

2010 SUMMER CANDIDACY PROGRAM MATERIALS
THE CHICAGO-KENT LAW REVIEW

QUESTION

A number of states recognize the right of publicity as a property right. Other states recognize the right of publicity as a personal privacy right. And some states do not recognize the right at all. Using only the sources contained in this packet, write a 15-page academic article discussing the right of publicity and evaluate whether the right is best considered a property right or a privacy right, or should be disregarded altogether. Keep in mind that not every word of every source relates to the issue. You must determine what is relevant.

Read and follow the 2010 Summer Candidacy Program Instructions, which are available on the CHICAGO-KENT LAW REVIEW website (www.cklawreview.com) in the Prospective Members section.

GOOD LUCK!

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California Civil Code Annotated § 3344 (West 1997)

(a) Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.

(b) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable.

(1) A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use.

(2) If the photograph includes more than one person so identifiable, then the person or persons complaining of the use shall be represented as individuals rather than solely as members of a definable group represented in the photograph. A definable group includes, but is not limited to, the following examples: a crowd at any sporting event, a crowd in any street or public building, the audience at any theatrical or stage production, a glee club, or a baseball team.

(3) A person or persons shall be considered to be represented as members of a definable group if they are represented in the photograph solely as a result of being present at the time the photograph was taken and have not been singled out as individuals in any manner.

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

(d) For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).

(e) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).

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

(g) *** SECTION OMITTED ***

765 Illinois Compiled Statutes Annotated 1075 (West 1999)

1075/1. Short title

This Act may be cited as the Right of Publicity Act.

1075/5. Definitions

As used in this Act: "Commercial purpose" means the public use or holding out of an individual's identity (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; (ii) for purposes of advertising or promoting products, merchandise, goods, or services; or (iii) for the purpose of fundraising. "Identity" means any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener, including but not limited to (i) name, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice. "Individual" means a living or deceased natural person, regardless of whether the identity of that individual has been used for a commercial purpose during the individual's lifetime. "Juristic person" means a partnership, trust, estate, corporation, unincorporated association, or other organization capable of suing and being sued in a court of law. "Name" means the actual name or other name by which an individual is known that is intended to identify that individual. "Person" means a natural or juristic person. "Work of Fine Art" means (i) a visual rendition including, but not limited to, a painting, drawing, sculpture, mosaic, videotape, or photograph; (ii) a work of calligraphy; (iii) a work of graphic art including, but not limited to, an etching, lithograph, serigraph, or offset print; (iv) a craft work in materials including, but not limited to, clay, textile, fiber, wood, metal, plastic, or glass; or (v) a work in mixed media including, but not limited to, a collage, assemblage, or work consisting of any combination of items (i) through (iv).

1075/10. Recognition of right of publicity

Recognition of right of publicity. The right to control and to choose whether and how to use an individual's identity for commercial purposes is recognized as each individual's right of publicity.

1075/15. Transferability, descendability, and divisibility

Transferability, descendability, and divisibility. The rights under this Act are property rights that are freely transferable in whole or in part to any person either by written transfer, including but not limited to wills and trusts, or by intestate succession only to an individual's spouse, parents, children, and grandchildren, except that the rights under this Act are not subject to levy or attachment and may not be the subject of a security interest. Nothing in this Section limits the ability of any party to levy, attach, or obtain a security interest in the proceeds of the rights under this Act or the proceeds of the exercise of those rights.

1075/20. Enforcement of rights and remedies

Enforcement of rights and remedies. (a) The rights and remedies set forth in this Act may be exercised and enforced by: (1) an individual or his or her authorized representative; (2) a person to whom the recognized rights have been transferred by written transfer under Section 15 of this Act; or (3) after the death of an individual who has not transferred the recognized rights by written transfer under this Act, any person or persons who possesses an interest in those

rights. (b) Each person described in paragraph (3) of subsection (a) shall make a proportional accounting to, and shall act at all times in good faith with respect to, any other person in whom the rights being enforced have vested.

1075/25. Termination of rights of deceased individual

*** SECTION OMITTED ***

1075/30. Limitations regarding use of an individual's identity

Limitations regarding use of an individual's identity. (a) A person may not use an individual's identity for commercial purposes during the individual's lifetime without having obtained previous written consent from the appropriate person or persons specified in Section 20 of this Act or their authorized representative. (b) If an individual's death occurs after the effective date of this Act, a person may not use that individual's identity for commercial purposes for 50 years after the date of the individual's death without having obtained previous written consent from the appropriate person or persons specified in Section 20 of this Act.

1075/35. Applicability

(a) This Act applies to acts or events that take place after the effective date of this Act. (b) This Act does not apply to the following: (1) use of an individual's identity in an attempt to portray, describe, or impersonate that individual in a live performance, a single and original work of fine art, play, book, article, musical work, film, radio, television, or other audio, visual, or audio-visual work, provided that the performance, work, play, book, article, or film does not constitute in and of itself a commercial advertisement for a product, merchandise, goods, or services; (2) use of an individual's identity for non-commercial purposes, including any news, public affairs, or sports broadcast or account, or any political campaign; (3) use of an individual's name in truthfully identifying the person as the author of a particular work or program or the performer in a particular performance; (4) promotional materials, advertisements, or commercial announcements for a use described under paragraph (1), (2), or (3) of this subsection; or (5) use of photographs, videotapes, and images by a person, firm, or corporation practicing the profession of photography ("professional photographer") to exhibit in or about the professional photographer's place of business or portfolio, specimens of the professional photographer's work, unless the exhibition is continued by the professional photographer after written notice objecting to the exhibition has been given by the individual portrayed.

1075/40. Violations; monetary relief

(a) A person who violates Section 30 of this Act may be liable for either of the following, whichever is greater: (1) actual damages, profits derived from the unauthorized use, or both; or (2) \$1,000. (b) Punitive damages may be awarded against a person found to have willfully violated Section 30 of this Act.

1075/45. Establishment of profits

*** SECTION OMITTED ***

1075/50. Injunctive relief

*** SECTION OMITTED ***

1075/55. Attorney's fees; costs

*** SECTION OMITTED ***

1075/60. Rights and remedies

s 60. Rights and remedies. The rights and remedies provided for in this Act are meant to supplant those available under the common law as of the effective date of this Act, but do not affect an individual's common law rights as they existed before the effective date of this Act. Except for the common law right of publicity, the rights and remedies provided under this Act are supplemental to any other rights and remedies provided by law including, but not limited to, the common law right of privacy.

Ind. Code Ann. § 32-36-1-1 (West 2002)

IN ST 32-36-1-1

(a) This chapter applies to an act or event that occurs within Indiana, regardless of a personality's domicile, residence, or citizenship. (b) This chapter does not affect rights and privileges recognized under any other law that apply to a news reporting or an entertainment medium. (c) This chapter does not apply to the following:

1. The use of a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms in any of the following: (A) Literary works, theatrical works, musical compositions, film, radio, or television programs. (B) Material that has political or newsworthy value. (C) Original works of fine art. (D) Promotional material or an advertisement for a news reporting or an entertainment medium that: (i) uses all or part of a past edition of the medium's own broadcast or publication; and (ii) does not convey or reasonably suggest that a personality endorses the news reporting or entertainment medium. (E) An advertisement or commercial announcement for a use described in this subdivision.

2.) The use of a personality's name to truthfully identify the personality as: (A) the author of a written work; or (B) a performer of a recorded performance; under circumstances in which the written work or recorded performance is otherwise rightfully reproduced, exhibited, or broadcast.

3.) The use of a personality's: (A) name; (B) voice; (C) signature; (D) photograph; (E) image; (F) likeness; (G) distinctive appearance (H) gestures; or (I) mannerisms in connection with the broadcast or reporting of an event or a topic of general or public interest

IN ST 32-36-1-2

As used in this chapter, "commercial purpose" means the use of an aspect of a personality's right of publicity as follows:

1.) On or in connection with a product, merchandise, goods, services, or commercial activities

2.) For advertising or soliciting purchases of products, merchandise, goods, services, or for promoting commercial activities

3.) For the purpose of fundraising

IN ST 32-36-1-3

As used in this chapter, "name" means the actual or assumed name of a living or deceased natural person that is intended to identify the person

IN ST 32-36-1-4

As used in this chapter, "news reporting or an entertainment medium" means a medium that publishes, broadcasts, or disseminates advertising in the normal course of its business, including the following

Newspapers

Magazines

Radio and television networks and stations

Cable television systems

IN ST 32-36-1-5

As used in this chapter, "person" means a natural person, a partnership, a firm, a corporation, or an unincorporated association

IN ST 32-36-1-6

As used in this chapter, "personality" means a living or deceased natural person whose

name
voice
signature
photograph
image
likeness
distinctive appearance
gesture; or
mannerisms

has commercial value, whether or not the person uses or authorizes the use of the person's rights of publicity for a commercial purpose during the person's lifetime

IN ST 32-36-1-7

As used in this chapter, "right of publicity" means a personality's property interest in the personality's

name
voice
signature
photograph
image
likeness
distinctive appearance
gesture; or
mannerisms

IN ST 32-36-1-8

(a) A person may not use an aspect of a personality's right of publicity for a commercial purpose during the personality's lifetime or for one hundred (100) years after the date of the personality's death without having obtained previous written consent from a person specified in section 17 of this chapter

*** SECTION OMITTED ***

IN ST 32-36-1-9

Sec. 9. A person who

- 1.) engages in conduct within Indiana that is prohibited under section 8 of this chapter
- 2.) creates or causes to be created within Indiana goods, merchandise, or other materials prohibited under section 8 of this chapter
- 3.) transports or causes to be transported into Indiana goods, merchandise, or other materials created or used in violation of section 8 of this chapter; or

4.) knowingly causes advertising or promotional material created or used in violation of section 8 of this chapter to be published, distributed, exhibited, or disseminated within Indiana submits to the jurisdiction of Indiana courts

IN ST 32-36-1-10

A person who violates section 8 of this chapter may be liable for any of the following

Damages in the amount of (A) one thousand dollars (\$1,000); or (B) actual damages, including profits derived from the unauthorized use whichever is greater

Treble or punitive damages, as the injured party may elect, if the violation under section 8 of this chapter is knowing, willful, or intentional

IN ST 32-36-1-11

*** SECTION OMITTED ***

IN ST 32-36-1-12

*** SECTION OMITTED ***

IN ST 32-36-1-13

*** SECTION OMITTED ***

IN ST 32-36-1-14

*** SECTION OMITTED ***

IN ST 32-36-1-15

*** SECTION OMITTED ***

IN ST 32-36-1-16

Sec. 16. The rights recognized under this chapter are property rights, freely transferable and descendible, in whole or in part, by the following

Contract

License

Gift

Trust

Testamentary document

Operation of the laws of intestate succession applicable to the state administering the estate and property of an intestate deceased personality, regardless of whether the state recognizes the property rights set forth under this chapter.

IN ST 32-36-1-17

Sec. 17. (a) The written consent required by section 8 of this chapter and the rights and remedies set forth in this chapter may be exercised and enforced by

a personality; or

a person to whom the recognized rights of a personality have been transferred under section 16 of this chapter

b) If a transfer of a personality's recognized rights has not occurred under section 16 of this chapter, a person to whom the personality's recognized rights are transferred under section 18 of this chapter may exercise and enforce the rights under this chapter and seek the remedies provided in this chapter

IN ST 32-36-1-18

*** SECTION OMITTED ***

IN ST 32-36-1-19

Sec. 19. If

a deceased personality's recognized rights under this chapter were not transferred by (A) contract (B) license (C) gift (D) trust; or (E) testamentary document; and

there are no surviving persons as described in section 17 of this chapter to whom the deceased personality's recognized rights pass by intestate succession the deceased personality's rights set forth in this chapter terminate

IN ST 32-36-1-20

*** SECTION OMITTED ***

NY Civ. Rights Law § 50 (McKinney 2000)

§ 50. Right of Privacy.

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

N.Y. Civ. Rights Law § 51 (McKinney 2000)

§ 51. Action for injunction and for damages

Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. But nothing contained in this article shall be so construed as to prevent any person, firm or corporation from selling or otherwise transferring any material containing such name, portrait, picture or voice in whatever medium to any user of such name, portrait, picture or voice, or to any third party for sale or transfer directly or indirectly to such a user, for use in a manner lawful under this article; nothing contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this article shall be so construed as to prevent any person, firm or corporation from using the name, portrait, picture or voice of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait, picture or voice used in connection therewith; or from using the name, portrait, picture or voice of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait, picture or voice used in connection therewith. Nothing contained in this section shall be construed to prohibit the copyright owner of a sound recording from disposing of, dealing in, licensing or selling that sound recording to any party, if the right to dispose of, deal in, license or sell such sound recording has been conferred by contract or other written document by such living person or the holder of such right. Nothing contained in the foregoing sentence shall be deemed to abrogate or otherwise limit any rights or remedies otherwise conferred by federal law or state law.

N.Y. Sen. Bill 06790, 2010 Leg. Sess. (Feb. 5, 2010)

Section 1. The civil rights law is amended by adding a new section 50-f to read as follows:

S 50-F. USE OF THE PERSONA OF A DECEASED PERSONALITY PROHIBITED.

1. NO PERSON, FIRM OR CORPORATION SHALL USE FOR ADVERTISING PURPOSES OR FOR THE PURPOSES OF TRADE, THE PERSONA OF ANY DECEASED PERSONALITY WITHOUT HAVING FIRST OBTAINED THE WRITTEN CONSENT OF THE PERSON OR PERSONS IDENTIFIED IN SUBDIVISION FOURTEEN OF THIS SECTION WHO HAVE REGISTERED THEIR CLAIM OF RIGHTS PURSUANT TO SUBDIVISION SEVENTEEN OF THIS SECTION, OR AS OTHERWISE PROVIDED IN THIS SECTION. 2. AS USED IN THIS SECTION, THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS:

A. "PERSONA" MEANS THE NAME, INCLUDING LEGAL AND PROFESSIONAL NAME, PORTRAIT, VOICE AND/OR PICTURE OF A NATURAL PERSON.

B. "DECEASED PERSONALITY" MEANS ANY NATURAL PERSON WHO: (1) DIED A DOMICILIARY OF THE STATE OF NEW YORK ON OR AFTER, OR WITHIN SEVENTY YEARS PRIOR TO, THE EFFECTIVE DATE OF THIS SECTION; AND (2) WHOSE PERSONA WAS OF COMMERCIAL VALUE AT THE TIME OF HIS OR HER DEATH, WHETHER OR NOT THE INDIVIDUAL USED HIS OR HER PERSONA FOR ADVERTISING PURPOSES OR FOR THE PURPOSES OF TRADE DURING HIS OR HER LIFETIME.

3. NOTHING IN THIS SECTION SHALL BE READ AS PROHIBITING THE USE OF A DECEASED PERSONALITY'S PERSONA THAT OCCURS AFTER THE EXPIRATION OF SEVENTY YEARS FOLLOWING THE DEATH OF THAT DECEASED PERSONALITY. NOR SHALL ANYTHING IN THIS SECTION BE READ AS CREATING LIABILITY OR GIVING RISE TO ANY REMEDY FOR ANY ACTIONS OR CONDUCT INVOLVING THE USE OF A DECEASED PERSONALITY'S PERSONA THAT OCCURRED PRIOR TO THE EFFECTIVE DATE OF THIS SECTION.

4. THE WRITTEN CONSENT SPECIFIED IN SUBDIVISION ONE OF THIS SECTION SHALL NOT BE REQUIRED IN CONNECTION WITH THE USE OF A DECEASED PERSONALITY'S PERSONA FOR OTHER THAN ADVERTISING PURPOSES OR THE PURPOSES OF TRADE.

5. FOR PURPOSES OF THIS SECTION, THE FOLLOWING WORKS, OR NON-UTILITARIAN EXPRESSIVE WORKS DERIVED THEREFROM, REGARDLESS OF LENGTH OR FORMAT, APPEARING IN ANY MEDIUM NOW KNOWN OR HEREAFTER DEvised, SHALL NOT BE CONSIDERED TO HAVE USED A DECEASED PERSONALITY'S PERSONA FOR ADVERTISING PURPOSES OR FOR THE PURPOSES OF TRADE, SO LONG AS SUCH WORKS DO NOT CONSTITUTE AN ADVERTISEMENT, ENDORSEMENT OR SOLICITATION FOR THE SALE OR PURCHASE OF A PRODUCT, ARTICLE OF MERCHANDISE, GOOD OR SERVICE OTHER THAN THE FOLLOWING

WORKS, OR NON-UTILITARIAN EXPRESSIVE WORKS DERIVED THEREFROM, WHICH ARE EXEMPT UNDER THIS SECTION:

A. A PLAY, BOOK, STORY, GRAPHIC NOVEL, OR OTHER LITERARY OR THEATRICAL WORK;

B. AN ARTICLE, EDITORIAL, COMMENTARY, MAGAZINE, NEWSPAPER, NEWSLETTER OR OTHER PERIODICAL;

C. A MUSICAL COMPOSITION;

D. A RADIO PROGRAM, SOUND RECORDING, OR OTHER SIMILAR NON-UTILITARIAN EXPRESSIVE AUDIO WORK;

E. A DOCUMENTARY, MOTION PICTURE, TELEVISION PROGRAM OR OTHER SIMILAR NON-UTILITARIAN EXPRESSIVE AUDIOVISUAL WORK;

F. A PHOTOGRAPH OR POSTER, OR REPRODUCTION THEREOF;

G. AN ORIGINAL WORK OF ART, ART REPRODUCTION, OR OTHER SIMILAR NON-UTILITARIAN EXPRESSIVE WORK;

H. A GAME THAT USES THE PERSONAS OF MULTIPLE DECEASED PERSONALITIES;

I. A WORK OF POLITICAL OR NEWSWORTHY VALUE;

J. A NEWS, PUBLIC AFFAIRS, PUBLIC INTEREST OR SPORTS BROADCAST OR ACCOUNT;

K. ANY WORK USED IN CONNECTION WITH ANY POLITICAL CAMPAIGN;

L. A CALENDAR OR GREETING CARD;

M. A TEE-SHIRT WHERE THE PORTRAIT OR PICTURE OF A DECEASED PERSONALITY APPEARS ON THE TEE-SHIRT ITSELF, AND NOT AS PART OF ANY HANG TAG OR OTHER LABEL;

N. ANY OTHER EDITORIAL, ARTISTIC OR NON-UTILITARIAN EXPRESSIVE WORK; OR

O. ANY ADVERTISEMENT, PROMOTION OR COMMERCIAL ANNOUNCEMENT FOR ANY OF THE PRECEDING WORKS. IN THE CASE OF ALL WORKS IDENTIFIED IN PARAGRAPHS A THROUGH O OF THIS SUBDIVISION, THE WRITTEN CONSENT SPECIFIED IN SUBDIVISION ONE OF THIS SECTION SHALL NOT BE REQUIRED.

6. NO PERSON OR ENTITY POSSESSING RIGHTS OR TITLE, HOWEVER HELD, IN A WORK ENCOMPASSING ANY ASPECT OR ASPECTS OF A DECEASED PERSONALITY'S PERSONA SHALL BE RENDERED LIABLE UNDER THIS SECTION FOR LICENSING OR OTHERWISE AUTHORIZING THE USE OF SUCH WORK BY A THIRD PARTY, OR FOR DISPLAYING IMAGES OF SUCH WORK AS AVAILABLE FOR LICENSE OR SIMILAR USE BY A THIRD PARTY, SO LONG AS SUCH PERSON OR ENTITY DOES NOT (I) KNOW AND INTEND THAT THE THIRD PARTY PLANS TO USE SUCH WORK TO ENGAGE IN AN UNAUTHORIZED USE OF THE DECEASED PERSONALITY'S PERSONA AS PROHIBITED BY THIS SECTION, OR (II) DOES NOT WARRANT OR REPRESENT THAT THE THIRD PARTY MAY USE THE LICENSED OR AUTHORIZED ASPECT OF THE DECEASED PERSONALITY'S PERSONA FOR ADVERTISING PURPOSES OR FOR THE PURPOSES OF TRADE WITHOUT FIRST OBTAINING THE WRITTEN CONSENT REQUIRED BY SUBDIVISION ONE OF THIS SECTION. IN THE EVENT THAT SUCH THIRD PARTY LICENSEE WISHES TO USE ANY ASPECT OF A DECEASED PERSONALITY'S PERSONA ENCOMPASSED IN SUCH

WORK FOR ADVERTISING PURPOSES OR FOR THE PURPOSES OF TRADE, WITHOUT THE PRIOR KNOWLEDGE AND INTENT OF THE LICENSING OR AUTHORIZING PERSON OR ENTITY, IT SHALL BE THE SOLE RESPONSIBILITY OF THE THIRD PARTY LICENSEE TO OBTAIN THE WRITTEN CONSENT REQUIRED BY SUBDIVISION ONE OF THIS SECTION.

7. *** SECTION OMITTED ***

8. THIS SECTION SHALL NOT PROHIBIT THE USE OF A DECEASED PERSONALITY'S PERSONA IN PROMOTIONAL MATERIAL OR AN ADVERTISEMENT FOR A NEWS REPORTING OR AN ENTERTAINMENT MEDIUM THAT:

A. USES ALL OR PART OF A PAST OR FUTURE EDITION OF THE MEDIUM'S OWN BROADCAST OR PUBLICATION; AND

B. DOES NOT CONVEY OR REASONABLY SUGGEST THAT THE DECEASED PERSONALITY ENDORSES THE NEWS REPORTING OR ENTERTAINMENT MEDIUM.

9. THIS SECTION SHALL NOT PROHIBIT THE USE OF A DECEASED PERSONALITY'S PERSONA IN PROMOTIONAL MATERIAL OR AN ADVERTISEMENT FOR AN AGGREGATOR OF NEWS REPORTING AND/OR ENTERTAINMENT CONTENT THAT:

A. USES ALL OR A PART OF THE CONTENT OF ANY NEWS MEDIUM OR ENTERTAINMENT MEDIUM AVAILABLE TO THE AGGREGATOR'S CUSTOMERS; AND

B. DOES NOT CONVEY OR REASONABLY SUGGEST THAT THE DECEASED PERSONALITY ENDORSES THE NEWS AND/OR ENTERTAINMENT AGGREGATOR. AS USED IN THIS SUBDIVISION, THE TERM "AGGREGATOR" MEANS A PARTY WHO RECEIVES CONTENT NOT OF ITS OWN CREATION FROM OTHERS WHICH IT TRANSMITS OR OTHERWISE PROVIDES TO OTHERS.

10. THIS SECTION SHALL NOT PROHIBIT THE USE OF A DECEASED PERSONALITY'S PERSONA TO ACCURATELY IDENTIFY THAT DECEASED PERSONALITY AS THE AUTHOR OF OR CONTRIBUTOR TO A WORK OR A PERFORMER OF A RECORDED PERFORMANCE, UNDER CIRCUMSTANCES IN WHICH THE WORK OR RECORDED PERFORMANCE IS OTHERWISE LAWFULLY REPRODUCED, EXHIBITED, OR BROADCAST.

11. A DECEASED PERSONALITY'S PERSONA IS PERSONAL PROPERTY, FREELY TRANSFERABLE OR DESCENDIBLE, IN WHOLE OR IN PART, BY CONTRACT OR BY MEANS OF ANY TRUST OR TESTAMENTARY INSTRUMENT, WHETHER SUCH CONTRACT, TRUST OR TESTAMENTARY INSTRUMENT IS ENTERED INTO OR EXECUTED BEFORE OR AFTER THE EFFECTIVE DATE OF THIS SECTION, BY THE DECEASED PERSONALITY OR BY ANY SUBSEQUENT OWNER OF THE DECEASED PERSONALITY'S PERSONA AS RECOGNIZED BY THIS SECTION.

12. THE RIGHTS RECOGNIZED UNDER THIS SECTION ARE EXPRESSLY MADE RETROACTIVE AND SHALL BE DEEMED TO HAVE EXISTED AT THE TIME OF DEATH OF ANY DECEASED PERSONALITY WHO DIED WITHIN SEVENTY YEARS

PRIOR TO THE EFFECTIVE DATE OF THIS SECTION AND, EXCEPT WHERE SUCH RIGHTS WERE PASSED OR ASSIGNED PRIOR TO SUCH DECEASED PERSONALITY'S DEATH BY MEANS OF ANY CONTRACT OR TRUST INSTRUMENT, SHALL BE DEEMED TO HAVE VESTED IN THE PERSON OR PERSONS ENTITLED TO THESE RIGHTS UNDER THE TESTAMENTARY INSTRUMENT OF THE DECEASED PERSONALITY EFFECTIVE AS OF THE DATE OF HIS OR HER DEATH. IN THE ABSENCE OF A TRANSFER ELSEWHERE IN A TESTAMENTARY INSTRUMENT OF THE PERSONA OF A DECEASED PERSONALITY RECOGNIZED UNDER THIS SECTION, A PROVISION IN THE TESTAMENTARY INSTRUMENT THAT PROVIDES FOR THE DISPOSITION OF THE RESIDUE OF THE DECEASED PERSONALITY'S ASSETS SHALL BE EFFECTIVE TO TRANSFER THE DECEASED PERSONALITY'S PERSONA IN ACCORDANCE WITH THE TERMS OF THAT PROVISION.

13. IF NO TRANSFER OF SOME OR ALL OF THE RIGHTS RECOGNIZED UNDER THIS SECTION HAS OCCURRED IN ACCORDANCE WITH SUBDIVISION ELEVEN OR TWELVE OF THIS SECTION, THEN SUCH RIGHTS SHALL BE DEEMED TO HAVE PASSED IN ACCORDANCE WITH SECTION 4-1.1 OF THE ESTATES, POWERS AND TRUSTS LAW; PROVIDED, HOWEVER, THAT IF THERE ARE NO SURVIVING NATURAL PERSONS TO WHOM SAID RIGHTS PASS BY INTESTATE SUCCESSION, THEN SAID RIGHTS SHALL TERMINATE.

14. THE WRITTEN CONSENT REQUIRED BY THIS SECTION SHALL BE EXERCISABLE BY THE PERSON OR PERSONS WHO COLLECTIVELY OWN MORE THAN FIFTY PERCENT OF THE RIGHTS IN THE DECEASED PERSONALITY'S PERSONA IN ACCORDANCE WITH SUBDIVISIONS ELEVEN, TWELVE AND THIRTEEN OF THIS SECTION. RELIANCE UPON SUCH WRITTEN CONSENT PROVIDED BY THOSE WHO HAVE REGISTERED A CLAIM OF RIGHTS UNDER SUBDIVISION SEVENTEEN OF THIS SECTION SHALL BE A COMPLETE DEFENSE IN ANY ACTION BROUGHT UNDER THIS SECTION.

15. *** SECTION OMITTED ***

16. *** SECTION OMITTED ***

17. ANY PERSON OR PERSONS CLAIMING TO BE A SUCCESSOR-IN-INTEREST TO THE RIGHTS IN A DECEASED PERSONALITY'S PERSONA UNDER THIS SECTION, OR A LICENSEE THEREOF, MAY REGISTER A VERIFIED CLAIM WITH THE SECRETARY OF STATE OF THE STATE OF NEW YORK ON A FORM PRESCRIBED BY SUCH SECRETARY, WHICH SHALL INCLUDE THE NAME AND DATE OF DEATH OF THE DECEASED PERSONALITY, THE NAME AND ADDRESS OF THE CLAIMANT, THE BASIS OF THE CLAIM, AND THE RIGHTS CLAIMED. AS SOON AS SHALL BE PRACTICABLE, THE SECRETARY OF STATE SHALL CREATE A SYSTEM WHICH ALLOWS, UPON RECEIPT AND AFTER FILING OF ANY DOCUMENT UNDER THIS SECTION, SUCH SECRETARY TO POST THE DOCUMENT ALONG WITH THE ENTIRE REGISTRY OF PERSONS CLAIMING TO BE A SUCCESSOR-IN-INTEREST TO THE RIGHTS OF A DECEASED PERSONALITY OR A REGISTERED LICENSEE UNDER THIS

SECTION UPON THE DEPARTMENT OF STATE WEBSITE, PROVIDED THAT INSTEAD OF THE NAME AND ADDRESS OF THE CLAIMANT, THE CLAIMANT MAY REQUEST THAT THE CONTACT LISTED ON THE WEBSITE BE THE DESIGNATED REPRESENTATIVE OR AGENT. CLAIMS REGISTERED UNDER THIS SUBDIVISION SHALL BE PUBLIC RECORDS; SUCH CLAIMS SHALL BE DEEMED VALID UNLESS AND UNTIL OTHERWISE ADJUDICATED BY A COURT OF COMPETENT JURISDICTION. THE COST FOR FILING SHALL BE ONE HUNDRED DOLLARS. THE SECRETARY OF STATE SHALL PROMULGATE REGULATIONS FOR CARRYING OUT THE PROVISIONS OF THIS SUBDIVISION.

18. *** SECTION OMITTED ***

19. *** SECTION OMITTED ***

20. *** SECTION OMITTED ***

Court of Chancery of New Jersey.

EDISON

v.

EDISON POLYFORM MFG. CO.

July 22, 1907.

Bill by Thomas A. Edison against the Edison Polyform Manufacturing Company to restrain defendant from the use of the name 'Edison' as a part of its corporate title or in connection with its business or advertisements. Decree for complainant.

STEVENS, V. C.

The complainant, who is an inventor of electrical instruments and processes, and enjoys in this regard a worldwide reputation, early in his career compounded a medicinal preparation intended to relieve neuralgic pains by external application. It was first made for the personal use of Mr. Edison and his assistants, and not for sale. In the year 1879 a Mr. Lewis and a Mr. Jacobs went to his laboratory in Menlo Park to examine his inventions. While there Mr. Edison happened to mention the fact that he had been a sufferer from facial neuralgia, and that he had made *137 a preparation which he had called 'Polyform' and which he had found to be a good pain killer. Lewis and Jacobs were so impressed with its merits that they asked him to sell it. He finally agreed to sell for \$5,000. The arrangement was that he would apply for a patent and execute an assignment. The patent does not appear to have been issued, but a written assignment of his right to it and to the preparation was made on September 2, 1879. On November 7, 1879, a company, called the 'Menlo Park Manufacturing Company,' in which Mr. Edison had no interest, was organized under the laws of Connecticut, and it proceeded to manufacture and sell the preparation. It did so for several years on a small scale, with little or no success, and finally failed. It was succeeded by a corporation, organized on September 3, 1886, under the laws of Maine, called the 'Edison Polyform Company.' This company, too, met with little success. It was, in turn, succeeded by a New York company, which did nothing. Finally a New Jersey company, the present defendant, was on May 23, 1893, formed by certain gentlemen living in Chicago. This corporation is now carrying on the business of making and selling Polyform in that city. The present suit was commenced October 9, 1903. There has been some delay in prosecuting it, caused, I suppose, by the death of complainant's solicitor. I do not think, however, that as the case stands there is any question of laches. The case must be decided on its merits.

The prayer of the bill is that the defendant company may be restrained from using the name 'Edison' as a part of its corporate title or in connection with its business, or in connection with any advertisements circulated or published by it, and from holding out that complainant is the inventor or manufacturer or seller of the preparation sold by defendant. What the defendant company is doing is to manufacture and sell a liquid preparation containing apparently all but one of the drugs (viz., morphine) mentioned in Mr. Edison's formula. On each bottle is a label, containing on the one side directions for use, and on the other a picture of Mr. Edison and the following words: 'Edison's Polyform. I certify that this preparation is compounded according to the formula devised and used by myself. Thos. A. Edison.' Mr. Edison testifies that he has never *138 authorized the use of his picture and that he has never made or authorized this certificate. **393 As to the present defendant, there is absolutely no pretense that he has. As to the predecessors of the defendant, there is evidence that the picture and certificate were used; but it would seem that, when Mr. Edison heard that they were, he objected. He says that he objected to any use whatever of his name or picture. Mr. Grant says, but does not show by competent proof, that he objected only to the representation of machinery around the head. I do not regard the matter as important, because, even if Mr. Edison had given a license to use a picture and certificate of the first vendees-persons whom he knew and in whom he may have reposed confidence-it would not by any means follow that others, unlicensed and whom he did not know, would possess the same privilege. In the original assignment of the formula no authority whatever to use either name or picture was conferred.

The regularity of the assignments to the successive corporations was attacked. They appear to be in some respects defective; but I do not apprehend that it makes any difference, so far as the present bill is concerned, whether the title of the defendant is or is not perfect. The decision turns upon quite a different point.

The cases relating to the law of unfair trade have no application. They decide merely that a trader or manufacturer has no right to put off his goods as the goods of his competitor. The defendant does not put off his goods as being of Mr. Edison's manufacture. It asserts that it is itself the maker of them. What it does, however, falsely declare, is that it is Mr. Edison who is certifying that the preparation which the company is making and selling is made according to the Edison formula. It is, by its corporate name, by the certificate, and by the picture, holding out that Mr. Edison is connected with the enterprise and supervising its work. The question is whether Mr. Edison is without standing to complain because he is not a business competitor.

Clark v. Freeman, 11 Beav. 112, and Dockrell v. Douglas, 78 L. T. Rep. 848, may be thought to favor defendant's contention. In the first case Lord Langdale refused an injunction to prevent *139 a druggist from selling a quack medicine which he called 'Sir James Clark's Consumption Pills,' under the false representation that it was prepared by or under the direction of the eminent physician, Sir James Clark. The decision was that, inasmuch as Sir James was not engaged in the business of selling pills, no injury was done to his property of which a court of equity could take cognizance. Dockrell v. Douglas differs from Clark v. Freeman in the circumstance that the druggist who was selling a drink, which he called 'Jellico,' under the representation that Dr. Dockrell had recommended it, was in point of fact telling the truth. The complaint was that he was not authorized to use the doctor's name in his advertisements; that the doctor had done nothing more than make the statement advertised in private conversation, without any idea that what he said would be thus utilized. Here, too, an injunction was refused. Whatever view may be taken of the soundness of the conclusion reached by Ridley, J., in Dockrell v. Douglas, it is certain that the decision in Sir James Clark's Case was wrong. In Maxwell v. Hogg, L. R. 2 Ch. 307, Lord Cairns said that it had always appeared to him that it might have been decided in the plaintiff's favor on the ground that he had a property in his own name, and Lord Selborne, in Re Rivere's Trade-Mark, 26 Ch. Div. 48, said that it had seldom been cited, but to be disapproved.

The leading case on the other side of this question is Routh v. Webster, 10 Beav. 561. There the provisional directors of a jointstock company had, without plaintiff's authority, published a prospectus stating that he was a trustee. Lord Langdale granted an injunction on the ground that the company was representing the plaintiff as responsible in their speculations in a way calculated to involve him in all sorts of liabilities. In Dixon v. Holden, L. R. 7 Eq. 458, Malins, V. C., restrained the publication of a notice stating that plaintiff was a partner in a bankrupt firm. Of this case it was said by Lord Cairns in the subsequent case of Prudential Insurance Company v. Knott, L. R. 10 Ch. App. 142, that, while he did not agree to the reasoning of the Vice Chancellor, he did not mean to say that the decision itself was not capable of being maintained. *140 Somewhat analogous to the last case is that line of cases which holds that, where a business (including the good will) is sold, the vendee may not use the vendor's name in such manner as to expose the vendor to liability. Thynne v. Shove, 45 Ch. Div. 577; Burchell v. Wilde, [1900] 1 Ch. 552.

The latest English case that I have been able to find on the very question here presented is Walter v. Ashton, [1902] 2 Ch. 282. There a dealer advertised a cycle which he called 'the Times Cycle.' Among other things in his advertisement were statements to the effect that the Times Cycle was the only cycle that could be obtained on the Times (meaning the London Times newspaper) system of payments. There was a manifest attempt to suggest in other ways, without expressly affirming, that the London Times was connected with the venture. An injunction was granted on the authority of Routh v. Webster, supra, on the ground that it appeared that there was a reasonable probability that that newspaper might be exposed to liability-that it might possibly be held responsible if it should not take steps to disconnect its name from the advertisements after they had been brought to its attention. The distinction made was between a liability **394 that was merely shadowy and one that carried with it a reasonable probability of litigation or pecuniary loss.

Passing such cases as Prince Albert v. Strange, 1 McN. & G. 25, 2 De G. & S. 652, Pollard v. Photographic Co., 40 Ch. Div. 345, and Dentacura Company v. [N. J. State Dental Co., 57 N. J. Eq. 593, 41 Atl. 672, 58 N. J. Eq. 582, 43 Atl. 1098](#), which were decided upon the ground of implied contract or breach of confidence-grounds wanting in the present case-I come to the American cases on the subject. They are comparatively few in number. Two of them (

[Schuyler v. Curtis, 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671](#), and [Atkinson v. Doherty, 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507](#)) are plainly inapplicable. Aside from the dicta in the latter, the point really decided in both was that a man's reputation does not, on his death, descend or pass like an asset in such manner that the widow or a relative can sue to protect it from defamation.

In [Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828](#), however, the suit was brought on behalf of a living person, a *141 young lady under age, to restrain a flour company from putting her likeness upon prints advertising its flour. The allegation admitted by the demurrer was that the company was printing, selling, and circulating 25,000 of these likenesses, with the result of humiliating her and of causing mental distress and physical sickness. A bare majority of the Court of Appeals overruled the decision of the Appellate Division, and held that no cause of action was set forth in the complaint. This case resembles the case in hand, in that the defendant is here seeking to make an unauthorized use of Mr. Edison's likeness. It differs from it in the fact that no attempt was made to induce the public to believe that the person depicted was recommending the flour. This case cannot be sustained on principle, and has been disapproved by the [Supreme Court of Georgia in Pavesich v. New England Life Insurance Company, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104](#), and by our own Court of Appeals in [Vanderbilt v. Mitchell \(not yet officially reported\) 67 Atl. 97, 103](#). If a man's name be his own property, as no less an authority than the United States Supreme Court says it is ([Brown Chemical Co. v. Meyer, 139 U. S. 542, 11 Sup. Ct. 625, 35 L. Ed. 247](#)) it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it. If the mere exhibition of one's face to one's friends and to others on the public streets be a publication for all purposes, then that line of cases of which *Pollard v. Photographic Company* is an example was wrongly decided, for there could be no implied contract or confidence to keep that private which was already public property.

That the subject is attended with difficulty, and that the line between what the court will restrain and what it will not restrain is hard to draw with absolute precision, is undoubted. This is well illustrated by the case of libel. If you call a business man a thief, or a physician a quack, in a printed publication, you undoubtedly do that which tends, and very directly tends, to diminish his earnings; and yet all the authorities, up to this time at least, agree that, because libel is a crime and is actionable at law, equity will not interfere. *Prudential Insurance Company v. Knott*, L. R. 10 Ch. 142, is an illustration. There *142 the defendant had published a pamphlet in which he charged the plaintiff company with reckless management and with being in a state of insolvency. On bill filed alleging the representation to be untrue, and further alleging that the company was in fact prosperous and solvent, and that the continued publication of the pamphlet would damage the company's business and diminish its profits, an injunction was refused by the Vice Chancellor, and by the Lords Justices on appeal. The decision was put upon the ground that the pamphlet, if its statements were untrue, was libelous and actionable at law; and yet Lord Cairns said, in giving judgment, that there were publications which a court of equity would restrain, and that such publications would be restrained none the less because they happened also to be libelous. He expressly dissented, however, from Vice Chancellor Malins' view that reputation was property, and that it might, on that ground, be protected by injunction. It would seem that the right of the citizen to have his publication passed on by a jury is, to some extent at least, responsible for the rule. Liberty of speech and of the press are guaranteed by the Constitution, and the question of their abuse is committed to that body.

There must be limits to the so-called right of privacy. It is certain that a man in public life may not claim the same immunity from publicity that a private citizen may. [Corless v. Walker Co., 64 Fed. 280, 31 L. R. A. 283](#). And as far as my researches have extended I do not find that it has yet been decided that injury to property in some form is not an essential element to relief. It may, at times, have been a matter of doubt whether what was called 'property' was really such, and whether the injury thereto, actual or apprehended, was not so 'shadowy' as to be incapable of judicial cognizance; but still the criterion was always injury to property or to property rights. It is to be noted, however, that the insignificance of the right from a pecuniary standpoint does not always bar relief. Thus the report of an association of dentists ([**395 N. J. State Dental Soc. v. Dentacura Co., 57 N. J. Eq. 594, 41 Atl 672](#)), the exhibition of one's photograph (*Pollard v. Photographic Co.*, 40 Ch. Div. 345), and the publication of a private letter, which, as *143 a literary production may be worthless ([Folsom v. March, 2 Story, 100](#); *Boosey v. Jeffreys*, 6 Exch. 583), are accorded the same protection as the lectures of a professor (*Abernethy v. Hutchinson*, 3 L. T. Ch. 209), the catalogue of a prince's etchings (*Prince Albert v. Strange*, 1 McN. & G. 25), and the currency of a foreign state (*Emperor of Austria v. Day*, 3 De G. & J. 217). I think that under the above authorities the complainant in the

present case is clearly entitled to an injunction to restrain the unauthorized use of his name, his picture, and his certificate. The possibility of injury because of their use without apparent objection on Mr. Edison's part is quite as great as it would have been in the Times Case had Mr. Walter stood by and allowed the advertisement of the bicycle with what seemed to be a Times indorsement.

I regard the case of *Vanderbilt v. Mitchell*, just decided by the court of Appeals, as conclusive. That court, as I have said, condemned *Robertson v. Rochester Folding Box Co.*, and cited with approval *Routh v. Webster* and *Walter v. Ashton*. It appeared in *Vanderbilt v. Mitchell* that complainant's wife, having had born to her, two years after her marriage, a son who was not complainant's son, falsely stated to the attending physician that the complainant was the father of the child. This statement was credited by the physician, who inserted it in his birth certificate, sent by him to the bureau of vital statistics, where it was recorded. The record, by the terms of our statute, is prima facie evidence of the facts therein stated. The complainant prayed that this fraudulent record might be canceled, and that an injunction might issue restraining both mother and child from claiming thereunder the status, name, or property of a child lawfully begotten by complainant. The defense set up was that complainant did not show that any of his property rights had been affected, and such was the decision of *Garrison, V. C.*; but on appeal it was held that the complainant was entitled to relief. It was pointed out by Dill, J., that, inasmuch as the statute made the recorded certificate prima facie evidence of the facts stated in it, it could be used as evidence in a suit brought against the *144 complainant for necessities furnished to the child. This of itself, brought the case well within the ruling in *Routh v. Webster, supra*. It was a false statement, which exposed the complainant to the risk of pecuniary liability; but the court went further. It appeared that the complainant was a beneficiary of a vested remainder in land under a trust which was being executed according to the laws of New York. Under the laws of that state a man cannot devise more than half of his estate to charity where he leaves (inter alios) a child. His right to make an absolute devise of his property was thus threatened, and the impairment of this right was held to give him a standing in a court of equity to attack the certificate. Judge Dill, in concluding his illuminating opinion, said that the question whether the bill might not have been rested on the ground of an interference with personal, as contradistinguished from property, rights, was not decided, for the reason that the case 'presented the property feature to an extent sufficient to satisfy even the rule adopted by the court below.'

The Court of Appeals has thus emphatically declared that the term 'property right' is not to be taken in any narrow sense, and that the tendency of equity in cases of this description should be to extend, rather than to restrict, the jurisdiction. Judge Dill says: 'From time immemorial it has been the rule not to grant equitable relief where a party praying for it had an adequate remedy at law; but modern ideas of what are adequate remedies are changing and expanding, and it is gradually coming to be understood that a system of law which will not prevent the doing of a wrong, but only affords redress after the wrong is committed, is not a complete system, and is inadequate to the present needs of society.' It is difficult to imagine a case in which preventive relief would be more appropriate than the present. In a perfectly unauthorized way a certificate falsely purporting to be made by Mr. Edison, and also false in fact, because the preparation is not compounded with all the ingredients of the formula, is put by a company bearing Edison's name upon every bottle of Polyform which it sells. That there may be no mistake as to who is intended, the certificate is accompanied with a likeness.

*145 I think an injunction should be granted restraining the defendant company from holding out, either in the name of the company, or by certificate, or by pictorial representation, that Mr. Edison has any connection with or part in the complainant's business. I cannot divorce the company's name from the other parts of the representation. It is, as the evidence stands, part of the fraudulent contrivance. The abstract question whether a company can innocently use, as a part of its title, the name of a distinguished living character, is not before me for decision, and no opinion is expressed about it.

United States Court of Appeals Second Circuit.
HAELAN LABORATORIES, Inc.

v.

TOPPS CHEWING GUM, Inc.
No. 158, Docket 22564.

Argued Jan. 6, 1953.

Decided Feb. 16, 1953.

On Petition for Rehearing and Motion to Stay Mandate March 20, 1953.

Action for inducing breach of contract. The United States District Court for the Eastern District of New York rendered a judgment adverse to the plaintiff and the plaintiff appealed. The Court of Appeals, Frank, Circuit Judge, held that if baseball player enters into contract entitling another to exclusive right to use player's name in connection with sale of commercial product, and player subsequently enters into contract to same effect with another party, latter contract would become fully effective at time of expiration of terms of prior contract if latter contract provided that its rights should go into effect only upon expiration of prior grantee's exclusive rights, but latter contract would be invalid if party soliciting it knew of prior right and proceeded to use grant given by latter contract in violation of such prior rights, but grant of latter contract would be valid if subsequent solicitor made no effort to use grant before expiration of prior rights.

Reversed and remanded.

Before SWAN, Chief Judge, and CLARK and FRANK, Circuit Judges.

FRANK, Circuit Judge.

After a trial without a jury, the trial judge dismissed the complaint on the merits.^{[FN1](#)} The plaintiff maintains that defendant invaded plaintiff's exclusive right to use the photographs of leading baseball-players. Probably because the trial judge ruled against plaintiff's legal contentions, some of the facts were not too clearly found.

[FN1](#). plaintiff abandoned its appeal from the dismissal of that part of the complaint asserting unfair competition and trade-mark infringement. Defendant has abandoned its cross-appeal from the dismissal of its counterclaim.

1. So far as we can now tell, there were instances of the following kind:

(a). The plaintiff, engaged in selling chewing-gum, made a contract with a ball-player providing that plaintiff for a stated term should have the exclusive right to use the ball-player's photograph in connection with the sales of plaintiff's gum; the ball-player agreed not to grant any other gum manufacturer a similar right during such term; the contract gave plaintiff an option to extend the term for a designated period.

(b). Defendant, a rival chewing-gum manufacturer, knowing of plaintiff's contract, deliberately induced the ball-player to authorize defendant, by a contract with defendant, to use the player's photograph in connection with the sales of defendant's gum either during the original or extended term of plaintiff's contract, and defendant did so use the photograph.

Defendant argues that, even if such facts are proved, they show no actionable wrong, for this reason: The contract with plaintiff was no more than a release by the ball-player to plaintiff of the liability which, absent the release, plaintiff would have incurred in using the ball-player's photograph, because such a use, without his consent, would be an invasion of his right of privacy under [Section 50](#) and [Section 51 of the New York Civil Rights Law](#); this statutory right of privacy is personal, not assignable; therefore, plaintiff's contract vested in plaintiff no 'property' right or other legal interest which defendant's conduct invaded.

Both parties agree, and so do we, that, on the facts here, New York 'law' governs. And we shall assume, for the moment, that, under the New York decisions, defendant correctly asserts that any such contract between plaintiff and a ball-player, in so far as it merely authorized plaintiff to use the player's photograph, created nothing but a release of liability. On that basis, were there no more to the contract, plaintiff would have no actionable claim against defendant. But defendant's argument neglects the fact that, in the contract, the ball-player also promised not to give similar releases to others. If defendant,*868 knowing of the contract, deliberately induced the ball-player to break that promise, defendant behaved tortiously.^{FN2} See, e.g., [Hornstein v. Podwitz, 254 N.Y. 443, 173 N.E. 674, 84 A.L.R. 1](#); 6 Corbin, Contracts (1951) Sec. 1470.

[FN2](#). Defendant is also liable if he thus induced any player to breach his contract to renew.

Some of defendant's contracts were obtained by it through its agent, Players Enterprise, Inc; others were obtained by Russell Publishing Co., acting independently, and were then assigned by Russell to defendant. Since Players acted as defendant's agent, defendant is liable for any breach of plaintiff's contracts thus induced by Players. However, as Russell did not act as defendant's agent when Russell, having knowledge of plaintiff's contract with a player, by subsequently contracting with that player, induced a breach of plaintiff's contract, defendant is not liable for any breach so induced; nor did there arise such a liability against defendant for such an induced breach when defendant became the assignee of one of those Russell contracts.

2. The foregoing covers the situations where defendant, by itself or through its agent, induced breaches. But in those instances where Russell induced the breach, we have a different problem; and that problem also confronts us in instances- alleged in one paragraph of the complaint and to which the trial judge in his opinion also (although not altogether clearly) refers- where defendant, 'with knowledge of plaintiff's exclusive rights,' used a photograph of a ball-player without his consent during the term of his contract with plaintiff.^{FN3}

[FN3](#). On the remand, the judge should make findings on this subject, on the basis of the evidence now in the record and such additional evidence as the parties may introduce.

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

[\[1\]](#) A majority of this court rejects this contention. We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth.

[\[2\]](#) This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

We think the New York decisions recognize such a right. See, e.g., [Wood v. Lucy, Lady Duff Gordon, 222 N.Y. 88, 118 N.E. 214](#); [Madison Square Garden Corp. v. Universal Pictures Co., 255 App.Div. 459, 465, 7 N.Y.S.2d 845](#); Cf. [Liebig's Extract of Meat Co. v. Liebig Extract Co., 2 Cir., 180 F. 688](#).

We think *Pekas Co., Inc. v. Leslie*, 52 N.Y.L.J. 1864, decided in 1915 by Justice Greenbaum sitting in the Supreme Court Term, is not controlling since apart from a doubt as to whether an opinion of that court must be taken by us as an authoritative exposition of New York law- the opinion shows that the judge had his attention directed by plaintiff

exclusively to Sections *869 50 and [51 of the New York statute](#), and, accordingly, held that the right of privacy was 'purely personal and not assignable' because 'rights for outraged feelings are no more assignable than would be a claim arising from a libelous utterance.' We do not agree with [Hanna Mfg. Co. v. Hillerich & Bradsby Co., 5 Cir., 78 F.2d 763, 101 A.L.R. 484](#); see adverse comments on that decision in 36 Col.Law Rev. (1936) 502, 49 Harv.Law Rev. (1936) 496, and 45 Yale L.J. (1936) 520.^{FN4}

[FN4](#). It should be noted that the Hanna case was a pre-Erie-Tompkins decision, which, although it discussed the New York decisions, did not purport to decide authoritatively the New York 'law' on the subject.

We said above that defendant was not liable for a breach of any of plaintiff's contracts induced by Russell, and did not become thus liable (for an induced breach) when there was assigned to defendant a contract between Russell and a ball-player, although Russell, in making that contract, knowingly induced a breach of a contract with plaintiff. But plaintiff, in its capacity as exclusive grantee of player's "right of publicity," has a valid claim against defendant if defendant used that player's photograph during the term of plaintiff's grant and with knowledge of it. It is no defense to such a claim that defendant is the assignee of a subsequent contract between that player and Russell, purporting to make a grant to Russell or its assignees. For the prior grant to plaintiff renders that subsequent grant invalid during the period of the grant (including an exercised option) to plaintiff, but not thereafter.^{FN5}

[FN5](#). Since plaintiff asserts that, in all instances, defendant acted with knowledge of plaintiff's contracts, we need not consider whether and how far defendant would be liable to plaintiff, absent such knowledge, when, during the term of plaintiff's contract, defendant used a player's photograph without inducing a breach of that contract.

3. We must remand to the trial court for a determination (on the basis of the present record and of further evidence introduced by either party) of these facts: (1) the date and contents of each of plaintiff's contracts, and whether plaintiff exercised its option to renew; (2) defendant's or Players' conduct with respect to each such contract.

Of course, if defendant made a contract with a ball-player which was not executed- or which did not authorize defendant to use the player's photograph-until the expiration of the original or extended term of plaintiff's contract with that player, or which did not induce a breach of the agreement to renew, then defendant did no legal wrong to plaintiff. The same is true of instances where neither defendant nor Players induced a breach of plaintiff's contract, and defendant did not use the player's photograph until after the expiration of such original or extended or option term.

If, upon further exploration of the facts, the trial court, in the light of our opinion, concludes that defendant is liable, it will, of course, ascertain damages and decide what equitable relief is justified.

Reversed and remanded.

On Defendant's Petition for Rehearing
PER CURIAM.

1. In our original opinion, footnote 1, we said that defendant had 'abandoned its cross-appeal from dismissal of its counterclaim.' But we are now satisfied that defendant had preserved its cross-appeal on the issue of impairment of its own contract rights. Therefore, if plaintiff induced breaches of exclusive agreements which defendant had made with ball-players, defendant is entitled to relief against plaintiff. Accordingly, we add the following to our mandate as additional items for determination by the trial court: (3) The *870 date and contents of each of defendant's contracts under which defendant claims, and whether defendant exercised its option to renew, and (4) plaintiff's conduct with respect to each such contract.

[\[3\]](#) 2. The last sentence under point 2 of our opinion might suggest that, as long as one of the parties had a contract with a ball-player giving it exclusive rights, any subsequent contract made between that player and the other party before expiration of the prior rights is necessarily invalid. This point appears to require further clarification.

Certainly, if the terms of one party's contract provide that its rights shall go into effect only upon expiration of a prior grantee's exclusive rights, the later grant would become fully effective at the time of such expiration. Indeed, in this situation no tort has been committed. However, the problem becomes more complex where the subsequent contract, by its terms, purports to go into effect before termination of any prior exclusive rights. Where the party soliciting such a subsequent contract knows of the prior rights and actually proceeds to use the grant given in violation thereof, its contract is tainted with illegality and is utterly invalid. See [Reiner v. North American Newspaper Alliance, 259 N.Y. 250, 181 N.E. 561, 83 A.L.R. 23](#). Hence such a contract would convey no rights even if it ran beyond the duration of the other party's prior rights. But where the subsequent solicitor treated its contract as if it became effective only upon expiration of any prior rights and made no effort to use the grant before then, that grant would bloom into full force as soon as the earlier rights expired. The same is true if the subsequent grantee did not know at the time he entered into his contract that the ball-player had already given exclusive rights to another party. The validity of one party's contracts beyond the expiration date of prior exclusive rights given the other will thus depend on the district court's findings of fact as to the considerations we have pointed out.

On Plaintiff's Motion for a Stay

We deny plaintiff's motion for a temporary stay. But we have directed that our mandate shall issue forthwith in order that the trial court may immediately entertain a motion by either party for a temporary injunction.^{FN6} Because of the seasonal character of the business here involved, the taking of evidence on such a motion should be conducted, and the decision should be made, with the utmost dispatch. Without intimating what the decision should be, it may be suggested that the trial judge in his discretion (1) may think it advisable at once to require that a party desiring to avoid being enjoined shall give a bond in a substantial amount, and (2) may deem it wise to issue a series of temporary injunctions, i.e., to enjoin the use by one party of a particular player's picture as and when the exclusive right of the other party to the use of such picture is established by the evidence.

^{FN6.} We have denied defendant's motion for a stay pending action by the Supreme Court on a petition for certiorari.

On Defendant's Motion to Stay Mandate and Plaintiff's Motion to Award It Appellate Costs PER CURIAM:

The motion for stay of mandate is denied and the Clerk of the Court is directed to issue the mandate forthwith.

Costs of appeal are awarded to the plaintiff-appellant, with the exception of the item for printing the Transcript of Record. As to this item only one-half the cost of printing is awarded inasmuch as it contains a great deal of matter unnecessary for adequate presentation of the questions raised by the appeal.

SWAN, Chief Judge (concurring in part).

I agree that the cause should be reversed and remanded, and I concur in so much of the opinion as deals with the defendant's liability for intentionally inducing a ball-player to breach a contract which gave plaintiff the exclusive privilege of using his picture.

United States Court of Appeals Second Circuit.
Helen D. MILLER, Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE, Respondent.
No. 76, Docket 27018.

Argued Jan. 4, 1962.
Decided Feb. 6, 1962.

Petition to review a decision of the Tax Court, Arnold Raum, J., [35 T.C. 631](#), determining a deficiency in taxpayer's 1954 income tax return in the amount of \$159,850.71 holding that the proceeds of a contract purporting to sell the 'right' to make a motion picture film entitled 'The Glenn Miller Story' were ordinary income. The United States Court of Appeals, Kaufman, Circuit Judge, held that the proceeds of the contract were taxable as ordinary income and were not subject to capital gains treatment as 'property'.

Affirmed.

Before WATERMAN, KAUFMAN and MARSHALL, Circuit Judges.

KAUFMAN, Circuit Judge.

Petitioner is the widow of Glenn Miller, a band leader who achieved world fame about twenty-five years ago, Although Glenn Miller died in 1944, petitioner has been able to engage in a number of enterprises actively exploiting his continuing popularity. Apparently 'the good that men do,' if sufficiently publicized, does live after them, for petitioner's commercial efforts have met with appreciable financial success.

Thus, in 1952, she entered into a contract with Universal Pictures Company, Inc. (Universal) in connection with the production of a motion picture film entitled 'The Glenn Miller Story'; and in the calendar year 1954, she received \$409,336.34 as her share of the income derived from that theatrical venture. According to the terms of the 1952 contract, petitioner had purportedly granted to Universal 'the exclusive right to produce, release, distribute and exhibit * * * one or more photoplays based upon the life and activities of Glenn Miller throughout the world'; and had warranted that she was 'the sole and exclusive owner of all the rights' conveyed by her.

Petitioner now contends that the payment received in 1954 from Universal pursuant to that contract should be considered, for income tax purpose, as a 'gain from the sale or exchange of a capital asset held for more than 6 months * * *' [26 U.S.C. § 1222](#); while the Commissioner, whose position was sustained by the Tax Court, contends that the 1954 payment must be treated as ordinary income.^{FN1} That is the difference between the parties, and in terms of taxes allegedly due in this case, it amounts to *708 \$159,850.71. Since there is little doubt on the facts presented here that there was a 'gain,' a 'sale or exchange,' and a holding 'for more than 6 months,' the specific question dividing the parties relates to the meaning of the term 'capital asset.' Furthermore, since [Section 1221 of the Internal Revenue Code](#) of 1954, [26 U.S.C. § 1221](#), defines the term 'capital asset' as 'property held by the taxpayer * * *' (emphasis supplied), and since, if anything was held by anyone it was held by the petitioner,^{FN2} the conflict is narrowed to the meaning of the word 'property' for purposes of this section of the Code.

[1] One would assume that since the question is so easily narrowed, the answer would be correspondingly free of difficulty. The assumption is unwarranted. The narrowing of a question does, ordinarily, reduce the complexity of the answer; but it also tends to increase the difficulty of reaching it. Moreover, in order to avoid creating more problems than we resolve, we wish to emphasize that throughout the ensuing discussion, our analysis of the term 'property' is made within the context of capital gains taxation; universality in definition is not only unlikely, but undesirable.

The Internal Revenue Code does not define 'property' as used in [Section 1221](#). 'It is here that the Code itself discloses the enormity of the problem.' Surrey, [Definitional Problems in Capital Gains Taxation](#), 69 *Harv.L.Rev.* 985, 988 (1956). This is one of those instances in which the drafters of that statute have (for obvious reasons) declined the challenge of preserving a chameleon in a pithy phrase. See [3B Mertens, Federal Income Taxation, § 22.12 \(1958\)](#). Therefore, we must look outside the eight corners of the code for some elucidation. The ordinary technique is to refer to principles of state property law for, if not an answer, at least a hint. Since ultimately it is the Congressional purpose which controls, such non-tax definitions are certainly not binding on us. See [Ernest A. Watson, 15 T.C. 800, 813 \(1950\)](#), aff'd, on other grounds, [197 F.2d 56 \(9th Cir. 1952\)](#), aff'd, [345 U.S. 544, 73 S.Ct. 848, 97 L.Ed. 1232 \(1953\)](#); cf. [Burnet v. Harmel, 287 U.S. 103, 110, 53 S.Ct. 74, 77 L.Ed. 199 \(1932\)](#). On the other hand, Congress may be presumed to have had ordinary property concepts in mind so they are relevant to our inquiry.

Most people trained in the law would agree that for many purposes one may define 'property' as a bundle of rights, protected from interference by legal sanctions. Cf. [Restatement, Property, §§ 1-5](#). This concept is behind one prong of petitioner's attack. She cites several cases,^{FN3} claiming they indicate that if Universal had made its motion picture without contracting with her, it would have been the victim of a substantial lawsuit.

*709 Even if this were so, those cases would not compel this court to recognize, for income tax purposes, a 'property right' in Glenn Miller himself if he were still alive. However, it is not necessary for us to reach a determination upon such an assertion. Those cases do not such remotely bear on the question whether such a property right,^{FN4} if it existed, could pass to the sole beneficiary under his will; and certainly they lend no support to petitioner's theory that the reputation or fame of a dead person could give rise to such 'property rights.'^{FN5} In fact, in the only case cited in which the rights of a dead man were considered at all, the court held against the claimant. [Runyon, Jr. v. U.S., 281 F.2d 590, 592 \(5th Cir. 1960\)](#). Indeed, petitioner is well aware of this, for she concedes that at the time of the 'sale' there were 'no clear-cut decisions * * * protecting publicity rights of a deceased celebrity * * *' (Pet.Br. p. 43).

Undeterred by her failure to find case authority which would substantiate the existence of 'property rights' petitioner invokes the authority of logic. With considerable ingenuity, she argues:

(1) Universal paid petitioner \$409,336.34 in 1954, which is a great deal of money.^{FN6}

(2) Universal was a sophisticated corporate being to which donative intent would be difficult to ascribe.

(3) If there was no danger in free use of Glenn Miller material,^{FN7} why did Universal pay?

Petitioner appears to find this question unanswerable unless it is conceded that there was a sale of a 'property right.' Petitioner is wrong.

It is clear to this Court, at least, that many things can be sold which are not 'property' in any sense of the word. One can sell his time and experience, for instance, or, if one is dishonest, one can sell his vote; but we would suppose that no one would seriously contend that the subject matter of such sales is 'property' as that word is ordinarily understood. Certainly no one would contend that such subject matter was inheritable. We *710 conclude, therefore, that not everything people pay for is 'property.'

In the instant case, 'something' was indeed sold. And the expedient business practice may often be to sell such 'things.' But the 'thing' bought, or more appropriately 'bought off,' seems to have been the chance that a new theory of 'property' might be advanced, and that a lawsuit predicated on it might be successful. It was a purchase, so to speak, of freedom from fear. In effect, it was a hedge against the chance that the Miller 'property' might exist. Because Universal feared that it might sometime in the future be held to have infringed a property right does not mean, however, that a court presently considering whether that property right did exist in 1952 must realize Universal's worst fears. That does not mean that Universal's payments was foolish or illusory. It got what it contracted for in 1952 and what it later paid Mrs. Miller for: freedom from the danger that at a future date a defensible right constituting 'property' would be found to exist. But it didn't pay for 'property.'^{FN8}

It may be helpful to compare this situation with one which involves the settlement of a tort claim, e.g., a negligence lawsuit. No one doubts the existence of a legal principle creating liability for negligence. If the facts are as a plaintiff contends, and they come within that principle, the defendant's liability exists. Even if they do not, the defendant, for his own reasons, may agree to make a payment in settlement of his alleged liability. Moreover, the Commissioner, for purposes of taxation, may accept that settlement as an implied affirmation that the facts were substantially as the plaintiff contended, and treat the recovery accordingly. But no two individuals can, by agreement between themselves, create a legal principle, binding upon everyone else, including the Commissioner, where none existed before. This is the exclusive domain of the legislature and the courts as repository of the public will. Admittedly, this court cannot overlook the fact that much of the work of a lawyer is predicting future judicial advances (or aberrations, perhaps); and that is undoubtedly what Universal's lawyers were doing in 1952. But, a lawyer's prediction of the future, as some lawyers, know, is not law.

In any event, we are unwilling to accept the fact of substantial payment as proof that 'property' within the meaning of [Section 1221](#) of the Code exists; and for the reasons stated, we must reject this argument as being in reality a makeweight.^{FN9} Petitioner concedes that at the time of the 'sale' there had been no authoritative decision holding that a decedent's successors had any 'property right' to the public image of a deceased entertainer; and therefore it follows that their bargain was not, at that time, a bargain that both parties knew involved a 'property right.' Furthermore, we do not find it necessary to decide whether the parties were then bargaining for a property right. The case before us only involves the meaning of language in a highly technical statute and the legal effects flowing from that language.

[\[2\]\[3\]](#) 'It is evident that not everything which can be called property in *711 the ordinary sense and which is outside the statutory exclusions qualifies as a capital asset * * *' [C.I.R. v. Gillette Motor Transport, Inc.](#), 364 U.S. 130, 134, 80 S.Ct. 1497, 1500, 4 L.Ed.2d 1617 (1960); [C.I.R. v. Phillips](#), 275 F.2d 33, 35 (4th Cir. 1960). Gains which result from the sale or exchange of capital assets receive preferential tax treatment. Therefore, 'the definition of a capital asset must be narrowly applied,' [Corn Products Refining Co. v. C.I.R.](#), 350 U.S. 46, 52, 76 S.Ct. 20, 24, 100 L.Ed. 29 (1955); [Mansfield Journal Co. v. C.I.R.](#), 274 F.2d 284, 286 (6th Cir. 1960), in order to effectuate the basic Congressional purpose 'to relieve the taxpayer from * * * excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions.' [Burnet v. Harmel](#), *supra*, 287 U.S. at p. 106, 53 S.Ct. at p. 75; [Corn Products Refining Co. v. C.I.R.](#), *supra*. We do not believe that for income tax computation purposes the beneficiaries of the estate of a deceased entertainer received by descent a capitalizable 'property' in the name, reputation, right of publicity, right of privacy or 'public image' of the deceased; or that in this case the petitioner, for tax purposes, owned any 'property' which came into existence after Glenn Miller's death.^{FN10} Therefore, income received by Mrs. Miller from contractual arrangements made by her with Universal dealing with deceased's intangible rights of the nature above specified is 'ordinary' income as opposed to capital gain or loss under [§ 1221 of the Internal Revenue Code](#) of 1954.

Affirmed.

[FN1.](#) The Tax Court concluded that, (a) petitioner was compensated by Universal for services which she had agreed to render in connection with the photoplay; (b) petitioner accepted a share in the proceeds of the motion picture as an advance settlement of any liability which Universal might incur because of an invasion of privacy; and (c) petitioner had no 'property right' in the name, image, reputation etc. of Glenn Miller which could qualify as a capital asset. Although the Tax Court's discussion of issues (a) and (b) suggests that there are alternative theories upon which this Court might affirm its decision, we prefer to dispose of the matter by accepting, arguendo, petitioner's theory that the contract dealt with a conveyance of 'property' only. For this purpose we ignore the fact that taxpayer's original petition characterized the contract proceeds as constituting both a payment for taxpayer's services and a settlement of tort liability.

[FN2.](#) It is clear that whatever was sold to Universal was either created by petitioner, or owned by her deceased husband during his life. In addition, there is no dispute that under his will petitioner was the decedent's sole beneficiary.

[FN3.](#) [Ettore v. Philco Television Broadcasting Corp.](#), 229 F.2d 481, 58 A.L.R.2d 626 (3rd Cir.), cert. denied 351 U.S. 926, 76 S.Ct. 783, 100 L.Ed. 1456 (1956); [Haelan Laboratories, Inc. v. Topps Chewing](#)

[Gum, Inc., 202 F.2d 866 \(2nd Cir.\)](#), cert. denied [346 U.S. 816, 74 S.Ct. 26, 98 L.Ed. 343 \(1953\)](#); [Uproar Co. v. National Broadcasting Co., 8 F.Supp. 358 \(D.Mass.1934\)](#), aff'd, [81 F.2d 373 \(C.C.A. 1\)](#), cert. denied [298 U.S. 670, 56 S.Ct. 835, 80 L.Ed. 1393 \(1936\)](#).

[FN4](#). The Ettore and Haelan Laboratories cases, both decided after the petitioner contracted with Universal, involved 'rights' of living persons. Ettore, which concerned the exclusive 'right' to publication of one's own performance, is wholly inapposite, since petitioner does not purport to grant rights to a performance of Glenn Miller. Heelan Laboratories, which held that a living celebrity has a 'right of publicity' in the use of his own photograph, under New York Law, carefully avoided terming it a 'property right,' no doubt in order to avoid unintended consequences which might follow from such classification. Uproar, apparently an application of pre-Erie 'federal contract law,' held that a living person's grant of the use of his name created 'rights of a pecuniary nature * * * which partake of the elements of property rights.' (Italics added.) 8 F.Supp. 361. Aside from its questionable authority as the law of any state, and the 'unfair competition' context in which the issue arose, this case has little application because of the scope of the rights asserted to exist in the present instance.

[FN5](#). There is apparently a right under continental law, which is similar to the 'property right' asserted by petitioner, the so-called 'moral right.' See e.g., Strauss, *The Moral Right of the Author*, 4 Am.J.Comp. 506 (1955). This seems to encompass the right to prevent the 'distortion, mutilation or other alteration' of an author's work. See art. 6 bis, section (1) of the Brussels Convention (1948); Strauss, *op. cit. supra* at p. 509; and that right may pass to the heirs of the author in certain circumstances. See art. 6 bis, section (2) of the Brussels Convention (1948). Whether it would permit the heirs of Glenn Miller to protect 'The Glenn Miller Story' is unclear. But, in any event, the moral right, as such, is not recognized in this country.

[FN6](#). It should be noted that petitioner received a fixed percentage of the income produced by the motion picture. Only the ultimate success of the venture, the extent of which was unknown at the time of the signing of the contract, made the sum actually paid so high.

[FN7](#). Petitioner characterizes the subject matter of the sale variously as Glenn Miller's 'story' (Pet.Br. p. 27), as 'good will' (Pet.Br. pp. 27, 37), and as a 'right of publicity' (Pet.Br. p. 32).

[FN8](#). One must remember that, the techniques of advertising and promotion being what they are, timing is very important and a successful motion for a preliminary injunction made by one who claims a 'property right' might be as disastrous as a final award of damages. One can easily find wisdom in this payment by Universal without finding that it paid for 'property.'

[FN9](#). 'Since in one sense everything that the taxpayer holds is 'property' * * * it would seem to follow that all income could well be 'capital gain'- for any moneys received by a taxpayer could readily be regarded as the result of the surrender by him of 'property' in the form of either tangible assets or intangible property such as claims to moneys. Hence, unless the definition is to be useless, exclusions must be found.' Surrey, *supra*.

[FN10](#). Petitioner insists that in [Thomas D. Armour, 22 T.C. 181 \(1954\)](#) we have a 'reasonably definite indication' (Pet.Br. p. 32) that the Tax Court would, under some circumstances, hold that a right of publicity is property which qualifies as a capital asset. In that case a living celebrity granted the use of his name to a golf ball manufacturer. The court did not discuss the issue of whether there was 'property,' but held that on the facts of that case there was no 'sale.' Petitioner regards this as an implied recognition of the 'property right'; but we think, to the contrary, that the absence of a 'sale' was used to avoid that very issue. Compare Runyon, Jr. v. U.S., *supra*.

Supreme Court of Georgia.
PAVESICH
v.
NEW ENGLAND LIFE INS. CO. et al.
March 3, 1905.

*68 Paolo Pavesich brought an action against the New England Mutual Life Insurance Company, a nonresident corporation, Thomas B. Lumpkin, its general agent, and J. Q. Adams, a photographer, both residing in the city of Atlanta. The allegations of the petition were, in substance, as follows: In an issue of the Atlanta Constitution, a newspaper published in the city of Atlanta, there appeared a likeness of the plaintiff, which would be easily recognized by his friends and acquaintances, placed by the side of the likeness of an ill-dressed and sickly looking person. Above the likeness of the plaintiff were the words: "Do it now. The man who did." Above the likeness of the other person were the words: "Do it while you can. The man who didn't." Below the two pictures *69 were the words: "These two pictures tell their own story." Under the plaintiff's picture the following appeared: "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day my family is protected and I am drawing an annual dividend on my paid-up policies." Under the other person's picture was a statement to the effect that he had not taken insurance, and now realized his mistake. The statements were signed, "Thomas B. Lumpkin, General Agent." The picture of the plaintiff was taken from a negative obtained by the defendant Lumpkin, or some one by him authorized, from the defendant Adams, which was used with his consent, and with knowledge of the purpose for which it was to be used. The picture was made from the negative without the plaintiff's consent, at the instance of the defendant insurance company, through its agent, Lumpkin. Plaintiff is an artist by profession, and the publication is peculiarly offensive to him. The statement attributed to plaintiff in the publication is false and malicious. He never made any such statement, and has not, and never has had, a policy of life insurance with the defendant company. The publication is malicious, and tends to bring plaintiff into ridicule before the world, and especially with his friends and acquaintances, who know that he has no policy in the defendant company. The publication is a "trespass upon plaintiff's right of privacy, and was caused by breach of confidence and trust reposed" in the defendant Adams. The prayer was for damages in the sum of \$25,000. The petition was demurred to generally, and specially on the grounds that there was a misjoinder of defendants and causes of action, that no facts were set forth from which malice can be inferred, and that no special damages were alleged. The court sustained the general demurrer, and the plaintiff excepted.

COBB, J.

1-12. The petition really contains two counts—one for a libel, and the other for a violation of the plaintiff's right of privacy. There was no special demurrer raising the objection that the counts were not properly arranged, as there was in [Cooper v. Portner Brewing Company, 112 Ga. 894, 38 S. E. 91](#); and hence the petition is to be dealt with in relation to its substance, without reference to its form.

We will first deal with the general demurrer to the second count, which claimed damages on account of an alleged violation of the plaintiff's right of privacy. The question therefore to be determined is whether an individual has a right of privacy which he can enforce, and which the courts will protect against invasion. It is to be conceded that prior to 1890 every adjudicated case, both in this country and in England, which might be said to have involved a right of privacy, was not based upon the existence of such right, but was founded upon a supposed right of property, or a breach of trust or confidence, or the like, and that therefore a claim to a right of privacy, independent of a property or contractual right, or some right of a similar nature, had, up to that time, never been recognized in terms in any decision. The entire absence for a long period of time, even for centuries, of a precedent for an asserted right should have the effect to cause the courts to proceed with caution before recognizing the right, for fear that they may thereby invade the province of the lawmaking power; but such absence, even for all time, is not conclusive of the question as to the existence of the right. The novelty of the complaint is no objection, when an injury cognizable by law is shown to have been inflicted on the plaintiff. In such a case, "although there be no precedent, the common law will judge according to the law of nature and the public good." Where the case is new in principle, the courts have no authority to give a remedy, no matter how great the grievance; but where the case is only new in instance, and the sole question is upon the application of a recognized principle to a new case, "it will be just as competent to

courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago.” Broom's Legal Maxims (8th Ed.) 193. This results from the application of the maxim, “Ubi jus ibi remedium,” which finds expression in our Code, where it is declared that “for every right there shall be a remedy, and every court having jurisdiction of the one may, if necessary, frame the other.” Civ. Code 1895, § 4929.

The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for the benefits which he receives as a member of society. But he is not presumed to surrender all those rights, and the public has no more right, without his consent, to invade the domain of those rights which it is necessarily to be presumed he has reserved, than he has to violate the valid regulations of the organized government under which he lives. The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private, and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which *70 are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. This idea is embraced in the Roman's conception of justice, which “was not simply the external legality of acts, but the accord of external acts with the precepts of the law, prompted by internal impulse and free volition.” McKeldey's Roman Law (Dropsie) § 123. It may be said to arise out of those laws sometimes characterized as “immutable,” “because they are natural, and so just at all times and in all places that no authority can either change or abolish them.” 1 Domat's Civil Law by Strahan (Cushing's Ed.) p. 49. It is one of those rights referred to by some law writers as “absolute”DD-‘FF’such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it.” 1 Bl. 123. Among the absolute rights referred to by the commentator just cited is the right of personal security and the right of personal liberty. In the first is embraced a person's right to a “legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation”; and in the second is embraced “the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law.” 1 Bl. 129, 134.

While neither Sir William Blackstone nor any of the other writers on the principles of the common law have referred in terms to the right of privacy, the illustrations given by them as to what would be a violation of the absolute rights of individuals are not to be taken as exhaustive, but the language should be allowed to include any instance of a violation of such rights which is clearly within the true meaning and intent of the words used to declare the principle. When the law guaranties to one the right to the enjoyment of his life, it gives to him something more than the mere right to breathe and exist. While, of course, the most flagrant violation of this right would be deprivation of life, yet life itself may be spared, and the enjoyment of life entirely destroyed. An individual has a right to enjoy life in any way that may be most agreeable and pleasant to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor, or violate public law or policy. The right of personal security is not fully accorded by allowing an individual to go through life in possession of all of his members, and his body unmarred; nor is his right to personal liberty fully accorded by merely allowing him to remain out of jail, or free from other physical restraints. The liberty which he derives from natural law, and which is recognized by municipal law, embraces far more than freedom from physical restraint. The term “liberty” is not to be so dwarfed, “but is deemed to embrace the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. ‘Liberty,’ in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.” See Brannon on Fourteenth Amendment, 111. Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters, and of publicity as to others. One may wish to live a life of toil, where his work is of a nature that keeps him constantly before the public gaze, while another may wish to live a life of research and contemplation, only moving before the public at such times and under such circumstances as may be necessary to his actual existence. Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him this liberty. See, in this connection, Cyc. Law Dict. (Shumaker & Longsdorff), and Bouvier's Law Dict., tit. “Liberty.” All will admit that the individual who desires to live a life of seclusion cannot be compelled, against his consent, to exhibit his person

in any public place, unless such exhibition is demanded by the law of the land. He may be required to come from his place of seclusion to perform public duties—to serve as a juror and to testify as a witness, and the like; but, when the public duty is once performed, if he exercises his liberty to go again into seclusion, no one can deny him the right. One who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze. Subject to the limitation above referred to, the body of a person cannot be put on exhibition at any time or at any place without his consent. The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also embraced within the right of personal liberty. Publicity in one instance, and privacy in the other, are each guaranteed. If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy, and this is no new idea in Georgia law. In [Wallace v. Railway Company, 94 Ga. 732, 22 S. E. 579](#), it was said: “Liberty of speech and of writing is secured by the Constitution, *71 and incident thereto is the correlative liberty of silence, not less important nor less sacred.” The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this state both by the Constitutions of the United States and of the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law.

