

The Right of Publicity

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RIGHTS OF PRIVACY/PUBLICITY

The right of publicity derives from one of the torts generally included under the rubric of the right of privacy. It protects against the unauthorized commercial appropriation of an individual's identity. The specifics of exactly what aspects of one's identity are included under this right (e.g., name, likeness, picture, voice, persona, etc.) vary widely from state to state. And the extent of the right is always limited by the First Amendment, which permits the use of an individual's identity for informational and other protected purposes.

COMMERCIAL APPROPRIATION

Under the laws of certain states, including New York, a written release is necessary whenever a person's name, picture, likeness or voice is "commercial"; in other words that it is used for advertising or promotion (paid media insertion or speech promoting the sale of goods or services) or for any purposes of trade (products and merchandise). See N.Y. Civ. Rights Law §§50-51. The question whether a use is or is not commercial has always been a difficult one, and is becoming more difficult in light of new technologies that blur traditional lines between commerce and information. Titan Sports, Inc. v. Comics World Corp., 870 F.2d 85 (2d Cir. 1989) (function and marketing determine whether use is for purpose of trade). See Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 106 Cal. Rptr. 2d 126 (2001) (Three Stooges faces in a lithograph and on T-shirts held to be no more than celebrity likenesses with a commercial purpose); Beverly v. Choices Women's Medical Center, Inc., 141 A.D.2d 89, 532 N.Y.S. 2d 400 (2d Dep't 1988), appeal dismissed, 73 N.Y.2d 785 (1988) (calendar given to medical center patients, female physicians, and others held to be advertising). See cases below.

An illustration of the difficulty courts have found in deciding whether a use is or is not commercial can be found in a recent case where Michael Jordan sued Chicago supermarket chain Jewel-Osco, claiming that it had improperly used his identity without authorization. The case stemmed from an advertisement that the supermarket ran in a 2009 Sports Illustrated publication commemorating Jordan's induction into the Basketball Hall of Fame. The ad stated: "Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was 'just around the corner' for so many years," and included the Jewel logo and slogan "Good things are just around the corner." In February 2012, a

federal judge ruled that the ad was “noncommercial speech” protected by the First Amendment, because the ad did “not propose any kind of commercial transaction.” In his decision, the District Court Judge wrote: “The reader would see the Jewel page for precisely what it is -- a tribute by an established Chicago business to Chicago’s most accomplished athlete.” He also found that the use of Jewel’s slogan in the ad was “simply a play on words.” Jordan v. Jewel Food Stores, Inc., 851 F. Supp. 2d 1102 (N.D. Ill. Feb. 15, 2012). But this decision recently was reversed by the Seventh Circuit, 743 F.3d 509, with the Court finding that the commercial purpose of the advertisement was readily apparent, as it was used to promote the goodwill of and enhance the Jewel brand.

EDITORIAL USE

Where a public figure is named or portrayed in an expression of editorial opinion, the First Amendment provides a protection against a right of publicity claim, even if the expression is entwined with commercial aspects. Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001) (still images of actors from classic Hollywood films altered and published by Los Angeles Magazine to model new fashions). One court has distinguished the impermissible use of a person’s image or likeness to promote a product or service from the lawful use of excerpts from an expressive work to sell copies of the work itself. Lane v. MRA Holdings, LLC, 242 F. Supp. 2d 1205 (M.D. Fla. 2002) (use of a woman’s image to market the “Girls Gone Wild” video in which she consented to appear could not give rise to liability under Florida law). Another court has held that a newspaper’s 1-900 phone number poll to name the most popular member of a pop group, with the results published as a feature story, did not constitute a use for purposes of trade of the names of the celebrities – regardless of whether the newspaper had a profit motive. New Kids on the Block v. News America Publ’g, Inc., 745 F. Supp. 1540 (C.D. Cal. 1990), aff’d, 971 F.2d 302 (9th Cir. 1992). In New York, where the person named or portrayed bears a real relationship to an article on matters of public interest, an unauthorized use does not give rise to a right of publicity claim. Howell v. New York Post Co., 81 N.Y.2d 115, 596 N.Y.S.2d 350 (1993) (plaintiff photographed talking to a person who was newsworthy); Finger v. Omni Publs. Int’l Ltd., 77 N.Y.2d 138, 564 N.Y.S.2d 1014 (1990) (photo of family with six children used to illustrate an article about caffeine-enhanced fertility); Creel v. Crown Publishers, Inc., 115 A.D.2d 414, 496 N.Y.S. 2d 219 (1st Dep’t 1985) (photograph illustrating a book entitled “World Guide to Nude Beaches and Recreation” concerned newsworthy matter of public interest and could not be the basis for a claim for invasion of privacy). However, falsity may make such uses actionable. Hoffman, supra (celebrity must prove reckless disregard for falsity of the image); see Messenger ex rel. Messenger v. Gruner + Jahr Printing & Publ’g, 94 N.Y.2d 436, 706 N.Y.S.2d 52 (2000).

PRODUCT INFORMATION

Information regarding availability of products and services, provided it is not a paid insertion or controlled by the marketer, does not generally require permission. Hoffman, supra; Stephano v. News Group Publ’ns, Inc., 64 N.Y.2d 174, 485 N.Y.S.2d 220 (1984) (New York Magazine “Best Bets” article could not be found to be an “advertisement in disguise” solely because it featured price and store location information for a jacket, and because stores mentioned in article had previously advertised in the magazine). However,

editorial content in a catalog may be deemed to be part of the advertising. Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001) (photo of surfers illustrating an article about surfing held to be advertising).

PRODUCT INTEGRATION AND ADJACENCIES

Integrating a product or advertisement into a publication's otherwise editorial content may give rise to a publicity rights claim when the editorial material includes the name or pictures (or indicia of identity) of a person. See Hoffman supra; Messenger, supra. If the advertising or sales copy references or depicts products featured in the editorial content, persons referenced in the editorial content may have a claim that their name or likeness has been commercially appropriated. Downing, supra. Advertisers can be informed about the subject matter adjacent to the advertising, as is often the case with special inserts and gatefolds, but permitting the advertiser to label the insert with a sponsor identification, influence the content, or approve content or photography may create exposure to commercial appropriation claims by any person included in the editorial content. See Stewart v. Rolling Stone LLC, 181 Cal. App. 4th 664, 688, 105 Cal. Rptr. 3d 98, 118 (1st Dist. 2010) (observing that defendant magazine maintained "a 'wall' between its editorial and advertising staff"); Stephano, 64 N.Y.2d at 186, 485 N.Y.S.2d at 226 (noting that plaintiff had not contended that "it is uncommon for commercial publishers to print legitimate news items . . . concerning products by persons or firms who have previously advertised in the publisher's newspaper or magazine.").

BRANDED ENTERTAINMENT

Where the content is an infomercial or program-length commercial or promotion for a product, the entire program may be deemed commercial, requiring permission to use any person's name, picture or voice in the program. See Facenda v. N.F.L. Films, Inc., 542 F.3d 1007 (3d Cir. 2008).

