STATE DESCENDIBLE RIGHT OF PUBLICITY LAWS

MIP Project - Professor Field

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JUL 18 1997

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This paper is divided into four parts; Part I addresses publicity rights in general, issues involved in their nature and descendibility, and problems arising from a lack of national consistency, Part II is a comparison of ten state statutes detailing descendible publicity/privacy rights. The comparison does not detail the entire statute, but highlights key common and dissimilar provisions, Part III addresses those courts which have expressly found, or not found, a common law descendible right of publicity, and Part IV addresses constitutional issues arising from descendible publicity rights. The conclusion will note significant problems which could be addressed by federal legislation.

PART I

The commercial exploitation of the deceased great, and near great, proceeds apace. The descendants and successors in interest of the marketable dead ,e.g., Agatha Christie, the Marx Brothers, Tennessee Williams, Martin Luther King, have all come to court trying to establish or to regain control of the use of various aspects (name, likeness, voice, etc.) of the deceased. (FN1). There are divergent opinions on the nature of the rights claimed, the scope and duration of the rights, and a wide variety of other issues including the descendibility of these rights whatever their nature. The answers to these questions are becoming more economically important with each advance onto the information superhighway. The improvements in communication technology and the resultant world-wide markets are conscripting the personalities, likenesses, and characteristics of public figures during their lifetimes and (seemingly) forever after. A 1994 article in the New York Times (FN2) described the advent of a "reanimation" computer technology. The computer translates physical data about a living or deceased celebrity (from a film or a photo) into an image. That image is then placed into new digital entertainment forms, e.g., a new video. What rights

does the estate of the deceased celebrity have? Obviously a number of intellectual property issues are implicated, trademark and copyrights as well as descendible publicity rights.

As there is no federal law concerning descendible publicity rights, one looks to state law and Circuit Court opinions. Unfortunately only a small number of states and Federal Courts have specifically addressed this issue. At present ten (10) states have codified descendible or post-mortem publicity or privacy rights; California (FN3), Florida (FN4), Indiana (FN5), Kentucky (FN6), Nebraska (FN7), Nevada (FN8), Oklahoma (FN9), Tennessee (FN10), Texas (FN11), and Virginia (FN12). In addition the law in four states has been interpreted to allow a common law descendible right of publicity; Arizona (FN13), Georgia (FN14), New Jersey (FN15), and Utah (FN16). On the other side, the law of four states has been interpreted to find no descendible publicity rights; Illinois (FN17), New York (FN18), Ohio (FN19), and Pennsylvania (FN20).

A major cause for the inconsistent approach to these rights is the disagreement over the exact nature of publicity rights. The right of publicity was first articulated in Haelan Laboratories, Inc. v Topps Chewing Gum, Inc. (FN21). The case involved the right of baseball players to their names and likenesses on baseball cards. The Court spoke about the publicity value of the photographs and said that "this right might be called a right to publicity" (FN22). Public reaction allowed for commercial benefits but "This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant" (FN23). The Court did not call this right a property right, but it did say that the characterization was immaterial. The term "property", "simply symbolizes the fact that courts enforce a claim which has pecuniary worth." (FN24).

Subsequent state and federal courts which have addressed this issue had to decide whether or not a separate right of publicity exists, if it is descendible, and if it is, under what criteria. However, "much confusion is generated by the notion that the right of publicity emanates from the classic right of privacy." (FN25). Dean Prosser wrote that the personal right of privacy included protection against the appropriation of a person's name or likeness. (FN26).With this analysis, of a publicity interest as personal, the right of publicity would end with the death of the person involved. On the other hand if publicity rights were property, separate from privacy rights, then they could partake of the attributes of property, including assignability and inheritibilty.

Confusion can also arise from a mixture of commercial appropriation claims with other traditional personal privacy intrusion claims, e.g., intrusion into a person's private affairs or publicity placing someone in a false light or subject to derision. This issue can be seen in Martin Luther King , Jr. Center for Social change, Inc. v. American Heritage Products, Inc. noted below.

Even if a court finds publicity rights to be property, must an individual have exercised these rights during life to allow for their descendibility? The states which have codified descendible publicity rights do not require commercial exploitation during life (see Part II) while Arizona, New Jersey, and Utah case law seems to require it. (FN27).

The variety of law on descendible publicity rights and the manner of its development have presented, and continue to present, difficulties for plaintiffs. Since there is no federal law on point, state law must be followed. But as noted above , a small number of states have statute law. An added complication has been that before some of these statutes were passed, the state common law position was articulated by federal courts in diversity actions with no state court decisions to refer too. This situation still exists today as noted below in Part III. As a result, choice of law

questions, venue, and timing of actions are extremely important. An example of this can be seen in Groucho Marx Productions, Inc. v Day and Night Co, Inc. (FN28). In that case the assignees of the Marx's brothers' publicity rights brought an action against the producers of a Broadway play for infringement of those rights. All the defendants were New York residents, and the play was developed and perfected in New York. On the other hand, all three Marx brothers were resident in California when they died and the plaintiff company is incorporated in California. The District Court held that "New York, as the forum state, would apply its own substantive law (concerning descendible publicity rights) either as the law of the place of the wrong...or as the law of the place with the most significant contacts" (FN29). The Court then found that New York recognized a descendible right of publicity and so granted plaintiff's motion for partial summary judgment on the issue of liability. The Circuit did not see it that way (FN30). It stated that, in a right of publicity case, "(a New York court) would apply its property choice of law rules to select the state whose law determines whether a plaintiff has a protectable right of publicity." (FN31). In the instant case the Court held that California law, not New York law, governed whether or not plaintiffs had any property right upon which to bring suit. They found that California (at that time) did not recognize a descendible publicity right "that protects against an original play using a celebrity's likeness and comedic style." (FN32) and so reversed the District Court's holding.

Problems can also result from a federal court deciding what a state common law is in the absence of any state decisions. In New York for example, most cases dealing with descendible publicity rights were decided in federal courts. In the absence of state authority, the federal courts recognized a common law descendible publicity right separate from rights granted under New York Civil Rights law over a number of years (FN33). However in 1984, a New York State

court held in Stephano v. News Group that the "right of publicity is encompassed under the Civil Rights Law as an aspect of the right of privacy, which, as noted, is exclusively statutory in this state, [and so] the plaintiff cannot claim an independent common law right of publicity.' (FN34).

