

INFORMATION LAW SERIES - 5

FROM PRIVACY TOWARD A NEW
INTELLECTUAL PROPERTY RIGHT IN
PERSONA

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FROM PRIVACY TOWARD A
NEW INTELLECTUAL PROPERTY
RIGHT IN PERSONA

The Right of Publicity (United States) and Portrait Law
(Netherlands) Balanced with Freedom of Speech and Free
Trade Principles

Julius C.S. Pinckaers

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FOREWORD

Julius Pinckaers has undertaken a very challenging and important study of the legal right of every person to control the commercial use of his or her identity. In the United States we call this legal right a "right of publicity." In other nations, it is either recognized under a different label, or, as in Great Britain, is not recognized as a legal right at all.

In the United States, this "right of publicity" has, over a period of 100 years, slowly developed into a widely recognized and enforced human right. But its development has not been smooth or quiet, nor is its future ensured. The development of this right in American jurisprudence has continuously been accompanied by critics who express doubts about its scope and dimensions.

This "right of publicity" historically developed in the U.S. out of several different legal concepts such as the intellectual property concepts of copyright and trademark, concepts of consumer protection and false advertising and, most importantly, the rights of privacy. Out of all these historical antecedents, it was the right of privacy that most strongly influenced the "right of publicity." It is this influence of privacy law that makes the "right of publicity" a uniquely human right, not possessed by non-real entities such as corporations, partnerships, institutions or animals.

In the United States, this "right of publicity" has encountered its most difficult justification when it is in conflict with the principles of free speech, even in the context of traditional advertising. For example, a maker of sports shoes may use in an advertisement, without permission, the name and likeness of a celebrity soccer player, together with a list of the historical accomplishments of the player, in order to attract attention to the advertisement. The sports shoe seller argues in defense that it has a free speech right to disseminate to the public historical sports information. But this is an advertisement, not the sports pages of a newspaper, and in the United States, most, but not all, courts would deny the defense and hold that the player is entitled to an injunction and damages for infringement of his "right of publicity." This kind of conflict with free speech becomes more acute when the advertiser uses a cartoon drawing and makes a joke about some attribute of the soccer player. The advertiser claims that its use of the player's identity is merely parody - an attempt at humor in advertising. While some U.S. courts and commentators would hold that parody is no defense, others argue that parody justifies a fair use of a celebrity persona.

Julius Pinckaers in this study reveals his mastery of the American legal experience with the "right of publicity." His ideas are well thought out and carefully researched. They reveal a considerable amount of keen analysis of a difficult subject. I am proud to have been a promoter of his thesis. His proposals for Dutch law deserve serious consideration and will, I think, engender significant and productive discussion.

Prof. J. Thomas McCarthy
University of San Francisco
San Francisco, California
October, 1996

PREFACE

This book is the commercial edition of my Ph.D from the University of Amsterdam, which was defended on December 6, 1996. This Ph.D was promoted by Prof. Herman Cohen Jehoram, Prof. J. Thomas McCarthy, and Prof. G.A.I. Schuijt.

Herman Cohen Jehoram's lectures at the University of Amsterdam created my affection for intellectual property law. After I graduated, he agreed to become the promoter of my thesis. He supported my plan to study American law at the University of California at Berkeley and introduced me to his friend, J. Thomas McCarthy.

In 1987, McCarthy published his treatise "The Rights of Publicity and Privacy," which is regularly updated. This influential treatise is the most important source of the American right of publicity. As a student at Berkeley, I was fortunate enough to be able to attend his lectures on intellectual property and unfair competition law at the University of San Francisco. A paper that I wrote in 1989 on my intellectual property view of the right of publicity was the starting point for very fruitful discussions with Tom McCarthy. Since 1989, he has been a promoter of my thesis alongside Herman Cohen Jehoram. I was delighted when J. Thomas McCarthy agreed to write the Foreword for this edition.

Since my book not only deals with intellectual property law, but also with media law, press publications and the freedom of speech, I am grateful that Gerard Schuijt, who is an expert in these fields, agreed to join Cohen Jehoram and McCarthy as a promoter of my thesis.

This book could not have been written without the support of a research assistant scholarship from the University of Amsterdam, Faculty of Law, and a scholarship from the Max-Planck-Institute for foreign and international Patent- Copyright- and Competition Law, which enabled me to carry out my research for a period of nine months at its institute in Munich, Germany.

After I became a member of the Amsterdam Bar in 1992, it took me more time than expected to complete this book. I am, therefore, thankful to Prof. Charles Gielen for arranging for my law firm to grant me leave in which to finish my book, and to Dr. Jan Kabel for always encouraging me to finish my thesis and for granting me all the facilities of the Institute for Information Law in order to keep my book updated.

My thanks also go to Dr. Bernt Hugenholtz, Prof. Jan de Meij, Prof. Antoon Quaadvlieg and Prof. Feer Verkade for agreeing to become a member of the Ph.D commission, to Willem van Manen and my other colleagues at my law firm for teaching me to practice law, to Tina Klos and Amanda Janes for checking my English text, to Marieke Klap and my secretary, Ineke van de Leest, for helping me to reproduce this book in a readable lay-out, to Julius J. Pinckaers for being a great father and a great doctor, who always shows interest in my activities, to Alphons Winters for being a great grandfather and a great painter, notwithstanding his age of ninety years, and to Jette van Zuthpen, for so often accepting my having to spend time on writing this book instead of with her.

Although I have received help from many persons, responsibility for the contents of the book or any errors within it are exclusively mine. Account has been taken of cases decided and literature published before May 1996, although in certain instances it was possible to refer to more recent cases.

J.C.S Pinckaers
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October 1996

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- Adams, John N., *Merchandising Intellectual Property*, London 1987
- Anderson, David A., Avoiding Defamation Problems in Fiction, 51 Brooklyn L. Rev. 383 (1985)
- Apfelbaum, Marc J., Copyright and the Right of Publicity: One Pea in Two Pods?, 71 Geo. L.J. 1567 (1983)
- Arkenbout, E.J., *Handelsnamen en merken*, diss. Zwolle 1991
- Armstrong, George M., The Reification of Celebrity: Persona as Property, 51 La. L. Rev. 443 (1991)
- Asser, C./Hartkamp, A.S., *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Algemene leer der overeenkomsten II*, Zwolle 1989
- Asser, C./Hartkamp, A.S., *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Verbintenissenrecht III*, Zwolle 1990
- Asser, C./Scholten, P., *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Algemeen deel*, Zwolle 1974
- Asser, C./De Ruiter, J., *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Personen- en Familierecht I*, Zwolle 1984
- Aubel, C.P., *Persoon en pers*, diss. Nijmegen 1968
- Ausness, Richard, The right of Publicity: A 'Haystack in a Hurricane', 55 Temp. L.Q. 977 (1982)
- Baird, Douglas G., Common Law Intellectual Property and the Legacy of International News Service v. Associated Press, 50 U. Chi. L. Rev. 411 (1983)
- Baird, Douglas G., Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co., 30 Stan. L. Rev. 1185 (1978)
- Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964 (1978)
- Baker, 1-900 New Kids: The Clash between Newsgathering and the Right of Publicity, 2 J. Art & Ent. L. 1 (1991)
- Barendt, Eric, *Freedom of Speech*, Oxford 1987
- Barnett, Stephen R., At the Crossroads: The Right of Publicity in the United States, 160 RIDA, 5 (1994)
- Barnett, Stephen R., First Amendment Limits on the Right of Publicity, 30 Tort & Ins. L.J. 635 (1995)
- Battersby G.J., and Grimes, Ch. W., *The Law of Merchandising and Character Licensing*, Deerfield, IL (1991)
- Beard, Joseph J., Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers-A 21st Century Challenge for Intellectual Property Law, 8 High Tech.L.J. 101 (1993)
- Beaufort, H.L. de, *Auteursrecht*, Zwolle 1932
- Beaufort, H.L. de, *Het auteursrecht in het Nederlandsche en internationale recht*, diss. Utrecht 1909
- Becourt, Daniel, *Le Droit de la personne sur son image*, Paris 1969
- Beekhuis, C.H., Nog eens het 'Ja zuster, nee zuster'-arrest, RMth 1972, 7
- Bigle, Gérald, *Droits Dérivés, licensing et character merchandising*, Paris 1987
- Bingman, J. Steven, A Descendible Right of Publicity: Has the Time Finally Come For A National Standard?, 17 Pepperdine L. Rev. 933 (1990)
- Bitter, H.C., Hoge Raad: nee zuster! Auteursrechtbelangen no. 73, 4

BIBLIOGRAPHY

- *Black's Law Dictionary*, St. Paul (Minn.) (5th ed. 1979)
- Bloembergen, A.R., *Schadevergoeding bij onrechtmatige daad*, diss, Deventer 1965
- Bloom, Seth E., Preventing the Misappropriation of Identity: Beyond the "Right of Publicity", 13 *Comm-Ent L.J.* 489 (1991)
- Bloustein, E.J., Privacy as an Aspect off Human Dignity: An Answer to Dean Prosser, 39 *N.Y.U. L. Rev.* 962 (1964)
- Bodine, J. Joseph, A Picture is Worth \$775.00: the Right of Publicity, an Analysis and Proposed Test, 17 *Cap. U.L. Rev.* 411 (1988)
- Boekman, S., Publicaties van eens anders portret en onrechtmatige mededeling, *BIE* 1966, 29
- Bois, R. Du, Nee zuster? ja zuster, *Auteursrechtbelangen* no. 74, 4
- Boorstin, Daniel, *The Image: A Guide to Pseudo-Events*, New York (1961)
- Borchard, William M., The Common Law Right of Publicity is Going Wrong in the United States: *Waits v. Frito-Lay* and *White v. Samsung Electronics*, 3 *Ent. L. Rev.* 208 (1992)
- Bork, Robert H., Neutral Principles and Some First Amendment Problems, 47 *Ind. L.J.* 1 (1971)
- Brauw, P.J.W. de, behoort de wetgever regelen te treffen ter bescherming van het individu tegen het doen, het gebruiken en het openbaarmaken van waarnemingen, diens persoonlijke levenssfeer betreffende?, *HNJV* 1965-I, 1
- Brown, Ralph S., Design protection: An Overview, 34 *UCLA L. Rev.* 1331 (1987)
- Buchanan, Catherine Louise, The Need for a Right of Publicity, 8 *Eur. Intell. Prop. Rev.* 227 (1988);
- Buchanan, Catherine Louise, A Comparative Analysis of Name and Likeness Rights in the United States and England, 18 *Golden Gate U.L. Rev.* 301 (1988)
- Bunschoten, D.E, Civielrechtelijk publikatieverbod en de vrijheid van meningsuiting; een tweelandenpunt, *AA* 1987, 311
- Burnett, Barbara A., The Property Right of Publicity and the First Amendment: Popular Culture and the Commercial Persona, 3 *Hofstra Prop. L.J.* 171 (1990)
- Caenegem, W. van, Different Approaches to the Protection of Celebrities against Unauthorized Use of their Image in Australia, the United States and the Federal Republic of Germany, 12 *Eur. Intell. Prop. Rev.* 452 (1990)
- Calabresi, Guido, and Melamed, Douglas, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 *Harv. L. Rev.* 1089 (1972)
- Carlson, William E., Defamation By Fiction, 42 *Md. L. Rev.* 387 (1983)
- Chafee, Z., Reflections on the Law of Copyright, 45 *Colum. L. Rev.* 503 (1945)
- Chromeck, Milan, and McCormack, Stuart C., Canada, in: Chisum, Donald, *World intellectual Property Guidebook*, New York (1991)
- Cifelli, Armand, and McMurray, Walter, The Right of Publicity--a Trademark Model for Its Temporal Scope, 57 *Conn. B.J.* 373 (1983), reprinted in 66 *J. Pat. Off. Soc'y* 455 (1984)

BIBLIOGRAPHY

- Clay, Steven C., *Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts*, 79 *Minn. L. Rev.* 485 (1994)
- Coase, Ronald H., *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960)
- Cohen, J.H.G., *Beleediging door Caricaturen*, diss. Amsterdam, 1896
- Cohen Jehoram, H., *De strijd tegen de platenpiraterij*, AMI 1989, 67
- Cohen Jehoram, H., Netherlands, in: Nimmer-Geller, *International Copyright Law and Practice*, New York (Rev. 1995)
- Cohen Jehoram, H., *The freedom of expression in copyright and media law*, *GRUR Int.* 1983, 385
- Cohen Jehoram, H., *Auteursrecht contra vrijheid van meningsuiting*, *NJB* 1974, 1393
- Cohen Jehoram, H., *Recht op verzilverbare populariteit*, in: *Noten bij noten. Ter herinnering aan Mr L. Wichers Hoeth* 1990, 33
- Cohen, Morris L., and Berring, Robert C., *How to Find the Law*, St. Paul (Minn.) (8th ed. 1983)
- Committee Report, *The Tension Between the First Amendment and the "Right of Publicity,"* 39 *The Record of the Ass. of the Bar of the City of N.Y.* 368 (1984)
- Considine, J.A.F., *Portretten*, 41 *BMM-bulletin*, 26 (Dec. 1985)
- Cooley, Thomas M., *A treatise on the Law of Torts*, (2d ed. 1888)
- Coombe, Rosemary J., *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 *Tex. L. Rev.* 1853 (1991)
- Coombe, Rosemary J., *Authorizing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 *Card. Arts & Ent. L.J.* 365 (1992)
- Cooter, Robert, and Ulen, Thomas, *Law and Economics*, Glenview IL etc. (1988)
- Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, London, 2nd ed. 1989
- Coyne, Randall T., *Toward a Modified Fair Use Defense in Right of Publicity Cases*, 29 *Wm. & Mary L. Rev.* 781 (1988)
- Cray, Richard C., *Choice of Law in Right of Publicity*, 31 *UCLA L. Rev.* 640 (1984)
- Cunningham, R., Stoebeck, W., and Whitman, D., *The Law of Property*, St. Paul (Minn.) (1984)
- Deelen, J.E.J.Th., *Van namen en zo*, in: *Plus est en vous; Opstellen over recht en cultuur*, Pitlo-liber amicorum 1970, 189
- Demsetz, Harold, *Toward a Theory of property Rights*, 57 *Am. Econ. Rev.* 347 (1967)
- Denicola, Robert C., *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 *Minn. L. Rev.* 707 (1983)
- Denicola, Robert C., *Trademarks As Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 *Wis. L. Rev.* 158 (1982)
- Denicola, Robert C., *Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols*, 62 *N.C.L. Rev.* 603 (1984), reprinted in 75 *Trademark Rep.* 41 (1985)

BIBLIOGRAPHY

- Diacovo, Robert C., Going Once, Going Twice, Sold: the First Sale Doctrine Defense in Right of Publicity Actions, 12 U. Miami Ent. & Sports L. Rev. 57 (1995)
- Dijk, P. van, et. al., *Het Internationale verdrag inzake burgerlijke en politieke rechten en zijn betekenis voor Nederland*, Nijmegen 1988
- Dijk, P. van en Hoof, G.J.H. van, *De Europese conventie in theorie en praktijk*, Nijmegen 1990
- Doi, T., Character Merchandising in Japan: Protection of Fictional Characters and Well Known Personalities as the Basis for Merchandising Activities, AIPL 283 (1978)
- Donovan, Valerie B., Unauthorized Use of Deceased's Persona: Current Theories and the Need for Uniform Legislative Treatment, 7 Comm. & L. 31 (1985)
- Drion, H., Het rechterlijk verbod en de vrijheid van meningsuiting, in: Beekhuisbundel "Op grenzen van komend recht," Deventer 1969
- Dworkin, Ronald, *Taking Rights Seriously*, London, 1977
- Ebbink, R., "Ander gebruik" van andermans merk in de Benelux, 58 BMM-bulletin 1990, 8
- Economides, Nicholas S., The Economics of Trademarks, 78 Trademark Rep. 523 (1988)
- Eldredge, Laurence H., *The Law of Defamation*, Indianapolis 1978
- Ellis, Damages and the Privacy Tort: Sketching a Legal Profile, 64 Iowa L. Rev. 1111 (1979)
- Ellis, Douglas J. The Right of Publicity and the First Amendment: a Comment on Why Celebrity Parodies are Fair Game for Fair Use, 64 U. Cin. L. Rev. 575 (1996)
- Emerson, Thomas I., *The System of Freedom of Expression*, New York (1970)
- Engelen, Th.C.J.A. van, Beantwoording rechtsvraag (198) Intellectuele Eigendom, AA 1991, 267
- Engelen, Th.C.J.A. van, Van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, diss. Zwolle 1994
- Epstein, Richard A., Privacy, Property Rights, and Misrepresentations, 12 Ga. L. Rev. 455 (1978)
- Eyssell, A.P.Th., Het wetsvoorstel omtrent de onregmatige daad en de rechtszekerheid, Themis 1911, 568
- Felcher, Peter L., and Rubin, Edward L., Privacy, Publicity, and the Portrayal of Real People by the Media, 88 Yale L.J. 1577 (1979)
- Felcher, Peter L., and Rubin, Edward L., The Descendibility of the Right of Publicity: Is There Commercial Life After Death? 89 Yale L.J. 1125 (1980)
- Fernández-Nóvoa, Der Schutz von Name, Stimme und eigenen Bild gegen eine Verwendung in der Werbung (Right of Publicity) im spanischen Recht, GRUR Int. 1983, 494
- Fikentscher, Wolfgang, *Wirtschaftsrecht I*, Munich, (1983)
- Franklin, Justin D. and Bouchard, Robert F., *The Freedom of Information and Privacy Acts*, New York, (Rev. 1989)

BIBLIOGRAPHY

- Franks, Kelly, "Son of Sam" laws After *Simon & Schuster v. New York Crime Victims board: Free Speech Versus Victim's Rights*, 14 *Comm--Ent L.J.* 595 (1992)
- Frazer, Tim, *Publicity, Privacy and Personality*, 6 *Eur. Intell. Prop. Rev.* 139 (1983)
- Frazer, Tim, *Appropriation of Personality New Tort?*, 99 *Law Q. Rev.* 281 (1983)
- Frisch, Randy S., *New Technologies on the Block*, 10 *Card. Arts & Ent. L.J.* 51 (1991)
- Ganesh, Bala, *The Right of Publicity vs. the First Amendment: Reconciling the Conflict Between a Proprietary Interest of the Plaintiff and the Constitutional Guarantee of Free Speech*, 27 *Vill. L. Rev.* 1205 (1982)
- Garbus, Martin, and Kurnit, Richard, *Libel Claims Based On Fiction Should Be Lightly Dismissed*, 51 *Brooklyn L. Rev.* 401 (1985)
- Gareis, Karl, *Das Wesen der Autorrechte, sowie des Firmen- und Markenschutzes*, 35 *Buschs Archiv für Theorie und Praxis des allgemeinen Deutschen Handels- und Wechselrechts*, 185 (1877)
- Gerbrandy, S. *Industriële eigendom en subjectief recht*, diss. 1946
- Gerbrandy, S., *Kort commentaar op de Auteurswet 1912*, Arnhem 1988
- Gerike, Paul A., *Human Biological Material: A Proprietary Interest or Part of the Monistic Being?*, 17 *Ohio N.U. L. Rev.* 805 (1991)
- Gielen, Ch., and Wichers Hoeth, L., *Merkenrecht*, Zwolle 1991
- Gigliotti, Lisa M., *Beyond Name and Likeness: Should California's Expansion of the Right of Publicity Protect Non-Human Identity*, 83 *Trademark Rep.* 64 (1993)
- Giller, Richard C., *Defamation in Fiction: The Need For A Clear "Of and Concerning Standard,"* 3 *Ent. & Sports L.J.* 1 (1986)
- Glatt, *Trial by Docudrama: Fact or Fiction*, 9 *Card. Arts & Ent. L.J.* 201 (1990)
- Goldstein, Paul, *Copyright and the First Amendment*, 70 *Columbia L. Rev.* 983 (1970)
- Goodenough, Oliver R., *The Price of Fame: The Development of the Right of Publicity in the United States*, *Eur. Intell. Prop. Rev.* 55 and 90 (1992)
- Gordon Stephen R., and Honig, Leslie A., *The Celebrity Rights Act*, 7 *Ent. & Sports Lawyer* 1 (1988)
- Gordon, Harold R., *Right of Property in Name, likeness, Personality and History*, 55, *Nw. U. L. Rev.* 553 (1960)
- Gordon, Wendy J., *On Owing Information: Intellectual Property and the Restitutionary Impulse*, 78 *Va. L. Rev.* 149 (1992)
- Götting, Horst-Peter, *Persönlichkeitsrechte als Vermögensrechte*, Tübingen 1995
- Graaf, F. de, e.a (ed.), *Handboek privacybescherming en persoonsregistratie*, Alphen a/d Rijn/Brussel (Rev. 1986)
- Graaf, F. de, *Bescherming van persoonlijkheid, privéleven, persoonsgegevens*, diss. Utrecht, Alphen a.d. Rijn 1977
- Green, L., *Right of Privacy*, 27 *Ill. L. Rev.* 237 (1932)

BIBLIOGRAPHY

- Greiner, John C., The First Amendment v. Right of Publicity in Theatrical Imitations--a Delicate Balance, 57 *Notre Dame L. Rev.* 658 (1982)
- Grimes Ch. W., and Battersby, G.J., The Protection of Merchandising Properties, 69 *Trademark Rep.* 431 (1979)
- Groen, H.A., preadvies, De reikwijdte van fundamentele rechten in burgerlijke zaken, HNJV 1995-I, 131
- Grosheide, F.W., *Auteursrecht op maat*, Deventer 1986
- Grosheide, F.W. (ed.), *Hoofdstukken mediarecht*, Alphen aan de Rijn 1991
- Gross, Joan, The Right of Publicity Revisited: Reconciling fame, Fortune, and Constitutional Rights, 62 *B.U.L. Rev.* 965 (1982)
- Gurney, D. Scott, Celebrities and the First Amendment: Broader Protection Against the Unauthorized Publication of Photographs, 61 *Ind. L.J.* 697 (1985)
- Gyarfas, B.M. de, Right of Publicity v. Fiction-Based Art: Which Deserves More Protection?, 15 *Loy. L.A. Ent. L.J.*, 381 (1995)
- Haas, Theodore F., Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising, 19 *U.C. Davis L. Rev.* 539 (1986)
- Haines, James Barr, Developments in the Right of Publicity, 1989 *Ann. Surv. Am. L.* 211 (1989)
- Halpern, Sheldon W., The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality, 46 *Hastings L.J.* 853 (1995)
- Halpern, Sheldon W., The Right of Publicity: Commercial Exploitation of the Associative Value of Personality, 39 *Vand. L. Rev.* 1199 (1986)
- Hannigan, Thomas H., First Amendment Theory Applied to the Right of Publicity, 19 *Boston College L. Rev.* 277 (1978), reprinted in 19 *Pub. Ent. Advert. & Allied Fields L.Q.* 21 (1980)
- Hardin, The Tragedy of the Commons, 162 *Science* 1243 (1968), also printed in: Ackerman, Bruce A., *Economic Foundations of Property Law*, Boston, Toronto 1975, 2
- Hartmann, Michael E. and Kelly, Daniel R., Parody (of Celebrities, in Advertising), Parity (Between Advertising and Other Types of Commercial Speech), and (the Property Right of) Publicity, 17 *Hastings Comm/Ent L.J.* 633 (1995)
- Hauser, M., Werbung und das Recht am eigenen Bild in Frankreich, *GRUR Int* 1988, 839
- Hayhurst, William H., Industrial Property Law in Canada II, 12 *IIC* 786 (1981)
- Heath, Japanese Intellectual Property Rights, 26 *IIC* 900 (1995)
- Heberer, William M., The Overprotection of Celebrity: A Comment On *White V. Samsung Electronics America, Inc.*, 22 *Hofstra L. Rev.* 729 (1994)
- Hefter, L.R., Besha, R.G., Character Merchandising in the USA; A Search for Definable Remedies and a Warning of Potential Liability, *AIPL*, 579 (1978)
- Hefti, E, *Die Parodie im Urheberrecht*, Berlin 1977

BIBLIOGRAPHY

- Helle, Jürgen, *Besondere Persönlichkeitsrechte im Privatrecht, Das Recht am eigenen Bild, das Recht am gesprochenen Wort und der Schutz des geschriebenen Wortes*, Tübingen 1991
- Henning-Bodewig, Frauke, Celebrity Endorsement Under German Law, 22 IIC 195 (1991)
- Hetherington, H. Lee, Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity, 17 Colum.-VLA J.L. & Arts 1 (1992)
- Hill, Albert, Defamation and Privacy Under the first Amendment, 76 Colum. L. Rev. 1205 (1976)
- Hilliard, Terri Eileen, Advertisers Beware: Bette Midler Doesn't Want to Dance, 9 Loy. L.A. Ent. L.J. 43 (1989)
- Himelfarb, A Canadian Perspective on the Protection of an Individual's Personality from Commercial Exploitation, Entertainment, Publishing and the Arts Handbook 1985, 263
- Hirsch Ballin, E.D., Het ja zuster, nee zuster-arrest, NJB 1970, 744
- Hoffman, Richard B., The Right of Publicity: An Analytical Update, 14 Int. Prop. L. Rev. 3 (1982)
- Hoffman, Steven J., Limitations on the Right of Publicity, 28 Bull. Copyright Soc'y, 111 (1980)
- Horwitz, Lester, The Right of Publicity in the US, its Breath and Limitations, 8 Eur. Intell. Prop. Rev. 218 (1982)
- Houdek, Frank G., Researching the Right of Publicity: a Revised and Comprehensive Bibliography of Law-related Materials, 16 Comm-Ent L.J. 385 (1994)
- Houdek, Frank G., The Right of Publicity: a Comprehensive Bibliography of Law-related Materials, 7 Comm-Ent L.J. 505 (1985)
- Howell, Robert G., Is There an Historical Basis for the Appropriation of Personality Tort, 4 Intel. Prop. J. 265 (1989)
- Howell, Robert G., The Common Law Appropriation of personality Tort, 2 Intel. Prop. J. 149 (1986)
- Hubmann, H., *Das Persönlichkeitsrecht*, Cologne, Graz, 2nd ed. 1967
- Hugenholtz, P.B., *Auteursrecht op informatie*, Deventer 1989
- Hugenholtz, P.B., and Koedoeder, M.T.M., Klankjatten: juridische aspecten van sound sampling, NJB 1987, 1511
- Hugenholtz, P.B. and Jonge Balie Congrescommissie 1990 (eds.), *Recht in de kijker, het recht en de media*, Jonge Balie Congres, Zwolle 1990
- Hughes, Justin, The Philosophy of Intellectual Property, 77 Geo. L.J. 287 (1988)
- Hyland John F., and Lindquist, Ted. C., The wheels of Justice Take an Unfortunate Turn, 23 Golden Gate U.L. Rev. 299 (1993)
- Identity Crisis: A Vision for the Right of Publicity in the Year 2020, 20 Colum. - VLA J.L. & Arts 1 (1995)
- Ivey, Laura M., Insufficient Protection of Patients' Rights In The Biotechnological Market, 25 Ga. L. Rev. 489 (1991)
- Jessurun d'Oliveira, H.U., Literaire belediging, in: *Plus est en vous; Opstellen over recht en cultuur*, Pitlo-bundel 1970, 233

BIBLIOGRAPHY

- Jollymore, Nicholas J., Expiration of the Right of Publicity - When Symbolic Names and Images Pass Into the Public Domain, 84 Trademark Rep. 125 (1994)
- Jones, M.E., Celebrity Endorsements: A Case For Alarm and Concern for the Future, 15 New England L. Rev., 521 (1980)
- Kabel, J.J.C., Informationele privacy als heilige koe, AMI 1993, 23
- Kabel, J.J.C., *Uitingsvrijheid en absolute beperkingen op de handelsreclame*, diss. Amsterdam 1981
- Kabel, J.J.C., Zelfregulering en recht. Basiscriteria voor zelfregulering van reclame in Nederland, SEW 1983, 151
- Kalven, Harry, Privacy in Tort Law: Were Warren and Brandeis Wrong?, 31 Law & Contemp. Prob. 326 (1966)
- Kaplan, Benjamin, *An Unhurried View of Copyright* (1967)
- Karlen, Peter H., Descendible Publicity Rights: California's Grateful Dead, 8 Comm-Ent L.J. 111 (1986)
- Katz, Steven I., Unauthorized Biographies and Other 'Books of Revelations': A Celebrity's Legal Recourse to a Truthful Public Disclosure, 36 UCLA L. Rev. 815 (1989)
- Kayser, P., *La protection de la vie privée*, 2nd ed., Paris 1990
- Kemper, G.J, Pers en Privacy, AMI 1987, 101
- Ketelaar, R., Holvast, J., and Bakker, K. de, *Privacy gids*, Amsterdam 1989
- Knoester, J.A.W., De candid camera van Crime Time, De verborgen camera van Crime Time in een juridisch zoeklicht, AA 1994, 562
- Kogan, Jay S., Celebrity Endorsement: Recognition of a Duty, 21 J. Mar. L. Rev. 47 (1987)
- Komen, A. and Verkade, D.W.F., *Compendium van het auteursrecht*, Deventer 1970
- Korman and Koeningsberg, Performing Rights in Music and Performing Rights Societies, 33 J. Copyright Soc'y 352 (1986)
- Kranz, Jonathan L., Sharing the Spotlight: Equitable Distribution of the Right of Publicity, 13 Card. Arts & Ent L.J. 917 (1995)
- Krüger, Christof, Right of Privacy, Right of Personality and Commercial Advertising, 13 IIC 1982, 183
- Kulzick Kenneth E., and Hogue, Amy D., Chilled Bird: Freedom of Expression in the Eighties, 14 Loy. L.A. L. Rev. 57 (1980)
- Kunath, Pamela Lynn, Lights, Camera, Animate! The Right of Publicity's Effect on Computer-animated Celebrities, 29 Loy. L.A. L. Rev. 863 (1996)
- Kwall, Roberta Rosenthal, The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis, 70 Ind. L.J. 47 (1994)
- Kwall, Roberta Rosenthal, Is Independence Day Dawning for the Right of Publicity?, 17 U.C.D. L. Rev. 191 (1983)
- Land, N.K.F., Het ontwerp tot herziening van het burgerlijk wetboek, Themis 1887, 251
- Landes, William M., and Posner, Richard A., Trademark Law: An Economic Perspective, 30 J.L. & Econ. 265 (1987)
- Landes, William M., and Posner, Richard A., An Economic Analysis of Copyright Law, 18 J. Legal Stud. 325 (1989)

BIBLIOGRAPHY

- Lange, Barbara M., Shopping for the California Right of Publicity, 16 Comm-Ent L.J. 151 (1994)
- Langemeijer, G.E., Aantasting en uitoefening van subjectieve rechten in hare beteekenis voor de onrechtmatige daad, WPNR 3706 en WPNR 3707, 12
- Langvardt, Arlen W., Protected Marks and Protected Speech: Establishing The First Amendment Boundaries In Trademark Parody Cases, 36 Vill. L. Rev. 1 (1991), reprinted in 82 Trademark Rep. 671 (1994)
- Lawrence, Lisa A., The Right of Publicity: A Research Guide, 10 Comm-Ent L.J. 143 (1987)
- Lawrence, Lisa A., Television Docudramas and the Right of Publicity: Too Bad Liz, That's Show Biz, 8 Comm-Ent L.J. 257 (1986)
- Lazar, Towards a Right of Biography: Controlling Commercial Exploitation of Personal History, 2 Comm/Ent L.J. 489 (1980)
- Lee, E.C., Celebrity Look-Alikes: Rethinking the Right to Privacy and Right of Publicity, 2 U. Miami Entertainment & Sports Law J 193 (1985)
- Lehmann, Michael, The theory of property rights and the protection of intellectual and industrial property, 16 IIC (1985)
- Lehmann, Michael, Property and Intellectual Property- Property Rights as Restrictions on Competition in Furtherance of Competition, 20 IIC 1 (1989)
- Leuze, Dieter, *Die Entwicklung des Persönlichkeitsrechts im 19. Jahrhundert*, Bielefeld 1962
- Lichtman, A.C., Commercial Exploitation of DNA and the Tort of Conversion: A Physician May Not Destroy a Patient's Interest in Her Body-matter, 34 N.Y.L. Sch. L. Rev. 531 (1989)
- Lindon, Raymond, *Les droits de la personnalité*, Paris 1983
- Lindon, Raymond, *La création prétorienne en matière de droits de la personnalité et son incidence sur la notion de famille*, Paris 1974
- Linggen, N. van, *Auteursrecht in hoofdlijnen*, Alphen aan den Rijn 1990
- Locke, *Two Treatises of Government* (1690): A Critical Edition with an Introduction and Apparatus Criticus by Peter Laslett, Cambridge University Press (Rev. ed. 1964)
- Loeb, E., *Naam en recht, Praktische beschrijving van het naamrecht in Nederland* 1990
- Logeais, Elisabeth, The French Right to One's Image: A Legal Lure? 5 Ent. L. Rev. 163 (1994)
- Lurie, Keith E. Copyright In The Twenty-first Century: *Waits V. Frito-lay: The Song Remains The Same*, 13 Card. Arts & Ent. L.J. 187 (1994)
- Macpherson, C.B. (ed.), *Property, Mainstream and Critical Positions*, Toronto 1978
- Madow, Michael, Private Ownership of Public Image: Popoular Culture and Publicity Rights, 81 Cal. L. Rev. 127 (1993)
- Manen, W.C. van, Grote merken vangen veel wind, BIE 1985, 203
- Manen, W.C. van, Große Marken fangen viel Wind, GRUR Int. 1986, 25
- Manson, Deborah, The television Docudrama and the Right of Publicity, 7 Com. & L. 41 (1985)

BIBLIOGRAPHY

- Marks, Kevin S., An Assessment of the Copyright Model in Right of Publicity Cases, 70 Cal. L. Rev. 786 (1982), reprinted in: 32 Copyright L. Symp. (ASCAP) 1 (1986)
- Martens, S.K., *Onrechtmatige daad in het sociaal-economisch verkeer*, Deventer (Rev. 1991)
- Martucelli, An Up - and - coming Right - The Right of Publicity: Its Birth in Italy and its Consideration in the United States, 4 Ent. L. Rev. 109 (1993)
- McCarthy, J. Thomas, *McCarthy on Trademarks and Unfair Competition*, Deerfield, IL, etc. (3d ed. 1992)
- McCarthy, J. Thomas, *Rights of Publicity and Privacy*, Deerfield, IL (Rev. 1993)
- McCarthy, J. Thomas, The spring 1995 Horace S. Manges Lecture - The Human Persona as Commercial Property: The right of Publicity 19 Colum. - VLA J.L. & Arts 129 (1995)
- McCarthy, Commentary: Is Vanna White Right and judge Kozinsky Wrong? Ent. L. Rep., Sept. 1993, 1
- McManus, Right of Publicity, -the need for a durational limit on the Right of Publicity- 14 Seton Hall L. Rev. 190 (1983)
- Meij, J.M. de, Reclame en vrijheid van meningsuiting, NJB 1977, 925
- Meij, J.M. de, *Uitingsvrijheid. De vrije informatiestroom in grondwettelijk perspectief*, Amsterdam 1989
- Meijer, R.S., naschrift onder Schellen, J. van, De existentiële filosofie en het 'Ja zuster, nee zuster'-arrest, AA 1970, 445
- Meijers, E.M., *Algemene begrippen van het burgerlijk recht*, 1948
- Meiklejohn, Alexander, *Free Speech and its Relation to Self-Government*, 1948
- Mell, Patricia, Seeking Shade in a Land of Perpetual Sunlight: Privacy as a Property in the Electronic Wilderness, 11 Berkeley Techn. L.J. 1 (1996)
- Meltzer, Donald, Toward A New Standard of Liability For Defamation In Fiction, 58 N.Y.U.L. Rev. 1115 (1983)
- Michiels van Kessenich-Hoogendam, *Onrechtmatige Daad*, vol. IX, art. 1408 e.v. en art. 1401 in verband met krenkende uitlatingen, Deventer (Rev. 1989)
- Molengraaff, W.L.P.A., De "oneerlijke concurrentie" voor het forum van den Nederlandschen rechter, Rechtsgeleerd Magazijn 1887, 373
- Mom, G.J.H.M., De auteurswet 1912: Face-lift voor een dame van tachtig, IER 1992, 97
- Montes, Joseph, Celebrity Goodwill: Nailing Jello to the Wall, 13 Loy. Ent. L.J. 615 (1993)
- Moore, Larry, Regulating Publicity: Does Elvis Want Privacy?, 5 J. Art & Ent. Law 1 (1994)
- Mostert, Frederick W., The Parasitic Use of the Commercial Magnetism of a Trademark on Non-Competing Goods, 11 Eur. Intell. Prop. Rev. 342 (1986)
- Mout, P.J.W., Bescherming van het individu tegen ongefundeerde aantijgingen in massamedia, HNJV-I, 1978, 81
- Murumba, S.K., *Commercial Exploitation of Personality*, Sydney 1986
- Neumeyer, V.G., The Right of Publicity and its Descendibility, 7 U. Miami Ent. & Sports L. Rev. 287 (1990)

BIBLIOGRAPHY

- Nieuwenhoven Helbach, E.A. van, Huydecoper J.L.R.A. and Nispen, C.J.J.C., *Industriële eigendom en mededingingsrecht*, Arnhem, 8th ed. 1989
- Nimmer, Melville B., and Nimmer, David, *Nimmer on Copyright*, New York (Rev. 1993)
- Nimmer, Melville B., *Nimmer on Freedom of Speech*, New York (1984)
- Nimmer, Melville B., The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 Calif. L. Rev. 935 (1968)
- Nimmer, Melville B., Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA L. Rev. 1180 (1970)
- Nimmer, Melville B., The Right of Publicity, 19 Law & Contemp. Prob. 203 (1954)
- Nispen, C.J.J.C., *Het rechterlijk verbod en bevel*, Deventer 1978
- Note, Assignability of Rights in a Person's Name as Property, 45 Yale L.J. 520 (1936)
- Note, Publicity As an Aspect of Privacy and personal Autonomy, 55 S. Cal. L. Rev. 727 (1982)
- Note, State "Copyright" Protection of Performers: The First Amendment Question, 1978 Duke L.J. 1198 (1978)
- Note, An Assessment of the Commercial Exploitation Requirement as a Limit on the Right of Publicity, 96 Harv. L. Rev. 1703 (1983)
- Note, A Critical Analysis of Celebrity Careers as Property Upon Dissolution of Marriage, 61 Geo. Wash. L. Rev. 522 (1993)
- Note, The Right of Property in Human Tissue and its Effect on medical Research, 16 Rutgers Computer & Tech. L.J. 629 (1990)
- Note, Right of Publicity and Copyright Preemption after Baltimore Orioles, 40 Rutgers L. Rev. 971 (1988)
- Note, Defamation in Fiction, The case for Absolute First Amendment Protection, 29 Am. U.L. Rev. 571 (1980)
- Note, Apple Corp. v. Leber, Did Beatlemania Infringe the Beatles' Right of Publicity? 17 Sw. U.L. Rev. 755 (1988)
- Note, Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co., 30 Stan. L. Rev. 1185 (1978)
- Note: Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value, 108 Harv. L. Rev. 683 (1995)
- Noyon, T.J., Langemijer, G.E., *Het Wetboek van Strafrecht*, Arnhem (Rev. 1992)
- Nozick, *Anarchy, State, and Utopia* (1974)
- Oerle, R.C.K. van, Hoofdenhandel. Het portret als handelswaar, in: Recht in de kijker, het recht en de media, Jonge Balie Congres 1990, Zwolle, 113
- Ohlsen, Fictionalized Publications: When Should Defamation and Privacy Be a Bar?, 1984 Utah L. Rev. 411
- Oppenoorth, F., Een lastig portret, IER 1986, 85
- Oppenoorth, F., Portretten na Hoge Raad 21 januari 1994, Mf 1994, 58
- Oppenoorth, F., Facets of Dutch Portrait law, 28 Copyright Word, 38 (1993)
- Ordoover, Janusz A., Economic Foundations and Considerations in Protecting Industrial and Intellectual Property, 53 Antitrust L.J. 503 (1984)

BIBLIOGRAPHY

- Oven, J.C. van, Het recht op den naam, NJB 1936, 181 en 205
- Overeem, R., *Smartegeld*, 1979
- Pagenberg, Jochen, Protection of Get-Up and Character merchandising Under German Law, 18 IIC 457 (1987)
- Pasek, Vicki, Performers' Rights in Sport: Where Does Copyright Stand? 8 Copyright World, 13 (1990)
- Patterson, Free Speech, Copyright and Fair Use, 40 Vand. L. Rev. 1 (1987)
- Pemberton, Gretchen A., The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity, 27 U.C. Davis L. Rev. 97 (1993)
- Pesce, Christopher, The Likeness Monster: Should The Right of Publicity Protect Against Imitation?, 65 N.Y.U. L. Rev. 782 (1990)
- Peters, J.A., *Het primaat van de vrijheid van meningsuiting. Vergelijkende aspecten Nederland-Amerika, Rechten van de mens*, diss. Nijmegen 1981
- Piccionelli, G.A., News Gathering, Intangible Property Rights and 900-Line Telephone Services: One Court Makes a Bad Connection, 11 Loy. Ent. L.J. 535 (1991)
- Pilgrim, Docudramas and False-Light Invasion of Privacy, 10 Comm/Ent L.J. 3 (1988)
- Pilpel, The Right of Publicity, 27 Bull. Copyright Soc'y 249 (1980)
- Polak, E.M., Kop erop of kop eraf? Persfoto's en portretrecht. in: *Recht in de kijker. het recht en de media*, Jonge Balie Congres 1990, Zwolle, 101
- Polinsky, A. Mitchell, *An Introduction to Law and Economics*, Boston and Toronto (1983)
- Poll, Günter, Die Entwicklung des "Rechts am eigenen Bild". Eine kritische Bestandsaufnahme der BGH- und OLG-Rechtsprechung, ZUM 1988, 454
- Ponzanelli, Giulio, La poverá dei "sospia" e la ricchezza delle "celebritá" Il "right of "Publicity" nell' esperienza italiana, Dir. Inf. 1988, 126
- Popper, Karl R., *The Logic of Scientific Discovery*, London 1959 (trans. Logik der Forschung, Vienna 1934)
- Posner, Richard A., *The Economics of Justice*, (1991)
- Posner, Richard A., *Economic Analysis of Law*, Boston and Toronto (3d. ed. 1986)
- Posner, Richard A., The Right of Privacy, 12 Ga. L. Rev. 393 (1978)
- Pot, C.W. van der and Donner, A.M., *Handboek van het Nederlandse staatsrecht*, Zwolle 1983
- Potvin, Louise, *La personne et la protection de son image*, Cowansville (Québec) 1990
- Pouillet, Yves, Data Protection between Property and Liberties. A Civil Law Approach, in: *Amongst Friends in Computer and Law, A Collection of Essays in Remembrance of Guy Vandenberghe*, 161 (1990)
- Pound, Roscoe, Interests in Personality, 28 Harv. L. Rev. 343 and 445 (1915)
- *Prosser and Keeton's Hornbook on Torts* (5th ed. 1984)
- Prosser, William L., Privacy, 48 Cal. L. Rev. 383 (1960)
- Prosser, William L., Das Recht auf die Privatsphäre in Amerika, 21 Zeitschrift für ausländisches und internationales Privatrecht, 401 (1956)
- Quaedvlieg, A.A., Een studie naar feiten en achtergronden rond sweat of the brow- of prestatiebescherming, BIE 1996, 4

BIBLIOGRAPHY

- Quaedvlieg, A.A., De parodiërende nabootsing als een bijzondere vorm van geoorloofd citaat, RMth 1987, 279
- Rahimi, Todd J., The Power to Control Identity: Limiting a Celebrity's Right to Publicity, 35 Santa Clara L. Rev. 725 (1995)
- Ravanas, *La protection des personnes contre la réalisation de la publication de leur image*, Paris 1978
- Rein, Irving J., Kotler, Philip, and Stoller, Martin R., *High Visibility*, London, 1987
- Report, The Tension Between The First Amendment and the "Right of Publicity," 39 The Record of the Association of the Bar of the City of New York 368 (1984)
- *Restatement of the Law (Third) of Unfair Competition*, as Adopted and Promulgated by the American Law Institute, St. Paul (Minn.) (1995)
- *Restatement (Second) of Torts*, as Adopted and Promulgated by the American Law Institute, St. Paul (Minn.) (1977)
- Rich, R. Bruce, and Brilliant, Livia D., Defamation-in-fiction: The Limited Viability of Alternative Causes of Action, 52 Brooklyn L. Rev. 1 (1986)
- Rielly, Eileen R., The Right of Publicity For Political Figures, 46 U. Pitt. L. Rev. 1161 (1985)
- Rigaux, François, *La protection de la vie privée et des autres biens de la personnalité*, 1990
- *Rights of Privacy*. One of a series documenting America's quest to achieve the promises of the Bill of Rights, 1979
- Ropski, Gary M., The Right of Publicity--the Trend Towards Protecting a Celebrity's, 72 Trademark Rep. 251 (1982)
- Ropski, Gary M., The Right of Publicity and the Celebrity Look-alike: now Section 43(a) Proscribes Faces That Deceive, 77 Trademark Rep. 31 (1987)
- Ropski, Gary M., Further Comments on the Development of the Right of Publicity--a Matter of Life, Death, and Sometimes the First Amendment, 73 Trademark Rep. 278 (1983)
- Rose-Ackerman, Susan, Inalienability and the Theory of Property Rights, 85 Colum. L. Rev. 931 (1985)
- Ruijsenaars, H.E., The WIPO-Report on Character Merchandising, 25 IIC 532 (1994)
- Sachs, A., It's Up to You, New York: It's Time for a Statutory Right of Publicity, 20 Colum. - VLA J.L. & Arts 59 (1995)
- Saint Gal Y. and Bassard, A., Character Merchandising in France: The Commercial Utilisation of the Representation of Personalities or Characters in French Law, AIPL 182 (1978)
- Salomon, Eugene J., The Right of Publicity Run Riot: The Case for a Federal Statute, 60 S. Cal. L. Rev. 1179 (1987)
- Samuelson, Pamela, Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases, 57 Tul. L. Rev. 836, (1983)
- Saxer, Shelley Ross, The Right of Publicity in Game Performances and Federal Copyright Preemption, 36 UCLA L. Rev. 861 (1989)
- Schechter, Frank, The Rational Basis of Trademark Protection, 40 Harv. L. Rev. 813 (1927)

BIBLIOGRAPHY

- Schellen, J. van, *Toerekening naar redelijkheid naar huidig en komend recht*, 1985
- Schellen, J. van, De existentiële filosofie en het 'Ja zuster, nee zuster'-arrest, AA 1970, 442 and 447
- Schmerber, Jean-Claude, *Le droit à l'image et ses relations avec le droit des marques et le droit d'auteur*, Strassbourg 1980
- Scholten, P. Opmerkingen over het Ontwerp Auteurswet, II: Portretten, WPNR 2211, 231 and 251, 1912
- Schricker, Gerhard, *Urheberrecht, Kommentar*, Munich 1987
- Schuijt, G.A.I., *Werkers van het woord*, diss., 1987
- Schuijt, G.A.I., Onrechtmatige publikaties naar Nieuw BW, AMI 1992, 10
- Schuijt, G.A.I., Hoge Raad niet meer bang voor de uitingsvrijheid, AMI 1996, 23
- Schuijt, G.A.I., Dichters liegen de waarheid ofwel: staan schrijvers boven de wet, AMI 1992, 23
- Schuijt, G.A.I., *Onrechtmatige daad*, vol. VII, Aantasting van eer en goede naam en andere aantasting van de persoon, Deventer 1995
- Schuijt, G.A.I., De rechter en de verborgen camera: recente en eerdere rechtspraak, AMI 1996, 83
- Schuijt, G.A.I., Reality tv, nieuwe kost voor de privacybescherming en het portretrecht, NJB 1996, 341
- Schuijt, G.A.I., Hinderlijk volgen ofwel: hoge bomen vangen veel wind, in: *Recht in de kijker, het recht en de media*, Jonge Balie Congres 1990, 83
- Sen, Sudakshina, Fluency of the Flesh: Perils of an Expanding Right of Publicity, 59 Alb. L. Rev. 739 (1995)
- Shiffrin, Steven, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. U.L. Rev. 1212 (1983)
- Shipley, David E., Three Strikes and They're Out at the Old Ball Game: Preemption of Performers' Rights of Publicity Under the Copyright Act of 1976, 20 Ariz. St. L.J. 369 (1988)
- Shipley, David E., Publicity Never Dies; it Just Fades Away: the Right of Publicity and Federal Preemption, 66 Cornell L. Rev. 673 (1981)
- Simensky, Melvin, Economic Basis For the Right of Publicity, 5 New York L.J., 5 and 28 (June 3, 1988)
- Sims, Andrew B., Right of Publicity: Survivability Reconsidered, 49 Fordham L. Rev. 453 (1981)
- Singer, Barbara, The Right of Publicity: Star Vehicle or Shooting Star?, 10 Card. Arts & Ent. L.J. 1 (1991)
- Smirlock, Daniel, "Clear and Convincing" Libel: Fiction and the Law of Defamation, 92 Yale L.J. 520 (1983)
- Smith, Gordon V. and Parr, Russel, L., *Valuation of Intellectual Property and Intangible Assets*, New York (1988)
- Smolla, Rodney A., *Law of Defamation*, Deerfield, IL (Rev. 1986)
- Sniijder van Wissenkerke, F.W.J.G., *Het auteursrecht in Nederland*, Gouda 1913

BIBLIOGRAPHY

- Sonner, David A., Did Beatlemania Infringe the Beatles' Right of Publicity? 17 Sw. U.L. Rev. 755 (1988)
- Spoor, J.H. and Verkade, D.W.F., *Auteursrecht*, Deventer 1993
- Stack, Linda J., White v. Samsung Electronics America, Inc.'s Expansion of the Right of Publicity: Enriching Celebrities at the Expense of Free Speech, 89 Nw. U.L. Rev. 1189 (1995)
- Staveren, H.T. van, and Kramer, A., *Exploitatie van naam, afbeelding en prestatie van de topsporter*, Rijswijk 1992
- Stiefelmann, Gary S., Community Property Interests in the Right of Publicity: Fame and/or Fortune, 25 UCLA L. Rev. 1095 (1978)
- Strömholm, Stig, *Right of Privacy and Rights of Personality, a Comparative Study*, Stockholm 1967
- Swanson, James L, Are the California right of Publicity Statutes Unconstitutional? A second Look at Some First Amendment Problems, 20 Beverly Hills Bar Ass. J. 234 (1985-86) reprinted in Entertainment, Publishing and the Arts Handbook, 437 (1987)
- Symposium: Defamation in Fiction, 51 Brooklyn L. Rev. 223-423 (1985)
- Terrell Timothy P., and Smith, Jane S., Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue, 34 Emory L.J. 1 (1985)
- *The American Heritage Dictionary* (3d ed. 1992)
- Trechak, John, The Seventh Circuit Beans Performer Publicity Rights in Baseball's Telecast Rights Rhubarb, 8 Loy. Ent. L.J. 75 (1988)
- Treece, James M., Commercial Exploitation of Names, Likenesses, and Personal Histories, 51 Tex. L. Rev. 637 (1973)
- Ulmer, Eugen, *Urheber- und Verlagsrecht*, Berlin, etc., 3d ed. 1980
- Van Dale, *Groot Woordenboek der Nederlandse taal*, 10th ed. 1982
- Vandevelde, Kenneth J., The New property of the Nineteenth Century: The Development of the Modern Concept of Property, 29 Buffalo L. Rev. 325 (1980)
- Verkade, D.W.F., *Misleidende reclame*, Deventer 1992
- Verkade, D.W.F., *Ongeoorloofde mededinging*, Zwolle 1986
- Verkade, D.W.F., *Intellectuele eigendom, mededinging en informatievrijheid*, Deventer 1990
- Verkade, D.W.F., Verwarrende verwarring? in: Gratia Commercii, Van Oven- liber amicorum 1981, 400
- Visser, D.J.G., Merkenrecht en vrijheid van meningsuiting, Mf 1993, 62
- Visser, D.J.G., De bescherming van gewichtheffers, cheerleaders en menselijke kanonskogels, AA 1993, 20
- Vliet, L. van, Een gewogen afbeelding; een civielrechtelijk model voor het afwegen van belangen bij het openbaarmaken van afbeeldingen, AA 1995, 252
- Wacks, Raymond, *The Protection of Privacy*, London 1989
- Wacks, Raymond, *Personal Information: Privacy and the Law*, Oxford 1989
- Wagner, Wencelas J., The Development of the Theory of the Right to Privacy in France, Wash. U.L.Q. 45 (1971)
- Wallace, Generalbericht, GRUR Int. 1960, 609

BIBLIOGRAPHY

- Wallheimer, Overeenkomst voor character-licensing, in: Cohen Jehoram and Asscher, *Uitgeefovereenkomsten*, Zwolle 1988, 151
- Walzer, Stuart B., and Gabrielson, Jan C., Celebrity Goodwill, 2 J. Am. Acad. Matrimonial Law. 35 (1986)
- Warren, S.D., and Brandeis, L.D., The Right to Privacy, 4 Harv. L. Rev. 193 (1890)
- Webner, Mack, The Right of Publicity: A Commercial Property Right- Not a Privacy Right, 84 Trademark Rep. 586 (1994)
- Weiler, Fred M., The Right of Publicity Gone Wrong: A Case For Privileged Appropriation of Identity, 13 Card. Arts & Ent. L.J. 223 (1993)
- Welkowitz, David S., Catching Smoke, Nailing Jello to a Wall: the Vanna White Case and the Limits of Celebrity Rights, 3 J. Intell. Prop. L. 67 (1995)
- Wenzel, Karl Egbert, *Das Recht der Wort- und Bildberichterstattung. Handbuch des Äußerungsrechts*, 3. ed., Cologne 1986
- Westin, Alan F., *Privacy and Freedom*, London 1967
- Westin, Alan F. and Baker, M., *Databanks in a Free Society*, New York (1972)
- Wichers Hoeth, L., *Kort begrip van het intellectuele eigendomsrecht*, Zwolle 1993
- Wijnstroom J.J. and Peremans, J.L.A., *Het auteursrecht*, Zwolle 1930
- Williams, Wayne S., The Right of Publicity Versus the First Amendment, Entertainment, Publishing and the Arts Handbook, 217 (1983)
- Winner, Ellen P., Right of Identity: Right of Publicity and Protection for a Trademark's "Persona," 71 Trademark Rep. 193 (1981)
- WIPO report on Character Merchandising of November 1993, Document WO/INF/93
- Wohl, Leonard A., Federal Preemption of the Right of Publicity In Sing-alike Cases, 1 Fordham Ent. Media & Intell. Prop. L.F. 47 (1990)
- Záborszky-Van Boxtel, Reality-tv en de realiteit van het recht, Mf 1996, 5
- Zeben, C.J. van, Du Pon, *Parlementaire Geschiedenis NBW*, Book 6, 1982
- Zimmerman, Diane, Requiem For A Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort, 68 Cornell L. Rev. 291 (1983)
- Zimmerman, Diane, Defamation In Fiction: Real People In Fiction: Cautionary Words About Troublesome Old Torts Poured Into New Jugs, 51 Brooklyn L. Rev. 355 (1985)
- Zimmerman, Diane, False Light Invasion of Privacy: The Light That Failed, 64 N.Y.U.L. Rev. 364, 396 (1989)

TABLE OF ABBREVIATIONS

A.	Atlantic Reporter
A.2d	Atlantic Reporter, Second Series
A.D.	Appellate Division Reports (New York)
A.D.2d	Appellate Division Reports, Second Series (New York)
A.L.R.	American Law Reports, Annotated
A.L.R.2d	American Law Reports, Annotated, Second Series
A.L.R.3d	American Law Reports, Annotated, Third Series
A.L.R.4th	American Law Reports, Annotated, Fourth Series
AA	Ars Aequi
AB	Nederlandse Jurisprudentie, Administratiefrechtelijke Beslissingen
aff'd	affirmed
AfP	Archiv für Presserecht
AIPLA	American Intellectual Property Law Association
Alb. L. Rev.	Albany Law Review
Am. Econ. Rev.	American Economic Review
Am. U.L. Rev.	American University Law Review
AMI	Informatierecht, Tijdschrift voor auteurs-, media- en informatierecht
AMR	Tijdschrift voor auteurs- en mediarecht
Ann. Surv. Am. L.	Annual Survey of American Law
Antitrust L.J.	Antitrust Law Journal
Ariz. St. L.J.	Arizona State Law Journal
ASCAP	American Society of Composers, Authors, and Publishers
B.U.L. Rev.	Boston University Law Review
Berkeley Techn. L.J.	Berkeley Technology Law Journal
Beverly Hills Bar Ass. J.	Beverly Hills Bar Association Journal
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BIE	Bijblad bij de Industriële Eigendom
Bijl. Hand. II	Bijlage bij Handelingen Tweede Kamer
BMI	Broadcasting Music Incorporation
BMM-bull	Bulletin van de Beneluxvereniging van merken- en modellengemachtigden
Brooklyn L. Rev.	Brooklyn Law Review
Buffalo L. Rev.	Buffalo Law Review
Bull. Copyright Soc'y	Bulletin of the Copyright Society

TABLE OF ABBREVIATIONS

BVAR	Annotation of B.V.A. Röling
C.A.	Federal Court of Appeals (the number indicates the Circuit)
C.F.R.	Code of Federal Regulations
C.M.L. Rev	Common Market Law Review
Cal. L. Rev.	California Law Review
Cal.3d	California Reports, Third Series (California Supreme Court)
Cal.App.	California Appellate Court Reports
Cal.App.2d	California Appellate Court Reports, Second Series
Cal.App.3d	California Appellate Court Reports, Third Series
Cal.App.4th	California Appellate Court Reports, Fourth Series
Cal.Rptr.	West's California Reporter
Cap. U.L. Rev.	Capital University Law Review
Card. Arts & Ent. L.J.	Cardozo Arts and Entertainment Law Journal
Cf.	confer, i.e. compare
ChG	Annotation of Ch. Gielen
CJHB	Annotation of C.J.H. Brunner
Colum. L. Rev.	Columbia Law Review
Colum.-VLA J.L. & Arts	Columbia (Volunteer Lawyers for the Arts) Journal of the Law and the Arts
Com. & L.	Communications and the Law
Copr.L.Dec.	Decisions of the United States Involving Copyright
Copyright L. Symp.	Copyright Law Symposium
Cornell L. Rev.	Cornell Law Review
CR	Computerrecht
CvN	Annotation of C.J.J.C. van Nispen,
D.C.	District Court
DCA	Dutch Copyright Act of 1912
DEB	Annotation of D.E. Bunschoten
diss.	dissertation
Duke L.J.	Duke Law Journal 1198
DWFV	Annotation of D.W.F. Verkade
EAA	Annotation of E.A. Alkema
ECHR	The European Court of Human Rights
ECJ	The European Court of Justice
EDHB	Annotation of E.D. Hirsch Ballin
EHRC	European Convention for the Protection of Human Rights and Fundamental Freedoms

TABLE OF ABBREVIATIONS

EJD	Annotation of E.J. Dommering
EMM	Annotation of E.M. Meijers
Emory L.J.	Emory Law Journal
Eng. Rep.	English Reports
Ent. & Sports Law J.	Entertainment and Sports Law Journal
Ent. & Sports Lawyer	Entertainment and Sports Lawyer
Ent. L. Rep.	Entertainment Law Reporter
Ent. L. Rev.	Entertainment Law Review
Et seq.	Et sequentia (and the following)
Eur. Intell. Prop. Rev.	European Intellectual Property Review
EWiR	Entscheidungen zum Wirtschaftsrecht
F.	Federal Reporter
F.2d	Federal Reporter, Second Series
F.3d	Federal Reporter, Third Series
F.R.D.	Federal Rules Decisions
F.Supp.	Federal Supplement
F.T.C.	Federal Trade Commission
Fordham Ent. Media & Intell. Prop. L.F.	Fordham Entertainment, Media & Intellectual Property Law Forum
Fordham L. Rev.	Fordham Law Review
Ga.	Georgia Reports
Ga. L. Rev.	Georgia Law Review
GAIS	Annotation of G.A.I. Schuijt
Gaz. Pal.	Gazette du Palais
Geo. L.J.	Georgetown Law Journal
Geo. Wash. L. Rev.	George Washington Law Review
GJHMM	Annotation of G.J.H.M. Mom
GJS	Annotation of G.J.S. Scholten
Golden Gate U.L. Rev.	Golden Gate University Law Review
GRUR	Gewerblicher Rechschutz und Urheberrecht
GRUR Int	Gewerblicher Rechschutz und Urheberrecht Internationaler Teil
H. Rep.	House Report
Hand. II	Handelingen Tweede Kamer
Harv. L. Rev. 1089	Harvard Law Review
Hastings Comm--Ent L.J.	Hastings Communication and Entertainment Law Journal
Hastings L.J.	Hastings Law Journal
HCJ	Annotation of H. Cohen Jehoram
HER	Annotation of H.E. Ruijsenaars
High Tech. L.J.	High Technology Law Journal
HNJV	Handelingen der Nederlandse Juristen-Vereniging
Hofstra L. Rev.	Hofstra Law Review

TABLE OF ABBREVIATIONS

Hofstra Prop. L.J.	Hofstra Property Law Journal
ICCPR	International Convention on Civil and Political Rights
IER	Intellectuele Eigendom en Reclamerecht
IIC	International Review of Industrial Property and Copyright Law
Ill. L. Rev.	Illinois Law Review
Ill.App.2d	Illinois Appellate Court Reports, Second Series
Ind. L.J.	Indiana Law Journal
Ind.App	Indiana Court of Appeals Reports
Ing.-Cons.	Revue de droit intellectuel l'Ingenieur-Conseil
Int. Prop. L. Rev.	International Property Law Review
Intel. Prop. J.	Intellectual Property Journal
Iowa L. Rev.	Iowa Law review
J. Am. Acad. Matrimonial Law.	Journal of American Academy Matrimonial Lawyers
J. Art & Ent. L.	Journal of Art and Entertainment Law (DePaul University)
J. Copyright Soc'y	Journal of the Copyright Society
J. Intell. Prop. L.	Journal of Intellectual Property Law
J. Legal Stud.	Journal of Legal Studies
J. Mar. L. Rev.	The John Marshall Law Review
J.L. & Econ.	Journal of Law and Economics
JCSP	Annotation of J.C.S. Pinkaers
JHS	Annotation of J.H. Spoor
JZ	Juristenzeitung
KG	Kort Geding
L.Ed.	United States Supreme Court Reports, Lawyers' Edition
L.Ed.2d	United States Supreme Court Reports, Lawyers' Edition, Second Series
La. L. Rev.	Louisiana Law Review
Law & Contemp. Prob.	Law and Contemporary Problems
Law Q. Rev.	Law Quarterly Review
Loy. L.A. Ent. L.J.	Loyola of Los Angeles Entertainment Law Journal
Loy. L.A. L. Rev.	Loyola of Los Angeles Law Review
LWH	Annotation of L. Wichers Hoeth
Md.	Maryland or Maryland Reports
Md. L. Rev.	Maryland Law Review
MDR	Monatsschrift für deutsches Recht
Media L. Rep.	Media Law Reporter
Mf	Mediaforum

TABLE OF ABBREVIATIONS

Mff	Annotation of W.L.P.A.
Minn. L. Rev.	Molengraaff
Misc.	Minnesota Law Review
Misc.2d	New York Miscellaneous Reports
Mo.	New York Miscellaneous Reports, Second Series
Mo.App.	Missouri or Missouri Reports
MRM	Missouri Appeal Reports
MS	Annotation of M.R. Mok
MuW	Annotation of M. Scheltema
MvA	Markenschutz und Wettbewerb
MvT	Memorie van Antwoord (Memorandum of Reply)
N.C.	Memorie van Toelichting (Explanatory Memorandum)
N.C.L. Rev.	North Carolina Reports
N.E.	North Carolina Law Review
N.E.2d	Northeastern Reporter
N.H.	Northeastern Reporter, Second Series
N.J.Eq.	New Hampshire Reports
N.J.Super	New Jersey Equity Reports
N.W.2d	New Jersey Superior Court Reports
N.Y.	Northwestern Reporter, Second Series
N.Y.2d	New York Court of Appeals Reports
N.Y.L. Sch. L. Rev.	New York Court of Appeals Reports, Second Series
N.Y.S.	New York Law School Law Review
N.Y.S.2d	New York Supplement
N.Y.U.L. Rev.	New York Supplement, Second Series
New England L. Rev.	New York University Law Review
New York L.J.	New England Law Review
NGL	New York Law Journal
NJ	Netherlands Guilder
NJB	Nederlandse Jurisprudentie of New Jersey
NJCM	Nederlands Juristenblad
NJW	Nederlands Juristen Comité voor de Mensenrechten
Notre Dame L. Rev.	Neue Juristische Wochenschrift
Nw. U.L. Rev.	Notre Dame Law Review
Ohio App.3d	Northwestern University Law Review
	Ohio Appellate reports, Third Series

TABLE OF ABBREVIATIONS

Ohio N.U. L. Rev.	Ohio Northern University Law Review
Ohio St.2d	Ohio State Reports, Second Series
OLG	Oberlandesgericht
Or.	Oregon Reports
P.	Pacific Reporter
P.2d	Pacific Reporter, Second Series
Pepperdine L. Rev.	Pepperdine Law Review
PRAR	Praktijkboek Reclame- en Aanduidingenrecht
Pres.	President of District Court
Pub. Ent. Advert. & Allied Fields L.Q.	Publishing, Entertainment, Advertising and Allied Fields Law Quarterly
REPdR	Annotation of R.E.P. de Ranitz revised
rev.	
RGZ	Reichsgerichtsentscheidungen in Zivilsachen
RIDA	Revue Internationale du Droit d'Auteur
RMTh	Rechtsgeleerd Magazijn Themis
Rutgers Computer & Tech. L.J.	Rutgers Computer and Technology Law Journal
Rutgers L. Rev.	Rutgers Law Review
RVDW	Rechtspraak van de Week
RzU	Rechtsprechung zum Urheberrecht (E. Schulze)
S. Cal. L. Rev.	Southern California Review
S.Ct.	Supreme Court Reporter
S.E.	South Eastern Reporter
S.E.2d	South Eastern Reporter, Second Series
S.W.	South Western Reporter
S.W.2d	South Western Reporter, Second Series
Santa Clara L. Rev.	Santa Clara Law Review
SB	Annotation of S. Boekman
Sch	Annotation of T.M. Schalken
Seton Hall L. Rev.	Seton Hall Law Review
SEW	Sociaal-Economische Wetgeving
So.2d	Southern Reporter, Second Series
Stan. L. Rev.	Stanford Law Review
Stb.	Staatsblad
Ste	Annotation of P.J.M Steinhauser
Sw. U.L. Rev	Southwestern University Law Review
Temp. L.Q.	Temple Law Quarterly

TABLE OF ABBREVIATIONS

Tex. L. Rev.	Texas Law Review
ThWvV	Annotation of Th.W. van Veen
Tort & Ins. L.J.	Tort and Insurance Law Journal
Trademark Rep.	Trademark Reporter
Trb.	Tractatenblad
Trib. Gr. Inst.	Tribuneaux de grande instance
Tul. L. Rev.	Tulane Law Review
TvC	Tijdschrift voor Consumentenrecht
TVVS	Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen
U. Chi. L. Rev.	University of Chicago Law Review
U. Cin. L. Rev.	University of Cincinnati Law Review
U. Miami Ent. & Sports L. Rev.	University of Miami Entertainment and Sports Law Review
U.C. Davis L. Rev.	University of California, Davis Law Review
U.S.	United States Supreme Court Reports
U.S.C.	United States Code
U.S.P.Q.	United States Patent Quarterly
U.S.P.Q.2d	United States Patent Quarterly, Second Series
UCLA L. Rev.	University of California, Los Angeles Law Review
UFITA	Archiv für Urheber-, Film-, Funk- und Theaterrecht
v.	versus
Va. L. Rev.	Virginia Law Review
Vand. L. Rev.	Vanderbilt Law Review
vdZ	Annotation of J.W. van der Zanden
Vill. L. Rev.	Villanova Law Review
vNH	Annotation of E.A. Nieuwenhoven Helbach
W.	Weekblad van het Recht
W.Va.	West Virginia Reports
WPKA	Annotation of W.F. Korthals Altes
Wis. L. Rev.	Wisconsin Law Review
Wis.2d	Wisconsin Reports, Second Series
Wm. & Mary L. Rev.	William and Mary Law Review
WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie
WRP	Wettbewerb in Recht und Praxis
Yale L.J.	Yale Law Journal
ZUM	Zeitschrift für Urheber- und Medienrecht

PART I

**THE LAW IN THE UNITED STATES AND
THE NETHERLANDS**

CHAPTER 1

INTRODUCTION

1.1 Economic Reality: Persona Merchandising Exists

This study deals with the commercial use of the name, image, voice, signature, and other indicia which identify a specific human being. These indicia can be referred to as "identity" or "persona." At this stage, it is sufficient to note that the term "commercial use" of persona refers to the use of elements that identify a specific person in connection with (an advertisement for) commercial merchandise or services.¹ The phenomenon of a commercial exploitation of persona is not new.

In the Middle Ages, Popes granted warrants, or licenses, to local entrepreneurs, who collected taxes a percentage of which they forwarded to the Vatican. In the 1770s, two ladies of British nobility consented to the use of their names in connection with a line of facial cosmetics in return for a royalty based on the sales.² The invention of photography in the first third of the 19th century made it possible to use a photograph of a person for advertising purposes. However, most newspapers did not employ pictorial advertising until the end of the 19th century.³ Advances in lithographic technology encouraged the use of pictorial advertising. At the beginning of the 20th century, newspapers' editorial standards began to allow graphic advertising despite protests of "typographical impropriety." Gradually, advertising copy began to feature pictures of real people instead of stereotyped artistic conceptions of ideal types.⁴ Since then, it has become a widespread advertising or merchandising technique to use a person's name, likeness, voice or other attribute which identifies this person in advertising or in connection with merchandise to attract the consumer's attention or to stimulate a purchase decision.⁵

Today, television, radio, film, cable, magazines, satellite dish receivers, all help make possible the worldwide transmission of images of persons. The development of modern communication technology and the mass media in the 20th century made it possible that a new industry came into being centered around celebrities. In their book "High Visibility," Rein, Kotler, and Stoller describe a "celebrity industry" which "consists of specialists who take unknown and well-known people, design and manufacture their images, supervise their distribution, and manage their rise to high visibility."⁶ In their opinion, this

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1. The term "commercial use" is discussed in chapters 9 and 10. The term "persona" is discussed in § 8.2.
 2. Cf. Battersby and Grimes, *The Law of Merchandising and Character Licensing* § 1.02 (1991).
 3. Some of the first pictorials were famous billboards made by Toulouse-Lautrec in Paris.
 4. See Armstrong, *The Reification of Celebrity: Persons as Property*, 51 *La. L. Rev.* 443 (1991), citing Turner, E., *The Shocking History of Advertising!* (1953) and Presbrey, F., *The History and Development of Advertising* (1929).
 5. See for reasons of the popularity of merchandising and character licensing: Battersby and Grimes, *The Law of Merchandising and Character Licensing* § 1.04 (1991). The authors define "merchandising" as the "licensing of publicly recognizable properties." *Id.* at § 1.01.
 6. Rein, Kotler, and Stoller, *High Visibility*, at 33 (1987). They define a *celebrity* as "a person whose name has attention getting, interest-riveting, profit-generating value." *Id.* at 15. The word originates from the latin word "celebrare" meaning "to honor".

industry draws upon several other industries, such as the entertainment industry (e.g. producers, directors, actors, sportsmen, musicians, photographers), representation industry (agents), publicity industry (advertising agencies), communication industry (media), legal and business services industry (lawyers and accountants), and celebrity service industry (e.g. Ron Smith's Celebrity Lookalikes, a company that provides look-alikes to others).⁷

1.2 Three Theories of Protection in Different Countries

[A] Introduction: Three Legal Theories

This study discusses the extent to which persons receive protection against unauthorized commercial use of their persona by third parties and to what extent they can exploit their persona themselves.

At the end of the 19th century and the beginning of the 20th century, courts in continental Europe and the United States started granting legal protection against unauthorized advertising or other forms of commercial use of a person's picture based on the legal theory that the unauthorized commercial use of a person's identity is an affront to human dignity and self-esteem.⁸ This protection was based on a *dignity*, or *privacy* interest of the person whose identity was appropriated. However, courts did not prohibit personality merchandising itself. They granted protection against unwanted commercial use, but also recognized the principle that it is up to every person himself to decide whether to permit the use of his picture for commercial purposes.⁹

During the early development of the mass media, persons, especially the famous, found that the commercial use of their pictures, names and other identifying aspects had a potential pecuniary value, which could be exploited if a legal action was available to them to prohibit the unauthorized commercial use of their identity. Their interest was not a privacy interest that no one would commercialize their identity, but rather a *financial* interest in controlling the use of their identity. Since the 1950s, courts in continental Europe and the United States have also protected this financial interest.¹⁰

Before defining the problem of this study in § 1.3, a short overview of the legal situation in the UK, France, Germany, Spain, Italy, the Netherlands, the United States, Australia, Canada and Japan is provided.¹¹ In these countries, it

7. Id. chapter 3, at 32-63.

8. See e.g. in *France*: Trib. com. Seine, June 13, 1892, Gaz. Pal. 1892-2-107 (*Bonnet/Société Olibet*), *Annales prop. ind.* 1893, 248; Use of picture of women in connection with trade for biscuits; in *United States*: *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); Use of a picture of an artist in an advertisement for life insurances; in *Germany*: German Reichsgericht, October 28, 1910, II 688/09, RGZ 74, 308; 10 MuW 1910, 126; GRUR 1911, 81; RzU RGZ Nr 15 (annot. Neumann-Duesberg) (*Graf Zeppelin*): Use of a picture of Graf Zeppelin as a trademark for tobacco products.

9. See decisions mentioned in the former note.

10. See *infra*, § 1.2[C] and [D].

11. The description of Germany, the Netherlands and the United States is based on my own extensive research of case law and literature. The description of the other countries is based on secondary sources: articles or books written by other authors.

is possible to distinguish *three* different concepts of protection against unauthorized commercial use of personal identity:

- a) protection on the basis of the passing off-tort,
- b) protection against (mis)appropriation of personality, and
- c) protection against infringement of a property right.

[B] Passing off or Misrepresentation

[1] England

The *first* concept can be found in countries which do not recognize a right of privacy, such as England and Australia. In these countries, the main protection is based on the passing off theory and libel law.

England does not recognize a general right of privacy. Advertisers have voluntarily enforced "*The British Code of Advertising Practice*," which provides protection against invasion of privacy and exploitation of the individual by the unpermitted use of an identity in advertising. Section 17.1 Advertising Code provides that "advertisements should not portray or refer to any living persons in whatever form or by whatever means, unless their express prior permission has been obtained." However, this protection is diminished by an exception recognized in § 17.2 allowing exploitation if the product is not "inconsistent with the celebrity's position" and does not interfere with the individual's "right to enjoy a reasonable degree of privacy."¹² Therefore, a celebrity whose name and likeness was used in a marketing strategy consistent with his public character may be without a remedy.¹³

If the unauthorized exploitation does not fall within the scope of this Code, or if the Code is ignored, under English law, a plaintiff can only prevail if defendant's commercial use constitutes libel, passing off or a breach of contract.¹⁴ The leading *libel* case is *Tolley v. Fry*¹⁵ which held that the use of a picture of the amateur golfer Tolley in an advertisement for chocolate bars defamed him. The court found it relevant that the advertisement implied Tolley's endorsement of defendant's chocolate bars for money, which would affect his status as an amateur golfer, compelling him to withdraw from certain amateur golf clubs. In order to state a claim for *passing off*,¹⁶ English courts require that the plaintiff and defendant be engaged in a common field of activity. Section 85(1) of the 1988 Copyright, Design and Patents Act provides that a person who

12. Buchanan, A Comparative Analysis of Name and Likeness Rights in the United States and England, 18 *Golden Gate U.L. Rev.* 301, at 366 (1988).

13. Frazer, Appropriation of Personality--A New Tort?, 99 *Law Q. Rev.* 281, at 282 (1983).

14. Cf. *Nice Man Merchandising, Inc. v. Logocraft Ltd.*, 23 U.S.P.Q.2d 1290 (E.D.Pa. 1992) and *Bi-Rite Enterprises, Inc. v. Bruce Miner Co., Inc.*, 757 F.2d 440, at 442, 225 U.S.P.Q. 793, 11 Media L. Rep. 1891 (C.A.1 1985); "The law of Great Britain does not recognize a right to control commercial exploitation of personal names or likenesses."

15. [1931] AC 333.

16. "Passing off" one's product as the product of another competitor is the traditional case of unfair competition.

commissions a photograph for private or domestic purposes has the right to oppose its publication.