PRESS RELEASES/TWITTER

Public relations professionals have long assumed that since the ultimate publication of their material would be in news stories in established media, the content would fall under the exclusion from publicity rights claims for content that is "newsworthy." This assumption must now be questioned as press releases are routinely published on corporate websites. This publication to the public at large may result in a right of publicity claim by any person who is referenced in the press release. See Yeager v. Cingular Wireless, 627 F. Supp. 2d 1170 (E.D. Cal. 2008) (allegations involving press release using pilot Chuck Yeager's name as an historical reference held sufficient to state a claim). In recent years, mentions of celebrities by brands on their Twitter feeds have led to claims. See e.g., recent claim by Katherine Heigl for Tweet showing celebrity coming out of Duane Reade drug store with caption "Love a quick #DuaneReade run? Even @KatieHeigl can't resist shopping #NYC's favorite drugstore."

PARODY

Satire and parody have been held to constitute protected speech. See Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (caricature of celebrity in a parody of an advertisement protected by First Amendment); Geary v. Goldstein, No. 91 CIV. 6222 (KMW), 1996 WL 447776 (S.D.N.Y. Aug. 8, 1996) (actor's performance in a commercial which was used in a sexually explicit parody of the commercial could not be the basis for a claim); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959 (10th Cir. 1996) (parody baseball cards). But parody is a very tricky defense and just claiming that an otherwise commercial use is a parody may not be sufficient.

ART

Art and drama are also protected by the First Amendment. See ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003) (5,000 copies of "limited edition" Tiger Woods lithograph). In New York, works of fiction do not fall within the scope of "advertising" or "trade," and hence uses of a person's name, portrait or picture in such works do not inherently violate a person's right of privacy under state law. Hampton v. Guare, 195 A.D.2d 366, 600 N.Y.S.2d 57 (1993) (play "Six Degrees of Separation" inspired in part by actual story); Costanza v. Seinfeld, 279 A.D.2d 255, 719 N.Y.S.2d 29 (1st Dep't 2001) (TV show character allegedly based on actual person). Other states protect the use of a person's name, portrait, picture, or voice in the context of a dramatic work. See, e.g., Joplin Enters. v. Allen, 795 F. Supp. 349 (W.D. Wash. 1992) (play based on life of Janis Joplin).

However, in the case of an artistic or literary use as opposed to a biographical, news or historical use, there is likely to be an inquiry into whether the work is exploiting the individual's value as an artist or celebrity, in selling something to fans of the artist who purchase a variation of the artist's own performance, or purchase the work for its own artistic or additional value as a work of art. Compare Winter v. D.C. Comics, 30 Cal. 4th 881, 134 Cal. Rptr. 2d 634 (2003) (under transformative use test, use of celebrities' names and likenesses for characters in a graphic novel significantly expressive and not actionable), with Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003) (en banc) (applying predominant use test, use of a celebrity's name for a character in a graphic novel was primarily to promote the graphic novel to the fans of the celebrity).

Thus, the use of a celebrity in art must be "more than a mere celebrity likeness." Comedy III Prods., Inc., 25 Cal. 4th at 391, 106 Cal. Rptr. 2d at 129; see also Winter, 30 Cal. 4th at 890, 134 Cal. Rptr. 2d at 641; Hilton v. Hallmark Cards, 599 F.3d 894, 911 (9th Cir. 2010). Compare ETW Corp., *supra* (Tiger Woods montage of images in a poster held to be transformative), with TCI Cablevision, *supra* (right of publicity claim prevails where the predominant use is to exploit celebrity's commercial value).

First Amendment protection may be lost where the work is insufficiently related to the celebrity. There is also the possibility that dicta in cases upholding First Amendment protection but noting that the use was incidental or de minimis could mean that the use of a celebrity as principal character may be actionable. Compare Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989) (film title "Ginger and Fred" protected against infringement claims by

Ginger Rogers), with Parks v. LaFace Records, 329 F.3d 437, 459 (6th Cir. 2003) (artistic relevance of song title “Rosa Parks” to content of song was “highly questionable”). See also University of Notre Dame du Lac v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 454, 256 N.Y.S. 2d 301, 304 (1st Dep’t 1965), aff’d, 15 N.Y.2d 940, 259 N.Y.S. 2d 832 (1965) (use of name of president of Notre Dame in a novel and motion picture was “fleeting and incidental” and not actionable under New York’s right of privacy law); Preston v. Martin Bregman Prods., Inc., 765 F. Supp. 116, 119 (S.D.N.Y. 1991) (relying on incidental use to dismiss woman’s claim based on depiction of her in a feature film for nine seconds).

In addition, the New York Court of Appeals has suggested that “an article may be so infected with fiction, dramatization or embellishment” that a portrayal of an actual person may be actionable. Messenger ex rel. Messenger v. Gruner + Jahr Printing & Publ’g, 94 N.Y.2d 436, 446, 706 N.Y.S.2d 52, 58 (2000); see also Binns v. Vitagraph Co. of America, 210 N.Y. 51, 58 (1913) (fictionalization designed “to amuse” the audience rather than “to instruct or educate”); Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 286 N.Y.S.2d 832 (1967) (substantially fictitious biography was not actually damaging to public figure).

VIDEO GAMES

Video games have been accepted by courts as expressive works protected by the First Amendment. Brown v. Entm’t Merchs. Ass’n, 131 S. Ct. 2729 (2011). The question whether the use of identifiable people in video games without their consent has been the subject of significant recent litigation. For example, the Third Circuit recently reversed a grant of summary judgment in favor of a video game distributor in a case brought by a former college football quarterback, holding that the use of the player’s likeness was not sufficiently transformative to escape a right of publicity claim. Hart v. Electronic Arts, Inc., 717 F.3d 141 (3d Cir. 2013), reversing, 808 F. Supp. 2d 757 (D.N.J. 2011); In re NCAA Student-Athlete Name & Likeness Litigation, 2013 WL 3928293 (9th Cir. July 31, 2013) (Use of likenesses of college athletes in football video game is not protected by First Amendment). See Brown v. Electronic Arts, Inc. 2013 WL 3927736 (9th Cir. July 31 2013) (Use of former football star Jim Brown’s likeness in video game does not violate the Lanham Act. District Court declined to exercise jurisdiction over state law right of publicity claims). See Also, Romantics v. Activision Publ’g, Inc., 574 F. Supp. 2d 758 (E.D. Mich. 2008); No Doubt v. Activision Publ’g, Inc., 192 Cal. App. 4th 1018, 122 Cal. Rptr. 3d 397 (2d Dist. 2011); Kirby v. Sega of America, 144 Cal. App. 4th 47, 50 Cal. Rptr. 3d 607 (2d Dist. 2006). The California courts have, however, applied the “transformative use” test enunciated in Winter, supra. Thus, in Kirby, supra, the defendant prevailed because the court found the character in the video game sufficiently transformed a musician’s likeness or identity, but in No Doubt, supra, the court upheld the plaintiff’s right of publicity claims where it found the celebrities’ avatars were depicted as the celebrities themselves might be.

ARTIST’S EXCEPTION

Use of an artist’s name and likeness in connection with truthful advertising of the sale or the showing of the artist’s works is generally not actionable and probably protected by the First Amendment. See Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536, 18 Cal. Rptr.

2d 790 (2d Dist.1993); Shaw v. Time-Life Records, 38 N.Y.2d 201, 379 N.Y.S.2d 390 (1975) (use of music arranger's name in advertisements for recordings within exception of New York's right of privacy statute); Restatement (Third) of Unfair Competition §47 cmt. a; 2 J. Thomas McCarthy, *The Rights of Publicity and Privacy* §7:11 (2d ed. 2012).