A classic example of the complications which can arise over inconsistent law between jurisdictions is found in the Elvis Presley estate's six year series of cases involving Factors Etc., Inc. v Pro Arts, Inc. (FN35), Factors I-VII. These cases involved both New York and Tennessee law.

In an earlier New York case, Factors Etc., Inc. v Creative Card Company (FN36), Factors Etc. won a Federal District court case claiming infringement of their licensed publicity rights from the Presley estate. The court stated that the right of publicity is a proprietary descendible right in New York. (This was before Stephano had been decided). Three years later, the Sixth Circuit in Memphis Development Foundation v Factors Etc., Inc. (FN37) found against Factors Etc. because it found no descendible publicity right in Tennessee law.

The day after Factors Etc., v Creative Card Co was decided , the first Factors Etc., Inc. v Pro Arts, Inc. case (Factors I) was also decided in New York (FN38). The case concerned unauthorized use of Elvis' photo on Pro Arts' poster. Pro Arts had filed a suit in its state of incorporation, Ohio, to seek a declaratory judgment of non-infringement. When it heard of the suit, Factors Etc. brought suit in New York as a companion case to Factors Etc., Inc.v. Creative Card Co, Inc. The New York court determined that jurisdiction and venue were proper and granted Factors a preliminary injunction based on their right of publicity. This decision was affirmed in Factors II (FN39).

Before Factors III could be heard, the Memphis Development case had been decided by the Federal Court which decided against a descendible right of publicity in Tennessee. The New York District Court nevertheless granted Factors Etc. a permanent injunction against Pro Arts on the basis of New York's descendible right of publicity. In Factors IV, Pro Arts appealed to the Second Circuit which took a look at the choice of law question. The court determined that Presley's publicity rights were formed and governed under Tennessee law, therefore Tennessee law should apply. On this basis the Second Circuit reversed and found for Pro Arts under Tennessee law (FN40).

These cases were not yet finished. Factors V, VII, and VII concerned Pro Arts attempt to get damages from Factors Etc. for a wrongful injunction. In between Factors IV and V a Tennessee state court case seemed to allow for a descendible right of publicity. (FN41). While between Factors V and VI another Tennessee state court case seemed to deny such a right in Tennessee (FN42). Despite the confusion. in Factors VI the New York court held to its understanding of Tennessee law as not allowing for a descendible right of publicity. And the issue was finally resolved after six years in Factors VII when damages were awarded to Pro Arts, Inc.

As noted above, some states have codified a descendible publicity right. This has brought some order as two of these states, California and Tennessee, account for a large number of such cases. Part II presents a comparison of some key features in the state codes.

PART II

CA Civil.Code s990:

A deceased personality means any natural person whose name, voice, signature, photograph, or likeness has commercial value at time of death, whether or not those attributes were used on or in products, merchandise or goods, or for purposes of advertising or selling, or solicitation of products, merchandise, goods or service during life. Publicity rights are property rights, freely transferable, in whole or part, by contract or by means of trust or testamentary documents.

Duration of protection:

50 years from the death of the deceased personality. However, if the deceased personality did not transfer their rights by contract or trust or testamentary document, and there is no surviving spouse, child, grandchild or parent, then the rights terminate at death. The rights under this section can be exercised by those persons, who in the aggregate, are entitled to more than one-half interest in the rights. For purposes of this statute, a deceased person includes any natural person who has died within 50 years prior to January 1, 1985.

Scope of protection:

Unauthorized use of a deceased personality's name, voice, signature, photograph, or likeness , in any manner, on or in products, merchandise, or goods for the purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services. No requirements for commercial exploitation during life.

Relief available:

An amount equal to the greater of $750.00 or the actual damages, any profits from the unauthorized use which are not taken into account in computing actual damages, , punitive damages, and attorneys' fees and costs for the prevailing party. No claim for damages may be brought for prohibited use which occurs prior to the registration of a claim of the rights with the Secretary of State. The remedies provided are cumulative and are in addition to any others provided by law.

Fair use provisions:

Section 990 will not apply in any of the following instances:

1. a play, book, magazine, newspaper, musical composition, film, radio, or television program, other than an advertisement or commercial announcement not exempt under paragraph 4 below.

2. Material that is of political or newsworthy value

3. Single and original works of fine art.

4. an advertisement or commercial announcement for a use permitted by paragraph 1, 2, and 3 above.

FLA. Stat. Ann. s540.08:

The rights noted in this section can be transferred and are descendible. A deceased person is provided the same protections against unauthorized use as a living person. No specific right of publicity is named.

Duration of protection:

40 years after death.

Scope of protection:

No person shall, without consent, publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait. photograph, or other likeness of any natural person. There is no requirement for commercial exploitation during life.

Relief available:

Unauthorized use can be enjoined and damages can be recovered for any loss or injury resulting from the use, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.

Fair use provisions:

1. The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of a bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes

2. Any photograph of a person solely a member of he public and where such person is not named or otherwise identified in or in connection with the use of such photograph.

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IN ST ss32-13-1-1 , 19:

In Indiana, publicity rights are property rights, freely transferable and descendible, in whole or in part.

Duration of protection:

100 years after date of death. If the rights of publicity have not been transferred and there are no survivors under state intestacy statute, the rights terminate at death.

Scope of protection:

Unauthorized use of a name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms.. If there were no transfer of the rights, upon the death of an intestate personality the rights may be exercised and enforced only by a person who possesses not less than one-half interest of the rights. There is no requirement for commercial exploitation during life.

Relief available:

The greater of damages in the amount of $1,000.00 or actual damages including profits from unauthorized use and treble or punitive damages , upon election, for knowing, willful or intentional violations, attorney's fees, costs, and expenses to prevailing party, temporary or permanent injunctive relief. Injunctive relief is also available.

Fair use provisions:

No publicity right under this chapter affects the rights and privileges recognized under any other law that apply to a news reporting or an entertainment medium. The chapter also provides a detailed list of uses of protected personality aspects which do not violate the right of publicity, IN ST 32-13-1-1. These include, literary or theatrical works, musical compositions, film radio or television programs, material that has political or newsworthy value, and original works of art. Use is also allowed in promotional material or advertisements with some specific requirements, e.g.., that the material "does not convey or reasonably suggest" that the personality has endorsed the entertainment or news report.