While, in reaching the conclusion just stated, we have been deprived of the benefit of the light that would be shed on the question by decided cases and utterances of law writers directly dealing with the matter, we have been aided by many side lights in the law. The “injuria” of the Roman law, sometimes translated “injury,” and at other times “outrage,” and which is generally understood at this time to convey the idea of legal wrong, was held to embrace many acts resulting in damage for which the law would give redress. It embraced all of those wrongs which were the result of a direct invasion of the rights of the person and the rights of property which are enumerated in all of the commentaries on the common law, and which are so familiar to every one at this time. But it included more. An outrage was committed not only by striking with the fists or with the club or lash, but also by shouting until a crowd gathered around one, and it was an outrage or legal wrong to merely follow an honest woman or young boy or girl; and it was declared in unequivocal terms that these illustrations were not exhaustive, but that an injury or legal wrong was committed “by numberless other acts.” Sandar’s Just. (Hammond’s Ed.) 499; Poste’s Inst. of Gaius (3d Ed.) 449. The punishment of one who had not committed any assault upon another, or impeded in any way his right of locomotion, but who merely attracted public attention to the other as he was passing along a public highway or standing upon his private grounds, evidences the fact that the ancient law recognized that a person had a legal right “to be let alone,” so long as he was not interfering with the rights of other individuals or of the public. This idea has been carried into the common law, and appears from time to time in various places; a conspicuous instance being in the case of private nuisances resulting from noise which interferes with one’s enjoyment of his home, and this, too, where the noise is the result of the carrying on of a lawful occupation. Even in such cases where the noise is unnecessary, or is made at such times that one would have a right to quiet, the courts have interfered by injunction in behalf of the person complaining. See 2 Wood on Nuisances (3d Ed.) p. 827 et seq. It is true that these cases are generally based upon the ground that the noise is an invasion of a property right, but there is really no injury to the property, and the gist of the wrong is that the individual is disturbed in his right to have quiet. Under the Roman law, “to enter a man’s house against his will, even to serve a summons, was regarded as an invasion of his privacy.” Hunter’s Roman Law (3d Ed.) p. 149. This conception is the foundation of the common-law maxim that “every man’s house is his castle”; and in *Semayne’s Case*, 5 Coke, 91, 1 Smith’s Lead. Cas. 228, where this maxim was applied, one of the points resolved was “that the house of every one is to him as his castle and fortress, as well for his defense against injury and violence as for his repose.” “Eavesdroppers, or such as listen under walls or windows or the eaves of a house to hearken after discourse, and thereupon to frame slanderous and mischievous tales,” were a nuisance at common law, and indictable, and were required, in the discretion of the court, to find sureties for their good behavior. 4 Bl. 168. The offense consisted in lingering about dwelling houses and other places where persons meet for private intercourse, and listening to what is said, and then tattling it abroad. 10 Am. & Eng. Enc. L. (2d Ed.) 440. A common scold was at common law indictable as a public nuisance to her neighborhood. 4 Bl. 168. And the reason for the punishment of such a character was not the protection of any property right of her neighbors, but the fact that her conduct was a disturbance of their right to quiet and repose; the offense being complete even when the party indicted committed it upon her own premises. Instances might be multiplied where the common law has both tacitly and expressly recognized the right of an individual to repose and privacy. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, which is so fully protected both in the Constitutions of the United States and of this state (Civ. Code 1895, §§ 6017, 5713), is not a right created by these instruments, but is an ancient right, which, on account of its gross violation at different times,

was preserved from such attacks in the future by being made the subject of constitutional provisions. The right to search the papers or houses of another for the purpose of enforcing a claim of one individual against another in a civil proceeding, or in the maintenance of a mere private right, was never recognized at common law, but such search was confined entirely to cases of public prosecutions; and even in those cases the legality of the search was formerly doubted, and it has been said that it crept into the law by imperceptible practice. 25 Am. & Eng. Enc. L. (2d Ed.) 145. The refusal to allow such search as an aid to the assertion of a mere private right, and its allowance sparingly to aid in maintaining the rights of the public, is an implied recognition of the existence of a right of privacy, for the law on the subject of unreasonable searches cannot be based upon any other principle than the right of a person*72 to be secure from invasion by the public into matters of a private nature, which can only be properly termed his right of privacy.

The right of privacy, however, like every other right that rests in the individual, may be waived by him, or by any one authorized by him, or by any one whom the law empowers to act in his behalf, provided the effect of his waiver will not be such as to bring before the public those matters of a purely private nature which express law or public policy demands shall be kept private. This waiver may be either express or implied, but the existence of the waiver carries with it the right to an invasion of privacy only to such an extent as may be legitimately necessary and proper in dealing with the matter which has brought about the waiver. It may be waived for one purpose, and still asserted for another; it may be waived in behalf of one class, and retained as against another class; it may be waived as to one individual, and retained as against all other persons. The most striking illustration of a waiver is where one either seeks or allows himself to be presented as a candidate for public office. He thereby waives any right to restrain or impede the public in any proper investigation into the conduct of his private life which may throw light upon his qualifications for the office, or the advisability of imposing upon him the public trust which the office carries. But even in this case the waiver does not extend into those matters and transactions of private life which are wholly foreign, and can throw no light whatever upon the question as to his competency for the office, or the propriety of bestowing it upon him. One who holds public office makes a waiver of a similar character-that is, that his life may be subjected at all times to the closest scrutiny in order to determine whether the rights of the public are safe in his hands-but beyond this the waiver does not extend. So it is in reference to those belonging to the learned professions, who by their calling place themselves before the public, and thereby consent that their private lives may be scrutinized for the purpose of determining whether it is to the interest of those whose patronage they seek to place their interests in their hands. In short, any person who engages in any pursuit or occupation or calling which calls for the approval or patronage of the public submits his private life to examination by those to whom he addresses his call, to any extent that may be necessary to determine whether it is wise and proper and expedient to accord to him the approval or patronage which he seeks.

It may be said that to establish a liberty of privacy would involve in numerous cases the perplexing question to determine where this liberty ended, and the rights of others and of the public began. This affords no reason for not recognizing the liberty of privacy, and giving to the person aggrieved legal redress against the wrongdoer, in a case where it is clearly shown that a legal wrong has been done. It may be that there will arise many cases which lie near the border line which marks the right of privacy, on the one hand, and the right of another individual or of the public, on the other. But this is true in regard to numerous other rights which the law recognizes as resting in the individual. In regard to cases that may arise under the right of privacy, as in cases that arise under other rights where the line of demarkation is to be determined, the safeguard of the individual, on the one hand, and of the public, on the other, is the wisdom and integrity of the judiciary. Each person has a liberty of privacy, and every other person has, as against him, liberty in reference to other matters, and the line where these liberties impinge upon each other may in a given case be hard to define; but that such a case may arise can afford no more reason for denying to one his liberty of privacy than it would to deny to another his liberty, whatever it may be. In every action for a tort it is necessary for the court to determine whether the right claimed has a legal existence, and for the jury to determine whether such right has been invaded, and to assess the damages if their finding is in favor of the plaintiff. This burden which rests upon the court in every case of the character referred to is all that will be imposed upon it in actions brought for a violation of the right of privacy. No greater difficulties will be encountered in such cases in determining the existence of the right than often will be encountered in determining the existence of other rights sought to be enforced by action. The courts may proceed in cases involving the violation of a right of privacy as in other cases of a similar nature, and the juries may in the same manner proceed to a determination of those questions which the law requires to be submitted for their consideration. With honest and fearless trial judges to pass in the first instance upon the question of law as to the existence of the right in each case, whose decisions are subject to

review by the court of last resort, and with fair and impartial juries to pass upon the questions of fact involved, and assess the damages in the event of a recovery, whose verdict is, under our law, in all cases subject to supervision and scrutiny by the trial judge, within the limits of a legal discretion, there need be no more fear that the right of privacy will be the occasion of unjustifiable litigation, oppression, or wrong than that the existence of many other rights in the law would bring about such results.

The liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition. But it must be kept within its proper limits, and in its exercise must be made to accord with the rights of those who have other liberties, as well as the rights of any person who may be properly interested*73 in the matters which are claimed to be of purely private concern. Publicity in many cases is absolutely essential to the welfare of the public. Privacy in other matters is not only essential to the welfare of the individual, but also to the well-being of society. The law stamping the unbreakable seal of privacy upon communications between husband and wife, attorney and client, and similar provisions of the law, is a recognition not only of the right of privacy, but that, for the public good, some matters of private concern are not to be made public, even with the consent of those interested.

It therefore follows from what has been said that a violation of the right of privacy is a direct invasion of a legal right of the individual. It is a tort, and it is not necessary that special damages should have accrued from its violation in order to entitle the aggrieved party to recover. Civ. Code 1895, § 3807. In an action for an invasion of such right the damages to be recovered are those for which the law authorizes a recovery in torts of that character, and, if the law authorizes a recovery of damages for wounded feelings in other torts of a similar nature, such damages would be recoverable in an action for a violation of this right.

The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy has been that the recognition of such right would inevitably tend to curtail the liberty of speech and of the press. The right to speak and the right of privacy have been coexistent. Each is a natural right, each exists, and each must be recognized and enforced with due respect for the other. The right to convey one's thoughts by writing or printing grows out of, but does not enlarge in any way, the natural right of speech. It simply authorizes one to take advantage of those mediums of expression which the ingenuity of man has contrived for broadening and making more effective the influences of that which was formerly confined to mere oral utterances. The right to speak and write and print has been at different times in the world's history seriously invaded by those who, for their own selfish purposes, desired to take away from others such privileges, and consequently these rights have been made the subject of provisions in the Constitutions of the United States and of this state. The Constitution of the United States prohibits Congress from passing any law "abridging the freedom of speech or of the press." Civ. Code 1895, § 6014. The constitution of this state declares, "No law shall ever be passed to curtail or restrain the liberty of speech or of the press." Civ. Code 1895, § 5712. Judge Cooley says: "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or, to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted." Cool. Con. Lim. (5th Ed.) p. 521. In *Rex v. St. Asaph*, 3 Term Rep. 428, Lord Mansfield said: "The liberty of the press consists in printing without any previous license, subject to the consequence of law." [Chancellor Kent, while Judge of the Supreme Court of New York, in *People v. Crosswell*, 3 Johns. Cas. 336, 394](#), adopted as a definition of the phrase "liberty of the press" what was said by Gen. Hamilton in his brief in that case, where it was set forth that "the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals"; and the learned jurist declared that this definition was perfectly correct, comprehensive, and accurate. Mr. Justice Story defined the phrase to mean "that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so, always, that he does not injure any other person in his rights, person, property, or reputation, and so, always, that he does not thereby disturb the public peace or attempt to subvert the government." Story, Const. § 1880. See, also, 18 Am. & Eng. Enc. Law (2d Ed.) 1125.

The Constitution of this state declares what is meant by "liberty of speech" and "liberty of the press" in the following words: "Any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Civ. Code 1895, § 5712. The right preserved and guaranteed against invasion by the Constitution is therefore the right to utter, to write, and to print one's sentiments, subject only to the limitation that in so doing he shall not be guilty of an abuse of this privilege, by invading the legal rights of others. The Constitution uses the word "sentiments," but it is used in the sense of thoughts, ideas, opinions. To make intelligent, forceful, and effective an expression of opinion, it may be necessary to refer to the life, conduct, and character of a person; and, so long as the truth is adhered to, the right of privacy of another cannot be said to have been invaded by one who speaks or writes or prints, provided the reference to such person, and the manner in which he is referred to, is reasonably*74 and legitimately proper in an expression of opinion on the subject that is under investigation. It will therefore be seen that the right of privacy must in some particulars yield to the right of speech and of the press. It is well recognized that slander is an abuse of the liberty of speech, and that a libel is an abuse of the liberty to write and print, but it is nowhere expressly declared in the law that these are the only abuses of such rights. And that the law makes the truth in suits for slander and in prosecutions and suits for libel a complete defense may not necessarily make the publication of the truth the legal right of every person, nor prevent it from being in some cases a legal wrong. The truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest. The truth may be uttered and printed in reference to the life, character, and conduct of individuals whenever it is necessary to the full exercise of the right to express one's sentiments on any and all subjects that may be proper matter for discussion. But there may arise cases where the speaking or printing of the truth might be considered an abuse of the liberty of speech and of the press, as in a case where matters of purely private concern, wholly foreign to a legitimate expression of opinion on the subject under discussion, are injected into the discussion for no other purpose and with no other motive than to annoy and harass the individual referred to. Such cases might be of rare occurrence, but, if such should arise, the party aggrieved may not be without a remedy. The right of privacy is unquestionably limited by the right to speak and print. It may be said that to give liberty of speech and of the press such wide scope as has been indicated would impose a very serious limitation upon the right of privacy, but, if it does, it is due to the fact that the law considers that the welfare of the public is better subserved by maintaining the liberty of speech and of the press than by allowing an individual to assert his right of privacy in such a way as to interfere with the free expression of one's sentiments, and the publication of every matter in which the public may be legitimately interested. In many cases the law required the individual to surrender some of his natural and private rights for the benefit of the public, and this is true in reference to some phases of the right of privacy as well as other legal rights. Those to whom the right to speak and write and print is guaranteed must not abuse this right, nor must one in whom the right of privacy exists abuse this right. The law will no more permit an abuse by the one than by the other. Liberty of speech and of the press is and has been a useful instrument to keep the individual within limits of lawful, decent, and proper conduct; and the right of privacy may be well used within its proper limits to keep those who speak and write and print within the legitimate bounds of the constitutional guarantees of such rights. One may be used as a check upon the other, but neither can be lawfully used for the other's destruction.

There is nothing in the ruling made in the present case to conflict with the decision in [Chapman v. Telegraph Company](#), 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183. It was held in that case that in an action against a telegraph company for a failure to deliver a message in due time, and thereby preventing the sender from going to bedside of his sick brother, damages on account of mental pain and suffering could not be recovered. The effect of that decision is simply that in an action upon a contract, or in an action sounding in tort for a breach of duty growing out of the contract, damages for mental pain and suffering cannot be recovered, when no other damages have been sustained. Mr. Justice Lumpkin, in his opinion, distinctly recognizes that where there has been an invasion of a right, from which the law would presume damages to flow, additional damages for pain and suffering might be recovered.

It seems that the first case in this country where the right of privacy was invoked as the foundation for an application to the courts for relief was the unreported case of *Manola v. Stevens*, which was an application for injunction to the Supreme Court of New York, filed on June 15, 1890. The complainant alleged that while she was playing in the Broadway Theatre, dressed as required by her role, she was, by means of a flash light, photographed surreptitiously and without her consent, from one of the boxes, by the defendant, and she prayed that an injunction issue to restrain the use of the photograph. An interlocutory injunction was granted ex parte. At the time set for a hearing there was no appearance for the defendant, and the injunction was made permanent. See 4 Harv. Law Rev. 195, note 7. The

article in this magazine which refers to the case above mentioned appeared in 1890, and was written by Samuel D. Warren and Louis D. Brandeis. In it the authors ably and forcefully maintained the existence of a right of privacy, and the article attracted much attention at the time. It was conceded by the authors that there was no decided case in which the right of privacy was distinctly asserted and recognized, but it was asserted that there were many cases from which it would appear that this right really existed, although the judgment in each case was put upon other grounds when the plaintiff was granted the relief prayed. The cases especially referred to were *Yovatt v. Wingard*, 1 J. & W. 394 (1820); *Abernethy v. Hutchinson*, 3 L. J. Ch. 209 (1825); *Prince Albert v. Strange*, 2 De Gex & Sm. 652 (1849); *Tuck v. Priester*, 19 Q. B. D. 639 (1887); *Pollard v. *75 Phot. Co.*, 40 Ch. Div. 345 (1888). The first three of these cases related respectively to the publication of recipes, writings, and etchings, which the complainant in each case alleged were either published or about to be published without his consent; and an injunction was granted in the first case upon the ground that the publication of the recipes was the result of breach of trust and confidence, and in the other two cases upon this ground as well as upon the ground that the complainant had a property right in the writings and etchings. The Tuck and Pollard Cases dealt with the publication of pictures; the former being where one was employed to make copies of a picture owned by the plaintiff, and the latter where a photographer was employed to take a photograph of the complainant; the defendant in each instance being about to use the copies in his possession without the consent of the plaintiff. An injunction was granted in the Tuck Case on the ground that the sale of the copies would be a breach of contract, and in the Pollard Case the decision was rested upon the right of property, although a finding that the publication would be a breach of contract and of trust was authorized. Attention is called to the fact that in Prince Albert's Case, while the decision was put upon the ground above stated, Lord Cottenham declared that, with respect to the acts of the defendants, "privacy is the right invaded."

It must be conceded that the numerous cases decided before 1890 in which equity has interfered to restrain the publication of letters, writings, papers, etc., have all been based either upon the recognition of a right of property, or upon the fact that the publication would be a breach of contract, confidence, or trust. It is well settled that, if any contract or property right or trust relation has been violated, damages are recoverable. There are many cases which sustain such a doctrine. Cases involving the right of privacy that have arisen since 1890 will now be considered:

In [Mackenzie v. Mineral Springs Company \(1891\) 18 N. Y. Supp. 240](#), an injunction was granted by the New York Supreme Court, Special Term, at the instance of a physician, to restrain the publication of an unauthorized recommendation of a medicinal preparation under his name, upon the grounds that such publication would be injurious to his professional reputation, and "an infringement of his right to the sole use of his own name," and prejudicial to public interest. While this case was not based upon the right of privacy, that right was impliedly recognized.

The first reported case in which the right of privacy was expressly recognized was the case of [Schuyler v. Curtis \(Sup. 1892\) 15 N. Y. Supp. 787](#), where Justice O'Brien, of the Supreme Court of New York, granted an injunction to restrain the making and public exhibition of a statue of a deceased person, upon the ground that it was not shown that she was a public character. This judgment was affirmed by the Supreme Court, General Term, by Van Brunt and Barrett, JJ., in an opinion by the former, in which the rule was laid down that a person, whether a public character or not, has a right to enjoin the making and placing on exhibition of his statue, and, he being dead, a relative has this right. [19 N. Y. Supp. 264](#). When the case came before the Supreme Court, Special Term, in 1893, the judgment of the General Term was followed, and in an opinion by Ingraham, J., the rule was announced that a court of equity, at the instance of one of the relatives of a deceased person, will enjoin the making and placing on public exhibition of a statue of the deceased by unauthorized persons, which the complaining relatives unite in alleging will cause them pain and distress, and will be considered by them a disgrace; and this, too, whether or not the court be of the opinion that the proposed representation should produce the alleged effect, and that such unauthorized act is not within the provision of the state Constitution which secures to each person the right to freely speak, write, and publish his sentiments on all subjects. [24 N. Y. Supp. 509](#). The statue which it was proposed to exhibit was in no sense a caricature, and the exhibition of the same would not have been a libel upon the deceased.

In 1893, in [Marks v. Jaffa, 26 N. Y. Supp. 908, 6 Misc. Rep. 290](#), an injunction was granted by the superior court of New York City, Special Term, to restrain the publication of a picture of the plaintiff in the defendant's newspaper, with an invitation to the readers of the paper to vote on the question of the popularity of the plaintiff, as compared with another person, whose picture was also published in such newspaper. McAdam, J., in the opinion said: "No

newspaper or institution, no matter how worthy, has the right to use the name or picture of any one for such a purpose without his consent.” The decision was apparently based upon the case of Schuyler v. Curtis, above referred to.

In 1893 an application was made to Judge Colt, of the United States Circuit Court for the District of Massachusetts, by the widow and children of George H. Corliss, to enjoin the publication and sale of a biographical sketch of Mr. Corliss, and from printing and selling his picture in connection therewith. The bill did not allege that the publication contained any matter which was scandalous, libelous, or false, or that it affected any right of property, but the relief was prayed upon the ground that the publication was an injury to the feelings of the plaintiffs, and against their express prohibition. An injunction was refused as to the biography on the ground that Mr. Corliss was a public man, in the same sense as authors or artists are public men; but an injunction was granted as to *76 the publication of the picture upon the ground that the publisher had obtained a copy of the photograph upon certain conditions, and the publication would be a violation of those conditions. Subsequently a motion was made to dissolve the injunction on the ground that the photograph from which the copies were made was not obtained in the manner above referred to, but from a copy which was obtained in a lawful way; and the injunction was dissolved upon the ground that neither a public character, nor his family after his death, has a right to enjoin the publication of his portrait, when the publication would not be a violation of a contract or a breach of trust or confidence. Judge Colt, in the opinion, uses this language: “Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form, that this is a property as well as a personal right, and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk.” [Corliss v. Walker \(C. C.\) 57 Fed. 434; Id., 64 Fed. 280, 31 L. R. A. 283.](#) It is to be noted that the ruling in this case goes no further than that a public character has so waived his right of privacy, if he ever had it, as to authorize the publication of his life and his picture, not only without his consent, but also without the consent of his family after his death, when there is nothing in the biography or the picture which will reflect discredit upon the subject.

In 1894, in [Murray v. Lithographic Company, 28 N. Y. Supp. 271](#)-a case decided by the court of common pleas of New York city and county-it was held that a person cannot sue to enjoin the publication of a portrait of his infant child, or for damages caused thereby. This decision was undoubtedly correct, for, if there was any right to sue for a violation of the right of privacy, the cause of action was in the child, and not in the parent.

In 1895 the case of [Schuyler v. Curtis reached the Court of Appeals of New York, and the judgment of the lower court was reversed. 147 N. Y. 436, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671.](#) It was held that if any right of privacy, in so far as it includes the right to prevent the public from making pictures or statues commemorative of the worth and services of the subject, exists at all, it does not survive after death, and cannot be enforced by the relatives of the deceased. The opinion was delivered by Judge Peckham, in the course of which he uses this language: “If the defendants had projected such a work in the lifetime of Mrs. Schuyler, it would perhaps have been a violation of her individual right of privacy, because it might be contended that she had never occupied such a position towards the public as would have authorized such action by any one so long as it was in opposition to her wishes.” Judge Gray dissented, saying in his opinion: “I cannot see why the right of privacy is not a form of property, as much as is the right of complete immunity of one's person.” This case settles nothing as to the existence of a right of privacy, but merely rules that, if it exists at all, it is a personal right, and dies with the person.

In [Atkinson v. Doherty, 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507](#)-a case decided in 1899-the Supreme Court of Michigan held that the use of the name and likeness of a deceased person as a label for a brand of cigars cannot be restrained by injunction, so long as they do not constitute a libel. Many, if not all, the cases above referred to, in reference to the right of privacy, are mentioned and reviewed in this case. While this decision apparently lays down the broad proposition that the right of privacy does not exist to such an extent as to prohibit one from publishing the picture of another without his consent, in reality the only question necessary to have been decided was whether this right of privacy was personal, and died with the person; and therefore the decision, on its facts, is authoritative no further than the decision of the New York Court of Appeals in Schuyler v. Curtis. While the right of privacy is personal, and may die with the person, we do not desire to be understood as assenting to the proposition that the relatives of the deceased cannot, in a proper case, protect the memory of their kinsman, not only from defamation, but also from an invasion into the affairs of his private life after his death. This question is not now

involved, but we do not wish anything said to be understood as committing us in any way to the doctrine that, against the consent of relatives, the private affairs of a deceased person may be published, and his picture or statue exhibited. We call attention to the ruling in [Jacobus v. Children of Israel](#), 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141, that damages may be recovered by the relative of a deceased person, who is the owner of an easement of burial in a cemetery lot, for the disinterment of the dead body, and that if the injury has been wanton and malicious, or the result of gross negligence and a reckless disregard of the rights of others, exemplary damages may be awarded, in estimating which the injury to the natural feelings of the plaintiff may be taken into consideration. If damages for wounded feelings can be recovered in such a case for the wanton removal of the bleaching bones of the deceased relative, it would seem, for a stronger reason, that such damages ought to be allowed to be recovered when those matters which the deceased had jealously guarded from the public during his lifetime, and his portrait, which was likewise⁷⁷ protected from the public gaze, are made public property after his death.

In [Roberson v. Rochester Folding Box Company \(1901\)](#) 64 App. Div. 30, 71 N. Y. Supp. 876, decided by the Appellate Division of the Supreme Court of New York, it appeared that lithographic likenesses of a young woman, bearing the words "Flour of the Family," were, without her consent, printed and used by a flour milling company to advertise its goods. The declaration alleged that in consequence of the circulation of such lithographs the plaintiff's good name had been attacked, and she had been greatly humiliated and made sick, and been obliged to employ a physician, and prayed for an injunction against the further use of the lithographs and for damages. It was held that the declaration was not demurrable. It was also held that, if a right of property was necessary to entitle the plaintiff to maintain the action, the case might stand upon the right of property which every one has in his own body. This case came before the Court of Appeals of New York in 1902, and the judgment was reversed. [171 N. Y. 540](#), [64 N. E. 442](#), [59 L. R. A. 478](#), [89 Am. St. Rep. 828](#). This is the first and only decision by a court of last resort involving the existence of a right of privacy. The decision was by a divided court; Chief Judge Parker and three of the Associate Judges concurring in a ruling that the complaint set forth no cause of action either at law or in equity, while Judge Gray, with whom concurred two of the Associate Judges, filed a dissenting opinion, in which it was maintained that the injunction should have been granted. While the ruling of the majority is limited in its effect to the unwarranted publication of the picture of another for advertising purposes, the reasoning of Judge Parker goes to the extent of denying the existence in the law of a right of privacy, "founded upon the claim that a man has a right to pass through this world without having his picture published, his business enterprises discussed, or his eccentricities commented upon, whether the comment be favorable or otherwise." The reasoning of the majority is, in substance, that there is no decided case either in England or in this country in which such a right is distinctly recognized; that every case that might be relied on to establish the right was placed expressly upon other grounds, not involving the application of this right in any sense; that the right is not referred to by the commentators and writers upon the common law or the principles of equity; that the existence of the right is not to be legitimately inferred from anything that is said by any of such writers, and that a recognition of the existence of the right would bring about a vast amount of litigation; and that in many instances where the right would be asserted it would be difficult, if not impossible, to determine the line of demarkation between the plaintiff's right of privacy and the well-established rights of others and of the public. For these reasons the conclusion is reached that the right does not exist, has never existed, and cannot be enforced as a legal right. We have no fault to find with what is said by the distinguished and learned judge who voiced the views of the majority as to the existence of decided cases, and agree with him in his analysis of the various cases which he reviews—that the judgment in each was based upon other grounds than the existence of a right of privacy. We also agree with him so far as he asserts that the writers upon the common law and the principles of equity do not in express terms refer to this right. But we are utterly at variance with him in his conclusion that the existence of this right cannot be legitimately inferred from what has been said by commentators upon the legal rights of individuals, and from expressions which have fallen from judges in their reasoning in cases where the exercise of the right was not directly involved. So far as the judgment in the case is based upon the argument *ab inconvenienti*, all that is necessary to be said is that this argument has no place in the case if the right invoked has an existence in the law. But if it were proper to use this argument at all, it could be said with great force that as to certain matters the individual feels and knows that he has a right to exercise the liberty of privacy, and that he has a right to resent any invasion of this liberty, and, if the law will not protect him against invasion, the individual will, to protect himself and those to whom he owes protection, use those weapons with which nature has provided him, as well as those which the ingenuity of man has placed within his reach. Thus the peace and good order of society would be disturbed by each individual becoming a law unto himself to determine when and under what circumstances he should avenge the outrage which has been perpetrated upon him or a member of his family. The true lawyer, when called to the discharge of judicial functions, has in all times, as a general rule, displayed remarkable conservatism; and, wherever it was legally possible to base a judgment upon principles which had been

recognized by a long course of judicial decision, this has been done, in preference to applying a principle which might be considered novel. It was for this reason that the numerous cases both in England and in this country which really protected the right of privacy were not placed upon the existence of this right, but were allowed to rest upon principles derived from the law of property, trust, and contract. Any candid mind will, however, be compelled to concede that, in order to give relief in many of those cases, it required a severe strain to bring them within the recognized rules which were sought to be applied. The desire to avoid the novelty of recognizing a principle which *78 had not been theretofore recognized was avoided in such cases by the novelty of straining a well-recognized principle to cover a state of facts to which it had never before been applied. This conservatism of the judiciary has sometimes unconsciously led judges to the conclusion that, because the case was novel, the right claimed did not exist. With all due respect to Chief Judge Parker and his associates who concurred with him, we think the conclusion reached by them was the result of an unconscious yielding to the feeling of conservatism which naturally arises in the mind of a judge who faces a proposition which is novel. The valuable influence upon society and upon the welfare of the public of the conservatism of the lawyer, whether at the bar or upon the bench, cannot be overestimated; but this conservatism should not go to the extent of refusing to recognize a right which the instincts of nature prove to exist, and which nothing in judicial decision, legal history, or writings upon the law can be called to demonstrate its nonexistence as a legal right.

We think that what should have been a proper judgment in the Roberson Case was that contended for by Judge Gray in his dissenting opinion, from which we quote as follows:

“The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone. Cooley, Torts, p. 29. The principle is fundamental and essential in organized society that every one, in exercising a personal right and in the use of his property, shall respect the rights and properties of others. He must so conduct himself, in the enjoyment of the rights and privileges which belong to him as a member of society, as that he shall prejudice no one in the possession and enjoyment of those which are exclusively his. When, as here, there is an alleged invasion of some personal right or privilege, the absence of exact precedent, and the fact that early commentators upon the common law have no discussion upon the subject, are of no material importance in awarding equitable relief. That the exercise of the preventive power of a court of equity is demanded in a novel case is not a fatal objection.”

“As I have suggested, that the exercise of this peculiar preventive power of a court of equity is not found in some precisely analogous case furnishes no valid objection at all to the assumption of jurisdiction, if the particular circumstances of the case show the performance or the threatened performance of an act by a defendant which is wrongful, because constituting an invasion, in some novel form, of a right to something which is or should be conceded to be the plaintiff's, and as to which the law provides no adequate remedy. It would be a justifiable exercise of power, whether the principle of interference be rested upon analogy to some established common-law principle, or whether it is one of natural justice.”

“Instantaneous photography is a modern invention, and affords the means of securing a portraiture of an individual's face and form in invitum their owner. While, so far forth as it merely does that, although a species of aggression, I concede it to be an irremediable and irrepressible feature of the social evolution. But if it is to be permitted that the portraiture may be put to commercial or other uses for gain, by the publication of prints therefrom, then an act of invasion of the individual's privacy results, possibly more formidable and more painful in its consequences than an actual bodily assault might be. Security of person is as necessary as the security of property, and for that complete personal security which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain. The proposition is to me an inconceivable one that these defendants may unauthorizedly use the likeness of this young woman upon their advertisement as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity. Such a view, as it seems to me, must have been unduly influenced by a failure to find precedents in analogous cases, or some declaration by the great commentators upon the law of a common-law principle which would precisely apply to and govern the action, without taking into consideration that, in the existing state of society, new conditions affecting the

relations of persons demand the broader extension of those legal principles which underlie the immunity of one's person from attack. I think that such a view is unduly restricted, too, by a search for some property which has been invaded by the defendants' acts. Property is not necessarily the thing itself which is owned. It is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and, as such, entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it, and so it is called forth for the protection of the right to that which is one's exclusive possession, as a property right. It seems to me that the principle *79 which is applicable is analogous to that upon which courts of equity have interfered to protect the right of privacy in cases of private writings, or of other unpublished products of the mind."

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

"The right to grant the injunction does not depend upon the existence of property which one has in some contractual form. It depends upon the existence of property in any right which belongs to a person."

"It would be, in my opinion, an extraordinary view, which, while conceding the right of a person to be protected against the unauthorized circulation of an unpublished lecture, letter, drawing, or other ideal property, yet would deny the same protection to a person whose portrait was unauthorizedly obtained and made use of for commercial purposes. The injury to the plaintiff is irreparable, because she cannot be wholly compensated in damages for the various consequences entailed by the defendants' acts. The only complete relief is an injunction restraining their continuance. Whether, as incidental to that equitable relief, she should be able to recover only nominal damages, is not material, for the issuance of the injunction does not, in such a case, depend upon the amount of the damages, in dollars and cents."

The effect of the reasoning of the learned judge whose words have just been quoted is to establish conclusively the correctness of the conclusion which we have reached, and we prefer to adopt as our own his reasoning, in his own words, rather than to paraphrase them into our own.

The decision of the Court of Appeals of New York in the Roberson Case gave rise to numerous articles in the different law magazines of high standing in the country—some by the editors and others by contributors. In some the conclusion of the majority of the court was approved, in others the views of the dissenting judges were commended, and in still others the case and similar cases were referred to as apparently establishing that the claim of the majority was correct, but regret was expressed that the necessity was such that the courts could not recognize the right asserted. An editorial in the American Law Review (volume 36, p. 636) said: "The decision under review shocks and wounds the ordinary sense of justice of mankind. We have heard it alluded to only in terms of regret." There were also articles referring to other cases cited which deal with the question as to the existence of a right of privacy. See 36 Am. Law Rev. 614, 634; 34 Am. Law Reg. (N. S.) 134; [41 Id. 669](#); 1 Col. Law Rev. 491; [2 Id. 437](#); 44 Alb. Law J. 428; 55 Cent. L. J. 123; [57 Id. 361](#). See, also, North American Review (September, 1902) 361; 22 Am. & Eng. Enc. Law (2d Ed.) 1311; note to [Roberson v. Box Co. \(N. Y.\) 89 Am. St. Rep. 844](#); note to [Corliss v. Walker \(Mass.\) 31 L. R. A. 283](#). Articles on the subject of the right of privacy have also appeared in 12 Yale L. J. 35, 24 Nat. Corp. Rep. 709, 25 Nat. Corp. Rep. 183, 415, 6 Law Notes, 79, and Case and Comment, 36 Chicago L. N. 126 (July, 1902); but these articles were not accessible to us at the time this opinion was written.

As we have already said, cases may arise where it is difficult to determine on which side of the line of demarkation which separates the right of privacy from the well-established rights of others they are to be found; but we have little difficulty in arriving at the conclusion that the present case is one in which it has been established that the right of privacy has been invaded, and invaded by one who cannot claim exemption under the constitutional guaranties of freedom of speech and of the press. The form and features of the plaintiff are his own. The defendant insurance company and its agent had no more authority to display them in public for the purpose of advertising the business in which they were engaged than they would have had to compel the plaintiff to place himself upon exhibition for this

purpose. The latter procedure would have been unauthorized and unjustifiable, as every one will admit, and the former was equally an invasion of the rights of his person. Nothing appears from which it is to be inferred that the plaintiff has waived his right to determine himself where his picture should be displayed in favor of the advertising right of the defendants. The mere fact that he is an artist does not of itself establish a waiver of this right, so that his picture might be used for advertising purposes. If he displayed in public his works as an artist, he would, of course, subject his works and his character as an artist, and possibly his character and conduct as a man, to such scrutiny and criticism as would be legitimate and proper to determine whether he was entitled to rank as an artist, and should be accorded recognition as such by the public. But it is by no means clear that even this would have authorized the publication of his picture. The constitutional right to speak and print does not necessarily carry with it the right to reproduce the form and features of man. The plaintiff was in no sense a public character, even if a different rule in regard to the publication of one's picture should be applied to such characters. It is not necessary in this case to hold—nor are we prepared to do so—that the *80 mere fact that a man has become what is called a public character, either by aspiring to public office, or by holding public office, or by exercising a profession which places him before the public, or by engaging in a business which has necessarily a public nature, gives to every one the right to print and circulate his picture. To use the language of Hooker, J., in *Atkinson v. Doherty*, supra: “We are loath to believe that the man who makes himself useful to mankind surrenders any right to privacy thereby, or that, because he permits his picture to be published by one person and for one purpose, he is forever thereafter precluded from enjoying any of his rights.” It may be that the aspirant for public office, or one in official position, impliedly consents that the public may gaze not only upon him, but upon his picture, but we are not prepared now to hold that even this is true. It would seem to us that even the President of the United States, in the lofty position which he occupies, has some rights in reference to matters of this kind which he does not forfeit by aspiring to or accepting the highest office within the gift of the people of the several states. While no person who has ever held this position, and probably no person who has ever held public office, has even objected or ever will object to the reproduction of his picture in reputable newspapers, magazines, and periodicals, still it cannot be that the mere fact that a man aspires to public office or holds public office subjects him to the humiliation and mortification of having his picture displayed in places where he would never go to be gazed upon, at times when and under circumstances where if he were personally present the sensibilities of his nature would be severely shocked. If one's picture may be used by another for advertising purposes, it may be reproduced and exhibited anywhere. If it may be used in a newspaper, it may be used on a poster or a placard. It may be posted upon the walls of private dwellings or upon the streets. It may ornament the bar of the saloon keeper or decorate the walls of a brothel. By becoming a member of society, neither man nor woman can be presumed to have consented to such uses of the impression of their faces and features upon paper or upon canvas. The conclusion reached by us seems to be so thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic principles of the common law, and so thoroughly in harmony with those principles as molded under the influence of American institutions, that it seems strange to us that not only four of the judges of one of the most distinguished and learned courts of the Union, but also lawyers of learning and ability, have found an insurmountable stumbling block in the path that leads to a recognition of the right which would give to persons like the plaintiff in this case and the young woman in the *Roberson Case* redress for the legal wrong, or what is by some of the law writers called the outrage, perpetrated by the unauthorized use of their pictures for advertising purposes.

What we have ruled cannot be in any sense construed as an abridgment of the liberty of speech and of the press as guaranteed in the Constitution. Whether the reproduction of a likeness of another which is free from caricature can in any sense be declared to be an exercise of the right to publish one's sentiments, certain it is that one who merely for advertising purposes, and from mercenary motives, publishes the likeness of another without his consent, cannot be said, in so doing, to have exercised the right to publish his sentiments. The publication of a good likeness of another, accompanying a libelous article, would give a right of action. The publication of a caricature is generally, if not always, a libel. Whether the right to print a good likeness of another is an incident to a right to express one's sentiments in reference to a subject with which the person whose likeness is published is connected, is a question upon which we cannot, under the present record, make any authoritative decision; but it would seem that a holding that the publication of a likeness under such circumstances without the consent of the person whose likeness is published is allowable would be giving to the word ““sentiment” a very extended meaning. The use of a pen portrait might be allowable in some cases where the use of an actual portrait was not permissible. There is in the publication of one's picture for advertising purposes not the slightest semblance of an expression of an idea, a thought, or an opinion, within the meaning of the constitutional provision which guarantees to a person the right to publish his sentiments on any subject. Such conduct is not embraced within the liberty to print, but is a serious invasion of one's right of privacy, and may in many cases, according to the circumstances of the publication and the uses to which it is

put, cause damages to flow which are irreparable in their nature. The knowledge that one's features and form are being used for such a purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him; and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master; and if a man of true instincts. or even of ordinary sensibilities, no one can be more conscious of his enthrallment than he is.

So thoroughly satisfied are we that the law *81 recognizes, within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability, just as in the present day we stand amazed that Lord Coke should have combated with all the force of his vigorous nature the proposition that the court of chancery had jurisdiction to entertain an application for injunction to restrain the enforcement of a common-law judgment which had been obtained by fraud, and that Lord Hale, with perfect composure of manner and complete satisfaction of soul, imposed the death penalty for witchcraft upon ignorant and harmless women.

13-15. It is now to be determined whether what may be called the first count in the petition set forth a cause of action for libel, as against a general demurrer. The publication did not mention the plaintiff's name, but it did contain a likeness of him that his friends and acquaintances would readily recognize as his, and the words of the publication printed under the likeness were put into the mouth of him whose likeness was published. It was, so far as his friends and acquaintances were concerned, the same as if his name had been signed to the printed words. In these words he was made to say, in effect, that he had secured insurance with the defendant company; that on this account his family were protected, and he was receiving an income from an annual dividend on paid-up policies. These words are harmless in themselves. Standing alone, they contain nothing, and carry no inference of anything that is disgraceful, to be ashamed of, or calculated to bring one into reproach. When, in an action for libel, the words declared on are harmless in themselves, and the petition alleges no extrinsic fact which would show that the words might be taken in other than their ordinary sense, a cause of action for a libel is not sufficiently set forth. [Stewart v. Wilson, 23 Minn. 449](#). If, in the light of extrinsic facts, words apparently harmless are such as to convey to the mind of the reader who is acquainted with the extrinsic facts a meaning which will be calculated to expose the person about whom the words are used to contempt or ridicule, then such harmless words become libelous, and an action is well brought, although no special damages may be alleged. [Behre v. Cash Register Co., 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320](#); [Holmes v. Clisby, 118 Ga. 823, 45 S. E. 684](#); [Central Ry. Co. v. Sheftall, 118 Ga. 865, 45 S. E. 687](#).

It is alleged that the plaintiff did not have, and never had had, a policy of insurance with the defendant company, and that this fact was known to his friends and acquaintances. In the light of these allegations, the words attributed to the plaintiff become absolutely false, and those who are acquainted with the facts, upon reading the statement, would naturally ask, "For what purpose was this falsehood written?" It was either gratuitous, or it was for a consideration; and, whichever conclusion might be reached, the person to whom the words were attributed would become contemptible in the mind of the reader. He would become at once a self-confessed liar. If he lied gratuitously, he would receive and merit the contempt of all persons having a correct conception of moral principles. If he lied for a consideration, he would become odious to every decent individual. See [Colvard v. Black, 110 Ga. 643, 36 S. E. 80](#). It seems clear to us that a jury could find from the facts alleged that the publication, in the light of the extrinsic facts, was libelous, and the plaintiff was entitled to have this question submitted to the jury. [Beazley v. Reid, 68 Ga. 380](#); [Holmes v. Clisby, 121 Ga. 241, 48 S. E. 934](#).

16. *** SECTION OMITTED *** The court erred in dismissing the petition.

Judgment reversed. All the Justices concur.

United States Court of Appeals, Ninth Circuit.
Lothar MOTSCHENBACHER, Plaintiff-Appellant,

v.

R. J. REYNOLDS TOBACCO COMPANY, a corporation, and William Esty Company, Defendants-Appellees.

No. 72-1419.

June 6, 1974.

Professional driver of racing cars brought action against cigarette manufacturer for injunctive relief and damages for the alleged misappropriation of driver's name, likeness, personality, and endorsement in nationally televised advertising for cigarettes. The United States District Court for the Central District of California, Manuel L. Real, J., granted summary judgment in favor of defendant and plaintiff appealed. The Court of Appeals, Koelsch, Circuit Judge, held that California courts would afford legal protection to an individual's proprietary interest in his own identity; and that fact that the 'likeness' of driver was unrecognizable in the commercial and that cigarette manufacturer had changed number of racing car from '11' to '71' and had added a 'spoiler' to the car did not preclude finding that driver was identifiable as plaintiff in view of the distinctive decorations appearing on the car.

Judgment vacated and cause remanded.

OPINION

KOELSCH, Circuit Judge:

Lothar Motschenbacher appeals from the district court's order granting summary judgment in favor of defendants in his suit seeking injunctive relief and damages for the alleged misappropriation of his name, likeness, personality, and endorsement in nationally televised advertising for Winston cigarettes. The jurisdiction of the district court is founded on diversity of citizenship, [28 U.S.C. § 1332](#); appellate jurisdiction is predicated on [28 U.S.C. § 1291](#).

The 'facts' on which the district court rendered summary judgment are substantially as follows:^{FNL} Plaintiff Motschenbacher is a professional driver of racing cars, internationally known and recognized in racing circles and by racing fans. He derives part of his income from manufacturers of commercial products who pay him for endorsing their products.

^{FNL} We of course express no opinion regarding what facts the evidence may ultimately establish; we simply accept the statements of plaintiff's affiants as true for the purposes of the motion.

During the relevant time span, plaintiff has consistently 'individualized' his cars to set them apart from those of other drivers and to make them more readily identifiable as his own. Since 1966, each of his cars has displayed a distinctive narrow white pinstripe appearing on no other car. This decoration has adorned the leading edges of the cars' bodies, which have uniformly been solid red. In addition, the white background for his racing number '11' has always been oval, in contrast to the circular backgrounds of all other cars.

In 1970, defendants, R. J. Reynolds Tobacco Company and William Esty Company, produced and caused to be televised a commercial which utilized a 'stock' color photograph depicting several racing cars on a racetrack. Plaintiff's car appears in the foreground, and although plaintiff is the driver, his facial features are not visible.

In producing the commercial, defendants altered the photograph: they changed the numbers on all racing cars depicted, transforming plaintiff's number '11' into '71'; they 'attached' a wing-like device known as a 'spoiler' to plaintiff's car; they added the word 'Winston,' the name of their product, to that spoiler and removed advertisements for other products from the spoilers of other cars. However, they made no other changes, and the white pinstriping, the oval medallion, and the red color of plaintiff's car were retained. They then made a motion picture from the altered photograph, adding a series of comic strip-type 'balloons' containing written messages of an advertising nature; one such balloon message, appearing to emanate from plaintiff, was: 'Did you know that Winston tastes

good, like a cigarette should?' They also added a sound track consisting in part of voices coordinated with, and echoing, the written messages. The commercial was subsequently broadcast nationally on network television and in color.

Several of plaintiff's affiants who had seen the commercial on television had immediately recognized plaintiff's car and had inferred that it was sponsored by Winston cigarettes.

On these facts the district court, characterizing plaintiff's action as one 'for damages for invasion of privacy,' granted summary judgment for defendants, finding as a matter of law that

'... the driver of car No. 71 in the commercial (which was plaintiff's car No. 11 prior to said change of number and design) is anonymous; that is, (a) the person who is driving said car is unrecognizable and unidentified, and (b) a reasonable inference could not be drawn that he is, or could reasonably be understood to be plaintiff,*823 Lothar Motschenbacher, or any other driver or person.^{FN2}

^{FN2}. The district court concluded:

'3. Not having been identified in the commercial either visually, aurally, explicitly, or inferentially, plaintiff's action fails, and the Court is authorized to grant defendants' Motion for Summary Judgment.'

'Summary judgment of course is proper only where there is no genuine issue of any material fact or where viewing the evidence . . . in the light most favorable to the adverse party, the movant is clearly entitled to prevail as a matter of law.' See [Stansifer v. Chrysler Motors Corporation](#), 487 F.2d 59, 63 (9th Cir. 1973), and cases cited therein.

[1][2] Since the Winston commercial was broadcast on television throughout the United States, our initial inquiry in determining the correct legal standards to be applied on the motion for summary judgment is directed at the proper choice of law. In a diversity case, a federal court must follow the substantive law of the state in which it sits. [Erie R. Co. v. Tompkins](#), 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). This includes the conflict of laws rules of that state. [Klaxon Co. v. Stentor Electric Mfg. Co.](#), 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); [Moore v. Greene](#), 431 F.2d 584, 589-590 (9th Cir. 1970).

In this case, we believe that California courts, under [Reich v. Purcell](#), 67 Cal.2d 551, 63 Cal.Rptr. 31, 432 P.2d 727 (1967), would apply California local ^{FN3} law.^{FN4} By the same token, noting the novelty of the factual situation presented and recognizing that the parties have each cited general case law in support of their respective positions, we think that California courts would not hesitate to consider relevant precedent from other jurisdictions in determining California local law.

^{FN3}. We employ the definition of 'local law' set forth in [Restatement \(Second\) of Conflict of Laws, § 4 \(1971\)](#), as follows:

'[T]he 'local law' of a state is the body of standards, principles and rules, exclusive of its rules of Conflict of Laws, which the courts of that state apply in the decision of controversies brought before them.'

^{FN4}. First, it appears that California, the state of plaintiff's residency, has a greater interest in compensating its residents for injuries of the type here alleged than other jurisdictions may have in compensating foreigners so injured within their respective borders. Second, in cases of this type, the state of plaintiff's residency is normally the state of the greatest injury. Third, California, as the forum, has an interest in convenience and presumably can most easily ascertain its own law. And fourth, California's Uniform Single Publication Act ([Civ.Code § 3425.3](#)) effectively advances the universal interest in avoiding a multiplicity of suits and assisting the orderly administration of justice.

[3] In California, as in the vast majority of jurisdictions,^{FN5} the invasion of an individual's right of privacy is an actionable tort. [Melvin v. Reid](#), 112 Cal.App. 285, 297 P. 91 (1931).^{FN6} In 1960 *824 Dean Prosser, drawing on

over 300 cases, observed that the tort is actually a complex of four separate and distinct torts, each of which is decided under an 'invasion of privacy' label. See Prosser, Privacy, 48 Calif.L.Rev. 383 (1960); Prosser, Law of Torts 804 (4th ed. 1971). Prosser's four categories are: (1) intrusion upon the plaintiff's seclusion or solitude; (2) public disclosure of private facts; (3) placing the plaintiff in a false light in the public eye; and (4) appropriation, for defendant's advantage, of plaintiff's name or likeness.^{FN7} The case before us is of the fourth variety-commercial appropriation.^{FN8}

^{FN5}. Compare [Time, Inc. v. Hill](#), 385 U.S. 374, 383 n. 7, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) (citing Prosser, Law of Torts 831-832 (3d ed. 1964), for the proposition that 'a 'right of privacy' has been recognized at common law in 30 States plus the District of Columbia and by statute in 4 States'), with Prosser, Law of Torts 804 (4th ed. 1971) (observing that 'the right of privacy is by this time recognized and accepted in all but a very few jurisdictions' and noting at 804 n. 16 six jurisdictions recently added to the list.)

^{FN6}. See also [Briscoe v. Reader's Digest Association, Inc.](#), 4 Cal.3d 529, 93 Cal.Rptr. 866, 483 P.2d 34 (1971); [Carmel-By-The-Sea v. Young](#), 2 Cal.3d 259, 85 Cal.Rptr. 1, 466 P.2d 225 (1970); [Kapellas v. Kofman](#), 1 Cal.3d 20, 81 Cal.Rptr. 360, 459 P.2d 912 (1969); [Gill v. Hearst Publishing Co.](#), 40 Cal.2d 224, 253 P.2d 441 (1953); [Coverstone v. Davies](#), 38 Cal.2d 315, 239 P.2d 876 (1952); [Gill v. Curtis Publishing Co.](#), 38 Cal.2d 273, 239 P.2d 630 (1952); [Stilson v. Reader's Digest Association, Inc.](#), 28 Cal.App.3d 270, 104 Cal.Rptr. 581 (1972); [Williams v. Weisser](#), 273 Cal.App.2d 726, 78 Cal.Rptr. 542 (1969); [Grimes v. Carter](#), 241 Cal.App.2d 694, 50 Cal.Rptr. 808 (1966); [Leavy v. Cooney](#), 214 Cal.App.2d 496, 29 Cal.Rptr. 580 (1963); [Carlisle v. Fawcett Publications](#), 201 Cal.App.2d 733, 20 Cal.Rptr. 405 (1962); [Werner v. Times-Mirror Co.](#), 193 Cal.App.2d 111, 14 Cal.Rptr. 208 (1961); [James v. Screen Gems, Inc.](#), 174 Cal.App.2d 650, 344 P.2d 799 (1959); [Kelly v. Johnson Publishing Co.](#), 160 Cal.App.2d 718, 325 P.2d 659 (1958); [Smith v. National Broadcasting Co.](#), 138 Cal.App.2d 807, 292 P.2d 600 (1956); [Fairfield v. American Photocopy Equip. Co.](#), 138 Cal.App.2d 82, 291 P.2d 194 (1955); 158 Cal.App.2d 53, 322 P.2d 93 (1958); [Stryker v. Republic Pictures Corp.](#), 108 Cal.App.2d 191, 238 P.2d 670 (1951); [Cohen v. Marx](#), 94 Cal.App.2d 704, 211 P.2d 320 (1949); [Kerby v. Hal Roach Studios](#), 53 Cal.App.2d 207, 127 P.2d 577 (1942); [Metter v. Los Angeles Examiner](#), 35 Cal.App.2d 304, 95 P.2d 491 (1939).

^{FN7}. The California Supreme Court recognized Prosser's four-pronged system of classification in [Kapellas v. Kofman](#), 1 Cal.3d 20, 81 Cal.Rptr. 360, 459 P.2d 912 (1969), at 36 n. 16, though it there suggested that a 'false light' cause of action in California is equivalent to, and meets the same requirements of, a libel claim. See also [Briscoe v. Reader's Digest Association, Inc.](#), 4 Cal.3d 529, 543, 93 Cal.Rptr. 866, 483 P.2d 34 (1971).

^{FN8}. In [Fairfield v. American Photocopy Equip. Co.](#), 138 Cal.App.2d 82, 291 P.2d 194 (1955), the California Court of Appeal observed at 86, 291 P.2d at 197:

'The exploitation of another's personality for commercial purposes constitutes one of the most flagrant and common means of invasion of privacy.'

California courts have observed that 'the gist of the cause of action in a privacy case is not injury to the character or reputation, but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community.' [Fairfield v. American Photocopy Equip. Co.](#), 138 Cal.App.2d 82, 86, 291 P.2d 194, 197 (1955). But this observation is perhaps better applied to Prosser's first three categories than it is to the appropriation cases.

[4] It is true that the injury suffered from an appropriation of the attributes of one's identity^{FN9} may be 'mental and subjective'- in the nature of humiliation, embarrassment, and outrage. [Fairfield, supra](#), at 86, 291 P.2d 194. However, where the identity appropriated has a commercial value,^{FN10} the injury may be largely, or even wholly, of an economic or material nature.^{FN11} Such is *825 the nature of the injury alleged by plaintiff.

^{FN9}. As Dean Prosser noted in his Law of Torts (4th ed. 1971), at 805-806:

'It is the plaintiff's name as a symbol of his identity that is involved here, and not as a mere name. Unless there is some tortious use made of it, there is no such thing as an exclusive right to the use of a name; and any one can be given or assume any name he likes. It is only when he makes use of the name to pirate the plaintiff's identity for some advantage of his own * * * that he becomes liable. It is in this sense that 'appropriation' must be understood.'

[FN10](#). It would be wholly unrealistic to deny that a name, likeness, or other attribute of identity can have commercial value. As the court observed in [Uhlaender v. Henricksen, 316 F.Supp. 1277 \(D.Minn.1970\)](#), at 1283:

'A name is commercially valuable as an endorsement of a product or for financial gain only because the public recognizes it and attributes good will and feats of skill or accomplishments of one sort or another to that personality.'

See also notes 11 and 14, *infra*.

[FN11](#). Generally, the greater the fame or notoriety of the identity appropriated, the greater will be the extent of the economic injury suffered. However, it is quite possible that the appropriation of the identity of a celebrity may induce humiliation, embarrassment and mental distress, while the appropriation of the identity of a relatively unknown person may result in economic injury or may itself create economic value in what was previously valueless. In this latter context, see [Canessa v. J. I. Kislak, Inc., 97 N.J.Super. 327, 235 A.2d 62, 75 \(1967\)](#). See also Kalven, *Privacy in Tort Law- Were Warren and Brandeis Wrong?*, 31 *Law & Contemp.Prob.* 326, 331 (1966); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 *N.Y.U.L.Rev.* 962, 985-991 (1964).

Some courts have protected this 'commercial' aspect of an individual's interest in his own identity under a privacy theory. See, e.g., [Palmer v. Schonhorn Enterprises, Inc., 96 N.J.Super. 72, 232 A.2d 458 \(1967\)](#); see generally [Trecee, Commercial Exploitation of Names, Likenesses, and Personal Histories, 51 Texas L.Rev. 637 \(1973\)](#); [Netterville, Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary, 35 S.Cal.L.Rev. 225, 253-254, 267-275 \(1962\)](#); and Annotation, [Invasion of Privacy by Use of Plaintiff's Name or Likeness in Advertising, 23 A.L.R.3d 865 \(1969\)](#).

Others have sought to protect it under the rubric of 'property' or a so-called 'right of publicity.' See, e.g., [Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 485-493 \(3d Cir. 1956\)](#), cert. den., [351 U.S. 926, 76 S.Ct. 783, 100 L.Ed. 1456 \(1956\)](#); [Haelan v. Topps Chewing Gum, 202 F.2d 866, 868 \(2d Cir. 1953\)](#), cert. den., [346 U.S. 816, 74 S.Ct. 26, 98 L.Ed. 343 \(1953\)](#), noted in [Nimmer, The Right of Publicity, 19 Law & Contemp.Prob. 203 \(1954\), 62 Yale L.J. 1123 \(1953\)](#), and [41 Geo.L.J. 583 \(1953\)](#); [Uhlaender v. Henricksen, 316 F.Supp. 1277, 1280-1283 \(D.Minn.1973\)](#); [Canessa v. J. I. Kislak, Inc., 97 N.J.Super. 327, 235 A.2d 62 \(1967\)](#). Cf. [Cepeda v. Swift & Co., 415 F.2d 1205, 1206 \(8th Cir. 1969\)](#) (dictum); [O'Brien v. Pabst Sales Co., 124 F.2d 167, 170-171 \(5th Cir. 1941\)](#) (dissent); [Sharman v. C. Schmidt & Sons, Inc., 216 F.Supp. 401, 407 \(E.D.Pa., 1963\)](#) (dictum). See also [Gordon, Right of Property in Name, Likeness, Personality and History, 55 Nw.U.L.Rev. 553 \(1961\)](#).

Prosser synthesizes the approaches as follows:

'Although the element of protection of the plaintiff's personal feelings is obviously not to be ignored in such a case, the effect of the appropriation decisions is to recognize or create an exclusive right in the individual plaintiff to a species of trade name, his own, and a kind of trade mark in his likeness. It seems quite pointless to dispute over whether such a right is to be classified as 'property'; it is at least clearly proprietary in its nature. Once protected by the law, it is a right of value upon which the plaintiff can capitalize by selling licenses.'

Law of Torts (4th ed. 1971), at 807.

[\[5\]\[6\]](#) So far as we can determine, California has no case in point; the state's appropriation cases uniformly appear to

have involved only the 'injury to personal feelings' aspect of the tort.^{FN12} Nevertheless, from our review of the relevant authorities, we conclude that the California appellate courts would, in a case such as this one, afford legal protection to an individual's proprietary interest in his own identity. We need not decide whether they would do so under *826 the rubric of 'privacy',^{FN13} 'property',^{FN14} or 'publicity';^{FN15} we only determine that they would recognize such an interest and protect it.^{FN16}

FN12. For example, in [Kerby v. Hal Roach Studios](#), 53 Cal.App.2d 207, 127 P.2d 577 (1942), where an actress' name was appropriated in an advertisement which 'cast doubt on her moral character,' the court spoke only of the traditional compensation for injury to her feelings. [53 Cal.App.2d at 210, 127 P.2d at 580.](#) Similarly, in [Fairfield](#), supra, an attorney whose name, personality, and endorsement had been appropriated in an advertisement was compensated only 'for injury to his peace of mind and to his feelings.' [138 Cal.App.2d at 88, 291 P.2d at 198.](#) And even in the recent decision in [Stilson v. Reader's Digest Association, Inc.](#), 28 Cal.App.3d 270, 104 Cal.Rptr. 581 (1972), the Court of Appeal reiterated that the injury in a privacy case is 'mental and subjective.' [28 Cal.App.3d at 274, 104 Cal.Rptr. 581.](#)

FN13. Two recent decisions, [Williams v. Weisser](#), 273 Cal.App.2d 726, 78 Cal.Rptr. 542 (1969), and [Stilson v. Reader's Digest Association, Inc.](#), 28 Cal.App.3d 270, 104 Cal.Rptr. 581 (1972), suggest that a 'commercial' interest in one's identity may be protected in California under the 'privacy' rationale of [Fairfield](#). In [Weisser](#), a university professor brought suit for invasion of privacy and infringement of common law copyright when the defendant, without his consent, published student notes of plaintiff's classroom lectures under plaintiff's name. Plaintiff prevailed under both theories and was awarded compensatory damages based on a publisher's testimony of the commercial value of the notes. In [Stilson](#), the court noted that 'if commercial exploitation be found, (plaintiffs) would be entitled to nominal recoveries upon little more than an election to proceed' and that 'each such plaintiff has an established right to show the mental anguish, as well as the financial detriment, which may have been caused to him by the use of his name in letters to * * * other persons. This * * * could well concern the status and business relationship to him of the recipients of the letters using his name.' [28 Cal.App.3d at 273-274, 104 Cal.Rptr. at 583.](#)

FN14. The interest may likewise be protectable as 'property.' In [Yuba River Power Co. v. Nevada Irrigation District](#), 207 Cal. 521, 523, 279 P. 128, 129 (1929), a water rights case, the California Supreme Court said in construing a statute: 'The term 'property' is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value.' In [Republic Pictures Corp. v. Rogers](#), 213 F.2d 662, 665-666 (9th Cir. 1954), this court interpreted California law in a somewhat different context, observing that reproductions of the 'name, voice and likeness' of a performer are valuable because of the notoriety of the performer and his great public following. And in a second appeal of [Fairfield](#), supra, [158 Cal.App.2d 53, 56, 322 P.2d 93 \(1958\)](#), relating to the question of damages, the California Court of Appeal recognized that the names of celebrities may have substantial commercial value. Accord, [In Re Weingand](#), 231 Cal.App.2d 289, 293-294, 41 Cal.Rptr. 778 (1964).

FN15. Commentators have noted that at least two California trial courts have already recognized the 'right of publicity.' [Gordon](#), supra, at 663-664; Note, Commercial Appropriation of an Individual's Name, Photograph or Likeness: A New Remedy for Californians, 3 Pacific L.J. 651, 663-664 (1972). While these decisions bind neither this court nor the appellate courts of California, we shall not deny their existence. Moreover, we place little reliance on [Strickler v. National Broadcasting Company](#), 167 F.Supp. 68, 70 (S.D.Cal.1958), in which the district court refused 'to blaze the trail to establish in California a cause of action based upon the right of publicity' upon the plaintiff's specific admission that the right had not yet received recognition there. Furthermore, the factual situation in [Strickler](#) involved a 'public disclosure of private facts' more than it did an 'appropriation' and the district court notably upheld the plaintiff's complaint for invasion of privacy.

FN16. Two recent instances of the expression of California public policy lend additional support to our conclusion. First, [Article I, § 1, of the California Constitution](#) was amended in November, 1972, to include

‘pursuing and and obtaining * * * privacy’ as an alienable right. And second, the California legislature recently enacted [Civ.Code § 3344](#), providing that anyone who knowingly uses another's name, photograph, or likeness for purposes of advertising or solicitation shall be liable for any damages sustained by the persons injured, in an amount no less than \$300. The ‘knowing use’ requirement of the statute conflicts with the Fairfield language that ‘inadvertence or mistake is no defense where the publication does in fact refer to the plaintiff in such manner as to violate his right of privacy.’ However, one commentator has observed that inclusion of the ‘knowing use’ requirement in the statute was occasioned by the penal damages which the bill initially provided for. See Note, Commercial Appropriation of an Individual's Name, Photograph or Likeness: A New Remedy for Californians, 3 Pacific L.J. 651, 659 (1972). Moreover, the statute's concluding subsection states that ‘the remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.’

We turn now to the question of ‘identifiability.’ Clearly, if the district court correctly determined as a matter of law that plaintiff is not identifiable *827 in the commercial, then in no sense has plaintiff’s identity been misappropriated nor his interest violated.

[7] Having viewed a film of the commercial, we agree with the district court that the ‘likeness’ of plaintiff is itself unrecognizable; however, the court's further conclusion of law to the effect that the driver is not identifiable as plaintiff is erroneous in that it wholly fails to attribute proper significance to the distinctive decorations appearing on the car. As pointed out earlier, these markings were not only peculiar to the plaintiff's cars but they caused some persons to think the car in question was plaintiff's and to infer that the person driving the car was the plaintiff.^{FN17}

^{FN17.} The addition of a ‘Winston’ spoiler to the plaintiffs car does not necessarily render the automobile impersonal, for plaintiff's cars have frequently used spoilers; it may be taken as contributing to the inference of sponsorship or endorsement. The alteration which may affect identifiability is the change in numbering, but this alteration does not preclude a finding of identifiability by the trier of fact.

Defendant's reliance on [Branson v. Fawcett Publications, Inc., 124 F.Supp. 429 \(E.D.Ill.1954\)](#), is misplaced. In *Branson*, a part-time racing driver brought suit for invasion of privacy when a photograph of his overturned racing car was printed in a magazine without his consent. In ruling that ‘the photograph * * * does not identify the plaintiff to the public or any member thereof,’ [124 F.Supp. at 433](#), the court said:

‘[T]he automobile is pointed upward in the air and the picture shows primarily the bottom of the racer. The backdrop of the picture is not distinguishable. No likeness, face, image, form or silhouette of the plaintiff or of any person is shown. From all that appears from the picture itself, there is no one in the car. Moreover, no identifying marks or numbers on the car appear . . . Plaintiff does not even assert that the car he was driving was the same color as that which appears in the colored reproduction.’

[124 F.Supp. at 432](#).

But in this case, the car under consideration clearly has a driver and displays several uniquely distinguishing features.

The judgment is vacated and the cause is remanded for further proceedings.^{FN18}

^{FN18.} We have no occasion to discuss the measure of damages in the instant case, and our conclusion renders consideration of whether plaintiff has a cause of action under the California law of trade names or unfair competition unnecessary.

Supreme Court of the United States
Hugo ZACCHINI, Petitioner,
v.
SCRIPPS-HOWARD BROADCASTING COMPANY.
No. 76-577.

Argued April 25, 1977.
Decided June 28, 1977.

A performer in a 'human cannonball' act brought an action against a television broadcasting company to recover damages allegedly suffered when, against his wishes, the broadcasting company videotaped the entire performance and played the videotape on a television news program. The Ohio Court of Appeals reversed the trial court's action in entering summary judgment for the [broadcasting company, and the Ohio Supreme Court, 47 Ohio St.2d 224, 351 N.E.2d 454](#), rendered judgment for the broadcasting company on the grounds that it was constitutionally privileged to include matters of public interest in its newscasts which otherwise would be protected by the right of publicity, absent an intent to injure or to appropriate for some nonprivileged purpose. On certiorari, the United States Supreme Court, Mr. Justice White, held that although the State of Ohio might, as a matter of its own law, privilege the press in the circumstances of the case, the First and Fourteenth Amendments did not require it to do so.

Reversed.

Mr. Justice WHITE delivered the opinion of the Court.

Petitioner, Hugo Zacchini, is an entertainer. He performs a 'human cannonball' act in which he is shot from a cannon into a net some 200 feet away. Each performance occupies some 15 seconds. In August and September 1972, petitioner was engaged to perform his act on a regular basis at the Geauga County Fair in Burton, Ohio. He performed in a fenced area, surrounded by grandstands, at the fair grounds. Members of the public attending the fair were not charged a separate admission fee to observe his act.

On August 30, a freelance reporter for Scripps-Howard Broadcasting Co., the operator of a television broadcasting station and respondent in this case, attended the fair. He *564 carried a small movie camera. Petitioner noticed the reporter and asked him not to film the performance. The reporter did not do so on that day; but on the instructions of the producer of respondent's daily newscast, he returned the following day and videotaped the entire act. This film clip approximately 15 seconds in length, was shown on the 11 o'clock news program that night, together with favorable commentary.^{FN1}

^{FN1}. The script of the commentary accompanying the film clip read as follows:

'This . . . now . . . is the story of a true spectator sport . . . the sport of human cannonballing . . . in fact, the great Zacchini is about the only human cannonball around, these days . . . just happens that, where he is, is the Great Geauga County Fair, in Burton . . . and believe me, although it's not a long act, it's a thriller . . . and you really need to see it in person . . . to appreciate it. . . .' (Emphasis in original.) App. 12.

**2852 Petitioner then brought this action for damages, alleging that he is 'engaged in the entertainment business,' that the act he performs is one 'invented by his father and . . . performed only by his family for the last fifty years,' that respondent 'showed and commercialized the film of his act without his consent,' and that such conduct was an 'unlawful appropriation of plaintiff's professional property.' App. 4-5. Respondent answered and moved for summary judgment, which was granted by the trial court.

The Court of Appeals of Ohio reversed. The majority held that petitioner's complaint stated a cause of action for conversion and for infringement of a common-law copyright, and one judge concurred in the judgment on the

ground that the complaint stated a cause of action for appropriation of petitioner's 'right of publicity' in the film of his act. All three judges agreed that the First Amendment did not privilege the press to show the entire performance on a news program without compensating petitioner for any financial injury he could prove at trial.

*565 Like the concurring judge in the Court of Appeals, the Supreme Court of Ohio rested petitioner's cause of action under state law on his 'right to the publicity value of his performance.' [47 Ohio St.2d 224, 351 N.E.2d 454, 455 \(1976\)](#). The opinion syllabus, to which we are to look for the rule of law used to decide the case,^{FN2} declared first that one may not use for his own benefit the name or likeness of another, whether or not the use or benefit is a commercial one, and second that respondent would be liable for the appropriation over petitioner's objection and in the absence of license or privilege, of petitioner's right to the publicity value of his performance. Ibid. The court nevertheless gave judgment for respondent because, in the words of the syllabus:

[FN2. Beck v. Ohio, 379 U.S. 89, 93 n. 2, 85 S.Ct. 223, 226, 13 L.Ed.2d 142 \(1964\); Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 441-443, 72 S.Ct. 413, 416-417, 96 L.Ed. 485 \(1952\); Minnesota v. National Tea Co., 309 U.S. 551, 554, 60 S.Ct. 676, 678, 84 L.Ed. 920 \(1940\). See Cassidy v. Glossip, 12 Ohio St.2d 17, 231 N.E.2d 64 \(1967\); Williamson Heater Co. v. Radich, 128 Ohio St. 124, 190 N.E. 403 \(1934\); Thackery v. Helfrich, 123 Ohio St. 334, 336, 175 N.E. 449, 450 \(1931\); State v. Hauser, 101 Ohio St. 404, 408, 131 N.E. 66, 67 \(1920\); 14 Ohio Jur.2d, Courts s 247 \(1955\).](#)

'A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual.' Ibid.

We granted certiorari, [429 U.S. 1037, 97 S.Ct. 730, 50 L.Ed.2d 747 \(1977\)](#), to consider an issue unresolved by this Court: whether the First and Fourteenth Amendments immunized respondent from damages for its alleged infringement of petitioner's statelaw 'right of publicity.' Pet. for Cert. 2. Insofar as the Ohio Supreme Court held that the First and Fourteenth Amendments of the *566 United States Constitution required judgment for respondent, we reverse the judgment of that court.

I

[1] If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, [Wilson v. Loew's Inc., 355 U.S. 597, 78 S.Ct. 526, 2 L.Ed.2d 519 \(1958\)](#), for '(o)ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could **2853 amount to nothing more than an advisory opinion.' [Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S.Ct. 459, 463, 89 L.Ed. 789 \(1945\)](#). We are confident, however, that the judgment below did not rest on an adequate and independent state ground and that we have jurisdiction to decide the federal issue presented in this case.

[2] There is no doubt that petitioner's complaint was grounded in state law and that the right of publicity which petitioner was held to possess was a right arising under Ohio law. It is also clear that respondent's claim of constitutional privilege was sustained. The source of this privilege was not identified in the syllabus. It is clear enough from the opinion of the Ohio Supreme Court, which we are permitted to consult for understanding of the syllabus, [Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 441-443, 72 S.Ct. 413, 416-417, 96 L.Ed. 485 \(1952\)](#),^{FN3} that in adjudicating the *567 crucial question of whether respondent had a privilege to film and televise petitioner's performance, the court placed principal reliance on [Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 \(1967\)](#), a case involving First Amendment limitations on state tort actions. It construed the principle of that case, along with that of [New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 \(1964\)](#), to be that 'the press has a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private,' and concluded, therefore, that the press is also 'privileged when an individual seeks to publicly exploit his talents while keeping the benefits private.' [47 Ohio St.2d, at 234, 351 N.E.2d, at 461.](#)

The privilege thus exists in cases ‘where appropriation of a right of publicity is claimed.’ The court's opinion also referred to Draft 21 of the relevant portion of Restatement (Second) of Torts (1975), which was understood to make room for reasonable press appropriations by limiting the reach of the right of privacy rather than by creating a privileged invasion. The court preferred the notion of privilege over the Restatement's formulation, however, reasoning that ‘since the gravamen of the issue in this case is not whether the degree of intrusion is reasonable, but whether First Amendment principles require that the *568 right of privacy give way to the public right to be informed of matters of public interest and concern, the concept of privilege seems the more useful and appropriate one.’ [47 Ohio St.2d, at 234 n. 5, 351 N.E.2d, at 461 n. 5.](#) (Emphasis added.)

[FN3.](#) In Perkins the issue was whether the Ohio courts could exercise personal jurisdiction over a foreign corporation. The syllabus of the Ohio Supreme Court declared that it did not have personal jurisdiction, but it gave no indication of whether the Ohio court's decision rested on state grounds or on the Fourteenth Amendment. The only opinion filed with the syllabus reasoned, however, that the Due Process Clause of the Fourteenth Amendment prohibited the Ohio courts from exercising personal jurisdiction in that case. While recognizing the existence of the Ohio syllabus rule, this Court felt obliged in these circumstances to reach the merits of the constitutional issue, holding that the Due Process Clause did not preclude the exercise of jurisdiction. ‘(F) or us to allow the judgment to stand as it is would risk an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so.’ [342 U.S., at 443, 72 S.Ct., at 417.](#)

The Ohio courts do not suggest that the opinion is not relevant to a determination of the Ohio Supreme Court's holding.

‘The syllabus is the language of the court. The opinion is more particularly the language of the judge preparing the same, and yet so much of the opinion as is reasonably necessary to sustain the judgment must of necessity be concurred in by the court.’ [Hart v. Andrews, 103 Ohio St. 218, 221, 132 N.E. 846, 847 \(1921\)](#) (emphasis added).

See also Williamson Heater Co., supra; State v. Hauser, supra.

[\[3\]](#) Had the Ohio court rested its decision on both state and federal grounds, either of which would have been dispositive, we would have had no jurisdiction. [Fox Film Corp. v. Muller, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 \(1935\); **2854Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U.S. 157, 164, 37 S.Ct. 318, 320, 61 L.Ed. 644 \(1917\).](#) But the opinion, like the syllabus, did not mention the Ohio Constitution, citing instead this Court's First Amendment cases as controlling. It appears to us that the decision rested solely on federal grounds. That the Ohio court might have, but did not, invoke state law does not foreclose jurisdiction here. [Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 197 n. 1, 65 S.Ct. 226, 229, 89 L.Ed. 173 \(1944\); Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 98, 58 S.Ct. 443, 445, 82 L.Ed. 685 \(1938\).](#)

[\[4\]](#) Even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of Ohio law. Perkins v. Benguet Consolidated Mining Co., supra. ‘If the Supreme Court of Ohio ‘held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide . . . these suits according to its own local law.’ [Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1, 5, 71 S.Ct. 1, 3, 95 L.Ed. 3 \(1950\).](#)

*569 II

[\[5\]](#) The Ohio Supreme Court held that respondent is constitutionally privileged to include in its newscasts matters of public interest that would otherwise be protected by the right of publicity, absent an intent to injure or to appropriate for some nonprivileged purpose. If under this standard respondent had merely reported that petitioner was

performing at the fair and described or commented on his act, with or without showing his picture on television, we would have a very different case. But petitioner is not contending that his appearance at the fair and his performance could not be reported by the press as newsworthy items. His complaint is that respondent filmed his entire act and displayed that film on television for the public to see and enjoy. This, he claimed, was an appropriation of his professional property. The Ohio Supreme Court agreed that petitioner had 'a right of publicity' that gave him 'personal control over commercial display and exploitation of his personality and the exercise of his talents.'^{FN4} This right of 'exclusive control over the publicity given to his performances' was said to be such a 'valuable part of the benefit which may be attained by his talents and efforts' that it was entitled to legal protection. It was *570 also observed, or at least expressly assumed, that petitioner had not abandoned his rights by performing under the circumstances present at the Geauga County Fair Grounds.

FN4. The court relied on [Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340, 341 \(1956\)](#), the syllabus of which held:

'An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.'

The court also indicated that the applicable principles of Ohio law were those set out in Restatement (Second) s 652C of Torts (Tent. Draft No. 13, 1967), and the comments thereto, portions of which were stated in the footnotes of the opinion. Also, referring to the right as the 'right of publicity,' the court quoted approvingly from [Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 \(CA2 1953\)](#).

The Ohio Supreme Court nevertheless held that the challenged invasion was privileged, saying that the press 'must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. No fixed standard which would bar the press from reporting or depicting either an entire occurrence or an **2855 entire discrete part of a public performance can be formulated which would not unduly restrict the 'breathing room' in reporting which freedom of the press requires.'^{FN5} [47 Ohio St.2d, at 235, 351 N.E.2d, at 461.](#) Under this view, respondent was thus constitutionally free to film and display petitioner's entire act.

FN5. The court's explication was as follows:

'The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer. It might also be the case that the press would be liable if it recklessly disregarded contract rights existing between the plaintiff and a third person to present the performance to the public, but that question is not presented here.'^{FN5} [47 Ohio St.2d, at 235, 351 N.E.2d, at 461.](#)

The Ohio Supreme Court relied heavily on [Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 \(1967\)](#), but that case does not mandate a media privilege to televise a performer's entire act without his consent. Involved in *Time, Inc. v. Hill* was a claim under the New York 'Right of Privacy' statute^{FN6} that Life Magazine, in *571 the course of reviewing a new play, had connected the play with a long-past incident involving petitioner and his family and had falsely described their experience and conduct at that time. The complaint sought damages for humiliation and suffering flowing from these nondefamatory falsehoods that allegedly invaded Hill's privacy. The Court held, however, that the opening of a new play linked to an actual incident was a matter of public interest and that Hill could not recover without showing that the Life report was knowingly false or was published with reckless disregard for the truth the same rigorous standard that had been applied in [New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 \(1964\)](#).

FN6. [Section 51 of the New York Civil Rights Law](#) (McKinney 1976) provides an action for injunction and damages for invasion of the 'right of privacy' granted by [s 50](#):

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

Time, Inc. v. Hill, which was hotly contested and decided by a divided Court, involved an entirely different tort from the ‘right of publicity’ recognized by the Ohio Supreme Court. As the opinion reveals in Time, Inc. v. Hill, the Court was steeped in the literature of privacy law and was aware of the developing distinctions and nuances in this branch of the law. The Court, for example, cited W. Prosser, Law of Torts 831-832 (3d ed. 1964), and the same author's well-known article, Privacy, 48 Calif.L.Rev. 383 (1960), both of which divided privacy into four distinct branches.^{FN7} The Court was aware that it was adjudicating a ‘false light’ privacy case involving a matter of public interest, not a case involving ‘intrusion,’ 385 U.S., at 384-385, n. 9, 87 S.Ct., at 540, ‘appropriation’ of a *572 name or likeness for the purposes of trade, *id.*, at 381, 87 S.Ct., at 538, or ‘private details’ about a non-newsworthy person or event, *id.*, at 383 n. 7, 87 S.Ct., at 539. It is also abundantly clear that Time, Inc. v. Hill did not involve a performer, a person with a name having commercial value, or any claim to a ‘right of publicity.’ This discrete kind of ‘appropriation’ case was plainly identified in the **2856 literature cited by the Court^{FN8} and had been adjudicated in the reported cases.^{FN9}

^{FN7}. ‘The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . ‘to be let alone.’ Prosser, Privacy, 48 Calif.L.Rev., at 389. Thus, according to Prosser, some courts had recognized a cause of action for ‘intrusion’ upon the plaintiff's seclusion or solitude; public disclosure of ‘private facts’ about the plaintiff's personal life; publicity that places the plaintiff in a ‘false light’ in the public eye; and ‘appropriation’ of the plaintiff's name or likeness for commercial purposes. One may be liable for ‘appropriation’ if he ‘pirate(s) the plaintiff's identity for some advantage of his own.’ *Id.*, at 403.

^{FN8}. See, for example, W. Prosser, Law of Torts 842 (3d ed. 1964); Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U.L.Rev. 962, 986-991 (1964); Kalven, Privacy in Tort Law Were Warren and Brandeis Wrong?, 31 Law & Contemp.Prob. 326, 331 (1966).

^{FN9}. E. g., [Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 \(CA3\), cert. denied, 351 U.S. 926, 76 S.Ct. 783, 100 L.Ed. 1456 \(1956\)](#); [Sharkey v. National Broadcasting Co., Inc., 93 F.Supp. 986 \(S.D.N.Y.1950\)](#); [Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F.Supp. 490 \(WD Pa. 1938\)](#); [Twentieth Century Sporting Club, Inc. v. Transradio Press Service, Inc., 165 Misc. 71, 300 N.Y.S. 159 \(1937\)](#); [Hogan v. A. S. Barnes & Co., Inc., 114 U.S.P.Q. 314 \(Pa.Ct.C.P. 1957\)](#); [Myers v. U. S. Camera Publishing Corp., 9 Misc.2d 765, 167 N.Y.S.2d 771 \(1957\)](#). The cases prior to 1961 are helpfully reviewed in Gordon, Right of Property in Name, Likeness, Personality and History, 55 Nw.U.L.Rev. 553 (1960).