You may be able to advertise that you are selling or giving away a celebrity's product. See Astaire v. Best Film & Video Corp., 116 F.3d 1297 (9th Cir. 1997), amended, 136 F.3d 1208 (9th Cir. 1998), cert. denied, 525 U.S. 868 (1998) (use of Fred Astaire film clips in instructional dance videotapes). However, you must avoid any implication that the celebrity himself is involved in the advertising campaign. Allen v. Nat'l Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985) (use of Woody Allen's name and photo on videocassettes of his films appearing in an advertisement for video rental stores is permissible, but together with the use of look-alike raised likelihood of confusion as to his endorsement of the advertiser); see Rostropovich v. Koch Int'l Corp., 34 U.S.P.Q.2d 1609 (S.D.N.Y. 1995) (attribution to artist literally true, but use of artist's name and/or image on front covers of CD albums could confuse as to artist's approval of the new release of old recordings). The practice of using the offering for sale of videos and DVDs of films as a basis for using the actors' images on TV sets shown in advertising for electronics stores has also been challenged.

MEDIA EXCEPTION

Truthful advertising of the content of a publication is protected by the First Amendment, provided that the advertising is a truthful description of the content of the medium. Montana v. San Jose Mercury News, Inc., 34 Cal. App. 4th 790, 40 Cal. Rptr. 2d 639 (6th Dist. 1995) (newspaper's use of a poster of football star permissible as advertising of its content). Under state laws, the person used must be a subject presented or discussed in the publication. See, e.g., Lane v. MRA Holdings, supra ("Girls Gone Wild" video); Cohn v. Nat'l Broad. Co., 50 N.Y.2d 885, 430 N.Y.S.2d 265 (1980) (use of Roy Cohn's name in advertising TV movie about Senator Joseph McCarthy that included Cohn was permissible). In addition, the advertising must be limited to an explanation or illustration of the content of the publication. Namath v. Sports Illustrated, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1st Dep't 1975) (Sports Illustrated subscription advertising could use Joe Namath's picture and name in describing coverage of Namath); see Booth v. Curtis Publ'g Co., 11 N.Y.2d 907, 228 N.Y.S.2d 468 (1962); Stern v. Delphi Internet Services Corp., 165 Misc.2d 21, 626 N.Y.S.2d 694 (N.Y. Sup. Ct. 1995) (use of the subject of chat in advertising of an online chat service is permissible). However, a medium cannot use any photograph merely because it has appeared in the medium, and it cannot use the people who appear in publication as models or endorsers. See Gritzke v. M.R.A. Holding, LLC, No. 4:01CV495–RH, 2002 WL 32107540 (N.D. Fla. Mar. 15, 2002) ("Girls Gone Wild" video package); Velez v. VV Publ'g Corp., 135 A.D.2d 47, 524 N.Y.S.2d 186 (1st Dep't 1988) (Village Voice newspaper cover).

If the advertising falsely describes the nature of the publication it may be actionable. Cher v. Forum Int'l, Ltd., 692 F.2d 634 (9th Cir. 1982) (false claims in ad promoting an interview of Cher in a magazine resulted in violation of her publicity rights); see Eastwood v. Nat'l Enquirer, Inc., 123 F.3d 1249 (9th Cir. 1997) (false representation that an

interview was an exclusive). See also McFarland v. Miller, 14 F.3d 912 (3d Cir. 1994) (restaurant's use of the name "Spanky McFarland" unauthorized by the former "Our Gang" actor).

FOREIGN CITIZEN

Canada and France recognized certain rights in the nature of commercial appropriation in the 1980s. The European Court of Human Rights has held that Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms includes privacy rights. See Peck v. United Kingdom, App. No. 44647/98, 2003-I Eur. Ct. H.R., <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60898>; Von Hannover v. Germany, App. No. 59320/00, 2004-VI Eur. Ct. H.R., <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61853> (Princess Caroline of Monaco's right of privacy precludes publication of photo illustrating her private life). Courts in Great Britain have recognized claims of breach of commercial confidence and implied endorsement that serve the same purpose. E.g., Douglas v. Hello! Ltd., [2003] EWHC (Ch) 786 (Eng.). However, most countries have unfair competition, passing off, or false endorsement principles, which may be applied.

Choice of law principles should require use of the law of the individual's domicile. See Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013 (C.D. Cal. 1998) (no post-mortem right of publicity for Princess Diana, applying law of decedent's domicile, but Lanham Act and state unfair competition claims are not precluded). However, where a license has been granted for use in the United States, there may be a claim. Bi-Rite Enters. v. Bruce Miner Co., 757 F.2d 440 (1st Cir. 1985) (companies with exclusive licenses to exploit certain English rock stars could despite the absence of any rights under English law enjoin sale of products with rock stars' likenesses under law of states where licensees reside); see Bi-Rite Enters. v. Button Master, 555 F. Supp. 1188 (S.D.N.Y. 1983); Apple Corps Ltd. v. Button Master, No. CIV. A. 96-5470, 1998 WL 126935, 47 U.S.P.Q. 2d 1236 (E.D. Pa. Mar. 19, 1998).

DECEASED

Until the 1980s only Florida, Oklahoma, Utah and Virginia provided a statutory right of publicity that survived death. Recent legislation clearly establishes a trend toward extending rights after death. The following states recognize a post-mortem right of publicity, but make sure you check current law because the law with respect to these rights is changing quickly both legislatively and through judicial decisions. For example, a bill protecting a post-mortem right of publicity recently passed one of the houses of the Massachusetts legislature, and initiatives are ongoing in other states.

Arizona. In 2014, the Arizona Court of Appeals recognized a post-mortem right of publicity in case of Reynolds v. Reynolds, No. 1 CA-CV 13-0274 (Apr. 24, 2014) but did rule how long the right would last or provide other details of its application.

California - 70 years after death. Cal. Civ. Code § 3344.1. California also provides for registration by successors in interest. Cal. Civ. Code § 3344.1(f). (Also a common law right according to the federal courts.)

Connecticut - common law (federal court). Jim Henson Prods. V. John T. Brady & Assoc., 867 F. Supp. 175 (S.D.N.Y. 1995).

Florida - 40 years, but claims may be brought only by a “person, firm or corporation authorized in writing to license the commercial use of [the decedent’s] name or likeness,” or if there is no such party, then by the decedent’s surviving spouse or surviving children. Fla. Stat. § 540.08.

Georgia - common law. Martin Luther King Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc., 296 S.E.2d 697 (Ga. 1982).

Illinois - 50 years, but rights terminate if a deceased individual has not transferred his or her rights in writing, and the individual has no living spouse, parents, children or grandchildren. 765 Ill. Comp. Stat. 1075/1, 1075/30(b), 1075/25.

Indiana - 100 years, without regard to where estate is located; “right of publicity” includes distinctive appearance, gestures and mannerisms. Ind. Code §§ 32-36-1-1, 32-36-1-7, 32-36-1-8.

Kentucky - 50 years, for a person who is a “public figure”; use of such a person’s name or likeness for commercial profit during the time period requires written consent of the executor or administrator of the person’s estate. Ky. Rev. Stat. § 391.170(2).

Michigan - common law (federal court). Herman Miller, Inc. v. Palazzetti Imports, 270 F.3d 298 (6th Cir. 2001).

