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Ninth Circuit Limits Right of Publicity Claims

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The Ninth Circuit recently decided that, in light of First Amendment guarantees, the actor Dustin Hoffman could not prevail on his claims for breach of California’s statutory and common law right of publicity.¹ This decision marks the latest twist in the rather tortuous history of the right of publicity doctrine both in California and elsewhere. This time the turn is in the right direction. The *Hoffman* decision highlights the important role of the First Amendment in placing boundaries on right of publicity claims.

The right of publicity protects people from the commercial exploitation of their likenesses. Unlike privacy torts, it does not protect against hurt feelings that may result from being portrayed in a given manner, but rather recognizes that people may have economic interests in their identities that others should not be allowed to exploit.² Although some have noted a relationship between the right of publicity and causes of action involving privacy,³ the right of publicity, once referred to as “copyright’s

‘upstart cousin,’”⁴ also traces its roots to notions underlying the intellectual property doctrine.⁵ For example, the U.S. Supreme Court has recognized that this cause of action “provides an economic incentive for [a performer] to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws.”⁶ California courts and those interpreting California law have consistently held the elements of the common law right of



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publicity to be: “(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.”⁷ To succeed on a statutory claim, a plaintiff must also establish “a knowing use of the plaintiff’s name, photograph or likeness for purposes of advertising or solicitation of purchases” and a “direct” connection “between the use and the commercial purpose.”⁸ Despite agreement on the elements necessary to establish a right of publicity cause of action, courts have reached inconsistent positions regarding the limits of such a claim.⁹ For example, they have disagreed on issues such as the validity of a First Amendment defense, what constitutes commercial use, and what constitutes a likeness sufficient to support a cause of action for violation of the right of publicity. As these disagreements occur in a world where “[t]here is not an agreed-upon method for resolving conflicts between property and free speech claims,”¹⁰ there has been a great deal of instability and unpredictability regarding claims for violation of an individual’s right of publicity.

The Ultimate Fashion Show

It was in this context that the Ninth Circuit confronted the dispute between Dustin Hoffman and *Los Angeles Magazine*. The case arose out of a March 1997 article, billed on the cover as “The Ultimate Fashion Show.” The article featured instantly recognizable film stills, including Cary Grant in *North by Northwest*, Marilyn Monroe in *The Seven Year Itch*, John Travolta in *Saturday Night Fever*, and the character Darth Vader in *The Empire Strikes Back*, in which the clothes originally worn by the actors had been replaced with the latest fashions from designers such as Versace, Giorgio Armani,

and Ralph Lauren. Included in this article was a still of Dustin Hoffman from the 1982 movie *Tootsie*, in which the actor memorably portrayed an underemployed actor who lands a part on a soap opera with just one hitch—the character he plays is a woman. The original film still featured Hoffman posing in front of an American flag in a red sequined dress. The photograph in the magazine was the same, except that the red dress and shoes had been replaced with a more current look. The text accompanying the updated photograph commented: “Dustin Hoffman isn’t a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels.”¹¹ To create this image, the magazine had attached another man’s body, posed in exactly the same manner as Hoffman in the original photo, to Hoffman’s head and used the original background. On the page following this layout, the original still was reproduced. The magazine noted in several places that the original movie stills had been altered “with the help of digital magic.”¹² The magazine did not receive authorization to reproduce this still from either Hoffman or from Columbia Pictures, the company that owned the rights to *Tootsie*.

U.S. District Court Finds for Hoffman

Hoffman brought suit in federal district court asserting, among other causes of action, that the magazine had violated his common law and statutory right of publicity. He alleged that the photograph made it seem as though he were promoting the designers of the clothes that he appeared to be wearing and that this would harm him in light of his “strict policy of not endorsing commercial products.”¹³ In response, the magazine argued that the altered photograph of Hoffman was protected by the First Amendment and that Hoffman’s state law claims were preempted by the federal Copyright Act.

The district court sided with Hoffman and awarded him \$1.5 million in damages and an additional \$1.5 million in punitive damages, finding that the magazine had acted willfully, maliciously, and with a “conscious disregard of Plaintiff’s rights.”¹⁴ In a wooden and humorless opinion rejecting the magazine’s First Amendment defense, the court concluded that the article was a purely commercial use and, as a result, was not entitled to First Amendment

protection. Moreover, the district court concluded that even if the article were noncommercial speech, it had presented a false image of Hoffman that it knew was false and, therefore, was not entitled to First Amendment protection.¹⁵ Finally, the district court also rejected the magazine’s preemption argument.

