Franklin Pierce Law Center

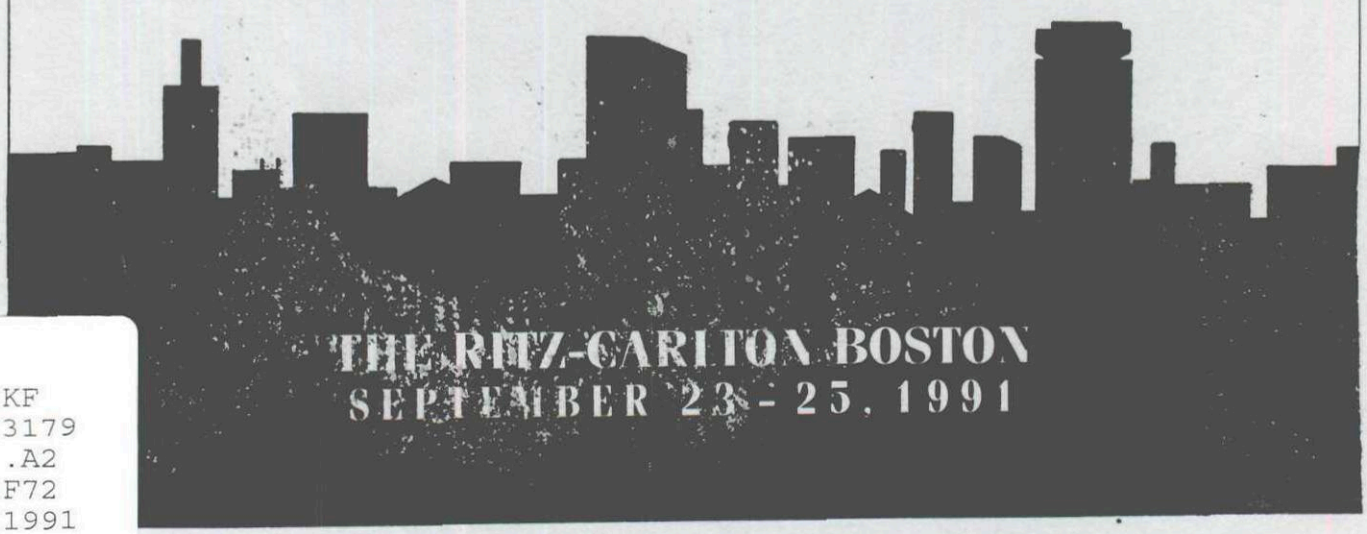
PRESENTS

ENFORCING AND LITIGATING PATENTS AND TRADEMARKS

TRADEMARK LITIGATION
SEPTEMBER 23

BORDER ENFORCEMENT & BIOTECHNOLOGY LITIGATION
SEPTEMBER 24

PATENT LITIGATION
SEPTEMBER 25



THE RITZ-CARLTON BOSTON
SEPTEMBER 23 - 25, 1991

KF
3179
.A2
F72
1991
v.1
c.3

IP

KF
3155
.S35
1991

ENFORCEMENT OF ITC EXCLUSION ORDERS

Presented To

FRANKLIN PIERCE LAW CENTER:

ENFORCING AND LITIGATING PATENTS AND TRADEMARKS

FRANKLIN PIERCE
LAW CENTER LIBRARY
CONCORD, NH

FEB 11 1998

By: Charles F. Schill
ADDUCI, MASTRIANI,
MEEKS & SCHILL
1140 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 467-6300

September 24, 1991

KF
3155
.S35
1991

I. EXCLUSION ORDERS AS A MEANS OF ENFORCEMENT

There are two different types of exclusion orders which may issue after an affirmative determination of a violation of Section 337 of the Tariff Act of 1930 ("Section 337"). The first is a general exclusion order that covers all products which fall within the scope of the intellectual property right, regardless of whether the products or parties were subject to the actual International Trade Commission ("Commission") investigation. The second type of exclusion order is a limited exclusion order which is operable only against the infringing or unfairly competitive products of respondents found to be in violation of Section 337.

In determining whether to issue a general or a limited exclusion order, the Commission balances the interest of complainant in obtaining complete protection from potential infringing products against the potential of the exclusion order to disrupt legitimate trade. A general exclusion order will issue when the intellectual property right in question could be easily infringed by foreign manufacturers who are not parties to the investigation, when there exists a widespread pattern of unauthorized use of the product at issue, and when certain business conditions make infringement likely. The unauthorized use pattern includes criteria such as: unauthorized importation into the U.S. of infringing articles by numerous foreign manufacturers; pendency of foreign infringement suits based on foreign patents which

correspond to the domestic patent in issue; and evidence which demonstrates a history of unauthorized foreign use of the product at issue. The business conditions which will be considered are: an established demand for the product in the U.S. market and a corresponding demand in foreign markets; the lack of barriers to entry into the U.S. market; the existence of marketing and distribution channels in the U.S. for potential foreign manufacturers; the cost to foreign entrepreneurs of constructing manufacturing facilities; the number of foreign manufacturers who could potentially manufacture the article at issue; and/or the cost to foreign manufacturers of producing the alleged infringing article.

The following are a number of case analyses which specifically discuss the Commission's rationale in issuing either limited or general exclusion orders. In Airless Paint Spray Pumps and Components Thereof, ITC Inv. No. 337-TA-90 (1981) ("Spray Pumps"), the Commission provided the rationale for issuing a limited rather than a general exclusion order. The Commission noted the traditional practice of issuing a general exclusion order when the patent in question might readily be infringed by foreign manufacturers not party to the Commission investigation. The Commission stated further, however, that such broad exclusion orders might stifle the flow of legitimate trade. The underlying reason for this concern was the

reality that Customs officials with massive workloads could not always perform the analysis needed to determine infringement in complex cases, resulting in the potential exclusion of legitimate products. Additionally, the Commission expressed concern that potential importers of legitimate like products would be hesitant to import due to the uncertainties of enforcement of a general exclusion order, resulting in a chilling effect upon foreign trade. In Spray Pumps, the Commission based its decision on the fact that there was no widespread pattern of unauthorized use. It found that although the case involved several foreign patents which corresponded to those at issue, there was no evidence of other infringement suits based on those foreign patents. Infringement was also based on the act of a single foreign manufacturer and the foreign use of the patented inventions by others was authorized rather than unauthorized. In addition, there was little evidence that business conditions would encourage further unauthorized importation of infringing articles. The Commission found that the complainant failed to establish that the technology necessary to manufacture the infringing articles was widely available and that infringing imports were probable in the future.

A general exclusion order, rather than a limited exclusion order, will issue in cases in which foreign manufacturers could easily produce infringing products for the U.S. market, when there is a likelihood that

future imports will be infringing, and when there are attempts by respondents to solicit sales in the U.S. through a non-party importer. Unlike in Spray Pumps, the Commission in Foam Earplugs, ITC Inv. No. 337-TA-184 (1985), found that there was a widespread pattern of past unauthorized use of complainant's patent on ear plugs and that foreign manufacturers could easily enter this market. See also Single Handle Faucets, ITC Inv. No. 337-TA-167 (1984), in which a general exclusion order was found to be the appropriate remedy due to a widespread pattern of unauthorized use by respondents, as well as the satisfaction of other business condition criteria.

Limited exclusion orders may also be more appropriate where the criteria for a general exclusion order cannot be met. For example, in Erasable Programmable Read Only Memories, Components Thereof, Products Containing Such Memories, and Processes for Making Such Memories ("EPROMs"), ITC Inv. No. 337-TA-276 (1989), aff'd, Hyundai Electronics Industries Co. v. United States International Trade Commission, 14 U.S.P.Q.2d 1396 (Fed. Cir. 1990), the Commission issued a limited exclusion order to prohibit the unlicensed entry of EPROMs manufactured by the respondents. The exclusion order, which included downstream products incorporating the EPROMs, was affirmed on appeal by the Federal Circuit. In addition to the limited exclusion order, the Commission issued cease and desist

orders to domestic corporations ordering them to cease and desist from importing, selling, assembling, testing or carrying on other pre-sale preparation for EPROMs which had been determined to be infringing.

A. Exclusion Orders Directed to Products of Process Patents

In some areas, both a general and a limited exclusion order may be difficult to enforce. For example, in Reclosable Plastic Bags and Tubing, ITC Inv. No. 337-TA-266 (1988), the Commission issued a general temporary exclusion order for a product that was covered by a process patent. Enforcement was problematic because there was no means for Customs to determine whether the product at issue was made by a particular process without some sort of certification from importers or a list of specific manufacturers who allegedly produce according to the infringing process. There was a lengthy dissent in Plastic Bags regarding the difficulty in the enforcement of exclusion orders for articles infringing process patents and suggestions that more practical relief would be provided by a limited exclusion order.

B. Exclusion Orders Against Defaulting Respondents

In cases in which respondents default, the Commission may issue a limited exclusion order or a cease and desist order against the defaulting parties' products. A limited exclusion order and/or cease and desist order will issue in cases in which the complaint is filed and served upon the defaulting party, that party fails to respond or appear, and the complainant limits relief to that party. See Certain Key Blanks for Keys of High Security Cylinder Locks, ITC Inv. No. 337-TA-308 (1990).

If complainant does not prevail on the existence of the intellectual property right, however, the Commission has held that even a limited exclusion order against defaulting respondents would be against the public interest. Electric Power Tools, Battery Cartridges and Battery Chargers, ITC Inv. No. 337-TA-284 (1988). In Power Tools, complainant failed to prove the existence of a common law trademark and, therefore, even under the Commission's new tougher default rules, the Commission refused to exclude the products of the defaulting respondents. Although the Omnibus Trade Act of 1988 amended the provisions regarding defaulting respondents, the Commission reasoned that the imposition of an exclusion order without the underlying intellectual property right as a basis would be against public policy.

II. CEASE AND DESIST ORDERS

In addition to an exclusion order, the Commission may issue a cease and desist order directed to specific respondents. Cease and desist orders often accompany exclusion orders where there are foreign manufacturers and importers, as well as domestic distributors of products. A cease and desist order may be entered independently of an exclusion order when the Commission determines that the likelihood of importation is *de minimis* and the potential imposition of a civil penalty is an adequate barrier to the entry of potentially infringing articles. Electric Power Tools, Battery Cartridges and Battery Chargers, ITC Inv. No. 337-TA-284 (1988). In Power Tools, a cease and desist order was determined adequate because the sole respondent found guilty of "passing off," (advertising his product using the registered trademark of complainant), had previously ceased importation of the products and appeared only in a limited capacity at the preliminary stage of the investigation. A cease and desist order may prohibit any or all of the following activity: the importation, sale for importation, assembling, testing, performing manufacturing steps with respect to using, marketing, distributing, offering for sale or selling the infringing product. Cease and desist orders may be directed to conduct of the accused infringers or to activities relating to the products found to be in violation of Section 337. In cases involving

products previously imported, the Commission may require information regarding the available stock and may allow the sale of the remaining products in stock when there is no evidence of large inventories and/or stockpiling. Certain Nonwoven Gas Filter Elements, ITC Inv. No. 337-TA-275 (1988). Cease and desist orders, like exclusion orders, are subject to Presidential review and may be disapproved by the President for policy reasons.

III. SEEKING AN EXCLUSION ORDER IN A TEO PROCEEDING

A complainant may also request a general or limited exclusion order in a temporary relief proceeding. Where complainant can demonstrate strong likelihood of success on the merits and irreparable harm in the absence of relief, the Commission will issue a temporary exclusion order. See Cellular Radiotelephones and Subassemblies and Components, ITC Inv. No. 337-TA-297 (1989); Crystalline Cefadroxil Monohydrate, ITC Inv. No. 337-TA-293 (1989); Reclosable Plastic Bags and Tubing, ITC Inv. No. 337-TA-266 (1987) ("Plastic Bags"). In Plastic Bags, a general temporary exclusion order issued in a case involving infringement of a process patent and a registered trademark. However, temporary exclusion orders were denied in the following investigations: Certain Pressure Transmitters, ITC Inv. No. 337-TA-304 (1990); One Piece Cold Forged Bicycle Cranks, ITC Inv. No. 337-TA-

227 (1986); Double Sided Floppy Disk Drives, ITC Inv. No. 337-TA-215 (1986).

IV. PRESIDENTIAL REVIEW OF EXCLUSION ORDERS

In a number of cases in which the Commission has issued general exclusion orders, the President has exercised his prerogative to disapprove of the exclusion order for policy reasons. Presidential review usually occurs as a result of a broad exclusion order which the Executive Branch determines is against the public interest. There are a number of reasons why the President may reject an exclusion order, including the inability of a complainant to meet domestic demand, the medical need for the infringing product and, first and foremost, the potential chilling effect on legitimate trade. In such instances, the Commission will usually reissue a more limited exclusion order that accommodates the policy concerns of the President. An example of a recent reissue of a exclusion order is Dynamic Random Access Memories, Components Thereof, and Products Containing Same, ITC Inv. No. 337-TA-242 (1987) ("DRAMs"). In DRAMs, the limited exclusion order was disapproved by the President and, as a result, the Commission issued a more limited exclusion order. In disproving the exclusion order, the President reasoned that the effect of the order on U.S. firms and trade would extend far beyond the respondents named

the violation occurs. Once a violation is detected, the Commission initiates a civil action. The civil penalty for violation of a cease and desist order is $100,000.00 per day or twice the domestic value of the articles entered or sold on that day, whichever is greater. In 1986, the U.S. General Accounting Office performed a survey and reported the results of the enforcement by Customs in the U.S. District Courts. GAO, International Trade: U.S. Firms' View on Customs' Protection of Intellectual Property Rights, GAO/NSIAD-86-96 (May 1986) at 17-18. Although the reports regarding enforcement of exclusion orders and cease and desist orders varied, it was clear that Customs inspectors are better able to enforce orders when assisted by the owner of the intellectual property right.

VII. PROCEEDINGS TO ENFORCE ITC ORDERS

Enforcing an exclusion order may be conducted on a formal or informal level. 37 C.F.R. § 211.56. When a violation of a Commission order is brought to the attention at the Office of Unfair Import Investigations, that office may propose orders to the Commission to assist in the implementation of and to assure compliance with the terms of the cease and desist order or exclusion order. The Commission may also seek formal enforcement of an exclusion order by a court or formal enforcement proceedings at the Commission level.

In recent cases, Commission enforcement proceedings have been effective and have resulted in civil penalties of up to $2.6 million dollars. See EPROMs, supra, in which the Commission determined that the cease and desist order had been violated by a respondent importer of infringing articles.