Since it is possible to use a person's identity for advertising purposes without passing off or defaming this person, advertisers or merchandising companies can still avoid liability if they use another's identity without that person's permission. Therefore, some authors have called for a new statutory law that protects human identity against commercial appropriation.¹⁷

[2] Australia

In *Australia*, protection against the appropriation of human identity is based on the tort of passing off, which provides for a greater protection than in England, because courts do not require that the plaintiff and defendant be engaged in a common field of activity.¹⁸ Under this theory, a plaintiff, whose picture is exploited by another, will prevail if the consumer public believes that the picture indicated plaintiff's sponsorship or approval of the product.¹⁹

However, if there is no confusion as to sponsorship, the unpermitted use of a celebrity's identity for commercial purposes is not unlawful. For example, Olivia Newton-John could not enjoin an advertisement for cosmetics which showed an Olivia Newton-John look-alike and the words: "Olivia? No. Maybelline!". The court stated that the advertisement did not cause any confusion because the text made it clear that the look-alike was not Olivia Newton-John.²⁰

[C] Appropriation of Personality

The *second* concept of protection is the appropriation of personality theory, which can be found in countries which recognize a right of privacy or personality right, and which have often adopted statutes that protect certain identifiable characteristics of a human being, such as a person's name or picture. Since the name, likeness and other personal features are strictly linked to the person, they are protected as personality rights. The European continental countries, such as Germany, France, Italy, Spain, and the Netherlands, and also Canada and Japan, seem to adhere to this concept. In these countries the law does recognize a

17. *E.g.* Buchanan, *The Need for a Right of Publicity*, 8 *Eur. Intell. Prop. Rev.* 227 (1988); Frazer, *Appropriation of Personality--A New Tort?*, 99 *Law Q. Rev.* 281, at 313 (1983); Frazer, *Publicity, Privacy and Personality*, 6 *Eur. Intell. Prop. Rev.* 139 (1983). *Cf.* Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 420 (2nd ed. 1989).

18. *See* for a treatise on Australian law in this field: Murumba, *Commercial Exploitation of Personality*, 1986.

19. *See* § 52(1) of the Trade Practices Act. *See e.g.* *Pacific Dunlop Ltd. v. Hogan*, 83 ALR 403 (Gummow, J.) and 87 ALR 14 (1989) (Federal Court). *Cf.* Van Caenegem, *Different Approaches to the Protection of Celebrities against Unauthorized Use of their Image in Australia, the United States and the Federal Republic of Germany*, 12 *Eur. Intell. Prop. Rev.* 452 (1990).

20. *Olivia Newton-John v. Scholl-Plough Ltd.*, ATPR para. 40-697 (1986). *Cf.* *Honey v. Australian Airlines Ltd.*, 14 I.P.R. 264 (1989): well-known long-jumper, Garey Honey could not enjoin the production and distribution by defendant Australian Airlines of a poster which pictured him in action during the Commonwealth Games, because, according to the court, the public would not conclude that the poster was authorized by him.

person's commercial interest in protection against unauthorized commercial use of certain aspects of his identity, but the courts struggle with questions as to the content, exploitation, assignability and descendibility of the given protection. The rights granted to a licensee are based on the personal obligation of the licensor to refrain from opposing the use on the basis of his personality right.

Because of their highly personal character, personality rights are per definition non-assignable and non-descendible. On the other hand, the protection of financial interests can be compared with an economic good with a property character.²¹ Protection of commercial interests in human identity is often justified by referring to its personality right character, since its "*object*"²² consists of elements which refer to a human being. Therefore, commercial and privacy interests are often considered to be inextricably intertwined. A major problem seems to be that further legal development by courts in this field is often blocked by the text of statutes that were enacted at a time when the commercial nature of interests was not yet fully recognized.

[1] Germany

In *Germany*,²³ persons are protected against the unpermitted commercial use of their identity based on different personality theories, depending upon whether the element used is a picture, name or other indicia of persona. If the indicia used is a picture, the "*Recht am eigenen Bild*" (right to one's own picture) will apply. This right is considered to be a special form of the general personality right.²⁴ Section 22(1) of the KUG²⁵ provides that pictures may only be circulated or displayed with the consent of the person pictured. Section 23(1) KUG creates exceptions to this general rule. Most important is the exception providing that pictures from the sphere of contemporary history may be circulated or exhibited without the consent of the person pictured. However, pursuant to § 23(2) KUG this exception does not apply if its application injures a justified interest of the person pictured.

While the right to one's own picture was originally viewed as protecting the personal interests of the person, the German Federal Supreme Court (BGH) also recognized that it can protect commercial interests and that the exception of

21. The terms "property" and "assignability" are discussed in § 8.1 and § 8.3.

22. See *infra* § 1.3[B] and § 8.2.

23. See Krüger, *Right of Privacy, Right of Personality and Commercial Advertising*, 13 *IIC* 183 (1982); Helle, *Besondere Persönlichkeitsrechte im Privatrecht, Das Recht am eigenen Bild, das Recht am gesprochenen Wort und der Schutz des geschriebenen Wortes*, 1991; Wenzel, *Das Recht der Wort- und Bildberichterstattung. Handbuch des Äußerungsrechts*, 3. ed., 1986; Schricker, *Urheberrecht. Kommentar*, Munich, 1987; Göting, *Persönlichkeitsrechte als Vermögensrechte*, 1995.

24. See Helle, *Besondere Persönlichkeitsrechte im Privatrecht, Das Recht am eigenen Bild, das Recht am gesprochenen Wort und der Schutz des geschriebenen Wortes*, 1991.

25. *Kunsturhebergesetz* (Law of artistic Creations) of January 9, 1907. Most of the articles of this law were scrapped in 1966 when Germany adopted a new Copyright Act, but the articles concerning the protection of pictures are still valid.

§ 23(1) does not apply in the event of commercial use of a famous person.²⁶ For example, the Federal Supreme Court held that the selling of pictures of well-known soccer players in closed paper bags is an infringement of the right to one's own picture if the players do not receive a reasonable profit share.²⁷

Section 22(3) in connection with § 22(4) KUG provides that after his death, pictures of the person pictured may only be circulated or displayed with the consent of the surviving spouse and the children, or failing these the parents, for a period of 10 years. From this provision, it follows that the right to one's own picture is *non-assignable* (no "*Übertragung*") and *non-descendible* (no "*Vereblichkeit*"). The heirs do not inherit this right. Only the spouse, children, or parents get this right. Other heirs, such as brothers, sisters or other third parties never get this right. The deceased's picture can only be exploited with the permission of the spouse and all children. If one child does not agree, he can oppose the exploitation by the others.

Non-assignable rights may be exploited by asking a fee for permission (a license) to commercial use, but what is the position of the licensee? In 1986, in the "*Nena*" decision,²⁸ the Federal Supreme Court ruled that if a famous singer authorizes a collecting society, on a worldwide and exclusive basis, to permit third parties to commercially exploit her likeness at a fee, the collecting society has a right to recover the unpaid fees on the basis of unjust enrichment²⁹ from anyone who utilizes such likeness commercially without permission. Thus, even though, due to the non-assignability, *Nena* was not able to confer rights upon the plaintiff-licensee which he could claim against third parties in his own name, the plaintiff-licensee had a right to recover the fee which he normally demands for the commercial exploitation of *Nena's* likeness.³⁰ In his annotation under this decision, Hubmann stated that it would be consequent that the right to one's own picture would be deemed assignable.³¹ Schricker agreed with the result of the decision, but the reasoning of the Federal Supreme Court caused some worry. In his opinion, the case would only be understandable if it was assumed that *Nena* had granted a "*Nutzungsrecht*" (a copyright-like license) with effect on third

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26. The first decision was Federal Supreme Court, May 8, 1956, I ZR 62/54; BGHZ 20, 345; GRUR 1956, 427; 22 UFITA (1956) 361; RzU BGHZ Nr 25 (annot. Runge), NJW 1956, 1554; JZ 1956, 657 (annot. Kleine) (*Paul Dahlke*): use of picture of actor in advertisement for NSU-Lambretta scooter is infringement of the right to one's own picture.
27. Federal Supreme Court, February 20, 1968, VI ZR 200/66; BGHZ 49, 288; GRUR 1968, 652 (annot. Kleine), 55 UFITA (1970) 293; RzU BGHZ Nr 150 (annot. Neumann-Duesberg) (*Ligaspieler*).
28. Federal Supreme Court, October 14, 1986, VI ZR 10/86; JZ 1987, 158; GRUR 1987, 128; RzU BGHZ Nr 356 (annot. Hubmann), IIC 1988, 269; 43; EWIR 1987 § 22 KUG, 79-80 (annot. Schricker) (*Nena*).
29. Section 812(1) Civil Code.
30. The Federal Supreme Court explicitly noticed that plaintiff did not claim an injunction order.
31. RzU BGHZ Nr 356 at 7: "Er [the BGH in the *Nena* decision] erkennt damit zugleich an, daß das Recht am eigenen Bild, obwohl es Persönlichkeitsrecht ist und in erster Linie persönliche Interessen schützen soll, praktisch weitgehend kommerzialisiert ist und vielfach wirtschaftlich verwertet wird. Es wäre dann nur consequent, das Recht auch für übertragbar zu erklären. Die Übertragbarkeit schließt die Wahrung des persönlichen Interessen am Bildnis nicht aus." However, Hubmann argues that an assignment of the right to one's own picture to a collective society is problematic, since under German law, due to the legal obligation to grant licenses, a collective society cannot develop a licensing policy.

parties.³² From this decision it can be concluded that the German right to one's own picture is developing toward a (still non-assignable) intellectual property right.³³

If plaintiff's *name* is used without his permission, § 12 of the Civil Code may apply if such use causes confusion. However, in the case of celebrity merchandising, there is often no confusion since the name used is indeed the name of the celebrity. Therefore, in most celebrity merchandising cases, a third right comes into play, which provides protection against the use of a person's name or *other indicia*. It is recognized that the unauthorized use of a person's name³⁴ or voice³⁵ may invade a person's *general personality right*. This right was recognized for the first time in 1954³⁶ when it was characterized as an "other right" as referred to in § 823(1) Civil Code, which provides that damages can be recovered in the event of wrongful damage caused to another's life, body, health, freedom, property or "other right". Although in Germany only the legislature, not the courts, can create new "other rights," the Federal Supreme Court was able to recognize this general personality right after the Second World War on the basis of Article 1(1)³⁷ and Article 2(1)³⁸ of the Constitution of the Federal Republic of Germany of 1949.³⁹ Although the general personality right does not survive, the next of kin is entitled to an injunction against use of the personality of the deceased if this use constitutes a serious affront to human dignity. Such protection is based on Article 1(1) of the Constitution, which does not end at death. For example, the use of the name of Prof. dr. Paul Niehans after his death in advertisements for a Beauty Center which advertised his therapy, even though he had rejected the application of his therapy to cosmetics, could be prohibited by his daughter on the condition that she proved that the deceased would lose his credibility as a result of the advertisements.⁴⁰

32. EWIR 1987 § 22 KUG, 80.

33. However, it is still a "personality right," similar to a copyright under German Law. Under the German Copyright Act, a copyright is considered a non-assignable personality right of the author (See § 29 of German Copyright Act), which can be exploited by granting (exclusive) "Nutzungsrechte" pursuant to § 31 German Copyright Act.

34. Federal Supreme Court, June 26, 1981, I ZR 73/79; BGHZ 81, 75; RzU BGHZ Nr 289 (Hubmann), NJW 1981, 2402; GRUR 1981, 846 (Wild), IIC 1983, 289 (*Carrera*): Unauthorized advertising use of plaintiff's name which is also used commercially as a means of advertising by plaintiff, constitutes a violation of plaintiff's personal rights, even if there is no impairment of reputation.

35. Court of Appeals Hamburg (Germany), May 8, 1989, 3 W 45/89; GRUR 1989, 666; ZUM 1989, 582; AFP 1989, 760 (Pietzko), NJW 1990, 1995; IIC 1990, 881 (*Sprachimitator Heinz Erhardt*): use of voice of Heinz Erhardt imitated by a voice imitator in a radio advertisement can violate the general personality right.

36. Federal Supreme Court, May 25, 1954, I ZR 211/53; BGHZ 13, 334; GRUR 1955, 197; NJW 1954, 1404; JZ 1954, 689 (annot. Coing), RzU BGHZ Nr 10 (annot. Reinhardt) (*Leserbriefe*): publication of a letter in a distorted form in newspaper invades the general personality right of the author.

37. "Schutz der Menschenwürde": Protection of human dignity.

38. "Persönliche Freiheitsrechte": "Everyone has the right to free development of his personality, insofar as he does not violate the rights of others and does not contravene the constitutional order or moral law."

39. See about the general personality right: Hubmann, *Das Persönlichkeitsrecht*, 2nd ed., 1967.

40. Federal Supreme Court, May 17, 1984, I ZR 73/82; WRP 1984, 681; MDR 1984, 997; GRUR 1984, 907; IIC 1986, 426 (*Frischzellenkosmetik*) remanding the case to the Court of Appeals.

[2] France

In *France*,⁴¹ personality rights have been recognized and protected independently of any statutory provisions since very early on in history. Unlike the situation in Germany, the French courts were able to award damages pursuant to a general provision of civil liability,⁴² which does not require that there be infringement of any specific statutory right. Under French civil law, different personality rights, such as the right to one's image (*droit à l'image*), the right to marital life, the right to health, and the right to be let alone, are deemed to be part of the general personality right to respect for one's private life. The right to respect for one's private life (*droit au respect de la vie privée*) was codified in 1970 in § 9 of the Code Civil.⁴³

Despite the initial emphasis on the moral aspects of appropriation of a person's identity, the French courts have also recognized the commercial value of a person's image and have extended protection to proprietary interests in personal characteristics. For example, the Lyon District Court has ruled that the unauthorized use of a picture of a basketball player for advertising purposes is an exploitation of the proprietary right to the image ("*exploitation patrimoniale de l'image*").⁴⁴ However, since this recognition of the proprietary character of the right to one's personality, the courts have not addressed the question of the duration and descendibility of this right. In 1983, the Paris Court of Appeals ruled that heirs could not assign the right to exploit the image of their father.⁴⁵ However, in 1988, the Aix-en-Provence District Court compared the right to one's image with a copyright in one's image that passes on to heirs in the same way as a copyright. The court held that

"The right to one's image has a moral and patrimonial character; the patrimonial right which allows the contracting of the commercial exploitation of the image for monetary compensation, is not purely personal and passes on to heirs."⁴⁶

41. See Becourt, *Le Droit de la personne sur son image*, 1969; Wagner, The Development of the Theory of the Right to Privacy in France, *Wash. U.L.Q.* 45 (1971); Lindon, *La création prétorienne en matière de droits de la personnalité et son incidence sur la notion de famille*, 1974; Ravanas, *La protection des personnes contre la réalisation de la publication de leur image*, 1978; Saint Gal and Bassard, Character Merchandising in France: The Commercial Utilisation of the Representation of Personalities or Characters in French Law, *AIPL* 182 (1978); Schmerber, *Le droit à l'image et ses relations avec le droit des marques et le droit d'auteur*, 1980; Lindon, *Les droits de la personnalité*, 1983; Hauser, Werbung und das Recht am eigenen Bild in Frankreich, *GRUR Int* 1988, 839; Rigaux, *La protection de la vie privée et des autres biens de la personnalité*, 1990; Kayser, *La protection de la vie privée*, 2nd ed., 1990.

42. Article 1382 Code civil.

43. "Everyone is entitled to respect of his private life."

44. Trib. Gr. Inst. Lyon, December 17, 1980, D. 1981, 202 (*ASVEL Basket et Gilles/s.a. Lumiere et s.a. Euro-Advertising*).

45. Court of Appeals Paris, June 7, 1983, cited from Logeais, The French Right to One's Image: A Legal Lure? 5 *Ent. L. Rev.* 163, at 166 (1994).

46. Trib. Gr. Inst. Aix-en-Provence, November 24, 1988 (*Brun/Expobat*), aff'd Court of Appeals Aix-en-Provence, May 21, 1991, holding that the widow of famous actor Raimu could claim damages for the unauthorized commercial use of his image. Cited from Logeais, 5 *Ent. L. Rev.* 163, at 166 (1994). According to Logeais, id. at 168, it is not clear whether, through the image, it is fame itself which is protected as a "detachable" economic asset, or the professional achievements which resulted in fame.

Since this right protects both commercial and personal interests, its nature as an exclusive property right remains questioned in legal literature. The majority view still considers the right to the image as a personality right.⁴⁷ In 1994, Logeais stated that the courts view the right to one's image as a dualist right protecting privacy and property (patrimonial) aspects, that "has departed from a pure 'personality right', although its content and true nature remain unassessed."⁴⁸ She concluded that "in France as well as abroad, the law of the image looks like a succession of experimentations which fail to be reconciled into a coherent system."⁴⁹

[3] Canada

In *Canada*, the law of both the common law tradition and of the civil law tradition is applied.⁵⁰ The courts that apply civil law have recognized the act of misappropriation of personality under the influence of similar decisions in France. The courts that apply common law seem to be under the influence of legal developments in the U.S.⁵¹ These courts have also protected property values in a person's identity against unpermitted commercial use. However, the tort is often considered in the context of protecting a privacy interest.⁵²

In contrast with England and Australia, courts in Canada seem to have resolved the question of "*misrepresentation*" versus "*misappropriation*" in favor of the latter theory by recognizing the tort of misappropriation of one's personality and the exclusive right to market one's personality as constituting an aspect of that tort.⁵³ The main difference between the two theories is that under the misappropriation theory a plaintiff need not prove any celebrity status or secondary meaning, because what is protected is not goodwill which attracts customers, but the right of each individual to commercially exploit his identity.

47. See Lindon, *Les droits de la personnalité*, 1983, 114-120.

48. Logeais, *The French Right to One's Image: A Legal Lure?* 5 *Ent. L. Rev.* 163, at 164 (1994).

49. *Id.* 5 *Ent. L. Rev.* 163, at 170 (1994). *Id.* at 167: "a law would have to be passed to fill in the blanks on issues like descendibility and, as the case may be, pseudo moral rights."

50. See Chromeck, in: *World Intellectual Property Guidebook, Canada*, 1991, chapter 7; Hayhurst, *Industrial Property Law in Canada II*, 12 *IIC* 786, at 814-815 (1981); Himelfarb, *A Canadian Perspective on the Protection of an Individual's Personality from Commercial Exploitation, Entertainment, Publishing and The Arts Handbook*, 1985, 263; Potvin, *La personne et la protection de son image*, 1990.

51. See Howell, *The Common Law Appropriation of personality Tort*, 2 *Intel. Prop. J.* 149, at 158-162 (1986).

52. See Howell, *Is There an Historical Basis for the Appropriation of Personality Tort*, 4 *Intel. Prop. J.* 265, at 268 (1989).

53. *Athens v. Canadian Adventure Camps Ltd.*, (1977) 34 C.P.R.2d 126, at 136: "it is clear that mr Athens has a proprietary right in the exclusive marketing for gain of his personality, image and name, and that the law entitles him to protect that right if it is invaded."

[4] Italy

In *Italy*,⁵⁴ courts have recognized a celebrity's right to act against misappropriation of the commercial value of his personal attributes such as his likeness, name and other distinctive characteristics that are capable of recalling the celebrity immediately. If a picture is used, this protection is based on the right of image (*diritto all'immagine*) which is based on § 10 of the Italian Civil Code (abuse of another's image) and Articles 96 and 97 of the Italian Copyright Act which, like the German KUG, grants rights to persons who are portrayed. In the event that other identifying attributes are appropriated, the Italian courts have granted protection by applying the rules provided for the right of image by analogy. In the "*Lucio Dalla*" case, the Rome District Court held that the use of a woollen cap and a pair of small round glasses in advertising posters for radios and CD players of defendant Autovox constituted an appropriation of the identity of famous singer Lucio Dalla.⁵⁵ The main obstacle for further development of the protection of the property interest in personality attributes in Italy derives from the fact that the statutory provisions that are applied by analogy do not deal with the question of its transferability and descendibility. Therefore, Martucelli concludes: "[T]he contours of the right are still unclear. The most disputed aspects [...] are its transferability, its descendibility and the precise requirements for its protection."⁵⁶

[5] Spain

In *Spain*, the Act of May 5, 1982 protects the right of honor, right of private sphere and the right to one's own image.⁵⁷ This Act also protects the property interest of a person to control the commercial use of his identity, but this protection is based on a concept of a non-assignable personality right, not on a concept of an assignable and descendible property right. Section 7 no. 6 of this Act declares the unpermitted use of someone's name, voice or likeness for advertising or trade purposes an invasion of one's private life. Pursuant to § 2(2) a person may consent to the commercial use of one's identity. However, § 2(3) provides that the consent may be revoked at any time, if the person who invokes this right indemnifies the licensee. The right to one's own image is non-assignable, since § 4(2) indicates which family members have postmortem standing to sue. However, according to § 4(1) the protection and remedies of the Act may be invoked by the persons who were appointed to do so in the deceased's will.

54. Cf. Ponzanelli, *La poverá dei "sosia" e la ricchezza delle "celebritá"* Il "right of "publicity" nell'esperienza italiana, *Dir. Inf.* 1988, 126; Martucelli, *An Up - and - coming Right - The Right of Publicity: Its Birth in Italy and its Consideration in the United States*, 4 *Ent. L. Rev.* 109 (1993).

55. Pretura di Roma, April 18, 1984, *For. It.*, 1984, I, 2030 (*Lucio Dalla/Autovox SpA*).

56. Martucelli, *An Up - and - coming Right - The Right of Publicity: Its Birth in Italy and its Consideration in the United States*, 4 *Ent. L. Rev.* 109, at 115 (1993).

57. Cf. Fernández-Nóvoa, *Der Schutz von Name, Stimme und eigenen Bild gegen eine Verwendung in der Werbung (Right of Publicity) im spanischen Recht*, *GRUR Int.* 1983, 494.

[6] The Netherlands

In the *Netherlands*,⁵⁸ like in Germany and Italy, the portrait right is recognized in a copyright act. Pursuant to Article 21 of the Copyright Act of 1912, a copyright owner is not allowed to make a portrait⁵⁹ public if publication conflicts with a "reasonable interest" of the portrayed or, after his death, of one of his next of kin (i.e. parents, spouse or children). The Dutch courts initially recognized moral interests as reasonable ones. The basis for protection of personality interests is the right to respect for one's private life (recht op eerbiediging van de persoonlijke levenssfeer) which is guaranteed by Article 10 of the Dutch Constitution and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Since 1959, courts have also recognized the commercial interest of the portrayed to share in the financial benefit of a commercial publication of his portrait.⁶⁰

Like in France, Dutch courts are able to award damages under a general provision of civil liability in the case of a tort,⁶¹ which does not require the infringement of a specific statutory right. Therefore, Dutch courts were able to recognize a person's financial interest in sharing in the financial benefit of the commercial use of identifying attributes other than a portrait, such as one's name.⁶² As in other countries, the text of Article 21 of the 1912 Copyright Act prevents further judicial development of this protection, in particular with respect to its exploitation. For example, in the "*Elvis Presley*" case, the Dutch Supreme Court⁶³ held that portrait rights of Presley cannot be enforced by a record company which exploits his portraits pursuant to an exclusive license, since Article 21 of the Copyright Act provides that portrait rights are exclusively reserved to the portrayed or his next of kin.

[7] Japan

In *Japan*, the Tokyo District Court protected the economic interest of a famous person to give an exclusive license to a third party to exploit his name and portrait in a commercial for chocolate products. The court held that British movie actor Mark Lester had an economic interest in his name and portrait "that ordinary persons do not possess" because his name and portrait could help to sell products. This interest was protected under the law of torts (Article 709 Japanese

58. See Cohen Jehoram, *Netherlands* § 8[2][G], in: Nimmer-Geller *International Copyright Law and Practice*: Spoor/Verkade, *Auteursrecht*, 1993, chapter VI; Oppenoorth, *Facets of Dutch Portrait law*, 28 *Copyright Word*, 38 (1993); *Onrechtmatige Daad* (new) VII (Schuijt), nos. 121-138.

59. If the portrait is made on order by or on behalf of the person portrayed, the author is not entitled to make it public without the consent of the persons portrayed, see Article 20 of the Copyright Act.

60. See e.g. Pres. District Court Rotterdam, April 14, 1959, NJ 1959, 648 (*Teddy Scholten*).

61. Article 6:162 Civil Code, discussed in § 5.2[A].

62. District Court Zwolle, November 24, 1971, NJ 1972, 285 (*Mies Bouwman/Fino Fabrieken*): NLG 5,000 damages awarded for unauthorized use of name of TV-hostess Mies Bouwman in advertisement for California soup.

63. Supreme Court of the Netherlands, February 24, 1989, NJ 1989, 701 (LWH); AA 1989, 675 (HCJ); AMI 1989, 70; IER 1989, 41 (JHS); GRUR Int 1990, 233 (HER) (*Elvis Presley I*).

Civil Code).⁶⁴ In 1991, the Tokyo High Court ruled that an artist and its company could oppose the unpermitted use of the artist's photographs for a calendar. The court recognized the exclusive commercial right of persons with a marketing value to exploit their popularity and fame commercially.⁶⁵

However, the boundaries of this protection remain unclear. Heath stated that, save photographs, it is unclear what aspects of the personality are protected. Further it is not clear whether this right is limited to professional artists and models, whether such rights are transferrable, and whether Japanese law recognizes post-mortem personality rights.⁶⁶

[D] Property Right: American Right of Publicity

A *third* concept is to grant protection against unpermitted commercial use of personal identity on the basis of a property right which in itself can be commercially exploited. This theory can be found in some states of the *United States of America*.⁶⁷ This property right is called "*the right of publicity*."

The legal development in the United States was similar to the European continental countries. The right to control the commercial use of one's identity first developed within the domain of the right of privacy with its focus upon the indignity of an unpermitted commercial use. Later, courts also recognized the financial interest of celebrities to control the commercial use of their identity. The major breakthrough was the "*Haelan*" case in 1953.⁶⁸ Plaintiff, Haelan Laboratories, had obtained exclusive licenses from professional baseball players to use their names and pictures on baseball cards, which were used for the promotion and sale of its chewing gum. Defendant, competitor Topps Chewing Gum, also used some names and pictures of the same baseball players on cards without authorization from the players. In the case that followed, the classic defense, that not the plaintiff but only the players had standing to sue since the privacy right of the baseball players was a personal right which could not be assigned, was rejected. The Second Circuit Court of Appeals recognized the "*right of publicity*" which not only consisted of the (negative) right to prohibit unauthorized commercial use of identity, but also of the (positive) right to grant exclusive rights to third parties to exploit the licensor's identity. The concept of a new property right in the commercial value of a person's identity under the name "*right of publicity*" was created. Since 1953 the right of publicity has further been developed by the courts and commentators. McCarthy concluded in 1987:

64. See Doi, Character Merchandising in Japan: Protection of Fictional Characters and Well Known Personalities as the Basis for Merchandising Activities, *AJPL* 283, at 301 (1978), citing *Mark Lester v. Tokyo Daiichi Film* (June 29, 1976).

65. Tokyo High Court, September 26, 1991, 772 Hanrei Times 246 (*Oniyanko Club*) (cited from: Heath, *Japanese Intellectual Property Rights*, 26 *IIC* 900, at 913, fn. 32 (1995)).

66. See Heath, *Japanese Intellectual Property Rights*, 26 *IIC* 900, at 914 (1995).

67. See McCarthy, *The Rights of Publicity and Privacy* (Rev. 1993).

68. *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (C.A.2 1953).

"By the 1980s, its very existence as a quite separate and distinct human property right could no longer be ignored. It had finally become a widely recognized commercial tort to use a person's identity for advertising without getting permission. But much work remained to define the shape and contours of the right of publicity."⁶⁹

Today, the American right of publicity is defined as a commercial tort which protects against (mis)appropriation of the commercial value of another's identity. It is not defined as an intellectual property right, which provides for the exclusive rights of the owner.

[E] Restriction to the United States and the Netherlands

The protection against unpermitted commercial use of identity in the various states differs. This can be shown by way of a simple example. Suppose that a company wishes to use a photograph of a celebrity, who died twenty years ago, in its advertising campaign in the fifteen Member States of the European Union and in the United States. The company owns the worldwide copyrights in the picture, but does not own the rights in the identity of the deceased. For which states must it ask a license? Since there is no federal US law governing this issue, the company must check the laws of 50 US States and the 15 EU States. It will probably learn that in California the heirs may oppose the unpermitted commercial use of the identity of the deceased celebrity, but in New York it does not require a license. In Germany, it does not need a license as long as the campaign does not seriously damage the good reputation of the deceased. In the Netherlands and the UK, it does not need a license. In France, the company should check whether there are heirs. If so, it would be wise to request a license from them.

This study will be restricted to the legal situation in the United States and in the Netherlands. The choice of the *United States* is based on my impression that of the three theories distinguished, the right of publicity concept is furthest developed and fits best with commercial realities,⁷⁰ and that other countries are developing in the same direction as the states in the United States, only less quickly. The choice of the *Netherlands* is based on the fact that it is my own country. However, without being able to prove this, it is my feeling that the Dutch legal situation is, due to the influence of the laws of its three bigger neighbors Germany, France and England, fairly representative for Western Europe.

69. Id. at § 1.11[A].

70. Cf. Goodenough, *The Price of Fame: The Development of the Right of Publicity in the United States*, *Eur. Intell. Prop. Rev.* 55 and 90, at 95 (1992): "The United States is not always seen as a leader in intellectual property matters. Nonetheless, on the commercial value of identity, it has developed a body of law which protects the individual's rights, permits a market to operate and maintains a good balance between the rights of the individual and the rights of society. The fact that the law developed in fits and starts, and has a number of unnecessary quirks, is to some extent the price of leadership."

1.3 Definition of Problem

[A] Examples of Current Problems

[1] The Netherlands

In the Netherlands, the *exploitation* of the commercial portrait right is impeded by its non-assignability. For example, BMG Music Partnership, which had a license from Elvis Presley to use his picture in connection with the sale of sound-recordings, could not oppose the use of Presley's portrait in connection with the sale of unauthorized recordings because Article 21 Copyright Act provides that portrait rights are exclusively reserved to the portrayed or his parents, spouse or children. Similarly, the Dutch company Verkerke, which had obtained exclusive rights to produce and sell posters of Madonna, Michael Jackson, George Michael and Tina Turner, could not oppose the sale of unauthorized posters of these artists in the Netherlands, because portrait rights may only be claimed by the person portrayed or that person's next of kin.⁷¹ Of course, the licensees can improve their legal positions by drafting better contracts which include an exclusive representation of the celebrities by the licensee. However, such contractual provisions do not create an "*own right*" for the licensee to claim his own damages. Under Dutch law, the portrait right, even insofar as it only protects commercial interests, cannot be assigned or pawned, and is not descendible. Such restrictions lower the value of the commercial rights. Therefore, the concept of the non-salability of the portrait right would not appear to fit well with the existing practice of personality merchandising.

The *content* of the commercial portrait right is unclear. The Dutch Supreme Court ruled that famous actors had a right to share in the profits made by the publication of their portraits in a book about the television series "*'t Schaep met de vijf Pooten*" in which they had performed roles.⁷² Referring to the public opinion in this respect, the Court stated that such a right belongs to persons who enjoy a popularity obtained in their profession which they can license against a fee. But do other persons have a commercial portrait right? Is a commercial portrait right which restricts the publication of books not too broad?

In 1995, the Amsterdam soccer team A.F.C. Ajax won the European Champions League Cup, resulting in great popularity for its players. When in 1996, the KNVB, the Royal Dutch Soccer Federation, sold the exclusive television rights to the Dutch Soccer League to a commercial television station, the soccer players argued that they had a right to share in the profits because of the broadcast of their portraits. Should a commercial portrait right encompass the

71. See Supreme Court of the Netherlands, February 24, 1989, NJ 1989, 701 (LWH); AA 1989, 675 (HCJ); AMI 1989, 70; IER 1989, 41 (JHS); GRUR Int 1990, 233 (HER) (*Elvis Presley I*) and Court of Appeals 's-Hertogenbosch, September 18, 1990, NJ 1991, 281; IER 1990, no. 60, at 129; IER 1991, at 24 (REPdR); AMI 1991, at 48 (DWFV); BIE 1991, no. 91, at 332 (*Van Uden Productions/Winterland Productions*).

72. Supreme Court of the Netherlands, January 19, 1979, NJ 1979, 383 (LWH); BIE 1979, no. 23, at 163, *Auteursrecht 1979*, 52 (JHS) (*'t Schaep met de vijf Pooten*).

right to share in profits made by broadcasts? Should the players have a right to enjoin the broadcast if they remain unpaid?

[2] United States

In the *United States* the non-assignable right of privacy protecting mental interests and the assignable right of publicity protecting commercial interests are simply divided. However, the legal situation in cases where these two rights conflict is unclear. Most scholars disagree about the justification of the right of publicity.⁷³ The choice of the justification influences other questions about this right.

The current *content* of the right of publicity is unclear. The right of publicity is defined as a commercial tort which protects against appropriation of the commercial value of another's identity. Courts try to resolve conflicts which involve the right of publicity on the basis of an *ad hoc* balancing of all relevant circumstances. As a result, the outcome of cases is not always inconsistent. As in the Dutch "*Schaep*" case, American courts have held that publications about celebrities in the media may infringe their right of publicity. For example, in *Ali v. Playgirl, Inc.*⁷⁴ an American court granted a preliminary injunction, restraining the publication in "*Playgirl Magazine*" of a fictionalized drawing of the heavyweight boxing world champion Muhammed Ali as a nude black man seated in the corner of a boxing ring because there was an insufficient informative or newsworthy dimension to defendant's unauthorized use of Ali's likeness.

In *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*,⁷⁵ the professional baseball players of Baltimore Orioles argued that the broadcasts of telecasts of their baseball games infringed their right of publicity. The Seventh Circuit ruled that the Clubs' copyright in the fixed telecasts of major league baseball games preempted the players' right of publicity. Would the players have won the case if the telecasts had not been copyrighted by the club?

[B] Goal of Study

I had two goals in writing this book: to describe the actual legal protection that human beings receive against the unauthorized commercial use of their identity in the United States and the Netherlands, and to develop a future legal right that can be adopted in the United States and the Netherlands. This study purports to formulate coherent answers with regard to the following questions pertaining to a new right:

- a) *Justification*: What are the reasons for protection? Is it the protection of human dignity, prevention of unfair competition, incentive for skill and labor, incentive for efficiency, or prevention of unjust enrichment?

73. See § 2.2[E] and Chapter 7.

74. 447 F.Supp. 723, 206 U.S.P.Q. 1021, 3 Media L. Rep. 2540 (D.C.N.Y. 1978).

75. 805 F.2d 663, 231 U.S.P.Q. 673, 1986 Copr.L.Dec. P 26,024, 13 Media L. Rep. 1625, GRUR Int. 1988, 791 (C.A.7 1986).

- b) *Object*: What is protected? The name, the likeness or image, the voice, or other attributes which identify a human being? Only tangible pictures of persons? Or publicity values in general, resting in human beings and in of non-human beings, such as performing groups, animals or buildings? General terms which refer to the object of protection are "*identity*," "*personality*" or "*persona*".
- c) *Subject*: I use the term "*subject*" for the person who receives the protection: the owner. Who will receive the protection? all persons, or only *certain* persons who have achieved some celebrity status or have met some specific requirements?
- d) *Scope*:⁷⁶ This term does not refer to the infringing acts of a defendant but to the issue of whether defendant used the object which falls under the plaintiff's protection. Is the subject/licensor/original assignor identifiable from defendant's use? The scope is influenced by the test of identification. If only one percent of the public must recognize the plaintiff in defendant's use, the scope of protection is broader than under a test in which the percentage is fifty percent.
- e) *Content*: In a negative sense, this term refers to the acts that third parties cannot perform without the subject's permission. In a positive sense, the content refers to the subject's exclusive rights. Which types of use are unlawful? Which acts constitute an infringement? Terms that will be used in this context are: exploitation, *commercial use*, media use, nonmedia use, etc.
- f) *Duration*: How long does the protection last? Does it survive the person it protects? If so, for how long should the law grant a postmortem protection?
- g) *Exploitation*: How can the subject exploit his exclusive rights? By consenting to specific types of use, by granting an exclusive license, or by assigning the right to another party?
- h) *Remedies*: How can a plaintiff redress defendant's infringing acts? Is an injunction possible? What damages may be recovered?
- i) *Nature*: What is the character of the protection? Is it a personality right, an intellectual property right, protection against a tort or any of these?
- j) *Cumulation*: What is the relation with other legal theories? Is protection under two or more theories possible? Is protection preempted by other legal theories?

1.4 Outline

This study is divided into two parts. I have chosen for a division into two parts: a neutral part which describes the actual legal situation, and a normative part, in which I describe my personal views, dispute current legal theories, and reject the outcome of certain American and Dutch court decisions. The disadvantage of this

76. Note that in legal literature the term "scope" is also used in a broader sense, as a synonym for the content of a right.

division is that several cases are discussed twice. However, in my opinion, this disadvantage is outweighed by the advantage of having a more neutral description of the actual legal situation which is not influenced by my personal views.

In *Part I* (Chapters 1-5), the actual legal rights which may provide protection against unauthorized use of a person's identity in the United States (Chapters 2 and 3) and the Netherlands (Chapters 4 and 5) are described. *Chapter 2* describes the current status of the right of publicity. *Chapter 3* describes the legal theories of defamation law, the right of privacy, the intentional infliction of mental distress, copyright law, trademark law, and false advertising. This chapter is not restricted to the commercial use of persona. However, this chapter is necessary in order to understand the "*own position*" of the right of publicity, and to understand my critical comments on many right of publicity cases in part II, which, in my opinion, should have been decided based on one of the theories discussed in Chapter 3.

Chapter 4 deals with Dutch portrait law. Since the portrait right is codified in the Dutch Copyright Act 1912, the relation with copyright law is discussed in this chapter. The portrait right protects both commercial and privacy interests.

In the same way as Chapter 3, *Chapter 5* discusses the right to one's personal name, the misappropriation theory, the general personality right, neighboring rights, trademark law, and misleading advertising.

Part II (Chapters 6-12) begins with a brief comparison of the legal situation in the United States and the Netherlands and my personal view as to how the current American right of publicity tort should be developed further into a new intellectual property right that is also suitable for the Netherlands (Chapter 6). *Chapters 7-10* deal with the *main* issues that must be resolved before a coherent property right in a person's identity can be recognized. Such issues are:

- 1) *Chapter 7*: What are the *justifications* for granting protection? This is an important question because its answer influences that to many other questions.
- 2) *Chapter 8*: What is the *nature* of the protection; is it an *assignable intellectual property right*? And if so, how can the potential conflicts between *privacy* or personality interests of the licensor or assignor and the commercial interests of the licensee or assignee be resolved? This conflict in particular, which stems from the idea that personality and commercial interests are often inextricably intertwined, seems to be the reason for adhering to the concept of a non-assignable personality right in the continental European countries. In legal literature, *descendibility* is a major issue. The answer to this issue follows from the justification and characterization.
- 3) *Chapters 9 and 10*: What is the *content* of the protection: Which *acts* of the defendant should be held to be an infringement? The American right of publicity is usually defined as a tort with a focus on the commercial damage to the plaintiff. Many authors have suggested that all problems be resolved by recognizing a general fair use exception. The disadvantage of such an approach is that it provides no clear rules. In my opinion, the content question is one of the most difficult, because a precise definition of

the content of a right requires that the interests protected by the principles of free speech be taken into account. It follows from Chapters 9 and 10 that the right of publicity can be defined in terms of exclusive rights, which are balanced with the freedom of speech.

Chapter 11 discusses the protection of *performers* in the United States, because American courts do not clearly distinguish between the two different rights which they recognize under the current American right of publicity: a person's right in his identity and a performer's right in his performance. This distinction is important because it helps in defining the content of both rights. The protection of performers in the Netherlands is described in Chapter 5 because their rights are described in a specific Act: the Neighboring Rights Act.

In *Chapter 12*, I conclude that it follows from Chapters 6 to 11 that the shape and contours of a Right of Persona can be defined in such a way that it can be viewed as an assignable, descendible, intellectual property right in human identity, with a specific content, in which the principles of free trade and free speech are integrated. This right can be adopted in the Netherlands and the United States. The answers to the questions listed in § 1.3[B] are summarized in § 12.2.

CHAPTER 2

UNITED STATES: THE RIGHT OF PUBLICITY

2.1 Introduction

[A] Outline Chapters 2 and 3

Chapters 2 and 3 describe to what extent, according to American law, persons can control the commercial exploitation of their portrait, name, voice and other identifying characteristics.

Chapter 2 discusses the right of publicity. Section 2.2 describes the historical *development* of right of publicity. The *object, subject, scope, content, duration and exploitation* of the right of publicity are respectively discussed in §§ 2.3, 2.4, 2.5, 2.6, 2.7, and 2.8. Section 2.9 deals with the *remedies* in case of infringement of the right of publicity. The *justification* theories of the right of publicity are discussed in Chapter 7.

Chapter 3 discusses the other relevant theories of defamation Law (§ 3.1), the right of privacy (§ 3.2), infliction of mental distress (§ 3.3), copyright law (§ 3.4), trademark law (§ 3.5) and false advertising (§ 3.6).

[B] For Non-Americans: Introduction to the Legal System of the United States

The authoritative norms of the American legal system consist of *federal* law and *state* law. This law is embodied in *legislation* of Congress and state legislatures, and in *case law*. The U.S. Constitution is federal law of the highest order. Federal and state statutes can be challenged in the courts as unconstitutional. Federal laws are of a higher order than state laws. Article I, Section 8 of the Constitution (Supremacy Clause) provides that federal statutes made in pursuance of the Constitution are of superior authoritativeness to any state constitutional provisions or state legislation. An example of a federal law is the Copyright Act, which preempts the states from creating laws which grant equivalent rights within the subject matter of copyright.¹

The right of publicity is state law. No federal right of publicity exists. In some states where the legislature enacted a "*right of publicity*" act, the right of publicity is (state) *statute law*. In other states, the right of publicity is recognized by courts as the *common law* of the state. In some states, such as California, courts recognize in addition to the statute right of publicity, a common law right of publicity.

The American "*common law*" system, unlike the Dutch "*civil law*" system, explicitly recognizes the doctrine of precedent, known as the principle of *stare decisis*: past judicial decisions are "*generally binding*"² for the disposition of factually similar present conflicts in the territory of the courts' jurisdiction. In

1. See 17. U.S.C. § 301(a).

2. A Court follows precedents, unless when it is persuaded, in exceptional cases, that the precedent is too unsound or socially unfair to be adhered to. Cf. *Black's Law Dictionary*, at 1261 (5th ed. 1979).

addition, American courts draw upon decisions of courts in other jurisdictions if they are considered to have *persuasive authority*. As a result, many states have the similar legal rules. Therefore, it is possible to describe the "right of publicity" by looking at the statutes and court decisions of different states.

Since the right of publicity is state law, in principle, plaintiffs must submit their claim with the relevant state court. Each of the fifty states has its own system of state courts. In the more populous states three tiers of courts exist: a) (inferior) trial court,³ b) (intermediate) appellate court, and c) (appellate) court of last resort. In most states the highest state court is called the Supreme Court.⁴

However, many right of publicity cases are decided by federal courts. Federal courts have jurisdiction in three types of cases: a) cases involving the United States as a party, b) cases involving a "federal question," i.e. the interpretation of the U.S. Constitution or of some federal statute or regulation, and c) cases involving "diversity of citizenship," i.e. a suit between citizens of different states. In the federal system also three tiers of courts exist: a) District Courts,⁵ b) Courts of Appeals,⁶ and c) in last resort, the U.S. Supreme Court.⁷ Many right of publicity cases are decided by federal courts under the diversity rule.

The United States is divided into twelve judicial "circuits", each with its own Court of Appeals. For example California is part of the Ninth Circuit, and New York is part of the Second Circuit. There are only twelve federal Courts of Appeals. Instead of speaking of the United States Court of Appeals, Ninth Circuit, one also speaks of the Ninth Circuit. Some of the most important right of publicity cases were decided by the Ninth Circuit.

2.2 Development of Right of Publicity

[A] Right of Privacy as a Proprietary Right

In the 1902 "*Roberson*" case,⁸ the highest court of New York rejected the common law right of privacy.⁹ Three years later in the "*Pavesich*" case,¹⁰ the highest court of Georgia recognized the existence of a distinct common law right of privacy. For the next thirty years there was a continued judicial debate as to

3. *E.g.* the Superior Court of Los Angeles.

4. An important exception is the state New York, where the court of first instance is called the "Supreme Court". The highest New York State court is called the "Court of Appeals."

5. Some states have only one district court, the more populous states have two to four district courts. Since 1933, decisions of district courts are published in the Federal Supplement, and can be recognized by its abbreviation "*F. Supp.*"

6. The decisions of the twelve federal Courts of Appeals (including the one of the District of Columbia) rendered between 1929-1993 are published in the Federal Reporter, and can be recognized by the abbreviation "*F.2d.*" Since 1993 the abbreviation is "*F.3d.*"

7. The decisions of the U.S. Supreme Court are published in the United States Reports ("*U.S.*"), the Supreme Court Reporter ("*S.Ct.*"), and the United States Supreme Court Reports, Lawyers' Edition ("*L.Ed.*" or "*L.Ed. 2d*").

8. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902). See discussion in § 3.2[A].

9. The right of privacy is discussed *infra* at § 3.2.

10. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

whether the right of privacy existed in other states. But in the 1930s, the tide turned in favor of the right of privacy, and the decisions rejecting the right of privacy began to be overruled.¹¹

During the period when the right of privacy was strongly disputed, some courts grounded their arguments for a right of privacy on a property theory. Warren and Brandeis had suggested that "the right of property in its widest sense [...] affords alone that broad basis upon which the protection which the individual demands can be rested."¹² In their view the right of property included the right to an inviolate personality. But instead of using the right of private property in "an extended and unusual sense," they preferred the "right to privacy."¹³ In some early cases, courts recognized an independent right of privacy, protecting against unpermitted commercial use of identity, on the basis of a property right in one's own name and likeness. A reference point was the old case *Brown Chemical Co. v. Meyer*, in which the U.S. Supreme Court argued:

"A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property."¹⁴

This argument was initially used only in the context of a man's right to use his own name fairly on his own goods. But in the *Edison v. Edison Polyform Mfg. Co.* case, this right was extended to a case where defendant had exploited the name of inventor Thomas Edison:

"If a man's name be his own property, as no less an authority than the United States Supreme Court says it is (*Brown Chemical Co. v. Meyer*, 139 U.S. 542, 11 S.Ct. 625, 35 L.Ed. 247) it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it."¹⁵

Edison was a famous man. But non-famous persons also received protection against unpermitted commercial use of their identity. In *Munden v. Harris*,¹⁶ the defendant had used a picture of a five-year-old child in an advertisement for Elgin watches. In this case, the court recognized the right of privacy in Missouri. However, as in the "*Edison*" case, the individual's interest in the commercial value of his identity was regarded as proprietary in nature. The right of privacy encompassed the right to one's own image. The court expressly recognized the valuable property right of an individual to his own likeness, stating:

11. See Prosser, *Privacy*, 48 *Cal. L. Rev.* 383, at 386 (1960). Cf. *Restatement of Torts* § 867 (1939).

12. *The Right to Privacy*, 4 *Harv. L. Rev.* 193, at 211 (1890).

13. *Id.* 4 *Harv. L. Rev.* 193, at 213.

14. 139 U.S. 542, 11 S.Ct. 625, at 627, 35 L.Ed. 247 (1891).

15. 73 N.J. Eq. 136, at 141, 67 A. 392, 3 *Buchanan* 136 (N.J.Ch. 1907). The court discussed the limits of the "so-called right of privacy," at 73 N.J. Eq. 136, 142. The *Brown Chemical* case is a case of the U.S. Supreme Court.

16. 153 Mo.App. 652, 134 S.W. 1076 (1911).

"If a man has a right to his own image as made to appear by his picture, it cannot be appropriated by another against his consent. [...] One may have peculiarity of appearance, and if it is to be made a matter of merchandise, why should it not be for his benefit? It is a right which he may wish to exercise for his own profit, and why may he not restrain another who is using it for gain? If there is value in it, sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?"¹⁷

[B] Right of Privacy as a Personal Right

This line of cases, which recognized a proprietary nature of the right of privacy protecting against commercial use of an individual's identity, was gradually overruled by courts, stressing the personal character of the right of privacy with a focus on injury to the feelings. Courts eliminated the property aspect of the right of privacy and viewed the right of privacy as a purely personal right.¹⁸ This caused several obstacles to prevent the unauthorized commercial use of another's identity.

The *first* difficulty was that only the plaintiff himself, not third parties, could state a claim for invasion of privacy. For example, the consul of Austria-Hungary could not claim invasion of privacy on behalf of Emperor Franz Josef, when defendant, a beneficent association, used the emperor's name and portrait in advertising its business, because the privacy claim was personal to Franz Josef, and it was not up to the consul to remedy it.¹⁹

A *second* problem was that due to its personal nature, the right of privacy is non-assignable. The non-assignability greatly diminished the possibility for persons to exploit the commercial value of their identity, since advertisers could not get exclusive rights enforceable against third parties. Permission to use someone's identity for commercial purposes was only valid as a release to the purchaser. A famous case is *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*²⁰ Hillerich & Bradsby had contracts with certain famous baseball players for the exclusive use of their names on bats. When Hanna started using the same names on its bats, Hillerich & Bradsby alleged that its property rights in the names had been violated. The District Court granted an injunction against Hanna prohibiting it from using the names of baseball players who had given Hillerich & Bradsby the exclusive right to their names. The District Court followed the old property theory holding that

"[b]aseball players, like any other individuals, have a property right to their names. This property right is capable of assignment and has been assigned by certain players to the

17. *Id.* 153 Mo.App. 652, at 658-659 (1911).

18. *Cf.* Gordon, Right of Property in Name, likeness, Personality and History, 55 *Nw. U.L. Rev.* 553, at 560 (1960).

19. *Von Thodorovich v. Franz Josef Beneficial Ass'n*, 154 F. 911, at 912 (C.C.Pa. 1907). However, the court granted an injunction restraining the use of the name and portrait of the emperor on the theory that defendant was misleading ignorant immigrants, leading them to believe that defendant was under the special patronage of the emperor.

20. 78 F.2d 763, 101 A.L.R. 484 (C.A.5 1935).

plaintiff, and the plaintiff has used and advertised such right and has such right exclusively, irrespective of any trademark or unfair competition law."²¹

Hanna appealed, and the Fifth Circuit reversed. The court remarked that Hanna used the names of the players without infringing trademark rights or unfair competition. The question was whether the right of privacy was a property or personal right. The court found it more reasonable to view it as a personal right. But even if conceived as a property right, the right of privacy could not be vendible in gross so as to pass from purchaser to purchaser unconnected with any trade or business. The court said in 1935: "Fame is not merchandise. It would help neither sportsmanship nor business to uphold the sale of a famous name to the highest bidder as property."²² Hillerich & Bradsby could not get the property of the name and likeness of the players. The exclusive contracts only prevented the players from objecting to the purchaser's use of their names and likeness.

A *third* problem was that some courts were unwilling to protect celebrities against unpermitted commercial use of their identity, on the grounds that they were public figures, who had dedicated their life to the public. These courts reasoned that public figures had waived their right of privacy with respect to the public role which made them famous. In *Melvin v. Reid*, the California Appellate Court stated: "[The right of privacy] does not exist where a person has become so prominent that by his very prominence he has dedicated his life to the public, and thereby waived his right to privacy. There can be no privacy in that which is already public."²³

In the "*O'Brien*" case²⁴ Davey O'Brien could not invoke his right of privacy to prevent defendant, the Pabst beer company, from using his photograph without his permission on a football calendar which advertised Pabst beer. O'Brien felt upset because he was a member of the Allied Youth of America which discouraged alcohol among young people, and he had always refused to sell his endorsement for beer and alcoholic beverages. The Second Circuit found that there was no false suggestion that O'Brien endorsed or recommended the consumption of Pabst beer, and that his right of privacy had not been violated by the publishing of his picture, since he was perhaps the most publicized football player of the year 1938-39. The court did not distinguish between use in an advertisement for beer and sports media attention. It conceived the right of privacy as the right to be let alone, which protects against unwanted publicity given to a private person. O'Brien could not state a claim for invasion of privacy because the unpermitted commercial use was not offensive to a reasonable person. The fact that he was unpaid was in itself not so offensive as to give a

21. *Id.* 78 F.2d 763, at 766.

22. *Id.* 78 F.2d 763, at 766.

23. 112 Cal.App. 285, 297 P. 91, at 92 (1931). Cf. *Paramount Pictures v. Leader Press*, 24 F.Supp. 1004, at 1007 (D.C.Okla. 1938): "Neither the stars nor the plaintiffs are in a position to claim the right of privacy for the stars because their productions, faces and names are sold to the public."

24. *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (C.A.5 1941). See for other examples: Nimmer, *The Right of Publicity*, 19 *Law & Contemp. Prob.* 203, 205-206(1954).

right of action in privacy. In this view, famous persons could not object that their identity was used against their will to sell another's product.

A *fourth* obstacle to prevent the unauthorized commercial use of personal identity was that the personal right of privacy evolved as a remedy for mental injury, caused by offensive publicity,²⁵ not against commercial damage. Those courts which held that a plaintiff could state a claim for invasion of privacy in cases of a non-offensive unpermitted commercial use, focused on injury to feelings. Such a focus on mental injury did not help the growing group of famous and other persons who did not want to protest the commercial use of their identity in itself, but only the fact that their identity was used without payment. For example, in *Miller v. Madison Square Garden Corp.*,²⁶ the plaintiff, a famous performer known as "Broncho Charlie," sought to recover damages, alleging invasion of his privacy, because defendant had used his name and photograph on its "official program" for a six-day bicycle race, sold to clients who attended the race. The court found an invasion of privacy, since defendant had used plaintiff's identity for commercial purposes without permission. But plaintiff received only nominal damages in the sum of six cents because the use of plaintiff's name and photograph in the official program was not offensive. Relevant was that the plaintiff had testified that the use of his name and picture by defendant had neither subjected him to any ridicule nor caused him any humiliation whatsoever. Since the commercial value of plaintiff's identity to the defendant was undoubtedly more than six cents, Nimmer concluded that a plaintiff was unable to protect his publicity values under the right of privacy.²⁷

[C] Return to the Concept of Property: Right of Publicity

Before the mid-1950's, in almost every case, plaintiffs sued for invasion of privacy, even when they did in fact suffer commercial, not mental, injury.²⁸ In the above-mentioned 1941 "*O'Brien*" case, Judge Holmes wrote a dissenting opinion in which he distinguished the right of privacy from the property right to use one's name or picture for purposes of commercial advertisement. In his opinion, Pabst should pay the actual damages measured by the value of the unauthorized use of O'Brien's picture on the calendar. But the majority explicitly replied that it did not express an opinion on question whether O'Brien had a property right to recover commercial damages "*on quantum meruit*,"²⁹ for the

25. Cf. *Restatement of Torts* § 867 (1939).

26. 176 Misc. 714, 28 N.Y.S.2d 811 (N.Y.Sup. 1941). Cf. *Fisher v. Murray M. Rosenberg, Inc.*, 175 Misc. 370, 23 N.Y.S.2d 677, at 679 (N.Y.Sup. 1940): Professional dancer was entitled to compensatory damages only for injured feelings not commercial injury caused by defendant's unpermitted use of his photographs in advertisements for shoes.

27. Nimmer, *The Right of Publicity*, 19 *Law & Contemp. Prob.* 203, at 208-209 (1954).

28. See Gordon, *Right of Property in Name, likeness, Personality and History*, 55 *Nw. U.L. Rev.* 553, at 554 (1960).

29. Latin expression meaning "as much as he deserves," an equitable doctrine describing the extent of liability in unjust enrichment cases.

use of his name for advertising purposes, since he had not claimed infringement of his property right.³⁰

The question arises why in appropriation cases plaintiffs hardly ever stated a claim for infringement of their property right. Two factors appear to be relevant. In cases where the defendant appropriated an aspect of plaintiff's person, the concept of a non-assignable privacy right is probably easier to understand than the concept of an intangible property right in personal aspects such as a name or a face.

Another important factor must have been the 1935 "*Hanna*" case, in which the influential Second Circuit reversed a District Court's decision, which had recognized the property right of baseball players to their names.³¹ The outcome of the "*Hanna*" case was criticized by many commentators.³² The courts' premise that "fame is not merchandise" became increasingly unrealistic in the light of the growing practice of personality advertising and the obstacles to control the unauthorized commercial use of their identity.

In the 1953 "*Haelan*" case³³ the Second Circuit Court of Appeals returned³⁴ to the old property right concept and gave it a new name: "right of publicity." The Second Circuit explicitly stated: "We do not agree with *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*"³⁵ It held that Haelan Laboratories, which had obtained exclusive licenses from professional baseball players to exploit their names and pictures, had standing to sue Topps, which used names and pictures of the same baseball players without their authorization. Applying New York law, the court recognized a person's common law right in the publicity value of his photograph, which is independent of the right of privacy.³⁶ The Second Circuit said: "Whether it be labelled a "property" right is immaterial; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth."³⁷

After 1953 the recognition of the right of publicity was similar to the acceptance of the right of privacy. Some courts rejected it,³⁸ other courts

30. *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, at 170 (C.A.5 1941).

31. *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*, 78 F.2d 763, 101 A.L.R. 484 (C.A.5 1935). See *supra* ad § 2.2[B].

32. See Note, Assignability of Rights in a Person's Name as Property, 45 *Yale L.J.* 520 (1936); 36 *Colum. L. Rev.* 502 (1936), and 49 *Harv. L. Rev.* 496 (1936).

33. *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (C.A.2 1953).

34. Gordon, Right of Property in Name, likeness, Personality and History, 55 *Nw. U.L. Rev.* 553, at 605 (1960) concluded: "We have come full circle in the development of the law as it relates to property rights in the field of privacy and related areas."

35. *Id.* 202 F.2d 866, at 869.

36. But in *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, at 183, 485 N.Y.S.2d 220, 474 N.E.2d 580, 11 *Media L. Rep.* 1303 (N.Y. 1984) the New York Court of Appeals held that New York does not recognize an independent common law right of publicity, since this right is encompassed under the Civil Rights Law (see § 3.2[A].) as an aspect of the right of privacy, which is exclusively statutory. But the statutory privacy right is not limited to situations where defendant's conduct has caused mental distress.

37. *Id.* 202 F.2d 866, at 868.

38. *E.g. Strickler v. National Broadcasting Company*, 167 F.Supp. 68, at 70 (D.C.Cal. 1958): "This Court does not feel it wishes to blaze the trail to establish in California a cause of action based upon the right of publicity."

recognized it.³⁹ The recognition of the right of publicity by the U.S. Supreme Court in the 1977 "*Zacchini*" case⁴⁰ did give this right a major impetus.

Since 1977 more than 150 law review articles have appeared dealing with the right of publicity.⁴¹ Many authors have discussed whether the right of publicity was an old legal concept under a new label or a new common law right that must be distinguished from other legal rights which can be involved when a person's identity is used without permission, such as the defamation law, right of privacy, copyright law, trademark law, or false advertising.⁴² The majority view is that a right of publicity claim has its own place in the panoply of legal claims that can be involved when someone's identity is used without permission.⁴³

Today, under either common law⁴⁴ or statute,⁴⁵ the right of publicity has been recognized as the law of at least twenty-four states.

[D] Definition of the Right of Publicity

The right of publicity has been defined variously. In the 1953 "*Haelan*" case, the Second Circuit described the "right of publicity" for the first time:

"We think that [...] a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture [...]. This right might be called a 'right of publicity.'"⁴⁶

In his article published in 1954 under the title "The Right of Publicity," Nimmer defined this right as

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39. *E.g. Hogan v. A.S. Barnes & Co., Inc.*, 114 U.S.P.Q. 314, at 320 (Pa.Ct. 1957): "[T]here have been a great many cases decided under the heading 'right of privacy' which we feel do not properly belong under the heading and which, although we believe they were properly decided, more appropriately should be considered as cases coming under the heading 'right of publicity';" *Sharman v. C. Schmidt & Sons, Inc.*, 216 F.Supp. 401, 407 (D.C.Pa. 1963): "Public figures in the celebrity category have a valuable property right in their name and image."
 40. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977). The case is discussed at § 11.3[B].
 41. See for bibliographies on the Right of Publicity: Lawrence, *The Right of Publicity: A Research Guide*, 10 *Comm-Ent L.J.* 143-392 (1987), and Houdek, *Researching the Right of Publicity: a Revised and Comprehensive Bibliography of Law-related Materials*, 16 *Hastings Comm-Ent L.J.* 385 (1994).
 42. See Chapter 3.
 43. Cf. McCarthy, *The Rights of Publicity and Privacy*, Chapter 5 (Rev. 1993); Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 *Hastings L.J.* 853, at 853 (1995): "After forty years of wandering in a definitional wilderness, the right of publicity appears to have reached the promised land of independent status, a distinct right and remedy unmoored from privacy or any other analogic anchor."
 44. The common law right of publicity has been recognized in California, Connecticut, Florida, Georgia, Hawaii, Illinois, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Utah, and Wisconsin. See McCarthy, *The Rights of Publicity and Privacy*, § 6.1[B] (Rev. 1993).
 45. Statutory provisions that encompass a right of publicity exist in California, Florida, Kentucky, Massachusetts, Nebraska, Nevada, New York, Oklahoma, Rhode Island, Tennessee, Texas, Virginia, and Wisconsin. See McCarthy, *The Rights of Publicity and Privacy*, § 6.4-15 (Rev. 1993).
 46. *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866, at 868 (C.A.2 1953). See § 1.2.

"the right of each person to control and profit from the publicity values which he has created or purchased."⁴⁷

According to Nimmer, the right of publicity is not only infringed if defendant appropriates plaintiff's publicity values by using his name and likeness for purposes of trade or advertising, but also if defendant appropriates plaintiff's publicity values in television programs.⁴⁸

This view received support in 1977 when the U.S. Supreme Court dealt for the first time with the "right of publicity" in the famous "*Zacchini*" case.⁴⁹ The Court recognized that the right of publicity not only protects against appropriation of the entertainer's reputation but also against appropriation of a performance.⁵⁰

In 1982, Ausness stated that the right of publicity protects two different interests. In most cases, the right of publicity protects the "recognition values," publicity values that arise from the goodwill associated with the name or likeness of a famous person. In addition, the right of publicity protects "performance values."⁵¹ The right of publicity protects not only against appropriation of the commercial value of a person's identity but also against reproduction of a performance.

In 1987, J. Thomas McCarthy's "*The Rights of Publicity and Privacy*" was published.⁵² In this first and important treatise on the right of publicity, McCarthy stated in his introduction:

"The Right of Publicity is simply this: the inherent right of every human being to control the commercial use of his or her identity. This legal right is infringed by unpermitted use which damages the commercial value of this inherent human right of identity and which is not immunized by principles of free press and free speech."⁵³

In 1995, the Restatement (Third) of Unfair Competition was published by the American Law Institute.⁵⁴ The tort of "Appropriation of the Commercial Value of a Person's Identity: The Right of Publicity" is defined in § 46:

"One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49."⁵⁵

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47. 19 *Law & Contemp. Prob.* 203, at 216 (1954).
 48. *Id.* 19 *Law & Contemp. Prob.* 203, at 217.
 49. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977). *See* § 11.3[B].
 50. *See* § 2.3[D].
 51. The right of Publicity: A 'Haystack in a Hurricane', 55 *Temp. L.Q.* 977, at 989-94 (1982). *Cf.* Baird, Human Cannonballs and the First Amendment: *Zacchini v. Scripps-Howard Broadcasting Co.*, 30 *Stan. L. Rev.* 1185, at 1186, fn. 7 (1978).
 52. Loose-leaf edition, published by Clark Boardman Callaghan as part of its Entertainment and Communications Law Library.
 53. McCarthy, *The Rights of Publicity and Privacy*, vii (Rev. 1993).
 54. *Restatement (Third) of Unfair Competition*, as Adopted and Promulgated by the American Law Institute (1995).
 55. *Restatement (Third) of Unfair Competition* § 46 (1995). *See* for my comment on this *Restatement* § 6.2[B].

Although, like Ausness, McCarthy and the Restatement (Third) of Unfair Competition §§ 46-49 (1995) recognize the two different interests protected by the right of publicity, they do not distinguish between them in their definitions. In McCarthy's opinion, an unpermitted reproduction or a competitive imitation of an entertainer's live performance can constitute a commercial use of his identity which infringes the right of publicity.⁵⁶ Similarly, the Restatement (Third) of Unfair Competition (1995) provides that the right of publicity also protects against the unauthorized broadcast of the plaintiff's performance or the sustained imitation of the plaintiff's performing style.⁵⁷

There are many definitions of the right of publicity. But today the prevailing view seems to follow the view of McCarthy and the Restatement (Third) of Unfair Competition: its subject is a human being, its object consists of the individual's identifying characteristics, such as name, voice or likeness, and his non-copyrightable live performance, and it protects the commercial interest in controlling the commercial use of the identifying characteristics and live performances. Probably, the Restatement will have a great influence in the further development of the right of publicity, especially in those States which have not yet recognized the right of publicity.

[E] Justifications of the Right of Publicity

Courts and commentators disagree about the justification of the right of publicity. In the 1953 "*Haelan*" case, the Second Circuit stated:

"For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures."⁵⁸

According to Nimmer it is a person's *labor and investment* in creating an object with a publicity value that justifies the protection of the right of publicity.⁵⁹ Other justifications mentioned are the *incentive* justification, stating that the right of publicity creates an incentive to invest in the creation of a valuable identity by becoming a celebrity, the *unjust enrichment* justification, stating that the right of publicity prevents that advertisers reap where they have not sown, and the *consumer protection* justification, stating that the right of publicity prevents the use of false endorsements. These justifications are discussed in Chapter 7.

56. *Id.* The Rights of Publicity and Privacy, §§ 8.13-16 (Rev. 1993).

57. *Restatement* (Third) of Unfair Competition § 47, comment d. (1995).

58. *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866, at 868 (C.A.2 1953).

59. *See* § 7.4[A].

2.3 Object: What Is Protected By the Right of Publicity?

[A] Minority View: The Right of Publicity as a General Merchandising Right, Protecting Merchandising Properties

The majority opinion is that the right of publicity does not protect a tangible object, such as a photograph of a person, but intangible publicity values in a specific object.⁶⁰ However, commentators disagree about this object: only human beings, or also other non-human entities such as animals or other media symbols made popular by television series, musical groups, famous buildings, or prestigious institutions, such as universities.

Some authors have proposed a right of publicity that protects publicity values in general against appropriation by persons who have not created or purchased this publicity value. *Nimmer* was the first author to support this view. He defined the right of publicity as "the right of each person to control and profit from the publicity values which he has created or purchased."⁶¹ *Nimmer* did not see any necessary relationship between the right of publicity and human beings as in the case of the right of privacy.⁶² He stated that the right of publicity should not solely protect the publicity values of human beings, but also the publicity values in non-living objects that are made popular through effort:

"Moreover, since animals, inanimate objects and business and other institutions all may be endowed with publicity values, the human owners of these non-human entities should have a right of publicity (although no right of privacy) in such property, and this right should exist (unlike unfair competition) regardless of whether the defendant is in competition with the plaintiff, and regardless of whether he is passing off his own products as those of the plaintiff."⁶³

Nimmer justified this right of publicity by referring to "a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors, unless there are important countervailing public policy considerations."⁶⁴ Thus, in this view, the right of publicity in non-human objects belong to the person who made these objects popular. For example, the legal person that produced a television series which popularized an animal (*e.g.* dolphin Flipper) or a car (*e.g.* the General Lee car featured in television series *The Dukes of Hazzard*), will own the right of publicity in such objects.

This view received some support in the 1980s, when the licensing of publicly recognizable properties, such as popular fictional characters or famous

60. See about a discussion of the subject-object relation *infra* at § 8.2.

61. The Right of Publicity, 19 *Law & Contemp. Prob.* 203, at 216 (1954).

62. See *Restatement (Second) of Torts* § 652i, comment c. (1977). Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded. The right of privacy protects against injury to human feelings. A non-human being, *e.g.* a corporation as such, has no right of privacy: See *United States v. Morton*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950).

63. *Id.* 19 *Law & Contemp. Prob.* 203, at 216 (1954).

64. *Id.* 19 *Law & Contemp. Prob.* 203, at 216 (1954).

trademarks, for use on or in association with specific products or services to foster its sales had become a fast-growing phenomenon, labeled "*character merchandising*"⁶⁵ or commercial use of "*merchandising properties*."⁶⁶ Since the United States do not recognize a general merchandising right,⁶⁷ and traditional legal theories of copyright law, trademark law, dilution law, and unfair competition law could not provide full protection against all forms of appropriation of merchandising properties, some authors have proposed extending the concept of the right of publicity⁶⁸ to trademarks and other popular symbols, such as fictional characters.

For example, *Winner* has proposed to use the concept of the right of publicity to protect the "*persona*" of a trademark, that is its identity, apart from its function of identifying the source of goods and services and beyond the traditional limits of the likelihood of confusion and dilution criterions.⁶⁹ Also, *Mostert* wanted to prevent the parasitic use of popular symbols. Instead of going through the laborious process of creating a new right, he proposed to extend the right of publicity "to protect the intellectual property interest in the commercial magnetism of popularity values vested in a trademark or fictional character."⁷⁰ In his opinion there would seem to be no reason not to extend the right of publicity in this manner, since the property interest in the commercial magnetism of popularity values vested in a trademark or fictional character represents an identical independent property interest.

Most courts have not followed such proposals. Only a few courts have extended the right of publicity to non-human entities. Although there is no case law which recognized a right of publicity for animals, *Nimmer* cited as a "proto

65. See Hester and Besha, *Character Merchandising in the USA; A Search for Definable Remedies and a Warning of Potential Liability*, *AJPL* 579 (1978); Battersby and Grimes, *The Law of Merchandising and Character Licensing* § 1.01 (1991). Cf. In the United Kingdom: Adams, *Merchandising Intellectual Property*, London, 1987; In France: Bigne, *Droits Dérivés, licensing et character merchandising*, Paris, 1987; In Germany: Pagenberg, *Protection of Get-Up and Character merchandising Under German Law*, 18 *IIC* 457 (1987). See also the *WIPO report on Character Merchandising of november 1993*, Document WO/INF/93; Ruijsenaars, *The WIPO-Report on Character Merchandising*, 25 *IIC* 532 (1994).

66. This term was introduced by Grimes and Battersby, *The Protection of Merchandising Properties*, 69 *Trademark Rep.* 431 (1979). It includes "any word, name, title, symbol, character or personality image, design or combination thereof which, when used on or in association with a particular product, will create consumer demand therefor." *Id.* at 431.

67. However, some states grant a protection beyond the traditional protection granted by trademark and dilution law to specific symbols. See e.g. N.Y. General Business Law § 397 (protecting against use of name or other identification of certain non-profit organizations "for advertising purposes or for purposes of trade.") Cf. Denicola, *Institutional Publicity Rights: An Analysis of The merchandising of Famous Trade Symbols*, 62 *N.C.L. Rev.* 603 (1984), reprinted in 75 *Trademark Rep.* 41 (1985), arguing that on the grounds of prevention of unjust enrichment there should exist an exclusive right in the merchandising value of (famous) trade symbols, independent of the right of publicity.

68. The right of publicity is independent of any likelihood of confusion or dilution, see § 2.5.

69. *Winner*, *Right of Identity: Right of Publicity and Protection for a Trademark's "Persona"*, 71 *Trademark Rep.* 193-214 (1981). *Winner* called this not the right of publicity but the Right of identity of a trademark owner.

70. *Mostert*, *The Parasitic Use of the Commercial Magnetism of a Trademark on Non-Competing Goods*, 11 *Eur. Intell. Prop. Rev.* 342, at 348 (1986).

right of publicity case" *Lawrence v. Ylla*.⁷¹ In this case, plaintiff claimed invasion of her privacy, when she found that a photograph of her dog was used in an advertisement for the National Biscuit Company, which was published in the New York Times. It was held that under New York law the right of privacy does not cover a case of a photograph of a dog, but the court found that one of the defendants, the photographer, was liable under a contract theory. Remarkable was that the court also enjoined the other defendants, the National Biscuit Company, the advertising agency and the newspaper from further use of the photograph of the dog. Therefore, Nimmer viewed this case as an example of an early recognition of the protection of publicity values. But probably the injunction was based on a contract theory.

However, in a similar case, *Bayer v. Ralston Purina Co.*,⁷² the defendant was not held liable for its advertising use of a photograph of plaintiff's registered Appaloosa horse. The court said that there was no invasion of plaintiff's privacy, because the photograph of the horse used in defendant's advertisement did not identify the plaintiff.

The cases where the right of publicity was extended to non-human entities involve *musical groups*. The first case was the "Winterland" case.⁷³ The plaintiff, Winterland Concessions, produced shirts bearing the names of a number of entertainers and musical groups, such as the Rolling Stones, Electric Light Orchestra, Santana, and Grateful Dead, on the basis of an exclusive license from these entertainers and groups. Plaintiff sued defendant when it sold shirts bearing the names of the same entertainers and musical groups without a license from those licensors. The District Court held that the unauthorized printing on shirts of names and/or likenesses of entertainers and musical groups constituted a violation of the right of publicity of each of those entertainers and musical groups. The plaintiff licensee was entitled to a preliminary injunction since the defendant was in violation of rights of the exclusive licensee. The court said that the "right of publicity encompasses the right of each of the plaintiff entertainers and musical groups to have the sole right to commercially exploit their name and likeness."⁷⁴ The court cited the U.S. Supreme Court which stated in the "Zacchini" case: "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

71. 184 Misc. 807, 55 N.Y.S.2d 343 (N.Y.Sup. 1945). Cf. *Universal City Studios, Inc. v. Montgomery Ward & Co.*, 207 U.S.P.Q. 852, at 858 (N.D.Ill. 1980) with respect to defendant's use of the marks JAWS and JAWS 2 on trash compactors: "Plaintiffs are also likely to succeed at trial under their claim for misappropriation of merchandising properties. Plaintiffs' marks JAWS and JAWS 2 are such properties because they create consumer demand for products with which they are associated [...] Likelihood of confusion is not required."

72. 484 S.W.2d 473, 87 A.L.R.3d 1275 (Mo. 1972).

73. *Winterland Concessions Co. v. Sileo*, 528 F.Supp. 1201, 213 U.S.P.Q. 813 (D.C.Ill. 1981).

74. *Id.* 528 F.Supp. 1201, at 1213. For this conclusion, the court cited three cases, and Prosser, Torts, 804 (4th ed. 1971). But the cases cited and Prosser did not discuss the extension of the right of publicity to non-human entities such as musical groups.

plaintiff that would have market value and for which he would normally pay."⁷⁵ Thus like Nimmer, the court did not restrict the right of publicity to protect only publicity values of human beings and applied the right of publicity to musical groups, entitling them to the publicity value, resulting from their labors.

In *Bi-Rite Enterprises, Inc. v. Button Master*,⁷⁶ the plaintiffs, individual entertainers, several rock groups and their authorized licensee, alleged that defendants infringed the right of publicity by manufacturing and distributing buttons and other novelty items bearing among other things the marks of the plaintiff performers and rock groups. The court repeated the rationale for extension mentioned in the "*Winterland*" case, and found that not only the individual performers but also the musical groups had a right of publicity in their "persona." Citing Winner's article, the court defined "persona" as "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."⁷⁷ In the court's opinion 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."⁷⁸

Some courts have explicitly rejected claims of plaintiffs who claimed a right of publicity in symbols that referred to non-human entities. For example, in *Heinemann v. General Motors Corporation*,⁷⁹ plaintiff, Heinemann, the owner of a modified automobile named "*The Judge*" alleged infringement of his right of publicity when defendant, General Motors, gave a new automobile model the same name. The court rejected plaintiff's claim for infringement of the right of publicity, stating that the defendant did not use plaintiff's name or likeness.

In *Eagle's Eye, Inc. v. Ambler Fashion Shop, Inc.*,⁸⁰ the court clearly stated that the right of publicity cannot be used to extend the protection of trademarks beyond the scope of trademark law: "it is clear that the right of publicity inures to an individual who seeks to protect and control the commercial

75. Id. Citing *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, at 576, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977).

76. 555 F.Supp. 1188, 217 U.S.P.Q. 910, 9 Media L. Rep. 1531 (D.C.N.Y. 1983).

77. Id. 555 F.Supp. 1188, at 1199, citing Winner, Right of Identity: Right of Publicity and Protection for a Trademark's "Persona," 71 *Trademark Rep.* 193, at 193 (1981).