Ettore v. Philco Television Broadcasting Corp., supra, involved a challenge to television exhibition of a film made of a prize fight that had occurred some time ago. Judge Biggs, writing for the Court of Appeals, said:

‘There are, speaking very generally, two polar types of cases. One arises when some accidental occurrence rends the veil of obscurity surrounding an average person and makes him, arguably, newsworthy. The other type involves the appropriation of the performance or production of a professional performer or entrepreneur. Between the two extremes are many gradations, most involving strictly commercial exploitation of some aspect of an individual's personality, such as his name or picture.’ [229 F.2d, at 486](#).

‘. . . The fact, is that, if a performer performs for hire, a curtailment, without consideration, of his right to control his performance is a wrong to him. Such a wrong vitally affects his livelihood, precisely as a trade libel, for example, affects the earnings of a corporation. If the artistry of the performance be used as a criterion, every judge perforce must turn himself into a literary, theatrical or sports critic.’ [Id.](#), at 490.

*573 The differences between these two torts are important. First, the State's interests in providing a cause of action in each instance are different. 'The interest protected' in permitting recovery for placing the plaintiff in a false light 'is clearly that of reputation, with the same overtones of mental distress as in defamation.' Prosser, *supra*, 48 Calif.L.Rev., at 400. By contrast, the State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment.^{FN10} As we later note, the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation. Second, the two torts differ in the degree to which they intrude on dissemination of information to the public. In 'false light' cases the only way to protect the interests involved is to attempt to minimize publication of the damaging matter, while in 'right of publicity' cases the only question is who gets to do the publishing. An entertainer such as petitioner usually has no objection to the widespread publication of his act as long as he gets the commercial benefit of such publication. Indeed, in the present case petitioner did not seek to enjoin the broadcast of his act; he simply *574 sought compensation for the broadcast in the form of damages.

^{FN10} The Ohio Supreme Court expressed the view 'that plaintiff's claim is one for invasion of the right of privacy by appropriation, and should be considered as such.' 47 Ohio St.2d, at 226, 351 N.E.2d, at 456. It should be noted, however, that the case before us is more limited than the broad category of lawsuits that may arise under the heading of 'appropriation.' Petitioner does not merely assert that some general use, such as advertising, was made of his name or likeness; he relies on the much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform.

Nor does it appear that our later cases, such as [Rosenbloom v. Metromedia, Inc.](#), 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971); [Gertz v. Robert Welch, Inc.](#), 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); and [Time, Inc. v. Firestone](#), 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976), require or furnish substantial support for the Ohio court's privilege ruling. These cases, like *New York Times*, emphasize the protection extended to the press by the First Amendment in defamation cases, particularly**2857 when suit is brought by a public official or a public figure. None of them involve an alleged appropriation by the press of a right of publicity existing under state law.

Moreover, *Time, Inc. v. Hill*, *New York Times*, *Metromedia*, *Gertz*, and *Firestone* all involved the reporting of events; in none of them was there an attempt to broadcast or publish an entire act for which the performer ordinarily gets paid. It is evident, and there is no claim here to the contrary, that petitioner's state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner's act.^{FN11} Wherever the line in particular situations is to be drawn between media reports that are protected and *575 those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner. Copyrights Act, 17 U.S.C.App. s 101 et seq. (1976 ed.); cf. [Kalem Co. v. Harper Bros.](#), 222 U.S. 55, 32 S.Ct. 20, 56 L.Ed. 92 (1911); [Manners v. Morosco](#), 252 U.S. 317, 40 S.Ct. 335, 64 L.Ed. 590 (1920), or to film and broadcast a prize fight, [Ettore v. Philco Television Broadcasting Corp.](#), 229 F.2d 481 (CA3), cert. denied, 351 U.S. 926, 76 S.Ct. 783, 100 L.Ed. 1456 (1956); or a baseball game, [Pittsburgh Athletic Co. v. KQV Broadcasting Co.](#), 24 F.Supp. 490 (WD Pa. 1938), where the promoters or the participants had other plans for publicizing the event. There are ample reasons for reaching this conclusion.

^{FN11} W. Prosser, *Law of Torts* 806-807 (4th ed. 1971), generalizes on the cases:

The New York courts were faced very early with the obvious fact that newspapers and magazines, to say nothing of radio, television and motion pictures, are by no means philanthropic institutions, but are operated for profit. As against the contention that everything published by these agencies must necessarily be 'for purposes of trade,' they were compelled to hold that there must be some closer and more direct connection, beyond the mere fact that the newspaper itself is sold; and that the presence of advertising matter in adjacent columns, or even the duplication of a news item for the purpose of advertising the publication itself, does not make any difference. Any other conclusion would in all probability have been an unconstitutional interference with the freedom of the press. Accordingly, it has been held that the mere incidental mention of the plaintiff's name in a book or a motion picture is not an invasion of his privacy;

nor is the publication of a photograph or a newsreel in which he incidentally appears.' (Footnotes omitted.) Cf. [Restatement \(Second\) of Torts s 652C](#), Comment d (Tent. Draft No. 22, 1976).

The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance. As the Ohio court recognized, this act is the product of petitioner's own talents and energy, the end result of much time, effort, and expense. Much of its economic value lies in the 'right of exclusive control over the publicity given to his performance'; if the public can see the act free on television, it will be less willing to pay to see it at the fair.^{FN12} The *576 effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee. 'The rationale for (protecting the right of publicity) is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.' Kalven, *Privacy in Tort Law Were Warren and Brandeis Wrong?*, 31 *Law & Contemp. Prob.* 326, 331 (1966). Moreover, the broadcast of petitioner's entire performance, unlike the unauthorized use of another's**2858 name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer. Thus, in this case, Ohio has recognized what may be the strongest case for a 'right of publicity' involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.

^{FN12}. It is possible, of course, that respondent's news broadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the act live. In these circumstances, petitioner would not be able to prove damages and thus would not recover. But petitioner has alleged that the broadcast injured him to the extent of \$25,000, App. 5, and we think the State should be allowed to authorize compensation of this injury if proved.

Of course, Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court. As the Court stated in [Mazer v. Stein, 347 U.S. 201, 219, 74 S.Ct. 460, 471, 98 L.Ed. 630 \(1954\)](#):

'The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.'

*577 These laws perhaps regard the 'reward to the owner (as) a secondary consideration,' [United States v. Paramount Pictures, 334 U.S. 131, 158, 68 S.Ct. 915, 929, 92 L.Ed. 1260 \(1948\)](#), but they were 'intended definitely to grant valuable, enforceable rights' in order to afford greater encouragement to the production of works of benefit to the public. [Washingtonian Publishing Co. v. Pearson, 306 U.S. 30, 36, 59 S.Ct. 397, 400, 83 L.Ed. 470 \(1939\)](#). The Constitution does not prevent Ohio from making a similar choice here in deciding to protect the entertainer's incentive in order to encourage the production of this type of work. Cf. [Goldstein v. California, 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed.2d 163 \(1973\)](#); [Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 94 S.Ct. 1879, 40 L.Ed.2d 315 \(1974\)](#).^{FN13}

^{FN13}. Goldstein involved a California statute outlawing 'record piracy' the unauthorized duplication of recordings of performances by major musical artists. Petitioners there launched a multifaceted constitutional attack on the statute, but they did not argue that the statute violated the First Amendment. In rejecting this broad-based constitutional attack, the Court concluded:

'The California statutory scheme evidences a legislative policy to prohibit 'tape piracy' and 'record piracy,' conduct that may adversely affect the continued production of new recordings, a large industry in California. Accordingly, the State has, by statute, given to recordings the attributes of property. No restraint has been placed on the use of an idea or concept; rather, petitioners and other individuals remain free to record the same compositions in precisely the same manner and with the same personal as appeared on the

original recording.

'Until and unless Congress takes further action with respect to recordings . . . , the California statute may be enforced against acts of piracy such as those which occurred in the present case.' [412 U.S., at 571, 93 S.Ct., at 2317.](#) (Emphasis added.)

We note that Federal District Courts have rejected First Amendment challenges to the federal copyright law on the ground that 'no restraint (has been) placed on the use of an idea or concept.' [United States v. Bodin, 375 F.Supp. 1265, 1267 \(W.D.Okl.1974\)](#). See also [Walt Disney Productions v. Air Pirates, 345 F.Supp. 108, 115-116 \(N.D.Cal.1972\)](#) (citing Nimmer, Does Copyright Abridge The First Amendment Guarantees of Free Speech and Press?, 17 UCLA Rev. 1180 (1970), who argues that copyright law does not abridge the First Amendment because it does not restrain the communication of ideas or concepts); [Robert Stigwood Group Ltd. v. O'Reilly, 346 F.Supp. 376 \(Conn.1972\)](#) (also relying on Nimmer, supra). Of course, this case does not involve a claim that respondent would be prevented by petitioner's 'right of publicity' from staging or filming its own 'human cannonball' act.

In Kewanee this Court upheld the constitutionality of Ohio's trade-secret law, although again no First Amendment claim was presented. Citing Goldstein, the Court stated:

'Just as the States may exercise regulatory power over writings so may the States regulate with respect to discoveries. States may hold diverse viewpoints in protecting intellectual property relating to invention as they do in protecting the intellectual property relating to the subject matter of copyright. The only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress' [416 U.S., at 479, 94 S.Ct., at 1885.](#)

Although recognizing that the trade-secret law resulted in preventing the public from gaining certain information, the Court emphasized that the law had 'a decidedly beneficial effect on society,' [id., at 485, 94 S.Ct., at 1888.](#) and that without it, 'organized scientific and technological research could become fragmented, and society, as a whole, would suffer.' [Id., at 486, 94 S.Ct., at 1888.](#)

****2859 [6] *578** There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news. *Time, Inc. v. Hill*. But it is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized. Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it. Nor do we think that a state-law damages remedy against respondent would represent a species of liability without fault contrary to the letter or spirit of [Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 \(1974\)](#). Respondent knew that petitioner objected to televising his act, but nevertheless displayed the entire film.

We conclude that although the State of Ohio may as a ***579** matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so.

Reversed.

Mr. Justice POWELL, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting. Disclaiming any attempt to do more than decide the narrow case before us, the Court reverses the decision of the Supreme Court of Ohio based on repeated incantation of a single formula: 'a performer's entire act.' The holding today is summed up in one sentence:

'Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent.' Ante, at 2856.

I doubt that this formula provides a standard clear enough even for resolution of this case.^{FNI} In any event, I am not

persuaded that the Court's opinion is appropriately sensitive *580 to the First Amendment values at stake, and I therefore dissent.

[FN1](#). Although the record is not explicit, it is unlikely that the 'act' commenced abruptly with the explosion that launched petitioner on his way, ending with the landing in the net a few seconds later. One may assume that the actual firing was preceded by some fanfare, possibly stretching over several minutes, to heighten the audience's anticipation: introduction of the performer, description of the uniqueness and danger, last-minute checking of the apparatus, and entry into the cannon, all accompanied by suitably ominous commentary from the master of ceremonies. If this is found to be the case on remand, then respondent could not be said to have appropriated the 'entire act' in its 15-second newsclip and the Court's opinion then would afford no guidance for resolution of the case. Moreover, in future cases involving different performances, similar difficulties in determining just what constitutes the 'entire act' are inevitable.

Although the Court would draw no distinction, ante, at 2857, I do not view respondent's action as comparable to unauthorized commercial broadcasts of sporting events, theatrical performances, and the like where the broadcaster keeps the profits. There is no suggestion here that respondent made any such use of the film. Instead, it simply reported on what petitioner concedes to be a newsworthy event, in a way hardly surprising for a television station by means of film coverage. The report was part of an ordinary daily news program, consuming a total of 15 seconds. It is a routine example of the press' fulfilling the informing function so vital to our system.

****2860** The Court's holding that the station's ordinary news report may give rise to substantial liability^{[FN2](#)} has disturbing implications, for the decision could lead to a degree of media self-censorship. Cf. [Smith v. California](#), 361 U.S. 147, 150-154, 80 S.Ct. 215, 217-219, 4 L.Ed.2d 205 (1959). Hereafter, whenever a television news editor is unsure whether certain film footage received from a camera crew might be held to portray an 'entire act,'^{[FN3](#)} he may ***581** decline coverage even of clearly newsworthy events or confine the broadcast to watered-down verbal reporting, perhaps with an occasional still picture. The public is then the loser. This is hardly the kind of news reportage that the First Amendment is meant to foster. See generally [Miami Herald Publishing Co. v. Tornillo](#), 418 U.S. 241, 257-258, 94 S.Ct. 2831, 2839, 41 L.Ed.2d 730 (1974); [Time, Inc. v. Hill](#), 385 U.S. 374, 389, 87 S.Ct. 534, 542, 17 L.Ed.2d 456 (1967); [New York Times Co. v. Sullivan](#), 376 U.S. 254, 270-272, 279, 84 S.Ct. 710, 720-721, 725, 11 L.Ed.2d 686 (1964).

[FN2](#). At some points the Court seems to acknowledge that the reason for recognizing a cause of action asserting a 'right of publicity' is to prevent unjust enrichment. See, e. g., ante, at 2857. But the remainder of the opinion inconsistently accepts a measure of damages based not on the defendant's enhanced profits but on harm to the plaintiff regardless of any gain to the defendant. See, e. g., ante, at 2857 n. 12. Indeed, in this case there is no suggestion that respondent television station gained financially by showing petitioner's flight (although it no doubt received its normal advertising revenue for the news program revenue it would have received no matter which news items appeared). Nevertheless, in the unlikely event that petitioner can prove that his income was somehow reduced as a result of the broadcast, respondent will apparently have to compensate him for the difference.

[FN3](#). Such doubts are especially likely to arise when the editor receives film footage of an event at a local fair, a circus, a sports competition of limited duration (e. g., the winning effort in a ski-jump competition), or a dramatic production made up of short skits, to offer only a few examples.

In my view the First Amendment commands a different analytical starting point from the one selected by the Court. Rather than begin with a quantitative analysis of the performer's behavior is this or is this not his entire act? we should direct initial attention to the actions of the news media: what use did the station make of the film footage? When a film is used, as here, for a routine portion of a regular news program, I would hold that the First Amendment protects the station from a 'right of publicity' or 'appropriation' suit, absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation.^{[FN4](#)}

[FN4](#). This case requires no detailed specification of the standards for identifying a subterfuge, since there is no claim here that respondent's news use was anything but bona fide. Cf. [47 Ohio St.2d 224, 351 N.E.2d](#)

[454, 455](#) (the standards suggested by the Supreme Court of Ohio, quoted ante, at 2852). I would point out, however, that selling time during a news broadcast to advertisers in the customary fashion does not make for 'commercial exploitation' in the sense intended here. See W. Prosser, *Law of Torts* 806-807 (4th ed. 1971). Cf. [New York Times Co. v. Sullivan](#), 376 U.S. 254, 266, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964).

I emphasize that this is a 'reappropriation' suit, rather than one of the other varieties of 'right of privacy' tort suits identified by Dean Prosser in his classic article. Prosser, *Privacy*, 48 *Calif.L.Rev.* 383 (1960). In those other causes *582 of action the competing interests are considerably different. The plaintiff generally seeks to avoid any sort of public exposure, and the existence of constitutional privilege is therefore less likely to turn on whether the publication occurred in a news broadcast or in some other fashion. In a suit like the one before us, however, the plaintiff does not complain about the fact of exposure to the public, but rather about its timing or manner. He welcomes some publicity, but seeks to retain control over means and manner as a way to maximize for himself the monetary benefits that flow from such publication. But having made the matter public having chosen, in essence, to make it newsworthy he cannot, consistent with the **2861 First Amendment, complain of routine news reportage. Cf. [Gertz v. Robert Welch, Inc.](#), 418 U.S. 323, 339-348, 351-352, 94 S.Ct. 2997, 3006-3011, 3012-3013, 41 L.Ed.2d 789 (1974) (clarifying the different liability standards appropriate in defamation suits, depending on whether or not the plaintiff is a public figure).

Since the film clip here was undeniably treated as news and since there is no claim that the use was subterfuge, respondent's actions were constitutionally privileged. I would affirm.

Mr. Justice STEVENS, dissenting.

*** SECTION OMITTED ***

United States Court of Appeals,
Ninth Circuit.
Bette MIDLER, Plaintiff-Appellant,
v.

FORD MOTOR COMPANY, a Delaware Corporation, and Young & Rubicam Inc., a New York Corporation,
Defendants-Appellees.
No. 87-6168.

Argued and Submitted Feb. 4, 1988.
Decided June 22, 1988.

Professional singer sued automobile company and advertising agency based on advertisement for automobile in which "sound alike" was used in commercial. The United States District Court for the Central District of California, Ferdinand F. Fernandez, J., entered summary judgment in favor of defendants, and appeal followed. The Court of Appeals, Noonan, Circuit Judge, held that under California law, singer stated tort cause of action.

Reversed and remanded.

NOONAN, Circuit Judge:

This case centers on the protectibility of the voice of a celebrated chanteuse from commercial exploitation without her consent. Ford Motor Company and its advertising agency, Young & Rubicam, Inc., in 1985 advertised the Ford Lincoln Mercury with a series of nineteen 30 or 60 second television commercials in what the agency called "The Yuppie Campaign." The aim was to make an emotional connection with Yuppies, bringing back memories of when they were in college. Different popular songs of the seventies were sung on each commercial. The agency tried to get "the original people," that is, the singers who had popularized the songs, to sing them. Failing in that endeavor in ten cases the agency had the songs sung by "sound alike." Bette Midler, the plaintiff and appellant here, was done by a sound alike.

Midler is a nationally known actress and singer. She won a Grammy as early as 1973 as the Best New Artist of that year. Records made by her since then have gone Platinum and Gold. She was nominated in 1979 for an Academy award for Best Female Actress in *The Rose*, in which she portrayed a pop singer. *Newsweek* in its June 30, 1986 issue described her as an "outrageously original singer/comedian." *Time* hailed her in its March 2, 1987 issue as "a legend" and "the most dynamic and poignant singer-actress of her time."

When Young & Rubicam was preparing the Yuppie Campaign it presented the commercial to its client by playing an edited version of Midler singing "Do You Want To Dance," taken from the 1973 Midler album, "The Divine Miss M." After the client accepted the idea and form of the commercial, the agency contacted Midler's manager, Jerry Edelstein. The conversation went as follows: "Hello, I am Craig Hazen from Young and Rubicam. I am calling you to find out if Bette Midler would be interested in doing ...? Edelstein: "Is it a commercial?" "Yes." "We are not interested."

Undeterred, Young & Rubicam sought out Ula Hedwig whom it knew to have been one of "the Harlettes" a backup singer for Midler for ten years. Hedwig was told by Young & Rubicam that "they wanted someone who could sound like Bette Midler's recording of [Do You Want To Dance]." She was asked to make a "demo" tape of the song if she was interested. She made an a capella demo and got the job.

At the direction of Young & Rubicam, Hedwig then made a record for the commercial. The Midler record of "Do You Want To Dance" was first played to her. She was told to "sound as much as possible like the Bette Midler record," leaving out only a few "aahs" unsuitable for the commercial. Hedwig imitated Midler to the best of her ability.

After the commercial was aired Midler was told by "a number of people" that it *462 "sounded exactly" like her

record of “Do You Want To Dance.” Hedwig was told by “many personal friends” that they thought it was Midler singing the commercial. Ken Fritz, a personal manager in the entertainment business not associated with Midler, declares by affidavit that he heard the commercial on more than one occasion and thought Midler was doing the singing.

Neither the name nor the picture of Midler was used in the commercial; Young & Rubicam had a license from the copyright holder to use the song. At issue in this case is only the protection of Midler's voice. The district court described the defendants' conduct as that “of the average thief.” They decided, “If we can't buy it, we'll take it.” The court nonetheless believed there was no legal principle preventing imitation of Midler's voice and so gave summary judgment for the defendants. Midler appeals.

The First Amendment protects much of what the media do in the reproduction of likenesses or sounds. A primary value is freedom of speech and press. [Time, Inc. v. Hill, 385 U.S. 374, 388, 87 S.Ct. 534, 542, 17 L.Ed.2d 456 \(1967\)](#). The purpose of the media's use of a person's identity is central. If the purpose is “informative or cultural” the use is immune; “if it serves no such function but merely exploits the individual portrayed, immunity will not be granted.” Felcher and Rubin, “Privacy, Publicity and the Portrayal of Real People by the Media,” [88 Yale L.J. 1577, 1596 \(1979\)](#). Moreover, federal copyright law preempts much of the area. “Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.” Notes of Committee on the Judiciary, [17 U.S.C.A. § 114\(b\)](#). It is in the context of these First Amendment and federal copyright distinctions that we address the present appeal.

Nancy Sinatra once sued Goodyear Tire and Rubber Company on the basis of an advertising campaign by Young & Rubicam featuring “These Boots Are Made For Walkin’,” a song closely identified with her; the female singers of the commercial were alleged to have imitated her voice and style and to have dressed and looked like her. The basis of Nancy Sinatra's complaint was unfair competition; she claimed that the song and the arrangement had acquired “a secondary meaning” which, under California law, was protectible. This court noted that the defendants “had paid a very substantial sum to the copyright proprietor to obtain the license for the use of the song and all of its arrangements.” To give Sinatra damages for their use of the song would clash with federal copyright law. Summary judgment for the defendants was affirmed. [Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 717-718 \(9th Cir.1970\)](#), cert. denied, [402 U.S. 906, 91 S.Ct. 1376, 28 L.Ed.2d 646 \(1971\)](#). If Midler were claiming a secondary meaning to “Do You Want To Dance” or seeking to prevent the defendants from using that song, she would fail like Sinatra. But that is not this case. Midler does not seek damages for Ford's use of “Do You Want To Dance,” and thus her claim is not preempted by federal copyright law. Copyright protects “original works of authorship fixed in any tangible medium of expression.” [17 U.S.C. § 102\(a\)](#). A voice is not copyrightable. The sounds are not “fixed.” What is put forward as protectible here is more personal than any work of authorship.

Bert Lahr once sued Adell Chemical Co. for selling Lestoil by means of a commercial in which an imitation of Lahr's voice accompanied a cartoon of a duck. Lahr alleged that his style of vocal delivery was distinctive in pitch, accent, inflection, and sounds. The First Circuit held that Lahr had stated a cause of action for unfair competition, that it could be found “that defendant's conduct saturated plaintiff's audience, curtailing his market.” [Lahr v. Adell Chemical Co., 300 F.2d 256, 259 \(1st Cir.1962\)](#). That case is more like this one. But we do not find unfair competition here. One-minute commercials of the sort the defendants put on would not have saturated Midler's audience and curtailed her market. Midler did not do television commercials. The defendants were not in competition*463 with her. See [Halicki v. United Artists Communications, Inc., 812 F.2d 1213 \(9th Cir.1987\)](#).

[California Civil Code section 3344](#) is also of no aid to Midler. The statute affords damages to a person injured by another who uses the person's “name, voice, signature, photograph or likeness, in any manner.” The defendants did not use Midler's name or anything else whose use is prohibited by the statute. The voice they used was Hedwig's, not hers. The term “likeness” refers to a visual image not a vocal imitation. The statute, however, does not preclude Midler from pursuing any cause of action she may have at common law; the statute itself implies that such common law causes of action do exist because it says its remedies are merely “cumulative.” [Id. § 3344\(g\)](#).

The companion statute protecting the use of a deceased person's name, voice, signature, photograph or likeness states that the rights it recognizes are “property rights.” [Id. § 990\(b\)](#). By analogy the common law rights are also property rights. Appropriation of such common law rights is a tort in California. [Motschenbacher v. R.J. Reynolds](#)

Tobacco Co., 498 F.2d 821 (9th Cir.1974). In that case what the defendants used in their television commercial for Winston cigarettes was a photograph of a famous professional racing driver's racing car. The number of the car was changed and a wing-like device known as a "spoiler" was attached to the car; the car's features of white pinpointing, an oval medallion, and solid red coloring were retained. The driver, Lothar Motschenbacher, was in the car but his features were not visible. Some persons, viewing the commercial, correctly inferred that the car was his and that he was in the car and was therefore endorsing the product. The defendants were held to have invaded a "proprietary interest" of Motschenbacher in his own identity. *Id.* at 825.

Midler's case is different from Motschenbacher's. He and his car were physically used by the tobacco company's ad; he made part of his living out of giving commercial endorsements. But, as Judge Koelsch expressed it in *Motschenbacher*, California will recognize an injury from "an appropriation of the attributes of one's identity." *Id.* at 824. It was irrelevant that Motschenbacher could not be identified in the ad. The ad suggested that it was he. The ad did so by emphasizing signs or symbols associated with him. In the same way the defendants here used an imitation to convey the impression that Midler was singing for them.

Why did the defendants ask Midler to sing if her voice was not of value to them? Why did they studiously acquire the services of a sound-alike and instruct her to imitate Midler if Midler's voice was not of value to them? What they sought was an attribute of Midler's identity. Its value was what the market would have paid for Midler to have sung the commercial in person.

A voice is more distinctive and more personal than the automobile accouterments protected in *Motschenbacher*. A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested. We are all aware that a friend is at once known by a few words on the phone. At a philosophical level it has been observed that with the sound of a voice, "the other stands before me." D. Ihde, *Listening and Voice* 77 (1976). A fortiori, these observations hold true of singing, especially singing by a singer of renown. The singer manifests herself in the song. To impersonate her voice is to pirate her identity. See W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser & Keeton on Torts* 852 (5th ed. 1984).

We need not and do not go so far as to hold that every imitation of a voice to advertise merchandise is actionable. We hold only that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California. Midler has made a showing, sufficient to defeat summary judgment, that the defendants here for their own *464 profit in selling their product did appropriate part of her identity.

REVERSED AND REMANDED FOR TRIAL.

United States Court of Appeals,
Ninth Circuit.
Tom WAITS, Plaintiff-Appellee,
v.
FRITO-LAY, INC.; Tracy-Locke, Inc., Defendants-Appellants.
No. 90-55981.

Argued and Submitted Dec. 3, 1991.

Decided Aug. 5, 1992.

Singer whose unique voice was imitated in radio commercial brought suit for false endorsement under Lanham Act and voice misappropriation under California law. Jury returned verdict in favor of performer following trial in the United States District Court for the Central District of California, [James M. Ideman](#), J. Appeal was taken. The Court of Appeals, [Boochever](#), Circuit Judge, held that: (1) claim under California law for infringement of voice was not preempted by federal copyright law; (2) singer was "widely known" as needed to prevail on voice misappropriation claim; (3) compensatory damages award totaling \$375,000 was supported by evidence; (4) \$2 million punitive damages award was supported by clear and convincing evidence; (5) false endorsement claim was cognizable under Lanham Act; (6) singer had standing to bring false endorsement claim under Lanham Act; and (7) award of attorney fees under § 35 of Lanham Act was not abuse of discretion.

Affirmed in part and vacated in part.

OPINION

[BOOCHEVER](#), Circuit Judge:

Defendants Frito-Lay, Inc., and Tracy-Locke, Inc., appeal a jury verdict and award of \$2.6 million in compensatory damages, punitive damages, and attorney's fees, in favor of singer Tom Waits. Waits sued the snack food manufacturer and its advertising agency for voice misappropriation and false endorsement following the broadcast of a radio commercial for SalsaRio Doritos which featured a vocal performance imitating Waits' raspy singing voice. On appeal, the defendants mount attacks on nearly all aspects of the judgment.

In challenging the judgment on Waits' voice misappropriation claim, the defendants first contend that our decision in [Midler v. Ford Motor Co.](#), 849 F.2d 460 (9th Cir.1988), cert. denied, 503 U.S. 951, 112 S.Ct. 1513, 1514, 117 L.Ed.2d 650 (1992), recognizing voice misappropriation as a California tort, is no longer good law. Next, they contend that the district court erred in instructing the jury on the elements of voice misappropriation. Finally, the defendants urge us to vacate portions of the jury's damage award, arguing that several types of compensatory damages as well as punitive damages are unavailable as a matter of law, and in any event lack evidentiary support.

In challenging the judgment on Waits' false endorsement claim under section 43(a) of the Lanham Act, the defendants contend that Waits lacks standing to sue because he is not in competition with the defendants. They also argue that Waits did not establish his claim at trial, and that damages and attorney's fees were improperly awarded.

Because it is duplicative, we vacate the award of damages under the Lanham Act. We affirm in all other respects.

*1097 BACKGROUND

Tom Waits is a professional singer, songwriter, and actor of some renown. Waits has a raspy, gravelly singing voice, described by one fan as "like how you'd sound if you drank a quart of bourbon, smoked a pack of cigarettes and swallowed a pack of razor blades.... Late at night. After not sleeping for three days." Since the early 1970s, when his professional singing career began, Waits has recorded more than seventeen albums and has toured extensively,

playing to sold-out audiences throughout the United States, Canada, Europe, Japan, and Australia. Regarded as a “prestige artist” rather than a musical superstar, Waits has achieved both commercial and critical success in his musical career. In 1987, Waits received *Rolling Stone* magazine's Critic's Award for Best Live Performance, chosen over other noted performers such as Bruce Springsteen, U2, David Bowie, and Madonna. *SPIN* magazine listed him in its March 1990 issue as one of the ten most interesting recording artists of the last five years. Waits has appeared and performed on such television programs as “Saturday Night Live” and “Late Night with David Letterman,” and has been the subject of numerous magazine and newspaper articles appearing in such publications as *Time*, *Newsweek*, and the *Wall Street Journal*. Tom Waits does not, however, do commercials. He has maintained this policy consistently during the past ten years, rejecting numerous lucrative offers to endorse major products. Moreover, Waits' policy is a public one: in magazine, radio, and newspaper interviews he has expressed his philosophy that musical artists should not do commercials because it detracts from their artistic integrity.

Frito-Lay, Inc. is in the business of manufacturing, distributing, and selling prepared and packaged food products, including Doritos brand corn chips. Tracy-Locke, Inc. is an advertising agency which counts Frito-Lay among its clients. In developing an advertising campaign to introduce a new Frito-Lay product, SalsaRio Doritos, Tracy-Locke found inspiration in a 1976 Waits song, “Step Right Up.” Ironically, this song is a jazzy parody of commercial hucksterism, and consists of a succession of humorous advertising pitches.^{FN1} The commercial the ad agency wrote echoed the rhyming word play of the Waits song. In its presentation of the script to Frito-Lay, Tracy-Locke had the copywriter sing a preliminary rendition of the commercial and then played Waits' recorded rendition of “Step Right Up” to demonstrate the feeling the commercial would capture. Frito-Lay approved the overall concept and the script.

[FN1](#). Waits characterizes the song as an indictment of advertising. It ends with the line, “What the large print giveth, the small print taketh away.” See [Murray Ohio Mfg. Co. v. Continental Ins. Co., 705 F.Supp. 442, 444 \(N.D.Ill.1989\)](#) (quoting “Tom Waits' noted maxim” in interpreting insurance contract).

The story of Tracy-Locke's search for a lead singer for the commercial suggests that no one would do but a singer who could not only capture the feeling of “Step Right Up” but also imitate Tom Waits' voice. The initial efforts of the ad agency's creative team, using a respected professional singer with a deep bluesy voice, met with disapproval from executives at both Tracy-Locke and Frito-Lay. Tracy-Locke then auditioned a number of other singers who could sing in a gravelly style.

Stephen Carter was among those who auditioned. A recording engineer who was acquainted with Carter's work had recommended him to Tracy-Locke as someone who did a good Tom Waits imitation. Carter was a professional musician from Dallas and a Tom Waits fan. Over ten years of performing Waits songs as part of his band's repertoire, he had consciously perfected an imitation of Waits' voice. When Carter auditioned, members of the Tracy-Locke creative team “did a double take” over Carter's near-perfect imitation of Waits, and remarked to him how much he sounded like Waits. In fact, the commercial's musical director warned Carter that he probably wouldn't get the job because he sounded too much like Waits, which *1098 could pose legal problems. Carter, however, did get the job.

At the recording session for the commercial David Brenner, Tracy-Locke's executive producer, became concerned about the legal implications of Carter's skill in imitating Waits, and attempted to get Carter to “back off” his Waits imitation. Neither the client nor the members of the creative team, however, liked the result. After the session, Carter remarked to Brenner that Waits would be unhappy with the commercial because of his publicly avowed policy against doing commercial endorsements and his disapproval of artists who did. Brenner acknowledged he was aware of this, telling Carter that he had previously approached Waits to do a Diet Coke commercial and “you never heard anybody say no so fast in your life.” Brenner conveyed to Robert Grossman, Tracy-Locke's managing vice president and the executive on the Frito-Lay account, his concerns that the commercial was too close to Waits' voice. As a precaution, Brenner made an alternate version of the commercial with another singer.

On the day the commercial was due for release to radio stations across the country, Grossman had a ten-minute long-distance telephone consultation with Tracy-Locke's attorney, asking him whether there would be legal problems with a commercial that sought to capture the same feeling as Waits' music. The attorney noted that there was a “high profile” risk of a lawsuit in view of recent case law recognizing the protectability of a distinctive voice. Based on what Grossman had told him, however, the attorney did not think such a suit would have merit, because a

singer's style of music is not protected. Grossman then presented both the Carter tape and the alternate version to Frito-Lay, noting the legal risks involved in the Carter version. He recommended the Carter version, however, and noted that Tracy-Locke would indemnify Frito-Lay in the event of a lawsuit. Frito-Lay chose the Carter version.

The commercial was broadcast in September and October 1988 on over 250 radio stations located in 61 markets nationwide, including Los Angeles, San Francisco, and Chicago. Waits heard it during his appearance on a Los Angeles radio program, and was shocked. He realized “immediately that whoever was going to hear this and obviously identify the voice would also identify that [Tom Waits] in fact had agreed to do a commercial for Doritos.”

In November 1988, Waits sued Tracy-Locke and Frito-Lay, alleging claims of misappropriation under California law and false endorsement under the Lanham Act. The case was tried before a jury in April and May 1990. The jury found in Waits' favor, awarding him \$375,000 compensatory damages and \$2 million punitive damages for voice misappropriation, and \$100,000 damages for violation of the Lanham Act. The court awarded Waits attorneys' fees under the Lanham Act. This timely appeal followed.

DISCUSSION

I. Voice Misappropriation

In [*Midler v. Ford Motor Co.*, 849 F.2d 460, 463 \(9th Cir.1988\)](#), *cert. denied*, [503 U.S. 951, 112 S.Ct. 1513, 1514, 117 L.Ed.2d 650 \(1992\)](#), we held that “when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.” The *Midler* tort is a species of violation of the “right of publicity,” the right of a person whose identity has commercial value—most often a celebrity—to control the commercial use of that identity. See [*Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824-25 \(9th Cir.1974\)](#). See generally J.T. McCarthy, *The Rights of Publicity and Privacy* (1987) (hereafter *Publicity and Privacy*). We recognized in *Midler* that when voice is a sufficient indicia of a celebrity's identity, the right of publicity protects against its imitation for commercial purposes without the celebrity's consent. See [Midler](#), 849 F.2d at 463.

The jury found that the defendants had violated Waits' right of publicity by broadcasting a commercial which featured a deliberate imitation of Waits' voice. In doing *1099 so, the jury determined that Waits has a distinctive voice which is widely known. On appeal, the defendants attack the legal underpinnings of voice misappropriation, arguing that *Midler* is no longer an accurate statement of California law. They also find fault with the court's formulation of the elements of voice misappropriation in its instructions to the jury. Finally, they attack both the compensatory and punitive damages awarded by the jury as legally inappropriate and unsupported by the evidence. We address each contention in turn.

A. Continuing Viability of *Midler*

[1] As a threshold matter, the defendants ask us to rethink *Midler*, and to reject it as an inaccurate statement of California law. *Midler*, according to the defendants, has been “impliedly overruled” by the Supreme Court's decision in [*Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 109 S.Ct. 971, 103 L.Ed.2d 118 \(1989\)](#). Additionally, they argue that the *Midler* tort is preempted by the federal Copyright Act. We review these questions of law *de novo*. See [*Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 \(9th Cir.1989\)](#), *cert. denied*, [496 U.S. 937, 110 S.Ct. 3217, 110 L.Ed.2d 664 \(1990\)](#).

Bonito Boats involved a Florida statute giving perpetual patent-like protection to boat hull designs already on the market, a class of manufactured articles expressly excluded from federal patent protection. The Court ruled that the Florida statute was preempted by federal patent law because it directly conflicted with the comprehensive federal patent scheme. In reaching this conclusion, the Court cited its earlier decisions in [*Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 84 S.Ct. 784, 11 L.Ed.2d 661 \(1964\)](#), and [*Compco Corp. v. Day-Brite Lighting*, 376 U.S. 234, 84 S.Ct. 779, 11 L.Ed.2d 669 \(1964\)](#), for the proposition that “publicly known design and utilitarian ideas which were unprotected by patent occupied much the same position as the subject matter of an expired patent,” *i.e.*, they are

expressly unprotected. [Bonito Boats](#), 489 U.S. at 152, 109 S.Ct. at 978.

The defendants seize upon this citation to *Sears* and *Compco* as a reaffirmation of the sweeping preemption principles for which these cases were once read to stand. They argue that *Midler* was wrongly decided because it ignores these two decisions, an omission that the defendants say indicates an erroneous assumption that *Sears* and *Compco* have been “relegated to the constitutional junkyard.” Thus, the defendants go on to reason, earlier cases that rejected entertainers’ challenges to imitations of their performances based on federal copyright preemption, were correctly decided because they relied on *Sears* and *Compco*. See [Sinatra v. Goodyear Tire & Rubber Co.](#), 435 F.2d 711, 716-18 (9th Cir.1970), cert. denied, 402 U.S. 906, 91 S.Ct. 1376, 28 L.Ed.2d 646 (1971); [Booth v. Colgate-Palmolive Co.](#), 362 F.Supp. 343, 348 (S.D.N.Y.1973); [Davis v. Trans World Airlines](#), 297 F.Supp. 1145, 1147 (C.D.Cal.1969). This reasoning suffers from a number of flaws.

Bonito Boats itself cautions against reading *Sears* and *Compco* for a “broad pre-emptive principle” and cites subsequent Supreme Court decisions retreating from such a sweeping interpretation. “[T]he Patent and Copyright Clauses do not, by their own force or by negative implication, deprive the States of the power to adopt rules for the promotion of intellectual creation.” [Bonito Boats](#), 489 U.S. at 165, 109 S.Ct. at 985 (citing, *inter alia*, [Goldstein v. California](#), 412 U.S. 546, 552-61, 93 S.Ct. 2303, 2307-08, 37 L.Ed.2d 163 (1973) and [Kewanee Oil Co. v. Bicron Corp.](#), 416 U.S. 470, 478-79, 94 S.Ct. 1879, 1885, 40 L.Ed.2d 315 (1974)). Instead, the Court reaffirmed the right of states to “place limited regulations on the use of unpatented designs in order to prevent consumer confusion as to source.” *Id.* *Bonito Boats* thus cannot be read as endorsing or resurrecting the broad reading of *Compco* and *Sears* urged by the defendants, under which Waits’ state tort claim arguably would be preempted.

Moreover, the Court itself recognized the authority of states to protect entertainers’ “right of publicity” in [Zacchini v. Scripps-Howard Broadcasting Co.](#), 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977). In *1100 *Zacchini*, the Court endorsed a state right-of-publicity law as in harmony with federal patent and copyright law, holding that an unconsented-to television news broadcast of a commercial entertainer’s performance was not protected by the First Amendment. *Id.* at 573, 576-78, 97 S.Ct. at 2856, 2858-59. The cases Frito asserts were “rightly decided” all predate *Zacchini* and other Supreme Court precedent narrowing *Sears*’ and *Compco*’s sweeping preemption principles. In sum, our holding in *Midler*, upon which Waits’ voice misappropriation claim rests, has not been eroded by subsequent authority.

The defendants ask that we rethink *Midler* anyway, arguing as the defendants did there that voice misappropriation is preempted by [section 114](#) of the Copyright Act. Under this provision, a state cause of action escapes Copyright Act preemption if its subject matter “does not come within the subject matter of copyright ... including works or authorship not fixed in any tangible medium of expression.” [17 U.S.C. § 301\(b\)\(1\)](#). We rejected copyright preemption in *Midler* because voice is not a subject matter of copyright: “A voice is not copyrightable. The sounds are not ‘fixed.’ ” [Midler](#), 849 F.2d at 462. As a three-judge panel, we are not at liberty to reconsider this conclusion, and even if we were, we would decline to disturb it.

[2] Waits’ claim, like Bette Midler’s, is for infringement of voice, not for infringement of a copyrightable subject such as sound recording or musical composition. Moreover, the legislative history of [section 114](#) indicates the express intent of Congress that “[t]he evolving common law rights of ‘privacy,’ ‘publicity,’ and trade secrets ... remain unaffected [by the preemption provision] as long as the causes of action contain elements, such as an invasion of personal rights ... that are different in kind from copyright infringement.” H.R.Rep. No. 1476, 94th Cong., 2d Sess. 132, reprinted in 1976 U.S.C.C.A.N. 5659, 5748. Waits’ voice misappropriation claim is one for invasion of a personal property right: his right of publicity to control the use of his identity as embodied in his voice. See [Midler](#), 849 F.2d at 462-63 (“What is put forward as protectable here is more personal than any work of authorship.... A voice is as distinctive and personal as a face.”) The trial’s focus was on the elements of voice misappropriation, as formulated in *Midler*: whether the defendants had deliberately imitated Waits’ voice rather than simply his style and whether Waits’ voice was sufficiently distinctive and widely known to give him a protectable right in its use. These elements are “different in kind” from those in a copyright infringement case challenging the unauthorized use of a song or recording. Waits’ voice misappropriation claim, therefore, is not preempted by federal copyright law.

B. Jury Instructions

[3][4][5] The defendants next contend that the district court committed prejudicial error by rejecting their proposed jury instructions on three elements of the *Midler* tort: the deliberate misappropriation for commercial purposes of (1) a voice, that is (2) distinctive and (3) widely known. We consider jury instructions as a whole to determine if they are misleading or inadequate. *United States v. Beltran-Rios*, 878 F.2d 1208, 1214 (9th Cir.1989). We review challenges to the formulation of jury instructions for abuse of discretion. *Id.* Whether a jury instruction misstates the elements that must be proved at trial, however, is a question of law which we review *de novo*. *United States v. Spillone*, 879 F.2d 514, 525 (9th Cir.1989), *cert. denied*, 498 U.S. 864, ---, 111 S.Ct. 173, 210, 112 L.Ed.2d 137, 170 (1990).

(1) “Voice” vs. “Style”

The defendants argued at trial that although they had consciously copied Tom Waits' style in creating the Doritos commercial, they had not deliberately imitated his voice. They accordingly proposed a jury instruction which distinguished in detail between voice, which is protected under *Midler*, and style, which is not.^{FN2} The district*1101 court rejected this instruction. Instead, its instructions on voice misappropriation track closely the elements of the tort as formulated in *Midler*. The court's instruction directed the jury to decide whether Waits' voice is distinctive, whether his voice is widely known, and whether the defendants had deliberately imitated his voice.

FN2. The proposed instruction read in pertinent part:

Style is the way, manner or method of carrying out an activity.... In contemporary music, there are a great many styles or “sounds,” for example ... blues, dixieland, country and western, rock, rap, rhythm and blues, etc.

Style is *how* a song is sung, how the music is delivered, how the words of a song are expressed. Style includes mood, phrasing, and timing, whether a selection is performed loudly or quietly, whether the song is expressed in singing, talking, or a combination of the two.

Style is not subject to ownership. No singer can appropriate for himself any style and exclude others from performing in the same style. Any singer is free to sing in the same style as any other singer. That is why we have a great many opera singers, blues singers, country-western singers, etc.

Defendants could not be held liable to plaintiff merely because the singer in their commercial performed in the same style as plaintiff has performed in.

The defendants argue that their proposed “style” instruction was crucial because of the deliberate stylistic similarities between the Doritos commercial and “Step Right Up” and because in instructing the jury on Waits' Lanham Act claim, the court told the jury that it could consider Waits' singing style, songwriting style, and manner of presentation. In failing to give their proposed instruction, the defendants contend, the court misled the jury into believing that it could also consider the defendants' admitted imitation of Waits' style in determining liability for voice misappropriation.

[6] We disagree because, read as a whole, the instructions were not misleading. In charging the jury, the court repeatedly noted that two claims were presented for determination and gave separate instructions on each claim. The court's voice misappropriation instructions limited the jury's consideration to voice, and in no way implied that it could consider style. Indeed, in addressing the jury in closing argument, Waits' attorney agreed with the defendants that style was not protected. Moreover, the court included an additional instruction that effectively narrowed the jury's focus to Waits' voice and indicated that style imitation alone was insufficient for tort liability. For the defendants to be liable for voice misappropriation, the court stated, the imitation had to be so good that “people who were familiar with plaintiff's voice who heard the commercial *believed plaintiff performed it*. In this connection it is not enough that they were reminded of plaintiff or thought the singer sounded like plaintiff....” ^{FN3} (Emphasis added.) Even if the jury were initially confused about whether the defendants could be liable simply for imitating Waits' style, this instruction would have disabused them of this notion.

[FN3](#). This instruction effectively added an additional element to *Midler*'s formulation of voice misappropriation: actual confusion. The validity of this instruction is not before us in this appeal and we express no opinion on this issue.

(2) Definition of “Distinctive”

The defendants next argue that the court's instruction concerning the meaning of “distinctive” was an unfair and inaccurate statement of the law because it confuses the “distinctiveness” of a voice with its identifiability or recognizability. The instruction given states in part: “A voice is distinctive if it is distinguishable from the voices of other singers.... if it has particular qualities or characteristics that identify it with a particular singer.” At trial the defendants' experts testified that identifiability depends, not on distinctiveness, but on the listener's expectations; that distinctiveness and recognizability are not the same thing; and that recognizability is enhanced by style similarity. The defendants argue that these theories were inadequately dealt with by the court's instruction and that because *anyone's* voice is identifiable by someone, it was error for the court not to make clear the difference between distinctiveness and identifiability. We disagree.

***1102** The defendants' technical argument that distinctiveness is a separate concept from identifiability, while supported by their experts' testimony, has no basis in law. Identifiability is properly considered in evaluating distinctiveness, for it is a central element of a right of publicity claim. *See Publicity and Privacy* § 3.4[A] & n. 1 (citing cases). Our *Midler* holding is premised on the fact that a person is as identifiable by voice as by any other indicia of identity previously recognized as protectable. Although we did not define “distinctiveness” in *Midler*, we stated: “A voice is as *distinctive* and personal as a face. The human voice is one of the most palpable ways *identity is manifested*. We are all aware that a friend is at once *known* by a few words on the phone.... [T]hese observations hold true of singing....” [Midler v. Ford, 849 F.2d at 463](#) (emphasis added). *See also Motschenbacher, 498 F.2d at 826-27* (rejecting trial court's ruling that because plaintiff's face was not recognizable in advertisement photograph, his identity had not been misappropriated, and finding that plaintiff was identifiable from distinctive decorations on race car).

[\[7\]](#) The court's “distinctiveness” instruction informed the jury that it could consider the recordings of Waits' voice introduced into evidence and the testimony of expert and other witnesses. The court thus invited members of the jury to use their common sense in determining whether Waits has a distinctive enough voice to warrant protection, and to consider as well what the experts had to say. This was entirely appropriate. *See Publicity and Privacy*, § 3.4 [C] (jury must use “common sense ... guided by the weight of the evidence” in determining minimum threshold of identifiability in right of publicity actions). The court was not required to formulate instructions endorsing expert opinions which lacked legal foundation. Finally, we are unpersuaded by the defendants' argument that the court's instruction would have allowed the jury to hold them liable for imitation of a voice that was identifiable by only a small number of people, inasmuch as *Midler* also requires that the plaintiff's voice be “widely known.”

(3) Definition of “Widely Known”

[\[8\]](#) The defendants next object to the district court's instruction concerning the element of “widely known” on the ground that it was too vague to guide the jury in making a factual determination of the issue. The court instructed the jury: “A professional singer's voice is widely known if it is known to a *large number* of people throughout a *relatively large* geographic area.” (Emphasis added.) The court rejected an instruction proposed by the defendants, which reflected their contention at trial that Tom Waits is a singer known only to music insiders and to a small but loyal group of fans: “A singer is not widely known if he is only recognized by his own fans, or fans of a particular sort of music, or a small segment of the population.”

The legal underpinnings of this proposed instruction are questionable. The defendants assert that because Waits has not achieved the level of celebrity Bette Midler has, he is not well known under the *Midler* standard. We reject this crabbed interpretation of *Midler*. The defendants' proposed instruction would have excluded from legal protection the voices of many popular singers who fall short of superstardom. “Well known” is a relative term, and differences in the extent of celebrity are adequately reflected in the amount of damages recoverable. *See Motschenbacher, 498*

[F.2d at 824 n. 11](#) (“Generally, the greater the fame or notoriety of the identity appropriated, the greater will be the extent of the economic injury suffered.”). Moreover, even were these instructions inadequate in some regard the error would be harmless, for we agree with the district court that the “great weight of evidence produced at trial indicates that Tom Waits is very widely known.”

In sum, we find no error in the instructions given to the jury on Waits' voice misappropriation claim.

C. *Compensatory Damage Award*

The jury awarded Waits the following compensatory damages for voice misappropriation: ***1103** \$100,000 for the fair market value of his services; \$200,000 for injury to his peace, happiness and feelings; and \$75,000 for injury to his goodwill, professional standing and future publicity value. The defendants contest the latter two awards, disputing both the availability of such damages in a voice misappropriation action and the sufficiency of the evidence supporting the awards.

1. *Injury to Peace, Happiness and Feelings*

[9] The defendants argue that in right of publicity actions, only damages to compensate for economic injury are available. We disagree. Although the injury stemming from violation of the right of publicity “may be largely, or even wholly, of an economic or material nature,” we have recognized that “it is quite possible that the appropriation of the identity of a celebrity may induce humiliation, embarrassment, and mental distress.” [Motschenbacher, 498 F.2d at 824 & n. 11](#). Contrary to the defendants' assertions, *Midler* neither discussed nor limited the damages recoverable in a voice misappropriation action. *Midler* makes reference to the market value of Midler's voice solely to support its conclusion that her voice has economic value and, therefore, is a protectable property right. See [849 F.2d at 463](#).

[10] In assessing the propriety of mental distress damages, our focus is properly directed to the nature of the infringement and its embarrassing impact on the plaintiff. *Publicity and Privacy* § 4.2[A]. Often the objectionable nature of the use will cause mental distress. *Id.* § 4.2[B], [C], [D] (discussing cases). In [Grant v. Esquire, Inc., 367 F.Supp. 876 \(S.D.N.Y.1973\)](#), for example, the court found that the mere use of a celebrity's identity could cause embarrassment for which mental distress damages would be available. The case involved a suit by Cary Grant against *Esquire* magazine for publishing a photograph in which Grant's head was superimposed on a clothing model's torso. Like Waits, Grant had taken a public position against reaping commercial profits from the publicity value of his identity. *Id.* at 880. The court, after finding that Grant had a protectable right of publicity, noted that “[i]f the jury decides in plaintiff Grant's favor he will of course be entitled to recover for any lacerations to his feelings that he may be able to establish” in addition to the fair market value of use of his identity. *Id.* at 881. Given the evidence that the commercial use of his voice was particularly offensive to Waits, we conclude that Waits' prayer for mental distress damages was properly submitted to the jury.

The defendants argue, however, that merely taking offense is an insufficient basis for awarding mental distress damages, and that under California law the evidence was insufficient to support the award. In California, mental distress damages may be recovered for “shame, humiliation, embarrassment, [and] anger.” [Young v. Bank of America, 141 Cal.App.3d 108, 114, 190 Cal.Rptr. 122 \(1983\)](#); see also [Moore v. Greene, 431 F.2d 584, 591 & n. 3 \(9th Cir.1970\)](#) (damages available for anxiety, humiliation and indignity). Waits testified that when he heard the Doritos commercial, “this corn chip sermon,” he was shocked and very angry. These feelings “grew and grew over a period of a couple of days” because of his strong public opposition to doing commercials. Waits testified, “[I]t embarrassed me. I had to call all my friends, that if they hear this thing, please be informed this is not me. I was on the phone for days. I also had people calling me saying, Gee, Tom, I heard the new Doritos ad.” Added to this evidence of Waits' shock, anger, and embarrassment is the strong inference that, because of his outspoken public stance against doing commercial endorsements, the Doritos commercial humiliated Waits by making him an apparent hypocrite. This evidence was sufficient both to allow the jury to consider mental distress damages and to support their eventual award.

2. *Injury to Goodwill and Future Publicity Value*

The defendants next argue that reputational damages are available only in defamation*1104 actions and that since Waits did not allege or prove defamation, they were unavailable here. Further, they argue, there was no evidence to support the award of such damages because Waits did not show that his career had suffered. Again, we reject these contentions.

[11][12] We have no doubt, in light of general tort liability principles, that where the misappropriation of identity causes injury to reputation, compensation for such injury is appropriate. See [Cal.Civ.Code § 3333 \(West 1970\)](#) (available damages are those “which will compensate for all of the detriment” caused by defendant's tortious conduct). Reputational damages, moreover, have been awarded in right of publicity cases. See [Clark v. Celeb Publishing, Inc., 530 F.Supp. 979, 984 \(S.D.N.Y.1981\)](#) (applying California law); [Hirsch v. S.C. Johnson & Son, Inc., 90 Wis.2d 379, 280 N.W.2d 129, 138 \(1979\)](#). The central issue is not whether these damages were available, but whether the evidence was sufficient to establish injury to Waits' reputation. As we noted above, the jury could have inferred from the evidence that the commercial created a public impression that Waits was a hypocrite for endorsing Doritos. Moreover, it also could have inferred damage to his artistic reputation, for Waits had testified that “part of my character and personality and image that I have cultivated is that I do not endorse products.” Finally, from the testimony of Waits' expert witness, the jury could have inferred that if Waits ever wanted to do a commercial in the future, the fee he could command would be lowered by \$50,000 to \$150,000 because of the Doritos commercial. This evidence was sufficient to support the jury's award of \$75,000 for injury to Waits' goodwill and future publicity value.

D. Punitive Damage Award

*** SECTION OMITTED ***

II. Lanham Act Claim

*** SECTION OMITTED ***

CONCLUSION

Waits' voice misappropriation claim and his Lanham Act claim are legally sufficient. The court did not err in instructing the jury on elements of voice misappropriation. The jury's verdict on each claim is supported by substantial evidence, as are its damage awards. Its award of damages on Waits' Lanham Act claim, however, is duplicative of damages awarded for voice misappropriation; accordingly we vacate it. Finally, the court did not abuse its discretion in awarding attorneys' fees under the Lanham Act.

Waits is awarded his costs on appeal.

AFFIRMED in part and VACATED in part.

United States Court of Appeals,
Sixth Circuit.

John W. CARSON, d/b/a Johnny Carson, an individual, and Johnny Carson Apparel, Inc., a corporation, Plaintiffs-Appellants,

v.

HERE'S JOHNNY PORTABLE TOILETS, INC., a corporation, Defendant-Appellee.

No. 80-1720.

Argued May 26, 1982.

Decided Feb. 1, 1983.

Entertainer, who used phrase "Here's Johnny" as method of introduction, and apparel company with which entertainer was associated brought action against corporation engaged in renting and selling "Here's Johnny" portable toilets, alleging trademark infringement and infringement of right of privacy and right of publicity. The United States District Court for the Eastern District of Michigan, Julian Abele Cook, Jr., J., [498 F.Supp. 71](#), ordered dismissal of complaint, and entertainer and apparel company appealed. The Court of Appeals, Bailey Brown, Senior Circuit Judge, held that: (1) facts did not implicate likelihood of confusion within purview of Lanham Trade-Mark Act provision governing false designation of origin and false description, but (2) entertainer's right of publicity was invaded by intentional appropriation of his identity for commercial exploitation, notwithstanding that neither his name nor likeness were used.

Judgment vacated and case remanded.

Cornelia G. Kennedy, Circuit Judge, dissented and filed opinion.

BAILEY BROWN, Senior Circuit Judge.

This case involves claims of unfair competition and invasion of the right of privacy and the right of publicity arising from appellee's adoption of a phrase generally associated with a popular entertainer.

Appellant, John W. Carson (Carson), is the host and star of "The Tonight Show," a well-known television program broadcast five nights a week by the National Broadcasting Company. Carson also appears as an entertainer in night clubs and theaters around the country. From the time he began hosting "The Tonight Show" in 1962, he has been introduced on the show each night with the phrase "Here's Johnny." This method of introduction was first used for Carson in 1957 when he hosted a daily television program for the American Broadcasting Company. The phrase "Here's Johnny" is generally associated with Carson by a substantial segment of the television *833 viewing public. In 1967, Carson first authorized use of this phrase by an outside business venture, permitting it to be used by a chain of restaurants called "Here's Johnny Restaurants."

Appellant Johnny Carson Apparel, Inc. (Apparel), formed in 1970, manufactures and markets men's clothing to retail stores. Carson, the president of Apparel and owner of 20% of its stock, has licensed Apparel to use his name and picture, which appear on virtually all of Apparel's products and promotional material. Apparel has also used, with Carson's consent, the phrase "Here's Johnny" on labels for clothing and in advertising campaigns. In 1977, Apparel granted a license to Marcy Laboratories to use "Here's Johnny" as the name of a line of men's toiletries. The phrase "Here's Johnny" has never been registered by appellants as a trademark or service mark.

Appellee, Here's Johnny Portable Toilets, Inc., is a Michigan corporation engaged in the business of renting and selling "Here's Johnny" portable toilets. Appellee's founder was aware at the time he formed the corporation that "Here's Johnny" was the introductory slogan for Carson on "The Tonight Show." He indicated that he coupled the phrase with a second one, "The World's Foremost Comedian," to make "a good play on a phrase."

Shortly after appellee went into business in 1976, appellants brought this action alleging unfair competition, trademark infringement under federal and state law, and invasion of privacy and publicity rights. They sought

damages and an injunction prohibiting appellee's further use of the phrase "Here's Johnny" as a corporate name or in connection with the sale or rental of its portable toilets.

After a bench trial, the district court issued a memorandum opinion and order, [Carson v. Here's Johnny Portable Toilets, Inc.](#), 498 F.Supp. 71 (E.D.Mich.1980), which served as its findings of fact and conclusions of law. The court ordered the dismissal of the appellants' complaint. On the unfair competition claim, the court concluded that the appellants had failed to satisfy the "likelihood of confusion" test. On the right of privacy and right of publicity theories, the court held that these rights extend only to a "name or likeness," and "Here's Johnny" did not qualify.

I.

*** SECTION OMITTED ***

II.

The appellants also claim that the appellee's use of the phrase "Here's Johnny" violates the common law right of privacy and right of publicity. ^{FN1} The confusion in this area of the law requires a brief analysis of the relationship between these two rights.

^{FN1} Michigan law, which governs these claims, has not yet clearly addressed the right of publicity. But the general recognition of the right, *see* W. Prosser, HANDBOOK OF THE LAW OF TORTS § 117, at 805 (4th ed. 1971), suggests to us that the Michigan courts would adopt the right. Michigan has recognized a right of privacy. [Beaumont v. Brown](#), 401 Mich. 80, 257 N.W.2d 522 (1977).

[5] In an influential article, Dean Prosser delineated four distinct types of the right of privacy: (1) intrusion upon one's seclusion or solitude, (2) public disclosure of embarrassing private facts, (3) publicity which places one in a false light, and (4) appropriation of one's name or likeness for the defendant's advantage. Prosser, *Privacy*, 48 Calif.L.Rev. 383, 389 (1960). This fourth type has become known as the "right of publicity." [Factors Etc., Inc. v. Pro Arts, Inc.](#), 579 F.2d 215, 220 (2d Cir.1978), *cert. denied*, 440 U.S. 908, 99 S.Ct. 1215, 59 L.Ed.2d 455 (1979); *see* [Zacchini v. Scripps-Howard Broadcasting Co.](#), 433 U.S. 562, 572, 97 S.Ct. 2849, 2855, 53 L.Ed.2d 965 (1977). Henceforth we will refer to Prosser's last, or fourth, category, as the "right of publicity."

Dean Prosser's analysis has been a source of some confusion in the law. His first three types of the right of privacy generally protect the right "to be let alone," while the right of publicity protects the celebrity's pecuniary interest in the commercial exploitation of his identity. [Zacchini, supra](#), 433 U.S. at 573, 97 S.Ct. at 2856. *See generally* *The Right of Publicity-Protection for Public Figures and Celebrities*, 42 Brooklyn L.Rev. 527 (1976). Thus, the right of privacy and the right of publicity protect fundamentally different interests and must be analyzed separately.

[6] We do not believe that Carson's claim that his right of privacy has been invaded is supported by the law or the facts. Apparently, the gist of this claim is that Carson is embarrassed by and considers it odious to be associated with the appellee's product. Clearly, the association does not appeal to Carson's sense of humor. But the facts here presented do not, it appears to us, amount to an invasion of any of the interests protected by the right of privacy. In any event, our disposition of the claim of an invasion of the right of publicity makes it unnecessary for us to accept or reject the claim of an invasion of the right of privacy.

*835 [7] The right of publicity has developed to protect the commercial interest of celebrities in their identities. The theory of the right is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity. In [Memphis Development Foundation v. Factors Etc., Inc.](#), 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953, 101 S.Ct. 358, 66 L.Ed.2d 217 (1980), we stated: "The famous have an exclusive legal right during life to control and profit from the commercial use of their name and personality." *Id.* at 957.

[8] The district court dismissed appellants' claim based on the right of publicity because appellee does not use Carson's name or likeness. 498 F.Supp. at 77. It held that it "would not be prudent to allow recovery for a right of publicity claim which does not more specifically identify [Johnny Carson](#)." 498 F.Supp. at 78. We believe that, on

the contrary, the district court's conception of the right of publicity is too narrow. The right of publicity, as we have stated, is that a celebrity has a protected pecuniary interest in the commercial exploitation of his identity. If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his "name or likeness" is used. Carson's identity may be exploited even if his name, John W. Carson, or his picture is not used.

In [*Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 \(9th Cir.1974\)](#), the court held that the unauthorized use of a picture of a distinctive race car of a well known professional race car driver, whose name or likeness were not used, violated his right of publicity. In this connection, the court said:

We turn now to the question of "identifiability." Clearly, if the district court correctly determined as a matter of law that plaintiff is not identifiable in the commercial, then in no sense has plaintiff's identity been misappropriated nor his interest violated.

Having viewed a film of the commercial, we agree with the district court that the "likeness" of plaintiff is itself unrecognizable; however, the court's further conclusion of law to the effect that the driver is not identifiable as plaintiff is erroneous in that it wholly fails to attribute proper significance to the distinctive decorations appearing on the car. As pointed out earlier, these markings were not only peculiar to the plaintiff's cars but they caused some persons to think the car in question was plaintiff's and to infer that the person driving the car was the plaintiff.

Id. at 826-827 (footnote omitted).

In [*Ali v. Playgirl, Inc.*, 447 F.Supp. 723 \(S.D.N.Y.1978\)](#), Muhammad Ali, former heavyweight champion, sued Playgirl magazine under the New York "right of privacy" statute and also alleged a violation of his common law right of publicity. The magazine published a drawing of a nude, black male sitting on a stool in a corner of a boxing ring with hands taped and arms outstretched on the ropes. The district court concluded that Ali's right of publicity was invaded because the drawing sufficiently identified him in spite of the fact that the drawing was captioned "Mystery Man." The district court found that the identification of Ali was made certain because of an accompanying verse that identified the figure as "The Greatest." The district court took judicial notice of the fact that "Ali has regularly claimed that appellation for himself." [*Id.* at 727.](#)

In [*Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis.2d 379, 280 N.W.2d 129 \(1979\)](#), the court held that use by defendant of the name "Crazylegs" on a shaving gel for women violated plaintiff's right of publicity. Plaintiff, Elroy Hirsch, a famous football player, had been known by this nickname. The court said:

The fact that the name, "Crazylegs," used by Johnson, was a nickname rather than Hirsch's actual name does not preclude a cause of action. All that is required is that the name clearly identify the wronged person. In the instant case, it is not disputed at this juncture of the *836 case that the nickname identified the plaintiff Hirsch. It is argued that there were others who were known by the same name. This, however, does not vitiate the existence of a cause of action. It may, however, if sufficient proof were adduced, affect the quantum of damages should the jury impose liability or it might preclude liability altogether. Prosser points out "that a stage or other fictitious name can be so identified with the plaintiff that he is entitled to protection against its use." 49 Cal.L.Rev., [*supra* at 404](#). He writes that it would be absurd to say that Samuel L. Clemens would have a cause of action if that name had been used in advertising, but he would not have one for the use of "Mark Twain." If a fictitious name is used in a context which tends to indicate that the name is that of the plaintiff, the factual case for identity is strengthened. Prosser, [*supra* at 403](#).

[280 N.W.2d at 137.](#)

[9] In this case, Earl Braxton, president and owner of Here's Johnny Portable Toilets, Inc., admitted that he knew that the phrase "Here's Johnny" had been used for years to introduce Carson. Moreover, in the opening statement in the district court, appellee's counsel stated:

Now, we've stipulated in this case that the public tends to associate the words "Johnny Carson", the words "Here's

Johnny” with plaintiff, John Carson and, Mr. Braxton, in his deposition, admitted that he knew that and probably absent that identification, he would not have chosen it.

App. 68. That the “Here's Johnny” name was selected by Braxton because of its identification with Carson was the clear inference from Braxton's testimony irrespective of such admission in the opening statement.

We therefore conclude that, applying the correct legal standards, appellants are entitled to judgment. The proof showed without question that appellee had appropriated Carson's identity in connection with its corporate name and its product.^{FN2}

^{FN2.} See also Prosser, HANDBOOK OF THE LAW OF TORTS, *supra*, at 805 (“It is the plaintiff's name as a symbol of his identity that is involved here, and not as a mere name.”).

Although this opinion holds only that Carson's right of publicity was invaded because appellee intentionally appropriated his identity for commercial exploitation, the dissent, relying on its interpretation of the authorities and relying on policy and constitutional arguments, would hold that there was no invasion here. We do not believe that the dissent can withstand fair analysis.

The dissent contends that the authorities hold that the right of publicity is invaded only if there has been an appropriation of the celebrity's “name, likeness, achievements, identifying characteristics or actual performances.” After so conceding that the right is at least this broad, the dissent then attempts to show that the authorities upon which the majority opinion relies are explainable as involving an appropriation of one or more of these attributes. The dissent explains *Motschenbacher*, *supra*, where the advertisement used a photograph, slightly altered, of the plaintiff's racing car, as an “identifying characteristic” case. But the dissent fails to explain why the photograph any more identified Motschenbacher than the phrase “Here's Johnny” identifies appellant Carson. The dissent explains *Hirsch*, *supra*, by pointing out that there the use of the appellation “Crazylegs” by the defendant was in a “context” that suggested a reference to Hirsch and that therefore Hirsch was identified by such use. Here, the dissent states, there is no evidence of the use of “Here's Johnny” in such a suggestive “context.” Putting aside the fact that appellee also used the phrase “The World's Foremost Comedian,” we fail to see why “context” evidence is necessary where appellee's president admitted that it adopted the name “Here's Johnny” because it identified appellant Carson. We do not understand appellee to even contend that it did not successfully accomplish its intended purpose of appropriating his identity. The dissent explains *Ali*, *supra*, by pointing out that in that case the magazine used a drawing that “strongly suggests” it to be a representation*837 of the famous fighter, but it is also true that the court put emphasis on the fact that the subject of the drawing was referred to as “The Greatest,” which “further implied” that the individual was [Ali. 447 F.Supp. at 726-727.](#)

It should be obvious from the majority opinion and the dissent that a celebrity's identity may be appropriated in various ways. It is our view that, under the existing authorities, a celebrity's legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes. We simply disagree that the authorities limit the right of publicity as contended by the dissent.^{FN3} It is not fatal to appellant's claim that appellee did not use his “name.” Indeed, there would have been no violation of his right of publicity even if appellee had used his name, such as “J. William Carson Portable Toilet” or the “John William Carson Portable Toilet” or the “J.W. Carson Portable Toilet.” The reason is that, though literally using appellant's “name,” the appellee would not have appropriated Carson's identity as a celebrity. Here there was an appropriation of Carson's identity without using his “name.”

^{FN3.} Although Michigan law is applicable and the author of the dissent is an experienced and able Michigan lawyer and judge, we do not understand the dissent to contend that the law of that state in particular proscribes the holding of the majority opinion.

With respect to the dissent's general policy arguments, it seems to us that the policies there set out would more likely be vindicated by the majority view than by the dissent's view. Certainly appellant Carson's achievement has made him a celebrity which means that his identity has a pecuniary value which the right of publicity should vindicate. Vindication of the right will tend to encourage achievement in Carson's chosen field. Vindication of the right will

also tend to prevent unjust enrichment by persons such as appellee who seek commercially to exploit the identity of celebrities without their consent. [FN4](#)

[FN4](#). Appellee did not brief and make the policy and constitutional arguments relied upon in the dissent. Instead, the appellee confined its argument to the straightforward proposition that the right of publicity is limited to appropriation of the celebrity's "name or likeness."

The dissent also suggests that recognition of the right of publicity here would somehow run afoul of federal monopoly policies and first amendment proscriptions. If, as the dissent seems to concede, such policies and proscriptions are not violated by the vindication of the right of publicity where the celebrity's "name, likeness, achievements, identifying characteristics or actual performances" have been appropriated for commercial purposes, we cannot see why the policies and proscriptions would be violated where, as here, the celebrity's identity has admittedly been appropriated for commercial exploitation by the use of the phrase "Here's Johnny Portable Toilets."

The judgment of the district court is vacated and the case remanded for further proceedings consistent with this opinion.

CORNELIA G. KENNEDY, Circuit Judge, dissenting.

I respectfully dissent from that part of the majority's opinion which holds that appellee's use of the phrase "Here's Johnny" violates appellant Johnny Carson's common law right of publicity. While I agree that an individual's identity may be impermissibly exploited, I do not believe that the common law right of publicity may be extended beyond an individual's name, likeness, achievements, identifying characteristics or actual performances, to include phrases or other things which are merely associated with the individual, as is the phrase "Here's Johnny." The majority's extension of the right of publicity to include phrases or other things which are merely associated with the individual permits a popular entertainer or public figure, by associating himself or herself with a common phrase, to remove those words from the public domain.

The phrase "Here's Johnny" is merely associated with Johnny Carson, the host and star of "The Tonight Show" broadcast by the National Broadcasting Company. Since 1962, the opening format of "The Tonight *838 Show," after the theme music is played, is to introduce Johnny Carson with the phrase "Here's Johnny." The words are spoken by an announcer, generally Ed McMahon, in a drawn out and distinctive manner. Immediately after the phrase "Here's Johnny" is spoken, Johnny Carson appears to begin the program. [FN1](#) This method of introduction was first used by Johnny Carson in 1957 when he hosted a daily television show for the American Broadcasting Company. This case is not transformed into a "name" [FN2](#) case simply because the diminutive form of John W. Carson's given name and the first name of his full stage name, Johnny Carson, appears in it. The first name is so common, in light of the millions of persons named John, Johnny or Jonathan that no doubt inhabit this world, that, alone, it is meaningless or ambiguous at best in identifying Johnny Carson, the celebrity. In addition, the phrase containing Johnny Carson's first stage name was certainly selected for its value as a double entendre. [FN3](#) Appellee manufactures portable toilets. The value of the phrase to appellee's product is in the risqué meaning of "john" as a toilet or bathroom. [FN4](#) For this reason, too, this is not a "name" case.

[FN1](#). It cannot be claimed that Johnny Carson's appearances on "The Tonight Show" are the only times at which a performer is introduced with the phrase "Here's _____." Numerous other performers are introduced with the phrase "Here's _____," using their first name, last name or full name.

[FN2](#). See note 5, *infra*.

[FN3](#). Random House College Dictionary 397 (Rev'd ed. 1980).

[FN4](#). *Id.* 721.

Appellee has stipulated that the phrase "Here's Johnny" is associated with Johnny Carson and that absent this association, he would not have chosen to use it for his product and corporation, Here's Johnny Portable Toilets, Inc.

I do not consider it relevant that appellee intentionally chose to incorporate into the name of his corporation and product a phrase that is merely associated with Johnny Carson. What is not protected by law is not taken from public use. Research reveals no case in which the right of publicity has been extended to phrases or other things which are merely associated with an individual and are not part of his name, likeness, achievements, identifying characteristics or actual performances. Both the policies behind the right of publicity and countervailing interests and considerations indicate that such an extension should not be made.

I. Policies Behind Right of Publicity

The three primary policy considerations behind the right of publicity are succinctly stated in Hoffman, *Limitations on the Right of Publicity*, 28 *Bull. Copr. Soc'y*, 111, 116-22 (1980). First, “the right of publicity vindicates the economic interests of celebrities, enabling those whose achievements have imbued their identities with pecuniary value to profit from their fame.” *Id.* 116; *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573, 575-76, 97 S.Ct. 2849, 2857-58, 53 L.Ed. 965 (1977). Second, the right of publicity fosters “the production of intellectual and creative works by providing the financial incentive for individuals to expend the time and resources necessary to produce them.” *Limitations on the Right of Publicity, supra*, 118; *Zacchini, supra*, 433 U.S. at 575-76, 97 S.Ct. at 2857-58. Third, “[t]he right of publicity serves both individual and societal interests by preventing what our legal tradition regards as wrongful conduct: unjust enrichment and deceptive trade practices.” *Limitations on the Right of Publicity, supra*, 118; *Zacchini, supra*, 433 U.S. at 580 n. 2, 97 S.Ct. at 2860 n. 2 (Powell, J., dissenting) (unjust enrichment argument); *University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 15 N.Y.2d 940, 207 N.E.2d 508, 511-513, 259 N.Y.S.2d 832, 837-38 (1965) (dissent) (deceptive trade practices argument).

None of the above-mentioned policy arguments supports the extension of the right of publicity to phrases or other things which are merely associated with an individual. First, the majority is awarding Johnny Carson a windfall, rather than vindicating his *839 economic interests, by protecting the phrase “Here’s Johnny” which is merely associated with him. In *Zacchini*, the Supreme Court stated that a mechanism to vindicate an individual’s economic rights is indicated where the appropriated thing is “the product of ... [the individual’s] own talents and energy, the end result of much time, effort and expense.” *Zacchini, supra*, 433 U.S. at 575, 97 S.Ct. at 2857. There is nothing in the record to suggest that “Here’s Johnny” has any nexus to Johnny Carson other than being the introduction to his personal appearances. The phrase is not part of an identity that he created. In its content “Here’s Johnny” is a very simple and common introduction. The content of the phrase neither originated with Johnny Carson nor is it confined to the world of entertainment. The phrase is not said by Johnny Carson, but said of him. Its association with him is derived, in large part, by the context in which it is said—generally by Ed McMahon in a drawn out and distinctive voice ^{FN5} after the theme music to “The Tonight Show” is played, and immediately prior to Johnny Carson’s own entrance. Appellee’s use of the content “Here’s Johnny,” in light of its value as a double entendre, written on its product and corporate name, and therefore outside of the context in which it is associated with Johnny Carson, does little to rob Johnny Carson of something which is unique to him or a product of his own efforts.

^{FN5}. Ed McMahon arguably has a competing publicity interest in this same phrase because it is said by him in a distinctive and drawn out manner as his introduction to entertainers who appear on “The Tonight Show,” including Johnny Carson.

The second policy goal of fostering the production of creative and intellectual works is not met by the majority’s rule because in awarding publicity rights in a phrase neither created by him nor performed by him, economic reward and protection is divorced from personal incentive to produce on the part of the protected and benefited individual. Johnny Carson is simply reaping the rewards of the time, effort and work product of others.

Third, the majority’s extension of the right of publicity to include the phrase “Here’s Johnny” which is merely associated with Johnny Carson is not needed to provide alternatives to existing legal avenues for redressing wrongful conduct. The existence of a cause of action under section 43(a) of the Lanham Act, 15 U.S.C.A. § 1125(a) (1976) and Michigan common law does much to undercut the need for policing against unfair competition through an additional legal remedy such as the right of publicity. The majority has concluded, and I concur, that the District Court was warranted in finding that there was not a reasonable likelihood that members of the public would be confused by appellee’s use of the “Here’s Johnny” trademark on a product as dissimilar to those licensed by Johnny Carson as portable toilets. In this case, this eliminates the argument of wrongdoing. Moreover, the majority’s

extension of the right of publicity to phrases and other things merely associated with an individual is not conditioned upon wrongdoing and would apply with equal force in the case of an unknowing user. With respect to unjust enrichment, because a celebrity such as Johnny Carson is himself enriched by phrases and other things associated with him in which he has made no personal investment of time, money or effort, another user of such a phrase or thing may be enriched somewhat by such use, but this enrichment is not at Johnny Carson's expense. The policies behind the right of publicity are not furthered by the majority's holding in this case.

II. Countervailing Interests and Considerations

The right of publicity, whether tied to name, likeness, achievements, identifying characteristics or actual performances, etc. conflicts with the economic and expressive interests of others. Society's interests in free enterprise and free expression must be balanced against the interests of an individual seeking protection in the right of publicity where the right is being expanded beyond established limits. In addition, the right to publicity may be subject to federal §840 preemption where it conflicts with the provisions of the Copyright Act of 1976.

A. Federal Policy: Monopolies

Protection under the right of publicity creates a common law monopoly that removes items, words and acts from the public domain. That federal policy favors free enterprise was recently reaffirmed by the Supreme Court in [National Society of Professional Engineers v. United States](#), 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978), in which the Supreme Court indicated that outside of the “rule of reason,” only those anticompetitive restraints expressly authorized by Congress would be permitted to stand. *Id.* at 692 n. 18, 98 S.Ct. at 1365 n. 18. Concern for the impact of adopting an overbroad approach to the right of publicity was also indicated in this Court's decision in [Memphis Development Foundation v. Factors Etc., Inc.](#), 616 F.2d 956 (6th Cir.), cert. denied, 449 U.S. 953, 101 S.Ct. 358, 66 L.Ed.2d 217 (1980). In *Memphis Development*, this Court held that the right of publicity does not survive a celebrity's death under Tennessee law. In so holding, this Court recognized that commercial and competitive interests are potentially compromised by an expansive approach to the right of publicity. This Court was concerned that an extension of the right of publicity to the exclusive control of the celebrity's heirs might compromise the efficiency, productivity and fairness of our economic system without enlarging the stock or quality of the goods, services, artistic creativity, information, invention or entertainment available and detract from the equal distribution of economic opportunity available in a free market system. *Id.* 959-60. *Memphis Development* recognized that the grant of a right of publicity is tantamount to the grant of a monopoly, in that case, for the life of the celebrity. The majority's grant to Johnny Carson of a publicity right in the phrase “Here's Johnny” takes this phrase away from the public domain, giving him a common law monopoly for it, without extracting from Johnny Carson a personal contribution for the public's benefit.