In enforcement proceedings in district courts, the Commission may initiate a civil action against the violator in U.S. district court pursuant to Section 337(f) and request the imposition of civil penalties or the issuance of such mandatory injunctions as deemed necessary to enforce its orders and protect the public interest. 37 C.F.R. § 211.56(b). The Commission may also institute an enforcement proceeding at the Commission level by filing a complaint setting forth the alleged violations of any final Commission orders. Failure of a respondent to file and serve a response to a complaint within fifteen days will result in an affirmative finding on the facts as alleged in the complaint. In such cases, the Commission is authorized to take any such action as may be appropriate without notice or hearing. The Commission can also proceed without notice to take evidence on the allegations or charges set forth in the complaint, as long as the Commission permits late filings for good cause shown. In formal enforcement proceedings, the Commission has the power to:

1) modify a cease and desist order, consent order or an exclusion order to prevent the unfair practices which were originally the basis for issuing the order;

2) seek enforcement in U.S. district courts and request the imposition of a civil penalty or the issuance of a mandatory injunction; or

3) direct that the articles at issue be excluded from entry into the United States. The public interest is also considered before adopting any modification, revocation or exclusion under the enforcement proceedings.

A good example of a case in which enforcement mechanisms were employed is Amorphous Metal Alloys and Amorphous Metal Articles, ITC Inv. No. 337-TA-143 (1984) ("Amorphous Metal"). After an investigation in which the products were found infringing and an exclusion order issued, the Commission, at respondents' request, instituted an advisory opinion proceeding to determine whether respondents' modified product would infringe the patent in suit. The Commission also instituted a proceeding in which the ALJ made findings of fact/conclusions of law and issued a recommended determination regarding the modification of the exclusion order. The recommended determination discussed: 1) the feasibility of enforcing the order without excluding products made by non-infringing processes;

2) what those feasible means were; and 3) whether the order should be modified or limited in scope, vacated, or left unchanged.

Customs was also encouraged to participate in the Commission proceeding in Amorphous Metals. Although the Administrative Law Judge found the modified product non-infringing, the Commission ordered a modification of the outstanding exclusion order. The order was modified in such a way that non-infringing products would not be mistakenly retained as a result of the scope of the order. In an appeal from the order modifying the exclusion order, the Federal Circuit found that the Commission's advisory opinion was not reviewable because it was not a final determination. Allied Corp. v. United States International Trade Commission, 7 U.S.P.Q.2d 1303 (Fed. Cir. 1988); see also Wire Electrical Discharge Machining Apparatus and Components Thereof, ITC Inv. No. 337-TA-290 (1990) ("Wire Electrical"). In Wire Electrical, the Commission terminated the modification proceeding after the U.S. District Court for the Northern District of Illinois granted a summary judgement holding that respondents' newly designed wire EDMs did not infringe the claims of the patents in suit. Although complainant originally argued that the newly designed products could easily be retrofitted with replacement parts from infringing assemblies, and the Commission originally accepted the petition, once the district court found the respondents'

modifications non-infringing, the modification proceeding was terminated upon request of all parties.

Any party desiring to import products which are the subject of an exclusion order or which may be subject to an exclusion order may petition the Commission to institute further proceedings for the purpose of determining whether the product sought to be imported should be allowed entry into the United States. In most instances, the Commission will issue an advisory opinion as to whether a respondent's proposed new course of action or conduct would violate the existing exclusion order. 37 C.F.R. § 211.54(b). The Commission will issue an exclusion order where it is in the public interest, where it will facilitate enforcement of Section 337, and where it will benefit consumers and competitive conditions in the United States.

In instances in which there has been a change in conditions, a party may request that the Commission action be modified or set aside by filing a motion. 37 C.F.R. § 211.57. The Commission may either accept or reject a motion and may hold a public hearing and afford interested persons the opportunity to appear and be heard. The Commission may also refer any action to an Administrative Law Judge who must certify a recommended determination to the Commission.

KF
3179
.A2
F72
1991



Franklin Pierce Law Center

ENFORCING AND LITIGATING PATENTS AND TRADEMARKS
SEPTEMBER 23-25, 1991
THE RITZ-CARLTON BOSTON

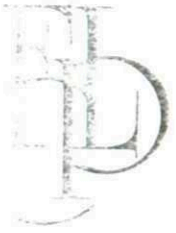
TRADEMARK LITIGATION

Table of Contents

Welcome	
Program	
About the Speakers	
What's New on the Trademark Litigation Front	David J. Kera
Litigating the Right of Publicity	Patricia S. Smart
Defense of a Trademark Infringement Charge	Albert Robin
In the Cross Hairs: Taking Aim at Appropriate Trademark and Trade Dress Remedies	Richard J. Groos
Trademark Remedies -- Monetary Relief	Gregory A. Madera
Survey of Leading Trademark Parody Cases: 1962 to the Present	Sheri L. Rosenfeld

FRANKLIN PIERCE
LAW CENTER LIBRARY
CONCORD, NH

MAY 03 2004



Franklin Pierce Law Center

September 1991

Good Morning!

It is my pleasure to welcome you to Franklin Pierce Law Center's fourth annual conference on current issues in intellectual property litigation. This year's program has been directed by Professor Karl Jorda, Director of the Kenneth J. Germeshausen Center for the Law of Innovation and Entrepreneurship at FPLC. Ron Coolley arranged the topics and speakers for Monday's portion on trademarks. Jamie Bulen, the Law Center's Marketing Director, has been program manager.

Franklin Pierce Law Center graduates 50+ students each year qualified for patent and other IP practice. Half of them are administrators and practitioners from other countries who enroll in the Master of Intellectual Property degree program -- a year-long course of study that places them in IP classes with JD students. The MIP program also includes a semester of placements in the PTO in Washington and in private and corporate practice. JD degree students may qualify for the MIP degree as well by completing certain course requirements and preparing an extensive paper of professional value and publishable quality. Thus, for domestic students, the MIP degree is a functional substitute for an LLM degree in intellectual property law.

We encourage you to visit the Law Center in Concord, New Hampshire. Learn first-hand why we believe FPLC is one of the principal intellectual property specialists west of Munich. Arrangements to interview JD degree students can be made through Pam Kirby, Placement Director or, for MIP students, Mary Lee (Assistant Director of Graduate Programs).

We also urge your company or law firm to join the *Patent, Trademark and Copyright (PTC) Research Foundation* at the Law Center. PTC membership provides you direct and continuing access to the Law Center and provides us the extra support high-quality IP instruction requires. Further information is available from Professor Robert Shaw, Director of the PTC and Editor of the quarterly IDEA: THE JOURNAL OF LAW AND TECHNOLOGY.

Enjoy your participation in the conference and your stay in Boston.

Sincerely,

Robert M. Viles
Dean

2 White Street • Concord, NH 03301 • 603-228-1541

TRADEMARK LITIGATION

MONDAY, SEPTEMBER 23

8:30-9:00	Registration
9:00-9:10	Trademark Law, Trademark Litigation in the 1990s Karl F. Jorda Franklin Pierce Law Center Concord, NH
9:10-10:00	What's New on the Trademark Litigation Front? David J. Kera Oblon, Spivak, McClelland, Maier & Neustadt Arlington, VA
10:00-10:50	Litigating the Right of Publicity -- Is Elvis Really Dead? Patricia S. Smart Pattishall, McAuliffe, Newbury, Hilliard & Geraldson Chicago, IL
10:50-11:00	Break
11:00-12:00	Defense of a Trademark Infingement Charge Albert Robin Robin, Blecker, Daley & Driscoll New York, NY
12:00-1:30	Lunch (Provided)
1:30-2:15	In the Cross Hairs: Taking Aim at Appropriate Trademark and Trade Dress Remedies Richard J. Groos Arnold, White & Durkee Austin, TX
2:15-3:00	Damages in Trademark Litigation -- An Update Gregory A. Madera Fish & Richardson Boston, MA
3:00-3:10	Break
3:10-4:00	Whither the Defense of Trademark Parody? Sheri L. Rosenfeld Cowan, Liebowitz & Latman, PC New York, NY
4:00-4:30	Open Forum

SPEAKERS

David J. Kera

David J. Kera is a Member of the law firm of Oblon, Spivak, McClelland, Maier & Neustadt, P.C. of Arlington, Virginia. Earning degrees from New York University (BA) and Harvard Law School (JD), Mr. Kera is an Adjunct Professor of Law at George Mason University and is active in ABA, AIPLA, and USTA. Prior professional experience includes serving as Member of the Trademark Trial and Appeal Board (1975-76, 1977-81) and Special Assistant To Assistant Commissioner for Trademarks (1976-1977). He lectures extensively on intellectual property issues and has authored articles appearing in THE TRADEMARK REPORTER; Enforcing and Exploiting Trademarks, Patent and Trademark Review, Vol. 73, Nos. 3-11 (1975); Trademark Licensing, Franchising and Antitrust Problems, Patent Resources Group, 1984; Trademark Rules of Practice, 37 C.F.R., Part 2 (1983); and coauthor of The Forty-Third Year of Administration of The Lanham Trademark Act of 1946, Vol. 80 TMR (1990).

Patricia S. Smart

Patricia S. Smart is Partner at Pattishall, McAuliffe, Newbury, Hilliard & Geraldson, a Chicago firm specializing in the areas of trademark and copyright infringement and counterfeiting, unfair competition and false advertising, right of publicity, computer software and trade secret protection and related counseling including security interest agreements, advertising approval and trademark licensing.

A speaker with Chicago Bar Association, John Marshall Law School and Northwestern Corporate Counsel Center, Ms. Smart is a member of the ABA, AIPLA, Chicago & Illinois Bar Associations, Copyright Society, Intellectual Property Law Association of Chicago and Legal Club. In 1984 she cofounded the Legal Aid Clinic for the Disabled and has served on its Board of Directors and Advisory Board.

Albert Robin

Albert Robin is a partner in the New York firm of Robin, Blecker, Daley & Driscoll. A graduate of Yale University (A.B.) and Harvard Law School (LL.B.), Mr. Robin is admitted to practice in New York. Professional associations include: Member, Governing Committee, ABA Forum Committee on Franchising (1977-1982); Member of Council, Patent, Trademark and Copyright Section, ABA (1983-1987); Member, Board of Directors, AIPLA (1977-1980 & 1987-1990); President, The New York Patent, Trademark and Copyright Law Association, Inc. (1981-1982); Counsel, USTA (1976-1979); Member, Commerce Department Public Advisory Committee for Trademark Affairs (1979-); and Member, Trademark Review Commission (1985-1988).

Richard J. Groos

Richard J. Groos is an associate in the Austin office of Arnold, White & Durkee. He obtained a Bachelor of Engineering Science in Environmental Engineering from The University of Texas and a J.D. from The University of Texas School of Law. Licensed to practice before the U.S. Patent and Trademark Office, Mr. Groos is active in the USTA (Membership Committee member) and State Bar of Texas Intellectual Property Law Section (Chairman, Amicus Briefs Committee). He is also a member of the American and Federal Bar Associations and the AIPLA. Mr. Groos authored and presented "Intent-To-Use Under The Trademark Law Revision Act" (1989).

Gregory A. Madera

Gregory A. Madera, Managing Partner of the Boston firm of Fish & Richardson, holds degrees from Massachusetts Institute of Technology and Harvard Law School. Dealing exclusively in patent, trademark and copyright litigation, Mr. Madera has been trial counsel in a number of cases, including several patent infringement actions for 3M (most recently against Johnson & Johnson resulting in a judgment for 3M in the amount of $116 million, incuding $53 million in punitive damages for willful infringement and misappropriation of trade secrets relating to 3M's Scotchcast® orthopedic casting products)(see 1 USPQ2d 1991), Post-it™ self-stick notepads (see 7 USPQ2d 1589), Scotchtint™ reflective window film, intraocular lenses and foam earplugs. Other patent infringement cases include The Gillette Company (Right Guard® antiperspirant [see 211 USPQ 499], razors, Foamy® shave gel) and Cobe Laboratories (dialysis machines). Mr. Madera's experience also includes actions involving enforcement of trademarks for Trak (see 205 USPQ 35, 475 F.Supp. 1076, 209 USPQ 507, and 212 USPQ 846), Paramount Pictures ("Cheers®"), Children's Television Workshop ("Sesame Street"), Stride Rite (Keds® shoes), United Brands (Chiquita® bananas), and Speedy Muffler King.

Mr. Madera is a member of the USTA TRADEMARK REPORTER Board of Editors (1987-1991) and coauthor of AVOIDANCE AND RESOLUTION OF DISCOVERY DISPUTES -- FROM THE PERSPECTIVE OF LITIGATION COUNSEL and APPROPRIATE USE OF INTERROGATORIES AND REQUESTS FOR ADMISSIONS, in "Patent Litigation: Avoidance and Successful Resolution," ALI-ABA Course of Study C116 (1986); and coauthor MASSACHUSETTS LAW, a chapter in "State Trademark and Unfair Competition Law",ed. USTA, pub. Clark Boardman, 1987.

Sheri L. Rosenfeld

A graduate of Rutgers Law School, Sheri L. Rosenfeld is an Associate in the New York firm of Cowan, Liebowitz & Latman. Her experience lies in intellectual property and related areas of law, having drafted litigation papers for copyright infringement, trademark infringement, trade dress infringement and entertainment cases. Nonlitigation experience includes administration of large international trademark registration programs and drafting of license agreements and record contracts. Ms. Rosenfeld is a member of the New York and New Jersey bars and is active in the JOURNAL OF THE COPYRIGHT SOCIETY's Editorial Board and USTA. She has coauthored, with David Goldberg and others, "Recent Developments in Copyright: Selected Annotated Cases" which has appeared in 38 Journal of the Copyright Society (1991), 37 Journal of the Copyright Society 502 (1990), and 36 Journal of the Copyright Society 211 (1989).

I. Recognition of The Right of Publicity As A Protectable Right

A. The right of publicity has been defined as the right to the exclusive commercial exploitation of the publicity value of one's name, likeness or persona.

1. The right of publicity "represents the right of an individual to control the commercial value of his name and likeness and to prevent their unauthorized exploitation by others." Groucho Marx Productions, Inc. v. Day & Night Co., 523 F.Supp. 485, 487 (S.D.N.Y. 1981), reversed on other grounds, 689 F.2d 317 (2d Cir. 1982).

2. The right of publicity "protects the persona -- the public image that makes people want to identify with the object person, and thereby imbues his name or likeness with commercial value marketable to those that seek such identification." Bi-Rite Enterprises, Inc. v. Button Master, 555 F.Supp. 1188, 1199 (S.D.N.Y. 1983).

3. "The rationale for protecting the right of publicity is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have a market value and for which he [the defendant] would normally pay." Zacchini v. Scripps-Howard Broadcasting Co.,

433 U.S. 562, 576, 97 S. Ct. 2849, 2857, 53 L. Ed. 2d 965 (1977).

B. Initially, protection against the unauthorized use of one's name or likeness was provided under the rubric of right of privacy and was intended to protect the right to be left alone.