Nebraska - no stated limit. Neb. Rev. Stat. §§ 20-208, 20-202.

Nevada - 50 years (without regard to where estate is located). Nev. Rev. Stat. § 597.790. Nevada also provides for registration by successors in interest or licensees. Nev. Rev. Stat. § 597.800(3).

New Jersey - common law (federal court). Estate of Elvis Presley v. Russen, 513 F. Supp. 1339 (D. N.J. 1981); Gleason v. Hustler Magazine, Inc., 7 Med. L. Rep. 2183 (D. N.J. 1981). See also the recent Albert Einstein case suggesting N.J. would protect a post-mortem right of publicity for “no more than 50 years after death.” Hebrew University of Jerusalem v. General Motors LLC, No. CV10-03790 AHM (JCx), 2012 WL 4868003, at *1 (C.D. Cal. Oct. 15, 2012).

Ohio - 60 years. Ohio Rev. Code Ann. § 2741.02(A)(2).

Oklahoma - 100 years. Okla. Stat. tit. 12, § 1448(G).

Pennsylvania - 30 years. 42 Pa. Cons. Stat. § 8316(c).

Tennessee - statutory right extends for 10 years, and, if used during that 10-year period, extends indefinitely until two years of nonuse. Personal Rights Protection Act (“Elvis Law”), Tenn. Code Ann. § 47-25-1104.

Texas - 50 years. Tex. Prop. Code Ann. § 26.012(d).

Utah - common law (federal court). Nature's Way Prods., Inc. v. Nature-Pharma, Inc., 736 F. Supp. 245 (D. Utah 1990). Utah revised its right of publicity statute in 1981, eliminating an express consent provision for a decedent's "heirs or personal representatives." See Utah Code Ann. § 76-9-405 (repealed 1981); Utah Code Ann. § 45-3-3.

Virginia - 20 years. Va. Code Ann. § 8.01-40(B).

Washington - 75 years under certain circumstances. Wash. Rev. Code § 63.60.040(2).

The following states have rejected claims for a descendible right of publicity: Mass., N.Y., R.I., and Wis. by statute; and Ariz. and N.H. by defeating legislation proposing to enact it. See generally Restatement (Third) of Unfair Competition § 46 cmt. (h) (1995).

Under prevailing conflicts of law principles the existence of a post-mortem right of publicity should be determined by the law of the domicile of the estate. Groucho Marx Prods., Inc. v. Day & Night Co., 689 F.2d 317 (2d Cir. 1982); Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013 (C.D. Cal. 1998); Southeast Bank, N.A. v. Lawrence, 66 N.Y.2d 910, 498 N.Y.S.2d 775 (1985); see also Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983 (9th Cir. 2012). But see McFarland, *supra*; Prima v. Darden Rests., Inc., 78 F. Supp. 2d 337 (D. N.J. 2000). The Nevada and Indiana statutes explicitly provide that they are applicable regardless of the law of the domicile of the deceased's estate. Meanwhile, under Calif. Civ. Code § 946, the law of a person's domicile governs if there is no law to the contrary in the place "where personal property is situated."

In 2011, an Indiana federal court ruled that the Indiana right of publicity statute, which has the longest post-mortem period of continuing the right of publicity, does not apply to personalities who died before 1994, the year the statute was enacted. Dillinger, LLC vs. Electronic Arts, Inc., 795 F. Supp. 2d 829 (S.D. Ind. 2011). The Indiana state legislature responded by amending its statute to expressly state that the right of publicity applies to a personality "whether the personality died before, on, or after July 1, 1994." Ind. Code § 32-36-1-8(1); see also Ind. Code § 32-36-1-8(2) ("If the personality died before July 1, 1994, the rights are considered to have existed on and after the date the personality died.").

PUBLIC FIGURE

Unauthorized use of the name or likeness of public figures and public officials in advertising technically violates their right of privacy. Politicians are frequently used and have not sued, but letters demanding that use be stopped (e.g., from the U.S. President) are likely. A bona fide commentary on an issue of public importance may be given First Amendment protection. Paulsen v. Personality Posters, Inc., 299 N.Y.S.2d 501, 59 Misc. 2d 444 (Sup. Ct. 1968) (poster of comedian, in the context of his presidential candidacy, not prohibited use for purposes of trade); see N.Y. Magazine v. Metro. Transit Auth., 136 F.3d 123 (2d Cir. 1998) (finding constitutional protection for bus poster for New York Magazine that advertised itself as "[p]ossibly the only good thing in New York [that Mayor] Rudy [Giuliani] hasn't taken credit for.").

COMPARATIVE ADVERTISING

Showing a competitor's product necessarily includes any model on the package. Referencing the competitor's endorser may depend on whether the reference addresses the endorser's qualifications or endorsement.

NAME

Any use of a first and last name should be covered by a release from someone with that actual name who is consistent with the portrayal. No matter how fanciful and ridiculous, names often result in claims. Use names of people from whom you can obtain a release, or find someone with that name (e.g., by searching phone books) and get a written release. A release from anyone with the name suffices so long as no one else is more closely identified. The key is whether there is a use of a person's identity. See C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp 2d 1077 (E.D. Mo. 2006) (finding that baseball players did not have a right of publicity in their names and playing records as used by a fantasy baseball game producer).

First names generally do not require a release, but where a name identifies a person (e.g., Cher, Madonna), you need a release. See Cher v. Forum Int'l, Ltd., 692 F. 2d 634 (9th Cir. 1982) (upholding lower court's finding that magazine knowingly published a false endorsement by Cher), cert. denied, 462 U.S. 1120 (1983).

Nicknames, if sufficient to identify a particular person, may be sufficient to support a claim. See McFarland, supra; Hirsch v. S.C. Johnson & Son, Inc., 90 Wis. 2d 379, 280 N.W.2d 129 (1979).

A former name may also be protected. Abdul-Jabbar v. Gen. Motors Corp., 75 F.3d 1391 (9th Cir. 1996) (basketball player formerly known as Lew Alcindor), amended and superseded on denial of reh'g and reh'g en banc, 85 F.3d 407 (9th Cir. 1996).

Context may make a nickname recognizable. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983) (use of entertainer's introductory phrase, "Here's Johnny," for portable toilets).

PICTURE

Any picture of a person should be covered by a written license.

Recognizable. There may be a claim if anyone recognizes a person. It's not just a person's face that makes him or her recognizable. See Cohen v. Herbal Concepts, Inc., 63 N.Y.2d 379, 385, 482 N.Y.S.2d 457, 459–60 (1984) (faces of nude mother and child not shown in photograph, "but the backs and right sides of both [photographic subjects were] clearly presented"; subjects' identifying features including "their hair, bone structure, body contours and stature and their posture" could be sufficient evidence of recognizability at trial). It might also be sufficient if a person recognizes himself or herself. See Cohen, 63 N.Y.2d at 385, 482 N.Y.S.2d at 460, footnote (New York right of privacy statute protects an individual's own sentiments, thoughts and feelings); see also Cohen v. Herbal Concepts,

Inc., 100 A.D.2d 175, 190–91, 473 N.Y.S.2d 426, 436 (1st Dep’t 1984) (Silverman, J., concurring).

Distinguishing feature/context. Distinctive clothing, jewelry or context in which a photo was taken may be sufficient to identify person. See Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) (retouched but identifiable racing car made image of driver in photo recognizable as the race car’s owner, even though his facial features were not visible).