Protection under the right of publicity confers a monopoly on the protected individual that is potentially broader, offers fewer protections and potentially competes with federal statutory monopolies. As an essential part of three federal monopoly rights, copyright, trademark and patents, notice to the public is required in the form of filing with the appropriate governmental office and use of an appropriate mark. This apprises members of the public of the nature and extent of what is being removed from the public domain and subject to claims of infringement. The right of publicity provides limited notice to the public of the extent of the monopoly right to be asserted, if one is to be asserted at all. As the right of privacy is expanded beyond protections of name, likeness and actual performances, which provide relatively objective notice to the public of the extent of an individual's rights, to more subjective attributes such as achievements and identifying characteristics, the public's ability to be on notice of a common law monopoly right, if one is even asserted by a given famous individual, is severely diminished. Protecting phrases and other things merely associated with an individual provides virtually no notice to the public at all of what is claimed to be protected. By ensuring the invocation of the adjudicative process whenever the commercial use of a phrase or other associated thing is considered to have been wrongfully appropriated, the public is left to act at their peril. The result is a chilling effect on commercial innovation and opportunity.

Also unlike the federal statutory monopolies, this common law monopoly right offers no protections against the monopoly existing for an indefinite time or even in perpetuity. See *Memphis Development*, *supra* (right not inheritable under Tennessee law); [Lugosi v. Universal Pictures](#), 25 Cal.3d 813, 603 P.2d 425, 160 Cal.Rptr. 323 (1979) (right not inheritable under California law). *Contra*, [King v. American Heritage Products, Inc.](#), 250 Ga. 135,

[296 S.E.2d 697 \(1982\)](#) (right inheritable under Georgia law); [Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 \(2d Cir.1978\)](#), cert. denied, *841440 U.S. 908, 99 S.Ct. 1215, 59 L.Ed.2d 455 (1979) (right inheritable); [Groucho Marx Productions, Inc. v. Day & Night Co., Inc., 523 F.Supp. 485 \(S.D.N.Y.1981\)](#) (right inheritable if commercially exploited during lifetime).

B. Federal Policy: Free Expression and Use of Intellectual Property

The first amendment protects the freedom of speech, including commercial speech. [U.S. Const. amend. I](#); [Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 rehr'g denied, 423 U.S. 886, 96 S.Ct. 162, 46 L.Ed.2d 118 \(1975\)](#). Strong federal policy permits the free use of intellectual property, words and ideas that are in general circulation and not protected by a valid copyright, patent or trademark. [Lear, Inc. v. Adkins, 395 U.S. 653, 668, 89 S.Ct. 1902, 1910, 23 L.Ed.2d 610 \(1969\)](#); [Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 84 S.Ct. 784, 11 L.Ed.2d 661, rehr'g denied, 376 U.S. 973, 84 S.Ct. 1131, 12 L.Ed.2d 87 \(1964\)](#); [Compro Corp. v. Day-Bright Lighting, Inc., 376 U.S. 234, 84 S.Ct. 779, 11 L.Ed.2d 669, rehr'g denied, 377 U.S. 913, 84 S.Ct. 1162, 12 L.Ed.2d 183 \(1964\)](#). The federal copyright statute only protects original works that fix the author's particular expression of an idea or concept in a tangible form. State statutory or common law protection against activities violating rights that are not equivalent to those granted under copyright law or protection of subject matter which is not copyrightable, including works that are not fixed in any tangible form of expression, are not preempted. [17 U.S.C.A. § 301\(b\)](#) (1977). See generally, Shipley, *Publicity Never Dies; It Just Fades Away: The right of Publicity and Federal Preemption*, 66 Cornell L.Rev. 673 (1981). Apart from the technical arguments regarding preemption, if federal law and policy does not protect phrases such as "Here's Johnny," which is certainly not an original combination of words, state law should not protect them either under a right of publicity for want of a sufficient interest justifying protection. See U.S. Const., art. I, § 8 (purpose of copyright and patent laws is to "promote the Progress of Science and the useful Acts"); [Zacchini, supra, 433 U.S. at 575, 576-77, 97 S.Ct. at 2857, 2858](#) (purpose of right of publicity is to promote production of works that benefit the public that are product of individual's own talents and energy). In addition, because copyright does not restrain the use of a mere idea or concept but only protects particular tangible expressions of an idea or concept, it has been held not to run afoul of first amendment challenges. [United States v. Bodin, 375 F.Supp. 1265, 1267 \(W.D.Okl.1974\)](#); [Walt Disney Productions v. Air Pirates, 345 F.Supp. 108, 115-16 \(N.D.Cal.1972\)](#), citing, Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L.Rev. 1108 (1970). See [Zacchini, supra, 433 U.S. at 577-78 n. 13, 97 S.Ct. at 2858-59 n. 13](#) (right of publicity could not prevent station from producing own human cannonball act). The protected tangible expressions are asserted to not run afoul of first amendment challenges because the notice requirements and limited duration of copyright protection balances the interest of individuals seeking protection under the copyright clause and the first amendment. See, e.g., *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, *supra*, 1193. Because the phrase "Here's Johnny" is more akin to an idea or concept of introducing an individual than an original protectable fixed expression of that idea and because the right of publicity in this instance is not complemented by saving notice or duration requirements, phrases such as "Here's Johnny" should not be entitled to protection under the right of publicity as a matter of policy and concern for the first amendment.

Apart from the possibility of outright federal preemption, public policy requires that the public's interest in free enterprise and free expression take precedence over any interest Johnny Carson may have in a phrase associated with his person.

III. Case Law

The common law right of publicity has been held to protect various aspects of an individual's identity from commercial exploitation: [FN6](#) *842 name, [FN7](#) likeness, [FN8](#) achievements, [FN9](#) identifying characteristics, [FN10](#) actual performances, [FN11](#) and fictitious characters created by a performer. [FN12](#) Research reveals no case which has extended the right to publicity to phrases and other things which are merely associated with an individual.

[FN6](#). The concept that an individual should have the right to protect and profit from the commercial use of his name, likeness, achievements, identifying characteristics and actual performances took many forms as modern advertising and merchandising techniques developed and the name, etc. of celebrities assumed greater value. Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 Cornell L.Rev. 673, 678 (1981). The right of publicity as a distinct right is of relatively

recent origin. This right was first recognized in the Second Circuit case of [Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.](#), 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816, 74 S.Ct. 26, 98 L.Ed. 343 (1953). Only in 1953 did this right emerge from the right to privacy, the tort of misappropriation, the unfair competition doctrine and other theories in contract and defamation, as a distinct and separate theory. The scope and definition of new common law rights is often hazy in the development process. [Ettore v. Philco Television Broadcasting Corp.](#), 229 F.2d 481, 490 (3d Cir.) cert. denied, 351 U.S. 926, 76 S.Ct. 783, 100 L.Ed. 1456 (1956). Although some of the cases cited in footnotes 4-9, *infra*, discuss these other theories, it is evident from a reading of the cases that virtually all of the courts were concerned with protection of an individual's right to control and profit from the commercial use of his name, likeness, etc. and were attempting to come to grips with this new interest. For these reasons, several cases which do not specifically refer to the right of publicity are cited for propositions to which the right of publicity would now no doubt be applied.

FN7. See e.g., [Cepeda v. Swift & Co.](#), 415 F.2d 1205 (8th Cir.1969) (real name); [Gardella v. Log Cabin Products Co.](#), 89 F.2d 891 (2d Cir.1937) (stage name); [Hirsch v. S.C. Johnson & Son, Inc.](#), 90 Wis.2d 379, 280 N.W.2d 129 (1979) (nickname); [Guglielmi v. Spelling-Goldberg Productions](#), 25 Cal.3d 860, 603 P.2d 454, 160 Cal.Rptr. 352 (1979) (stage-real name).

FN8. [Ali v. Playgirl, Inc.](#), 447 F.Supp. 723 (S.D.N.Y.1978) (likeness). See, e.g., [Grant v. Esquire, Inc.](#), 367 F.Supp. 876 (S.D.N.Y.1973) (likeness); [McQueen v. Wilson](#), 117 Ga.App. 488, 161 S.E.2d 63 (Ct.App.), rev'd on other grounds, 224 Ga. 420, 162 S.E.2d 313 (1968) (likeness); [Brinkley v. Casablancas](#), 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1st Dept.1981); see [Guglielmi v. Spelling-Goldberg Productions](#), 25 Cal.3d 860, 603 P.2d 454, 160 Cal.Rptr. 352 (1979) (likeness-impersonation); [Memphis Development v. Factors Etc., Inc.](#), 616 F.2d 956 (6th Cir.), cert. denied, 449 U.S. 953, 101 S.Ct. 358, 66 L.Ed.2d 217 (1980); [King v. American Heritage Products, Inc.](#), 250 Ga. 135, 296 S.E.2d 697 (1982).

FN9. See, e.g., [Palmer v. Schonhorn](#), 96 N.J.Super. 72, 232 A.2d 458 (Super.Ct.1967) (individual's achievements); [Guglielmi v. Spelling-Goldberg Productions](#), 25 Cal.3d 860, 603 P.2d 454, 160 Cal.Rptr. 352 (1979) (no right to individual's life story); [Rosemont Enterprises, Inc. v. Random House, Inc.](#), 58 Misc.2d 1, 294 N.Y.S.2d 122 (Sup.Ct.1968), *affd. mem.*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (App.Div.1969) (no right to individual's life story); [Donahue v. Warner Bros. Pictures Distributing Corp.](#), 2 Utah 2d 256, 272 P.2d 177 (1954) (no right to individual's life story).

FN10. [Motschenbacher v. R.J. Reynolds Tobacco Co.](#), 498 F.2d 821 (9th Cir.1974) (identifying characteristics/distinctive racing car); [Lombardo v. Doyle, Dane & Bernbach, Inc.](#), 58 A.D.2d 620, 396 N.Y.S.2d 661 (App.Div.1977) (identifying characteristics/band leader's gestures setting, nickname-Mr. New Year's Eve).

FN11. [Zacchini v. Scripps-Howard Broadcasting Co.](#), 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (actual performance); [Ettore v. Philco Television Broadcasting Corp.](#), 229 F.2d 481 (3d Cir.), cert. denied, 351 U.S. 926, 76 S.Ct. 783, 100 L.Ed. 1456 (1956) (actual performance).

FN12. [Groucho Marx Productions, Inc. v. Day & Night Co.](#), 523 F.Supp. 485 (S.D.N.Y.1981); [Price v. Hal Roach Studios, Inc.](#), 400 F.Supp. 836 (S.D.N.Y.1975) (Laurel & Hardy characters). See [Lugosi v. Universal Pictures](#), 25 Cal.3d 813, 603 P.2d 425, 160 Cal.Rptr. 323 (1979) (Dracula).

The three cases cited by the majority in reaching their conclusion that the right of privacy should be extended to encompass phrases and other things merely associated with an individual and one other case merit further comment. [Hirsch v. S.C. Johnson & Son, Inc.](#), 90 Wis.2d 379, 280 N.W.2d 129 (1979), [Ali v. Playgirl, Inc.](#), 447 F.Supp. 723 (S.D.N.Y.1978), and [Motschenbacher v. R.J. Reynolds Tobacco Co.](#), 498 F.2d 821 (9th Cir.1974), are factually and legally distinguishable from the case on appeal. *Hirsch* simply stands for the principle accepted by the commentators, if not by the courts, that the right of publicity extends not only to an individual's name but to a nickname or stage name as well. *843 [Hirsch, supra](#), 280 N.W.2d at 137; Comment, *The Tort of Misappropriation of Name or Likeness Under Wisconsin's New Privacy Law*, 1978 Wis.L.Rev. 1029, 1046; Prosser, *Privacy*, 48

Cal.L.Rev. 383, 404 (1960). *Hirsch* required that the name clearly identify the wronged person. [Hirsch, supra, 280 N.W.2d at 137](#). *Hirsch* goes on to state that if a fictitious name is used, context may be sufficient to link the fictitious name with the complaining individual, and therefore give rise to protection under a right of publicity. In the *Hirsch* case, context supplied the missing link which is not present here. *Hirsch*, a/k/a “Crazylegs,” was a famous football player and all around athlete. He is described as the superstar of the era. [Id. 280 N.W.2d at 131](#). He made a number of commercials and advertisements during his career and a movie was produced on his life. His unique running style, which was described by the *Hirsch* court as looking something like a whirling egg-beater, earned him his nickname. [Id. 280 N.W.2d at 131](#). The defendant in *Hirsch*, S.C. Johnson & Son, marketed a moisturizing shaving gel for women under the name of “Crazylegs.” The context linking this product to *Hirsch* was Johnson's first promotion of its product at a running event for women, the use of a cheer in a television commercial similar to the “Crazylegs” cheer initiated at a college where *Hirsch* became athletic director, and the fact that the product was for women's legs. [Id. 280 N.W.2d at 138](#). Based on this evidence of “context,” the Wisconsin appellate court found a question of fact for the jury as to whether “Crazylegs” identified *Hirsch*. In this case, not only is the majority not dealing with a nickname or a stage name, but there is not a scintilla of evidence to support the context requirement of *Hirsch*.^{FN13} Appellee has only used the content of the “Here's Johnny” phrase on its product and its corporate name as transfigured by the double meaning of “John.”

[FN13](#). In fact, I concur with that portion of the majority's opinion in which we find no reasonable likelihood of confusion between Johnny Carson's licensed products and appellee's portable toilets.

In *Ali*, Muhammad Ali sought protection under the right of publicity for the unauthorized use of his picture in Playgirl Magazine. *Ali* is a “likeness” case reinforced by the context in which the likeness occurs and further bolstered by a phrase, “the Greatest,” commonly stated by Ali regarding himself. The essence of the case, and the unauthorized act from which Ali claims protection, is a drawing of a nude black man seated in the corner of a boxing ring with both hands taped and outstretched resting on the ropes on either side. The *Ali* court found that even a cursory inspection of the picture suggests that the facial characteristics of the man are those of Ali. The court stated: “The cheekbones, broad nose and widerset brown eyes, together with the distinctive smile and close cropped black hair are recognizable as the features of ... [Ali].” *Ali supra*, 726. Augmenting this likeness and reinforcing its identification with Ali was the context in which the likeness appeared—a boxing ring. The court found that identification of the individual depicted as Ali was further implied by the accompanying phrase “the Greatest.” *Id.* 727. Based on these facts, the court had no difficulty concluding that the drawing was Ali's portrait or picture. See *id.* 726. To the extent the majority uses the phrase “the Greatest” to support its position that the right of publicity encompasses phrases or other things which are merely associated with an individual, they misstate the law of *Ali*. Once again, *Ali* is clearly a “likeness” case. To the extent the likeness was not a photographic one free from all ambiguity, identification with Muhammad Ali was reinforced by context and a phrase “the Greatest” stated by Ali about himself. The result in that case is so dependent on the identifying features in the drawing and the boxing context in which the man is portrayed that the phrase “the Greatest” may not be severed from this whole and the legal propositions developed by the *Ali* court in response to the whole applied to the phrase alone. To be analogous, a likeness of Johnny Carson would be required in addition to the words “Here's Johnny” suggesting*844 the context of “The Tonight Show” or the *Ali* court would have to have enjoined all others from using the phrase “the Greatest.” In short, *Ali* does not support the majority's holding.

Motschenbacher, the third case cited by the majority, is an “identifying characteristics” case. *Motschenbacher*, a professional driver of racing cars who is internationally known, sought protection in the right of publicity for the unauthorized use of a photograph of his racing car, slightly altered, in a televised cigarette commercial. Although he was in fact driving the car at the time it was photographed, his facial features are not visible in the commercial. *Motschenbacher, supra*, 822. The Ninth Circuit found as a matter of California law, that the right of publicity extended to protect the unauthorized use of photographs of *Motschenbacher*'s racing car as one of his identifying characteristics. Identifying characteristics, such as *Motschenbacher*'s racing car, are not synonymous with phrases or other things which are merely associated with an individual. In *Motschenbacher*, the Ninth Circuit determined that the car driver had “consistently ‘individualized’ his cars to set them apart from those of other drivers and to make them more readily identifiable as his own.” *Id.* Since 1966, each car had a distinctive narrow white pinstripe appearing on no other car. This decoration has always been in the same place on the car bodies, which have uniformly been red. In addition, his racing number “11” has always been against an oval background in contrast to the circular white background used by other drivers. *Id.* In the commercial, the photo of *Motschenbacher*'s car was

altered so that the number “11” was changed to “71,” a spoiler with the name “Winston” was added, and other advertisements removed. The remainder of the individualized decorations remained the same. *Id.* Despite these alterations, the Ninth Circuit determined that car possessed identifying characteristics *peculiar* to Motschenbacher. *Id.* 827. This case is factually and legally distinguishable from the case on appeal. Motschenbacher's racing car was not merely associated with him but was the vehicle, literally and figuratively, by which he achieved his fame. The identifying characteristics, in the form of several decorations peculiar to his car, were the product of his personal time, energy, effort and expense and as such are inextricably interwoven with him as his individual work product, rather than being merely associated with him. Furthermore, the number and combination of the peculiar decorations on his cars results in a set of identifying characteristics, which although inanimate, are unique enough to resist duplication other than by intentional copying. This uniqueness provides notice to the public of what is claimed as part of his publicity right, as does an individual's name, likeness or actual performance, and narrowly limits the scope of his monopoly. In contrast to *Motschenbacher*, Johnny Carson's fame as a comedian and talk show host is severable from the phrase with which he is associated, “Here's Johnny.” This phrase is not Johnny Carson's “thumbprint”; it is not his work product; it is not original; it is a common, simple combination of a direct object, a contracted verb and a common first name; divorced from context, it is two dimensional and ambiguous. It can hardly be said to be a symbol or synthesis, *i.e.*, a tangible “expression” of the “idea,” of Johnny Carson the comedian and talk show host, as Motschenbacher's racing car was the tangible expression of the man.

Finally, [*Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 \(App.Div.1977\)](#), which although not cited by the majority is discussed by a number of the commentators with the cases cited by the majority, does not go so far as to extend the right of publicity to phrases or things which are merely associated with an individual. In *Lombardo*, an advertising agency and foreign automobile manufacturer entered into negotiations with the band leader, Guy Lombardo, for the purpose of producing a television commercial designed to depict Lombardo and his orchestra in New Year's Eve party hats, playing “Auld Lang Syne” while models of cars rotated in the foreground. *845 [*Lombardo, supra*, 396 N.Y.S.2d at 665](#) (Hopkins, J., concurring). After negotiations between the parties fell through, the agency and manufacturer proceeded with the commercial. An actor was employed to lead a band playing “Auld Lang Syne” in the same musical beat as developed by Lombardo, using the same gestures as Lombardo employed in conducting his band. Lombardo then instituted suit claiming that the agency and manufacturer had used a “likeness and representation” of himself without his consent, violating his statutory right to privacy under New York law and his common law right to be free from the misappropriation of his cultivated public persona as “Mr. New Year's Eve.” [*Id.* 396 N.Y.S.2d at 664](#). The *Lombardo* court found no statutory violation but did find a cause of action to be stated under Lombardo's common law theory. *Lombardo* appears to be in part a “likeness” case based on impersonation reinforced by context, and in part an “identifying characteristics” case like *Motschenbacher*. The “likeness” aspect comes from the actor portraying a bandleader, Lombardo's profession and vehicle for his fame, while using the same gestures employed by Lombardo and a musical beat linked to him. As in *Ali*, likeness is reinforced by context—the trappings of New Year's Eve, balloons, party hats and the band playing “Auld Lang Syne.” Like *Motschenbacher*, Lombardo's gestures while conducting are part of his “thumbprint” and his musical beat and rendition of “Auld Lang Syne” on New Year's Eve are probably inseparable from his fame. *Lombardo*, however, is a less compelling case for finding a right of privacy than *Motschenbacher* and his similarities to the case on appeal. Unlike the several individualized decorations on Motschenbacher's car, only the conducting gestures and musical beat are unique to Lombardo. The very elements that he urged tied him to his persona as “Mr. New Year's Eve” are not peculiar to him but are shared with numerous bandleaders on New Year's Eve—balloons, party hats and “Auld Lang Syne.” The commonness of these crucial alleged “identifying characteristics” undercuts the value of their combination by Lombardo. In *Motschenbacher*, the combination of several individualized decorations peculiar to Motschenbacher resulted in relatively clear notice to the public of what the extent of Motschenbacher's monopoly right was and resulted in this monopoly right being very narrow; it protected only the unauthorized use of photographs or depictions of a particular set of identical cars. In contrast, in *Lombardo*, the net result of the court's opinion would seem to be that Lombardo has a monopoly right enforceable against anyone who wishes to duplicate a bandleader playing “Auld Lang Syne” amid the trappings of a New Year's Eve party. *Limitations on the Right of Publicity, supra*, 123. The *Lombardo* court did not explore the anti-competitive or free expression ramifications of its decision. *Id.* As with the holiday New Year's Eve, the song “Auld Lang Syne” and party trappings such as balloons and party hats in *Lombardo*, the phrase “Here's Johnny” is very common and hardly peculiar to a particular individual. Unlike the combination of common and unique (gestures and musical beat) elements in *Lombardo*, the phrase “Here's Johnny” as used here does not exist in combination with other elements, with the exception of the pun, the “Great Commodium,” an indirect reference to Johnny Carson, to narrow the monopoly right proposed or apprise the public of what is claimed. Unlike the situation

in *Motschenbacher* and *Lombardo*, the phrase contains nothing personal to Carson in the sense of being caused by him or a product of his time, effort and energies. Therefore, while questioning the merits of extending the right or privacy as far as the court did in *Lombardo*, primarily for the court's lack of policy analysis concerning anticompetitive consequences and first amendment problems, I believe that *Lombardo* is distinguishable.

Accordingly, neither policy nor case law supports the extension of the right of publicity to encompass phrases and other things merely associated with an individual as in this case. I would affirm the judgment of the District Court on this basis as well.

United States Court of Appeals,
Ninth Circuit.
Vanna WHITE, Plaintiff-Appellant,
v.
SAMSUNG ELECTRONICS AMERICA, INC., a New York corporation, and David Deutsch Associates, Inc., a
New York corporation, Defendants-Appellees.
No. 90-55840.

Argued and Submitted June 7, 1991.
Decided July 29, 1992.

Celebrity sued electronic manufacturer alleging that its product ads violated California Civil Code, common-law right of publicity, and Lanham Act. The United States District Court for the Central District of California, [Ronald S.W. Lew](#), J., granted summary judgment in favor of manufacturer on each claim. Celebrity appealed. The Court of Appeals, [Goodwin](#), Senior Circuit Judge, held that: (1) robot was not celebrity's "likeness" within meaning of California Civil Code provision authorizing award of damages against person who knowingly uses another's likeness for purposes of advertising without consent; (2) issue of material fact precluded summary judgment in favor of manufacturer on claim for violation of common-law right of publicity; and (3) issue of fact precluded summary judgment on Lanham Act claim.

Affirmed in part; reversed in part and remanded.

[GOODWIN](#), Senior Circuit Judge:

This case involves a promotional "fame and fortune" dispute. In running a particular advertisement without Vanna White's permission, defendants Samsung Electronics America, Inc. (Samsung) and David Deutsch Associates, Inc. (Deutsch) attempted to capitalize on White's fame to enhance their fortune. White sued, alleging infringement of various intellectual property rights, but the district court granted summary judgment in favor of the defendants. We affirm in part, reverse in part, and remand.

Plaintiff Vanna White is the hostess of "Wheel of Fortune," one of the most popular game shows in television history. An estimated forty million people watch the program daily. Capitalizing on the fame which her participation in the show has bestowed on her, White markets her identity to various advertisers.

The dispute in this case arose out of a series of advertisements prepared for Samsung by Deutsch. The series ran in at least half a dozen publications with widespread, and in some cases national, circulation. Each of the advertisements in the series followed the same theme. Each depicted a current item from popular culture and a Samsung electronic product. Each was set in the twenty-first century and conveyed the message that the Samsung product would still be in use by that time. By hypothesizing outrageous future outcomes for the cultural items, the ads created humorous effects. For example, one lampooned current popular notions of an unhealthy diet by depicting a raw steak with the caption: "Revealed to be health food. 2010 A.D." Another depicted irreverent "news"-show host Morton Downey Jr. in front of an American flag with the caption: "Presidential candidate. 2008 A.D."

The advertisement which prompted the current dispute was for Samsung video-cassette recorders (VCRs). The ad depicted a robot, dressed in a wig, gown, and jewelry which Deutsch consciously selected to resemble White's hair and dress. The robot was posed next to a game board which is instantly recognizable as the Wheel of Fortune game show set, in a stance for which White is famous. The caption of the ad read: "Longest-running game show. 2012 A.D." Defendants referred to the ad as the "Vanna White" ad. Unlike the other celebrities used in the campaign, White neither consented to the ads nor was she paid.

Following the circulation of the robot ad, White sued Samsung and Deutsch in federal district court under: (1) [California Civil Code § 3344](#); (2) the California common law right of publicity; and (3) § 43(a) of the Lanham Act,

[15 U.S.C. § 1125\(a\)](#). The district court granted summary judgment *1397 against White on each of her claims. White now appeals.

I. [Section 3344](#)

[1] White first argues that the district court erred in rejecting her claim under [section 3344](#). [Section 3344\(a\)](#) provides, in pertinent part, that “[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, ... for purposes of advertising or selling, ... without such person's prior consent ... shall be liable for any damages sustained by the person or persons injured as a result thereof.”

White argues that the Samsung advertisement used her “likeness” in contravention of [section 3344](#). In [Midler v. Ford Motor Co., 849 F.2d 460 \(9th Cir.1988\)](#), this court rejected Bette Midler's [section 3344](#) claim concerning a Ford television commercial in which a Midler “sound-alike” sang a song which Midler had made famous. In rejecting Midler's claim, this court noted that “[t]he defendants did not use Midler's name or anything else whose use is prohibited by the statute. The voice they used was [another person's], not hers. The term ‘likeness’ refers to a visual image not a vocal imitation.” *Id.* at 463.

In this case, Samsung and Deutsch used a robot with mechanical features, and not, for example, a manikin molded to White's precise features. Without deciding for all purposes when a caricature or impressionistic resemblance might become a “likeness,” we agree with the district court that the robot at issue here was not White's “likeness” within the meaning of [section 3344](#). Accordingly, we affirm the court's dismissal of White's [section 3344](#) claim.

II. *Right of Publicity*

[2] White next argues that the district court erred in granting summary judgment to defendants on White's common law right of publicity claim. In [Eastwood v. Superior Court, 149 Cal.App.3d 409, 198 Cal.Rptr. 342 \(1983\)](#), the California court of appeal stated that the common law right of publicity cause of action “may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” *Id.* at 417, [198 Cal.Rptr. 342](#) (citing Prosser, *Law of Torts* (4th ed. 1971) § 117, pp. 804-807). The district court dismissed White's claim for failure to satisfy *Eastwood's* second prong, reasoning that defendants had not appropriated White's “name or likeness” with their robot ad. We agree that the robot ad did not make use of White's name or likeness. However, the common law right of publicity is not so confined.

The *Eastwood* court did not hold that the right of publicity cause of action could be pleaded only by alleging an appropriation of name or likeness. *Eastwood* involved an unauthorized use of photographs of Clint Eastwood and of his name. Accordingly, the *Eastwood* court had no occasion to consider the extent beyond the use of name or likeness to which the right of publicity reaches. That court held only that the right of publicity cause of action “may be” pleaded by alleging, *inter alia*, appropriation of name or likeness, not that the action may be pleaded *only* in those terms.

The “name or likeness” formulation referred to in *Eastwood* originated not as an element of the right of publicity cause of action, but as a description of the types of cases in which the cause of action had been recognized. The source of this formulation is Prosser, *Privacy*, 48 Cal.L.Rev. 383, 401-07 (1960), one of the earliest and most enduring articulations of the common law right of publicity cause of action. In looking at the case law to that point, Prosser recognized that right of publicity cases involved one of two basic factual scenarios: name appropriation, and picture or other likeness appropriation. *Id.* at 401-02, nn. 156-57.

Even though Prosser focused on appropriations of name or likeness in discussing the right of publicity, he noted that “[i]t is not impossible that there might be appropriation of the plaintiff's identity, as by impersonation, without the use of either his name or his likeness, and that this would *1398 be an invasion of his right of privacy.” *Id.* at 401, n. 155. ^{FNI} At the time Prosser wrote, he noted however, that “[n]o such case appears to have arisen.” *Id.*

^{FNI}. Under Professor Prosser's scheme, the right of publicity is the last of the four categories of the right to

privacy. Prosser, 48 Cal.L.Rev. at 389.

Since Prosser's early formulation, the case law has borne out his insight that the right of publicity is not limited to the appropriation of name or likeness. In [Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 \(9th Cir.1974\)](#), the defendant had used a photograph of the plaintiff's race car in a television commercial. Although the plaintiff appeared driving the car in the photograph, his features were not visible. Even though the defendant had not appropriated the plaintiff's name or likeness, this court held that plaintiff's California right of publicity claim should reach the jury.

In *Midler*, this court held that, even though the defendants had not used Midler's name or likeness, Midler had stated a claim for violation of her California common law right of publicity because "the defendants ... for their own profit in selling their product did appropriate part of her identity" by using a Midler sound-alike. *Id.* at 463-64.

In [Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 \(6th Cir.1983\)](#), the defendant had marketed portable toilets under the brand name "Here's Johnny"-Johnny Carson's signature "Tonight Show" introduction-without Carson's permission. The district court had dismissed Carson's Michigan common law right of publicity claim because the defendants had not used Carson's "name or likeness." *Id.* at 835. In reversing the district court, the sixth circuit found "the district court's conception of the right of publicity ... too narrow" and held that the right was implicated because the defendant had appropriated Carson's identity by using, *inter alia*, the phrase "Here's Johnny." *Id.* at 835-37.

[3] These cases teach not only that the common law right of publicity reaches means of appropriation other than name or likeness, but that the specific means of appropriation are relevant only for determining whether the defendant has in fact appropriated the plaintiff's identity. The right of publicity does not require that appropriations of identity be accomplished through particular means to be actionable. It is noteworthy that the *Midler* and *Carson* defendants not only avoided using the plaintiff's name or likeness, but they also avoided appropriating the celebrity's voice, signature, and photograph. The photograph in *Motschenbacher* did include the plaintiff, but because the plaintiff was not visible the driver could have been an actor or dummy and the analysis in the case would have been the same.

Although the defendants in these cases avoided the most obvious means of appropriating the plaintiffs' identities, each of their actions directly implicated the commercial interests which the right of publicity is designed to protect. As the *Carson* court explained:

[t]he right of publicity has developed to protect the commercial interest of celebrities in their identities. The theory of the right is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity.... If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his "name or likeness" is used.

[Carson, 698 F.2d at 835](#). It is not important *how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so. *Motschenbacher*, *Midler*, and *Carson* teach the impossibility of treating the right of publicity as guarding only against a laundry list of specific means of appropriating identity. A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.

***1399** Indeed, if we treated the means of appropriation as dispositive in our analysis of the right of publicity, we would not only weaken the right but effectively eviscerate it. The right would fail to protect those plaintiffs most in need of its protection. Advertisers use celebrities to promote their products. The more popular the celebrity, the greater the number of people who recognize her, and the greater the visibility for the product. The identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice.

Consider a hypothetical advertisement which depicts a mechanical robot with male features, an African-American

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

Viewed separately, the individual aspects of the advertisement in the present case say little. Viewed together, they leave little doubt about the celebrity the ad is meant to depict. The female-shaped robot is wearing a long gown, blond wig, and large jewelry. Vanna White dresses exactly like this at times, but so do many other women. The robot is in the process of turning a block letter on a game-board. Vanna White dresses like this while turning letters on a game-board but perhaps similarly attired Scrabble-playing women do this as well. The robot is standing on what looks to be the Wheel of Fortune game show set. Vanna White dresses like this, turns letters, and does this on the Wheel of Fortune game show. She is the only one. Indeed, defendants themselves referred to their ad as the “Vanna White” ad. We are not surprised.

Television and other media create marketable celebrity identity value. Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit. The law protects the celebrity's sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof. We decline Samsung and Deutch's invitation to permit the evisceration of the common law right of publicity through means as facile as those in this case. Because White has alleged facts showing that Samsung and Deutsch had appropriated her identity, the district court erred by rejecting, on summary judgment, White's common law right of publicity claim.

III. *The Lanham Act*

*** SECTION OMITTED ***

IV. *The Parody Defense*

[7] In defense, defendants cite a number of cases for the proposition that their robot ad constituted protected speech. The only cases they cite which are even remotely relevant to this case are [Hustler Magazine v. Falwell, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 \(1988\)](#) and [L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 \(1st Cir.1987\)](#). Those cases involved parodies of advertisements run for the purpose of poking fun at Jerry Falwell and L.L. Bean, respectively. This case involves a true advertisement run for the purpose of selling Samsung VCRs. The ad's spoof of Vanna White and Wheel of Fortune is subservient and only tangentially related to the ad's primary message: “buy Samsung VCRs.” Defendants' parody arguments are better addressed to non-commercial parodies.^{FN3} The difference between a “parody” and a “knock-off” is the difference between fun and profit.

^{FN3}. In warning of a first amendment chill to expressive conduct, the dissent reads this decision too broadly. See *Dissent* at 1407. This case concerns only the market which exists in our society for the exploitation of celebrity to sell products, and an attempt to take a free ride on a celebrity's celebrity value. Commercial advertising which relies on celebrity fame is different from other forms of expressive activity in two crucial ways.

First, for celebrity exploitation advertising to be effective, the advertisement must evoke the celebrity's identity. The more effective the evocation, the better the advertisement. If, as Samsung claims, its ad was based on a “generic” game-show hostess and not on Vanna White, the ad would not have violated anyone's right of publicity, but it would also not have been as humorous or as effective.

Second, even if some forms of expressive activity, such as parody, do rely on identity evocation, the first amendment hurdle will bar most right of publicity actions against those activities. Cf. [Falwell, 485 U.S. at 46, 108 S.Ct. at 876](#). In the case of commercial advertising, however, the first amendment hurdle is not so high. [Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557,](#)

[566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 \(1980\)](#). Realizing this, Samsung attempts to elevate its ad above the status of garden-variety commercial speech by pointing to the ad's parody of Vanna White. Samsung's argument is unavailing. See [Board of Trustees, State Univ. of N.Y. v. Fox, 492 U.S. 469, 474-75, 109 S.Ct. 3028, 3031, 106 L.Ed.2d 388 \(1988\)](#); [Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67-68, 103 S.Ct. 2875, 2880-81, 77 L.Ed.2d 469 \(1983\)](#). Unless the first amendment bars all right of publicity actions-and it does not, see [Zachini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 \(1977\)](#)-then it does not bar this case.

***1402 V. Conclusion**

In remanding this case, we hold only that White has pleaded claims which can go to the jury for its decision.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

[ALARCON](#), Circuit Judge, concurring in part, dissenting in part:

Vanna White seeks recovery from Samsung based on three theories: the right to privacy, the right to publicity, and the Lanham Act. I concur in the majority's conclusions on the right to privacy. I respectfully dissent from its holdings on the right to publicity and the Lanham Act claims.

I.

RIGHT TO PRIVACY ([CAL.CIV.CODE § 3344\(a\)](#))

I agree with the majority's conclusion that no reasonable jury could find that the robot was a "likeness" of Vanna White within the meaning of [California Civil Code section 3344\(a\)](#).

II.

RIGHT TO PUBLICITY

I must dissent from the majority's holding on Vanna White's right to publicity claim. The district court found that, since the commercial advertisement did not show a "likeness" of Vanna White, Samsung did not improperly use the plaintiff's identity. The majority asserts that the use of a likeness is not required under California common law. According to the majority, recovery is authorized if there is an appropriation of one's "identity." I cannot find any holding of a California court that supports this conclusion. Furthermore, the record does not support the majority's finding that Vanna White's "identity" was appropriated.

The district court relied on [Eastwood v. Superior Court, 149 Cal.App.3d 409, 198 Cal.Rptr. 342, \(1983\)](#), in holding that there was no cause of action for infringement on the right to publicity because there had been no use of a likeness. In *Eastwood*, the California Court of Appeal described the elements of the tort of "commercial appropriation of the right of publicity" as "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, ...; (3) lack of consent; and (4) resulting injury." *Id.* at 417, 198 Cal.Rptr. 342. (Emphasis added).

All of the California cases that my research has disclosed hold that a cause of action for appropriation of the right to publicity requires proof of the appropriation of a name or likeness. See, e.g., [Lugosi v. Universal Pictures, 25 Cal.3d 813, 603 P.2d 425, 160 Cal.Rptr. 323 \(1979\)](#) ("The so-called right of publicity means in essence that the reaction of the public to name and likeness ... endows the name and likeness of the person involved with commercially exploitable opportunities."); [Guglielmi v. Spelling-Goldberg Prods., 25 Cal.3d 860, 603 P.2d 454, 457, 160 Cal.Rptr. 352, 355 \(1979\)](#) (use of name of Rudolph Valentino in fictional biography allowed); *Eastwood v. Superior Court, supra* (use of photo and name of actor on cover of tabloid newspaper); [In re Weingand, 231 Cal.App.2d 289, 41 Cal.Rptr. 778 \(1964\)](#) (aspiring actor denied court approval to change name to "Peter Lorie" when famous actor

Peter Lorre objected); [Fairfield v. American Photocopy Equip. Co.](#), 138 Cal.App.2d 82, 291 P.2d 194 (1955), later app. 158 Cal.App.2d 53, 322 P.2d 93 (1958) (use of attorney's name in advertisement); [Gill v. Curtis Publishing Co.](#), 38 C.2d 273, 239 P.2d 630 (1952) (use of photograph of a couple in a magazine).

Notwithstanding the fact that California case law clearly limits the test of the right to publicity to name and likeness, the majority concludes that “the common law right of publicity is not so confined.” Majority opinion at p. 1397. The majority relies on two factors to support its innovative extension of the California law. The first is that the *Eastwood* court's statement of the elements was permissive rather than exclusive. The second is that Dean Prosser, in describing the common law right to publicity, stated that it might be *1403 possible that the right extended beyond name or likeness. These are slender reeds to support a federal court's attempt to create new law for the state of California.

In reaching its surprising conclusion, the majority has ignored the fact that the California Court of Appeal in *Eastwood* specifically addressed the differences between the common law right to publicity and the statutory cause of action codified in [California Civil Code section 3344](#). The court explained that “[t]he differences between the common law and the statutory actions are: (1) [Section 3344](#), subdivision (a) requires *knowing* use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation and (2) [section 3344](#), subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided by law.” *Eastwood*, 149 Cal.App.3d at n. 6, [198 Cal.Rptr. 342](#) (emphasis in original). The court did not include appropriations of identity by means other than name or likeness among its list of differences between the statute and the common law.

The majority also relies on Dean Prosser's statement that “[i]t is not impossible that there might be an appropriation of the plaintiff's identity, as by impersonation, without the use of either his name or his likeness, and that this would be an invasion of his right of privacy.” Prosser, *Privacy*, 48 Cal.L.Rev. 383, 401 n. 155 (1960). As Dean Prosser noted, however, “[n]o such case appears to have arisen.” *Id.*

The majority states that the case law has borne out Dean Prosser's insight that the right to publicity is not limited to name or likeness. As noted above, however, the courts of California have never found an infringement on the right to publicity without the use of the plaintiff's name or likeness.

The interest of the California Legislature as expressed in [California Civil Code section 3344](#) appears to preclude the result reached by the majority. The original [section 3344](#) protected only name or likeness. In 1984, ten years after our decision in [Motschenbacher v. R.J. Reynolds Tobacco Company](#), 498 F.2d 821 (9th Cir.1974) and 24 years after Prosser speculated about the future development of the law of the right of publicity, the California legislature amended the statute. California law now makes the use of someone's voice or signature, as well as name or likeness, actionable. [Cal.Civ.Code sec. 2233\(a\)](#) (Deering 1991 Supp.). Thus, California, after our decision in *Motschenbacher* specifically contemplated protection for interests other than name or likeness, but did not include a cause of action for appropriation of another person's identity. The ancient maxim, *inclusio unius est exclusio alterius*, would appear to bar the majority's innovative extension of the right of publicity. The clear implication from the fact that the California Legislature chose to add only voice and signature to the previously protected interests is that it wished to limit the cause of action to enumerated attributes.

The majority has focused on federal decisions in its novel extension of California Common Law. Those decisions do not provide support for the majority's decision.

In each of the federal cases relied upon by the majority, the advertisement affirmatively represented that the person depicted therein was the plaintiff. In this case, it is clear that a metal robot and not the plaintiff, Vanna White, is depicted in the commercial advertisement. The record does not show an appropriation of Vanna White's identity.

In *Motschenbacher*, a picture of a well-known race driver's car, including its unique markings, was used in an advertisement. *Id.* at 822. Although the driver could be seen in the car, his features were not visible. *Id.* The distinctive markings on the car were the only information shown in the ad regarding the identity of the driver. These distinctive markings compelled the inference that Motschenbacher was the person sitting in the racing car. We

concluded that “California appellate courts would ... afford legal protection to an individual's proprietary interest in his own identity.” *Id.* at 825. (Emphasis added). Because the distinctive markings on the racing car were sufficient to identify Motschenbacher as the driver of the car, *1404 we held that an issue of fact had been raised as to whether his identity had been appropriated. *Id.* at 827.

In [Midler v. Ford Motor Co., 849 F.2d 460 \(9th Cir.1988\)](#), a singer who had been instructed to sound as much like Bette Midler as possible, sang a song in a radio commercial made famous by Bette Midler. *Id.* at 461. A number of persons told Bette Midler that they thought that she had made the commercial. *Id.* at 462. Aside from the voice, there was no information in the commercial from which the singer could be identified. We noted that “[t]he human voice is one of the most palpable ways identity is manifested.” *Id.* at 463. We held that, “[t]o impersonate her voice is to pirate her identity,” *id.*, and concluded that Midler had raised a question of fact as to the misappropriation of her identity.

In [Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 \(6th Cir.1983\)](#), the Sixth Circuit was called upon to interpret Michigan's common-law right to publicity. The case involved a manufacturer who used the words, “Here's Johnny,” on portable toilets. *Id.* at 832-33. These same words were used to introduce the star of a popular late-night television program. There was nothing to indicate that this use of the phrase on the portable toilets was not associated with Johnny Carson's television program. The court found that “[h]ere there was an appropriation of Carson's identity,” which violated the right to publicity. *Id.* at 837.

The common theme in these federal cases is that identifying characteristics unique to the plaintiffs were used in a context in which they were the only information as to the identity of the individual. The commercial advertisements in each case showed attributes of the plaintiff's identities which made it appear that the plaintiff was the person identified in the commercial. No effort was made to dispel the impression that the plaintiffs were the source of the personal attributes at issue. The commercials affirmatively represented that the plaintiffs were involved. *See, e.g., Midler* at 462 (“The [Motschenbacher] ad suggested that it was he.... In the same way the defendants here used an imitation to convey the impression that Midler was singing for them.”). The proper interpretation of *Motschenbacher*, *Midler*, and *Carson* is that where identifying characteristics unique to a plaintiff are the only information as to the identity of the person appearing in an ad, a triable issue of fact has been raised as to whether his or her identity as been appropriated.

The case before this court is distinguishable from the factual showing made in *Motschenbacher*, *Midler*, and *Carson*. It is patently clear to anyone viewing the commercial advertisement that Vanna White was not being depicted. No reasonable juror could confuse a metal robot with Vanna White.

The majority contends that “the individual aspects of the advertisement ... [v]iewed together leave little doubt about the celebrity the ad is meant to depict.” Majority Opinion at p. 1399. It derives this conclusion from the fact that Vanna White is “the only one” who “dresses like this, turns letters, and does this on the Wheel of Fortune game show.” *Id.* In reaching this conclusion, the majority confuses Vanna White, the person, with the role she has assumed as the current hostess on the “Wheel of Fortune” television game show. A recognition of the distinction between a performer and the part he or she plays is essential for a proper analysis of the facts of this case. As is discussed below, those things which Vanna White claims identify her are not unique to her. They are, instead, attributes of the *role* she plays. The representation of those attributes, therefore, does not constitute a representation of Vanna White. *See Nurmi v. Peterson, 10 U.S.P.Q.2d 1775 (C.D.Cal.1989)* (distinguishing between performer and role).

Vanna White is a one-role celebrity. She is famous solely for appearing as the hostess on the “Wheel of Fortune” television show. There is nothing unique about Vanna White or the attributes which she claims identify her. Although she appears to be an attractive woman, her face and figure are no more distinctive than that of other equally comely women. She performs her *1405 role as hostess on “Wheel of Fortune” in a simple and straightforward manner. Her work does not require her to display whatever artistic talent she may possess.

The majority appears to argue that because Samsung created a robot with the physical proportions of an attractive woman, posed it gracefully, dressed it in a blond wig, an evening gown, and jewelry, and placed it on a set that

resembles the Wheel of Fortune layout, it thereby appropriated Vanna White's identity. But an attractive appearance, a graceful pose, blond hair, an evening gown, and jewelry are attributes shared by many women, especially in Southern California. These common attributes are particularly evident among game-show hostesses, models, actresses, singers, and other women in the entertainment field. They are not unique attributes of Vanna White's identity. Accordingly, I cannot join in the majority's conclusion that, even if viewed together, these attributes identify Vanna White and, therefore, raise a triable issue as to the appropriation of her identity.

The only characteristic in the commercial advertisement that is not common to many female performers or celebrities is the imitation of the "Wheel of Fortune" set. This set is the only thing which might possibly lead a viewer to think of Vanna White. The Wheel of Fortune set, however, is not an attribute of Vanna White's identity. It is an identifying characteristic of a television game show, a prop with which Vanna White interacts in her role as the current hostess. To say that Vanna White may bring an action when another blond female performer or robot appears on such a set as a hostess will, I am sure, be a surprise to the owners of the show. Cf. [Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n](#), 805 F.2d 663 (7th Cir.1986) (right to publicity in videotaped performances preempted by copyright of owner of telecast).

The record shows that Samsung recognized the market value of Vanna White's identity. No doubt the advertisement would have been more effective if Vanna White had appeared in it. But the fact that Samsung recognized Vanna White's value as a celebrity does not necessarily mean that it appropriated her identity. The record shows that Samsung dressed a robot in a costume usually worn by television game-show hostesses, including Vanna White. A blond wig, and glamorous clothing are not characteristics unique to the current hostess of Wheel of Fortune. This evidence does not support the majority's determination that the advertisement was meant to depict Vanna White. The advertisement was intended to depict a robot, playing the role Vanna White currently plays on the Wheel of Fortune. I quite agree that anyone seeing the commercial advertisement would be reminded of Vanna White. Any performance by another female celebrity as a game-show hostess, however, will also remind the viewer of Vanna White because Vanna White's celebrity is so closely associated with the role. But the fact that an actor or actress became famous for playing a particular role has, until now, never been sufficient to give the performer a proprietary interest in it. I cannot agree with the majority that the California courts, which have consistently taken a narrow view of the right to publicity, would extend law to these unique facts.

III.

THE LANHAM ACT

*** SECTION OMITTED ***

IV.

SAMSUNG'S FIRST AMENDMENT DEFENSE

The majority gives Samsung's First Amendment defense short shrift because "[t]his case involves a true advertisement run for the purpose of selling Samsung VCRs." Majority opinion at p. 1401. I respectfully disagree with the majority's analysis of this issue as well.

The majority's attempt to distinguish this case from [Hustler Magazine v. Falwell](#), 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), and [L.L. Bean, Inc. v. Drake Publishers, Inc.](#), 811 F.2d 26 (1st Cir.1987), is unpersuasive. The majority notes that the parodies in those cases were made for the purpose of poking fun at the Reverend Jerry Falwell and L.L. Bean. But the majority fails to consider that the defendants in those cases were making fun of the Reverend Jerry Falwell and L.L. Bean for the purely commercial purpose of selling soft-core pornographic magazines.

Generally, a parody does not constitute an infringement on the original work if it takes no more than is necessary to "conjure up" the original. [Walt Disney Prods. v. Air Pirates](#), 581 F.2d 751, 756 (9th Cir.1978). The majority has failed to consider these factors properly in deciding that Vanna White may bring an action for damages solely because the popularity of the fame show, Wheel of Fortune.

The effect of the majority's holding on expressive conduct is difficult to estimate. The majority's position seems to allow any famous person or entity to bring suit based on any commercial advertisement that depicts a character or role performed by the plaintiff. Under the majority's view of the law, Gene Autry could have brought an action for damages against all other singing cowboys. Clint Eastwood would be able to sue anyone who plays a tall, soft-spoken cowboy, unless, of course, Jimmy Stewart had not previously enjoined Clint Eastwood. Johnny Weismuller would have been able to sue each actor who played the role of Tarzan. Sylvester Stallone could sue actors who play blue-collar boxers. Chuck Norris could sue all karate experts who display their skills in motion pictures. Arnold Schwarzenegger could sue body builders who are compensated for appearing in public.

The majority's reading of the Lanham Act would provide a basis for "commercial" enterprises to maintain an action for section 43(a) violations even in the absence of confusion or deception. May Black and Decker, maker of the "Dustbuster" portable vacuum, now sue "Bust-dusters," the Los Angeles topless cleaning service. Can the Los Angeles Kings hockey team state a cause of action against the City of Las Vegas for its billboards reading "L.A. has the Kings, but we have the Aces."

***1408** Direct competitive advertising could also be affected. Will BMW, which advertises its automobiles as "the ultimate driving machine," be able to maintain an action against Toyota for advertising one of its cars as "the ultimate saving machine"? Can Coca Cola sue Pepsi because it depicted a bottle of Coca Cola in its televised "taste test"? Indeed, any advertisement which shows a competitor's product, or any recognizable brand name, would appear to be liable for damages under the majority's view of the applicable law. Under the majority's analysis, even the depiction of an obvious facsimile of a competitor's product may provide sufficient basis for the maintenance of an action for damages.

V.

CONCLUSION

The protection of intellectual property presents the courts with the necessity of balancing competing interests. On the one hand, we wish to protect and reward the work and investment of those who create intellectual property. In so doing, however, we must prevent the creation of a monopoly that would inhibit the creative expressions of others. We have traditionally balanced those interests by allowing the copying of an idea, but protecting a unique expression of it. Samsung clearly used the idea of a glamorous female game show hostess. Just as clearly, it avoided appropriating Vanna White's expression of that role. Samsung did not use a likeness of her. The performer depicted in the commercial advertisement is unmistakably a lifeless robot. Vanna White has presented no evidence that any consumer confused the robot with her identity. Indeed, no reasonable consumer could confuse the robot with Vanna White or believe that, because the robot appeared in the advertisement, Vanna White endorsed Samsung's product.

I would affirm the district court's judgment in all respects.

United States Court of Appeals,
Ninth Circuit.
Vanna WHITE, Plaintiff-Appellant,
v.
SAMSUNG ELECTRONICS AMERICA, INC.; David Deutsch Associates, Defendants-Appellees.
No. 90-55840.

March 18, 1993.

Before [GOODWIN](#), [PREGERSON](#) and [ALARCON](#), Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Circuit Judge Pregerson has voted to reject the suggestion for rehearing en banc, and Circuit Judge Goodwin so recommends. Circuit Judge Alarcon has voted to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. [Fed.R.App.P. 35](#).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

[KOZINSKI](#), Circuit Judge, with whom Circuit Judges [O'SCANNLAIN](#) and [KLEINFELD](#) join, dissenting from the order rejecting the suggestion for rehearing en banc.

I

Saddam Hussein wants to keep advertisers from using his picture in unflattering contexts.^{[FN1](#)} Clint Eastwood doesn't want tabloids to write about him.^{[FN2](#)} Rudolf Valentino's heirs want to control his film biography.^{[FN3](#)} The Girl Scouts don't want their image soiled by association with certain activities.^{[FN4](#)} George Lucas wants to keep Strategic Defense Initiative fans from calling it "Star Wars."^{[FN5](#)} Pepsico doesn't want singers to use the word "Pepsi" in their songs.^{[FN6](#)} Guy Lombardo wants an exclusive *1513 property right to ads that show big bands playing on New Year's Eve.^{[FN7](#)} Uri Geller thinks he should be paid for ads showing psychics bending metal through telekinesis.^{[FN8](#)} Paul Prudhomme, that household name, thinks the same about ads featuring corpulent bearded chefs.^{[FN9](#)} And scads of copyright holders see purple when their creations are made fun of.^{[FN10](#)}

[FN1](#). See Eben Shapiro, *Rising Caution on Using Celebrity Images*, N.Y. Times, Nov. 4, 1992, at D20 (Iraqi diplomat objects on right of publicity grounds to ad containing Hussein's picture and caption "History has shown what happens when one source controls all the information").

[FN2](#). *Eastwood v. Superior Court*, 149 Cal.App.3d 409, 198 Cal.Rptr. 342 (1983).

[FN3](#). *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal.3d 860, 160 Cal.Rptr. 352, 603 P.2d 454 (1979) (Rudolph Valentino); see also *Maheu v. CBS, Inc.*, 201 Cal.App.3d 662, 668, 247 Cal.Rptr. 304 (1988) (aide to Howard Hughes). Cf. Frank Gannon, *Vanna Karenina*, in *Vanna Karenina and Other Reflections* (1988) (A humorous short story with a tragic ending. "She thought of the first day she had met VR__SKY. How foolish she had been. How could she love a man who wouldn't even tell her all the letters in his name?").

[FN4](#). *Girl Scouts v. Personality Posters Mfg.*, 304 F.Supp. 1228 (S.D.N.Y.1969) (poster of a pregnant girl in a Girl Scout uniform with the caption "Be Prepared").

[FN5. *Lucasfilm Ltd. v. High Frontier*, 622 F.Supp. 931 \(D.D.C.1985\).](#)

[FN6.](#) Pepsico Inc. claimed the lyrics and packaging of grunge rocker Tad Doyle's "Jack Pepsi" song were "offensive to [it] and [...] likely to offend [its] customers," in part because they "associate [Pepsico] and its Pepsi marks with intoxication and drunk driving." Deborah Russell, *Doyle Leaves Pepsi Thirsty for Compensation*, *Billboard*, June 15, 1991, at 43. Conversely, the Hell's Angels recently sued Marvel Comics to keep it from publishing a comic book called "Hell's Angel," starring a character of the same name. Marvel settled by paying \$35,000 to charity and promising never to use the name "Hell's Angel" again in connection with any of its publications. *Marvel, Hell's Angels Settle Trademark Suit*, *L.A. Daily J.*, Feb. 2, 1993, § II, at 1.

Trademarks are often reflected in the mirror of our popular culture. See Truman Capote, *Breakfast at Tiffany's* (1958); Kurt Vonnegut, Jr., *Breakfast of Champions* (1973); Tom Wolfe, *The Electric Kool-Aid Acid Test* (1968) (which, incidentally, includes a chapter on the Hell's Angels); Larry Niven, *Man of Steel, Woman of Kleenex*, in *All the Myriad Ways* (1971); *Looking for Mr. Goodbar* (1977); *The Coca-Cola Kid* (1985) (using Coca-Cola as a metaphor for American commercialism); *The Kentucky Fried Movie* (1977); *Harley Davidson and the Marlboro Man* (1991); *The Wonder Years* (ABC 1988-present) ("Wonder Years" was a slogan of Wonder Bread); Tim Rice & Andrew Lloyd Webber, *Joseph and the Amazing Technicolor Dream Coat* (musical).

Hear Janis Joplin, *Mercedes Benz*, on *Pearl* (CBS 1971); Paul Simon, *Kodachrome*, on *There Goes Rhyming Simon* (Warner 1973); Leonard Cohen, *Chelsea Hotel*, on *The Best of Leonard Cohen* (CBS 1975); Bruce Springsteen, *Cadillac Ranch*, on *The River* (CBS 1980); Prince, *Little Red Corvette*, on 1999 (Warner 1982); dada, *Dizz Knee Land*, on *Puzzle* (IRS 1992) ("I just robbed a grocery store-I'm going to Disneyland / I just flipped off President George-I'm going to Disneyland"); Monty Python, *Spam*, on *The Final Rip Off* (Virgin 1988); Roy Clark, *Thank God and Greyhound [You're Gone]*, on *Roy Clark's Greatest Hits Volume I* (MCA 1979); Mel Tillis, *Coca-Cola Cowboy*, on *The Very Best of* (MCA 1981) ("You're just a Coca-Cola cowboy / You've got an Eastwood smile and Robert Redford hair ...").

Dance to Talking Heads, Popular Favorites 1976-92: Sand in the Vaseline (Sire 1992); Talking Heads, *Popsicle*, on *id. Admire Andy Warhol, Campbell's Soup Can*. Cf. REO Speedwagon, 38 Special, and Jello Biafra of the Dead Kennedys.

The creators of some of these works might have gotten permission from the trademark owners, though it's unlikely Kool-Aid relished being connected with LSD, Hershey with homicidal maniacs, Disney with armed robbers, or Coca-Cola with cultural imperialism. Certainly no free society can demand that artists get such permission.

[FN7. *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 \(1977\).](#)

[FN8. *Geller v. Fallon McElligott*, No. 90-Civ-2839 \(S.D.N.Y. July 22, 1991\) \(involving a Timex ad\).](#)

[FN9. *Prudhomme v. Procter & Gamble Co.*, 800 F.Supp. 390 \(E.D.La.1992\).](#)

[FN10. E.g., *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429 \(6th Cir.1992\); *Cliffs Notes v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490 \(2d Cir.1989\); *Fisher v. Dees*, 794 F.2d 432 \(9th Cir.1986\); *MCA, Inc. v. Wilson*, 677 F.2d 180 \(2d Cir.1981\); *Elsmere Music, Inc. v. NBC*, 623 F.2d 252 \(2d Cir.1980\); *Walt Disney Prods. v. The Air Pirates*, 581 F.2d 751 \(9th Cir.1978\); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 \(2d Cir.1964\); *Lowenfels v. Nathan*, 2 F.Supp. 73 \(S.D.N.Y.1932\).](#)

Something very dangerous is going on here. Private property, including intellectual property, is essential to our way of life. It provides an incentive for investment and innovation; it stimulates the flourishing of our culture; it protects the moral entitlements of people to the fruits of their labors. But reducing too much to private property can be bad

medicine. Private land, for instance, is far more useful if separated from other private land by public streets, roads and highways. Public parks, utility rights-of-way and sewers reduce the amount of land in private hands, but vastly enhance the value of the property that remains.

So too it is with intellectual property. 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. ^{FN11}

^{FN11.} See Wendy J. Gordon, *A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533, 1556-57 (1993).

*1514 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 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.

II

Samsung ran an ad campaign promoting its consumer electronics. Each ad depicted a Samsung product and a humorous prediction: One showed a raw steak with the caption "Revealed to be health food. 2010 A.D." Another showed Morton Downey, Jr. in front of an American flag with the caption "Presidential candidate. 2008 A.D." ^{FN12} The ads were meant to convey-humorously-that Samsung products would still be in use twenty years from now.

^{FN12.} I had never heard of Morton Downey, Jr., but I'm told he's sort of like Rush Limbaugh, but not as shy.

The ad that spawned this litigation starred a robot dressed in a wig, gown and jewelry reminiscent of Vanna White's hair and dress; the robot was posed next to a Wheel-of-Fortune-like game board. See Appendix. The caption read "Longest-running game show. 2012 A.D." The gag here, I take it, was that Samsung would still be around when White had been replaced by a robot.

Perhaps failing to see the humor, White sued, alleging Samsung infringed her right of publicity by "appropriating" her "identity." Under California law, White has the exclusive right to use her name, likeness, signature and voice for commercial purposes. [Cal.Civ.Code § 3344\(a\)](#); [Eastwood v. Superior Court](#), 149 Cal.App.3d 409, 417, 198 Cal.Rptr. 342, 347 (1983). But Samsung didn't use her name, voice or signature, and it certainly didn't use her likeness. The ad just wouldn't have been funny had it depicted White or someone who resembled her-the whole joke was that the game show host(ess) was a robot, not a real person. No one seeing the ad could have thought this was supposed to be White in 2012.

The district judge quite reasonably held that, because Samsung didn't use White's name, likeness, voice or signature, it didn't violate her right of publicity. [971 F.2d at 1396-97](#). Not so, says the panel majority: The California right of publicity can't possibly be limited to name and likeness. If it were, the majority reasons, a "clever advertising strategist" could avoid using White's name or likeness but nevertheless remind people of her with impunity, "effectively eviscerat[ing]" her rights. To prevent this "evisceration," the panel majority holds that the right of publicity must extend beyond name and likeness, to any "appropriation" of White's "identity"-anything that "evoke[s]" her personality. [Id. at 1398-99](#).

III

But what does "evisceration" mean in intellectual property law? Intellectual property rights aren't like some

constitutional rights, absolute guarantees protected against all kinds of interference, subtle as well as blatant.^{FN13} They cast no penumbras, emit no emanations: The very point of intellectual property laws is that they protect only against certain specific kinds of appropriation. I can't publish unauthorized copies of, say, *Presumed Innocent*; I can't make a movie out of it. But I'm *1515 perfectly free to write a book about an idealistic young prosecutor on trial for a crime he didn't commit.^{FN14} So what if I got the idea from *Presumed Innocent*? So what if it reminds readers of the original? Have I "eviscerated" Scott Turow's intellectual property rights? Certainly not. All creators draw in part on the work of those who came before, referring to it, building on it, poking fun at it; we call this creativity, not piracy.^{FN15}

^{FN13.} *Cf., e.g., Guinn v. United States*, 238 U.S. 347, 364-65, 35 S.Ct. 926, 931, 59 L.Ed. 1340 (1915) (striking down grandfather clause that was a clear attempt to evade the Fifteenth Amendment).

^{FN14.} It would be called "Burden of Going Forward with the Evidence," and the hero would ultimately be saved by his lawyer's adept use of [Fed.R.Evid. 301](#).

^{FN15.} In the words of Sir Isaac Newton, "[i]f I have seen further it is by standing on [the shoulders] of Giants." Letter to Robert Hooke, Feb. 5, 1675/1676.

Newton himself may have borrowed this phrase from Bernard of Chartres, who said something similar in the early twelfth century. Bernard in turn may have snatched it from Priscian, a sixth century grammarian. See *Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F.Supp. 37, 77 n. 3 (D.Mass.1990).

The majority isn't, in fact, preventing the "evisceration" of Vanna White's existing rights; it's creating a new and much broader property right, a right unknown in California law.^{FN16} It's replacing the existing balance between the interests of the celebrity and those of the public by a different balance, one substantially more favorable to the celebrity. Instead of having an exclusive right in her name, likeness, signature or voice, every famous person now has an exclusive right to *anything that reminds the viewer of her*. After all, that's all Samsung did: It used an inanimate object to remind people of [White](#), to "evoke [her identity]." 971 F.2d at 1399.^{FN17}

^{FN16.} In fact, in the one California case raising the issue, the three state Supreme Court Justices who discussed this theory expressed serious doubts about it. [Guglielmi v. Spelling-Goldberg Prods.](#), 25 Cal.3d 860, 864 n. 5, 160 Cal.Rptr. 352, 355 n. 5, 603 P.2d 454, 457 n. 5 (1979) (Bird, C.J., concurring) (expressing skepticism about finding a property right to a celebrity's "personality" because it is "difficult to discern any easily applied definition for this amorphous term").

Neither have we previously interpreted California law to cover pure "identity." [Midler v. Ford Motor Co.](#), 849 F.2d 460 (9th Cir.1988), and [Waits v. Frito-Lay, Inc.](#), 978 F.2d 1093 (9th Cir.1992), dealt with appropriation of a celebrity's voice. See [id.](#) at 1100-01 (imitation of singing style, rather than voice, doesn't violate the right of publicity).

[Motschenbacher v. R.J. Reynolds Tobacco Co.](#), 498 F.2d 821 (9th Cir.1974), stressed that, though the plaintiff's likeness wasn't directly recognizable by itself, the surrounding circumstances would have made viewers think the likeness was the plaintiff's. [Id.](#) at 827; see also [Moore v. Regents of the Univ. of Cal.](#), 51 Cal.3d 120, 138, 271 Cal.Rptr. 146, 157, 793 P.2d 479, 490 (1990) (construing *Motschenbacher* as "hold [ing] that every person has a proprietary interest in his own likeness").

^{FN17.} Some viewers might have inferred White was endorsing the product, but that's a different story. The right of publicity isn't aimed at or limited to false endorsements, [Eastwood v. Superior Court](#), 149 Cal.App.3d 409, 419-20, 198 Cal.Rptr. 342, 348 (1983); that's what the Lanham Act is for.

Note also that the majority's rule applies even to advertisements that unintentionally remind people of someone. California law is crystal clear that the common-law right of publicity may be violated even by unintentional appropriations. [Id.](#) at 417 n. 6, 198 Cal.Rptr. at 346 n. 6; [Fairfield v. American Photocopy Equipment Co.](#), 138 Cal.App.2d 82, 87, 291 P.2d 194 (1955).

Consider how sweeping this new right is. What is it about the ad that makes people think of White? It's not the robot's wig, clothes or jewelry; there must be ten million blond women (many of them quasi-famous) who wear dresses and jewelry like White's. It's that the robot is posed near the "Wheel of Fortune" game board. Remove the game board from the ad, and no one would think of Vanna White. *See* Appendix. But once you include the game board, anybody standing beside it—a brunette woman, a man wearing women's clothes, a monkey in a wig and gown—would evoke White's image, precisely the way the robot did. It's the "Wheel of Fortune" set, not the robot's face or dress or jewelry that evokes White's image. The panel is giving White an exclusive right not in what she looks like or who she is, but in what she does for a living.^{FN18}

[FN18](#). Once the right of publicity is extended beyond specific physical characteristics, this will become a recurring problem: Outside name, likeness and voice, the things that most reliably remind the public of celebrities are the actions or roles they're famous for. A commercial with an astronaut setting foot on the moon would evoke the image of Neil Armstrong. Any masked man on horseback would remind people (over a certain age) of Clayton Moore. And any number of songs—"My Way," "Yellow Submarine," "Like a Virgin," "Beat It," "Michael, Row the Boat Ashore," to name only a few—would instantly evoke an image of the person or group who made them famous, regardless of who is singing.

See also Carlos V. Lozano, *West Loses Lawsuit over Batman TV Commercial*, L.A. Times, Jan. 18, 1990, at B3 (Adam West sues over Batman-like character in commercial); [Nurmi v. Peterson, 10 U.S.P.Q.2d 1775, 1989 WL 407484 \(C.D.Cal.1989\)](#) (1950s TV movie hostess "Vampira" sues 1980s TV hostess "Elvira"); text accompanying notes 7-8 (lawsuits brought by Guy Lombardo, claiming big bands playing at New Year's Eve parties remind people of him, and by Uri Geller, claiming psychics who can bend metal remind people of him). *Cf. Motschenbacher*, where the claim was that viewers would think plaintiff was actually in the commercial, and not merely that the commercial reminded people of him.

***1516** This is entirely the wrong place to strike the balance. Intellectual property rights aren't free: They're imposed at the expense of future creators and of the public at large. Where would we be if Charles Lindbergh had an exclusive right in the concept of a heroic solo aviator? If Arthur Conan Doyle had gotten a copyright in the idea of the detective story, or Albert Einstein had patented the theory of relativity? If every author and celebrity had been given the right to keep people from mocking them or their work? Surely this would have made the world poorer, not richer, culturally as well as economically.^{FN19}

[FN19](#). *See generally* Gordon, *supra* note 11; *see also* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 Cal.L.Rev. 125, 201-03 (1993) (an excellent discussion).

This is why intellectual property law is full of careful balances between what's set aside for the owner and what's left in the public domain for the rest of us: The relatively short life of patents; the longer, but finite, life of copyrights; copyright's idea-expression dichotomy; the fair use doctrine; the prohibition on copyrighting facts; the compulsory license of television broadcasts and musical compositions; federal preemption of overbroad state intellectual property laws; the nominative use doctrine in trademark law; the right to make soundalike recordings.^{FN20} All of these diminish an intellectual property owner's rights. All let the public use something created by someone else. But all are necessary to maintain a free environment in which creative genius can flourish.

[FN20](#). *See* [35 U.S.C. § 154](#) (duration of patent); [17 U.S.C. §§ 302-305](#) (duration of copyright); [17 U.S.C. § 102\(b\)](#) (idea-expression dichotomy); [17 U.S.C. § 107](#) (fair use); [Feist Pubs., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, ---, 111 S.Ct. 1282, 1288, 113 L.Ed.2d 358 \(1991\)](#) (no copyrighting facts); [17 U.S.C. §§ 115, 119\(b\)](#) (compulsory licenses); [Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 109 S.Ct. 971, 103 L.Ed.2d 118 \(1989\)](#) (federal preemption); [New Kids on the Block v. News America Publishing, Inc., 971 F.2d 302, 306-308 \(9th Cir.1992\)](#) (nominative use); [17 U.S.C. § 114\(b\)](#) (soundalikes); *accord* [G.S. Rasmussen & Assocs. v. Kalitta Flying Serv., Inc., 958 F.2d 896, 900 n. 7 \(9th Cir.1992\)](#); Daniel A. Saunders, Comment, *Copyright Law's Broken Rear Window*, [80 Cal.L.Rev. 179, 204-05 \(1992\)](#). *But see* [Midler v. Ford Motor Co., 849 F.2d 460 \(9th Cir.1988\)](#).

The intellectual property right created by the panel here has none of these essential limitations: No fair use exception; no right to parody; no idea-expression dichotomy. It impoverishes the public domain, to the detriment of future creators and the public at large. Instead of well-defined, limited characteristics such as name, likeness or voice, advertisers will now have to cope with vague claims of “appropriation of identity,” claims often made by people with a wholly exaggerated sense of their own fame and significance. See pp. 1512-13 & notes 1-10 *supra*. Future Vanna Whites might not get the chance to create their personae, because their employers may fear some celebrity will claim the persona is too similar to her own.^{FN21} The public will be robbed of parodies of celebrities, and *1517 our culture will be deprived of the valuable safety valve that parody and mockery create.

^{FN21}. If Christian Slater, star of “Heathers,” “Pump up the Volume,” “Kuffs,” and “Untamed Heart”-and alleged Jack Nicholson clone-appears in a commercial, can Nicholson sue? Of 54 stories on LEXIS that talk about Christian Slater, 26 talk about Slater's alleged similarities to Nicholson. Apparently it's his nasal wisecracks and killer smiles, St. Petersburg Times, Jan. 10, 1992, at 13, his eyebrows, Ottawa Citizen, Jan. 10, 1992, at E2, his sneers, Boston Globe, July 26, 1991, at 37, his menacing presence, USA Today, June 26, 1991, at 1D, and his sing-song voice, Gannett News Service, Aug. 27, 1990 (or, some say, his insinuating drawl, L.A. Times, Aug. 22, 1990, at F5). That's a whole lot more than White and the robot had in common.

Moreover, consider the moral dimension, about which the panel majority seems to have gotten so exercised. Saying Samsung “appropriated” something of White's begs the question: *Should* White have the exclusive right to something as broad and amorphous as her “identity”? Samsung's ad didn't simply copy White's schtick-like all parody, it created something new.^{FN22} True, Samsung did it to make money, but White does whatever she does to make money, too; the majority talks of “the difference between fun and profit,” 971 F.2d at 1401, but in the entertainment industry fun *is* profit. Why is Vanna White's right to exclusive for-profit use of her persona-a persona that might not even be her own creation, but that of a writer, director or producer-superior to Samsung's right to profit by creating its own inventions? Why should she have such absolute rights to control the conduct of others, unlimited by the idea-expression dichotomy or by the fair use doctrine?

^{FN22}. Cf. *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302, 307 n. 6 (9th Cir.1992) (“Where the infringement is small in relation to the new work created, the fair user is profiting largely from his own creative efforts rather than free-riding on another's work.”).

To paraphrase only slightly *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, ---- - ----, 111 S.Ct. 1282, 1289-90, 113 L.Ed.2d 358 (1991), it may seem unfair that much of the fruit of a creator's labor may be used by others without compensation. But this is not some unforeseen byproduct of our intellectual property system; it is the system's very essence. Intellectual property law assures authors the right to their original expression, but encourages others to build freely on the ideas that underlie it. This result is neither unfair nor unfortunate: It is the means by which intellectual property law advances the progress of science and art. We give authors certain exclusive rights, but in exchange we get a richer public domain. The majority ignores this wise teaching, and all of us are the poorer for it.^{FN23}

^{FN23}. The majority opinion has already earned some well-deserved criticisms on this score. Stephen R. Barnett, *In Hollywood's Wheel of Fortune, Free Speech Loses a Turn*, Wall St. J., Sept. 28, 1992, at A14; Stephen R. Barnett, *Wheel of Misfortune for Advertisers: Ninth Circuit Misreads the Law to Protect Vanna White's Image*, L.A. Daily J., Oct. 5, 1992, at 6; Felix H. Kent, *California Court Expands Celebrities' Rights*, N.Y.L.J., Oct. 30, 1992, at 3 (“To speak of the ‘evisceration’ of such a questionable common law right in a case that has probably gone the farthest of any case in any court in the United States of America is more than difficult to comprehend”); Shapiro, *supra* note 1 (“A fat chef? A blond robot in an evening gown? How far will this go?” (citing Douglas J. Wood, an advertising lawyer)). See also Mark Alan Stamaty, *Washington*, Wash. Post, Apr. 5, 1993, at A21.

IV

*** SECTION OMITTED ***

V

*** SECTION OMITTED ***

VI

Finally, I can't see how giving White the power to keep others from evoking her image in the public's mind can be squared with the First Amendment. Where does White get this right to control our thoughts? The majority's creation goes way beyond the protection given a trademark or a copyrighted work, or a person's name or likeness. All those things control one particular way of expressing an idea, one way of referring to an object or a person. But not allowing *any* means of reminding people of someone? That's a speech restriction unparalleled in First Amendment law.^{FN28}

^{FN28} Just compare the majority's holding to the intellectual property laws upheld by the Supreme Court. The Copyright Act is constitutional precisely because of the fair use doctrine and the idea-expression dichotomy, *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 560, 105 S.Ct. 2218, 2230, 85 L.Ed.2d 588 (1985), two features conspicuously absent from the majority's doctrine. The right of publicity at issue in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576, 97 S.Ct. 2849, 2857-58, 53 L.Ed.2d 965 (1977), was only the right to “broadcast of petitioner's entire performance,” not “the unauthorized use of another's name for purposes of trade.” *Id.* Even the statute upheld in *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 530, 107 S.Ct. 2971, 2977, 97 L.Ed.2d 427 (1987), which gave the USOC sweeping rights to the word “Olympic,” didn't purport to protect all expression that reminded people of the Olympics.

What's more, I doubt even a name-and-likeness-only right of publicity can stand without a parody exception. The First Amendment isn't just about religion or politics-it's also about protecting the free development of our national culture. Parody, humor, irreverence are all vital components of the marketplace of ideas. The last thing we need, the last thing the First Amendment will tolerate, is a law that lets public figures keep people from mocking them, or from “evok[ing]” their images in the mind of the public. 971 F.2d at 1399.^{FN29}

^{FN29} The majority's failure to recognize a parody exception to the right of publicity would apply equally to parodies of politicians as of actresses. Consider the case of Wok Fast, a Los Angeles Chinese food delivery service, which put up a billboard with a picture of then-L.A. Police Chief Daryl Gates and the text “When you can't leave the office. Or won't.” (This was an allusion to Chief Gates's refusal to retire despite pressure from Mayor Tom Bradley.) Gates forced the restaurant to take the billboard down by threatening a right of publicity lawsuit. Leslie Berger, *He Did Leave the Office-And Now Sign Will Go, Too*, L.A. Times, July 31, 1992, at B2.

See also Samsung Has Seen the Future: Brace Yourself, Adweek, Oct. 3, 1988, at 26 (ER 72) (Samsung planned another ad that would show a dollar bill with Richard Nixon's face on it and the caption ‘Dollar bill, 2025 A.D.,’ but Nixon refused permission to use his likeness); Madow *supra* note 19, at 142-46 (discussing other politically and culturally charged parodies).

The majority dismisses the First Amendment issue out of hand because Samsung's ad was commercial speech. *Id.* at 1401 & n. 3. So what? Commercial speech may be less protected by the First Amendment than noncommercial speech, but less protected means protected nonetheless. ***1520***Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). And there are very good reasons for this. Commercial speech has a profound effect on our culture and our attitudes. Neutral-seeming ads influence people's social and political attitudes, and themselves arouse political controversy.^{FN30} “Where's the Beef?” turned from an advertising catchphrase into the only really memorable thing about the 1984 presidential campaign.^{FN31} Four years later, Michael Dukakis called George Bush “the Joe Isuzu of American politics.”^{FN32}

^{FN30} *See, e.g.*, Bruce Horovitz, *Nike Does It Again; Firm Targets Blacks with a Spin on “Family Values”*, L.A. Times, Aug. 25, 1992, at D1 (“The ad reinforces a stereotype about black fathers” (quoting Lawrence A. Johnson of Howard University)); Gaylord Fields, *Advertising Awards-Show Mania: CEBA Awards Honors Black-Oriented Advertising*, Back Stage, Nov. 17, 1989, at 1 (quoting the Rev. Jesse Jackson as emphasizing the importance of positive black images in advertising); Debra Kaufman, *Quality of Hispanic*

Production Rising to Meet Clients' Demands, Back Stage, July 14, 1989, at 1 (Hispanic advertising professional stresses importance of positive Hispanic images in advertising); Marilyn Elias, *Medical Ads Often Are Sexist*, USA Today, May 18, 1989, at 1D (“There’s lots of evidence that this kind of ad reinforces stereotypes” (quoting Julie Edell of Duke University)).

[FN31](#). See *Wendy's Kind of Commercial; “Where's the Beef” Becomes National Craze*, Broadcasting, Mar. 26, 1984, at 57.

[FN32](#). See Gregory Gordon, *Candidates Look for Feedback Today*, UPI, Sept. 26, 1988.

In our pop culture, where salesmanship must be entertaining and entertainment must sell, the line between the commercial and noncommercial has not merely blurred; it has disappeared. Is the Samsung parody any different from a parody on Saturday Night Live or in Spy Magazine? Both are equally profit-motivated. Both use a celebrity's identity to sell things—one to sell VCRs, the other to sell advertising. Both mock their subjects. Both try to make people laugh. Both add something, perhaps something worthwhile and memorable, perhaps not, to our culture. Both are things that the people being portrayed might dearly want to suppress. See notes 1 & 29 *supra*.

Commercial speech is a significant, valuable part of our national discourse. The Supreme Court has recognized as much, and has insisted that lower courts carefully scrutinize commercial speech restrictions, but the panel totally fails to do this. The panel majority doesn't even purport to apply the *Central Hudson* test, which the Supreme Court devised specifically for determining whether a commercial speech restriction is valid.^{[FN33](#)} The majority doesn't ask, as *Central Hudson* requires, whether the speech restriction is justified by a substantial state interest. It doesn't ask whether the restriction directly advances the interest. It doesn't ask whether the restriction is narrowly tailored to the interest. See *id.* at 566, 100 S.Ct. at 2351.^{[FN34](#)} These are all things the Supreme Court told us—in no uncertain terms—we must consider; the majority opinion doesn't even mention them.^{[FN35](#)}

[FN33](#). Its only citation to *Central Hudson* is a seeming afterthought, buried in a footnote, and standing only for the proposition that commercial speech is less protected under the First Amendment. See [971 F.2d at 1401 n. 3](#).

[FN34](#). See also *Board of Trustees v. Fox*, 492 U.S. 469, 476-81, 109 S.Ct. 3028, 3032-35, 106 L.Ed.2d 388 (1989) (reaffirming “narrowly tailored” requirement, but making clear it's not a “least restrictive means” test).