78. Id. 555 F.Supp. 1188, at 1199. See also *Brockum Co., a Div. of Krimson Corp. v. Blaylock*, 729 F.Supp. 438, at 446 (D.C.Pa. 1990): "The unauthorized printing on defendant's T-shirts of the name 'The Rolling Stones' is a violation of the right of publicity of that musical performing group."; *Nice Man Merchandising, Inc. v. Logocraft Ltd.*, 23 U.S.P.Q.2d 1290 (E.D.Pa. 1992): The right of publicity is applicable in a case where defendant had illegally distributed posters bearing the likenesses and names of popular musical groups; *Apple Corps Ltd. v. A.D.P.R., Inc.*, 843 F.Supp. 342 (D.C. Tenn. 1993): plaintiff owns right of publicity of The Beatles music group and of its former members individually; *Philadelphia Orchestra Assn. v. Walt Disney Co.*, 821 F.Supp. 341, at 349, 27 U.S.P.Q.2d 1107, Copy. L. Rep. P27,091 (D.E.Pa. 1993) citing the Zacchini case the court stated: "Individuals and groups hold the right to control the commercial exploitation of their inherently distinctive names and likenesses, which right is referred to as their 'right of publicity.' Plaintiff holds a right of publicity in the inherently distinctive name, 'The Philadelphia Orchestra.'"

79. 342 F.Supp. 203, at 209, 173 U.S.P.Q. 214, 174 U.S.P.Q. 296 (D.C.Ill. 1972).

80. 627 F.Supp. 856, 227 U.S.P.Q. 1018 (D.C.Pa. 1985).

value of his name or likeness. This is to be distinguished from the facts at bar, in which a right of publicity is alleged to inhere in a corporate trademark."⁸¹

McCarthy warned that if one extends the right of publicity to non-human entities, such as business firms and institutions, one is in fact creating a substitute for the law of trademarks. This would shove aside the carefully constructed requirements for trademark protection. He criticized Winner's proposal to expand the protection given to business symbols beyond the traditional limits of "likely confusion" because she did not discuss the implications her proposal would have in the traditional law of trademarks or the dislocations imposed on the concept of free competition and an open market.⁸²

[B] Majority View: The Right of Publicity Protects Only the Identity of Human Beings

The majority of commentators and courts have defined the right of publicity as a right protecting the commercial value of the identity of *human beings* against unpermitted appropriation.⁸³ But within this majority opinion, different opinions exist regarding the question *who* should have a right of publicity: all human beings or, for example, only specific celebrities who exploit their identity. This issue is discussed in § 2.4. Assuming that the right of publicity protects the publicity values of human beings, the issue raises *how* they can be appropriated and *how* they are protected. There are many ways in which a defendant can exploit an individual's identity. The Restatement (Third) of Unfair Competition, § 46 (1995) states that a the commercial value of a person's identity can be appropriated by using the person's "name, likeness, or other indicia of identity." Courts and commentators have stated that the right of publicity protects such "indicia of identity." The next section analyzes the protection of these "*indicia*."

[C] The Right of Publicity Protects Indicia that Identify a Human Being

[1] General Terms: Identity, Personality or Persona

There are many ways in which a defendant can exploit an individual's identity. Traditionally, courts and commentators have held that the right of publicity protects against unpermitted use of a person's *name* or *likeness*,⁸⁴ but other indicia can also identify an individual. Prosser stated that there might be an appropriation of plaintiff's identity by impersonation, although in 1960 no such

81. *Id.* 627 F.Supp. 856, at 862.

82. *See* McCarthy, *The Rights of Publicity and Privacy*, § 4.8[C]-[D] (Rev. 1993).

83. *See* Restatement (Third) of Unfair Competition, § 46 (1995) discussing the "Appropriation of the Commercial Value of a Person's Identity." *See also* McCarthy's definition of the right of publicity *supra* at § 2.2[D].

84. *Cf.* Restatement (Second) of Torts § 652c which defines appropriation of "the name or likeness of another" as invasion of privacy.

cases appeared to have arisen.⁸⁵ Since then courts have held that the unpermitted commercial use of indicia that identify the plaintiff, such as his name, nickname, likeness, distinctive *voice, signature, typical objects,*⁸⁶ or *characterization* can infringe the right of publicity. As a general term for all the different elements by which a specific person can be identified, courts have used the word "identity," "personality,"⁸⁷ or "persona."⁸⁸ The Restatement (Third) of Unfair Competition (1995) has defined the right of publicity as a right protecting against "Appropriation of the Commercial Value of a Person's Identity."⁸⁹

Only if a defendant has used indicia of plaintiff's personality, persona or identity, can the right of publicity be infringed. In *White v. Samsung Electronics America inc.*,⁹⁰ the Ninth Circuit stated that

"[i]t is not important how the defendant has appropriated the plaintiff's identity, but whether the defendant has done so. [...] A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth."⁹¹

[2] Likeness; Look-Alikes

Many courts have held that the unpermitted commercial use of a picture of the plaintiff can be an infringement of the right of publicity, whether or not the plaintiff's name is mentioned. For example, in *Factors Etc., Inc. v. Pro Arts, Inc.*,⁹² the Second Circuit held that defendant's selling of a "memorial poster" with a photograph of Elvis Presley entitled "IN MEMORY" and below the photograph the dates "1935-1977" constitutes an infringement of the right of publicity.

The plaintiff must be identifiable from defendant's use. If the plaintiff's face is not visible, it is still possible that he is identifiable from other characteristics. But there can be no liability for publication of a picture of only a hand, leg

85. Prosser, *Privacy*, 48 *Cal. L. Rev.* 383, at 401, fn. 155 (1960).

86. See *infra* at § 2.3[C][5].

87. *Uhlaender v. Henricksen*, 316 F.Supp. 1277, at 1282, 1971 Trade Cases P 73,414 (D.C.Minn. 1970): "A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property."

88. *Factors Etc., Inc. v. Pro Arts, Inc.*, 444 F.Supp. 279, at 283 (D.C.N.Y. 1977); *Lugosi v. Universal Pictures*, 25 Cal.3d 813, at 834, 160 Cal.Rptr. 323, 603 P.2d 425, 10 A.L.R.4th 1150, 205 U.S.P.Q. 1090, 5 Media L. Rep. 2185 (Cal. 1979): "[T]he sale of one's persona in connection with the promotion of commercial products has unquestionably become big business." One court has used the word "persona" as a synonym for the commercial values embodied in an individual's identity, not the identity itself. In *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F.Supp. 1188, at 1199, 217 U.S.P.Q. 910, 9 Media L. Rep. 1531 (D.C.N.Y. 1983) the court, holding that a right of publicity plaintiff must show a publicity value in his identity, defined "persona" as "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."

89. *Restatement (Third) of Unfair Competition* § 46 (1995).

90. 971 F.2d 1395, 23 U.S.P.Q.2d 1583, 20 Media L. Rptr. 1457 (C.A.9 1992).

91. *Id.* 20 Media L. Rptr. 1457, at 1459.

92. 579 F.2d 215, 205 U.S.P.Q. 751, 4 Media L. Rep. 1144 (C.A.2 1978).

and foot, with nothing to indicate to whom they belong.⁹³ In the "*Muhammad Ali*" case,⁹⁴ it was held that publication in 'Playgirl' magazine of a fictionalized drawing of a nude black man seated in the corner of a boxing ring constituted a violation of the right of publicity of Muhammad Ali. The court found that the picture suggested that black male portrayed was Muhammad Ali and that the identification was further implied by an accompanying verse which referred to him as "*the Greatest*," the name he was regularly identified with in the news media.

Also, the commercial use of a *look-alike* can constitute an infringement of the right of publicity of the person imitated. In the "*Fat Boys*" case the court held that the use in defendants' beer commercial of three look-alikes who are physically similar to the individual plaintiffs, professionally known as the "Fat Boys," could violate § 50 and § 51 of New York's Civil Rights Law, which provide protection against unpermitted commercial use of an individual's "portrait or picture." The use of a celebrity look-alike in an advertisement, with an implication that the look-alike is the real celebrity, may constitute an unauthorized use of the celebrity's "portrait or picture" within meaning of the New York statute.⁹⁵

[3] Personal Names and Nicknames

A plaintiff can be identifiable from defendant's commercial use of plaintiff's real name⁹⁶ or nickname. But if different persons have the same name, mere name-sameness alone is not sufficient to prove that the plaintiff is identifiable from defendant's commercial use.⁹⁷ If the common name of a celebrity is used for commercial purposes, the celebrity can still be directly identified if the context of the commercial use refers to that celebrity. A non-famous plaintiff must prove that other characteristics than the name-sameness in defendant's use refer to the plaintiff. For example, in *Newton v. Thomason*,⁹⁸ plaintiff Wood Newton, a country music songwriter and performer, claimed that defendants, television

93. Prosser, *Privacy*, 48 *Cal. L. Rev.* 383, at 404-405 (1960).

94. *Ali v. Playgirl, Inc.*, 447 F.Supp. 723, 206 U.S.P.Q. 1021, 3 *Media L. Rep.* 2540 (D.C.N.Y. 1978).

95. *Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.*, 737 F.Supp. 826, 1990 Copr.L.Dec. P 26,577, 15 U.S.P.Q.2d 1412, 17 *Media L. Rep.* 2273 (S.D.N.Y. 1990). Cf. *Onassis v. Christian Dior-New York, Inc.*, 122 Misc.2d 603, 472 N.Y.S.2d 254, 10 *Media L. Rep.* 1859 (N.Y.Sup. 1984): Use of a "look-alike" model who looked like Jacqueline Kennedy Onassis in advertising campaign to promote the products and the image of Christian Dior was held to be invasion of privacy by appropriation under New York Civil Rights Law; *Prudhomme v. Procter & Gamble Co.*, 800 F.Supp 390, 24 U.S.P.Q.2d 1627, 20 *Media L. Rptr.* 1900 (D.E.La. 1992): Dismissal of plaintiff's lawsuit claiming that use of "look-alike" actor in coffee commercial violated his right of publicity is not warranted.

96. Or old name. See *Abdul-Jabbar v. GMC*, 85 F.3d 407; 1996 U.S. App. LEXIS 11804 (C.A.9 1995): Former basketball star Kareem Abdul-Jabbar argued that GMC violated his right of publicity by using his former name, "Lew Alcindor," without his consent, in a television commercial. The Court of Appeals rejected the argument that Abdul-Jabbar had abandoned the name "Lew Alcindor."

97. Cf. *Restatement (Third) of Unfair Competition* § 46, comment d. (1995): "If the appropriation consists of the use of a name, e.g. the name as used by the defendant must be understood by the audience as referring to the plaintiff."

98. *Newton v. Thomason*, 22 F.3d 1455; 30 U.S.P.Q.2d 1633; 22 *Media L. Rep.* 1609 (C.A.9 1994).

producers, had used his name for a character in the television show "*Evening Shade*" in violation of his right of publicity. The District Court granted summary judgment in favor of defendants. In appeal, the Ninth Circuit held that nothing indicated that the character name was the same as Newton's name or that the fictional character in the television series in any way resembled Newton. Any commercial advantage that appellees gained by using the name Newton was totally unrelated to Newton's notoriety as a country/western music performer.

In *Hooker v. Columbia Pictures Industries, Inc.*⁹⁹ the plaintiff, a professional wood-carver, claimed that defendant had appropriated his name "Hooker" as a title of a fictional television police series. The court held that there was insufficient support for a reasonable identification between plaintiff and the fictional character bearing the same name. Mere coincidental use of a name that happens to be the same as the plaintiff's is insufficient to trigger liability.

The unpermitted commercial use of someone's *nickname* can also infringe the right of publicity. In the "*Crazylegs*" case,¹⁰⁰ plaintiff Elroy Hirsch claimed damages for the unauthorized use of his nickname, "Crazylegs," on a moisturizing shaving gel for women, manufactured by the defendant. The Wisconsin Supreme Court held that Elroy Hirsch could state a claim for infringement of his right of publicity. Hirsch was a sports figure of national prominence, who had acquired the nickname "Crazylegs" because of his "unique running style, which looked something like a whirling eggbeater."¹⁰¹

Even the unpermitted commercial use of an individual's *first name* can infringe the right of publicity if other attributes indicate the plaintiff. In *Carson v. Here's Johnny Portable Toilets, Inc.*,¹⁰² the defendant had marketed portable toilets under the brand name "Here's Johnny." These words were also used to introduce Johnny Carson in his famous "*Tonight Show*." The District Court dismissed Carson's right of publicity claim because the defendant had not used Carson's "name or likeness." The Sixth Circuit reversed, because the District Court's conception of the right of publicity was found to be too narrow. The phrase "Here's Johnny" clearly identified Johnny Carson, because since 1962 he had always been introduced with it in his "*Tonight Show*" on television. Defendant, who operated under the name Here's Johnny Portable Toilets, rented and sold "Here's Johnny" portable toilets. It was clear that defendant wanted to associate his product with Johnny Carson, since the phrase was coupled with a second one: "The World's Foremost Comedian," to make "a good play on a phrase."¹⁰³

99. 551 F.Supp. 1060 (D.C.Ill. 1982).

100. *Hirsch v. S. C. Johnson & Son, Inc.*, 90 Wis.2d 379, 280 N.W.2d 129, 205 U.S.P.Q. 920 (Wis. 1979).

101. 280 N.W.2d 129, at 131.

102. 698 F.2d 831, 218 U.S.P.Q. 1, 9 Media L. Rep. 1153, GRUR Int. 1985, 64 (C.A.6 1983).

103. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 218 U.S.P.Q. 1, 9 Media L. Rep. 1153, GRUR Int. 1985, 64 (C.A.6 1983). The word "comedian" refers to comedian and commode, which is like the word "John" used as a synonym for toilet.

[4] Voice

A person can be identified from his distinctive voice or from an imitation of this voice. In the "*Bette Midler*" case,¹⁰⁴ the Ninth Circuit held that when a distinctive voice of a professional singer is widely known and is deliberately imitated by a "*sound-alike*" in order to sell a product, the defendant infringes the singer's right of publicity. The court said:

"A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested. We are all aware that a friend is at once known by a few words on the phone. At a philosophical level it has been observed that with the sound of a voice, "the other stands before me." [...] A fortiori, these observations hold true of singing, especially singing by a singer of renown. The singer manifests herself in the song. To impersonate her voice is to pirate her identity."¹⁰⁵

The Ninth Circuit restated this view, when it held that the imitation of the distinctive voice of well-known songwriter and singer Tom Waits in an advertisement for Doritos chips infringed his right of publicity.¹⁰⁶

[5] Physical Objects

It is possible that a person is identified from distinctive tangible objects associated with that person. Then the commercial use of such objects can infringe the right of publicity. The Restatement (Third) of Unfair Competition (1995) provides that

"[t]he use of other identifying characteristics or attributes may also infringe the right of publicity, but only if they are so closely and uniquely associated with the identity of a particular individual that their use enables the defendant to appropriate the commercial value of the person's identity."¹⁰⁷

The classic example is the combination of a black beat-up bowler hat, oversized old shoes, a fake mustache and a walking-cane, which may identify Charlie Chaplin.¹⁰⁸

In *Motschenbacher v. R. J. Reynolds Tobacco Co.*,¹⁰⁹ the Ninth Circuit held that defendant's use of a picture of the racing car of famous driver Lothar Motschenbacher in a television commercial for Winston cigarettes could infringe his right of publicity. Although Motschenbacher was the driver, his facial features were not visible in the picture used by the defendant. Motschenbacher had consistently individualized his cars to set them apart from those of other drivers and to make them more readily identifiable as his own. Each of his cars

104. *Midler v. Ford Motor Co.*, 849 F.2d 460, 1988 Copr.L.Dec. P 26,313, 7 U.S.P.Q.2d 1398, 15 Media L. Rep. 1620, GRUR Int. 1989, 338 (C.A.9 1988). But see for the preemption problem in this case § 3.4[D].

105. *Id.* 7 U.S.P.Q.2d 1398, at 1401.

106. *Waits v. Frito-Lay Inc.*, 978 F.2d 1992, 23 U.S.P.Q.2d 1721, 20 Media L. Rptr. 1585 (C.A.9 1992).

107. Restatement (Third) of Unfair Competition § 46, comment d. (1995).

108. See McCarthy, *The Rights of Publicity and Privacy*, § 4.15[E] (Rev. 1993).

109. 498 F.2d 821 (C.A.9 1974).

had displayed a distinctive narrow white pinstripe which appeared on no other car, red edges, and a white oval with racing number "11," in contrast to the circular backgrounds of all other cars. Even though defendant had changed the number of the car to "71," and attached a spoiler to the car, the public identified the car, especially through its oval medallion and red coloring, with its driver, the plaintiff. The court held that Motschenbacher had provided sufficient evidence to enable him to prove his identification at trial. It should be noted that this opinion is not inconsistent with the view that the right of publicity protects only the identity of human beings, not objects. The court did not say that the plaintiff's car was protected by the right of publicity. It only held that the distinctive car was capable of identifying its famous driver.

One should not confuse the theory, discussed *supra*,¹¹⁰ stating that the right of publicity should protect popular non-human objects, such as a popular dolphin or a popular car, with the theory discussed in this section, that the right of publicity protects against unpermitted commercial use of objects *which identify a human being*: The Ninth Circuit did not protect Motchenbacher's car in itself as a merchandising property: it only ruled that it was an issue of fact whether the car used in defendant's advertisement identified its actual driver, Motchenbacher.¹¹¹

In the "*Vanna White*" case,¹¹² the Ninth Circuit held that the plaintiff, Vanna White, hostess of the popular "*Wheel of Fortune*" game show, had stated a cause of action for violation of her common law right of publicity by defendant's unpermitted use, in an advertisement for its electronic products, of a robot which could be identified with her. The advertisement depicted a robot, dressed in a wig, gown, and jewelry which were consciously selected to resemble Vanna White's hair and dress. The robot was posed next to a game board which was instantly recognizable as the "*Wheel of Fortune*" game show set, in a stance for which White is famous. The caption of the ad read: "Longest-running game show. 2012 A.D." The message was that defendant's products would be still around in the next century. Defendants referred to the ad as the "*Vanna White*" ad. The court said that "[v]iewed separately, the individual aspects of the advertisement in the present case say little. Viewed together, they leave little doubt about the celebrity the ad is meant to depict."¹¹³ The court noted that the ad was part of a series of ads in which other celebrities participated and were paid for their endorsement of defendant's products.¹¹⁴ This case has been criticized by several commentators. Their comments are discussed in § 8.2[B][2].

110. See § 2.3[A].

111. However, it is true that there can be cases where it is not easy to make this distinction: See the discussion of the *Vanna White* case in § 8.2[B].

112. *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 23 U.S.P.Q.2d 1583, 20 Media L. Rptr. 1457 (C.A.9 1992), petition for rehearing en banc denied, 989 F.2d 1512, 26 U.S.P.Q.2d 1362, 21 Media L. Rptr. 1330 (C.A.9 1993).

113. *Id.* 20 Media L. Rptr. 1457, at 1460.

114. *Id.* 20 Media L. Rptr. 1457, at 1462. The case proceeded to trial, and produced a jury verdict of \$403,000 for White, see Barnett, *At the Crossroads: The Right of Publicity in the United States*, 160 *RIDA* 5, at 35 (1994).

[6] Human Beings as Fictional Characters

The right of publicity does not protect fictional characters per se, such as James Bond, Donald Duck, or Batman, because they are not human beings. But if a particular fictional character also identifies its actor as a human being, the right of publicity can come into play. Some actors create a public recognition not in their "natural" appearance but in their portrayal of a particular character. The publicity value exists in the appearance of each of these actors in their character roles.

In the "*Laurel and Hardy*" case a distinction was made between actors portraying themselves and developing their own public characters and actors portraying fictional characters which have been given a particular interpretation by that actor.¹¹⁵ The first case is easier to decide than the second. Classic examples of actors who developed their own public fictional character are Stanley Laurel and Oliver Hardy, known as Laurel and Hardy, Charles Chaplin, who created the "*Little Tramp*" character, and the Marx brothers.

In the "*Marx brothers*" case it was held that the Marx brothers had a right of publicity in their self-created instantly recognizable stage characters, even though the stage characters had no relation to their real personalities.¹¹⁶ Thus, for example, the Groucho Marx character with his fake moustache, cigar, slouch and leer, cannot be freely exploited by others, independent of the question whether these indicia are protected by copyright.

If an actor impersonates a fictional character which is created by another author, it can also be played by other actors. In such cases, the right of publicity is infringed if the defendant not only used the character, but also the likeness of the actor. For example, "*James Bond*" has been played by Sean Connery, George Lazenby, Roger Moore, Timothy Dalton, and Pierce Brosnan. The commercial use of the James Bond character does not infringe the right of publicity of one of these actors, unless one of them can be identified because defendant's used also the likeness or name of one these actors.¹¹⁷

115. *Price v. Hal Roach Studios, Inc.*, 400 F.Supp. 836, at 845 (S.D.N.Y. 1975): Stanley Laurel and Oliver Hardy had right of publicity in their names and likenesses which descended to their heirs.

116. *Groucho Marx Productions, Inc. v. Day and Night Co., Inc.*, 523 F.Supp. 485, at 491-492, 212 U.S.P.Q. 926, 7 Media L. Rep. 2030 (D.C.N.Y. 1981), rev. on other grounds, 689 F.2d 317, 216 U.S.P.Q. 553, 8 Media L. Rep. 2201 (C.A.2 1982). Cf. *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, at 622, 396 N.Y.S.2d 661, 2 Media L. Rep. 2321 (N.Y.A.D. 1977): Guy Lombardo's public personality as Mr. New Year's Eve can be protected by the right of publicity against unpermitted commercial exploitation; *Lugosi v. Universal Pictures*, 25 Cal.3d 813, at 844, 160 Cal.Rptr. 323, 603 P.2d 425, 10 A.L.R.4th 1150, 205 U.S.P.Q. 1090, 5 Media L. Rep. 2185 (Cal. 1979): "[T]here appears to be no reason why the right of publicity should not extend to one's own likeness while portraying a particular fictional character."

117. The protection of the right of publicity extends only to the actor's likeness, not to the character itself. The right of publicity does not prohibit another actor from developing and playing the character with permission from the copyright owner. But some courts have held that an imitation of plaintiff's performance which fulfills the demand for plaintiff's performance can infringe the right of publicity. See § 2.6[B][2].

In the "*Lugosi*" case,¹¹⁸ the trial court found that defendant exploited the "uniquely individual likeness and appearance of Bela Lugosi in the role of Count Dracula."¹¹⁹ Although Bram Stoker's character "*Count Dracula*" has been played by many actors in motion pictures and on stage, the trial court found that Universal did not exploit an undifferentiated Count Dracula character, but the distinctive and readily recognizable portrayal of Lugosi as the notorious Transylvanian count. Chief Justice Bird said: "Lugosi had a protectible property interest in controlling unauthorized commercial exploitation of his likeness in his portrayal of Count Dracula."¹²⁰

In the "*Vampira*" case,¹²¹ the plaintiff claimed that defendants had infringed her right of publicity in her "Vampira" character which she had created and performed by creating a character named "Elvira," which used certain props, clothes, and mannerisms similar but not identical to the Vampira character. However, the court found no infringement because defendant's Elvira character, which resembled the Vampira character but had another name and was played by a different actress, did not show plaintiff's actual features.

More complicated is the exceptional case where an actor impersonates a fictional character created by another author in such a manner, that the actor can be identified from defendant's use of that character without using the actor's natural face, voice or name. In such cases, courts have made a distinction between the actor and the role associated with the actor.

For example, in the "*Spanky McFarland*" case,¹²² the plaintiff, McFarland, had once been a child actor in the "Our Gang" series, a popular short subject comedy series shown in movie theaters from the 1920's to the 1940's, and thereafter on television. In the series, McFarland played a role under the nickname "*Spanky*." McFarland claimed infringement of his right of publicity when a restaurant used the name "Spanky McFarland" without his authorization, as well as his image as it appeared in his Our Gang days. The District Court granted defendant's motion for summary judgment. It held that McFarland had no interest in the exploitation of the image or the name Spanky McFarland because Spanky was merely a character whom McFarland was employed to play. The court held that an actor who portrays a character in such a manner that the character becomes inextricably intertwined with the individual, to such an extent that the individual comes to utilize the character's name as his own, has no proprietary interest in the exploitation of the name or image.¹²³

118. *Lugosi v. Universal Pictures*, 25 Cal.3d 813, 160 Cal.Rptr. 323, 603 P.2d 425, 10 A.L.R.4th 1150, 205 U.S.P.Q. 1090, 5 Media L. Rep. 2185 (Cal. 1979): Bela Lugosi's right of publicity in his uniquely individual appearance and likeness as Count Dracula can only be exercised by his heirs if he exercised his right during his lifetime.

119. *Id.* 25 Cal.3d 813, at 817.

120. *Id.* 25 Cal.3d 813, at 845, dissenting on other grounds.

121. *Nurmi v. Peterson*, 10 U.S.P.Q.2d. 1775, 16 Media L. Rep. 1606 (D.C.Cal. 1989).

122. *McFarland v. Miller*, 14 F.3d 912, 1994 U.S. App. Lexis 1225, 29 U.S.P.Q.2d 1586, 22 Media L. Rep. 1205 (C.A.3 1993).

123. *Id.* 1994 U.S. App. Lexis 1225, at 21-22.

In appeal, the Third Circuit reversed. Starting from the assumption that the value of the right of publicity lies in the association between the celebrity and product, the court said:

"Where an actor's screen persona becomes so associated with him that it becomes inseparable from the actor's own public image, the actor obtains an interest in the image which gives him standing to prevent mere interlopers from using it without authority."¹²⁴

The court held that there existed a triable issue of fact as to whether McFarland had become so inextricably identified with the character Spanky McFarland that McFarland's own identity would be invoked by the name Spanky.

The right of publicity is an independent form of protection. The presence of a copyright or trademark right does not preclude protection under the right of publicity.¹²⁵ A producer of a motion picture, who owns all copyrights, including the copyright in the main character, cannot ignore the right of publicity of the actor who is inextricably identified with that character by the public. Thus, if an actor is inextricably identified with a fictive character, the advertiser, who wishes to use this character for merchandising purposes, needs a license from both the copyright owner and right of publicity owner.¹²⁶

Thus, the critical question is whether defendant's commercial use of a character identifies the actor who played that character or identifies that character as distinguished from its impersonator. For example, actor Johnny Weismuller did not become indistinguishable from Tarzan, and actor Adam West could not stop a retail chain from using the "Batman" character in a commercial that West argued invoked his portrayal because West's identity did not merge into Batman.¹²⁷ However, the Third Circuit held that McFarland, like Groucho Marx, may have become indistinguishable in the public's eye from his stage identity.

[D] The Right of Publicity also Protects Non-Fixed Live Performances

Nimmer has argued that the right of publicity should protect publicity values not only against unpermitted use for purposes of trade or advertising, but also against appropriation of publicity values in television programs.¹²⁸ He discussed the "Pittsburgh Pirates" case¹²⁹ as a proto right of publicity case. In this case, the defendant, a radio station, used vantage points looking inside Forbes Field

124. *Id.* 1994 U.S. App. Lexis 1225, at 26.

125. *See* § 3.4[C] and § 3.5.

126. *See Wendt v. Host International, Inc.*, 1995 U.S. App. LEXIS 5464; 35 U.S.P.Q.2d (BNA) 1315 (C.A.9 1995): Plaintiffs claim for appropriation of their identities in the design of animatronic figures placed in bars operated by defendant Host, under a license from the copyright owner Paramount Pictures Corporation, is not preempted by federal copyright law. Case remanded for trial.

127. *See* Lozano, *West Loses Lawsuit Over Batman TV commercial*, L.A. Times, Jan. 18, 1990, at B3, cited from *McFarland v. Miller*, 1994 U.S. App. Lexis 1225, fn. 15 (C.A.3 1993).

128. *The Right of Publicity*, 19 *Law & Contemp. Prob.* 203, at 217 (1954).

129. *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F.Supp. 490 (D.C.Pa. 1938).

stadium in Pittsburgh. Defendant paid viewers at these vantage points to observe the baseball games played by the Pirates, a professional baseball team, and broadcast the games live over the radio. Plaintiff, the owner of the Pirates, asked for a preliminary injunction to restrain defendant from broadcasting play-by-play reports and descriptions of the baseball games of the Pirates, because it had sold to a third party the exclusive right to broadcast the games. The court rejected defendant's defense that it had a right to broadcast information which it received from its observers stationed on its own property without trespassing on plaintiffs' property. The court found the defendant liable for both unfair competition and for violation of plaintiff's property right in the news value of its games. Judge Schoonmaker stated:

"The Athletic Company has, at great expense, acquired and maintains a baseball park, pays the players who participate in the game, and have, as we view it, a legitimate right to capitalize on the news value of their games by selling exclusive broadcasting rights to companies which value them as affording advertising mediums for their merchandise."¹³⁰

In Nimmer's opinion, the court recognized a property right approximating the right of publicity, without expressly designating it as such.¹³¹ While most right of publicity cases involve the use of plaintiff's identity in advertising or in connection with commercial merchandise, some courts have extended the right of publicity to protection of the publicity value of *live events* against unpermitted television broadcasts and imitations. The most famous case is the 1977 "*Zacchini*" case,¹³² the only right of publicity case decided by the U.S. Supreme Court. Defendant had filmed and showed on the eleven o'clock television news program *Zacchini's* entire performance of 15 seconds, in which he was shot from a cannon into a net some 60 meters away. *Zacchini* claimed that defendant had infringed the right of publicity in his live performance. The U.S. Supreme Court held that the First Amendment did not immunize the television news media when they infringed *Zacchini's* right of publicity by broadcasting his entire fifteen-second human cannonball-act without compensation, because it largely preempted demand for the live performance. The Court recognized that the "right of publicity" not only protects against appropriation of the entertainer's reputation but also against appropriation of a performance:

"Thus, in this case, Ohio has recognized what may be the strongest case for a 'right of publicity' involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place."¹³³

130. *Id.* 24 F.Supp. 490, at 492. Plaintiff "has a property right in such news, and the right to control the use thereof for a reasonable time following the games." *Id.* at 492.

131. The Right of Publicity, 19 *Law & Contemp. Prob.* 203, at 220 (1954).

132. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977).

133. *Id.* 433 U.S. 562, at 575.

In this case the object protected by the right of publicity is not the name, likeness, voice, or identity of Zacchini, but his *performance*. In such cases, the right of publicity is preempted by federal copyright law, if the performance constitutes a work of authorship fixed in a tangible medium.¹³⁴

Although the Restatement (Third) of Unfair Competition § 46 (1995) defines the right of publicity as a right protecting against unpermitted appropriation of "the commercial value of a person's identity," it becomes clear from comment d. under § 47 that the right of publicity can also provide protection against the appropriation of another's performance:

"Liability has been imposed, for example, in connection with an unauthorized broadcast of the plaintiff's performance or a sustained imitation of the plaintiff's performing style or performing persona that is marketed by the defendant as a simulation of the plaintiff's performance."¹³⁵

2.4 Subject: Who Has a Right of Publicity?

The subject question "who has a right of publicity" addresses the issue of whether all persons have this right or only persons with certain qualities. The question whether non-human entities, such as animals, inanimate objects, institutions or corporations can be protected by the right of publicity is discussed in § 2.3[A].¹³⁶

[A] Minority View: The Right of Publicity Protects Only Celebrities

Some commentators¹³⁷ and courts have stated that only *famous* persons have a right of publicity and that non-famous persons only have a right of privacy. For example, the Georgia Supreme Court concluded in a dictum "that while private citizens have the right of privacy, public figures have a similar right of publicity, and that the measure of damages to a public figure for violation of his or her right of publicity is the value of the appropriation to the user."¹³⁸ In *Delan v. CBS, Inc.*¹³⁹ a New York court held that the plaintiff had not shown a cause of action for violation of his right of publicity because he had not demon-

134. See § 3.4[B].

135. Restatement (Third) of Unfair Competition § 47, comment d. (1995). See also illustrations 7 and 8, based on *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977).

136. But see McCarthy, *The Rights of Publicity and Privacy*, § 4.7-8 (Rev. 1993) who discusses this question in part I of Chapter 4, entitled "Who has a right of publicity?"

137. E.g. Hoffman, *The Right of Publicity: An Analytical Update*, 14 *Int. Prop. L. Rev.* 3, at 4 (1982).

138. *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*, 250 Ga. 135, 296 S.E.2d 697, at 703, 216 U.S.P.Q. 711, 8 Media L. Rep. 2377 (Ga. 1982). The court held that Martin Luther King, a political figure, has a right of publicity that survived his death, and that exploitation of his identity was not necessary to state a claim for infringement of this right.

139. 91 A.D.2d 255, 458 N.Y.S.2d 608, 9 Media L. Rep. 1130 (N.Y.A.D. 1983).

strated that he was in any way a public personality. In the court's opinion, only a public personality has "a right to reap the reward of his endeavors."¹⁴⁰

Closely related to this "celebrity" requirement, is the requirement that an individual claiming a violation of his right to publicity must show that his identity, his name or likeness, has a *publicity value* which the defendant has appropriated. This view is probably influenced by the tort concept of the appropriation type of privacy. Comment c. of the Restatement (Second) of Torts § 652c states that for liability under the appropriation privacy tort, the defendant must have appropriated to his own use or benefit "the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness." From this statement courts have concluded that there can be no invasion of privacy by appropriation, unless the plaintiff proves the value of his identity, which the defendant has appropriated. In *Jackson v. Playboy Enterprises, Inc.*,¹⁴¹ the court held that the plaintiffs, non-celebrities, could not state a claim for invasion of privacy by appropriation because they "have not given any indication that their likenesses have value in and of themselves which could be taken by someone else for his or her benefit."¹⁴²

This requirement has been transferred to the right of publicity. For example, in *Cheatham v. Paisano Pubs. Inc.*,¹⁴³ the court stated:

"Plaintiff must prove that she has developed a property interest in her likeness or her designs by proving that her image has commercial value and that she intended to profit from that value. Without such proof, Plaintiff cannot show that Defendants exploited the fame or fortune that Plaintiff has developed. [...] This Court concludes the best rule is that the remedy available in right of publicity claims belongs to those whose identity has commercial value. Commercial value may be established by proof of (1) the distinctiveness of the identity and by (2) the degree of recognition of the person among those receiving the publicity. [...] In order to succeed in her claim, Plaintiff must have a notoriety which is strong enough to have commercial value within an identifiable group."¹⁴⁴

Similarly, Judge Werker stated in the "*Lerman*" case that an individual claiming a violation of his right to publicity must show that his name or likeness has publicity value.¹⁴⁵ The court concluded that the name and persona of Ms.

140. Id. 458 N.Y.S.2d 608, at 615, citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, at 573, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977).

141. 574 F.Supp. 10, 9 Media L. Rep. 1575 (D.C. Ohio 1983).

142. Id. 574 F.Supp. 10, at 13. Cf. *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, at 592, 11 Media L. Rep. 2057 (D.C. App. 1985): "While the record clearly establishes that appellees used Mrs. Vassiliades' photographs for their own benefit, Mrs. Vassiliades has not shown there was a public interest or other value in her likeness;" *Schifano v. Greene County Greyhound Park Inc.*, 21 Media L. Rep. 1794, at 1796 (Ala. Sup.Ct. 1993): "It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded."

143. 891 F.Supp. 381; 1995 U.S. Dist. LEXIS 9757 (D.C.W.Ky 1995).

144. Id. 1995 U.S. Dist. LEXIS 9757, at 11.

145. *Lerman v. Chuckieberry Pub., Inc.*, 521 F.Supp. 228, at 232, 7 Media L. Rep. 2282 (D.C.N.Y. 1981), rev'd. on other grounds in *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 10 Media L. Rep. 2497 (C.A.2 1984). Cf. *Bi-Rite Enterprises, Inc. v. Bruce Miner Poster Co., Inc.*, 616 F.Supp. 71, at 74 (D.C.Mass. 1984). See also *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F.Supp. 1188, at 1198, 217

Lerman has a publicity value, because she had appeared in numerous press releases, interviews, and newspaper and magazine articles. The Restatement (Third) of Unfair Competition (1995) gives some support to this view by defining the right of publicity as a form of protection against "Appropriation of the Commercial Value of a Person's Identity".¹⁴⁶

[B] Minority View: The Right of Publicity Protects Only Persons Who Have Previously Exploited their Identity

A few courts have held that a living plaintiff who claims infringement of his right of publicity must prove that he previously exploited his identity. In the above-cited "*Lerman*" case, the District Court stated that an individual claiming a violation of the right of publicity must show that he himself has exploited his name or likeness by acting "in such a way as to evidence his or her own recognition of the extrinsic commercial value of his or her name or likeness, and manifested that recognition in some overt manner."¹⁴⁷ In this case Ms. Lerman, a novelist, claimed infringement of her right of publicity because defendant had published in *Adelina* magazine a nude photograph mistakenly identified as a photograph of Lerman. The court found that plaintiff had exploited her identity, since her name and likeness had appeared in connection with the marketing of her books and screenplays, and awarded \$10,000,000.

In appeal, the Second Circuit reversed the \$10,000,000 damages award, because Lerman had not proven that defendant had acted with actual malice.¹⁴⁸ The court repeated that the plaintiff must have developed a property interest with financial value. In the court's opinion, Ms. Lerman did not establish a prima facie cause of action for violation of her right to publicity, because "[s]he has never exploited the value of her nude appearance and obviously cannot claim to have developed a property interest in the subject matter of this alleged infringement."¹⁴⁹ Unfortunately the court did not indicate why a plaintiff must have previously exploited his identity.

U.S.P.Q. 910, 9 Media L. Rep. 1531 (D.C.N.Y. 1983): the court's definition of the right of publicity in the *Lerman* case is consistent with definitions of Illinois and California courts.

146. Restatement (Third) of Unfair Competition § 46, comment d. (1995): "[A] few cases appear to require some minimum degree of fame or notoriety as a prerequisite for relief. However, the identity of even an unknown person may possess commercial value."

147. *Lerman v. Chuckleberry Pub., Inc.*, 521 F.Supp. 228, at 232, 7 Media L. Rep. 2282 (D.C.N.Y. 1981), citing *Hicks v. Casablanca Records*, 464 F.Supp. 426, at 429, 204 U.S.P.Q. 126, 4 Media L. Rep. 1497 (D.C.N.Y. 1978), which discussed the prior exploitation requirement in the context of the question whether the right of publicity is a descendible right. See also *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F.Supp. 1188, at 1199, 217 U.S.P.Q. 910, 9 Media L. Rep. 1531 (D.C.N.Y. 1983), citing the *Lerman* case.

148. *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 10 Media L. Rep. 2497 (C.A.2 1984). See for the term "actual malice" § 3.1[F].

149. *Id.* 745 F.2d 123, at 134. McCarthy, *The Rights of Publicity and Privacy*, § 4.1[C][2] (Rev. 1993) remarked that the court, stating that Lerman could only claim infringement of her right of publicity if she had exploited the nude picture, ignored the fact that she sued defendant for falsely linking her name with a nude picture of another woman.

[C] Majority View: The Right of Publicity Protects All Human Beings

However, most of the courts and commentators,¹⁵⁰ that have recognized the right of publicity have held that every human being should have both a right of privacy and a right of publicity, independent of any prior exploitation.¹⁵¹ In this view, celebrities also have a right of privacy and non-celebrities also have a right of publicity. This opinion was already stated in the early privacy cases which recognized a property right in one's name and likeness,¹⁵² and is clearly expressed in 1941 by Judge Holmes in his dissenting opinion in the "*O'Brien*" case:

"The right of privacy is distinct from the right to use one's name or picture for purposes of commercial advertisement. The latter is a property right that belongs to every one; it may have much or little, or only a nominal, value; but it is a personal right, which may not be violated with impunity."¹⁵³

In 1974 the Ninth Circuit restated this view:

"Generally, the greater the fame or notoriety of the identity appropriated, the greater will be the extent of the economic injury suffered. However, it is quite possible that the appropriation of the identity of a celebrity may induce humiliation, embarrassment and mental distress, while the appropriation of the identity of a relatively unknown person may result in economic injury or may itself create economic value in what was previously valueless."¹⁵⁴

In the majority view, a plaintiff who claims infringement of the right of publicity does not have to prove that his identity has a specific publicity value. Although the publicity value of the identity of a non-celebrity is in most cases worth less than the value of the identity of a celebrity, it cannot be concluded that the non-celebrity's identity has no value. Courts¹⁵⁵ and commentators infer from defendant's commercial use of plaintiff's identity that it had a commercial value for the defendant. This commercial value can be inferred from defendant's commercial use, independent of any celebrity status or prior exploitation. For example, in 1960, Gordon stated:

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150. *E.g.* Nimmer, *The Right of Publicity*, 19 *Law & Contemp. Prob.* 203, 217 (1954); Gordon, *Right of Property in Name, likeness, Personality and History*, 55 *Nw. U.L. Rev.* 553, at 610-612 (1960); Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 *Tex. L. Rev.* 637, at 648 (1973); McCarthy, *The Rights of Publicity and Privacy*, § 4.3[G] (Rev. 1993).
151. *E.g.* *Grant v. Esquire, Inc.*, 367 F.Supp. 876 at 880 (D.C.N.Y. 1973) and *Waits v. Frito-Lay Inc.*, 978 F.2d 1992, 23 U.S.P.Q.2d 1721, 20 *Media L. Rptr.* 1585 (C.A.9 1992): In both cases the plaintiffs did not exploit their identity for advertising purposes, but they could state a claim for infringement of the right of publicity.
152. *Cf. Munden v. Harris*, 153 *Mo. App.* 652, at 658-659, 134 *S.W.* 1076 (1911), protecting the commercial value of a picture of an infant. *See supra* § 2.2[A].
153. *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, at 170 (C.A.5 1941).
154. *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, at 824, fn. 11 (C.A.9 1974).
155. *Cf. Price v. Hal Roach Studios, Inc.*, 400 F.Supp. 836, at 843 (S.D.N.Y. 1975): "The commercial value of such a right stems from a person's ability to control its use." *Cf. Canessa v. J. I. Kislak, Inc.*, 97 *N.J. Super.* 327, at 350, 235 *A.2d* 62 (N.J. Super.L. 1967) discussed *infra*.

"In the case of one not a public figure or one who makes himself a public figure by his own act, such as the commission of a crime, we have a situation where there is no pecuniary or market value in the name, likeness, etc., of such a person until the defendant, by unlawfully appropriating the property rights in these aspects of plaintiff's personality, establishes a pecuniary value and a market for them (though the plaintiff has never attempted to market them). In such a case, the damages would be measured by the value to the defendant and, in a suit on the basis of unjust enrichment, would be that portion of the profits accruing to the defendant to which a court or jury decides plaintiff is entitled, commensurate with his role in and importance to the commercial enterprise."¹⁵⁶

However, the plaintiff who wishes to recover the commercial damages, caused by defendant's commercial use without compensation, must prove the market value of his identity.¹⁵⁷ In this context, most courts distinguish the right of publicity from the right of privacy, which protects against the injury to feelings. The right of publicity "recognizes the pecuniary value which attaches to the names and pictures of public figures, particularly athletes and entertainers, and the right of such people to this financial benefit."¹⁵⁸

As an example of a non-famous person who suffers economic injury, can be found in *Canessa v. J. I. Kislak, Inc.*¹⁵⁹ In this case, it was held that Canessa, a private citizen, could sue for both mental injury and commercial damages to the value of his identity. Defendant, a real estate company, had used for its own commercial purposes reprints of a picture and a newspaper article which informed how defendant had solved the housing problem of the Canessa family. The court stated that most reported cases involved public figures, because the value of their name in the market place is greater than that of private persons. But from the fact the defendant decided to use the identity of a non-public figure for its commercial purposes, it must be concluded that in defendant's opinion plaintiff's identity had a commercial value. The court said:

"In any event, it seems to us that however little or much plaintiff's likeness and name may be worth, defendant, who has appropriated them for his commercial benefit, should be made to pay for what he has taken, whatever it may be worth."¹⁶⁰

The Restatement (Third) of Unfair Competition (1995) opines that both celebrities and less well-known plaintiffs can state a claim for infringement of the right of publicity.¹⁶¹

Nimmer argued that the right of publicity should not be restricted to persons with a specific celebrity status or to persons who exploit their identity

156. Gordon, Right of Property in Name, likeness, Personality and History, 55 *Nw. U.L. Rev.* 553, at 611 (1960).

157. See also *Restatement (Third) of Unfair Competition* § 49, comment d. (1995).

158. *Chaplin v. National Broadcasting Co.*, 15 F.R.D. 134, at 139-140 (S.D.N.Y. 1953). Cf. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc.2d 1, 294 N.Y.S.2d 122, at 129 (N.Y. Sup. 1968).

159. 97 N.J. Super. 327, 235 A.2d 62 (N.J. Super. L. 1967).

160. *Id.* 97 N.J. Super. 327, at 351. Cf. *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904, at 909, 13 Media L. Rep. 1401 (D.N.J. 1986): "I do not find that New Jersey law limits the cause of action of misappropriation to famous individuals."

161. See *Restatement (Third) of Unfair Competition* § 46, comment b. (1995).

because it is impractical, if not impossible, to draw a line as to which persons have achieved the required celebrity status and which have not.¹⁶² McCarthy argued that the celebrity status requirement would prevent non-celebrities from recovering the fair market price of unpermitted commercial use of their identity. In such situations it is demeaning for a non-celebrity to be forced to testify about mental suffering.¹⁶³

2.5 Scope of Protection: Test of Identification

The right of publicity can be infringed if defendant used plaintiff's identity or non-copyrightable live performance without consent. In right of publicity cases involving the broadcast of a performance, the issue is not whether defendant's use of the performance identifies the plaintiff, but whether it is an infringing form of use, which is not immunized by principles of free speech. This issue is dealt with in § 2.6[B]. This paragraph discusses the test of identification in advertising and merchandising cases.

The right of publicity can only be infringed if the plaintiff is identifiable from defendant's use. The identification question is normally only an issue if the defendant states as a defense that its commercial use does not identify the plaintiff, but a third person or something else. Then the court must decide whether or not the defendant commercially used elements which identify the plaintiff.

It is not necessary that the defendant used plaintiff's actual identity, for example the name or a photograph of the plaintiff.¹⁶⁴ A defendant cannot simply avoid liability by making some minor changes if the plaintiff is still identifiable. For example, Charlie Chaplin could enjoin an imitation of his "Little Tramp" character named "Charlie Aplin."¹⁶⁵ The test of identification determines the scope of the right of publicity in the same way as the likelihood of confusion test in trademark law and the test of substantial similarity in copyright law.¹⁶⁶

It has been held that a picture of another person with the plaintiff's name can identify the plaintiff. In the "*Lerman*" case, the District Court held that the right of publicity and right of privacy of Lerman were invaded, when defendant published a nude photograph which was mistakenly identified as being a photo-

162. Nimmer, *The Right of Publicity*, 19 *Law & Contemp. Prob.* 203, at 217 (1954).

163. McCarthy, *The Rights of Publicity and Privacy*, § 4.3[E] (Rev. 1993).

164. *Cf. Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 218 U.S.P.Q. 1, 9 Media L. Rep. 1153, GRUR Int. 1985, 64 (C.A.6 1983): Right of publicity extends beyond an individual's actual name and likeness.

165. *Chaplin v. Amador*, 93 Cal.App. 358, 269 P. 544 (1928). Chaplin stated a claim for unfair competition, not infringement of his right of publicity.

166. *Cf. Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (C.A.2 1930): Copyright protection extends beyond literal elements.

graph of Lerman.¹⁶⁷ Also, the commercial use of a *sound-alike* or a *look-alike* can infringe the right of publicity of the person who is imitated.¹⁶⁸

In *Negri v. Schering Corporation*,¹⁶⁹ it was held that the use in an advertisement for Polaramine tablets in 1969 of a photograph of plaintiff Pola Negri, a motion picture actress, which had been taken from a movie of 1922, identified the plaintiff. The court rejected the defense that the photograph in its advertisement was not recognizable as Miss Negri because she no longer looked as she did 40 years earlier when the picture was taken. In 1969, the photograph was recognized by the physician and friend who brought the ad to Pola Negri's attention and by four others, who were even able to identify the film from which it was taken. This was enough for liability of the defendant. The court stated that if there were any doubts as to the recognizability of the photograph as that of Miss Negri, and there were none, the fact that she was shown recommending POLAramine plainly pointed toward recognition.

Most courts have held that the right of publicity does not protect physical objects in themselves. But a person can be identified from a distinctive tangible object which is associated with that person. For example, in *Int-Elect Engineering Inc. v. Clinton Harley Corp.*,¹⁷⁰ the court held that defendant's use of a photograph of plaintiffs' customized motorcycle in an advertisement for its magazine could identify the plaintiffs under California state law, even though plaintiffs themselves were not depicted in this photograph.¹⁷¹ The court found that plaintiffs' rendering of the U.S. flag on the sides of the motorcycle is an unique and readily-identifiable artistic creation. Plaintiffs' motorcycle was well-known because a full page photograph of it was featured in defendant's motorcyclist magazine as part of an article that was produced with the cooperation of Plaintiffs. However, defendant's advertisement use did not infringe the right of publicity, because defendant was allowed to use the photograph to indicate the magazine's nature, quality, and contents.¹⁷²

Courts have not required a specific percentage of people to identify the plaintiff from defendant's use. But the number of people who identify plaintiff can affect the amount of damages. In the "*Crazylegs*" case, the Wisconsin Supreme Court stated that:

"All that is required is that the name clearly identify the wronged person. In the instant case, it is not disputed at this juncture of the case that the nickname identified the plaintiff Hirsch. It is argued that there were others who were known by the same name. This, however, does not vitiate the existence of a cause of action. It may, however, if

167. *Lerman v. Chuckleberry Pub., Inc.*, 521 F.Supp. 228, at 232, 7 Media L. Rep. 2282 (D.C.N.Y. 1981), rev'd. on other grounds in *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 10 Media L. Rep. 2497 (C.A.2 1984). Cf. *Davis v. High Soc. Magazine, Inc.*, 90 A.D.2d 374, at 382, 457 N.Y.S.2d 308, 9 Media L. Rep. 1164 (N.Y.A.D. 1982): Liability for publication of picture of topless female boxer, misidentified as plaintiff, a female boxer and public figure, depends on defendant's knowledge of the factual error.

168. See § 2.3[C][2] and [4].

169. 333 F.Supp. 101 (D.C.N.Y. 1971).

170. 21 Media L. Rptr. 1762 (D.C.Cal. 1993).

171. Cf. § 2.3[C][5].

172. See § 10.4[B].

sufficient proof were adduced, affect the quantum of damages should the jury impose liability or it might preclude liability altogether.¹⁷³

McCarthy has argued that the test of identification for *celebrities* and *non-celebrities* should be different. The difference results from the nature of the commercial advantage which defendant gains from unpermitted use of plaintiff's identity. In the case of a celebrity, the commercial advantage flows from customer identification of plaintiff. In the case of a non-celebrity, the advantage may flow from plaintiff's general, non-recognizable appearance, for example, as an attractive or typical person, but it does not flow from customer identification. He argues that for celebrities that test must be that of "*unaided identification*," in which the plaintiff must prove that he is reasonably identifiable in defendant's use to a significant or more than de minimis number of ordinary viewers. The reasonable viewer or listener must be able to identify plaintiff merely from seeing defendant's use. The identification is made by a mental link of what the viewer perceives when confronted with defendant's use. The defendant is liable if a survey proves that surveyees indicate plaintiff when defendant's use is shown and they are asked whom or what defendant's use calls to their mind.¹⁷⁴

For non-celebrities McCarthy has proposed the different test of "*aided identification*," in which the plaintiff must prove that the defendant's use is in fact of the plaintiff. In aided identification, surveyees are shown both plaintiff's identity and defendant's use and asked if they think that plaintiff is identifiable. Viewers must be able to identify plaintiff when they are simultaneously presented with the plaintiff and defendant's use. If the "aided identification" test were applied to celebrities it would make the identifiability issue too biased in favor of plaintiffs, because the commercial benefit to defendant is created only in the minds of those persons who identify plaintiff by comparing what they already have in mind with whatever is shown in defendant's commercial use.¹⁷⁵

The Restatement (Third) of Unfair Competition (1995) provides that defendant's use must be sufficient to identify the person whose identity the defendant is alleged to have appropriated. The plaintiff must be reasonably identifiable from defendant's use. Whether this is the case, is a question of fact. Relevant evidence includes:

- a) the nature and extent of the identifying characteristics used by the defendant;
- b) the defendant's intent;
- c) the fame of the plaintiff;
- d) evidence of actual identification made by third persons, and
- e) surveys or other evidence indicating the perceptions of the audience.¹⁷⁶

173. *Hirsch v. S. C. Johnson & Son, Inc.*, 90 Wis.2d 379, 280 N.W.2d 129, at 137, 205 U.S.P.Q. 920 (Wis. 1979). Cf. *Negri v. Schering Corp.*, 333 F.Supp. 101, at 104 (D.C.N.Y. 1973).

174. McCarthy, *The Rights of Publicity and Privacy*, § 3.4[B] (Rev. 1993).

175. *Id.* § 3.4[B].

176. *Restatement (Third) of Unfair Competition* § 46, comment d. (1995).

2.6 Content: Which Acts Infringe the Right of Publicity?

[A] Recognition Values: Protection Against Unpermitted Commercial Use

[1] Use of Identity in Connection with Commercial Products

The content of the right of publicity depends on the object of protection, a person's identity or performance. Sometimes the right of publicity is invoked against an unauthorized appropriation of the publicity value in a non-copyrightable performance. But most right of publicity cases involve an unpermitted commercial use of plaintiff's identity. What is "commercial use"? In answering this question, courts and commentators have transferred the rules developed in appropriation privacy cases.¹⁷⁷ Courts have held the following types of use of plaintiff's identity actionable under the right of publicity.

Unpermitted use of someone's identity on commercial merchandise, such as posters, T-shirts, cars, cigarettes, shaving gel, or commercial services, will infringe the right of publicity.¹⁷⁸ In *Palmer v. Schonhorn Enterprises, Inc.*,¹⁷⁹ the court granted an injunction and damages to plaintiffs, well-known professional golfers, because defendant had used their names for commercial purposes in conjunction with playing charts as part of a golf game, even though their names and accomplishments, which had been highly publicized, were not advertised on the game box itself.¹⁸⁰

The use of Hirsch's nickname "Crazylegs" as a trademark for a moisturizing shaving gel for women was held to infringe the football player's right of publicity.¹⁸¹ Johnny Carson could prohibit the use of the phrase "Here's

177. Most old appropriation privacy decisions come from New York, where courts applying § 50 and § 51 of the 1905 Civil Rights Law had to answer the question whether defendant had appropriated plaintiff's name, portrait or picture for "advertising purposes, or for the purposes of trade."

178. Cf. *Winterland Concessions Co. v. Fenton*, 835 F.Supp. 529, 29 U.S.P.Q.2d 1630 (D.Cal. 1993): defendants enjoined from manufacturing, advertising, distributing, selling, or otherwise commercially exploiting any posters, posterbooks, calendars or other merchandise bearing the identity of plaintiffs; *McFarland v. Miller*, 14 F.3d 912, 1994 U.S. App. Lexis 1225, 29 U.S.P.Q.2d 1586, 22 Media L. Rep. 1205 (C.A.3 1993): Plaintiff stated right of publicity claim that defendant exploited plaintiff's identity for its restaurant services.

179. 232 A.2d 458, 96 N.J.Super. 72 (1967) applying Prosser's fourth type of invasion of privacy by appropriation.

180. Cf. *Uhlaender v. Henricksen*, 316 F.Supp. 1277, 1971 Trade Cases P 73,414 (D.C.Minn. 1970): Injunction against baseball using players' names in connection with a table game without permission; *Cardtoons v. Major League Baseball Players Ass.*, 838 F.Supp. 1501 (D. Okl 1993): "Baseball Parody Cards" set which depicts the likenesses and parody names of active Major League Baseball players violates the players' rights of publicity. However, in *Cardtoons v. Major League Baseball Players Ass.*, --- F.3d ---; 1996 WL 490707; 39 U.S.P.Q.2d 1865 (C.A.10 1996) the Tenth Circuit held that baseball trading cards are a "traditional medium of expression" which do not infringe the right of publicity. See § 10.1[B][1].

181. *Hirsch v. S. C. Johnson & Son, Inc.* 90 Wis.2d 379, 280 N.W.2d 129, at 137, 205 U.S.P.Q. 920 (Wis. 1979).

Johnny," the introduction slogan of his "The Tonight Show," in connection with portable toilets.¹⁸²

Courts have recognized one exception. A manufacturer has the right to truthfully tell its consumers which author created the product which is advertised and sold. This exception is especially relevant in cases where the author cannot claim copyright infringement. For example, in *Shaw v. Time-Life Records*,¹⁸³ the musical arrangements of Artie Shaw were no longer protected by copyright law. The court held that other manufacturers who reproduced the arrangements, had the right to say that the arrangements were made by Shaw, as long as the statements would not mislead buyers into thinking that the records were of performances of Shaw if in fact that was not the case.

A general principle of intellectual property law is that the exclusive right to sell is exhausted with respect to each product upon the first authorized sale by the intellectual property owner or licensee.¹⁸⁴ This principle also restricts the right of publicity.¹⁸⁵ In *Major League Baseball Players Ass. v. Dad's Kid Corp*,¹⁸⁶ the court held that baseball players "have little if any continuing publicity rights with respect to the use and reuse of their pictures on cards by subsequent purchasers and sellers of duly licensed baseball cards following a perfectly proper first sale into commerce for which the players get a royalty."¹⁸⁷

[2] Use of Identity in Advertisements for Commercial Products

In the *second* place, courts have held that the unpermitted use of someone's identity in defendant's advertisement for commercial products such as Doritos chips¹⁸⁸ or commercial services¹⁸⁹ infringes the right of publicity. For example, in the "*Motschenbacher*" case the Ninth Circuit held that defendant's use of the race-car of famous driver Lothar Motschenbacher in a television commercial for Winston cigarettes infringed his right of publicity.¹⁹⁰ The same court held that Bette Midler submitted a claim for infringement of her right of publicity by

182. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 218 U.S.P.Q. 1, 9 Media L. Rep. 1153, GRUR Int. 1985, 64 (C.A.6 1983).

183. 38 N.Y.2d 201, 379 N.Y.S.2d 390, 341 N.E.2d 817, 190 U.S.P.Q. 573 (1975).

184. The exhaustion rule is also known as the "first sale doctrine." This rule is recognized in copyright law (17 U.S.C. § 109(a)), patent law and trademark law. See for the exhaustion rule in trademark law: *McCarthy on Trademarks and Unfair Competition* § 25:11 (3d ed. 1992).

185. Cf. *Diacovo*, *Going Once, Going Twice, Sold: the First Sale Doctrine Defense in Right of Publicity Actions*, 12 *U. Miami Ent. & Sports L. Rev.* 57, at 80-93 (1995).

186. 806 F.Supp. 458; 25 U.S.P.Q.2d 1559 (D.S.N.Y. 1992).

187. *Id.* 806 F.Supp. 458, at 460.

188. *Waits v. Frito-Lay Inc.*, 978 F.2d 1992, 23 U.S.P.Q.2d 1721, 20 Media L. Rptr. 1585 (C.A.9 1992).

189. *Beverly v. Choices Women's Medical Center, Inc.*, 78 N.Y.2d 745, 587, 579 N.Y.S.2d 637, N.E.2d 275, 21 U.S.P.Q.2d 1313, 19 Media L. Rep. 1724 (N.Y. 1991): Medical center's unauthorized use of doctor's name, photograph, and professional title on its calendar which served as a promotional publication violates New York Civil Rights Law § 51.

190. *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821 (C.A.9 1974).

defendants, who aired a television commercial for a Ford car in which a sound-alike imitated Midler's distinctive voice.¹⁹¹

[3] Use of Identity in the Media

In the *third* place, some courts have held that the use of someone's identity in a traditional medium of expression, such as a film, magazine or newspaper, can infringe the right of publicity. The general rule is that "a celebrity's right of publicity does not preclude others from incorporating a person's name, features or biography in a literary work, motion picture, news or entertainment story. Only the use of an individual's identity in advertising infringes on the persona."¹⁹² But some courts have held that the right of publicity can also be infringed by use in a news or entertainment medium if the publicity value is appropriated. For example, in the "*Muhammad Ali*" case,¹⁹³ the court held that the publication in "Playgirl Magazine" of a drawing of a nude black man seated in the corner of a boxing ring infringed the right of publicity of heavyweight boxing world champion Muhammad Ali. The court granted a preliminary injunction, restraining the publication, because "[i]n the instant case there is no such informational or newsworthy dimension to defendant's unauthorized use of Ali's likeness."¹⁹⁴

In the "*Cher*" case,¹⁹⁵ magazine Forum had published without permission an interview with Cher, which was originally intended for publication in competitor's magazine US, under the false implication that Cher endorsed the magazine: "Cher tells Forum things that she would never tell US." Because of this false element the court held that her right of publicity would be infringed if Cher, a public figure, could prove that the publishers knew that their statements were false or published in reckless disregard of the truth.

Some courts have held that mentioning the name of a famous person in a media publication can infringe the right of publicity if there is no reasonable relationship between the plaintiff's identity and the subject of the story. For example, in *Grant v. Esquire, Inc.*,¹⁹⁶ defendant Esquire had published in 1946 an article about the clothing tastes and habits of six Hollywood stars, including plaintiff Cary Grant, which was illustrated with pictures of these stars. In 1971, Esquire republished the same picture with the modification that everything below the collar line had been replaced with the figure of another model in other clothes. The text under this picture made clear that the picture was modified and

191. *Midler v. Ford Motor Co.*, 849 F.2d 460, 1988 Copr.L.Dec. P 26,313, 7 U.S.P.Q.2d 1398, 15 Media L. Rep. 1620, GRUR Int. 1989, 338 (C.A.9 1988). Cf. *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661, 2 Media L. Rep. 2321 (N.Y.A.D. 1977): Lombardo stated a claim for infringement of his right of publicity because defendant had used his public personality as Mr. New Year's Eve in a television commercial for a car.

192. Armstrong, *The Reification of Celebrity: Persona as Property*, 51 *La. L. Rev.* 443, at 467 (1991), citing *Rogers v. Grimaldi*, 695 F.Supp. 112, at 121 (S.D.N.Y. 1988), *aff'd*, 875 F.2d 994 (C.A.2 1989.).

193. *Ali v. Playgirl, Inc.*, 447 F.Supp. 723, 206 U.S.P.Q. 1021, 3 Media L. Rep. 2540 (D.C.N.Y. 1978).

194. *Id.* 447 F.Supp. 723, at 727.

195. *Cher v. Forum Intern. Ltd.*, 692 F.2d 634, 217 U.S.P.Q. 407, 8 Media L. Rep. 2484 (C.A.9 1982).

196. 367 F.Supp. 876 (D.C.N.Y. 1973).

provided information about the clothes. The court concluded that although the text could be considered informative, "Mr. Grant's face serves no function but to attract attention to the article,"¹⁹⁷ and therefore infringed his right of publicity.

[4] Use of Identity in Advertisements for the Media

In the *fourth* place, courts have held that if use of someone's identity in the media does not infringe the right of publicity, the advertising of such non-infringing media products is also immune from liability for infringement of the right of publicity. For example, in *Int-Elect Engineering Inc. v. Clinton Harley Corp.*,¹⁹⁸ the court held that defendant's use of a photograph which could identify the plaintiffs on promotional material for defendant's magazine did not infringe the right of publicity, because the photograph had been published in defendant's magazine and defendant was allowed to give its readers an impression of the nature and content of the magazine.

This view has been adopted by the Restatement (Third) of Unfair Competition § 47 (1995) which provides that "use 'for purposes of trade' does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses."¹⁹⁹

However, this advertisement for media exemption does not apply if the plaintiff's identity does not appear in the media product which is advertised. In *Tellado v. Time-Life Books, Inc.*,²⁰⁰ the use of a picture of plaintiff, an ex-Vietnam soldier, in an advertisement for books, infringed his right of publicity, because he did not appear in the advertised books.

[B] Performance Values: Protection Against Reproduction and Imitation

[1] Reproduction and Broadcasting of Reproduction

In the "*Zacchini*" case,²⁰¹ the U.S. Supreme held that the First Amendment does not immunize the news media if they *broadcast* the entire act of a performer without compensation. It was held that the operator of a television station infringed the right of publicity of Zacchini when it filmed and showed in its entirety on the eleven o'clock television news program his entire fifteen-second human cannonball-act performed at a county fair in Ohio. The Court said that

197. Id. 367 F.Supp. 876 at 878.

198. 21 Media L. Rptr. 1762 (D.C.Cal. 1993).

199. See also *Restatement* (Third) of Unfair Competition § 47, comment c. (1995): "The use of a person's identity primarily for the purpose of communicating information or expressing ideas is not generally actionable as a violation of the person's light of publicity." See for a discussion § 47, *infra*, § 6.2[B].

200. 643 F.Supp. 904, at 914 (D.N.J. 1986).

201. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977). The case is discussed in § 11.3[A].

"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."²⁰²

A problem of the Zacchini decision is that the Court did not provide a criterion for predicting when media reports will infringe the right of publicity. The Court made clear that its holding did not extend to the reporting of information about an event of public interest. It stated that "if [...] respondent had merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television, we would have a very different case."²⁰³ On the other hand, the Court was "quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent."²⁰⁴ Justice Powell said in his dissenting opinion that the criterion of a performer's entire act is inadequate to provide "a standard clear enough even for the resolution of this case."²⁰⁵

[2] Imitation of Performance

The right of publicity involving performances is not limited to protection against appropriation of the actual performance. Courts have extended the protection to exploitative forms of *imitation* of a performer's performance.

Illustrative is the "*Marx brothers*" case.²⁰⁶ The plaintiffs claimed that defendants' musical play, "A Day in Hollywood/A Night In the Ukraine" infringed their right of publicity. The second half of the play featured performers who simulated the unique appearance, style and mannerisms of the Marx brothers. Defendants contended that the play contained a parody of the Marx brothers' performance and cited reviews of the play terming it a "spoof," "compendium" and "parody." The author of the play testified that his intention was to write a satiric comment on Hollywood movies using a parody of the Marx brothers movies as one of the literary devices. The District Court held that the imitation of the appearance and comedy style of the Marx brothers in a play was not privileged by the First Amendment without paying damages to plaintiffs because the play was neither biographical nor an attempt to convey information. The court stated that

"[a]lthough literary commentary may have been the intent of the playwright, any such intent was substantially overshadowed in the play itself by the wholesale appropriation of the Marx Brothers characters. [...] Here, defendants have gone beyond merely building

202. Id. 433 U.S. 562, at 573. Footnote omitted.

203. Id. 433 U.S. 562, at 569.

204. Id. 433 U.S. 562, at 574-75 (1977).

205. Id. 433 U.S. 562, at 579 (1977).

206. *Groucho Marx Productions, Inc. v. Day and Night Co., Inc.*, 523 F.Supp. 485, 212 U.S.P.Q. 926, 7 Media L. Rep. 2030 (D.C.N.Y. 1981), rev'd on other grounds, 689 F.2d 317, 216 U.S.P.Q. 553, 8 Media L. Rep. 2201 (C.A.2 1982).

on the original to the point of duplicating as faithfully as possible the performances of the Marx Brothers, albeit in a new situation with original lines."²⁰⁷

In appeal the Second Circuit reversed because not New York law but California law applied which did not recognize a descendible right of publicity.²⁰⁸ The performance reproduction and imitation case law is supported by the Restatement (Third) of Unfair Competition.²⁰⁹

2.7 Duration of the Right of Publicity

The question whether the right of publicity ends when the person identified dies, or continues after death and descends to the heirs, has resulted in conflicting case law and doctrine. Houdek listed 42 law review articles which discuss the issue of descendibility of the right of publicity.²¹⁰ Gordon was one of the first commentators to state that the property rights in one's name and likeness "do not pass into the public domain after death, but rather, accrue to the deceased's estate for the benefit of his next of kin."²¹¹ It seems that today the majority of courts and commentators agree that the right of publicity is a descendible property right.

In 1972, a court dealt for the first time with the descendibility of the right of publicity. In *Lugosi v. Universal Pictures Co.*,²¹² the widow and surviving son, the heirs of Bela Lugosi, sued Universal Pictures for infringing the right of publicity in the character of Count Dracula as performed by Lugosi. The court held that "Bela Lugosi's interest or right in his likeness and appearance as Count Dracula was a property right of such character and substance that it did not terminate with his death but descended to his heirs."²¹³ But the California Supreme Court²¹⁴ reversed because it viewed the right of publicity as a personal privacy right of Lugosi and therefore non-descendible. The Supreme Court mentioned two other arguments for non-descendibility of the right of publicity. A descendible right of publicity was not in society's interest in the free dissemina-

207. *Id.* 523 F.Supp. 485, at 493.

208. *Groucho Marx Productions, Inc. v. Day and Night Co., Inc.*, 689 F.2d 317, 216 U.S.P.Q. 553, 8 Media L. Rep. 2201 (C.A.2 1982).

209. See Restatement (Third) of Unfair Competition § 47, comment d. (1995).

210. Houdek, Researching the Right of Publicity: a Revised and Comprehensive Bibliography of Law-related Materials, 16 *Hastings Comm-Ent L.J.* 385, at 407-111 (1994). Cf. Lawrence, The Right of Publicity: A Research Guide, 10 *Hastings Comm-Ent L.J.* 143, at 323-332 (1987), listing 34 articles about this topic. Cf. Bingman, A Descendible Right of Publicity: Has The Time Finally Come For A National Standard?, 17 *Pepperdine L. Rev.* 933 (1990), and Neumeyer, The Right of Publicity And Its Descendibility, 7 *U. Miami Ent. & Sports L. Rev.* 287 (1990).

211. Gordon, Right of Property in Name, likeness, Personality and History, 55 *Nw. U.L. Rev.* 553, at 612-613 (1960). Cf. Green, Right of Privacy, 27 *Ill. L. Rev.* 237, at 248 (1932): "[I]n the case of exploiting the personality of an individual for profit the courts might well overlook the defamation and allow the surviving relatives an action on the basis of profit-making from the exploitation of a deceased relatives's personality."

212. 172 U.S.P.Q. 541 (1972).

213. *Id.* 172 U.S.P.Q. 541, at 551.

214. *Lugosi v. Universal Pictures*, 25 Cal.3d 813, 160 Cal.Rptr. 323, 603 P.2d 425, 10 A.L.R.4th 1150, 205 U.S.P.Q. 1090, 5 Media L. Rep. 2185 (Cal. 1979). *Id.* *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, 160 Cal.Rptr. 352, 603 P.2d 454, 205 U.S.P.Q. 1116, 5 Media L. Rep. 2208 (Cal. 1979): Right of publicity in identity of Rudolph Valentino is not descendible and expired upon actor's death.

tion of ideas.²¹⁵ The Court found it also difficult to judicially select an appropriate duration limit if the right of publicity were held descendible.²¹⁶ In 1985, the California legislature overruled the *Lugosi* decision by creating a postmortem right of publicity of fifty years.²¹⁷

The right of publicity is non-descendible in states where it is viewed as an inextricable part of the right of privacy, such as in New York or Ohio.²¹⁸ In *Pirone v. MacMillan, Inc.*,²¹⁹ the Second Circuit held that the New York statutory right of privacy preempts a common law right of publicity and is clearly limited to living persons rather than heirs. Therefore, Babe Ruth's heirs could not state a claim for infringement of the right of publicity or invasion of privacy under New York law against a defendant who used photographs of Ruth for a calendar. Therefore, some commentators have argued that New York should adopt a right of publicity statute.²²⁰

In *Memphis Development Foundation v. Factors Etc., Inc.*,²²¹ the Sixth Circuit concluded that the right of publicity, under Tennessee law, should not be given the status of a descendible right. The court repeated the practical problems of judicial line-drawing mentioned by the California Supreme Court. In the court's opinion, a descendible right of publicity does not create a necessary encouragement of effort and creativity. The court concluded that the "memory, name and pictures of famous individuals should be regarded as a common asset to be shared, an economic opportunity available in the free market system."²²²

However, in 1987 the Tennessee Court of Appeals²²³ dealt with the descendibility issue, holding that Elvis Presley's right of publicity survived his death and remained enforceable by his estate and its licensees. The court said that "the Sixth Circuit appears to believe that there is something inherently wrong with recognizing that the right of publicity is descendible. [...] We do not share this bias. Like the Supreme Court of Georgia, we recognize that the "trend since the early common law has been to recognize survivability, notwithstanding the legal problems which may thereby arise."²²⁴

The court mentioned several policies promoted by a descendible right of publicity. *First*, the Court referred to the "*Laurel and Hardy*" case, which held that if the right of publicity is treated not as a privacy right but as an intangible

215. *Id.* 25 Cal.3d 813, at 824.

216. *Id.* 25 Cal.3d 813, at 823, fn. 8.

217. See Civil Code § 990(g). See Appendix A.

218. See McCarthy, *The Rights of Publicity and Privacy*, § 9.5 [7] and [8] (Rev. 1993).

219. 894 F.2d 579, 13 U.S.P.Q.2d 1799, 17 Media L. Rep. 1472 (C.A.2 1990).

220. Cf. Gordon and Honig, *The Celebrity Rights Act*, 7 *Ent. & Sports Lawyer* 1 (1988); Sachs, *It's Up to You*, New York: *It's Time for a Statutory Right of Publicity*, 20 *Colum. - VLA J.L. & Arts* 59 (1995).

221. 616 F.2d 956, 205 U.S.P.Q. 784, 5 Media L. Rep. 2521 (C.A.6 1980).

222. *Id.* 616 F.2d 956, at 960.

223. State ex rel. *Elvis Presley Intern. Memorial Foundation v. Crowell*, 733 S.W.2d 89, 2 U.S.P.Q.2d 1663, 14 Media L. Rep. 1043 (Tenn.App. 1987). Cf. *Commerce Union Bank v. Coors of the Cumberland, Inc.*, 7 Media L. Rep. 2204 (Tenn. Ct. 1981): Descendible right of publicity exists under Tennessee law.

224. *Id.* 733 S.W.2d 89, at 97, citing *Martin Luther King Center for Social Change, Inc. v. American Heritage Products, Inc.*, 250 Ga. 135, 296 S.E.2d 697, at 705, 216 U.S.P.Q. 711, 8 Media L. Rep. 2377 (Ga. 1982): Martin Luther King' right of publicity is descendible, even if he did not exploit it during his lifetime.

property right, it is no less a property right at death.²²⁵ *Second*, a descendible right of publicity would prevent unjust enrichment by granting a windfall to an advertiser who has no tenable claim to a celebrity's interest in the right of publicity. *Third*, it is consistent with a celebrity's expectation that he is creating a valuable capital asset that will benefit his heirs and assignees after his death. *Fourth*, it recognizes the value of the contract rights of persons who have acquired the right to use a celebrity's name and likeness. If a celebrity's identity were to enter the public domain at death, the value of any existing contract made while the celebrity was alive would be greatly diminished. *Fifth*, it prevents unfair competition and deception with regard to the sponsorship, approval or certification of goods and services.²²⁶

Most courts that have recognized a descendible right of publicity, have tried to solve the practical problems of judicial line-drawing. In a dissenting opinion in the "*Lugosi*" case, Chief Justice Bird suggested, in analogy with copyright law,²²⁷ that the right of publicity should be recognized during the subject's life and for fifty years thereafter.²²⁸ Others have suggested 20 years,²²⁹ or 10 to 20 years.²³⁰ A postmortem right of publicity has been recognized as the law in thirteen states,²³¹ including California, Florida and Texas. Some State statutes²³² have defined durations of a postmortem right varying from *hundred* years (Oklahoma),²³³ *fifty* years (California, Texas),²³⁴ *forty* years (Florida),²³⁵ *twenty* years (Virginia),²³⁶ or *ten* years (Tennessee).²³⁷

McCarthy argued that the conflict between the right of publicity and the First Amendment does not depend on the descendibility issue, but on the definition of the content of the right of publicity. The mere possibility of a constitutional conflict should not result in an outright rejection of an otherwise viable right.²³⁸

225. *Price v. Hal Roach Studios, Inc.*, 400 F.Supp. 836, at 844 (S.D.N.Y. 1975): "There appears to be no logical reason to terminate this right upon death of the person protected."

226. *Id.* 733 S.W.2d 89, at 98-99.

227. According to 17 U.S.C. § 302(a) copyright in works created on or after January 1, 1978, endures for a term consisting of the life of the author and fifty years after the author's death.

228. *Lugosi v. Universal Pictures*, 25 Cal.3d 813, at 847, 160 Cal.Rptr. 323, 603 P.2d 425, 10 A.L.R.4th 1150, 205 U.S.P.Q. 1090, 5 Media L. Rep. 2185 (Cal. 1979).

229. Ausness, *The Right of Publicity: A 'Haystack in a Hurricane'*, 55 *Temp. L.Q.* 977, at 1012 (1982).

230. McCarthy, *The Rights of Publicity and Privacy*, § 9.4 (Rev. 1993).

231. See McCarthy, *The Human Persona as Commercial Property: The right of Publicity*, 19 *Colum. - VLA J.L. & Arts* 129, at 132 (1995).

232. See for a discussion of the postmortem rules in the different States McCarthy, *The Rights of Publicity and Privacy*, § 9.5 (Rev. 1993).

233. 12 Okl. Stat. § 1448(G); this rule applies only to persons who died after January 1, 1936.