KY ST s391.170:

Kentucky specifically states in this code provision that the right of publicity is distinguishable from the traditional right of privacy which terminates upon death. The right of publicity is a property right which protects from appropriation elements of an individual's personality for commercial exploitation and does not terminate upon death. This code section is not extensive.

Duration of protection:

50 years from the date of death.

Scope of protection:

The name and likeness of a person who is a public figure. There is no requirement for commercial exploitation during life.

Relief available:

None specific to this section.

Fair use provisions:

None listed.

NE ST s20-202

An action arising out of the exploitation of a person's name or likeness in this section is considered a privacy action in Nebraska. However, under NE ST s20-208, this type of exploitation is the only privacy right which is deemed to survive death.

Duration of protection:

None listed.

Scope of protection:

Any person, firm, or corporation that exploits a natural person, name, picture, portrait, or personality for advertising or commercial purposes. There is no requirement of commercial exploitation during life.

Relief available:

A violation of protected uses will result in liability for invasion of privacy with the same damages available as other non-descendible privacy violations

Fair use provisions:

The publication, printing, display, or use of the name or likeness of a person in any news medium or publication as part of " any bona fide news report or presentation or non-commercial advertisement having a current or historical public interest and when such name or likeness is not used for commercial advertising purposes". An additional fair use is allowed for photographs of a person solely as a member of the public when the person is not named or otherwise identified in or in connection with the use of the photograph.

NV ST s597.790

A specific right of publicity exits in Nevada.

Duration of protection:

50 years after death.

Scope of protection:

Unauthorized commercial use of the name, signature, photograph or likeness of every person. There is no requirement for commercial exploitation during life.

Remedies available:

None specific to this section.

Fair use provisions:

Use in material which is commercially sponsored but the use is not directly connected with the commercial sponsorship and use in connection with an original work of art, except that multiple editions of the work require consent

OK ST T. 21 s839.1

No separate right of publicity is created in Oklahoma. Unauthorized use is included with offenses against the right of privacy of living persons.

Duration of protection:

None listed.

Scope of protection:

Unauthorized use of the name, portrait or picture of any person for the purpose of advertising for the sale of goods or for the solicitation of patronage by any business enterprise. If a person's heirs hold the rights, a majority of the adult heirs are needed to exercise these rights. There is no requirement for commercial exploitation during life.

Relief available:

None specific to this section.

Fair use provisions:

None listed.

VA ST s 8.01-40:

Virginia does not create a separate right of publicity but includes unauthorized use under this section as an injury to the person whether alive or dead.

Duration of protection:

20 years after death.

Scope of protection:

Unauthorized use of a person's name, portrait or picture for advertising purposes or for the purposes of trade. After death, consent for use can only be given by the surviving consort, or if none, of the next of kin. No provision is made for holders of rights to a person's name, portrait or picture transferred by contract. There is no requirement for commercial exploitation during life.

Relief available:

Unauthorized use allows a suit in equity against the violators in which injunctions can be granted and suit can be brought to recover damages for injuries resulting from the use. If the defendant's unauthorized use was knowing, exemplary damages may be awarded.

Fair use provisions:

None listed.

TX PROPERTY s26.002:

Texas recognizes a survivable property right in the use outlined in this section. This right is freely transferable in whole or in part.

Duration of protection:

Until the 50th anniversary of the individual's date of death. However the property right expires on the first anniversary of the date of death if the individual did not transfer the right and there is no surviving spouse, child, grandchild, or parent.

Scope of protection:

Unauthorized use of a deceased individual's name, voice, signature, photograph, or likeness in any manner, including in connection with goods or merchandise or for advertising, or soliciting the purchase or sale of goods and services. The protection applies to individuals "alive on or after September 1, 1987, or who died before September 1, 1987, but on or after January 1, 1937 " and whose name, voice , signature, photograph, or likeness has commercial value at time of death or comes to have such value after death. So there is no requirement for commercial exploitation during life. Also;

a. if the right is held by more than one person, the right can be exercised by those persons owning more than one-half interest in the aggregate, and

b. during the first year following the death of the individual, the owner of a property right may exercise that right only if the right has been registered with the Secretary of State. Such registration is prima facie evidence of a valid claim to a property right. After the first year, an owner of the property right may exercise that right whether or not a claim has been registered.

Relief available:

Either $2,500.00 or the amount of damages sustained, whichever is greater. The amount of any profits attributable to that use, exemplary damages, and reasonable attorney's fees, expenses, and court costs.

Fair use provisions:

The use of a deceased individual's name, voice, signature, photograph, or likeness in;

1. a play, book, film, radio or television program
2. a magazine or newspaper article
3. material that is primarily of political or newsworthy value
4. single and original works of fine art
5. the use by a media enterprise if the material constituting the use is not integrally and directly connected with commercial sponsorship or paid advertising.

PART III

As noted above, the law in four states has been interpreted to allow for a common law descendible right of publicity; Arizona, Georgia, New Jersey, and Utah. An interesting complication arises with regard to choice of law questions in diversity cases because for three of these states (Georgia excepted) a Federal court decided the issue absent a clear ruling from the state Supreme Court. This can result in confusing situations as noted above in the Factors Etc. series of cases. This confusion may not be resolved if a state does not allow questions to be certified from the Federal Courts to the State Supreme Court.

In Sinkler v Goldsmith (FN43) the District Court reviewed a claim for the control of post-mortem publicity rights. The case involved the widow (Goldsmith) and a student (Sinkler) of Joel Goldsmith, the deceased founder of a spiritual movement called The Infinite Way. A number of intellectual property issues were raised, among them Mrs. Goldsmith claimed that she was "the sole owner of the right to benefit from the name of her husband and the preeminence of her husband gained during his lifetime...(and) Sinkler has been using and will continue to use the preeminence of Joel Goldsmith in the conduct of her classes and lectures." (FN44). The court did a brief review of other circuit's decisions in this area and found that while the "notable and famous " have sole right during life to control the commercial use of their name and personality, in general this right does not survive death. "However, the right of publicity has been held to survive if the holder of the right exploited it during his lifetime. (FN45). In the instant case however, there was " no showing that Joel exploited the use of his name and personality by assigning the right to use them to another.(FN46). So a detailed analysis of state law was not reached. Although not addressed by the court, it would seem that Arizona common law could recognize a descendible

publicity right as long as there had been commercial exploitation during the lifetime of the deceased.