The government has a freer hand in regulating false or misleading commercial speech, but this isn't such a regulation. Some “appropriations” of a person's “identity” might misleadingly suggest an endorsement, but the mere possibility that speech might mislead isn't enough to strip it of First Amendment protection. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 644, 105 S.Ct. 2265, 2278, 85 L.Ed.2d 652 (1985).

[FN35](#). Neither does it discuss whether the speech restriction is unconstitutionally vague. *Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328, 347, 106 S.Ct. 2968, 2980, 92 L.Ed.2d 266 (1986).

Process matters. The Supreme Court didn't set out the *Central Hudson* test for its health. It devised the test because it saw lower courts were giving the First Amendment short shrift when confronted with commercial speech. See *Central Hudson*, 447 U.S. at 561-62, 567-68, 100 S.Ct. at 2348-49, 2352. The *Central Hudson* test was an attempt to constrain lower courts' discretion, to focus judges' thinking *1521 on the important issues—how strong the state interest is, how broad the regulation is, whether a narrower regulation would work just as well. If the Court wanted to leave these matters to judges' gut feelings, to nifty lines about “the difference between fun and profit,” [971 F.2d at 1401](#), it could have done so with much less effort.

Maybe applying the test would have convinced the majority to change its mind; maybe going through the factors would have shown that its rule was too broad, or the reasons for protecting White's “identity” too tenuous. Maybe not. But we shouldn't thumb our nose at the Supreme Court by just refusing to apply its test.

VII

For better or worse, we *are* the Court of Appeals for the Hollywood Circuit. Millions of people toil in the shadow of the law we make, and much of their livelihood is made possible by the existence of intellectual property rights. But much of their livelihood-and much of the vibrancy of our culture-also depends on the existence of other intangible rights: The right to draw ideas from a rich and varied public domain, and the right to mock, for profit as well as fun, the cultural icons of our time.

In the name of avoiding the “evisceration” of a celebrity's rights in her image, the majority diminishes the rights of copyright holders and the public at large. In the name of fostering creativity, the majority suppresses it. Vanna White and those like her have been given something they never had before, and they've been given it at our expense. I cannot agree.

*1522 APPENDIX



Vanna White

*1523



Ms. C3PO?

Court of Appeals of New York.
Tony STEPHANO, Respondent,
v.
NEWS GROUP PUBLICATIONS, INC., Appellant.
Dec. 20, 1984.

Plaintiff, a professional model, brought suit claiming that defendant used his picture for trade or advertising purposes without his consent, and thus violated his statutory right to privacy. The Supreme Court at Special Term, New York County, Martin H. Rettinger, J., granted defendant's motion for summary judgment and dismissed complaint, and plaintiff appealed. The Appellate Division of the Supreme Court in the [First Judicial Department, 98 A.D.2d 287, 470 N.Y.S.2d 377](#), reversed. Defendant appealed by leave of the Appellate Division which certified question as to correctness of its order. The Court of Appeals, Wachtler, J., held that: (1) defendant's publication of plaintiff's picture was protected by newsworthiness exception, and (2) plaintiff was not entitled to additional discovery.

Order reversed, complaint dismissed and certified question answered.

***179 OPINION OF THE COURT**

WACHTLER, Judge.

The plaintiff, a professional model, claims that the defendant used his picture for trade or advertising purposes without his consent, and thus violated his statutory right to privacy ([Civil Rights Law, § 51](#)), by publishing a picture of him modeling a "bomber jacket" in a magazine article containing information regarding the approximate price of the jacket, the name of the designer, and the names of three stores where the jacket might be purchased. Plaintiff also claims that the defendant's conduct violated a common-law right of publicity. The trial court granted summary judgment to the defendant concluding that the article reported a newsworthy event of fashion news, and was not published for trade or advertising purposes. A divided Appellate Division, [98 A.D.2d 287, 470 N.Y.S.2d 377](#), reversed and denied summary judgment finding that factual questions were presented as to whether the defendant had used the plaintiff's picture for trade purposes and whether the article constituted an advertisement in disguise. The defendant has appealed by leave of the Appellate Division which certified a question as to the correctness of its order.

In the summer of 1981 the plaintiff agreed to model for an article on men's fall fashions. The photographic session took place on August 11, 1981. The defendant used two of the photographs taken during that session to illustrate an article entitled "Classic Mixes", which appeared under the heading "Fall Fashions" in the September 7, 1981 issue of *New York* magazine. Another photograph taken during the session was used, a week earlier, in the August 31, 1981 issue of *New York* magazine, in a column entitled "Best Bets". That column, a regular feature in the magazine, contains ***222 **582 information about new and unusual products and services available in the metropolitan area. One of the items included in the August 31 column was a bomber jacket modeled by the plaintiff. The text above the picture states: "Yes Giorgio-From Giorgio Armani. Based on his now classic turn on the bomber jacket, this cotton-twill version with 'fun fur' collar features the same cut at a far lower price-about \$225. It'll be available in the stores next week.-Henry Post Bomber Jacket/Barney's, Bergdorf Goodman, Bloomingdale's."

***180** It is the plaintiff's contention that he agreed to model for one article only-the September 7, 1981 article on Fall Fashions-and that the defendant violated his rights by publishing his photograph in the August 31 "Best Bets" column.^{FN1} The complaint alleges two causes of action. First the plaintiff claims that the defendant violated his civil rights by using his photograph for trade or advertising purposes without his consent. In his second cause of action the plaintiff claims that the defendant's conduct "invaded plaintiff's right of publicity". On each cause of action the plaintiff seeks \$350,000 in compensatory damages and an equal amount in exemplary damages.

[FN1](#). In his brief to this court the plaintiff claims that the defendant's use of his photographs in both articles is in issue because the plaintiff did not give his written consent to use them in either article. It appears that

the plaintiff was injured at the photographic session and subsequently refused to sign a release in order to avoid compromising the unrelated action for physical injuries. Nevertheless, in his complaint, he only objected to the August 31 "Best Bets" article. Similarly, in his papers in opposition to the motion for summary judgment, the plaintiff identified that publication alone as the basis for the complaint. Thus the only question properly before us concerns the defendant's liability for publishing the plaintiff's photograph in the "Best Bets" article of August 31, 1981.

The defendant's answer asserts several affirmative defenses. The primary defense is that the photograph and article relating to it involve matters of legitimate public interest and concern and thus do not violate the plaintiff's rights under the [Civil Rights Law \(§§ 50, 51\)](#), or any common-law right of publicity. The defendant also urged that the second cause of action, for invasion of the plaintiff's right of publicity, does not set forth a claim "separate and distinct" from the first cause of action.

On May 4, 1982 the plaintiff filed a note of issue and statement of readiness indicating that he waived his right to discovery proceedings, that there are no outstanding requests for discovery, and that the case was ready for trial. At the defendant's request, however, the parties stipulated that the note of issue would be withdrawn to afford the defendant an opportunity to move for summary judgment. In the motion for summary judgment the defendant urged that the complaint should be dismissed because the plaintiff's photograph was not published for trade or advertising purposes.

In support of the motion the defendant submitted affidavits by two of the editors involved in the publication of the "Best Bets" column of August 31, 1981. The affidavits state that the column is a regular news feature of the editorial portion of the magazine, designed to provide readers with information, sometimes ***181** including prices, concerning interesting products and services in the New York metropolitan area. They state that such information is provided solely for newsworthy purposes—"advertising concerns" play no part in deciding what to include in "Best Bets" and the magazine receives no payment for any item mentioned in the column. They further state that the item concerning the bomber jacket was included in the August 31 "Best Bets" column because the fashion editor suggested that it would be of interest to readers of *New York* magazine.

The plaintiff's affidavit in opposition to the motion stated: "While it may be that a party whose service or product is included in 'Best Bets' does not pay a direct advertising fee to be included, the benefits to the magazine are obtained in an indirect manner. Stores, designers, and retailers featured there have all advertised in *New York* magazine at other times and places, *****223** and giving them this 'breakout' feature in the 'Best Bets' column acts as barter for such advertising at another time and place." The plaintiff further stated that the designer and the stores mentioned in the August 31 column had previously advertised in *New York* magazine and observed that "the publicity benefits in the column to the designer and retail outlets mentioned are evident from a fair reading of the column".

The trial court granted summary judgment to the defendant concluding, on the basis of the exhibits submitted, that the bomber jacket item was a "newsworthy observation" and was not published for advertising or trade purposes within the contemplation of the statute. The court also held that the inclusion of information concerning the availability of the jacket at certain stores, which currently advertised in the magazine, was not sufficient to sustain the claim that the item had been published for trade or advertising purposes "without a further showing of benefit to defendant".

The Appellate Division reversed and denied the defendant's motion for summary judgment. The majority observed that the September 7 article was published for trade purposes because it was included to increase circulation. Finding that the "form and presentation" of both articles were identical the majority held that a reasonable person could conclude that the August 31 article was also used for trade purposes. "The real question", the majority stated, "is whether the public interest aspect of the August 31, 1981 article is merely incidental to its commercial purpose". The majority held that it "is also possible that this article constituted an advertisement in disguise since many of the magazine's advertisers were mentioned in the copy" (***18298 A.D.2d 287, 291, 470 N.Y.S.2d 377**). One Justice concurred on the ground that a fact question was presented as to whether the plaintiff had consented to the use of his picture in both articles. One Justice dissented for essentially the same reasons as those stated by the trial court.^{FN*} We now reverse.

FN* On January 15, 1985, subsequent to the date of the Court of Appeals decision, the Appellate Division, upon that court's own motion, corrected its originally published vote ([98 A.D.2d 287, 299, 470 N.Y.S.2d 377](#)) to reflect that its vote “at the time of reversal of the order appealed from was Murphy, P.J.; Fein, J. concurred in a separate writing; and Asch and Milonas, JJ. dissented and would affirm in a writing by Asch, J.”-REP.

[Section 50 of the Civil Rights Law](#) prohibits the use of “the name, portrait or picture of any living person” for advertising or trade purposes without the person's consent and declares a violation of the statute to be a misdemeanor. [Section 51](#) of the statute provides civil remedies, including injunctive relief, compensatory damages and, if the defendant acted knowingly, exemplary damages.

The statutes have their origin in this court's 1902 decision in [Roberson v. Rochester Folding Box Co.](#), 171 N.Y. 538, 64 N.E. 442. In that case it was held that a young woman whose picture had been used by the defendant on flour advertisements without her consent could not recover for a violation of her right to privacy because no such right was recognized at common law. The Legislature responded the following year by amending the Civil Rights Law to establish a statutory “right to privacy” (see [Rhodes v. Sperry & Hutchinson Co.](#), 193 N.Y. 223, 227, 85 N.E. 1097, affd. *sub nom.* [Sperry & Hutchinson Co. v. Rhodes](#), 220 U.S. 502, 31 S.Ct. 490, 55 L.Ed. 561). Since the adoption of the statutes, this court has repeatedly held that the right of privacy is governed entirely by statute in this State ([Arrington v. New York Times Co.](#), 55 N.Y.2d 433, 449 N.Y.S.2d 941, 434 N.E.2d 1319; [Cohen v. Hallmark Cards](#), 45 N.Y.2d 493, 497, n. 2, 410 N.Y.S.2d 282, 382 N.E.2d 1145; [Gautier v. Pro-Football, Inc.](#), 304 N.Y. 354, 358, 107 N.E.2d 485).

[Section 51 of the Civil Rights Law](#) has been applied in cases, such as the *Roberson* case, where the picture of a person who has apparently never sought publicity has been used without his or her consent for ****584** trade or advertising purposes (see, e.g., *****224** [Cohen v. Herbal Concepts](#), 63 N.Y.2d 379, 482 N.Y.S.2d 457, 472 N.E.2d 307; [Flores v. Mosler Safe Co.](#), 7 N.Y.2d 276, 196 N.Y.S.2d 975, 164 N.E.2d 853). In such cases it has been noted that the statute serves “to protect the sentiments, thoughts and feelings of an individual” ([Flores v. Mosler Safe Co.](#), *supra*, 7 N.Y.2d p. 280, 196 N.Y.S.2d 975, 164 N.E.2d 853; [Cohen v. Herbal Concepts](#), *supra*).

This history has led some courts to conclude that the statutory right to privacy is limited to the type of case which originally ***183** prompted its enactment and thus would not preclude the recognition in this State of a common-law “right of publicity” in cases where the defendant has exploited, without consent, and usually without payment, the name, picture, or portrait of an individual who has consciously sought to establish a publicity value for his personality (see, e.g., [Haelan Labs. v. Topps Chewing Gum](#), 202 F.2d 866, 868 (2d Cir.1953), cert. den. 346 U.S. 816, 74 S.Ct. 26, 98 L.Ed. 343; [Factors Etc. v. Pro Arts](#), 579 F.2d 215 (2d Cir.1978), cert. den. 440 U.S. 908, 99 S.Ct. 1215, 59 L.Ed.2d 455; but also see [Brinkley v. Casablancas](#), 80 A.D.2d 428, 438 N.Y.S.2d 1004). The statute, however, is not limited to situations where the defendant's conduct has caused distress to a person who wishes to lead a private life free of all commercial publicity.

[\[1\]\[2\]](#) By its terms the statute applies to any use of a person's picture or portrait for advertising or trade purposes whenever the defendant has not obtained the person's written consent to do so. It would therefore apply, and recently has been held to apply, in cases where the plaintiff generally seeks publicity, or uses his name, portrait, or picture, for commercial purposes but has not given written consent for a particular use ([Welch v. Mr. Christmas](#), 57 N.Y.2d 143, 454 N.Y.S.2d 971, 440 N.E.2d 1317; cf. [Shields v. Gross](#), 58 N.Y.2d 338, 461 N.Y.S.2d 254, 448 N.E.2d 108). Thus where the written consent to use the plaintiff's name or picture for advertising or trade purposes has expired ([Welch v. Mr. Christmas](#), *supra*) or the defendant has otherwise exceeded the limitations of the consent ([Shields v. Gross](#), *supra*), the plaintiff may seek damages or other relief under the statute, even though he might properly sue for breach of contract. The right which the statute permits the plaintiff to vindicate in such a case may, perhaps, more accurately be described as a right of publicity ([Zacchini v. Scripps-Howard Broadcasting Co.](#), 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965). In this respect the statute parallels the common-law right of privacy which generally provides remedies for any commercialization of the individual's personality without his consent (see Prosser, Privacy, 48 Cal.L.Rev. 383, 403; also, see, [Cohen v. Herbal Concepts](#), *supra*; [Flores v. Mosler Safe Co.](#), *supra*, 7 N.Y.2d pp. 280-281, 196 N.Y.S.2d 975, 164 N.E.2d 853; [Gautier v. Pro-Football, Inc.](#), *supra*, 304 N.Y. p. 358, 107 N.E.2d 485). Since the “right of publicity” is encompassed under the Civil Rights Law as an aspect of the right of

privacy, which, as noted, is exclusively statutory in this State, the plaintiff cannot claim an independent common-law right of publicity.^{FN2}

FN2. In view of the fact that the plaintiff is asserting his own right of publicity we need not consider whether the statute would also control assignment, transfer or descent of publicity rights (compare Price v. Hal Roach Studios, 400 F.Supp. 836, 844 (S.D.N.Y.1975), with Frosch v. Grosset & Dunlap, 75 A.D.2d 768, 427 N.Y.S.2d 828; and Rosemont Enterprises v. Random House, 58 Misc.2d 1, affd. 32 A.D.2d 892, 301 N.Y.S.2d 948; see, also, Sims, Right of Publicity: Survivability Reconsidered, 49 Fordham L.Rev. 453).

*184 The only question then is whether the defendant used the plaintiff's picture for trade or advertising purposes within the meaning of the statute when it published his picture in the "Best Bets" column without his consent.

[3] The statute does not define trade or advertising purposes. However, the courts have consistently held, from the time of its enactment, that these terms should not be construed to apply to publications concerning newsworthy events or matters of public interest (***225 Binns v. Vitagraph Co., 210 N.Y. 51, 52, 103 N.E. 1108; accord Humiston v. Universal Film Mfg. Co., 189 App.Div. 467, 178 N.Y.S. 752; Lahiri v. Daily Mirror, 162 Misc. 776, 295 N.Y.S. 382; Gautier v. Pro-Football, Inc., supra; Booth v. Curtis Pub. Co., 15 A.D.2d 343, 223 N.Y.S.2d 737, affd. 11 N.Y.2d 907, 228 N.Y.S.2d 468, 182 N.E.2d 812; Pagan v. New York Herald Tribune, 32 A.D.2d 341, 301 N.Y.S.2d 120, affd. 26 N.Y.2d 941, 310 N.Y.S.2d 327, 258 N.E.2d 727; Murray v. New York Mag. Co., 27 N.Y.2d 406, 318 N.Y.S.2d 474, 267 N.E.2d 256; Arrington v. New York Times Co., supra). The exception reflects Federal and State constitutional concerns for free dissemination of news and other matters of interest to the public (Arrington v. New York Times Co., supra, 55 N.Y.2d p. 440, 449 N.Y.S.2d 941, 434 N.E.2d 1319), but essentially requires an interpretation of the statute to give effect to the legislative intent (Binns v. Vitagraph Co., supra, 210 N.Y. p. 52, 103 N.E. 1108; Humiston v. Universal Film Mfg. Co., supra; Lahiri v. Daily Mirror, supra; Gautier v. Pro-Football, Inc., supra, 304 N.Y. p. 359, 107 N.E.2d 485). We have recently noted that this exception should be liberally applied (Arrington v. New York Times Co., supra, 55 N.Y.2d p. 440, 449 N.Y.S.2d 941, 434 N.E.2d 1319).

[4] The newsworthiness exception applies not only to reports of political happenings and social trends (Arrington v. New York Times Co., supra; Murray v. New York Mag. Co., supra), but also to news stories and articles of consumer interest including developments in the fashion world (Pagan v. New York Herald Tribune, supra). Nevertheless, the plaintiff contends that the photograph in this case did not depict a newsworthy event because it is a posed picture of a professional model taken at a photographic session staged by the defendant. However, the event or matter of public interest which the defendant seeks to convey is not the model's performance, but the availability of the clothing item displayed. A fashion display is, of necessity, posed and arranged. Obviously the picture of the jacket does not lose its newsworthiness simply because the defendant chose to employ a person to model it in a controlled or contrived setting (Pagan v. New York Herald Tribune, supra).

[5][6] The fact that the defendant may have included this item in its column solely or primarily to increase the circulation of its magazine and therefore its profits, as the Appellate Division suggested, does not mean that the defendant has used the plaintiff's picture for trade purposes within the meaning of the *185 statute. Indeed, most publications seek to increase their circulation and also their profits. It is the content of the article and not the defendant's motive or primary motive to increase circulation which determines whether it is a newsworthy item, as opposed to a trade usage, under the Civil Rights Law (Arrington v. New York Times Co., supra, 55 N.Y.2d p. 440, 449 N.Y.S.2d 941, 434 N.E.2d 1319; Booth v. Curtis Pub. Co., supra). It is settled that a " 'picture illustrating an article on a matter of public interest is not considered used for the purposes of trade or advertising within the prohibition of the statute * * * unless it has no real relationship to the article * * * or unless the article is an advertisement in disguise' " (Murray v. New York Mag. Co., 27 N.Y.2d 406, 409, 318 N.Y.S.2d 474, 267 N.E.2d 256, supra, quoting Dallesandro v. Holt & Co., 4 A.D.2d 470, 471, 166 N.Y.S.2d 805, app. dsmd. 7 N.Y.2d 735, 193 N.Y.S.2d 635, 162 N.E.2d 726; see, also, Arrington v. New York Times Co., supra, 55 N.Y.2d p. 440, 449 N.Y.S.2d 941, 434 N.E.2d 1319; Pagan v. New York Herald Tribune, supra; Gautier v. Pro-Football, Inc., supra, 304 N.Y. p. 359, 107 N.E.2d 485; Booth v. Curtis Pub. Co., supra). A contrary rule would unreasonably and unrealistically limit the exception to nonprofit or purely altruistic organizations which are not the only, or even the primary, source of information concerning newsworthy events and matters of public interest.

The plaintiff's primary contention is that his picture was used for advertising purposes within the meaning of the statute. ****586** Although the article was not presented to *****226** the public as an advertisement, and was published in a column generally devoted to newsworthy items (cf. [Gautier v. Pro-Football, Inc., supra, 304 N.Y. pp. 358-359, 107 N.E.2d 485](#)), the plaintiff claims that it is in fact an advertisement in disguise. In addition, although the defendant has submitted affidavits that the article was published solely as a matter of public interest, without any consideration for advertising concerns, and that the magazine received no payment for including the item in its "Best Bets" column, the plaintiff nevertheless contends that he has presented sufficient facts to require a trial on the issue.

The facts on which the plaintiff relies are entirely circumstantial. He does not claim to have personal knowledge, or direct proof, that this particular article was actually published by the defendant for advertisement purposes. The circumstances on which he bases his claim are (1) the fact that the news column contains information normally included in an advertisement identifying the designer of the jacket, the approximate price, and three places where the jacket may be purchased, and (2) the fact that some or all of those stores mentioned in the article had previously advertised products in the magazine. Those circumstances are not enough to raise a jury question as to whether the article was published for advertising purposes.

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

[\[7\]](#) The Appellate Division suggested that the plaintiff should be permitted to explore the merits of his claim during discovery proceedings. However, as noted, the plaintiff waived his right to discovery and certified that the case was ready for trial. It is also evident, from his opposition papers to the summary judgment motion, that he was content to present his case entirely on the basis of the circumstances of the publication. He never requested discovery in connection with the motion, or contended that discovery was necessary to respond to the facts alleged in the defendant's affidavits ([CPLR 3212](#), subd. [f]). Under these circumstances it cannot be said, as a matter of law, that the plaintiff should be granted additional opportunities for discovery.

Finally, it should be emphasized that we do not mean to suggest that a publisher who has employed a professional model to pose for pictures to be used in an article may avoid the agreed fee, or otherwise ignore contractual arrangements, if the model's pictures are used to illustrate a newsworthy article or one involving matters of public interest. Although the complaint alludes to an agreement between the parties, the plaintiff has not sought to enforce a contract or recover damages for a breach. Since the plaintiff chose to frame his complaint entirely in terms ***187** of rights covered by the Civil Rights Law, which we *****227** ****587** have concluded is not applicable in this case, the complaint should be dismissed.

Accordingly, the order of the Appellate Division should be reversed, the complaint dismissed and the certified question answered in the negative.

COOKE, C.J., and JASEN, JONES, MEYER, SIMONS and KAYE, JJ., concur.

Order reversed, with costs, complaint dismissed, and question certified answered in the negative.

United States District Court,
N.D. Illinois,
Eastern Division.

Philip AHN, Elizabeth Malecki, and Katalin Zamiar, Plaintiffs,

v.

MIDWAY MANUFACTURING COMPANY, Williams Electronics Games, Inc., Nintendo of America, Inc., Sega of America, Inc., Acclaim Entertainment, Inc., Defendants.

No. 95 C 0719.

May 28, 1997.

Martial arts practitioners brought action against video game producer for infringement of right of publicity, violation of Copyright Act, and quantum meruit. Producer moved for summary judgment. The District Court, [Gettleman, J.](#), held that: (1) practitioners' claims of infringement of right of publicity were preempted by Copyright Act; (2) practitioners were not joint authors of games; and (3) practitioners could not recover under quantum meruit.

Motion for summary judgment granted.

MEMORANDUM OPINION AND ORDER

[GETTLEMAN](#), District Judge.

Plaintiffs Philip Ahn, Elizabeth Malecki, and Katalin Zamiar bring this seven count action against defendants Midway Corporation ("Midway"), Williams Electronics Games, Inc. ("Williams"), Acclaim Entertainment, Inc. ("Acclaim"), Nintendo of America, Inc. ("Nintendo"), and Sega of America, Inc. ("Sega"), alleging infringement of the common law right of publicity, and violations of: Section 43(a) of the Lanham Act; the Illinois Consumer Fraud and Deceptive Practices Act; the Illinois Uniform Deceptive Trade Practices Act; and, the Copyright *1136 Act of 1976, along with one count under common law quantum meruit. Plaintiffs seek a constructive trust on all moneys defendants received and continue to receive from the alleged breach of their duty to plaintiffs. Defendants have filed a motion for summary judgment on all counts. For the reasons set forth below, defendants' motion is granted.

FACTS

Plaintiff Philip Ahn is a fourth degree black belt in Tae Kwon Do and has practiced martial arts for approximately twenty years. Plaintiff Elizabeth Malecki holds a degree in ballet and modern dance and is a professional dancer, actress, and aerobics instructor. Plaintiff Katalin Zamiar is a first degree black belt in Karate and has twelve years of experience. Midway designs, manufactures, and sells coin-operated amusement games and licenses home video games, including Mortal Kombat and Mortal Kombat II, to which Midway owns the copyright to the computer program and related audiovisual materials. Williams acts in conjunction with Midway in designing, manufacturing, and selling coin-operated video games. Acclaim manufactures software for use in Nintendo and Sega hardware systems for home video games. Nintendo and Sega design, market and sell home video games.

Plaintiffs' versions of the events that lead to their association with Midway are essentially identical. All plaintiffs allege that on separate occasions between 1992 and 1993 they were approached by Midway's agents about the possibility of using their images, names and performances for various character in the coin-operated arcade format of Mortal Kombat and Mortal Kombat II. Plaintiff Malecki modeled the character Sonja Blade for Mortal Kombat. Plaintiff Ahn modeled the character Shang Tsung in the coin-operated version of Mortal Kombat II, while plaintiff Zamiar modeled for three characters, Kitana, Mileena, and Jade, all of whom appeared in Mortal Kombat II. Plaintiffs' movements were videotaped by Midway and these images were eventually digitalized and incorporated into the coin-operated arcade games.

All plaintiffs signed a release form with Midway at the time of the videotaping. This agreement authorized Midway to film each plaintiff in a martial arts performance in order to use that plaintiff's name or likeness in connection with the manufacture, design, advertising, promotion, sale, and use of the coin-operated video games. The agreement also made Midway the sole and exclusive owner of all of plaintiffs' copyrightable expression, defining any such expression as "works for hire," and permitted Midway, at its sole discretion, to use plaintiffs' likeness in any copyright obtained in connection with the coin-operated arcade games.

Plaintiffs allege that they were required to sign the release in case of injury and that Midway lead them to believe that only a small number of arcade games were being contemplated. However, in the event the game proved successful, they were told they would receive bonuses, or if the coin-operated versions of the game developed into ancillary uses, plaintiffs would receive royalties, and would be considered for movie parts, personal appearances and television commercials. Plaintiffs allege that based on these representations they all signed the agreement, which the parties refer to as the General Release.

The arcade version of Mortal Kombat and its successor, Mortal Kombat II, proved to be successful. In September, 1993, Acclaim, Nintendo and Sega released the home video game version of Mortal Kombat, and in September, 1994, they released the home game version of Mortal Kombat II. In April of 1994, all plaintiffs attended a meeting with agents of Midway and Williams. At this meeting plaintiffs were promised what plaintiffs have termed "wonderful opportunities" if they signed an additional agreement, known as the Non-disclosure Agreement and Release. Plaintiffs allege that at this meeting they were informed that various companies were interested in utilizing plaintiffs' images in various products and commercial endorsements. All three plaintiffs refused to sign this second agreement.

Plaintiffs' seven count complaint against defendants is based on the alleged unauthorized use of their names, persona and likenesses***1137** in connection with the home video, home computer, and hand-held versions of Mortal Kombat and Mortal Kombat II. Plaintiffs' response to defendants' motion for summary judgment indicates that they do not contest defendants' motion on the counts dealing with the Lanham Act (Count II), the Illinois Consumer Fraud and Deceptive Practices Act (Count III) and the Illinois Uniform Deceptive Trade Practices Act (Count IV). Accordingly, the only counts remaining are Count I alleging infringement of the right of publicity, Count V alleging violation of the Copyright Act of 1976, and Count VII, the common law quantum meruit count.

DISCUSSION

I. Summary Judgment Procedure

[Rule 56\(c\) of the Federal Rules of Civil Procedure](#) provides that a summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The court must consider the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmovant, and any doubts as to whether a genuine factual dispute exists must be resolved in favor of the non-moving party. [New Burnham Prairie Homes, Inc. v. Village of Burnham, 910 F.2d 1474, 1477 \(7th Cir.1990\)](#). However, once the movant has satisfied its initial burden, the nonmoving party then has the burden of coming forward with evidence demonstrating that there is a genuine issue to be tried to the factfinder. *Id.* A fact is genuinely in dispute when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 \(1986\)](#).

II. The Right of Publicity

In Count I plaintiffs allege that defendants' unauthorized use of their names, personas, and likenesses violated their common law right of publicity. Defendants argue both that the right of publicity is preempted by the Copyright Act of 1976, [17 U.S.C. § 301\(a\)](#), and that plaintiffs have not satisfied the requirements for a claim under the right of publicity.^{FN1}

^{FN1} Because the court concludes that plaintiff's publicity claim is preempted, it need not reach defendant's

assertion that they are entitled to judgment on the claim because plaintiffs cannot demonstrate that they had acquired any value in their names or likenesses. The court notes, however, that an issue of fact exists as to whether plaintiffs had acquired such value through defendants' promotion of the arcade games, prior to the alleged misappropriation.

[1][2][3] A state claim is preempted by the Copyright Act if two elements are satisfied. First, the work in which the right is asserted must be fixed in a tangible form and fall within the subject matter of copyright under [§ 102](#) of the Act. Second, the right asserted must be equivalent to any of the rights specified in [§ 106](#) of the Act. *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 674 (7th Cir.1986). Section 102 sets forth three conditions for copyrightability. First, the work must be fixed in a tangible form; second, the work must be the original work of authorship; and third, the work must come within the subject matter of copyright. *Baltimore Orioles*, 805 F.2d at 668. Under [§ 106](#), the copyright owner has certain rights including reproduction, the preparation of derivative works, and distribution. A state claim is equivalent to one of the rights asserted under the Copyright Act if it is violated by the exercise of any of the rights set forth in [§ 106](#). *Baltimore Orioles*, 805 F.2d at 676. In *Baltimore Orioles*, the Major League Baseball Players Association asserted that the telecasts of Major League Baseball games were made without the players' consent, and that the telecasts misappropriated the players' property right in their performances. The plaintiffs, representing the Major League baseball clubs, brought an action seeking declaratory judgment that the clubs possessed the exclusive right to broadcast the games and the exclusive right to the telecasts. *Id.* at 665.

Applying the two-part test, the Seventh Circuit held that the baseball clubs' copyright ***1138** in the telecasts preempted the players' right of publicity in their game time performances. The court held that the first condition for preemption, fixation in a tangible form, was satisfied because the telecasts of the baseball games were recorded simultaneously. *Id.* at 674. The court then examined whether the right of publicity was equivalent to one of the rights specified in [§ 106](#) of the Copyright Act. The court held that because the right to broadcast telecasts of the games infringes on the players' right of publicity in their performance, and because the right of publicity does not differ in kind from copyright, the players' right was equivalent to one of the rights encompassed in [§ 106](#) of the Copyright Act. Accordingly, because both elements of preemption were satisfied, the players' state claim under the right of publicity was preempted. *Id.* at 677.

[4] In the instant case, plaintiffs' images were videotaped and, as a result, became fixed in a tangible form. To be fixed in a tangible form, the work must be recorded by or under the authority of the author. [17 U.S.C. § 101 \(1994\)](#). Because plaintiffs consented to the videotaping, the definition of 'fixed' is satisfied. Further, the choreographic works were all original works of authorship. Finally, choreographic works fall within the subject matter of copyright. *See*, Nimmer on Copyright, § 2.07(B). Thus, the first condition for preemption has been satisfied.^{FN2} Applying the [§ 106](#) test, the right of publicity is equivalent to one of the rights in [§ 106](#) because it is infringed by the act of distributing, performing or preparing derivative works. Thus, plaintiffs' claim is preempted.

^{FN2}. Even if plaintiffs argue that it is their performance in which they claim a right and not the videotape of the performance, the plaintiffs' claim must still fail. In *Baltimore Orioles*, plaintiffs claimed a right in their performances, and not in the telecast. *Baltimore Orioles*, 805 F.2d at 674. The court, however, held that because the performances were embodied in a copy, the performances were fixed in a tangible form and thus satisfied the definition of 'fixed' under [17 U.S.C. § 101](#). *Id.* at 675.

III. Copyright Act of 1976

In Count V of their complaint, plaintiffs allege that defendants, in filing and securing an exclusive copyright to the exclusion of plaintiffs, unlawfully appropriated plaintiffs' choreographic work. Plaintiffs further allege that defendants violated the copyright laws when they reproduced plaintiffs' protected expression, and ask this court to grant a permanent injunction pursuant to §§ 502-506 of the Copyright Act prohibiting all defendants from using plaintiffs' choreographic works, personas, names and/or likenesses. In the alternative, plaintiffs ask that this court find that the software for Mortal Kombat and Mortal Kombat II are joint works, as evidenced by their limited release.

[5][6] Defendants correctly argue that Midway's certificates of registration from the Copyright Office constitute prima facie evidence of the validity of their copyright, and upon introduction of the certificates the burden shifts to the party challenging the invalidity of the copyright to overcome this presumption and affirmatively demonstrate invalidity. *Fonar Corp. v. Domenick*, 105 F.3d 99, 101 (2nd Cir.1997). Defendants argue that because plaintiffs have failed to rebut this presumption, they are entitled to summary judgment. In addition, defendants argue that because defendants Midway and Williams alone developed the source code for the games-and it was that source code that was copyrighted-those defendants must, as a matter of law, be considered the sole authors of the work.

[7] Under federal copyright law, if a work is considered "joint" the joint authors hold undivided interests in the work. 17 U.S.C. § 201 (1994). Each author, as a co-owner, has the right to use or to license the use of the work, subject to an accounting to the other co-owners for any profits. See *Napoli v. Sears, Roebuck & Co.*, 874 F.Supp. 206, 209 (N.D.Ill.1995). ^{FN3} Thus, this court must determine whether plaintiffs and defendant Midway are to be considered joint authors in the computer program that incorporates plaintiffs' performances.

^{FN3}. In *Napoli*, this court had occasion to review the law governing joint authorship of computer programs and graphics. Although that opinion was later withdrawn for other reasons, 926 F.Supp. 780 (N.D.Ill.1996), the analysis discussed therein is a useful reference for purposes of the instant case.

*1139 [8] A joint work is defined as "a work prepared by two or more authors with the intention that their contribution be merged into inseparable or interdependent parts of the unitary whole." 17 U.S.C. § 101 (1994). In *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir.1994), a playwright successfully sought to enjoin a theater whose actors had contributed ideas to the plaintiff's copyrighted plays and videotapes from performing these plays without license from the plaintiff. The Seventh Circuit adopted Professor Goldstein's copyrightable subject matter test to determine the issue of joint authorship. Under this standard, "[a] collaborative contribution will not produce a joint work, and a contribution will not obtain a co-ownership interest, unless the contribution represents original expression that could stand on its own as the subject matter of copyright." *Id.* at 1070.

[9][10] In addition, the Goldstein test requires that the parties must have intended to be joint authors at the time the work was created. The intent requirement is satisfied if the parties intended to merge their respective contributions into a single whole. The mere fact, however, of contemporaneous input into the copyrighted work does not satisfy the statutory requirement of intent. "To qualify as an author, one must supply more than mere direction or ideas. An author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright expression." *Erickson*, 13 F.3d at 1071. As to the requirement of fixation, § 101 states: "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.*

In *Erickson*, the Seventh Circuit held there was no intent between the playwright and the theater to be joint authors at the time the plays were written. The court relied on certain factors to determine the absence of joint authorship. First, the works were largely created before the actors offered their improvisations. Second, final contents of the plays, including which suggestions to be incorporated, were solely determined by the playwright. Third, neither the playwright nor the theater considered the actors to be joint authors. Based on these factors the court in *Erickson* ruled that the defendants could not overcome the presumption in favor of the plaintiff's copyright.

[11] In the present case plaintiffs incorrectly assert that they are co-authors of the copyrighted work. First, plaintiffs offer no evidence to rebut Midway's affidavit that it never considered plaintiffs to be collaborators or joint authors of the games. More importantly (since plaintiffs correctly point out that it is difficult to come up with hard evidence to rebut a self-serving statement of intent) ^{FN4}, Midway's agents had the final authority to decide on the selection of movements and poses that would be recorded during the videotaping session as well as the authority to decide which frames of the videotape and in what manner and order the frames would be incorporated into the computer program that drives the game.

^{FN4}. Midway, however, has presented some hard evidence of its intent that plaintiffs not be considered joint authors. The Release Agreement specifically identified each plaintiff's contributions as a "work for

hire.” This document, prepared and signed contemporaneously with plaintiffs’ performances, clearly indicates defendants’ intent that plaintiffs not be considered joint authors. [Erickson, 13 F.3d at 1072](#). In their complaint plaintiffs suggest that they were “induced” into signing the general releases. Plaintiffs have failed, however, to plead a separate claim for fraudulent inducement, and their attorney candidly admitted at oral argument that they could not prove such a claim.

Indeed, Midway alone decided which portions of plaintiffs’ “performances” to digitalize and alone transformed the video images into the cartoon-like images in the game. It is apparent to the court, in viewing videotapes of the actual games, that the superhuman gyrations and leaps high into the air of the characters, including plaintiffs’ characters, are fanciful products of the imaginations of the creators of the source codes-much like the playwright’s penmanship in *Erickson*. To be sure, according to their testimony, plaintiffs contributed their images and movements to the creation of the games, but, *1140 like the actors in *Erickson*, that contribution was transitory. It was Midway alone that translated the ideas “into a fixed, tangible expression entitled to copyright protection.” [Erickson, 13 F.3d at 1071](#).

Finally, the general release signed by all plaintiffs made Midway the sole and exclusive owner of all plaintiffs’ copyrightable expression in connection with the coin-operated arcade games and stipulated that plaintiffs’ efforts were “works for hire.” Plaintiffs have conceded that this agreement partially governed their relationship with respect to the production of the arcade games. It is also uncontested that the source codes (that are the subject of Midway’s copyright) for the arcade games are the same source codes used in the hand-held and home video versions. It is hard to see how plaintiffs could have conveyed any and all their rights with respect to the original source codes, yet retain additional rights when that same code is used in another application.

Accordingly, this court concludes that the uncontested facts demonstrate that plaintiffs cannot prove that they are joint authors of the copyrighted source codes. Summary judgment will therefore be entered for defendants on Count V.

IV. Quantum Meruit

[12][13] In Count VII of their complaint plaintiffs request the reasonable value of their services and royalties under the common law theory of quantum meruit. Quantum meruit “is based on the premise that a party should not be permitted to retain the benefit of services provided by another if such retention ‘violates the fundamental principles of justice, equity, and good conscience.’ ” [Industrial Specialty Chemicals v. Cummins Engine Co., 918 F.Supp. 1173, 1179 \(N.D.Ill.1996\)](#). To be successful on a claim under quantum meruit, a party must prove performance of the services, reasonable value of the services, and a benefit received by the defendant without paying the complaining party. *Id.* Under Illinois law, however, the law which governs this dispute, a plaintiff cannot pursue a quasi-contractual claim where there has been an enforceable express contract between the parties. [Barry Mogul & Assocs. v. Terrestriis Development Co., 267 Ill.App.3d 742, 205 Ill.Dec. 294, 300, 643 N.E.2d 245, 251 \(1994\)](#).

[14] In the instant case, plaintiffs’ claim under quantum meruit must fail because a valid, enforceable agreement existed between the parties. Contemporaneously with the videotaping of their performances, all plaintiffs signed the General Release. Under the terms of that document, plaintiffs received valuable consideration in exchange for, among other things, allowing defendants to videotape their performances and incorporate those performances into the arcade games. Thus, defendants are entitled to summary judgment on Count VII.

CONCLUSION

For the reasons set forth above, defendants’ motion for summary judgment on all counts is granted.

United States Court of Appeals,
Ninth Circuit.

George DOWNING, an individual; Paul Strauch, an individual; Rick Steere, an individual; Richard Buffalo Keaulana, an individual; Ben Aipa, an individual; Mike Doyle, an individual; Joey Cabell, an individual, Plaintiffs-Appellants,

v.

ABERCROMBIE & FITCH, an Ohio corporation, Defendant-Appellee.
Nos. 00-55363, 00-55834.

Argued and Submitted March 7, 2001
Filed Sept. 13, 2001

Surfers depicted in photograph of surfing competition held over 30 years earlier brought suit against clothing retailer which had used photograph without their permission in surf-themed catalog, asserting statutory and common law commercial misappropriation claims under California law, and also asserting Lanham Act claims. The United States District Court for the Central District of California, [Manuel L. Real](#), J., granted summary judgment to retailer. Surfers appealed. The Court of Appeals, [Hug](#), Circuit Judge, held that: (1) First Amendment did not bar misappropriation claims; (2) misappropriation claims did not involve rights that fell within subject matter of copyright, and thus were not preempted; (3) California law, rather than law of state where surfers resided, applied to misappropriation claims; and (4) whether use of photograph created likelihood of confusion regarding endorsement by surfers was fact issue; but (5) use of photograph could not support defamation claims.

Reversed and remanded.

[HUG](#), Circuit Judge:

Appellants brought this diversity action against Abercrombie and Fitch (“Abercrombie”) for publishing a photograph of them, with identification of their names, for Abercrombie's commercial benefit without the Appellants' authorization. They allege a violation of California's common law and statutory prohibition against misappropriation of a person's name and likeness for commercial purposes, a violation of the Lanham Act for confusion and deception indicating sponsorship of Abercrombie goods, and a claim for negligence and defamation. The district court entered summary judgment for Abercrombie, holding that their California state claims were foreclosed because Abercrombie's use of the photograph was protected by the First Amendment, and those claims were also preempted by the federal Copyright Act; that Hawaii law was the proper choice of law for some of these claims; that the Lanham Act claim was precluded by the First Amendment and it was also precluded by the nominative fair use doctrine; and that there was insufficient evidence to sustain the negligence or defamation claims. The district court had jurisdiction under [28 U.S.C. § 1332](#), and we have appellate jurisdiction under [28 U.S.C. § 1291](#). We reverse the grant of summary judgment and remand for trial.

BACKGROUND

I. Factual Background

Abercrombie is an outfitter catering to young people. The upscale retailer sells casual apparel for men and women, including shirts, khakis, jeans, and outerwear. In addition to sales in approximately 200 stores nationwide, Abercrombie also sells merchandise through its subscription catalog, the “Abercrombie and Fitch Quarterly” (“Quarterly”).

The Quarterly is Abercrombie's largest advertising vehicle. It accounts for approximately 80% of Abercrombie's overall advertising budget. The primary purpose of the Quarterly is to build brand awareness and increase sales. Each issue is over 250 pages in length and embraces a theme such as collegiate lifestyle, back to school, or winter wear. The Quarterly contains photographs of models wearing Abercrombie's garments as well as pictures of the clothing displayed for sale. In addition, approximately one-quarter of each issue is devoted to stories, news and other

editorial pieces.

In 1998, Michael Jeffries, Abercrombie's CEO, developed a surfing theme for the upcoming Quarterly. Abercrombie held the photo shoot for the upcoming issue at *1000 San Onofre Beach, California. While at the photo shoot, Abercrombie employees Sam Shahid and Savas Abadsidis looked through a compilation of surfing photographs by surf photographer LeRoy Grannis. The photo book contained a picture of Appellants which Grannis had taken at the 1965 Makaha International Surf Championship in Hawaii. Sam Shahid purchased the photograph, along with three other photographs from the book, for \$100 each. LeRoy Grannis then handwrote the names of Appellants at the bottom of the photograph.

Subsequently, Sam Shahid showed Appellants' photograph to Jeffries who decided to use the photograph in the upcoming Quarterly. Abercrombie did not obtain Appellants' permission. Jeffries also decided to create t-shirts, exactly like those worn by the Appellants in the photograph, for sale in the upcoming issue. Abercrombie labeled the t-shirts "Final Heat Tees." The t-shirts were advertised for sale in the Quarterly.

The Spring 1999 Quarterly, "[Spring Fever](#)," contains a section entitled "Surf Nekkid." The "Surf Nekkid" section includes an article recounting the history of surfing. Abercrombie also included a 700-word story, entitled "Your Beach Should Be This Cool," describing the history of Old Man's Beach at San Onofre, California. The following page exhibits the photograph of Appellants. The two pages immediately thereafter feature the "Final Heat Tees."

The "[Spring Fever](#)" issue contains other articles about the surfing lifestyle. An article entitled "Beachcombing" documents the efforts of the Surfrider Foundation, an ecological group founded by surfers. Still another article entitled "Where the Wild Things Are," written by the editor of Surfer Magazine, describes various surfer "types." Also contained in the issue is an interview of Nat Young, former world surfing champion and the first professional surfer. The interview is accompanied by photographs of Young and his son wearing Abercrombie clothing.

II. Procedural History

On April 28, 1999, Appellants George Downing, Paul Strauch, Rick Steere, Richard Buffalo Keaulana, and Ben Aipa filed a complaint in the United States District Court for the Central District of California. Appellants later amended the complaint to add Joey Cabell and Mike Doyle. Appellants alleged that Abercrombie misappropriated their names and likenesses in violation of California's statutory and common law protections against commercial misappropriation, that the publication of the photograph in the catalog violated the Lanham Act and they alleged claims for negligence and defamation. Subsequently, Appellants and Abercrombie both filed motions for summary judgment. The district court entered summary judgment for Abercrombie. Appellants timely appealed. Abercrombie then filed a motion for attorneys' fees and other expenses. The district court granted the motion, awarding Abercrombie approximately one-fourth of the attorneys' fees that it sought. Appellants timely filed a notice of appeal from that order. We consolidated the two appeals.

On appeal, Appellants contend: (1) Abercrombie's use of the photograph is not protected under the First Amendment; (2) the state law publicity claims are not preempted by the Copyright Act; (3) California law is the proper choice of law for the claim under [California Civil Code § 3344](#); (4) triable issues of fact exist with regard to the Lanham Act claims; (5) triable issues of fact exist with regard to the defamation claim; (6) the district court erred in denying the motion for a continuance; (7) the district court erred in awarding*1001 attorneys' fees and costs to Abercrombie.^{FN1}

[FN1](#). The Appellants do not appeal the summary judgment on their negligence claim.

STANDARD OF REVIEW

[1] The district court's grant of summary judgment is reviewed de novo. [Botosan v. Paul McNally Realty](#), 216 F.3d 827, 830 (9th Cir.2000). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. [Lopez v. Smith](#), 203 F.3d 1122, 1131 (9th Cir.2000) (en banc).

ANALYSIS

I. First Amendment and Right of Publicity Claims

The district court concluded that Abercrombie's use of the photograph containing Appellants' names and likenesses was proper because it constituted expression protected under the First Amendment. We disagree.

[2][3] California has long recognized a common law right of privacy for protection of a person's name and likeness against appropriation by others for their advantage. See [Eastwood v. Superior Court](#), 149 Cal.App.3d 409, 416, 198 Cal.Rptr. 342 (1983). To sustain a common law cause of action for commercial misappropriation, a plaintiff must prove: “(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” [Id.](#) at 417, 198 Cal.Rptr. 342.

[4][5] In addition to the common law cause of action, California has provided a statutory remedy for commercial misappropriation under [California Civil Code § 3344](#). The remedies provided for under [California Civil Code § 3344](#) complement the common law cause of action; they do not replace or codify the common law. See [Newcombe v. Adolf Coors Co.](#), 157 F.3d 686, 691-92 (9th Cir.1998). [Section 3344](#) provides in relevant part, “any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner ... for purposes of advertising ... without such person's prior consent ... shall be liable for any damages sustained by the person.” [Cal. Civ.Code § 3344\(a\)](#). Under [section 3344](#), a plaintiff must prove all the elements of the common law cause of action. In addition, the plaintiff must allege a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose. See [Eastwood](#), 149 Cal.App.3d at 417, 198 Cal.Rptr. 342.

[6][7] Under both the common law cause of action and the statutory cause of action “no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.” [Montana v. San Jose Mercury News, Inc.](#), 34 Cal.App.4th 790, 793, 40 Cal.Rptr.2d 639 (1995). This First Amendment defense extends “to almost all reporting of recent events,” as well as to publications about “people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities.” [Eastwood](#), 149 Cal.App.3d at 422, 198 Cal.Rptr. 342. However, the defense is not absolute; we must find “a proper accommodation between [the] competing concerns” of freedom of speech and the right of publicity. *Id.*

*1002 [8] In the instant case, Abercrombie defends on the basis of the First Amendment arguing that the photograph illustrates an article about surfing, a matter in the public interest. To support its defense, Abercrombie relies on [Dora v. Frontline Video, Inc.](#), 15 Cal.App.4th 536, 18 Cal.Rptr.2d 790 (1993). In *Dora*, the court held that a surfing documentary was in the public interest because it was “about a certain time and place in California history and, indeed, in American legend.” *Id.* at 543. *Dora* involved a surfing legend, Mickey Dora, who sued the producer of a video documentary on surfing claiming common law and statutory appropriation of his name and likeness. See [id.](#) at 540, 18 Cal.Rptr.2d 790. The trial court entered summary judgment for the film's producer and the California Court of Appeal affirmed. See *id.* In addressing the First Amendment issue, the court found that the documentary was about a matter of public interest, specifically surfing, and, therefore, the producer was protected by the defense. See [id.](#) at 544, 18 Cal.Rptr.2d 790. In so concluding the court stated:

surfing is of more than passing interest to some. It has created a life-style that influences speech, behavior, dress, and entertainment, among other things. A phenomenon of such scope has an economic impact, because it affects purchases, travel, and the housing market. Surfing has also had a significant influence on the popular culture, and in that way touches many people. It would be difficult to conclude that a surfing documentary does not fall within the category of public affairs.

[Id.](#) at 546, 18 Cal.Rptr.2d 790.

Although the theme of Abercrombie's catalog was surfing and surf culture, a matter of public interest, the use of

Appellants' names and pictures is quite different from that involved in the *Dora* case. In *Dora*, Mickey Dora's contribution to the development of the surf life-style and his influence on the sport was "the point of the program." [Id. at 543, 18 Cal.Rptr.2d 790](#). Dora was depicted in the documentary because his identity directly contributed to the story about surfing which came within the protected public interest.

In the current action, there is a tenuous relationship between Appellants' photograph and the theme presented. Abercrombie used Appellants' photograph essentially as window-dressing to advance the catalog's surf-theme. The catalog did not explain that Appellants were legends of the sport and did not in any way connect Appellants with the story preceding it. In fact, the catalog incorrectly identifies where and when the photograph was taken. We conclude that the illustrative use of Appellants' photograph does not contribute significantly to a matter of the public interest and that Abercrombie cannot avail itself of the First Amendment defense.^{FN2} Accordingly, we reverse the district***1003** court's grant of summary judgment in favor of Abercrombie.

[FN2](#). This case is also distinguishable from [Hoffman v. L.A. Magazine, 255 F.3d 1180 \(9th Cir.2001\)](#), in which the defendant magazine successfully asserted a First Amendment defense to Dustin Hoffman's claim of misappropriation. In that case, L.A. Magazine used a digitally-altered picture of Hoffman, as "Tootsie," in a current designer dress to illustrate its "Grand Illusions" article. We concluded that such use was noncommercial speech entitled to full First Amendment protection. [Id. at 1189](#). In contrast to the present case, where Abercrombie, itself, used Appellants' images in its catalog to promote its clothing, L.A. Magazine was unconnected to and received no consideration from the designer for the gown depicted in the article. [Id. at 1189](#). Further, while L.A. Magazine merely referenced a shopping guide buried in the back of the magazine that provided stores and prices for the gown, *id.*, Abercrombie placed the Appellants' photograph on the page immediately preceding the "Final Heat Tees" for sale. Based on these factors, we conclude that Abercrombie's use was much more commercial in nature and, therefore, not entitled to the full First Amendment protection accorded to L.A. Magazine's use of Hoffman's image. [Id. at 1190](#).

II. Federal Copyright Preemption

Abercrombie contends that its right to reproduce and publish the photograph of the Appellants is governed by the federal Copyright Act, [17 U.S.C. §§ 101-1101](#), and that Appellants' state law claims are preempted by federal copyright law.

[\[9\]\[10\]\[11\]](#) "[W]hen acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms." [California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280, 107 S.Ct. 683, 93 L.Ed.2d 613 \(1987\)](#). Under [17 U.S.C. § 301](#), States are expressly prohibited from legislating in the area of copyright law.^{FN3} In order for preemption to occur under the federal Copyright Act, two conditions must be satisfied. First, the content of the protected right must fall within the subject matter of copyright as described in [17 U.S.C. §§ 102](#) and [103](#). Second, the right asserted under state law must be equivalent to the exclusive rights contained in [section 106](#) of the Copyright Act. See [Del Madera Properties v. Rhodes & Gardner, Inc., 820 F.2d 973, 976 \(9th Cir.1987\)](#) (overruled on other grounds).

[FN3](#). [Section 301\(a\) of 17 U.S.C.](#) preempts:

all legal or equitable rights that are the equivalent to any of the exclusive rights within the general scope of copyright as specified by [sections 102](#) and [103](#), whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

The subject matter protected by the Copyright Act is set forth in [17 U.S.C. § 102](#), which provides in relevant part as follows:

Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include ... pictorial, graphic, and sculptural

works.

[Section 103](#) provides that the subject matter specified in [§ 102](#) also includes compilations and derivative works, “but the copyright in a compilation or derivative work extends only to the material contributed by the author of such works as distinguished from the preexisting material employed in the work.” [Section 106](#) gives the copyright holder exclusive rights to copy the copyrighted work or derivatives and to distribute it to the public.

[\[12\]\[13\]](#) The photograph itself, as a pictorial work of authorship, is subject matter protected by the Copyright Act. See [17 U.S.C. § 101](#) (providing that “pictorial, graphic, and sculptural works include ... photographs.”) However, it is not the publication of the photograph itself, as a creative work of authorship, that is the basis for Appellants' claims, but rather, it is the use of the Appellants' likenesses and their names pictured in the published photograph. The Nimmer treatise on copyright law states:

[T]he “work” that is the subject matter of the right of publicity is the persona, i.e., the name and likeness of a celebrity or other individual. A persona can hardly be said to constitute a “writing” of an “author” within the meaning of the copyright clause of the Constitution. *A fortiori* it is not a “work of authorship” under the Act. Such name or likeness *1004 does not become a work of authorship simply because it is embodied in a copyrightable work such as a photograph.

1 Nimmer on Copyright § 1.01[B][1][c] at 1-23 (1999). The same point is made in McCarthy's Treatise on Right of Publicity and Privacy:

The “subject matter” of a Right of Publicity claim is not a particular picture or photograph of plaintiff. Rather, what is protected by the Right of Publicity is the very identity or persona of the plaintiff as a human being ... While copyright in a given photograph may be owned by the person depicted in it, the exact image in that photograph is not the underlying “right” asserted in a Right of Publicity case. To argue that the photograph is identical with the person is to confuse illusion and illustration with reality. Thus, assertion of infringement of the Right of Publicity because of defendant's unpermitted commercial use of a picture of plaintiff is not assertion of infringement of copyrightable “subject matter” in one photograph of plaintiff.

McCarthy, *Rights of Publicity and Privacy* § 11.13[C] at 11-72-73 (1997).

A recent case in the Fifth Circuit held that the Texas tort of misappropriation, which provides protection from the unauthorized appropriation of one's name, image, or likeness was not preempted by the Copyright Act. See [Brown v. Ames](#), 201 F.3d 654, 661 (5th Cir.2000). The case involved a record company's misappropriation of the names and likenesses of individual musicians, song writers, and music producers on the company's CD's, tapes, catalogs, and posters. See [id. at 656-57](#). The court stated that “the tort of misappropriation of a name or likeness protects a person's *persona*. A *persona* does not fall within the subject matter of copyright.” [Id. at 658](#). Thus, the court held that [§ 301](#) preemption does not apply.

A similar result was reached in a case decided by a California Court of Appeal, [KNB Enterprises v. Matthews](#), 78 Cal.App.4th 362, 92 Cal.Rptr.2d 713 (2000). The California Court of Appeal held that the state law right of publicity claims were not preempted by the Copyright Act. See [id. at 374-75](#), 92 Cal.Rptr.2d 713. The copyright owner of erotic photographs, which had been displayed without authorization and for profit on an Internet website, brought suit against the website's operator asserting a misappropriation claim under [California Civil Code § 3344](#). See [id. at 365-66](#), 92 Cal.Rptr.2d 713. The court applied the two-part test for determining preemption and found that neither condition had been met. See [id. at 374](#), 92 Cal.Rptr.2d 713. The court found that “because a human likeness is not copyrightable, even if captured in a copyrighted photograph, the models' [section 3344](#) claims against the unauthorized publisher of their photographs are not the equivalent of a copyright infringement claim and are not preempted by federal copyright law.” [Id. at 365](#), 92 Cal.Rptr.2d 713.

[\[14\]](#) We agree with the approach taken by the Fifth Circuit and the reasoning employed in *KNB Enterprises*. The subject matter of Appellants' statutory and common law right of publicity claims is their names and likenesses. See [Newcombe](#), 157 F.3d at 691. A person's name or likeness is not a work of authorship within the meaning of [17 U.S.C. § 102](#). This is true notwithstanding the fact that Appellants' names and likenesses are embodied in a

copyrightable photograph. The same concept is specifically embodied in [17 U.S.C. § 103](#), which provides that the copyright in derivative works extends only to the material contributed by the author as distinguished from preexisting material *1005 employed in the work.^{FN4}

^{FN4}. Abercrombie relies on the California case of [Fleet v. CBS, 50 Cal.App.4th 1911, 58 Cal.Rptr.2d 645 \(1996\)](#). This case was distinguished by both the Fifth Circuit in [Brown, 201 F.3d at 658](#), and the California Court of Appeals in [KNB Enterprises, 78 Cal.App.4th at 370-71, 92 Cal.Rptr.2d 713](#). In *Fleet*, the plaintiffs were actors in a copyrighted film. The claims of the plaintiffs were based on their dramatic performance in a film CBS sought to distribute. The court stated:

We agree that as a general proposition [Civil Code section 3344](#) is intended to protect rights which cannot be copyrighted and that claims made under its provisions are usually not preempted. But appellants' analysis crumbles in the face of one obvious fact: their individual performances in the film *White Dragon* were copyrightable. Since their [section 3344](#) claims seeks only to prevent CBS from reproducing and distributing their performances in the film, their claims must be preempted by federal copyright law.

[Fleet, 50 Cal.App.4th at 1919, 58 Cal.Rptr.2d 645](#). This is clearly distinguishable from this case where the Appellants' claim is based on the use of their names and likenesses, which are not copyrightable.

The second requirement for copyright preemption as noted above is that the right asserted under state law must be equivalent to the exclusive rights contained in [§ 106](#) of the Copyright Act. This requirement also is not met. Because the subject matter of the Appellants' statutory and common law right of publicity claims is their names and likenesses, which are not copyrightable, the claims are not equivalent to the exclusive rights contained in [§ 106](#).

III. Choice of Law

[***SECTION OMITTED***]

IV. Lanham Act

[***SECTION OMITTED***]

V. Doctrine of Nominative Fair Use

[***SECTION OMITTED***]

VI. Defamation Claim

Appellants contend they were defamed by Abercrombie's publication of the photograph in the “Surf Nekkid” section of the Quarterly. Specifically, they maintain that inclusion of their names and likenesses in a section depicting naked and scantily *1010 clothed models caused them shame and embarrassment.

[28][29][30] Under [California Civil Code § 45a](#), Appellants may only prevail on a libel claim if the publication is (1) libelous on its face, or (2) if special damages have been proven. See [Newcombe, 157 F.3d at 694](#). A publication is libelous on its face only if there is no need to have explanatory matter introduced. See [Cal. Civ.Code § 45a](#). The determination as to whether a publication is libelous on its face is one of law, and must be measured by “the effect the publication would have on the mind of the average reader.” [Newcombe, 157 F.3d at 695](#).

[31] To support their argument that inclusion of the photograph was libelous on its face, Appellants provide three declarations. However, all three declarations are from lifetime surfers and leaders in the surf industry. The declarations do not provide evidence that an average person viewing the Quarterly would think it defamatory if Appellants' picture was included in a section in which nude models were shown. Thus, Appellants fail to satisfy the

first requirement under [California Civil Code § 45a](#) that the publication is libelous on its face.

[32] In order to satisfy the alternate requirement, Appellants must allege and prove that they suffered special damages as a proximate result of the publication of the photograph. *See id.* at 695. Special damages are defined as “all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other.” [Cal. Civ.Code § 48a](#)(4)(b). Appellants did not submit any evidence demonstrating that they incurred special damages due to Abercrombie's publication of the photograph. Thus, Appellants failed to meet either requirement under [California Civil Code § 45a](#). Accordingly, we conclude that the district court did not err in denying the Appellants' defamation claim.

VII. Continuance

[***SECTION OMITTED***]

VIII. Attorneys' Fees

[California Civil Code § 3344](#)(a) mandates the award of attorneys' fees and costs to the “prevailing party” in actions brought under the section. *See Newton v. Thomason*, 22 F.3d 1455, 1464 (9th Cir.1994). Because we reverse the judgment of the district court, the district court's award of attorneys' fees and costs to Abercrombie under [California Civil Code § 3344](#) is vacated.

IX. Conclusion

Neither the California state law claims or the Lanham Act claim are precluded by the First Amendment; the California state claims are not preempted by the federal Copyright Act; the proper choice of law to apply to these claims is California law; there is insufficient evidence to support the defamation claim; and the attorneys' fee award is vacated.

REVERSE AND REMAND FOR TRIAL.

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

*** SEE FOLLOWING ATTACHMENT ***

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THE RIGHT TO PRIVACY.

“ It could be done only on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make common law without a precedent ; much more when received and approved by usage.”

WILLES, J., in *Millar v. Taylor*, 4 Burr. 2303, 2312.

THAT the individual shall have full protection in person and in property is a principle as old as the common law ; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the “right to life” served only to protect the subject from battery in its various forms ; liberty meant freedom from actual restraint ; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man’s spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened ; and now the right to life has come to mean the right to enjoy life,—the right to be let alone ; the right to liberty secures the exercise of extensive civil privileges ; and the term “property” has grown to comprise every form of possession — intangible, as well as tangible.

Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury ; that is, the putting another in

fear of such injury. From the action of battery grew that of assault.¹ Much later there came a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed.² So regard for human emotions soon extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow-men, was considered, and the law of slander and libel arose.³ Man's family relations became a part of the legal conception of his life, and the alienation of a wife's affections was held remediable.⁴ Occasionally the law halted,—as in its refusal to recognize the intrusion by seduction upon the honor of the family. But even here the demands of society were met. A mean fiction, the action *per quod servitium amisit*, was resorted to, and by allowing damages for injury to the parents' feelings, an adequate remedy was ordinarily afforded.⁵ Similar to the expansion of the right to life was the growth of the legal conception of property. From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind,⁶

¹ Year Book, Lib. Ass., folio 99, pl. 60 (1348 or 1349), appears to be the first reported case where damages were recovered for a civil assault.

² These nuisances are technically injuries to property; but the recognition of the right to have property free from interference by such nuisances involves also a recognition of the value of human sensations.

³ Year Book, Lib. Ass., folio 177, pl. 19 (1356), (2 Finl. Reeves Eng. Law, 395) seems to be the earliest reported case of an action for slander.

⁴ *Winsmore v. Greenbank*, Willes, 577 (1745).

⁵ Loss of service is the gist of the action; but it has been said that "we are not aware of any reported case brought by a parent where the value of such services was held to be the measure of damages." Cassoday, J., in *Lavery v. Crooke*, 52 Wis. 612, 623 (1881). First the fiction of constructive service was invented; *Martin v. Payne*, 9 John. 387 (1812). Then the feelings of the parent, the dishonor to himself and his family, were accepted as the most important element of damage. *Bedford v. McKowl*, 3 Esp. 119 (1800); *Andrews v. Askey*, 8 C. & P. 7 (1837); *Phillips v. Hoyle*, 4 Gray, 568 (1855); *Phelin v. Kenderdine*, 20 Pa. St. 354 (1853). The allowance of these damages would seem to be a recognition that the invasion upon the honor of the family is an injury to the parent's person, for ordinarily mere injury to parental feelings is not an element of damage, e. g., the suffering of the parent in case of physical injury to the child. *Flemington v. Smithers*, 2 C. & P. 292 (1827); *Black v. Carrolton R. R. Co.*, 10 La. Ann. 33 (1855); *Covington Street Ry. Co. v. Packer*, 9 Bush, 455 (1872).

⁶ "The notion of Mr. Justice Yates that nothing is property which cannot be earmarked and recovered in detinue or trover, may be true in an early stage of society, when property is in its simple form, and the remedies for violation of it also simple, but is not true in a more civilized state, when the relations of life and the interests arising therefrom are complicated." Erle, J., in *Jefferys v. Boosey*, 4 H. L. C. 815, 869 (1854).

as works of literature and art, ¹ goodwill, ² trade secrets, and trademarks. ³

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." ⁴ Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; ⁵ and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. ⁶ The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago, ⁷ directly involved the consideration

¹ Copyright appears to have been first recognized as a species of private property in England in 1558. Drone on Copyright, 54, 61.

² Gibblett v. Read, 9 Mod. 459 (1743), is probably the first recognition of goodwill as property.

³ Hogg v. Kirby, 8 Ves. 215 (1803). As late as 1742 Lord Hardwicke refused to treat a trade-mark as property for infringement upon which an injunction could be granted. Blanchard v. Hill, 2 Atk. 484.

⁴ Cooley on Torts, 2d ed., p. 29.

⁵ 8 Amer. Law Reg. N. S. 1 (1869); 12 Wash. Law Rep. 353 (1884); 24 Sol. J. & Rep. 4 (1879).

⁶ Scribner's Magazine, July, 1890. "The Rights of the Citizen: To his Reputation," by E. L. Godkin, Esq., pp. 65, 67.

⁷ Marion Manola v. Stevens & Myers, N. Y. Supreme Court, "New York Times" of June 15, 18, 21, 1890. There the complainant alleged that while she was playing in the Broadway Theatre, in a rôle which required her appearance in tights, she was, by means of a flash light, photographed surreptitiously and without her consent, from one of the boxes by defendant Stevens, the manager of the "Castle in the Air" company, and defendant Myers, a photographer, and prayed that the defendants might be restrained from making use of the photograph taken. A preliminary injunction issued *ex parte*, and a time was set for argument of the motion that the injunction should be made permanent, but no one then appeared in opposition.

of the right of circulating portraits ; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.

Of the desirability — indeed of the necessity — of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual ; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is.

Owing to the nature of the instruments by which privacy is invaded, the injury inflicted bears a superficial resemblance to the wrongs dealt with by the law of slander and of libel, while a legal remedy for such injury seems to involve the treatment of mere wounded feelings, as a substantive cause of action. The principle on which the law of defamation rests, covers, however, a radically different class of effects from those for which attention is now asked. It deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency to injure him in his intercourse with others, and even if in writing or in print, must subject him to the hatred, ridicule, or contempt of his fellow-men,—the effect of the publication upon his estimate of himself and upon his own feelings not forming an essential element in the cause of action. In short, the wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual. That branch of the law simply extends the protection surrounding physical property to certain of the conditions necessary or helpful to worldly prosperity. On the other hand, our law recognizes no principle upon which compensation can be granted for mere injury to the feelings. However painful the mental effects upon another of an act, though purely wanton or even malicious, yet if the act itself is otherwise lawful, the suffering inflicted is *damnum absque injuria*. Injury of feelings may indeed be taken account of in ascertaining the amount of damages when attending what is recognized as a legal injury;¹

¹ Though the legal value of "feelings" is now generally recognized, distinctions have been drawn between the several classes of cases in which compensation may or may not be recovered. Thus, the fright occasioned by an assault constitutes a cause of action, but fright occasioned by negligence does not. So fright coupled with bodily injury affords a foundation for enhanced damages; but, ordinarily, fright unattended by bodily injury cannot be relied upon as an element of damages, even where a valid cause of action exists, as in trespass *quare clausum fregit*. *Wyman v. Leavitt*, 71 Me. 227; *Canning v. Williamstown*, 1 Cush. 451. The allowance of damages for injury to the parents'

but our system, unlike the Roman law, does not afford a remedy even for mental suffering which results from mere contumely and insult, from an intentional and unwarranted violation of the "honor" of another.¹

It is not however necessary, in order to sustain the view that the common law recognizes and upholds a principle applicable to cases of invasion of privacy, to invoke the analogy, which is but superficial, to injuries sustained, either by an attack upon reputation or by what the civilians called a violation of honor; for the legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which properly understood afford a remedy for the evils under consideration.

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.² Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular

feelings, in case of seduction, abduction of a child (*Stowe v. Heywood*, 7 All. 118), or removal of the corpse of child from a burial-ground (*Meagher v. Driscoll*, 99 Mass. 281), are said to be exceptions to a general rule. On the other hand, injury to feelings is a recognized element of damages in actions of slander and libel, and of malicious prosecution. These distinctions between the cases, where injury to feelings does and where it does not constitute a cause of action or legal element of damages, are not logical, but doubtless serve well as practical rules. It will, it is believed, be found, upon examination of the authorities, that wherever substantial mental suffering would be the natural and probable result of the act, there compensation for injury to feelings has been allowed, and that where no mental suffering would ordinarily result, or if resulting, would naturally be but trifling, and, being unaccompanied by visible signs of injury, would afford a wide scope for imaginative ills, there damages have been disallowed. The decisions on this subject illustrate well the subjection in our law of logic to common-sense.

¹ "Injuria, in the narrower sense, is every intentional and illegal violation of honour, *i.e.*, the whole personality of another." "Now an outrage is committed not only when a man shall be struck with the fist, say, or with a club, or even flogged, but also if abusive language has been used to one." Salkowski, *Roman Law*, p. 668 and p. 669, n. 2.

² "It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends." Yates, J., in *Millar v. Taylor*, 4 Burr. 2303, 2379 (1769).

method of expression adopted. It is immaterial whether it be by word¹ or by signs,² in painting,³ by sculpture, or in music.⁴ Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression.⁵ The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public.⁶ No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material on which, or the means by which, the thought, sentiment, or emotion is expressed. It may exist independently of any corporeal being, as in words spoken, a song sung, a drama acted. Or if expressed on any material, as a poem in writing, the author may have parted with the paper, without forfeiting any proprietary right in the composition itself. The right is lost only when the author himself communicates his production to the public,—in other words,

¹ *Nicols v. Pitman*, 26 Ch. D. 374 (1884).

² *Lee v. Simpson*, 3 C. B. 871, 881; *Daly v. Palmer*, 6 Blatchf. 256.

³ *Turner v. Robinson*, 10 Ir. Ch. 121; s. c. ib. 510.

⁴ *Drone on Copyright*, 102.

⁵ "Assuming the law to be so, what is its foundation in this respect? It is not, I conceive, referable to any consideration peculiarly literary. Those with whom our common law originated had not probably among their many merits that of being patrons of letters; but they knew the duty and necessity of protecting property, and with that general object laid down rules providently expansive,—rules capable of adapting themselves to the various forms and modes of property which peace and cultivation might discover and introduce.

"The produce of mental labor, thoughts and sentiments, recorded and preserved by writing, became, as knowledge went onward and spread, and the culture of man's understanding advanced, a kind of property impossible to disregard, and the interference of modern legislation upon the subject, by the stat. 8 Anne, professing by its title to be 'For the encouragement of learning,' and using the words 'taken the liberty,' in the preamble, whether it operated in augmentation or diminution of the private rights of authors, having left them to some extent untouched, it was found that the common law, in providing for the protection of property, provided for their security, at least before general publication by the writer's consent." *Knight Bruce, V. C., in Prince Albert v. Strange*, 2 DeGex & Sm. 652, 695 (1849).

⁶ "The question, however, does not turn upon the form or amount of mischief or advantage, loss or gain. The author of manuscripts, whether he is famous or obscure, low or high, has a right to say of them, if innocent, that whether interesting or dull, light or heavy, saleable or unsaleable, they shall not, without his consent, be published." *Knight Bruce, V. C., in Prince Albert v. Strange*, 2 DeGex & Sm. 652, 694.

publishes it.¹ It is entirely independent of the copyright laws, and their extension into the domain of art. The aim of those statutes is to secure to the author, composer, or artist the entire profits arising from publication; but the common-law protection enables him to control absolutely the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all.² The statutory right is of no value, *unless* there is a publication; the common-law right is lost *as soon as* there is a publication.

What is the nature, the basis, of this right to prevent the publication of manuscripts or works of art? It is stated to be the enforcement of a right of property;³ and no difficulty arises in accepting this view, so long as we have only to deal with the reproduction of literary and artistic compositions. They certainly possess many of the attributes of ordinary property: they are transferable; they have a value; and publication or reproduction is a use by which that value is realized. But where the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptance

¹ *Duke of Queensberry v. Shebbeare*, 2 Eden, 329 (1758); *Bartlett v. Crittenden*, 5 McLean, 32, 41 (1849).

² *Drone on Copyright*, pp. 102, 104; *Parton v. Prang*, 3 Clifford, 537, 548 (1872); *Jefferys v. Boosey*, 4 H. L. C. 815, 867, 962 (1854).

³ "The question will be whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of the friendship affords a reason for the interference of the court." Lord Eldon in *Gee v. Pritchard*, 2 Swanst. 402, 413 (1818).

"Upon the principle, therefore, of protecting property, it is that the common law, in cases not aided or prejudiced by statute, shelters the privacy and seclusion of thought and sentiments committed to writing, and desired by the author to remain not generally known." Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 695.

"It being conceded that reasons of expediency and public policy can never be made the sole basis of civil jurisdiction, the question, whether upon any ground the plaintiff can be entitled to the relief which he claims, remains to be answered; and it appears to us that there is only one ground upon which his title to claim, and our jurisdiction to grant, the relief, can be placed. We must be satisfied, that the publication of private letters, without the consent of the writer, is an invasion of an exclusive right of property which remains in the writer, even when the letters have been sent to, and are still in the possession of his correspondent." Duer, J., in *Woolsey v. Judd*, 4 Duer, 379, 384 (1855).

of that term. A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully; and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry; the restraint extends also to a publication of the contents. What is the thing which is protected? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence. A man writes a dozen letters to different people. No person would be permitted to publish a list of the letters written. If the letters or the contents of the diary were protected as literary compositions, the scope of the protection afforded should be the same secured to a published writing under the copyright law. But the copyright law would not prevent an enumeration of the letters, or the publication of some of the facts contained therein. The copyright of a series of paintings or etchings would prevent a reproduction of the paintings as pictures; but it would not prevent a publication of a list or even a description of them.¹ Yet in the famous case of

¹ "A work lawfully published, in the popular sense of the term, stands in this respect, I conceive, differently from a work which has never been in that situation. The former may be liable to be translated, abridged, analyzed, exhibited in morsels, complimented, and otherwise treated, in a manner that the latter is not.

"Suppose, however,—instead of a translation, an abridgment, or a review,—the case of a catalogue,—suppose a man to have composed a variety of literary works ('innocent,' to use Lord Eldon's expression), which he has never printed or published, or lost the right to prohibit from being published,—suppose a knowledge of them unduly obtained by some unscrupulous person, who prints with a view to circulation a descriptive catalogue, or even a mere list of the manuscripts, without authority or consent, does the law allow this? I hope and believe not. The same principles that prevent more candid piracy must, I conceive, govern such a case also.

"By publishing of a man that he has written to particular persons, or on particular subjects, he may be exposed, not merely to sarcasm, he may be ruined. There may be in his possession returned letters that he had written to former correspondents, with whom to have had relations, however harmlessly, may not in after life be a recommendation; or his writings may be otherwise of a kind squaring in no sort with his outward habits and worldly position. There are callings even now in which to be convicted of literature, is dangerous, though the danger is sometimes escaped.

"Again, the manuscripts may be those of a man on account of whose name alone a mere list would be matter of general curiosity. How many persons could be mentioned, a catalogue of whose unpublished writings would, during their lives or afterwards, command a ready sale!" Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 De Gex & Sm. 652, 693.

Prince Albert *v.* Strange, the court held that the common-law rule prohibited not merely the reproduction of the etchings which the plaintiff and Queen Victoria had made for their own pleasure, but also "the publishing (at least by printing or writing), though not by copy or resemblance, a description of them, whether more or less limited or summary, whether in the form of a catalogue or otherwise."¹ Likewise, an unpublished collection of news possessing no element of a literary nature is protected from piracy.²

That this protection cannot rest upon the right to literary or artistic property in any exact sense, appears the more clearly

¹ "A copy or impression of the etchings would only be a means of communicating knowledge and information of the original, and does not a list and description of the same? The means are different, but the object and effect are similar; for in both, the object and effect is to make known to the public more or less of the unpublished work and composition of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others. Cases upon abridgments, translations, extracts, and criticisms of published works have no reference whatever to the present question; they all depend upon the extent of right under the acts respecting copyright, and have no analogy to the exclusive rights in the author of unpublished compositions which depend entirely upon the common-law right of property." Lord Cottenham in *Prince Albert v. Strange*, 1 McN. & G. 23, 43 (1849). "Mr. Justice Yates, in *Millar v. Taylor*, said, that an author's case was exactly similar to that of an inventor of a new mechanical machine; that both original inventions stood upon the same footing in point of property, whether the case were mechanical or literary, whether an epic poem or an orrery; that the immorality of pirating another man's invention was as great as that of purloining his ideas. Property in mechanical works or works of art, executed by a man for his own amusement, instruction, or use, is allowed to subsist, certainly, and may, before publication by him, be invaded, not merely by copying, but by description or by catalogue, as it appears to me. A catalogue of such works may in itself be valuable. It may also as effectually show the bent and turn of the mind, the feelings and taste of the artist, especially if not professional, as a list of his papers. The portfolio or the studio may declare as much as the writing-table. A man may employ himself in private in a manner very harmless, but which, disclosed to society, may destroy the comfort of his life, or even his success in it. Every one, however, has a right, I apprehend, to say that the produce of his private hours is not more liable to publication without his consent, because the publication must be creditable or advantageous to him, than it would be in opposite circumstances."

"I think, therefore, not only that the defendant here is unlawfully invading the plaintiff's rights, but also that the invasion is of such a kind and affects such property as to entitle the plaintiff to the preventive remedy of an injunction; and if not the more, yet, certainly, not the less, because it is an intrusion,—an unbecoming and unseemly intrusion,—an intrusion not alone in breach of conventional rules, but offensive to that indred sense of propriety natural to every man,—if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life,—into the home (a word hitherto sacred among us), the home of a family whose life and conduct form an acknowledged title, though not their only unquestionable title, to the most marked respect in this country." Knight Bruce, *V. C.*, in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 696, 697.