234. Cal. Civil Code § 990 (See Appendix A); 4 Tex. Prop. Code Ann. § 26.012(d).

235. Fla. Stat. Ann. § 540.08(4).

236. Va. Code Ann. § 8.01-40(B).

237. Tenn. Code Ann. § 47-25-1104(a). But the term of protection can be extended if the right is exploited.

238. McCarthy, *The Rights of Publicity and Privacy*, § 9.2[B][3][b] (Rev. 1993).

2.8 Exploitation of the Right of Publicity

The right of privacy is purely personal and not assignable.²³⁹ In the "*Haelan*" case,²⁴⁰ the Second Circuit distinguished the right of publicity from the right of privacy. It held that an exclusive licensee which had obtained the exclusive right to exploit the names and pictures of baseball players, had standing to sue a third party which used names and pictures of the same baseball without authorization from the players.²⁴¹

Commentators have argued that the right of publicity must be fully assignable. Nimmer defined the right of publicity as a right "to control and profit from the publicity values which he has created or purchased."²⁴² In his opinion the "pecuniary worth of the publicity values will be greatly diminished if not totally destroyed if these values cannot be effectively sold."²⁴³ Courts have held that the right of publicity can be fully assigned. Every person can sell his right of publicity to another party.²⁴⁴ In *State ex rel. Elvis Presley Intern. Memorial Foundation v. Crowell*, the court stated: "Unquestionably, a celebrity's right of publicity has value. It can be possessed and used. It can be assigned, and it can be the subject of a contract."²⁴⁵ For example, Clyde Beatty, an animal trainer who operated the Clyde Beatty Circus, assigned, one month before his death in 1965, the right of publicity in his identity to his wife.²⁴⁶ There appear to be no court decisions which have restricted the possibility of selling one's right of publicity.

The right of publicity owner can grant an exclusive or non-exclusive license to use the licensor's identity within the limits of the license. The licensee does not buy the right of publicity itself. He merely purchases the permission to use an aspect of the licensor's identity or performance. In the license agreement, the licensor can limit the permission with respect to the elements of identity or performances, types of use, types of products, duration, or territory. The

239. See *Restatement (Second) of Torts* § 652i, comment a; See with respect to the appropriation privacy tort: *Restatement (Second) of Torts* § 652c, comment a., which only discusses the license, not the assignment. Cf. *infra* at § 3.2[E][2].

240. *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (C.A.2 1953).

241. Since a licensee does not acquire ownership of the commercial value of the identity, the non-exclusive licensee does not ordinarily have standing to sue, see *Restatement (Third) of Unfair Competition* § 46, comment g. (1995).

242. Nimmer, *The Right of Publicity*, 19 *Law & Contemp. Prob.* 203, at 216 (1954).

243. *Id.* 19 *Law & Contemp. Prob.* 203, at 212.

244. E.g. *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661, 2 *Media L. Rep.* 2321 (N.Y.A.D. 1977): right of publicity, unlike right of privacy, is assignable and descendible; *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 205 U.S.P.Q. 751, 4 *Media L. Rep.* 1144 (C.A.2 1978): Elvis Presley assigned the right of publicity in his identity to Boxcar Enterprises, a corporation in which he owned a 22% share.

245. 733 S.W.2d 89, at 97, 2 U.S.P.Q.2d 1663, 14 *Media L. Rep.* 1043 (Tenn.App. 1987).

246. *Acme Circus Operating Co., Inc. v. Kuperstock*, 711 F.2d 1538, 221 U.S.P.Q. 420, 9 *Media L. Rep.* 2138 (C.A.11 1983).

licensee's use outside the scope of the license will constitute an infringement of the right of publicity and a breach of contract.²⁴⁷

2.9 Prima Facie Case of Infringement of the Right of Publicity and Remedies

[A] Elements of a Claim for Infringement of the Right of Publicity

To create liability for infringement of the right of publicity in identity, a plaintiff must prove that:

- 1) he is the owner of the right of publicity;²⁴⁸
- 2) defendant used some element of the identity of the plaintiff in such a way that he can be identified from defendant's use;²⁴⁹
- 3) defendant acted without permission from the plaintiff, and
- 4) defendant's use is likely to cause damage to the commercial value of plaintiff's identity.

Most courts and commentators have stated that the right of publicity protects against unpermitted commercial use which causes financial damages.²⁵⁰ Often such statements distinguish the right of publicity from the right of privacy which protects against injury to feelings. But some commentators and courts have held that the proof of commercial damages is an extra element of a right of publicity claim. In this view, the lack of damages is a valid defense against a claim for infringement of the right of publicity. For example, in *Presley's Estate v. Russen*,²⁵¹ the court expressed "that the plaintiff in seeking relief for an infringement of its rights of publicity should demonstrate an identifiable economic harm."²⁵² For this position the court cited an article of Felcher and Rubin who argued that the "harm requirement" follows from First Amendment considerations. If a plaintiff cannot show a harm, courts should avoid imposing liability because of First Amendment rights.²⁵³ Opposing this view, McCarthy stated that

247. See *Restatement (Third) of Unfair Competition* § 46, comment f. (1995): "If the use is outside the scope of consent, the defendant is subject to liability for any harm resulting from conduct that exceeds he consent."

248. The right of publicity can also be owned through descent or assignment.

249. See § 2.5. In most cases the defendant used plaintiff's identity. However, if A assigned his right of publicity to B and defendant C uses A's identity, plaintiff B must prove that A can be identified from C's use.

250. Cf. definition of right of publicity given by McCarthy, *The Rights of Publicity and Privacy*, vii (Rev. 1993) cited at § 2.2[D].

251. 513 F.Supp. 1339, 211 U.S.P.Q. 415 (D.C.N.J. 1981).

252. Id. 513 F.Supp. 1339, at 1379.

253. Felcher and Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 *Yale L.J.* 1577, at 1608-16 (1979). According to the authors the harm requirement must be applied to all types of media portrayals, not just those classified as right of publicity claims. In their view the harm requirement follows from three social policies: Protection of the freedom of the individual against the disclosure of information, prevention of fraudulent business practices, and encouraging individual achievement by allowing people to profit from their own efforts.

"[s]ome damage to the commercial value of identity is presumed once it is proved that the defendant has made an unpermitted use of some identifiable aspect of identity in such a commercial context that one can state that such damage is likely."²⁵⁴

Some courts have held that to state a claim for infringement of the right of publicity a plaintiff must prove one or more of the following additional elements:

- a) that plaintiff's identity has a commercial value;²⁵⁵
- b) that the plaintiff actually exploited the commercial value in his identity;²⁵⁶
- c) that defendant acted with actual malice;²⁵⁷
- d) that defendant intentionally used plaintiff's identity.

Courts have never held that a defendant can state as a valid defense that he did not intend to injure the plaintiff. But some courts have held that the right of publicity is infringed if the plaintiff intended to identify the plaintiff. For example, in *Carson v. Here's Johnny Portable Toilets, Inc.*,²⁵⁸ the Sixth Circuit said: "[A] celebrity's legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes."

However, there appears to be no court decision which held that a defendant can state as a valid defense that he did not intend to use the identity of the plaintiff and that he did not realize that other people would identify plaintiff. In *Fairfield v. American Photocopy Equipment Company*,²⁵⁹ an invasion of privacy by appropriation case, the court stated that "[i]nadvertence or mistake is no defense where the publication does in fact refer to the plaintiff in such manner as to violate his right of privacy."²⁶⁰ McCarthy argued that ignorance or negligence should not serve as a defense of an infringement in a right of publicity case because the commercial loss to the plaintiff and the commercial advantage to the defendant are independent of the defendant's state of mind.²⁶¹

The defense that the defendant mistakenly thought that he had a license to use the plaintiff's identity has been rejected. In *Douglass v. Hustler Magazine, Inc.*, the Seventh Circuit stated:

"[T]he analogy to copyright which supports Douglass's right-of-publicity claim, suggests that knowledge or even care is irrelevant at least to that claim; for it is no defense to copyright infringement that the infringer reasonably but mistakenly thought he had a license."²⁶²

254. The Rights of Publicity and Privacy, § 3.1[B] (Rev. 1993).

255. See § 2.3[B].

256. See § 2.4.

257. See § 3.1[H] and the Cher case discussed in § 2.6[A][3]. But see § 10.4[C][2].

258. 698 F.2d 831, at 837, 218 U.S.P.Q. 1, 9 Media L. Rep. 1153, GRUR Int. 1985, 64 (C.A.6 1983).

259. 138 Cal.App.2d 82, 291 P.2d 194 (Cal.App. 1955).

260. Id. 291 P.2d 194, at 197, citing *Kerby v. Hal Roach Studios*, 53 Cal.App.2d 207, at 213, 127 P.2d 577 (1942).

261. The Rights of Publicity and Privacy, § 3.6[F] (Rev. 1993).

262. 769 F.2d 1128, at 1140, 11 Media L. Rep. 2264 (C.A.7 1985).

The Restatement (Third) of Unfair Competition (1995) rejects any requirement of intent:

"Unless required by an applicable statutory provision, an intent to infringe another's right of publicity is not an element of liability. [...] Thus, the plaintiff is not required to prove that the defendant intended to identify the plaintiff. Similarly, a mistake regarding the plaintiff's consent is not a defense."²⁶³

Even retailers or distributors of infringing merchandise are subject to liability for infringement of the right of publicity without regard to their knowledge or intent. However, the absence of an intent to infringe on the plaintiff's publicity rights remains relevant in determining appropriate relief. Publishers and broadcasters who disseminate infringing advertisements on behalf of others should be subject to liability for infringement of the right of publicity. However, without knowledge that the advertisement is infringing, the liability of a publisher or broadcaster should not extend beyond an injunction against further publication.²⁶⁴

[B] Remedies: Injunction

The remedies in cases of an infringement of the right of publicity can be an injunction and/or damages. If defendant infringed the right of publicity, the usual remedy is a permanent injunction. The injunction may not cover more than acts which infringe the right of publicity. For example, in *Elvis Presley Enterprises, Inc. v. Elvisly Yours, Inc.*,²⁶⁵ the District Court held that defendants "are permanently enjoined from using the name, likeness and image of Elvis Presley [...] for any purpose whatsoever, including the sale, distribution, marketing, advertising and licensing of goods or services."²⁶⁶ In appeal the Sixth Circuit held that an injunction "for any purpose whatsoever" is too broad insofar as it covers more than the unauthorized commercial use or exploitation of plaintiff's rights. For example, defendant was still allowed to write a magazine article or book about Elvis Presley or dealing in properly licensed products without infringing the right of publicity.

Further, the injunction should be limited to the United States and its possessions. The court remanded to the District Court with instructions to modify the injunction that defendants "are permanently enjoined from using the name, likeness and image of Elvis Presley [...] for the purposes of the sale,

263. *Restatement (Third) of Unfair Competition* § 46, comment e. (1995). However, the intent and knowledge of the defendant remains relevant to the resolution of the identification issue, and the determination of appropriate relief.

264. *See Restatement (Third) of Unfair Competition* § 47, comment e. (1995).

265. 936 F.2d 889, 19 U.S.P.Q. 1377 (C.A.6 1991).

266. *Id.* 936 F.2d 889, at 896.

distribution, marketing, advertising and licensing of unauthorized goods or services in the United States and its possessions and territories."²⁶⁷

A preliminary injunction can be obtained upon a showing of irreparable harm and a likelihood of success on the merits.²⁶⁸ For example, in *Ali v. Playgirl, Inc.*,²⁶⁹ the court granted a preliminary injunction restraining the publication of a fictionalized drawing of Muhammed Ali in defendant's "Playgirl" magazine, which showed a nude black man, seated in corner of boxing ring, which could be identified as the plaintiff. However, in *Rosenfeld v. W.B. Saunders, Inc.*,²⁷⁰ the plaintiff, trustee of testamentary trusts of an author of a treatise on plastic surgery, moved for a preliminary injunction prohibiting the publication and distribution of a revised edition of the work undertaken after the author's death. The District Court denied plaintiff's application for a preliminary injunction upon the right of publicity because plaintiff had failed to establish the necessary likelihood of success on the merits for a claim based on New York privacy law as the source of a descendible right of publicity.

The Restatement (Third) of Unfair Competition § 48 (1995) provides that in cases of infringement of the right of publicity, the appropriateness of injunctive relief depends upon a comparative appraisal of all the factors of the case.²⁷¹

[C] Remedies: Damages

In a case of infringement of the right of publicity, courts have awarded different types of damages suffered by the plaintiff.²⁷²

In the *first* place, the plaintiff is entitled to the fair market value of the unauthorized use of plaintiff's identity. That is the reasonable fee the infringer did not pay for permission to use the plaintiff's identity. This measure is appropriate in cases in which it is difficult to prove the loss to the plaintiff or the gain to the defendant, attributable to an appropriation of identity. The fair market value then represents either the loss of compensation to the plaintiff for the value

267. *Id.* 936 F.2d 889, at 897. *Cf. Carson v. Here's Johnny Portable Toilets, Inc.*, 810 F.2d 104, 1 U.S.P.Q.2d 2007 (C.A.6 1987): Injunction against exploiting phrase "Here's Johnny" in any state was proper where use violated entertainer's right of publicity under Michigan law, even though it was not certain that all other states would recognize Carson's right of publicity, because the defendant could seek a modification of the injunction if it desired to use the phrase in another state.

268. *Cf. Restatement (Third) of Unfair Competition § 48, comment d. (1995):* "the appropriateness of preliminary relief depends upon the likelihood that the plaintiff will suffer irreparable harm in the absence of preliminary relief, the plaintiff's likelihood of success on the merits, the balance of equities between the parties, and the interest of the public."

269. 447 F.Supp. 723, 206 U.S.P.Q. 1021, 3 Media L. Rep. 2540 (D.C.N.Y. 1978).

270. 728 F.Supp. 236, 15 U.S.P.Q.2d 1423 (S.D.N.Y. 1990).

271. See for the text of *Restatement (Third) of Unfair Competition § 48 (1995)* and my comment, *infra*, § 6.2[B].

272. *Cf. Restatement (Third) of Unfair Competition § 49, comment. d (1995).*

of the defendant's use or the unjust gain to the defendant in avoiding payment for the use.²⁷³

Second, the plaintiff can recover his own loss due to the lost of control over the exploitation of his right: lost profits on sales or licenses, the reduction in the commercial value of his identity,²⁷⁴ and costs of corrective measures undertaken by the plaintiff to restore the value of his identity.

Third, the plaintiff may recover some or all of the profits resulting from the unauthorized use of the plaintiff's identity. Recovery of the infringer's net profits, attributable to the unauthorized use, is possible *in addition* to recovery of plaintiff's own losses and damages, so long as there is no double recovery. The plaintiff bears the burden of establishing the defendant's sales; the defendant has the burden of establishing any portion of the sales that is attributable to factors other than the appropriation of the plaintiff's identity and any expenses properly deducted in determining net profits.²⁷⁵

Some courts have held that a plaintiff can also recover *mental* injury in a right of publicity claim. For example, in the "*Tom Waits*" case it was held that the unpermitted imitation of the distinctive voice of Tom Waits in an advertisement for corn chips infringed his right of publicity. The Ninth Circuit affirmed a jury award of compensatory damages of \$100,000 for the fair market value of his services, \$75,000 for injury to his goodwill, professional standing and future publicity value, and \$200,000 for injure to his peace, happiness and feelings. The court remarked:

"The defendants argue that in right of publicity actions, only damages to compensate for economic injury are available. We disagree. Although the injury stemming from violation of the right of publicity "may be largely, or even wholly, of an economic or material nature," we have recognized that "it is quite possible that the appropriation of the identity of a celebrity may induce humiliation, embarrassment, and mental distress."²⁷⁶

273. Relevant evidence in determining the value of the use can be the manner in which the defendant has exploited the identity, the relative fame of the plaintiff, the price that the plaintiff has received for similar uses, and expert testimony concerning the licensing fees for similar uses. See *Restatement (Third) of Unfair Competition* § 49, comment d. (1995).

274. Such loss can result from the manner or form of defendant's unauthorized use, the quality or nature of defendant's goods or services with which the plaintiff's identity is used, overexposure of plaintiff's identity, or other ways the use that reduce the plaintiff's future economic opportunities. The demand by consumers and potential licensees for plaintiff's identifying features may be reduced by the extra number of appearances or by an association of the plaintiff with a particular advertiser, advertisement, or product with an (inferior) quality that is or will be incompatible with the image of the plaintiff. Cf. *Restatement (Third) of Unfair Competition* § 49, comment d. (1995).

275. Cf. See McCarthy, *The Rights of Publicity and Privacy*, 11.8[D] (Rev. 1993); Id. *Restatement (Third) of Unfair Competition* § 49, comment d. (1995).

276. *Waits v. Frito-Lay Inc.*, 978 F.2d 1992, 23 U.S.P.Q.2d 1721, 20 Media L. Rptr. 1585, at 1591 (C.A.9 1992), citing *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, at 824 and fn. 11 (C.A.9 1974). Cf. Lange, Shopping for the California Right of Publicity, 16 *Hastings Comm-Ent L.J.* 151, at 182 (1993).

In addition, the plaintiff may recover *attorney fees*,²⁷⁷ and/or *punitive damages* if defendant intended to exploit plaintiff's identity.²⁷⁸ But in areas where the right of publicity has not been clearly established, punitive damages are generally unavailable. Bette Midler's claim for punitive damages against defendant for its deliberate imitation of her voice in a commercial was denied because she could not show that defendant acted with an "evil motive."²⁷⁹ But in the "*Tom Waits*" case the court stated that the right of publicity in the context of voice appropriation was not an issue, because defendants were familiar with the "*Bette Midler*" case. Applying California law the court said that punitive damages are available where it is proven by clear and convincing evidence that the defendant has been guilty of despicable conduct which is carried out by the defendant with a willful and conscious disregard of the rights or safety of others. The court awarded \$2,000,000 punitive damages against defendants for imitating Waits' voice.²⁸⁰

In *Clark v. Celeb Pub., Inc.*,²⁸¹ defendant published without consent pictures of plaintiff, a self-employed professional model, in advertisements for Celeb Magazine, "a low quality and very explicit pornographic magazine." The court granted the following damages:

- a) \$6,750 for the loss of compensation for defendant's use;
- b) \$7,000 for damage to her publicity value. Because of the publication in defendant's magazine other advertisers did not want to use her as a model. The court based its estimation on her projected earnings for modelling fees for 1991;
- c) \$25,000 for mental anguish she has suffered, and
- d) \$25,000 in punitive damages.

The Restatement (Third) of Unfair Competition § 49 (1995) provides that the appropriateness of monetary relief depends upon a comparative appraisal of all the factors of the case.²⁸²

277. Restatement (Third) of Unfair Competition § 49, comment f. (1995). Cf. *Winterland Concessions Co. v. Fenton*, 835 F.Supp. 529; 29 U.S.P.Q.2d 1630 (D.Cal. 1993); defendants are ordered to pay to plaintiffs \$187,980 in attorneys' fees in case of infringement of right of publicity.

278. Restatement (Third) of Unfair Competition § 49, comment e. (1995). To create liability for infringement of the right of publicity in identity, a plaintiff does not have to prove that defendant intended to infringe his right, see *supra* at § 2.9[A].

279. *Midler v. Young & Rubicam Inc.*, 19 Media L. Rep. 2190 (C.A.9 1991).

280. *Waits v. Frito-Lay Inc.*, 978 F.2d 1992, 23 U.S.P.Q.2d 1721, 20 Media L. Rptr. 1585, at 1593 (C.A.9 1992).

281. 530 F.Supp. 979, 8 Media L. Rep. 1261, at 1263-1264 (D.C.N.Y. 1981).

282. See for the text of Restatement (Third) of Unfair Competition § 49 (1995) and my comment, *infra*, § 6.2[B].

CHAPTER 3

UNITED STATES: OTHER LEGAL THEORIES

3.1 Defamation Law

[A] Introduction

Defamation law and the right of publicity protect different interests, but both actions can be claimed if a defendant's unpermitted commercial use also defames the plaintiff. The law of defamation¹ consists of the two old common law torts of libel and slander.² Libel is defamation by a communication which is embodied in some tangible form, such as a newspaper publication. Slander consists of a defamatory communication by spoken words, or gestures. Defamation involves a publication to a third party of a false statement of fact concerning a person which is understood as tending to damage his reputation.

There is no postmortem common defamation law. Once a person dies, his interest in protection of his reputation ceases. Therefore, one who publishes defamatory speech concerning a deceased person is not liable under defamation law either to the deceased or to his descendants or relatives. To create liability for defamation, plaintiff must plead and prove the following elements,³ which is discussed in the following sections:

- 1) a false statement of fact;
- 2) which is defamatory, i.e. tends to harm plaintiff's reputation;
- 3) which is of and concerning the plaintiff;
- 4) which is embodied in an unprivileged publication to a third party;
- 5) which is the result of fault on the part of the defendant, and
- 6) which causes harm to plaintiff's reputation.

[B] False Facts, Opinion and Fiction

[1] No False Opinion

The statement must be false. One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true, even if it is published solely for the purpose of harming a person.⁴ Liability for defamation exist only if the publication is both defamatory and false. Traditionally courts have held that the expression of an opinion is not actionable under defamation law. Opinions are constitutionally privileged because under the First Amendment

1. See Eldredge, *The Law of Defamation* (1978); Smolla, *Law of Defamation* (1989); *Prosser and Keeton on Torts*, Chapter 19, 771-848 (5th ed. 1984).
2. Since the second half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by defamation. See Eldredge, *Law of Defamation* 5 (1978).
3. Cf. *Restatement (Second) of Torts* § 558 (1977). See for an alternative list of nine elements: Smolla, *Law of Defamation*, § 1.08 (1989).
4. *Restatement (Second) of Torts* § 581a (1977).

there is no such thing as a false idea.⁵ However, in the 1990 "*Milkovich*" case the U.S. Supreme Court held that adding the words "in my opinion...." does not dispel the possible factual implications contained in a statement. A statement of opinion relating to matters of public concern which does not contain a provable false factual connotation will receive full constitutional protection. But a statement of "opinion" on a matter of public concern can be actionable under defamation law if it "reasonably implies false and defamatory facts" regarding the plaintiff.⁶ Chief Justice Rehnquist gave an example. He distinguished the statement "In my opinion Mayor Jones is a liar" from the statement "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin." While the second statement would not be actionable, the first implies a knowledge of facts which can lead to the conclusion that Jones told an untruth and therefore can cause as much damage to the reputation of Jones as the factual statement "Jones is a liar." Therefore the first statement may imply an actionable false assertion of fact, if the facts upon which the speaker bases his opinion are either incorrect or if his assessment of them is erroneous.⁷

[2] No False Fiction

The question whether a work of fiction can defame a real person is often problematic.⁸ A plaintiff who states a claim for defamation because he concluded that he is defamed in a work of fiction, such as a story, novel, play or film, has not only to prove that the fictitious character depicted is "of and concerning" him,⁹ but also that the fictitious work is false. But can a fictitious work be false?

One theory states that all works of fiction are false, after all a "lie," which deserves no First Amendment protection. However, the U.S. Supreme Court has ruled that works of fiction are also protected by the First Amendment, since what is one man's amusement, teaches another's doctrine.¹⁰ Therefore, a *second* theory suggests creating an absolute privilege against liability, stating that

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5. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, at 339-40, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).
 6. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, at 2706-2707; 111 L.Ed.2d 1, 17 Media L. Rep. 2009 (1990).
 7. *Id.* 110 S.Ct. 2695, at 2705-2706.
 8. See Symposium: Defamation in Fiction, 51 *Brooklyn L. Rev.* 223-423 (1985); Garbus and Kurnit, Libel Claims Based On Fiction Should Be Lightly Dismissed, 51 *Brooklyn L. Rev.* 401 (1985); Anderson, Avoiding Defamation Problems in Fiction, 51 *Brooklyn L. Rev.* 383 (1985); Zimmerman, Defamation In Fiction: Real People In Fiction: Cautionary Words About Troublesome Old Torts Poured Into New Jugs, 51 *Brooklyn L. Rev.* 355 (1985); Carlson, Defamation By Fiction, 42 *Md. L. Rev.* 387 (1983); Smirlock, "Clear and Convincing" Libel: Fiction and the Law of Defamation, 92 *Yale L.J.* 520 (1983); Meltzer, Toward A New Standard Of Liability For Defamation In Fiction, 58 *N.Y.U.L. Rev.* 1115 (1983); Ohlsen, Fictionalized Publications: When Should Defamation and Privacy Be a Bar?, 1984 *Utah L. Rev.* 411; Rich and Brilliant, Defamation-in-fiction: The Limited Viability Of Alternative Causes Of Action, 52 *Brooklyn L. Rev.* 1 (1986); Giller, Defamation in Fiction: The Need For A Clear "Of and Concerning Standard," 3 *Ent. & Sports Law J.* 1 (1986); Smolla, *Law of Defamation*, § 4.09[7] (1989).
 9. The "of and concerning" test is discussed at § 3.1[D].
 10. See § 9.2[C][3].

all works of fiction are pure ideas, which can never be either true or false.¹¹ This theory would create an absolute immunity for a work of fiction, even if it is nothing but a shield for intentional defamation.

The better view seems to be that courts approach fictional works in the same way as the U.S. Supreme Court did in the 1990 "*Milkovich*" case with respect to "opinion." If it is given that a work of fiction portrays the plaintiff, it should be held to be "false" if it leads the public to the false conclusion that the plaintiff committed the "facts" described in it. Like a statement of opinion, a fictional work can imply false and defamatory facts, which can damage someone's reputation.¹²

[C] Defamatory

A communication is defamatory if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.¹³ Prosser stated: "Defamation is rather that which tends to injure "reputation" in the popular sense; to diminish the esteem, respect, goodwill or confidence in which plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."¹⁴

[D] "Of and Concerning" the Plaintiff

The defamatory statement must be "of and concerning" the plaintiff. The recipient of the defamatory communication must reasonably understand it as intended to refer to the plaintiff.¹⁵ This understanding must be reasonable in the light of all the circumstances. It is not necessary that plaintiff's name is mentioned, if there is such a description of or reference to him that those who hear or read the statement reasonably understand the plaintiff to be the person intended. Not everyone needs to recognize the plaintiff as the person intended. It is sufficient that any recipient of the statement reasonably so understands it. But the fact that only one person believes that the plaintiff was referred to is an important factor in determining the reasonableness of his belief. If the applicability of the defamatory statement to the plaintiff depends upon extrinsic circumstances, it must be found that some person who saw or read it was familiar with the circumstances and reasonably believed that it referred to the plaintiff.¹⁶

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11. Cf. Note, Defamation in Fiction, The case for Absolute First Amendment Protection, 29 *Am. U.L. Rev.* 571 (1980).
 12. Cf. *Falwell v. Flynt*, 797 F.2d 1270, rev'd on other grounds, *Hustler Magazine and Flynt v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41, 14 *Media L. Rep.* 2281 (1988): Publication of parody, satirizing advertising campaign for Campari liqueur with photo of Rev. Jerry Falwell and text in which he describes his "first time" as an incestuous rendezvous with his mother, was found not to be defamatory because no reasonable person would believe that parody described actual facts about Falwell.
 13. *Restatement (Second) of Torts* § 559 (1977).
 14. *Prosser and Keeton on The Law of Torts*, at 773 (5th ed. 1984) See for examples of defamatory statements *id.* at 773-778, and *infra* § 3.1[D].
 15. *Restatement (Second) of Torts* § 564 (1977).
 16. See *Restatement (Second) of Torts* § 564, comment b. (1977).

Courts have held that a libel can be published of an actual person by a story or essay, novel, play or moving picture that is intended to deal only with fictitious characters if the characters or plot bear such a resemblance to actual persons or events as to make it reasonable for the public to understand that a particular character is intended to portray that person.¹⁷ However, mere similarity of name alone or a resemblance to an actual person is not sufficient. The readers must reasonably believe that the character is intended to portray the plaintiff. Often the author or producer states that his work is exclusively one of fiction and in no sense applicable to living persons. Such a disclaimer is not decisive if readers actually and reasonably understand otherwise. Factors that courts have looked at to determine whether a fictitious character is "of and concerning" the plaintiff include:¹⁸

- a) the similarity of names, physical appearance, personality characteristics, age, geographic location and setting, occupation or career, relationships, or events;
- b) the incidental or prominent significance of these similarities in the fictional work;
- c) the manner in which the work was presented as fictitious, and the text of a disclaimer;
- d) the impression of the reasonable reader that the events depicted are not fantastic but realistic.

For example, in the "*Nude Therapy*" case,¹⁹ plaintiff, Dr. Bindrim, a psychologist, stated a claim for defamation against Mitchell, who had published a novel entitled "Touching." Plaintiff conducted nude encounter therapy groups and claimed to be defamed by vulgar language and conduct attributed to a character in novel with the name "*Simon Herford*," a character with a complete different physical appearance, and slightly different professional credentials, but who conducted similar 'nude marathon' sessions, a type of therapy practiced, according to trial testimony, by one to two dozen professionals. The court found liability, even though the work was clearly labeled as a "novel," because plaintiff satisfied the "of and concerning" requirement. The main evidence that linked "Simon Herford" with the real plaintiff consisted of the testimony of three friends and plaintiff's tape recordings of the encounter sessions, which showed a close parallel between the novel and actual events.

[E] Publication

The defamatory statement must be communicated to some one other than the person defamed, because the law of defamation protects the interest in reputation, which is the estimation in which one's character is held by others. It is not

17. *Restatement (Second) of Torts* § 564, comment d. (1977).

18. *Cf. Smolla, Law of Defamation*, § 4.09[7][b] (1989).

19. *Bindrim v. Mitchell*, 92 Cal.App.3d 61, 155 Cal.Rptr. 29, 5 Media L. Rptr. 1113 (1979).

necessary that the defamatory statement is communicated to a large group of persons. Communication to a single individual other than the one defamed who understands its defamatory significance is sufficient.²⁰

[F] Type of Fault on the Part of the Publisher

[1] Actual Malice or Negligence

The U.S. Supreme Court ruled that a finding of no fault liability in a defamation case is precluded by the First Amendment. In its first decisions, the U.S. Supreme Court did place the applicability of the required fault standard not on the question whether the defamatory speech involved "matters of public or general interest" but on whether it was directed toward a public or private person. This distinction results in two different fault standards:

- 1) If plaintiff is a public figure, he must prove that the defamatory statement was made with "*actual malice*" that is, with knowledge that it was false or with reckless disregard of whether it was false or not.²¹ A synonym for "actual malice" is "*scienter*."
- 2) If plaintiff is not a public figure, he must prove defendant's negligence as to the falsity.²²

In a case involving a private figure, the U.S. Supreme Court subdivided the defamation cases into those which involve defamatory statements about "*matters of public concern*" and those not containing defamatory speech about "matters of public concern." The Court held that this liability restriction does not apply if plaintiff is a private figure and "the defamatory statements do not involve matters of public concern."²³ For such defamatory speech the states are free to adopt a strict liability standard.²⁴ With accepting the "matters of public concern" test, the Court implicitly rejected the media defendant versus nonmedia defendant distinction.²⁵

20. See *Restatement (Second) of Torts* § 577, comment b. and c. (1977).

21. *New York Times Co. v. Sullivan*, 376 U.S. 254, at 279-280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, at 342, 94 S.Ct. 2997, 347 41 L.Ed.2d 789 (1974). Cf. *Restatement (Second) of Torts* § 580a (1977).

22. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, at 347-348, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974): The States are allowed "to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*."

23. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, at 763, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985): Credit report which was false and grossly misrepresented respondent's assets and liabilities did not involve matters of public concern: "It was speech solely in the individual interest of the speaker and its specific business audience," which "was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further." *Id.* 472 U.S. 749, at 762.

24. Cf. Smolla, *Law of Defamation*, § 3.01[4] (1989).

25. Cf. Justice White in his concurring opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, at 773: "Wisely, in my view, Justice Powell does not rest his application of a different rule here on a distinction drawn between media and nonmedia defendants. On that issue, I agree with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others

At this moment it is not yet clear whether the U.S. Supreme Court will also apply this subdivision to cases involving a public figure alleging a defamation claim based on matters which are not of public concern, or purely private matters not affecting his conduct, fitness or role in his public capacity. It seems that if one agrees with the "matter of public interest" test,²⁶ the answer should be positive.²⁷

It follows from the actual malice standard, that the First Amendment affords less protection to the reputations of public figures than to the reputations of private figures. The Supreme Court mentioned two reasons for applying the actual malice standard to public figures. They "usually enjoy significantly greater access to the channels of communication and hence have a more realistic opportunity to counteract false statements" and they have as a rule assumed the risk of public commentary.²⁸

[2] Public Figure

Who is a public figure?²⁹ This term includes all "public officials,"³⁰ or employees with any substantial governmental power. But also other persons can become a public figure, since discussion of public issues cannot be meaningful without reference to the persons involved in such issues, even if they are not an employee with governmental power.³¹ The U.S. Supreme Court has created two sub-categories of public figures:³²

- 1) the "*all purpose*" public figure who achieves "pervasive fame or notoriety;" and
- 2) the "*special purpose public figure*" who qualifies for only a "limited range of issues."

The "*limited purpose* public figure" has (a) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (b) voluntarily injected himself into a public controversy related to the subject of the litigation; (c) assumed a position of prominence in the public controversy; and (d) maintained regular and continuing access to the

exercising their freedom of speech."

26. But see § 3.2[C][4].

27. Cf. *Restatement (Second) of Torts* § 580b (1977). But see Smolla, *Law of Defamation*, § 3.04 (1989), who states that this view is not consistent with the public figure "for all purposes" analysis in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, at 345, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

28. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, at 344-345, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Cf. *Street v. National Broadcasting Co.*, 645 F.2d 1227, at 1248 (C.A.6 1981).

29. See for examples, *Restatement (Second) of Torts* § 580a, comment c. (1977).

30. *New York Times Co. v. Sullivan*, 376 U.S. 254, at 266, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

31. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, at 344-345, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

32. *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979).

media.³³ "All purpose" public figures are celebrities, famous persons, movie stars, entertainers, etc. To state a defamation claim, they must prove "actual malice."

[3] Actual Malice in Works of Fiction

Since fictional works, by their nature, are "false" and their authors "knew" this when they created them, some courts have found the actual malice test fully satisfied. In the "*Nude Therapy*" case, the court said that actual malice was found "from [the author's] knowledge of the truth of what transpired at the encounter, and the literary portrayals of that encounter. Since she attended sessions, there can be no suggestion that she did not know the true facts."³⁴

It seems that the actual malice/negligence standard can only be applied with regard to assertions of fact. In § 3.1[B][2] it was concluded that fictional works can get a factual connotation, if the public is misled in believing that the plaintiff committed the facts described in it. Therefore, a plaintiff can only prevail in a fictional defamation case if he proves:

- a) that the defendant caused the audience to improperly believe that the plaintiff committed the facts described in the fictional work,³⁵ and
- b) that the defendant made his false defamatory statements with actual malice or negligence.

Thus, if a fictional work does not contain a false statement of fact which was made with actual malice or negligence, there can be no liability.

[G] Damages

If plaintiff proves the elements of a defamation claim, defendant is liable for

- a) the emotional damages and bodily harm that is proved to have been caused by the defamatory publication;³⁶
- b) the proved, actual harm caused to the reputation of the plaintiff defamed,³⁷ and

33. See *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, at 136-137, 10 Media L. Rep. 2497 (1984). Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, at 344-45 and at 352, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

34. *Bindrim v. Mitchell*, 92 Cal.App.3d 61, at 72-73, 155 Cal. Rptr. 29 (1979).

35. Cf. *Pring v. Penthouse Int.*, 695 F.2d 438 (C.A.10 1982): Reversing multi-million dollar jury verdict for plaintiff, court held that magazine article, presented as humor, not fiction, and without a disclaimer, which described sexual acts performed by "Miss Wyoming" was of and concerning the plaintiff, the real Miss Wyoming, but did not defame her, because the charged portions in context could not be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated.

36. *Restatement (Second) of Torts* § 623 (1977).

37. *Id.* § 621. The U.S. Supreme Court held that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of actual malice. Thus both, the public and private figure plaintiff can only recover presumed and punitive damages if they prove actual malice. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, at 349 and 352, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

- c) the special (financial) damages caused by the defamatory publication, for example damages caused by a discharge from employment.³⁸

[H] Differences Between Defamation Law and the Right of Publicity

The right of publicity protects a person's commercial value in his identity and performance against unpermitted commercial use. Defamation law protects a person's reputation against unpermitted false defamatory statements which are published with actual malice or negligence. The two rights differ with regard to the following aspects.

Defamation law protects against injury to reputation. Therefore, the focus is primarily upon human dignity. In a right of publicity case, the focus is on damage to a commercial value in an individual's identity or performance.

The reputation protected by the law of defamation should be distinguished from a person's identity protected by the right of publicity. Someone's reputation can be exploited by using his name, picture or other elements of his identity. Reputation depends on what others think, while the name, picture and voice of a human being can exist in itself, and can have a commercial value for other reasons than a good reputation. For example, the characteristic face of a convicted criminal with a bad reputation can have a commercial value.

Defamation law protects against all types of publication of false defamatory statements, while the right of publicity protects against acts that constitute a form of commercial use, such as publication of an advertisement or use in connection with commercial products, or a reproduction or imitation of a performance. Thus, if defendant publishes a defamatory advertisement, both actions can be involved.³⁹

Defamation law provides only protection against defamatory statements that are false. On the other hand, the right of publicity protects against the unauthorized commercial use of someone's identity, independent of any element of falsity.⁴⁰ For example, an unauthorized advertisement in which a cigarette manufacturer congratulates a celebrity with winning a championship the day before clearly infringes the celebrity's right of publicity, although there is no element of falsity.

A defendant in a defamation case is only liable for damages if the plaintiff proves that the defamatory speech was made public with actual malice or negligence. In a right of publicity case, a plaintiff does not have to prove that defendant acted with actual malice or negligence, because the triggering question is whether the plaintiff can be identified from defendant's infringing use, not

38. *Id.* § 622.

39. *See Restatement (Third) of Unfair Competition* § 46, comment d. (1995): Liability [for defamation or invasion of privacy] however, is independent of liability for an infringement of the right of publicity under the rule stated in this Section."

40. *See* § 3.6.

whether the factual statements are false.⁴¹ Falsity is not an issue in a right of publicity case. Only in a few cases which involve false statements in a media publication, courts have applied the actual malice standard in a right of publicity case.⁴²

(I) Examples of Defamation in Advertisements

Although defamation law and the right of publicity protect different interests, both actions can be asserted if the defendant published an advertisement which defames the plaintiff. The unpermitted use of the identity of a non-celebrity in a commercial context is in itself not libellous.⁴³ However, a defamation claim can be submitted if plaintiff's name or picture has been falsely connected to a discreditable product.⁴⁴ For example, one court held that a professional model submitted a cause of action for libel, when her picture, that first had been used with her consent in an advertisement for Marboro Books, was reused in advertisements for bedsheets.⁴⁵ In the second advertisement, the picture of plaintiff was retouched and altered so as to place her in the company of an elderly male reading a book, entitled "*Clothes Make the Man*," which had been "nationally advertised to contain reading matter and illustrations so vulgar in content that publication thereof had been refused by editors." The plaintiff felt humiliated because she was depicted as "a willing call girl waiting to be used by a stranger whetting his sexual appetite."⁴⁶ The court concluded that this advertisement could injure plaintiff's reputation.

The unpermitted advertising use of plaintiff's picture in an advertising campaign to promote the sale of defendant's beer was not held to be defamatory

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41. *Hustler Magazine and Flynt v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, at 880, 99 L.Ed.2d 41, 14 Media L. Rep. 2281 (1988): "[T]he 'actual malice' standard does not apply to the tort of appropriation of a right of publicity." Cf. Ausness, *The Right of Publicity: A 'Haystack in a hurricane'*, 55 *Temp. L.Q.* 977, at 1028, (1982): "[T]he actual malice test of *New York Times and Hill* is not directly applicable to publicity cases because, with the possible exception of fictionalized portrayals of celebrities, the truth or falsity of defendant's publication is not at issue;" McCarthy, *The Rights of Publicity and Privacy*, § 3.8(A) (Rev. 1993).
 42. See *Cher v. Forum Intern., Ltd.*, 692 F.2d 634, 217 U.S.P.Q. 407, 8 Media L. Rep. 2484 (C.A.9 1982); *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 10 Media L. Rep. 2497 (C.A.2 1984); *Eastwood v. Superior Court for Los Angeles County*, 149 Cal.App.3d 409, 198 Cal.Rptr. 342, 10 Media L. Rep. 1073 (Cal.App.2 Dist. 1983). But see § 10.3(E)[1] and § 10.4(C)[2].
 43. See e.g. *Beverly v. Choices Women's Medical Center, Inc.*, 141 A.D.2d 89, 532 N.Y.S.2d 400, 16 Media L. Rep. 1159 (N.Y.A.D. 2 Dept. 1988) aff'd 78 N.Y.2d 745, 579 N.Y.S.2d 637, N.E.2d 275, 21 U.S.P.Q.2d 1313, 19 Media L. Rep. 1724 (N.Y. 1991): Use of plaintiff physician's photograph on calendar that was distributed by for-profit medical center in order to solicit patronage does not give rise to cause of action for defamation.
 44. Cf. *Restatement (Second) of Torts* § 559, Illustration 1 (1977), which is taken from *Peck v. Tribune Co.*, 214 U.S. 185, 29 S.Ct. 554, 53 L.Ed. 960 (1909): Use of picture of plaintiff, Mrs. Peck, in advertisement for "Malt Whiskey" identified as nurse Mrs. A. Schuman. The U.S. Supreme Court reversed the decision of the Seventh Circuit, which held that the advertisement was not libelous per se.
 45. *Russell v. Marboro Books*, 18 Misc.2d 166, at 183-184, 183 N.Y.S.2d 8 (N.Y.Sup. 1959).
 46. *Id.* 18 Misc.2d 166, at 171.

in a case were the plaintiff had given to other parties an unrestricted permission for the use of his picture, distorted in character or form.⁴⁷

In the "*Bert Lahr*" case,⁴⁸ the First Circuit stated that the imitation of Bert Lahr's distinctive voice in a television commercial used to advertise defendant's chemical product could defame him because "a charge that an entertainer has stooped to perform below his class may be found to damage his reputation."⁴⁹

3.2 Right of Privacy

[A] History of the Right of Privacy

In December 1890, Warren and Brandeis published an influential law review article entitled "The Right to Privacy."⁵⁰ They argued that "the existing law affords a principle which can properly be invoked to protect the privacy of the individual."⁵¹ It appears that they viewed the right to privacy as a right that protects against unwanted publicity. Protesting against the intrusiveness of a press they saw as "overstepping in every direction the obvious bounds of propriety and decency,"⁵² they defined the right to privacy as what Judge Thomas Cooley had called the right "to be let alone."⁵³ Unlike defamation law, which deals only with damage to reputation, the right to privacy involves the treatment of "mere injury to the feelings."⁵⁴ As an example of the common law recognition of the right to be let alone they mentioned the protection afforded against the first publication of personal writings.⁵⁵ The principle of this protection "is in reality not the principle of private property, but that of an inviolate personality."⁵⁶ In their view, the right to restrain publication of artistic works can only be rested upon "the right to privacy, as a part of the more general right to the immunity of the person, --the right to one's personality."⁵⁷ This protection had to be extended to the personal appearance, sayings, acts and to personal relation.⁵⁸

47. *Sharman v. C. Schmidt & Sons, Inc.*, 216 F.Supp. 401 (D.C.Pa. 1963).

48. *Lahr v. Adell Chemical Co.*, 300 F.2d 256 (C.A.1 1962).

49. *id.* 300 F.2d 256 at 258.

50. 4. *Harv. L. Rev.* 193-220 (1890).

51. *Id.* 4. *Harv. L. Rev.* 193, at 197 and 213.

52. *Id.* 4. *Harv. L. Rev.* 193, at 196.

53. *Id.* 4. *Harv. L. Rev.* 193, at 195, quoting, T. Cooley, *A treatise on the Law of Torts*, 29 (2d ed. 1888).

54. *Id.* 4. *Harv. L. Rev.* 193, at 197. They contended that the wrongs recognized by defamation law are material rather than spiritual.

55. *Id.* 4. *Harv. L. Rev.* 193, at 198-207. In 1890 American copyright law only protected property interests.

56. *Id.* 4. *Harv. L. Rev.* 193, at 205.

57. *Id.* 4. *Harv. L. Rev.* 193, at 207.

58. *Id.* 4. *Harv. L. Rev.* 193, at 213.

Warren and Brandeis were influenced by civil law developments in Europe. They recognized that "[t]he right to privacy, limited as such right must necessarily be, has already found expression in the law of France."⁵⁹

Not all courts directly agreed that a common-law right of privacy existed. In the 1902 "*Roberson*" case, the New York Court of Appeals rejected a claim of invasion of privacy of an attractive young woman, whose picture had been used by the defendant without permission on 25,000 posters advertising its flour.⁶⁰ The court viewed the right of privacy as "founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers."⁶¹ Reasons for rejecting this right were the lack of real precedents, the purely mental character of the damages, the vast amount of litigation that might be expected to follow, and the fear of undue restriction of the freedom of speech. Not the courts, but the legislative body had to decide in which cases a plaintiff could claim an action.⁶² This suggestion was followed in 1903, when the New York Legislature adopted a statute establishing both criminal and civil liability for the unauthorized use of "the name, portrait or picture of any living person" for "advertising purposes, or for the purposes of trade."⁶³

The leading case in favor of the right of privacy is the 1905 "*Pavesich*" case.⁶⁴ In this case, the Georgia Supreme Court stated that the common law right of privacy actually existed as a derivative of natural law:⁶⁵ "The publication of a picture of a person, without his consent, as a part of an advertisement, for the purpose of exploiting the publisher's business, is a violation of the right of privacy of the person whose picture is reproduced, and entitles him to recover without proof of special damage."⁶⁶ Implicitly referring to the *Roberson* decision, the court said about the possible conflict between the right of privacy and the freedoms of speech and press:

59. *Id.* 4. *Harv. L. Rev.* 193, at 214. Before 1890 also German authors had discussed the personality right (Persönlichkeitsrecht) in the context of copyright law and intangible "property" rights. See e.g. Gareis, *Das Wesen der Autorrechte, sowie des Firmen- und Markenschutzes*, 35 *Buschs Archiv für Theorie und Praxis des allgemeinen Deutschen Handels- und Wechselrechts*, 185-200 (1877). See for the development of the personality right in the 19th century: Leuze, *Die Entwicklung des Persönlichkeitsrechts im 19. Jahrhundert*, 1962, and Hubmann, *Das Persönlichkeitsrecht*, 2. ed. 1967, at 31-41 and 85-98.

60. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (N.Y. 1902).

61. *Id.* 171 N.Y. 538, at 544.

62. *Id.* 171 N.Y. 538, at 545.

63. Sections 50 and 51 of the Civil Rights Law, entitled "Right of Privacy." Section 51 provides the right to obtain an injunction and a cause of action to obtain compensatory and exemplary damages for the use of a person's name, picture or likeness for advertising or trade purposes. Section 50 provides criminal penalties for such use and is hardly applied. The full text of New York Civil Rights Law §§ 50-51 is printed in Appendix A.

64. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905): Unpermitted use of a picture of artist Pavesich in an advertisement for life insurances held to be actionable.

65. Cf: "The conclusion reached by us seems to be so thoroughly in accord with natural justice, with the principles of the law of every civilized nation [...]" *Id.* 122 Ga. 190, at 218-19.

66. *Id.* 122 Ga. 190, at 191.

"There is in the publication of one's picture for advertising purposes not the slightest semblance of an expression of an idea, a thought, or an opinion, within the meaning of the constitutional provision which guarantees to a person the right to publish his sentiments on any subject."⁶⁷

During the next fifty years, the right of privacy was recognized by decision or by statute in most states. But the courts were not able to provide a clear definition of the right of privacy. Instead, they used vague expressions such as "the right to be let alone."

In 1915, Roscoe Pound published an article about the interests of personality.⁶⁸ In discussing the "disputed legal right of privacy," he applied the method of balancing of competing interests. He argued that the problem was to devise suitable redress and to limit this right in view of other interests involved. Therefore, Pound emphasized that the over-sensitive must give away, and that "in applying legal redress, societal interests in free speech and dissemination of news have also to be considered."⁶⁹

Most influential in the formulation of the torts of invasion of the right of privacy was dean William Prosser, who inventoried several hundred appellate court decisions in which invasion of privacy had been claimed. Prosser concluded that these cases could be categorized in four groups. Although he described these four groups earlier,⁷⁰ his article entitled "*Privacy*," published in 1960⁷¹ became most the famous. He stated:

"The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, "to be let alone." Without any attempt to exact definition, these four torts may be described as follows:

1. Intrusion upon the plaintiff's seclusion or solitude or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity that places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness."⁷²

Even though some authors doubted the utility and validity of Prosser's four-part division,⁷³ the courts have almost uniformly approved his privacy concept consisting of four different torts. His theory was codified in Chapter 28A of the Restatement (Second) of Torts (1977) entitled "Invasion of privacy."⁷⁴

67. Id. 122 Ga. 190, at 219.

68. Pound, Roscoe, *Interests in Personality*, 28 *Harv. L. Rev.* 343 and 445 (1915).

69. Id. 28 *Harv. L. Rev.* 343 at 363.

70. Cf. Prosser on Torts, 2th ed., 1955, at 639 and Prosser, *Das Recht auf die Privatsphäre in Amerika*, 21 *Zeitschrift für ausländisches und internationales Privatrecht*, 401-417 (1956).

71. 48 *Cal. L. Rev.* 383-423 (1960).

72. Id. 48 *Cal. L. Rev.* 383, at 389.

73. E.g. Bloustein, *Privacy as an Aspect off Human Dignity: An Answer to Dean Prosser*, 39 *N.Y.U.L. Rev.* 962 (1964).

74. See *Restatement (Second) of Torts* § 652a-i (1977).

[B] First Tort: Intrusion

Someone's privacy is invaded by "intrusion" if defendant intentionally intrudes, physically or otherwise, upon the solitude or seclusion of plaintiff or his private affairs in a manner which is highly offensive to a reasonable person.⁷⁵ The defendant is liable for the actual mental distress that is caused by the highly offensive intrusion. For example, in *Hamberger v. Eastman*,⁷⁶ the New Hampshire Supreme Court held that the installation of an eavesdropping device in the bedroom of plaintiffs, a husband and wife, by their landlord and neighbor constituted an actionable intrusion. Publication of the information obtained is not a necessary element.

In *Galella v. Onassis*,⁷⁷ the Second Circuit held that the First Amendment does not establish a wall of immunity which protects newsmen from any liability for their conduct while gathering news. Crimes and torts committed in news gathering are not protected by the First Amendment. Court injunctions only chill "intrusive acts," they do not chill legitimate news gathering activities protected as freedom of expression.⁷⁸

A physical intrusion occurs if the defendant invades the place in which the plaintiff has secluded himself, or insists, contrary to the plaintiff's objection, on entering his home. A non-physical intrusion can occur if the defendant uses his senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs.

It is clear that the right of publicity is completely different from this tort. Not a commercial use, but the intrusion itself makes the defendant subject to liability.

[C] Second Tort: Public Disclosure of Embarrassing Private Facts**[1] Introduction**

Someone's privacy can be invaded by public disclosure of embarrassing private facts about the plaintiff if the disclosure would be highly offensive to a reasonable person, results in immaterial damage such as mental distress, and the facts disclosed are not of legitimate concern to the public.⁷⁹ This type of invasion of privacy is usually associated with the "right to be let alone" and the article of Warren and Brandeis, "The Right to Privacy."⁸⁰ To create liability for invasion of privacy by disclosure plaintiff must prove four elements:

75. See *Restatement (Second) of Torts* § 652b (1977).

76. 106 N.H. 107, 206 A.2d 239, 11 A.L.R.3d 1288 (N.H. 1965).

77. 487 F.2d 986 (C.A.2 1973).

78. Cf. Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 *Cal. L. Rev.* 935, at 957 (1968): Intrusion does not involve protected speech.

79. Cf. *Restatement (Second) of Torts* § 652d (1977).

80. 4 *Harv. L. Rev.* 193 (1890).

- 1) a disclosure to the public at large, or to so many persons that the matter must be regarded as certain to become one of public knowledge;⁸¹
- 2) of a matter concerning the private life of plaintiff as distinguished from information about the plaintiff that is already public;
- 3) which would be highly offensive to a reasonable person, and
- 4) which is not of legitimate concern to the public.

The facts disclosed must concern the private life of plaintiff. Not all private facts about a person are protected. A citizen must accept the casual observation by his neighbors as to what he does, and that his ordinary daily activities will be described in the press. To state a claim, the facts must reflect that disclosure would be unreasonable, and highly offensive. If the disclosure is not deemed highly offensive, the plaintiff cannot recover damages for mental injury suffered.

The disclosure of pictures of intimate parts of the body can be highly offensive and not a matter of public interest. For example, in *McCabe v. Village Voice, Inc.*,⁸² a District Court held that publication of a nude photograph of a private individual in a bathtub was not newsworthy but, rather, needlessly exposed aspects of his private life to the public.⁸³

[2] Can Courts Decide that a Matter is Not of Legitimate Concern to the Public?

The main problem with this tort action follows from the fourth element, that courts must decide whether the embarrassing facts disclosed are of legitimate concern to the public or not. Unlike in defamation law and in the false light privacy tort, falsity is not an element in invasion of privacy by public disclosure. The tort of disclosure assumes that publicity of true information can invade someone's privacy. In order to solve the conflict with the First Amendment, courts have held that if facts disclosed are of legitimate concern to the public, or newsworthy, the tort is immunized by the First Amendment.⁸⁴ Any information disseminated "for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published," is protected by this privilege.⁸⁵

However, courts have not been able to give a precise definition of a "matter of public interest" or "newsworthiness." In *Carlisle v. Fawcett Publications, Inc.*, the court clarified "matters in the public interest" as follows:

"The privilege of printing an account of happenings and of enlightening the public as to matters of interest is not restricted to current events; magazines and books, radio and

81. *Restatement (Second) of Torts* § 652d, comment a. (1977). This definition differs from the term "publication" described in § 3.1[E] with regard to defamation law, which means any communication by the defendant to a third person.

82. 550 F.Supp. 525 (E.D.Pa. 1982).

83. *Cf. Gallon v. Hustler Magazine Inc.*, 17 Media L. Rep. 1719 (D.C.N.Y. 1990): Publication of nude picture held to be invasion of privacy.

84. *Cf. Virgil v. Time, Inc.*, 527 F.2d 1122, at 1131 (C.A.9 1975).

85. *Restatement (Second) of Torts* § 652d, comment j. (1977).

television may legitimately inform and entertain the public with the reproduction of past events, travelogues and biographies."⁸⁶

In 1890, Warren and Brandeis believed that the press, by reporting gossip and "details of sexual relations," in fact creates the demand for such news. They wanted a right to privacy to put the press under "bounds of propriety and of decency."⁸⁷ But Posner⁸⁸ rejected the view that supply creates demand. The press publishes only what its readers want and the readers want gossip about the personal lives of others in order to get information to better judge the worth of others and make personal lifestyle choices. He stated: "Gossip columns open people's eyes to opportunities and dangers; they are genuinely informational."⁸⁹ He mentioned as an example the story of Howard Hughes, the man who tried to escape publicity, which is usually told as a morality play, warning of the pitfalls of success. A media publication which reported matters of no concern to anyone would find no willing buyers.

Zimmerman concluded that there is no satisfactory test to determine the newsworthiness of a publication.⁹⁰ She stated that judges "share the Supreme's Court reluctance to engage in line drawing over newsworthiness and simply accept the press's judgment about what is and is not news."⁹¹ The U.S. Supreme Court stated in a copyright law case: "as judge Meskill wisely noted, [c]ourts should be chary of deciding what is and what is not news."⁹² Prosser stated that the media make their own definition of news: "To a very great extent the press, with its experience or instinct as to what its readers will want, has succeeded in making its own definition of news. A glance at any morning newspaper will sufficiently indicate the content of the term. It includes [...] matters of genuine, if more or less deplorable, popular appeal."⁹³

The First Amendment protects expressions of matters of public interest, and courts are unable to tell which expressions are not of public interest, since all information is potentially useful in some way to the public in forming its opinions. One must conclude that what the media themselves decide to publish or broadcast is a matter of public interest. Therefore, the media, not the courts define what is protected by the First Amendment. This raises the question whether Prosser's disclosure tort in reality exists.

86. 201 Cal.App.2d 733, at 746, 20 Cal.Rptr. 405 (1962).

87. The Right to Privacy, 4 *Harv. L. Rev.* 193, at 196 (1890).

88. The Right of Privacy, 12 *Ga. L. Rev.* 393, at 394-97 (1978).

89. *id.* 12 *Ga. L. Rev.* 393, at 396 (1978). See for the social functions of gossip: Zimmerman, Requiem For A Heavyweight: A Farewell to Warren And Brandeis's Privacy Tort, 68 *Cornell L. Rev.* 291, at 332-336 (1983).

90. Requiem For A Heavyweight: A Farewell to Warren And Brandeis's Privacy Tort, 68 *Cornell L. Rev.* 291, at 343 (1983).

91. *Id.* 68 *Cornell L. Rev.* 291, at 353 (1983).

92. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, at 561, 105 S.Ct. 2218, 85 L.Ed.2d 588, 225 U.S.P.Q. 1073, 1985 Copr.L.Dec. P 25,793 (1985) citing 723 F.2d, 195, at 215 (C.A.2 1983).

93. Privacy, 48 *Cal. L. Rev.* 383, at 412 (1960).

[3] Some Courts Held that the Tort of Public Disclosure Does Not Exist

In *Gilbert v. Medical Economics Co.*,⁹⁴ the Tenth Circuit stated that "[b]ecause each member of our society at some time engages in an activity that fairly could be characterized as a matter of legitimate public concern, to permit that activity to open the door to the exposure of any truthful secret about that person would render meaningless the tort of public disclosure of private facts."⁹⁵ But to defend a tort by stating that it would otherwise be meaningless is a form of circular reasoning.

Ellis⁹⁶ found that there had been no reported cases in which a plaintiff successfully recovered damages for truthful disclosure by the press between 1967⁹⁷ and 1979, and concluded that the tort's "very existence is in doubt, at least outside the law reviews." Some commentators have argued that the disclosure tort does not exist, because tort liability for true speech cannot be justified by the First Amendment. According to Zimmerman, Prosser's disclosure tort deserves a requiem.⁹⁸

Recently, some courts have even rejected the disclosure tort.⁹⁹ The Oregon Supreme Court rejected this tort in the 1986 "*Anderson*" case.¹⁰⁰ The plaintiff was victim of an auto accident which was filmed by the defendant, who broadcast the film to advertise its special news report about a new system for dispatching emergency medical help. The court reinstated the summary judgment in favor of the defendant, stating "that in Oregon the truthful presentation of facts concerning a person, even facts that a reasonable person would wish to keep private and that are not "newsworthy," does not give rise to common-law tort liability for damages for mental or emotional distress, unless the manner or purpose of defendant's conduct is wrongful in some respect apart from causing the plaintiff's hurt feelings."¹⁰¹

94. 665 F.2d 305 (C.A.10 1981).

95. *Id.* 665 F.2d 305, at 308.

96. Ellis, *Damages and the Privacy Tort: Sketching a Legal Profile*, 64 *Iowa L. Rev.* 1111, at 1133 (1979).

97. *The year of Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456, 1 *Media L. Rep.* 1791 (1967) which held that the media have a First Amendment privilege to report matters of public interest which would otherwise give cause for a false light invasion of privacy action.

98. Zimmerman, *Requiem For A Heavyweight: A Farewell to Warren And Brandeis's Privacy Tort*, 68 *Cornell L. Rev.* 291, at 305-306 (1983). Cf. Kalven, *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 *Law & Contemp Probs* 326, at 336 (1966) asking "whether the claim of privilege is not so overpowering as virtually to swallow the tort."

99. *Cf. Hall v. Post*, 323 N.C. 259, 372 S.E.2d 711 (1988) reversing 85 N.C.App. 610, 355 S.E.2d 819, 14 *Media L. Rep.* 1129 (N.C.App. 1987) which had held the circumstances surrounding a particular child adoption and identities of parties involved, are not a matter of public interest. The North Carolina Supreme Court rejected the existence of the disclosure privacy tort.

100. *Anderson v. Fisher Broadcasting Companies, Inc.*, 300 Or. 452, 712 P.2d 803, 12 *Media L. Rep.* 1604 (Or. 1986).

101. *Id.* 300 Or. 452, at 469. As examples of wrongful conduct the court mentioned publication of information which is obtained by conversion, bribery, or intrusion, publication which constitutes a breach of contract or duty of confidentiality, and publication for advertising purposes.

The U.S. Supreme Court has stated in *Cox Broadcasting Corp. v. Cohn*¹⁰² that under the First Amendment there can be no recovery for disclosing and publishing facts that are a matter of public record. The interest in privacy fades when the information already appears on the public record. Therefore, the Court held that the publication of the name of a rape victim, which was on the public record of the court, could be published without invasion of privacy.

The U.S. Supreme Court has not dealt with the question whether the disclosure of true private embarrassing facts from other sources than public records can lead to liability. In *The Florida Star v. B.J.F.*,¹⁰³ the Court held that an award of damages against a newspaper publisher who had disclosed the name of a rape victim was unconstitutional, since the name was mentioned in a police report that the Sheriff's Department had placed in its pressroom in violation of state law. However, the Court did not deny the existence of the tort:

"We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense."¹⁰⁴

[4] Minority View: Ad Hoc Balancing

It seems that most courts have interpreted the defendant's defense that the disclosed matter was a matter of public concern as an absolute defense. A plaintiff can only prevail if he proves that the private disclosed matter was not a matter of public interest. This requirement does not give much weight to the individual's privacy interest in public disclosure cases, since in almost all cases it can be said that the disclosed matter is of some public interest. Courts are generally not willing to conclude that a disclosure in a media publication is of no interest to the public. For example, there is always some public interest in publishing the name of the victim of a crime, since its disclosure affects the impact and credibility of the publication.

However, once the private matter is disclosed, it cannot, as in defamation cases, be rebutted.¹⁰⁵ Hill suggested that the controlling final criterion should not be the legitimate public interest, but the shocking character of the disclosure. The nature of the publication, the public interest in the matter disclosed and other circumstances would simply be factors in finding the final conclusion.¹⁰⁶ In *Forsher v. Bugliosi*,¹⁰⁷ the California Supreme Court applied an ad hoc balancing test to decide whether a report is newsworthy and thus constitutionally protected. The court stated:

102. 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).

103. 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443, 16 Media L. Rep. 1801 (1989).

104. *Id.* 491 U.S. 524, at 541.

105. *Cf.* Nimmer, *The Right To Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 *Cal. L. Rev.* 935, at 961 (1968).

106. Hill, *Defamation and Privacy Under the first Amendment*, 76 *Colum. L. Rev.* 1205, at 1258-1262 (1976).

107. 26 Cal.3d 792, 163 Cal.Rptr 628, 608 P.2d 716 (1980).

"Among the factors to consider are the depth of the intrusion into the plaintiff's private affairs, the extent to which the plaintiff voluntarily pushed himself into a position of public notoriety, the exact nature of the state's interest in preventing the disclosure, and whether the information is a matter of public record. Additionally, we look to any continued public interest in the event so that the passage of time does not per se extinguish the privilege of the publisher, if a report made reasonably contemporaneously with the incident would have been in the public interest, the weighing process continues in light of the circumstances prevailing at the time of publication."¹⁰⁸

In this case, plaintiff's true name and identity had been publicly disclosed in the book "*Helter-Skelter*" which detailed facts surrounding the disappearance of an attorney during a notorious murder trial. The court concluded in favor of the defendant because plaintiff's name had been published in connection with a description of the attorney's disappearance by two newspapers, the mention of plaintiff in the book was not offensive, the depth of intrusion was minuscule, and plaintiff's name might even escape notice in the context of the entire 650-page volume.¹⁰⁹

Some courts do not stop at the conclusion that the disclosed matter is of some public interest, and try to further balance the public's right to information with the individual's right to privacy in cases which involve patients, prisoners, ex-criminals, and victims. In such cases, some courts have held that it was not necessary to disclose the identify of the plaintiff, even though the disclosed matter itself was within the protected sphere of public interest. One might call this a "not-necessary-exception" to a matter of public interest. Such decisions clearly infringe on freedom of speech principles, but can be justified by the privacy interests involved.

In *Vassiliades v. Garfinckel's, Brooks Bros.*,¹¹⁰ the plaintiff was a patient who sued her plastic surgeon for invasion of privacy because the doctor used "before" and "after" photographs of her cosmetic surgery at a store presentation and on a television program promoting the presentation. The appellate court observed that the subject matter of plastic surgery was of general public interest, and that a professional presentation with photographs would enhance the public interest in the subject. But the court drew a distinction between the private fact of plaintiff's reconstructive surgery and the fact that plastic surgery is a matter of legitimate public interest. The court balanced the interest of the public in information against plaintiff's privacy interest, and held that the latter was the higher interest, because publication of plaintiff's photographs neither strengthened the impact nor the credibility of the presentations, nor otherwise enhanced the public's general awareness of the issues and facts concerning plastic surgery. The court concluded that

108. *Id.* 26 Cal.3d 792, at 812.

109. *Id.* 26 Cal.3d 792, at 812.

110. 492 A.2d 580, 11 Media L. Rep. 2057 (D.C.App. 1985).

"the "logical nexus" that courts have relied upon in determining that no liability exists where a matter of legitimate public interest is concerned--here, the nexus between the subject matter and Mrs. Vassiliades' photographs--is missing."¹¹¹

An important aspect is whether identification of the plaintiff affects the impact or credibility of the presentation. For example, in *Howard v. Des Moines & Tribune Co.*,¹¹² the Iowa Supreme Court held that the printing of the name of a woman who was involuntarily sterilized in an article about involuntary sterilizations in a county home, was privileged because of the credibility of the publication: "[W]e do not say it was necessary to do so, but we are certain they had right to treat the identity of victims of involuntarily sterilizations as matters of public concern [...] Moreover, at a time it was important to separate fact from rumor, the specificity of the report would strengthen the accuracy of the public perception of the merits of the controversy."¹¹³

The aspect of safety of the plaintiff was relevant in *Times Mirror Co. v. Superior Court*,¹¹⁴ which held that a newspaper, which had published the name of a witness of a murder case while the murderer was still at large, did not have a First Amendment privilege to print this name, when doing so could have subjected the witness to an increased risk of harm.

In *U.S. Dept. of Justice v. Reporters Committee For Freedom of Press*,¹¹⁵ the U.S. Supreme Court held that the FBI could deny a request by journalists based on the Freedom of Information Act (FOIA) to provide a copy of a rap sheet¹¹⁶ for a private citizen from the FBI computer insofar as it contained "matters of public record," because the disclosure of the content of the FBI rap sheet could reasonably be expected to constitute an unwarranted invasion of personal privacy of this private citizen. This criterion was mentioned in exemption 7(C) of the FOIA. The Court held that it was not unconstitutional for the Congress to balance the public interest in disclosure against the privacy interest by creating the general exemption of 7(C).

111. Id. 492 A.2d 580, at 590. Cf. *Barber v. Time*, 348 Mo. 1199, 159 S.W.2d 291 (1942): Privacy of plaintiff invaded because a magazine had published an article, using her name and picture, about an unusual physical ailment for which she had been hospitalized and was being treated. The Missouri Supreme Court held that "[w]hile plaintiff's ailment may have been a matter of some public interest because unusual, certainly the identity of the person who suffered this ailment was not." Id. 348 Mo. 1199, at 1206; *Melvin v. Reid*, 297 P. 91, 112 Cal.App. 285 (1931): Use of name of former prostitute involved in murder in a movie made eight years later, was not necessary; *Diaz v. Oakland Tribune, Inc.*, 139 Cal.App.3d 118, 188 Cal.Rptr. 762, 9 Media L. Rep. 1121 (Cal.App. 1983): Fact that plaintiff was transsexual is not a matter of public interest.

112. 283 N.W.2d. 289, 5 Media L. Rep. 1667 (1979).

113. Id. 283 N.W.2d. 289, at 303.

114. 198 Cal.App.3d 1420, 244 Cal.Rptr. 556, 15 Media L. Rep. 1129 (Cal.App.4 Dist. 1988).

115. 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774, 16 Media L. Rep. 1545 (1989).

116. This is a criminal identification record on a person containing criminal information.

[5] Differences Between the Public Disclosure Tort and the Right of Publicity

The fact that not the courts but the media decide what is newsworthy or a matter of public interest, leads in most cases to the conclusion that the media cannot be held liable for mental injury caused by invasion of privacy by disclosure. According to Prosser, this tort is an extension of defamation law into publications that do not fall within the narrow scope of the old defamation tort with its truth defense.¹¹⁷

The disclosure privacy tort protects a human being's interest in certain private facts remaining private. The right of publicity only protects a person's commercial interest in his identity against unpermitted commercial use. The right of publicity and the disclosure privacy tort have in common that falsity or truth of a statement is not a triggering fact. But the focus of the privacy tort is upon mental injury caused by the disclosure. In a right of publicity case, the focus is on commercial damage to one's identity. The interest of a plaintiff who exploits his identity is that he gets paid for it, not that his identity remains undisclosed. The object protected by the right of publicity consists of the characteristics that identify a person, while on the other hand the privacy tort protects not against disclosure of these characteristics in itself, but only in connection with private facts which gives the disclosure a highly offensive character. The privacy tort protects against all types of disclosure, while the right of publicity protects against acts that constitute a form of commercial use, such as publication of an advertisement or use in connection with commercial products, or a reproduction or imitation of a performance. The "*not-necessary-exception*" of a matter of public interest is only valid in a public disclosure claim, but not a right of publicity case.¹¹⁸

[D] Third Tort: False Light

[1] Introduction

Prosser's third¹¹⁹ privacy tort consists of publicity that places the plaintiff in a false light in the public eye.

To create liability for invasion of false light privacy, a plaintiff must prove the following elements:¹²⁰

117. Privacy, 48 *Cal. L. Rev.* 383, at 398 (1960).

118. See rejection of alternative way argument in § 9.3[B][2], and reasonable relation requirement in § 10.3[E][4].

119. See Privacy, 48 *Cal. L. Rev.* 383, at 398 (1960). In fact, after Prosser had distinguished the other three privacy torts in his the first edition of his treatise on Torts in 1941, he distinguished false light type of privacy later: See Prosser, Das Recht auf die Privatsphäre in Amerika, 21 *Zeitschrift für ausländisches und internationales Privatrecht*, 401, at 405f (1956).

120. Cf. *Restatement (Second) of Torts* § 652e (1977).

- 1) a publication,¹²¹
- 2) of matter concerning the plaintiff,¹²²
- 3) which places the plaintiff before the public in a false light,
- 4) which would be highly offensive to a reasonable person,
- 5) which is the result of fault on the part of the defendant, and
- 6) which causes mental damages to plaintiff.

[2] Difference from Defamation Law

The list of elements a plaintiff must plead and prove to state a claim for invasion of false light privacy is quite similar to the elements of a claim of defamation. Defamation law protects the plaintiff's reputation against false statements of fact, while the false light privacy tort protects against mental distress or feelings of outrage caused by placing the plaintiff before the public in an objectionable false light or false position, or in other words, otherwise than he is.¹²³ Defamation law focuses on the impact of the false statement on the public, since reputation exists only in the view of others, while the false light privacy tort focuses on the impact of the false statement on the plaintiff in terms of mental distress. It should be noted that mental injury can be recovered under both false light privacy and defamation law.¹²⁴ The difference from defamation is that false light invasion of privacy is broader and encompasses virtually any falsehood on the grounds that it has caused injured feelings. The difference between the two actions is described by Posner:

"The false-light tort, to the extent distinct from the tort of defamation (but there is indeed considerable overlap), rests on an awareness that people who are made to seem pathetic or ridiculous may be shunned, and not just people who are thought to be dishonest or incompetent or immoral."¹²⁵

According to this view there exist certain false statements, which do not injure reputation, but can be actionable under the false light theory because of the mental distress to the plaintiff caused by the publication of the untrue statements, which can be called nondefamatory (flattering) falsehoods.

The justification for protection under the false light privacy tort is not the falsity in itself.¹²⁶ The plaintiff's privacy is not invaded if minor errors are made, since complete and perfect accuracy in published reports is seldom attainable by any reasonable effort. The rationale of protection is to prevent

121. This term is similar to the term "disclosure" of Prosser's second tort: The false light must reach the public. See *Restatement (Second) of Torts* § 652e, comment a. (1977).

122. The "of and concerning" test is similar to the "of and concerning" test in defamation law. See § 3.1[D].

123. Cf. See *Restatement (Second) of Torts* § 652e, comment b. (1977).

124. See § 3.1[G].

125. *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, at 1134 (C.A.7 1985).

126. But see Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 *N.Y.U.L. Rev.* 364, 396 (1989) who argues that court decisions turn almost entirely on falsity rather than the requirement of mental harm, which has become an easily satisfied formality meaning only that the plaintiff was irritated enough to sue.

mental distress to the individual from false speech.¹²⁷ A claim for invasion of privacy by false light can only be stated if there is such a major misrepresentation of plaintiff's character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position.¹²⁸ The false publicity must be highly objectionable.¹²⁹

Prosser admitted that the false light privacy tort goes beyond the narrow limits of defamation law. He stated:

"The question may well be raised, and apparently still is unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims?"¹³⁰

Indeed the courts have imported into the false light privacy tort the actual malice/negligence requirements of defamation law,¹³¹ in order to create the same constitutional protection for false publications. In *Time, Inc. v. Hill*,¹³² the U.S. Supreme Court held that the rule of *New York Times Co. v. Sullivan*, that the plaintiff must prove that the media defendant published with actual malice, also applies to the false light privacy tort. After 1975 courts¹³³ have also imported into the false light tort the distinction between public and private figures of the Gertz decision.¹³⁴

Thus, instead of the false light privacy tort "swallowing up" the law of defamation, an important constitutional restriction of defamation law has been applied to the privacy tort.

127. But see Prosser, *Privacy*, 48 *Cal. L. Rev.* 383, at 400 (1960), who states that the false light torts protects the interest in reputation with same overtones of mental distress as in defamation.

128. See *Restatement (Second) of Torts* § 652e, comment c. (1977).

129. Cf. *Prosser and Keeton on The Law of Torts*, at 864 (5th ed. 1984): "The action for defamation [...] is to protect a person's interest in a good reputation, [...] the action for invasion of privacy is to protect a person's interest in being let alone and is available when there has been publicity of a kind that is highly offensive."

130. *Privacy*, 48 *Cal. L. Rev.* 383, at 401 (1960).

131. See § 3.1[F].

132. 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456, 1 *Media L. Rep.* 1791 (1967). But see Nimmer, *The Right To Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 *Cal. L. Rev.* 935, at 961 (1968) who suggests a less restrictive first amendment standard than "constitutional malice" because unlike in defamation cases, plaintiff cannot remedy an invasion of false light privacy by "rebuttal."

133. See e.g. *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, at 1090, 10 *Media L. Rep.* 2113 (C.A.5 1984); *Crump v. Beckley Newspapers, Inc.*, 173 W.Va. 699, 320 S.E.2d 70, at 77 (W.Va. 1984).

134. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) decided seven years after *Hill*, held that private individuals could recover for defamation upon a showing that the published falsehood was the result of negligence on the part of the defendant.

[3] Examples of False Light Cases

The torts of defamation and false light invasion of privacy overlap. Usually plaintiffs sue under both theories. If they prevail, they usually do so on the defamation claim. When the plaintiff sues only for false light, courts often treat the claim as if it were one for defamation.¹³⁵ It should be noted that the decisions based on the false light privacy tort can often also be understood as defamation cases.

One form of the false light tort is a *false attribution* of authorship. Prosser mentioned as the first example of invasion of false light privacy, the old English case of *Lord Byron v. Johnson*,¹³⁶ in which Byron was able to enjoin further circulation of a bad poem falsely attributed to him. But one could argue that Byron's professional reputation was also involved, and that he could have stated a claim for defamation.¹³⁷

Another form in which the false light tort can appear is the use of plaintiff's picture to illustrate a book or article to which the plaintiff has no reasonable relation and therefore creates the false impression that the plaintiff is like the persons described in the publication. Liability for a publication may arise under the false light theory, if the content of the message falsely implies that the unrelated person had some relationship with the subject of a controversial story. Prosser¹³⁸ mentions the example of the picture of an honest taxi driver used to ornament a story about the cheating propensities of taxi drivers in the city.¹³⁹

The publication of plaintiff's name in connection with the picture of another in an *embarrassing context* can also constitute a false light. For example, in *Lerman v. Flynt Distributing Co., Inc.*,¹⁴⁰ defendant had published in *Adelina* magazine a nude photograph of an actress in an orgy scene taken from a movie, which was mistakenly identified as being a photograph of the plaintiff. The court agreed that plaintiff submitted a claim for invasion of privacy, but reversed a 10 million dollar damages award, because she was a "limited purpose public figure"¹⁴¹ and had not proven actual malice.