The fact of commercial exploitation during lifetime was also an important factor in Nature's Way Products., Inc. v Nature-Pharma, Inc. (FN47). One issue raised was the alleged exclusive use in the name of a deceased health food guru, a Dr Christopher. The District Court noted that Utah state courts had not yet addressed the issue of whether the common law right of publicity survives the death of the person being publicized. The issue in the instant case was framed as "whether or not an inter-vivos assignment of the right of publicity is valid after the death of the transferor" (FN48). The District Court held that the Utah Supreme Court would "recognize a common law right of publicity cause of action, and that it would follow what appears to be the majority and modern rule that the common law right of publicity survives the death of the subject person in cases where he transferred or otherwise exploited such rights while alive." (FN49).

The Court also found the Restatement (Second) of Torts consistent with this view. It provides that "except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded." (FN50). The Court's reading would carve out a distinct, descendible, right of publicity from the personal right of privacy. Since the Utah court had recently followed the Restatement in a similar case, it was the District Court's "Erie guess" that Utah courts would also follow the Restatement's position on this issue.

In Estate of Presley v Russen (FN51) another District Court found that the common law right of publicity is descendible under New Jersey law. The plaintiff's publicity claim was based on

the appropriation of Presley's likeness and name for the defendant's commercial benefit. The Court noted that New Jersey had always enjoined the use of a person's likeness and name on the basis that it was a protected property right.

> "we conclude that ...a New Jersey Court would allow a cause of action for infringement of a right of publicity...this right, having been characterized by New Jersey courts as a property right, rather than as a right personal to and attached to the individual, is capable of being disassociated from the individual and transferred by him for commercial purposes.' (FN52)

While reviewing other circuit opinions, the Court opined that they had concluded that publicity rights "having been exercised during the individual's life and thus having attained a concrete form, should descend at the death of the individual "like any other intangible property right."(FN53). In a footnote (#9), the Court declined to reach the question of whether or not Presley's publicity rights would survive his death if he had not commercially exploited his name and likeness during life. The Court also declined to rule on any duration limit for the right of publicity. (FN54). The tenor of the Court's analysis however seemed to find an "exploitation requirement " in New Jersey law for a descendible publicity right.

This understanding of New Jersey law was also implied in Lamonaco v CBS, Inc. (FN55). Plaintiffs were family members of the late Philip Lamonaco, whose tragic death was dramatized by CBS. The plaintiffs claimed a violation of their relational rights of privacy (not publicity) and the District Court recognized ,for this case only, a "relational right in the privacy tort of appropriation of another's name or likeness" in New Jersey law. Whether or not the relatives of the deceased had standing to bring this suit turned on whether CBS's use was commercial or newsworthy. New Jersey cases articulated the differences; "commercial use is mainly for purposes of trade, without a redeeming public interest, news, or historic value." (FN56), and a

newsworthy publication contains an "indefinable quality of information that arouses the public's interest and attention" (FN57). In the instant case, the defendants dramatized Lamanaco's death because of its inherent value, not as a "way of promoting other commercial activities."

Uniquely among the Federal Courts discussed above, the Eleventh Circuit Court of Appeals certified questions concerning rights of publicity to the Supreme Court of Georgia in Martin Luther King, Jr. v American Heritage Products. Inc. (FN58). The state Supreme Court replied and the Court of Appeals held that in Georgia; 1. the right to publicity is distinct from the right to privacy, 2. the right of publicity is inheritable and devisable, and 3. the right of publicity need not have been commercially exploited before it can survive (FN59).

In deciding the second question, the Court focused in on the economic interest involved in the right of publicity as the key reason for its inheritibility.

> "Recognition of the right of publicity rewards and thereby encourages effort and creativity. If the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished because the celebrity's untimely death would seriously impair, if not destroy, the value of the right of continued commercial use. Conversely, those who would profit from the fame of a celebrity after his or her death for their own benefit and without authorization have failed to establish their claim that they should be the beneficiaries of the celebrity's death." (FN60)

And yet the Court also found that the right of publicity did not have to be commercially exploited during life to be descendible. The Court's reasoning here seemed to reflect policy concerns. "The net result (of requiring exploitation during life) ...would be to say that public figures have the right of publicity during their lifetimes...but only those who contract for bubble gum cards, posters, and tee shirts have a descendible right of publicity upon their death." (FN61) Despite the importance of commercial use in establishing publicity rights during life the Court opined "that [if] we should single out for protection after death those entertainers and athletes who exploit their persons during life, and deny protection after death to those who enjoy public acclamation but did not

exploit themselves during life, [this would put]...a premium on exploitation. (FN62). It must be noted that the instant case involved Dr Martin Luther King and not a rock star or movie idol. It may be that the Courts' concern went to the "proper" use of the names and prestige of notable public figures who did not profit from their celebrity as such. Requiring commercial exploitation during life may open up such people to inappropriate exploitation after death if their designated successors in interest or heirs were not in control. This concern however would touch more on one's reputation than on publicity interest. This reasoning undercuts the separation of publicity from personal privacy actions because it weakens the property interest (commercial exploitation) which would survive death. It is interesting to note that no state which has codified descendible publicity rights under whatever name has required commercial exploitation during lifetime. The federal courts mentioned above also failed to address the duration of any descendible rights of publicity.

A number of states' laws have also been interpreted as denying the existence of descendible publicity rights, at least in specific circumstances; Illinois, Ohio, Pennsylvania, and New York. In Maritote v. Desilu Productions (FN63), the Seventh Circuit Court of Appeals held that under Illinois law relatives of the deceased (Al Capone) could not maintain an action for invasion of right of privacy through publication and telecasts respecting the deceased when they (the relatives) were not referred to. Despite a claim of appropriation of the decedent's name likeness and personality, the court (agreeing with the District Court) found the relief sought as "essentially for a claimed invasion of a right of privacy." (FN64). And the" right of privacy cannot be asserted by anyone other than him whose privacy is invaded." (FN65).