The Ninth Circuit Reverses

Los Angeles Magazine appealed the decision to the Ninth Circuit, offering several bases for overturning the district court’s opinion. The magazine argued that the district court erred in finding the article to be commercial speech and that it ignored Ninth Circuit precedent holding that the First Amendment requires a finding of “actual malice” prior to imposing liability for violating the right of publicity in the context of noncommercial speech. The magazine took exception to the district court’s conclusion that the layout constituted commercial speech because it “contained no commentary on fashion trends . . . no statement that any particular style of clothing is in vogue, that any particular color is becoming popular, or that any type of fabric is attracting the attention of designers.”¹⁶ The magazine argued that the fashion spread was the product of editorial decision making and, therefore, it was noncommercial speech entitled to full First Amendment protection. Finally, the magazine argued that the district court erred in concluding that the actual malice standard had been demonstrated by clear and convincing evidence, and urged the Ninth Circuit to undertake an independent review of the sufficiency of the evidence.

In response, Hoffman argued that the use of his identity was not related to a matter of public interest but rather was a thinly veiled attempt to increase the profile of the magazine, its advertiser base, or both. As a result, the article was not entitled to First Amendment protection. Hoffman placed a good deal of emphasis on the U.S. District Court for the Southern District of New York’s decision in *Grant v. Esquire, Inc.*,¹⁷ in which a magazine took a 1946 photograph of the actor Cary Grant and replaced the torso with that of a model wearing the more modish fashions of 1971. In that case, the court denied the defendant’s motion for summary judgment. In addition, Hoffman argued that the magazine had acted with actual malice because it

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portrayed him as wearing clothes that he never wore on a body that was not his, thereby creating a deliberately false image. Finally, Hoffman argued that although constitutional issues are generally subject to de novo review by appellate courts, the Ninth Circuit should defer to the district court's credibility determinations in evaluating the evidence underlying the magazine's intent in publishing the layout. A group of publishers, broadcasters, and various media organizations submitted an amicus brief in support of the magazine. Elvis Presley Enterprises, Inc., submitted an amicus brief in support of Hoffman.

On July 6, 2001, a panel of the Ninth Circuit reversed the district court's decision.¹⁸ In an opinion written by Judge Boochever, who had previously written an opinion in a right of publicity case involving the singer Tom Waits,¹⁹ the appellate court held that the district court's holding could not be squared with First Amendment principles.

The Ninth Circuit first turned to the issue of whether the layout as it appeared in the magazine was commercial speech. The court noted that the dividing line between commercial and noncommercial speech is one that has not been clearly defined, but that, at its core, commercial speech is speech that "does no more than propose a commercial transaction."²⁰ The court concluded that the photograph of Hoffman in the magazine was not commercial speech because it "did not use Hoffman's image in a traditional advertisement printed merely for the purpose of selling a particular product . . . [n]or did the article simply advance a commercial message."²¹ That the article featuring digitally altered film stills was intended to boost circulation of the magazine, or that the magazine contained information about where to purchase the clothing featured in the layout, did not place the Hoffman photograph outside the scope of the First Amendment. Furthermore, the court noted that any commercial aspects of the photograph could not be separated from the fully protected "fashion photography, humor and visual and verbal editorial comment," and thus the entire work was entitled to heightened protection available for noncommercial works under the First Amendment. In other words, "common sense tells us this is not a simple advertisement."²²

Ninth Circuit Reviews Finding of Actual Malice

The Ninth Circuit next considered whether the district court properly found that the magazine acted with actual malice so as to overcome the magazine's First Amendment defense. Addressing the standard of review, the court determined that it was compelled to review the district court's finding of actual malice de novo. The appellate court noted that while it was required to give the district court's credibility decisions "special deference," it was also compelled to satisfy itself that Hoffman had met his burden of proving that the magazine acted with a reckless disregard for the truth.²³ In the context of this case, the Ninth Circuit found that the district court had not made any particular determinations that certain testimony was to be believed while other testimony was not, and therefore the appellate court was justified in reviewing the record de novo.

The Ninth Circuit then considered the evidence that had been before the district court. The appellate court identified "the purported false statement of fact" as the "impression that Hoffman himself posed for the altered photograph" in attire other than what he wore in the original film still—a red dress.²⁴ Therefore, Hoffman was required to "clearly and convincingly demonstrate that [the magazine] knew (or purposely avoided knowing) that the photograph would mislead its readers into thinking that the body in the altered photograph was Hoffman's."²⁵ The court concluded that Hoffman had not satisfied this burden. The court held that there was sufficient information both in the article and in the magazine as a whole to alert the average reader that Hoffman had not posed for the photograph and that the Hoffman photograph (like the others) was a digitally altered version of the original film still. Thus, the article was entitled to full First Amendment protection.