² *Kiernan v. Manhattan Quotation Co.*, 50 How. Pr. 194 (1876).

when the subject-matter for which protection is invoked is not even in the form of intellectual property, but has the attributes of ordinary tangible property. Suppose a man has a collection of gems or curiosities which he keeps private: it would hardly be contended that any person could publish a catalogue of them, and yet the articles enumerated are certainly not intellectual property in the legal sense, any more than a collection of stoves or of chairs.¹

The belief that the idea of property in its narrow sense was the basis of the protection of unpublished manuscripts led an able court to refuse, in several cases, injunctions against the publication of private letters, on the ground that "letters not possessing the attributes of literary compositions are not property entitled to protection;" and that it was "evident the plaintiff could not have considered the letters as of any value whatever as literary productions, for a letter cannot be considered of value to the author which he never would consent to have published."² But

¹ "The defendants' counsel say, that a man acquiring a knowledge of another's property without his consent is not by any rule or principle which a court of justice can apply (however secretly he may have kept or endeavored to keep it) forbidden without his consent to communicate and publish that knowledge to the world, to inform the world what the property is, or to describe it publicly, whether orally, or in print or writing.

"I claim, however, leave to doubt whether, as to property of a private nature, which the owner, without infringing on the right of any other, may and does retain in a state of privacy, it is certain that a person who, without the owner's consent, express or implied, acquires a knowledge of it, can lawfully avail himself of the knowledge so acquired to publish without his consent a description of the property.

"It is probably true that such a publication may be in a manner or relate to property of a kind rendering a question concerning the lawfulness of the act too slight to deserve attention. I can conceive cases, however, in which an act of the sort may be so circumstanced or relate to property such, that the matter may weightily affect the owner's interest or feelings, or both. For instance, the nature and intention of an unfinished work of an artist, prematurely made known to the world, may be painful and deeply prejudicial against him; nor would it be difficult to suggest other examples. . . .

"It was suggested that, to publish a catalogue of a collector's gems, coins, antiquities, or other such curiosities, for instance, without his consent, would be to make use of his property without his consent; and it is true, certainly, that a proceeding of that kind may not only as much embitter one collector's life as it would flatter another, — may be not only an ideal calamity, — but may do the owner damage in the most vulgar sense. Such catalogues, even when not descriptive, are often sought after, and sometimes obtain very substantial prices. These, therefore, and the like instances, are not necessarily examples merely of pain inflicted in point of sentiment or imagination; they may be that, and something else beside." Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 689, 690.

² *Hoyt v. Mackenzie*, 3 Barb. Ch. 320, 324 (1848); *Wetmore v. Scovell*, 3 Edw. Ch. 515 (1842). See Sir Thomas Plumer in 2 Ves. & B. 19 (1813).

these decisions have not been followed,¹ and it may now be considered settled that the protection afforded by the common law to the author of any writing is entirely independent of its pecuniary value, its intrinsic merits, or of any intention to publish the same, and, of course, also, wholly independent of the material, if any, upon which, or the mode in which, the thought or sentiment was expressed.

Although the courts have asserted that they rested their decisions on the narrow grounds of protection to property, yet there are recognitions of a more liberal doctrine. Thus in the case of *Prince Albert v. Strange*, already referred to, the opinions both of the Vice-Chancellor and of the Lord Chancellor, on appeal, show a more or less clearly defined perception of a principle broader than those which were mainly discussed, and on which they both placed their chief reliance. Vice-Chancellor Knight Bruce referred to publishing of a man that he had "written to particular persons or on particular subjects" as an instance of possibly injurious disclosures as to private matters, that the courts would in a proper case prevent; yet it is difficult to perceive how, in such a case, any right of property, in the narrow sense, would be drawn in question, or why, if such a publication would be restrained when it threatened to expose the victim not merely to sarcasm, but to ruin, it should not equally be enjoined, if it threatened to embitter his life. To deprive a man of the potential profits to be realized by publishing a catalogue of his gems cannot *per se* be a wrong to him. The possibility of future profits is not a right of property which the law ordinarily recognizes; it must, therefore, be an infraction of other rights which constitutes the wrongful act, and that infraction is equally wrongful, whether its results are to forestall the profits that the individual himself might secure by giving the matter a publicity obnoxious to him, or to gain an advantage at the expense of his mental pain and suffering. If the fiction of property in a narrow sense must be preserved, it is still true that the end accomplished by the gossip-monger is attained by the use of that which

¹ *Woolsey v. Judd*, 4 Duer, 379, 404 (1855). "It has been decided, fortunately for the welfare of society, that the writer of letters, though written without any purpose of profit, or any idea of literary property, possesses such a right of property in them, that they cannot be published without his consent, unless the purposes of justice, civil or criminal, require the publication." Sir Samuel Romilly, *arg.*, in *Gee v. Pritchard*, 2 Swanst. 402, 418 (1818). But see High on Injunctions, 3d ed., § 1012, *contra*.

is another's, the facts relating to his private life, which he has seen fit to keep private. Lord Cottenham stated that a man "is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his," and cited with approval the opinion of Lord Eldon, as reported in a manuscript note of the case of *Wyatt v. Wilson*, in 1820, respecting an engraving of George the Third during his illness, to the effect that "if one of the late king's physicians had kept a diary of what he heard and saw, the court would not, in the king's lifetime, have permitted him to print and publish it;" and Lord Cottenham declared, in respect to the acts of the defendants in the case before him, that "privacy is the right invaded." But if privacy is once recognized as a right entitled to legal protection, the interposition of the courts cannot depend on the particular nature of the injuries resulting.

These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed — and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.¹

¹ "But a doubt has been suggested, whether mere private letters, not intended as literary compositions, are entitled to the protection of an injunction in the same manner as compositions of a literary character. This doubt has probably arisen from the habit of not discriminating between the different rights of property which belong to an unpublished manuscript, and those which belong to a published book. The latter, as I have intimated in another connection, is a right to take the profits of publication. The former is a right to control the act of publication, and to decide whether there shall be any publication at all. It has been called a right of property; an expression perhaps not quite satisfactory, but on the other hand sufficiently descriptive of a right which, however incorporeal, involves many of the essential elements of property, and is at least positive and definite. This expression can leave us in no doubt as to the meaning of the learned

If we are correct in this conclusion, the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds. For the protection afforded is not confined by the authorities to those cases where any particular medium or form of expression has been adopted, nor to products of the intellect. The same protection is afforded to emotions and sensations expressed in a musical composition or other work of art as to a literary composition; and words spoken, a pantomime acted, a sonata performed, is no less entitled to protection than if each had been reduced to writing. The circumstance that a thought or emotion has been recorded in a permanent form renders its identification easier, and hence may be important from the point of view of evidence, but it has no significance as a matter of substantive right. If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.

It may be urged that a distinction should be taken between the

judges who have used it, when they have applied it to cases of unpublished manuscripts. They obviously intended to use it in no other sense, than in contradistinction to the mere interests of feeling, and to describe a substantial right of legal interest." Curtis on Copyright, pp. 93, 94.

The resemblance of the right to prevent publication of an unpublished manuscript to the well-recognized rights of personal immunity is found in the treatment of it in connection with the rights of creditors. The right to prevent such publication and the right of action for its infringement, like the cause of action for an assault, battery, defamation, or malicious prosecution, are not assets available to creditors.

"There is no law which can compel an author to publish. No one can determine this essential matter of publication but the author. His manuscripts, however valuable, cannot, without his consent, be seized by his creditors as property." McLean, J., in *Bartlett v. Crittenden*, 5 McLean, 32, 37 (1849).

It has also been held that even where the sender's rights are not asserted, the receiver of a letter has not such property in it as passes to his executor or administrator as a salable asset. *Eyre v. Higbee*, 22 How. Pr. (N. Y.) 198 (1861).

"The very meaning of the word 'property' in its legal sense is 'that which is peculiar or proper to any person; that which belongs exclusively to one.' The first meaning of the word from which it is derived — *proprius* — is 'one's own.'" Drone on Copyright, p. 6.

It is clear that a thing must be capable of identification in order to be the subject of exclusive ownership. But when its identity can be determined so that individual ownership may be asserted, it matters not whether it be corporeal or incorporeal.

deliberate expression of thoughts and emotions in literary or artistic compositions and the casual and often involuntary expression given to them in the ordinary conduct of life. In other words, it may be contended that the protection afforded is granted to the conscious products of labor, perhaps as an encouragement to effort.¹ This contention, however plausible, has, in fact, little to recommend it. If the amount of labor involved be adopted as the test, we might well find that the effort to conduct one's self properly in business and in domestic relations had been far greater than that involved in painting a picture or writing a book; one would find that it was far easier to express lofty sentiments in a diary than in the conduct of a noble life. If the test of deliberateness of the act be adopted, much casual correspondence which is now accorded full protection would be excluded from the beneficent operation of existing rules. After the decisions denying the distinction attempted to be made between those literary productions which it was intended to publish and those which it was not, all considerations of the amount of labor involved, the degree of deliberation, the value of the product, and the intention of publishing must be abandoned, and no basis is discerned upon which the right to restrain publication and reproduction of such so-called literary and artistic works can be rested, except the right to privacy, as a part of the more general right to the immunity of the person, — the right to one's personality.

It should be stated that, in some instances where protection has been afforded against wrongful publication, the jurisdiction has been asserted, not on the ground of property, or at least not wholly on that ground, but upon the ground of an alleged breach of an implied contract or of a trust or confidence.

Thus, in *Abernethy v. Hutchinson*, 3 L. J. Ch. 209 (1825), where the plaintiff, a distinguished surgeon, sought to restrain the publication in the "Lancet" of unpublished lectures which he had delivered at St. Bartholomew's Hospital in London, Lord Eldon

¹ "Such then being, as I believe, the nature and the foundation of the common law as to manuscripts independently of Parliamentary additions and subtractions, its operation cannot of necessity be confined to literary subjects. That would be to limit the rule by the example. Wherever the produce of labor is liable to invasion in an analogous manner, there must, I suppose, be a title to analogous protection or redress." Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 696.

doubted whether there could be property in lectures which had not been reduced to writing, but granted the injunction on the ground of breach of confidence, holding "that when persons were admitted as pupils or otherwise, to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of short-hand, yet they could do that only for the purposes of their own information, and could not publish, for profit, that which they had not obtained the right of selling."

In *Prince Albert v. Strange*, 1 McN. & G. 25 (1849), Lord Cottenham, on appeal, while recognizing a right of property in the etchings which of itself would justify the issuance of the injunction, stated, after discussing the evidence, that he was bound to assume that the possession of the etchings by the defendant had "its foundation in a breach of trust, confidence, or contract," and that upon such ground also the plaintiff's title to the injunction was fully sustained.

In *Tuck v. Priestler*, 19 Q. B. D. 639 (1887), the plaintiffs were owners of a picture, and employed the defendant to make a certain number of copies. He did so, and made also a number of other copies for himself, and offered them for sale in England at a lower price. Subsequently, the plaintiffs registered their copyright in the picture, and then brought suit for an injunction and damages. The Lords Justices differed as to the application of the copyright acts to the case, but held unanimously that independently of those acts, the plaintiffs were entitled to an injunction and damages for breach of contract.

In *Pollard v. Photographic Co.*, 40 Ch. Div. 345 (1888), a photographer who had taken a lady's photograph under the ordinary circumstances was restrained from exhibiting it, and also from selling copies of it, on the ground that it was a breach of an implied term in the contract, and also that it was a breach of confidence. Mr. Justice North interjected in the argument of the plaintiff's counsel the inquiry: "Do you dispute that if the negative likeness were taken on the sly, the person who took it might exhibit copies?" and counsel for the plaintiff answered: "In that case there would be no trust or consideration to support a contract." Later, the defendant's counsel argued that "a person has no property in his own features; short of doing what is libellous or otherwise illegal, there is no restriction on the

photographer's using his negative." But the court, while expressly finding a breach of contract and of trust sufficient to justify its interposition, still seems to have felt the necessity of resting the decision also upon a right of property,¹ in order to

¹ "The question, therefore, is whether a photographer who has been employed by a customer to take his or her portrait is justified in striking off copies of such photograph for his own use, and selling and disposing of them, or publicly exhibiting them by way of advertisement or otherwise, without the authority of such customer, either express or implied. I say 'express or implied,' because a photographer is frequently allowed, on his own request, to take a photograph of a person under circumstances in which a subsequent sale by him must have been in the contemplation of both parties, though not actually mentioned. To the question thus put, my answer is in the negative, that the photographer is not justified in so doing. Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained; and an injunction is granted, if necessary, to restrain such use; as, for instance, to restrain a clerk from disclosing his master's accounts, or an attorney from making known his client's affairs, learned in the course of such employment. Again, the law is clear that a breach of contract, whether express or implied, can be restrained by injunction. In my opinion the case of the photographer comes within the principles upon which both these classes of cases depend. The object for which he is employed and paid is to supply his customer with the required number of printed photographs of a given subject. For this purpose the negative is taken by the photographer on glass; and from this negative copies can be printed in much larger numbers than are generally required by the customer. The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer; and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer; and further, I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only." Referring to the opinions delivered in *Tuck v. Priestler*, 19 Q. B. D. 639, the learned justice continued: "Then Lord Justice Lindley says: 'I will deal first with the injunction, which stands, or may stand, on a totally different footing from either the penalties or the damages. It appears to me that the relation between the plaintiffs and the defendant was such that, whether the plaintiffs had any copyright or not, the defendant has done that which renders him liable to an injunction. He was employed by the plaintiffs to make a certain number of copies of the picture, and that employment carried with it the necessary implication that the defendant was not to make more copies for himself, or to sell the additional copies in this country in competition with his employer. Such conduct on his part is a gross breach of contract and a gross breach of faith, and, in my judgment, clearly entitles the plaintiffs to an injunction, whether they have a copyright in the picture or not.' That case is the more noticeable, as the contract was in writing; and yet it was held to be an implied condition that the defendant should not make any copies for himself. The phrase 'a gross breach of faith' used by Lord Justice Lindley in that case applies with equal force to the present, when a lady's feelings are shocked by finding that the photographer she has employed to take her likeness for her own use is publicly exhibiting and selling copies thereof." *North, J., in Pollard v. Photographic Co.*, 40 Ch. D. 345, 349-352 (1888).

"It may be said also that the cases to which I have referred are all cases in which there was some right of property infringed, based upon the recognition by the law of pro-

bring it within the line of those cases which were relied upon as precedents.¹

This process of implying a term in a contract, or of implying a trust (particularly where the contract is written, and where there is no established usage or custom), is nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand the recognition of such a rule, and that the publication under similar circumstances would be considered an intolerable abuse. So long as these circumstances happen to present a contract upon which such a term can be engrafted by the judicial mind, or to supply relations upon which a trust or confidence can be erected, there may be no objection to working out the desired protection through the doctrines of contract or of trust. But the court can hardly stop there. The narrower doctrine may have satisfied the demands of society at a time when the abuse to be guarded against could rarely have arisen without violating a contract or a special

tection being due for the products of a man's own skill or mental labor; whereas in the present case the person photographed has done nothing to merit such protection, which is meant to prevent legal wrongs, and not mere sentimental grievances. But a person whose photograph is taken by a photographer is not thus deserted by the law; for the Act of 25 and 26 Vict., c. 68, s. 1, provides that when the negative of any photograph is made or executed for or on behalf of another person for a good or valuable consideration, the person making or executing the same shall not retain the copyright thereof, unless it is expressly reserved to him by agreement in writing signed by the person for or on whose behalf the same is so made or executed; but the copyright shall belong to the person for or on whose behalf the same shall have been made or executed.

"The result is that in the present case the copyright in the photograph is in one of the plaintiffs. It is true, no doubt, that sect. 4 of the same act provides that no proprietor of copyright shall be entitled to the benefit of the act until registration, and no action shall be sustained in respect of anything done before registration; and it was, I presume, because the photograph of the female plaintiff has not been registered that this act was not referred to by counsel in the course of the argument. But, although the protection against the world in general conferred by the act cannot be enforced until after registration, this does not deprive the plaintiffs of their common-law right of action against the defendant for his breach of contract and breach of faith. This is quite clear from the cases of *Morison v. Moat* [9 Hare, 241] and *Tuck v. Priester* [19 Q. B. D. 629] already referred to, in which latter case the same act of Parliament was in question." Per North, J., *ibid.* p. 352.

This language suggests that the property right in photographs or portraits may be one created by statute, which would not exist in the absence of registration; but it is submitted that it must eventually be held here, as it has been in the similar cases, that the statute provision becomes applicable only when there is a publication, and that before the act of registering there is property in the thing upon which the statute is to operate.

¹ *Duke of Queensberry v. Shebbeare*, 2 Eden, 329; *Murray v. Heath*, 1 B. & Ad. 804; *Tuck v. Priester*, 19 Q. B. D. 629.

confidence; but now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation. While, for instance, the state of the photographic art was such that one's picture could seldom be taken without his consciously "sitting" for the purpose, the law of contract or of trust might afford the prudent man sufficient safeguards against the improper circulation of his portrait; but since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to. The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.

Thus, the courts, in searching for some principle upon which the publication of private letters could be enjoined, naturally came upon the ideas of a breach of confidence, and of an implied contract; but it required little consideration to discern that this doctrine could not afford all the protection required, since it would not support the court in granting a remedy against a stranger; and so the theory of property in the contents of letters was adopted.¹ Indeed, it is difficult to conceive on what theory of the law the casual recipient of a letter, who proceeds to publish it, is guilty of a breach of contract, express or implied, or of any breach of trust, in the ordinary acceptation of that term. Suppose a letter has been addressed to him without his solicitation. He opens it, and reads. Surely, he has not made any contract; he has not accepted any trust. He cannot, by opening and reading

¹See Mr. Justice Story in *Folsom v. Marsh*, 2 Story, 100, 111 (1841):—

"If he [the recipient of a letter] attempt to publish such letter or letters on other occasions, not justifiable, a court of equity will prevent the publication by an injunction, as a breach of private confidence or contract, or of the rights of the author; and *a fortiori*, if he attempt to publish them for profit; for then it is not a mere breach of confidence or contract, but it is a violation of the exclusive copyright of the writer. . . . The general property, and the general rights incident to property, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business. The general property in the manuscripts remains in the writer and his representatives, as well as the general copyright. *A fortiori*, third persons, standing in no privity with either party, are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion."

the letter, have come under any obligation save what the law declares; and, however expressed, that obligation is simply to observe the legal right of the sender, whatever it may be, and whether it be called his right of property in the contents of the letter, or his right to privacy.¹

A similar groping for the principle upon which a wrongful publication can be enjoined is found in the law of trade secrets. There, injunctions have generally been granted on the theory of a breach of contract, or of an abuse of confidence.² It would, of course, rarely happen that any one would be in the possession of a secret unless confidence had been reposed in him. But can it be supposed that the court would hesitate to grant relief against one who had obtained his knowledge by an ordinary trespass,—for instance, by wrongfully looking into a book in which the secret was recorded, or by eavesdropping? Indeed, in *Yovatt v. Winyard*, 1 J. & W. 394 (1820), where an injunction was granted against making any use of or communicating certain recipes for veterinary medicine, it appeared that the defendant, while in the plaintiff's employ, had surreptitiously got access to his book of recipes, and copied them. Lord Eldon "granted the injunction, upon the ground of there having been a breach of trust and confidence;" but it would seem to be difficult to draw any sound legal distinction between such a case and one where a mere stranger wrongfully obtained access to the book.³

¹ "The receiver of a letter is not a bailee, nor does he stand in a character analogous to that of a bailee. There is no right to possession, present or future, in the writer. The only right to be enforced against the holder is a right to prevent publication, not to require the manuscript from the holder in order to a publication of himself." Per Hon. Joel Parker, quoted in *Grigsby v. Breckenridge*, 2 Bush. 480, 489 (1857).

² In *Morison v. Moat*, 9 Hare, 241, 255 (1851), a suit for an injunction to restrain the use of a secret medical compound, Sir George James Turner, V. C., said: "That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence,—meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it."

³ A similar growth of the law showing the development of contractual rights into rights of property is found in the law of goodwill. There are indications, as early as the Year Books, of traders endeavoring to secure to themselves by contract the advantages now designated by the term "goodwill," but it was not until 1743 that goodwill received

We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.¹

If the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation.

The right of one who has remained a private individual, to prevent his public portraiture, presents the simplest case for such extension; the right to protect one's self from pen portraiture, from a discussion by the press of one's private affairs, would be a more important and far-reaching one. If casual and unimportant state-

legal recognition as property apart from the personal covenants of the traders. See Allan on Goodwill, pp. 2, 3.

¹ The application of an existing principle to a new state of facts is not judicial legislation. To call it such is to assert that the existing body of law consists practically of the statutes and decided cases, and to deny that the principles (of which these cases are ordinarily said to be evidence) exist at all. It is not the application of an existing principle to new cases, but the introduction of a new principle, which is properly termed judicial legislation.

But even the fact that a certain decision would involve judicial legislation should not be taken as conclusive against the propriety of making it. This power has been constantly exercised by our judges, when applying to a new subject principles of private justice, moral fitness, and public convenience. Indeed, the elasticity of our law, its adaptability to new conditions, the capacity for growth, which has enabled it to meet the wants of an ever changing society and to apply immediate relief for every recognized wrong, have been its greatest boast.

"I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature." 1 Austin's Jurisprudence, p. 224.

The cases referred to above show that the common law has for a century and a half protected privacy in certain cases, and to grant the further protection now suggested would be merely another application of an existing rule.

ments in a letter, if handiwork, however inartistic and valueless, if possessions of all sorts are protected not only against reproduction, but against description and enumeration, how much more should the acts and sayings of a man in his social and domestic relations be guarded from ruthless publicity. If you may not reproduce a woman's face photographically without her consent, how much less should be tolerated the reproduction of her face, her form, and her actions, by graphic descriptions colored to suit a gross and depraved imagination.

The right to privacy, limited as such right must necessarily be, has already found expression in the law of France.¹

It remains to consider what are the limitations of this right to privacy, and what remedies may be granted for the enforcement of the right. To determine in advance of experience the exact line at which the dignity and convenience of the individual must yield to the demands of the public welfare or of private justice would be a difficult task; but the more general rules are furnished by the legal analogies already developed in the law of slander and libel, and in the law of literary and artistic property.

1. The right to privacy does not prohibit any publication of matter which is of public or general interest.

In determining the scope of this rule, aid would be afforded by the analogy, in the law of libel and slander, of cases which deal with the qualified privilege of comment and criticism on matters of public and general interest.² There are of course difficulties in applying such a rule; but they are inherent in the subject-matter, and are certainly no greater than those which exist in many other branches of the law,—for instance, in that large class of cases in which the reasonableness or unreasonableness of an act is made the test of liability. The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may

¹ Loi Relative à la Presse. 11 Mai 1868.

“11. Toute publication dans un écrit périodique relative à un fait de la vie privée constitue une contravention punie d’une amende de cinq cent francs.

“La poursuite ne pourra être exercée que sur la plainte de la partie intéressée.”
Rivière, Codes Français et Lois Usuelles. App. Code Pen., p. 20.

² See *Campbell v. Spottiswoode*, 3 B. & S. 769, 776; *Henwood v. Harrison*, L. R. 7 C. P. 606; *Gott v. Pulsifer*, 122 Mass. 235.

properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented. The distinction, however, noted in the above statement is obvious and fundamental. There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victims of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation. Matters which men of the first class may justly contend, concern themselves alone, may in those of the second be the subject of legitimate interest to their fellow-citizens. Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for political office. Some further discrimination is necessary, therefore, than to class facts or deeds as public or private according to a standard to be applied to the fact or deed *per se*. To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted, if not an unexampled, infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety.

The general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn.¹ Since, then, the propriety of publishing the very same facts may depend wholly upon the person concerning whom they are published, no fixed formula can be used to prohibit obnoxious publications. Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case, — a necessity which unfortunately renders such a doctrine not only more difficult of application, but also to

¹ “ Nos mœurs n'admettent pas la prétention d'enlever aux investigations de la publicité les actes qui relèvent de la vie publique, et ce dernier mot ne doit pas être restreint à la vie officielle ou à celle du fonctionnaire. Tout homme qui appelle sur lui l'attention ou les regards du public, soit par une mission qu'il a reçue ou qu'il se donne, soit par le rôle qu'il s'attribue dans l'industrie, les arts, le théâtre, etc., ne peut plus invoquer contre la critique ou l'exposé de sa conduite d'autre protection que les lois qui repriment la diffamation et l'injure.” *Circ. Mins. Just.*, 4 Juin, 1868. *Rivière Codes Français et Lois Usuelles*, App. *Code Pen.* 20 n (b).

a certain extent uncertain in its operation and easily rendered abortive. Besides, it is only the more flagrant breaches of decency and propriety that could in practice be reached, and it is not perhaps desirable even to attempt to repress everything which the nicest taste and keenest sense of the respect due to private life would condemn.

In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity. The foregoing is not designed as a wholly accurate or exhaustive definition, since that which must ultimately in a vast number of cases become a question of individual judgment and opinion is incapable of such definition; but it is an attempt to indicate broadly the class of matters referred to. Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation.¹

2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.

Under this rule, the right to privacy is not invaded by any publication made in a court of justice, in legislative bodies, or the committees of those bodies; in municipal assemblies, or the committees of such assemblies, or practically by any communication made in any other public body, municipal or parochial, or in any body quasi public, like the large voluntary associations formed

¹ "Celui-la seul a droit au silence absolu qui n'a pas expressément ou indirectement provoqué ou autorisé l'attention, l'approbation ou le blâme." Circ. Mins. Just., 4 Juin, 1868. Rivière Codes Français et Lois Usuelles, App. Code Pen. 20 n (b).

The principle thus expressed evidently is designed to exclude the wholesale investigations into the past of prominent public men with which the American public is too familiar, and also, unhappily, too well pleased; while not entitled to the "silence absolu" which less prominent men may claim as their due, they may still demand that all the details of private life in its most limited sense shall not be laid bare for inspection.

for almost every purpose of benevolence, business, or other general interest ; and (at least in many jurisdictions) reports of any such proceedings would in some measure be accorded a like privilege.¹ Nor would the rule prohibit any publication made by one in the discharge of some public or private duty, whether legal or moral, or in conduct of one's own affairs, in matters where his own interest is concerned.²

3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.

The same reasons exist for distinguishing between oral and written publications of private matters, as is afforded in the law of defamation by the restricted liability for slander as compared with the liability for libel.³ The injury resulting from such oral communications would ordinarily be so trifling that the law might well, in the interest of free speech, disregard it altogether.⁴

¹ *Wason v. Walters*, L. R. 4 Q. B. 73 ; *Smith v. Higgins*, 16 Gray, 251 ; *Barrows v. Bell*, 7 Gray, 331.

² This limitation upon the right to prevent the publication of private letters was recognized early : —

“But, consistently with this right [of the writer of letters], the persons to whom they are addressed may have, nay, must, by implication, possess, the right to publish any letter or letters addressed to them, upon such occasions, as require, or justify, the publication or public use of them ; but this right is strictly limited to such occasions. Thus, a person may justifiably use and publish, in a suit at law or in equity, such letter or letters as are necessary and proper, to establish his right to maintain the suit, or defend the same. So, if he be aspersed or misrepresented by the writer, or accused of improper conduct, in a public manner, he may publish such parts of such letter or letters, but no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach.” *Story, J.*, in *Folsom v. Marsh*, 2 Story, 100, 110, 111 (1841).

The existence of any right in the recipient of letters to publish the same has been strenuously denied by Mr. Drone ; but the reasoning upon which his denial rests does not seem satisfactory. *Drone on Copyright*, pp. 136-139.

³ *Townshend on Slander and Libel*, 4th ed., § 18 ; *Odgers on Libel and Slander*, 2d ed., p. 3.

⁴ “But as long as gossip was oral, it spread, as regards any one individual, over a very small area, and was confined to the immediate circle of his acquaintances. It did not reach, or but rarely reached, those who knew nothing of him. It did not make his name, or his walk, or his conversation familiar to strangers. And what is more to the purpose, it spared him the pain and mortification of knowing that he was gossiped about. A man seldom heard of oral gossip about him which simply made him ridiculous, or trespassed on his lawful privacy, but made no positive attack upon his reputation. His peace and comfort were, therefore, but slightly affected by it.” *E. L. Godkin*, “The Rights of the Citizen : To his Reputation.” *Scribner's Magazine*, July, 1890, p. 66.

Vice-Chancellor Knight Bruce suggested in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 694, that a distinction would be made as to the right to privacy of works of art between an oral and a written description or catalogue.

4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.

This is but another application of the rule which has become familiar in the law of literary and artistic property. The cases there decided establish also what should be deemed a publication, — the important principle in this connection being that a private communication of circulation for a restricted purpose is not a publication within the meaning of the law.¹

5. The truth of the matter published does not afford a defence. Obviously this branch of the law should have no concern with the truth or falsehood of the matters published. It is not for injury to the individual's character that redress or prevention is sought, but for injury to the right of privacy. For the former, the law of slander and libel provides perhaps a sufficient safeguard. The latter implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all.²

6. The absence of "malice" in the publisher does not afford a defence.

Personal ill-will is not an ingredient of the offence, any more than in an ordinary case of trespass to person or to property. Such malice is never necessary to be shown in an action for libel or slander at common law, except in rebuttal of some defence, *e. g.*, that the occasion rendered the communication privileged, or, under the statutes in this State and elsewhere, that the statement complained of was true. The invasion of the privacy that is to be protected is equally complete and equally injurious, whether the motives by which the speaker or writer was actuated are, taken by themselves, culpable or not; just as the damage to character, and to some extent the tendency to provoke a breach of the peace, is equally the result of defamation without regard to the motives leading to its publication. Viewed as a wrong to the individual, this rule is the same pervading the whole law of torts, by which one is held responsible for his intentional acts, even though they are committed with no sinister intent; and viewed as a wrong

¹ See Drone on Copyright, pp. 121, 289, 290.

² Compare the French law.

"En prohibant l'envahissement de la vie privée, sans qu'il soit nécessaire d'établir l'intention criminelle, la loi a entendue interdire toute discussion de la part de la défense sur la vérité des faits. Le remède eut été pire que le mal, si un débat avait pu s'engager sur ce terrain." *Circ. Mins. Just.*, 4 Juin, 1868. *Rivière Code Français et Lois Usuelles*, App. Code Penn. 20 n(a).

to society, it is the same principle adopted in a large category of statutory offences.

The remedies for an invasion of the right of privacy are also suggested by those administered in the law of defamation, and in the law of literary and artistic property, namely :—

1. An action of tort for damages. in all cases.¹ Even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.

2. An injunction, in perhaps a very limited class of cases.²

It would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law, but for this, legislation would be required.³ Perhaps it would be deemed proper to bring the criminal liability for such publication within narrower limits ; but that the community has an interest in preventing such invasions of privacy, sufficiently strong to justify the introduction of such a remedy, cannot be doubted. Still, the protection of society must come mainly through a recognition of

¹ Comp. Drone on Copyright, p. 107.

² Comp. High on Injunctions, 3d ed., § 1015 ; Townshend on Libel and Slander, 4th ed., §§ 417a-417d.

³ The following draft of a bill has been prepared by William H. Dunbar, Esq., of the Boston bar, as a suggestion for possible legislation :—

“ SECTION 1. Whoever publishes in any newspaper, journal, magazine, or other periodical publication any statement concerning the private life or affairs of another, after being requested in writing by such other person not to publish such statement or any statement concerning him, shall be punished by imprisonment in the State prison not exceeding five years, or by imprisonment in the jail not exceeding two years, or by fine not exceeding one thousand dollars ; provided, that no statement concerning the conduct of any person in, or the qualifications of any person for, a public office or position which such person holds, has held, or is seeking to obtain, or for which such person is at the time of such publication a candidate, or for which he or she is then suggested as a candidate, and no statement of or concerning the acts of any person in his or her business, profession, or calling, and no statement concerning any person in relation to a position, profession, business, or calling, bringing such person prominently before the public, or in relation to the qualifications for such a position, business, profession, or calling of any person prominent or seeking prominence before the public, and no statement relating to any act done by any person in a public place, nor any other statement of matter which is of public and general interest, shall be deemed a statement concerning the private life or affairs of such person within the meaning of this act.

“ SECT. 2. It shall not be a defence to any criminal prosecution brought under section 1 of this act that the statement complained of is true, or that such statement was published without a malicious intention ; but no person shall be liable to punishment for any statement published under such circumstances that if it were defamatory the publication thereof would be privileged.”

the rights of the individual. Each man is responsible for his own acts and omissions only. If he condones what he reprobates, with a weapon at hand equal to his defence, he is responsible for the results. If he resists, public opinion will rally to his support. Has he then such a weapon? It is believed that the common law provides him with one, forged in the slow fire of the centuries, and to-day fitly tempered to his hand. The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?

*Samuel D. Warren,
Louis D. Brandeis.*

Boston, December, 1890.

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

[*Editor's note*: Skip sections I – III of this article. The pages for those sections have been provided for the sake of continuity of footnote references.]

*** SEE FOLLOWING ATTACHMENT ***

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Privacy

*William L. Prosser**

IN THE YEAR 1890 Mrs. Samuel D. Warren, a young matron of Boston, which is a large city in Massachusetts, held at her home a series of social entertainments on an elaborate scale. She was the daughter of Senator Bayard of Delaware, and her husband was a wealthy young paper manufacturer, who only the year before had given up the practice of law to devote himself to an inherited business. Socially Mrs. Warren was among the élite; and the newspapers of Boston, and in particular the *Saturday Evening Gazette*, which specialized in "blue blood" items, covered her parties in highly personal and embarrassing detail. It was the era of "yellow journalism," when the press had begun to resort to excesses in the way of prying that have become more or less commonplace today;¹ and Boston was perhaps, of all of the cities in the country, the one in which a lady and a gentleman kept their names and their personal affairs out of the papers. The matter came to a head when the newspapers had a field day on the occasion of the wedding of a daughter, and Mr. Warren became annoyed.² It was an annoyance for which the press, the advertisers and the entertainment industry of America were to pay dearly over the next seventy years.

Mr. Warren turned to his recent law partner, Louis D. Brandeis, who was destined not to be unknown to history. The result was a noted article, *The Right to Privacy*,³ in the *Harvard Law Review*, upon which the two men collaborated. It has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law. In the Harvard

* Dean, University of California School of Law, Berkeley.

¹ "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury." Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

² MASON, BRANDEIS, A FREE MAN'S LIFE 70 (1946).

³ 4 HARV. L. REV. 193 (1890).

Law School class of 1877 the two authors had stood respectively second and first, and both of them were gifted with scholarship, imagination, and ability. Internal evidences of style, and the probabilities of the situation, suggest that the writing, and perhaps most of the research, was done by Brandeis; but it was undoubtedly a joint effort, to which both men contributed their ideas.

Piecing together old decisions in which relief had been afforded on the basis of defamation, or the invasion of some property right,⁴ or a breach of confidence or an implied contract,⁵ the article concluded that such cases were in reality based upon a broader principle which was entitled to separate recognition. This principle they called the right to privacy; and they contended that the growing abuses of the press made a remedy upon such a distinct ground essential to the protection of private individuals against the outrageous and unjustifiable infliction of mental distress. This was the first of a long line of law review discussions of the right of privacy,⁶ of which this is to be yet one more. With very few exceptions,⁷ the writers have agreed, expressly or tacitly, with Warren and Brandeis.

The article had little immediate effect upon the law. The first case to

⁴ *Woolsey v. Judd*, 4 Duer (11 N.Y. Super.) 379, 11 How. Pr. 49 (N.Y. 1855) (publication of private letters); *Gee v. Pritchard*, 2 Swans. 402, 36 Eng. Rep. 670 (1818) (same); *Prince Albert v. Strange*, 2 De G. & Sm. 652, 41 Eng. Rep. 1171, 1 Mac. & G. 25, 64 Eng. Rep. 293 (1849) (exhibition of etchings and publication of catalogue).

⁵ *Yovatt v. Winyard*, 1 Jac. & W. 394, 37 Eng. Rep. 425 (1820) (publication of recipes surreptitiously obtained by employee); *Abernethy v. Hutchinson*, 3 L.J. Ch. 209 (1825) (publication of lectures to class of which defendant was a member); *Pollard v. Photographic Co.*, 40 Ch. D. 345 (1888) (publication of plaintiff's picture made by defendant).

⁶ Larremore, *The Law of Privacy*, 12 COLUM. L. REV. 693 (1912); Ragland, *The Right of Privacy*, 17 KY. L.J. 101 (1929); Winfield, *Privacy*, 47 L.Q. REV. 23 (1931); Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Kacedan, *The Right of Privacy*, 12 B.U.L. REV. 353, 600 (1932); Dickler, *The Right of Privacy*, 70 U.S.L. REV. 435 (1936); Harper & McNeely, *A Re-examination of the Basis for Liability for Emotional Distress*, [1938] WIS. L. REV. 426; Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526 (1941); Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713 (1948); Ludwig, "Peace of Mind" in 48 Pieces vs. Uniform Right of Privacy, 32 MINN. L. REV. 734 (1948); Yankwich, *The Right of Privacy*, 27 NOTRE DAME LAW. 429 (1952); Daims, *What Do We Mean by "Right to Privacy,"* 4 S.D.L. REV. 1 (1959).

Also Notes in 8 MICH. L. REV. 221 (1909); 12 COLUM. L. REV. 1 (1912); 43 HARV. L. REV. 297 (1929); 7 N.C.L. REV. 435 (1929); 26 ILL. L. REV. 63 (1931); 81 U. PA. L. REV. 324 (1933); 33 ILL. L. REV. 87 (1938); 13 SO. CAL. L. REV. 81 (1939); 15 TEMP. L.Q. 148 (1941); 25 MINN. L. REV. 619 (1941); 30 CORNELL L.Q. 398 (1945); 48 COLUM. L. REV. 713 (1948); 15 U. CHI. L. REV. 926 (1948); 6 ARK. L. REV. 459 (1952); 38 VA. L. REV. 117 (1952); 28 IND. L.J. 179 (1953); 27 MISS. L.J. 256 (1956); 44 VA. L. REV. 1303 (1958); 31 MISS. L.J. 191 (1960).

The foreign law is discussed in Gutteridge, *The Comparative Law of the Right to Privacy*, 47 L.Q. REV. 203 (1931); Walton, *The Comparative Law of the Right to Privacy*, 47 L.Q. REV. 219 (1931).

⁷ O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902); Lisle, *The Right of Privacy (A Contra View)*, 19 KY. L.J. 137 (1931); Notes, 2 COLUM. L. REV. 437 (1902); 64 ALBANY L.J. 428 (1902); 29 LAW NOTES 64 (1925); 43 HARV. L. REV. 297 (1929); 26 ILL. L. REV. 63 (1931).

allow recovery upon the independent basis of the right of privacy was an unreported decision⁸ of a New York trial judge, when an actress very scandalously, for those days, appeared upon the stage in tights, and the defendant snapped her picture from a box, and was enjoined from publishing it. This was followed by three reported cases in New York,⁹ and one in a federal court in Massachusetts,¹⁰ in which the courts appeared to be quite ready to accept the principle. Progress was brought to an abrupt halt, however, when the Michigan court flatly rejected the whole idea, in a case¹¹ where a brand of cigars was named after a deceased public figure. In 1902 the question reached the Court of Appeals of New York, in the case of *Roberson v. Rochester Folding Box Co.*¹² in which the defendant made use of the picture of a pulchritudinous young lady without her consent to advertise flour, along with the legend, "The Flour of the Family." One might think that the feebleness of the pun might have been enough in itself to predispose the court in favor of recovery; but in a four-to-three decision, over a most vigorous dissent, it rejected Warren and Brandeis and declared that the right of privacy did not exist, and that the plaintiff was entitled to no protection whatever against such conduct. The reasons offered were the lack of precedent, the purely mental character of the injury, the "vast amount of litigation" that might be expected to ensue, the difficulty of drawing any line between public and private figures, and the fear of undue restriction of the freedom of the press.

The immediate result of the *Roberson* case was a storm of public disapproval, which led one of the concurring judges to take the unprecedented step of publishing a law review article in defense of the decision.¹³ In consequence the next New York Legislature enacted a statute¹⁴ making it both a misdemeanor and a tort to make use of the name, portrait or picture of any person for "advertising purposes or for the purposes of trade" without his written consent. This act remains the law of New York, where there have been upwards of a hundred decisions dealing with it. Except as the statute itself limits the extent of the right, the New York decisions are quite

⁸ *Manola v. Stevens* (N.Y. Sup. Ct. 1890), in N.Y. Times, June 15, 18, 21, 1890.

⁹ *Mackenzie v. Soden Mineral Springs Co.*, 27 Abb. N. Cas. 402, 18 N.Y.S. 240 (Sup. Ct. 1891) (use of name of physician in advertising patent medicine enjoined); *Marks v. Jaffa*, 6 Misc. 290, 26 N.Y.S. 908 (Super. Ct. N.Y. City 1893) (entering actor in embarrassing popularity contest); *Schuyler v. Curtis*, 147 N.Y. 434, 42 N.E. 22 (1895) (erection of statue as memorial to deceased; relief denied only because he was dead).

¹⁰ *Corliss v. E. W. Walker Co.*, 64 Fed. 280 (D. Mass. 1894) (portrait to be inserted in biographical sketch of plaintiff; relief denied because he was a public figure).

¹¹ *Atkinson v. John E. Dolerty & Co.*, 121 Mich. 372, 80 N.W. 285 (1899). The man was dead, and in any case a public figure; and on either ground the same decision would probably result today. See *infra*, text at notes 205, 218-32.

¹² 171 N.Y. 538, 64 N.E. 442 (1902).

¹³ O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902).

¹⁴ N.Y. Sess. Laws 1903, ch. 132, §§ 1-2. Now, as amended in 1921, N.Y. CIV. RIGHTS LAW, §§ 50-51. Held constitutional in *Rhodes v. Sperry & Hutchinson Co.*, 193 N.Y. 223, 85 N.E. 1097 (1908), *aff'd*, 220 U.S. 502 (1911). See generally, HOFSTADTER, *THE DEVELOPMENT OF THE*

consistent with the common law as it has been worked out in other states, and they are customarily cited in privacy cases throughout the country.

Three years later the supreme court of Georgia had much the same question presented in *Pavesich v. New England Life Insurance Co.*,¹⁵ when the defendant's insurance advertising made use of the plaintiff's name and picture, as well as a spurious testimonial from him. With the example of New York before it, the Georgia court in turn rejected the *Roberson* case, accepted the views of Warren and Brandeis, and recognized the existence of a distinct right of privacy. This became the leading case.

For the next thirty years there was a continued dispute as to whether the right of privacy existed at all, as the courts elected to follow the *Roberson* or the *Pavesich* case. Along in the thirties, with the benediction of the *Restatement of Torts*,¹⁶ the tide set in strongly in favor of recognition, and the rejecting decisions began to be overruled. At the present time the right of privacy, in one form or another, is declared to exist by the overwhelming majority of the American courts. It is recognized in Alabama,¹⁷ Alaska,¹⁸ Arizona,¹⁹ California,²⁰ Connecticut,²¹ the District of Columbia,²² Florida,²³ Georgia,²⁴ Illinois,²⁵ Indiana,²⁶ Iowa,²⁷ Kansas,²⁸ Kentucky,²⁹ Louisiana,³⁰

¹⁵ 122 Ga. 190, 50 S.E. 68 (1905).

¹⁶ RESTATEMENT, TORTS §867 (1939).

¹⁷ *Smith v. Doss*, 251 Ala. 250, 37 So.2d 118 (1948); *Birmingham Broadcasting Co. v. Bell*, 259 Ala. 656, 68 So.2d 314 (1953), *later appeal*, 266 Ala. 266, 96 So.2d 263 (1957).

¹⁸ *Smith v. Suratt*, 7 Alaska 416 (1926).

¹⁹ *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P.2d 133 (1945).

²⁰ *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931); *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P.2d 577 (1942); *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P.2d 670 (1951); *Gill v. Curtis Pub. Co.*, 38 Cal. 2d 273, 239 P.2d 630 (1952); *Linehan v. Linehan*, 134 Cal. App. 2d 250, 285 P.2d 326 (1955); *Fairfield v. American Photocopy Equipment Co.*, 138 Cal. App. 2d 82, 291 P.2d 194 (1955).

²¹ *Korn v. Rennison*, 156 A.2d 476 (Conn. Super. 1959).

²² *Peay v. Curtis Pub. Co.*, 78 F. Supp. 305 (D.D.C. 1948).

²³ *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243 (1944), *second appeal*, 159 Fla. 31, 30 So.2d 635 (1947); and see *Jacova v. Southern Radio & Television Co.*, 33 So. 2d 34 (Fla. 1955).

²⁴ *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930); *McDaniel v. Atlanta Coca Cola Bottling Co.*, 60 Ga. App. 92, 2 S.E.2d 810 (1939); *Walker v. Whittle*, 83 Ga. App. 445, 64 S.E.2d 87 (1951); *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 96 Ga. App. 48, 99 S.E.2d 475 (1957).

²⁵ *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952); *Annerino v. Dell Pub. Co.*, 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958).

²⁶ *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949). See also *Estill v. Hearst Pub. Co.*, 186 F.2d 1017 (7th Cir. 1951).

²⁷ *Bremmer v. Journal-Tribune Co.*, 247 Iowa 817, 76 N.W.2d 762 (1956).

²⁸ *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532 (1918). See also *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953).

²⁹ *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909); *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927); *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1931); *Trammell v. Citizens News Co.*, 285 Ky. 529, 148 S.W.2d 708 (1941).

³⁰ *Izkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905); *Schwartz v. Edrington*, 133 La. 235, 62 So. 660 (1913); *Hamilton v. Lumherinen's Mut. Cas. Co.*, 82 So.2d 61 (La. App. 1955); *Sander v. Dunham Detectors*, 88 So.2d 516 (La. App. 1956).

Michigan,³¹ Mississippi,³² Missouri,³³ Montana,³⁴ Nevada,³⁵ New Jersey,³⁶ North Carolina,³⁷ Ohio,³⁸ Oregon,³⁹ Pennsylvania,⁴⁰ South Carolina,⁴¹ Tennessee,⁴² and West Virginia.⁴³ It will in all probability be recognized in Delaware⁴⁴ and Maryland,⁴⁵ where a federal and a lower court have accepted it; and also in Arkansas,⁴⁶ Colorado,⁴⁷ Massachusetts,⁴⁸ Minnesota,⁴⁹ and Washington,⁵⁰ where the courts at least have refrained from holding

³¹ Pallas v. Crowley, Milner & Co., 322 Mich. 411, 33 N.W.2d 911 (1948).

³² Martin v. Dorton, 210 Miss. 668, 50 So.2d 391 (1951). See Note, 27 Miss. L.J. 256 (1956).

³³ Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942); State *ex rel.* Clemens v. Witthaus, 228 S.W.2d 4 (Mo. 1950); Biederman's of Springfield, Inc. v. Wright, 322 S.W.2d 892 (Mo. 1959).

³⁴ Welsh v. Pritchard, 125 Mont. 517, 241 P.2d 816 (1952).

³⁵ Norman v. City of Las Vegas, 64 Nev. 38, 177 P.2d 442 (1947).

³⁶ Vanderbilt v. Mitchell, 72 N.J. Eq. 910, 67 Atl. (Ct. Err. & App. 1907); Edison v. Edison Polyform Mfg. Co., 73 N.J. Eq. 136, 67 Atl. 392 (Ch. 1907); Frey v. Dixon, 141 N.J. Eq. 481, 58 A.2d 86 (Ch. 1948); Ettore v. Philco Television Broadcasting Co., 229 F.2d 481 (3d Cir. 1956).

³⁷ Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938).

³⁸ Friedman v. Cincinnati Local Joint Exec. Board, 6 Ohio Supp. 276, 20 Ohio Op. 473 (C.P. 1941); Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

³⁹ Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438 (1941).

⁴⁰ Clayman v. Bernstein, 38 Pa. D. & C. 543 (C.P. 1940); Bennett v. Norban, 396 Pa. 94, 151 A.2d 476 (1959); Aquino v. Bulletin Co., 154 A.2d 422 (Pa. Super. 1959); Jenkins v. Dell Pub. Co., 251 F.2d 447 (3d Cir. 1958).

⁴¹ Holloman v. Life Ins. Co. of Va., 192 S.C. 454, 7 S.E.2d 169 (1940); Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956); Frith v. Associated Press, 176 F. Supp. 671 (E.D.S.C. 1959).

⁴² Langford v. Vanderbilt University, 199 Tenn. 389, 287 S.W.2d 32 (1956).

⁴³ Roach v. Harper, 105 S.E.2d 564 (W. Va. 1958); Sutherland v. Kroger Co., 110 S.E.2d 716 (W. Va. 1959).

⁴⁴ Miller v. National Broadcasting Co., 157 F. Supp. 240 (D. Del. 1957).

⁴⁵ Graham v. Baltimore Post Co., (Baltimore Super. Ct. 1932), reported in 22 Ky. L.J. 108 (1933).

⁴⁶ Mabry v. Kettering, 89 Ark. 551, 117 S.W. 746 (1909), *second appeal*, 92 Ark. 81, 122 S.W. 115 (1909).

⁴⁷ Fitzsimmons v. Olinger Mortuary Ass'n, 91 Colo. 544, 17 P.2d 535 (1932); McCreery v. Miller's Groceries Co., 99 Colo. 499, 64 P.2d 803 (1936). In the last named case the dissent indicates that an opinion recognizing the right of privacy was written, but withdrawn.

⁴⁸ Marek v. Zanol Products Co., 298 Mass. 1, 9 N.E.2d 393 (1937); Thayer v. Worcester Post Pub. Co., 284 Mass. 160, 187 N.E. 292 (1933); Thermo v. New England Newspaper Pub. Co., 306 Mass. 54, 27 N.E.2d 753 (1940). In Wright v. R.K.O. Radio Pictures, 55 F. Supp. 639 (D. Mass. 1944), the court considered that the state had rejected the right of privacy; but in Kelley v. Post Pub. Co., 327 Mass. 275, 98 N.E.2d 286 (1951), the question was said to be still open. See also Hazlitt v. Fawcett Publications, 116 F. Supp. 538 (D. Conn. 1953).

⁴⁹ Berg v. Minneapolis Star & Tribune Co. 79 F. Supp. 957 (D. Minn. 1948). See also Hazlitt v. Fawcett Publications, 116 F. Supp. 538 (D. Conn. 1953).

⁵⁰ In Hillman v. Star Pub. Co., 64 Wash. 691, 117 Pac. 594 (1911), the right of privacy was rejected, and said to be a matter for legislation. In State *ex rel.* La Follette v. Hinkle, 131 Wash. 86, 229 Pac. 317 (1924), it was apparently recognized; but in Lewis v. Physicians & Dentists Credit Bureau, 27 Wash.2d 267, 177 P.2d 896 (1947), the question was said to be

that it does not exist, but the decisions have gone off on other grounds. It is recognized in a limited form by the New York statute,⁵¹ and by similar acts adopted in Oklahoma,⁵² Utah,⁵³ and Virginia.⁵⁴

At the time of writing the right of privacy stands rejected only by a 1909 decision in Rhode Island,⁵⁵ and by more recent ones in Nebraska,⁵⁶ Texas,⁵⁷ and Wisconsin,⁵⁸ which have said that any change in the old common law must be for the legislature, and which have not gone without criticism.

In nearly every jurisdiction the first decisions were understandably preoccupied with the question whether the right of privacy existed at all, and gave little or no consideration to what it would amount to if it did. It is only in recent years, and largely through the legal writers, that there has been any attempt to inquire what interests are we protecting, and against what conduct. Today, with something over three hundred cases in the books,

still open in Washington. See also *Hazlitt v. Fawcett Publications*, 116 F. Supp. 538 (D. Conn. 1953).

Writers have added South Dakota and Wyoming. Davis, *What Do We Mean by "Right to Privacy,"* 4 S.D.L. REV. 1 (1959), considers that rather vague constitutional provisions in South Dakota will lead to recognition of the right; and the Note, 11 Wyo. L.J. 184 (1957), believes that the same result may follow on the basis of the Wyoming constitutional provision that truth is a defense to libel.

⁵¹ See *supra*, note 14.

⁵² OKLA. STAT. ANN. tit. 21, §§ 839-40 (1958). Before the statute there were numerous indications that Oklahoma would recognize the right of privacy without it. *Bartholomew v. Workman*, 197 Okl. 267, 169 P.2d 1012 (1946); *McKinzie v. Huckaby*, 112 F. Supp. 642 (W.D. Okl. 1953); *Lyles v. State*, 330 P.2d 734 (Okl. Cr. 1958); *Paramount Pictures v. Leader Press*, 24 F. Supp. (W.D. Okl. 1938), *rev'd on other grounds* in 106 F.2d 229 (10th Cir. 1939); *Banks v. King Features Syndicate*, 30 F. Supp. 352 (S.D.N.Y. 1939, Oklahoma law); *Hazlitt v. Fawcett Publications*, 116 F. Supp. 538 (D. Conn. 1953, Oklahoma law). The Note in 10 OKL. L. REV. 353 (1957), considers that there is still some doubt as to whether the common law right may not be recognized, in addition to the statutory one. The New York statute has been held to be exclusive. *Kimmerle v. New York Evening Journal Co.*, 262 N.Y. 99, 186 N.E. 217 (1933).

⁵³ UTAH CODE ANN. §§ 76-4-8 and 76-4-9 (1953).

⁵⁴ VA. CODE ANN. § 8-650 (1957). See Notes, 38 VA. L. REV. 117 (1952); 44 VA. L. REV. 1303 (1958).

⁵⁵ *Henry v. Cherry & Webb*, 30 R.I. 13, 73 Atl. 97 (1909).

⁵⁶ *Brunson v. Ranks Army Store*, 161 Neb. 519, 73 N.W.2d 803 (1955). See also *Schmieding v. American Farmers Mut. Ins. Co.*, 138 F. Supp. 167 (D. Neb. 1955).

⁵⁷ *Milner v. Red River Valley Pub. Co.*, 249 S.W.2d 227 (Tex. Civ. App. 1952); *McCullagh v. Houston Chronicle Pub. Co.*, 211 F.2d 4 (5th Cir. 1954). See *Seavey, Can Texas Courts Protect Newly Discovered Interests*, 31 TEXAS L. REV. 309 (1953).

⁵⁸ *Judevine v. Benzie-Montanye Fuel & Warehouse Co.*, 222 Wis. 512, 269 N.W. 295 (1936); *State ex rel. Distefeld v. Neelen*, 255 Wis. 214, 38 N.W.2d 703 (1949); see Note, [1952] WIS. L. REV. 507. The last decision, in *Yoeckel v. Samonig*, 272 Wis. 430, 75 N.W.2d 925 (1956), involved a particularly outrageous invasion, when the defendant intruded into a ladies' rest room, photographed the plaintiff there, and exhibited the picture to patrons in a restaurant. The court bowed to the fact that a bill providing for the right of privacy had failed to pass in the last legislature. The case is nevertheless an atrocity.

the holes in the jigsaw puzzle have been largely filled in, and some rather definite conclusions are possible.

What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley,⁵⁹ "to be let alone." Without any attempt to exact definition, these four torts may be described as follows:

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

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

The four may be considered in detail, in order.

I

INTRUSION

Warren and Brandeis, who were concerned with the evils of publication, do not appear to have had in mind any such thing as intrusion upon the plaintiff's seclusion or solitude. Nine years before their article was published there had been a Michigan case⁶⁰ in which a young man had intruded upon a woman in childbirth, and the court, invalidating her consent because of fraud, had allowed recovery without specifying the ground, which may have been trespass or battery. In retrospect, at least, this was a privacy case. Others have followed, in which the defendant has been held liable for intruding into the plaintiff's home,⁶¹ his hotel room,⁶² and a woman's stateroom on a steamboat,⁶³ and for an illegal search of her shopping bag in a store.⁶⁴ The privacy action which has been allowed in such cases will evi-

⁵⁹ COOLEY, *TORTS* 29 (2d ed. 1888).

⁶⁰ *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881).

⁶¹ *Young v. Western & A. R. Co.*, 39 Ga. App. 761, 148 S.E. 414 (1929) (search without warrant); *Walker v. Whittle*, 83 Ga. App. 445, 64 S.E.2d 87 (1951) (entry without legal authority to arrest husband); *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952) (landlord moving in on tenant).

⁶² *Newcomb Hotel Co. v. Corbett*, 27 Ga. App. 365, 108 S.E. 309 (1921).

⁶³ *Byfield v. Candler*, 33 Ga. App. 275, 125 S.E. 905 (1924).

⁶⁴ *Sutherland v. Kroger Co.*, 110 S.E.2d 716 (W. Va. 1959).

dently overlap, to a considerable extent at least, the action for trespass to land or chattels.

The principle was, however, soon carried beyond such physical intrusion. It was extended to eavesdropping upon private conversations by means of wire tapping⁶⁵ and microphones;⁶⁶ and there are three decisions,⁶⁷ the last of them aided by a Louisiana criminal statute, which have applied the same principle to peering into the windows of a home. The supreme court of Ohio, which seems to be virtually alone among our courts in refusing to recognize the independent tort of the intentional infliction of mental distress by outrageous conduct,⁶⁸ has accomplished the same result⁶⁹ under the name of privacy, in a case where a creditor hounded the debtor for a considerable length of time with telephone calls at his home and his place of employment.⁷⁰ The tort has been found in the case of unauthorized prying into the plaintiff's bank account,⁷¹ and the same principle has been used to invalidate a blanket subpoena duces tecum requiring the production of all of his books and documents,⁷² and an illegal compulsory blood test.⁷³

It is clear, however, that there must be something in the nature of prying or intrusion, and mere noises which disturb a church congregation,⁷⁴ or bad manners, harsh names and insulting gestures in public,⁷⁵ have been held not to be enough. It is also clear that the intrusion must be

⁶⁵ Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931).

⁶⁶ McDaniel v. Atlanta Coca Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939); Roach v. Harper, 105 S.E.2d 564 (W. Va. 1958). The same conclusion was reached, on the basis of a criminal statute, in People v. Trieber, 28 Cal. 2d 657, 163 P.2d 492, 171 P.2d 1 (1946).

⁶⁷ Moore v. New York Elevated R. Co., 130 N.Y. 523, 29 N.E. 997 (1892) (looking into windows from elevated railway; plaintiff compensated under eminent domain); Pritchett v. Board of Commissioners of Knox County, 42 Ind. App. 3, 85 N.E. 32 (1908) (relief on the basis of nuisance); Souder v. Pendleton Detectives, 88 So. 2d 716 (La. App. 1956) (spying into windows).

This topic gave rise to a possible nomination for the all-time prize law review title, in the Note, *Crimination of Peeping Toms and Other Men of Vision*, 5 ARK. L. REV. 388 (1951).

⁶⁸ Bartow v. Smith, 149 Ohio St. 301, 78 N.E.2d 735 (1948).

⁶⁹ Cf. Duty v. General Finance Co., 154 Tex. 16, 273 S.W.2d 64 (1954).

⁷⁰ House v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956), *affirming* 99 Ohio App. 485, 135 N.E.2d 440 (1955). *Accord*, on the ground of "nuisance," Wiggins v. Moskins Credit Clothing Store, 137 F. Supp. 764 (E.D.S.C. 1956).

⁷¹ Brex v. Smith, 104 N.J. Eq. 386, 146 Atl. 34 (Ch. 1929); Zimmerman v. Wilson, 81 F.2d 847 (3d Cir. 1936).

⁷² Frey v. Dixon, 141 N.J. Eq. 481, 58 A.2d 86 (Ch. 1948); State *ex rel.* Clemens v. Witthaus, 228 S.W.2d 4 (Mo. 1950) (court order).

⁷³ Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (Ch. 1940). Cf. Hawkins v. Kuhne, 153 App. Div. 216, 137 N.Y.S. 1090 (1912), *aff'd*, 208 N.Y. 555, 101 N.E. 1104 (1913) (illegal photographing and measuring by police called an "assault").

⁷⁴ Owens v. Henman, 1 W. & S. 548, 37 Am. Dec. 481 (Pa. 1841).

⁷⁵ Lisowski v. Jaskiewicz, 76 Pa. D. & C. 79 (C.P. 1950); Christie v. Greenleaf, 78 Pa. D. & C. 191 (C.P. 1951).

something which would be offensive or objectionable to a reasonable man, and that there is no tort when the landlord stops by on Sunday morning to ask for the rent.⁷⁶

It is clear also that the thing into which there is prying or intrusion must be, and be entitled to be, private. The plaintiff has no right to complain when his pre-trial testimony is recorded,⁷⁷ or when the police, acting within their powers, take his photograph, fingerprints or measurements,⁷⁸ or when there is inspection and public disclosure of corporate records which he is required by law to keep and make available.⁷⁹ On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about.⁸⁰ Neither is it such an invasion to take his photograph in such a place,⁸¹ since

⁷⁶ Horstman v. Newman, 291 S.W.2d 567 (Ky. 1956).

⁷⁷ Gotthelf v. Hillcrest Lumber Co., 280 App. Div. 668, 116 N.Y.S.2d 873 (1952).

⁷⁸ Voelker v. Tyndall, 226 Ind. 43, 75 N.E.2d 548 (1947); McGovern v. Van Riper, 140 N.J. Eq. 341, 54 A.2d 469 (Ch. 1947), affirming 137 N.J. Eq. 548, 45 A.2d 842 (Ct. Err. & App. 1946), which reversed 137 N.J. Eq. 24, 43 A.2d 514 (Ch. 1945); State ex rel. Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946); Bartletta v. McFeeley, 107 N.J. Eq. 141, 152 Atl. 17 (Ch. 1930), aff'd, 109 N.J. Eq. 241, 156 Atl. 658 (Ct. Err. & App. 1931); Fernicola v. Keenan, 136 N.J. Eq. 9, 39 A.2d 851 (Ch. 1944); Norman v. City of Las Vegas, 64 Nev. 38, 177 P.2d 442 (1947); Mabry v. Kettering, 89 Ark. 551, 117 S.W. 746 (1909), second appeal, 92 Ark. 81, 122 S.W. 115 (1909); Hodgeman v. Olson, 86 Wash. 615, 150 Pac. 1122 (1915); cf. Sellers v. Henry, 329 S.W.2d 214 (Ky. 1959). As to the use made of police photographs, see *infra*, text at notes 143-45.

In Anthony v. Anthony, 9 N.J. Super. 411, 74 A.2d 919 (Ch. 1950), a compulsory blood test in a paternity suit was held to be justified, and not to invade any right of privacy.

Such cases, of course, usually turn on constitutional rights.

⁷⁹ Bowles v. Misle, 64 F. Supp. 835 (D. Neb. 1946); United States v. Alabama Highway Express Co., 46 F. Supp. 450 (D. Ala. 1942); Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810 (1944).

⁸⁰ Chappell v. Stewart, 82 Md. 323, 33 Atl. 542 (1896). Cf. McKinzie v. Huckaby, 112 F. Supp. 642 (W.D. Okl. 1953), where the defendant, calling at the plaintiff's home, brought along a policeman, who remained outside in the car.

In Schultz v. Frankfort Marine, Accident & Plate Glass Ins. Co., 151 Wis. 537, 139 N.W. 386 (1913), "rough shadowing" which was visible to onlookers, was held to be actionable as slander.

⁸¹ Gill v. Hearst Pub. Co., 40 Cal. 2d 224, 253 P.2d 441 (1953); Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D. Minn. 1948) (courtroom); Lyles v. State, 330 P.2d 734 (Okla. Cr. 1958) (television in court). Cf. Gautier v. Pro-Football, Inc., 304 N.Y. 354, 107 N.E.2d 485 (1952); Sports & General Press Agency v. "Our Dogs" Pub. Co., [1916] 2 K.B. 880; and cases cited *infra*, note 104. See Fitzpatrick, *Unauthorized Photographs*, 20 GEO. L.J. 134 (1932). In United States v. Gugel, 119 F. Supp. 897 (E.D. Ky. 1954), the right to take such pictures was said to be protected by the Constitution of the United States.

The same type of reasoning, that the record does not differ from a written report, was applied to the recording of a private telephone conversation between plaintiff and defendant, in Chaplin v. National Broadcasting Co., 15 F.R.D. 134 (S.D.N.Y. 1953).

As to publication, see *infra*, text at notes 102-08.

In Friedman v. Cincinnati Local Joint Executive Board, 6 Ohio Supp. 276, 20 Ohio Op. 473 (C.P. 1941), a labor union which had taken pictures of customers crossing a picket line was enjoined from making use of them for purposes of retaliation.

this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see. On the other hand, when he is confined to a hospital bed,⁸² and in all probability when he is merely in the seclusion of his home, the making of a photograph without his consent is an invasion of a private right, of which he is entitled to complain.

It appears obvious that the interest protected by this branch of the tort is primarily a mental one. It has been useful chiefly to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights.

II

PUBLIC DISCLOSURE OF PRIVATE FACTS

Because of its background of personal annoyance from the press, the article of Warren and Brandeis was primarily concerned with the second form of the tort, which consists of public disclosure of embarrassing private facts about the plaintiff. Actually this was rather slow to appear in the decisions. Although there were earlier instances,⁸³ in which other elements were involved, its first real separate application was in a Kentucky case⁸⁴ in 1927, in which the defendant put up a notice in the window of his garage announcing to the world that the defendant owed him money and would not pay it. But the decision which has become the leading case, largely because of its spectacular facts, is *Melvin v. Reid*,⁸⁵ in California in 1931. The plaintiff, whose original name was Gabrielle Darley, had been a prostitute, and the defendant in a sensational murder trial. After her acquittal she had abandoned her life of shame, become rehabilitated, married a man named Melvin, and in a manner reminiscent of the plays of Arthur Wing Pinero, had led a life of rectitude in respectable society, among friends and associates who were unaware of her earlier career. Seven years afterward the defendant made and exhibited a motion picture, called "The Red Kimono," which enacted the true story, used the name of Gabrielle Darley, and ruined her new life by revealing her past to the world and her friends. Relying in part upon a vague constitutional provi-

⁸² *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942). Cf. *Clayman v. Bernstein*, 38 Pa. D. & C. 543 (C.P. 1940) (picture of semi-conscious patient taken by physician).

⁸³ *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912) (publication of picture by photographer, breach of implied contract); *Thompson v. Adelberg & Berman*, 181 Ky. 487, 205 S.W. 558 (1918) (publication of debt, libel); *Feeney v. Young*, 191 App. Div. 501, 181 N.Y.S. 481 (1920) (exhibition of pictures of caesarian operation, breach of trust and implied contract); *Peed v. Washington Times*, 55 Wash. L. Rep. 182 (D.C. 1927) (publication of stolen picture).

⁸⁴ *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927). "Dr. W. R. Morgan owes an account here of \$49.67. And if promises would pay an account this account would have been settled long ago. This account will be advertised as long as it remains unpaid."

⁸⁵ 112 Cal. App. 285, 297 Pac. 91 (1931).

sion that all men have the inalienable right of "pursuing and obtaining happiness," which has since disappeared from the California cases, the court held that this was an actionable invasion of her right of privacy.

Other decisions have followed, involving the use of the plaintiff's name in a radio dramatization of a robbery of which he was the victim,⁸⁶ and publicity given to his debts,⁸⁷ to medical pictures of his anatomy,⁸⁸ and to embarrassing details of a woman's masculine characteristics, her domineering tendencies, her habits of profanity, and incidents of her personal conduct toward her friends and neighbors.⁸⁹ Some limits, at least, of this branch of the right of privacy appear to be fairly well marked out, as follows:

First, the disclosure of the private facts must be a public disclosure, and not a private one. There must be, in other words, publicity. It is an invasion of the right to publish in a newspaper that the plaintiff does not pay his debts,⁹⁰ or to post a notice to that effect in a window on the public street⁹¹ or cry it aloud in the highway;⁹² but, except for one decision of a lower Georgia court which was reversed on other grounds,⁹³ it has been agreed that it is no invasion to communicate that fact to the plaintiff's employer,⁹⁴ or to any other individual, or even to a small group,⁹⁵ unless

⁸⁶ *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845 (N.D. Cal. 1939).

⁸⁷ *Trammell v. Citizens News Co., Inc.*, 285 Ky. 529, 148 S.W.2d 708 (1941); *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959). *Cf.* *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959).

In *Maysville Transit Co. v. Ort*, 296 Ky. 524, 177 S.W.2d 369 (1944), it was held that a corporation had no right of privacy, but that there could be recovery for disclosure of its tax returns on the basis of violation of a statute.

⁸⁸ *Banks v. King Features Syndicate*, 30 F. Supp. 352 (S.D.N.Y. 1939) (Oklahoma law; newspaper publication of X-rays of woman's pelvic region); *Griffin v. Medical Society*, 11 N.Y.S.2d 109 (Sup. Ct. 1939) (publication in medical journal of pictures of plaintiff's deformed nose); *Feeney v. Young*, 191 App. Div. 501, 181 N.Y.S. 481 (1920) (public exhibition of films of caesarian operation). *Cf.* *Clayman v. Bernstein*, 38 Pa. D. & C. 543 (C.P. 1940) (doctor enjoined from using pictures of facial disfigurement taken while patient was semi-conscious).

⁸⁹ *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1945), *second appeal*, 159 Fla. 31, 30 So. 2d 635 (1947).

⁹⁰ *Trammell v. Citizens News Co.*, 285 Ky. 529, 148 S.W.2d 708 (1941). *Cf.* *Thompson v. Adelberg & Berman, Inc.*, 181 Ky. 487, 205 SW. 558 (1918).

⁹¹ *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927).

⁹² *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959). *Cf.* *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959) (public restaurant).

⁹³ *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 96 Ga. App. 48, 99 S.E.2d 475 (1957), *reversed* 213 Ga. 682, 100 S.E.2d 881 (1957), on the ground that the communication was privileged.

⁹⁴ *Patton v. Jacobs*, 118 Ind. App. 358, 78 N.E.2d 789 (1948); *Voneye v. Turner*, 240 S.W.2d 588 (Ky. 1951); *Lucas v. Moskins Stores*, 262 S.W.2d 679 (Ky. 1953); *Hawley v. Professional Credit Bureau, Inc.*, 345 Mich. 500, 76 N.W.2d 835 (1956); *Lewis v. Physicians & Dentists Credit Bureau*, 27 Wash. 2d 267, 177 P.2d 896 (1947). *Cf.* *Davis v. General Finance & Thrift Corp.*, 80 Ga. App. 708, 57 S.E.2d 225 (1950) (telegram to plaintiff); *Perry v. Moskins Stores*, 249 S.W.2d 812 (Ky. 1952) (postcard to plaintiff).

⁹⁵ *Gregory v. Bryan-Hunt Co.*, 295 Ky. 345, 174 S.W.2d 510 (1943) (oral accusation of

there is some breach of contract, trust or confidential relation which will afford an independent basis for relief.⁹⁶ Warren and Brandeis⁹⁷ thought that the publication would have to be written or printed unless special damage could be shown; and there have been decisions⁹⁸ that the action will not lie for oral publicity; but the growth of radio alone has been enough to make this obsolete,⁹⁹ and there now can be little doubt that writing is not required.¹⁰⁰

Second, the facts disclosed to the public must be private facts, and not public ones. Certainly no one can complain when publicity is given to information about him which he himself leaves open to the public eye, such as the appearance of the house in which he lives, or to the business in which he is engaged. Thus it has been held that a public school teacher has no action for a compulsory disclosure of her war work and other outside activities.¹⁰¹

Here two troublesome questions arise. One is whether any individual, by appearing upon the public highway, or in any other public place, makes his appearance public, so that any one may take and publish a picture of him as he is at the time. What if an utterly obscure citizen, reeling along drunk on the main street, is snapped by an enterprising reporter, and the picture given to the world? Is his privacy invaded? The cases have been much involved with the privilege of reporting news and other matters of public interest,¹⁰² and for that reason cannot be regarded as very conclusive; but the answer appears to be that it is not. The decisions indicate that anything visible in a public place may be recorded and given circulation by means of a photograph, to the same extent as by a written descrip-

theft). On the other hand, in *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P.2d 577 (1942), the distribution of a letter to a thousand persons was held, without discussion, to make it public.

⁹⁶ *Berry v. Moench*, 8 Utah 2d 191, 331 P.2d 814 (1958); *cf.* *Simonsen v. Swenson*, 104 Neb. 224, 177 N.W. 831 (1920); and see Note, 43 MINN. L. REV. 943 (1959).

⁹⁷ Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 217 (1890).

⁹⁸ *Martin v. F.I.Y. Theatre Co.*, 10 Ohio Op. 338 (Ohio C.P. 1938); *Gregory v. Bryan-Hunt Co.*, 295 Ky. 345, 174 S.W.2d 510 (1943); *Pangallo v. Murphy*, 243 S.W.2d 496 (Ky. 1951); *Lewis v. Physicians & Dentists Credit Bureau*, 27 Wash. 2d 267, 177 P.2d 896 (1947).

⁹⁹ *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845 (N.D. Cal. 1939) (radio); *Strickler v. National Broadcasting Co.*, 167 F. Supp. 68 (S.D. Cal. 1958) (television); *Binns v. Vitagraph Co. of America*, 210 N.Y. 51, 103 N.E. 1108 (1913) (motion picture); *Donohue v. Warner Bros. Pictures*, 194 F.2d 6 (10th Cir. 1952) (same); *Ettore v. Philco Television Broadcasting Co.*, 229 F.2d 481 (3d Cir. 1956) (motion picture film on television).

¹⁰⁰ *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959); *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959); *Linehan v. Linehan*, 134 Cal. App. 2d 250, 285 P.2d 326 (1955).

¹⁰¹ *Reed v. Orleans Parish Schoolboard*, 21 So. 2d 895 (La. App. 1945). Compare the cases of disclosure of corporate records, *supra* note 79.

¹⁰² See *infra*. text at notes 218-63.

tion,¹⁰³ since this amounts to nothing more than giving publicity to what is already public and what any one present would be free to see.¹⁰⁴ Outstanding is the California case¹⁰⁵ in which the plaintiff, photographed while embracing his wife in the market place, was held to have no action when the picture was published. It has been contended¹⁰⁶ that when an individual is thus singled out from the public scene, and undue attention is focused upon him, there is an invasion of his private rights; and there is one New York decision to that effect.¹⁰⁷ It was, however, later explained upon the basis of the introduction of an element of fiction into the accompanying narrative.¹⁰⁸

On the other hand, it seems clear that when a picture is taken surreptitiously, or over the plaintiff's objection, in a private place,¹⁰⁹ or one already made is stolen,¹¹⁰ or obtained by bribery or other inducement of breach of trust,¹¹¹ the plaintiff's appearance which is thus made public is at the time still a private thing, and there is an invasion of a private right, for which an action will lie.

The other question is as to the effect of the fact that the matter made public is already one of public record. If the record is a confidential one,

¹⁰³ In *Chaplin v. National Broadcasting Co.*, 15 F.R.D. 134 (S.D.N.Y. 1953), the same reasoning was applied to the broadcast of a recorded private telephone conversation between plaintiff and defendant. The case looks wrong, since one element, the sound of Chaplin's voice, was not then public, and was expected to be private to the recipient.

¹⁰⁴ *Sports & General Press Agency v. "Our Dogs" Pub. Co.*, [1916] 2 K.B. 880; *Humiston v. Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N.Y.S. 752 (1919); *Merle v. Sociological Research Film Corp.*, 166 App. Div. 376, 152 N.Y.S. 829 (1915); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948) (courtroom); *Lyles v. State*, 330 P.2d 734 (Okla. Cr. 1958) (television in courtroom). *Cf. Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952) (football game); *Jacova v. Southern Radio & Television Co.*, 83 So. 2d 34 (Fla. 1955) (cigar store raid).

It may be suggested, however, that a man may still be private in a public place. Suppose that a citizen responds to a call of nature in the bushes in a public park?

¹⁰⁵ *Gill v. Hearst Pub. Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1953).

¹⁰⁶ Note, 44 Va. L. Rev. 1303 (1958).

¹⁰⁷ *Blumenthal v. Picture Classics*, 235 App. Div. 570, 257 N.Y.S. 800 (1932), *aff'd*, 261 N.Y. 504, 185 N.E. 713 (1933).

¹⁰⁸ In *Sarat Lahiri v. Daily Mirror*, 162 Misc. 776, 295 N.Y.S. 382 (Sup. Ct. 1937).

¹⁰⁹ *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942) (hospital bed). *Cf. Clayman v. Bernstein*, 38 Pa. D. & C. 543 (C.P. 1940) (picture of semi-conscious patient taken by physician).

¹¹⁰ *Peed v. Washington Times*, 55 Wash. L. Rep. 182 (D.C. 1927).

In *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (1939), the newspaper appears to have gotten away with a great deal. After plaintiff's wife had committed suicide, the screen of his kitchen window was forced open, and a photograph of his wife disappeared from his table. The same day the same photograph appeared in the paper. The court considered that there was no evidence that the defendant had stolen it. The actual decision can be justified, however, on the ground that the woman was dead. See *infra*, text at note 205.

¹¹¹ *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930) (picture of deformed child born to plaintiff, obtained from hospital attendants). *Cf. Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912) (breach of implied contract by photographer).

not open to public inspection, as in the case of income tax returns,¹¹² it is not public, and there can be no doubt that there is an invasion of privacy. But it has been held that no one is entitled to complain when there is publication of his recorded date of birth or his marriage,¹¹³ or his military service record;¹¹⁴ and the same must certainly be true of his admission to the bar or to the practice of medicine, or the fact that he is driving a taxicab. The difficult question is as to the effect of lapse of time, and the extent to which forgotten records, as for example of a criminal conviction, may be dredged up in after years and given more general publicity. As in the case of news,¹¹⁵ with which the problem may be inextricably interwoven, it has been held that the memory of the events covered by the record, such as a criminal trial,¹¹⁶ can be revived as still a matter of legitimate public interest. But there is the leading case of *Melyvin v. Reid*,¹¹⁷ which held that the unnecessary use of the plaintiff's name, and the revelation of her history to new friends and associates, introduced an element which was in itself a transgression of her right of privacy. The answer may be that the existence of a public record is a factor of a good deal of importance, which will normally prevent the matter from being private, but that under some special circumstances it is not necessarily conclusive.

Third, the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities.¹¹⁸ All of us, to some extent, lead lives exposed to the public gaze or to public inquiry, and complete privacy does not exist in this world except for the hermit in the desert. Any one who is not a hermit must expect the more or less casual

¹¹² *Cf. Maysville Transit Co. v. Ort*, 296 Ky. 524, 177 S.W.2d 369 (1944); *Munzer v. Blaisdell*, 183 Misc. 773, 49 N.Y.S.2d 915 (Sup. Ct. 1944), *aff'd*, 269 App. Div. 970, 58 N.Y.S.2d 360 (1945) (records of mental institution); *Sellers v. Henry*, 329 S.W.2d 214 (Ky. 1959) (police photograph; liability dependent upon use).

¹¹³ *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956).

¹¹⁴ *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P.2d 670 (1951); *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949).

In *Thompson v. Curtis Pub. Co.*, 193 F.2d 953 (3d Cir. 1952), a patent obtained by the plaintiff was held to be a public matter, "as fully as a play, a book, or a song."

¹¹⁵ See *infra*, text at notes 285-88.

¹¹⁶ *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817 (D.D.C. 1955), *aff'd*, 232 F.2d 369 (D.C. Cir. 1956) (murder trial used in broadcast); *Smith v. National Broadcasting Co.*, 138 Cal. App. 2d 807, 292 P.2d 600 (1956) (false report to police of escape of black panther). In both cases the name of the plaintiff was not used.

¹¹⁷ 112 Cal. App. 285, 297 Pac. 91 (1931) (see *supra*, text at note 85). *Accord*, *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845 (N.D. Cal. 1939); and see cases cited in the preceding note. The *Melvin* and *Mau* cases were explained on the basis of the use of the name in the *Smith* case.