The false light privacy tort also involves cases where information about the plaintiff, such as a photograph or an interview, appeared in a sexually oriented periodical, suggesting the false impression that plaintiff voluntarily appeared in defendant's periodical, or endorsed its content. For example, in *Braun v. Flynt*,¹⁴² the plaintiff argued that the fact that her picture was published in *Chic*, a "girlie magazine," caused mental distress. The jury agreed that she was placed in a false light, and the Fifth Circuit affirmed. The Court held that even if the

135. See Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 *N.Y.U.L. Rev.* 364, fn. 16 and fn. 21 (1989).

136. [1816] 35 Eng. Rep. 851.

137. Since June 1, 1991, 17 U.S.C. § 106a (Copyright Act) recognizes the moral rights of attribution and integrity with respect to works of visual arts.

138. *Prosser and Keeton on The Law of Torts*, at 864 (5th ed. 1984).

139. See *Peay v. Curtis Publishing Co.*, 78 F.Supp 305 (D.D.C. 1948).

140. 745 F.2d 123, 10 Media L. Rep. 2497 (C.A.2 1984).

141. See for the term "limited purpose public figure" § 3.1[F](2).

142. 726 F.2d 245 (C.A.5 1984).

picture itself did not portray plaintiff in any way falsely, when it was viewed in the context of the magazine as a whole, it resulted in a false impression of the plaintiff as an indecent woman.¹⁴³

Often the false light invasion of privacy tort involves a publication about a plaintiff which is false or fictionalized. In *Time, Inc. v. Hill*,¹⁴⁴ the defendant, in reviewing the play "*Desperate Hours*," which was based on the experience of the Hill family when it was held captive in their house by escaped convicts for 19 hours, incorrectly attributed some of the fictionalized material in the play to the Hills' actual experience. The U.S. Supreme Court reversed the decision of the New York court which had awarded damages on the theory of substantial falsification. The U.S. Supreme Court applied a rule for defamation cases, holding that the First Amendment precluded recovery for "false reports of matters of public interest in the absence of proof that the material was published with knowledge of falsity or in reckless disregard of the truth."¹⁴⁵

It seems that the rules of defamation law are applied if false facts are told about the plaintiff. If a true story about the plaintiff is published in a fictionalized form, the relevant question must be whether the public realizes that the story is fictionalized. Only if a fictionalization leads the public to the false conclusion that the plaintiff committed the "facts" described in it, plaintiff should be able to state a cause of action.¹⁴⁶

In *Cantrell v. Forest City Pub. Co.*,¹⁴⁷ a false light action was brought by plaintiffs, a mother and her son, against defendants, a newspaper and reporter, for publishing a story concerning the impact on their family of the father's death some months before in a bridge collapse that had received much attention in the media. The reporter had embellished the facts by implying that he had interviewed the widow of the disaster by describing the look on her face. He wrote the plaintiff was "wearing the same mask of non-expression she wore at her husband's funeral" when, in fact, the reporter had not interviewed or seen her for this article. The U.S. Supreme Court found that the evidence was sufficient to support a finding that the article portrayed the family in a false light through publication of knowing or reckless untruths.

[4] Differences Between the False Light Tort and the Right of Publicity

The differences between the false light invasion of privacy tort and the right of publicity are similar to the differences described in § 3.1[H] in the context of defamation law. The false light invasion of privacy tort protects against mental distress caused by placing the plaintiff in a false light in a highly offensive way,

143. *Id.* 726 F.2d 245, at 257. But in *Faloona by Fredrickson v. Hustler Magazine, Inc.*, 799 F.2d 1000, at 1006-1007, 13 Media L. Rep. 1353 (C.A.5 1986) the court restricted the context test, by stating that in the Braun case it did not take the entire magazine into account, only the Chic Thrills section.

144. 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456, 1 Media L. Rep. 1791 (1967).

145. *Id.* 385 U.S. 374, at 388.

146. *Cf.* § 3.1[B][2].

147. 419 U.S. 245, 95 S.Ct. 465, 42 L.Ed.2d 419, 1 Media L. Rep. 1815 (1974).

while the right of publicity protects the commercial interest in plaintiff's identity and performance.

The *main* difference between the two rights is the element of falsity. The right of publicity is infringed if defendant appropriated plaintiff's identity or performance without permission. Plaintiff does not have to prove any element of falsity.¹⁴⁸

A *second* difference is the standard of liability. In false light cases, plaintiff can only recover damages if he proves actual malice, or negligence if he is a private figure. The right of publicity can be infringed if defendant innocently used plaintiff's identity.¹⁴⁹

The U.S. Supreme Court clearly distinguished between the right of publicity and the false light privacy tort in the 1977 "*Zacchini*" case:

"Time, Inc. v. Hill [...] involved an entirely different tort from the 'right of publicity' recognized by the Ohio Supreme Court. [...] It is also abundantly clear that Time, Inc. v. Hill did not involve a performer, a person with a name having commercial value, or any claim to a 'right of publicity.'"¹⁵⁰

It is possible that a plaintiff asserts both infringement of the right of publicity and invasion of false light privacy, for example, if an advertisement places the plaintiff in a false light.¹⁵¹

[E] Fourth Tort: Appropriation

[1] Introduction

Prosser's fourth tort consists of invasion of privacy by appropriation. This tort is associated with the 1902 "*Roberson*" case and the 1905 "*Pavesich*" case,¹⁵² which involved the unpermitted commercial use of plaintiff's picture. Today there are two different views of this tort. In the *first* view, propagated by Prosser, the tort protects against both mental and commercial damage to the plaintiff. In the *second* view, the appropriation tort protects only against mental and physical damages.

[2] Inclusion of the Right of Publicity

In Prosser's view, to create liability for invasion of appropriation privacy, the plaintiff must prove:

148. See § 3.6.

149. See § 2.9[A].

150. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, at 571, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977).

151. Cf. *Maples v. National Enquirer*, 763 F.Supp. 1137, at 1143 (N.D.Ga. 1990): "Plaintiff alleges that Defendant's report of false information under the guise of an "exclusive" interview constitutes a commercial appropriation of Plaintiff's name, likeness and story." Cf. *Restatement (Third) of Unfair Competition* § 46, comment b. (1995).

152. See discussion in § 3.2[A].

- 1) an unpermitted appropriation for the defendant's benefit or advantages,
- 2) of the plaintiff's name or likeness or other identifiable elements,
- 3) which causes mental or commercial damage to the plaintiff.¹⁵³

In defending his fourth tort, Prosser stated in 1960:

"It seems sufficiently evident that appropriation is quite a different matter from intrusion, disclosure of private facts, or a false light in the public eye. The interest protected is not so much a mental as a proprietary one, in the exclusive use of plaintiff's name and likeness as an aspect of his identity."¹⁵⁴

According to Prosser, both mental and proprietary interests,¹⁵⁵ are protected under this privacy tort. In a less-known 1956 article, Prosser also described his four torts. In this article, after he had described the appropriation privacy tort, Prosser stated that American law did not principally differ from German rules developed for the protection of the personality and personality rights.¹⁵⁶ In Germany, the right to one's own picture protects both mental and commercial interests, but this right is conceived as a personality right, not as an assignable property right.¹⁵⁷

Prosser agreed with the outcome of the 1953 "*Haelan*" case,¹⁵⁸ in which the Second Circuit recognized the right of an exclusive licensee to enjoin the use of the name or likeness by a third person, called the "right of publicity." But he did see this right of publicity as a part of an unified appropriation privacy tort, not as an independent property right.¹⁵⁹ Since he realized that the protection afforded under the appropriation privacy tort creates a value upon which the plaintiff can capitalize by selling licenses, he stated that this tort had "a proprietary nature."

It seems that in Prosser's view the protection of commercial or property interests under the appropriation privacy tort is justified as a consequence of the protection against mental anguish. In comment a. under Restatement (Second) of Torts § 652c (1977), which codified Prosser's view of the invasion of privacy by appropriation tort, it is stated:

"Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it."

153. Cf. Restatement (Second) of Torts § 652c (1977): "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." See also Restatement (Third) of Unfair Competition § 46, comment b. (1995).

154. Privacy, 48 Cal. L. Rev. 383, at 406 (1960).

155. "[H]arm to the plaintiff's own commercial interests," Id. 48 Cal. L. Rev. 383, at 409 (1960).

156. Das Recht auf die Privatsphäre in Amerika, 21 Zeitschrift für ausländisches und internationales Privatrecht, 401, at 404 (1956). In a footnote 15 he referred to Enneccerus-Nipperdey, Allgemeiner Teil des bürgerlichen Rechts, 14th ed. (1952) § 78 1, 1 and 2.

157. See § 1.2(C); Germany.

158. *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (C.A.2 1953).

159. Privacy, 48 Cal. L. Rev. 383, at 406-407 (1960).

Prosser explicitly stated that his four torts were personal, non-assignable and non-descendible rights.¹⁶⁰ Since the appropriation privacy tort also protects against mental distress or injury of personal feelings, the appropriation tort could not be characterized as a property right. In his opinion, "it seems quite pointless to dispute over whether such a right is to be classified as "property."¹⁶¹

A person who has never commercially exploited his identity can state a claim for invasion of appropriation because he is forced against his will to advertise another's product or service. But even a person, famous or unknown, who has previously permitted the commercial use of his identity does not entirely lose his right of privacy. This person cannot recover mental damages for the unpermitted commercial use in itself, but it is possible that he proves mental injury from the offensive nature of defendant's appropriation. For example, in *Clark v. Celeb Pub., Inc.*,¹⁶² the plaintiff was a self-employed professional model who had previously appeared in advertisements. Defendant published pictures of her without her consent in advertisements for Celeb Magazine, "a low quality and very explicit pornographic magazine." The court, applying California law, granted damages for emotional suffering and economic injury suffered as a result of the appearance of plaintiff's photographs in defendant's magazine.

Prosser's concept of one privacy tort protecting both mental interests and commercial interests in cases of non-offensive appropriation caused some confusion among judges and attorneys who could not see a relation between the commercial interest in controlling the exploitation and the privacy interest in solitude, the right to be completely free from exploitation.¹⁶³ They did not understand Prosser's idea that the commercial right to control the exploitation could follow from a privacy interest to be free from exploitation.

The right of publicity was recognized by the Second Circuit in 1953 as a non-privacy right which was immune from the classical privacy defense that not the plaintiff-licensee, but only the licensor had standing to sue, since a privacy right was a personal right which could not be assigned. Therefore, Prosser's inclusion of the right of publicity in a privacy concept did cause some confusion.

In 1992, in *Waits v. Frito-Lay Inc.*,¹⁶⁴ the Ninth Circuit affirmed a jury award of \$200,000 for mental injury of well-known songwriter and singer Tom Waits, caused by infringement of the right of publicity. This view of the right of publicity as protecting against commercial and mental damage is similar to Prosser's appropriation of privacy tort under another name.

160. *Id.* 48 *Cal. L. Rev.* 383, at 408. *Cf. Restatement (Second) of Torts* § 652i, comment a: "The right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded. The cause of action is not assignable, and it cannot be maintained by other persons such as members of the individual's family, unless their own privacy is invaded along with his."

161. *Id.* 48 *Cal. L. Rev.* 383, at 406.

162. 530 F.Supp. 979, 8 *Media L. Rep.* 1261 (D.C.N.Y. 1981).

163. *See* about this confusion in general: Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 *Vand. L. Rev.* 1199 (1986). *See* § 2.2.

164. 978 F.2d 1992, 23 *U.S.P.Q.2d* 1721, 20 *Media L. Rptr.* 1585 (C.A.9 1992).

[3] Exclusion of the Right of Publicity

Under the *second* view of the appropriation tort,¹⁶⁵ which excludes commercial interests, in order to establish a prima facie claim for invasion of appropriation privacy, the plaintiff must prove:

- 1) an unpermitted appropriation for the defendant's benefit or advantages,
- 2) of the plaintiff's name or likeness or other identifiable elements,
- 3) which causes mental damage to the plaintiff.

In this view, the appropriation privacy tort protects only mental privacy interests, not commercial property interests, which are protected by the right of publicity. This view is supported by McCarthy, who states that the difference between the two rights turns not upon the type of activity by the defendant but on the nature of plaintiff's injury. In his opinion, "the appropriation branch of the Right of Privacy gives control over another's commercial use of one's identity only insofar as one can establish some bruised feelings."¹⁶⁶ In 1995, this view received support in the Restatement (Third) of Unfair Competition (1995).¹⁶⁷

Both rights can protect the same object: all the characteristics which identify a certain human being, such as a name, likeness, voice, picture, photograph or other identifying features. Both rights involve neither a disclosure of something "private," nor an element of falsity. Both rights are triggered by the same acts, which constitute an unpermitted use in a commercial context.¹⁶⁸

The difference is that both rights protect different interests. The tort invasion of privacy by appropriation protects the privacy interest to be free from mental injury, while the right of publicity protects the property interest to be free from pecuniary damage. Thus, the type of injury that results from the unpermitted use determines which right is applicable. If the commercial use results in injury to human feelings such as dignity and integrity, the cause of action is invasion of privacy by appropriation. The right of publicity is the cause of action if the commercial use results in a loss of money or negatively influences earning potential. McCarthy states: "Simplistically put, while the appropriation branch of privacy is invaded by an injury to the psyche, the Right of Publicity is infringed by an injury to the pocketbook."¹⁶⁹

165. See McCarthy, *The Rights of Publicity and Privacy*, § 5.8 (Rev. 1993).

166. *The Rights of Publicity and Privacy*, § 5.8[F] (Rev. 1993).

167. See *Restatement (Third) of Unfair Competition* § 46, comment b. (1995).

168. Cf. *Restatement (Third) of Unfair Competition* § 46, comment b. (1995). But see *Restatement (Second) of Torts* § 652c, comment b. (1977), giving examples of noncommercial or non-pecuniary appropriation of privacy: A, who has been B's mistress, poses as his common law wife, calling herself Mrs. B. A has invaded the privacy of B, and also of his wife, Mrs. B by appropriating B's name. Such examples, which involve a defendant who in private actions falsely used the name of the plaintiff for own purposes, are not actionable under the right of publicity.

169. *The Rights of Publicity and Privacy*, § 5.8[C] (Rev. 1993), citing other commentators. Cf. *Restatement (Third) of Unfair Competition* § 46, comment b. (1995): "The distinction between the publicity and privacy actions, however, relates primarily to the nature of the harm suffered by the plaintiff; similar substantive rules govern the determination of liability."

The difference between these actions is not based on the distinction between celebrities and non-celebrities. A famous person can claim mental damages,¹⁷⁰ a private person can claim commercial damages.¹⁷¹ The two claims can be joined in one lawsuit.¹⁷²

The concept of the appropriation privacy tort, as protecting only against mental injury, can clarify the confusion that exists between the two rights.¹⁷³ It should be noted that courts that recognize the distinction sometimes use different terms for both actions when they apply state statutes or common law. For example, the term appropriation or misappropriation is sometimes used with respect to the protection of solely commercial interests.¹⁷⁴

The main advantage of this *second* view seems to be that the development of the right of publicity as a property right is not impeded by the limitations of privacy rights.

[F] The Right of Privacy Outside Prosser's Four Torts

In 1890, Warren and Brandeis conceived the "Right to Privacy" as a right to be let alone which protects against mere injury of feelings. This right of privacy was part of the more general right to the immunity of the person, the right to one's personality. Then Prosser divided the privacy right in four distinct torts.

In 1964, Bloustein criticized Prosser's four-part division and argued that the right of privacy should not be seen as four different torts, but as one single tort, which protects against affronts to human dignity and individuality which threaten

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170. *Cf. Waits v. Frito-Lay Inc.*, 978 F.2d 1992, 23 U.S.P.Q.2d 1721, 20 Media L. Rptr. 1585 (C.A.9 1992): affirming a jury award of \$200,000 for mental injury of Tom Waits, a well-known songwriter and singer, whose distinctive voice was imitated in an advertisement for Doritos chips.
171. *Tellado v. Time-Life Books, Inc.*, 643 F.Supp. 904, at 909, 13 Media L. Rep. 1401 (D.N.J. 1986): "I do not find that New Jersey law limits the cause of action of misappropriation to famous individuals." The court recognized the "right of an individual to be compensated for the commercial use of his or her likeness." *Id.* 643 F.Supp. 904, at 913; *Cf. Slocum v. Sears Roebuck & Co.*, 542 So.2d 777 (La.App. 1989): Parents could not recover for mental anguish occasioned by the unpermitted display of photography studio's display of baby's photograph, since baby was too young to suffer damages. It could be argued that if the parents had claimed identity of the right of publicity they could have claimed commercial damages.
172. *E.g. Clark v. Celeb Pub., Inc.*, 530 F.Supp. 979, 8 Media L. Rep. 1261 (D.C.N.Y. 1981) awarding \$25,000 for mental anguish and \$13,750 for commercial damages in a case where defendant had used a picture of plaintiff, a self-employed professional model, in advertisements for Celeb Magazine, a very explicit pornographic magazine.
173. *See Restatement (Third) of Unfair Competition* § 46, comment b. (1995) stating that "[t]he 'appropriation' tort as described by Prosser and the *Restatement*. Second, of Torts subsumes harm to both personal and commercial interests caused by an unauthorized exploitation of the plaintiff's identity. Classification of the tort as an aspect of the right of privacy, however, led some courts to deny relief to well-known personalities whose celebrity precluded the allegations of injury to solitude or personal feelings normally associated with an invasion of privacy."
174. *Cf. Hirsch v. S. C. Johnson & Son, Inc.*, 90 Wis.2d 379, 280 N.W.2d 129, at 132, 205 U.S.P.Q. 920 (Wis. 1979): "We conclude that the right of a person to be compensated for the use of his name for advertising purposes or purposes of trade is distinct from other privacy torts which protect primarily the mental interest in being let alone. The appropriation tort is different because it protects primarily the property interest in the publicity value of one's name."

our liberty.¹⁷⁵ Bloustein argued that this principle not only runs through the tort cases, but also through criminal cases involving the rule of exclusion under the Fourth Amendment,¹⁷⁶ eavesdropping, and disclosure of confidential information obtained by government agencies.¹⁷⁷ He mentioned the example of electronic storage of personal data which threatens the same interest.¹⁷⁸ Such examples of invasion of privacy were outside Prosser's four torts.

Today the term privacy connotes a variety of interests, which have nothing to do with the right of publicity. These different "privacy" interests can be divided in different categories,¹⁷⁹ such as:

- a) the interest in preventing intrusion into one's zone of private seclusion,¹⁸⁰
- b) the interest in freedom from forced association, belief and thought. People should not be forced to express what they do not want to express, and have the right to anonymous expression and to refrain from speaking,¹⁸¹
- c) the interest in autonomy to make personal decisions and life choices, such as the right to have an abortion,¹⁸² and
- d) the interest in controlling information about oneself.¹⁸³

Prosser's intrusion tort is protected by the first interest. His three other torts can be brought under the interest in controlling information about oneself. The protection against governmental and private record-keeping can also be based on

175. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 *N.Y.U.L. Rev.* 962, at 971 and 1000-1007 (1964).

176. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated [...]."

177. *Id.* 39 *N.Y.U.L. Rev.* 962, at 1000-1001.

178. *Id.* 39 *N.Y.U.L. Rev.* 962, at 1006.

179. *Cf. Rights of Privacy*. One of a series documenting America's quest to achieve the promises of the Bill of Rights, 1979.

180. *Cf. the Fourth Amendment*: "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated [...]."

181. *Cf. Board of Education v. Barnette*, 319 U.S. 624, at 633-636 and 645, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943): The right of freedom of thought protected by the First amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." (*Id.* 319 U.S. 624, at 637).

182. *Cf. Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

183. *Cf. Westin, Privacy and Freedom*, 1967, at 7: privacy is the extent to which an individual has control over information about himself. *Cf. Wacks, Personal Information*, 1989, at 20, arguing "that at the centre of the concern about 'privacy' is the use of (and especially the misuse) of personal information about an individual." "Personal information consists of facts, communications or opinions which relate to the individual and which it would be reasonable to expect him to regard as intimate or sensitive and therefore to want to withhold or at least to restrict their collection, use, or circulation." *Id.* at 26.

the interest in controlling information about oneself.¹⁸⁴ Several federal laws have been enacted which regulate governmental¹⁸⁵ and private record-keeping.¹⁸⁶

The U.S. Constitution does not recognize a right of privacy as such. Although this absence of an express right of privacy made it difficult to recognize such a right, the U.S. Supreme Court stated in the famous 1965 *Griswold v. Connecticut* case,¹⁸⁷ that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."¹⁸⁸ In the Court's opinion, several amendments to the Constitution contain various guarantees that create zones of privacy. The Court held unconstitutional a Connecticut statute that forbade both the use of contraceptives and the aiding and abetting of such use, because the right of privacy in the marriage relationship is within such a "zone of privacy."¹⁸⁹ The right which protects a citizen against acts of the government which intrude upon his "zones of privacy" protected by the U.S. Constitution is often called the *constitutional right of privacy*.¹⁹⁰

In 1989, the U.S. Supreme Court recognized the individual's interest in controlling information concerning his person as a privacy interest:

"To begin with, both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another. Thus the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private."¹⁹¹

Traditionally, authors make a traditional distinction between the privacy torts and privacy under the U.S. Constitution. For example, McCarthy argues that the

184. Westin and Baker, *Databanks in a Free Society*, 1972; *Rights of Privacy*, 1979, at 148. See for an overview of Federal Statutes regulating informational privacy: Mell, *Seeking Shade in a Land of Perpetual Sunlight: Privacy as a Property in the Electronic Wilderness*, 11 *Berkeley Techn. L.J.* 1, at 82-85 (1996) (proposing a Uniform Electronic Persona Protection Act).

185. See the 1967 Freedom of Information Act, 5 U.S.C. § 552, creating a public right of access to government information on individual citizens, and the 1974 Privacy Act, 5 U.S.C. § 552a, creating an individual right of access to government information on the individual himself. See also Franklin and Bouchard, *The Freedom of Information and Privacy Acts*, 1989 (loose leaf).

186. E.g. the Fair Credit Reporting Act of 1971, 15 U.S.C. § 1681 *et seq.* which gives applicants for credit a limited right to know what is in the files that are kept and disseminated about them.

187. 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

188. 381 U.S. 479, at 484.

189. 381 U.S. 479, at 484-485.

190. Cf. Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 *N.Y.U.L. Rev.* 364, at 364 (1989): "The common thread uniting these forms of the constitutional right to privacy is the claim that each citizen has a right of autonomy, a right to decide how to live and to associate with others, free from all but the most carefully limited impingements by governmental authority."

191. *U.S. Dept. of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. 749, at 763, 109 S.Ct. 1468, 103 L.Ed.2d 774, 16 Media L. Rep. 1545 (1989) (footnotes omitted). The Court stated it was not dealing with the privacy interest in making certain personal decisions: "As we have pointed out before, '[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.'" (Citing *Whalen v. Roe*, 429 U.S. 589, 598-600, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977)).

privacy as guaranteed by the U.S. Constitution differs from privacy as protected by the civil law of torts in two respects. *First*, the types of acts which constitute an invasion of privacy are quite different in the two areas. *Second*, Constitutional "privacy" protects against governmental intrusion, but the tort law of privacy primarily protects against invasion by private parties.¹⁹²

However, this distinction overlooks the fact that the acts which constitute a tort of invasion of privacy can also invade a constitutional zone of privacy. In intrusion cases, this is clear.¹⁹³ The other three "informational" common law torts can also find protection in the constitutionally protected "zones of privacy." For example, in *Cox Broadcasting Corp. v. Cohn*,¹⁹⁴ the U.S. Supreme Court affirmed "that however it may be ultimately defined, there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press with all its attendant publicity."¹⁹⁵

3.3 Intentional Infliction of Mental Distress

Most states recognize the tort of infliction of mental distress. The Restatement (Second) of Torts § 46 (1977) states that

"One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

Like the privacy torts, this tort of "outrage" focuses on mental injury. Because of the fear of trivial claims, the difficulty of proving emotional distress, and the lack of any boundaries to liability, the law has been slow in recognizing this rule as a separate and distinct basis of tort liability, without the requirement of proving the elements of the four privacy torts. The tort is still in a stage of development, and the ultimate limits of this tort are not yet determined.¹⁹⁶ Examples of outrageous conduct are cruel jokes, such as falsely informing the plaintiff that his wife has been badly injured in an accident, or the joke, where plaintiff was invited to a swimming party at an exclusive resort, where she received a special bathing suit, that dissolved while she was swimming, leaving her naked in the presence of men and women whom she has just met.¹⁹⁷

In *Hustler Magazine and Flynt v. Falwell*,¹⁹⁸ the U.S. Supreme Court made clear that if the tort of intentional infliction of emotional distress is applied in media cases, the liability standard of actual malice will apply if plaintiff is a public figure. The Court reversed a judgment of the Fourth Circuit for emotional distress caused by an advertisement parody of Rev. Jerry Falwell in magazine

192. *The Rights of Publicity and Privacy*, § 5.7 (Rev. 1993). By using the word "primarily," McCarthy recognizes that also the government can commit one of the privacy torts.

193. *See supra* ad a).

194. 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).

195. 420 U.S. 469, at 487.

196. *See Restatement (Second) of Torts* § 46, comment b-c. (1977).

197. *See Restatement (Second) of Torts* § 46, illustrations 1 and 3 (1977).

198. 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41, 14 Media L. Rptr. 2281 (1988).

Hustler, implying facetiously that he was often drunk, and that his first sexual experience was with his mother in an outhouse.¹⁹⁹ Falwell argued that the actual malice standard of defamation law was not applicable so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, not reputational damage. The Court did not follow this reasoning because the subjective criterion "outrageous" does not provide a principled standard to separate non-actionable publications, such as traditional political cartoons, from actionable ones. The Court concluded that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. According to the Court such a standard "is not merely a 'blind application' of the New York Times standard, [...] it reflects our considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment."²⁰⁰

It is possible for a plaintiff to state a claim for infringement of the right of publicity and the tort of outrage, if defendant's unpermitted commercial use caused severe emotional distress to the plaintiff.²⁰¹

3.4 Differences Between Copyright Law and the Right of Publicity

[A] Introduction

Copyright protection subsists in any original²⁰² work of authorship,²⁰³ fixed in any tangible medium of expression. Examples of works of authorship are literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures, audiovisual works and sound recordings.²⁰⁴ To satisfy the fixation requirement, these works must be embodied in a material object. Such a material object or "tangible medium of expression," consists of either a copy or a phonorecord. There is only one work of authorship, which can be embodied in numerous copies. The

199. The jury had rejected a libel claim on the grounds that no reasonable person would believe the cartoon described actual facts.

200. *Id.* 108 S.Ct. 876, at 882.

201. *Cf.* § 3.1[1].

202. Creation through independent effort as opposed to imitation.

203. Ideas are not protected 17 U.S.C. § 102b. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 111 S.Ct. 1282, 113 L.Ed.2d 358, 1991 Copr.L.Dec. P 26,702, 18 U.S.P.Q.2d 1275, 18 Media L. Rep. 1889 (1991): Rural's white pages of telephone directory are not entitled to copyright, and therefore Feist's use of them does not constitute infringement, because Rural publishes uncopyrightable facts: the most basic information--name, town, and telephone number--about each person who applies to it for telephone service. Rural's "selection" lacks the modicum of creativity necessary to transform mere selection into copyrightable expression.

204. 17 U.S.C. § 102(a).

1978 Copyright Act gives the author five exclusive rights: to reproduce the copyrighted work in copies or phonorecords; to prepare derivative works based upon the copyrighted work; to first distribute copies or phonorecords of the copyrighted work to the public; to perform the copyrighted work publicly; and to display the copyrighted work publicly.²⁰⁵

The 1990 Visual Artist's Rights Act created a limited federal system of moral rights. This Act confers in 17 U.S.C. § 106A two moral rights, the right of attribution and the right of integrity for the specified category "works of visual art."²⁰⁶ The right of attribution ensures that the author is identified with his work and is not identified with works of others or with distortions of the author's own work.²⁰⁷ The right of integrity grants the author the right to prevent any intentional distortion, mutilation, or other modification of the author's work of visual art which would be prejudicial to the author's honor or reputation, and to prevent destruction.²⁰⁸

The difference between these rights and the right of publicity is that the moral rights protect moral interests, such as the artist's honor or reputation, not commercial interests. A possible cumulation of the right of publicity and the right of attribution in cases where defendant commercially exploits works of visual art, which deliberately misidentify the plaintiff as the author, is restricted by § 106A(c)(3). According to this section the right of attribution does not apply to any reproduction or other use of works in posters, motion pictures, books, periodicals, advertising and other non-works of visual art.

In comparing copyright law with the right of publicity one must distinguish between the two different interests protected by this right. In § 2.6[1] it was stated that the right of publicity in most cases protects against appropriation of the commercial value of a person's name, likeness, voice and other identifying aspects, but in some cases against the reproduction or imitation of a performance as well.

[B] Performance Values

The right of publicity protecting performance values is quite similar to copyright law, which recognizes the exclusive right to reproduce a copyrighted work, and to perform it publicly. The right of publicity is preempted by federal copyright,

205. 17 U.S.C. § 106, but see restrictions of the exclusive rights in 17 U.S.C. §§ 107-118.

206. See definition in 17 U.S.C. § 101. A "work of visual art" is "(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author." It does not include a poster, map, globe, chart, technical drawing, applied art, audio-visual work, book, newspaper, periodical, merchandising item, advertising, or promotional material.

207. 17 U.S.C. § 106A(a)(1)-(2).

208. 17 U.S.C. § 106A(a)(3).

if the performance constitutes a work of authorship and is fixed in a tangible medium.²⁰⁹

However, the right of publicity can protect non-copyrightable performances, such as a human cannon ball act lasting 15 seconds, which is not fixed in any tangible medium. In the "*Zacchini*" case, the U.S. Supreme Court stated:

"The Constitution no more prevents a state from requiring respondent [a broadcasting company] to compensate petitioner [*Zacchini*] for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner [...], or to film and broadcast a prize fight [...]; or a baseball game [...], where the promoters or the participants had other plans for publicizing the event."²¹⁰

Thus even though there are similarities with federal copyright law, the Court recognized that state law right of publicity can protect a non-copyrightable performance, like a human cannon ball act.

[C] Recognition Values

The right of publicity, which protects against the commercial use of attributes of plaintiff's identity, such as a name, likeness and voice, can be distinguished from copyright law. The exclusive rights of a copyright owner are broader, since they are not generally restricted to forms of commercial use. A plaintiff who asserts infringement of the right of publicity must prove that defendant's use had a commercial character.

The object of protection²¹¹ is different.²¹² Copyright law protects original works of authorship which are fixed in any tangible medium of expression. The right of publicity, on the other hand, protects the attributes which identify a specific individual, such as the individual's name, likeness and voice. These attributes in themselves are not fixed. Copyright does not protect the identifying attributes in themselves. An individual's identifying characteristics can be part of a work of authorship, but copyright protection exists only in the manner these characteristics are fixed in a tangible medium of expression. The right of publicity protects someone's name, likeness and voice independent of any specific physical rendering.

A copyrighted work is only one of the means by which plaintiff may be identifiable from defendant's unauthorized commercial usage. The copyright in a photograph of an individual does not prohibit a third party from independently taking another photograph of this person, as long as the copyrighted photograph is not actually copied. If the third party uses this second photograph for adver-

209. See *infra* § 11.3[A].

210. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, at 575, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977).

211. In a copyright context the term used is "the subject matter of copyright." The term "object" can also refer to a "tangible medium of expression," in which a work of authorship is fixed, or to the "thing" which is expressed in an original work of authorship.

212. Cf. *Restatement (Third) of Unfair Competition* § 46, comment i. (1995).

tising purposes without permission, the person represented in it can claim infringement of the right of publicity, not of the copyright of the third party.

It is possible that both rights are infringed by one single act. For example, if defendant used a copyrighted photograph of an individual for commercial purposes without permission from the right of publicity and copyright owner(s). An advertiser who obtained a copyright license to use this photograph, still needs the permission from the portrayed to use it for commercial purposes. A defendant's ownership of copyright in a picture of plaintiff is not a defense to a claim based on the right of publicity.²¹³

[D] Recognition Values and Copyright in Sound Recordings

The relation between the right of publicity protecting a person against unpermitted commercial use of his voice, and copyright in sound recordings²¹⁴ is complicated. Congress has limited the exclusive right of the owner of copyright in a sound recording to the right to duplicate the sound recording in a form, that directly or indirectly recaptures the actual sounds fixed in the recording.²¹⁵ This right protects against piracy, unauthorized duplication of the actual recorded sounds. Congress explicitly stated that this copyright does not extend to the making of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.²¹⁶ Congress made clear that "[m]ere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible."²¹⁷

This policy raises the question whether the right of publicity is preempted if a performer claims that defendant imitated his voice in an advertisement.²¹⁸ The "*Bette Midler*" case²¹⁹ dealt with this question. Defendants, the Ford Motor Company and an advertising agency, had advertised the Ford Lincoln Mercury in a television commercial, in which the popular song "*Do You Want To Dance*," taken from the 1973 Midler album, "The Divine Miss M," was sung by a "sound-alike," who deliberately imitated Midler's voice to sound it like in Midler's original recording. Neither the name nor the picture of Midler were used in the commercial. The advertising agency had obtained a license from the

213. See *Bi-Rite Enterprises, Inc. v. Bruce Miner Co., Inc.*, 757 F.2d 440, at 446, 225 U.S.P.Q. 793, 11 Media L. Rep. 1891 (C.A.1 1985); McCarthy, *The Rights of Publicity and Privacy*, § 11.14[C] (Rev. 1993).

214. "Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied. See 17 U.S.C. § 101.

215. See 17 U.S.C. § 114(b).

216. *Id.* 17 U.S.C. § 114(b).

217. Notes of Committee of the Judiciary, 17 U.S.C. § 114(b), House Report No. 94-1476.

218. Cf. McCarthy, *The Rights of Publicity and Privacy*, § 4.14[E][2] (Rev. 1993) who analyzes the preemption question by application of 17 U.S.C. § 301(a); Wohl, *Federal Preemption of The Right of Publicity In Sing-alike Cases*, 1 *Fordham Ent. Media & Intell. Prop. L.F.* 47 (1990).

219. *Midler v. Ford Motor Co.*, 849 F.2d 460, 1988 Copr.L.Dec. P 26,313, 7 U.S.P.Q.2d 1398, 15 Media L. Rep. 1620, GRUR Int. 1989, 338 (C.A.9 1988).

copyright holder to use the song in the commercial. Therefore, Midler did not allege infringement of copyright. She asserted that defendants had appropriated her identity for commercial purposes by using a sound-alike, who imitated her distinctive voice in the advertisement.

The Ninth Circuit held that if a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort. This tort protects against the appropriation of a voice, which is as distinctive and personal as a face, and therefore identifies the plaintiff.²²⁰

The court reasoned that the tort is not preempted by the Copyright Act, because a sound recording copyright does not exist in Midler's voice, only in the recording. Thus in the court's opinion, a state can forbid an act which Congress intended to validate if the object protected by state law is in itself non-copyrightable. The state does not protect against imitation of recorded sounds, but against sounds which imitate a distinctive voice, in such a way that the plaintiff is identified by the public listening to the sound imitation in the commercial. The outcome of the "*Bette Midler*" case seems to conflict with the intention of Congress, which made clear that "sound-alike" recordings are permissible.²²¹

Although the legal rule applied by the Ninth Circuit is clear, there can be a factual difficulty in deciding whether defendant's use of a sound-alike is only an imitation of the actual sounds in a sound recording, which is allowed, or an imitation of a distinctive voice which identifies the plaintiff, which is not allowed. In the "*Bette Midler*" case the defendants "used an imitation to convey the impression that Midler was singing for them." They had first contacted Midler's manager to find out if Midler would be interested in doing a commercial. When they found out that Midler did not want to do commercials, they asked a sound-alike to sing like Bette Midler.²²²

In the "*Tom Waits*" case the trial court stated that for liability for voice misappropriation, the imitation had to be so good that "people who were familiar with plaintiff's voice who heard the commercial believed plaintiff performed it. In this connection, it is not enough that they were reminded of plaintiff or thought the singer sounded like plaintiff....."²²³ Since the jury found that defendants were liable, the Ninth Circuit was not asked to express an opinion on

220. *Id.* 7 U.S.P.Q.2d 1398, at 1401. This view is restated in *Waits v. Frito-Lay Inc.*, 978 F.2d 1992, 23 U.S.P.Q.2d 1721, 20 Media L. Rptr. 1585 (C.A.9 1992), when the Ninth Circuit upheld a jury award of \$375,000 compensatory damages in a case where defendant had violated Waits' right of publicity by broadcasting a commercial for Doritos chips which featured a deliberate imitation of Waits' distinctive and widely known voice.

221. *Cf.* Nimmer on Copyright, § 1.01[B][3][b] (Rev. 1993). But see Hilliard, Advertisers Beware: Bette Midler Doesn't Want to Dance, 9 *Loy. L.A. Ent. L.J.* 43, at 54 (1989), arguing that the Midler decision "appears reasonable because her voice is distinguishable and recognizable to worldwide audiences."

222. *Id.* 7 U.S.P.Q.2d 1398, at 1399.

223. *Waits v. Frito-Lay Inc.*, 978 F.2d 1992, 23 U.S.P.Q.2d 1721, 20 Media L. Rptr. 1585, at 1590 (C.A.9 1992).

the issue of whether plaintiff must prove this additional element of actual confusion.²²⁴

Often a popular song is associated with the actor whose performance made it popular. If this song is imitated by another in a commercial, it is possible that the public listening to it will remember the first performer. In the trial court's opinion such a fact in itself is not enough for infringement of the right of publicity, if the public is aware that the song is performed by an imitator. The right of publicity can only be infringed if the plaintiff is identified by defendant's use. But actual voice confusion should not be required if the plaintiff is identifiable from other elements than the imitation of his voice.

It seems that the solution of the preemption problem of the right of publicity in voice-alike cases could be found in a distinction between the use of an imitation of a sound recording in an advertisement for other commercial products, such as in the Midler and Waits cases, and use for the purpose of the sale of phonorecords itself. If courts would recognize this distinction, the sale of the imitation of the song "Do You Want To Dance" as phonorecords would be allowed, while the use of that record in advertisements for other commercial products would infringe Midler's right of publicity. However, Congress' limitation of the copyright in a sound recording does not recognize such a restriction.

3.5 Differences Between Trademark Law and the Right of Publicity

In 1960, Prosser compared his appropriation privacy tort, which included the right of publicity, with trademark law: "As for the appropriation cases, they create in effect, for every individual, a common law trade name, his own, and a common law trade mark in his likeness."²²⁵ But he recognized also that there was a difference. He stated that the appropriation cases "confer upon him rights much more extensive than those which any corporation engaged in business can expect under the law of unfair competition....[T]here has been no hint that they are in any way affected by any of the limitations which have been considered necessary and desirable in the ordinary law of trade marks and trade names."²²⁶ Also, other commentators²²⁷ and courts²²⁸ have discussed the right of publicity by drawing an analogy to the protection accorded trademarks, service marks and trade names.

The right of publicity and trademark law have in common that both rights protect an object that identifies something else, and that the question whether

224. *Id.* 20 Media L. Rptr. 1585, at 1590, fn. 3.

225. Prosser, *Privacy*, 48 *Cal. L. Rev.* 383, at 423 (1960).

226. *Id.* 48 *Cal. L. Rev.* 383, at 423.

227. *E.g.* Pilpel, *The Right of Publicity*, 27 *Bull. Copyright Soc'y* 249, at 255 (1980); Ropski, *The Right of Publicity--the Trend Towards Protecting a Celebrity's*, 72 *Trademark Rep.* 251 (1982); Winner, *Right of Identity: Right of Publicity and Protection for a Trademark's "Persona"*, 71 *Trademark Rep.* 193 (1981).

228. *Grant v. Esquire, Inc.*, 367 F.Supp. 876, at 879 (D.C.N.Y. 1973): "The 'right of publicity' is somewhat akin to the exclusive right of a commercial enterprise to the benefits to be derived from the goodwill and secondary meaning that it has managed to build up in its name."

defendant used this object, and not something else, is often defined by consumer perception.

However, both rights have essential differences.²²⁹ The *object* of protection of trademark law, a trademark, differs from the object protected by the right of publicity, an individual's identity. Section 45 of the federal Lanham Act states: "The term "trademark" includes any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify and distinguish his goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."²³⁰ Thus, the object of a trademark right is a symbol (the trademark) which through its use in connection with products identifies in the eyes of consumers a single, sometimes anonymous, commercial source. A trademark identifies a single commercial source, such as the manufacturer of the product on which it is used, or the sponsor who supports the product. The right of publicity on the other hand protects the identifying features such as name, likeness or voice, which identify a single person or his performance. A cumulation of the two rights may occur when the identifying features of a human being are used as a trademark in connection with a product.²³¹

A *second* difference is that a right in a trademark can only exist if the trademark is used in trade. On the other hand, the right of publicity also protects a person who does not exploit his identity.²³²

A *third* difference is the scope of the trademark right, which is defined by consumer conception or confusion. A trademark right is only infringed if defendant's use of plaintiff's mark is likely to cause confusion of purchasers as to the source of,²³³ affiliation with, connection with or sponsorship by the trademark owner.²³⁴ On the other hand, the right of publicity is infringed if the public identifies the plaintiff from defendant's unauthorized commercial use. Likelihood of confusion is not an element of a right of publicity claim.²³⁵ A trademark owner can only prohibit the use of signs which cause confusion with

229. Cf. McCarthy, *The Rights of Publicity and Privacy*, § 5.2 (Rev. 1993) who distinguishes four differences with respect to: a) what is identified, b) the need of prior exploitation, c) the test of infringement and d) the transfer and licensing rules.

230. See 15 U.S.C. § 1127, which also provides a definition of a "service mark," which identifies and distinguishes a single commercial source of services.

231. Cf. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 218 U.S.P.Q. 1, 9 Media L. Rep. 1153 (C.A.6 1983); *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis.2d 379, 280 N.W.2d 129, 205 U.S.P.Q. 920 (Wis. 1979).

232. See § 2.4.

233. § 32(1)(a) Lanham Act= 15 U.S.C. § 1114(1)(a).

234. See McCarthy on Trademarks and Unfair Competition § 24:01[4][d] and § 24:03[3] (3d ed. 1992). Cf. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, at 564, 107 S.Ct. 2971, 97 L.Ed.2d 427, 3 U.S.P.Q.2d 1145 (1987) (Brennan, J., dissenting): likelihood of confusion occurs "when consumers make an incorrect mental association between the involved commercial products or their producers."

235. But see Pesce, *The Likeness Monster: Should The Right Of Publicity Protect Against Imitation?*, 65 *N.Y.U.L. Rev.* 782 (1990), arguing that the right of publicity runs counter to general policies supporting creativity, free competition, free speech, and federalism, and creates a cause of action easy to invoke but impossible to enforce. To avoid these problems, according to Pesce, courts should incorporate the "likelihood of confusion" requirement into the right of publicity.

his trademark, while a right of publicity plaintiff can prohibit all forms of commercial use of his identity or broadcast of his performance.

The scope of trademark law has been broadened by the enactment of the 1996 Federal Trademark Dilution Act.²³⁶ Section 43(c)(1) of the Lanham Act²³⁷ provides that the owner of a *famous* mark can prohibit defendant's commercial use of his famous trademark if he proves that this use causes *dilution* of the distinctive quality of the mark, notwithstanding the absence of confusion as to the source of goods or services. The protection provided under this theory differs from the right of publicity, because a plaintiff does not have to prove any injury to reputation or dilution. For example, the ornamental commercial use of a trademark does not generally generate a significant threat of dilution. But the ornamental commercial use of plaintiff's identity infringes his right of publicity.

Often it will be easier to prove identifiability than likelihood of confusion. If plaintiff A. asserts a claim for infringement of his right of publicity because his photograph is used on the package of defendant's commercial product without permission, he must only prove that he is pictured in the photograph. Suppose that plaintiff B. used the same photograph with permission from A. as a trademark for B's commercial products. If plaintiff B also states a claim for infringement of his trademark rights in the same photograph, he must prove that defendant's use is likely to cause confusion as to the source of defendant's commercial products, which he can only prove if this trademark has acquired a "secondary meaning" or source significance.²³⁸

A *fourth* difference is that trademark rights can only be sold with the accompanying goodwill symbolized by the trademark,²³⁹ and can only be licensed if the licensor exercises control over the quality of the licensee's products.²⁴⁰ The right of publicity does not recognize these requirements.²⁴¹

A *fifth* difference is that trademark rights last as long as the symbol is used as a trademark. If a trademark is owned by an individual, upon his death the trademark and its associated good will pass to his heirs. On the other hand, the right of publicity has a fixed duration.²⁴²

236. Public Law 104-98 of January 16, 1996, amending § 43 Lanham Act. Cf. Model State Trademark Bill § 12 (1964). See also Schechter, *The Rational Basis of Trademark Protection*, 40 *Harv. L. Rev.* 813 (1927). See also *McCarthy on Trademarks and Unfair Competition* § 24:13-19 (3d ed. 1992).

237. 15 U.S.C. § 1125(c)(1), listing factors that are relevant in determining whether plaintiff's mark is famous.

238. The same rule applies if other elements of an individual's identity are used as a trademark. *McCarthy, The Rights of Publicity and Privacy*, § 5.2[C][3] (Rev. 1993), states with respect to personal names: "[W]hite trademark infringement is a trespass on the 'secondary meaning' in a personal name, Right of Publicity infringement is a trespass on the 'primary meaning' in a personal name."

239. Cf. § 10 Lanham Act= 15 U.S.C. § 1060.

240. Cf. § 5 Lanham Act= 15 U.S.C. § 1055, in conjunction with the definition of "related company" in § 45 Lanham Act= 15 U.S.C. § 1127.

241. cf. *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866, at 868 (C.A.2 1953): "[A] man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else."

242. See § 2.7.

3.6 Differences Between False Advertising, False Endorsement and the Right of Publicity

The law of false advertising is regulated by state law and federal law.²⁴³ The Federal Trade Commission Guides Concerning the Use of Endorsements and Testimonials in Advertising²⁴⁴ affect the freedom of advertisers to use endorsements and testimonials, if they are deceptive. However, it is not inconceivable that a celebrity who deceptively endorsed a specific product, will be held liable for damages by a consumer who used this product because of the endorsement.²⁴⁵ Although these Guides affect the advertiser's possibilities of exploiting a person's identity, they protect other interests than the right of publicity, and need not be discussed here.

The main difference between false advertising and infringement of the right of publicity is that false advertising must be false, while falsity is not an element of infringement of the right of publicity. In a right of publicity case, truth or falsity of speech is not an issue.²⁴⁶ The commercial value of an individual's identity protected by the right of publicity does not depend on the truth or falsity of defendant's commercial use. The right of publicity can be infringed, even though defendant's unpermitted commercial use of plaintiff's identity contains no element of falsity. If a soft drink manufacturer congratulates a celebrity with winning a championship in an advertisement for its softdrinks, the right of publicity of the champion is infringed, although there is no element of falsity. But there are often cases where the unpermitted use of a person's identity also creates a misleading and false impression of approval, endorsement, or sponsorship. In such a case, the plaintiff can claim both infringement of the right of publicity and/or false advertising.

Section 43(a) of the Lanham Act²⁴⁷ provides protection against false endorsements by the unpermitted use of a person's identity in advertising. Section § 43(a) creates civil liability for any

243. See § 43(a) of the Federal Lanham Trademark Act = 15 U.S.C. § 1125(a), modified in 1989 and the Federal Trade Commission Act (e.g. 15 U.S.C. §§ 45 and 52).

244. See 16 C.F.R. § 255.0-5, with examples of endorsements. Section 255(b) defines an endorsement as "any advertising message [...] which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser." The FTC rules are federal rules enforced by the FTC itself. A private parties cannot sue another private party for infringement of the FTC rules. Cf. Jones, *Celebrity Endorsements: A Case For Alarm and Concern for the Future*, 15 *New England L. Rev.* 521 (1980).

245. Cf. Kogan, *Celebrity Endorsement: Recognition of a Duty*, 21 *J. Mar. L. Rev.* 47 (1987). Cf. in Germany: Henning-Bodewig, *Celebrity Endorsement Under German Law*, 22 *IIC* 195 (1991).

246. See *Restatement (Third) of Unfair Competition* § 46, comment b. (1995): "Proof of deception or consumer confusion is not required for the imposition of liability under this Section." Cf. *Rogers v. Grimaldi*, 875 F.2d 994, at 1004, 10 U.S.P.Q.2d 1825, 16 *Media L. Rep.* 1648 (C.A.2 1989): "Because the right of publicity, unlike the Lanham Act, has no likelihood of confusion requirement, it is potentially more expansive than the Lanham Act;" Cf. *National Bank of Commerce v. Shaklee Corp.*, 503 F.Supp. 533, at 539, 207 U.S.P.Q. 1005, 1978-81 *Copr.L.Dec.* P 25,200 (D.C.Tex. 1980): "Heloise's theory of recovery for invasion of privacy through misappropriation of her name and likeness does not depend on any element of falsity."

247. 15 U.S.C. § 1125(a) (amended in 1989).

"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 goods, services, or commercial activities."

A defendant who creates a false or misleading representation of fact, which is likely to cause confusion as to sponsorship or approval of his products by the plaintiff is liable under the first prong. If the defendant misrepresents the qualities of his products or services in an advertisement, he is liable under the second prong. Thus, if defendant falsely suggests that plaintiff endorses his products, both prongs come into play. The plaintiff must prove that he has been or is likely to be damaged by defendant's false or misleading description or representation of fact.

There are two lines of cases where the use of personal identity constitutes false advertising. The *first* type is the false use or over-representation of plaintiff's *contribution* in connection with defendant's product. For example, in *Columbia Broadcasting System Inc. v. Springboard International Records*,²⁴⁸ the sale by defendant of albums of recordings made many years earlier with an up-to-date picture of the recording artist on the cover was held to be false advertising, because the consumer would believe that he was buying a modern version of the artist's work, when in fact he was getting an old version. If a record company releases an old recording in which a singer performed as a background-singer, the promotion of this performer as a lead-singer constitutes false advertising.²⁴⁹

In a *second* line of cases, courts have held that defendant falsely suggested that the plaintiff *endorsed* his products. In the early case *Edison v. Edison Polyform Mfg. Co.*,²⁵⁰ inventor Thomas Edison sued a manufacturing company, that produced and sold the painkiller "Polyform," because the company falsely declared that Thomas Edison certified that the painkiller was made according to one of his formula's. The court noted that this was not a classical unfair competition case, since defendant did not sell its products as the goods of the plaintiff. But the court granted an injunction restraining the defendant from maintaining, either in the name of the company, or by certificate, or by pictorial representation, that Thomas Edison had any connection with or part in defendant's business. This injunction was not based on the theory of consumer protection, but on a broad property concept.²⁵¹ However, in later cases courts have applied § 43(a) in cases of false endorsements.

248. 429 F.Supp. 563, 199 U.S.P.Q. 422 (D.C.N.Y. 1976).

249. *Yameta Co. v. Capitol Records, Inc.*, 279 F.Supp. 582, 157 U.S.P.Q. 491 (D.C.N.Y. 1968).

250. 73 N.J. Eq. 136, 67 A. 392, 3 Buchanan 136 (N.J.Ch. 1907).

251. *Id.* 73 N.J. Eq. 136, at 141.

In the "*Tom Waits*" case²⁵² the Ninth Circuit held that defendant's use of a voice-alike, who imitated Waits' distinctive singing voice in a radio commercial, misrepresented his association with, and endorsement of, the Doritos chips being advertised. Defendants argued that Waits had no standing to sue, since he was not a competitor. The court rejected this defense, and held that a celebrity whose endorsement of a product is implied through the imitation of a distinctive attribute of his identity, has standing to sue for false endorsement under § 43(a) Lanham Act. The court reasoned that Waits' standing was sufficiently established by the likelihood that wrongful use of his professional unique voice would injure him commercially.

In *Allen v. Men's World Outlet, Inc.*,²⁵³ the use of a picture of a look-alike of Woody Allen with a clarinet in a magazine advertisement for a clothing store was held to violate § 43(a) Lanham Act. The court found a likelihood of consumer confusion of Allen's endorsement or involvement with defendant's clothing store, despite the appearance of a disclaimer in the advertisement which stated that the look-alike was not Allen. It was held to be relevant that the advertisement did not contain a disclaimer that Allen endorsed the product.²⁵⁴

252. *Waits v. Frito-Lay Inc.*, 978 F.2d 1992, 23 U.S.P.Q.2d 1721, 20 Media L. Rptr. 1585 (C.A.9 1992).

253. 679 F.Supp. 360, 5 U.S.P.Q.2d 1850, 15 Media L. Rep. 1001 (D.C.N.Y. 1988).

254. Cf. *Allen v. National Video, Inc.*, 610 F.Supp. 612, 226 U.S.P.Q. 483 (D.C.N.Y. 1985): Use of a look-alike of Allen in an advertisement for video rental stores was held to constitute a false advertising. The court issued an injunction, but stated that defendant may sell his services as a look-alike in any setting if the overall context makes it completely clear that he is a look-alike and that plaintiff has nothing to do with the project, whether that is accomplished through a bold and unequivocal disclaimer, the staging of the photograph, or the accompanying advertising copy.

CHAPTER 4

THE NETHERLANDS: PORTRAIT LAW

4.1 Introduction

[A] Outline Chapters 4 and 5

Chapters 4 and 5 investigate to what extent, under Dutch law, persons can control the commercial exploitation of their portrait, name, voice and other identifying indicia. Dutch law does not recognize any specific exclusive right to commercially exploit one's identity as such. The 1912 Copyright Act (hereinafter also: DCA, i.e. Dutch Copyright Act of 1912) includes a regulation that protects a person under certain circumstances against unauthorized publications of his portrait. Besides that, it is also acknowledged in case law that on the basis of unwritten law under certain circumstances protection can also be obtained against commercial exploitation of other identifying characteristics than the portrait.

Chapter 4 deals with the protection of a person's *portrait*, being a portrayal with a person's features, produced in any possible way.¹ Portrait protection is embodied in the Copyright Act. It affords a person the possibility of opposing under certain circumstances commercial exploitation and other forms of publication of his portrait. Section 4.2 describes the historical *development* of the portrait right. The *object, scope, content, subject, duration, and exploitation* of the right of publicity are respectively discussed in §§ 4.3, 4.4, 4.5, 4.6, 4.7, and 4.8. Section 4.9 deals with the *remedies* in case of infringement of the portrait right.

Chapter 5 discusses the other relevant theories of the right to one's name (§ 5.1), the misappropriation of non-portrait indicia, such as *name, voice*, or other distinctive characteristics (§ 5.2), the general personality right (§ 5.3), trademark law (§ 5.4) and misleading advertising (§ 5.6).

[B] For Non-Dutchmen: Introduction to the Legal System of the Netherlands

Intellectual property laws are created by the Dutch legislature. However, many intellectual property laws are being harmonized under influence of Directives and Regulations of the Council of the European Union.² The Netherlands "*civil law*"

1. See § 4.3.

2. See e.g. for *topographies of semiconductor products*: Council Directive 87/57 of December 16, 1986 on the legal protection of topographies of semiconductor products, OJ 1987 L24/36; for *trademark law*: Council Directive 89/104 of December 21, 1988 to approximate the laws of the member states relating to trademarks, OJ 1989 L 440/1; Council Regulation 40/94 of December 20, 1993 on the Community trademark, OJ 1994, L 11/1; for *copyright and neighboring rights*: EC Council Directive 92/100 of November 19, 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ 1992, L 346/61; Council Directive 93/83 of September 27, 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ 1993, L 248/15; Council Directive 91/250 of May 14, 1991 on the legal protection of computer programs, OJ 1991 L 122/42; Council Directive 93/98 of October 29, 1993 harmonizing the term of protection of copyright and certain related rights, OJ 1993 L 290/9; for *plant*

system does not recognize common law with its principle of *stare decisis*.³ However, since Dutch many civil law rules contain vague norms, Dutch courts have often a great freedom to render their decisions. In this system, the lower courts, in principle, follow the higher courts. In the Netherlands three tiers of courts exist: a) District Court b) Court of Appeals, and c) Dutch Supreme Court (Hoge Raad).⁴ The Netherlands is divided into nineteen "districts," each with its own District Court, and five judicial "circuits", each with its own Court of Appeals. Each District Court has a President, who gives judgments in preliminary relief proceedings.

4.2 Development of Portrait Law

[A] History of Portrait Rules in the 1912 Copyright Act

Until 1912, Dutch law did not provide any regulation with respect to portraits. Legal action could only be instituted against the publication of a portrait if it resulted in any form of insult or an offense. For example, in 1911 the Amsterdam District Court⁵ required defendant to pay NLG 50 to the plaintiff for wilfully injuring his reputation by defendant's publication. Defendant had exhibited in a shop-window an (according to the plaintiff) very unbecoming and unartistic portrait of the plaintiff with the additional text "Defaulter".

Offensive portraits were also dealt with in a criminal sense. In 1903, for example, there was a criminal case against the exhibition of a photograph of Dr. Abraham Kuyper (Prime Minister and Secretary of the Interior), strangling a chained laborer, with the additional text "this is how one tames animals, this is how one controls savages, but this is not how one rules a nation, Dr. Abraham Kuyper in 1891" for insulting a person in and on account of his political actions within the meaning of Article 271 Criminal Act (Wetboek van Strafrecht).⁶

Until 1909, Dutch legal literature limited itself to the doctrine of defamation law.⁷ During that year the first Dutch publication on portrait protection was published. In his dissertation on copyright law, De Beaufort dealt with the "right of a portrayed person."⁸

breeders' rights: Council Regulation of 27, July, 1994, OJ 1994, L 227/1 concerning a community plant breeders' right; for *patent law*: Council Regulation 1768/92 of June 18, 1992 concerning the creation of a supplementary protection certificate for medicinal products, OJ 1992 L 182/1; the non-ratified 1989 Agreement relating to Community Patents, OJ 1989 L 401/1; for *design rights*: Proposals of Commission and Council for a Directive concerning designs and models, OJ 1993, C 345/14 and OJ 1996, C142/7.

3. See § 2.1[B].

4. In cases of lower interest (i.e. if the plaintiff claims less than NLG 5,000) the three tiers of courts are: a) Cantonal Court (one Judge); b) District Court and c) Dutch Supreme Court.

5. Supreme Court, October 16, 1911, W.9242 (Defaulter).

6. District Court Middelburg, May 29, 1903, W.7920 (Prime Minister Kuyper): acquittal because of lack of proof that the accused, a book seller, had knowledge of the defamatory content and that he intended to make the defamatory matter public.

7. See e.g. Cohen, *Beleediging door Caricaturen*, Dissertation, Amsterdam, 1896. Other sources can be found in: *Onrechtmatige Daad* (old Civil Code) IX (Michiels van Kessenich-Hoogendam)no. 3.

8. De Beaufort, *Het auteursrecht in het Nederlandsche en internationale recht*, dissertation, Utrecht, 1909, Chapter 6: some rights relating to copyright, at 299-304.

He came to the conclusion that in the Netherlands for lack of any specific legal provision, portrait protection was "still in the air," as long as the broad interpretation of the concept "*unlawful act*" (hereinafter: tort) was not accepted.⁹ In those days the limited legal interpretation of the tort concept was prevalent. Until 1919, the Dutch Supreme Court interpreted the general tort provision of Article 1401 Civil Code (old version) in such a way that a claim for damages as a result of a tort could be made only in cases of infringement on another person's legal subjective right or in cases of conflict with the offender's legal obligations.¹⁰ According to this interpretation, the concept "*wrongful*" equals "*unlawful*".¹¹

However, in legal literature a broader interpretation of the concept "unlawful" was being advocated.¹² In the broad interpretation, an act can also be unlawful when it goes against the (unwritten) standards of care, which are considered normal in society with respect to the reputation or the properties of another person. In the 1991 "*Lindenbaum/Cohen*" case,¹³ the Dutch Supreme Court accepted the broad interpretation.¹⁴

De Beaufort's remark that in 1909 the existence of portrait protection was uncertain, must be construed in the light of this controversy. He acknowledged the difference between copyright law on the one hand and portrait protection on the other:

"If one considers it necessary to award the portrayed a right by law, this should be defined separately, in order to control the implication as well as the duration of this right, that are stated by the principle on which this protection is founded."¹⁵

As the principle of portrait protection he suggested the "*personality right*." If portrait rules should come into existence, he did not consider it desirable to speak of a "property right to features" or a "*Recht am eigenen Bild*,"¹⁶ in which (except for some exceptions), an exclusive right for every individual to dispose over his features is recognized. In his opinion, only under certain circumstances the publication of someone's portrait violates the personality right

9. Id. De Beaufort, *Het auteursrecht in het Nederlandsche en internationale recht*, at 302.

10. Cf. Section 823(1) German Civil Code, discussed *supra* at § 1.2[C].

11. The President of the Dutch Supreme Court in those years, Mr. Eyssell, argued in an article in *Themis* 1911, at 568, that the interest in legal security outbalanced the disadvantage of having sometimes an unpleasant decision. A consequence of this doctrine was that trade names were not protected against imitation since at that time the Netherlands did not recognize any Trade Name Act. Dutch Supreme Court, October 16, 1910, W. 9117 (*Lewenstein/Singer*) denied the existence of a right in a trade name, notwithstanding the fact that the Netherlands was obliged to protect trade names under Art. 8 Paris Convention of March 20, 1883 (W. April 23, 1884, S.284). Supreme Court, June 29, 1916, NJ 1916, at 866 held that the name of a person cannot be object of a property right. These decisions resulted in the enactment of the Trade Name Act in 1921.

12. See Molengraaff, De "oneerlijke concurrentie" voor het forum van den Nederlandschen rechter, *Rechtsgeleerd Magazijn* 1887, at 373.

13. Supreme Court, January 31, 1919, NJ 1919, at 161; W.10.365 (Mff); WPNR 2564 (EMM) (*Lindenbaum/Cohen*).

14. This doctrine is now codified in Art. 6:162(2) Civil Code. The text of this Article is printed in Appendix A.

15. Id. De Beaufort, *Het auteursrecht in het Nederlandsche en internationale recht*, at 301.

16. See *supra*, § 1.2[C] ad Germany.

of the portrayed.¹⁷ As an example of portrait use that should be prohibited, he mentioned the painting of a professor's portrait on a beer jug.

The portrait rules were subsequently incorporated in Articles 19-21 and 35 Copyright Act of September 23, 1912.¹⁸ In the original Bill, only Articles 19 and 20 DCA were incorporated,¹⁹ which offered a regulation for portraits that were made under the authority of, or to the benefit of the portrayed himself.

Since these articles limit the copyright of the author on his portrait, they have been embodied in Chapter 1, § 6 of the DCA entitled "The Limitations of Copyright". In Article 19 DCA, permission is granted to the portrayed to multiply the ordered portrait. In Article 20 DCA the author of the portrait is prohibited from publishing the ordered portrait without the permission from the portrayed or his next of kin.

In the WPNR issue of May 11, 1912, Paul Scholten criticized the Bill.²⁰ He considered it unjust that the portrayed should only be capable of prohibiting the publication of an ordered portrait, since the use of portraits that were not ordered can be especially undesirable. As an example he mentioned the photograph of the corpse of Bismarck,²¹ that was to lead to the recognition of the "Recht am eigenen Bild" in Germany in 1907, and the photograph of Miss Roberson which was used in New York by a flour manufacturer in order to advertise his business. She could not institute legal action, but this judgement would lead to the introduction of a legal Right of Privacy in New York in 1903.²²

Scholten wanted a subjective right to one's own portrait for the Netherlands as well. He knew, however, that portrayed persons were not entitled to legal portrait protection without any legal foundation, as the concept "wrongful" was interpreted as "unlawful" in 1912. Therefore, he suggested modifying the Bill in such a way that every individual would obtain the right to refuse permission to publish undesirable photographs. He was clearly inspired by the German rule of § 22(1) KUG,²³ which makes the publication of a portrait dependant on the permission from the portrayed. He did not, however, sympathize with the exceptions as referred to in § 23(1) KUG regarding "photographs from the sphere of contemporary history." Scholten realized that the portrait right he suggested did not really belong in the Copyright Act, but he was of the opinion that his approach would have the advantage that special remedies could be exercised by the portrayed, equal to those awarded to the author. Since the Berne Convention made it mandatory upon the legislator to award the copyright in a photograph not to the portrayed, but to the photographer, this issue had already been settled in the Bill.

17. Id. De Beaufort, *Het auteursrecht in het Nederlandsche en internationale recht*, at 302-303, referring to circumstances which conflict with the integrity and dignity of the person portrayed.

18. Stb. 308.

19. Bill, Art. 18 and 19, Bijl. Hand. II 1911-1912, no. 227.2, at 2-3.

20. Opmerkingen over het Ontwerp Auteurswet 1912, II: Portretten, WPNR 2211, at 229-232 (1912) and WPNR 2212, at 251-252 (1912).

21. German Reichsgericht, December 28, 1899, VI 259/99; RGZ 45, 170 (*Bismarck*).

22. See *supra* at § 3.2[A].

23. See *supra* at § 1.2, ad Germany.

Like De Beaufort, Scholten wondered whether it would be possible to obtain a substantial protection of the portrayed through a broader interpretation of the tort concept. Such a rule would be preferable if it concerned a matter of which the boundaries still had to be explored. He was of the opinion however, that in this case a clear rule could be defined in order to meet the requirements: permission from the portrayed is always required. He also feared that application of the general civil law tort rules would be hurt by a preemption of the Copyright Act,²⁴ in the sense that courts would not want to limit any further that which is provided for by the Copyright Act.

Scholten found himself immediately heard by the member of the Dutch Lower House (Tweede Kamer) W.H. Drucker, who proposed to amend Article 19²⁵ of the Bill. He stated that the publication of a portrait without permission, that was not ordered by the portrayed, is unlawful, as far as a reasonable interest of the portrayed or his next of kin opposes this. He illustrated this as such:

"Also, with portraits that have not been created by order of the portrayed, publication can be, also by the author, highly indecent. A general rule cannot be given in this case; it all depends on the specific circumstances of each case."²⁶

Differing with Scholten, Drucker, following De Beaufort,²⁷ was of the opinion that a clearly defined standard could not be given, but that everything depended on the circumstances of the case. Drucker did in fact follow Scholten in his amendment which resulted in the present Article 30 DCA, in which the specific means of assertion under copyright law are granted to the portrayed.²⁸

Drucker was of the opinion that his regulation could only be valid with respect to publication by the author of the portrait: "The answer to the question to what extent it is in general allowed to publish portraits, does not belong in a copyright law."²⁹

The Government agreed with Drucker's amendment. It suggested incorporating Drucker's regulation concerning portraits that had not been ordered, in a separate article.³⁰ Subsequently, the present Article 21 DCA was carried without opposition.³¹ Government Commissioner Bles did remark on Drucker's amendment to incorporate the present Article 30 in statutory law, that the amendment only applied to the author of portraits, and he wondered

"whether it would not be desirable to expand this prohibition to publish also to other persons. One could say: if the author does not have the right to publish, this also applies to (a fortiori) a third party. It would therefore be desirable to read: 'if a person publishes a portrait without authorization.'³²

24. Dutch authors speak of the "negative reflex" of the Copyright Act on the general tort clause.

25. Now: Art. 20 DCA.

26. Bijl. Hand. II 1911-1912, no. 227.8 (Proposed Amendments of Drucker, June 12, 1912), at 41 under VI.

27. Id. De Beaufort, *Het auteursrecht in het Nederlandsche en internationale recht*, at 302-303.

28. Bijl. Hand. II 1911-1912, no. 227.8, at 42 under XI. See *infra*, § 4.9[B][4].

29. Bijl. Hand. II 1911-1912, no. 227.8, at 41 under V.

30. Bijl. Hand. II 1911-1912, no. 227.11 (Amendments by the government of July 3, 1912), at 47.

31. Hand. II 1911-1912, July 4, 1912, at 3070.

32. Hand. II 1911-1912, July 4, 1912, at 3073.

Drucker accepted this, and thus came into existence the portrait rules that exist to this day.³³ It is remarkable that the legislator, by using the vague expression "reasonable interest" in Article 21 DCA, in fact introduced a kind of tort action in the broad sense, at a time when legislation taught the premise of the importance of legal security and clear legal statutory rules.

[B] Survey of Portrait Rules

[1] Portrait Rules in the Copyright Act

Articles 19-21, 25a, 30 and 35 DCA embody the portrait rules. Pursuant to Articles 19(4) and 20(3), Articles 19 and 20 are valid only in the case of ordered portraits. These are portraits that were made in accordance with instructions given to the author, by, on behalf of, or for the benefit of the portrayed. Under Article 19(1) DCA the portrayed or, after his death, his next of kin,³⁴ will not infringe the copyright by reproducing the ordered portrait. Pursuant to Article 20(1) DCA, he who has the copyright in an ordered portrait is not authorized to publish the portrait without the permission from the portrayed, or, for ten years after his death, the permission from his next of kin.

Article 21 DCA applies to all portraits that have not been ordered and says:

"If a portrait has been produced without any particular instructions given to the author by or on behalf of the portrayed, or to his benefit, the publication of that portrait by the person who owns the copyright, is prohibited, as far as a reasonable interest of the portrayed or, after his death, of one of his next of kin, opposes publication."

The "reasonable interest" criterion is therefore the pivot of Dutch portrait law. The publication or exploitation of the non-ordered portrait by the author or a third party³⁵ is not allowed insofar as a reasonable interest of the portrayed opposes this. In 1912, the legislator presumed that a reasonable interest was purely a personality interest.³⁶ In 1959, courts also acknowledged as reasonable the financial interest of a popular person to oppose the unauthorized commercial exploitation of his portrait.³⁷

Article 22 DCA provides that in the interest of civil order as well as in order to trace criminal offenses, portraits of any nature by and on behalf of the authorities can be reproduced, published and distributed.

In Chapter II "The assertion of the copyright and rules of criminal law" was incorporated Article 30 DCA, which grants the portrayed certain legal remedies of the copyright owner regarding unlawfully published portraits, such as the right to claim their destruction, and Article 35(1) DCA, which provides:

33. The complete Bill was carried on July 5, 1912 without a division: Hand. II 1911-1912, July 5, 1912, at 3126. See for the text of the portrait rules appendix A.

34. Only his parents, spouse, or children, see Art. 25a DCA.

35. With permission of the copyright owner.

36. See *infra*, § 4.5[B][1].

37. See *infra*, § 4.5[C][1].

"He who shows a portrait in public or publishes it in any other way without authorization, is punishable by fine of the fourth category."³⁸

[2] Effect of Portrait Rules on Third Parties

Literally, Articles 19-21 DCA only regulate the legal relation between the portrayed and the copyright owner of the portrait. A regulation of the non-copyright relation between the portrayed and a third party (neither portrayed nor copyright owner) does not belong in the Copyright Act. It is generally recognized, however, that the portrait protection can also be invoked against a third party who publishes the portrait.

Two legal theories are relevant to this involvement of a third party. The *first* theory states that the values underlying Articles 20-21 DCA fill in the penal provisions of Article 35 DCA. Article 35 DCA prohibits any person from publishing a portrait "without authorization".³⁹

Infringement of the standards of Articles 20-21 DCA means that a portrait has been published unlawfully in the sense of Article 35 DCA. This constitutes a civil tort in the sense of Article 6:162 Civil Code for infringement of the legal obligation of Art 35 DCA. In other words, by way of the construction of Article 20 or 21 DCA in conjunction with Article 35 DCA and Article 6:162 Civil Code, the portrayed can institute legal action against other third parties that he could only institute against the copyright owner under Article 20-21 DCA.⁴⁰

The *second* theory⁴¹ states that Article 35 DCA can be left out of this construction. It is self-evident that the portrait rules can also be applied to a third party, since the protection of the portrayed against the copyright owner would otherwise be without substance.⁴² In practice there is no difference between a direct application of Articles 20-21 or an indirect application by way of Article 35 DCA.

Below, instead of Articles 20-21 DCA in conjunction with Article 35 DCA and Article 6:162 Civil Code, only Articles 20-21 will be mentioned, thereby assuming the effect with respect to a third party who is not a copyright owner.

38. The maximum penalty is NLG 25,000.

39. Supreme Court, May 22, 1916, NJ 1916, at 808; W.9975 (*Handelsprotector*): the words in Art. 35 DCA "without being entitled to" signify that the defendant who made public a portrait was not authorized by law, contract or other source. Art. 35 DCA is also defined by Artt. 20 and 21 DCA. Id. Supreme Court, November 22, 1966, NJ 1967, 101 (vE) (*"Buitengewoon opsporingsblad" II*).

40. E.g. District Court Amsterdam, May 21, 1975, para. 4, and Court of Appeals Amsterdam, July 7, 1977, para. 11 and 12, upheld in cassation, Supreme Court, January 19, 1979, NJ 1979, 383 (LWH); BIE 1979, no. 23, at 163, Auteursrecht 1979, at 52 (JHS) (*'t Schaep met de vijf Pooten*). Supreme Court, October 30, 1987, NJ 1988, 277 (LWH); AMI 1988, at 58 (DEB) (*Naturist*), para. 3.2 stated: "the protection which Art. 21 in connection with Articles 30 and 35 Copyright Act grants to the person portrayed."

41. See *Franz in his opinion*, and Spoor in his annotation under Supreme Court, January 19, 1979, NJ 1979, 383 (LWH); BIE 1979, no. 23, at 163, Auteursrecht 1979, at 52 (JHS) (*'t Schaep met de vijf Pooten*).

42. Cf. the a fortiori-reasoning of government commissioner Bles, cited in § 4.2[A], and Supreme Court, November 22, 1966, NJ 1967, 101 (vE) (*"Buitengewoon opsporingsblad" II*): after repeating the a fortiori-reasoning, the Court stated that "therefore [in connection with Art. 21 DCA] the same rule must apply to persons who do not own copyright in the portrait."

[3] Terms: the Portrait "Right" of the Portrayed

It is possible to distinguish two kinds of portrait protection depending on whether or not the portrait was made by order of the portrayed:

- a) Pursuant to Article 20(1) DCA, nobody is allowed to publish the ordered portrait without permission of the portrayed or, for a period of ten years after his death, the permission of his next of kin.
- b) Pursuant to Article 21 DCA, nobody is allowed to publish a portrait which was not ordered, as far as a reasonable interest of the portrayed or, for ten years after his death, his next of kin, opposes this publication.

Can one derive subjective (personal) positively formulated "*portrait rules*" of the portrayed with respect to his portrait from two forms of protection, which are incorporated as negatively formulated actions in Article 20 ("not authorized") and Article 21 ("not allowed")? Can a right to do something be derived from the possibility of prohibiting something? There are good reasons for answering this question positively and to speak of subjective portrait rights.

Two forms of protection are founded in law. The two forms of protection were not formulated positively in the Copyright Act, since the legislator was primarily concerned with restrictions of the copyright of the creator of the portrait, and not with the rights of the portrayed. However, one cannot conclude from the negative formulations that one cannot speak of subjective rights.

The portrayed can claim the protection of Articles 20 and 21 DCA against any person who publishes his portrait in the way mentioned in these articles. Even though the law literally affords only a claim against the copyright owner, the legislator and case law make it clear that the same claim also applies to non-copyright owners. Only the portrayed or, after his death, the next of kin, can claim protection in their own interest by law. Other persons are not entitled to do so.

Both forms of protection are granted with respect to a specific object, namely the portrait of a person.⁴³ The legislator, however, did not define in which cases the portrayed can institute legal action in the event of infringement in Article 21 DCA. Whether this action will be successful depends on the interpretation of the concept "reasonable interest". In this light, however, one cannot speak of a "portrait right" under Article 21 DCA if one holds the opinion that a subjective right by definition should always be carefully defined with respect to its content. In those cases in which the legislator has clearly defined the content of a subjective right, it holds true that a claim for infringement of that right includes the unlawfulness of defendant's act, in such a way that the defendant must point out circumstances which exclude the unlawfulness as such. Because of that, the position of the owner of a subjective right is stronger than the position of the person who appeals to the unwritten standards of care with regard to the burden of proof.

43. See § 4.3.

However, the legislator has not precisely defined the content of all absolute property rights. For example, Article 5:1(2) Civil Code provides that the owner is free to use his tangible property provided that this use does not violate the rights of others and the limitations of statutory rules and rules of unwritten law.⁴⁴ Article 13A(1)(d) Benelux Trademark Act provides that the trademark owner can oppose "any use in the course of trade, made without a valid reason, of the mark or a similar sign other than for the purpose of distinguishing goods or services where use of that sign takes unfair advantage of, or is detrimental to, the distinctive character or reputation of the trademark." The legislator of the Benelux left it to the court to decide what exact circumstances will result in violation of trademark. This open formulation results in the fact that with the mere establishment of the violation of trademark, the unlawfulness is not necessarily a fact, but the trademark right is still generally considered to be a subjective right.⁴⁵

As far as personality rights go, these rights are still developing, so the content cannot exactly be defined, and the court, in principle, has a free hand with respect to the question whether these rights have been infringed, and the question of apportionment of the onus of proof. The criterion of unlawfulness is therefore more like a criterion of unwritten rules of decency.