Age. Age difference is irrelevant if it is the person’s photograph. Negri v. Schering Corp., 333 F. Supp. 101 (S.D.N.Y. 1971) (photo of movie star taken in 1922 used in 1969).

Portrait. A drawing, even a caricature or cartoon, may be a sufficient basis for a claim. Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978); see Cardtoons, L.C. v. Major League Baseball Players Ass’n, 838 F. Supp. 1501 (N.D. Okla. 1993), set aside on other grounds, 868 F. Supp. 1266 (N.D. Okla. 1994), aff’d, 95 F.3d 959 (10th Cir. 1996).

Crowd. Some states (e.g., Cal., Fla., Neb.) limit claims to exclude crowd shots. However, if a person recognizes himself, there may be a claim.

Stock photos. Stock photo licenses usually cover only the copyright in the photograph. Do not rely on a claim that the photographer has a release covering any people in the photo. Obtain a copy of the release. Photographers often incorrectly presume that they have an unconditional release. Even where there is a release, the signature may not be genuine. Stock photo house indemnifications are usually limited to the amount of the license fee, and are therefore totally inadequate.

LIKENESS

Advertising may include a likeness without using a person’s photograph. Any likeness, even illustrations or cartoons, communicating a person’s appearance, participation or endorsement may violate publicity rights. Claims are most likely where a celebrity knows you contemplated using him. In addition, a showing of likelihood of confusion as to authorization by the celebrity is sufficient to state a claim under federal false advertising law (§ 43(a)(1) of the Lanham Act, codified at 15 U.S.C. § 1125(a)(1)).

Look-alike. Use of a model made up to look like a celebrity, where the public believes it is the actual celebrity, constitutes a “portrait” or “likeness” of the celebrity. Onassis v. Christian Dior-New York, Inc., 122 Misc.2d 603, 472 N.Y.S.2d 254 (Sup. Ct. 1984) (Dior campaign included a photograph with actual celebrities and a Jacqueline Onassis look-alike (circa 1960)).

Disclosed look-alike. Use of a look-alike in an advertisement may be permissible where it is clear that is not the celebrity and it is clear that the celebrity has not authorized the advertisement. Allen v. Nat’l Video, supra (finding that an advertisement which featured a Woody Allen look-alike “clearly makes reference to” plaintiff Allen, but “hesita[ting] to conclude that the photograph is, as a matter of law, plaintiff’s portrait or picture.”). (But Woody Allen won summary judgment on his claim that readers were likely to be confused

over whether he authorized the use of the look-alike. Allen v. Nat'l Video, *supra* (“Given the close resemblance between defendant [look-alike] and plaintiff . . . at a cursory glance, many consumers, even sophisticated ones, are likely to be confused.”). A disclaimer of identity may not be sufficient to avoid the likelihood of confusion as to authorization. Allen v. Men’s World Outlet, Inc., 679 F. Supp. 360 (S.D.N.Y. 1988) (user bears the burden of proving that a disclaimer is effective in dispelling any confusion as to authorization).

Similarity in appearance. Similarity between the celebrity and the person depicted in an advertisement may also result in a claim. This usually happens where the celebrity has previously been approached. *E.g.*, Washington v. Brown & Williamson, No. 82–0776, 1984 WL 63629, 223 U.S.P.Q. 1116 (E.D. Pa. Apr. 27, 1984) (claim by Grover Washington, Jr. that advertiser intended for him to be recognized as appearing in a Kool cigarettes ad featuring another black jazz saxophonist, based in part on advertiser having invited Washington to play at its Kool Jazz Festival). It may also happen where a particular individual claims to be the most famous example of a particular type. Prudhomme v. Procter & Gamble Co., 800 F. Supp. 390, 394 (E.D. La. 1992) (commercial which identified the chef portrayed as someone other than plaintiff could still be the basis for a claim for false advertising and trademark infringement: “The mere existence of a disclaimer will not preclude a finding of consumer confusion.”).

Similarity in costume. Similarity in costume also may provide the basis for a claim. In one case, members of the Fat Boys rap group were referenced for purposes of costuming a Miller Light commercial’s intended generic group of rap singers. The Fat Boys, who had previously declined to appear in the commercial, sued. The group claimed that the commercial’s characters imitated its members’ style of performance, music, personas and costumes—including the square studded eyeglass frames worn by one of the singers. Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826 (S.D.N.Y. 1990).

Context. Context alone may result in a claim. One such New York case involved an advertising agency and a foreign automobile manufacturer which had negotiated with “Mr. New Year’s Eve” bandleader Guy Lombardo to appear in an end-of-year-sale television commercial. When the parties failed to reach an agreement, the agency and automaker hired an actor who did not physically resemble Lombardo, but who used the same gestures as Lombardo in conducting a band’s performance of “Auld Lang Syne” during the commercial. Lombardo sued, claiming breach of contract, invasion of privacy, and appropriation of his public personality for commercial purposes. Reviewing the trial court’s denial of the defendants’ motion to dismiss the second and third causes of action, a majority of a New York appeals court held that one’s personality or style of performance were not protected as “picture[s]” under the state’s right of privacy law. Hence, the appeals court concluded, Lombardo’s invasion of privacy action was invalid. However, the majority affirmed the trial court on the third cause of action, concluding that the crux of the claim was that “the imitation is completely unfair, amounts to a deception of the public, and thus exploits [Lombardo’s common-law] property right in his public personality.” Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D.2d 620, 622, 396 N.Y.S.2d 661, 665 (2d Dep’t 1977). New York’s highest court has subsequently made clear that there is no common-law privacy or publicity right in the state. Stephano, 64 N.Y.2d at 183, 485

N.Y.S.2d at 224 (“the ‘right of publicity’ is encompassed under the Civil Rights Law as an aspect of the right of privacy, which . . . is exclusively statutory in this State”); see also Freihofer v. Hearst Corp., 65 N.Y.2d 135, 140, 490 N.Y.S.2d 735, 739 (1985) (“[I]n this State, there is no common-law right of privacy and the only available remedy is that created by Civil Rights Law §§ 50 and 51”); Howell v. New York Post Co., 81 N.Y.2d 115, 124, 596 N.Y.S.2d 350, 354 (1993) (“[I]n this State . . . we have no common law of privacy”).