¹¹⁸ *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P.2d 133 (1945); *Davis v. General Finance & Thrift Corp.*, 80 Ga. App. 708, 57 S.E.2d 225 (1950); *Gill v. Hearst Pub. Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1953); *Samuel v. Curtis Pub. Co.*, 122 F. Supp. 327 (N.D. Cal. 1954).

observation of his neighbors and the passing public as to what he is and does, and some reporting of his daily activities. The ordinary reasonable man does not take offense at mention in a newspaper of the fact that he has returned from a visit, or gone camping in the woods, or that he has given a party at his house for his friends; and very probably Mr. Warren would never have had any action for the reports of his daughter's wedding. The law of privacy is not intended for the protection of any shrinking soul who is abnormally sensitive about such publicity.¹¹⁹ It is quite a different matter when the details of sexual relations are spread before the public gaze,¹²⁰ or there is highly personal portrayal of his intimate private characteristics or conduct.¹²¹

Here the outstanding case is *Sidis v. F-R Publishing Corporation*.¹²² The plaintiff, William James Sidis, had been an infant prodigy, who had graduated from Harvard at sixteen, and at the age of eleven had lectured to eminent mathematicians on the fourth dimension. When he arrived at adolescence he underwent some unusual psychological change, which brought about a complete revulsion toward mathematics, and toward the publicity he had received. He disappeared, led an obscure life as a book-keeper, and occupied himself in collecting street car transfers, and studying the lore of the Okamakamessett Indians. The *New Yorker* magazine sought him out, and published a not unsympathetic account of his career, revealing his present whereabouts and activities. The effect upon Sidis was devastating, and the article unquestionably contributed to his early death. The case involved the privilege of reporting on matters of public interest;¹²³ but the decision that there was no cause of action rested upon the ground that there was nothing in the article which would be objectionable to any normal person. When this case is compared with *Melvin v. Reid*,¹²⁴ with its revelation of the past of a prostitute and a murder defendant, what emerges is something in the nature of a "mores" test,¹²⁵ by which there will be liability only for publicity given to those things which the customs and ordinary views of the community will not tolerate.

¹¹⁹ *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956) (report of birth of child to girl twelve years old).

¹²⁰ *Garner v. Triangle Publications*, 97 F. Supp. 546 (S.D.N.Y. 1951). *Cf.* *Myers v. U.S. Camera Pub. Corp.*, 9 Misc. 2d 765, 167 N.Y.S.2d 771 (N.Y. City Ct. 1957) (nude full body photograph of model); *Feeney v. Young*, 191 App. Div. 501, 181 N.Y.S. 481 (1920) (exhibition of film of caesarian operation); *Banks v. King Features Syndicate*, 30 F. Supp. 352 (S.D.N.Y. 1939) (X-rays of woman's pelvic region).

¹²¹ *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243 (1944), *second appeal*, 159 Fla. 31, 30 So.2d 635 (1947). *Cf.* *Stryker v. Republic Pictures Corp.*, 108 Cal. App.2d 191, 238 P.2d 670 (1951).

¹²² 113 F.2d 806 (2d Cir. 1940), *affirming* 34 F. Supp. 19 (S.D.N.Y. 1938).

¹²³ See *infra*, text at notes 218-63.

¹²⁴ See *supra*, text at note 85.

¹²⁵ Suggested by the lower court in *Sidis v. F-R Pub. Corp.*, 34 F. Supp. 19 (S.D.N.Y. 1938).

This branch of the tort is evidently something quite distinct from intrusion. The interest protected is that of reputation, with the same overtones of mental distress that are present in libel and slander. It is in reality an extension of defamation, into the field of publications that do not fall within the narrow limits of the old torts, with the elimination of the defense of truth.¹²⁶ As such, it has no doubt gone far to remedy the deficiencies of the defamation actions, hampered as they are by technical rules inherited from ancient and long forgotten jurisdictional conflicts, and to provide a remedy for a few real and serious wrongs that were not previously actionable.

III

FALSE LIGHT IN THE PUBLIC EYE

The third form of invasion of privacy, which Warren and Brandeis again do not appear to have had in mind at all, consists of publicity that places the plaintiff in a false light in the public eye. It seems to have made its first appearance in 1816, when Lord Byron succeeded in enjoining the circulation of a spurious and inferior poem attributed to his pen.¹²⁷ The principle frequently, over a good many years, has made a rather nebulous appearance in a line of decisions¹²⁸ in which falsity or fiction has been held to defeat the privilege of reporting news and other matters of public interest, or of giving further publicity to already public figures. It is only in late years that it has begun to receive any independent recognition of its own.

One form in which it occasionally appears, as in Byron's case, is that of publicity falsely attributing to the plaintiff some opinion or utterance.¹²⁹ A good illustration of this might be the fictitious testimonial used in advertising,¹³⁰ or the Oregon case¹³¹ in which the name of the plaintiff was signed to a telegram to the governor urging political action which it would have been illegal for him, as a state employee, to advocate. More typical are spurious books and articles, or ideas expressed in them, which

¹²⁶ See *infra*, text at note 290.

¹²⁷ Lord Byron v. Johnston, 2 Mer. 29, 35 Eng. Rep. 851 (1816).

¹²⁸ See *infra*, text at notes 260-63, 271-73.

¹²⁹ See Wigmore, *The Right Against False Attribution of Belief or Utterance*, 4 Kx. L.J. No. 8, p. 3 (1916).

¹³⁰ Cf. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Manger v. Kree Institute of Electrolysis*, 233 F.2d 5 (2d Cir. 1956); *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909); *Fairfield v. American Photocopy Equipment Co.*, 138 Cal. App.2d 82, 291 P.2d 194 (1955).

¹³¹ *Hinish v. Meier & Frank Co.*, 166 Ore. 482, 113 P.2d 438 (1941). *Accord*, *Schwartz v. Edrington*, 133 La. 235, 62 So. 660 (1913) (continued circulation of petition after plaintiff had withdrawn his signature).

purport to emanate from the plaintiff.¹³² In the same category are the unauthorized use of his name as a candidate for office,¹³³ or to advertise for witnesses of an accident,¹³⁴ or the entry of an actor, without his consent, in a popularity contest of an embarrassing kind.¹³⁵

Another form in which this branch of the tort frequently has made its appearance is the use of the plaintiff's picture to illustrate a book or an article with which he has no reasonable connection. As remains to be seen,¹³⁶ public interest may justify a use for appropriate and pertinent illustration. But when the face of some quite innocent and unrelated citizen is employed to ornament an article on the cheating propensities of taxi drivers,¹³⁷ the negligence of children,¹³⁸ profane love,¹³⁹ "man hungry" women,¹⁴⁰ juvenile delinquents,¹⁴¹ or the peddling of narcotics,¹⁴² there is an obvious innuendo that the article applies to him, which places him in a false light before the public, and is actionable.

Still another form in which the tort occurs is the inclusion of the plaintiff's name, photograph and fingerprints in a public "rogues' gallery" of convicted criminals, when he has not in fact been convicted of any crime.¹⁴³ Although the police are clearly privileged to make such a record in the first instance, and to use it for any legitimate purpose pending trial,¹⁴⁴ or even

¹³² *D'Altomonte v. New York Herald Co.*, 154 App. Div. 453, 139 N.Y.S. 200 (1913), *modified*, however, as not within the New York statute, in 208 N.Y. 596, 102 N.E. 1101 (1913) (authorship of absurd travel story); *Hogan v. A. S. Barnes & Co.*, 114 U.S.P.Q. 314 (Pa. C.P. 1957) (book on golf purporting to give information from plaintiff about his game).

¹³³ *State ex rel. La Follette v. Hinkle*, 131 Wash. 86, 229 Pac. 317 (1924).

¹³⁴ *Hamilton v. Lumbermen's Mutual Cas. Co.*, 82 So.2d 61 (La. App. 1955).

¹³⁵ *Marks v. Jaffa*, 6 Misc. 290, 26 N.Y.S. 908 (Super. Ct. N.Y. City 1893).

¹³⁶ *Infra*, text at notes 258-59.

¹³⁷ *Peay v. Curtis Pub. Co.*, 78 F. Supp. 305 (D.D.C. 1948).

¹³⁸ *Leverton v. Curtis Pub. Co.*, 192 F.2d 974 (3d Cir. 1951).

¹³⁹ *Gill v. Curtis Pub. Co.*, 38 Cal. 2d 273, 239 P.2d 630 (1952).

¹⁴⁰ *Martin v. Johnson Pub. Co.*, 157 N.Y.S.2d 409 (Sup. Ct. 1956). *Accord*, *Semler v. Ultem Publications*, 170 Misc. 551, 9 N.Y.S.2d 319 (N.Y. City Ct. 1938) (pictures of model in sensational sex magazine); *Russell v. Marboro Books*, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1959) (picture of model used in bawdy advertisement for bed sheets).

¹⁴¹ *Metzger v. Dell Pub. Co.*, 207 Misc. 182, 136 N.Y.S.2d 888 (Sup. Ct. 1955).

More doubtful is *Callas v. Whisper, Inc.*, 198 Misc. 829 (1950), *affirmed*, 278 App. Div. 974, 105 N.Y.S.2d 1001 (1951), where the picture of a minor, obtained by fraudulent representations, was used as background in a night club, with the innuendo that she was in a disreputable place. It was held that she had no cause of action. The facts, however, are by no means entirely clear from the summary of the pleading.

¹⁴² *Thompson v. Close-Up, Inc.*, 277 App. Div. 848, 98 N.Y.S.2d 300 (1950).

¹⁴³ *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1950); and see *Downs v. Swann*, 111 Md. 53, 73 Atl. 653 (1909); *State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946); *Norman v. City of Las Vegas*, 64 Nev. 38, 177 P.2d 442 (1947). *Cf.* *Vanderbilt v. Mitchell*, 72 N.J. Eq. 910, 67 Atl. 97 (Ct. Err. & App. 1907) (birth certificate naming plaintiff as father of child).

¹⁴⁴ *Mabry v. Kettering*, 89 Ark. 551, 117 S.W. 746 (1909), *second appeal*, 92 Ark. 81, 122 S.W. 115 (1909); *State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946);

after conviction,¹⁴⁵ the element of false publicity in the inclusion among the convicted goes beyond the privilege.

The false light need not necessarily be a defamatory one, although it very often is,¹⁴⁶ and a defamation action will also lie. It seems clear, however, that it must be something that would be objectionable to the ordinary reasonable man under the circumstances, and that, as in the case of disclosure,¹⁴⁷ the hypersensitive individual will not be protected.¹⁴⁸ Thus minor and unimportant errors in an otherwise accurate biography, as to dates and place, and incidents of no significance, do not entitle the subject of the book to recover,¹⁴⁹ nor does the erroneous description of the plaintiff as a cigarette girl when an inquiring photographer interviews her on the street.¹⁵⁰ Again, in all probability, something of a "mores" test must be applied.

The false light cases obviously differ from those of intrusion, or disclosure of private facts. The interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation. There is a resemblance to disclosure; but the two differ in that one involves truth and the other lies, one private or secret facts and the other invention. Both require publicity. There has been a good deal of overlapping of defamation in the false light cases, and apparently either action, or both, will very often lie. The privacy cases do go considerably beyond the

Norman v. City of Las Vegas, 64 Nev. 38, 177 P.2d 442 (1947); Bartletta v. McFeeley, 107 N.J. Eq. 141, 152 Atl. 17 (Ch. 1930), *affirmed*, 109 N.J. Eq. 241, 156 Atl. 658 (Ct. Err. & App. 1931); McGovern v. Van Riper, 140 N.J. Eq. 341, 54 A.2d 469 (Ch. 1947); Downs v. Swann, 111 Md. 53, 73 Atl. 653 (1909).

¹⁴⁵ Hodgeman v. Olsen, 86 Wash. 615, 150 Pac. 1122 (1915) (convict); Fernicola v. Keenan, 136 N.J. Eq. 9, 39 A.2d 851 (Ch. 1944).

¹⁴⁶ Cf. Bennett v. Norban, 396 Pa. 94, 151 A.2d 476 (1959) (accusation of theft upon the street); Linehan v. Linehan, 134 Cal. App. 2d 250, 285 P.2d 326 (1955) (public accusation that plaintiff was not the lawful wife of defendant's ex-husband); D'Altomonte v. New York Herald, 154 App. Div. 453, 139 N.Y.S. 200 (1913), *modified*, 208 N.Y. 596, 102 N.E. 1101 (1913) (imputing authorship of absurd travel story); Peay v. Curtis Pub. Co., 78 F. Supp. 305 (D.D.C. 1948) (imputing cheating practices to taxi driver); Martin v. Johnson Pub. Co., 157 N.Y.S.2d 409 (Sup. Ct. 1956) (use of picture with article on "man hungry" women); Russell v. Marlboro Books, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1959) (picture used in bawdy advertisement).

¹⁴⁷ See *supra*, text at notes 118-25.

¹⁴⁸ In Strickler v. National Broadcasting Co., 167 F. Supp. 68 (S.D. Cal. 1958), it was left to the jury to decide whether fictitious details of plaintiff's conduct in an airplane crisis, as portrayed in a broadcast, would be objectionable to a reasonable man.

¹⁴⁹ Koussevitzky v. Allen, Towne & Heath, 188 Misc. 479, 68 N.Y.S.2d 779 (Sup. Ct.), *aff'd*, 272 App. Div. 759, 69 N.Y.S.2d 432 (1947).

¹⁵⁰ Middleton v. News Syndicate Co., 162 Misc. 516, 295 N.Y.S. 120 (Sup. Ct. 1937).

It would appear, however, that this was carried entirely too far in Jones v. Herald Post Co., 230 Ky. 227, 18 S.W.2d 972 (1929). There was a newspaper report of the murder of plaintiff's husband in her presence, and false and sensational statements were attributed to her, that she had fought with the criminals, and would have killed them if she could.

narrow limits of defamation, and no doubt have succeeded in affording a needed remedy in a good many instances not covered by the other tort.

It is here, however, that one disposed to alarm might express the greatest concern over where privacy may be going. The question may well be raised, and apparently still is unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?

IV

APPROPRIATION

There is little indication that Warren and Brandeis intended to direct their article at the fourth branch of the tort, the exploitation of attributes of the plaintiff's identity. The first decision¹⁵¹ had relied upon breach of an implied contract, where a photographer who had taken the plaintiff's picture proceeded to put it on sale; and this is still one basis upon which liability continues to be found.¹⁵² By reason of its early appearance in the *Roberson* case,¹⁵³ and the resulting New York statute,¹⁵⁴ this form of invasion has bulked rather large in the law of privacy. It consists of the appropriation, for the defendant's benefit or advantage, of the plaintiff's name or likeness.¹⁵⁵ Thus in New York, as well as in many other states, there are a great many decisions in which the plaintiff has recovered when his name¹⁵⁶ or picture,¹⁵⁷ or other likeness,¹⁵⁸ has been used without his

¹⁵¹ *Pollard v. Photographic Co.*, 40 Ch. D. 345 (1888).

¹⁵² *Holmes v. Underwood & Underwood*, 225 App. Div. 360, 233 N.Y.S. 153 (1929); *Klug v. Sheriffs*, 129 Wis. 468, 109 N.W. 656 (1906); *Fitzsimmons v. Olinger Mortuary Ass'n*, 91 Colo. 544, 17 P.2d 535 (1932); *McCreery v. Miller's Grocerteria Co.*, 99 Colo. 499, 64 P.2d 803 (1936); *Bennett v. Gusdorf*, 101 Mont. 39, 53 P.2d 91 (1935).

¹⁵³ *Supra*, text at note 12.

¹⁵⁴ *Supra*, note 14.

¹⁵⁵ It is not impossible that there might be appropriation of the plaintiff's identity, as by impersonation, without the use of either his name or his likeness, and that this would be an invasion of his right of privacy. No such case appears to have arisen.

¹⁵⁶ *Mackenzie v. Soden Mineral Springs Co.*, 27 Abb. N. Cas. 402, 18 N.Y.S. 240 (Sup. Ct. 1891); *Eliot v. Jones*, 66 Misc. 95, 120 N.Y.S. 989 (Sup. Ct. 1910), *aff'd*, 140 App. Div. 911, 125 N.Y.S. 1119 (1910); *Thompson v. Tillford*, 152 App. Div. 928, 137 N.Y.S. 523 (1912); *Brociner v. Radio Wire Television, Inc.*, 15 Misc.2d 843, 183 N.Y.S.2d 743 (Sup. Ct. 1959) (use in union drive for membership held advertising); *Birmingham Broadcasting Co. v. Bell*, 259 Ala. 656, 68 So.2d 314 (1953), *later appeal*, 266 Ala. 266, 96 So.2d 263 (1957); *Kerby v.*

consent to advertise the defendant's product, or to accompany an article sold,¹⁵⁹ to add luster to the name of a corporation,¹⁶⁰ or for other business purposes.¹⁶¹ The statute in New York,¹⁶² and the others patterned after

Hal Roach Studios, 53 Cal. App.2d 207, 127 P.2d 577 (1942); Fairfield v. American Photocopy Equipment Co., 138 Cal. App.2d 82, 291 P.2d 194 (1955).

In the cases cited in the next note, the plaintiff's name accompanied the picture.

¹⁵⁷ Fisher v. Murray M. Rosenberg, Inc., 175 Misc. 370, 23 N.Y.S.2d 677 (Sup. Ct. 1940); Russell v. Marboro Books, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1959); Flores v. Mosler Safe Co., 7 N.Y.2d 276, 164 N.E.2d 853 (1959), *affirming* 7 App. Div. 2d 226, 182 N.Y.S.2d 126 (1959); Kořn v. Rennison, 156 A.2d 476 (Conn. Super. 1959); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); Colgate-Palmolive Co. v. Tullos, 219 F.2d 617 (5th Cir. 1955) (Georgia law); Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952); Continental Optical Co. v. Reed, 119 Ind. App. 643, 86 N.E.2d 306 (1949); Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918); Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364 (1909); Pallas v. Crowley, Milner & Co., 322 Mich. 411, 33 N.W.2d 911 (1948); Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938).

¹⁵⁸ Young v. Greneker Studios, 175 Misc. 1027, 26 N.Y.S.2d 357 (Sup. Ct. 1941) (manikin). In Freed v. Loew's, Inc., 175 Misc. 616, 24 N.Y.S.2d 679 (Sup. Ct. 1940), an artist used the plaintiff's figure as a base, but improved it, and it was held not to be a "portrait or picture" within the New York statute. But in Loftus v. Greenwich Lithographing Co., 192 App. Div. 251, 182 N.Y.S. 428 (1920), the artist used the plaintiff's picture in designing a poster, but made some changes, and the result was held not to fall within the statute. The difference between the two cases may have been one of the extent of the resemblance.

¹⁵⁹ Neyland v. Home Pattern Co., 65 F.2d 363 (2d Cir. 1933) (patterns); Lane v. F. W. Woolworth Co., 171 Misc. 66, 11 N.Y.S.2d 199 (Sup. Ct. 1939), *aff'd*, 256 App. Div. 1065, 12 N.Y.S.2d 352 (1939) (lockets); McNulty v. Press Pub. Co., 136 Misc. 833, 241 N.Y.S. 29 (Sup. Ct. 1930) (cartoon containing photograph); Jansen v. Hilo Packing Co., 202 Misc. 900, 118 N.Y.S.2d 162 (Sup. Ct. 1952), *aff'd*, 282 App. Div. 935, 125 N.Y.S.2d 648 (1952) (popcorn); Miller v. Madison Square Garden Corp., 176 Misc. 714, 28 N.Y.S.2d 811 (Sup. Ct. 1941) (booklet sold at bicycle races).

Also, of course, when there is an unauthorized sale of the picture itself. Kunz v. Boselman, 131 App. Div. 288, 115 N.Y.S. 650 (1909); Wyatt v. James McCreery Co., 126 App. Div. 650, 111 N.Y.S. 86 (1908); Holmes v. Underwood & Underwood, 225 App. Div. 360, 233 N.Y.S. 153 (1929).

¹⁶⁰ Von Thodorovich v. Franz Josef Beneficial Ass'n, 154 Fed. 911 (E.D. Pa. 1907); Edison v. Edison Polyform Mfg. Co., 73 N.J. Eq. 136, 67 Atl. 392 (Ch. 1907). *Cf.* U.S. Life Ins. Co. v. Hamilton, 238 S.W.2d 289 (Tex. Civ. App. 1951), where the use of an employee's name on company letterhead after termination of his employment was said not to invade his right of privacy (not recognized in Texas), but was held to be actionable anyway.

¹⁶¹ Hogan v. A. S. Barnes Co., 114 U.S.P.Q. 314 (1957) (book); Binns v. Vitagraph Co. of America, 210 N.Y. 51, 103 N.E. 1108 (1913) (motion picture); Redmond v. Columbia Pictures Corp., 277 N.Y. 707, 14 N.E.2d 636 (1938), *affirming* 253 App. Div. 708, 1 N.Y.S.2d 643 (same); Stryker v. Republic Pictures Corp., 108 Cal. App.2d 191, 238 P.2d 670 (1951) (same); Ettore v. Philco Television Broadcasting Co., 229 F.2d 481 (3d Cir. 1956) (motion picture exhibited on television); Almind v. Sea Beach Co., 78 Misc. 445, 139 N.Y.S. 559 (Sup. Ct. 1912), *aff'd*, 157 App. Div. 927, 142 N.Y.S. 1106 (1913) (picture of plaintiff entering or leaving street car used to teach other passengers how to do it).

In Donahue v. Warner Bros. Pictures, 194 F.2d 6 (10th Cir. 1952), it was held that a motion picture, based upon the life of a deceased celebrity but partly fictional, and using his name, came within the Utah statute. But in Donahue v. Warner Bros. Pictures Distributing Corp., 2 Utah 2d 256, 272 P.2d 177 (1954), the state court rejected this decision, and indicated that the statute was to be limited to the use of name and likeness in advertising, or the sale of "some collateral commodity." The effect of this is to nullify the federal decision.

it¹⁶³ are limited by their terms to use for advertising or for "purposes of trade," and for that reason must be somewhat more narrow in their scope than the common law of the other states;¹⁶⁴ but in general, there has been no significant difference in their application in the field that they cover.

It is the plaintiff's name as a symbol of his identity that is involved here, and not his name as a mere name. There is, as a good many thousand John Smiths can bear witness, no such thing as an exclusive right to the use of any name. Unless there is some tortious use made of it, any one can be given or assume any name he likes.¹⁶⁵ The Kabotznicks may call themselves Cabots, and the Lovelskis become Lowells, and the ancient proper Bostonian houses can do nothing about it but grieve. Any one may call himself Dwight D. Eisenhower, Henry Ford, Nelson Rockefeller, Eleanor Roosevelt, or Willie Mays, without any liability whatever. It is when he makes use of the name to pirate the plaintiff's identity for some advantage of his own, as by impersonation to obtain credit or secret information,¹⁶⁶ or by posing as the plaintiff's wife,¹⁶⁷ or providing a father for a child on a birth certificate,¹⁶⁸ that he becomes liable. It is in this sense that "appropriation" must be understood.

On this basis, the question before the courts has been first of all whether there has been appropriation of an aspect of the plaintiff's identity. It is not enough that a name which is the same as his is used in a novel,¹⁶⁹ a comic strip,¹⁷⁰ or the title of a corporation,¹⁷¹ unless the context or the

¹⁶³ In Oklahoma, Utah and Virginia. See *supra* notes 52-54.

¹⁶⁴ See, as illustrations of possible differences: *Cardy v. Maxwell*, 9 Misc.2d 329, 169 N.Y.S.2d 547 (Sup. Ct. 1957) (use of name and publicity to extort money not a commercial use within the statute); *Hamilton v. Lumbermen's Mutual Cas. Co.*, 82 So.2d 61 (La. App. 1955) (advertising in name of plaintiff for witnesses of accident); *State ex rel. La Follette v. Hinkle*, 131 Wash. 86, 229 Pac. 317 (1924) (use of name as candidate for office by political party). See also the cases cited *infra*, notes 167 and 168.

¹⁶⁵ *Du Boulay v. Du Boulay*, L.R. 2 P.C. 430 (1869); *Cowley v. Cowley*, [1901] A.C. 450; *Brown Chemical Co. v. Meyer*, 139 U.S. 540 (1891); *Smith v. United States Casualty Co.*, 197 N.Y. 420, 90 N.E. 947 (1910); *Baumann v. Baumann*, 250 N.Y. 382, 165 N.E. 819 (1929); *Bartholomew v. Workman*, 197 Okla. 267, 169 P.2d 1012 (1946).

¹⁶⁶ "While I know of no instance, it can safely be assumed that should *A*, by the use of *B*'s name, together with other characteristics of *B*, successfully impersonate *B*, and thereby obtain valuable recognition or benefits from a third person, a suit by *B* against *A* could be maintained." Green, *The Right of Privacy*, 27 ILL. L. REV. 237, 243-44 (1932).

Three years after these words were published, recovery was allowed in such a case. *Goodyear Tire & Rubber Co. v. Vandergriff*, 52 Ga. App. 662, 184 S.E. 452 (1936), in which defendant, impersonating plaintiff's agent, obtained confidential information from dealers about tire prices.

¹⁶⁷ *Burns v. Stevens*, 236 Mich. 443, 210 N.W. 482 (1926). *Contra*, *Baumann v. Baumann*, 250 N.Y. 382, 165 N.E. 819 (1929); *but cf.* *Niver v. Niver*, 200 Misc. 993, 111 N.Y.S.2d 889 (Sup. Ct. 1951).

¹⁶⁸ *Vanderbilt v. Mitchell*, 72 N.J. Eq. 910, 67 Atl. 97 (Ct. Err. & App. 1907).

¹⁶⁹ *Swacker v. Wright*, 154 Misc. 822, 277 N.Y.S. 296 (Sup. Ct. 1935); *People v. Charles Scribner's Sons*, 205 Misc. 818, 130 N.Y.S.2d 514 (N.Y. City Magis. Ct. 1954).

¹⁷⁰ *Nebb v. Bell Syndicate*, 41 F. Supp. 929 (S.D.N.Y. 1941).

¹⁷¹ *Pfaudler v. Pfaudler Co.*, 114 Misc. 477, 186 N.Y.S. 725 (Sup. Ct. 1920).

circumstances,¹⁷² or the addition of some other element,¹⁷³ indicate that the name is that of the plaintiff. It seems clear that a stage or other fictitious name can be so identified with the plaintiff that he is entitled to protection against its use.¹⁷⁴ On the other hand, there is no liability for the publication of a picture of his hand, leg and foot,¹⁷⁵ his dwelling

¹⁷² In *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 358 (D. Mass. 1934), *affirmed as modified*, 81 F.2d 373 (1st Cir. 1936), the comedian Ed Wynn published, in pamphlet form, humorous skits which he had performed on the radio, in which he made frequent mention of "Graham." It was held that the public would reasonably understand this to refer to Graham McNamee, a radio announcer who had been his foil.

In *Kerby v. Hal Roach Studios*, 53 Cal. App.2d 207, 127 P.2d 577 (1942), defendant, advertising a motion picture, made use of the name Marion Kerby, which was signed to a letter apparently suggesting an assignation. Plaintiff, an actress named Marion Kerby, was the only person of that name listed in the city directory and the telephone book. She had in fact a large number of telephone calls about the letter. It was held that it might reasonably be understood to refer to her.

In *Krieger v. Popular Publications*, 167 Misc. 5, 3 N.Y.S.2d 480 (Sup. Ct. 1938), a complaint alleging that the plaintiff was a professional boxer, and that the defendant had appropriated his name by publishing a story about such a boxer of the same name, which appeared more than a hundred times in twenty pages, was held sufficient to state a cause of action.

On the other hand, in *Levey v. Warner Bros. Pictures*, 57 F. Supp. 40 (S.D.N.Y. 1944), the plaintiff, whose name was Mary, was the divorced first wife of the actor George M. Cohan. The defendant made a motion picture of his life, in which the part of the wife, named Mary, was played by an actress. The part was almost entirely fictional, and there was no mention of the divorce. It was held that this could not reasonably be understood to be a portrayal of the plaintiff.

In such cases the test appears to be that usually applied in cases of defamation, as to whether a reasonable man would understand the name to identify the plaintiff. Compare *Harrison v. Smith*, 20 L.T.R. (n.s.) 713 (1869); *Clare v. Farrell*, 70 F. Supp. 276 (D. Minn. 1947); *Macfadden's Publications v. Turner*, 95 S.W.2d 1027 (Tex. Civ. App. 1936); *Landau v. Columbia Broadcasting System*, 205 Misc. 357, 128 N.Y.S.2d 254 (Sup. Ct. 1954); *Newton v. Grubb*, 155 Ky. 479, 159 S.W. 994 (1913).

¹⁷³ *Mackenzie v. Soden Mineral Springs Co.*, 27 Abb. N. Cas. 402, 18 N.Y.S. 240 (Sup. Ct. 1891) (signature); *Orsini v. Eastern Wine Corp.*, 190 Misc. 235, 73 N.Y.S.2d 426 (Sup. Ct. 1947), *aff'd*, 273 App. Div. 947, 78 N.Y.S.2d 224 (1948), *appeal denied*, 273 App. Div. 996, 79 N.Y.S.2d 870 (1948) (plaintiff's coat of arms).

¹⁷⁴ The only cases have involved construction of the New York statute, as to the use of the plaintiff's "name." In *Davis v. R.K.O. Radio Pictures*, 16 F. Supp. 195 (S.D.N.Y. 1936), where a clairvoyant made use of the name "Cassandra," it was held that this was limited to genuine names. In *Gardella v. Log Cabin Products Co.*, 89 F.2d 891 (2d Cir. 1937), a trade mark case, a dictum disagreed, and said that the statute would cover a stage name. In *People v. Charles Scribner's Sons*, 205 Misc. 818, 130 N.Y.S.2d 514 (N.Y. City Magis. Ct. 1954), it was said that there was no protection of an "assumed" name, and doubt as to a "stage name." In the unreported case of *Van Duren v. Fawcett Publications*, No. 13114, S.D. Cal. 1952, the court regarded the *Davis* case as controlling New York law, and disregarded the *Gardella* case as dictum.

Apart from statutory language, however, it is suggested that the text statement is correct. The suggestion, for example, that Samuel L. Clemens would have a cause of action when that name was used in advertising, but not for the use of "Mark Twain," fully speaks for itself.

¹⁷⁵ *Brewer v. Hearst Pub. Co.*, 185 F.2d 846 (7th Cir. 1950). *Cf. Sellers v. Henry*, 329 S.W.2d 214 (Ky. 1959), and *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956), where there were photographs of unidentifiable dead bodies.

house,¹⁷⁶ his automobile,¹⁷⁷ or his dog,¹⁷⁸ with nothing to indicate whose they are. Nor is there any liability when the plaintiff's character, occupation, and the general outline of his career, with many real incidents in his life, are used as the basis for a figure in a novel who is still clearly a fictional one.¹⁷⁹

Once the plaintiff is identified, there is the further question whether the defendant has appropriated the name or likeness for his own advantage. Under the statutes this must be a pecuniary advantage; but the common law is very probably not so limited.¹⁸⁰ The New York courts were faced very early with the obvious fact that newspapers and magazines, to say nothing of radio, television and motion pictures, are by no means philanthropic institutions, but are operated for profit. As against the contention that everything published by these agencies must necessarily be "for purposes of trade," they were compelled to hold that there must be some closer and more direct connection, beyond the mere fact that the newspaper is sold; and that the presence of advertising matter in adjacent columns does not make any difference.¹⁸¹ Any other conclusion would undoubtedly have been an unconstitutional interference with the freedom of the press.¹⁸² Accordingly, it has been held that the mere incidental mention of the plaintiff's name in a book¹⁸³ or a motion picture¹⁸⁴ or even in a commentary upon news which is part of an advertisement,¹⁸⁵ is not an invasion of his privacy;

¹⁷⁶ *Rozhon v. Triangle Publications*, 230 F.2d 359 (7th Cir. 1956). In accord is the unreported case of *Cole v. Goodyear Tire & Rubber Co.*, App. Dept. Superior Court, San Francisco, Calif., Nov. 21, 1955.

¹⁷⁷ *Branson v. Fawcett Publications*, 124 F. Supp. 429 (E.D. Ill. 1954).

¹⁷⁸ *Lawrence v. Ylla*, 184 Misc. 807, 55 N.Y.S.2d 343 (Sup. Ct. 1945).

¹⁷⁹ *Toscani v. Hersey*, 271 App. Div. 445, 65 N.Y.S.2d 814 (1946). Cf. *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817 (D.D.C. 1955), *aff'd*, 232 F.2d 369 (D.C. Cir. 1956); *Miller v. National Broadcasting Co.*, 157 F. Supp. 240 (D. Del. 1957); *Levey v. Warner Bros. Pictures*, 57 F. Supp. 40 (S.D.N.Y. 1944).

¹⁸⁰ See, for example, *State ex rel. La Follette v. Hinkle*, 131 Wash. 86, 229 Pac. 317 (1924) (use of name as candidate by political party); *Hinisch v. Meier & Frank Co.*, 166 Ore. 482, 113 P.2d 438 (1941) (name signed to telegram urging governor to veto a bill); *Schwartz v. Edrington*, 133 La. 235, 62 So. 660 (1913) (name signed to petition); *Vanderbilt v. Mitchell*, 72 N.J. Eq. 910, 67 Atl. 97 (Ct. Err. & App. 1907) (birth certificate naming plaintiff as father); *Burns v. Stevens*, 236 Mich. 443, 210 N.W. 482 (1926) (posing as plaintiff's common law wife).

¹⁸¹ *Colyer v. Richard K. Fox Pub. Co.*, 162 App. Div. 297, 146 N.Y.S. 999 (1914).

¹⁸² See *Donahue v. Warner Bros. Picture Distributing Corp.*, 2 Utah 2d 256, 272 Pac. 177 (1954).

¹⁸³ *Damron v. Doubleday, Doran & Co.*, 133 Misc. 302, 231 N.Y.S. 444 (Sup. Ct. 1928), *aff'd*, 226 App. Div. 796, 234 N.Y.S. 773 (1929); *Shubert v. Columbia Pictures Corp.*, 189 Misc. 734, 72 N.Y.S.2d 851 (Sup. Ct. 1947), *aff'd*, 274 App. Div. 571, 80 N.Y.S.2d 724 (1948), *appeal denied*, 274 App. Div. 880, 83 N.Y.S.2d 233 (1948).

¹⁸⁴ *Stillman v. Paramount Pictures Corp.*, 1 Misc. 2d 108, 147 N.Y.S.2d 504 (Sup. Ct. 1956), *aff'd*, 2 App. Div. 2d 18, 153 N.Y.S.2d 190 (1956), *appeal denied*, 2 App. Div. 2d 886, 157 N.Y.S.2d 899 (1956).

¹⁸⁵ *Wallach v. Bacharach*, 192 Misc. 979, 80 N.Y.S.2d 37 (Sup. Ct. 1948), *aff'd*, 274 App. Div. 919, 84 N.Y.S.2d 894 (1948).

In accord is *O'Brien v. Public Sales Co.*, 412 F.2d 1674 (5th Cir. 1941), where the court

nor is the publication of a photograph¹⁸⁶ or a newsreel¹⁸⁷ in which he incidentally appears.

This liberality toward the publishers was brought to an abrupt termination, however, when cases began to appear in which false statements were made. It was held quite early in New York¹⁸⁸ that the publication of fiction concerning a man is a use of his name for purposes of trade, and that in such a case the mere sale of the article is enough in itself to provide the commercial element. It follows that when the name or the likeness is accompanied by false statements about the plaintiff,¹⁸⁹ or he is placed in a false light before the public,¹⁹⁰ there is such a use. The result of this rule for the encouragement of accuracy in the press is that the New York court has in fact recognized and applied the third form of invasion of privacy¹⁹¹ under a statute which was directed only at the fourth.

It seems sufficiently evident that appropriation is quite a different matter from intrusion, disclosure of private facts, or a false light in the public eye. The interest protected is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity. It seems quite pointless to dispute over whether such a right is to be classified as "property."¹⁹² If it is not, it is at least, once it is protected by the law, a right of value upon which the plaintiff can capitalize by selling licenses. Its proprietary nature is clearly indicated by a decision of the Second Circuit¹⁹³ that an exclusive license has what has been called

refused to find a commercial use in the publication of the pictures of an all-American football team on a calendar advertising the defendant's beer, with no suggestion that the team endorsed it.

¹⁸⁶ *Dallessandro v. Henry Holt & Co.*, 4 App. Div. 2d 470, 166 N.Y.S.2d 805 (1957) (plaintiff's photograph while conversing with a priest who was the subject of the book).

¹⁸⁷ *Humiston v. Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N.Y.S. 752 (1919); *Merle v. Sociological Research Film Corp.*, 166 App. Div. 376, 152 N.Y.S. 829 (1915) (picture of plaintiff's factory showing his name).

¹⁸⁸ *Binns v. Vitagraph Co. of America*, 147 App. Div. 783, 132 N.Y.S. 237 (1911), *aff'd*, 210 N.Y. 51, 103 N.E. 1108 (1913).

¹⁸⁹ *Holmes v. Underwood & Underwood*, 225 App. Div. 360, 233 N.Y.S. 153 (1929); *Sutton v. Hearst Corp.*, 277 App. Div. 155, 98 N.Y.S.2d 233 (1950), *appeal denied*, 297 App. Div. 873, 98 N.Y.S.2d 589 (1950); *Garner v. Triangle Publications*, 97 F. Supp. 546 (S.D.N.Y. 1951).

¹⁹⁰ *Semler v. Ultem Publications*, 170 Misc. 551, 9 N.Y.S.2d 319 (N.Y. City Ct. 1938); *Thompson v. Close-Up, Inc.*, 277 App. Div. 848, 98 N.Y.S.2d 300 (1950); *Metzger v. Dell Pub. Co.*, 207 Misc. 182, 136 N.Y.S.2d 888 (Sup. Ct. 1955); *Martin v. Johnson Pub. Co.*, 157 N.Y.S.2d 409 (Sup. Ct. 1956). These were all cases involving the use of plaintiff's picture to illustrate articles with which he had no connection.

¹⁹¹ *Supra*, text at notes 126-50.

¹⁹² See *Rhodes v. Sperry & Hutchinson Co.*, 193 N.Y. 223, 85 N.E. 1097 (1908); *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952); *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845 (N.D. Cal. 1939); *Hull v. Curtis Pub. Co.*, 182 Pa. Super. 86, 125 A.2d 644 (1956); *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (1939); *Ludwig, "Peace of Mind" in 48 Pieces vs. Uniform Right of Privacy*, 32 MINN. L. REV. 734 (1948).

¹⁹³ *Haelan Laboratories v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), *reversing Bowman Gum Co. v. Topps Chewing Gum, Inc.*, 103 F. Supp. 944 (E.D.N.Y. 1952).

a "right of publicity,"¹⁹⁴ which entitles him to enjoin the use of the name or likeness by a third person. Although this decision has not yet been followed,¹⁹⁵ it would seem clearly to be justified.

V

COMMON FEATURES

Judge Biggs has described the present state of the law of privacy as "still that of a haystack in a hurricane."¹⁹⁶ Disarray there certainly is; but almost all of the confusion is due to a failure to separate and distinguish these four forms of invasion, and to realize that they call for different things. Typical is the bewilderment which a good many members of the bar have expressed over the holdings in the two *Gill* cases in California. Both of them involved publicity given to the same photograph, taken while the plaintiff was embracing his wife in the Farmers' Market in Los Angeles. In one of them,¹⁹⁷ which involved only the question of disclosure by publishing the picture, it was held that there was nothing private about it, since it was a part of the public scene in a public place. In the other,¹⁹⁸ which involved the use of the picture to illustrate an article on the right and the wrong kind of love, with the innuendo that this was the wrong kind, liability was found for placing the plaintiff in a false light in the public eye. The two conclusions were based entirely upon the difference between the two branches of the tort.

Taking them in order—intrusion, disclosure, false light, and appropriation—the first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest. Obviously this is an area in

¹⁹⁴ Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954); Notes, 62 YALE L.J. 1123 (1953); 41 GEO. L.J. 583 (1953).

¹⁹⁵ The "right of publicity" was held not to exist in California in *Strickler v. National Broadcasting Co.*, 167 F. Supp. 68 (S.D. Cal. 1958). It was rejected in *Pekas Co. v. Leslie*, 52 N.Y.L.J. 1864 (Sup. Ct. 1915).

It appears to have been foreshadowed when relief was granted on other grounds in *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 358 (D. Mass. 1934), *modified* in 81 F.2d 373 (1st Cir. 1936); *Liebig's Extract of Meat Co. v. Liebig Extract Co.*, 180 Fed. 68 (2d Cir. 1910). See also *Madison Square Garden Corp. v. Universal Pictures Co.*, 255 App. Div. 459, 7 N.Y.S.2d 845 (1938).

¹⁹⁶ In *Ettore v. Philco Television Broadcasting Co.*, 229 F.2d 481 (3d Cir. 1956).

¹⁹⁷ *Gill v. Hearst Pub. Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1953). The complaint alleged the publication of the picture in connection with the article involved in the other case, but failed to plead that the defendant had authorized it. A demurrer was sustained, but the plaintiff was permitted to amend.

¹⁹⁸ *Gill v. Curtis Pub. Co.*, 38 Cal. 2d 273, 239 P.2d 630 (1952).

which one must tread warily and be on the lookout for bogs. Nor is the difficulty decreased by the fact that quite often two or more of these forms of invasion may be found in the same case, and quite conceivably all four.¹⁹⁹

There has nevertheless been a good deal of consistency in the rules that have been applied to the four disparate torts under the common name. As to any one of the four, it is agreed that the plaintiff's right is a personal one, which does not extend to the members of his family,²⁰⁰ unless, as is obviously possible,²⁰¹ their own privacy is invaded along with his. The right is not assignable;²⁰² and while the cause of action may²⁰³ or may not²⁰⁴ survive after his death, according to the survival rules of the particular state, there is no common law right of action for a publication concerning one who is already dead.²⁰⁵ The statutes of Oklahoma, Utah and Virginia,²⁰⁶ however, expressly provide for such an action. It seems to be generally agreed that the right of privacy is one pertaining only to indi-

¹⁹⁹ *E.g.*, the defendant breaks into the plaintiff's home, steals his photograph, and publishes it with false statements about the plaintiff in his advertising.

²⁰⁰ *Murray v. Gast Lithographic & Engraving Co.*, 8 Misc. 36, 28 N.Y.S. 271 (N.Y.C.P. 1894); *Rozhon v. Triangle Publications*, 230 F.2d 359 (7th Cir. 1956); *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956); *Bremmer v. Journal-Tribune Co.*, 247 Iowa 817, 76 N.W.2d 762 (1956); *Kelly v. Johnson Pub. Co.*, 160 Cal. App. 2d 718, 325 P.2d 659 (1958). See also the cases cited *infra*, note 202.

²⁰¹ *Walker v. Whittle*, 83 Ga. App. 445, 64 S.E.2d 87 (1951) (intrusion into home to arrest husband). See *Coverstone v. Davies*, 38 Cal. 2d 315, 239 P.2d 876 (1952); *Smith v. Doss*, 251 Ala. 250, 37 So. 2d 118 (1948); and *cf. Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 195 (1930); *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912).

²⁰² *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*, 78 F.2d 763 (5th Cir. 1939); *Wyatt v. Hall's Portrait Studios*, 71 Misc. 199, 128 N.Y.S. 247 (Sup. Ct. 1911); *Murray v. Gast Lithographic & Engraving Co.*, 8 Misc. 36, 28 N.Y.S. 271 (N.Y.C.P. 1894); *Rhodes v. Sperry & Hutchinson Co.*, 193 N.Y. 223, 85 N.E. 1097 (1908). *Cf. Von Thodorovich v. Franz Josef Beneficial Ass'n*, 154 Fed. 911 (E.D. Pa. 1907) (Austrian diplomat cannot maintain action on behalf of Emperor of Austria).

²⁰³ *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P.2d 133 (1945).

²⁰⁴ *Wyatt v. Hall's Portrait Studios*, 71 Misc. 199, 128 N.Y.S. 247 (Sup. Ct. 1911); *Lunceford v. Wilcox*, 88 N.Y.S.2d 225 (N.Y. City Ct. 1949).

²⁰⁵ *Sehuyler v. Curtis*, 147 N.Y. 434, 42 N.E. 22 (1895); *In re Hart's Estate*, 193 Misc. 884, 83 N.Y.S.2d 635 (Surr. Ct. 1948); *Schumann v. Loew's, Inc.*, 199 Misc. 38, 102 N.Y.S.2d 572 (Sup. Ct. 1951), *aff'd*, 135 N.Y.S.2d 361 (Sup. Ct. 1954); *Rozhon v. Triangle Publications*, 230 F.2d 359 (7th Cir. 1956); *Abernathy v. Thornton*, 263 Ala. 496, 83 So.2d 235 (1955); *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (1939); *Kelly v. Johnson Pub. Co.*, 160 Cal. App. 2d 718, 325 P.2d 659 (1958); *James v. Screen Gems, Inc.*, 174 Cal. App. 2d 650, 344 P.2d 799 (1959); *Kelley v. Post Pub. Co.*, 327 Mass. 275, 98 N.E.2d 286 (1951); *Bartholomew v. Workman*, 197 Okl. 267, 169 P.2d 1012 (1946). *Cf. Atkinson v. John E. Doherty & Co.*, 121 Mich. 372, 80 N.W. 285 (1899).

As in the case of living persons, however, a publication concerning one who is dead may invade the separate right of privacy of surviving relatives. See the last three cases cited *supra* and note 198.

²⁰⁶ *Supra*, notes 52-54. See *Donahue v. Warner Bros. Pictures*, 194 F.2d 6 (10th Cir. 1952); *Donahue v. Warner Bros. Pictures Distributing Corp.*, 2 Utah 2d 256, 272 P.2d 177 (1954).

viduals, and that a corporation²⁰⁷ or a partnership²⁰⁸ cannot claim it as such, although either may have an exclusive right to the use of its name, which may be protected upon some other basis such as that of unfair competition.²⁰⁹

So far as damages are concerned, there is general agreement that the plaintiff need not plead or prove special damages,²¹⁰ and that in this respect the action resembles one for libel or slander per se. The difficulty of measuring the damages is no more reason for denying relief here than in a defamation action.²¹¹ Substantial damages may be awarded for the presumed mental distress inflicted, and other probable harm, without proof.²¹² If there is evidence of special damage, such as resulting illness, or unjust enrichment of the defendant,²¹³ or harm to the plaintiff's own commercial interests,²¹⁴ it can be recovered. Punitive damages can be awarded upon the same basis as in other torts, where a wrongful motive or state of mind appears,²¹⁵ but not in cases where the defendant has acted innocently, as for example in the belief that the plaintiff has given his consent.²¹⁶

²⁰⁷ *Jaggard v. R. H. Macy & Co.*, 176 Misc. 88, 26 N.Y.S.2d 829 (Sup. Ct. 1941), *aff'd*, 265 App. Div. 15, 37 N.Y.S.2d 570 (1942); *Shubert v. Columbia Pictures Corp.*, 189 Misc. 734, 72 N.Y.S.2d 851 (Sup. Ct. 1947), *aff'd*, 274 App. Div. 571, 80 N.Y.S.2d 724 (1948), *appeal denied*, 274 App. Div. 880, 83 N.Y.S.2d 233 (1948); *Maysville Transit Co. v. Ort*, 296 Ky. 524, 177 S.W.2d 369 (1944); *United States v. Morton*, 338 U.S. 632 (1950).

²⁰⁸ *Rosenwasser v. Ogoglia*, 172 App. Div. 107, 158 N.Y.S. 56 (1916).

²⁰⁹ *Vassar College v. Loose-Wiles Biscuit Co.*, 197 Fed. 982 (W.D. Mo. 1912).

²¹⁰ *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P.2d 133 (1945); *Fairfield v. American Photocopy Equipment Co.*, 138 Cal. App.2d 82, 291 P.2d 194 (1955); *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243 (1945); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532 (1918); *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909); *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911); *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938).

²¹¹ *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927); *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1951); *Hinish v. Meier & Frank Co.*, 166 Ore. 482, 113 P.2d 438 (1941); *Fairfield v. American Photocopy Equipment Co.*, 138 Cal. App.2d 82, 291 P.2d 194 (1955).

²¹² *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Sutherland v. Kroger Co.*, 110 S.E.2d 716 (W. Va. 1959). In *Cason v. Baskin*, 159 Fla. 31, 30 So.2d 635 (1947), where there was evidence that the plaintiff had suffered no great distress, and had gained weight, the recovery was limited to nominal damages.

²¹³ *Bunnell v. Keystone Varnish Co.*, 254 App. Div. 885, 5 N.Y.S.2d 415 (1938), *affirming* 167 Misc. 707, 4 N.Y.S.2d 601 (Sup. Ct. 1938).

²¹⁴ *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949); *Manger v. Kree Institute of Electrolysis*, 233 F.2d 5 (2d Cir. 1956); *Hogan v. A. S. Barnes & Co., Inc.*, 114 U.S.P.Q. 314 (Pa. C.P. 1957). Likewise, the fact that the plaintiff has benefited in his profession by the publicity may be considered in mitigation, and may reduce his recovery to nominal damages. *Harris v. H. W. Gossard Co.*, 194 App. Div. 688, 185 N.Y.S. 861 (1921).

²¹⁵ *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911); *Hinish v. Meier & Frank Co.*, 166 Ore. 482, 113 P.2d 438 (1941); *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952).

²¹⁶ *Fisher v. Murray M. Rosenberg, Inc.*, 175 Misc. 370, 23 N.Y.S.2d 677 (Sup. Ct. 1940); *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942). But in *Myers v. U.S. Camera*

At an early stage of its existence, the right of privacy came into head-on collision with the constitutional guaranty of freedom of the press. The result was the slow evolution of a compromise between the two. Much of the litigation over privacy has been concerned with this compromise, which has involved two closely related, special and limited privileges arising out of the rights of the press.²¹⁷ One of these is the privilege of giving further publicity to already public figures. The other is that of giving publicity to news, and other matters of public interest. The one primarily concerns the person to whom publicity is given; the other the event, fact or other subject-matter. They are, however, obviously only different phases of the same thing.

VI

PUBLIC FIGURES AND PUBLIC INTEREST

A public figure has been defined as a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a "public personage."²¹⁸ He is, in other words, a celebrity—one who by his own voluntary efforts has succeeded in placing himself in the public eye. Obviously to be included in this category are those who have achieved at least some degree of reputation²¹⁹ by appearing before the public, as in the case of an actor,²²⁰ a professional baseball

Pub. Corp., 9 Misc.2d 765, 167 N.Y.S.2d 771 (N.Y. City Ct. 1957), punitive damages were allowed where the defendant "knew or should have known."

In *Harlow v. Buno Co.*, 36 Pa. D.&C. 101 (C.P. 1939), the fact that the defendant had acted in good faith under a forged consent was held to defeat the action entirely. This appears to be wrong. *Cf. Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P.2d 577 (1942), where the defendant made use of the plaintiff's name without even being aware of her existence.

²¹⁷ In *Themo v. New England Newspaper Pub. Co.*, 306 Mass. 54, 27 N.E.2d 753 (1940), it was said that these privileges are not technically defenses, and the absence of a privileged occasion must be pleaded and proved by the plaintiff. This is the only case found bearing on the question; but it may be doubted that other jurisdictions will agree.

²¹⁸ *Cason v. Baskin*, 159 Fla. 31, 30 So.2d 635, 638 (1947).

²¹⁹ The question of degree has not been discussed in the cases. In *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P.2d 577 (1942), the plaintiff was an actress, concert singer and monologist, so obscure that the defendant's studio had never heard of her. She was allowed to recover for appropriation of her name and a false light before the public, without mention of whether she was a public figure, which obviously would have made no difference in the decision. It may be suggested that even an obscure entertainer may be a public figure to some limited extent, but that the field in which she may be given further publicity may be more narrowly limited. See *infra*, text at notes 282-84.

²²⁰ *Paramount Pictures v. Leader Press*, 24 F. Supp. 1004 (W.D. Okl. 1938), *reversed on other grounds* in 106 F.2d 229 (10th Cir. 1939); *Chaplin v. National Broadcasting Co.*, 15 F.R.D. 134 (S.D.N.Y. 1953).

player,²²¹ a pugilist,²²² or any other entertainer.²²³ The list is, however, broader than this. It includes public officers,²²⁴ famous inventors²²⁵ and explorers,²²⁶ war heroes²²⁷ and even ordinary soldiers,²²⁸ an infant prodigy,²²⁹ and no less a personage than the Grand Exalted Ruler of a lodge.²³⁰ It includes, in short, any one who has arrived at a position where public attention is focused upon him as a person. It seems clear, however, that such public stature must already exist before there can be any privilege arising out of it, and that the defendant, by directing attention to one who is obscure and unknown, cannot himself create a public figure.²³¹

Such public figures are held to have lost, to some extent at least, their right of privacy. Three reasons are given, more or less indiscriminately, in the decisions: that they have sought publicity and consented to it, and so cannot complain of it; that their personalities and their affairs already have become public, and can no longer be regarded as their own private business; and that the press has a privilege, guaranteed by the Constitution, to inform the public about those who have become legitimate matters of public interest. On one or another of these grounds, and sometimes all, it is held that there is no liability when they are given additional publicity,

²²¹ *Ruth v. Educational Films*, 194 App. Div. 893, 184 N.Y.S. 948 (1920); see *Jansen v. Hilo Packing Co.*, 202 Misc. 900, 118 N.Y.S.2d 162 (Sup. Ct. 1952), *aff'd*, 282 App. Div. 935, 125 N.Y.S.2d 648 (1953). *Cf. O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941) (all-American football player).

²²² *Jeffries v. New York Evening Journal Pub. Co.*, 67 Misc. 570, 124 N.Y.S.780 (Sup. Ct. 1910); *Cohen v. Marx*, 94 Cal. App.2d 704, 211 P.2d 320 (1950); *Oma v. Hillman Periodicals*, 281 App. Div. 240, 118 N.Y.S.2d 720 (1953).

²²³ *Colyer v. Richard K. Fox Pub. Co.*, 162 App. Div. 297, 146 N.Y.S. 999 (1914) (high diver); *Koussevitzky v. Allen, Towne & Heath*, 188 Misc. 479, 68 N.Y.S.2d 779 (Sup. Ct. 1947), *aff'd*, 272 App. Div. 759, 69 N.Y.S.2d 432 (1947) (symphony conductor); *Gavrilov v. Duell, Sloan & Pierce*, 84 N.Y.S.2d 320 (Sup. Ct. 1948) (dancer); *Redmond v. Columbia Pictures Corp.*, 277 N.Y. 707, 14 N.E.2d 636 (1938), *affirming* 253 App. Div. 708, 1 N.Y.S.2d 643 (trick shot golfer). *Cf. Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952) (performing animal act at football game); *Goelet v. Confidential, Inc.*, 5 App. Div. 2d 226, 171 N.Y.S.2d 223 (1958) (unspecified).

²²⁴ *Martin v. Dorton*, 210 Misc. 668, 50 So.2d 391 (1951) (sheriff); *Hull v. Curtis Pub. Co.*, 182 Pa. Super. 86, 125 A.2d 644 (1956) (arrest by policeman).

²²⁵ *Corliss v. E. W. Walker Co.*, 64 Fed. 280 (D. Mass. 1894). *Cf. Thompson v. Curtis Pub. Co.*, 193 F.2d 953 (3d Cir. 1952).

²²⁶ *Smith v. Suratt*, 7 Alaska 416 (1926).

²²⁷ *Stryker v. Republic Pictures Corp.*, 108 Cal. App.2d 191, 238 P.2d 670 (1951). *Accord, Molony v. Boy Comics Publishers*, 277 App. Div. 166, 98 N.Y.S.2d 119 (1950), *reversing* 188 Misc. 450, 65 N.Y.S.2d 173 (Sup. Ct. 1946) (hero in disaster).

²²⁸ See *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949).

²²⁹ *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir. 1940), *affirming* 34 F. Supp. 19 (S.D. N.Y. 1938).

²³⁰ *Wilson v. Brown*, 189 Misc. 79, 73 N.Y.S.2d 587 (Sup. Ct. 1947).

²³¹ *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1945), *second appeal*, 159 Fla. 31, 30 So. 2d 635 (1947). A book, *Cross Creek*, which became a best seller, was written about the back woods people of Florida, and an obscure local woman was described in embarrassing personal detail. It was held that she did not become a public figure.

as to matters reasonably within the scope of the public interest which they have aroused.²³²

The privilege of giving publicity to news, and other matters of public interest, arises out of the desire and the right of the public to know what is going on in the world, and the freedom of the press and other agencies of information to tell them. "News" includes all events and items of information which are out of the ordinary humdrum routine, and which have "that indefinable quality of information which arouses public attention."²³³ To a very great extent the press, with its experience or instinct as to what its readers will want, has succeeded in making its own definition of news. A glance at any morning newspaper will sufficiently indicate the content of the term. It includes homicide²³⁴ and other crimes,²³⁵ arrests²³⁶ and police raids,²³⁷ suicides,²³⁸ marriages²³⁹ and divorces,²⁴⁰ accidents,²⁴¹ a death from the use of narcotics,²⁴² a woman with a rare disease,²⁴³ the birth of a child to a twelve year old girl,²⁴⁴ the filing of a libel suit,²⁴⁵ a report to the police concerning the escape of a black panther,²⁴⁶ the reappearance of one supposed to have been murdered years ago,²⁴⁷ and undoubtedly many other similar matters of genuine, if more or less deplorable, popular appeal.²⁴⁸

²³² See cases cited *supra*, notes 221-31.

²³³ *Sweenek v. Pathe News*, 16 F. Supp. 746, 747 (E.D.N.Y. 1936).

²³⁴ *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W.2d 972 (1929); *Bremmer v. Journal-Tribune Co.*, 247 Iowa 817, 76 N.W.2d 762 (1956); *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956); *Jenkins v. Dell Pub. Co.*, 143 F. Supp. 953 (W.D. Pa. 1956), *aff'd*, 251 F.2d 447 (3d Cir. 1958); *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817 (D.D.C. 1955), *aff'd*, 232 F.2d 369 (D.C. Cir. 1956).

²³⁵ *Elmhurst v. Pearson*, 153 F.2d 467 (D.C. Cir. 1946) (sedition); *Miller v. National Broadcasting Co.*, 157 F. Supp. 240 (D. Del. 1957) (robbery); *Hillman v. Star Pub. Co.*, 64 Wash. 691, 117 Pac. 594 (1911) (mail fraud).

²³⁶ *Frith v. Associated Press*, 176 F. Supp. 671 (E.D.S.C. 1959) (mob action); *Coverstone v. Davies*, 38 Cal.2d 315, 239 P.2d 876 (1952) ("hot-rod" race); *Hull v. Curtis Pub. Co.*, 182 Pa. Super. 86, 125 A.2d 644 (1956).

²³⁷ *Jacova v. Southern Radio & Television Co.*, 83 So.2d 34 (Fla. 1955). *Cf. Schnabel v. Meredith*, 378 Pa. 609, 107 A.2d 860 (1954).

²³⁸ *Metter v. Los Angeles Examiner*, 35 Cal. App.2d 304, 95 P.2d 491 (1939); and see *Samuel v. Curtis Pub. Co.*, 122 F. Supp. 327 (N.D. Cal. 1954).

²³⁹ *Aquino v. Bulletin Co.*, 154 A.2d 422, 190 Pa. Super. 528 (1959).

²⁴⁰ *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948); *Aquino v. Bulletin Co.*, 154 A.2d 422, 190 Pa. Super. 528 (1959).

²⁴¹ *Kelley v. Post Pub. Co.*, 327 Mass. 275, 98 N.E.2d 286 (1951). *Cf. Strickler v. National Broadcasting Co.*, 167 F. Supp. 68 (S.D. Cal. 1958) (crisis in airplane).

²⁴² *Rozbon v. Triangle Publications*, 230 F.2d 539 (7th Cir. 1956). *Cf. Abernathy v. Thornton*, 263 Ala. 496, 83 So.2d 235 (1955) (death of criminal paroled for federal offense).

²⁴³ See *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942).

²⁴⁴ *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956).

²⁴⁵ *Langford v. Vanderbilt University*, 199 Tenn. 389, 287 S.W.2d 32 (1956).

²⁴⁶ *Smith v. National Broadcasting Co.*, 138 Cal. App.2d 807, 292 P.2d 600 (1956).

²⁴⁷ *Smith v. Doss*, 251 Ala. 250, 37 So.2d 118 (1948).

²⁴⁸ See, as to unspecified news, *Morse v. United Press Pub. Co.*, 89 Misc.2d 78, 109 N.Y.S. 963 (Sup. Ct. 1968); *Themo v. New England Newspaper Pub. Co.*, 306 Mass. 54, 27 N.E.2d 753 (1940).

The privilege of enlightening the public is not, however, limited to the dissemination of news in the sense of current events. It extends also to information or education, or even entertainment and amusement,²⁴⁹ by books, articles, pictures, films and broadcasts concerning interesting phases of human activity in general,²⁵⁰ and the reproduction of the public scene as in newsreels and travelogues.²⁵¹ In determining where to draw the line the courts have been invited to exercise nothing less than a power of censorship over what the public may be permitted to read; and they have been understandably liberal in allowing the benefit of the doubt.

Caught up and entangled in this web of news and public interest are a great many people who have not sought publicity, but indeed, as in the case of the accused criminal, have tried assiduously to avoid it. They have nevertheless lost some part of their right of privacy. The misfortunes of the frantic woman whose husband is murdered before her eyes,²⁵² or the innocent bystander who is caught in a raid on a cigar store and mistaken by the police for the proprietor,²⁵³ can be broadcast to the world, and they have no remedy. Such individuals become public figures²⁵⁴ for a season; and "until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains

²⁴⁹ *Ruth v. Educational Films*, 194 App. Div. 893, 184 N.Y.S. 948 (1920) (baseball); *Sweenek v. Pathe News*, 16 F. Supp. 746 (E.D.N.Y. 1936) (group of fat women-reducing with novel and comical apparatus); and see *Jenkins v. Dell Pub. Co.*, 143 F. Supp. 953 (W.D. Pa. 1956), *aff'd*, 251 F.2d 447 (3d Cir. 1958).

²⁵⁰ *People ex rel. Stern v. Robert M. McBride & Co.*, 159 Misc. 5, 288 N.Y.S. 501 (N.Y. City Magis. Ct. 1936) (strike-breaking); *Kline v. Robert M. McBride & Co.*, 170 Misc. 974, 11 N.Y.S.2d 674 (Sup. Ct. 1939) (same); *Samuel v. Curtis Pub. Co.*, 122 F. Supp. 327 (N.D. Cal. 1954) (suicide); *Hogan v. A. S. Barnes Co.*, 114 U.S.P.Q. 314 (Pa. C.P. 1957) (golf); *Oma v. Hillman Periodicals*, 281 App. Div. 240, 118 N.Y.S.2d 720 (1953) (boxing); *Delinger v. American News Co.*, 6 App. Div. 2d 1027, 178 N.Y.S.2d 231 (1958) (muscular development and virility).

²⁵¹ *Humiston v. Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N.Y.S. 752 (1919). *Cf. Gill v. Hearst Pub. Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1953) (market place); *Berg. v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948) (photograph in courtroom); *Lyles v. State*, 330 P.2d 734 (Okl. Cr. 1958) (television in courtroom); *Middleton v. News Syndicate Co.*, 162 Misc. 516, 295 N.Y.S. 120 (Sup. Ct. 1937) ("inquiring photographer" on the street).

²⁵² *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W.2d 972 (1929).

²⁵³ *Jacova v. Southern Radio & Television Co.*, 83 So. 2d 34 (Fla. 1955).

²⁵⁴ In theory the privilege as to public figures is to depict the person, while that as to news is to report the event. In practice the two often become so merged as to be inseparable. See, for example, *Elmhurst v. Pearson*, 153 F.2d 467 (D.D.C. 1946) (place of employment of defendant in sedition trial); *Martin v. Dorton*, 210 Miss. 668, 50 So. 2d 391 (1951) (mass meeting complaining of conduct of sheriff); *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P.2d 670 (1951) (military career of war hero); *Molony v. Boy Comics Publishers*, 277 App. Div. 166, 98 N.Y.S.2d 119 (1950), *reversing* 188 Misc. 450, 65 N.Y.S.2d 173 (Sup. Ct. 1946) (conduct of hero in disaster). The outstanding example in our time has been the popular interest in Charles A. Lindbergh, after he flew the Atlantic.

and victims.²⁵⁵ The privilege extends even to identification and some reasonable depiction of the individual's family,²⁵⁶ although there must certainly be limits as to their own private lives into which the publisher cannot go.²⁵⁷

What is called for, in short, is some logical connection between the plaintiff and the matter of public interest. The most extreme cases of the privilege are those in which the likeness of an individual is used to illustrate a book or an article on some general topic, rather than any specific event. Where this is appropriate and pertinent, as where the picture of a strike-breaker is used to illustrate a book on strike-breaking,²⁵⁸ or that of a Hindu illusionist is employed to illustrate an article on the Indian rope trick,²⁵⁹ it has been held that there is no liability, since the public interest justifies any invasion of privacy. On the other hand, where the illustration is not pertinent, and a connection is suggested which does not exist, as where the face of an honest taxi driver appears in connection with an article on the cheating practices of the trade,²⁶⁰ or the picture of a decent model illustrates one on "man hungry" women,²⁶¹ the plaintiff is placed in a false light, and may recover on that basis. The difference is well brought out by two cases in California and New York. In one of them²⁶²

²⁵⁵ RESTATEMENT, TORTS § 867, comment c (1939).

²⁵⁶ *Smith v. Doss*, 251 Ala. 250, 37 So.2d 118 (1948) (family of man who disappeared, was believed murdered, died, and his body was brought home); *Coverstone v. Davies*, 38 Cal. 2d 315, 239 P.2d 876 (1952) (father of boy arrested for "hot-rod" race); *Kelly v. Post Pub. Co.*, 327 Mass. 275, 98 N.E.2d 286 (1951) (parents of girl killed in accident); *Aquino v. Bulletin Co.*, 190 Pa. Super. 528, 154 A.2d 422 (1959) (parents of girl secretly married and then divorced); *Jenkins v. Dell Pub. Co.*, 143 F. Supp. 952 (W.D.Pa. 1956), *aff'd*, 251 F.2d 447 (3d Cir. 1958) (family of boy kicked to death by hoodlums); *Hillman v. Star Pub. Co.*, 64 Wash. 691, 117 Pac. 594 (1911) (son of man arrested for mail fraud). *Cf. Milner v. Red River Valley Pub. Co.*, 249 S.W.2d 227 (Tex. Civ. App. 1952) (family of man killed in accident).

²⁵⁷ Such a limitation is indicated in *Martin v. New Metropolitan Fiction*, 139 Misc. 290, 248 N.Y.S. 359 (Sup. Ct. 1931), *aff'd*, 234 App. Div. 904, 254 N.Y.S. 1015 (1931), where a mother, attending her son's criminal trial, was depicted as broken-hearted in a news story. On the pleadings, the court refused to dismiss because it could not say that evidence could not be produced which would go beyond the privilege.

²⁵⁸ *People ex rel. Stern v. Robert M. McBride & Co.*, 159 Misc. 5, 288 N.Y.S. 501 (N.Y. City Magis. Ct. 1936); *Kline v. Robert M. McBride & Co.*, 170 Misc. 974, 11 N.Y.S.2d 674 (Sup. Ct. 1939).

²⁵⁹ *Sarat Lahiri v. Daily Mirror*, 162 Misc. 776, 295 N.Y.S. 382 (Sup. Ct. 1937). *Accord*, *Delinger v. American News Co.*, 6 App. Div. 2d 1027, 178 N.Y.S.2d 231 (1958) (physical training instructor, article on relation of muscular development and virility); *Dallessandro v. Henry Holt & Co.*, 4 App. Div. 2d 470, 166 N.Y.S.2d 805 (1957) (picture of plaintiff conversing with priest who was subject of book); *Oma v. Hillman Periodicals*, 281 App. Div. 240, 118 N.Y.S.2d 720 (1953) (boxer, article on boxing); *Gavrillov v. Duell, Sloan & Pierce*, 84 N.Y.S.2d 320 (Sup. Ct. 1948), *aff'd*, 276 App. Div. 826, 93 N.Y.S.2d 715 (dancer, book on dancing).

²⁶⁰ *Peay v. Curtis Pub. Co.*, 78 F. Supp. 305 (D.D.C. 1948).

²⁶¹ *Martin v. Johnson Pub. Co.*, 157 N.Y.S.2d 409 (Sup. Ct. 1956). For other examples, see *supra* notes 137-42.

²⁶² *Samuel v. Curtis Pub. Co.*, 122 F. Snpp. 327 (N.D. Cal. 1954).

a photograph of the plaintiff arguing with a would-be suicide on a bridge was held properly used to illustrate an article on suicide. In the other²⁶³ the picture of a boy in the slums, taken while he was innocently talking baseball on the street, was used with an article about juvenile delinquency, entitled "Gang Boy," and he was allowed to recover.

VII

LIMITATIONS

It is clear, however, that the public figure loses his right of privacy only to a limited extent,²⁶⁴ and that the privilege of reporting news and matters of public interest is likewise limited. The decisions indicate very definitely that both privileges apply only to one branch of the tort, that of disclosure of private facts about the individual. The famous motion picture actress who "wants to be alone"²⁶⁵ unquestionably has as much right as any one else to be free from intrusion into her home or her bank account; and so has the individual whose divorce is the sensation of the day.²⁶⁶ The celebrity can undoubtedly complain of the appropriation of his name or likeness for purposes of advertising, or the sale of a product,²⁶⁷ and so can the victim of an accident.²⁶⁸ It was once held that even the Emperor of Austria had a right to object when his name was bestowed on an insurance company.²⁶⁹ And while it seems to be agreed that the courts are not arbiters of taste, and the fact that a publication is morbid, grue-

²⁶³ *Metzger v. Dell Pub. Co.*, 207 Misc. 182, 136 N.Y.S.2d 888 (Sup. Ct. 1955).

²⁶⁴ Discussed in Spiegel, *Public Celebrity v. Scandal Magazine—The Celebrity's Right to Privacy*, 30 So. CAL. L. REV. 280 (1957).

²⁶⁵ Attributed to Greta Garbo.

²⁶⁶ This seems to be clear from the cases holding that the publication of stolen or surreptitiously obtained pictures is actionable, even though the plaintiff is "news." See *supra* notes 109-11.

²⁶⁷ *Eliot v. Jones*, 66 Misc. 95, 120 N.Y.S. 989 (Sup. Ct. 1910), *aff'd*, 140 App. Div. 911, 125 N.Y.S. 1119 (1910) (name of president of Harvard used to sell books); *Lane v. F.W. Woolworth Co.*, 171 Misc. 66, 11 N.Y.S.2d 199 (Sup. Ct. 1939), *aff'd*, 256 App. Div. 1065, 12 N.Y.S.2d 352 (1939) (picture of actress sold in lockets); *Birmingham Broadcasting Co. v. Bell*, 259 Ala. 656, 68 So. 2d 314 (1953), *later appeal*, 69 So. 2d 263 (Ala. 1957) (name of sports broadcaster used to advertise program with which he had no connection); *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949) (picture of soldier used to advertise optical goods); *Jansen v. Hilo Packing Co.*, 202 Misc. 900, 118 N.Y.S.2d 162 (Sup. Ct. 1952), *aff'd*, 282 App. Div. 935, 125 N.Y.S.2d 648 (1953) (picture of baseball player sold with popcorn). *Cf.* *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P.2d 577 (1942) (name of actress used to advertise motion picture); *State ex rel. La Follette v. Hinkle*, 131 Wash. 86, 229 Pac. 317 (1924) (use of name of politician as candidate by political party).

²⁶⁸ *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 164 N.E.2d 853 (1959), *affirming* 7 App. Div. 2d 226, 182 N.Y.S.2d 126 (1959) (picture and news story of man who accidentally set a fire used to advertise safes).

²⁶⁹ *Von Thodorovich v. Franz Josef Beneficial Ass'n*, 154 Fed. 911 (E.D. Pa. 1907). *Accord*, *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136, 67 Atl. 392 (Ch. 1907) (*Thomas Edison*).

some, lurid, sensational, immoral, and altogether cheap and despicable will not forfeit the privilege,²⁷⁰ it is also clear that either the public figure²⁷¹ or the man in the news²⁷² can maintain an action when false or fictitious statements are published about him, or when his picture is used with an innuendo which places him in a false light before the public.²⁷³

But even as to the disclosure of private facts, it appears that there must be some rather undefined limits upon these privileges. Warren and Brandeis²⁷⁴ thought that even a celebrity was entitled to his private life, and that he would become a public figure only as to matters already public and those which directly bore upon them. The development of the law has not been so narrow. It has recognized a legitimate public curiosity about the personalities of celebrities, and about a great deal of otherwise private

²⁷⁰ *Goelet v. Confidential, Inc.*, 5 App. Div. 2d 226, 171 N.Y.S.2d 223 (1958); *Bremmer v. Journal-Tribune Pub. Co.*, 247 Iowa 817, 76 N.W.2d 762 (1956); *Jenkins v. Dell Pub. Co.*, 143 F. Supp. 953 (W.D. Pa. 1956), *aff'd*, 251 F.2d 447 (3d Cir. 1958); *Aquino v. Bulletin Co.*, 190 Pa. Super. 528, 154 A.2d 422 (1959); *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956).

Two cases sometimes cited to the contrary, *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912), and *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930), are apparently to be explained on the basis of pictures obtained by inducing breach of trust.

It may nevertheless be suggested that there must be some as yet undefined limits of common decency as to what can be published about anyone; and that a photograph of indecent exposure, for example, can never be legitimate "news."

²⁷¹ *Hazlitt v. Fawcett Publications*, 116 F. Supp. 539 (D. Conn. 1953) (fictional account of stunt driver, tried for homicide); *Sutton v. Hearst Corp.*, 277 App. Div. 155, 98 N.Y.S.2d 233 (1950), *appeal denied*, 277 App. Div. 873, 98 N.Y.S.2d 589 (1950) (fictional story about turret gunner); *Hogan v. A. S. Barnes Co.*, 114 U.S.P.Q. 314 (Pa. C.P. 1957) (book purporting to give information from plaintiff about his golf game); *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P.2d 670 (1951) (fiction in motion picture about war hero); *Binns v. Vitagraph Co. of America*, 147 App. Div. 783, 132 N.Y.S. 237 (1911), *aff'd*, 210 N.Y. 51, 103 N.E. 1108 (1913) (fiction in motion picture about radio operator hero); *Donahue v. Warner Bros. Pictures*, 194 F.2d 6 (10th Cir. 1952) (fiction in motion picture about entertainer); *D'Altomonte v. New York Herald Co.*, 154 App. Div. 953, 139 N.Y.S. 200 (1913), *modified* as not within the New York statute in 208 N.Y. 596, 102 N.E. 1101 (1913) (authorship of absurd story attributed to well known writer). See also the last two cases cited *supra*, note 267.

²⁷² *Garner v. Triangle Publications*, 97 F. Supp. 546, (S.D.N.Y. 1951) (fiction added to murder story); *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P.2d 133 (1945) (false statements in story of crime); *Annerino v. Dell Pub. Co.*, 11 Ill. App. 2d 205, 149 N.E.2d 761 (1958) (fiction in account of murder of plaintiff's husband); *Strickler v. National Broadcasting Co.*, 167 F. Supp. 68 (S.D. Cal. 1958) (false details in story of plaintiff's conduct in airplane crisis); *Aquino v. Bulletin Co.*, 190 Pa. Super. 528, 154 A.2d 422 (1959) (reporter of secret marriage and subsequent divorce drew on his imagination).

²⁷³ See the cases of pictures used to illustrate articles, *supra*, notes 137-42.

²⁷⁴ "In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity." Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 215 (1890).

and personal information concerning them. Their biographies can be written,²⁷⁵ and their life histories and their characters set forth before the world in unflattering detail. Discreditable facts about them can be exposed.²⁷⁶ And as our newspapers demonstrate daily, the public can be treated to an enormous amount of petty gossip as to what they eat for breakfast, wear, read, do with their spare time, or say to their friends.

Some boundaries, however, still remain; and one may venture the guess that the private sex relations of actresses and baseball players, to say nothing of inventors and the victims of automobile accidents, are still not in the public domain.²⁷⁷ As some evidence of popular feeling in such matters, one might look to the statutes in several states²⁷⁸ prohibiting the public disclosure of the names of victims of sex crimes. The private letters, even of celebrities, cannot be published without their consent;²⁷⁹ and the good Prince Albert was once held to have an action when his private etchings were exhibited to all comers.²⁸⁰ An excellent illustration of the privacy of a public figure is a case²⁸¹ in a trial court in Los Angeles, not officially reported, in which the actor Kirk Douglas, after engaging in some undignified antics before a home motion picture camera for his friends, was held to have a cause of action when the film was put upon public exhibition.

Very probably there is some rough proportion to be looked for, between the importance of the public figure or the man in the news, and of the occasion for the public interest in him, and the nature of the private facts revealed. Perhaps there is very little in the way of information about the President of the United States, or any candidate for that high office,²⁸² that is not a matter of legitimate public concern; but when a mere member of the armed forces is in question, the line is drawn at his military service,

²⁷⁵ *Jeffries v. New York Evening Journal Co.*, 67 Misc. 570, 124 N.Y.S. 780 (Sup. Ct. 1910); *Koussevitzky v. Allen, Towne & Heath*, 188 Misc. 479, 68 N.Y.S.2d 779 (1947), *aff'd*, 272 App. Div. 759, 69 N.Y.S.2d 432 (1947). *Cf.* *Corliss v. E.W. Walker Co.*, 64 Fed. 280 (D. Mass. 1894).

²⁷⁶ *Smith v. Suratt*, 7 Alaska 416 (1926) (Dr. Cook).

²⁷⁷ *Cf.* *Garner v. Triangle Publications*, 97 F. Supp. 546 (S.D.N.Y. 1951) (relations, partly fictional, between participants in murder).

²⁷⁸ For example, FLA. STAT. § 794.03 (1957); WIS. STAT. ANN. § 942.02 (1958).

²⁷⁹ *Pope v. Curl*, 2 Atk. 341, 26 Eng. Rep. 608 (1741); *Roberts v. McKee*, 29 Ga. 161 (1859); *Woolsey v. Judd*, 4 Duer 379 (11 N.Y. Super. 1855); *Denis v. Leclerc*, 1 Mart. (o.s.) 297 (La. 1811); *Baker v. Libbie*, 210 Mass. 599, 97 N.E. 109 (1912). Usually this has been put upon the ground of a property right in the letter itself, or literary property in its contents. See Note, 44 IOWA L. REV. 705 (1959).

²⁸⁰ *Prince Albert v. Strange*, 1 Mac. & G. 25, 64 Eng. Rep. 293 (1848), *aff'd*, 2 De. G. & Sm. 652, 41 Eng. Rep. 1171 (1849).

²⁸¹ *Douglas v. Disney Productions*, reported in *Los Angeles Daily Journal Rep.*, Dec. 31, 1956, p. 27, col. 3.

²⁸² Witness the disclosure, in the election of 1884, of Grover Cleveland's parentage of an illegitimate child, many years before.

and those things that more or less directly bear upon it.²⁸³ And no doubt the defendant in a spectacular murder trial which draws national attention can expect a good deal less in the way of privacy than an ordinary citizen who is arrested for ignoring a parking ticket. But thus far there is very little in the cases to indicate just where such lines are to be drawn.