1. The right of an individual to prevent the unauthorized, nondefamatory use of his name or likeness in advertising was recognized in the early 1900's; this right to be free from unwarranted publicity was denominated the right of privacy. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905) ("So thoroughly satisfied are we that the law recognizes . . . the right of privacy, and that the publication of one's picture without his consent by another as an advertisement . . . is an invasion of this right, that we venture to predict the day will come when the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability"); but see Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902) (No common law right of privacy which prohibited non-libellous use of plaintiff's portrait on advertising posters resulting in injury to her feelings), superseded by New York Civil Rights Law §§ 50, 51 (initially enacted as N.Y. Sess. Laws 1903, ch. 132,

§§ 1,2 in response to Roberson, prohibiting use of a person's name, portrait, or picture in advertising or for purposes of trade without prior written consent).

2. The right of privacy subsequently was held to provide protection against intrusion upon one's seclusion or solitude, public disclosure of embarrassing private facts, or publicity placing one in a false light, as well as appropriation of one's name and likeness for another's commercial benefit or advantage. Prosser, Privacy, 48 Calif. L. Rev. 383, 389 (1960).

3. Each branch of the right of privacy was premised on protecting the right to be left alone, a right which could be waived by thrusting oneself into the public light. See, e.g., O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941), cert. denied, 315 U.S. 823 (1942) (Use of athlete's photograph on a calendar together with a beer advertisement was not actionable because the player had forfeited his right to privacy by virtue of the fact he previously had sought publicity).

C. The right of publicity subsequently was recognized as an independent right, separate and distinct from the right of privacy, which protected a commercial interest.

1. The "right of publicity" first was judicially recognized as a separate legal interest in Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202

F.2d 866, 868 (2d Cir. 1953), cert. denied, 346 U.S. 816 (1953):

> We think that, in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph . . .
>
> This right might be called the "right of publicity." For it is common knowledge that many prominent persons far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances . . .

2. The right of publicity protects an interest fundamentally different from that protected by the right of privacy, namely the celebrity's pecuniary interest in the commercial exploitation of his identity, rather than his reputation or feelings. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983); Price v. Hal Roach Studios, Inc., 400 F.Supp. 836, 843 (S.D.N.Y. 1975). This difference was noted in Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573 (1977):

> By contrast, the State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment. As we later note, the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.

3. Thus, a celebrity's fame strengthens, not diminishes, his right of publicity.

D. While the right of publicity today has been generally recognized, the law varies from state to state as to whether the right is descendible and what attributes other than names or likenesses are protected.

1. Recognition of the right of publicity is a question of state statutory or common law.

2. In each state where the existence of the right of publicity has been considered, protection presently is available by statute, common law, or both; albeit, in some instances the right continues to be protected under the rubric of the right of privacy.

3. Statutory protection is available in California, Florida, Kentucky, Massachusetts, Nebraska, Nevada, New York, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Virginia, and Wisconsin.

   a. In some states, e.g., Nebraska, statutes were enacted subsequent to a finding that the right did not to exist at common law. See Carson v. National Bank of Commerce Trust and Savings, 501 F.2d 1082 (8th Cir. 1974); Gravina v. Brunswick Corp., 338 F.Supp. 1 (D.R.I. 1972).

   b. In other states, e.g., California, Tennessee, statutory protection compliments the protection available under the common law.

   c. Conversely, the New York Court of Appeals in 1984 held that recognition of a common law right of

publicity was precluded by the New York statute prohibiting the unauthorized use of a person's name, picture or portrait. Stephano v. News Group Publications, Inc., 64 N.Y.2d 174, 485 N.Y.S.2d 220, 474 N.E.2d 580 (1984).

4. Thus, when litigating a right of publicity case, it is necessary to determine which state law should govern and to advise the court that a choice of law question exists if a law other than forum law should be applied.

   a. The choice of law determination will effect the ability of the heirs or assigns of a deceased celebrity to bring a cause of action. See II.B.2. infra, p. 14.

   b. Likewise, the choice of law may determine whether a particular act, e.g. use of a sound-alike, constitutes a violation of the right of publicity. See III.C.8. infra, p. 25.

E. In some circumstances, coterminous protection is provided by Section 43(a) of the Lanham Act, 15 U.S.C. 1125(a), which prohibits the use of a false designation of origin or a false representation.

1. A violation of Section 43(a) has been found where a celebrity's identity was used in a manner likely to result in a mistaken belief that a product or service

was sponsored or endorsed by the celebrity or otherwise was connected with such person. E.g., Winterland Concessions Co. v. Creative Screen Design, Ltd., 210 U.S.P.Q. 6 (N.D.Ill. 1980) (Unauthorized sale of t-shirts bearing the names of entertainers and musical groups constituted a violation of both their right of publicity and Section 43(a) of the Lanham Act).

2. Thus, in contrast to right of publicity, to establish a violation of Section 43(a) there must be a showing that consumers are likely to be confused or deceived. E.g., Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983) (Unauthorized use of the phrase "Here's Johnny" as a corporate name in connection with the sale of portable toilets violated Johnny Carson's right of publicity, but did not constitute a violation of Section 43(a) since likelihood of confusion was not shown); Bi-Rite Enterprises, Inc. v. Button Master, 555 F.Supp. 1188 (S.D.N.Y. 1983) (Defendant's unauthorized sale of buttons, t-shirts and other novelties bearing the names of entertainers and musical groups violated their right of publicity but was not shown to violate Section 43(a) since there had been no demonstration consumers would assume the entertainers or groups sponsored the goods); but cf., Cher v. Forum

International, Ltd., 692 F.2d 634, 639 (9th Cir. 1982), cert. denied, 462 U.S. 1120 (1983) (Advertising to promote a news medium is not actionable under appropriation of publicity theory unless it falsely creates the impression that the celebrity has endorsed the publication).

3. Conversely, if confusion is likely, relief should be available under Section 43(a) regardless of whether the aspect of the celebrity's identity which was used is one protected by the right of publicity law of the relevant state. Allen v. National Video, Inc., 610 F.Supp. 612 (S.D.N.Y. 1985) (Use of Woody Allen look-alike falsely implied Allen had endorsed, or otherwise had a connection with, defendants' products and therefore violated Section 43(a); factual issue remained as to whether defendants' use of a look-alike constituted an appropriation of Allen's portrait or picture); Motown Record Corp. v. George A. Hormel & Co., 657 F.Supp. 1236 (C.D. Cal. 1987) (Although plaintiff's claim under California right of publicity statute was preempted by copyright act where plaintiffs alleged defendant used "the image" of the Supremes in connection with unlicensed musical composition plaintiff's allegation that the public would mistakenly believe defendant had obtained

license to use the subject persona stated cause of action under Section 43(a).

4. The protection available under Section 43(a) has been broadened as a result of amendment by the Trademark Law Revision Act and now prohibits misrepresentations as to the nature or characteristics of another's commercial activities, e.g. a celebrity's apparent agreement to appear in another's commercial.

II. Persons Having A Cause Of Action For Violation Of The Right Of Publicity

A. Individuals Whose Attributes Are Entitled To Protection

1. Protection has been granted to "celebrities," those persons who by virtue of talent or hard work have obtained recognition in a particular field of art, science, or business. See Palmer v. Schonhorn Enterprises, Inc., 232 A.2d 458, 462 (N.J. 1967).

a. Actors and entertainers, e.g., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) ("Human cannonball"); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983) (Johnny Carson); Price v. Hal Roach Studios, Inc., 400 F.Supp. 836 (S.D.N.Y. 1975) (Laurel and Hardy); Grant v. Esquire, Inc., 367 F.Supp. 876 (S.D.N.Y. 1973) (Cary Grant).

b. Musicians, e.g., Winterland Concessions Co. v. Creative Screen Design, Ltd., 210 U.S.P.Q. 6 (N.D.Ill. 1980) (Bob Seger, Ted Nugent, Sammy

Hagar, Bruce Springsteen); Factors Etc., Inc. v. Creative Card Co., 444 F.Supp. 279 (S.D.N.Y. 1977), rev'd on other grounds, 652 F.2d 278 (2nd Cir. 1981) (Elvis Presley).

c. Models, e.g., Brinkley v. Casablancas, 212 U.S.P.Q. 783 (N.Y.S.Ct. 1981) (Christie Brinkley).

d. Authors, e.g., Lerman v. Chuckleberry Publishing, Inc., 544 F.Supp. 966 (S.D.N.Y. 1982), reversed, 745 F.2d 123 (2nd Cir. 1984) (Novelist and screen writer Jack Collins Lerman); Zim v. Western Publishing Co., 573 F.2d 1318 (5th Cir. 1978) (Dr. Zim, science educator and author of a multi-volume series of books on scientific subjects, "Golden Guidelines"); see Hicks v. Casablanca Records, 464 F.Supp. 426 (S.D.N.Y. 1978) (Novelist Agatha Christie).

e. Athletes, e.g., Hirsch v. S.C. Johnson & Son, Inc., 280 N.W. 2d 129 (Wis. 1979) (Football star Elroy Hirsch); Uhlaender v. Henricksen, 316 F.Supp. 1277 (D. Minn. 1970) (Professional baseball players); Palmer v. Schonhorn Enterprises Inc., 232 A.2d 458 (N.J. 1967) (Professional golfers); Ali v. Playgirl, Inc., 447 F.Supp. 723 (S.D.N.Y. 1978) (Muhammad Ali); Andretti v. Rolex Watch U.S.A., Inc., 56 N.Y.2d

284, 452 N.Y.S.2d 5, 437 N.E.2d 264 (1982) (Mario Andretti); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) (Professional race car driver).

f. Political figures, Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc., 694 F.2d 674 (11th Cir. 1983) (Martin Luther King, Jr.).

2. It has been suggested that everyone, whether a celebrity or not, should be deemed to have a protectable right of publicity. See, Motschenbacher v. R. J. Reynolds Tobacco Company, 498 F.2d 821, 825 n.11 (9th Cir. 1974) ("Generally, the greater the fame or notoriety of the identity appropriated, the greater will be the extent of economic injury suffered. . . . However, the appropriation of the identity of a relatively unknown person may result in economic injury or may itself create economic value in what was previously valueless"); Nimmer, "The Right Of Publicity," 19 Law and Contemporary Problems 203, 217 (1954); Cal. Civ. Code §§3344(b)(2)-(3); Fla. Stat. §540.08(3)(c); Neb. Rev. Stat. §20-202(3); Okla. Stat. §1449(b)(2)-(3); Tenn. Code Ann. §§47-25-1102; 47-25-1105.

3. Where there is a disagreement as to the availability of protection for all individuals, protection has been

granted to individuals who have achieved some degree of celebrity or entered the public eye even if they would not be regarded as "famous". E.g. Benavidez v. Anheuser Busch, Inc., 873 F.2d 102 (5th Cir. 1989) (Vietnam veteran and recipient of Congressional Medal of Honor); Mendonsa v. Time, Inc., 678 F.Supp. 967 (D.R.I. 1988) (Sailor who was photographed kissing a nurse in Times Square moments after the announcement of Japanese surrender and appeared on the cover of the August 27, 1945 issue of Life Magazine had protectable right; Rhode Island statute by its terms applied to "any person"); Tellado v. Time-Life Books, Inc., 643 F.Supp. 904, 909 (D.N.J. 1986) (New Jersey law found not to be limited to famous individuals; court further noted Vietnam veteran could be regarded as public figure because he was a representative participant in an historical event of great historical significance).

4. The right of publicity has been extended to musical groups as well as individuals. Bi-Rite Enterprises, Inc. v. Button Master, 555 F.Supp. 1188, 1199 (S.D.N.Y. 1983) ("A group that develops market value in its persona should be as entitled as an individual to publicity rights in its name. The rationale for protecting the right to publicity does not justify treating similarly situated plaintiffs differently merely because one is an individual and one is a group

member."); Winterland Concessions Co. v. Sileo, 528 F.Supp. 1201, 1213 (N.D.Ill. 1981), aff'd in part and rev'd in part, 735 F.2d 257 (7th Cir. 1984).

5. It has been suggested that the right additionally should extend to corporations and famous animals. Nimmer, "The Right of Publicity", 19 Law and Contemporary Problems 203, 217 (1954); Compare University of Notre Dame Du Lac v. J. C. Gourmet Food Imports Co., 703 F.2d 1372, 1376 n.9 (Fed. Cir. 1983) (Under Section 2(a) of the Lanham Act, right extends to institutions as well as individuals) and Eagle's Eye, Inc. v. Ambler Fashion Shop, Inc., 627 F.Supp. 856, 862 (E.D. Pa. 1985) (No right of publicity for a corporate trademark).

B. Transferability of the Right of Publicity

1. It generally is recognized that an assignee or exclusive licensee may bring suit for violation of the right of publicity. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953), cert. denied, 346 U.S. 816 (1953); Bi-Rite Enterprises, Inc. v. Button Master, 555 F.Supp. 1188 (S.D.N.Y. 1983); Winterland Concessions Co. v. Sileo, 528 F.Supp. 1201 (N.D.Ill. 1981), aff'd in part and rev'd in part, 735 F.2d 257 (7th Cir. 1984); Factors Etc, Inc. v. Creative Card Co., 444 F.Supp. 279 (S.D.N.Y. 1977); but cf. Stephano v. News Group

Publications, Inc., 64 N.Y.2d 174, 485 N.Y.S.2d 220, 474 N.E.2d 580 (1984) (decision renders transferability of the right conferred by the New York law unclear since the right of privacy generally has not been transferable).