California, in contrast, permits judicial expansion of publicity rights. Cal. Civ. Code § 3344(g). The U.S. Court of Appeals for the Ninth Circuit has taken context to its outer limits, holding that a robot dressed in an evening gown, wearing large jewelry next to a “Wheel of Fortune” type game board was sufficient for a claim by Vanna White of an appropriation of her persona, as well as consumer confusion over whether she authorized the ad. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992), reh’g en banc denied, 989 F.2d 1512 (1993) (Kozinski, J., dissenting), cert. denied, 508 U.S. 951 (1993). But see Kirby, 144 Cal. App. 4th at 61, Cal. Rptr. 3d at 618 (concluding that “any public confusion” that a musician endorsed a video game, based on similarities between the musician’s claimed likeness or identity and the video game’s main character, “would arise from a false assumption that the game could not contain a character resembling [the musician] without her imprimatur”),

In 2010, the television show “Jimmy Kimmel Live” aired a segment on a then-recent business meeting between basketball star LeBron James and a rabbi. James had recently met with a Rabbi Pinto, but the rabbi featured in Kimmel’s video was not Pinto. Instead, the show had spliced YouTube footage of New York’s “Flying Rabbi” Dovid Sondik -- videos of whom had gained popularity online. Sondik sued Kimmel and show broadcaster ABC in New York Supreme Court, claiming the defendants violated California’s right of publicity statute (Cal. Civ. Code § 3344) and “misappropriat[ed] his likeness” under California’s common law. He also claimed violations of New York’s right of privacy law (N.Y. Civ. Rights Law §§ 50-51). The court found that New York law applied, and that under New York law, Kimmel’s use of the YouTube clip was within the “newsworthiness exception” to New York’s right of privacy law. (Under this exception, a defendant’s publication of materials for the purpose of news or addressing a matter of public interest will not violate a person’s right of privacy.) The court stated: “[T]he clip of plaintiff at issue was used as part of a comedic (or at least an attempted comedic) or satiric parody of LeBron James’ meeting with Rabbi Pinto, itself undoubtedly an event that was newsworthy or of public interest. . . . [T]he piece primarily makes fun of the idea that LeBron James was seeking business advice from a spiritual leader with whom he could not actually converse.” (James, the court presumed, does not speak Hebrew.) The court added that the use of the clip in an “entertainment context” raised “serious First Amendment concerns” that would also require dismissal of the privacy violation claim. The court also noted that plaintiff was not a public figure, and there was no allegation that the use of the YouTube clip “was mean spirited or intended to injure such that its use would be excluded from First Amendment protection.” Sondik v. Kimmel, No. 30176/10, 2011 WL 6381452 (N.Y. Sup. Ct. Dec. 15, 2011). In sum, whether you represent talent and are considering a licensing request, or you are creating a parody or other material using a person’s image, be sure to consult with your attorney.

VOICE

The unauthorized use of a person's voice in advertising is prohibited under various state laws. E.g., Cal. Civ. Code § 3344; N.Y. Civ. Rights Law § 51; Ind. Code §§ 32-36-1-7, 32-36-1-8; Nev. Rev. Stat. § 597.790; Okla. Stat. tit. 12, § 1449. But a properly licensed use of a validly copyrighted recording may be insulated from a publicity rights claim by copyright preemption. Laws v. Sony Music Entm't, Inc., 448 F.3d 1134 (9th Cir. 2006).

SOUND-ALIKE

Deliberate Imitation. In 1985, Ford Motor Company and its advertising agency, Young & Rubicam, used songs that were popular in the 1970s in a series of television commercials. One song was "Do You Want To Dance," a 1973 hit as recorded by Bette Midler. Young & Rubicam asked Midler's manager if she would perform the song for the commercial, but the manager replied that Midler was not interested. Instead, the agency hired one of Midler's backup singers to imitate Midler's rendition of the song. Midler sued both Ford Motor and Young & Rubicam in a California federal court, claiming invasion of her right of publicity under California state law. The district court granted summary judgment for the defendants, concluding that California's publicity rights statute did not prohibit imitation of a person's voice. On Midler's appeal, the U.S. Court of Appeals for the Ninth Circuit held that while Cal. Civ. Code § 3344 prohibited unauthorized use of a person's "name, voice, signature, photograph or likeness," it did not prohibit vocal imitations. However, the court recognized a common law claim in the state of theft of a property interest, "appropriation of the attributes of one's identity." Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (holding that the cause of action arises "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product"), cert. denied, Young & Rubicam, Inc. v. Midler, 112 S.Ct. 1513 (1992).

The Ninth Circuit distinguished the Midler case from an unsuccessful unfair competition claim brought by Nancy Sinatra against the Goodyear Tire and Rubber Company, in which Sinatra alleged female singers imitated her voice in a rendition of "These Boots Are Made for Walkin'" for a Goodyear television and radio commercial. Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970). Sinatra's voice, the Ninth Circuit reasoned, was not as distinctive as Midler's. The Midler holding is thus explained by the court's conclusion that the voice in the commercial would be mistaken for Midler's, and the public would be deceived. In this sense it does not go any further than a false advertising (implication of endorsement or participation) claim. See also Allen v. Nat'l Video, supra, which might have been the basis for the same result -- a jury award of \$400,000, Midler v. Young & Rubicam Inc., 944 F.2d 909 (9th Cir. 1991) -- if it had been pleaded differently. Midler has been rejected as not supportable under New York law. See Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826, 838 (S.D.N.Y. 1990) (holding New York's right of privacy law "does not yet extend to sound-alikes").

New York limits rights of publicity to those encompassed in its statute and does not allow parallel common law expansion of those rights. See Frehofer, supra; Howell, supra. California, on the contrary, specifically permits the courts to expand the right of publicity beyond the statutory protections. Cal. Civ. Code § 3344(g). Consequently, use of a sound-

alike is actionable, at least in California (unless the California state courts reject the Ninth Circuit's expansion of California law).

Anonymous voice-over. A voice imitation may result in a claim if listeners believe it is a famous person's voice. Lahr v. Adell Chem. Co., 300 F.2d 256 (1st Cir. 1962). In Lahr, defendant's television commercial used a cartoon duck with a voice that sounded like that of actor and comedian Bert Lahr (widely known for his performance in "The Wizard of Oz" as the Cowardly Lion and farmer Zeke). The U.S. Court of Appeals for the First Circuit held that the voice supported a possible defamation claim by Lahr, because the commercial suggested he had "stooped to perform below his class" in an anonymous voice-over. Lahr also could assert a claim for passing off and unfair competition since the advertiser had obtained "greater value" for its commercial with Lahr's apparent participation. 300 F.2d at 258-59. Similarly, a radio commercial using an imitation of a famous singer's voice resulted in a jury verdict for appropriation of publicity rights under California law and false, implied endorsement under federal law. Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992) (upholding award of \$2.5 million in compensatory damages, punitive damages and attorney's fees), cert. denied, 113 S.Ct. 1047 (1993).

Animated character. Similarity between the voice that a famous actor uses for an animated character and the voice used for that same character in a commercial (without the actor's participation) may result in a lawsuit. Historically, such claims have not always survived a motion to dismiss or motion for summary judgment. See Booth v. Colgate-Palmolive Co., 362 F. Supp. 343 (S.D.N.Y. 1973) (granting summary judgment against an actress who played Hazel, a character on television derived from a comic strip, who sued a licensee of the character based on the voice it used in an animated commercial). However, recent developments suggest a claim where it can be shown the public may believe that the voice is the actor's, and therefore he or she has licensed use of the his or her voice or performance. E.g., Waits, supra.

Popular song. Although imitation of voice alone does not violate right of publicity, a lawsuit is likely where you have sought permission to use a famous singer's recording. In one such case, Goodyear Tire and Rubber Company paid the composer for the right to use the music and lyrics of the song "These Boots Are Made For Walkin,'" which had been made popular by Nancy Sinatra, in a series of television and radio commercials. Goodyear's agency, Young & Rubicam, allegedly had contacted Nancy Sinatra's agent in an effort to employ her for the commercials, but the parties did not arrive at an agreement. Instead, Goodyear and the agency produced four commercials for TV and two for radio with anonymous female singers performing the song. Sinatra claimed: 1) the commercials contained deliberate imitations of her voice, style of singing, physical appearance, dress, and mannerisms; and 2) the companies had intentionally deceived the public to believe she was a participant. The U.S. District Court for the Central District of California granted summary judgment for the defendants, holding that "imitation alone does not give rise to a cause of action." On Sinatra's appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the lower court's judgment, finding that Nancy Sinatra's voice was not distinctive enough to be mistakenly recognized. Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970); see also Oliveira v. Frito-Lay, Inc., 251 F.3d 56 (2d Cir. 2001)

(singer's association with the song "The Girl from Ipanema" did not give her a Lanham Act claim based on use of the song in a commercial). But see Midler, supra.