One troublesome question, which cannot be said to have been fully resolved, is that of the effect of lapse of time, during which the plaintiff has returned to obscurity. There can be no doubt that one quite legitimate function of the press is that of educating or reminding the public as to past history, and that the recall of former public figures, the revival of past events that once were news, can properly be a matter of present public interest. If it is only the event itself which is recalled, without the use of the plaintiff's name, there seems to be no doubt that even a great lapse of time does not destroy the privilege.²⁸⁴ Most of the cases have held that even the use of his name²⁸⁵ or likeness²⁸⁶ is not enough in itself to lead to liability. Thus a luckless prosecuting attorney who once made the mistake of allowing himself to be photographed with his arm around a noted criminal was held to have no remedy when the picture was republished fifteen years later in connection with a story of the criminal's career.²⁸⁷ Such decisions indicate that once a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days.

There is, however, *Melvin v. Reid*,²⁸⁸ in which it was held that the use

²⁸³ Stryker v. Republic Pictures Corp., 108 Cal. App. 2d 191, 238 P.2d 670 (1951); and see Continental Optical Co. v. Reed, 119 Ind. App. 643, 86 N.E.2d 306 (1949).

²⁸⁴ Bernstein v. National Broadcasting Co., 129 F. Supp. 817 (D.D.C. 1955), *aff'd*, 232 F.2d 369 (D.C. Cir. 1956) (murder and trial); Smith v. National Broadcasting Co., 138 Cal. App. 2d 807, 282 P.2d 600 (1956) (false report to police of escape of black panther).

²⁸⁵ Cohen v. Marx, 94 Cal. App. 2d 704, 211 P.2d 320 (1950) (pugilist, ten years); Sidis v. F-R Pub. Corp., 113 F.2d 806 (2d Cir. 1940), *affirming* 34 F. Supp. 19 (S.D.N.Y. 1938) (infant prodigy, seven years); Schnabel v. Meredith, 378 Pa. 609, 107 A.2d 860 (1954) (slot machines found on plaintiff's premises, six months).

²⁸⁶ Jenkins v. Dell Pub. Co., 143 F. Supp. 953 (W.D. Pa. 1956), *aff'd*, 251 F.2d 447 (3d Cir. 1958) (family of murdered boy, three months). *Accord*, as to pictures illustrating articles, Samuel v. Curtis Pub. Co., 122 F. Supp. 327 (N.D. Cal. 1954) (arguing with suicide, twenty-two months); and see Leverton v. Curtis Pub. Co., 192 F.2d 974 (3d Cir. 1951) (child struck by car, two years).

²⁸⁷ Estill v. Hearst Pub. Co., 186 F.2d 1017 (7th Cir. 1951).

The case of Smith v. Doss, 251 Ala. 250, 37 So. 2d 118 (1948), where a man who had disappeared and was believed to have been murdered died in a distant state, and his body was brought back to town, is probably to be distinguished on the basis that the later event was itself "news," and so justified the revival of the story.

²⁸⁸ 112 Cal. App. 285, 297 Pac. 91 (1931).

The report of the case leaves the facts in some doubt. It came up on the plaintiff's pleading, which alleged that the defendant made use of the plaintiff's maiden name of Gabrielle Darley, and that "by the production and showing of the picture, friends of appellant learned for the first time of the unsavory incidents of her early life." It is difficult to see how this was accomplished, unless the picture also revealed her present identity under her married name of Melvin. At least the allegation is not to be ignored in interpreting the case.

of the name of a former prostitute and murder defendant made the publisher liable when a motion picture narrated her story; and there are a few other cases²⁸⁹ that look in the same direction. One may speculate that the real reason for the decision in the *Melvin* case was not the use of the name in connection with past history, but the disclosure of the plaintiff's whereabouts and identity, which were no part of the revived "news," or perhaps that the explanation lay in the shocking enormity of the revelation of a woman's past when she was trying to lead a decent life, and that again something in the nature of a "mores" test is to be applied. There is, however, almost nothing in the cases to throw any satisfactory light upon such speculations. All that can be said is that there appear to be situations in which ancient history cannot safely be revived.

VIII

DEFENSES

Next in order are the various defenses to the claim of invasion of privacy. It is clear first of all that the truth of the matter published does not arise in the cases of intrusion, and can be no defense to the appropriation of name or likeness, nor to the public disclosure of private facts.²⁹⁰ It may, however, be in issue where the third form of the tort is involved, that of putting the plaintiff in a false light in the public eye,²⁹¹ and to that extent it has some limited importance, and cannot be entirely ruled out.

Chief among the available defenses is that of the plaintiff's consent to the invasion, which will bar his recovery as in the case of any other tort.²⁹² It may be given expressly, or by conduct, such as posing for a picture with knowledge of the purposes for which it is to be used,²⁹³ or industriously

²⁸⁹ *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845 (N.D. Cal. 1939) (radio dramatization of robbery); and see the cases cited *supra*, note 284.

In *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942), the court laid stress upon the "unnecessary" use of the name in even a current report, concerning a woman suffering from a rare disease. The decision, however, appears rather to rest upon the intrusion of taking her picture in bed in a hospital.

²⁹⁰ *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927); *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931); *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845 (N.D. Cal. 1939); *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942); *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1945), *second appeal*, 159 Fla. 31, 30 So. 2d 635 (1947); *Themo v. New England Newspaper Pub. Co.*, 306 Mass. 54, 27 N.E.2d 753 (1940).

²⁹¹ See *supra*, text at notes 127-50.

²⁹² *Grossman v. Frederick Bros. Acceptance Corp.*, 34 N.Y.S.2d 785 (Sup. Ct., App. T. 1942) (written consent a complete defense under the New York statute); *Jenkins v. Dell Pub. Co.*, 143 F. Supp. 953 (W.D. Pa. 1956), *aff'd*, 250 F.2d 447 (3d Cir. 1958); *Reitmeister v. Reitmeister*, 162 F.2d 691 (2d Cir. 1947); *Tanner-Brice Co. v. Sims*, 174 Ga. 13, 161 S.E. 819 (1931).

In *Porter v. American Tobacco Co.*, 140 App. Div. 871, 125 N.Y.S. 710 (1910), it was held that consent must be pleaded and proved as a defense.

²⁹³ *Gill v. Hearst Pub. Co.*, 40 Cal.2d 224, 253 P.2d 441 (1953); *Thayer v. Worcester Post Co.*, 284 Mass. 160, 187 N.E. 292 (1933); *Wendell v. Conduit Machine Co.*, 74 Misc. 201, 133 N.Y.S. 758 (Sup. Ct. 1911); *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953).

seeking publicity of the same kind.²⁹⁴ A gratuitous consent can be revoked at any time before the invasion;²⁹⁵ but if the agreement is a matter of contract it is normally irrevocable, and there is no liability for any publicity or appropriation within its terms.²⁹⁶ But if the actual invasion goes beyond the contract, fairly construed, as by alteration of the plaintiff's picture,²⁹⁷ or publicity materially differing in kind or in extent from that contemplated,²⁹⁸ the consent is not effective to avoid liability. The statutes²⁹⁹ all require that the consent be given in writing. As against the contention that this can still be "waived" by consent given orally, the rule which has emerged in New York is that the oral consent will not bar the cause of action, but is to be taken into account in mitigation of damages.³⁰⁰

²⁹⁴ In *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941), the fact that the plaintiff had gone to great lengths to get himself named as an all-American football player was held to prevent any recovery for publicity given to him in that capacity. *Cf. Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952) (television broadcast of performing animal act at football game).

See also *Schmieding v. American Farmers Mut. Ins. Co.*, 138 F. Supp. 167 (D. Neb. 1955), where the plaintiff failed to object to continued use of his rubber-stamp signature after termination of his employment.

²⁹⁵ *Garden v. Parfumerie Rigaud*, 151 Misc. 692, 271 N.Y.S. 187 (Sup. Ct. 1933); *State ex rel. La Follette v. Hinkle*, 131 Wash. 86, 229 Pac. 317 (1924).

²⁹⁶ *Lillie v. Warner Bros. Pictures*, 139 Cal. App. 724, 34 P.2d 835 (1934) (motion picture contract includes use of "shorts"); *Long v. Decca Records*, 76 N.Y.S.2d 133 (Sup. Ct. 1947) (contract to make records held to include use of name and picture in advertising); *Fairbanks v. Wink*, 119 Misc. 809, 198 N.Y.S. 299 (Sup. Ct. 1922) (motion picture actor surrenders right to use of film); *Wendell v. Conduit Machine Co.*, 74 Misc. 201, 133 N.Y.S. 758 (Sup. Ct. 1911) (use of employee's picture in business after termination of employment); *Marek v. Zanol Products Co.*, 298 Mass. 1, 9 N.E.2d 393 (1937) (contract consent to use of name); *Sharaga v. Sinram Bros.*, 275 App. Div. 967, 90 N.Y.S.2d 705 (1949) (use of salesman's name after termination of employment); *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953) (consent to picture in house organ held to include national publication).

In *Bell v. Birmingham Broadcasting Co.*, 263 Ala. 355, 82 So.2d 345 (1955), it was held that a custom of giving consent was proper evidence bearing on the interpretation of the contract.

²⁹⁷ *Cf. Manger v. Kree Institute of Electrolysis*, 233 F.2d 5 (2d Cir. 1956) (letter altered to make it testimonial); *Myers v. Afro-American Pub. Co.*, 168 Misc. 429, 5 N.Y.S.2d 223 (Sup. Ct. 1938), *aff'd*, 255 App. Div. 838, 7 N.Y.S.2d 662 (1938) (consent to use of semi-nude picture on condition that nudity be covered up).

²⁹⁸ *Ettore v. Philco Television Broadcasting Co.*, 229 F.2d 481 (3d Cir. 1956) (motion picture contract held not to include use of the film on television, subsequently developed); *Colgate-Palmolive Co. v. Tullos*, 219 F.2d 617 (5th Cir. 1955) (use of employee's picture in advertising after termination of employment); *Sinclair v. Postal Tel. & Cable Co.*, 72 N.Y.S.2d 841 (Sup. Ct. 1935) (picture of actor putting him in undignified light); *Russell v. Marboro Books*, 18 Misc.2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1959) (picture of model used in bawdy advertisement of bed sheets).

²⁹⁹ *Supra*, notes 14, 52-54. It has been held that the consent of an infant is ineffective under the New York statute and that of the parent must be obtained. *Semler v. Ultem Publications*, 170 Misc. 551, 9 N.Y.S.2d 319 (N.Y. City Ct. 1938); *Wyatt v. James McCreery Co.*, 126 App. Div. 650, 111 N.Y.S. 86 (1908).

³⁰⁰ *Buschelle v. Conde Nast Publications*, 173 Misc. 674, 19 N.Y.S.2d 129 (Sup. Ct. 1940); *Hammond v. Crowell Pub. Co.*, 253 App. Div. 205, 1 N.Y.S.2d 728 (1938); *Miller v. Madison*

Other defenses have appeared only infrequently. Warren and Brandeis³⁰¹ thought that the action for invasion of privacy must be subject to any privilege which would justify the publication of libel or slander, reasoning that that which is true should be no less privileged than that which is false. There is still no reason to doubt this conclusion, since the absolute privilege of a witness,³⁰² and the qualified one to report the filing of a nominating petition for office³⁰³ or the pleadings in a civil suit³⁰⁴ have both been recognized. The privilege of the defendant to protect or further his own legitimate interests has appeared in a case or two, where a telephone company has been permitted to monitor calls,³⁰⁵ and the defendant was allowed to make use of the plaintiff's name in insuring his wife without his consent.³⁰⁶ It has been held that where uncopyrighted literature is in the public domain, and the defendant is free to publish it, the name of the plaintiff may be used to indicate its authorship,³⁰⁷ and that when the plaintiff has designed dresses for the defendant it is no invasion of his privacy to disclose his connection with the product in advertising.³⁰⁸

The conflict of laws, so far as the right of privacy is concerned, is in the same state of bewildered confusion as that which surrounds the law of defamation. The writer has attempted to deal with it elsewhere,³⁰⁹ and will not repeat it here.

Square Garden Corp., 176 Misc. 714, 28 N.Y.S.2d 811 (Sup. Ct. 1941) (reduced to nominal damages); Lane v. F. W. Woolworth Co., 171 Misc. 66, 11 N.Y.S.2d 199 (Sup. Ct. 1939), *aff'd*, 256 App. Div. 1065, 12 N.Y.S.2d 352 (1939); Harris v. H. W. Gossard Co., 194 App. Div. 683, 185 N.Y.S. 861 (1921).

³⁰¹ Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 216 (1890).

³⁰² Application of Tiene, 19 N.J. 149, 115 A.2d 543 (1955).

³⁰³ Johnson v. Scripps Pub. Co., 18 Ohio Op. 372 (C.P. 1940).

³⁰⁴ Langford v. Vanderbilt University, 199 Tenn. 389, 287 S.W.2d 32 (1956). *Cf.* Lyles v. State, 330 P.2d 734 (Okla. Cr. 1958) (television in courtroom); Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D. Minn. 1948) (photograph taken in courtroom).

³⁰⁵ Schumkler v. Ohio-Bell Tel. Co., 116 N.E.2d 819 (Ohio C.P. 1953). *Accord*, People v. Appelbaum, 277 App. Div. 43, 97 N.Y.S.2d 807 (1950), *aff'd*, 301 N.Y. 738, 95 N.E.2d 410 (1950) (subscriber tapping his own telephone to protect his interests). *Cf.* Davis v. General Finance & Thrift Co., 80 Ga. App. 703, 57 S.E.2d 225 (1950) (creditor's telegram to debtor threatening suit); Goldman-Taber Pontiac, Inc. v. Zerbst, 213 Ga. 682, 100 S.E.2d 881 (1957) (creditor's complaint to debtor's employer).

³⁰⁶ Holloman v. Life Ins. Co. of Va., 192 S.C. 454, 7 S.E.2d 169 (1940).

³⁰⁷ Ellis v. Hurst, 70 Misc. 122, 128 N.Y.S. 144 (Sup. Ct. 1910); Shostakovitch v. Twentieth-Century Fox Film Corp., 196 Misc. 67, 80 N.Y.S.2d 575 (Sup. Ct. 1948), *aff'd*, 275 App. Div. 692, 87 N.Y.S.2d 430 (1949).

Cf. White v. William G. White Co., 160 App. Div. 709, 145 N.Y.S. 743 (1914), where the plaintiff's sale of a corporation bearing his name was held to convey the right to continue to use it.

³⁰⁸ Brociner v. Radio Wire Television, Inc., 15 Misc. 2d 843, 183 N.Y.S.2d 743 (Sup. Ct. 1959).

³⁰⁹ Prosser, *Interstate Publication*, 51 MICH. L. REV. 959 (1953), reprinted in PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* 70-134 (1953).

CONCLUSION

It is evident from the foregoing that, by the use of a single word supplied by Warren and Brandeis, the courts have created an independent basis of liability, which is a complex of four distinct and only loosely related torts; and that this has been expanded by slow degrees to invade, overlap, and encroach upon a number of other fields. So far as appears from the decisions, the process has gone on without any plan, without much realization of what is happening or its significance, and without any consideration of its dangers. They are nonetheless sufficiently obvious, and not to be overlooked.

One cannot fail to be aware, in reading privacy cases, of the extent to which defenses, limitations and safeguards established for the protection of the defendant in other tort fields have been jettisoned, disregarded, or ignored. Taking intrusion first, the gist of the wrong is clearly the intentional infliction of mental distress, which is now in itself a recognized basis of tort liability.³¹⁰ Where such mental disturbance stands on its own feet, the courts have insisted upon extreme outrage, rejecting all liability for trivialities, and upon genuine and serious mental harm, attested by physical illness, or by the circumstances of the case. But once "privacy" gets into the picture, and the fact of intrusion is added, such guarantees apparently are no longer required. No doubt the cases thus far have been sufficiently extreme; but the question may well be raised whether there are not some limits, and whether, for example, a lady who insists upon sun-bathing in the nude in her own back yard should really have a cause of action for her humiliation when the neighbors examine her with appreciation and binoculars.

The public disclosure of private facts, and putting the plaintiff in a false light in the public eye, both concern the interest in reputation, and move into the field occupied by defamation. Here, as a result of some centuries of conflict, there have been jealous safeguards thrown about the freedom of speech and of the press, which are now turned on the left flank. Gone is the defense of truth, and the defendant is held liable for the publication of entirely accurate statements of fact, without any wrongful motive. Gone also is the requirement of special damage where what is said is not libel or slander "per se"—which, however antiquated and unreasonable the rigid categories may be, has at least served some useful purpose in the discouragement of trivial and extortionate claims. Gone even is the need for any defamatory innuendo at all, since the publication of non-defamatory facts, or of even laudatory fiction concerning the plaintiff, may be enough. The retraction statutes, with their provision for demand

³¹⁰ Discussed at length in Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956).

upon the defendant, and the limitation to proved special damage if a demand is not made, or is complied with, are circumvented; and so are the statutes requiring the filing of a bond for costs before a defamation action can be begun. These are major inroads upon a right to which there has always been much sentimental devotion in our land; and they have gone almost entirely unremarked. Perhaps more important still is the extent to which, under any test of "ordinary sensibilities," or the "mores" of the community as to what is acceptable and proper, the courts, although cautiously and reluctantly, have accepted a power of censorship over what the public may be permitted to read, extending very much beyond that which they have always had under the law of defamation.

As for the appropriation cases, they create in effect, for every individual, a common law trade name, his own, and a common law trade mark in his likeness. They confer upon him rights much more extensive than those which any corporation engaged in business can expect under the law of unfair competition. These rights are subject to the verdict of a jury. And there has been no hint that they are in any way affected by any of the limitations which have been considered necessary and desirable in the ordinary law of trade marks and trade names.

This is not to say that the developments in the law of privacy are wrong. Undoubtedly they have been supported by genuine public demand and lively public feeling, and made necessary by real abuses on the part of defendants who have brought it all upon themselves. It is to say rather that it is high time that we realize what we are doing, and give some consideration to the question of where, if anywhere, we are to call a halt.

All this is a most marvelous tree to grow from the wedding of the daughter of Mr. Samuel D. Warren. One is tempted to surmise that she must have been a very beautiful girl. Resembling, perhaps, that fabulous creature, the daughter of a Mr. Very, a confectioner in Regent Street, who was so wondrous fair that her presence in the shop caused three or four hundred people to assemble every day in the street before the window to look at her, so that her father was forced to send her out of town, and counsel was led to inquire whether she might not be indicted as a public nuisance.³¹¹ This was the face that launched a thousand lawsuits.

³¹¹ Reported in a note to *Rex v. Carlisle*, 6 Car. & P. 636, 172 Eng. Rep. 1397 (1834).

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

*** SEE FOLLOWING ATTACHMENT ***

THE RIGHT OF PUBLICITY

MELVILLE B. NIMMER*

Louis Brandeis and Samuel Warren in their essay "The Right to Privacy"¹ produced what is perhaps the most famous and certainly the most influential law review article ever written. In the words of Roscoe Pound, it did "nothing less than add a chapter to our law."² It was primarily due to the persuasiveness of this article that first Georgia³ and then 14 other states⁴ came to recognize a common law right of privacy. Furthermore, when the New York Court of Appeals rejected the Brandeis-Warren arguments and refused to recognize a common law right of privacy,⁵ the New York Legislature instituted legislation⁶ which in some ways has extended the scope of privacy actions even beyond that envisaged by Brandeis and Warren. Moreover, two states have since adopted privacy statutes substantially similar to the New York statute.⁷

But although the concept of privacy which Brandeis and Warren evolved fulfilled the demands of Beacon Street in 1890, it may seriously be doubted that the application of this concept satisfactorily meets the needs of Broadway and Hollywood in 1954. Brandeis and Warren were concerned with the preservation of privacy against a press "overstepping in every direction the obvious bounds of propriety and of decency," and in which "to satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers."⁸ Without in any way implying that the right of privacy is less important today than when first suggested by Brandeis and Warren, it is suggested that the doctrine, first developed to protect the sensibilities of nineteenth century Brahmin Boston, is not adequate to meet the demands of the second half of the twentieth century, particularly with respect to the advertising, motion picture, television, and radio industries. Well known personalities connected with these industries do not seek the "solitude and privacy"⁹ which

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¹ 4 HARV. L. REV. 193 (1890).

² Quoted in A. T. MASON, *BRANDEIS, A FREE MAN'S LIFE* 70 (1946).

³ *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1904).

⁴ Alabama, Arizona, California, Florida, Illinois, Indiana, Kansas, Kentucky, Michigan, Missouri, Montana, North Carolina, Oregon, and Pennsylvania.

⁵ *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902).

⁶ N. Y. CIVIL RIGHTS LAW §550, 51 (1948).

⁷ Utah and Virginia. Wisconsin also gives some protection to the right of privacy. See Yankwich, *The Right of Privacy*, 27 NOTRE DAME LAW. 499, 521 (1952).

⁸ Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

⁹ Warren and Brandeis, *supra* note 8, at 196.

Brandeis and Warren sought to protect. Indeed, privacy is the one thing they do "not want, or need."¹⁰ Their concern is rather with publicity, which may be regarded as the reverse side of the coin of privacy. However, although the well known personality does not wish to hide his light under a bushel of privacy, neither does he wish to have his name, photograph, and likeness reproduced and publicized without his consent or without remuneration to him. With the tremendous strides in communications, advertising, and entertainment techniques, the public personality has found that the use of his name, photograph, and likeness has taken on a pecuniary value undreamed of at the turn of the century. Often, however, this important value (which will be referred to in this article as publicity value) cannot be legally protected either under a privacy theory or under any other traditional legal theory. Recently a few cases have begun to indicate that publicity values are emerging as a legally cognizable right protectible without resort to the more traditional legal theories. This tendency reached its culmination in *Haclan Laboratories, Inc. v. Topps Chewing Gum, Inc.*¹¹ where the Court of Appeals for the Second Circuit in an opinion written by Judge Jerome Frank expressly recognized a "right of publicity." This article will attempt to outline the inadequacy of traditional legal theories in protecting publicity values, and will then discuss the probable substance of and limitations on the right of publicity, followed by an examination of the extent of judicial recognition thus far accorded to this new right.

INADEQUACY OF PRIVACY

Those persons and enterprises in the entertainment and allied industries wishing to control but not prohibit the use by others of their own or their employees' names and portraits will find, for the reasons indicated below, that the right of privacy is generally an unsatisfactory means of assuring such control.

Waiver by Celebrities. It is generally the person who has achieved the somewhat ephemeral status of "celebrity" who must cope with the unauthorized use by others of his name and portrait, since the fact of his fame makes such use commercially attractive to others. Yet, when such a person seeks to invoke the right of privacy to protect himself from such unauthorized use, he finds that by the very fact of his being a celebrity "he has dedicated his life to the public and thereby waived his right to privacy."¹² Some courts find this waiver to be absolute so that even aspects of the celebrity's private life which he has never made public no longer command the protection of the law of privacy.¹³ Most courts, however, have adopted the more limited waiver which Brandeis and Warren suggested when they wrote: "to

¹⁰ *Gautier v. Pro-Football*, 304 N. Y. 354, 361, 107 N. E. 2d 485, 489 (1952).

¹¹ 202 F. 2d 866 (2d Cir. 1953).

¹² Leon R. Yankwich, Chief Judge, United States District Court for the Southern District of California, in his article, *The Right of Privacy*, 27 NOTRE DAME LAW. 499 (1952).

¹³ *Donahue v. Warner Bros. Pictures*, District Court of the Third Judicial District, State of Utah, No. 87,714 (1952). This case had been transferred from the federal courts after the Court of Appeals for the Tenth Circuit, in 194 F. 2d 6 (10th Cir. 1952), reversed the summary judgment entered for the defendant, in the federal district court. See *Peay v. Curtis Publishing Co.*, 78 F. Supp. 305 (D. D. C. 1948); and *Reed v. Real Detective Publishing Co.*, 162 P. 2d 133 (Sup. Ct. Ariz. 1945).

whatever degree and in whatever connection a man's life has ceased to be private . . . to that extent the protection is to be withdrawn."¹⁴ Thus the fact that an actor has waived his right of privacy with respect to his professional life, does not mean that he has no right of privacy in connection with his private life. This doctrine permits the celebrity to maintain the privacy of his non-professional life, but it does not protect him from the appropriation by others of the valuable use of his name and portrait, showing him in the capacity or role which he has made famous. Thus it was held in *O'Brien v. Pabst Sales Co.*¹⁵ that the plaintiff could not invoke the right of privacy to prevent the defendant from using his photograph in football uniform on a calendar because the plaintiff, having been the most publicized football player of the year 1938-1939, had thereby surrendered his right of privacy. Again, in *Martin v. F. I. Y. Theatre Co.*,¹⁶ the plaintiff, an actress, brought an action for invasion of privacy on the ground that the defendant had without plaintiff's permission placed a photograph of her on the front of defendant's burlesque theatre, although plaintiff was not appearing in the theatre. The court found for defendant on the ground that the plaintiff as an actress had previously surrendered her right of privacy.¹⁷ Similarly in *Paramount Pictures, Inc. v. Leader Press, Inc.*¹⁸ it was held that motion picture stars in the employ of the plaintiff had waived their right to privacy so that the defendant could with impunity make and sell posters bearing the names and portraits of the Paramount stars.

Some courts have taken a more limited approach to the doctrine of waiver by celebrities. These courts hold that the mere fact that the plaintiff is a celebrity will not affect his right of privacy, but that if a person consents to appear or perform before a limited audience (*e.g.*, a live audience in the immediate presence of the performer), then such person cannot complain of an invasion of privacy if by means of motion pictures, still pictures or live television persons other than the limited audience also view the performance or appearance. However, even this limited waiver can be highly injurious to a professional performer. Thus, in *Gautier v. Pro-Football, Inc.*¹⁹ the plaintiff, having consented to perform before an audience of thirty-five thousand persons during the half time of a professional football game, was held to have waived his privacy with respect to the persons who might view this performance by television. Certainly one cannot quarrel with the court's conclusion that plaintiff by performing in the football stadium had consented to the loss of his "privacy," but to conclude that the plaintiff had thereby waived any right to control and profit from the reproduction of his image on television seems to be unnecessarily

¹⁴ Warren and Brandeis, *supra* note 8, at 215.

¹⁵ 124 F. 2d 167 (5th Cir. 1941).

¹⁶ 10 Ohio Ops. 338 (1938).

¹⁷ A similar factual situation occurred in *Loftus v. Greenwich Lithographing Co.*, 192 App. Div. 251, 182 N. Y. S. 428 (1st Dep't 1920), where plaintiff's right of privacy under the New York statute was upheld. The issue of waiver apparently was not raised. Cf. *Sinclair v. Postal Telegraph and Cable Co.*, 72 N. Y. S. 2d 841 (1935); *Semler v. Ultem Publications*, 170 Misc. 551, 9 N. Y. S. 2d 319 (N. Y. City Ct. 1938); *Lane v. F. W. Woolworth Co.*, 171 Misc. 66, 11 N. Y. S. 2d 199 (Sup. Ct. 1939); and *Young v. Greneker Studios*, 175 Misc. 1027, 26 N. Y. S. 2d 357 (Sup. Ct. 1941).

¹⁸ 24 F. Supp. 1004 (W. D. Okla. 1938), *reversed on other grounds*, 106 F. 2d 229 (10th Cir. 1939).

¹⁹ 304 N. Y. 354, 107 N. E. 2d 485 (1952).

harsh. Similarly, in *Chavez v. Hollywood American Legion Post No. 43*,²⁰ a California court denied a prize fighter a preliminary injunction to restrain a broadcasting station from televising a prize fight in which he was participating. The court in an oral opinion stated that a prize fighter who participates in a public boxing match waives his right of privacy as to that fight.²¹ The California Supreme Court in *Gill v. Hearst Publishing Co.*²² invoked this same doctrine in connection with a still photograph made of the plaintiffs in a public market. The court stated that "the photograph did not disclose anything which until then had been private, but rather only extended knowledge of the particular incident to a somewhat larger public than had actually witnessed it at the time of occurrence."²³ However, the court nevertheless indicated that if plaintiffs could establish that defendant consented to a use of the photograph in a manner which would be offensive to persons of ordinary sensibilities, then a cause of action for invasion of privacy would be stated.²⁴ Thus, apparently in California the fact that plaintiff consents to appear before a limited audience does not waive the right of privacy as to a more extensive audience where the exhibition is made in an offensive manner.²⁵

Although the doctrine of waiver in privacy cases is not always²⁶ nor uniformly²⁷ applied, it nevertheless presents a very real obstacle to the protection by a well known personality of the publicity values which often constitute an important part of his assets.

Offensive Use. It is reported that Brandeis and Warren first became interested in the problem of privacy and decided to write their article as a direct result of a Boston newspaper's practice of reporting in lurid detail the activities of Samuel Warren and his wife.²⁸ Thus, the doctrine of privacy was evolved as a means of

²⁰ 16 U. S. L. WEEK 2362 (U. S. Feb. 3, 1948).

²¹ See also *Peterson v. KMTR Radio Corp.*, 18 U. S. L. WEEK 2044 (U. S. July 26, 1949). It should be noted, however, that the *Gautier*, *Chavez*, and *Peterson* cases all involved employment relationships. It might well be argued that in the absence of an express reservation by the employee, he should be deemed to have granted to his employer the right to exhibit the performance for which he is employed in any medium which the employer may choose.

²² 40 Cal. 2d 224, 253 P. 2d 441 (1953).

²³ 40 Cal. 2d at 230, 253 P. 2d at 445.

²⁴ *Accord*, *Gill v. Curtis Publishing Co.*, 38 Cal. 2d 273, 239 P. 2d 630 (1952).

²⁵ It may be argued that the doctrine of waiver in California is introduced merely as a makeweight and that if the use of the plaintiff's name or portrait is made in a manner offensive to ordinary sensibilities a right of privacy action will lie regardless of whether or not the plaintiff is a celebrity or has consented to appear before a limited audience. Thus, in *Cohen v. Marx*, 94 Cal. App. 2d 704, 211 P. 2d 320 (1949), Groucho Marx on his radio program referred to the plaintiff in what was probably a non-offensive manner. The court found for the defendant and invoked the doctrine of waiver, stating that "plaintiff, by entering the prize ring, seeking publicity, and becoming widely known as a prize fighter under the name of 'canvasback Cohen,' waived his right to privacy. . . ." On the other hand, in *Kirby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P. 2d 577 (1942), defendant used plaintiff's name in an offensive manner and although plaintiff was an actress the court expressly held that she had not waived her right of privacy so as to permit an invasion of her privacy.

²⁶ For an example of an almost complete rejection of the waiver theory, see *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1904).

²⁷ Within New York state there would appear to be a lack of consistency in applying the doctrine of waiver. Thus, compare *Jansen v. Hilo Packing Co.*, 202 Misc. 900, 118 N. Y. S. 2d 162 (Sup. Ct. 1952); *Oma v. Hillman Periodical Inc.*, 281 App. Div. 240, 118 N. Y. S. 2d 720 (1st Dep't 1953); and *Redmond v. Columbia Pictures Corp.*, 277 N. Y. 707, 14 N. E. 2d 636 (1938).

²⁸ MASON, BRANDEIS, *A FREE MAN'S LIFE* 70 (1946).

preventing offensive (as distinguished from non-offensive) publicity. To this day most courts recognize the rule of the *Restatement of Torts* that in a privacy action "liability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues."²⁹

In attempting to control and profit from the use of publicity values connected with the use of his name, photograph, and likeness, the well known personality will usually find it difficult to invoke such protection under the right of privacy for the reason that usually such publicity cannot be considered such as "would be offensive to persons of ordinary sensibilities" or as an intrusion "beyond the limits of decency." Situations may of course occur where exploitation of a plaintiff's publicity values will prove humiliating or embarrassing to him,³⁰ but in most situations one who has achieved such prominence as to give a publicity value to the use of his name, photograph, and likeness cannot honestly claim that he is humiliated or offended by their use before the public. The fact that he wishes to be paid for such use does not indicate that use without payment is so offensive as to give a right of action in privacy. *Gill v. Hearst Publishing Co.*³¹ clearly indicates that in California a right of privacy will not lie unless the use of the plaintiff's photograph was made in a manner which would prove offensive to persons of ordinary sensibilities.³² Most other jurisdictions will likewise find no right of privacy action unless the plaintiff can establish a use offensive to one's sensibilities³³ and the sensibilities which will be protected are "ordinary sensibilities and not . . . super-sensitiveness or agoraphobia."³⁴

There are some jurisdictions which do not require that the use of the plaintiff's name, photograph or likeness be made in an offensive manner in order to constitute a cause of action in privacy. Florida is one such jurisdiction,³⁵ and the New York privacy statute is regarded generally as creating at least a technical cause of action despite the fact that the use of the plaintiff's name or portrait is not done in an offensive manner.³⁶ Recently, however, the opinion in *Gautier v. Pro-Football* rendered by the Appellate Division of the New York Supreme Court³⁷ indicated that

²⁹ RESTATEMENT, TORTS §867, comment *d* (1939). See also Yankwich, *The Right of Privacy*, 27 NOTRE DAME LAW. 499, 506 (1952).

³⁰ For example, in *Sinclair v. Postal Telegraph and Cable Co.*, 72 N. Y. S. 2d 841 (1935), the defendant used a photograph of the plaintiff (an actor) which had been taken in connection with a motion picture photoplay in which plaintiff appeared. Defendant's use of the photo made it appear that plaintiff was notifying his "enthusiastic admirers" by telegraph that he was about to appear in a motion picture at a given theatre. Plaintiff brought an action under the New York privacy act arguing that defendant's use of his photograph was humiliating to plaintiff in that it put him in an undignified light, in the same manner as an attorney would appear if he telegraphed his friends requesting that they attend a court room where he was about to participate in a case. Plaintiff recovered.

³¹ 40 Cal. 2d 224, 253 P. 2d 441 (1953).

³² *Accord*, *Gill v. Curtis Publishing Co.*, 38 Cal. 2d 273, 239 P. 2d 630 (1952).

³³ See, e.g., *Maysville Transit Co. v. Ort*, 296 Ky. 524, 177 S. W. 2d 369 (1943); *Vassar College v. Loose-Wiles Biscuit Co.*, 197 Fed. 982 (W. D. Mo. 1912).

³⁴ *Davis v. General Finance & Thrift Corp.*, 80 Ga. App. 708, 711, 57 S. E. 2d 225, 227 (1950).

³⁵ *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944).

³⁶ See *Miller v. Madison Square Garden*, 176 Misc. 714, 28 N. Y. S. 2d 811 (Sup. Ct. 1941).

³⁷ 278 App. Div. 431, 438, 106 N. Y. S. 2d 553, 560 (1st Dep't 1951), *aff'd*, 304 N. Y. 354, 107 N. E. 2d 485 (1952).

even in New York "the recovery is grounded on the mental strain and distress, on the humiliation, on the disturbance of the peace of mind suffered by the individual affected."

Even in those jurisdictions where it is held that a cause of action in privacy is stated despite the fact that use of the plaintiff's name, photograph or likeness was done in a non-offensive manner, the person wishing to be paid for the publicity value of such use will find himself effectively circumvented by the rule of damages.³⁸ Thus, in *Cason v. Baskin*,³⁹ the defendant Marjorie Kinnan Rawlings in her book *Cross Creek* depicted the plaintiff, using plaintiff's real first name. The court held that plaintiff had stated a cause of action in privacy but because "there was no mental anguish—no loss of friends—no loss of respect to the community—no loss of character or reputation," the court refused to award plaintiff any damages. Thus even if a plaintiff can establish a cause of action in privacy for non-offensive use of his publicity values, he will not succeed in recovering any damages if he cannot show an offensive use. Again, in *Miller v. Madison Square Garden*⁴⁰ plaintiff, a well known performer, known as "Bronco Charlie," brought an action alleging invasion of his privacy under the New York statute because of the unauthorized use of his name and photograph by defendant on its official program sold to patrons in connection with the six day bicycle races. At the trial, plaintiff frankly admitted that the use of his name and picture by defendant did not subject him to any ridicule or cause him any humiliation whatever. The court held that there was a technical violation of the New York privacy statute but since the use of plaintiff's name and picture was non-offensive to him, plaintiff received nominal damages in the sum of six cents. Plaintiff might well have taken the position that the use of the name and picture of a famous performer on defendant's program was worth a great deal more to defendant than six cents. In *Fisher v. Rosenberg*⁴¹ plaintiff was a professional dancer who, while dancing with Irene Castle, had his photograph taken in two dancing poses. Defendant used these pictures in newspaper advertisements of defendant's shoes. Plaintiff sued under the New York privacy statute and was awarded \$300 damages. However, the court stated: "Plaintiff is entitled to compensatory damages only for injured feelings."⁴² The court concluded that the use of plaintiff's picture in connection with the sale of shoes was humiliating to plaintiff, but noted that if the publication of the picture had been made "in connection with his profession" then the publicity attached to the picture would inure to his benefit and therefore plaintiff would not be entitled to any recovery under the privacy statute. Thus here again the court indicates a refusal to protect publicity values apart from an offensive use thereof. When the express question has arisen as to whether or not there is a right in a privacy action to recovery for the defendant's unjust enrichment, the

³⁸ See *O'Brien v. Pabst Sales Co.*, 124 F. 2d 167 (5th Cir. 1941).

³⁹ 159 Fla. 31, 30 So. 2d 635 (1947).

⁴⁰ 176 Misc. 714, 28 N. Y. S. 2d 811 (Sup. Ct. 1941).

⁴¹ 175 Misc. 370, 23 N. Y. S. 2d 677 (Sup. Ct. 1940).

⁴² 175 Misc. at 371, 23 N. Y. S. 2d at 679.

courts have usually indicated that no such measure of recovery will be permitted.⁴³ In New York, however, there is at least one case—*Bunnell v. Keystone Varnish Co.*⁴⁴—in which it was held that plaintiff may recover for defendant's unjust enrichment under the privacy statute. This decision, however, may be said to be doubtful in view of the fact that the court's only authority for this holding was a case not in point.⁴⁵ Furthermore, Justice Desmond's concurring opinion in *Gautier v. Pro-Football Inc.*⁴⁶ indicates that the Court of Appeals might not agree with the *Bunnell* holding. Justice Desmond, speaking of the New York privacy statute, stated that it was "enacted to fill a gap in existing law" and that it "should not be held to apply to a violation of a contract right to be compensated for public or semi-public theatrical, or similar, exhibitions. . . ."

Therefore since a defendant may well exploit for his own gain the publicity values of a plaintiff without presenting such publicity in an offensive manner, it follows that in such instances a plaintiff will usually be unable to protect his publicity values under a privacy theory.

Non-assignable. In most jurisdictions it is well established that a right of privacy is a personal right rather than a property right⁴⁷ and consequently is not assignable.⁴⁸ The publicity value of a prominent person's name and portrait is greatly restricted if this value cannot be assigned to others. Moreover, persons willing to pay for such publicity values will usually demand that in return for payment they obtain an exclusive right.⁴⁹ Yet since the right of privacy is non-assignable, any agreement purporting to grant the right to use the grantor's name and portrait (as in connection with a commercial endorsement or tie-up) is construed as constituting merely a release as to the purchaser and as not granting the purchaser any right which he can enforce as against a third party.⁵⁰ Thus, if a prominent motion picture actress should grant to a bathing suit manufacturer the right to use her name and portrait in connection with its product and if subsequently a competitive manufacturer should use the same actress's name and portrait in connection with its product, the first manufacturer cannot claim any right of action on a privacy theory against its competitor since the first manufacturer cannot claim to "own" the actress's right of privacy. Assuming the second manufacturer acted with the consent of the actress, it is possible that the first manufacturer would have a cause of action for breach of contract against the actress, but this would present a remedy in damages only and in some instances even recovery of damages might be doubtful. Therefore, if a

⁴³ *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944). See *Peterson v. KMTR Radio Corp.*, 18 U. S. L. WEEK 2044 (U. S. July 26, 1949).

⁴⁴ 254 App. Div. 885, 5 N. Y. S. 2d 415 (2d Dep't 1938).

⁴⁵ The case cited was *Franklin v. Columbia Pictures Corp.*, 246 App. Div. 35, 284 N. Y. S. 96 (1st Dep't 1935).

⁴⁶ 304 N. Y. 354, 361, 107 N. E. 2d 485, 489 (1952).

⁴⁷ *Mau v. Rio Grande Oil*, 28 F. Supp. 845 (N. D. Calif. 1939); *Metter v. Examiner*, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939).

⁴⁸ *Hanna Manufacturing Co. v. Hillerich & Bradsby*, 78 F. 2d 763 (5th Cir. 1935); Note, 45 YALE L. J. 520 (1936); see *Haelan Laboratories v. Topps Chewing Gum*, 202 F. 2d 866 (2d Cir. 1953).

⁴⁹ See *Rogers v. Republic Productions*, 104 F. Supp. 328, 341 (S. D. Calif. 1952).

⁵⁰ Cf. *Haelan Laboratories v. Topps Chewing Gum*, 202 F. 2d 866 (2d Cir. 1953).

prominent person is found merely to have a personal right of privacy and not a property right of publicity, the important publicity values which he has developed are greatly circumscribed and thereby reduced in value.

Limited to Human Beings. It is common knowledge that animals often develop important publicity values. Thus, it is obvious that the use of the name and portrait of the motion picture dog Lassie in connection with dog food would constitute a valuable asset. Yet an unauthorized use of this name could not be prevented under a right of privacy theory, since it has been expressly held that the right of privacy "does not cover the case of a dog or a photograph of a dog."⁵¹ Not only animals but business enterprises as well are unprotected under the right of privacy,⁵² and this applies to both partnerships⁵³ and corporations.⁵⁴ Yet as in the case of animals so also with business enterprises, the economic realities are such that the use of a business name may have a considerable publicity value. Thus, the name of a major motion picture studio (and perhaps a portrait of its physical plant) could prove a valuable asset if used in connection with format of a television program dealing with Hollywood, or if used in connection with the advertising of a commercial product. Yet no objection to such use could be made under a privacy theory.

INADEQUACY OF UNFAIR COMPETITION

If the well known personality finds that misappropriation of his publicity values cannot be effectively prevented under a privacy theory, he will usually find no greater relief under the traditional theory of unfair competition.

Competition Requirement. The absence of competition between the plaintiff and defendant is in a number of jurisdictions an effective defense to an unfair competition action.⁵⁵ In such jurisdictions, it is obvious that publicity values are not effectively protected, since a person's publicity values may be profitably exploited in non-competitive fields. Thus, a chewing gum company which includes in its packages pictures of prominent baseball players could hardly be characterized as in competition with the players. Even with respect to business or other enterprises (as distinguished from personalities) which, as has been indicated *supra*,⁵⁶ cannot invoke the right of privacy, the defense of no competition will effectively prevent a successful unfair competition action for misappropriation of the enterprise's publicity values. Thus, in *Vassar College v. Loose-Wiles Biscuit Co.*,⁵⁷ the defendant

⁵¹ Lawrence v. Ylla, 184 Misc. 807, 55 N. Y. S. 2d 343 (Sup. Ct. 1945).

⁵² Shubert v. Columbia Pictures Corp., 189 Misc. 734, 72 N. Y. S. 2d 851 (Sup. Ct. 1947); Gautier v. Pro-Football, 278 App. Div. 531, 106 N. Y. S. 2d 553 (1st Dep't 1951), *aff'd*, 304 N. Y. 354, 107 N. E. 2d 485 (1952); Maysville Transit Co. v. Ort, 296 Ky. 524, 177 S. W. 2d 364 (1943).

⁵³ Rosenwasser v. Ogoglia, 172 App. Div. 107, 158 N. Y. S. 56 (2d Dep't 1916).

⁵⁴ Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982 (W. D. Mo. 1912). See also Jaccard v. R. H. Macy & Co., 176 Misc. 88, 26 N. Y. S. 2d 829 (Sup. Ct. 1941), *aff'd*, 265 App. Div. 15, 37 N. Y. S. 2d 570 (1st Dep't 1942).

⁵⁵ *E.g.*, Women's Mutual Benefit Society v. Catholic Society Feminine, 304 Mass. 349, 23 N. E. 2d 886 (1939); Acme Screen Co. v. Pebbles, 159 Okla. 116, 14 P. 2d 366 (1932); Scutt v. Bassett, 86 Cal. App. 2d 373, 194 P. 2d 781 (1948). See Riggs Optical Co. v. Riggs, 132 Neb. 26, 270 N. W. 667 (1937).

⁵⁶ See p. 210.

⁵⁷ 197 Fed. 982 (W. D. Mo. 1912).

manufactured chocolates which it sold in a package labeled "Vassar Chocolates," and upon which there appeared a seal closely resembling the seal of the plaintiff college and a picture of a young lady wearing a mortarboard. The court rendered judgment for the defendant, holding that no unfair competition could be established since the parties were not in competition. Yet, it can hardly be doubted that the defendant was trading on the publicity values established by the plaintiff. A recent case, *Loeb v. Turner*,⁵⁸ in recognizing the defense of no competition, plainly illustrates the inadequacy of unfair competition in protecting publicity values. In this case plaintiff, operator of a radio station in Phoenix, Arizona, had acquired from the owner of an auto racetrack, also in Phoenix, the exclusive right to broadcast the races. Plaintiff's transmitter covered a radius of forty miles, and within this radius defendant stationed an agent who listened to plaintiff's broadcast and thus was enabled to phone defendant (who owned a radio station in Dallas, Texas) and to relate the course of the race as it occurred. Defendant then "recreated" the race several minutes thereafter in a broadcast over his station. The court found for the defendant in plaintiff's action for unfair competition, for the reason that the parties were not in competition since plaintiff's radio station covered a radius of only forty miles and defendant's station was 1000 miles away. Taken within the narrow confines of the traditional view of unfair competition, this case may be said to be correct or at least conceptually consistent. It is suggested, however, that were the plaintiff regarded as having been granted an exclusive property right in the race-track's radio publicity values, a result more consonant with the economic realities and the demands of justice would have been achieved. Under such a view, since plaintiff had an exclusive right (as was indicated in his contract), the fact that he chose to exercise this right only within a forty mile radius of the track would not divest him of the right beyond this radius.

*Smith v. Surati*⁵⁹ presents another example of the inadequate protection afforded publicity values under a theory of unfair competition. In that case plaintiff was the director of an expedition which planned to fly over the North Pole. Part of the cost of the expedition was to be obtained from the sale of moving pictures of the expedition to be photographed by Pathe News Service under an arrangement with the expedition. Defendant, a representative of International News Service, planned to photograph the expedition without plaintiff's consent and to sell the photographs prior to the time Pathe could market its officially approved pictures. Plaintiff sought an injunction to prevent defendant from proceeding as above described, to which defendant entered a demurrer. The court sustained defendant's demurrer, finding that no cause of action for unfair competition had been stated since the expedition was not engaged in a business, but was rather "a heroic adventure." Here again it would seem that a realistic recognition of the very considerable publicity values inherent in the expedition should have warranted protection of these values against

⁵⁸ 257 S. W. 2d 800 (Tex. Civ. App. 1953). Cf. *Twentieth Century Sporting Club v. Transradio Press Service*, 165 Misc. 71, 300 N. Y. S. 159 (Sup. Ct. 1937).

⁵⁹ 7 Alaska Rep. 416 (1926).

unauthorized appropriation, regardless of whether or not the appropriators were business competitors of those responsible for the publicity values.⁶⁰

Passing Off Requirement. It is generally recognized that "the essence of unfair competition consists in the palming off of the goods or business of one person as that of another."⁶¹

This requirement of passing off (or palming off), which is probably more universally recognized than the requirement of competition discussed *supra*, serves to limit further the protection available for publicity values under the theory of unfair competition. Publicity values of a person or firm may be profitably appropriated and exploited without the necessity of any imputation that such person or firm is connected with the exploitation undertaken by the appropriator. That is to say, publicity values may be usefully appropriated without the necessity of passing off, and therefore without violating the traditional theory of unfair competition. Thus in *Paramount Pictures, Inc. v. Leader Press*⁶² the defendant manufactured and sold to theatre exhibitors advertising accessories (posters, etc.) relating to plaintiff's motion pictures; these accessories were valuable and salable by reason of their containing and exploiting the publicity values inherent in both plaintiff's motion pictures and in the actors employed by plaintiff. The Court of Appeals for the Tenth Circuit found that the above practice did not constitute unfair competition since there was no passing off of the advertising accessories of the defendant as those of the plaintiff.⁶³

The commercial "tie up," as distinguished from the commercial endorsement,⁶⁴ presents another instance in which publicity values may be appropriated without the necessity of passing off. Advertisements, almost regardless of their nature, will increase their reader appeal by including the name and portrait of a prominent personality or a well known enterprise, although there is no "passing off" that such personality or enterprise produces or endorses the product being advertised.

No Assignment in Gross. The pecuniary worth of publicity values will be greatly diminished if not totally destroyed if these values cannot be effectively sold. Yet, under the theory of unfair competition, an assignee cannot acquire the right to use a name except as an incident to his purchase of the business and good will in connection with which the name has been used.⁶⁵ Therefore, if the potential purchaser of publicity values must rely upon the law of unfair competition to protect his investment, he will be unwilling to purchase publicity values unconnected with a business. This in effect means that the sale of publicity values will usually be

⁶⁰ Even the right of publicity, however, should be subject to the defense of public interest, and it is possible that this defense would have been appropriate in the *Suratt* case. See page 216, *infra*.

⁶¹ *American Broadcasting Co. v. Wahl Co.*, 36 F. Supp. 167, 168 (S. D. N. Y. 1940). The leading case on this point is *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118 (1905).

⁶² 106 F. 2d 229 (10th Cir. 1939).

⁶³ However, the court found for the plaintiff on the theories of disparagement and inducing breach of a contract.

⁶⁴ The commercial "tie-up" presents the name and portrait of an actor or other celebrity within the context of an advertisement without necessarily indicating that the actor endorses the product advertised.

⁶⁵ *Fisk v. Fisk*, 3 F. 2d 7 (8th Cir. 1924).

effectively blocked, since the potential seller of publicity values generally has established such value not in connection with his own business but rather through the rendering of personal services for another; he will therefore be unable to sell the business in connection with which his name has achieved fame. Furthermore, even if the potential seller has achieved fame through his own business, if he can only sell his publicity values as an incident to the sale of his business, he will ordinarily prefer not to enter such a transaction.

Unfair Competition Extended. In recent years there has been a marked tendency in a number of jurisdictions to take a broader view of the scope of unfair competition. Many courts have rejected the defense of lack of competition between the parties.⁶⁶ Some other courts no longer require a showing of passing off in order to establish an action in unfair competition.⁶⁷ However, even in those jurisdictions which have permitted recovery in the absence of either competition or passing off, the doctrine would generally not appear to be so far extended as to permit recovery where *both* competition and passing off are absent. Thus, in *International News Service v. Associated Press*,⁶⁸ a case usually cited by those courts which have extended the doctrine of unfair competition, I.N.S. appropriated news gathered by the Associated Press, and although there was no passing off in that I.N.S. did not represent the appropriated news as emanating from Associated Press, there was, of course, the element of competition between the two major news services.⁶⁹ Other instances may be found in which relief was granted under an unfair competition theory upon a showing of passing off although the parties were not in competition.⁷⁰ The language contained in *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*,⁷¹ however, goes so far as to indicate that relief might be granted although both competition and passing off were not established. This is dicta, however, since the court found as a matter of fact the existence of both competition and passing off.⁷² The danger of protecting publicity values on an unfair competition theory

⁶⁶ *Finchley, Inc. v. Finchly Co.*, 40 F. 2d 736 (D. Md. 1929); *Horlick's Malted Milk Corp. v. Horluch's, Inc.*, 43 F. 2d 767 (W. D. Wash. 1930); *Kotabs, Inc. v. Kotex Co.*, 50 F. 2d 810 (3d Cir. 1931); *Standard Oil Co. of New Mexico v. Standard Oil Co. of California*, 56 F. 2d 973 (10th Cir. 1932); *Emerson Electric Mfg. Co. v. Emerson Radio & Phonograph Corp.*, 105 F. 2d 908 (2d Cir. 1939).

⁶⁷ *International News Service v. Associated Press*, 248 U. S. 215 (1918); *Montegut v. Hickson*, 178 App. Div. 94, 164 N. Y. S. 858 (1st Dep't 1917). See *In re Northern Pigment Co.*, 61 F. 2d 447 (C.C.P.A. 1934).

⁶⁸ 248 U. S. 215 (1918).

⁶⁹ *Mutual Broadcasting System v. Muzak*, 117 Misc. 489, 30 N. Y. S. 2d 419 (Sup. Ct. 1941) presented another instance wherein, although passing off could not be established, relief was nevertheless granted on the basis of competition between the parties. See *Hanna Mfg. Co. v. Hillerich and Bradsby*, 78 F. 2d 763 (5th Cir. 1935).

⁷⁰ See *Madison Square Garden Corp. v. Universal Pictures Co.*, 255 App. Div. 459, 7 N. Y. S. 2d 845 (1st Dep't 1938).

⁷¹ 101 N. Y. S. 2d 483 (Sup. Ct. 1950).

⁷² In this case the defendant recorded radio broadcasts of the Metropolitan Opera and made phonograph records therefrom which it sold to the public. Defendant advertised and sold the records as records of broadcast Metropolitan Opera performances. The court found that competition existed due to the fact that Columbia Records, Inc. joined the Metropolitan Association as a plaintiff in the case (Columbia having contracted for the phonograph rights in the Metropolitan performances). Furthermore, the court found that the element of passing off existed since an inference could be drawn that the activities of the defendant misled the public into believing that the recordings were made with the cooperation of the Metropolitan Opera Association.

in the absence of both competition and passing off is indicated by further language found in the *Metropolitan* case. The court stated that the law of unfair competition rests on the principle that "property rights of commercial value are to be and will be protected from any form of unfair invasion or infringement and from any form of commercial immorality, and a court of equity will penetrate and restrain every guise resorted to by the wrongdoer. The courts have thus recognized that in the complex pattern of modern business relationships, persons in theoretically non-competitive fields may, by unethical business practices, inflict as severe and reprehensible injuries upon others as can direct competitors."⁷³ It will be seen from the above passage that under this view (*i.e.*, discarding the requirements of competition and passing off) the scope of unfair competition covers "any form of commercial immorality," and "unethical business practices." If this loose standard were in fact applied by the courts, the already uncertain field of unfair competition would be reduced to a chaos of complete uncertainty, since what lawyer or business man could predict with any degree of certainty where the courts would find that properly aggressive business practices leave off and "commercial immorality" and "unethical business practices" begin? True, publicity values might be protected under such a broad theory, but in doing so the courts would be adopting a standard which by its uncertainty could prove highly detrimental to orderly commercial intercourse. It is suggested that publicity values can be adequately protected under the right of publicity discussed *infra*, without going to the extremes indicated above.

INADEQUACY OF OTHER THEORIES

Publicity values may to a limited extent be protected by contract,⁷⁴ but such protection extends, of course, only to the parties to such contracts. The inadequacy of the contract theory in protecting publicity values is illustrated in *Corliss v. E. W. Walker Co.*,⁷⁵ in which plaintiff's deceased husband had his portrait taken by a photographer who agreed by contract not to furnish prints of the photograph to anyone other than plaintiff and plaintiff's husband. Thereafter the defendant purchased a print of the photograph from the photographer and inserted it in a biographical sketch of the deceased husband. The plaintiff sought to obtain an injunction against the use of the photograph, and the court granted the defendant's motion to dissolve the injunction on the ground that defendant was not a party to the contract between the plaintiff's husband and the photographer, and therefore defendant was not bound thereby.⁷⁶ However, if the plaintiff can establish a contract restricting use of the publicity values and if defendant although not a party to the contract can be shown to have induced breach of the contract, then relief may be obtained.⁷⁷ Thus if *A* purchases the right to use *B*'s publicity values under a contract in which *B* agrees not to grant the right to use such publicity values to

⁷³ 101 N. Y. S. 2d 483, 492 (Sup. Ct. 1950).

⁷⁴ See *Wood v. Lucy, Lady Duff Gordon*, 222 N. Y. 88, 118 N. E. 214 (1917).

⁷⁵ 64 Fed. 280 (C. C. D. Mass. 1894).

⁷⁶ See also *Lawrence v. Ylla*, 184 Misc. 807, 55 N. Y. S. 2d 343 (Sup. Ct. 1945).

⁷⁷ *Paramount Pictures v. Leader Press*, 106 F. 2d 229 (10th Cir. 1939).

anyone else, and if thereafter *C* induces *B* to grant to him the same publicity values and thereby causes *B* to breach his contract with *A*, *C* will be liable to *A* for the tort of inducing breach of contract. However, if *C* having thus acquired the publicity rights from *B* in turn assigns these rights to *D*, *D* in using such publicity rights will not be liable to *A* for the tort of inducing breach of contract since *D* merely benefited from the breach of the contract but did not induce it,⁷⁸ and *D* will not be liable for breach of contract since he was not a party to the contract between *A* and *B*. Thus even in the limited situations where appropriation of publicity values involves a breach of contract, a person who is not a party to the contract and who has not induced its breach may not be prevented from using the publicity values on either a contract theory or a theory of inducing breach of contract.

If the use of the plaintiff's publicity values is made in a manner so as to constitute defamation, trade libel or disparagement then, of course, liability will ensue. Thus, in *Paramount Pictures, Inc. v. Leader Press*,⁷⁹ although the court found that defendant's practice of producing advertising accessories embodying the publicity value of plaintiff's pictures and stars constituted neither an invasion of privacy nor unfair competition, still relief was granted on the theory of disparagement because of the fact that defendant's advertising accessories depicted plaintiff's stars in an unattractive manner. However, for the reasons discussed in connection with the right of privacy, publicity values are not adequately protected if relief can only be granted when the use of the values is made in an offensive manner, since generally an appropriation of publicity values does not involve a disparagement of the values thus appropriated, or of the persons identified with such values.⁸⁰

SUBSTANCE OF AND LIMITATIONS ON THE RIGHT OF PUBLICITY

The substance and direction of the right of publicity has to some extent been indicated by adjudicated cases which will be discussed later.⁸¹ Before examining the somewhat fragmentary outline embodied in existing case law, it might be well first to attempt some perspective as to the fundamental elements necessary to a workable and socially useful right of publicity. From such a perspective, the meaning and continuity of existing case law will be more apparent.

The substance of the right of publicity must be largely determined by two considerations: first, the economic reality of pecuniary values inherent in publicity and, second, the inadequacy of traditional legal theories in protecting such publicity values. It is an unquestioned fact that the use of a prominent person's name, photograph or likeness (*i.e.*, his publicity values) in advertising a product or in attracting an audience is of great pecuniary value. This is attested to by the now pervasive trade practice of paying well known personalities considerable sums for the right

⁷⁸ *Haelan Laboratories v. Topps Chewing Gum*, 202 F. 2d 866 (2d Cir. 1953).

⁷⁹ 106 F. 2d 229 (10th Cir. 1939).

⁸⁰ This section is not intended to exhaust other possible theories under which publicity values may be protected in particular circumstances. For instance, a copyright theory may be invoked if defendant uses a photograph in which plaintiff can claim a common law or statutory copyright.

⁸¹ See page 218, *infra*.

thus to use such publicity values.⁸² It is also unquestionably true that in most instances a person achieves publicity values of substantial pecuniary worth only after he has expended considerable time, effort, skill, and even money. It would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations. Yet, because of the inadequacy of traditional legal theories discussed *supra*, persons who have long and laboriously nurtured the fruit of publicity values may be deprived of them, unless judicial recognition is given to what is here referred to as the right of publicity—that is, the right of each person to control and profit from the publicity values which he has created or purchased.

The nature of the inadequacy of the traditional legal theories dictates in large measure the substance of the right of publicity. The right of publicity must be recognized as a property (not a personal) right, and as such capable of assignment and subsequent enforcement by the assignee. Furthermore, appropriation of publicity values should be actionable regardless of whether the defendant has used the publicity in a manner offensive to the sensibilities of the plaintiff. Usually the use will be non-offensive, since such a use is more valuable to the defendant as well as to the plaintiff. Likewise, the measure of damages should be computed in terms of the value of the publicity appropriated by defendant rather than, as in privacy, in terms of the injury sustained by the plaintiff. There must be no waiver of the right by reason of the plaintiff being a well known personality. Indeed, the right usually becomes important only when the plaintiff (or potential plaintiff) has achieved in some degree a celebrated status. Moreover, since animals, inanimate objects, and business and other institutions all may be endowed with publicity values, the human owners of these non-human entities should have a right of publicity (although no right of privacy) in such property, and this right should exist (unlike unfair competition) regardless of whether the defendant is in competition with the plaintiff, and regardless of whether he is passing off his own products as those of the plaintiff.

It is not possible to set forth here in any detail the necessary limitations on the right of publicity which only the unhurried occurrence of actual cases will clearly establish. Yet some few suggestions can be made. In privacy cases there is a tendency by some courts to confuse or at least fail to distinguish between the defense of waiver by a well known personality and the defense of “news” or public interest.⁸³ Although, as indicated *supra*, the defense of waiver by celebrities should not be recognized in a publicity action, the defense of public interest should be no less effective in a publicity action than in a privacy action. Where use of a person’s name, photograph, or likeness is made in the dissemination of news or in a manner

⁸² See *Haelan Laboratories v. Topps Chewing Gum*, 202 F. 2d 866 (2d Cir. 1953); *O'Brien v. Pabst Sales Co.*, 124 F. 2d 167 (5th Cir. 1941).

⁸³ *E.g.*, *Gautier v. Pro-Football*, 304 N. Y. 354, 107 N. E. 2d 485 (1952); *Smith v. Suratt*, 7 Alaska 416 (1926).

required by the public interest, that person should not be able to complain of the infringement of his right of publicity.

The question will be raised as to whether there is an infringement of the right of publicity when defendant appropriates the plaintiff's publicity values and uses them, but not for purposes of trade or advertising. It may be argued that since publicity values are useful mainly in connection with trade and advertising, this presents a convenient place to draw the line between wrongful infringement of the right of publicity and proper exercise of freedom of expression. However, in view of the holding in *Gautier v. Pro-Football*⁸⁴ that only that portion of a television broadcast containing the "commercial" may be said to be for purposes of trade or advertising,⁸⁵ if the right of publicity were restricted to uses for purposes of trade or advertising, there might be no protection against appropriation of publicity values on television programs.⁸⁶ Probably it would be wiser not to inject any arbitrary limitation on the scope of the right of publicity, relying instead on the limitation imposed by the rule of damages. In most instances, the use of publicity values for purposes other than for trade or advertising will be of no great value to the defendant and consequently will result in small or nominal damages for the plaintiff. It may also be suggested that the right of publicity should be limited to those persons having achieved the status of a "celebrity," as it is only such persons who possess publicity values which require protection from appropriation.⁸⁷ Here too, however, it would probably be preferable not to impose an arbitrary limit on the right but rather to rely upon the rule of damages. It is impractical to attempt to draw a line as to which persons have achieved the status of celebrity and which have not; it should rather be held that every person has the property right of publicity, but that the damages which a person may claim for infringement of the right will depend upon the value of the publicity appropriated which in turn will depend in great measure upon the degree of fame attained by the plaintiff. Thus, the right of publicity accorded to each individual "may have much or little, or only a nominal value,"⁸⁸ but the right should be available to everyone.

It may also be argued that the right of publicity should be limited to protection against appropriation of one's portrait but should not protect against appropriation of one's name.⁸⁹ However, the use of a name may in itself carry considerable

⁸⁴ 304 N. Y. 354, 107 N. E. 2d 485 (1952).

⁸⁵ Note, however, that the program telecast in the *Gautier* case was a sports event, with plaintiff's animal act appearing only during the half time.

⁸⁶ This raises the possibility of piracy by kinescope. That is, traditional legal theories discussed *supra* may not effectively prevent the unauthorized recording and use of a film made from a live television broadcast where, as in a sports program, the material contained in the broadcast would not command common law copyright protection. See *Loeb v. Turner*, 257 S. W. 2d 800 (Tex. Civ. App. 1953); *National Exhibition Co. v. Teleflash*, 24 F. Supp. 488 (S. D. N. Y. 1936); *Smith v. Suratt*, 7 Alaska 416 (1926). *But cf.* *Twentieth Century Sporting Club v. Transradio Press Service*, 165 Misc. 71, 300 N. Y. S. 159 (Sup. Ct. 1937); *Mutual Broadcasting System v. Muzak Corp.*, 177 Misc. 489, 30 N. Y. S. 2d 419 (Sup. Ct. 1941).

⁸⁷ *Cf.* *Shubert v. Columbia Pictures Corp.*, 189 Misc. 734, 72 N. Y. S. 2d 851 (Sup. Ct. 1947).

⁸⁸ *O'Brien v. Pabst Sales Co.*, 124 F. 2d 167 (5th Cir. 1941) dissenting opinion.

⁸⁹ *Haelan Laboratories v. Topps Chewing Gum*, 202 F. 2d 866 (2d Cir. 1953) indicates that the right of publicity may be limited to the protection of the publicity value of one's photograph.

publicity value, and there would seem to be no reason to exclude such appropriation from the protection of the right of publicity.

RECOGNITION OF THE RIGHT OF PUBLICITY

It would be premature to state that the right of publicity has as yet received any substantial degree of judicial recognition. Yet, even before Judge Jerome Frank's recent express application of the right in *Haelan Laboratories v. Topps Chewing Gum Inc.*,⁹⁰ a number of cases⁹¹ have indicated a judicial willingness to extend protection to publicity values which would not be protectible under the traditional legal theories discussed *supra*.

Before examining the cases which have extended protection to publicity values, it might be noted that even where such protection has not been forthcoming there has been an increasing recognition of the pecuniary value of modern publicity and of the need for evolving some appropriate legal protection. Thus in *Paramount Pictures, Inc. v. Leader Press*⁹² the court recognized that "proper and adequate publicity and advertising is indispensable to the stars and featured players appearing in motion pictures as well as to the pictures themselves . . . and that such attractive and adequate advertising as the medium of attracting the public to its motion pictures is of great value to plaintiff [Paramount]." Because of the particular facts of this case, however, the court was able to protect plaintiff's publicity values on trade libel and inducing breach of contract theories, thereby avoiding the necessity of invoking the right of publicity.

In *Gautier v. Pro-Football Inc.*,⁹³ for reason indicated *supra*,⁹⁴ plaintiff was denied protection under the New York privacy statute. However, Justice Desmond in a concurring opinion⁹⁵ recognized the inadequacy of protecting publicity values under a privacy theory, stating: "Privacy is the one thing he (plaintiff) did not want or need in his occupation. His real complaint, and perhaps a justified one, but one we cannot redress in this suit brought under the New York Right of Privacy statutes, is that he was not paid for the telecasting of his show . . . Enacted to fill a gap in existing law . . . these statutes have always been narrowly construed, and what plaintiff is asking for is the broadest kind of application."⁹⁶

Although until the *Haelan* case no court has named the right to the protection and control of publicity values the "right of publicity,"⁹⁷ in a number of previous

⁹⁰ *Supra*.

⁹¹ In addition to the cases discussed *infra*, see *Waring v. WDAS*, 327 Pa. 433, 194 Atl. 631 (1937), and *Waring v. Dunlea*, 25 F. Supp. 338 (E. D. N. C. 1939) wherein a performer's interpretation of a musical composition was regarded as a protectible property right. This is at least akin to the right of publicity. Cf. *RCA v. Whiteman*, 114 F. 2d 85 (2d Cir. 1940).

⁹² 106 F. 2d 229, 230 (10th Cir. 1939).

⁹³ 304 N. Y. 354, 107 N. E. 2d 485 (1952).

⁹⁴ See page 205, *supra*.

⁹⁵ 304 N. Y. 354, 361, 107 N. E. 2d 485, 489-490 (1952).

⁹⁶ Although Justice Desmond appears to be referring to the possibility that plaintiff might find redress in a breach of contract action (due to an AGVA form agreement which restricted the televising of plaintiff's performance), it would seem that plaintiff's "real complaint" to which Justice Desmond refers would be no less worthy of redress even in the absence of restrictive contractual provisions.

⁹⁷ However, compare *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 196, 50 S. E. 68, 69 (1904), wherein "the right of publicity" is spoken of as the correlative of the right of privacy.

cases this right has either been tacitly recognized or even expressly invoked without use of the name. In *Uproar Co. v. N.B.C.*,⁹⁸ it was held that the name "Graham," when used in reference to the popular radio announcer Graham McNamee, had "acquired through the efforts of McNamee and the National Broadcasting Co., a very substantial value, especially valuable for advertising purposes; and this definite commercial value exists apart from the services as radio announcer. Rights of a pecuniary nature have been created which partake of the elements of property rights, and which will receive the protection of equity." The court thus recognized a property right in the name "Graham," which it held could be validly assigned to N.B.C. so as to give the broadcasting company the right to prevent the use of the name by others.

In *Madison Square Garden Corp. v. Universal Pictures Co.*,⁹⁹ the defendant produced a motion picture which purported to show professional ice hockey games played in New York City in the Stanley Cup Series. The locale of the games in the motion picture was not expressly represented as being Madison Square Garden, but since the Stanley Cup Series was generally known to occur only in Madison Square Garden the court found that defendant's picture produced a false impression upon the part of the public that the picture contained scenes made in plaintiff's arena. The picture also contained actual newsreel scenes of plaintiff's ice hockey team, the Rangers, taken during an actual game, but these scenes were taken outside of New York City and therefore did not show the Garden. Although the plaintiff brought an action for unfair competition, the language of the court's opinion indicates that in finding for the plaintiff the court recognized publicity values as a property right. The court stated:¹⁰⁰

We think, too, that the complaint sufficiently alleges a misappropriation of plaintiff's property rights. Plaintiff had built up a valuable business licensing the use of genuine photographs taken in the Garden in feature moving pictures, and from that business had derived substantial revenue. That business had been created by the expenditure on plaintiff's part of large sums of money and of effort and skill in the management of its enterprise . . . [quoting from *Fisher v. Star Co.*, 231 N. Y. 414, 428, 132 N. E. 133, 137 (1921)] "any civil right not unlawful in itself nor against public policy that has acquired a pecuniary value, becomes a property right that is entitled to protection as such."

However, the court in the *Madison Square Garden* case seems to regard publicity values as a protectible property right under the expanded theory of unfair competition. It is, of course, of no serious concern to a plaintiff that his action for protection of publicity values is regarded as within the scope of unfair competition so long as the relief sought is granted. However, as discussed *supra*,¹⁰¹ it is suggested that if the *Madison Square Garden* court had found as it did purely on a theory of misappropriation of publicity values, the case would have been more helpful as a

⁹⁸ 8 F. Supp. 358, 361 (D. Mass. 1934).

⁹⁹ 255 App. Div. 459, 7 N. Y. S. 2d 845 (1st Dep't 1938).

¹⁰⁰ 255 App. Div. at 464, 7 N. Y. S. 2d at 850-851.

¹⁰¹ See page 213, *supra*.

guide to future conduct since it would, on the one hand, have indicated that misappropriation of publicity values will be proscribed even when the publicity values are not of the exact same nature as those in the adjudicated case, and, on the other hand, by not invoking the already muddied concept of unfair competition the danger of further extending this doctrine into uncertain and unpredictable areas would be avoided. In those cases in which the court finds liability under *both* an unfair competition theory and a publicity theory the two theories should be carefully distinguished so that the impression is not given that the right of publicity is but a particular aspect of unfair competition. This better practice was followed in *Pittsburgh Athletic Co. v. KQV*¹⁰² wherein defendant at a vantage point outside of plaintiff's baseball stadium broadcast play-by-play reports of plaintiff's baseball games. Plaintiff had previously granted the exclusive right to broadcast the games to a third party. The court found the defendant liable both for unfair competition *and* for violation of plaintiff's property rights.¹⁰³ On the latter point the court held that the plaintiff had a property right to capitalize on the news value of its games by selling exclusive broadcasting rights, thus recognizing a property right approximating the right of publicity, without expressly designating it as such.

Perhaps the most persuasive argument for the right of publicity appears in *O'Brien v. Pabst Sales Co.*¹⁰⁴ In that case the plaintiff, the most publicized football player of the year 1938-39, posed for football publicity pictures taken by the publicity department of his university. He agreed that such pictures might be distributed to "newspapers, magazines, sports journals and the public generally." Defendant purchased a copy of plaintiff's picture and published it on a calendar next to the words "Pabst Blue Ribbon Football Calendar, 1939." The court refused to find for plaintiff on a privacy theory for reasons indicated *supra*.¹⁰⁵ However, the court expressly refused to rule on the question of whether the plaintiff would be entitled to recover on quantum meruit (which would amount to a recovery under a right of publicity) because the plaintiff did not advance this argument. Circuit Judge Holmes in his dissenting opinion was not deterred by this procedural point, and concluded that plaintiff should recover not for invasion of his right of privacy but in quantum meruit for infringement of his property right to use his name and picture for commercial purposes. Judge Holmes, in a well reasoned opinion, stated: "The great property rights created by the demands of modern methods of advertising are of comparatively recent origin . . . but the common law of Texas is subject to growth and adaptation. . . . No one can doubt that commercial advertisers customarily pay for the right to use the name and likeness of a person who has become famous. The evidence in this case shows that appellant refused an offer by a New York beer company of \$400 for an endorsement of its beer. . . ."

¹⁰² 24 F. Supp. 490 (W. D. Pa. 1938).

¹⁰³ Cf. *National Exhibition Co. v. Teleflash*, 24 F. Supp. 488 (S. D. N. Y. 1936) where on similar facts it was held that defendant was not liable for unfair competition and the question of property (or publicity) right was not discussed.

¹⁰⁴ 124 F. 2d 167 (5th Cir. 1941).

¹⁰⁵ See page 205 and notes 15 and 38 *supra*.

Judge Holmes concluded that the decision in this case means that "if one is popular and permits publicity to be given to one's talent and accomplishment in any art or sport, commercial advertisers may seize upon such popularity to increase their sales of any lawful article without compensation of any kind for such commercial use of one's name and fame. This is contrary to usage and custom among advertisers in the marts of trade. They are undoubtedly in the habit of buying the right to use one's name or picture to create demand and good will for their merchandise. It is the peculiar excellence of the common law that, by general usage, it is shaped and moulded into new and useful forms."¹⁰⁶

It would seem to be entirely possible that this perceptive Holmes dissent (as with the dissenting opinions of another Holmes on another court) will eventually be adopted by the majority, particularly since in the *O'Brien* case the majority opinion was careful to point out that "nothing in the majority opinion purports to deal with or express an opinion on the matter dealt with in the dissenting opinion" because "that was not the case pleaded and attempted to be brought."¹⁰⁷

There are certain cases which speak neither of the "right of publicity" nor of a "property right" in matters which contain publicity values, but which by their results indicate a tacit recognition of the right of publicity.¹⁰⁸ One such case is *Lawrence v. Ylla*¹⁰⁹ wherein the plaintiff contracted for *A* to photograph plaintiff's dog. Thereafter *A* sold prints of the photograph to *B* who used the prints in advertisements which he published in the newspapers of *C* and *D*. Plaintiff brought an action against *A*, *B*, *C*, and *D*. The court held that the plaintiff could not recover under a right of privacy theory since that right "does not cover the case of a dog or a photograph of a dog." The court further found that only *A* was liable to plaintiff under a contract theory since the other defendants were not in privity of contract with plaintiff. Yet, the court enjoined defendants *B*, *C*, and *D* from further use of the photograph, although admittedly such use constituted neither an invasion of privacy nor a breach of contract. This case can, perhaps, best be explained as a tacit application of the right of publicity.

Finally, with *Haelan Laboratories Inc. v. Topps Chewing Gum Inc.*¹¹⁰ the right of a person (or his assignee) to protect the publicity value of his photograph was expressly recognized and designated the "right of publicity." The facts of this case, in so far as they involve the right of publicity, were as follows: The plaintiff and defendant were competitors in that both were manufacturers of candy or chewing gum confections. Plaintiff contracted with certain prominent baseball players for the exclusive right to use their photographs in connection with the sale of

¹⁰⁶ 124 F. 3d 167, 170-171 (5th Cir. 1941).

¹⁰⁷ It may be that even if the plaintiff had pursued both a privacy theory and a publicity theory, the two theories would have been found to be inconsistent. See *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944). Note that the *O'Brien* case is a federal diversity case and therefore subject to the limitations discussed at page 222, *infra*.

¹⁰⁸ See *Wood v. Lucy, Lady Duff Gordon*, 222 N. Y. 88, 118 N. E. 214 (1917).

¹⁰⁹ 184 Misc. 807, 55 N. Y. S. 2d 343 (Sup. Ct. 1945).

¹¹⁰ 202 F. 2d 866 (2d Cir. 1953). See subsequent history in 112 F. Supp. 904 (E. D. N. Y. 1953).

plaintiff's products. Thereafter one Russel contracted with the same players for the same purpose. Russel subsequently assigned his rights to the defendant who proceeded to use photographs of the players in connection with his product. In the ensuing litigation, the defendant argued plaintiff could not recover either under a privacy theory since the right of privacy is personal and non-assignable, nor for inducing breach of contract since it was Russel, not the defendant, who induced the breach.¹¹¹ The court impliedly recognized the validity of these defenses, but went on to state:¹¹²

We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may be validly made "in gross" i.e., without any accompanying transfer of a business or anything else. . . . This right may be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances. This right of publicity would usually yield no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

Thus in the *Haelan* case the highly respected Second Circuit of the Federal Courts of Appeals granted to the right of publicity a recognition and status of a qualitatively higher order than had been accorded in any previous case. The court clearly held that the right of publicity, unlike the right of privacy, is a property right which may be validly assigned and it at least implied that the privacy defenses of waiver by celebrities and of no liability for non-offensive uses are not applicable in a right of publicity action. Yet, by the very nature of our judicial process, a new principle of law can never be completely embodied in any one decision. The *Haelan* case in the final analysis is limited to its own facts, and therefore leaves unexplored certain important phases of the right of publicity. It remains for future cases finally to determine that the measure of damages in a publicity action shall be for the value of the use of the appropriated publicity rather than for the injury to the plaintiff's sensibilities. Likewise, the right to recover for misappropriation of publicity values inherent in animals, inanimate objects, and business and other institutions (regardless of competition and passing off) remains to be established. Furthermore, the effect of the *Haelan* case as a precedent is questionable since the Court of Appeals had jurisdiction on grounds of diversity of citizenship and therefore the resulting decision represents the federal court's interpretation and application of New York law,¹¹³ which is of course not binding in other jurisdictions. In fact, although persuasive, it is not even binding on the New York courts. Despite its limitations,

¹¹¹ Defendant had directly contracted with certain other players who had previously contracted with plaintiff. As to these players, the court found defendant liable for inducing breach of contract.

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

¹¹³ *Erie Railroad v. Tompkins*, 304 U. S. 64 (1938).

the *Haelan* case represents a major step in the inexorable process of reconciling law and contemporary problems.

This raises the final question of the right of our courts, in the absence of legislation, to enforce a right not previously recognized. Here we may return to the essay by Brandeis and Warren discussed at the beginning of this article. The argument was there advanced that "the beautiful capacity for growth which characterizes the common law" would with respect to the right of privacy "enable the judges to afford the requisite protection, without the interposition of the legislature."¹¹⁴ That this proved true is attested by judicial opinions in fifteen jurisdictions. There is no less reason to believe that the common law can likewise meet the publicity problems created by modern methods of advertising and communications without doing violence to our concept of an independent but limited judiciary. But whether the right of publicity is finally and fully realized by statute or through growth and adaptation of common law principles, eventual recognition of the right seems assured both from the trend of decisions already rendered, and from the more fundamental fact of community needs.

¹¹⁴ Warren and Brandeis, *supra* note 8, at 195.