The Federal District Court, ND. Ohio, E.D., held in Reeves v United Artists (FN66) that Ohio law specifically denied the descendibility of the right of publicity. In Ohio, Zacchini v Scripps-Howard Broadcasting Co., (FN67) recognized a right of publicity in a performer's exclusive control over the publicity given to the performance. Upon review by the United States Supreme Court (FN68), the publicity right was acknowledged as the television station could be held liable for violating a performer's right of publicity. However in Reeves, the court indicated that "although the right of publicity and the right to privacy are recognized as protecting "fundamentally different interests which must be analyzed separately" (FN69) , the right of publicity's root in the right of privacy has caused confusion." (FN70). The court then cited the Ohio Supreme Court in Zacchini 1 which characterized "plaintiff's (publicity) claim (as) one for invasion of the right of privacy by appropriation" (FN71). And so, since the Ohio Supreme Court linked the right of publicity more to the right of privacy than to a property right, and since the right of property is a personal right which ends at death, therefore in Ohio the right of publicity ends at death and is not descendible.

A similar argument, although less clearly articulated, is found in Sharman v C. Schmidt & Sons, Inc. (FN72). There the Federal District Court held that public figures in the "celebrity category" have a property right in their name and image. However, the "right of publicity is a fledgling branch of the tort of invasion of privacy." (FN73). Since the right of privacy is a personal right ending at death, it is reasonable to assume that the court would not hold the right of publicity to be descendible.

As noted above, a New York state court in Stephano v News Group Publications held that there was no independent common law right of publicity in New York. The right of publicity

exists under the state Civil Rights Law as an aspect of the right of privacy. This was counter to a number of federal court holdings which had interpreted New York law to allow for a separate right of publicity. However a footnote in Stephano noted that " In view of the fact that the plaintiff is asserting his own right of publicity we need not consider whether the statute would also control assignment, transfer or descent of publicity rights" (FN74). In other words, the court did not reach the question of whether even a privacy based publicity right could be descendible in New York. Subsequent courts have noted the footnote but prefer to wait for legislative action (FN75). A post-mortem right of publicity bill has been presented to the New York legislature which is based on the California publicity statute, CA Civil Code s 990, with the same 50 year duration of protection.

Whether or not descendible publicity rights are enacted by statute or derived from the common law, they can raise constitutional issues of free expression and preemption issues regarding federal intellectual property statutes. These issues are addressed in Part IV.

PART IV

An expansive enforcement of publicity rights can serve as a limitation on free expression by restricting the use of names, voices, likenesses, or even personal styles in entertainment or commercial settings. When does a reference to a famous person infringe on an enforceable right in the identity of that person? At what point does the balance of restriction tip too far against the First Amendment?

The Supreme Court spoke on publicity rights and the First Amendment in Zacchini v. Scripps-Howard Broadcasting Co. (FN76). The Court recognized a state publicity right in a performance which could be asserted against a First Amendment claim. In the case the news media taped and displayed an entire performance. The petitioner did not wish to enjoin the broadcast, merely get paid for it. Because Zacchini 's entire performance was filmed his economic interests in the performance were compromised. Allowing a damage claim against the broadcasters does not violate First Amendment protections, "entertainment, as well as news ,enjoys First Amendment protection...But it is important to note that neither the public nor respondent (the broadcasting company) will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized." (FN77). If the broadcaster had used only small segments of the performance, no publicity right would have been reached and First Amendment protection would have controlled.

The use of an individual's identity in a news or entertainment context will ordinarily receive First Amendment protection unless the commercial nature of the appropriation allows a

lesser amount of protection. The courts have not yet found a firm place to draw the line however, except for the a total appropriation of commercial value as in Zacchini.

In Elvis Presley's Estate v. Russen (FN78) the Court needed to determine whether a tribute show to Elvis Presley, The Big EL Show, misappropriated the Presley's Estate publicity rights. The use of Presley's attributes was not to sell some merchandise , Presley's likeness sold a show about Presley himself. Nevertheless the court found that the show "commercially exploit[ed] the likeness of Elvis Presley without contributing anything of substantial value to society." (FN79). The Big EL show was only imitation, "entertainment that is merely a copy or imitation , even if skillfully and accurately carried out, does not really have its own creative component and does not have a significant value as pure entertainment" (FN80). Because of this lack of any value to balance against the commercial appropriation, publicity rights would trump free expression, " The public interest in entertainment will support the sporadic, occasional and good-faith imitation of a famous person to achieve humor, to effect criticism or to season a particular episode, but it does not give a privilege to appropriate another's valuable attributes on a continuing basis as one's own without the consent of the other." (FN81).

The determination as to whether a work involved just imitation and little or no creative contribution can be an arbitrary one. In Groucho Marx Productions v. Day & Night Co. (FN82) the court found that an original musical comedy about the Marx brothers was "a satiric comment on Hollywood movies using a parody of the Marx brothers as one of the devices" (FN83). Despite this admitted level of creativity the court held that the play was an unwarranted appropriation of the brother's characters. It is difficult to find the fulcrum point of this balance.

The ability of courts to hold for the enforceability of publicity rights can be found in the weaker First Amendment rights associated with commercial speech. In a seminal case, Central Hudson Gas and Electric Corp. v Public Service Commission (FN84), the Supreme Court found a four part test to apply to regulation of commercial speech; is the speech protected by the First Amendment (concern lawful activity and not be misleading), is there a substantial government interest, does the regulation directly advance the government interest, and is the regulation more extensive than necessary to serve that interest. (FN85). This final prong was modified to a regulation that is only a "reasonable fit" for the government interest in Trustees of the Board of the State University of New York v Fox (FN86). This test however does not seem to be applied as such in publicity cases. "It appears to be assumed that the state's interest is the protection of the property right that its law creates and that granting compensatory and injunctive use against an infringing use is a reasonable fit. (FN87). Nevertheless, the fact that commercial speech is involved is used by courts to dismiss First Amendment concerns as against publicity rights because of the lesser protection accorded commercial speech. (FN88).