2. There is a divergence of views among the states as to whether the right to sue for violation of an individual's right of publicity descends to his heirs.

   a. The determination of whether a post mortem right exists therefore requires an analysis of which state's laws apply.

   b. Courts have tended to apply the law of the domicile of deceased individual. See, e.g., Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278 (2d Cir. 1981); Groucho Marx Productions, Inc. v. Day & Night Co., 689 F.2d 317 (2d Cir. 1982); but see Estate of Presley v. Russen, 513 F.Supp. 1339 (D.N.J. 1981) (Law of forum applied, conflicts issue never discussed); Gravina v. Brunswick Corp., 338 F.Supp. 1 (D.R.I. 1972) (In suit involving living individual, law of defendant's domicile which recognized right was applied, rather than law of plaintiff's domicile which did not); Bi-Rite Enterprises, Inc. v. Bruce Miner Co., 757 F.2d 440 (1st Cir. 1985) (With respect to musicians domiciled in

England, which did not recognize right of publicity, court applied law of domicile of their exclusive licensee).

c. The existence of a post mortem right of publicity has been established by statute in California, Florida, Kentucky, Nebraska, Nevada, Oklahoma, Tennessee and Texas and Virginia. (Note, in State Ex. Rel. Presley v. Corwell, 2 U.S.P.Q. 2d 1603 (1987), the court held that the common law right of publicity recognized under Tennessee law also survives death).

i. The duration of such rights varies from 10 to 100 years. Cal. Civ. Code, § 990 (50 years); Fla. Stat. § 540.08 (40 years); Ky. Rev. Stat. § 391.170 (50 years); Nev. Rev. Stat. § 598.984 (50 years); Okl. St. Tit. 12 § 1448 (100 years); Tenn. Code Ann. § 47-25-1104 (Right terminates upon proof of nonuse for 2 years at any time subsequent to first 10 years); Tex. Prop. Code §§ 26.003, 26.012(d) (50 years); Va. Code § 8.01-40 (20 years). See also Neb. Rev. Stat. § 20-208 (Right shall be deemed to survive death; no term given).

ii. In some of these states, the right terminates on death if the celebrity has not

assigned or bequeathed the right and is not survived by specified heirs. Cal. Civ. Code § 990 (spouse, children, grandchildren, parents); Fla. Stat. § 540.08 (spouse or children); Okla. Stat. Tit. 12 § 1448D. (spouse, issue or parents); Texas Prop. Code §§ 26.005, 26.010 (spouse, children, grandchildren, parents); see Southeast Bank, N.A. v. Lawrence, 227 U.S.P.Q. 1054 (1985). (Tennessee Williams' right of publicity terminated upon his death inasmuch as the playwright, a Florida documentary, was not survived by a spouse or child and did not issue a license during his lifetime).

iii. Some of the statutes expressly provide right of publicity protection for individuals who died prior to the passage of the statute. Cal. Civil Code, § 990 (Any person who died subsequent to January 1, 1935); Okl. Stat. Tit. 12 § 1448 (Any person who died subsequent to January 1, 1936); Tex. Prop Code §§ 26.003, 26.012(d) (Anyone who died after January 1, 1937).

iv. In California, Nevada, Oklahoma and Texas, a register is maintained of individuals

claiming rights to the right of publicity in deceased persons.

d. Additionally, it has been held that the right of publicity survives death under Georgia, New Jersey and Utah common law. Martin Luther King Jr. Center For Social Change, Inc. v. American Heritage Products, Inc., 694 F.2d 674 (11th Cir. 1983) (Georgia); Martin Luther King Jr. Center For Social Change, Inc. v. American Heritage Products, Inc., 216 U.S.P.Q. 711 (1982) (Georgia; Estate of Presley v. Russen, 513 F.Supp. 1339 (D.N.J. 1981) (New Jersey); Nature's Way Products, Inc. v. Nature-Pharma, Inc., 736 F.Supp. 245 (D. Utah 1990) (Utah).

e. The right has been held not to survive death under New York, Ohio or Wisconsin law. Pirone v. MacMillan, Inc., 894 F.2d 579 (2d Cir. 1990) (New York); Rosenfeld v. W.B. Saunders, 728 F.Supp. 236 (S.D.N.Y. 1990) (New York); James v. Delilah Films, Inc., 144 Misc. 2d 374, 544 N.Y.S. 2d 447 (1989) (New York); but see also, Stephano v. News Group Publications, 64 N.Y. 2d 174, 485 N.Y.S. 2d 220 (1984) (New York); Reeves v. United Artists, 572 F.Supp. 1231 (N.D. Ohio 1983), affirmed, 765 F.2d 79 (6th Cir. 1985) (Ohio); Heinz v. Frank Lloyd Wright Foundation, 229 U.S.P.Q. 201 (W.D.

FRANKLIN PIERCE
LAW CENTER LIBRARY
CONCORD, NH

Wis. 1986) (Wisconsin); but cf. Hirsch v. S. C. Johnson & Son, Inc., 90 Wis. 2d 379, 280 N.W.2d 129 (1979) (Wisconsin).

III. Proving The Attribute At Issue Is Protected By the Right of Publicity

A. Protection uniformly has been granted against the unauthorized use of a celebrity's name or likeness.

1. Protection has been granted to stage names and nicknames, as well as given names. E.g., Winterland Concessions Co. v. Creative Screen Design, Ltd., 210 U.S.P.Q. 6 (N.D. Ill. 1980) (Musicians' names); Hirsch v. S.C. Johnson & Son, Inc., 90 Wis. 2d 379, 280 N.W.2d 129 (1979) (Football player Elroy Hirsch's nickname "Crazy Legs").

2. Similarly, the prohibition against the unauthorized use of one's likeness encompasses sketches or drawings, as well as photographs, if they constitute a recognizable representation of the individual. Ali v. Playgirl, Inc., 447 F.Supp. 723 (S.D.N.Y. 1978) (Sketch)

B. In each case, it must be established that name or likeness used serves to identify the person whose right of publicity allegedly has been violated.

1. In some cases, a name alone, e.g., Marilyn Monroe, will be recognized instantly as referring to a particular individual.

2. In other cases, however, proof may be required that the name used serves to identify the individual whose right allegedly has been violated; more than coincidental use of the same name must be shown. Hooker v. Columbia Pictures Industries, Inc., 551 F.Supp. 1060 (N.D.Ill. 1982) (Plaintiff required to show "more than mere coincidental use of a name that happens to be the same" as plaintiff's; facts and circumstances alleged provided no basis for finding name "T.J. Hooker" as used in defendants' fictional television series referred to plaintiff) . This may be established by the context of the use or defendant's admission it intended to refer to the individual. See, Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983) (Defendant admitted "Here's Johnny" was selected because of its identification with Johnny Carson; defendant's use of phrase "World's Most Famous Commodian" also established tie to Johnny Carson).

3. Protection may be unavailable if it is demonstrated that the celebrity's "name" has become evocative of some more general, if not generic, concept. E.g. Rogers v. Grimaldi, 695 F.Supp. 112, 113 (S.D.N.Y. 1988), affirmed, 875 F.2d 994 (2d Cir. 1989) ("Fred and Ginger" recognized as shorthand term for elegant dancers and dancing as well as identification of Fred

Astaire and Ginger Rogers); see also definition of "einstein" in Webster's Third New International Dictionary as "a mathematical genius"; listing of "Shirley Temple" in bartending guides as drink containing grenadine and ginger ale.

4. Once it is shown that a name will be perceived as identifying the person whose right of publicity allegedly has been invaded, however, there is no requirement to prove that the defendant intended to exploit the name of that particular individual. Hirsch v. S.C. Johnson & Son, Inc., 90 Wis. 2d 379, 280 N.W.2d 129 (1979) (Fact that the name "Crazylegs" had been used to identify persons other than plaintiff did not vitiate the existence of a cause of action; with sufficient proof, however, that fact might affect the amount of damages or preclude liability altogether).

5. Similarly, with likenesses, the issue is whether the likeness used is recognized, in the case of a photograph, as being the individual or, in the case of a drawing or other likeness, as identifying the individual. Compare Negri v. Schering Corporation, 333 F.Supp. 101 (S.D.N.Y. 1971) and Ali v. Playgirl, Inc., 447 F.Supp. 723 (S.D.N.Y. 1978). Again, the context in which the name or likeness is used may serve to identify the individual. E.g., Ali v.

Playgirl, Inc., 447 F.Supp. 723 (S.D.N.Y. 1978) (sketch of a nude black man sitting in a boxing ring with accompanying verse which referred to him as "The Greatest" admittedly intended to be Muhammad Ali).

6. The issue of whether a threshold number of people have to recognize the name or likeness as identifying the individual has not been fully addressed by the courts.

   a. It was held that when an actual photograph was used and the figure was recognizable, the number of people who recognized it was irrelevant. Negri v. Schering Corporation, 333 F.Supp. 101 (S.D.N.Y. 1971).

   b. Conversely, when a look-alike was used, it was found necessary to prove that a threshold percentage of people would recognize the likeness as identifying the celebrity in question. Cf. Allen v. National Video, Inc., 610 F.Supp. 612 (S.D.N.Y. 1985) ("In order to find the photograph [of Woody Allen look-alike] contain's plaintiff's "portrait or picture," the court would have to conclude that most persons who could identify an actual photograph of plaintiff would be likely to think that this was actually his picture").

   c. The use of survey evidence to establish such identification is unresolved. Cf. Allen v. National Video, Inc., 610 F.Supp. 612 (S.D.N.Y.

tiff circling track found actionable); Uhlaender v. Henricksen, 316 F.Supp. 1277 (D.Minn. 1970) (Professional athletes' names and statistics entitled to protection).

3. Simulation of another's act also has been held actionable. Apple Corps Ltd. v. Leber, 229 U.S.P.Q. 1015 (1986) (Live show consisting of Beatles look-alike, sound-alike imitators and film version of same); Estate of Presley v. Russen, 513 F.Supp. 1339 (D.N.J. 1981) (Theatrical production designed to simulate a stage performance of Elvis Presley, featuring a Presley impersonator who imitated Presley's dress, singing voice, and distinctive poses and body movements).

4. Additionally, imitation of another's mannerisms or performance style in the context of a commercial also has been held actionable. Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D. 2d 620, 396 N.Y.S. 2d 661 (1977) (Allegations that commercial featuring an actor conducting a band against a background of a New Year's Eve party utilizing the same gestures, musical beat and choice of music with which Lombardo had been associated, failed to state or cause of action under N.Y. Civil Rights Act §§ 50, 51, but stated claim for exploitation of plaintiff's public personality).

5. In addition, the right of publicity may be violated through imitation of a stage persona or character created and made famous by a celebrity. Groucho Marx Productions, Inc. v. Day & Night Co., 523 F.Supp. 485, 487 (S.D.N.Y. 1981), rev'd on other grounds, 689 F.2d 317 (2d Cir. 1982) (Unauthorized appropriation where defendants reproduced the Marx Brothers' manner of performance by imitating their style and appearance); Price v. Hal Roach Studios, Inc., 400 F.Supp. 836 (S.D.N.Y. 1975) (Laurel and Hardy); see also McFarland v. E&K, 18 U.S.P.Q. 2d 1246 (D. Minn. 1991) (Use of name "Spanky" and photo of the child actor from Our Gang); but cf. Nurmi v. Peterson, 10 U.S.P.Q. 2d 1775 (C.D. Cal. 1989) (Plaintiff's allegation that defendant's Elvira character was based upon, and used props, clothing and mannerisms of, plaintiff's previously developed Vampira character failed to state a right of publicity claim).

6. Conversely, protection has been found not to extend to the portrayal of a character not created by the celebrity. Lugosi v. Universal Pictures, 205 U.S.P.Q 1090 (1979) (Bela Lugosi/Count Dracula); West v. Ian Leech and Associates, NCC 37200B (Adam West/Batman).

7. The use of a celebrity "look-alike" may be actionable. Tin Pan Apple, Inc. v. Miller Brewing Co., Inc., 737 F.Supp. 826 (S.D.N.Y. 1990) (Motion to dismiss denied

where plaintiffs alleged consumers would believe a rap group performing in defendants' commercial was plaintiffs); Onassis v. Christian Dior-New York, Inc., 122 Misc. 2d 603, 472 N.Y.S. 2d 254 (1984), aff'd, 110 A.D. 2d 1095 (1st Dept. 1985) (Magazine ad for Dior products which included a photograph of a Jacqueline Onassis look-alike violated the statutory prohibition against the unauthorized use of one's "portrait or picture" by conveying the essence and likeness of an individual in the close and purposeful resemblance to reality); see also, Allen v. National Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985) (Question of fact whether photograph of Woody Allen look alike would be perceived as Woody Allen and therefore a violation of the New York statute).

8. Protection also has been granted in some circumstances for voice imitations. Compare Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (Deliberate imitation of a distinctive and widely known voice of professional singer constitutes appropriation of common law right; no violation of California right of publicity statute since actual voice not used; Waits v. Frito-Lay, Inc., CVBB-06478JM1 (Defendants' use of imitation of plaintiff's voice in a radio commercial found actionable); Lahr v. Adell Chemical Co., 300 F.2d 256 (1st Cir. 1962) (Complaint alleging

$2.475 mil
Tom Waits

A. The right of publicity protects against use for commercial purposes, i.e., for advertising or purposes of trade.

1. Prohibited uses include use as a corporate name or trademark in connection with the sale of a product or service. E.g., Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983) (Use of phrase "Here's Johnny" as a corporate name in connection with the sale of portable toilets); Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129 (Wis. 1979) (Sale of shaving gel under the trademark "Crazy Legs").

2. Similarly, use in connection with the advertisement of goods or services is prohibited. E.g., Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (Use of Midler sound-alike in television commercial for an automobile); Motschenbacher v. R. J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) (Use of a doctored film of a professional race car driver's car in a television commercial for cigarettes).

3. Use of the celebrity's identity on a product, e.g., posters, buttons, t-shirts, games, calendars, also constitutes a violation of the right of publicity. Winterland Concessions Co. v. Creative Screen Design, Ltd., 210 U.S.P.Q. 6 (N.D.Ill. 1980) (T-shirts bearing various rock stars' names/likenesses); Uhlaender v. Henricksen, 316 F.Supp. 1277 (D.Minn. 1970); (Games

incorporating professional athletes' statistics); Brinkley v. Casablancas, 212 U.S.P.Q. 783 (N.Y.S. Ct. 1981) (Poster of Christie Brinkley).

B. If the primary purpose of unauthorized use is dissemination of ideas or information, the right of publicity gives way to the First Amendment. Rosemont Enterprises, Inc. v. Random House, Inc., 58 Misc. 2d 1, 6 (N.Y. Sup. Ct. 1968), aff'd, 32 App. Div. 2d 892, 301 NYS 2d 948 (1979) ("Just as a public figure's 'right of privacy' must yield to the public interest so too must the 'right of publicity' bow where such conflicts with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest").

1. The dissemination of newsworthy information or ideas is protected, whether through books, newspapers, magazines, plays, television shows, movies, handbills, or posters.

a. The scope of newsworthy events has been broadly defined and includes facts relating to the accomplishments or activities of a celebrity. E.g., New Kids On The Block v. News America Publishing, Inc., 745 F.Supp. 1540 (C.D. Cal. 1990) (Defendants' use of the names and likeness of the New Kids On The Block in connection with a 900 number poll allowing readers to vote for the "sexiest kid" held to be protected by the First

Amendment; use of the New Kids name was found descriptive and related to the constitutionally protected activity of news gathering and dissemination and therefore protected); Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 299 N.Y.S.2d 501 (1968) (Unlicensed poster of presidential candidate Pat Paulsen was protected because Paulsen's choice of the political arena for satire made him "newsworthy"); see also, Valentine v. CBS, Inc., 698 F.2d 430 (11th Cir. 1983) (Reference to plaintiff, who had been a witness in a criminal trial, in the Dylan song "Hurricane" was not considered an appropriation of the right of publicity because the use did not promote a product or service).

b. First amendment protection extends to the trivial or obnoxious. Ann-Margret v. High Society Magazine, Inc., 498 F.Supp. 401 (S.D.N.Y. 1980) (Photograph of Ann-Margaret in a publication devoted to photographs of well-known women caught in revealing positions protected).

c. Where, however, a celebrity's picture or persona is used merely to attract attention rather than in connection with a legitimate comment respecting him or a subject of public interest with which he is associated, such use constitutes

use for purposes of trade and will not be protected by the First Amendment. Grant v. Esquire, Inc., 367 F.Supp. 876 (S.D.N.Y. 1973) (Defendant was entitled to report almost any activity in which Cary Grant engaged, but not to "appropriate his services as a professional model; question for jury whether defendant, by superimposing Grant's head on torso of model in connection with article regarding fashions, made use for purposes of trade. See also Eastwood v. Superior Court, 149 Cal. App. 3d 409, 198 Cal. Rptr. 342 (1983).

d. Similarly, subsequent commercial use of photographs which initially constituted news may be actionable. Mendonsa v. Time Inc., 678 F.Supp. 967, 972 (D.R.I. 1988).