Hoffman's petition for panel rehearing or rehearing en banc was subsequently denied.

First Amendment Tension Within the Right of Publicity

Decisions involving the right of publicity generally attract a fair amount of attention, if merely because of the widespread obsession with celebrity. The *Hoffman* case is certainly no exception.

However, this case deserves interest and scrutiny for reasons unrelated to the fact that it involved a well-known actor in drag. It is the most recent in a line of cases asserting this cause of action and appears to place some meaningful limits on the tort that, according to various judges²⁶ and legal scholars,²⁷ has overgrown its proper place. The case also illustrates the challenges that courts face in addressing the often pivotal issue of whether the speech in question is commercial, and highlights the complex relationship between the right of publicity and more traditional forms of intellectual property protection.

The Commercial Speech Inquiry

In *Hoffman*, the trial and appellate courts reached contradictory positions on whether the fashion article was commercial or noncommercial speech. There is no simple and all-encompassing definition of exactly what constitutes commercial speech. In one case relied upon by the Ninth Circuit, the U.S. Supreme Court noted that commercial speech is speech "which does no more than propose a commercial transaction."²⁸ In light of such a definition, the district court's ruling that the article constituted commercial speech because it was "exploitative"²⁹ was clearly on shaky ground. Even if it could be argued that the *Tootsie* photograph proposed some sort of a commercial transaction, i.e., buy Richard Tyler gowns and Ralph Lauren heels, the photograph clearly did more. The article and the photographs featured therein provided commentary on fashion trends and style, albeit in a humorous and light-hearted manner. The Ninth Circuit also supported its ruling by citing to case law holding that when commercial and noncommercial elements are intertwined, the speech merits the full protection of the First Amendment. The district court, however, was not alone in struggling with the sometimes difficult decision of whether particular speech is commercial in nature.

In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,³⁰ an appellate court in California found that T-shirts featuring a silkscreen of an original charcoal drawing of the Three Stooges were not entitled to First Amendment protection. The court concluded that although the original drawing was protectable speech, the fact that this image was reproduced countless times and earned the artist approximately \$75,000 removed

the shirts from the ambit of the First Amendment because “reproductions of an image, made to be sold for profit, do not per se constitute speech.”³¹ The California Supreme Court disagreed and announced what it called a “balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.”³² The court affirmed the result of the appellate court, concluding that the T-shirts were not sufficiently “transformative,” an element borrowed from copyright’s doctrine of fair use, to be entitled to First Amendment protection.³³

The Ninth Circuit likewise struggled over the difference between commercial and noncommercial speech in a case involving the actors who memorably played Norm and Cliff in the television series *Cheers*. In that case, the company that owned the copyright to the television series granted a license to a company that operated a chain of airport restaurants to display robots resembling the characters Norm and Cliff in *Cheers*.³⁴ The Ninth Circuit concluded that because the robots were intended to help the bars succeed commercially, they were therefore commercial speech.³⁵

These cases demonstrate that courts are often troubled by the distinction. They also indicate that much hinges on the court’s resolution of the commercial speech issue. Although the district court and the Ninth Circuit reached opposite conclusions on the issue in *Hoffman*, the appellate court has the stronger position as a matter of both common sense and case law. Simply because there may be a commercial element to a publication should not remove such publication from First Amendment protection.³⁶

The Right of Publicity’s Kinship with Copyright

Concern over the proper scope of the right of publicity reflects a larger concern over ensuring that intellectual property doctrines do not unnecessarily encroach upon First Amendment values. As one court has noted, traditional intellectual property doctrines have “built-in mechanisms”: copyright and trademark laws employ the fair use and “likelihood of confusion” tests, respectively, directed at ensuring that they do not infringe First Amendment freedoms and encroach

upon the public domain.³⁷ The opinions in *Hoffman* bring into sharp relief not just the tensions, but the importance of resolving conflicts between the right of publicity and First Amendment concerns. To consider the difficulty in striking the appropriate balance, it is helpful to turn first to a case that unabashedly advanced the right of publicity.

The case commonly cited for an exceedingly expansive view of the right of publicity involved letter-turner extraordinaire Vanna White.³⁸ In this case, the electronics manufacturer Samsung ran an advertisement that portrayed a robot in a blond wig, a gown, and jewelry standing in front of a set that resembled the game show *Wheel of Fortune*. Vanna White sued, claiming the advertisement violated her right of publicity. The Ninth Circuit reversed the district court’s grant of summary judgment to Samsung and concluded that the use of a robot and not an actual likeness of Ms. White herself was not significant in the disposition of the case.

