Co., 300 F.2d 256 (1st Cir. 1962); Davis v. Trans World Airlines, 297 F. Supp. 1145 (C.D. Cal. 1969); Booth v. Colgate-Palmolive Co., 362 F. Supp. 343 (S.D.N.Y. 1973); Levis a.k.a. Mitch Ryder v. Lintas, No. 90 CV 70407 (E.D. Mich. Nov. 8, 1990). See also Tin Pan Apple Inc. v. Brewing Co., 737 F. Supp. 826 (S.D.N.Y. 1990) (New York privacy statute does not reach sound-alikes). Cases have also rejected claims of a publicity right in instrumental sounds. See Miller v. Universal Pictures Co., 11 A.D.2d 47, 201 N.Y.S.2d 632, 13 A.D.2d 473, 214 N.Y.S.2d 645 (1st Dep't 1960), aff'd 10 N.Y.2d 972, 224 N.Y.S.2d 662, 180 N.E.2d 248 (1961); Shaw v. Time-Life Records, 38 N.Y.2d 201, 379 N.Y.S.2d 390 (1975).

Some cases have found infringement in the imitation of a distinctive performing persona. See, e.g., Groucho Marx....; Estate of Presley...; Price v. Worldvision; Lombardo v. Doyle ... Cf. McFarland ... 14 F.3d 912 (3d Cir. 1994); Nurmi. On the potential constitutional limitations on the scope of liability, see § 47, Comment d. Portrayal of a character in a theatrical work will not ordinarily endow the actor with publicity rights in the character itself, but use of a likeness of the particular actor in the role of the character can infringe the right of publicity. See White v. Samsung. See also 989 F.2d 1512 (denying a petition for rehearing en banc (Kozinski, J., dissenting))

Some cases have found infringement in the imitation of a distinctive performing persona. See, e.g., ~~Groucho Marx Productions,....; Estate of Presley,....; Price v. Worldvision; Lombardo v. Doyle ... Cf. Nurmi ...~~ The district court opinions in Groucho Marx Productions, Inc. v. Day and Night Co., 523 F. Supp. 485 (S.D.N.Y. 1981) and Estate of Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981) both also upheld claims for infringement in the imitation of a distinctive performing persona; however, both the Second Circuit in Groucho Marx and the district court in Presley recognized that such claims must be balanced against substantial First Amendment considerations. See also discussion at Comment d to § 47. Portrayal of a character in a theatrical work will not ordinarily endow the actor with publicity rights in the character itself, but use of a likeness of the particular actor in the role of the character can infringe the right of publicity. See White v. Samsung. But see White v. Samsung Electronics America, Inc., 21 Med. L. Rptr. 1330 (9th Cir. 1993) (Kozinski, J., dissenting from denial of reh'g en banc) (vigorously criticizing, as overprotective and constitutionally suspect, panel opinion's extension of right of publicity claim to indicia of identity merely suggestive of plaintiff or the television role she plays) ("Under the majority's

opinion, it's now a tort for advertisers to remind the public of a celebrity. Not to use a celebrity's name, voice, signature or likeness, not to imply the celebrity endorses a product, but simply to evoke the celebrity's image in the public's mind. This Orwellian notion withdraws far more from the public domain than prudence and common sense allow. It conflicts with the Copyright Act and the Copyright Clause. It raises serious First Amendment problems. It's bad law, and it deserves a long, hard second look.")

* * *

No changes made

A few cases indicate that the right of publicity can be infringed through the use of other subject matter that serves to identify the plaintiff.... Other cases have rejected extension of the right of publicity to other identifying characteristics or attributes, particularly where the characteristics or attributes do not sufficiently identify the plaintiff. See, e.g., *Merz v. Professional Health Control Inc.*, 332 S.E.2d 333 (Ga. App. 1985) (film of plaintiff's home); *Rawls v. Conde Nast Publications, Inc.*, 446 F.2d 313 (5th Cir.), cert. denied, 404 U.S. 1038 (1971) (photograph of interior of plaintiff's home); *Branson v. Fawcett Publications, Inc.*, 124 F. Supp. 429 (E.D. Ill. 1954) (photograph of plaintiff's crashed racing car); *Brewer v. Hearst Publishing Co.*, 185 F.2d 846 (7th Cir. 1950) (photograph only of plaintiff's hands, legs, and feet). See also *White v. Samsung Electronics America, Inc.*, 21 Med. L. Rptr. 1330 (9th Cir. 1993) (Kozinski, J., dissenting from denial of reh'g en banc).