2. The fact that the media is normally operated in an attempt to earn a profit does not detract from its protected status. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 574 n.11 (1977).

3. Nor does the fact that there may be an incidental commercial benefit initiate First Amendment protection. Benavidez v. Anheuser Busch, Inc., 873 F.2d 102 (5th Cir. 1989) (The fact a corporate sponsor may have enjoyed increased good will as the result of the production and display of a documentary convert

the use into a form of commercial exploitation, even if shown at hospitality centers where corporate logos were displayed).

4. The fact that the media in question, e.g., a play, movie or book is a form of amusement or entertainment will not prevent it from being protected. See Hicks v. Casablanca Records, 464 F.Supp. 426 (S.D.N.Y. 1978) (Movie and novel); cf. Estate of Presley v. Russen, 513 F.Supp. 1339 (D.N.J. 1981) (Entertainment that is merely a copy or imitation, even if skillfully and accurately carried out, does not have its own creative component and is not protected).

5. The dissemination of ideas or information through fictionalization also has been protected. E.g., Guglielmi v. Spelling-Goldberg Productions, 603 P.2d 454 (Cal. 1979) (Televised showing of a fictionalized version of Rudolph Valentino's life).

   a. First Amendment protection may be lost, however, if the fictionalized account is presented as true. Compare, Hicks v. Casablanca Records, 464 F.Supp. 426 (S.D.N.Y. 1978) (Fictionalized account of an incident in Agatha Christie's life in a book and movie held protected where it was evident to the public that the events so depicted were fictitious) and Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986) (Publication of an "ad

parody" featuring alleged interview with Jerry Falwell regarding an incestuous rendezvous with his mother was not for purposes of trade since it was not reasonably believable and contained a disclaimer) with Marcinkus v. NAL Publishing, Inc., 138 Misc. 2d 256, 522 N.Y.S.2d 1009 (1987) (Where readers might fail to recognize that the discussion of plaintiff's motivations and activities was fictional, motion to dismiss would be denied) and Eastwood v. Superior Court, 149 Cal. App. 3d 409, 198 Cal. Rptr. 342 (1983) (Deliberate fictionalization presented as true news account actionable if requisite scienter is shown).

b. The right of publicity will not bar use of a movie title unless it is "wholly unrelated" to the movie or simply a disguised commercial advertisement for the sale of goods or services of a collateral commercial product. Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989) (No violation of Section 43(a) or Ginger Rogers' right of publicity where connection existed between movie title "Fred and Ginger" and plot of the movie).

6. First Amendment protection extends to the use of a public figure's name and likeness in advertising for the protected work.

a. Use of the name and likeness of a public figure who appeared in the protected publication previously is permitted to illustrate the contents and quality of the publication. Namath v. Sports Illustrated, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975), affirmed, 39 N.Y.2d 897, 386 N.Y.S.2d 397, 352 N.E.2d 584 (1976) (No violation of the right of publicity where a magazine uses a picture of a celebrity who had previously appeared in the magazine in a subscription advertisement with the heading "How to Get Close to Joe Namath"); Booth v. Curtis Publishing Co., 15 A.D.2d 343, 223 N.Y.S.2d 737 (1962), aff'd, 182 N.E.2d 812 (1962).

b. However, use in commercial advertisements for a publication of a photograph of a person who never appeared in the publication is actionable. Tellado v. Time-Life Books, Inc., 643 F.Supp. 904, 910 (D.N.J. 1986).

c. Similarly, use which falsely implies that the celebrity has endorsed the publication constitutes a misappropriation. Cher v. Forum International, Ltd., 692 F.2d 634 (9th Cir.

1982), cert. denied, 462 U.S. 1120 (1983) (Ad for Forum which falsely implied Cher had endorsed the magazine not protected).

V. Defenses.

A. The case may be barred, or the amount of damages limited by, the statute of limitations.

B. While there is little case law, laches or acquiescence may be a defense. Cf. Elvis Presley Enterprises, Inc. v. Elvisly Yours, Ltd., 936 F.2d 889 (6th Cir. 1991) (Third party infringers irrelevant to laches and acquiescence defenses).

C. The action may be found to have been federally preempted. Compare Baltimore Orioles, Inc. v. Major League Baseball Players Association, 805 F.2d 663 (7th Cir. 1986), cert. denied, 480 U.S. 941 (1987) and Motown Record Corp. v. George A. Hormel & Co., 657 F.Supp. 1236 (C.D. Cal. 1987) with Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) and Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

D. While use of a disclaimer may be raised as a defense, it is unlikely to constitute a defense.

1. Although the use of a disclaimer may preclude a likelihood of confusion and liability under Section 43(a), Allen v. National Video, Inc., 610 F.Supp. 612 (S.D.N.Y. 1985), it should not preclude liability for violation of right of publicity.

2. A disclaimer may serve, however, to help prevent a protected fictionalization from being perceived as true. Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986).

E. Statutory Exemptions

1. In Nevada, the failure to register right of publicity after becoming aware of an unauthorized use will constitute a waiver of the right. Nev. Rev. Stat. § 598.986.

2. The statutes of California, Florida, Nebraska, Oklahoma and Tennessee exempt liability for photographs of persons appearing as members of the public in situations such as spectators at a baseball game, as long as individual is not singled out; California, Oklahoma, and Tennessee extend the exemption to all definable groups. Cal. Civ. Code §§3344(b)(2)-(3); Fla. Stat. §540.08(3)(c); Neb. Rev. Stat. §20-202(3); Okla. Stat. §1449(b)(2)-(3); Tenn. Code Ann. §§47-25-1102; 47-25-1105.

VI. Proof of Irreparable Harm and Monetary Damages

A. Injunctive relief, both permanent and preliminary, has been granted. E.g., Price v. Hal Roach Studios, Inc., 400 F.Supp. 836 (S.D.N.Y. 1975) (Permanent injunction); Winterland Concessions Co. v. Sileo, 528 F.Supp. 1201 (N.D.Ill. 1981) (Preliminary injunction).

1. Typically, nationwide relief has been granted, despite defendants' claims of possible differences in state laws. Carson v. Here's Johnny Portable Toilets, Inc., 810 F.2d 104 (6th Cir. 1987) (In light of probable trend of the law nationally, it was fairer to require defendant to seek modification if it subsequently decided it wished to use the phrase in a state where it believed such use otherwise would be legal, than to require plaintiffs to file subsequent suits); Bi-Rite Enterprises, Inc. v. Button Master, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983) ("Neither fairness nor efficiency will be served by requiring plaintiffs to proceed in one or perhaps more state courts on these claims"); Ali v. Playgirl, Inc. 447 F.Supp. 723 (S.D.N.Y. 1978) (Preliminary injunction extended to England); but see Elvis Presley Enterprises, Inc. v. Elvisly Yours, Ltd., 936 F.2d 889 (6th Cir. 1991) (Injunctive relief limited to the United States).

2. Injunctive relief will be fashioned to avoid restrictions of another's First Amendment rights, or in the case of celebrity look-alikes to avoid unfair restrictions on their ability to earn a living. Elvis Presley Enterprises, Inc. v. Elvisly Yours, Ltd., 936 F.2d 889 (6th Cir. 1991) (injunction modified to prohibit use of Presley's publicity rights for "commercial purposes" rather than for any purpose

whatsoever); Onassis v. Christian Dior-New York, Inc., 122 Misc. 2d 603, 472 N.Y.S. 2d 254 (1984) (N.Y. Civ. Rts. Act. §§ 50, 51) (Where a violation of New York right of privacy statute, was found, the injunction prohibited the look-alike from appearing in commercial advertisements masquerading as the celebrity), Allen v. National Video, Inc., 610 F.Supp. 612 (S.D.N.Y. 1985), (Where a violation of Section 43(a) was found, the injunction initially prohibited the defendant look-alike from appearing in advertising that would create the likelihood that a reasonable person would believe that he was celebrity and subsequently was clarified to require a boldface disclaimer which identified defendant as a look-alike and disclaimed any connection between the celebrity Woody Allen and the product or service).

B. Plaintiff is also entitled to compensatory damages in the amount suffered by plaintiff or the amount defendant benefited.

1. The award may be measured by the fair market value of the name, likeness or other aspect appropriated by defendant. Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) ("value of imitative use of plaintiff's voice in car commercial was "what the market would have paid for Midler to have sung the commercial in person;" $400,000 subsequently awarded

by jury); Apple Corps. Ltd. v. Leber, 229 U.S.P.Q. 1015 (Cal. Super. 1986); (Since uncontradicted evidence shows public demand for Beatles was so great plaintiff could have named its own price for license to produce Beatlemania production, court accepts royalty figure of 12-1/2 of gross as fair market value taken by stage performance and $2,000,000 for right taken by movie); Clark v. Celeb Publishing, Inc., 530 F.Supp. 979, 983 (S.D.N.Y. 1981) (Value of advertising use of photograph for defendant's magazine determined from amount paid plaintiff to model as centerfold of Penthouse Magazine; $6,750 awarded); National Bank of Commerce v. Shaklee Corp., 503 F.Supp. 533, 546-547 (W.D. Tex. 1980) (Expert testimony introduced as to commercial license value for household hint expert Heloise, $75,000 awarded); Grant v. Esquire, Inc., 367 F.Supp. 876, 881 (S.D.N.Y. 1973) (plaintiff " will be able to recover the fair market value of the use for the purposes of trade of his face, name and reputation").

2. An accounting of defendant's profits may be awarded. E.g., Carson v. Here's Johnny Portable Toilets,Inc., 810 F.2d 104 (6th Cir. 1987) (Accounting of profits); Blackman v. Hustler Magazine, Inc., 800 F.2d 1160 (D.C.Cir. 1986) (60% of copyright infringer's profits attributable to infringing photospread in magazine);

Sygma Photo News, Inc. v. High Society Magazine, Inc., 778 F.2d 89, 96 (2d Cir. 1985) (50% of copyright infringer's profits ($25,700) held attributable to infringing use of photograph of Raquel Welch on magazine cover).

3. Damages may also be awarded to compensate individual for diminishment of commercial value of one's identity, their reputation or future earning potential. Moore v. Big Picture Co., 828 F.2d 270, 277 (6th Cir. 1987) ($21,000 projected lost income where employers would not hire plaintiff after defendant used plaintiff's name to obtain government contract); Clark v. Celeb Publishing, Inc., 530 F.Supp. 979, 984 (S.D.N.Y. 1981) (at $7,000 projected lost income form modeling because other magazine and its advertisers no longer wished to use plaintiff); See, e.g., Ali v. Playgirl, Inc., 447 F.Supp. 723, 729 (S.D.N.Y. 1978), where the court found that by suing a nude portrait of Muhammad Ali in their magazine, "defendants appear not only to be usurping plaintiff's valuable right of publicity for themselves but may well be inflicting damage upon [his] marketable reputation."

C. Punitive damages may be awarded if plaintiff can meet the requirements set by state law. Waits v. Frito-Lay ($2 million dollars in punitive awarded in addition to $475,000

in compensatory); compare Clark v. Celeb Publishing, Inc., 530 F.Supp. 979 (S.D.N.Y. 1981) (Punitive damages awarded where defendant continued to use photographs after being informed by plaintiff their use was unauthorized and defendant's attorney failed to respond to pleadings or appear) with Genesis Publications, Inc. v. Goss, 437 So. 2d 169 (Fla. App., 1983), review denied, 449 So. 2d 264 (Fla. 1984) (Award of punitive damages reversed on grounds publisher advertiser had acted intentionally, but without requisite wanton disregard).

D. Attorneys fees are available by statute in some states. Cal. Civ. Code §§3344(a); Okla. Stat. §1449A; Utah Code Ann. 45-3-4; Wisc. Stat. 895.50(1)(c).

CALIFORNIA

CAL. CIV. CODE §§ 990, 3344

§ 990. [Deceased personality]

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

(b) The rights recognized under this section are property rights, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents, whether the transfer occurs before the death of the deceased personality, by the deceased personality or his or her transferees, or, after the death of the deceased personality, by the person or persons in whom the rights vest under this section or the transferees of that person or persons.

(c) The consent required by this section shall be exercisable by the person or persons to whom the right of consent (or portion thereof) has been transferred in accordance with subdivision (b), or if no such transfer has occurred, then by the person or persons to whom the right of consent (or portion thereof) has passed in accordance with subdivision (d).

(d) Subject to subdivisions (b) and (c), after the death of any person, the rights under this section shall belong to the following person or persons and

may be exercised, on behalf of and for the benefit of all of those persons, by those persons who, in the aggregate, are entitled to more than a one-half interest in the rights:

(1) The entire interest in those rights belong to the surviving spouse of the deceased personality unless there are any surviving children or grandchildren of the deceased personality, in which case one-half of the entire interest in those rights belong to the surviving spouse.

(2) The entire interest in those rights belong to the surviving children of the deceased personality and to the surviving children of any dead child of the deceased personality unless the deceased personality has a surviving spouse, in which case the ownership of a one-half interest in rights is divided among the surviving children and grandchildren.

(3) If there is no surviving spouse, and no surviving children or grandchildren, then the entire interest in those rights belong to the surviving parent or parents of the deceased personality.

(4) The rights of the deceased personality's children and grandchildren are in all cases divided among them and exercisable in the manner provided in Section 240 of the Probate Code according to the number of the deceased personality's children represented; the share of the children of a dead child of a deceased personality can be exercised only by the action of a majority of them.

(e) If any deceased personality does not transfer his or her rights under this section by contract, or by means of a trust or testamentary document, and there are no surviving persons as described in subdivision (d), then the rights set forth in subdivision (a) shall terminate.

(f) (1) A successor-in-interest to the rights of a deceased personality under this section or a licensee thereof may not recover damages for a use prohibited by this section that occurs before the successor-in-interest or licensee registers a claim of the rights under paragraph (2).