In light of jurisprudence recognizing that commercial speech is entitled to limited First Amendment protection, the *White* case makes some sense. After all, unlike *Hoffman*, there was no question that Samsung’s work was an advertisement and thus clearly commercial speech. What is not so clear, however, is the legitimacy of the Ninth Circuit’s conclusion that Vanna White should be able to prevent someone from using a robot that, while suggesting her, actually had only limited resemblance to her physical appearance. This holding would seem to fly in the face of the idea/expression doctrine of copyright law that holds that while the expression of an idea may be copyrighted, the idea itself may not be so protected.³⁹ In other words, Vanna White attempted to prevent, and succeeded in preventing, others from using not just her image—that is, the expression—but also from using the idea of a woman (or an inanimate object with female attributes) standing on the set of a game show turning letters.

Courts have used a variety of justifications for the right of publicity. Some courts have concluded that the right of publicity is based on “the right of the individual to reap the reward of his endeavors.”⁴⁰ This formulation closely tracks justification for copyright that is set forth in the U.S. Constitution, which relies on a grant of exclusivity to en-

courage the arts and sciences.⁴¹ Copyright law, however, is limited by several doctrines and defenses aimed at protecting the First Amendment and ensuring a robust public domain for the creation of additional works. In addition to the idea/expression dichotomy discussed above, it is also black letter law that facts cannot be copyrighted. Moreover, the length of the copyright term is generally limited to the life of the author plus seventy years, after which a work becomes part of the public domain, freely available to anyone. Finally, the doctrine of fair use permits individuals to make new works based on existing ones, including parodies, without engaging in copyright infringement. These doctrines protect First Amendment freedoms and help ensure a public domain necessary for “the promotion of the Arts and Sciences.”

Although the U.S. Supreme Court has noted the similarity between the policy underlying copyright and the right of publicity, it is unclear how far this analogy should be extended. Significantly, the case where the Court noted such similarities is explicitly limited to its facts.⁴² Moreover, one court, after subjecting this argument to thorough examination, concluded that “[t]he incentive effect of publicity rights has been overstated. Most sports and entertainment celebrities with commercially valuable identities engage in activities that themselves generate a significant amount of income; the commercial value of their identities is merely a by-product of their performance values.”⁴³

Some courts considering right of publicity actions have explicitly turned to copyright doctrine in order to limit the tort consistent with First Amendment values. For example, although the California Supreme Court in *Saderup* rejected the “wholesale importation of the fair use doctrine into right of publicity law,” it turned to one of the fair use factors, “the purpose and character of the use,” for guidance.⁴⁴ The court utilized this fair use factor to determine whether the defendant’s artwork, reproduced on T-shirts, was sufficiently “transformative” so as to receive First Amendment protection. In *Hoffman*, the Ninth Circuit gave a nod to the *Saderup* analysis, stating that “there is no question that [the magazine’s] publication of the ‘Tootsie’ photograph contained ‘significant transformative elements.’”⁴⁵

Although some courts have shown a willingness to import intellectual property doctrine into the right of publicity analysis, others have grounded their limitations of the tort to traditional First Amendment principles. One such example is a case involving a publicity claim of Tiger Woods against an artist who created a limited edition print of a painting entitled “The Masters of Augusta” featuring Woods in action. The court, in granting the defendant’s motion to dismiss, noted that “this Court is not faced with an instance of mere copying of an idea but with a unique expression of an idea.”⁴⁶ Clearly if this were a copyright case, the defendant would not have been so fortunate. Instead, the court relied upon First Amendment principles in protecting the artist’s “unique expression” and in holding that simply because the print was sold “is irrelevant to the determination of whether it receives First Amendment protection.”

The *Hoffman* decision likewise illustrates that the First Amendment can be a potent weapon in preventing the overextension of the right of publicity. Actors, athletes, and other celebrities are often at the center of the public eye. Although they deserve to have the commercial value of their identities protected, they no doubt understand that their status brings with it increased attention, focus, and public interest. The right of publicity must take into consideration these competing values. First Amendment principles, either directly or through the lens of intellectual property doctrine, provide the tort with the necessary breathing space to allow comment, criticism, and artistic expression regarding such celebrities who play important roles in the American cultural landscape. *Hoffman* is a refreshing example of a court striking the right balance. 