Impersonations on radio. Impersonations of celebrities in the context of radio commercials may be actionable on a showing of confusion as to the celebrity's participation or authorization. A showing of confusion about whether the celebrity gave permission may be sufficient to convince a jury that people think that the celebrity endorses the product advertised. Waits, supra.

PERSONA

The Ninth Circuit has extended California common law beyond the scope of California's right of privacy statute to include any claim of commercial appropriation of identity of a celebrity, despite the absence of any use of the celebrity's name, picture, likeness, voice or signature. Although heavily criticized and subject to reversal by the California state courts, there is a significant risk that mere association of a celebrity, even without confusion as to endorsement or participation, may be actionable in California federal courts. See Wendt v. Host Int'l, Inc., 125 F.3d 806 (9th Cir. 1997), reh'g denied, 197 F.3d 1284 (9th Cir. 1999) (Kozinski, J., dissenting), cert. denied, 531 U.S. 811 (2000) (licensed use of "Cheers" characters as animatronic robots designed to not look like actors who played the roles on television was still actionable by the actors associated with characters); see also Newcombe v. Adolf Coors Co., 157 F.3d 686 (9th Cir. 1998) (genuine issue of material fact existed over depiction of former major league baseball pitcher's distinct windup in a drawing); White, supra; Waits, supra; Midler, supra. The Ninth Circuit's extension of the law has been rejected by other circuits. See, e.g., Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619 (6th Cir. 2000); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959 (10th Cir. 1996). See also Kirby, supra (video game character, even if based on musician's likeness or identity, was transformative and protected by First Amendment).

WEB SITES

Web sites pose particular problems in separating editorial content from advertising or commercial use. Care must be taken to resist the attraction of mingling promotion and opportunity to purchase into material which includes names or likenesses of people who have not authorized such use.

Content on web sites, including blogs and social networks, should not require permission if it is not advertising in disguise. See Stern, supra (online bulletin board service). In Stern, Delphi Internet Services was encouraging subscribers of its online bulletin board service to discuss radio personality Howard Stern's 1994 candidacy for governor of New York. Stern sued the company over its use of an "outlandish" photograph of him in an advertisement for the service without his permission. The court held that the service, which permitted subscribers to use Stern's name in discussing Stern and his candidacy, was editorial content fully protected by the First Amendment. The court, citing a seminal case dealing with online services, Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991), agreed that a computerized database service, even one where only paid subscribers may access the information, is like a book store or a letter to the editor column in a

newspaper. No permission is necessary to use the name of an individual in connection with such material. This of course goes to the chat aspect of the Delphi service as opposed to a web site's editorial material, but a publisher's own editorial material is certainly entitled to the same protection as letters to the editor. Daniel v. Dow Jones & Co., 137 Misc. 2d 94, 520 N.Y.S.2d 334, 340 (N.Y. Civ. Ct. 1987) (news and information aspect of online services are entitled to the same protection as a newspaper). See also Gorran v. Atkins Nutritionals, Inc., 464 F. Supp. 2d 315 (S.D.N.Y. 2006), aff'd, 279 Fed. App'x 40 (2d Cir. 2008) (content of a website that is separated from the commerce on the website is speech protected by First Amendment.)

Virtually all publishers seek to be compensated for access to their material, but this fact alone does not make the material "commercial." See Smith v. California, 361 U.S. 147, 150 (1959). Advertising support for a channel or publication does not make the editorial content fall within scope of the advertising. Similarly, the fact that a web site includes both advertising content and editorial content should not make the editorial content advertising materials. See Gorran v. Atkins Nutritionals, Inc., supra. Thus, as long as the material is not advertising (a speech that proposes or promotes a commercial transaction), the right of publicity (the obligation to have permission to include a person's name or likeness) there generally ought not to be the requirement for obtaining permission for use of name or likeness in the editorial material. The challenge here is to keep the advertising messages separate from the editorial content. See Stephano, supra.

With the advent of product placements, advertorials, and infomercials, there is increasing pressure to merge editorial and advertising content. A web site that constantly and conspicuously depicts the logo of the sponsor may be viewed as being more like an infomercial than a typical medium of communication containing editorial material and separate advertising material. Therefore, in developing a corporate web site, which is to include both "advertising" and "editorial" content it is important to consider how messages and opportunities to purchase products will be presented in order to avoid blurring the distinction between the editorial content and the commercial content. See Downing, supra.

The use of names, pictures and likenesses on social media presents a new and ever-changing set of legal issues. In a 2011 case, Fraleay v. Facebook, Inc., 830 F. Supp. 2d 785 (N.D. Cal. 2011), plaintiffs alleged that Facebook's "Sponsored Stories" advertising program, which places ads on members' Facebook pages with the names and pictures of other members who have "Liked" a product, violated California's right of publicity statute. Plaintiffs alleged that they were injured by Facebook's failure to compensate them for the use of their "Likes," or "personal endorsements." because, "in essence, plaintiffs are celebrities—to their friends." In the same way that a celebrity suffers economic harm when his or her likeness is misappropriated for another's commercial gain without compensation, plaintiffs alleged they suffered as well. Yet in moving to dismiss the case, Facebook argued that Sponsored Stories were newsworthy because "(1) Plaintiffs are 'public figures' to their friends, and (2) 'expressions of consumer opinion' are generally newsworthy." The court agreed, stating that "Plaintiffs' assertion of their status as local 'celebrities' within their own Facebook social networks likewise makes them subjects of public interest among the same audience." Although the court ultimately denied Facebook's motion to dismiss, it held that Facebook users are famous to their friends and

that even their most banal actions—indicating that they “Like” a product -- may be “newsworthy.”

LANHAM ACT CLAIMS

After resolving issues related to the use of another person’s copyrighted material, trademark, name, picture, likeness or voice, you must consider the possibility that your advertising or promotional materials may imply the authorization by, or other voluntary association with, another person or entity. This claim arises under the Lanham Act. It provides a cause of action where anyone can establish that a communication “is likely to cause confusion . . . as to the affiliation, connection, or association of [an advertiser] with another [person, firm or organization], or as to the origin, sponsorship, or approval of [the advertiser’s] goods, services, or commercial activities by [the other person, firm or organization].” 15 U.S.C.A. § 1125(a)(1)(A).

Thus, although your advertising or promotional materials may avoid a typical trademark infringement action on the basis of likelihood of confusion as to the identity of the manufacturer or marketer of a product, you still may be subjected to liability if consumers think that another entity has a voluntary connection with the brand being promoted. It is not necessary that the other entity prove that consumers believe it has endorsed the advertised product or service. The entity only has to prove that consumers think it has authorized or agreed to be referenced or implicated in the advertising or promotion.