(2) Any person claiming to be a successor-in-interest to the rights of a deceased personality under this section or a licensee thereof may register that claim with the Secretary of State on a form prescribed by the Secretary of State and upon payment of a fee of ten dollars ($10). The form shall be verified and shall include the name and date of death of the deceased personality, the name and address of the claimant, the basis of the claim, and the rights claimed.

(3) Upon receipt and after filing of any document under this section, the Secretary of State may microfilm or reproduce by other techniques any of the filings or documents and destroy the original filing or document. The microfilm or other reproduction of any document under the provision of this section shall be admissible in any court of law. The microfilm or other reproduction of any document may be destroyed by the Secretary of State 50 years after the death of the personality named therein.

(4) Claims registered under this subdivision shall be public records.

(g) No action shall be brought under this section by reason of any use of a deceased personality's name, voice, signature, photograph, or likeness occurring after the expiration of 50 years from the death of the deceased personality.

(h) As used in this section, "deceased personality" means any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, whether or not during the lifetime

of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods or service. A "deceased personality" shall include, without limitation, any such natural person who has died within 50 years prior to January 1, 1985.

(i) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any video tape or live television transmission, of any person, such that the deceased personality is readily identifiable. A deceased personality shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine who the person depicted in the photograph is.

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

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

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

(m) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

(n) This section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, 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).

(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), or (3).

Added Stats 1984 ch 1704 § 1. Amended Stats 1988 ch 113 sec 2, effective May 25, 1988, operative July 1, 1988.

§ 3344. [Unauthorized commercial use of name, voice, signature, photograph or likeness]

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

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

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

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

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

(c) Where a photograph or likeness of an employee of the person using the photograph or likeness appearing in the advertisement or other publication prepared by or in behalf of the user is only incidental, and not essential, to

the purpose of the publication in which it appears, there shall arise a rebuttable presumption affecting the burden of producing evidence that the failure to obtain the consent of the employee was not a knowing use of the employee's photograph or likeness.

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

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

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

(g) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

Amended Stats 1984 ch 1704 § 2.

RIGHTS TO NAME, VOICE, SIGNATURE, PHOTOGRAPH, OR LIKENESS OF DECEASED PERSONALITY

REGISTRATION OF CLAIM AS SUCCESSOR-IN-INTEREST
(Section 990, Civil Code)

NAME OF DECEASED PERSONALITY

Celebrity Name: _____

Legal Name or other name(s) if desired: _____

_____

Date of death: _____

****

Name of Claimant: _____

Address of Claimant: _____

_____

****

Percentage interest claimed: (X) 100% ( ) 50% ( ) 25% ( ) ____%
The above percentage is claimed in (X) all types of rights OR ( ) limited rights described as follows: _____

_____

I make this claim as successor-in-interest on the basis that I am the surviving ( ) spouse ( ) child (X) grandchild ( ) parent OR that property rights of said deceased personality have been transferred to me by (X) contract ( ) trust ( ) will.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

_____
Signature of Claimant

_____
Typed name of Claimant

Fee: $10.00
Mail to: Secretary of State, 1230 J Street, Sacramento, CA 95814 (916) 445-0620

FLORIDA

FLA. STAT. § 540.08

540.08 Unauthorized publication of name or likeness

(1) No person shall 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 without the express written or oral consent to such use given by:

(a) Such person; or

(b) Any other person, firm or corporation authorized in writing by such person to license the commercial use of his name or likeness; or

(c) If such person is deceased, any person, firm or corporation authorized i writing to license the commercial use of his name or likeness, or if no person, firm or corporation is so authorized, then by any one from among a class composed of his surviving spouse and surviving children.

(2) In the event the consent required in subsection (1) is not obtained, the person whose name, portrait, photograph, or other likeness is so used, or any person, firm, or corporation authorized by such person in writing to license

the commercial use of his name or likeness, or, if the person whose likeness is used is deceased, any person, firm, or corporation having the right to give suc consent, as provided hereinabove, may bring an action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.

(3) The provisions of this section shall not apply to:

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

(b) The use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property where such person has consented to the use of his name, portrait, photograph, or likeness on or in connection with the initial sale or distribution thereof; or

(c) Any photograph of a person solely as a member of the public and where such person is not named or otherwise identified in or in connection with the use of such photograph.

publication, printing, display, or other public use of the name or likeness of a person occurring after the expiration of 40 years from and after the death of such person.

(5) As used in this section, a person's "surviving spouse" is the person's surviving spouse under the law of his domicile at the time of his death, whether or not the spouse has later remarried; and a person's "children" are his immediate offspring and any children legally adopted by him. Any consent provided for in subsection (1) shall be given on behalf of a minor by the guardian of his person or by either parent.

(6) The remedies provided for in this section shall be in addition to and not in limitation of the remedies and rights of any person under the common law against the invasion of his privacy.

KENTUCKY

KY. REV. STAT. ANN. § 391.170

391.170. Commercial rights to use of names and likenesses of public figures. — (1) The general assembly recognizes that a person has property rights in his name and likeness which are entitled to protection from commercial exploitation. The general assembly further recognizes that although the traditional right of privacy terminates upon death of the person asserting it, the right of publicity, which is a right of protection from appropriation of some element of an individual's personality for commercial exploitation, does not terminate upon death.

(2) The name or likeness of a person who is a public figure shall not be used for commercial profit for a period of fifty (50) years from the date of his death without the written consent of the executor or administrator of his estate. (Enact. Acts 1984, ch. 263, § 1, effective July 13, 1984.)

MASSACHUSETTS

MASS. GEN. L. ch. 214, § 3A

§ 3A. Unauthorized use of name, portrait or picture of a person; injunctive relief; damages; exceptions

Any person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent may bring a civil action in the superior court against the person so using his name, portrait or picture, to prevent and restrain the use thereof; and may recover damages for any injuries sustained by reason of such use. If the defendant shall have knowingly used such person's name, portrait or picture in such manner as is prohibited or unlawful, the court, in its discretion, may award the plaintiff treble the amount of the damages sustained by him. Nothing in this section shall be so construed as to prevent any person practicing the profession of photography from exhibiting in or about his or its establishment specimens of the work of such person or establishment, unless the exhibiting of any such specimen is continued after written notice objecting thereto has been given by the person portrayed; and nothing in this section shall be so construed as to prevent any person from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by such manufacturer or dealer which such person has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with any literary, musical or artistic production of such author, composer or artist which such person has sold or disposed of with such name, portrait or picture used in connection therewith.

Added by St.1973, c. 1114, § 62.

NEBRASKA

NEB. REV. STAT. §§ 20-201 et. seq.

20-201. Right of privacy; legislative intent. It is the intention of the Legislature to provide a right of privacy as described and limited by sections 20-201 to 20-211 and 25-840.01, and to give to any natural person a legal remedy in the event of violation of the right.

Source: Laws 1979, LB 394, § 1.

20-202. Invasion of privacy; exploitation of a person for advertising or commercial purposes; situations; not applicable. Any person, firm, or corporation that exploits a natural person, name, picture, portrait, or personality for advertising or commercial purposes shall be liable for invasion of privacy. The provisions of this section shall not apply to:

(1) The publication, printing, display, or use of the name or likeness of any person in any printed, broadcast, telecast, or other news medium or publication as part of any bona fide news report or presentation or noncommercial advertisement having a current or historical public interest and when such name or likeness is not used for commercial advertising purposes;

(2) The use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property when such person has consented to the use of his or her name, portrait, photograph, or likeness on or in connection with the initial sale or distribution thereof so long as such use does not differ materially in kind, extent, or duration from that authorized by the consent as fairly construed; or

(3) Any photograph of a person solely as a member of the public when such person is not named or otherwise identified in or in connection with the use of such photograph.

Source: Laws 1979, LB 394, § 2.

20-203. Invasion of privacy; trespass or intrude upon a person's solitude. Any person, firm, or corporation that trespasses or intrudes upon any natural person in his or her place of solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for invasion of privacy.

Source: Laws 1979, LB 394, § 3.

20-204. Invasion of privacy; place person before public in false light. Any person, firm, or corporation which gives publicity to a matter concerning a natural person that places that person before the public in a false light is subject to liability for invasion of privacy, if:

(1) The false light in which the other was placed would be highly offensive to a reasonable person; and

(2) The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Source: Laws 1979, LB 394, § 4.

20-205. Publication or intrusion; not actionable; when. Any publication or intrusion otherwise actionable under section 20-202, 20-203, or 20-204 shall be justified and not actionable under sections 20-201 to 20-211 and 25-840.01 if the subject of such publication or intrusion expressly or by implication consents to the publicity or intrusion so long as such publication or intrusion does not differ materially in kind, extent, or duration from that implicitly or expressly authorized by the consent as fairly construed. If such person is a minor, such consent may be given by a parent or guardian. If the subject of the alleged invasion of privacy is deceased, such consent may be given by the surviving spouse, if any, or by the personal representative.

Source: Laws 1979, LB 394, § 5.

20-206. Right of privacy; defenses and privileges. In addition to any defenses and privileges created in sections 20-201 to 20-211 and 25-840.01, the statutory right of privacy created in sections 20-201 to 20-211 and 25-840.01 shall be subject to the following defenses and privileges:

(1) All applicable federal and Nebraska statutory and constitutional defenses;

(2) As to communications alleged to constitute an invasion of privacy, the defense that the communication was made under circumstances that would give rise to an applicable qualified or absolute privilege according to the law of defamation; and

(3) All applicable, qualified, and absolute privileges and defenses in the common law of privacy in this state and other states.

Source: Laws 1979, LB 394, § 6.

20-207. Invasion of privacy; action; nonassignable. The action for invasion of privacy created by sections 20-201 to 20-211 and 25-840.01 shall be personal to the subject of the invasion and shall in no case be assignable.

Source: Laws 1979, LB 394, § 7.

20-208. Invasion of privacy; right; not survive death; exception. The right of action for invasion of privacy created by sections 20-201 to 20-211 and 25-840.01, with the single exception of the action arising out of exploitation of a person's name or likeness in section 20-202, shall not be deemed to survive the death of the subject of any such invasion of privacy.

Source: Laws 1979, LB 394, § 8.

20-209. **Libel, slander, invasion of privacy; one cause of action.** No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication, exhibition, or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

Source: Laws 1979, LB 394, § 9.

20-210. **Judgment; bar against other actions.** A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication, exhibition, or utterance as described in section 20-209 shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication, exhibition, or utterance.

Source: Laws 1979, LB 394, § 10.

20-211. **Invasion of privacy; statute of limitations.** An action for invasion of privacy must be brought within one year of the date the cause of action arose.

Source: Laws 1979, LB 394, § 11.

NEVADA

NEV. REV. STAT. §§ 598.980 et. seq.

598.980. Definitions.

As used in NRS 598.980 to 598.988, inclusive:

1. "Commercial use" includes the use of the name, voice, signature, photograph or likeness of a person on or in any product, merchandise or goods or for the purposes of advertising, selling or soliciting the purchase of any product, merchandise, goods or service.

2. "Person" means a natural person. (1989, ch. 697, § 2, p. 1608.)

598.982. Scope.

The provisions of NRS 598.980 to 598.988, inclusive, apply to any commercial use within this state of a living or deceased person's name, voice, signature, photograph or likeness regardless of the person's domicile. (1989, ch. 697, § 6, p. 1610.)

598.984. Existence and term of right; written consent required for commercial use; exceptions.

1. There is a right of publicity in the name, voice, signature, photograph or likeness of every person. The right endures for a term consisting of the life of the person and 50 years after his death, regardless of whether the person commercially exploits the rights during his lifetime.

2. Any commercial use by another of the name, voice, signature, photograph or likeness of a person requires the written consent of that person or his successor in interest unless:

(a) The use is contained in material which is commercially sponsored but the use is not directly connected with the commercial sponsorship;

(b) The use is an attempt to portray, imitate, simulate or impersonate a person in a live performance;

(c) The use is in connection with a news, public affairs or sports broadcast or publication;

(d) The use is an attempt to portray, imitate, simulate or impersonate a person in a play, book, magazine article, newspaper article, musical composition, film, or a radio, television or other audio or visual program, except where the use is directly connected with commercial sponsorship;

(e) The use is in connection with an original work of art except that multiple editions of such a work of art require consent; or

(f) The use is in connection with an advertisement or commercial announcement for a use permitted by this subsection.

For the purposes of this subsection, the issue of whether a use is directly connected with commercial sponsorship is a question of fact, to be determined by a trier of fact in an action brought pursuant to NRS 598.988. (1989, ch. 697, § 3, p. 1608.)

598.986. Transferability of right; commercial use upon death; rights of successors in interest; registration of claim.

1. The right of publicity established by NRS 598.984 is freely transferable, in whole or in part, by contract, license, gift, conveyance, assignment, devise or testamentary trust by a person or his successor in interest.

2. If a deceased person has not transferred his rights as provided in subsection 1, and he has no surviving beneficiary or successor in interest upon his death, the commercial use of his name, voice, signature, photograph or likeness does not require consent.

3. A successor in interest or a licensee of a deceased person may file in the office of the secretary of state, on a form prescribed by the secretary of state and upon the payment of a filing fee of $25, a verified application for registration of his claim. The application must include:

(a) The legal and professional name of the deceased person;

(b) The date of death of the deceased person;

(c) The name and address of the claimant;

(d) The basis of the claim; and

(e) A description of the rights claimed.

4. A successor in interest or a licensee of a deceased person may not assert any right against any unauthorized commercial use of the deceased person's name, voice, signature, photograph or likeness that begins before the filing of an application to register his claim.

5. A person, firm or corporation seeking to use the name, voice, signature, photograph or likeness of a deceased person for commercial purposes must first make a reasonable effort, in good faith, to discover the identity of any person who qualifies as a successor in interest to the deceased person. A person claiming to be a successor in interest to a deceased person must, within 6 months after the date he becomes aware or should reasonably have become aware of an unauthorized commercial use of the deceased person's name, voice, signature, photograph or likeness, register a claim within the secretary of state pursuant to subsection 3. Failure to register shall be deemed a waiver of any right of publicity.

6. The secretary of state may microfilm or reproduce by other techniques any document filed pursuant to this section and thereafter destroy the original of the document. The microfilm or other reproduction is admissible in any court of record. The secretary of state may destroy the microfilm or other reproduction 50 years after the death of the person whose identity is the subject of the claim.

7. A claim registered pursuant to this section is a public record. (1989, ch. 697, § 4, p. 1609.)

598.988. Remedies for unauthorized commercial use; liability of owner or employer of medium used for advertising.

1. Any commercial use of the name, voice, signature, photograph or likeness of another by a person, firm or corporation without first having obtained written consent for the use is subject to:

(a) Injunctive relief to prevent or restrain the unauthorized use; and

(b) An action at law for any injuries sustained by reason of the unauthorized use. In such a suit, the plaintiff may recover:

(1) Actual damages, but not less than $750; and

(2) Exemplary or punitive damages, if the trier of fact finds that the defendant knowingly made use of the name, voice, signature, photograph or likeness of another person without the consent required by section 3 of this act.