In addition to First Amendment concerns, federal preemption of state publicity rights may be required under Federal Copyright Law (FN89). The US Supreme Court has addressed the issue of state laws relating to intellectual property and the Supremacy Clause of the Constitution. Bonito Boat Inc. v Thunder Craft Boats, Inc (FN90) involved the application of a Florida anti-direct molding statute to the duplication of unpatented boat hull designs. The Court held that the Florida statute was preempted by Federal Patent laws through the Supremacy Clause, indicating that the "statute is aimed directly at the promotion of intellectual creation by substantially restricting the public's ability to exploit ideas that the patent system mandates shall be

free for all to use." (FN91). The patent statute promotes certain creative activity in a "scheme of federal regulation...so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." (FN92). Can publicity rights protected by state laws be preempted by federal intellectual property statutes?

A copyright preemption analysis is articulated in Baltimore Orioles Inc., v Baseball Player's Association (FN93). In this case the Baseball Player's Assoc. claimed publicity rights in their performances during game telecasts. The court turned to the Copyright Statute which states the criteria for preemption of a right under state law; 1. the work in which the right is asserted must be fixed in a tangible medium of expression, 2. the right must be equivalent to any exclusive right within the general scope of copyright specified in s. 106, and 3. come within the subject matter of copyright as specified in ss 102-103. (FN94). The court found; that the player's performance was fixed in the videotape of the games, that the performance right claimed was equivalent to the s. 106 right to perform an audiovisual work, and that the performance as fixed in an audiovisual work was an original work of authorship under s. 102 (6) Therefore the Player's publicity rights in their performance are preempted by the Copyright Act.

The reasoning used by the court to find an equivalent right (criteria # 2 above) casts a wide net. "A right under state law is equivalent to one of the rights within the general scope of copyright if it is violated by the exercise of any of the rights set forth in s. 106." (FN95) Since a broadcast of the Player's performance would violate their publicity rights as an unauthorized performance, and since performance is an exclusive right under s. 106, therefore the claimed publicity rights are equivalent to a federal copyright right. Since many publicity rights actions are brought over the acts listed in s. 106, e.g., performance, reproduction, display, it would seem that

the "equivalence " prong of the preemption analysis is easily met. With regard to the third criteria noted above (a right within copyright subject matter), the Supreme Court's low threshold for copyright originality in Feist Publications Inc. v Rural Telephone Service Co. (FN96) would also allow easy satisfaction if the work fell into one of the eight broad categories of s. 102.

However, most actions under descendible publicity rights statutes have turned on issues of commercial appropriation of the value of another's identity or free expression concerns (FN97). It may be that copyright preemption issues may arise more often as the scope of publicity rights expands from specific attributes of names, voices, likenesses, etc., to more amorphous concepts of identity such as style. The Ninth Circuit has gone furthest along this path and a review of two opinions concerning White v. Samsung Electronics America, Inc. (Samsung I and II) (FN98) articulates these issues.

In Samsung I, Vanna White brought action against Samsung for their inclusion in an advertisement of a robot dressed to resemble White placed in front of a Wheel of Fortune-like game show board. However the robot's features were not molded to White's own face. The court denied White's claim under a statutory right of publicity (FN99) because her "likeness" under the statute was not used. But the court did allow a common law publicity right because the common law right was " not so confined" as the statute.(FN100). The court noted Dean Prosser's discussion of publicity as an appropriation of name and likeness. In the same article Dean Prosser added that "[i]t is not impossible that there might be appropriation of the plaintiff's identity, as by impersonation, without the use of either his name or his likeness". (FN101). This understanding allowed an expansive reading of common law likeness. "The common law of publicity reaches means of appropriation other than name or likeness...the right of publicity does not require that

appropriations of identity be accomplished through particular means (voice, name, etc.) to be actionable." (FN102). The court reasoned that without this construction, the common law right of publicity would be "eviscerated". "The identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness , or voice." (FN103)

Samsung raised a free speech defense as the advertisement (for VCRs) used a spoof of Vanna White and should be considered a protected parody. The court dismissed this claim fairly quickly. "The ad's spoof of Vanna White and Wheel of Fortune is subservient and only tangentially related to the ad's primary message: buy Samsung VCRs...The difference between a "parody" and a knock-off" is the difference between fun and profit." (FN104). In a footnote (FN105) the court said that their decision did not "chill" expressive conduct as "commercial advertising which relies on celebrity fame is different from other forms of expression."

In Samsung II, the Circuit court panel denied a petition for rehearing and rejected a suggestion for rehearing en banc. The dissenting Justice, Judge Kozinski, wrote a forceful condemnation of the expanded scope of California publicity rights and the damage done to free expression and federal intellectual property law by such an expansion:

> "Concerned about what it sees as a wrong done to Vanna White, the panel majority erects a property right of remarkable and dangerous breadth: Under the majority's opinion, it is now a tort for advertisers to remind the public of a celebrity. Not to use a celebrity's name ,voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity 's image in the public's mind...It conflicts with the Copyright Act, and the Copyright Clause. It raises serious First Amendment problems. It's bad law". (FN106).

A key failure in such expansive publicity rights is the lack of "essential limitations" which are present in other intellectual property rights, e.g., fair use exceptions in copyright. Such limitations

are there to keep the balance between " what's set aside for the owner and what's left in the public domain for the rest of us." (FN107).

Samsung parodied Vanna White appearing in a copyrighted game show, "and parodies of copyrighted works are governed by federal copyright law ...(which) gives..the right to make "fair use" parodies, "parodies that don't borrow too much of the original." (FN108). In addition copyright law grants an exclusive right to the copyright owner to create or license derivative works. (FN109). The courts understanding of publicity rights as encompassing anything which evokes the identity of an individual would vitiate the federal statute.

How could a parody of a movie or a TV show be made which does not "evoke" the identity of the actors? How could a license to create a derivative work be granted if any character in the original work had a publicity right in any attribute which served to evoke his identity? " The public's right to make a fair use parody and the copyright owner's right to license a derivative work are useless if a parodist is held hostage by every actor whose "identity" he might need to appropriate." (FN110).