Endnotes

1. See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).
2. See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824–25 (9th Cir. 1974).
3. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). The tort can be traced to a seminal article by Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), while its name can be traced to *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).
4. Diane Leenheer Zimmerman, *Fitting*

Publicity Rights Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!, 10 DEPAUL-LCA J. ART & ENT. L. 283, 284 (2000) (quoting Ralph S. Brown, *Copyright and Its Upstart Cousins: Privacy, Publicity, Unfair Competition*, 33 J. COPYRIGHT SOC’Y 301 (1986)).

5. See *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 967 (10th Cir. 1996).

6. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977); see also *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 106 Cal. Rptr. 2d 126, 135–36 (Cal. 2001).

7. *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 811 (9th Cir. 1997).

8. *Id.* at 811. The statutory cause of action is intended to complement, not replace, the common law cause of action. See *Lugosi v. Universal Pictures*, 160 Cal. Rptr. 323, 326 n.6 (Cal. 1979) (en banc).

9. See, e.g., *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 678–79 (7th Cir. 1986) (finding right of publicity claims preempted by federal Copyright Act); but see *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 623–24 (6th Cir. 2000).

10. *Amicus Curiae Brief of Seventy-Three Law Professors in Support of Jireh Publishing, Inc.*, reprinted in 22 WHITTIER L. REV. 391, 416 (2000).

11. *Los Angeles Magazine*, Mar. 1997, at 118.

12. *Id.* at 104.

13. *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 870 (C.D. Cal. 1999).

14. *Id.* at 869.

15. *Id.* at 875 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

16. *Id.* at 874.

17. 367 F. Supp. 876, 880 (S.D.N.Y. 1973).

18. See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).

19. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (finding the singer’s right of publicity had been violated by an advertisement featuring a singer who sounded almost identical to Waits).

20. *Hoffman*, 255 F.3d at 1184 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983)).

21. *Id.* at 1185.

22. *Id.* at 1186.

23. *Id.* (quoting *Eastwood v. Nat’l Enquirer*, 123 F.3d 1249 (9th Cir. 1997)).

24. *Id.* at 1187.

25. *Id.*

26. Notably Judge Kozinski of the Ninth Circuit and those who joined his dissents in *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), and *Wendt v. Host Int’l, Inc.*, 197 F.3d 1284 (9th Cir. 1999).

27. See, e.g., Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity*, 9 DEPAUL-LCA J. ART & ENT. L. 35 (1998).

28. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). See also, *Gaudiya Vai Shava Soc’y v. City and County of San Francisco*, 952 F.2d 1059, 1064 (9th Cir. 1990).

29. *Hoffman v. ABC/Capital Cities, Inc.*, 33 F. Supp. 2d 867, 874 (C.D. Cal. 1999).

30. 80 Cal. Rptr. 2d 464 (Cal. Ct. App. 1999). Under California law, a cause of action for violation of the right of publicity survives death. See CAL. CIV. CODE § 3344.1 (West 2000).

31. *Saderup*, 80 Cal. Rptr. 2d at 469–70.

32. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 106 Cal. Rptr. 2d 126, 142 (Cal. 2001).

33. See *id.* at 143.

34. See *Wendt v. Host Int’l, Inc.*, 197 F.3d 1284, 1285 (9th Cir. 1999) (Kozinski, J., dissenting from denial of rehearing en banc).

35. See *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 811–12 (9th Cir. 1997) (citing *Eastwood v. Superior Court*, 198 Cal. Rptr. 2d 342, 349 (Cal. Ct. App. 1983)).

36. See *Bolger v. Young’s Drug Prods. Corp.*, 463 U.S. 60, 66 (1983); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1198 (9th Cir. 1989).

37. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 970 (10th Cir. 1996). See also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991).

38. See *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

39. See *Feist*, 499 U.S. at 348–49.

40. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977); see also *Lugosi v. Universal Pictures*, 160 Cal. Rptr. 323, 336 (Cal. 1979) (Bird, C.J., dissenting); but see *Martin Luther King Jr. Ctr. for Social Change, Inc. v. Am. Heritage Prods., Inc.*, 694 F.2d 674, 679 (11th Cir. 1983) (relying on a theory of unjust enrichment).

41. See U.S. CONST. Art. I § 8, cl. 8.

42. *Zacchini*, 433 U.S. at 562.

43. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 973 (10th Cir. 1996).

44. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 106 Cal. Rptr. 2d 126, 139 (Cal. 2001).

45. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 n.2 (9th Cir. 2001).

46. *ETW Corp. v. Jireh Publ’g, Inc.*, 99 F. Supp. 2d 829, 835 (N.D. Ohio 2000).