Avoiding a claim that the advertising or promotion is likely to create confusion about the association with another entity is thus the final hurdle when creating a promotion that in some way alludes to, or references matters associated with, another entity. Thus, even if the use of copyrightable material will not subject you to a claim of copyright infringement (because, for example, the execution is sufficiently generic, the use is a “fair use” under the Copyright Act or the material has entered the public domain), there may be liability if consumers think that permission was obtained from the copyright holder or someone who is associated with the material. Similarly, an informational use of another’s trademark (used in proper trademark form to identify the other entity’s product or service) that does not infringe conventional trademark rights by causing confusion as to the source of the product, may still provide a basis for a claim if it appears that permission was obtained from the owner of the trademark. Most significantly, even where the use of a person’s name, picture or likeness (or an aspect of a celebrity’s persona) is permitted because it falls within one of the recognized exceptions to the right of publicity, there may still be a claim that consumers assume that the person or celebrity (or an owner of intellectual property associated with the character or context) has given permission. See *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446 (S.D.N.Y. 2008) (Times Square billboard depicting an M&M candy dressed like plaintiff’s “Naked Cowboy” character did not violate plaintiff’s right of publicity under New York law, but plaintiff’s Lanham Act claim could proceed).

BORROWED INTEREST

Some examples of claims of confusion as to the nature of the association may help to provide guidance.

CELEBRITY

The seminal case to develop celebrity claims under the Lanham Act involved the use of a Woody Allen look-alike in an ad for a chain of video rental stores. Even though the use of Woody Allen's name, picture and likeness in an advertisement did not provide a basis for a copyright, trademark or publicity right claim, it did provide a basis for a claim under the Lanham Act based on possible confusion as to Woody Allen's relationship to the advertising. Allen v. Nat'l Video, *supra* (advertisement for a chain of video rental stores featured a Woody Allen look-alike who was depicted renting videocassettes of Woody Allen films). Although Woody Allen's picture and name were shown on the box containing the videocassette for "Annie Hall," the court recognized that the artist's exception to the right of publicity permitted a video rental store that rented Woody Allen films to publicize this by including Woody Allen's name and picture in an advertisement. The court also held that the use of the look-alike in the advertisement did not violate Woody Allen's right of publicity under New York law, on the ground that a person who would recognize Woody Allen would also recognize that only a look-alike appeared in the advertisement. This rationale was buttressed by the fact that the whole point of the advertisement was that the look-alike was not a celebrity, but obtained recognition because he belonged to the video club being advertised. The court also found, however, that all of these otherwise permissible uses, together with Woody Allen's apparent interest in encouraging rental of his films, created a likelihood of confusion as to his voluntary participation in the advertising. The court suggested that consumers are aware of co-op advertising (where a manufacturer jointly advertises with a retailer) and might assume that Woody Allen authorized the promotion.

The question of whether there is a likelihood of confusion about whether an individual has given permission to be referenced or portrayed may depend on the context and the commercial nature of the use. See Hoffman, *supra* (still image of Dustin Hoffman from the film "Tootsie" used together with numerous stills of other actors from other films in a magazine's fashion spread); compare Eastwood, *supra* (false implication of consent to interview held to be a violation), with Kournikova v. General Media Communications, Inc., 278 F. Supp. 2d 1111, 1114 (C.D. Cal. 2003) (Penthouse magazine falsely identifying woman "caught close up on nude beach" as tennis player Anna Kournikova did not violate Lanham Act) and Condit v. Star Editorial, Inc., 259 F. Supp. 2d 1046 (E.D. Cal. 2003) (congressman's wife lacked a commercial interest in name). See also Estate of Presley, *supra* (Elvis Presley look-alike stage performance suggested permission from singer's estate); Joplin Enters., *supra* (dramatic play simulating Janis Joplin performance was permissible without authorization from plaintiff licensor); Comedy III Prods., Inc. v. New Line Cinema, 200 F.3d 593 (9th Cir. 2000) (Three Stooges film clip, as public domain footage, could not be trademarked); compare Rogers v. Grimaldi, 875 F.2d 994, 996 (2d Cir. 1989) (movie titled "Ginger and Fred," which "only obliquely relat[ed]" to Ginger Rogers and Fred Astaire, held to be not actionable by Ginger Rogers), with Parks, *supra* (Rosa Parks had established viable claim over use of her name as song title).

However, the Ninth Circuit has suggested that any time a commercial use implicates the persona of a celebrity, a jury must determine whether there is a likelihood of confusion as to endorsement. See Abdul-Jabbar, 85 F.3d at 409, 413 (holding that an Oldsmobile

television commercial that aired during a basketball tournament and which posed the question, “Who holds the record for being voted the most outstanding player of this tournament?” and then answered, “Lew Alcindor,” arguably attempted to “appropriate the cachet of one product for another”) (internal quotation marks and citation omitted). Accord Facenda, supra (Third Circuit remanding for trial estate of broadcaster’s Lanham Act claim against National Football League over use of late broadcaster’s voice in promotional television program). Considering the success generally of celebrities in arguing almost anything to a Los Angeles jury, the prospect of a jury trial against the user of a celebrity’s name, image, likeness, voice or persona, at least in Los Angeles, is cause for great concern.

SOUND-ALIKES

Anonymous voice-overs in television commercials and radio commercials that are celebrity sound-alikes also present a significant problem. The absence of a visual element to communicate a disassociation leaves the listener confused about the participation of the celebrity being imitated. Thus, an anonymous voice-over in a television commercial that sounds like the distinctive voice of a famous actor was held to present a sufficient basis to permit a jury determination of whether consumers would believe that it was the famous actor supplying the voice in the commercial. See Lahr, supra (commercial featuring an animated duck with a voice that sounded like actor and comedian Bert Lahr). Similarly, where the voice in a radio commercial was found to be confusingly similar to the voice and performance style of a famous singer, the Ninth Circuit upheld a jury verdict that there was a likelihood of confusion as to the singer’s participation in the commercial. See Waits, supra. A different result may obtain where, despite the relationship of a famous singer to a particular song, the court concludes that the voice or arrangement is sufficiently different from the singer’s voice or style so that there is no likelihood of confusion among the knowledgeable public. See Sinatra, supra.

CONTEXT

The most difficult claims are those made by a celebrity who is associated with materials included in an advertisement, even if that celebrity’s name, picture, likeness or voice is not used in that advertisement.

In the leading case in this area, Vanna White -- the “letter turner” on the television game show “Wheel of Fortune” -- sued over a print advertisement for Samsung Electronics that depicted a robot on the “Wheel of Fortune” set dressed in an evening gown, wearing large jewelry and playing the role of the “letter turner” thirty years in the future. Even though the owner of the copyright in “Wheel of Fortune” did not object to the advertisement, and White had no rights in the program or in the role she played (indeed, she was not the first person to play the role on the show), White claimed that she would necessarily be associated with the advertisement. The jury agreed, finding that consumers would believe that she had endorsed the product advertised. See White, supra.

The Ninth Circuit has carried the White case to its logical extreme in concluding that even though a company had obtained a license from Paramount Pictures -- the copyright owner of the television show “Cheers” -- to recreate the “Cheers” set in a line of airport bars, the

actors who portrayed the Cliff and Norm characters on the show were entitled to a jury determination of whether animatronic robots of patrons at each bar (specifically found by the district court to be “totally different” from the actors in facial appearance) created a likelihood of confusion as to association. See Wendt, supra.