2. No owner or employee of any medium used for advertising is liable pursuant to this section for any unauthorized commercial use of a person's name, voice, signature, photograph or likeness unless it is established that the owner or employee had actual knowledge of the unauthorized use. (1989, ch. 697, § 5, p. 1609.)

(Please Print)

OFFICE USE ONLY
Date Reg.:_____
Vol.: _____ Page: _____

SECRETARY OF STATE
APPLICATION FOR REGISTRATION
OF CLAIM TO RIGHT OF PUBLICITY

_____ OF _____
Name Claimant Address

_____,

BEING FIRST DULY SWORN, UNDER PENALTY OF PERJURY, DEPOSES AND SAYS THAT HE IS THE: (check one)

☐ SUCCESSOR IN INTEREST

☐ LICENSEE

OF _____
Legal Name of Deceased Person

_____
Professional Name of Deceased Person

WHO DIED ON _____.
Date of Death of Deceased Person

THAT THE BASIS OF THE CLAIMANT'S CLAIM IS AS FOLLOWS: _____

_____

_____

THAT THE FOLLOWING IS A DESCRIPTION OF THE RIGHTS CLAIMED: _____

_____

_____

_____

DATED THIS _____ DAY OF _____, 19_____.

BY CLAIMANT: _____
Signature

SUBSCRIBED AND SWORN TO ME THIS _____ DAY OF _____, 19_____.

(Notary Seal)

_____
Notary Public

MY COMMISSION EXPIRES _____.

NEW YORK

N.Y. CIV. RIGHTS LAW §§ 50, 51

§ 50. Right of privacy

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

§ 51. Action for injunction and for damages

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.

L.1909, c. 14; amended L.1911, c. 226; L.1921, c. 501.

OKLAHOMA

OKLA. STAT. tit. 12, §§ 1448, 1449
OKLA. STAT. tit. 21, §§ 839.1 et. seq.

§ 1448. Deceased personalty's right of publicity—Unauthorized use—Claims—Exemptions

A. Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subsection C of this section, shall be liable for any damages sustained by the person or persons injured as a result thereof, and any profits from the unauthorized use that are attributable to the use shall be taken into account in computing the actual damages. In establishing these profits, the injured party or parties shall be required to present proof only of the gross revenue attributable to the use and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party or parties in any action under this section shall also be entitled to attorney's fees and costs.

B. The rights recognized under this section are property rights, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents, whether the transfer occurs before the death of the deceased personality, by the deceased personality or his or her transferees, or, after the death of the deceased personality, by the person or persons in whom such rights vest under this section or the transferees of that person or persons.

C. The consent required by this section shall be exercisable by the person or persons to whom such right of consent (or portion thereof) has been transferred in accordance with subsection B of this section, or if no such transfer has occurred, then by the person or persons to whom such right of consent (or portion thereof) has passed in accordance with subsection D of this section.

D. Subject to subsections B and C of this section, after the death of any person, the rights under this section shall belong to the decedents' spouse, issue, or parents in accordance with Section 213 of Title 84 of the Oklahoma Statutes. Said rights shall be exercised on behalf of and for the benefit of all those persons, by those persons who, in the aggregate, are entitled to more than a one-half (½) interest in such rights.

E. If any deceased personality does not transfer his or her rights under this section by contract, or by means of a trust or testamentary document, and there are no surviving persons as described in subsection D of this section, then the rights set forth in subsection A of this section shall terminate.

F. 1. A successor-in-interest to the rights of a deceased personality under this section or a licensee thereof may not recover damages for a use prohibited by this section that occurs before the successor-in-interest or licensee registers a claim of the rights under paragraph 2 of this subsection.

2. Any person claiming to be a successor-in-interest to the rights of a deceased personality under this section or a licensee thereof may register that claim with the Secretary of State on a form prescribed by the Secretary of State and upon payment of a fee of Ten Dollars ($10.00). The form shall be verified and shall include the name and date of death of the deceased personality, the name and address of the claimant, the basis of the claim, and the rights claimed.

3. Upon receipt and after filing of any document under this section, the Secretary of State may microfilm or reproduce by other techniques any of the filings or documents and destroy the original filing or document. The microfilm or other reproduction of any document under the provision of this section shall be admissible in any court of law. The microfilm or other reproduction of any document may be destroyed by the Secretary of State fifty (50) years after the death of the personality named therein.

4. Claims registered under this subdivision shall be public records.

G. No action shall be brought under this section by reason of any use of a deceased personality's name, voice, signature, photograph, or likeness occurring after the expiration of one hundred (100) years from the death of the deceased personality.

H. As used in this section, "deceased personality" means any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods, or services. A "deceased personality" shall include, without limitation, any such natural person who has died within fifty (50) years prior to January 1, 1986.

I. As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the deceased personality is readily identifiable. A deceased personality shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine who the person depicted in the photograph is.

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

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

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

M. The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

N. This section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, in any of the following instances:

1. A play, book, magazine, newspaper, musical composition, exhibit, display, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph 4 of this subsection;

2. Material that is of political or newsworthy value;

3. Single and original works of fine art; and

4. An advertisement or commercial announcement for a use permitted by paragraph 1, 2 or 3 of this subsection.

Added by Laws 1985, c. 159, § 1, eff. Jan. 1, 1986.

§ 1449. Unauthorized use of another person's rights of publicity—Damages—Consent—Presumptions—Fact questions—Exemptions

A. Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof, and any profits from the unauthorized use that are attributable to the use shall be taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.

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

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

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

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

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

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

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

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

G. The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

Added by Laws 1985, c. 159, § 2, eff. Jan. 1, 1986.

§ 839.1. Right of privacy—Use of name or picture for advertising without consent—Misdemeanor

Any person, firm or corporation that uses for the purpose of advertising for the sale of any goods, wares or merchandise, or for the solicitation of patronage by any business enterprise, the name, portrait or picture of any person, without having obtained, prior or subsequent to such use, the consent of such person, or, if such person is a minor, the consent of a parent or guardian, and, if such person is deceased, without the consent of the surviving spouse, personal representatives, or that of a majority of the deceased's adult heirs, is guilty of a misdemeanor.

Laws 1965, c. 431, § 1, eff. July 9, 1965.

§ 839.2. Right of action—Damages

Any person whose right of privacy, as created in Section 1 hereof, is violated or the surviving spouse, personal representatives or a majority of the adult heirs of a deceased person whose name, portrait, or picture is used in violation of Section 1 hereof, may maintain an action against the person, firm or corporation so using such person's name, portrait or picture to prevent and restrain the use thereof, and may in the same action recover damages for any injuries sustained, and if the defendant in such action shall have knowingly used such person's name, portrait or picture in such manner as is declared to be unlawful, the jury or court, if tried without a jury, in its discretion may award exemplary damages.

Laws 1965, c. 431, § 2, eff. July 9, 1965.

§ 839.3. Right of photographer to exhibit specimens of work—Other uses excepted

Nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith. Provided that this act shall not prevent the continued use of names of such persons by business establishments using such names and displaying such names at the effective date of this act.

Laws 1965, c. 431, § 3, eff. July 9, 1965.

10.00

N DUPLICATE

CLEARLY

REGISTRATION OF CLAIM OF RIGHTS
AS SUCCESSOR-IN-INTEREST

ant to SB 7 - 1985 also referred to as Title 12 O.S. 1448)

ED PERSONALITY

Name or other name(s) if desired: _____

f death: _____

NT OF DECEASED PERSONALITY

f Claimant: _____

s of Claimant: _____

this claim as successor-in-interest on the basis that I am the
ing: ( ) spouse ( ) issue ( ) parent ( ) other in accordanc
ection 213 of Title 84 of the Oklahoma statutes OR that property
of said deceased personality have been transferred to me by:
ontract ( ) trust ( ) testamentary document.

tage interest claimed: ( )100% ( )50% ( )25% ( )____%
ove percentage is claimed in ( ) all rights OR ( ) limited right
cribed as follows: _____

are under penalty of perjury, under the laws of the State of Oklahoma
he foregoing is true and correct.

_____

_____
Signature of Claimant

of _____)
of _____)

_____
Typed Name of Claimant

he foregoing instrument was acknowledged before me this _____day of
_____, 19____, by _____.

_____
(NOTARY PUBLIC)

mission expires: _____
(SEAL)

RHODE ISLAND

R.I. GEN. LAWS §§ 9-1-28 et. seq.

9-1-28. Action for unauthorized use of name, portrait or picture. — Any person whose name, portrait or picture is used within the state for advertising purposes or for the purposes of trade without his written consent may bring an action in the superior court against the person so using his name, portrait or picture, to prevent and restrain the use thereof, and may recover damages for any injuries sustained by reason of such use. If the defendant shall have knowingly used such person's name, portrait or picture in such manner as is prohibited or unlawful, the court, in its discretion, may award the plaintiff treble the amount of the damages sustained by him. Nothing in this section shall be so construed as to prevent any person practicing the profession of photography from exhibiting in or about his or its establishment specimens of the work of such person or establishment, unless the exhibiting of any such specimen is continued after written notice objecting thereto has been given by the person portrayed; and nothing in this section shall be so construed as to prevent any person from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by such manufacturer or dealer which such person has sold or disposed of with such name, portrait or picture used in connection therewith, or from using the name, portrait or picture of any author, composer or artist in connection with any literary, musical or artistic production of such author, composer or artist which such person has sold or disposed of with such name, portrait or picture used in connection therewith.

9-1-28.1. Right to privacy — Action for deprivation of right. — (a) *Right to Privacy Created.* — It is the policy of this state that every person in this state shall have a right to privacy which shall be defined to include any of the following rights individually:

(1) The right to be secure from unreasonable intrusion upon one's physical solitude or seclusion;

(A) In order to recover for violation of this right, it must be established that:

(i) It was an invasion of something that is entitled to be private or would be expected to be private;

(ii) Such invasion was or is offensive or objectionable to a reasonable man; although,

(B) The person who discloses such information need not benefit from such disclosure.

(2) The right to be secure from an appropriation of one's name or likeness;

(A) In order to recover for violation of this right, it must be established that:

(i) The act was done without permission of the claimant;

(ii) The act is of a benefit to someone other than the claimant;

(B) It need not be established that there was any publication.

(3) The right to be secure from unreasonable publicity given to one's private life;

(A) In order to recover for violation of this right, it must be established that:

(i) There has been some publication of a private fact;

(ii) The fact which has been made public must be one which would be offensive or objectionable to a reasonable man of ordinary sensibilities;

(B) The fact which has been disclosed need not be of any benefit to the discloser of such fact.

(4) The right to be secure from publicity that reasonably places another in a false light before the public;

(A) In order to recover for violation of this right, it must be established that:

(i) There has been some publication of a false or fictitious fact which implies an association which does not exist;

(ii) The association which has been published or implied would be objectionable to the ordinary reasonable man under the circumstances;

(B) The fact which was disclosed need not be of any benefit to the discloser.

(b) *Right of Action.* — Every person who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to a deprivation and/or violation of his right to privacy shall be liable to the party injured in an action at law, suit in equity or any other appropriate proceedings for redress in either the superior court or district court of this state. The court having jurisdiction of an action brought pursuant to this section may award reasonable attorneys' fees and court costs to the prevailing party.

(c) Nothing in this section shall be construed to limit or abridge any existing right of access at law or in equity of any party to such records kept by any agency of state or municipal government.

TENNESSEE

TENN. CODE ANN. §§ 47-25-1011 et. seq.

Part 11—Protection of Personal Rights

47-25-1101. Short title. — This part shall be known and may be cited as the "Personal Rights Protection Act of 1984." [Acts 1984, ch. 945, § 1.]

47-25-1102. Definitions. — As used in this part, unless the context otherwise requires:

(1) "Definable group" means an assemblage of individuals existing or brought together with or without interrelation, orderly form, or arrangement, including but not limited to, a crowd at any sporting event, a crowd in any street or public building, the audience at any theatrical or stage production, a glee club, or a baseball team;

(2) "Individual" means human being, living or dead;

(3) "Likeness" means the use of an image of an individual for commercial purposes;

(4) "Person" means any firm, association, partnership, corporation, joint stock company, syndicate, receiver, common law trust, conservator, statutory trust, or any other concern by whatever name known or however organized, formed, or created, and includes not-for-profit corporations, associations, educational and religious institutions, political parties, community, civic, or other organizations; and

(5) "Photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any individual, so that the individual is readily identifiable. [Acts 1984, ch. 945, § 2.]

47-25-1103. Property right in use of name, photograph, likeness. — (a) Every individual has a property right in the use of his name, photograph, or likeness in any medium in any manner.

(b) The individual rights provided for in subsection (a) shall constitute property rights and shall be freely assignable and licensable, and shall not expire upon the death of the individual so protected, whether or not such rights were commercially exploited by the individual during the individual's lifetime, but shall be descendible to the executors, assigns, heirs, or devisees of the individual so protected by this part. [Acts 1984, ch. 945, § 3.]

47-25-1104. Exclusivity and duration of right. — (a) The rights provided for in this part shall be deemed exclusive to the individual, subject to the assignment or licensing of such rights as provided in § 47-25-1103, during such individual's lifetime and to the executors, heirs, assigns, or devisees for a period of ten (10) years after the death of the individual.

(b)(1) Commercial exploitation of the property right by any executor, assignee, heir, or devisee if the individual is deceased shall maintain the right as his exclusive property until such right is terminated as provided in this subsection (b).

(2) The exclusive right to commercial exploitation of the property rights is terminated by proof of the non-use of the name, likeness, or image of any individual for commercial purposes by an executor, assignee, heir, or devisee to such use for a period of two (2) years subsequent to the initial ten (10) year

47-25-1105. Unauthorized use prohibited. — (a) Any person who knowingly uses or infringes upon the use of another individual's name, photograph, or likeness in any medium, in any manner directed to any person other than such individual, as an item of commerce for purposes of advertising products, merchandise, goods, or services, or for purposes of fund raising, solicitation of donations, purchases of products, merchandise, goods, or services, without such individual's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, or in the case of a deceased individual, the consent of the executor or administrator, heirs, or devisees of such deceased individual, shall be liable to a civil action.

(b) It shall be no defense to the unauthorized use defined in subsection (a) that the photograph includes more than one (1) individual so identifiable; provided, that the individual or individuals complaining of the use shall be represented as individuals per se rather than solely as members of a definable group represented in the photograph. [Acts 1984, ch. 945, § 5.]

47-25-1106. Remedies. — (a) The chancery and circuit court having jurisdiction for any action arising pursuant to this part may grant injunctions on such terms as it may deem reasonable to prevent or restrain the unauthorized use of an individual's name, photograph, or likeness.