Another conflict with the federal copyright system identified by Justice Kozinski arises under what he termed the "dormant Copyright clause." Under this, state intellectual property laws can stand only so long as they don't "prejudice the interests of other states." (FN111). The Judge referenced Goldstein v. California (FN112) which addressed a claim of record piracy. The Supreme Court noted that if a state copyright law were not preempted by the Federal statute, it still needed to avoid any prejudice to the interest of other states. The Court reasoned that citizens of other states which did not offer the same protection remained free to copy within their borders works which were protected by another state. (FN113). Some types of state intellectual property

laws might not be so limited in its effects on the citizens of other states. For example, unlike a state law banning record piracy, the right of publicity isn't geographically limited. "The right of publicity created by one state applies to conduct everywhere, so long as it involves a celebrity domiciled in that state...the broader and more ill-defined one state's right of publicity, the more it interferes with the legitimate interests of other states." (FN114). A state would have too much control over artists in another state, and under the Goldstein analysis, such a state statute might fall.

Justice Kozinski also mentioned the courts dismissal of the First Amendment issue because Samsung's advertisement was "commercial" speech. The Judge referenced the Central Hudson test mentioned above and faulted the court for its failure to apply it. He ended his opinion by adding, "In the name of avoiding the "evisceration" of a celebrity's rights in her image, the majority diminishes the rights of copyright holders and the public at large." (FN115).

Conclusion

The current status of descendible publicity rights is not consistent enough to serve an increasingly valuable economic market or an increasingly sophisticated technology. Some reasons for this inconsistency can be understood from the cases discused above. As indicated above, the Circuits differ in their understanding of publicity rights, if they have actually addressed the issue. Because of the national nature of news reporting, entertainment and advertising, many publicity rights cases are brought as diversity actions in Federal Court. In addition, publicity right cases can have Lanham Act claims in the pleadings, e.g., for misrepresentations or likelihood of confusion (FN116), allowing Federal Court jurisdiction because of a federal question (FN117). The lack of state cases on point highlights the importance of choice of law and forum shopping

issues. In addition, as the Circuits continue to deal with these cases, questions concerning the scope of First Amendment protection and federal preemption under the Copyright Act will continue to arise. State by state codification of descendible publicity rights may not address these issues in a timely manner for potential plaintiffs.

One could argue that the resolution of these problems calls more for policy determinations by Congress rather than legal decisions. Where to place the balance between the granting of property rights in intellectual property to encourage creation and the open marketplace of ideas has been a political decision, dating back to Article 1, Section 8, Clause 8 of the U.S. Constitution. Once Congress has articulated a federal position on descendible publicity rights, to include their creation, duration, relation to other fedeal statutes, etc., courts can become more consistent. Thereby providing a key component to the efficient exploitation of any property, predictability.

FN1. (Agatha Christie) Hicks v. Casablanca Records , 464 F. Supp 426 (S.D. N. Y. 1978), (The Marx Brothers), Groucho Marx Productions Inc., v. Day and Night Co. Inc., 523 F Supp 485 (S.D.N.Y. 1981) (Tennessee Williams), Southeast Bank, N.A. v. Lawrence, 104 A.D. 2d 213, 483 N.Y.S. 2d 218 (1984), and (Martin Luther King), Martin Luther King Center for Social Change, Inc. v. American Heritage Products , Inc. 694 F.2d 674 (11th Cir, 1983)

FN2. Bruce Weber, "Why Marilyn and Bogie Still Need a Lawyer", N.Y. Times, March 11, 1994, at B18.

FN3. CA CIVIL CODE s 990

FN4. FLA STAT ANN s 540.08

FN5. IN ST ss 32-13-1-1 - 32-13-1-19

FN6. KY ST s 391.170

FN7. NE ST s 20-202

FN8. NV ST s 597.790

FN9. OK ST T.21 s 839.1

FN10. VA ST s 8.01-40

FN11. TN ST s 47-25-1102

FN12. TX PROPERTY s 26.002

FN13. Sinkler v. Goldsmith, 623 F. Supp, 727 (D. Arizona 1985)

FN14. Martin Luther King, Jr. Center for Social Change, Inc. , 694 F.2d 674

FN15. Estate of Elvis Presley v Russen, 513 F. Supp (D. New Jersey 1981)

FN16. Nature's Way Products, Inc v. Nature-Pharma, Inc., 736 F.Supp 245 (D. Utah, C.D. 1990)

FN17. Maritote v. Desilu Productions, 345 F.2d 418 (7th Cir, 1965)

FN18. Stephano v. News Group Publications, 64 N.Y. 2d 174, 474 N.E. 2d 580 (1984)

FN19. Reeves v. United Artists, 572 F. Supp 1231 (N.D. Ohio E.D. 1983)

FN20. Sharman v. C. Schmidt & Sons, Inc., 216 F Supp 401 (E.D. Pennsylvania 1963)

FN21. Haelan Laboratories, Inc, v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir, 1953)

FN22. Id. at 868

FN23. Id.

FN24. Id.

FN25. 17 Pepp. L. Rev 933, 934 citing Price v. Hal Roach Studies, Inc., 400 F. Supp 836, 843. (S.D.N.Y. 1975)

FN26. 48 Calif L. Rev 383, 389 (1960)

FN27. Sinkler, 623 F. Supp 727 (Arizona), Estate of Elvis Presley, 513 F. Supp 1339 (New Jersey), Nature's Way Products, 736 F. Supp 245 (Utah)

FN28. Groucho Marx Productions, Inc., v. Day and Night Company, Inc., 523 F. Supp 485 (S.D.N.Y. 1981)

FN29. Id. at 487

FN30. Groucho Marx Productions, Inc. v Day and Night Company, Inc., 689 F.2d 317 (2d Cir, 1982)

FN31. Id. at 319

FN32. Id. at 323

FN33. Hicks, 464 F.Supp 426, Factors, Etc., Inc., v. Pro-Arts, Inc., 579 F.2d 215 (2d Cir, 1978), Price, 400 F.Supp 836,

FN34. Stephano, 64 N.Y.2d 174

FN35. Factors Etc., Inc. v. Pro-Arts, Inc., (Factors I), 444 F. Supp 288 (S.D.N.Y. 1977), Factors Etc., Inc., v. Pro-Arts, Inc. (Factors II), 579 F.2d 215 (2d Cir, 1978), Factors Etc., Inc., v. Pro-Arts, Inc., (Factors III), 496 F. Supp 1090 (S.D.N.Y. 1980), Factors Etc., Inc., v. Pro-Arts, Inc. (Factors IV), 652 F. 2d 278 (2d Cir 1981), Factors Etc., Inc. v. Pro-Arts, Inc. (Factors V), 541 F. Supp 231 (S.D.N.Y. 1982), Factors Etc., Inc. v. Pro-Arts, Inc. (Factors VI), 701 F.2d 11 (2d Cir, 1983), Factors Etc., Inc. v. Pro-Arts, Inc. (Factors VII), 562 F.Supp 304 (S.D.N.Y. 1983).