Some authors have therefore stated that a personality right is not a subjective right.⁴⁶ Most authors on the other hand do not require that the content of the subjective personality right be exactly defined. They do consider the personality rights to be a subjective right,⁴⁷ since these rights concern values of a higher order. The fact that the personality interest⁴⁸ needs more protection is then the foundation of a stronger legal position.⁴⁹

One can therefore speak of the subjective portrait rights of the portrayed. In fact, in literature the term "*portrait right*" is occasionally mentioned.⁵⁰ In

44. Cf. Meijers in his annotation under Supreme Court, December 31, 1937, NJ 1938, 517 (*Nobel/Unitas*).

45. Art. 3(1) Benelux Trademark Act uses the words "an exclusive right to a mark." Under the old Trademark Act of 1893, the Dutch Supreme Court, May 1, 1911, W 9180 (*Greif*) used the words "right to a mark." See for a discussion of the development of this view: Gerbrandy, *Industriële eigendom en subjectief recht*, diss. 1946, at 85-86. Id. Van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, 1994, at 23-29.

46. See Aubel, *Persoon en pers*, at 55-62, with further references.

47. See e.g. Asser/Scholten, *Algemeen deel*, 1974, at 15; Asser/Hartkamp III, *De verbintenis uit de wet*, 1990, at 37; Meijers, *Algemene begrippen van het burgerlijk recht*, 1948, at 266-267; Langemeijer, *Aantasting en uitoefening van subjectieve rechten in hare beteekenis voor de onrechtmatige daad*, *WPNR* 3707, at 12-13 (Langemeijer also discusses the "right to honor and reputation"). See for further references: *Onrechtmatige daad* (old Civil Code) I (Jansen) no. 37.2.

48. See Art. 8 European Convention for the Protection of Human Rights and Fundamental Freedoms (EHRC) and Art. 10 Dutch Constitution, discussed at § 5.3[A].

49. On this ground, some authors use the term "subjective right" for general freedoms, such as the freedom of speech; See *Onrechtmatige daad* (old Civil Code) I (Jansen) no. 58.2.

50. Cf. Spoor/Verkade, *Auteursrecht*, 1993, Chapter VI; Oppenoorth, *Een lastig portret*, *IER* 1986, at 88; Cohen Jehoram, Annotation under District Court Haarlem, August 8, 1989, *AMI* 1990, at 225 (*Kierke/EMI and CBS et al.*); Polak, *Kop erop of kop eraf? Persfoto's en portretrecht*, in: *Recht in de kijker, het recht en de media*, Jonge Balie Congres 1990, at 101; Van Oerle, *Hoofdenhandel. Het portret als handelswaar*, in: *Recht in de kijker, het recht en de media*, Jonge Balie Congres 1990, at 113. *Onrechtmatige daad* (old Civil Code) VI (Martens) no. 23.1 (old Civil Code) puts the term "portrait right" in quotation marks.

court decisions, the term "portrait right" is used in a subjective ("right") and in an objective sense ("law"). In this sense, the Pres. of the Utrecht District Court spoke of "an infringement of the portrait right of the plaintiffs."⁵¹

The 's-Hertogenbosch Court of Appeals used the term portrait right in an objective sense when it spoke of the "increased commercial meaning of portrait rights."⁵²

The portrait right under Article 20 DCA only applies to ordered portraits, and has a precisely defined content. This right, which is not very important in practice, will only be dealt with briefly in § 4.2 [B][5]. Much more important in practice is the portrait right of Article 21 DCA, which protects against the unauthorized publication of a portrait that was not ordered.

[4] Distinction Between Rights of the Portrayed and Rights of the Copyright Owner

The rights of the portrayed regarding his portrait are formulated negatively in Articles 20 and 21 DCA as the right to oppose the publication of his portrait, under certain circumstances. This could be turned around and be formulated in a positive way as an exclusive right of the portrayed to publish his portrait, or to have his portrait published, under the circumstances as referred to in Articles 20-21 DCA, provided that one does not ignore the fact that the positively formulated rights should not come into conflict with the rights of others. The same, for example, applies to Article 13A(1) Benelux Trademark Act, which does not say what the trademark owner is authorized to do with respect to his trademark, but only what he can oppose. In spite of this negative formulation, it is generally recognized that the trademark right is a subjective right.⁵³ The trademark owner is allowed to perform actions he can forbid to a third party, provided that he does not infringe the rights of others. Should he have registered as a trademark a sign which is protected by copyright, he can only exercise his trademark right with the permission of the copyright owner.

The positive formulation of the portrait rights can possibly lead to confusion. For how can Articles 20-21 DCA, which literally limit the exclusive right of the copyright owner to publish a portrait, assign an exclusive right to publish (although under certain conditions) to the portrayed? By recognizing the effect on third parties of the portrait rules irrespective of the copyright, the portrayed obtains his own right to make his portrait public. The publication right of the copyright owner and that of the portrayed can be distinguished. The following situations could occur:

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51. Pres. District Court Utrecht, February 20, 1986, AMI 1986, at 62; IER 1986, no. 15, at 48 (*Motown/Rec Track*), para. 5.9. Dutch Supreme Court, February 24, 1989, NJ 1989, 701 (LWH); AA 1989, at 675 (HCJ); AMI 1989, at 70; IER 1989, no. 21, at 41 (JHS); GRUR Int 1990, at 233 (HER) (*Elvis Presley I*), para. 3.6, discussed the right to oppose the use of one's portrait: "Pursuant to Art. 21 Copyright Act, in the Netherlands, such a right only belongs to the portrayed or next of kin."
 52. Court of Appeals 's-Hertogenbosch, September 18, 1990, NJ 1991, 281; IER 1990, no. 60, at 129; IER 1991, at 24 (REPdR); AMI 1991, at 48 (DWFV); BIE 1991, no. 91, at 332 (*Van Uden Productions/Winterland Productions*), para. 4.4.
 53. See *supra*, § 4.2[B][3].

- 1) The portrayed, or a third party with permission from the portrayed, publishes a portrait without permission of the owner of the copyright in the portrait. In that case there can be a question of infringement of copyright.⁵⁴
- 2) The copyright owner, or a third party with permission of the copyright owner, publishes a portrait without the permission of the portrayed. In this case the question comes into play whether rights of the portrayed have been infringed, independent of the copyright. The protection of the portrait does not depend on whether there is a copyright in the portrait.⁵⁵
- 3) A third party publishes a portrait without permission of the portrayed or the copyright owner. In that case there can be a question of infringement of Articles 20 or 21 DCA and/or infringement of the copyright.

The trademark owner is not allowed to do himself what he can prohibit a third party from doing if he infringes another's copyright with his mark. The same applies to the portrayed who cannot do himself the things he prohibits a third party from doing, if he violates the author's copyright in his portrait.

[5] The Portrait Right of Article 20 Copyright Act

Since the legislator wished to regulate the relations between the author of a portrait and the portrayed, the portrait rules ended up in the Copyright Act. It fits in the system of the Copyright Act, in which the activities of the author of a portrait are in the foreground, that a distinction is made between portraits that are ordered (Articles 19-20 DCA) and portraits that are not ordered (Article 21 DCA). The portrayed obtains a stronger legal position regarding the portrait that has been produced to his order.

Article 19 DCA affords two positively formulated rights of the portrayed, that can be exercised without the permission of the copyright owner. Article 19(1) DCA grants the portrayed the right to reproduce the ordered portrait, something that the copyright owner under Article 13 DCA is also authorized to do. In addition, Article 19(3) DCA grants the portrayed the right to publish the ordered "photographic" portraits in a newspaper or a magazine under the condition that the name of the photographer is mentioned. This right belongs exclusively to the portrayed, since the copyright owner is not allowed to do so without the permission of the portrayed on the grounds of Article 20(1) DCA.

Under Article 20(1) DCA, any publication of the ordered portrait which takes place without the permission of the portrayed, or, for ten years after his death, the permission of his next of kin, is an infringement per se of the portrait

54. See e.g. Pres. District Court Breda, October 22, 1985, KG 1985, 348; AMI 1986, at 85 (*Nude pictures of Madonna*): infringement of copyright by publication of nude pictures of Madonna in weekly magazine "Aktueel;" Pres. District Court Breda, February 26, 1985, AMR 1985, at 118 (*Michael Jackson*): infringement of Sunshine's copyright in photograph of Michael Jackson by publication in magazine "Popbizz Special."

55. See § 4.3.

right of Article 20.⁵⁶ The content of the portrait right of Article 20 is clear. For any form of publication of the ordered portrait, the permission of the portrayed is required. He can always refuse to give this permission, even if this seems unreasonable. He does not have to give account to anyone. With respect to the ordered portrait, the portrayed has an absolute publication right. The owner of a copy of a portrait within the meaning of Article 20 DCA is not allowed to exhibit this portrait in order to sell it without the permission of the portrayed. This happened to a painter who painted a portrait of the mayor of Leeuwarden by his order. He could not exhibit this painting or make it public in any other way since he had not obtained the required permission.⁵⁷

In a conflict concerning the publication of a portrait, it must be investigated first whether the portrait was produced to order given to the author of the portrait by, on behalf of, or to the benefit of the portrayed. One can speak of "an ordered portrait" if the initiative lies with the person portrayed, or for instance with a relative or a committee of honor, that giving instructions to produce the portrait to the benefit of the portrayed.⁵⁸ The willingness to have one's photograph taken does not necessarily mean that one has given instructions to do so.⁵⁹ If the portrait was produced on the initiative of the author himself or by order of (and to the benefit of) a third party, there is no question of an ordered portrait, and Article 21 DCA does apply here.⁶⁰

In order to obtain a stronger legal position, the portrayed-plaintiff sometimes states that the portrait published by the defendant was produced to order.⁶¹ However, the defendant can also benefit from the fact that the portrait he published was an ordered portrait. The portrait right of Article 20 DCA can only be exercised by the next of kin during ten years after the death of the portrayed. This can be illustrated by the "*Diepraam*" case. When Willem Diepraam published a book that contained a photograph of a girl that had committed suicide more than ten years previously, the girl's mother claimed an injunction against publication of her daughter's photograph.

56. Art. 20(2) DCA provides that the consent of the other persons portrayed or their next of kin is required if a picture with two or more portraits is made public.

57. Pres. District Court Leeuwarden, December 15, 1971 *aff'd* Court of Appeals Leeuwarden, June 14, 1972, mentioned in: Van Lingen, *Auteursrecht in hoofdlijnen*, 1990, at 132. In the mayor's opinion, the painter had painted his ears too large. In this case, the painter had not stipulated the right to make his painting public in an exhibition or catalogs.

58. See Gerbrandy, *Kort commentaar op de Auteurswet 1912*, at 271.

59. Pres. District Court Arnhem, July 25, 1956, NJ 1957, 97 ("*Wij zijn óók 17*").

60. In his annotation under District Court Haarlem, February 8, 1994, *AMI* 1995, 93 at 96 (*Van Drumpt/Uitgeverij Spaarnestad*), Schuijt argues that a portrait is ordered "to the benefit of the portrayed" if the portrayed had some interest in cooperating in the production of the portrait. In his opinion, stills, consisting of nude photographs taken of an actress from a motion picture and ordered by the producer to promote his film, are portraits within the meaning of Article 20 DCA. It seems to me that this interpretation of the words "to the benefit of portrayed" is too broad.

61. Cf. Pres. District Court Amsterdam, March 29, 1974, NJ 1974, 398; BIE 1977, no. 81, at 265 (*Carl Denig-catalog*): Art. 20 DCA does not apply, because the portrait has been ordered not by plaintiff, but by plaintiff's advertising agency. *Id.* District Court Amsterdam, February 19, 1992, *AMI* 1992, at 99 (*Van der Giessen/de Kam*): photographs of squatter's spokesman not ordered by him.

Diepraam stated that he had taken the photograph by order of the portrayed who wanted to take her photograph to a modeling agency. According to him the mother could not appeal to Article 20 DCA more than ten years after her daughter's death. The Pres. of the Amsterdam District Court rejected this defense. The Pres. did not consider it very likely that Diepraam would succeed in proving the existence of such an order and judged the case on the basis of Article 21 DCA.⁶²

In practice the portrait right of Article 20 DCA is not very important.⁶³ The reason for this is probably that ordered portraits are usually in the hands of the portrayed persons themselves, which makes it difficult for a third party to publish them. If permission to publish an ordered portrait is refused, one can make a portrait on one's own initiative and publish it, without infringing Article 20 DCA. To this portrait, produced on one's own initiative, the standards of Article 21 apply. Hereafter, the term "portrait right," in the objective and subjective sense, will refer to the rights that the portrayed derives from Article 21 DCA. Yet, what is stated about portraits in § 4.3 also applies to the portrait right of Article 20 DCA.

4.3 Object: What Is Protected by the Portrait Right?

The portrait rules can only be applied in cases in which one can speak of a portrait. The legislator's Explanatory Statement (MvT) of 1912 of Article 18 (presently Article 19) states:

"This Article and the following two Articles embody limitations of the copyright in a portrait, this word interpreted in the general sense, made of the face of a person, with or without further parts of the body visible, produced in any possible way; the Articles can therefore be applied to both sculptures made of clay or stone, medals and plaques, and paintings, drawings and photographs."⁶⁴

Under Article 21 DCA, the portrayed can oppose the publication of a portrait of his face under certain circumstances, produced in any possible way. The object of the portrait right is therefore not the face itself but the portrait of the face, produced in any possible way. A description of the face is not a portrait in the sense of the portrait rules.

In 1970, the Dutch Supreme Court had to consider the meaning of the word "portrait" in the "*Ja Zuster, Nee Zuster*" case.⁶⁵ Defendant had distributed a series of key rings, with plastic key ring figures of the fictional characters "Zuster Klivia," "Gerrit" and "Opa," in connection with an advertising campaign for its detergent "Andy." These were characters in the television series "*Ja Zuster, Nee Zuster*," written especially for television broadcasting by A.M.G.

62. Pres. District Court Amsterdam, June 6, 1985, KG 1985, 194; AMI 1986, at 62 (*Diepraam's photo*).

63. Only Pres. District Court Utrecht, June 29, 1989, KG 1989, 289 (*Before and after hair transplant*) held that plaintiff's picture was a portrait in the sense of Art. 20 DCA.

64. Bijl. Hand. II 1911-1912, no. 227.3 (Explanatory Statement (MvT) at 11 (Art. 18)).

65. Supreme Court, January 16, 1970, NJ 1970, 220 (GJS); BIE 1971, no. 24, at 122 (SB); AA 1970, at 377 (HCJ).

Schmidt. Plaintiffs, actors Hetty Blok and Leen Jongewaard, performed the three characters in the successful series. They claimed an injunction against distribution of these plastic key ring figures for which they had not given permission as contravening to Article 21 in conjunction with Article 35 DCA and the generally accepted standards of care which they are entitled to. They argued that, because of their performance, the public almost completely identified "Zuster Klivia" with Blok and "Gerrit" and "Opa" with Leen Jongewaard. The use of these plastic key ring figures for advertising purposes was a publication of their portraits in defiance of their reasonable interest.

The Pres. of the Rotterdam District Court held that the features of the plastic figures had been kept vague and did not bear any resemblance at all the features of the plaintiffs, so there was no question of portraits of the plaintiffs. Before the Hague Court of Appeals, the appellants argued that the issue is not the similarity between the features of the plastic key ring figures and the features of the appellants, but the recognizability of their personalities in the particular plastic figures.

However, the Court of Appeals decided on the grounds of the above-mentioned Explanatory Statement, that one can only speak of a portrait if that the litigated object (inter alia) contains a portrait of the face of a person. Since the features of the appellants did not match the features of the plastic figures, the Court of Appeals upheld the verdict of the Pres. of the Rotterdam District Court.

In appeal to the Dutch Supreme Court, the plaintiffs argued that the Court of Appeals had interpreted the concept "portrait" incorrectly, since there can also be a question of a portrait if the person involved is or can be identified as a whole (even when the features are not considered). Owing to their performance, the public could associate the plastic figures with the plaintiffs.

The Dutch Supreme Court ruled that there is no reason to assume that a different meaning should be given to the word "portrait" in Article 21 DCA than the meaning that has been given in the Explanatory Statement, which meaning is in accordance with ordinary language.⁶⁶ The Dutch Supreme Court rejected the cassation plea, since the Court of Appeals had decided that the features of the three plastic key ring figures did not at all resemble the features of the plaintiffs. The plastic figures were therefore not considered to be portraits of the plaintiffs in the sense of the Copyright Act.

There has been a lot of criticism of this decision. Hirsch Ballin⁶⁷ stated that the issue is recognizability or identification. He did not see any good reason why there should be a difference between a portrait with the face of the portrayed, and a portrait without the face of the portrayed. In both cases the maintenance of one's own identity is equally important. Identification can be

66. But see Gerbrandy, *Kort commentaar op de Auteurswet 1912*, at 274: the term "portrait" in Art. 19 and 20 DCA is more limited than in Art. 21 DCA.

67. Het ja zuster, *nee zuster-arrest*, NJB 1970, at 744.

realized by mentioning the name⁶⁸ or adding certain typical attributes such as Churchill's cigar or Napoleon's typical posture. Linguistically speaking, the word "portrait" could be interpreted in a broader sense than the Dutch Supreme Court did.

Cohen Jehoram⁶⁹ was of the opinion that the Dutch Supreme Court had been leaning towards legislative history too much. Holding on to a 60-year-old criterion of the similarity of features of a portrait within the meaning of Article 21 DCA has been superseded by new developments and opinions. The interest for portraits has been extended from the face to other parts of the body. Besides, the public became familiar with many different kinds of persons, due to especially films and television, so that these persons can be identified not only by their faces, but also in other ways. He agrees with Hirsch Ballin: the important question is, whether one can recognize a person from the portrait of a human body. This will usually occur on the grounds of the identification of the face, but this can also be the case when it concerns other parts of the body and additional circumstances such as posture, occupation or clothing.⁷⁰

Van Schellen⁷¹ concluded that the Dutch Supreme Court had applied a cartesian method, in which a portrait is perceived as a thing in itself, not connected with the subjective-human interpretation and appreciation. This "thing in itself" is the agreement between the physical aspects of the individual and the portrait. In his opinion, it would have been better if the Dutch Supreme Court had applied the existential phenomenological method, in which subject and object are intertwined. An object is perceived in a certain way. As soon as a significant part of the public recognizes Jongewaard and Blok in the key ring figures, then the plastic figures can be seen as portraits. One does not see just a plastic figure; one sees "Gerrit," the character performed by Jongewaard.

Gerbrandy⁷² is of the opinion that the portrait rules are outdated. He is also of the opinion that in times of great reproduction techniques one should not hold on to a (non-statutory) Explanatory Statement (MvT). It is not the features that count but the identification by means of, for example, a caption.

Other authors have concluded however, that the interpretation of the word "portrait" by the Dutch Supreme Court is correct, since it has not only been

68. As support, he cited German Federal Supreme Court, June 9, 1965, 1b ZR 126/63; NJW 1965, at 2148; GRUR 1966, at 102 (Bußmann); 47 UFITA (1966) at 246; DB 1965, at 1474; RzU BGHZ no. 123 (Neumann-Duesberg); MDR 1965, at 976; BB 1965, at 1121 (*Spielgefährtin I*) which held that identification does not necessarily follow from the photograph itself. If the features are unrecognizable, a picture can still be a "Bildnis" (portrait) if the person portrayed can be identified from other data. In this case, the name of the portrayed had been printed under the picture.

69. Annotation under this judgement, AA 1970, at 377.

70. Id. Bitter, Hoge Raad: nee zuster! *Auteursrechtbelangen*, no. 73, at 4; Du Bois, nee zuster? ja zuster, *Auteursrechtbelangen*, no. 74, at 4.

71. De existentiële filosofie en het 'Ja zuster, nee zuster'-arrest, AA 1970, at 442 and 447. But see Meijer's reaction in AA 1970, at 445.

72. Kort commentaar op de Auteurswet 1912, at 269 and 274.

based on a clear interpretation, according to the history of law, but also on the grammatical meaning of that word in written law.⁷³

In 1987, the Dutch Supreme Court⁷⁴ extended the interpretation of the word "portrait" somewhat by rejecting a cassation plea which stated that there cannot be a question of a portrait if the portrayed cannot immediately be identified on the basis of the features of his face, but can only be identified after further inspection.⁷⁵

Also, in case law of courts of first instance, the requirements for a portrait are that at least certain parts of the face of the plaintiff are visible, with or without the presence of any other parts of the body.⁷⁶

Also, photographs from a movie,⁷⁷ caricatures⁷⁸ and photographs of action of identifiable athletes⁷⁹ can be portraits. The television performance of a newsreader was considered a (film)portrait of this newsreader; he could therefore oppose the use of this broadcasting in any other film.⁸⁰

The portrait right always concerns a portrait of a natural person. A photograph of a soccer team as such will not be considered a portrait of that soccer club.⁸¹

As the portrait rules have been incorporated in the Copyright Act, one could suppose that they only apply to portraits that are (or were) protected as a work of art within the meaning of Article 10 DCA. In case law it was decided that the protection by copyright is not a requirement for protection under portrait law.⁸² Thus, considered the Dutch Supreme Court:

"that the Court of Appeals has derived rightfully from the fact that what is not allowed to the copyright owner, 'a fortiori' is not allowed to the non-copyright owner, that in

73. Beekhuis, *Nog eens het 'Ja zuster, nee zuster'-arrest*, *RMth* 1972, 7, at 10-21; Boekman, Annotation, *BIE* 1971, no. 24, at 129: "A portrait must at least resemble the person portrayed."; Franx, Opinion under Supreme Court, January 19, 1979, *NJ* 1979, 383 (LWH); *BIE* 1979, no. 23, at 163, *Auteursrecht* 1979, at 52 (HHS) (*'t Schaep met de vijf Pooten*).

74. Supreme Court, October 30, 1987, *NJ* 1988, 277 (LWH); *AMI* 1988, at 58 (DEB) (*Naturist*).

75. This case is discussed in § 4.4.

76. Cantonal Court Amsterdam, March 27, 1987, *PRG* 1987, 2701; *AMI* 1987, at 115 (*Loret de Mar*): plaintiff was pictured lying on an airbed, dressed in bathing trunks. Because of the shadow, her features are not fully visible, but there is still sufficient visual similarity with plaintiff's face for a portrait; Pres. District Court Haarlem, August 1, 1984, *KG* 1984, 272; *AMI* 1986, at 59 (*Topless waitress in magazine "Panorama"*): Although one part of plaintiff's face under her nose is covered by her left hand holding a glass, it is a portrait, because the other part, including her eyes and nose, is clearly visible.

77. Cantonal Court Haarlem, February 8, 1935, *NJ* 1936, 692 (*Photograph in Polygoon news*).

78. Pres. District Court the Hague, December 7, 1965; *BIE* 1966, no. 66, at 240 (*Feyenoord players*). Cf. De Beaufort, *Auteursrecht*, 1932, at 163.

79. Pres. District Court Haarlem, June 26, 1974, *NJ* 1974, 415; *BIE* 1977, no. 3 and 4, at 11 and 13 (*"De slag om het voetbalgoud" I and II*): There is no reason not to regard these photographs as portraits because a part of the public does see these photographspictures of a soccer game, not individual players.

80. Pres. District Court Amsterdam, November 22, 1974, *NJ* 1976, 336 (*Bob Meijer in motion picture "Alicia"*). Cf. Pres. District Court Amsterdam, November 3, 1964, *NJ* 1964, 477 (*"Mensen van morgen"*): portrait of son of plaintiff in de motion picture of Kees Brugge entitled "Mensen van morgen" (people of tomorrow). The conflict was solved by applying contract rules.

81. Pres. District Court Utrecht, January 16, 1980, *NJ* 1980, 481 (*Ajax/Panini*).

82. Supreme Court, May 22, 1916, *NJ* 1916, at 808; *W.9975 (Handelsprotector)*.

this case it is of no importance whether copyright is applicable to the photograph under discussion."⁸³

In spite of all the criticism of the interpretation of this concept, it must be concluded that the object of the portrait protection is the portrayal of the face of a human being, with or without other parts of the body visible. One cannot speak of a portrait if there are no features visible.⁸⁴ The Pres. of the Amsterdam District Court judged that a photograph of a "look-alike," a woman that looked exactly like the television personality Sylvia Millecam, cannot be a portrait of Sylvia Millecam herself.⁸⁵ This means that a plaintiff who wishes to oppose the use of a look-alike by the defendant, cannot appeal to the portrait right.⁸⁶

Whether this limited interpretation of the word "portrait" will lead to unwanted legal results, depends on to what extent protection is possible on the basis of the general tort clause of Art. 6:162 Civil Code, under the application of the unwritten standards of care, in cases in which pictured or impersonated persons, despite the lack of sufficient similar features, can be identified by the public.⁸⁷ It concerns cases in which the public can recognize a person by his appearance, name, voice or other typical attributes, without even showing the face of the plaintiff himself. The question as to what extent protection is possible in these cases, is discussed in 5.2.

4.4 Scope of Protection: Test of Identification

Once it is clear that one can speak of a portrait, it should subsequently be decided whether it concerns a portrait of the plaintiff. The issue here is the *scope* of protection of the portrait right. The protection of the portrait right would be without substance, if the defendant could prevent liability by showing somewhat less than the complete face of the plaintiff. How many features should be similar to the features of the plaintiff in order to be able to speak of "a portrait of the plaintiff" and not of someone else? In the event that one can speak of a portrait,

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83. Supreme Court, November 22, 1966, NJ 1967, 101 (vE) ("*Buitengewoon opsporingsblad*" II). But see with respect to Art. 20 DCA: Cantonal Court Haarlem, February 8, 1935, NJ 1936, 692 (*Photograph in Polygoon news*): The Cantonal Judge rejected a claim based on Art. 20 because plaintiff had not stated that he was the copyright owner of his portrait.
84. See for this view: Boekman, *Publicaties van eens anders portret en onrechtmatige mededinging*, BIE 1966, 29, at 30. Cf. Pres. District Court Amsterdam, January 2, 1995, KG 1995, 71 (*A.M./NCRV*): face of plaintiff is made unrecognizable in film. The fact that plaintiff might be recognized by the view of his back and his living room, in combination with the sound of his voice, does not make it a portrait within the meaning of Article 21 DCA.
85. Pres. District Court Amsterdam, December 22, 1994, IER 1995, no. 12, at 61; Mf 1995, B19; AMI 1995, 136 (JHS) (*Millecam/Escom*). Id. Spoor/Verkade, *Auteursrecht*, 1993, no. 185. However, in his annotation under the "Millecam" decision, Spoor argued that a portrait of a look-alike must be considered a portrait of the person imitated, if that is the person the public recognizes in the portrait.
86. The issue of look-alikes is discussed in § 5.2[B].
87. Cf. Spoor/Verkade, *Auteursrecht*, 1993, no. 199. Oppenoorth, *Een lastig portret*, IER 1986, 85, at 88, concludes that one should not stretch the definition of the term "portrait" but one should reject it, and apply a general identification test. Id. Van Vliet, *Een gewogen afbeelding; een civielrechtelijk model voor het afwegen van belangen bij het openbaarmaken van afbeeldingen*, AA 1995, 252, at 256.

how can one define whether it is a portrait of the plaintiff? In jurisprudence, the general criterion of identification is applied.

In 1987, the Dutch Supreme Court elaborated on the identification requirements. The case concerned a nude photograph of a woman, printed on the back of the "Internationaler FKK-Reiseführer/Guide Naturiste International/International Naturist Guide 1984-1985." The woman claimed inter alia an injunction against the publication of her photograph. Defendants stated that it was not a portrait of the plaintiff, since essential parts of the face: the eyes, the ears and a part of the mouth, were not visible. Her face was only portrayed in profile, while her hair covered most of the visible part of the face. The Pres. of the District Court of the Hague⁸⁸ rejected this defense. First, the Pres. established that one could speak of a portrait, since sufficient parts of the face were portrayed, especially the forehead, the nose, the mouth, the left cheek, the chin and the hair implant, to identify the person. Subsequently he concluded, after a closer examination of the portrait of the plaintiff in court, that it concerned the portrait of the plaintiff.

The Hague Court of Appeals upheld this decision.⁸⁹ Article 21 DCA does not require that the portrayed should be identified immediately in the portrait. Besides the identification by the Pres., the Court of Appeals also took into consideration several letters in which it became evident that the writers had identified respondent in the photograph by her face and the posture of the body, typical of this woman, that made the face identifiable.

Appellants in cassation argued that the Court of Appeals had made use of the wrong standard of identification. They proposed the following alternative standards of identification:

- 1) The portrayed should be identified immediately (and not on closer investigation);
- 2) One should be able to independently create a clear image of the particular person, by looking at the portrait of the face of that person.
- 3) It should concern identification by persons from the group of people that the publication is meant for; or
- 4) The portrayed should only be identified on the grounds of the portrayed features, and the typical posture of the body should not play a role.

All criterions were explicitly rejected by the Dutch Supreme Court, since the limitations do not agree with the protection that Article 21 in relation with Articles 30 and 35 DCA assigns to the portrayed, particularly against invasion of his private life. Regarding the *second* proposed criterion, the Dutch Supreme Court considered that it is not required that a person who is not familiar with the portrayed, looking at the portrait of the face of that person, should be able to create a clear image of that person. With this consideration, the Dutch Supreme

88. Pres. District Court the Hague, February 15, 1985, KG 1985, 92; AMI 1986, at 60 (*Naturist*).

89. Court of Appeals the Hague, September 3, 1986, AMI 1987, at 66, also published in NJ 1988, 277 (*Naturist*).

Court gave important indications as to how to apply the standards of identification in cases in which a person is seeking protection against the invasion of his privacy.

Who should be able to identify the portrayed? Strangers do not have to identify the plaintiff. Identification by persons known to the plaintiff or by the judge, after he becomes acquainted with the plaintiff, suffices. The Court of Appeals based its decision on identification by the writers of letters who recognized the portrayed. Identification by persons whom the publication was not meant for is relevant since they can still take notice of the publication.

In what way and when is the identification tested? The judge, who is not familiar with the portrayed, can inspect the face of the plaintiff himself during the trial, and compare this with the portrait. He looks at the face of the plaintiff and looks at the portrait, then he decides whether it is of the same person or not.⁹⁰ Besides, a comparison in the courtroom, letters, spontaneous remarks to the plaintiff by a third party about his identification, and the attitude of the defendant can be used as evidence of the identification of the portrayed. In the "*Sjef van Oekel*" case,⁹¹ the Court decided that the cartoon character Sjef van Oekel was a portrait of plaintiff Dolf Brouwers, since there was enough resemblance between the face of Brouwers and the face of the cartoon character. Here, the Court took into consideration that Brouwers was regularly stopped in the street by people believing him to be the actual Van Oekel character, and that defendants had acknowledged in interviews that portraits of the cartoon character and Brouwers himself were very similar.

What sort of identification is required and to what extent? The issue is the identification of the face of the portrayed. Immediate identification of the portrayed in the portrait is not required. Identification on closer investigation is sufficient.⁹² The practice Dutch newspapers and magazines to make a face unrecognizable by covering the eyes with a bar does not exclude identification.⁹³ With the recognizability of a the face, other circumstances such as a typical posture of the body,⁹⁴ the mention of the name,⁹⁵ and lay-out and text

90. Cf. Pres. District Court Haarlem, August 1, 1984, KG 1984, 272; AMI 1986, at 59 (*Topless waitress in magazine "Panorama"*): "that the President by way of his own observation has concluded that plaintiff has recognizably been pictured in the disputed picture." Id. Pres. District Court Arnhem, November 11, 1988, KG 1989, 5 (*Kitty Courbois as "Kniertje"*); District Court Amsterdam, April 25, 1984, rev'd on other grounds by Court of Appeals Amsterdam, April 25, 1986, NJ 1986, 818 (*window prostitute*).

91. District Court Haarlem, January 22, 1991, AMI 1992, at 188 (JCSP) (*Brouwers/Schippers et al.*).

92. Cf. Pres. District Court Amsterdam, July 12, 1990, aff'd by Court of Appeals Amsterdam, January 10, 1991, AMI 1991, at 200 (JCSP) (*van de Leende/Courant Nieuws van de Dag*): sufficiently plausible that the identification standard has been met, notwithstanding the fact that plaintiff, a peanut seller, wears a hat and sunglasses.

93. Court of Appeals Amsterdam, January 14, 1993, AMI 1993, at 114; Mf 1993, B73 (*Former champion lightweight*): covering the eyes with a bar did not make plaintiff unrecognizable; Id. Pres. District Court Amsterdam, October 10, 1994, mentioned in Mf 1994, 133 (*De Muinck Keizer/KRO et al.*).

94. Supreme Court, October 30, 1987, NJ 1988, 277 (LWH); AMI 1988, at 58 (DEB) (*Naturist*). Cantonal Court Harderwijk, June 4, 1991, PRG 1991, 3507 (*Yep Kramer/Burnham Europa*): skater Yep Kramer is also recognizable by his typical ice skating pose.

of an article,⁹⁶ can play an additional role. The broad interpretation of the standards of identification are also advocated in literature.⁹⁷

It follows from the narrow interpretation of the word "*portrait*" that the judge cannot solely go by the impression of the public. A valid defense against a claim based on Article 21 DCA is that not the plaintiff, but in fact another person has been portrayed, even though the public will be of the opinion that it concerns the plaintiff.⁹⁸ On the cover of the "Nieuwe Revu" no.9, 1977, a drawing was published of a lady who bore a resemblance to the well-known Dutch actress and singer Willeke Alberti. She instituted proceedings, but withdrew when the defendant made it plausible that it involved a drawing of a "*Swedish beauty*."⁹⁹ Persons impersonated by an actor or actress, in a motion picture for example, cannot oppose this performance on the grounds of the portrait rights.¹⁰⁰

In published case law, in which famous persons do not appeal to a personality interest, but to a financial interest, the identification of the plaintiff as the portrayed does not in general seem to be an issue. On the contrary, the defendant is usually interested in extensive identification of the plaintiff. This perhaps explains why, until now, no other standards of identification have been developed for cases in which the plaintiff claims infringement of his portrait right in order to protect his commercial interests. However, from the explicit reference by the Dutch Supreme Court in the "*naturist*" decision¹⁰¹ to the protection of one's private life, one should not immediately conclude that the same standards of identification also apply in cases in which an appeal is made to protection of commercial interests.

The object of the portrait right is very limited. The portrait right only protects the portrait of the face of a person with or without further parts of the body visible. The scope of protection of the portrait right is very broad. The judge applies a test of identification, in which the face can be inspected more

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95. The question whether plaintiff's name has been mentioned is relevant to the question of plaintiff's "reasonable interest". *E.g.* Supreme Court, October 21, 1969, NJ 1971, 124 (CB) (*Witness robbery*) held that the District Court Maastricht had not wrongly interpreted the term "reasonable interest" by considering that it was not necessary for defendant to mention plaintiff's name and give up plaintiff's anonymity.
96. Cantonal Court Amsterdam, September 26, 1959, NJ 1961, 246 (*Story of detective De Roos I*): rejection of defense that there is no similarity between disputed portrait and plaintiff, because of the text of defendant's article. However, under other circumstances, this defense could have been valid.
97. Hirsch Ballin, *Het ja zuster, nee zuster-arrest*, *NJB* 1970, at 744; Cohen Jehoram, Annotation, *AA* 1970, at 383; Beekhuis, *Nog eens het 'Ja zuster, nee zuster'-arrest*, *RMth* 1972, 7, at 12-21; Gerbrandy, *Kort commentaar op de Auteurswet 1912*, at 269 and 274.
98. *Cf.* Pres. District Court Amsterdam, December 22, 1994, IER 1995, no. 12, at 61; Mf 1995, B19; AMI 1995, 136 (JHS) (*Millecam/Escom*). But see my comment in § 4.9[B][3].
99. This case is mentioned in a decision of Court of Appeals Amsterdam, November 2, 1977, NJ 1978, 333 (*Willeke Alberti I*).
100. Pres. District Court Amsterdam, March 19, 1987, no. KG 87/340 A; AMI 1987, at 133 (*Blond Marietje*): motion picture character "Marietje" is not a portrait of plaintiff's mother. It is a portrait of an actress who performs her role. It is also not likely that defendant wanted to picture plaintiff's mother. *Cf.* Pres. District Court Amsterdam, February 18, 1985, KG 1985, 81 (*Het Bittere Kruid*). Plaintiff, Marga Minco, whose role was performed by another actress, could not oppose the publication of the motion picture "Het Bittere Kruid" on the basis of her portrait right.
101. Supreme Court, October 30, 1987, NJ 1988, 277 (LWH); AMI 1988, at 58 (DEB) (*Naturist*).

closely and can be identified with the help of other characterizing circumstances, such as a typical posture of the body.

4.5 Content: Which Acts Infringe the Portrait Right?

[A] To Make Public

[1] Types of Making Public

The content of the portrait right is defined as the right of the portrayed to oppose the publication of his portrait.¹⁰² This right can only be exercised if the portrayed has a reasonable interest which opposes publication. The "reasonable interest" concept is discussed below.

The meaning of the concept "publication" appears from Article 12 DCA and the history of that article.¹⁰³ It concerns the publication of a work protected by copyright. It appears from the legislative history that the legislator wanted to use the same concept with respect to portraits.¹⁰⁴

Under Article 12(1) DCA, one can speak of three kinds of publication:¹⁰⁵ material publication, distribution and immaterial publication.

Material publication means the marketing or making available to the public, one or more copies of the particular work.¹⁰⁶ The Dutch Supreme Court has decided that the right to publish can be applied to every individual copy that is put into circulation.¹⁰⁷ This right will only be exhausted¹⁰⁸ with respect to copies that were put into circulation by or with the permission of the owner of the right concerned.¹⁰⁹ In principle, a third party is allowed to exploit these copies further.¹¹⁰

102. Artt. 21 and 35 DCA.

103. See also Artt. 11-11ter of the revised Berne Convention of July 24, 1971 (Paris) (Trb. 1972, 157), in the Netherlands ratified by Act of May 30, 1985 (Stb. 306).

104. Bijl. Hand. II 1911-1912, no. 227.3 (Explanatory Statement (MvT), 11, fn. 1 ad Art. 19 (now Art. 20).

105. Please note that other distinctions are possible. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, at 161-62 distinguishes two groups of publication. Spoor/Verkade, *Auteursrecht*, 1993, no. 102 make a four-part distinction; Cohen Jehoram, Annotation under Supreme Court, January 19, 1979, AA 1980, at 311 (*Poortvliet/Hovener*) distinguishes five types of publication.

106. Cf. Art. 12(1)(1) and Bijl. Hand. II 1911-1912, no. 227.3, Explanatory Statement under Art. 11 (now Art. 12): it is not necessary to define the term "publication" in its obvious sense. Relevant is the way in which works are normally made public. Id. Bijl. Hand. II 1911-1912, no. 227.5, Explanatory Statement in reply under Art. 11.

107. Supreme Court, December 18, 1953, NJ 1954, 258 (*Polak/De Muinck*): copies which are sold without permission, are copies which are made public contrary to plaintiff's copyright.

108. This term was used by Supreme Court, December 18, 1953, NJ 1954, 258 (*Polak/De Muinck*).

109. Supreme Court, December 16, 1986, NJ 1987, 613 (*Rental of videotapes*): rental of illegally copied videotapes is unlawful.

110. Supreme Court, January 25, 1952, NJ 1952, 95 (*Portfolio*) with respect of the rental of magazines; Supreme Court, July 20, 1987, NJ 1988, 280 (LWH); AMI 1988, at 15 (HCJ); AA 1989, at 941 (HCJ) (*Stemra/Free Record Shop*) with regard to the rental of music records. See in this respect EC Council Directive 92/100 of November 19, 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ 1992 L 346/61. But see for an exception: Supreme Court, January 19, 1979, NJ 1979, 412 (LWH); Auteursrecht 1979, at 50 (JHS); AA 1980, at 311 (HCJ) (*Poortvliet/Hovener*): the further exploitation of copies in another form does infringe the exclusive right of

The concept "*material publication*" embodies several forms of portrait use. The portrait right is invoked against the publication in an article or in an advertisement in (or on the cover of) a media product, such as a weekly magazine,¹¹¹ a book¹¹² or a comic book,¹¹³ that is distributed in the form of individual copies. Portraits can also be published through the sale of individual photographs,¹¹⁴ stickers,¹¹⁵ or postcards.¹¹⁶ The same applies to offering a portrait as a gift with another product.¹¹⁷ Often portraits are made public on the wrappings of commercial products in order to make them more attractive.¹¹⁸

The distribution of (a copy of) the work, as long as it has not yet appeared in print, is labeled by law¹¹⁹ as a form of publication. The legislator wanted the owner of the right to have the right to oppose distribution on a small scale. This also applies to the distribution of a portrait. The mere sending of photographs of a portrayed to several publishing houses and press agencies for publication can result in a form of publication which is not allowed under Article 12(1) sub 2 DCA.¹²⁰ Also, the distribution of a portrait in a leaflet within a small circle of about 75 persons, who live all over the Netherlands and pay for it, involves a publication that the portrayed can oppose.¹²¹

Immaterial publication consists of the public recital, performance, or (radio or television) broadcast of the work or a part of it, or a reproduction of the work.¹²² Also, merely the exhibition of material copies to the public is deemed to be an immaterial publication. It concerns a public showing,¹²³ without the

the copyright owner to make his work public.

- 111. E.g. District Court Haarlem, November 6, 1990, AMI 1991, at 198 (JCSP), aff'd Court of Appeals Amsterdam, May 27, 1993, NJ 1994, 658; AMI 1995, 96 (HCl) (*Spaarnestad/Vanderlijde*): use of portrait on poster in magazine.
- 112. E.g. Court of Appeals Amsterdam, August 25, 1983, BIE 1985, no. 22, at 75; AMR 1984, at 12 (*Elsevier's Culinary Handbook*): use of portrait on cover of cookbook.
- 113. District Court Haarlem, January 22, 1991, AMI 1992, at 188 (JCSP) (*Brouwers/Schippers et al.*): plaintiff pictured as main character in comic book.
- 114. Cantonal Court Middelburg, November 14, 1928, W 11.932 (*Non-strikers*).
- 115. Pres. District Court Utrecht, January 16, 1980, NJ 1980, 481 (*Ajax/Panini*): sale of pictures for soccer album.
- 116. Supreme Court, June 24, 1952, NJ 1955, 742 (BVAR) (*Girls in bathing suit*).
- 117. Pres. District Court the Hague, April 15, 1964, NJ 1964, 483; BIE 1966, no. 13, at 42 (*Beatles*): distribution of photographs of members of The Beatles with purchase of chewing gum.
- 118. District Court Amsterdam, December 12, 1970; BIE 1974, no. 11, at 20 (*Henk van Ulsen/Attema*): portrait on matchbox; Pres. District Court Utrecht, February 20, 1986, AMI 1986, at 62; IER 1986, no. 15, at 48 (*Motown/Rec Track*); District Court Haarlem, August 8, 1989, AMI 1990, at 225 (HCJ) (*Kierke/EMI and CBS et al.*); Court of Appeals 's-Hertogenbosch, September 18, 1990, NJ 1991, 281; IER 1990, no. 60, at 129; IER 1991, at 24 (REpR); AMI 1991, at 48 (DWFV); BIE 1991, no. 91, at 332 (*Van Uden Productions/Winterland Productions*): portraits on covers of records.
- 119. Art. 12(1)(2) DCA.
- 120. See District Court Zutphen, October 31, 1985, NJ 1986, 636; IER 1986, no. 3, at 9; AMI 1986, at 61 (*Nude motorcyclist II*).
- 121. Pres. District Court Arnhem, November 11, 1988, KG 1989, 5 (*Kitty Courbois as "Kniertje"*).
- 122. Art. 12(1)(3) DCA. This right is restricted in Art. 12(2) and (3) in cases of publications in intimate circles of family and friends, for educational or scientific purposes.
- 123. The legislator used the term "to make public" for different acts which have common that the work is put at the disposal of the public in one or another way. Pres. District Court Rotterdam, June 3, 1993, AMI 1994, at 52, aff'd Court of Appeals The Hague, December 1, 1994, AMI 1995, at 51 (GJHMM) (*Gilfa/Havermans*) held that the showing for remuneration of a movie in private projection rooms of a

public receiving a material copy. Unlike cases of material publication, the right of immaterial publication is not exhausted after the first showing. The owner of the right can also oppose forms of secondary immaterial publication.¹²⁴

A television newsreader could oppose the secondary publication of his portrait in a movie on the grounds of his portrait right. There was a scene in the movie, in which the leading character watches the television news. The permission of the newsreader to broadcast his portrait in a news show does not include permission to broadcast his portrait in the context of a movie.¹²⁵ Other forms of immaterial publication are the posting of posters with a portrait¹²⁶ for advertising purposes, or the showing of photographic portraits at an (art) exhibition.¹²⁷ But exhibiting a photographic portrait to a few visitors at a coffee house was not considered a publication.¹²⁸

[2] Exhaustion of Portrait Right

In principle, the exhaustion rule mentioned supra, applies also to the portrait right. After the lawful material publication of a copy of a portrait, the portrait right is exhausted. Copies embodying a portrait, which have been put into circulation with the permission of the portrayed, can be freely resold. The exhaustion rule has been extended in the jurisprudence of the ECJ (European Court of Justice) to the whole area of the European Union (EU)¹²⁹ and European Economic Area (EEA)¹³⁰ on the grounds of the principle of free of trade.¹³¹ Analogously, the portrait right cannot be used to prohibit the import

sexshop is a form of publication in the sense of Art. 12 DCA.

124. Supreme Court, May 6, 1938, NJ 1938, 635 (EMM) (*Lehar's The Tsarevitz*); Supreme Court, October 30, 1981, NJ 1982, 435 (vNH); Auteursrecht 1981, at 110; AA 1982, at 79 (HCJ) (*Cabel Television Amstelveen I*); Supreme Court, May 25, 1984, NJ 1984, 697 (vNH); AA 1986, at 628 (HCJ); AMR 1984, at 62; GRUR Int. 1985, at 124 (HCJ) (*Cabel Television Amstelveen II*); Supreme Court, July 20, 1987, NJ 1988, 280 (LWH); AMI 1988, at 15 (HCJ); AA 1989, at 941 (HCJ) (*Siemra/Free Record Shop*), para. 3.5; Supreme Court, December 24, 1993, NJ 1994, 641 (JHS); AMI 1994, at 66 (GJHMM); AA 1994, at 672 (HCJ) (*Coöperatie Centraal Antennesysteem Pastoor Schelstraetweg a.o./BUMA*).
125. Pres. District Court Amsterdam, November 22, 1974, NJ 1976, 336 (*Bob Meijer in motion picture "Alicia"*).
126. Court of Appeals Amsterdam, December 13, 1984, AMI 1986, at 62 (*Bhagwan I*): Use of photograph of religious leader Bhagwan advertisement for news magazine not unlawful.
127. Pres. District Court Amsterdam, June 6, 1985, KG 1985, 194; AMI 1986, at 62 (*Diepraam's photo*).
128. Cantonal Court Leiden, November 13, 1922, NJ 1923, at 11 (*Coffee house*).
129. As per January 1, 1995, the European Community consists of Germany, France, United Kingdom, Italy, Spain, Netherlands, Sweden, Belgium, Austria, Denmark, Portugal, Finland, Ireland, Greece and Luxembourg.
130. As per January 1, 1994 the territory of the EU has been extended with some European Free Trade Association (EFTA) member states under the European Economic Area (EEA) Agreement. At this moment, the EEA Agreement applies to the EU Member States and Iceland, Norway and Liechtenstein. Articles 11, 12 and 13 EEA Agreement in combination with Article 2 Protocol 28 of the EEA Agreement provide that the EU rules and ECJ case law on exhaustion of intellectual property rights apply equally in the EEA.
131. Art. 3a in conjunction with Art. 30 and 36 EU-Treaty. See e.g. for copyright law: ECJ May 17, 1988 (Case 158/86), Jur. ECJ 1988, 2605; NJ 1990, 246; AA 1990, at 176 (HCJ); AMI 1990, at 28 (HCJ); TVVS 1989, 318 (MRM) (*Warner Brothers/Christiansen*); for neighboring rights of producer of phonogram: ECJ January 24, 1989 (Case 341/87), Jur. ECJ 1989, 791; NJ 1990, 558; AA 1990, at 550; AMI 1989, at 83 (HCJ) (*EMI Electrola/Patricia*); for design rights: ECJ September 14, 1982 (Case

of goods, which have been marketed in a member country of the EU by or with the permission of the owner of the portrait right or his licensee, into another member country of the EU.

The immaterial publication right, however, does not get exhausted by this. Therefore, the use of those copies for advertising purposes for another product can result in an unlawful publication. In 1974, a publisher marketed a book called "*De slag om het voetbalgoud*" (Soccer: The Battle for Gold) about the 1974 World Championship Soccer in West Germany. In this book, portraits of well-known soccer players were published. The publishing, marketing and advertising of this book by the publisher was not held to be an unlawful publication, since the soccer players did not have a reasonable interest in opposing the publication.¹³² The publisher subsequently sold 20.000 copies of this book to a liquor manufacturer, who placed advertisements in magazines in which the book was recommended. Next to the names and photographs of one or two soccer players, also the trade name and the vignette of the liquor store were printed in the advertisement. The text said: "Thanks to Martini, for you ten guilders off." One could obtain the book by paying NLG 13.95 after sending a flattened Martini top. These advertisements constituted an unlawful publication of the portraits of the plaintiffs. The defense that Martini & Rossi had only published the portraits made public by others, was rejected:

"Articles 21 and 35 DCA do protect, in our opinion, not only the interests of the portrayed with a first publication of the portrait, but also with any exhibition in public after that or any other form of publication, in which the reasonable interests of the portrayed can be violated."¹³³

[3] No Protection Against Fixation or Reproduction of a Portrait

The portrait right does not protect against any other actions than the publication of the portrait. Looking at or perceiving a portrait, the fixation of a portrait on a copy, a photograph for example, and the reproduction of that fixation, are actions which are not covered by Article 21 DCA.¹³⁴ A famous rock singer

144/81), Jur. ECJ 1982, 2853; NJ 1983, 582 (LWH); BIE 1983, no. 5, at 9 (DWFV); SEW 1983, 418; AA 1984, at 1 (HCJ) (*Keurkoop/Nancy Kean Gifts*); for *unfair competition* by product imitation: ECJ March 2, 1982 (Case 6/81), Jur. ECJ 1982, 707; NJ 1983, 212; BIE 1982, no. 86, at 267 (DWFV); SEW 1983, 321; AA 1983, at 254 (HCJ) (*IDG/Beele*); for *patent law*: ECJ July 9, 1985 (Case 19/84), Jur. ECJ 1985, 2281; NJ 1986, 456 (LWH); AA 1987, at 28 (HCJ); BIE 1986, no. 49, at 174 (DWFV); IER 1985, no. 56, at 115 (*Pharmon/Hoechst*); for *trademark law* and *trade name law*: ECJ June 22, 1976 (Case 119/75), Jur. ECJ 1976, 1039; NJ 1977, 159 (LWH); BIE 1976, no. 104, at 335 (vdZ); SEW 1977, 145; AA 1976, at 752 (HCJ) (*Terrapin/Terranova*).

132. Pres. District Court Haarlem, June 26, 1974, NJ 1974, 415; BIE 1977, no. 3 and 4, at 11 and 13 ("*De slag om het voetbalgoud*" I and II).

133. Pres. District Court Haarlem, June 26, 1974, NJ 1974, 415; BIE 1977, no. 3 and 4, at 11 and 13 ("*De slag om het voetbalgoud*" I and II).

134. Cf. Supreme Court, February 5, 1991, NJ 1991, 403; taking photographs of accused by police does not violate Art. 8(1) ECHR; Supreme Court, October 13, 1992, NJ 1993, 223 (Sch) (*Police photographs*); taking pictures by police of persons who do not know that they are observed in public places is not unlawful; Pres. District Court Utrecht, March 22, 1993, KG 1993, 163 (*Van Wijgen/Den Hartog-Janssen and Troost*): "The use of the photographs must not be deemed as the continuation of the unlawful act of

cannot, on the basis of her portrait right, institute a legal action against the production of T-shirts with her portrait printed on it. Not until the T-shirts are (about to be) marketed, can legal action be instituted. In that case, the stock that has not yet been sold, can be claimed as property on the grounds of Article 30 DCA in conjunction with Article 28(1) DCA.¹³⁵

Under certain circumstances these non-publication actions can result in a tort, for instance because of violation of a legal obligation incorporated in the Criminal Act (Strafwet) or invasion of the right to respect for one's private life.¹³⁶

[B] Reasonable Interest: Personality Interest

[1] Respect for One's Private Life

Under Article 21 DCA, the portrayed can oppose the publication of his portrait if his reasonable interest opposes this publication. The legislator was only thinking of the protection of moral, non-financial interests¹³⁷ when Article 21 DCA was adopted in 1912. The legislator protected an aspect of the right to respect for one's private life, at a time when this right was not legally recognized as such. The development of this right in case law without a statutory basis would only be possible after 1919, when the Dutch Supreme Court acknowledged that the infringement of the unwritten standards of care can result in a tort.¹³⁸

Article 8 EHRC,¹³⁹ which acknowledges the right to respect for one's private life, became effective in the Netherlands in 1954.¹⁴⁰ The Dutch Supreme Court decided in the "*Edam welfare mother*" case that:

taking these photographs, since, for the time being, their taking cannot be qualified as unlawful."

135. See § 4.9[B][4].

136. See § 5.3[B]. Cf. District Court Amsterdam, December 3, 1923, NJ 1924, at 232; W.11170 (*Lady in traditional Zeeland costume*): "because under certain circumstances fixing a person's portrait in a photograph can have consequences, which a person must be able to prevent." In appeal, the decision was reversed by the Court of Appeals Amsterdam, March 6, 1925, NJ 1926, at 188; W.11354 (*Lady in traditional Zeeland costume*) because plaintiff had not put forward sufficient circumstances.

137. Cf. Explanatory Statement at Art. 27 (now Art. 35): "because by that fact one can interfere in one's private life in a shocking way." Bijl. Hand. II 1911-1912, no. 227.3 (at Art. 27); *Drucker* used the term "impropriety," see Bijl. Hand. II 1911-1912, no. 227.8 (Proposed Amendments of Drucker, June 12, 1912), at 41 under VI; De Beaufort, *Het auteursrecht in het Nederlandsche en internationale recht*, diss. Utrecht, 1909, at 302; Scholten, *Opmerkingen over het Ontwerp Auteurswet*, II: Portretten, *WPNR* 2211, at 231 (1912); Snijder van Wissenkerke, *Het auteursrecht in Nederland*, at 242; Wijnstroom/Peremans, *Het Auteursrecht*, at 93; De Beaufort, *Auteursrecht*, 1932, at 160; Aibel, *Persoon en pers*, at 27 (no. 28); De Graaf, *Bescherming van persoonlijkheid, privéleven, persoonsgegevens*, 1977, at 141.

138. See § 4.2[A].

139. European Convention for the Protection of Human Rights and Fundamental Freedoms (EHRC) (Treaty of Rome), November 4, 1950, Trb. 1951, 154; see § 5.3[A].

140. The EHRC has been ratified by Act of July 28, 1954, Stb. 335, and came into effect on August 31, 1954. By Act of May 25, 1960 (Stb. 226) the Dutch government recognized the right of individuals to complain about a breach of this treaty with the European Commission for Human Rights in Strasbourg.

"a right to respect for one's private life, that fits with similar developments in other countries and that, as far as its content is concerned, is also defined by Article 8 EHRC [...], should be accepted."¹⁴¹

The right of every individual to respect for one's private life was incorporated in Article 10(1) of the Dutch Constitution with the constitutional revision of 1983.¹⁴² The Dutch Supreme Court perceives the protection of one's private life as legal grounds for the protection of the portrayed.¹⁴³

[2] Subjective or Objective Criterion?

Sometimes it is said that, with respect to the concept "reasonable interest," the issue is not the subjective interpretation of reasonability by the portrayed, but the decision about reasonability by the judge, who tends to use objective criterions. The judge does not consider the subjective feelings of the portrayed, but judges by the feelings that reasonable people comparable to the plaintiff would experience in a similar situation. In case law¹⁴⁴ and in literature,¹⁴⁵ an objectified concept is usually used as a starting-point, since the media, who publish the portraits, cannot possibly anticipate the exceptional subjective objections of the portrayed.¹⁴⁶

The objectivity of this concept can result in the obstruction of an effective protection of a person's private life.¹⁴⁷ To prevent this, the Dutch Supreme Court subjectified the concept "reasonable interest" in the "*Vondelpark*" decision, in the sense that the actual circumstances and the subjective objections of the portrayed can be relevant together with other (objective) circumstances in order to decide whether the personality right has been invaded.¹⁴⁸ Cohen Jehoram

141. Supreme Court, January 9, 1987, NJ 1987, 928 (EAA); AB 1987, 231 (FHvdB); CR 1987, 110 (EJD); NICM 1987, 294 (L. Verhey) (*Edam welfare mother*).

142. Pursuant to Art. VI Additional Articles, Art. 10(1) Dutch Constitution came into force on February 17, 1988, see Acts of 11-02-1988, Stb. 33 and 34, and 01-02-1990, Stb. 60.

143. Supreme Court, July 1, 1988, NJ 1988, 1000 (LWH); AMI 1988, at 125 (HCJ) (*Vondelpark I*); Supreme Court, October 30, 1987, NJ 1988, 277 (LWH); AMI 1988, at 58 (DEB) (*Naturist*) uses the words: "the protection which Art. 21 in connection with Artt. 30 and 35 Copyright Act assigns to the portrayed, in particular against invasion of his private life."

144. Court of Appeals Amsterdam, March 6, 1925, NJ 1926, at 188; W.11354 (*Lady in traditional Zeeland costume*); Pres. District Court Arnhem, July 25, 1956, NJ 1957, 97 ("*Wij zijn óók 17*"): "We [can] find nothing in these pictures which should give offense to an unprejudiced spectator."; Pres. District Court Rotterdam, April 24, 1989, IER 1989, no. 46, at 86; AMI 1990, at 31 (GAIS) (*NRC/Duetz*).

145. Komen/Verkade, *Compendium van het auteursrecht*, no. 90 ad c; Spoor/Verkade, *Auteursrecht*, 1993, no. 191; Gerbrandy, *Kort commentaar op de Auteurswet 1912*, at 276: "the term 'reasonable interest' is understood to mean that a normal person must appreciate, understand it." Bunschoten, Annotation under Supreme Court, October 30, 1987, AMI 1988, at 58 (*Naturist*); Cohen Jehoram, Annotations under Supreme Court, July 1, 1988, AMI 1988, at 125 (*Vondelpark I*) and Court of Appeals Amsterdam, April 27, 1989, AMI 1989, at 125 (*Vondelpark II*); Schuijl, Annotation under Pres. District Court Rotterdam, April 24, 1989, AMI 1990, at 31 (*Aggression of Islam*).

146. Cf. Pres. District Court Arnhem, July 25, 1956, NJ 1957, 97 ("*Wij zijn óók 17*"): "Even if this were different, it would not be de jure relevant, because defendants rightfully remarked that they were not able to foresee these consequences."

147. Cf. De Graaf, *Bescherming van persoonlijkheid, privéleven, persoonsgegevens*, 1977, at 141.

148. Supreme Court, July 1, 1988, NJ 1988, 1000 (LWH); AMI 1988, at 125 (HCJ) (*Vondelpark I*).

argued in his annotation that the emphasis on the actual circumstances and background of the portrayed, could threaten the freedom of expression and information, since these circumstances are not known to a third party. However, the Dutch Supreme Court does take the personal subjective circumstances of the portrayed into consideration, since highly subjective feelings are particularly essential to personality protection.¹⁴⁹

[3] Balancing of Interests

In the opinion of Gerbrandy, the presence of a reasonable (not unreasonable) interest of the portrayed makes a publication per se unlawful. If the portrayed has a reasonable interest in the portrait not being published, one should not balance other interests. The text of Article 21 DCA does not leave room for further balancing with other interests. One single interest of the portrayed is decisive.¹⁵⁰ This opinion has been followed by courts in a few decisions. The Haarlem Court¹⁵¹ considered in the "*Ferdi E.*" case:

"The Court premises that Article 21 Copyright Act does not offer any space for a balancing of interests as argued by Spaarnestad. In cases it has been established that a portrayed has a reasonable interest which opposes the publication of his portrait, the publication of this portrait is unlawful, without the necessity of balancing his interest against other, possibly equally reasonable interests, such as for instance the interest of free news gathering."

However, this is not the opinion of the Dutch Supreme Court, which presumes that a reasonable interest of the portrayed should be balanced with other (important) interests. In this light the Dutch Supreme Court stated in the 1966 "*Buitengewoon opsporingsblad II*" decision, that the Amsterdam Court of Appeals had not violated Articles 21 and 35 DCA by accepting "that the reasonable interest of the portrayed opposed the publication of the portrait, while no other circumstance, derived from the general interest, was found on which grounds the interest of the portrayed should not be considered a reasonable interest."¹⁵²

In appeal in the "*Ferdi E.*" case, the Dutch Supreme Court considered that Article 21 DCA on the one hand affords the portrayed protection, especially

149. The Court of Appeals Amsterdam, April 27, 1989, NJ 1990, 370; AMI 1989, at 125 (HCJ) (*Vondelpark II*), which decided this case after reference by the Supreme Court, did not discuss the concrete circumstances and subjective feelings of the portrayed, because it had already concluded on other grounds that defendants had invaded plaintiff's personality right by publication of her portrait.

150. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, at 279-80. Schuijt, Annotation under Court of Appeals Amsterdam, January 17, 1985, AMR 1985, at 67 (GAIS) (*Erkamps/De Telegraaf*) also follows this view, but in his opinion a justification could remove the unlawfulness of the infringement of the portrait right.

151. District Court Haarlem, March 15, 1991, Mf 1991, B53 (WFKa) (*Ferdi E.*). Cf. Court of Appeals Amsterdam, January 17, 1985, AMR 1985, at 67 (GAIS) (*Erkamps/De Telegraaf*) which "by way of assumption" started from this view.

152. Supreme Court, November 22, 1966, NJ 1967, 101 (vE) (*"Buitengewoon opsporingsblad" II*). Id. Moons in his opinion under Supreme Court, February 8, 1966, NJ 1966, 394 (vB) (*"Buitengewoon Opsporingsblad" I*).

against infringement of the right to respect for his private life, but that this right does not carry an absolute weight, which is, in principle, more important than that of the right of freedom of speech. According to the Dutch Supreme Court it:

"concerns two kinds of freedom, that are essential to both the development of the individual and the democratic society as such, and there are no grounds on which one should accept a hierarchy between these two kinds of freedom, as where the plea [of Ferdi E.] starts from."¹⁵³

As a result, the answer to the question whether the publication of a portrait, which invades the right to respect for one's private life, is unlawful, can only be found by a balancing of interests, considering all the particular circumstances of the given case, in order to discover which of the two fundamental rights, privacy or freedom of speech, is more important.¹⁵⁴

[4] Case Law Personality Interest

The Government should respect the private life of a citizen.¹⁵⁵ Citizens in their mutual relations on the other hand, should also respect each other's private life. According to the Dutch Supreme Court a right to respect for one's private life should be accepted, "that fits with similar developments in other countries and that, as far as its content is concerned, is also defined by Article 8 EHRC, of which it should be presumed that it is also effective between citizens. A violation of this right will in principle result in a tort [...]"¹⁵⁶ The Dutch Supreme Court decided that the right to respect for one's private life will not be limited in a spatial sense by, for instance, the house that one lives in, and that the nature and the extent of intimacy of actions regarding another person, which are observed, recorded or passed on to other persons, is of major importance in order to decide where to draw the line.¹⁵⁷ With regard to the portrait right, the Dutch Supreme Court has decided that

"from the right of every individual to respect for one's private life, which by its content is also determined by Article 8 EHRC, it follows that if publication of a portrait

153. Supreme Court, January 21, 1994, NJ 1994, 473 (DWFV); AMI 1994, at 93 (GAIS); Mf 1994, B30 (*Ferdi E./Uitgeverij Spaarnestad*), para. 3.5.

154. Id. NJ 1994, 473, para. 3.5. Cf. *Drucker*: "A general rule cannot be given; it all depends on the particular circumstances of every case." Bijl. Hand. II 1911-1912, no. 227.8 (Proposed Amendments by Drucker, June 12, 1912), at 41 under VI, see § 4.2[A]; De Brauw, *HNJV* 1965 I, at 52-53; Aubel, *Persoon en pers.* at 27 (no. 28) and at 113 (no. 175); Spoor/Verkade, *Auteursrecht*, 1993, no. 191; Oppenoorth, Een lastig portret, *IER* 1986, 87; Van Lingem, *Auteursrecht in hoofdlijnen*, 1990, at 133; Polak, Kop erop of kop eraf? Persfoto's en portretrecht. in: *Recht in de kijker, het recht en de media*, Jonge Balie Congres 1990, at 106; Van Vliet, Een gewogen afbeelding; een civielrechtelijk model voor het afwegen van belangen bij het openbaar maken van afbeeldingen, *AA* 1995, 252, at 258.

155. Art. 10 Dutch Constitution, Art. 8 EHRC, and Art. 17 ICCPR (International Convention on Civil and Political Rights).

156. Supreme Court, January 9, 1987, NJ 1987, 928 (EAA); AB 1987, 231 (FHvdB); CR 1987, 110 (EJD); NJCM 1987, 294 (LV) (*Edam welfare mother*).

157. Id. The Supreme Court referred to the Explanatory Statement at (now) Art 10 Dutch Constitution (Bijl. Hand. II, 1975-1976 13.872, at 40 *et seq.*).

infringes this right, in principle there is a reasonable interest of the portrayed as is meant in Article 21 DCA, which opposes this publication."¹⁵⁸

In the "*Ferdi E.*" decision, mentioned supra, the Dutch Supreme Court made clear that the words "*in principle*" indicate that under certain circumstances the fundamental right to freedom of speech can outweigh the right to respect for one's private life.¹⁵⁹

Within the scope of the portrait right in particular, personal interests come into conflict with the (commercial) interest of the publisher, and interests that are served by the freedom of speech. From many published court decisions about the criterion "*reasonable interest*," what particular circumstances, personality interests and other interests are relevant in the balancing of interests can be deduced.

It is possible to distinguish several categories in case law with respect to the personality interest.¹⁶⁰ Different forms of unlawful publications of a portrait are concerned which invade a person's private life by:

- a) showing intimate parts of the body of the portrayed;
- b) an unwanted use in connection with commercial products;
- c) a false suggestion of a connection between the portrayed and the publication;
- d) publishing in a non-false context which might cause physical danger to the portrayed or destroys the portrayed's new life.

When these four categories have been dealt with, several other circumstances will be summed up under e), f) and g), which were considered relevant in case law with respect to the question whether the portrayed's privacy was invaded by publication of a portrait.

[a] Intimate Parts of the Body

The mere fact that a person has been portrayed naked in principle constitutes a reasonable interest which opposes publication. Van Oerle speaks of an "almost absolute protection against unwanted publication of portraits that involve nudity or eroticism."¹⁶¹

Only under particular circumstances can this be otherwise. This was decided by the Dutch Supreme Court in the "*Naturist*" case. It concerned a photograph of an eighteen-year-old girl, taken during the holidays, when she was staying, naked, in a naturist camp in France. The photograph, that was taken with the permission of the girl, was published eleven years later on the backside

158. Supreme Court, July 1, 1988, NJ 1988, 1000 (LWH); AMI 1988, at 125 (HCJ) (*Vondelpark I*), para. 3.3.

159. Supreme Court, January 21, 1994, NJ 1994, 473 (DWFV); AMI 1994, at 93 (GAIS); Mf 1994, B30 (*Ferdi E./Uitgeverij Spaarnestad*), para. 3.5.

160. See for other classifications: Spoor/Verkade, *Auteursrecht*, 1993, no. 193 (followed by Oppenoorth, Een lastig portret, *IER* 1986, 87) and *Onrechtmatige daad* (old Civil Code) VI (Martens) no. 23.8A.

161. See Van Oerle, in: Wichers Hoeth, *Kort begrip van het intellectuele eigendomsrecht*, 1993, at 302.

of the international naturist traveling guide of 1984-1985, which was generally available in bookstores. She successfully opposed this publication. The Dutch Supreme Court considered that "the decision of the Court of Appeals that the mere fact that X. has been portrayed in the nude constitutes a reasonable interest which opposes publication, apart from specific circumstances," is correct. The circumstances that the portrayed is a naturist herself, and that the guide was solely intended for naturists, did not influence the decision, since the guide was also available to non-naturists.

It can also be concluded from other decisions that the publication of nude photographs or photographs of the naked upper part of the body of the portrayed in principle is not allowed.¹⁶² The Pres. of the Amsterdam District Court granted a NLG 5,000 damages award for publishing a photograph in the column "Privé" in the newspaper "de Telegraaf," which showed the plaintiff at the moment her jacket accidentally fell open and one of her breasts was exposed. The nature of the photograph, on which the plaintiff exposed a part of her physical intimacy, plus a sneering comment to go with it, invaded her privacy.¹⁶³

Even if a photograph was taken in public with the permission of the portrayed, further publication can be unlawful.¹⁶⁴ A couple that had responded to a personal advertisement in a sex magazine by sending their clearly identifiable portraits in order to bring about an exchanging of partners, was able to oppose the publication of these portraits without their permission in the column "personal advertisements" in the next issue of that magazine.¹⁶⁵

In the "*Disco-stripper case*", the plaintiff was a visitor of a night club, who was filmed by a television station when he performed on stage with a striptease dancer. The film showed how the visitor, who was scantily dressed, had to eat the panties of a naked striptease dancer. After the broadcast, the visitor claimed an injunction and damages. The Pres. of the Amsterdam District Court granted an injunction to rebroadcast the film.¹⁶⁶

162. Pres. District Court Breda, May 14, 1984, KG 1984, 172; AMI 1986, at 60 (*Former nude model*); Pres. District Court Haarlem, August 1, 1984, KG 1984, 272; AMI 1986, at 59 (*Topless waitress*); Pres. District Court Amsterdam, January 9, 1974, no. KG 74/7, mentioned in Spoor/Verkade, *Auteursrecht*, no. 193, 1993, at 179 (*Josephine van Gasteren/VPRO*); Pres. District Court Amsterdam, August 12, 1982, KG 1982, 146 (*Former drug addict*): rejection of plaintiff's claim after defendants had promised not to mention plaintiff's name, and not to show the motion picture in Rotterdam during three years; District Court Haarlem, February 14, 1984, AMI 1986, at 59 (*EO-announcer*): fixing of photograph of features of Marianne Glashouwer on a drawing of an almost nude torso is unlawful; Cantonal Court Maastricht, October 7, 1992, Mf 1993, 95 (*Jaskowiak/De Limburger*): publication of picture which gives up plaintiff's intimacy is an invasion of his private life, even though his genitals were not shown.

163. Pres. District Court Amsterdam, February 18, 1993, AMI 1993, at 110 (*Breda Glamour City 1992*).

164. Pres. District Court Zutphen, August 13, 1984, KG 1984, 292; AMI 1986, at 60 (*Nude motorcyclist I*): plaintiff, who for a remuneration rode on a motorcycle without clothes over a platform during a pop concert, has an interest in following what will happen with the nude pictures taken of her.

165. District Court Middelburg, January 9, 1974 and March 27, 1974, NJ 1975, 57 (*Personal ad*): immaterial damage award of NLG 600 for defamation.

166. Pres. District Court Amsterdam, June 1, 1995, Mf 1995, at B97; AMI 1995, at 196 ("*Bed en andere geheimen*").

The actress Van Drumpt however, could not oppose the publication of stills, consisting of nude photographs taken of her from the movie "*De gulle minnaar*" (The Generous Lover), in the monthly magazine "*Playboy*" with an additional text about the movie and about Van Drumpt. The Haarlem District Court considered that the interest of the defendant in publication of the photographs prevailed since the monthly magazine came out just before the premiere of the movie, which should be considered a news fact. *Playboy* has a legitimate interest in publishing items about the course of the plaintiff's career.¹⁶⁷

[b] Commercial Use

In 1909 De Beaufort already mentioned, as examples of possible portrait right infringements, the portrait of a lady on a matchbox and the beer jug that is painted with the portrait of a professor.¹⁶⁸ In his opinion this was not allowed because such a use did conflict with the innocence or the dignity of the portrayed.

In case law it is acknowledged that the portrayed can oppose the commercial exploitation of his portrait, if he suffers immaterial damages.¹⁶⁹ In 1988, cafe "*Bukowski*" was opened in Haarlem. Two glass doors with the portrait of the writer Charles Bukowski embellished the entrance of the cafe. Posters with the portrait of the writer were distributed around the town. The Pres. of the Haarlem Court considered this use of the writer's portrait for commercial purposes as an infringement of his reasonable personality interest. Bukowski has a strong aversion to publicity because he does not want to see his personality connected with any form of commerce.¹⁷⁰

At the end of the 1940's, the Bureau of Industrial Property opposed the registration of a portrait of Winston Churchill as a trademark for cigars with the statement that "such a frequent, lengthy and not very elevating distribution of his portrait for the use of smokers' requisites" instituted a reasonable interest in opposing the registration. The Dutch Supreme Court¹⁷¹ rejected this statement in its general sense. The Court reasoned that "for indeed there are circumstances thinkable, under which the use of a person's portrait as a trademark for smokers' requisites conflicts with the reasonable interest of the person portrayed, but this does not apply to every case." Whether Churchill's personality right is violated by a registered trademark of his portrait for smokers' requisites, depends on the (non-financial) objections that necessarily should be made by himself. This is inherent to the highly personal nature of the right to respect for one's private life.

167. District Court Haarlem, February 8, 1994, Mf 1994, B35; AMI 1995, at 93 (GAIS) (*Van Drumpt/Uitgeverij Spaarnestad*).

168. Het auteursrecht in het Nederlandsche en internationale recht, diss. Utrecht, 1909, at 302-303, referring to writings of the German author Jozef Kohler.

169. See also decisions of Advertising Standards Authority (RCC) mentioned in § 5.6[B].

170. Pres. District Court Haarlem, August 8, 1989, BIE 1990, no. 71, at 227; AMI 1991, at 17 (*photograph of Bukowski*). The Pres. also held that defendant infringed the copyright in the photograph of Joan Levine.