(b) At any time while an action under this part is pending, the court may order the impounding, on such terms as it may deem reasonable, of all materials or any part thereof claimed to have been made or used in violation of the individual's rights, and such court may enjoin the use of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such materials may be reproduced.

(c) As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all materials found to have been made or used in violation of the individual's rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such materials may be reproduced.

(d) An individual is entitled to recover the actual damages suffered as a result of the knowing use or infringement of such individual's rights and any profits that are attributable to such use or infringement which are not taken into account in computing the actual damages. Profit or lack thereof by the unauthorized use or infringement of an individual's rights shall not be a criteria of determining liability.

(e) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law. [Acts 1984, ch. 945, § 6.]

47-25-1107. Exemptions. — (a) It shall be deemed a fair use and no violation of an individual's rights shall be found, for purposes of this part, if the use of a name, photograph, or likeness is in connection with any news, public affairs, or sports broadcast or account.

(b) The use of a name, photograph, or likeness in a commercial medium shall not constitute a use for purposes of advertising or solicitation solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the

use of the complainant individual's name, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for purposes of advertising or solicitation.

(c) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television stations, billboards, and transit ads, who have published or disseminated any advertisement or solicitation in violation of this part, unless it is established that such owners or employees had knowledge of the unauthorized use of the individual's name, photograph, or likeness as prohibited by this section. [Acts 1984, ch. 945, § 7.]

47-25-1108. Application to individuals protected by "Model Trademark Act." — This part shall apply to any individual otherwise entitled to the protection afforded under part 5 of this chapter. [Acts 1984, ch. 945, § 8.]

TEXAS

TEX. PROP. CODE ANN. §§ 26.001 et. seq.

CHAPTER 26 OF THE PROPERTY CODE
USE OF A DECEASED INDIVIDUAL'S NAME, VOICE, SIGNATURE, PHOTOGRAPH, OR LIKENESS

Effective September 1, 1987

§ 26.00. Definitions

In this chapter:

(1) "Photograph" means a photograph or photographic reproduction, still or moving, videotape, or live television transmission of an individual in a manner that allows a person viewing the photograph with the naked eye to reasonably determine the identity of the individual.

(2) "Property right" means the property right created by this chapter.

(3) "Name" means the actual or assumed name used by an individual which, when used in conjunction with other information, is intended to identify a particular person.

(4) "Media enterprise" means a newspaper, magazine, radio station or network, television station or network, or cable television system.

§ 26.002 Property Right Established

An individual has a property right in the use of the individual's name, voice, signature, photograph, or likeness after the death of the individual.

§ 26.003. Applicability

This chapter applies to an individual:

(1) alive on or after September 1, 1987, or who died before September 1, 1987, but on or after January 1, 1937; and

(2) whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death or comes to have commercial value after that time.

§ 26.004. Transferability

(a) The property riqht is freely transferable, in whole or in part, by contract or by means of trust or testamentary documents.

(b) The property right may be transferred before or after the death of the individual.

§ 26.005. Ownership After Death of Individual

(a) If the ownership of the property right of an individual has not been transferred at or before the death of the individual, the property right vests as follows:

(1) if there is a surviving spouse but there are no surviving children or grandchildren, the entire interest vests in the surviving spouse;

(2) if there is a surviving spouse and surviving children or grandchildren, one-half the interest vests in the surviving spouse and one-half the interest vests in the surviving children or grandchildren;

(3) if there is no surviving spouse, the entire interest vests in the surviving children of the deceased individual and the surviving children of any deceased children of the deceased individual; or

(4) if there is no surviving spouse, children or grandchildren, the entire interest vests in the surviving parents of the deceased individual.

(b) The interests of the deceased individual's children and grandchildren are divided among them and exercisable on a per stirpes basis in the manner provided by Section 43, Texas Probate Code, according to the number of the deceased individual s children represented. If there is more than one child of a deceased child of the deceased individual, the share of a child of a deceased child may only be exercised by a majority of the children of the deceased child.

(c) If the property right is split among more than one person, those persons who own more than a one-half interest in the aggregate may exercise the right on behalf of all persons who own the right.

§ 26.006. Registration of Claim

(a) A person who claims to own a property right may register that claim with the secretary of state.

(b) The secretary of state shall provide a form for registration of a claim under this section. The form must be verified and must include:

(1) the name and date of death of the deceased individual;

(2) the name and address of the claimant;

(3) a statement of the basis of the claim; and

(4) a statement of the right claimed.

(c) The secretary of state may microfilm or reproduce by another technique a document filed under this section and destroy the original document.

(d) A document or a reproduction of a document filed under this section is admissible in evidence.

(e) The secretary of state may destroy all documents filed under this section after the 50th anniversary of the date of death of the individual whose property right they concern.

(f) *The fee for filing a claim is* $25.

(g) A document filed under this section is a public record.

§ 26.007. Effect of Registration

(a) Registration of a claim is prima facie evidence of a valid claim to a property right.

(b) A registered claim is superior to a conflicting, unregistered claim unless a court invalidates the registered claim.

§ 26.008. Exercise of Ownership for First Year Following Death of Individual

(a) Except as provided by Subsection (b), for the first year following the death of the individual a property right may be exercised, if authorized by law or an appointing court, by the following persons who may be appointed by a court for the benefit of the estate of the deceased individual:

(1) an independent executor;

(2) an executor;

(3) an independent administrator;

(4) a temporary or permanent administrator; or

(5) a temporary or permanent guardian.

(b) For the first year following the death of the individual, an owner of a property right may exercise that right only if the owner registers a valid claim as provided by Section 26.006.

§ 26.009. Exercise of Ownership After First Year Following Death of Individual

After the first year following the death of the individual, an owner of a property right may exercise that right whether or not the owner has registered a claim as provided by Section 26.006.

§ 26.010. Termination

A property right expires on the first anniversary of the date of the death of the individual if:

(1) the individual has not transferred the right; and

(2) a surviving person under Section 26.005 does not exist.

§ 26.011. Unauthorized Uses

Except as provided by Section 26.012, a person may not use, without the written consent of a person who may exercise the property right, a deceased individual's name, voice, signature, photograph, or likeness in any manner, including:

(1) in connection with products, merchandise, or goods; or

(2) for the purpose of advertising, selling, or soliciting the purchase of products, merchandise, goods or services.

§ 26.012 Permittedd Uses

(a) A person may use a deceased individual's name, voice, signature, photograph, or likeness in:

(1) a play, book, film, radio program, 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; or

(5) an advertisement or commercial announcement concerning a use under this subsection.

(b) A media enterprise may use a deceased individual's name, voice, signature, photograph, or likeness in connection with

a media enterprise of a deceased individual's name, voice, signature, photograph, or likeness shall require consent if the material constituting the use is integrally and directly connected with commercial sponsorship or paid advertising. No consent shall be required for the use of the deceased individual's name, voice, signature, photograph, or likeness by a media enterprise if the broadcast or article is not commercially sponsored or does not contain paid advertising.

(c) A person who is an owner or employee of a media enterprise, including a newspaper, magazine, radio station or network, television station or network, cable television system, billboard, or transit ad, that is used for advertising a deceased individual's name, voice, signature, photograph, or likeness in a manner not authorized by this section is not liable for damages as provided by this section unless the person:

(1) knew that the use was not authorized by this section; or

(2) used the deceased individual's name, voice, signature, photograph, or likeness in a manner primarily intended to advertise or promote the media enterprise itself.

(d) A person may use a deceased individual's name, voice, signature, photograph, or likeness in any manner after the 50th anniversary of the date of the individual's death.

§ 26.013. Liability for Unauthorized Use

(a) A person who uses a deceased individual's name, voice, signature, photograph, or likeness in a manner not authorized by this chapter is liable to the person who owns the property right for:

(1) the amount of any damages sustained, as a result of the unauthorized use, by the person who owns the property right or $2,500, whichever is greater;

(2) the amount of any profits from the unauthorized use that are attributable to that use;

(3) the amount of any exemplary damages that may be awarded; and

(4) reasonable attorney's fees and expenses and court costs incurred in recovering the damages and profits established by this section.

(b) The amount of profits under Subsection (a)(2) may be established by a showing of the gross revenue attributable to the unauthorized use minus any expenses that the person who committed the unauthorized use may prove.

§ 26.014. Other Rights not Affected

This chapter does not affect a right an individual may have in the use of the individual's name, voice, signature, photograph, or likeness before the death of the individual.

§ 26.015. Defenses to Liability

A person shall not be liable for damages under this chapter if he has acted in reliance on the results of a probate proceeding governing the estate of the deceased personality in question.

USE OF DECEASED INDIVIDUAL'S NAME, VOICE, SIGNATURE, PHOTOGRAPH, OR LIKENESS

REGISTRATION OF CLAIM
(Section 26.006, Property Code)

1. THE LEGAL NAME OF DECEASED INDIVIDUAL: _____

2. OTHER NAMES BY WHICH DECEASED INDIVIDUAL WAS KNOWN: _____

_____

3. DATE OF DEATH OF DECEASED INDIVIDUAL: _____/_____/_____

4. NAME OF CLAIMANT: _____

5. ADDRESS OF CLAIMANT: _____

_____

6. BASIS OF CLAIM [Check appropriate statement]

I MAKE THIS CLAIM AS SUCCESSOR-IN-INTEREST ON THE BASIS THAT:

_____ (1) I am the Independent Executor **or** _____

of the Estate of _____, OR

_____ (2) I am the surviving

( ) spouse ( ) child
( ) grandchild ( ) parent, OR

_____ (3) The property rights of said deceased individual have been transferred to me by

( ) contract ( ) trust
( ) will.

7. STATEMENT OF THE RIGHT CLAIMED:

A. PERCENTAGE OF INTEREST CLAIMED:

( ) 100% ( ) 50%
( ) 25% ( ) _____%

B. THE ABOVE PERCENTAGE IS CLAIMED IN

( ) All types of rights

OR

( ) Limited rights described as follows:

_____

_____

_____

Signature of Claimant

STATE OF _____

COUNTY OF _____

Before me, a notary public, on this day personally appeared _____, known to me to be the person whose name is subscribed to the foregoing document and, being by me first duly sworn, declared that the statements therein contained are true and correct.

Given under my hand and seal of office this _____ day of _____, _____.

_____

Notary Public Signature

_____

Notary Public Printed or Typed Name

My commission expires:_____

INSTRUCTIONS

1. The filing fee is $25.00. The check should be made payable to the Secretary of State.

2. The completed form and filing fee should be sent to the Office of the Secretary of State, Statutory Documents Section, P.O. Box 12887, Austin, TX 78711-2887.

3. The claim is filed pursuant to Section 26.006 of the Texas Property Code. The date of filing is the date of receipt by the Secretary of State of a properly executed form and the required $25.00 filing fee.

4. The claim will not be filed if any of the statements on the claim are not completed, the statement is not properly signed and verified or the filing fee has not been submitted. A rejection letter will be sent stating the reason or reasons the claim was not filed.

5. Any questions should be directed to (512) 463-5654.

UTAH

UTAH CODE ANN. §§ 45-3-1 et. seq.

CHAPTER 3
ABUSE OF PERSONAL IDENTITY

Section		Section	
45-3-1.	Short title.	45-3-5.	Action against publisher — Grounds — Remedies.
45-3-2.	Definitions.	45-3-6.	Other remedies unaffected.
45-3-3.	Acts constituting abuse.		
45-3-4.	Cause of action for abuse — Remedies.		

45-3-1. Short title.

This act shall be known and may be cited as the "Abuse of Personal Identity Act."

45-3-2. Definitions.

As used in this act:

(1) "Person" means any natural person, firm, partnership, association, corporation, joint venture, or any other form of business organization or arrangement, and the agents or representatives of such persons.

(2) "Individual" means a natural person.

(3) "Publish" means that a person provides the instrumentality through which an advertisement is communicated to the public at large or to a significant portion thereof.

(4) "Cause the publication" means that a person prepares or requests another to prepare an advertisement of the type described in Subsection 45-3-3(1), and that person submits or requests another to submit the advertisement to a publisher, and the advertisement has been published.

(5) "Personal identity" means an individual's name, title, picture, or portrait.

45-3-3. Acts constituting abuse.

The personal identity of an individual is abused if:

(1) An advertisement is published in which the personal identity of that individual is used in a manner which expresses or implies that the individual approves, endorses, has endorsed, or will endorse the specific subject matter of the advertisement; and

(2) Consent has not been obtained for such use from the individual, or if the individual is a minor, then consent of one of the minor's parents or consent of the minor's legally appointed guardian.

45-3-4. Cause of action for abuse — Remedies.

An individual whose personal identity has been abused under Section 45-3-3 of this act may bring an action against a person who caused the publication of the advertisement, and is entitled to injunctive relief, damages alleged and proved, exemplary damages, and reasonable attorney's fees and costs.

45-3-5. Action against publisher — Grounds — Remedies.

(1) An individual whose personal identity has been abused under Section 45-3-3 of this act may bring an action against a person who published the advertisement:

(a) If the advertisement, on its face is such that a reasonable person would conclude that it is unlikely that an individual would consent to such use; and

(b) The publisher did not take reasonable steps to assure that consent was obtained.

(2) In an action under this section, the plaintiff shall be entitled to injunctive relief, damages alleged and proved, exemplary damages, and reasonable attorney's fees and costs.

45-3-6. Other remedies unaffected.

This act does not limit or supersede any causes of action otherwise available to the parties.

VIRGINIA

VA. CODE ANN. § 8.01-40

§ 8.01-40. Unauthorized use of name or picture of any person; exemplary damages; statute of limitations. — A. Any person whose name, portrait, or picture is used without having first obtained the written consent of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her parent or guardian, for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. And if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award exemplary damages.

B. No action shall be commenced under this section more than twenty years after the death of such person. (Code 1950, § 8-650; 1977, c. 617.)

WISCONSIN

WIS. STAT. § 895.50

895.50. Right of privacy

★ ★ ★ ★ ★ ★ ★

(7) No action for invasion of privacy may be maintained under this section if the claim is based on an act which is permissible under ss. 968.27 to • • • 968.37.

1. The action was commenced in bad faith or for harassment purposes.

2. The action was devoid of arguable basis in law or equity.

TRADEMARK ACT OF 1946
§§ 2(a), (c); 43(a)

15 U.S.C. §§ 1052(a), (c), 1125(a)

Marks Registrable on the Principal Register

SEC. 2 *(15 U.S.C. 1052).* No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it –

(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.

(c) Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow.

TITLE VIII – FALSE DESIGNATIONS OF ORIGIN AND FALSE DESCRIPTIONS FORBIDDEN

Unregistered Marks; False or Misleading Descriptions and Representations

SEC. 43 *(15 U.S.C. 1125).* **(a)** Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which –

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.