FN36. Factors Etc., Inc. v. Creative Card Co., 444 F Supp 279. ((S.D.N.Y. 1977)

FN37. Memphis Development Fund v. Factors Etc., Inc., 616 F.2d 956 (6th Cir, 1980)

FN38. Factors I, 444 F.Supp 288

FN39. Factors II, 579 F.2d 215

FN40. Factors IV, 652 F.2d 278

FN41. Commerce Union Bank v. Coors, 7 Media L. Rep 2204 (BNA) (1981)

FN42. Lancaster's v. Factors Etc., Inc., 9 Media L. Rep 1109 (BNA) (1982)

FN43. Sinkler, 623 F. Supp 727

FN44. Id. at 733

FN45. Id.

FN46. Id. at 734

FN47. Nature's Way Products, 736 F. Supp 245

FN48. Id. at 252

FN49. Id.

FN50. Restatement (Second) of Torts, s 652I (1977)

FN51. Estate of Elvis Presley, 513 F.Supp 1339

FN52. Id. at 1354

FN53. Id. at 1355 citing Factors Etc., Inc. v. Creative Card Co., 444 F. Supp 279, 284.

FN54. Id. at 1355 n. 9

FN55. Lamonaco v. CBS, Inc., 1993 WL 556536 (D.N.J.) (D. New Jersey 1993)

FN56. Id. at 7 citing Tellado v. Time-Life Books, Inc., 643 F.Supp 904, 910

FN57. Id. at 7 citing Romaine v. Kalinger, 109 N.J. 282, 301.

FN58. Martin Luther King , Jr., 694 F.2d 674

FN59. Id. at 683

FN60. Id. at 682

FN61. Id. at 683

FN62. Id.

FN63. Maritote v. Desilu Productions, Inc., 345 F.2d 418

FN64. Id. at 420

FN65. Id. at 419

FN66. Reeves v. United Artists, et. al., 572 F. Supp 1231 (N.D. Ohio E.D. 1983)

FN67. Id. at 1233 citing Zacchini v. Scripps-Howard Broadcasting Co., 54 Ohio St.2d 286, 376 N.E. 2d 582 (1978), Zacchini v. Scripps-Howard Broadcasting Co., 47 Ohio St.2d 224, 351 N.E.2d 454 (1976)

FN68. Id. citing Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575

FN69. Id. at 1234 citing Carson v Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 834 (6th Cir, 1983)

FN70. Id.

FN71. Zacchini, 47 Ohio St.2d 224, 226

FN72. Sharman v. C. Schmidt & Sons, Inc., 216 F. Supp 401

FN73. Id. at 407

FN74. Stephano, 64 N.Y. 2d 174, 474 N.E.2d 580 supra at 584 n.2

FN75. Pirone v. MacMillian, 894 F.2d 579, 586 (2d Cir, 1990)

FN76. Zacchini, 433 U.S. 562

FN77. Id. at 568

FN78. Estate of Presley, 513 F.Supp 1339

FN79. Id. at 1359

FN80. Id.

FN81. Id at 1360

FN82. Groucho Marx Productions, 689 F.2d 317

FN83. Id. at 493

FN84. Central Hudson Gas and Electric Corp. v/ Public Service Commission, 447 U.S. 557 (1980)

FN85. Id. at 566

FN86. Trustees of the Board of the State University of New York v. Fox, 492 U.S. 469, 480 (1989)

FN87. 28 Beverly Hills B.A. J. 13, 24

FN88. White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir, 1992), Midler v. Ford, 849 F.2d 460 (1988), Estate of Presley, 513, F.Supp 1339.

FN89. 17 USC ss 101-810

FN90. Bonito Boats Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989)

FN91. Id. at 167

FN92. Id.

FN93. Baltimore Orioles, Inc. v. Major League Baseball Association, 805 F.2d 663 (7th Cir, 1986)

FN94. 17 USC s 301a

FN95. Baltimore Orioles, supra at 676

FN96. Feist Publications Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991)

FN97. E.g., Reeves, 572 F.Supp 1231, Guglielmi v. Spelling-Goldberg Productions, 25 Cal 3d 860, 603 P.2d 454 (1975), Martin Luther King Center, 694 F.2d 674, Groucho Marx Productions, 523 F. Supp 485, Price v Hal Roach Studios, Inc., 400 F.Supp 836 (S.D.N.Y. 1975), Factors I, 444 F.Supp 288, Lugosi v.Universal Pictures, 25 Cal 3d 813, 603 P.2d 425 (1975)

FN98. White v Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir, 1992) (Samsung I), White v Samsung Electronics America, Inc., 989 F.2d 1512 (9th Cir, 1993) (Samsung II)

FN99. CA CIVIL CODE s 3344

FN100. Samsung I at. 1397

FN101 Id. citing 48 Cal L. Rev 383, 401 n 155

FN102. Id. at 1398

FN103. Id. at 1399

FN104. Id. at 1401

FN105. Id. n. 3

FN106. Samsung II at. 1514

FN107. Id. at 1516

FN108. Id. at 1517 citing Fisher v. Dees, 794 F.2d 432, 435 (9th Cir, 1986)

FN109. 17 USC s 106

FN110. Samsung II, supra at 1518

FN111. Id. at 1518 citing Goldstein v. California, 412 US 546, 558 (1973)

FN112. Goldstein, 412 US 546

FN113. Id. at 558

FN114. Samsung II supra. at 1519

FN115. Id. at 1521

FN116. 15 USC s 1125a (43a)

FN117. Rogers v. Grimaldi, 875 F.2d 994 (2d Cir, 1989), White v Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir, 1992), Estate of Elvis Presley, 513 F.Supp 1339, McFarland v. Miller, 14 F.3d 912, (3d Cir, 1994)