171. Supreme Court, October 28, 1948, NJ 1949, 169; BIE 1949, no. 4, at 19 (*Churchill cigars*).

The drawback of this opinion is, that persons, especially politicians, who do not want to institute legal proceedings for publicity reasons, must tolerate the exploitation of their portraits. The necessity of a reasonable personality interest for opposing the commercial exploitation of the portrait is particularly relevant if the portrayed does not, for reasons of principle, want to be used for commercial purposes in general or for certain controversial forms of commercial exploitation.¹⁷²

[c] False Suggestion of Connection Between Portrayed and Context of Publication

Courts have generally recognized the reasonable interest in opposing the creation of a false impression that the portrayed has anything to do with the subject matter of a publication, which is undesirable in his opinion. The unlawfulness is a result of the false suggestion that was given to the public. The false suggestion can be created by manipulating a photograph,¹⁷³ by placing a portrait in an undesirable context, or with an undesirable text,¹⁷⁴ by falsely suggesting a contribution to the publication,¹⁷⁵ or by the false suggestion that the portrayed has received a payment for the publication.¹⁷⁶

Examples of subject matters of publications which a portrayed does not want to be identified with, are sex/pornography,¹⁷⁷ criminality,¹⁷⁸ drugs,¹⁷⁹

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172. Cf. District Court Amsterdam, May 13, 1992, Mf 1992, 115 (*André Fiset/Scala Agenturen*): damage award of NLG 150,000 for use of picture of model André Fiset on packaging of pornographic products.
173. Pres. District Court Rotterdam, February 23, 1978, NJ 1979, 605 (*Amicales/Marokko Komitee I*): plaintiff can oppose the publication of his portrait outside the original background, because of the creation of a false impression. The Pres. enjoined the publication of this photograph in any manipulated form. But see Pres. District Court the Hague, to be known from Court of Appeals the Hague, January 11, 1979, NJ 1979, 606 (*Amicales/Marokko Komitee II*).
174. Pres. District Court Groningen, December 8, 1981, KG 1982, 10 (*Randgroepjongeren*): because of the text above this picture, every objective reader will identify the text of the interview with drop-out (*randgroepjongere*) Jan with the picture of plaintiff, who does not want to belong to the teenage drop-outs. Order to make picture of plaintiff in defendant's book unrecognizable.
175. Court of Appeals Amsterdam, August 25, 1983, BIE 1985, no. 22, at 75; AMR 1984, at 12 (*Elsevier's Culinary Handbook*): false suggestion that plaintiff cooperated with defendant's cookbook. In addition, plaintiff does not agree with main parts of defendant's book.
176. Court of Appeals Amsterdam, July 11, 1991, NJ 1992, 205; AMI 1993, at 37 (*Verbeke/Wang Nederland*); Pres. District Court Haarlem, August 1, 1984, KG 1984, 272; AMI 1986, at 59 (*Topless waitress in magazine "Panorama"*); Pres. District Court Amsterdam, November 22, 1974, NJ 1976, 336 (*Bob Meijer in motion picture "Alicia"*).
177. Pres. District Court Amsterdam, November 22, 1974, NJ 1976, 336 (*Bob Meijer in motion picture "Alicia"*): plaintiff's religious and moral views are incompatible with the content and pictures of defendant's motion picture "Alicia: Het Huwelijk open en bloot" (*Alicia, The marriage in full view*) in which appear several nude scenes and copulations. In addition, the public could get the false impression that plaintiff rendered his assistance to this film, or that he was paid for his assistance; District Court Haarlem, January 22, 1991, AMI 1992, at 188 (JCSP) (*Brouwers/Schippers et al.*): injunction to picture Brouwers as character Sjeff van Oekel in comic book in a pornographic context. It is relevant that no explicit sexual acts appeared in the television series in which plaintiff played this character.
178. Pres. District Court Amsterdam, December 15, 1989, AMI 1990, at 95 (GAIS) (*Lieshout/VPRO*): portrait right of accused, who was subsequently acquitted, prevails over the moral rights of the author in an entire showing of his motion picture. The television station may leave out the portrait because the portrayed has a reasonable interest. Cantonal Court Hilversum, June 3, 1992, Mf 1992, 115; AMI 1993, at 38 (*Ahlers/De*

gambling,¹⁸⁰ prostitution,¹⁸¹ unpopular political ideas,¹⁸² or social problem cases.¹⁸³ To lay a false personality upon a person strongly resembles defamation. The distinction between defamation and publications that create a false impression of the portrayed is vague.¹⁸⁴ The Amsterdam Cantonal Judge decided that the publication in the daily newspaper "*De Telegraaf*" of a photograph of the plaintiff and his wife with the additional text "with a shocked nervous system, the occupants of the haunted house in Rotterdam are waiting for things to come. Watch the facial expression," was unlawful and insulting. The plaintiff was portrayed with a twisted face and entangled hair. The text had put the photograph in the wrong context, because the appearance of the man was not affected by the ghost story, but by the wind. The photograph had been taken seven years earlier while the plaintiff was spending time on the beach.¹⁸⁵

The Pres. of the Amsterdam District Court granted an injunction against an integral broadcasting by NCRV in the program "*Surveillance*" which showed plaintiff, a mother, and her children in the context of a police investigation into her life. The Pres. found that the NCRV has the right to inform the public about the police's method of working including the investigation into the mother's life. However, in this case, the interests of the plaintiff prevailed because the criminal case against the plaintiff had been dismissed, and the program contained disapproving remarks of the police about the plaintiff, which caused the impression

Gooi- en Eemlander): story in newspaper about traffic surveillance with picture in which plaintiff and his car are visible. Plaintiff stated that this publication was unlawful because the public could get the impression that he offended a crime. The Cantonal Judge held that nor the photograph, nor the text create this suggestion.

179. Pres. District Court Haarlem, June 20, 1986, KG 1986, 347; AMI 1987, at 115 (*Heroin problems*): portrait of plaintiff announced as: "Peter. Pooler, dealer en junk." (Peter, pimp, dealer and junk). Defendant failed to show that plaintiff satisfied these qualifications.
180. District Court Amsterdam, July 22, 1976, NJ 1978, 24 (*Casino gambler*): picture of businessman taken for the promotion of tourism is used in a publication of a different nature about the attraction of legal and illegal casino's.
181. District Court Rotterdam, March 2, 1926, W 11.496 (*De Roofholen en hunne bevolking*): persons who are not prostitutes are pictured in an article about prostitutes.
182. Pres. District Court Amsterdam, February 17, 1983, KG 1983, 94 (*Des Bouvrie/PSP*): false suggestion that Des Bouvrie is not a supporter of share more and share alike; Pres. District Court the Hague, January 29, 1985, KG 1985, 55 (*Cakici/Centrumpartij*): false suggestion that plaintiff gave her assistance to political propaganda for Centrumpartij; Pres. District Court Amsterdam, February 18, 1985, KG 1985, 81 (*Her Bittere Kruid*): Marga Minco is of the opinion that she is portrayed in motion picture as having friendly relations with a NSB (National Socialism) family. The Pres. ruled that defendant must inform the public of this opinion at the beginning of the motion picture; Pres. District Court Arnhem, November 11, 1988, KG 1989, 5 (*Kitty Courbois as "Kniertje"*): association of picture of plaintiff with neo-fascist content of publication is unlawful; Court of Appeals 's-Hertogenbosch, February 23, 1994, NJ 1994, 474; AMI 1994, at 97 (GAIS); Mf 1994, B46 (*Prins/Walraven and Weijermans*): use of portraits of plaintiffs, police officers, in art work "Multiple 1/187" is unlawful because this work creates associations with nazi-activities.
183. Cantonal Court Utrecht, October 7, 1986, NJ 1987, 525; PRG 1986, 2602; AMI 1987, at 114 (*Randgroepjongeren II*): plaintiff pictured as drop-out on page 762. This false impression is not rectified by defendant's footnote on page 768 stating: "the editors do not want to label the persons on the photographs as drop-outs."
184. Cf. Zeiler, *HNV* II 1965, at 30.
185. Cantonal Court Amsterdam, July 23, 1930, NJ 1931, at 265 (*Scared of ghosts*).

that plaintiff acted blameworthy towards her children. The Pres. ordered the NCRV to make the plaintiff and her children unrecognizable.¹⁸⁶

[d] Exposing the Portrayed to Physical Danger or Danger to a New Built Life

Publication of a portrait is unlawful if physical danger can arise for the portrayed because of this publication.¹⁸⁷ For example, the publication of the portrait of the only witness of a robbery, of which, at the time of publication, the offenders are still at large, is unlawful.¹⁸⁸ The Dutch Supreme Court considered that there can be a reasonable interest "if there is [an] actual possibility that the portrayed [...], also as a result of that publication, will suffer damages."¹⁸⁹

The Pres. of the Arnhem District Court decided that the distribution of the book "*De tragedie van de geheime dienst*" (The Tragedy of the Secret Service) violated to a great extent the right to protection of the private life of the officers of the "*Politie Inlichtingendienst Nijmegen (PID)*" (Intelligence Service Nijmegen). The interest in distributing the book, such as creating openness about the operation techniques of the Dutch intelligence services and making public malpractices inside a public service in general and inside the PID Nijmegen in particular, do not justify the extensive identification of six police officers who work for the PID. For example, defendants had made public not only the portrait and the name of the police officer, but also the (war) history of his father, the registration number and brand of his and his wife's car, their private phone number, and the addresses and membership of associations. The Pres. ruled "that the purpose (openness and making malpractices public) is not served by the means (extensive identification)."¹⁹⁰

The publication of a portrait can also be unlawful, if this interferes with the rehabilitation of an accused, or convict.¹⁹¹ For example, the Pres. of the Middelburg District Court considered: "The interest of the [accused] portrayed to oppose the publication of the portrait should be ranked higher than the interest of

186. Pres. District Court Amsterdam, January 20, 1995, KG 1995, 83 (*P.H.B./NCRV*).

187. Cantonal Court Middelburg, November 14, 1928, W 11.932 (*Non-strikers*): publication of portraits of non-strikers during strike is unlawful; Supreme Court, February 8, 1966, NJ 1966, 394 (vB) ("*Buitengewoon Opsporingsblad*" I) and Supreme Court, November 22, 1966, NJ 1967, 101 (vE) ("*Buitengewoon opsporingsblad*" II): publication of picture will cause risk of unpleasant treatment of ex-prisoner.

188. Supreme Court, October 21, 1969, NJ 1971, 124 (CB) (*Witness robbery*).

189. Id. NJ 1971, 124.

190. Pres. District Court Arnhem, November 16, 1990, KG 1990, 390 ("*De tragedie van een geheime dienst*").

191. Cantonal Court Amsterdam, September 26, 1959, NJ 1961, 246 (*Story of detective De Roos I*); District Court Amsterdam, September 20, 1965, appeal in cassation rejected by: Supreme Court, November 22, 1966, NJ 1967, 101 (vE) ("*Buitengewoon opsporingsblad*" II): the publication will fix attention to plaintiff's unfavorable past, which will obstruct him in the exercise of his job; Pres. District Court Amsterdam, April 2, 1982, KG 1981, 43 (*Undertaker*); Court of Appeals Amsterdam, January 17, 1985, AMR 1985, at 67 (GAIS) (*Erkamps/De Telegraaf*): rejection of claim after balancing of interests in summary proceedings; Pres. District Court Amsterdam, September 19, 1985, KG 1985, 305 (*Picture of accused in De Telegraaf*); Pres. District Court Amsterdam, March 19, 1987, AMI 1987, at 133 (*Heineken-affair*): rejection after defendant's promise not to publish any portraits of plaintiff.

the press to publish, considering the fact that being charged with a crime is perceived as degrading."¹⁹²

In the "*Ferdi E.*" case, on February 17, 1989, the defendant had published an article in its weekly magazine "*Panorama*" about "*The Six Most Notorious Postwar Killers.*" In this article the author gave an account of his investigation into the backgrounds and motives of these convicts. The article was illustrated with six photographs, one of which was a photograph of the plaintiff Ferdi E., the murderer of industrialist G.J. Heijn. One month later, defendant published the photograph again in an article which gave information about the awarding of the Silver Camera to the best press photograph of 1988. Next to this article were fourteen prize-winning photographs, one of which was a portrait of Ferdi E., the photograph that won the photographer the first prize in the category "*News*". Toward the end of 1988, Ferdi E. was sentenced irreversibly to 20 years imprisonment for the murder on G.J. Heijn. This offense had attracted a lot of public attention. Ferdi E. stated that both publications of his portrait after his conviction were unlawful. The Haarlem Court decided that Ferdi E. had a reasonable interest in opposing the publication, and declared that the publications were unlawful.¹⁹³

In appeal, the Amsterdam Court of Appeals decided that the publications were not unlawful, since the interests of "*Panorama*" in the publications under the given circumstances, ranked higher than the interests of Ferdi E. The Court of Appeals considered that the defendant did not obtain the photographs in an unlawful way, that the photographs in themselves were of a neutral nature, and that in both cases the publication of the photograph was functional for the provision of news and information to the readers. The photograph of Ferdi E. in the article of the Six Most Notorious Postwar Killers added to the expressiveness of the article. The Court of Appeals acknowledged that the publication of the photographs could interfere with the rehabilitation of Ferdi E., since it is likely that he will be recognizable to the public in future, but this interest was considered less important. The Court of Appeals considered relevant that, at the time of publication by the defendant, more than one photograph of Ferdi E. was already in circulation. The Dutch Supreme Court rejected Ferdi E.'s cassation plea.¹⁹⁴

The publication of a portrait can be unlawful if the identity of a victim of a criminal offense¹⁹⁵ is exposed. For example, the broadcasting of the portrait of a victim of incest in a television news broadcast about the court meeting attended by the victim was considered unlawful. The Court found that, as the victim lives in a reasonably small community, the broadcast of her portrait enlarges the

192. Pres. District Court Middelburg, March 8, 1983, NJ 1984, 44; KG 1983, 116; BIE 1984, no. 52, at 172 (*fish fraud*).

193. District Court Haarlem, March 15, 1991, Mf 1991, B53 (WFKa) (*Ferdi E./Uitgeverij Spaarnestad*).

194. Supreme Court, January 21, 1994, NJ 1994, 473 (DWFV); AMI 1994, at 93 (GAIS); Mf 1994, B30 (*Ferdi E./Uitgeverij Spaarnestad*).

195. See respect to victims of accidents: Van Vliet, Een gewogen afbeelding; een civielrechtelijk model voor het afwegen van belangen bij het openbaar maken van afbeeldingen, *AA* 1995, 252, at 259, arguing that the media should be obliged to make victims of accidents unrecognizable.

chance that she will be addressed by a third party and subsequently confronted with the shocking experiences of the criminal offense¹⁹⁶

In the "*Zwerven in het Paradijs*" case, the Pres. of the Amsterdam District Court granted an injunction against television station NCRV to broadcast a recognizable portrait of the plaintiff in a film about homeless young persons. The plaintiff had cooperated in a recording of her private life when she was 17 year old. However, 18 months later the plaintiff opposed the broadcast of her portrait because the film showed intimate data about her life, such as her motherhood, problems to keep her former boyfriend, a possible new pregnancy, and her venereal disease, for which she did not want to have medical treatment. After the recording, the plaintiff had built a new life, with new friends, schoolmates, and in-laws, who did not know about her past. The Pres. ruled that under these circumstances, the plaintiff's privacy interest outbalanced NCRV's interests to broadcast her recognizable portrait.¹⁹⁷

[e] No Reasonable Interest Outside the Four Categories A-D

Judging all the circumstances of the actual case, it must be decided whether a publication of a portrait infringes the personality right of the portrayed. In principle it can be stated that outside the four categories a-d mentioned supra, the freedom of expression prevails.¹⁹⁸ In most cases outside of the four categories the judge comes to the conclusion that the portrayed has no reasonable interest.¹⁹⁹ For example, not unlawful were the following publications of portraits without the permission of the portrayed:

- Publication in a weekly magazine of a photograph of a woman in her traditional Zeeland costume, which was taken during a visit from the Queen to an Agriculture exhibition in Zierikzee. The woman claimed that defendant tried to ridicule her, but the Amsterdam Court of Appeals was of the opinion that it concerned a photograph which was not manipulated, and that there were not enough circumstances stated in order to assume a reasonable interest.²⁰⁰
- Publication of a photograph of a young man in Javanese costume in a blooming bulb-field with the additional text: "Oh, what a wonderful sight" in Malay,

196. Pres. District Court Amsterdam, April 28, 1994, KG 1994, 171; Mf 1994, B70, aff'd Court of Appeals Amsterdam, December 12, 1994, KG 1995, 274 (*Eveline v. B./RTL4*). Cf. Pres. District Court the Hague, January 28, 1994, AMI 1994, at 97 (GAIS); Mf 1994, B35 (*Yolanda/Uitgeverij Elmar*): injunction to publish portrait of victim Yolanda on cover of book "Epe het proces" about incest case.

197. Pres. District Court Amsterdam, February 2, 1995, KG 1995, 137 (*X/NCRV*).

198. Cf. Supreme Court, June 25, 1965, NJ 1966, 115 (*Televisier I*): subject to exceptional cases, everyone is free to make public or not to make public that what he knows.

199. Wrongly decided seems to be the decision of Pres. District Court Rotterdam, December 6, 1934, NJ 1935, at 1056 (*Princess Juliana*) holding not unlawful the preventive action against publication of photographs of Princess Juliana at her departure to England on the *Batavier II*. The Pres. did not mention any reasonable interest of the Princess.

200. Court of Appeals Amsterdam, March 6, 1925, NJ 1926, at 188; W.11354 (*Lady in traditional Zeeland costume*), reversing District Court Amsterdam, December 3, 1923, NJ 1924, at 232. W.11.170.

is not insulting. The photograph was taken from a broadcasting of the "*Polygoon news*," which had been made several years before.²⁰¹

- Publication of a photograph in the photo book "*We are 17 also*," of a sixteen-year-old girl, who has something altered at the back of her dress by a boy sitting next to her. The photograph was taken with her permission during the ball on a festive evening of pupils of a highschool, where the plaintiff's daughter was a guest. The judge did not consider this photograph immoral or harmful to the reputation of the father (who was a physician) and his daughter, since he could not find anything that would give offense to an unprejudiced spectator. It was also relevant here that it concerned a photo book of excellent quality and that, in the photograph, also several older people were present in the girl's surroundings, reinforcing the innocent nature of the photograph.²⁰²
- Veegens, an attorney, was not able to oppose the plan of the defendant to publish his portrait in a paperback about the "*Hollandsche Dreyfus-affaire*" (Dutch Dreyfus-affair). The judge considered "that plaintiff cannot in general oppose publication or reproduction of his photograph, according to the 1912 Copyright Act or any other statutory regulation."²⁰³
- Publication of a photograph of plaintiff's daughter, who committed suicide ten years earlier, in a photo book by Diepraam was not unlawful. The reasonable interest of the mother, not to be reminded of the unfortunate incident, did not outweigh the interest of the publication of the book. The judge took into account that the defendant cancelled the advertisements of the book which consisted of the photograph of the daughter, and had not distributed the photograph in the form of posters or other publicity material.²⁰⁴
- Publication in the weekly magazine "*Panorama*" of a photograph of the plaintiff with the caption "*Prof: Deals in coke only*," was not unlawful since the seriousness of the content of that announcement was justified sufficiently by the investigation of "*Panorama*" to find the truth. The plaintiff had not been able to give a satisfactory explanation as to why he was spotted in the particular photograph at a certain hour, in the company of two heroin dealers who were known to him.²⁰⁵
- Publication in "*Nieuwe Revu*" of a photograph portraying plaintiff in the context of an article about the Spanish seaside resort Lloret de Mar (which held many more jaunty photographs), during the summer holidays, was not unlawful. Dressed in bikini bottoms, the plaintiff was floating on an airbed on her stomach. The judge did not consider the photograph, the text, or the context disqualifying. Since intimate parts of the body were not visible, the plaintiff had no reasonable interest.²⁰⁶

201. Cantonal Court Haarlem, February 8, 1935, NJ 1936, 692 (*Photo Polygoon news*).

202. Pres. District Court Arnhem, July 25, 1956, NJ 1957, 97 ("*Wij zijn óók 17*").

203. Pres. District Court Amsterdam, December 14, 1965, NJ 1966, 86; AA 1968, at 61 (EDHB) (*Veegens/Vos*).

204. Pres. District Court Amsterdam, June 6, 1985, KG 1985, 194; AMI 1986, at 62 (*Diepraam's photo*).

205. Pres. District Court Haarlem, May 1, 1986, KG 1986, 378 (*Prof: Deals in coke only*).

206. Cantonal Court Amsterdam, March 27, 1987, PRG 1987, 2701; AMI 1987, at 115 (*Lloret de Mar*).

- Photograph of a family watching television is published for a second time in an article about the Islam with an additional text that does not refer to the portrayed members of the family. The death of the plaintiff's wife, who was also in the photograph, does not institute a reasonable interest.²⁰⁷
- Republication of a four-year-old photograph of a man selling peanuts, in order to illustrate an article about a Surinam summer festival, in the newspaper "*Nieuws van de dag*" is not unlawful. Plaintiff did not come forward with his objections until the second publication four years later.²⁰⁸
- Television broadcasting by TROS in the program "*Crime Time*" of a photograph of family, showing a person who provides information about a crime, is not unlawful towards the father and brother who also appear in this family photo. The Court mentioned as relevant circumstances the seriousness of the crime the television program dealt with, the fact that the public was told that the other family members shown in the picture had no relation to this crime, the fact that the family was known in criminal circles, and the fact that the family photo had been published before.²⁰⁹
- Television broadcasting by TROS in the program "*Deadline*" which criticizes plaintiff's clinical project to cure AIDS patients is not unlawful. The court found that plaintiff had an interest in opposing the broadcast of his portrait because the journalist had acted as a patient and filmed him with a hidden camera. However, after balancing plaintiff's interests with the public interest in a critical report about plaintiff's controversial clinic, the Court found in favor of the defendant.²¹⁰
- Television broadcasting by NCRV in the program "*Blik op de weg*" which showed how police held and booked plaintiff, a traffic offender who had driven too fast, was not held to be unlawful. The Court found that defendant, NCRV, had not shown that the offender had consented to a broadcast of the film. However, the court held that the film did not defame the plaintiff, was made in a public place, and served an educational and preventive function.²¹¹
- Television broadcasting by NCRV in the program "*Surveillance*" which showed police's search in house of plaintiff. The Court found in favor of the defendant because of the realistic and informational value of the program, the functionality of the pictures of the plaintiff and the fact that the face of plaintiff was made unrecognizable. The fact that the plaintiff might be recognized by the view of his back and his living room, in combination with the sound of his voice, did not outbalance the outcome.²¹²

207. Pres. District Court Rotterdam, April 24, 1989, IER 1989, no. 46, at 86; AMI 1990, at 31 (GAIS) (*NRC/Duetz*).

208. Court of Appeals Amsterdam, January 10, 1991, AMI 1991, at 200 (JCSP) (*Van de Leende/Courant Nieuws van de Dag*).

209. District Court Amsterdam, September 21, 1994, AMI 1995, at 59 (*T. van D. and J. van D./TROS*).

210. Pres. District Court Amsterdam May 19, 1995, Mf 1995, B96, aff'd Court of Appeals Amsterdam, December 21, 1995, KG 1996, 51; Mf 1996, B26; AMI 1996, at 90 (*Essaïdi c.s./TROS*).

211. Pres. District Court Amsterdam April 20, 1995, Mf 1995, B78; AMI 1995, 119 (*Van As/NCRV*).

212. Pres. District Court Amsterdam, January 2, 1995, KG 1995, 71 (*A.M./NCRV*).

[f] Exception: Reasonable Interest Outside the Four Categories A-D

However, in exceptional cases, courts have ruled that a reasonable interest of the portrayed opposes the publication of the portrait outside the four categories a-d mentioned supra. Courts have recognized that a publisher is obliged to take reasonable care that the privacy interests of the portrayed will not be endangered. This is the case if publication entails special risks with respect to the privacy of the portrayed, which could and should have been foreseen by the publisher. Whether that risk exists, depends again on all the circumstances of the case.

In the "Vondelpark" case, after a referral by the Dutch Supreme Court,²¹³ the Amsterdam Court of Appeals²¹⁴ came to the conclusion, with the help of a checklist of questions suggested by the Dutch Supreme Court, that the portrayed did have a reasonable interest in opposing the publication of her portrait in a weekly magazine. It concerned a photograph that was published in the weekly magazine "Nieuwe Revu," in an article about the Vondelpark in Amsterdam. On that particular photograph the face and the body, up to the knees of the plaintiff L., are portrayed, while she is taking a walk with her fiancé of that time. They are holding each other very close. In the background one can see trees, a pond and a tea house. The Court of Appeals investigated whether L.'s right to respect for her private life had been infringed by this publication of the photograph, so that a reasonable interest of L. could oppose the publication of her portrait. The Court of Appeals considered that the photograph, because of the fixation of L. on her boyfriend (3),²¹⁵ was of an obvious intimate nature (2), that L. was clearly recognizable (4) on the photograph, which was quite large: it covered 2/3 of two adjoining pages (2). Regarding the circumstances under which the photograph was taken (1), the Court of Appeals considered that the photograph was taken deliberately on a totally unexpected moment to the portrayed, in a park, a public place, but with a certain intimacy to persons who go there.

With respect to the medium (5), the Court of Appeals considered that the photograph was published in a weekly magazine with a circulation of 200.000 copies. Because of this fact the possibility was greater that acquaintances from her neighborhood would recognize her. The photograph was published in an article entitled "Vondelpark, vrijplaats voor geluk" (Vondelpark, Refuge for Happiness), in which a suggestion of eroticism, freedom of opinions and behavior in the Vondelpark, came into prominence (6). Subsequently the Court of Appeals came to the conclusion that "Nieuwe Revu," by publishing this for L. by no means offensive or degrading photograph, still took the risk that publication without her permission could be perceived by L. as very disturbing. Since it did indeed appear later that L. felt grieved by the publication, L.'s right to respect for her private life had been invaded. The relationship with her new

213. Supreme Court, July 1, 1988, NJ 1988, 1000 (LWH); AMI 1988, at 125 (HCJ) (*Vondelpark I*).

214. Court of Appeals Amsterdam, April 27, 1989, NJ 1990, 370; AMI 1989, at 125 (HCJ) (*Vondelpark II*).

215. The numbers refer to the questions that are listed in the checklist at the end of this section.

boyfriend ended when he saw the photograph of L. with her former boyfriend (9). The publication lead to uncomfortable feelings, shame and grief (10).

The defense of "*Nieuwe Revu*," that the photograph was taken on the public road and that it could not have foreseen the exceptional reaction of L., was rejected. The Dutch Supreme Court stated explicitly that the question whether L. had a reasonable interest, should be judged in the light of her actual circumstances and her background, and that it is not relevant whether similar objections would exist for other persons.²¹⁶

According to the Court of Appeals, the publication without permission of the photograph in question (questions 1-4) in the chosen context (questions 5-6), entailed special risks to the publisher with respect to the person and the privacy of the portrayed, which the defendant could and should have foreseen.

According to standards of fairness, the Court of Appeals assessed the immaterial damages at NLG 1,000.

The question about the news value of the article (question 8) was not considered by the Court of Appeals. Judges do not like to judge the news value of the content of a publication. The line between publications with a (news) value that serves the public interest and publications without that value, is hard to draw.²¹⁷ However, the Dutch Supreme Court has decided that with respect to the question whether a press publication infringes a person's right to respect for his private life, the judge can also take into account both the nature of the facts on which the press publication is based, and the interests which the involved press organ in general and the specific publication in particular endeavors to serve.²¹⁸

The publication by "*Consumenten Contact*" (Consumer's Guide) and the "*Leger des Heils*" (the Salvation Army) of a photograph of two extremely overweight ladies while they are shopping was considered to constitute an invasion of their privacy, because their size arouses the public's laughter, ridicule and possibly annoyance. According to the Cantonal Judge, "one must not aggravate this burden for the plaintiffs with a publication and thus turn them into a public spectacle; this institutes an infringement of their privacy and human integrity."²¹⁹ Unfortunately it does not become clear from this decision in what particular way and context the photograph was made public.

Another case is a VPRO television program, in which a fragment is shown of a prostitute sitting in a window of a house in the red light district in Amsterdam without any intimate parts of the body showing. For 20 seconds she was clearly visible. This caused the woman feelings of fright, annoyance and fear of recognition by her family. The Court awarded a compensation of NLG 3,000 for

216. See § 4.5[B][2].

217. Cf. De Brauw, *HNJV* 1965 I, at 39-41: Well-founded social criticism can be interwoven with entertainment. But see Mout, *HNJV* I, 1978, at 159-162, who argues that a story about a love affair of a famous singer cannot serve the "öffentliche Aufgabe" (public interest).

218. Supreme Court, March 4, 1988, NJ 1989, 361 (CIHB) (*Children Princess Irene*). In this case, portrait law was not an issue.

219. Cantonal Court of the Hague, January 23, 1981, NJ 1981, 578 (*Extreme fat ladies*). Spoor/Verkade, *Auteursrecht*, 1993, no. 193 mention this decision as an example of a category they distinguish: "risk of mockery or contempt."

immaterial damage. In appeal, the Amsterdam Court of Appeals nullified the compensation because it had appeared that after the broadcast, none of her relatives had fallen out with her.²²⁰

The Amsterdam Court of Appeals went to considerable lengths in order to protect the right to respect for one's private life in a dispute about a broadcast about a corrupt prison guard that was recorded by a hidden camera and microphone. The Court decided that the interest of society was served by publications in which the problem of corrupt prison guards in Dutch prisons was discussed, but in order to achieve this goal, it was not necessary to reveal the identity of the corrupt guard. The Court came to the conclusion that the TROS television broadcasting of the program "*Crime Time*" and a publication in the weekly magazine "*Aktueel*" were unlawful towards the guard who was suspected of corruption, because he remained identifiable in spite of the covering of his face. The Court did not consider the identification justified by a truthful presentation of the facts.²²¹

In 1994, the Pres. of the Amsterdam District Court granted an injunction against television station KRO to broadcast a recording that was made contrary to the will of the plaintiff, a surgeon, about an incident that happened in 1983, while the plaintiff gave up his practice in 1985. The Pres. found that the plaintiff was not a public figure and that his privacy interests preponderated KRO's journalistic interests.²²²

[g] Checklist for Balancing Interests

It becomes apparent from case law that in order to answer the question whether a publication brings special risks with respect to the privacy of the portrayed, which could and should have been foreseen by the publisher, depends on all the circumstances of the case. The following non-exhaustive list of questions could be relevant.²²³

- A) Questions with respect to the portrait:
- 1) Under what circumstances was the portrait produced?
 - where was it produced: on private property/in public?²²⁴

220. Court of Appeals Amsterdam, April 25, 1986, NJ 1986, 818 (*window prostitute*). Please note that this case was decided on the basis of Art. 1401 (now 6:162) Civil Code, not Art. 21 DCA.

221. Court of Appeals Amsterdam, June 18, 1992, Mf 1992, B67 (*B./TROS and De Vrijbouter*). Court of Appeals Amsterdam, February 2, 1995, NJ 1996, 205; AMI 1996, at 91 (*B./TROS*): B. claimed NLG 200,000 for psychic damages. The Court awarded NLG 5,000, because most of the damages were caused by B.'s own conduct.

222. Pres. District Court Amsterdam, October 10, 1994, mentioned in Mf 1994, 133 (*De Muinck Keizer/KRO et al.*).

223. Cf. the circumstances as referred to in § 5.3[C], which can be relevant to the issue of whether press publications are unlawful. See for an alternative list of factors: Van Vliet, Een gewogen afbeelding; een civielrechtelijk model voor het afwegen van belangen bij het openbaar maken van afbeeldingen, AA 1995, 252, at 258. It should be noted that in court decisions, all questions are never dealt with simultaneously.

224. Cf. Pres. District Court Amsterdam March 3, 1996, Mf 1996, B67; KG 1996, 132; AMI 1996, at 92 (*Stimezo e.a./EO*): injunction to broadcast a film made with a hidden camera in an abortion clinic, even if the persons filmed are made unrecognizable, because an abortion clinic should remain a private place.

- how was it produced: journalistic method; intrusion/ secretly/ unexpectedly/ openly?²²⁵
 - what equipment was used: long-focus lens?
- 2) What is the nature of the portrait?
- how old is this portrait?
 - what is the size of the portrait?
 - was the portrait published or generally obtainable before, or is this the only one that is made public?
- 3) In what way is the plaintiff portrayed?
- does it involve intimacy? What are the activities of the portrayed?
 - did the portrayed pose for this portrait?
 - has the portrait been manipulated?
- 4) What is the degree of identification?
- to whom is the portrayed identifiable?
 - to what degree is the portrayed identifiable?
- B) Questions with respect to the medium:
- 5) In what particular medium was the portrait made public?
- what particular medium is involved? television/newspaper/column or caricature?
 - what is the nature of the public that the medium is focusing on?
 - what is the authority of the medium?
 - what is the size of the public?²²⁶
 - what is the custom (or what are the current views) with respect to these kinds of publications?
 - what is the relation between the medium and the portrayed? Does the medium have a direct financial interest in harming the portrayed?
- 6) In what context is the portrait placed?
- what is the nature of the additional text (and the seriousness of possible inaccuracies)? Is this text grievous or defaming?
 - what is the nature of the imputations made public?
 - in what way have other portraits been published?
 - what is the tendency/style/suggestion of the publication?
 - how will the public read the context?
- 7) What is the function and purpose of the publication?
- was this the appropriate medium for the purpose? Could the purpose be pursued in any other way but publication?

225. Pres. District Court Amsterdam, October 10, 1994, mentioned in *Mf* 1994, 133 (*De Muinck Keizer/KRO et al.*): injunction to broadcast film of plaintiff made at his home without his permission, while he refused to answer any questions. See about the use of a hidden camera: Schuijt, *De rechter en de verborgen camera: recente en eerdere rechtspraak*, *AMf* 1996, 83; Knoester, *De candid camera van Crime Time, De verborgen camera van Crime Time in een juridisch zoeklicht*, *AA* 1994, 562.

226. *Cf.* Pres. District Court Utrecht, March 22, 1993, KG 1993, 163 (*Van Wilgen/Den Hartog-Janssen and Troost*): restricted publication of photograph plaintiff is not an unlawful invasion of the right to his private life.

- is the intention of the defendant to target the portrayed rightful?
 - was the portrait necessary in order to reach the pursued goal? Was it possible to make the portrait unrecognizable?
 - was it, in light of this purpose, possible to verify whether the portrayed had any objections?
- 8) What is the value of the publication?
- what is the public interest, informational value, or the entertainment value of the publication?
- C) Questions with respect to the portrayed:
- 9) What kind of person is the portrayed?
- to what length did the portrayed "provoke" the publication?
 - when committed the portrayed the acts that are the subject of the publication? Recently or a long time ago?
 - what is the public position of the portrayed? Is the portrayed a private or a public figure? Did the portrayed act as a public or private person?²²⁷
 - what is the background of the portrayed? Is the portrayed capable of standing up for himself?
- 10) What are the actual objections of or disadvantages to the portrayed?
- what is the seriousness of the consequences that may be expected with respect to the publication?
 - how likely is it that these consequences will arise?
 - when did the portrayed object to the publication? Was it possible for the portrayed to protest at an earlier stage?²²⁸
 - to what extent did the portrayed have an opportunity to reply to the publication?²²⁹

[5] Reality Television

The term "*reality television*" is a term that refers to the growing phenomenon of television programs such as "*Surveillance*", "*Crime Time*", "*Blik op de weg*", "*Deadline*", etc., which show local real life, such as reports about the daily life

227. In Dutch literature, the distinction between private and public figures has been made for the first time by De Beaufort, *Het auteursrecht in het Nederlandsche en internationale recht*, diss. Utrecht, 1909, at 302, fn. 1, with reference to American case law; See also: Peters, *Het primaat van de vrijheid van meningsuiting*, diss. 1981, passim; Schuijt, *Hinderlijk volgen ofwel: hoge bomen vangen veel wind*, in: *Recht in de kijker, het recht en de media*, Jonge Balie Congres 1990, 83. Cf. Pres. District Court Amsterdam October 23, 1995, Mf 1995, B128 (*Lubbers c.s./Party*), *aff'd* with modification of advance of damages by Court of Appeals Amsterdam June 6, 1996, Mf 1996, B97 (*Party/Lubbers e.a.*): son and daughter-in-law of former prime minister Lubbers are no public figures.

228. Cf. Pres. District Court Amsterdam April 20, AMI 1995, 119 (*Van As/NCRV*): relevant that plaintiff did not protest against television broadcasting by NCRV at an earlier stage.

229. Cf. Pres. District Court Amsterdam, February 2, 1995, KG 1995, 146 (*Van Sprundel/TROS*) and Pres. District Court Amsterdam, January 24, 1995, KG 1995, 84; Mf 1995, B39 (*Intercar c.s./RTLA*): reporter's unannounced confrontation of plaintiff with camera without giving plaintiff opportunity to reply is contrary to principle of hearing. See also § 5.3[C].

of police men, fire men, ambulance men.²³⁰ Often the persons who feel that they are filmed in a disqualifying context, submit legal claims against the stations that broadcast such programs. In an article about reality television cases, Záborszky-Van Boxtel concluded that courts generally find in favor of the "victims" of reality television.²³¹ This conclusion seems not justified in the light of the cases discussed supra at § 4.5[B][4][e].²³² In principle, the broadcast of reality television programs is not unlawful, unless the person portrayed can show specific circumstances leading to the conclusion that the right to respect his private life must prevail.

Some authors have suggested that the interests of the persons portrayed in reality television programs are insufficiently protected, and proposed to give them a few days time for reflection in order to decide whether they wish to oppose the broadcast.²³³ However, courts have not recognized specific rules for reality television cases, and solved such cases according to the general principles as outlined in § 4.5[B][4].

[6] Conclusion

The judge can come to the conclusion, after balancing all the relevant interests of the case before him, that the publication of a portrait conflicts with the reasonable interest of the portrayed regarding the respect for his private life. In court decisions, the following interests among others are acknowledged: a) the interest in hiding intimate parts of the body, b) the interest not to be used for commercial products and advertisements by a third party, c) the interest not to be portrayed in a false context, and d) the interest in avoiding a threat to one's safety or new built life. If one can speak of one of these interests, in principle, there will be a reasonable interest under Article 21 DCA: only in exceptional cases, will the publication not be unlawful. In the remaining cases, freedom of speech will in principle prevail, unless exceptional circumstances with respect to the nature of the published portrait, the medium, and the person of the portrayed, lead to the conclusion that publication of the portrait constitutes an invasion of the right to respect for one's private life.

230. Cf. Schuijt, *Reality tv, nieuwe kost voor de privacybescherming en het portretrecht*, *NJB* 1996, at 341; De Vries, *De opkomst van reality-tv, Iedereen wil vijf seconden beroemd zijn*, *Intermediair* June 2, 1995, at 25.

231. See Záborszky-Van Boxtel, *Reality-tv en de realiteit van het recht*, *Mf* 1996, 5, at 10.

232. E.g. District Court Amsterdam, September 21, 1994, AMI 1995, at 59 (*T. van D. and J. van D./TROS*); Pres. District Court Amsterdam May 19, 1995, *Mf* 1995, B96, aff'd Court of Appeals Amsterdam, December 21, 1995, KG 1996, 51; *Mf* 1996, B26; AMI 1996, at 90 (*Essaidi c.s./TROS*); Pres. District Court Amsterdam, January 2, 1995, KG 1995, 71 (*A.M./NCRV*).

233. Cf. Klaassen, *Bedenkijd voor de geportretteerde: het einde van reality-tv?*, *Entertainment & Recht*, November 1995, at 9.

[C] Reasonable Interest: Commercial Interest**[1] Recognition of Commercial Interest**

With the changing of public opinion and the rise of new media, it frequently occurred that well-known persons, who had no fundamental objections, gave permission to use their portrait for commercial purposes. The consequence of this was that portrayed persons also started to appeal to commercial interests in legal proceedings. A court recognized a commercial interest in opposing an unauthorized publication of plaintiff's portrait for the first time in 1959.

A photograph of the arrival of Teddy Scholten at Schiphol Airport, after she had won the Eurovision Song Contest in Cannes with the song "*Een beetje*," was used, without her permission, as an eye-catcher in an advertisement in the newspaper "*The Telegraaf*" for "*John Harris*" cigarettes. The same photograph was published six days earlier on the front page of that paper to illustrate a news report. Teddy Scholten stated that the use of her portrait and reputation in order to advertise products was unlawful and claimed an injunction against the use of this photograph for any further advertising purposes. The Pres. of the Rotterdam District Court judged that the portrayed has a reasonable interest in opposing publication if she suffers financial damage. Through her attractive appearance and popularity, she was able to exploit her portrait on a commercial basis if she could guarantee her licensees an exclusive use. The Pres. was of the opinion that a publication without the permission of the person involved, which influenced this exclusive nature and the financial profit in an unfavorable way, was unlawful to Teddy Scholten.²³⁴

In appeal, the cigarettes manufacturer stated that not every damage institutes a reasonable interest. The Hague Court of Appeals agreed with the manufacturer and stated that the reasonable interest depends on the circumstances of the case. Scholten, however, did have a reasonable commercial interest because she could in fact prove that she held the kind of popularity which put her in a position to give permission to use her portrait for advertising purposes in exchange for financial compensation. Indeed, at an earlier stage Teddy Scholten had made a deal with another manufacturer of cigarettes, who was only willing to pay under the condition of exclusiveness. Under these circumstances the Court of Appeals considered a commercial reasonable interest of Scholten present. The defense of the manufacturer that Scholten could not suffer any financial damages since, under Dutch law, no exclusive rights to publication of a portrait can be assigned, was rejected. The Court of Appeals did not acknowledge an absolute exclusive right of the portrayed to her portrait, but came to the conclusion that in this case, publication for commercial purposes without permission conflicted with the reasonable interest of the person portrayed. Finally the Court of Appeals rejected the defense that there was no question of an advertisement photograph, but of a news photograph, because the news

234. Pres. District Court Rotterdam, April 14, 1959, NJ 1959, 648 (*Teddy Scholten*).

photograph had been used for advertising purposes in order to sell cigarettes. The decision of the Pres. was upheld.²³⁵

Twenty years later, in 1979, the Dutch Supreme Court has also acknowledged a commercial interest as a reasonable interest within the meaning of Article 21 DCA. In this case it concerned the publishing of a photo book entitled "*'t Schaep met de vijf Pooten*," (the sheep with the five legs), in which color photographs of several scenes from the television series of the same name were printed. The actors from these scenes had only given permission for publication of their photographs in newspapers and magazines in order to inform the reading and viewing public. They opposed the publication of their photographs in a photo book since they did not receive any financial compensation for this. They were of the opinion that the publisher unlawfully took advantage of their popularity, which enabled them to gain a financial benefit. They stated that they had a reasonable commercial interest within the meaning of Article 21 DCA, and claimed damages of NLG 10,000.

The Amsterdam District Court awarded the sum of NLG 6,000. The Court considered a reasonable commercial interest present, since the private commercial interest of the publisher was very prominent when the photo book was put on the market. The photo book contained a reproduction of the text of the television series with the photographs as an additional illustration. The plaintiffs could ask for financial compensation for their permission because they were popular. The Amsterdam Court of Appeals upheld the decision in appeal and the Dutch Supreme Court rejected the appeal. In appeal to the Supreme Court, the publisher stated that Article 21 DCA only protects immaterial interests, but this was rejected by the Dutch Supreme Court:

"Although, at the time of enactment of the Copyright Act, by using the words "reasonable interest" in Article 21, the legislator must mainly have thought of non-financial interests, there can -also in view of the development of public opinion in this regard- also be a reasonable interest, when the popularity of the portrayed persons, obtained in their profession, is of such a nature that a commercial exploitation of that popularity, by any form of publication of their portraits becomes possible. The interest of the portrayed to be able to share the advantages of such exploitation by not agreeing to publication of their portraits for commercial purposes without receiving financial compensation, is a reasonable interest within the meaning of Article 21."²³⁶

[2] Case Law Commercial Interest

In the discussion about personality interests of the portrayed in § 4.5[B], no distinction was made between certain forms of publication. At most, the sort of medium and the size of the public at which the medium is aimed, are circumstances that influence the unlawfulness of the publication. From case law, regarding cases in which plaintiff appealed to a commercial interest, it appears

235. Court of Appeals the Hague, April 13, 1960, NJ 1961, 160 (*Teddy Scholten*).

236. Supreme Court, January 19, 1979, NJ 1979, 383 (LWH); BIE 1979, no. 23, at 163, *Auteursrecht 1979*, at 52 (JHS) (*'t Schaep met de vijf Pooten*).

that the portrayed can only oppose those forms of publication, that can be defined as "commercial exploitation."²³⁷

It is generally recognized that, for instance, publication of a photograph of a politician as an illustration to a news article in a newspaper is not considered a commercial exploitation of that photograph, which can be opposed by the portrayed, even if the newspaper is sold for profit. In literature concerning the portrait right, little attention is paid to the concept "commercial exploitation." Spoor/Verkade give as an example of commercial exploitation the use of products such as picture postcards, calendars, games and other utensils.²³⁸

Van Oerle considers it unjust only to speak about commercial exploitation of the portrait if the public is of the opinion that the portrayed is in favor of the recommended article himself.²³⁹

In case law, three forms of commercial exploitation can be distinguished.

[a] Use of Portrait to Promote the Sale of Commercial Products

Examples which are covered by this, are the use of a portrait as a trademark,²⁴⁰ as a gift with another product²⁴¹ or on the product itself,²⁴² or as an eye-catcher on the packaging.²⁴³

237. Supreme Court, January 19, 1979, NJ 1979, 383 (LWH); BIE 1979, no. 23, at 163, Auteursrecht 1979, at 52 (JHS) (*'t Schaep met de vijf Pooten*) used the words "a commercial exploitation [...] by any form of publication."

238. Auteursrecht, 1993, no. 194, at 285.

239. Van Oerle, Hoofdenhandel. Het portret als handelswaar, in: *Recht in de kijker, het recht en de media*, Jonge Balie Congres 1990, at 122.

240. Supreme Court, October 28, 1948, NJ 1949, 169; BIE 1949, no. 4, at 19 (*Churchill cigars*). In this case, the use of Churchill's name was not unlawful, because Churchill himself did not oppose this use.

241. Pres. District Court the Hague, April 15, 1964, NJ 1964, 483; BIE 1966, no. 13, at 42 (*Beatles*): distribution of free photographs of members of The Beatles with purchase of chewing gum is unlawful since Beatles did not give permission; Pres. District Court the Hague, February 17, 1965; BIE 1966, no. 14, at 44 (vdZ) (*Donners*): injunction against handing out a Mammouth Surprise "Pief Paf Poef" parcel with picture and name of soccer player Donners with purchase of chewing gum, since Donners had not given his permission. Cf. Supreme Court, January 16, 1970, NJ 1970, 220 (GJS); BIE 1971, no. 24, at 122 (SB); AA 1970, at 377 (HCJ) (*Ja Zuster, Nee Zuster*): gift of key rings, with plastic key ring figures of fictional characters in a popular tv-series, not unlawful because plastic figures have not portrait of plaintiffs, who played these characters.

242. Pres. District Court the Hague, December 7, 1965; BIE 1966, no. 66, at 240 (*Feyenoord players*): sale of soccer pins with caricature and name of Feyenoord soccer-players or trainer without their permission is unlawful; Pres. District Court Utrecht, January 16, 1980, NJ 1980, 481 (*Ajax/Panini*): use of portraits as sticker for soccer album. In summary proceedings it is not possible to check whether a compensation of NLG 150 per player is reasonable.

243. District Court Amsterdam, December 12, 1970, BIE 1974, no. 11, at 20 (*Henk van Ulsen/Attema*): use of portrait and name of artist Henk Ulsen without his permission is unlawful; Pres. District Court Utrecht, February 20, 1986, AMI 1986, at 62; IER 1986, no. 15, at 48 (*Motown/Rec Track*) and District Court Haarlem, August 8, 1989, AMI 1990, at 225 (HCJ) (*Kierke/EMI and CBS et al.*): use of portraits on covers of records without permission is unlawful not only against artists portrayed, but also their phonogram producers. Court of Appeals 's-Hertogenbosch, September 18, 1990, NJ 1991, 281; IER 1990, no. 60, at 129; IER 1991, at 24 (REPdR); AMI 1991, at 48 (DWFV); BIE 1991, no. 91, at 332 (*Van Uden Productions/Winterland Productions*) and Supreme Court, February 24, 1989, NJ 1989, 701 (LWH); AA 1989, at 675 (HCJ); AMI 1989, at 70; IER 1989, no. 21, at 41 (JHS); GRUR Int 1990, at 233 (HER)

[b] Use of Portrait in Advertisements for Commercial Products

The example of the use of the photograph of singer Teddy Scholten as an eye-catcher to an advertisement for John Harris cigarettes was already mentioned earlier.²⁴⁴ Also, the use in an advertising brochure is covered by this.²⁴⁵ The problem with this is of course that it must be decided when a certain expression should be labeled "advertising." For example, one court considered the use of the portrait of composer Vangelis in an article on synthesizers of the brand name Syntrance, in the inner cover of an album of Vangelis, a form of commercial exploitation of his portrait.²⁴⁶

[c] Use of Portrait in Connection with Media

The publication of portraits in books, daily and weekly papers, magazines, etc. is in principle not a form of commercial exploitation which the portrayed can oppose on the basis of financial interests. For example, the Haarlem District Court considered:

"The freedom of the [defendant] to pass on news, should not be obstructed by the (possible) circumstance that a person who is involved with the news facts requires financial compensation for the publication of his portrait."²⁴⁷

The Pres. of the Haarlem District Court did not consider the publication of a book about soccer, in which portraits of the soccer players were printed without their permission, unlawful, since it was not the custom of publishers of books which contain information, to pay money in order to gain permission to publish a portrait for illustration of news reports and other information.²⁴⁸

(*Elvis Presley I*): unpermitted use of portraits on covers of records by third parties is not unlawful towards the authorized phonogram producer, since portrait right is non-assignable.

244. Pres. District Court Rotterdam, April 14, 1959, NJ 1959, 648 (*Teddy Scholten*) aff'd by Court of Appeals the Hague, April 13, 1960, NJ 1961, 160 (*Teddy Scholten*). Cf. Cantonal Court Harderwijk, June 4, 1991, PRG 1991, 3507; Mf 1991, B115 (*Yep Kramer/Burnham Europa*): use of photograph of professional skater Yep Kramer in an advertisement for heaters in two magazines, is an infringement of Art. 21 DCA. Plaintiff was awarded NLG 5,000 for damages.
245. Pres. District Court Amsterdam, March 29, 1974, NJ 1974, 398; BIE 1977, no. 81, at 265 (*Carl Denig-catalog*): rejection of claim, because it was plausible that plaintiff had given permission.
246. District Court Amsterdam, May 15, 1985, AMI 1986, at 61 (*Vangelis*).
247. District Court Haarlem, February 8, 1994, AMI 1995, 93 (GAIS); Mf 1994, B35 (*Van Drumpt/Uitgeverij Spaarnestad*), para. 5.6; Cf. Court of Appeals Amsterdam, January 10, 1991, AMI 1991, at 200 (JCSP) (*van de Leende/Courant Nieuws van de Dag*): plaintiff, peanut seller, opposes the publication of his picture in a newspaper because he intends to exclusively use his artistic appearance for merchandising purposes. The Court of Appeals held that plaintiff must accept publications in the context of the publication of matters of public interest; District Court Amsterdam, August 26, 1987, AMI 1988, at 64 (*Jolanda Zwartjes*) reversing Cantonal Court Amsterdam, October 17, 1985, AMI 1986, at 63 (*Jolanda Zwartjes*): photo of singer Zwartjes in magazine "De Tijd."
248. Pres. District Court Haarlem, June 26, 1974, NJ 1974, 415; BIE 1977, no. 3 and 4, at 11 and 13 (*"De slag om het voetbalgoud" I and II*). But the purchase of almost all 20,000 copies of this book by Martini & Rossi, and the subsequent advertisements for this book in which also its beverages were advertised, was held to be a form of commercial exploitation of portraits, which the players could oppose. See § 4.5[A][2].

The use of portraits in advertisements for a newspaper, a magazine or another medium of information, is allowed in the event that the medium shows with this portrait the specific subject matters it deals with.²⁴⁹ It follows from the lawfulness of a publication of a portrait in a news magazine that the use of this particular portrait in an advertisement for that medium should also be considered lawful.²⁵⁰ In this light, the Pres. of the Haarlem District Court held the publisher's advertisements for a book about soccer, with photographs of soccer players, not unlawful towards the soccer players since the publication of the book itself was not unlawful.²⁵¹

Still, there are certain exceptions recognized in case law where the publication of a portrait in an information medium, was judged in defiance of the commercial interests of the portrayed. In the above-mentioned "*'t Schaep met de vijf Pooten*" decision, it was decided that the portraits of the actors, through insertion in a photo book about the television series in which they had performed, had been exploited for commercial purposes.²⁵²

The Amsterdam Cantonal Court considered the publication of a portrait of Van der Heyden in the weekly magazine "*Elle*" a form of commercial exploitation of her portrait. The portrait was published to illustrate an interview with Van der Heyden. Before the photographer took the photograph that was to illustrate the interview, Van der Heyden had agreed to change her clothes in order to look better on the photograph. The Cantonal Court considered the publication of this photograph with the interview a form of commercial use and granted an award of NLG 2,500, since the defendant had published the photograph without prior knowledge or consent of the portrayed, with the listing of shops where the clothing of the plaintiff could be bought.²⁵³

The Haarlem District Court held that unauthorized publication of a portrait of amateur boxer Arnold Vanderlijde in magazine "*Panorama*," was contrary to his commercial portrait right. The defense that it concerned an illustration to an article was rejected, since the way in which the portrait was published clearly went beyond the illustrative use and pointed to an intention of commercial

249. Pres. District Court Haarlem, November 29, 1960, NJ 1961, 383 (*Judy Garland*): advertisement for weekly magazine "*Libelle*" with text: "Judy Garland to Holland." The Pres. held that defendant was allowed to refer to actual events in an advertisement for its magazine. But certain false statements were held to be unlawful towards Garland's impresario.

250. Cf. Van Oerle, Hoofdenhandel. Het portret als handelswaar, in: *Recht in de kijker, het recht en de media*, Jonge Balie Congres 1990, at 122.

251. Pres. District Court Haarlem, June 26, 1974, NJ 1974, 415; BIE 1977, no. 3, at 11 (*"De slag om het voetbalgoud"*). Cf. Court of Appeals Amsterdam, November 28, 1985, KG 1986, 12; IER 1986, no. 4, at 12; AMI 1986, at 145 (*STER/volkskrant*): not plausible that the pictured politicians have a reasonable commercial or immaterial interest in opposing publication of their portraits in a television commercial for newspaper "*De Volkskrant*;" Id. Advertising Standards Council (*Reclame Raad*), June 18, 1985, IER 1985, no. 58, at 117 (*Volkskrant/STER*); Pres. District Court Amsterdam, September 20, 1984, KG 1984, 287; AMI 1986, at 62 aff'd Court of Appeals Amsterdam, December 13, 1984, AMI 1986, at 62 (*Bhagwan I*): photo of Bhagwan in advertisement for newspaper "*NRC Handelsblad*;" Advertising Standards Authority (RCC), March 26, 1985, AMI 1986, at 62 (*Bhagwan II*).

252. Supreme Court, January 19, 1979, NJ 1979, 383 (LWH); BIE 1979, no. 23, at 163, *Auteursrecht 1979*, at 52 (JHS) (*'t Schaep met de vijf Pooten*).

253. Cantonal Court Amsterdam, August 7, 1991, AMI 1991, at 207 (*Van der Heyden/Hachette*).

exploitation. It was relevant that the portrait was printed on a double page, exactly in the center of the magazine, and was advertised as a "poster". Besides, the "poster" was announced on the cover of the magazine, and the name of the magazine was printed in a misleading way on the boxing gloves and the boxing outfit of Vanderlijde.²⁵⁴

The same Court also considered the use of the fictive character "Sjef van Oekel" in a cartoon a form of commercial exploitation of the cartoon character. After the Court had established that the cartoon character constituted a portrait of the actor Dolf Brouwers, it ruled that Brouwers has a (insufficiently contradicted) reasonable commercial interest in sharing in the profits from the exploitation of his portrait.²⁵⁵

The portrayal of Petra van Niftrik, well-known in the culinary field, on the cover of the book "*Elseviers Culinair Handboek*" was considered in defiance of her immaterial interest of non-publication, because of the false suggestion that she had contributed to the book and the fact that she did not agree with parts of the content of the book. In addition, the Amsterdam Court of Appeals considered the publication contrary to her financial interest since she belonged to the group of persons who can claim a financial compensation when they give permission to use their portrait, and she was limited in the possibility of using her portrait herself on the cover of a book published by herself.²⁵⁶

[3] Conclusion

Since 1959, it has been recognized in Dutch jurisprudence that a portrayed person, on the grounds of commercial interests, can oppose the commercial exploitation by publication in any possible way. The content of the commercial portrait right is defined by forms of publication that constitute a "commercial exploitation". In case law, three types of commercial exploitation are recognized:

- a) use of a portrait in order to promote the sale of commercial products,
- b) use of a portrait in advertisements for these products, and
- c) use of a portrait in connection with information media if the portrayed could have stipulated a financial compensation.

The first two categories (a and b) are less problematic than the last one (c), since in that case forms of portrait use in an information medium are labeled as "commercial exploitation".

254. District Court Haarlem, November 6, 1990, AMI 1991, at 198 (JCSP), aff'd Court of Appeals Amsterdam, May 27, 1993, NJ 1994, 658; AMI 1995, 96 (HCJ) (*Vanderlijde/Panorama*). The Court of Appeals Amsterdam rejected Spaarnestad's free speech defense to publish an illustration next to an article because the way of publication made clear that in this case it was "a publication for primarily commercial purposes."

255. District Court Haarlem, January 22, 1991, AMI 1992, at 188 (JCSP) (*Brouwers/Schippers et al.*).

256. Court of Appeals Amsterdam, August 25, 1983, BIE 1985, no. 22, at 75; AMR 1984, at 12 (*Elsevier's Culinary Handbook*).

Boekman proposed that the judge should be guided by the relevant practice in trade circles in order to answer the question whether the financial interests of the portrayed should be recognized.²⁵⁷ Following Boekman, the Dutch Supreme Court has referred to "the development of public opinion in this regard."²⁵⁸ Therefore, the content of the commercial portrait right is also influenced by the customs in the relevant trade circles.

It is possible, on the grounds of the distinction between immaterial and commercial interests protected by Article 21 DCA, to make a distinction between the personality portrait right and the commercial portrait right. The content of the first right is broader than the content of the commercial portrait right since the former can also be appealed to against forms of publication that are not a form of "*commercial exploitation*".

4.6 Subject: Who Has a Portrait Right?

[A] Subject of Personality Portrait Right

Every natural individual can, on the basis of his personality portrait right, oppose publication of his portrait, as far as this publication is in defiance of a reasonable noncommercial interest. Article 21 DCA does not make any further requirements of the subject than that it should concern a portrayed person or next of kin. The law does not state any formal requirements to acquire a portrait right.²⁵⁹ Corporate bodies are not entitled to a portrait right.²⁶⁰ Foreigners can also oppose the violation of their immaterial interests in the Netherlands on the basis of their portrait right.²⁶¹

Article 21 also states that "*next of kin*" can oppose the publication of the portrait of their deceased family member under their reasonable interest. Article 25a DCA defines "*next of kin*" as "the parents, spouse, and children."²⁶² They can separately exercise their right. However, the next of kin exercise their own interests; not the interests of the deceased portrayed.²⁶³

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257. Boekman, *Publicaties van eens anders portret en onrechtmatige mededinging*, *BIE* 1966, 29, at 32.
258. Supreme Court, January 19, 1979, NJ 1979, 383 (LWH); *BIE* 1979, no. 23, at 163, *Auteursrecht* 1979, at 52 (JHS) (*'t Schaep met de vijf Pooten*).
259. The law does state the requirement that defendant's picture contains a person's portrait. See § 4.3.
260. Pres. District Court Utrecht, January 16, 1980, NJ 1980, 481 (*Ajax/Panini*): a photograph of players of a soccer team is not a portrait of that team.
261. See e.g. Pres. District Court Haarlem, August 8, 1989, *BIE* 1990, no. 71, at 227; *AMI* 1991, at 17 (*Bukowski*).
262. Mom, *De auteurswet 1912: Face-lift voor een dame van tachtig*, *IER* 1992, 97, at 102, argues that Article 25a DCA should also mention the life partner.
263. Pres. District Court Amsterdam, June 6, 1985, *KG* 1985, 194; *AMI* 1986, at 62 (*Diepraam's photo*): mother has no reasonable interest in opposing publication of portrait of daughter, who committed suicide ten years earlier. But see Pres. District Court Aikmaar, June 2, 1967, NJ 1967, 284 (*"Ongewijde aarde"*): use of film recording of funeral in motion picture "*Ongewijde Aarde*" (Unconsecrated soil) is contrary to rule of unwritten law pertaining to proper social conduct, and therefore unlawful towards person who was buried and his next of kin. The Pres. did not apply Art. 21 DCA, but Art. 1401 Civil Code (now Art. 6:162 Civil Code).

From the highly personal character of the personality portrait right it follows that persons other than the portrayed and the next of kin cannot appeal to this right.²⁶⁴ It is possible, however, for a third party to oppose this under the general tort clause of Art. 6:162 Civil Code,²⁶⁵ if publication also constitutes a violation of the right to respect for one's private life of this third party. However, a third party can, with the authorization of the portrayed rightfully look after the interests of the portrayed.

[B] Subject of Commercial Portrait Right

Courts have recognized that in the Netherlands foreign persons can also appeal to their commercial portrait right.²⁶⁶ The next of kin can also on the grounds of their financial interests oppose the commercial exploitation of the portrait of the deceased.²⁶⁷ The question whether a third party can appeal to the commercial portrait right, is dealt with in § 4.8.

Problematic is the question whether any natural person can oppose the publication of his portrait on the grounds of commercial interests. In case law and in literature, it seems that a limitation has been introduced regarding the persons who can appeal to commercial portrait right. The Dutch Supreme Court considered that one can speak of a reasonable financial interest

"when the popularity of the portrayed persons, obtained in their profession, is of such a nature that a commercial exploitation of that popularity, by any form of publication of their portraits becomes possible."²⁶⁸

With this, it seems that the Supreme Court has formulated three requirements²⁶⁹ that the person who appeals to the commercial portrait right should conform to:

264. Court of Appeals Amsterdam, November 28, 1985, KG 1986, 12; IER 1986, no. 4, at 12; AMI 1986, at 145 (*STER/voikskrant*); Court of Appeals Amsterdam, December 13, 1984, AMI 1986, at 62 (*Bhagwan I*); Cantonal Court Eindhoven, October 4, 1984, NJ 1985, 210 (*Taxpayer's handbook with portrait Queen Beatrix*); Pres. District Court Amsterdam, June 9, 1988; BIE 1989, no. 71, at 234 (CvN) (*WTS/IT*).

265. See Appendix A.

266. Publication in the Netherlands seems sufficient. Courts never applied the principle of reciprocity, by investigating whether Dutch men would get the same protection in the country of the plaintiff. Examples of foreigners who received protection in the Netherlands are the members of The Beatles (Pres. District Court the Hague, April 15, 1964, NJ 1964, 483; BIE 1966, no. 13, at 42), Vangelis (District Court Amsterdam, May 15, 1985, AMI 1986, at 61), Freddie Mercury, Donna Summer, Rod Stewart, Elton John (Pres. District Court Utrecht, February 20, 1986, AMI 1986, at 62; IER 1986, no. 15, at 48), Paul McCartney and Bob Dylan (District Court Haarlem, August 8, 1989, AMI 1990, at 225 (HCJ)). Only the Bureau voor de Industriële Eigendom stated under no. 32 of its petition, resulting in the decision of Supreme Court, October 28, 1948, NJ 1949, 169; BIE 1949, no. 4, at 19 (*Churchill cigars*), that the person portrayed (Churchill) originated from a Berne Convention country.

267. See § 4.7.

268. Supreme Court, January 19, 1979, NJ 1979, 383 (LWH); BIE 1979, no. 23, at 163, *Auteursrecht 1979*, at 52 (JHS) (*'t Schaep met de vijf Pooten*).

269. These requirements can implicitly be found in Court of Appeals the Hague, April 13, 1960, NJ 1961, 160 (*Teddy Scholten*).

- 1) the portrayed should enjoy popularity,
- 2) which is obtained in his profession, and
- 3) which can actually be exploited in exchange for financial compensation.

From this Spoor/Verkade concluded that artists, professional athletes, popular radio and television-hosts, quiz-masters and referees meet these requirements, but members of the Royal Family, (popular) politicians, business people, union leaders, physicians, spiritual advisers and many other categories of people do not. The latter can oppose exploitation of their portraits on immaterial grounds only.²⁷⁰

In literature, as a legal ground for the protection of financial interests of the portrayed, the positive appreciation of the achievements because of which the portrayed obtained his popularity has been put forward. In this view, the protection of financial interests is a form of labor protection.²⁷¹

The result of the *first* requirement is that unknown persons, who do not enjoy general popularity, cannot oppose unauthorized commercial exploitation of their portraits on the grounds of financial interests, even if they have no moral objections. Spoor/Verkade make an exception for the unauthorized use of portraits of (unknown) professional models.²⁷²

From the *second* requirement it follows that persons who do enjoy popularity, but who did not obtain this popularity in their profession, cannot appeal to a financial interest. Van Oerle criticized this requirement, since he does not understand why the financial interests of, for example, professional athletes deserve protection and the financial interests of amateur athletes do not.²⁷³ The Haarlem District Court has rejected the requirement of professionalism with an appeal to the public view with respect to amateur athletes. The Court decided that the Olympic medal winner Arnold Vanderlijde could oppose, on the grounds of his financial interests, the publication of a poster with his portrait.²⁷⁴

From the *third* requirement it follows that certain categories of persons, such as the members of the Royal Family and politicians, are not entitled to protection of their financial interests as long exploitation of their portraits remains an exception. For example, the Amsterdam Court of Appeals held that politicians do not have a commercial portrait right:

270. Auteursrecht, 1993, no. 194, at 284. Cf. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, at 281, who argues that persons without a popularity in the field of music, sports or culture, should have a right to oppose the unpermitted commercial use of their portraits on the basis of their personality right.

271. Spoor/Verkade, *Auteursrecht*, 1993, no. 190, at 271-272; Cohen Jehoram, *Recht op verzilverbare populariteit*, in: *Noten bij noten. Ter herinnering aan Mr L. Wichers Hoeth*, 1990, at 33; Van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, 1994, at 275.

272. Auteursrecht, 1993, no. 194, at 285. Cf. District Court Amsterdam, August 28, 1991, AMI 1991, at 207 (*Van Kinsbergen et al./De Vrijbuiters*): professional models have a reasonable interest in compensation because their portrait has been made public a second time. A specific cashable popularity is not required.

273. Van Oerle, *Hoofdenhandel. Het portret als handelswaar*, in: *Recht in de kijker, het recht en de media*, Jonge Balie Congres 1990, at 118. Id. Van Slaveren and Kramer, *Exploitatie van naam, afbeelding en prestatie van de topsporter*, 1992, at 41.

274. District Court Haarlem, November 6, 1990, AMI 1991, at 198 (JCSP), *aff'd* Appeals Amsterdam, May 27, 1993, NJ 1994, 658; AMI 1995, 96 (HCJ) (*Vanderlijde/Panorama*).

"It is true that celebrities in general exploit their popularity in the commercial atmosphere by obtaining financial compensation for appearing in advertising campaigns, however, especially politicians are not in the habit of doing so."²⁷⁵

Some judges have recognized the defense of a defendant that actual redeemability was missing, since the defendant would never have been willing to pay a financial compensation for its commercial exploitation of plaintiff's portrait.²⁷⁶

In the "*Peanut-seller*" case, the plaintiff opposed, among other things, the publication of a portrait of him selling peanuts in a news paper. The Pres. of the Amsterdam District Court judged that the photograph was published within the context of news supply and without a commercial purpose. Moreover, the Pres. considered that a reasonable commercial interest was missing since "it did not become evident that Van de Leende enjoys popularity in the [in the above-mentioned "'t Schaep" decision] defined form and that the commercial exploitation of his portrait becomes a possibility because of this [...]"²⁷⁷

In my annotation under this decision, I argued that the protection of the commercial portrait right should not be limited to certain categories of persons, but that this should be granted to every person, irrespective of the requirements discussed above. Therefore, the man who sold peanuts should also be entitled to oppose, on the grounds of financial interests, the unauthorized commercial exploitation of his portrait on, for example, picture postcards.²⁷⁸ This argument is discussed in § 7.2.

4.7 Duration of the Portrait Right

The portrayed can exercise his personality interests and his commercial interests during his lifetime. After his demise, the "parents, spouse, and children," as next of kin,²⁷⁹ can oppose the publication of the portrait of the deceased on the grounds of their own reasonable personality interest.

The next of kin can also appeal to a commercial interest of their own.²⁸⁰

275. Court of Appeals Amsterdam, November 28, 1985, KG 1986, 12; IER 1986, no. 4, at 12; AMI 1986, at 145 (*STER/volkkrant*). But see Van Oerle, *Hoofdenhandel. Het portret als handelswaar*, in: *Recht in de kijker, het recht en de media*, Jonge Balie Congres 1990, at 121. In his opinion decisive should be the question whether in practice the plaintiff's portrait is being used for commercial purposes.

276. Cf. Pres. District Court Amsterdam, March 29, 1974, NJ 1974, 398; BIE 1977, no. 81, at 265 (*Carl Denig-catalog*): a financial interest is difficult to accept because it is not plausible that defendant would have been willing to pay plaintiff a financial compensation for his assistance to defendant's advertisement. In this case, the Pres. held that plaintiff had consented to defendant's commercial portrait use.

277. Pres. District Court Amsterdam, July 12, 1990, aff'd Court of Appeals Amsterdam, January 10, 1991, AMI 1991, at 200 (JCSP) (*van de Leende/Courant Nieuws van de Dag*).

278. AMI 1991, at 202.

279. Art. 21 in conjunction with 25a DCA.

280. See Supreme Court, February 24, 1989, NJ 1989, 701 (LWH); AA 1989, at 675 (HCJ); AMI 1989, at 70; IER 1989, no. 21, at 41 (JHS); GRUR Int 1990, at 233 (HER) (*Elvis Presley I*): plaintiff, a phonogram producer, claimed an injunction against commercial use of portraits of Elvis Presley on the basis of the commercial portrait right of Art. 21 DCA. The Supreme Court held that "pursuant to Art. 21 Copyright Act 1912 DCA such a right can only be claimed by the portrayed or his next of kin." Id. Court of Appeals 's-Hertogenbosch, September 18, 1990, NJ 1991, 281; IER 1990, no. 60, at 129; IER 1991, at 24

Wallheimer names an unpublished decision, in which an appeal to a reasonable financial interest of a third party, who was acting on behalf of one of the next of kin of Elvis Presley, was honored.²⁸¹

Article 21 DCA does not state during what extent of time this right can be exercised by the next of kin. One could make an analogy with Article 20(1) DCA. Under this article,²⁸² the copyright owner is not allowed to publish the ordered portrait without the permission of the portrayed or, for ten years after his death, of his next of kin.²⁸³ The advantage of a ten-year-period is that it provides legal security.

On the other hand, one could conclude from the absence of a term in Article 21 DCA, that the next of kin can exercise their right for the rest of their lives. When all the next of kin have died, the portrait right can no longer be exercised. The Pres. of the Amsterdam District Court was of the opinion that the next of kin can also exercise the portrait right of Article 21 DCA after the ten-year-period.²⁸⁴

The drawback of this theory is that a third party must then investigate whether the next of kin are still alive. Besides, there might not be any relative, or the portrayed might prefer to leave his commercial portrait right to other persons than his next of kin.

From the recognition of certain rights of the next of kin, it follows clearly that in 1912 the legislator assumed that the portrait rights cannot be inherited. In those days, the legislator was only considering the protection of immaterial interests. After the death of the owner of the right, highly personal rights cannot be inherited by heirs.²⁸⁵

With the recognition of financial interests as a reasonable interest within the meaning of Article 21 DCA, courts in fact recognized a property right.²⁸⁶ Contrary to other property rights, this property right is not inheritable, since Article 21 DCA provides that the right can only be exercised by the parents, spouse and children in their own interest, after the death of the portrayed.²⁸⁷

(REpDR); AMI 1991, at 48 (DWFV); BIE 1991, no. 91, at 332 (*Van Uden Productions/Winterland Productions*): Art. 21 DCA is only applicable to the portrayed of his next of kin. But see Spoor/Verkade, *Auteursrecht*, 1993, no. 194, at 287 who doubt whether under Dutch law the next of kin can claim a financial interest.

281. Pres. District Court Almelo, December 19, 1978, aff'd Court of Appeals Arnhem, August 1, 1979 (*Elvis Presley*). See Wallheimer, *Overeenkomst voor character-licensing*, in: Cohen Jehoram and Asscher, *Uitgeefovereenkomsten*, 1988, 154, fn. 8.

282. See § 4.2[B](5).

283. The legislator held the period of ten years "indeed no a too short period of time." See Bijl. Hand. II 1911-1912, no. 227.5 (Explanatory Statement) ad Art. 19 (now 20), 27.

284. Pres. District Court Amsterdam, June 6, 1985, KG 1985, 194; AMI 1986, at 62 (*Diepraam's photo*): in this case, the surviving mother does not have a reasonable interest in the sense of Art. 21 DCA to oppose publication of the portrait of her daughter.

285. Cf. Art. 25(2) DCA which provides that the author's moral rights of Art. 25(1) DCA after death shall belong to the person whom an author has appointed by will or codicil.

286. Pursuant to Art. 3:6 Civil Code property rights (*vermogensrechten*) are among others rights which are intended to procure a material benefit to their holder.

287. *Id.* Spoor/Verkade, *Auteursrecht*, 1993, no. 194, at 286.

4.8 Exploitation of the Portrait Right

[A] No Assignment of Portrait Right

The portrayed cannot assign his rights under Article 21 DCA, since these rights can only be exercised by himself or, after his death, by his parents, his spouse or his children. The history of this rule is understandable since the legislator was only considering the protection the immaterial interests in 1912. It follows from the nature of these personal interests that the legislator did not opt for an assignable right. Nobody but the portrayed himself can decide whether his immaterial interests have been violated as a result of the publication of his portrait. Assignment of a portrait right to a third party or the passing on of this right through inheritance, bankruptcy or marriage portion, is therefore blocked by the text of Article 21 DCA.

Van Engelen however, states that the portrait right, as far as it concerns the protection of commercial interests, is assignable. He argues that Article 21 DCA does not obstruct the assignment of the portrait right, since this article is only applicable to the relationship of the portrayed and the author of a portrait, and the legislator in 1912 did not yet consider commercial interests. In his opinion, an unwritten assignable portrait right already exists.²⁸⁸ The problem with this opinion is that in general the commercial interest of the portrayed is considered a "*reasonable interest*" within the meaning of Article 21 DCA.²⁸⁹ Van Engelen does not come up with a solution for the conflict between his theory and Article 21 DCA which explicitly provides that the portrait right can only be exercised by the portrayed or his next of kin.²⁹⁰

There is also another reason why the commercial portrait right of Article 21 DCA cannot be assigned. Dutch law starts from a closed system of assignability. Pursuant to Article 3:83(3) Civil Code, all rights except ownership, restricted rights and rights to a claim, are only assignable, if the law provides for this. The portrait right is not a form of ownership within the meaning of the Civil Code, since ownership is the right a person has in a corporeal object susceptible of human control.²⁹¹ The portrait right is not a right in a corporeal object. Therefore, a portrait right can only be assignable if the legislator has created a legal rule for this. Such a rule has never been created.²⁹²

288. See Beantwoording rechtsvraag (198) *Intellectuele Eigendom*, AA 1991, at 267.

289. See Supreme Court, January 19, 1979, NJ 1979, 383 (LWH); BIE 1979, no. 23, at 163, *Auteursrecht 1979*, at 52 (JHS) (*'t Schaep met de vijf Pooten*).

290. Van Engelen, AA 1991, 267, at 272 warns that the reader should not estimate the chance too high that a legal successor will be successful in his claim for an injunction. *Spoort/Verkade, Auteursrecht*, 1993, no. 194, at 287 consider his attempt to sidestep Art. 21 DCA "doubtful."

291. Art. 5:1 in conjunction with Art. 3:2 Civil Code. The portrait rights is not a restricted right (*bepoort recht*) (Art. 3:8 Civil Code), nor a right to claim (*vorderingsrecht*).

292. This has been provided for the assignment of copyright (Art. 2(2) DCA), trademark right (Art. 11A Benelux Trademark Act), patent (Art. 65 Patent Act 1995), design right (Art. 13(2) and (3) Benelux Design Act), "chip" right (Art. 14(1) Semiconductor Act), plant breeder's right (Art. 48 Plant Breeder's Act), neighboring rights (Art. 9 Neighboring Rights Act), and trade names (Art. 2 Trade Name Act).

As far as the portrait right protects the financial interests of the portrayed, it can be defined as a property right within the meaning of Article 3:6 Civil Code.²⁹³ In the future this could become an assignable and inheritable right. The 's-Hertogenbosch Court of Appeals stated that this is the responsibility of the legislator, but that the judge should not anticipate on a legal regulation concerning the assignment of the portrait right.²⁹⁴

[B] Permission

In jurisprudence it is generally recognized that a portrayed person can lawfully give permission, with or without financial compensation, for publication of his portrait. For example, Phil Bloom had her photograph taken in 1967 "naked and covered with no more than a bunch of tulips" in front of the statue "het Lieverdje" on the Spui in Amsterdam. She gave permission to the photographer to publish the photograph in exchange for NLG 100. The photographer sold the copyright to a bookstore that exploited the photograph from 1969 onwards, in the form of cards and posters with the caption "With love from Holland." When later Bloom opposed this exploitation on the grounds of immaterial interests several years, the Pres. of the Amsterdam District Court judged that Bloom's legal action could not be successful on the grounds of the permission for publication given by herself in 1967.²⁹⁵ Such permission is not in defiance of the law, good manners or public order. If a portrayed reconsiders the permission given on the grounds of personality interests, the issue is a conflict of two rights: the right to respect for one's private life and the freedom of contract. The latter prevails if that the portrayed has given a valid permission to publish his portrait²⁹⁶ The Amsterdam Court of Appeals held that an unambiguous, unconditional, and well-considered permission to broadcast cannot be revoked.²⁹⁷ In the event that the portrayed does institute legal action against the publication of his portrait, the permission will be considered, according to the *volenti non fit iniuria* principle, as an unwritten ground of justification,²⁹⁸ by which the unlawfulness of the action of the defendant is taken away.²⁹⁹

The permission must be legally valid. A permission may be annulled when it has been entered into as a result of threat, fraud or abuse of circumstances

293. Article 3:6 Civil Code provides: property (patrimonial) rights are those which, either separately or together with another right, are transferable; rights which are intended to procure a material benefit to their holder; or rights which have been acquired in exchange for actual or expected material benefit.

294. Court of Appeals 's-Hertogenbosch, September 18, 1990, NJ 1991, 281; IER 1990, no. 60, at 129; IER 1991, at 24 (REPdR); AMI 1991, at 48 (DWFV); BIE 1991, no. 91, at 332 (*Van Uden Productions/Winterland Productions*).

295. Pres. District Court Amsterdam, May 12, 1977. *Auteursrecht* 1981, at 49 (*Phil Bloom/AKO*).

296. See Asser/Hartkamp II, *Algemene leer der overeenkomsten*, 1989, at 43. Pres. District Court Utrecht, May 9, 1995, Mf 1995, B80; KG 1995, 347; AMI 1995, 178 ("*Sex, de stand van zaken*"); in principle, it is not possible to revoke a permission to broadcast.

297. Court of Appeals Amsterdam, October 26, 1995, Mf 1996, B22 (*TROS/Philip and Tholen*).

298. Cf. Art. 6:162(2) Civil Code.

299. Cf. Court of Appeals Amsterdam, March 13, 1986, AMI 1986, at 105 (*Langerak/IKON*). Id. Annotation of Van Eck under Supreme Court, November 22, 1966, NJ 1967, 101 ("*Buitengewoon opsporingsblad*" II). See about permission as justification: *Onrechtmatige daad* (old Civil Code) I (Jansen) no. 199 e.v.

under Article 3:44(1) Civil Code. A permission which is part of a contract which has been entered into under the influence of error and which would not have been entered into had there been a correct assessment of the facts, may be annulled under Article 6:228 Civil Code.³⁰⁰

If a legally valid permission has been proved, an appeal to the reasonable interest of Article 21 DCA is in principle out of the question. However, Article 6:248(2) Civil Code provides that a rule between parties as a result of the agreement cannot be applied, if it would be unacceptable according to standards of reasonableness and fairness.³⁰¹ It is possible to oppose a publication after permission has been given, if the content or style of the publication could not in fairness be foreseen at the time that the permission was given,³⁰² or if the person who publishes cannot, according to standards of fairness and reasonableness, hold the portrayed to the permission given at an earlier stage.³⁰³

The permission should be given by the portrayed,³⁰⁴ or his legal representative if the portrayed is a minor.³⁰⁵ The question whether a legal obligation exists to verify with the portrayed whether the intermediary was legally entitled to give the permission, if permission to publish a portrait was obtained through an intermediary, is discussed in § 4.9[B][1].

Courts have generally accepted that the permission to portray, apparent from the fact that the portrayed has posed or did not protest against the recording, does not include the permission to publish.³⁰⁶ It must be clear for what forms of publication (form, quantity, duration) permission has been given. In general, the judge requires the defendant, who states as a defense that permission

300. Cf. Pres. District Court the Hague, January 29, 1985, KG 1985, 55 (*Cakici/Centrumpartij*): permission to interview plaintiff was obtained by keeping secret that the interview would be used for political propaganda reasons; Pres. District Court Amsterdam, February 2, 1995, KG 1995, 137 (*X/NCRV*): plaintiff, who was a minor of 17 at the time that she acted in defendant's film, might be able to annul her given permission under Article 3:44 Civil Code.

301. Pursuant to Art. 3:12 Civil Code, in determining what reasonableness and equity require, reference must be made to generally accepted principles of law, to current legal views in the Netherlands, and to the particular societal and private interests involved.

302. Court of Appeals Amsterdam, March 13, 1986, AMI 1986, at 105 (*Langerak/IKON*).

303. Cf. Pres. District Court Utrecht, June 29, 1989, KG 1989, 289 (*Before and after hair transplant*) in a case about an ordered portrait in the sense of Art. 20 DCA; Pres. District Court Amsterdam, February 2, 1995, KG 1995, 137 (*X/NCRV*): relevant fact is that 18 months have passed between the recording and its planned broadcasting.

304. Pres. District Court Middelburg, March 8, 1983, KG 1983, 116; BIE 1984, no. 52, at 172; NJ 1984, 44 (*fish fraud*): permission of Pres. to take photographs during court meeting is not permission to publish photograph of portrayed.

305. Pres. District Court Amsterdam, November 3, 1964, NJ 1964, 477 (*"Mensen van morgen"*): permission of minor to show film recording is not valid, since permission had to be granted by father; Pres. District Court Amsterdam, February 2, 1995, KG 1995, 137 (*X/NCRV*): it is uncertain whether permission to broadcast granted by minor is valid.

306. District Court Amsterdam, December 3, 1923, NJ 1924, at 232, W.11.170 (*Lady in traditional Zeeland costume*); Pres. District Court Arnhem, July 25, 1956, NJ 1957, 97 (*"Wij zijn ook 17"*); Court of Appeals Amsterdam, October 26, 1995, Mf 1996, B22 (*TROS/Philip and Tholen*).

was given, to prove that this permission was given clearly and unambiguously.³⁰⁷

It should appear from the agreement to which actions permission has been given. Even if permission for publication was given, the judge still investigates the nature of the publication.³⁰⁸ For example, permission to broadcast given to station RTL5 does not include the permission to rebroadcast by sister television station RTL4.³⁰⁹

[C] Permission for Commercial Use

[1] Position of Licensee: Effect of Portrait License on Third Parties?

The recognition by courts of the reasonable financial interest entails that the portrayed can share in the advantages of the commercial exploitation of his portrait. The portrayed gives permission for the commercial exploitation of his portrait for a remuneration.³¹⁰ This permission for the commercial exploitation will hereafter be referred to as license or portrait license.³¹¹

The portrait license only applies to the parties of the agreement and has no effect on third parties.³¹² The question whether the portrait licensee himself can institute legal action against the unauthorized commercial exploitation of the portrait by third parties, is an important one. The Dutch Supreme Court has

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307. Supreme Court, October 30, 1987, NJ 1988, 277 (LWH); AMI 1988, at 58 (DEB) (*Naturist*); Pres. District Court Breda, May 14, 1984, KG 1984, 172; AMI 1986, at 60 (*Former nude model*). Cf. with respect to the use of a person's voice: Pres. District Court Amsterdam, February 23, 1989, KG 1989, 124 (*De Gooyer/Banana-Split*). But see for an implicit permission for publication inferred from the conduct of the portrayed who did not protest: Pres. District Court Amsterdam, June 1, 1995, Mf 1995, at B97; AMI 1995, 196 (*"Bed en andere geheimen"*): Plaintiff, a visitor of a night club, was filmed by a television station when he performed on stage with a striptease dancer. A few days later the visitor contacted the producer and asked to be made unrecognizable. The producer denied his request and told him that the film was going to be broadcast. After the broadcast, the visitor claimed an injunction and damages. The Pres. found that the visitor implicitly consented to the broadcast because he had not protested in any way after the producer had told him that the film was going to be broadcast. However, the Pres. also found that the station had no (implied) permission to rebroadcast the film.
308. District Court Amsterdam, July 22, 1976, NJ 1978, 24 (*Casino gambler*); Pres. District Court Amsterdam, November 22, 1974, NJ 1976, 336 (*Bob Meijer in motion picture "Alicia"*); Cantonal Court Utrecht, October 7, 1986, NJ 1987, 525; PRG 1986, 2602; AMI 1987, at 114 (*"Randgroepjongeren" II*); District Court Zutphen, October 31, 1985, NJ 1986, 636; IER 1986, no. 3, at 9; AMI 1986, at 61 (*Nude motorcyclist II*): permission to publish nude picture in magazine "Jet Set" does not encompass any publication in any context. In this case, publication in hard porn magazine "Rosie" was held to be unlawful.
309. Pres. District Court Utrecht, May 9, 1995, Mf 1995, B80; KG 1995, 347; AMI 1995, 178 (*"Sex, de stand van zaken" I*): plaintiffs, two lesbians, who were dressed lightly, were filmed while kissing each other in a gay disco. They agreed to be filmed and interviewed for a television program aired by RTL5, which permission did not include a broadcasting by RTL4.
310. See e.g. Pres. District Court the Hague, April 15, 1964, NJ 1964, 483; BIE 1966, no. 13, at 42 (*Beatles*); Pres. District Court Haarlem, June 26, 1974, NJ 1974, 415; BIE 1977, no. 3, at 11 (*"De slag om het voetbalgoud" I*). See for a thoughtful opinion about the legal nature of the permission: *Franx in his conclusion under Supreme Court*, January 19, 1979, NJ 1979, 383 (LWH); BIE 1979, no. 23, at 163, *Auteursrecht 1979*, at 52 (JHS) (*'t Schaep met de vijf Pooten*).
311. The general rules of contract law are applicable to this license, See § 4.8[B].
312. The portrait license is not a restricted right in the sense of Art. 3:8 Civil Code because a portrait right does not meet the requirement of Art. 3:81(1) Civil Code that it must be assignable.

explicitly denied this possibility in a case in which a similar action had been granted on the basis of Article 6:162 Civil Code (general tort clause)³¹³ to persons exploiting performances of performing artists, when the Neighboring Rights Act was not yet effective. The Dutch Supreme Court considered

"that whoever makes sound recordings of the performances of a performing artist with his permission, should be able to oppose the reproduction of these recordings on a copy - even for some time after the death of the artist - since otherwise the possibility for the artist to ask a reasonable compensation for his permission, will be seriously undermined."³¹⁴

However, The Dutch Supreme Court rejected this construction for the portrait right, with the consideration

"that [authorized phonogram producer] BMG et al. cannot oppose the use of portraits of Elvis Presley by the [unauthorized producer] Boogaard et al. In the Netherlands, under Article 21 DCA 1912, only the portrayed himself or his next of kin are entitled to such a right. In this light [Boogaard's] use of the portraits does not constitute a tort against BMG and co."³¹⁵

Since Elvis Presley is dead, only his next of kin can oppose the commercial exploitation of his portrait on the basis of their own interests.³¹⁶

Winterland obtained, in the United States, the exclusive rights to the publication of portraits of pop artists like Madonna, Michael Jackson, George Michael and Tina Turner. The Dutch company Verkerke was given the exclusive license by Winterland for the production or the sale of posters with their portraits. Nevertheless, Winterland and Verkerke could not oppose, in the Netherlands, the sale of unauthorized posters of these artists. Following the Dutch Supreme Court, the 's-Hertogenbosch Court of Appeals ruled that, under Dutch law, licensees do not have a right of their own, and that only the portrayed or next of kin can appeal to the portrait right.³¹⁷

There are two decisions of lower courts that are not in accordance with the doctrine of the Dutch Supreme Court. In these cases an action on the part of the exclusive licensee was considered possible. In the "*Rec Track*" case, the Pres. of the Utrecht District Court held that defendant, who had provided records with new covers containing the portraits of artists, did not only act unlawfully against

313. See § 5.2[A].

314. Supreme Court, February 24, 1989, NJ 1989, 701 (LWH); AA 1989, at 675 (HCJ); AMI 1989, at 70; IER 1989, no. 21, at 41 (JHS); GRUR Int 1990, at 233 (HER) (*Elvis Presley I*), para. 3.3.

315. Supreme Court, February 24, 1989, NJ 1989, 701 (LWH); AA 1989, at 675 (HCJ); AMI 1989, at 70; IER 1989, no. 21, at 41 (JHS); GRUR Int 1990, at 233 (HER) (*Elvis Presley I*), para. 3.5.

316. Cf. Art. 6:163 Civil Code: There is no obligation to repair damage when the violated norm does not have as its purpose the protection from damage such as that suffered by the victim.

317. Court of Appeals 's-Hertogenbosch, September 18, 1990, NJ 1991, 281; IER 1990, no. 60, at 129; IER 1991, at 24 (REPdR); AMI 1991, at 48 (DWFV); BIE 1991, no. 91, at 332 (*Van Uden Productions/Winterland Productions*). Id. Pres. District Court the Hague, April 15, 1964, NJ 1964, 483; BIE 1966, no. 13, at 42 (Beatles): the unpermitted use of photographs of The Beatles in connection with chewing gum was held to be unlawful towards The Beatles members, but not towards Nems Ltd., their exclusive licensee, which was authorized to grant (sub)licenses to exploit their portraits.

the artists portrayed, as a result of violation of Article 21 DCA, but also against the exclusive licensee. The Pres. considered:

"This violation [of the portrait right] is an interest for which also MRC et al. can appeal to legal protection, now that Rec Track without authorization violates exclusive right of MRC et al. to the commercial exploitation of the popularity of the artists."³¹⁸

The Haarlem District Court held that the use of portraits of Paul McCartney and Bob Dylan by a bootleg producer was (also) unlawful towards the record producers, who held the exclusive rights to the use of their portraits, as part of the exploitation of their musical performances.³¹⁹ In his annotation to this decision, Cohen Jehoram observes that the relevant difference with the "*Elvis Presley*" case decided by the Dutch Supreme Court, lies in the fact that, in this case, the portrayed were still alive. When they are dead, only the next of kin can institute an action.

The outcome of these decisions, however, appears to be inconsistent with the "*Elvis Presley*" decision by the Dutch Supreme Court.³²⁰ In the "*Elvis Presley*" decision, the Amsterdam Court of Appeals in para. 4.4, ad f. rejected defendant's appeal to the above-mentioned "*Rec Track*" case, by pointing to the fact that the particular case involved living artists, whereas in the case of the deceased Elvis Presley, only his next of kin are entitled to an action. However, in appeal, the Dutch Supreme Court stated in general terms - without referring to the distinction made by the Court of Appeals - that only the portrayed or his next of kin are entitled to a right to oppose the unauthorized use of portraits under Article 21 DCA.

However, the recognition in lower case law of the personal action of the licensee while the portrayed is alive, does not yet offer a suitable rule for the optimal commercial exploitation of the portrait. The amount licensees are willing to pay for a license to commercially exploit a portrait is negatively influenced by the risk that the portrayed may suddenly die.

Article 30 DCA states that the portrayed is entitled to the same means of enforcement as the owners of the copyright under Articles 28 and 29 DCA. On the basis of Article 28(7) DCA, the licensee is also entitled to the rights mentioned in sub-sections 2-6 of this article, insofar as they serve to protect the rights he is licensed to exercise.³²¹ From this one could infer that portrait licensees can also exercise these rights. However, the 's-Hertogenbosch Court of Appeals rejected this reasoning. According to the Court of Appeals, the legislator passed over Article 30 DCA, when amending Articles 28 and 29. The Court was of the opinion that Article 30 only determines what rights can be exercised by the owner of the portrait right. The licensee cannot be the owner of a portrait

318. Pres. District Court Utrecht, February 20, 1986, AMI 1986, at 62; IER 1986, no. 15, at 48 (*Motown/Rec Track*).

319. District Court Haarlem, August 8, 1989, AMI 1990, at 225 (HCJ) (*Kierke/EMI and CBS et al.*).

320. Id. Verkade in his annotation under Court of Appeals 's-Hertogenbosch, September 18, 1990, AMI 1991, at 48 (*Van Uden/Verkerke*).

321. These are not rights to claim damages, but the right to seize, and the right to claim infringing copies or to destroy them.

right, since Article 21 DCA states that this is reserved for the portrayed and next of kin.³²²

In his annotation under this decision, Verkade does not think this a very solid argumentation. In his view, it can be defended that the rights which have been granted to the licensee are also in the interest of the licensor. In that case, Article 28 in conjunction with 30 DCA take priority over Article 21 DCA.³²³ However, the problem with this view is that the interest of the licensee may clash with the interests of the next of kin.

[2] Improvement of Position of Portrait Licensee

The portrait licensee can strengthen his position, if the portrayed, in the agreement in which he gives permission for the commercial exploitation of his portrait, grants an (irreversible) right to institute legal action in the name of the portrayed.³²⁴ It is possible to achieve a license with an economic result which, to a large extent, can be compared to the portrait right, by including the following provisions in the license agreement:

- a) exclusive representation by the licensee;
- b) a commitment not to enter into an agreement without permission of the licensee;
- c) a right of the licensee to institute action against third parties, and
- d) the obligation to transfer damage awards to the licensee.

This construction at least enables the licensee to institute legal action against third parties exploiting the portrait of the licensor without permission. However, this does not yet create a right of the licensee himself. In principle, the right of the licensee has a non-privative character. Such a right, even if irreversible, does not entail that the licensor who gives it loses his rights in question,³²⁵ unless the licensee explicitly stipulates that the licensee will exercise the licensor's rights with exclusion of the licensor. However, such a stipulation only has effect on third parties who knew or must have known it.³²⁶ Therefore, despite his license right, the portrayed may declare before the court that he does not object to exploitation by a third party, or he may, contrary to an exclusive license agreement, give permission to third parties for the commercial exploitation of the

322. Court of Appeals 's-Hertogenbosch, September 18, 1990, NJ 1991, 281; IER 1990, no. 60, at 129; IER 1991, at 24 (REPdR); AMI 1991, at 48 (DWFV); BIE 1991, no. 91, at 332 (*Van Uden Productions/Winterland Productions*).

323. AMI 1991, at 49.

324. Cf. Cantonal Court Eindhoven, October 4, 1984, NJ 1985, 210 (*Taxpayer's handbook with portrait Queen Beatrix*): the Rijks Voorlichtings Dienst (*Government Information Service*) cannot claim damages, because the State, nor the Government Information Service showed any evidence that it has been authorized to represent the Queen as a person in court.

325. Art. 3:74(1) Civil Code. Cf. Supreme Court, September 29, 1989, NJ 1990, 307 (DWFV); AMI 1990, at 91 (dB) (*8 Realisten*).

326. Art. 7:423(1) Civil Code. In principle, the third party must prove his good faith, which, however, will often be assumed. See MvA (Statement of Reply) Tweede Kamer 17 779, no. 8, at 8.

portrait.³²⁷ If the third party did not have (to have) knowledge of the stipulation, the third party does not infringe the rights of the licensee, even though he stipulated that the licensor would not himself exercise his rights.

Verkade is of the opinion that there is not much need for a legal assignment of the portrait right during the lifetime of the portrayed. He does not view the non-exclusive effect of the portrait license as a disadvantage, but as an advantage, since personality aspects continue to play a role in the commercial exploitation of the portrait.³²⁸ However, Verkade ignores the fundamental objection that in this construction, the licensee is not able to claim his own (possibly much more extensive) damage, since he does not act by virtue of his own right, but on behalf of the portrayed.³²⁹ The fact that it remains possible for the portrayed to act contrary to permission given earlier, means that there is no absolute guarantee for the licensee. This influences the amount of financial compensation the portrayed can claim for giving permission for commercial exploitation.³³⁰

[3] Position of Owner after Assignment or Exclusive License Under Foreign Law

Dutch Courts have held that foreigners can appeal to their commercial portrait right³³¹ in the Netherlands, irrespective of the question whether a Dutch citizen is entitled to an equal right in the home country of this foreigner.³³² What, however, is the position of a foreign plaintiff who has obtained the commercial portrait right after assignment under foreign law, or who has obtained an exclusive license? Contrary to the situation in the Netherlands, American law allows the assignment of a right to commercially exploit a portrait.³³³ Since 1953, it has also been recognized in the United States that the holder of an exclusive license can personally institute legal action against the unauthorized exploitation of a portrait.³³⁴ What is the legal position of the assignee of the right of publicity, or of the holder of an exclusive license to certain forms of commercial exploitation of a portrait, if he obtained his rights under foreign law?

327. He breaches his contract with the licensee. See for a case of conflicting licenses: Pres. District Court Breda, November 1, 1989, KG 1989, 432 (*Brian Roy-clothing*): Borsumij received a license to use soccer player Brian Roy's name and portrait for advertising purposes for its sports wear and shoes. Ajax, the soccer team of Brian Roy, had a similar contract for Ajax soccer players with a competitor of Borsumij. The Pres. held that Borsumij did not act unlawful towards Ajax because Borsumij got the license from Brian Roy before he signed his contract with Ajax as a player.

328. Annotation under Court of Appeals 's-Hertogenbosch, September 18, 1990 (*Van Uden/Verkerke*), AMI 1991, at 49.

329. The trademark right, design right, copyright, and patent licensee is able to claim his own damage under certain conditions, see resp. Artt. 11D Benelux Trademark Act, 13(4) Benelux Design Act, Art. 27a DCA, and Art. 70(5) Patent Act 1995.

330. But see § 8.3 in the event that the portrait right would be deemed assignable.

331. See § 4.6[B].

332. In my opinion, the lack of the principle of reciprocity must be explained by the relation with the personality right. See § 7.2.

333. See § 2.8.

334. See §§ 1.2, and 3.1[C].

The answer to the question whether the owner of an American right of publicity, or an exclusive license based thereupon, can institute legal action in the Netherlands, is determined by Dutch law. The plaintiff must show in court that he is the owner of the right under foreign law. Thereupon, the right of plaintiff is judged on the basis of the equivalent Dutch law. The content of the Dutch rule determines whether defendant has committed a tort.³³⁵ This means that insofar as the right of publicity refers to portraits, only the portrayed or his next of kin can appeal to the portrait right in the Netherlands. Without an authorization to sue from these persons, the owners of a right under foreign law cannot legally exercise their rights in the Netherlands.

4.9 Prima Facie Case of Infringement of the Portrait Right and Remedies

[A] Criminal Enforcement of Portrait Right

Article 35(1) DCA states that whoever publicly exhibits a portrait without authorization, will be punished with a fine of the fourth category.³³⁶ Article 35(2) DCA states that infringement of this rule is an offense, not a felony.³³⁷ From this it follows that those attempting to infringe, or being accessory to the infringement of the portrait right, are not liable to punishment.³³⁸

This article affords the Public Prosecutor the opportunity to take legal action against forms of publication that harm the reasonable interest of people who are not readily inclined to go to court themselves. However, it was in the 1960's that the Public Prosecutor last instituted action on the basis of this article.³³⁹

The Public Prosecutor has never taken action to protect the financial interests of the portrayed. The cases where the Public Prosecutor charged defendants on the grounds of Article 35 DCA dealt primarily with publications

335. Cf. Supreme Court, February 24, 1989, NJ 1989, 701 (LWH); AA 1989, at 675 (HCJ); AMI 1989, at 70; IER 1989, no. 21, at 41 (JHS); GRUR Int 1990, at 233 (HER) (*Elvis Presley I*): In the Netherlands, BMG could exercise the performing rights, which Elvis Presley had assigned to BMG under American law, under Dutch tort law. It was not held to be relevant whether such rights were assignable under Dutch law.

336. Pursuant to Art. 23(4) Criminal Act: NLG 25,000.

337. Pursuant to Art. 44(1) Judicial Organization Act (RO) the Cantonal Judge will decide the case in first instance.

338. Artt. 46 and 52 Criminal Act. Cf. Cantonal Court Amsterdam, September 26, 1959, NJ 1961, 246 (Story of detective De Roos I): the editor, not the publisher or printer, has committed the criminal offense of Art. 35 DCA; Cantonal Court Amsterdam, September 26, 1959, NJ 1961, 247 (Story of detective De Roos II): acquittal of general editor who had not read the article before publication. See for a discussion of the criminal liability of the publisher and printer: Schuijt, *Werkers van het woord*, diss. 1987, § 6.4.3, on Artt. 53 and 54 Criminal Act.

339. Supreme Court, October 21, 1969, NJ 1971, 124 (CB) (*Witness robbery*).

that could endanger the portrayed,³⁴⁰ or that could hinder his rehabilitation.³⁴¹ These are common interests, with a more objective character.

The Dutch Supreme Court has decided that the words "*without authorization*" indicate, that the person who publishes the portrait did not have any right by virtue of the law, an agreement or anything else.³⁴²

[B] Civil Enforcement of Portrait Right

[1] Elements of a Claim for Infringement of the Portrait Right: No Fault

The portrayed who wishes to oppose the publication of his portrait, must argue and, if necessary, prove that defendant

- 1) published³⁴³
- 2) a portrait³⁴⁴
- 3) of the portrayed³⁴⁵
- 4) without permission³⁴⁶
- 5) in defiance of a reasonable interest of the plaintiff.³⁴⁷

Is it also required for infringement of the portrait right that the tort can be imputed to the defendant? From Article 6:162 Civil Code it follows that the answer to this question is affirmative with respect to a claim for damages.³⁴⁸ However, Article 21 DCA does not mention this requirement, and Article 35 DCA, which states that publication of a portrait "*without authorization*" is an offense, does not include a requirement of intent.³⁴⁹ With respect to adjudgement of an injunction against future publication, the answer to the question is therefore, in principle, negative. This may be illustrated by three situations in which the question of fault or intent can play a role. Can the defendant avoid liability by stating the defense that publication of the portrait cannot be imputed to him because he

- 1) did not know or did not have to know that the portrayed has a reasonable interest which opposes publication?

340. Cantonal Court Middelburg, November 14, 1928, W 11.932 (Strikebreakers); Supreme Court, October 21, 1969, NJ 1971, 124 (CB) (*Witness robbery*).

341. Cantonal Court Amsterdam, September 26, 1959, NJ 1961, 246 (Story of detective De Roos I); District Court Amsterdam, September 20, 1965, aff'd Supreme Court, November 22, 1966, NJ 1967, 101 (vE) (*"Buitengewoon opsporingsblad" II*).

342. Supreme Court, May 22, 1916, NJ 1916, at 808; W.9975 (Handelsprotector). The Court found the charge "without authorization" sufficiently clear.

343. See §4.5[A].

344. See § 4.3.

345. See § 4.4.

346. See § 4.8.

347. See § 4.5[B] and § 4.5[C].

348. See *infra* § 4.9[B][3].

349. Unlike the offenses of Art. 31, 31a, 31b and 34 DCA, which include a requirement of intent.

- 2) did not know or did not have to know that defendant had not given permission for the publication?, or
- 3) did not know or did not have to know that it involved a portrait of the portrayed?

The *first* defense has never been recognized in cases with respect to both the personality portrait right and commercial portrait right, since the unlawfulness follows from the reasonable interest of the portrayed.³⁵⁰

In the *second* defense, the defendant argues that he was under the impression that the portrayed had given permission for publication, usually because this permission has been obtained through an intermediary who supplied the portrait. This defense will not succeed if there is a legal obligation to verify with the portrayed whether the intermediary was authorized to give the permission. It was decided in case law that this obligation does exist, if it follows from the nature of the photograph, the degree of intimacy with which the portrayed has been presented, and the medium and the context in which the portrayal will be published, that the personality right of the portrayed may be infringed.³⁵¹ The Dutch Supreme Court held that the party publishing a portrait cannot simply rely on the reputation of the photographer who supplies the photograph.³⁵²

Does such an obligation to verify also exist if the defendant wishes to exploit a portrait for commercial purposes? The 's-Hertogenbosch District Court has ruled that the licensee has no legal obligation to verify permission with a portrayed model, if the licensee obtained, in itself by no means considered unusual, a license from a professional licensor.³⁵³ In this particular case, the intermediary, a professional photographic designer who exploited the photographs "*Fritz and Friends*" produced by him, had supplied defendant with a non-exclusive license to exploit the photographs for certain commercial products. The portrayed model claimed damages for infringement of her commercial portrait right. The 's-Hertogenbosch District Court rejected her claim for damages. However, the court did not reveal whether this obtained permission defense will succeed as a defense against a claim for an injunction against further commercial exploitation.

In the *third* defense, defendant argues that he did not particularly intend to portray the plaintiff. In this case, in principle, it follows from the reasonable interest of the portrayed that this defense cannot succeed if his portrait was actually published. However, from the narrow description of the term "*portrait*"

350. Cf. Boekman, annotation under District Court 's-Hertogenbosch, August 14, 1992, BIE 1993, no. 51, at 188 (*Fritz and Friends*). In criminal cases, suspects sometimes stated the defense that their acts were not blameworthy because they had no knowledge of the reasonable interest of the portrayed. Courts always rejected this defense. By making public the portrait they created a "by no means as imaginary to be ignored chance." that the interests of the persons portrayed are invaded. Supreme Court, October 21, 1969, NJ 1971, 124 (CB) (*Witness robbery*): There is also a reasonable interest "if the non-imaginary possibility exists that the portrayed [...] will suffer damages as a consequence of this publication." Cf. Supreme Court, November 9, 1954, NJ 1955, 55 (WP) (*Cicero*).

351. Cf. Court of Appeals Amsterdam, April 27, 1989, NJ 1990, 370; AMI 1989, at 125 (HCJ) (*Vondelpark II*).

352. Supreme Court, June 24, 1952, NJ 1955, 742 (BVAR) (*Girls in bathing suit*).

353. District Court 's-Hertogenbosch, August 14, 1992, BIE 1993, no. 51, at 188 (SB) (*Fritz and Friends*).

it follows that the defense that not the portrayed, but another person has actually been depicted, is valid.³⁵⁴ The distinction between actually being depicted or not being depicted is becoming increasingly vague, as a result of computer techniques in which photographs can be manipulated and persons can be reanimated.³⁵⁵ Suppose the defendant publishes a drawing of a person, in which the public and the judge recognize plaintiff's portrait, but of which the defendant claims that it represents another person. Is the third defense valid in this case? One could argue that in both personality portrait right and commercial portrait right cases, this defense cannot succeed if the plaintiff institutes an action for an injunction. Since it has been established that the public recognizes the plaintiff in the portrayal, the plaintiff's reasonable interest is infringed. However, if the defense is credible, this may be relevant to awarding a claim for damages.

However, the Pres. of the Amsterdam District Court does not seem to share this opinion. Television-hostess Sylvia Millecam opposed the use of a photograph of a look-alike model, named Claudia, on the inside and back of a brochure that advertised computer articles. From the statements that were produced, it appeared that acquaintances of Millecam thought that she had been represented in the photograph. The Pres. rejected the claim for damages and an injunction against this act, because he was of the opinion that it had not been shown that defendant "deliberately chose a photograph of Claudia in which she resembles Millecam." Relevant in this decision was that in the advertisement there was no other reference to Millecam.³⁵⁶ The question is whether the outcome of this decision would have been different if defendant had not used a photograph, but a drawing of Claudia/Millecam in the brochure. An appeal to Article 21 DCA would then have been possible.³⁵⁷

Only the portrayed himself, or in the case of his death, his next of kin or an authorized agent appointed by them, can take legal action against infringement of the portrait right. They can institute the following actions:

- 1) a claim for an injunction;
- 2) a claim for damages
- 3) other actions, such as a claim for the statement in court regarding the unlawfulness of the publication; a claim for publication of the decision; a claim for rectification; claiming as property objects on which the portrait has been depicted, and a claim for taking back the objects on which the portrait has been depicted.

354. See § 4.4.

355. See § 11.5.

356. Pres. District Court Amsterdam, December 22, 1994, IER 1995, no. 12, at 61; *Mf* 1995, B19; *AMI* 1995, 136 (JHS) (*Millecam/Escom*). In his annotation under this decision, *AMI* 1995, 136, at 137, Spoor criticized this decision. He suggested introducing, in analogy with copyright law, an element of copying in portrait law, and to reverse the burden of proof if the public recognizes plaintiff in defendant's portrait.

357. Profiting of the popularity of a person by taking other identifying elements than a portrait can be unlawful, see § 5.2[B]. In this case a claim based on Art. 21 DCA was not possible because it was not contested that defendant had used a portrait of Claudia, not a portrait of Millecam.

Persons who publish a portrait in defiance of a reasonable interest are liable under civil law. They may be operators of an information medium (broadcast network/publisher), the (chief) editor/reporter, or the producer and vendor of commercial products. The basic rule is that if damage, as a result of a tort, has been caused by more than one (legal) person, all persons, are severally liable.

In the case of an infringement of the portrait right by the media, the publisher is usually summoned³⁵⁸ with respect to an award of damages. In cases of a claim for an injunction, the owner of the portrait must also be summoned, to prevent him from publishing with another publisher.

On the basis of Article 5(3) EEC-Execution treaty, the plaintiff can, with respect to an obligation resulting from a tort, summon the defendant, who resides in the territory of a Member State, to appear in the court of the place where the damaging fact has occurred. Thus, residents of other Member States may be summoned to appear in court in the Netherlands, if the plaintiff's portrait has (also) been published in the Netherlands.³⁵⁹

[2] Injunction

[a] Injunction or Right to Compensation?

In many portrait right cases, the portrayed claims in summary proceedings an injunction against further publication of his portrait and a penalty in the event of non-compliance. Courts have awarded this claim both for the infringement of the personality portrait right,³⁶⁰ and the commercial portrait right.³⁶¹ Should the

358. The publisher is the person who makes public. As employer the publisher is also responsible for his employees who make public the portrait: Art. 6:170 Civil Code.

359. Cf. Pres. District Court the Hague, February 15, 1985, KG 1985, 92; AMI 1986, at 60 (*Naturist*). ECJ, March 7, 1995 (C-68/93), AA 1995, 880 (P.Vlas); Mf 1995, B47 (*Shevill and Chequepoint/Presse Alliance*): in the case that an unlawful publication is distributed by a publisher in another EU-country, the plaintiff has the option to institute legal proceedings against the publisher in a) the country where the publisher has its official seat, or in the countries where the publication has been distributed, and where the plaintiff claims to have suffered his damages.

360. Pres. District Court Amsterdam, February 17, 1983, KG 1983, 94 (*Des Bouvrie/PSP*): injunction to show film of interview with Des Bouvrie; District Court Haarlem, February 14, 1984, no. 1396/1983; AMI 1986, at 59 (*EO-announcer*): injunction to publish photo-montage under a penalty of NLG 50,000; Pres. District Court Zutphen, August 13, 1984, KG 1984, 292; AMI 1986, at 60 (*Nude motorcyclist I*): injunction to publish pictures of plaintiff; District Court Haarlem, January 22, 1991, AMI 1992, at 188 (*JCSP (Brouwers/Schippers et al.)*): injunction to picture plaintiff and/or the figures created by him in an obscene and/or pornographic context under a penalty of NLG 500,000.

361. Pres. District Court the Hague, April 15, 1964, NJ 1964, 483; BIE 1966, no. 13, at 42 (*Beatles*): injunction to distribute exclusive photographs of The Beatles; Pres. District Court the Hague, February 17, 1965; BIE 1966, no. 14, at 44 (vdZ) (*Donners*): injunction to distribute photo of Donners; Pres. District Court the Hague, December 7, 1965; BIE 1966, no. 66, at 240 (*Feyenoord players*): injunction to make public pictures of plaintiffs, whether or not in conjunction with their names; Pres. District Court Haarlem, June 26, 1974, NJ 1974, 415; BIE 1977, no. 4, at 13 (*De slag om het voetbalgoud II*): injunction to exploit the book "De slag om het voetbalgoud."

imposed injunction be violated by publication of the portrait, the forfeited damages can be claimed for each violation.³⁶²

In literature it has been pointed out that in the case of an infringement of the commercial portrait right, the Dutch Supreme Court possibly does not intend to award an action for injunction, but a right to compensation.³⁶³ In the "*'t Schaep met de vijf Pooten*" decision, the Dutch Supreme Court spoke of the reasonable interest of the portrayed to "share the advantages of [...] exploitation, by not agreeing to publication of their portraits for commercial purposes without receiving financial compensation."³⁶⁴

Should, however, only a right to compensation be recognized, the portrayed will have to tolerate every form of publication that does not also infringe his personality right, if the operator pays a compensation, fixed (if necessary by the judge) in accordance with what is considered fair and reasonable, to the person who is entitled to the claim. It will then be difficult for the portrayed to optimally exploit his portrait.³⁶⁵

One could argue that the portrayed should have an action for injunction, in order to be able to personally set the price and the form of the commercial use, for which he is willing to give permission, or could otherwise enjoin. The words of the Dutch Supreme Court may be explained by the fact that the plaintiffs had not claimed an injunction, but merely damages. In lower courts, the claim for an injunction against infringement of the commercial interest of the portrayed has been awarded.³⁶⁶

Spoor and Verkade think that the portrayed should be able to institute an action for injunction upon his commercial interests, if it is likely that an exclusive license would result in a higher compensation. In their opinion, the judge should be able to reject a claim for an injunction, if the portrayed does not need exclusivity, or if the interest in the use of the portrayal for a compensation ranks higher than the wish of the portrayed not to be depicted in, for instance, a book.³⁶⁷ However, the balance between what the portrayed may or may not claim on the basis of his commercial interest, should not primarily be sought in

362. Cf. Court of Appeals Amsterdam, February 1, 1978, NJ 1979, 161 (*Nieuwe Revu/Sonja Barend et al.*): dispute about enforcement after violation of court injunction to comment in a defamatory way plaintiff's legal action against weekly magazine *Nieuwe Revu*, because magazine had published defamatory letters of readers who commented plaintiff's legal action.

363. Cf. Spoor/Verkade, *Auteursrecht*, 1993, no. 194, at 286; Cohen Jehoram, *Recht op verzilverbare populariteit*, in: *Noten bij noten. Ter herinnering aan Mr L. Wichers Hoeth*, 1990, 33, 35, discusses the commercial-financial interest of the portrayed "in publication-only-after-compensation."

364. Supreme Court, January 19, 1979, NJ 1979, 383 (LWH); BIE 1979, no. 23, at 163, *Auteursrecht* 1979, at 52 (*JHS*) (*'t Schaep met de vijf Pooten*).

365. See for an economic justification of this proposition § 7.3[A].

366. E.g. District Court Haarlem, August 8, 1989, AMI 1990, at 225 (HCJ) (*Kierke/Emi and CBS et al.*): injunction to make public portraits of McCartney and Dylan in connection with records without permission of their phonogram producers; District Court Haarlem, November 6, 1990, AMI 1991, at 198 (JCSP), aff'd Court of Appeals Amsterdam, May 27, 1993, NJ 1994, 658; AMI 1995, 96 (HCJ) (*Vanderlijde/Panorama*): injunction to publish portrait of Vanderlijde because of his financial interest; Pres. District Court Arnhem, November 24, 1993, KG 1994, 23 (*Evans/Timeless Records*): injunction to exploit unauthorized recordings of performances of plaintiff, jazz-pianist Bill Evans, and injunction to distribute Evans' portrait on inlay of compact discs and in catalog.

367. *Auteursrecht*, 1993, no. 194, at 286.

creating an action for compensation instead of an action for injunction, but in a clear definition of the forms of commercial exploitation that the portrayed can enjoin.³⁶⁸ If, for instance, the publication of a portrait in a book does not belong to the forms of commercial exploitation that the portrayed can enjoin, he will not be entitled to a compensation. In exceptional cases, it would then be possible to appeal to Article 6:168(1) Civil Code, which states that the judge may reject a claim for an injunction on the basis of considerable public interest. However, the conduct remains unlawful, and the plaintiff does not lose his right to damages.³⁶⁹ In cases of infringement of the commercial portrait right, these interests will, however, not often be present.

[b] Scope of Injunction; Prior Restraint?

In the event a claim for injunction against infringement of the portrait right is awarded, the judge must define the injunction as clearly as possible.³⁷⁰ The injunction may be defined in a broader sense than the infringement that has already occurred, provided that it meets the requirement, that in its definition, sufficient delineation is found to determine what is included in the injunction and what is not.³⁷¹

The commercial interest of the portrayed, which is to be protected by the injunction, may entail that, in order to render it effective, it can only be defined in more general terms, such as an injunction prohibiting defendant from using portrayals of plaintiff for commercial purposes. The Dutch Supreme Court has decided that such generally formulated injunctions should be interpreted restrictively. The scope of the injunction should be considered to be restricted to actions, of which it cannot be seriously doubted that, considering the interest against which the injunction has been awarded, they constitute infringements as prohibited by the judge.³⁷²

The defense that an injunction against further publication cannot be awarded, since damage has not yet been sustained, is not valid. The judge recognizes the reasonable interest of the portrayed to prevent recurrence of publications, of which it is likely that they could inflict harm.³⁷³ However, a universal injunction prohibiting defendant from publishing portraits of the plaintiff upon the basis of his personality interests cannot be awarded, since the

368. Cf. my annotation under District Court Haarlem, November 6, 1990, (*Vanderhijde/Panorama*), AMI 1991, at 202, no. 8.

369. See Asser/Hartkamp, *Verbintenissenrecht III*, 1990, at 65-66.

370. E.g. District Court Haarlem, August 8, 1989, AMI 1990, at 225 (HCJ) (*Kierke/EMI and CBS et al.*): injunction to make public portraits of Paul McCartney and Bob Dylan in connection with records or cover of records, and in connection with the distribution of records without their permission of permission of EMI/CBS.

371. See about the definition of the injunction: *Onrechtmatige daad* (old Civil Code) II (Van Nispen) no. 216. An injunction may not be described in such a way that it also encompasses lawful acts.

372. Supreme Court, February 18, 1966, NJ 1966, 208 (GJS) (*Klokkenspel-Vereniging*). Cf. Supreme Court, January 3, 1964, NJ 1964, 445 (GJS); BIE 1965, no. 27, at 98 (*Lexington*): a judicial injunction must reasonably be interpreted.

373. Court of Appeals the Hague, April 13, 1960, NJ 1961, 160 (*Teddy Scholten*): injunction to use photograph for further advertising purposes.

judge must consider per incident, on the basis of all circumstances, whether a reasonable interest is involved.³⁷⁴ Nevertheless, an injunction is possible in the case of portrayals that in themselves already infringe the personality right of the portrayed.

Usually an action for injunction is instituted after an infringement of the portrait right has been established. The judge may institute an injunction with respect to torts that have not yet occurred. This requires a reasonable danger that a tort will occur.³⁷⁵ A prior restraint (a preventive injunction) against infringement of the portrait right is not contrary to the constitutionally guaranteed freedom of speech and the prohibition of censorship,³⁷⁶ as long as its scope can be determined as to make it clear which unlawful acts are prohibited, and does not include lawful acts.³⁷⁷ Preventive injunctions fall outside the scope of the prohibition of censorship, if the prohibited conduct falls outside the protection of the freedom of speech.³⁷⁸ For example, a court may, on the basis of the reasonable interest in not showing intimate parts of the body of the portrayed, prohibit the imminent publication thereof.³⁷⁹

However, courts should only grant a preliminary injunction if no other relief is available. For example, in the "*Breekijzer*" case, the Pres. of the District Court Amsterdam did not prohibit the broadcast of a television program, even though it was held that a broadcast of this program was unlawful towards the plaintiffs. The Pres. found a relief of damages after the broadcast more appropriate in light of the fact that plaintiffs could have claimed an injunction at an earlier stage.³⁸⁰

[c] Cross-border Injunction?

In the "*Interlas*" decision,³⁸¹ the Dutch Supreme Court decided that a Dutch court may, under Dutch law, also impose an injunction against defendant's actions outside the Netherlands. The Dutch Supreme Court considered:

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374. District Court Amsterdam, August 28, 1991, AMI 1991, at 207 (*Van Kinsbergen et al./De Vrijbouter*); District Court Haarlem, March 15, 1991, Mf 1991, B53 (WFKa) (*Ferdi E.*): general injunction refused. Cf. Pres. District Court Amsterdam, June 15, 1989, KG 1989, 278 (*Berg/Laverman*): rejection of claim to enjoin invasion of right of private life, because plaintiff has not made plausible that such an invasion is imminent.
375. *Onrechtmatige daad* (old Civil Code) II (Van Nispen) no. 212.
376. Art. 7 Dutch Constitution; Art. 10 EHRC and Art. 19 ICCPR; see § 9.2[B][2].
377. Cf. Drion, *Het rechterlijk verbod en de vrijheid van meningsuiting*, in: *Op grenzen van komend recht*, Beekhuisbundel, 1969, at 91; Bunschoten, *Civielrechtelijk publicatieverbod en de vrijheid van meningsuiting, een tweelandenpunt*, AA 1987, 311, at 312; De Meij, *Uitingsvrijheid. De vrije informatiestroom in grondwettelijk perspectief*, 1989, at 87-88.
378. It follows from the words "subject to everyone's responsibility before the law" in Art. 7(1) and (3) Dutch Constitution that the freedom of speech is not absolute. Cf. Art. 10(2) EHRC and Art. 19(3) ICCPR.
379. Cf. Pres. District Court Breda, May 14, 1984, KG 1984, 172; AMI 1986, at 60 (*Former nude model*): injunction against publishing or otherwise making public without explicit written permission specific nude pictures of plaintiff in weekly magazine "Aktueel".
380. Pres. District Court Amsterdam, January 24, 1995, KG 1995, 84; Mf 1995, B39 (*Interlar c.s./RTL4*). However, the Pres. noticed that the plaintiffs did not claim a reasonable interest under Article 21 DCA.
381. Supreme Court, November 24, 1989, NJ 1992, 404 (DWFV); BIE 1991, no. 23, at 86 (*Interlas/Lincoln Electric*).

"Unless it follows otherwise from the law, the nature of the obligation or from a legal act, he who is obliged toward another person to give, do or refrain from doing something, is ordered by the court to do so, on demand of the rightful claimant. Generally there is no reason to assume that there is no room for such an order in the case of an obligation - possibly an obligation according to foreign law - which should be satisfied outside the Netherlands.

A more restricted view as defended in appeal, is not supported in the law and would, in a time of increasing international relations, lead to the unwanted result in practice, that in cases of torts with an international character - such as infringement of intellectual property rights and unlawful competition in more countries, or cross-border environmental pollution - the Dutch injured party could be impelled to go to court in all countries involved."

The rationale for this doctrine is to prevent the victim of an infringement of a right with an international character, from having to go to several courts in all countries involved. Under Dutch law it is then no longer necessary that justice is administered per country, and the case can be tried "*worldwide*" by the Dutch judge petitioned. The plaintiff, however, must show that the defendant also acts unlawfully against the plaintiff according to foreign law. This doctrine has particularly thrived in patent cases in which an injunction was imposed for the infringement of plaintiff's European patent in several EU- or EEA countries.³⁸² It follows from this rationale that it is not inconceivable that the judge may award a cross-border injunction in cases of an international infringement of the portrait right and equivalent rights abroad.³⁸³

[3] Damages

After an infringement of the commercial portrait right has occurred, the portrayed can claim financial compensation in basic legal proceedings if the infringer can be held liable for the tort. Article 6:162(1) Civil Code provides that whoever commits a tort against another which can be imputed to the him, must compensate the damages which the other person suffers as a consequence thereof.³⁸⁴ Pursuant to Article 6:162(3) an unlawful act can be imputed to the offender, if it results from his fault or from a cause for which he is responsible according to law or common opinion. This means that in addition to cases involving intent, the judge may impute an infringement of the portrait right, on the basis of common opinion. Often, such imputing to a defendant seems to

382. *E.g.* Court of Appeals the Hague, February 3, 1994, IER 1994, no. 8, at 57 (*Ares-Serono/Organon*): Injunction prohibiting Organon and its daughter companies in Belgium, Germany, France, Austria, UK, Sweden, and Switzerland from infringing plaintiff's European patent in Belgium, Germany, France, Liechtenstein, Luxembourg, Netherlands, Austria, UK, Switzerland, and Sweden.

383. *See* § 1.2.

384. Pursuant to Art. 6:98 Civil Code only damages can be recovered which are related to the event giving rise to the liability of the defendant in such a fashion that the damage, also taking into account its nature and that of the liability, can be imputed to the defendant as a result of this event.

follow from the view of the judge that the portrayed has a reasonable interest in opposing the publication of his portrait.³⁸⁵

Since the mid-1980's, an advance has increasingly been awarded in summary proceedings, in cases of unlawful competition,³⁸⁶ and it is to be expected that in future, an advance on commercial damages will also be awarded in summary proceedings in cases of unmistakable infringement of the portrait right.

Article 6:96(1) Civil Code provides that both loss suffered and profit of which the plaintiff has been deprived may be considered commercial damages. The following forms of commercial damages are generally distinguished in the event of infringement of intellectual property rights:

- a) loss of a license compensation;³⁸⁷
- b) limited sales potential for one's own or authorized products, because potential clients have purchased defendant's product;³⁸⁸
- c) depreciation of the right itself, as a result of damage to the reputation or exclusivity of the protected object;³⁸⁹
- d) other types of damages mentioned by Article 6:96(2) Civil Code, such as costs for the prevention of damage and costs for the assessment of damage.

Under Article 6:104 Civil Code, the judge can also assess the damage according to the amount of the profit or a part thereof that defendant has gained as a result of his tort. The portrayed may claim his lost profit or defendant's profit, but the

385. Cf. Court of Appeals Amsterdam, April 27, 1989, NJ 1990, 370; AMI 1989, at 125 (HCJ) (*Vondelpark II*) holding that immaterial damages caused by defendant's publication of plaintiff's portrait can be imputed to the defendant. See § 4.5[B][4].

386. See e.g. in cases of copyright infringement: Pres. District Court 's-Hertogenbosch, November 4, 1988, IER 1989, no. 55, at 110; BIE 1990, no. 57, at 181 (*Mascott show*); Court of Appeals Amsterdam, December 1, 1988, IER 1989, no. 3, at 13; BIE 1990, no. 84, at 264 (*Buzz-jacket*) affirming Pres. District Court Haarlem, March 11, 1988, IER 1988, no. 16, at 45; Pres. District Court Arnhem, January 20, 1989, IER 1989, no. 11, at 31; BIE 1990, no. 97, at 327 (*Bert- and Ernie-clip-ons*); In cases of infringement of trademark rights: Pres. District Court Middelburg, November 29, 1988, IER 1989, no. 28, at 55 (*Balsam*) and Pres. District Court Arnhem, April 12, 1990, IER 1990, no. 31, at 66 (*Counterfeit Reebok*); In cases of misleading advertisements: Pres. District Court Arnhem, February 1, 1990, KG 1990, 77; BIE 1991, no. 52, at 195 (*Slagerij Brussaard/De Echte Slager*).

387. Supreme Court, January 19, 1979, NJ 1979, 383 (LWH); BIE 1979, no. 23, at 163, *Auteursrecht 1979*, at 52 (JHS) (*'t Schaep met de vijf Pooten*): Court of Appeals Amsterdam could estimate the damages suffered (NLG 6,000 for all plaintiffs together) on the basis of the normal license fee. The plaintiff must prove the license fee he is able to ask for his a license. see District Court Amsterdam, December 12, 1970; BIE 1974, no. 11, at 20 (*Henk van Ulsen/Atema*): claimed: NLG 5,000; Court of Appeals Amsterdam, May 27, 1993, NJ 1994, 658; AMI 1995, 96 (HCJ) (*Spaarnestad/Vanderlijde*): Damage award of NLG 30,000 exclusive interest.

388. Cf. District Court Amsterdam, May 13, 1992, MF 1992, 115 (*André Fiset/Scala Agenturen*): damage award of NLG 150,000 for missing contracts after defendant had used portrait of model on packaging of pornographic products.

389. Cf. Pres. District Court Amsterdam, February 17, 1983, KG 1983, 94 (*Des Bouvrie/PSP*): Not implausible that Des Bouvrie suffered damages for loss of goodwill in his name because of defendant's use of his person in its propaganda film.

judge will be able to award only one of these two claims, which in his opinion agrees most with the nature of the damage.³⁹⁰

The portrayed is entitled to compensation for immaterial damage, fixed in accordance with what is considered fair, if, as a result of the publication of his portrait, his honor or good reputation has been harmed, or if he has otherwise been injured in his person.³⁹¹ In addition to their own immaterial damage, the next of kin may also claim immaterial damage due to violation of the memory of the deceased portrayed, if this violation would have entitled the deceased, were he still alive, to damages as a result of injury to his honor and good reputation.³⁹²

Immaterial damage does not consist of commercial damages or reduction of property, but involves mental grief, mental discontent or a reduction in one's sense of pleasure or joy in life.³⁹³ The judge must assess the amount, in accordance with what is considered fair, since feelings, such as irritation, offense, or grief, cannot be expressed exactly in terms of money. The amount of immaterial damages that the judge awards in the event of infringement of the portrait right, depends on the seriousness of the infringement of the private life and usually lies somewhere between NLG 500 and NLG 10,000.³⁹⁴ The Dutch Supreme Court has sanctioned the awarding of an advance on immaterial compensatory damages in summary proceedings.³⁹⁵

The distinction between commercial exploitation and other forms of publication is not determined by the distinction between a claim for compensation of commercial damage and a claim for compensation of immaterial damage. Immaterial damage is caused by a violation of the person, the honor or good

390. Art. 6:97 Civil Code.

391. Art. 6:106(1) Civil Code uses the words "harm other than commercial damage."

392. Art. 6:106(1)(c) Civil Code. See about this Article Van Zeven-Du Pon, *Parlementaire Geschiedenis NBW*, Book 6, at 371 *et seq.*

393. Bloembergen, *Schadevergoeding bij onrechtmatige daad*, diss. diss, 1965, no. 18; Overeem, *Smartegeld*, 1979, at 19-22; *Onrechtmatige daad* (old Civil Code) II (Bloembergen) no. 14.

394. District Court Amsterdam, July 22, 1976, NJ 1978, 24 (Casino gambler): NLG 4,000; Cantonal Court of the Hague, January 23, 1981, NJ 1981, 578 (*Extreme fat ladies*): NLG 1,500; District Court Haarlem, February 14, 1984, no. 1396/1983; AMI 1986, at 59 (*EO-announcer*): NLG 10,000 for plaintiff Glashouwer, and NLG 5,000 for the Evangelical broadcasting corporation; Pres. District Court Haarlem, August 1, 1984, KG 1984, 272; AMI 1986, at 59 (*Topless waitress in magazine "Panorama"*): NLG 2,500 advance; Pres. District Court Zutphen, August 13, 1984, KG 1984, 292; AMI 1986, at 60 (*Nude motorcyclist I*): rejection of damage advance, followed by District Court Zutphen, October 31, 1985, NJ 1986, 636; IER 1986, no. 3, at 9; AMI 1986, at 61 (*Nude motorcyclist II*): NLG 5,000; Pres. District Court Haarlem, June 20, 1986, KG 1986, 347; AMI 1987, at 115 (*Heroin problems*): NLG 1,000 advance; Supreme Court, October 30, 1987, NJ 1988, 277 (LWH); AMI 1988, at 58 (DEB) (*Naturist*): NLG 2,500 advance; Court of Appeals Amsterdam, April 27, 1989, NJ 1990, 370; AMI 1989, at 125 (HCl) (*Vondelpark II*): NLG 1,000; Pres. District Court Arnhem, November 13, 1988, KG 1989, 5 (*Kitty Courbois as "Kniertje"*): NLG 2,500 advance; Pres. District Court Haarlem, August 8, 1989, BIE 1990, no. 71, at 227; AMI 1991, at 17 (*Bukowski*): NLG 500; Cantonal Court Maastricht, October 7, 1992, Mf 1993, 95 (*Jaskowiak/De Limburger*): NLG 1,000.

395. Supreme Court, October 30, 1987, NJ 1988, 277 (LWH); AMI 1988, at 58 (DEB) (*Naturist*): NLG 5,000; Pres. District Court Amsterdam, February 18, 1993, AMI 1993, at 110 (*Breda Glamour City 1992*): NLG 5,000; Court of Appeals Amsterdam, June 18, 1992, Mf 1992, B67 (*Ronald Brok/TROS & De Vrijbuiter*): NLG 5,000 (television broadcast), and NLG 3,000 (Magazine); Pres. District Court Amsterdam, April 28, 1994, KG 1994, 171; Mf 1994, B70 (*Eveline v. B./RTL4*): NLG 10,000.

reputation. This damage may also be caused by certain forms of unauthorized commercial exploitation.³⁹⁶ On the other hand, commercial damage may also be caused by a form of publication that does not constitute a form of commercial exploitation. Commercial damage can also be claimed if it is a result of an invasion of the right to respect for one's private life.³⁹⁷ For example, the Amsterdam Court of Appeals held that the publication of a photograph of an ex-prisoner in an article entitled "*Buitengewoon Opsporingsblad*" unfavorably called the general public's attention to the portrayed, which did not merely create the possibility that he would be exposed to unpleasant treatment by others, but also caused him financial damage in his profession as a trade agent and in finding other employment.³⁹⁸ As the distinction between commercial damage and immaterial damage is vague, the judge will assume commercial damage in borderline cases, since it is more easily assessed than immaterial damage.³⁹⁹

[4] Other Claims

A claim is hardly ever filed for a declaratory statement in court⁴⁰⁰ that the publication of a portrait is unlawful. This claim is filed in cases in which a fundamental legal question is involved, to which the answer of the judge is sought in a declaratory decision.⁴⁰¹

The portrayed may claim that the decision will be published, or that the defendant will publish a rectification of the context in which a portrait was published.⁴⁰² The rectification may be a suitable remedy in the event of infringement of personality interests by publication of plaintiff's portrait in a false context.⁴⁰³

396. Cf. Pres. District Court Haarlem, August 8, 1989, BIE 1990, no. 71, at 227; AMI 1991, at 17 (*Bukowski*): award of immaterial damages after use of portrait of Bukowski in exploitation of bar.

397. Cf. Art. 6:98 Civil Code. See Van Schellen, *Toerekening naar redelijkheid naar huidig en komend recht*, 1985, at 171-73 (IVH. Belediging, pers & publiciteit).

398. Court of Appeals Amsterdam, May 17, 1966 under Supreme Court, November 22, 1966, NJ 1967, 101 (vE) ("*Buitengewoon opsporingsblad*" II) (Criminal case). Cf. District Court Amsterdam, July 22, 1976, NJ 1978, 24 (*Casino gambler*): damages in personal and commercial life after publication of photo of business man in casino; Cantonal Court Utrecht, October 7, 1986, NJ 1987, 525; PRG 1986, 2602; AMI 1987, at 114 ("*Randgroepjongeren*" II): plausible that plaintiff's commercial damages are caused by publication of plaintiff's portrait in false context in book.

399. Van Zeben/Du Pon, *Parlementaire geschiedenis van het NBW*, books 3,5 and 6, 1981, at 256.

400. Art. 3:302 Civil Code.

401. See *Onrechtmatige daad* (old Civil Code) II (van Nispen) no. 201-202a. Cf. District Court 's-Hertogenbosch, August 14, 1992, BIE 1993, no. 51, at 188 (SB) (*Fritz and Friends*): rejection of court declaration that it is unlawful "not to contact plaintiff to verify whether defendant had permission to publish plaintiff's portrait before publication."

402. Art. 6:167 Civil Code.

403. Pres. District Court Amsterdam, November 22, 1974, NJ 1976, 336 (*Bob Meijer in motion picture "Alicia"*): defendant agreed to publish an announcement that plaintiff had nothing to do with defendant's motion picture. Pres. District Court Amsterdam, February 17, 1983, KG 1983, 94 (*Des Bouwrie/PSP*): defendant PSP ordered to show rectification during 30 seconds in its next television broadcast. Cf. Pres. District Court Amsterdam, November 2, 1995, mentioned in Mf 1996, 14 (*Van Asten/De Telegraaf and Henk van der Meyden*): interviewer Henk van der Meyden cannot be ordered to rectify an interview with Vanessa, who criticizes plaintiff, since he does not endorse the story.

Article 30 DCA states that the portrayed is entitled to the same means of assertion as granted in Articles 28 and 29 DCA to the copyright owner. Article 28(1) DCA mentions the possibility for claiming as one's own property, the goods that have been distributed in defiance of the portrait right, as well as the claim for destruction of these goods, or for rendering them unusable. Article 28(4) DCA provides the possibility for immediate seizure of the infringing objects. This remedy is meant to prevent further infringement of the portrait right. Article 29(1) DCA states that these rights can only be exercised with respect to goods that are held by persons that trade them or that have themselves infringed the portrait right. The portrayed may therefore claim delivery to him or destruction of products that have his portrait on them or inside them.⁴⁰⁴ Sometimes the judge decides that defendant's product may be further traded, if plaintiff's portrait is rendered unrecognizable.⁴⁰⁵ Article 28(2) DCA recognizes the right to claim entrance fees, paid for unauthorized performances or exhibitions.

In case law it has been recognized that, in addition to the so-called order to recall or retrieve from buyers or retailers the objects that have been circulated in defiance of an intellectual property right, the claimant may also claim an order to provide an inventory of buyers with a specification of the delivered quantities.⁴⁰⁶

[5] Obligation to Produce Prima Facie Evidence; Onus of Proof

The legislator has not provided a specific rule with respect to the apportionment of the obligation to produce prima facie evidence and the onus of proof. Therefore, the judge will apply the general rules.⁴⁰⁷ Article 177 Civil Procedure Act (*Wetboek van Burgerlijke Rechtsvordering*) provides that the party that appeals to the legal consequences of the facts or rights stated by this party, carries the onus of proof, unless another apportionment of the onus of proof follows from the requirements of fairness and reasonableness. In principle, the plaintiff must prove that his portrait is involved, if the defendant argues that someone else has

404. Cf. Pres. District Court Haarlem, June 26, 1974, NJ 1974, 415; BIE 1977, no. 3, at 11 ("*De slag om het voetbalgoud*" I): defendant ordered to take away from Martini & Rossi N.V. all copies of the book "*De slag om het voetbalgoud*."

405. Court of Appeals Amsterdam, August 25, 1983, BIE 1985, no. 22, at 75; AMR 1984, at 12 (*Elsevier's Culinary Handbook*): injunction to sell cookbook with cover of plaintiff's portrait; Pres. District Court Middelburg, March 8, 1983, KG 1983, 116; BIE 1984, no. 52, at 172; NJ 1984, 44 (*fish fraud*): Photo of plaintiff in book must be deleted or made unrecognizable.

406. Pres. District Court Utrecht, February 20, 1986, AMI 1986, at 62; IER 1986, no. 15, at 48 (*Motown/Rec Track*): injunction, order to recall distributed record sleeves, order to provide list with names and addresses of buyers, and order to hand over designs, slides, schedules and moulds. Pres. District Court Arnhem, November 11, 1988, KG 1989, 5 (*Kitty Courbois as "Kniertje"*): order to hand over to plaintiff's counsel all copies of infringing writings which defendant owns, or will own. Cf. Supreme Court, February 23, 1990, NJ 1990, 664 (DWFV); BIE 1991, no. 81, at 294 (*Hameco/Smith Kline and French*) in a case of patent infringement.

407. Cf. Spoor/Verkade, *Auteursrecht*, 1993, no. 195; *Onrechtmatige daad* (old Civil Code) VI (Martens) no. 23.9.

been depicted. In principle, the plaintiff must also prove that defendant has in fact used the portrait for commercial purposes, if the defendant denies so doing.

Gerbrandy believes that from the phrase in Article 21 DCA "not authorized as [...]" it must be inferred that the point of departure is an injunction, so the portrayed may confine himself to mentioning his interest, to which the defendant can then reply, or may possibly have to prove that either this interest does not exist or that it is not reasonable.⁴⁰⁸ However, this assumption is not valid in cases where the plaintiff argues that the defendant has infringed the right to respect for his private life, without the plaintiff being able to point to a recognized actual reasonable interest,⁴⁰⁹ as was the case in the "*Vondelpark*" case⁴¹⁰ after reference by the Dutch Supreme Court.⁴¹¹ In this light, the question whether the right to respect for one's private life has been infringed cannot be answered in general, but depends on the actual circumstances of the case.

[6] Defenses

The defendant who is accused of infringement of the commercial portrait right of another person may, in addition to procedural defenses, put forward the following material defenses. He may argue that the portrayal is not a portrait in the sense of the law,⁴¹² that it is not a portrait of the plaintiff, but of someone else,⁴¹³ that he has not used the portrait for commercial purposes,⁴¹⁴ that plaintiff does not belong to those persons who can appeal to the commercial portrait right,⁴¹⁵ that the portrait right can no longer be exercised, since the portrayed died a long time ago,⁴¹⁶ that only the portrayed or relative, and not the plaintiff, can appeal to the portrait right,⁴¹⁷ or that the plaintiff has given permission.⁴¹⁸

Not successful are the defenses

- that the portrayed cannot appeal to the commercial portrait right because he has granted an exclusive license for the use of his portrait to a third party,

408. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, at 275-76.

409. See the personality interests mentioned in § 4.5[B]{5}, and the commercial interests mentioned in § 4.5[C]{3}.

410. Court of Appeals Amsterdam, April 27, 1989, NJ 1990, 370; AMI 1989, at 125 (HCJ) (*Vondelpark II*).

411. Supreme Court, July 1, 1988, NJ 1988, 1000 (LWH); AMI 1988, at 125 (HCJ) (*Vondelpark I*). See § 4.5[B]{4}.

412. See § 4.3.

413. See § 4.4.

414. See § 4.5{C}.

415. See §§ 4.6[B], 4.8{A}, and 4.8[C]{1}.

416. See § 4.7.

417. See § 4.8{C}{1}.

418. See § 4.8{C}.

- since plaintiff then no longer can ask defendant for a financial compensation,⁴¹⁹
- that the portrayed cannot institute an action because the portrait is not protected under copyright law, or because the defendant is not the author of the portrait or the owner of the portrait right,⁴²⁰
 - that the (implicit) permission of the portrayed for publication is clear from the fact that the portrayed has posed for the photograph,⁴²¹ or
 - that the plaintiff is not harmed, for instance, because his popularity has actually increased.⁴²²

If the defendant is sued for infringement of personality interests protected by the portrait right, the emphasis by the defense will be on a denial of a reasonable interest. The success of this defense will depend on the actual circumstances of the case.⁴²³

419. Pres. District Court the Hague, December 7, 1965; BIE 1966, no. 66, at 240 (*Feyenoord players*): licensor, soccer player Moulijn, must have a right to institute legal proceedings because otherwise he will be held liable by his exclusive licensee.

420. See § 4.2[B][2].

421. See § 4.8[B].

422. Cf. Beekhuis, *Nog eens het 'Ja zuster, nee zuster'-arrest*, *RMh* 1972, at 49. This defense is not relevant if the portrayed only claims an injunction. Pres. District Court Amsterdam, February 17, 1983, KG 1983, 94 (*Des Bouvrie/PSP*) held that "damages are no element of a claim based on Art. 21 Copyright Act." Cf. *Onrechtmatige daad* (old Civil Code) II (van Nispen) no. 210; Van Nispen, *Het rechterlijk verbod en bevel*, diss. 1978, at 131. Cf. with respect to the use of another's name: District Court Rotterdam, February 4, 1994, NJ 1995, 39; IER 1996, no. 20, at 113 (*Pogorelich/Honda*).

423. See § 4.5[B][4][d].

CHAPTER 5

THE NETHERLANDS: OTHER LEGAL THEORIES

5.1 The Right to One's Personal Name

[A] Functions of a Personal Name

A person's name can have different functions. The personal name may act as a trade name, trademark, as a means to distinguish its bearer from other persons, or as a popular symbol to induce the sales of other products. By using a name for a certain company, a trade name by right comes into being. The Trade Name Act (*Handelsnaamwet*) protects against confusing or misleading use of the same trade name or a name that is only marginally different.¹

The name of a natural person may also act as a trademark, if it can distinguish the goods or services of a company. Article 2(1) Benelux Trademark Act (BTA) explicitly states that the surname may also act as a trademark. This can be the surname of the trademark owner or that of another person.² But Article 13(6)(a) BTA limits the content of the trademark right to a surname.³ The owner of a trademark consisting of a surname cannot oppose its use by bearers of the same name for mere means of identification and without giving it the appearance of a trademark. The bearer of the same surname is always free to use that family name as a surname, however not also as a trademark or a trade name. For example, Mr Kips sold to Homburg the rights to the KIPS trademark for meat products, the method of preparation and data on production and sales of Kips' liverwurst. The Pres. of the Haarlem District Court found that his son, Hein Kips, infringed Homburg's rights to the KIPS trademark by indicating on his liverwurst wrappings that it concerned a product of Hein Kips, even though this indication was factually correct.⁴

The major function of the personal name is its identification function. The name distinguishes its bearer from other persons. The bearer of a name may be so famous or popular that his name can be exploited to increase the sales of products and services.

[B] Development of the Right to One's Personal Name

The existence of an exclusive right to one's personal name was recognized in the last century, when a clear distinction between personal names, trade names and trademarks had not yet been made. In 1882 the Dutch Supreme Court stated that

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1. See Articles 3-5b Trade Name Act.
 2. *Considine, Portretten*, *BMM-bull.* 41 (Dec. 1985), at 28 mentions as examples of registered trademarks: the names of Johan Cruyff, Evert van Benthem and Steve Mc'Queen. Cf. Supreme Court, October 28, 1948, NJ 1949, 169; BIE 1949, no. 4, at 19 (*Churchill cigars*): deposit of the wordmark "Winston Churchill" for cigars.
 3. Cf. Steinhauser, annotation under District Court Leuven, March 24, 1987, *BIE* 1988, no. 55, at 197 (*Marianne David/Dianne David*). Cf. with respect to tradenames: Pres. District Court Breda, May 3, 1995, KG 1995, 252 (*Staps VOF/Staps*).
 4. Pres. District Court Haarlem, November 29, 1979, NJ 1980, 427; BIE 1980, no. 53, at 193 (*Homburg/Hein Kips et al.*).

"everyone and thus also every merchant or manufacturer derives from civil law, the right to exclusive use of his name or trade name."⁵ Trading under another person's name or labeling one's own products with it, constituted an infringement of this right to one's personal name.

In 1887 Molengraaff stated in his influential article "De 'oneerlijke concurrentie' voor het forum van den Nederlandschen rechter" ('Unfair competition' before the forum of the Dutch judge)⁶ that the judicial recognition of an exclusive right to one's personal name was improper. According to Molengraaff the law provided no suitable basis for a right to one's personal name.

Moreover he took the view that there was no need for an exclusive right to one's personal name, which he defined as a right providing that "every third party has to refrain from using that name for the purpose of indicating a person other than the owner of the right."⁷ According to him the right to one's personal name would result in unwanted consequences:

"If the exclusive right to one's personal name does exist in the Netherlands, we had in fact better warn our poets and writers to be careful when choosing a pseudonym or names for the heroes in their novels; actions for the enforcement of the exclusive right to one's personal name are lurking everywhere."⁸

Molengraaff suggested solving disputes about the use of another person's name through unwritten standards of care. However, the Dutch Supreme Court did not proclaim this doctrine in its case law until 1919. Until that year, the (unintentional) result of his plea was less protection of one's personal name.⁹

With the enactment of the Trademark Act (Merkenwet) in 1893, the Trade Name Act in 1921¹⁰ and the recognition of the unwritten standards of care as a standard of tort law in 1919, the discussion about the subjective right to one's personal name faded.¹¹ In the thirties, a conflict between the divorced wife and her ex-husband about the use of his name after the divorce, would again lead to

5. Supreme Court, April 21, 1882, W.4770 (*Farina/Ayelts*).

6. Rechtsgeleerd Magazijn 1887, at 373.

7. Id. Rechtsgeleerd Magazijn 1887, 373, at 376.

8. Id. Rechtsgeleerd Magazijn 1887, 373, at 383.

9. Cf. Supreme Court, January 6, 1905, W 8163 (*Singer/Ivens*): advertising imitations of Singer sewing-machines as "improved Singer sewing-machines" not held to be unlawful because the law did not provide so; Supreme Court, December 16, 1910, WPNR 2078; Supreme Court, June 29, 1916, NJ 1916, at 866: No protection of trade name.

10. Molengraaff's argument about the absurd consequences of an exclusive name right must have influenced the legislator. In the Explanatory Statement (MvT) of the Trade Name Act it is stated that trade intercourse does not need "a right to a trade name, as an absolute right with effect on all third parties. [...] Therefore, there can be no question of an exclusive right, like a right in rem, or a trademark right." See *Handelsnaamwet*, Ed. Schuurmans & Jordens, 1986, at 7-8.

11. Art. 58 of the Proposal for a New Civil Code of 1886 (Ontwerp Burgerlijk Wetboek 1886) recognized a right to one's name, but this proposal was never carried on. See Land, *Het ontwerp tot herziening van het burgerlijk wetboek*, *Themis* 1887, 251, at 268-271.

a discussion about the issue of whether a person has a right to his personal name.¹²

Meijers realized that an absolute right to one's personal name did not necessarily have to lead to the absurd consequences pointed out by Molengraaff and Van Oven,¹³ if the content of that right was accurately defined. After the second World War Meijers formulated book 1 (law of persons and family law) of the Civil Code (Burgerlijk Wetboek), which has been in effect since 1970.

Title 2 of book 1 Civil Code is named "the right to one's personal name" (Het recht op de naam) and consists of Articles 1:4-1:9 Civil Code. This right is a codification of part of the case law concerning the use of another person's name.¹⁴

[C] Content of the Right to One's Personal Name (Article 1:8 Civil Code)

Article 1:8 Civil Code states that whoever uses another person's name without this person's permission, commits a tort against this person if his action creates the impression that he is this person, or belongs to his lineage or family.¹⁵ Loeb writes about the right to one's personal name:

"Should a person wish to oppose the use of his name by another person, he needs to have a certain exclusive right to the personal name. [...] Nowadays it is generally accepted that the right to one's personal name is not a property right or something similar, but a so-called personality right. Infringement of such a personality right - a 'subjective right' - may constitute a tort toward the owner of this right."¹⁶

The owner of the right to one's name can only oppose the unauthorized use of his name insofar as this creates confusion amongst third parties. If a look-alike gives a performance, for payment, under the name of a well-known artist, this artist can state a claim for infringement of the right to his personal name, if the audience does not realize that the performance is given by a look-alike. This confusion will be more easily created if a first name or surname or a relatively rare or unique combination of both is involved.

The advertising standards authority (Reclameraad) found that an advertisement for the Post Office Giro (postgiro) in which an actress contrary to the truth

12. The right to one's name was recognized by the Court of Appeals of the Hague, March 7, 1936, NJ 1936, 48. This decision was criticized by Van Oven, *NJB* 1936, at 181 and 205, at 208, who followed Molengraaff. But see District Court Utrecht, January 19, 1944, NJ 1944/45, 774 (*W.B./M.H.G.H.*) ruling that the law does not recognize an absolute "name right," in the sense that one can oppose the use by others of a similar surname.

13. Van Oven, *NJB* 1936, at 181 and 205.

14. See about the right to one's name: Deelen, *Van namen en zo*, in: *Plus est en vous; Opstellen over recht en cultuur*, Pilo-liber amicorum, 1970, at 189; Asser/De Ruiter, *Personen- en Familierecht I*, 1984, at 14-39; Loeb, *Naam en recht, Praktische beschrijving van het naamrecht in Nederland*, 1990; Arkenbout, *Handelsnamen en merken*, diss. 1991, at 66-68.

15. Art. 1:9 recognizes an exception to Art. 1:8 for woman, who are allowed to use the name of their husband during marriage, and after divorce, unless the District Court provides otherwise. The Artt. 1:4 t/m 1:7 provide for a regulation of the obtaining, evidence, and changing the official given names, and surname.

16. Loeb, *Naam en recht, Praktische beschrijving van het naamrecht in Nederland*, 1990, at 122.

and without permission presented herself as "*Mrs Dudok van Heel*," violated Article 1:8 Civil Code, because in this particular case an uncommon family name was involved and the actress created the impression of belonging to the lineage of the bearer of that surname.¹⁷ Should a common name be involved, it depends on the actual circumstances of the case, whether the use of that name creates the impression that this other person belongs to the plaintiff's lineage or family.¹⁸

The content of the right to one's personal name however, is very limited. In the *first* place it only protects against the use of another person's name, as if it is one's own name. It is not completely clear from the history of law what is exactly meant by this phrase. The legislator thought of the situation in which B starts calling himself A in everyday life. However, A will not be able to appeal to the right to his personal name, if B uses A's name as an eye-catcher in commercials for B's products. *Second*, the right to one's personal name only protects the official first name and/or surname, not for instance a pseudonym or a stage name. *Third*, as is the case with the portrait right, the right to one's personal name only protects the bearer of that name and not any third parties.¹⁹

It is clear from the history of law that the legislator did not aim at an extensive regulation, so courts can examine forms of use of a name not included in Article 1:8 Civil Code against the unwritten standards of care. The Secretary replied to questions in the Dutch Lower House (Tweede Kamer) that within the field of the right to one's personal name, a large proportion of unwritten law will remain, and that "it [may] therefore certainly not be claimed that, outside of the scope of the article at issue, the use of another person's name can never constitute a tort."²⁰

5.2 Misappropriation of Human Identity

[A] Introduction: Theory of Misappropriation

Outside of the scope of the portrait rules and Article 1:8 Civil Code, Dutch law does not provide any statutory rules for the protection of persons against others profiting from their identity. This raises the question under what circumstances the unauthorized commercial exploitation of someone's non-portrait personality elements constitutes a tort under unwritten law. If the plaintiff's claim is exclusively based on financial interests, one could argue that legal standards of competition law must apply. The celebrity whose identity is being exploited does not suffer any direct competition if he does not market the same products or services as the defendant. However, he does suffer indirect competition, since

17. Advertising Standards Council (Reclame Raad), January 17, 1983, no. 333, PRAR IVN no. 8 (*Dudok van Heel*).

18. Advertising Standards Council, December 31, 1984, no. 85, PRAR IVN no. 8 (*De Jong*): use of the name "De Jong" in advertisements does not conflict the Code of Advertising, since it is a common name.

19. The legislator did provide for an assignable right to one's name.

20. Van Zeben/Du Pon, *Parlementaire geschiedenis van het NBW*, Book 1, at 32-36. Cf. Asser/De Ruiter, *Personen- en Familierecht I*, 1984, at 35.

the defendant's action interferes with his opportunities for taking part in the economic advantages of such an exploitation.

Dutch unfair competition law is based on Article 6:162 Civil Code,²¹ which does not require a direct competitive relation. Article 6:162(1) provides that whoever commits a tort against another person, which can be imputed to him, is liable for damages caused by this tort. Under Article 6:162(2) Civil Code the following acts are deemed to be unlawful: the infringement of a right,²² an act or omission violating a statutory obligation,²³ or an act contrary to what is regarded proper social conduct according to unwritten law.

The Dutch Supreme Court has determined in several cases that from the principle of free trade and enterprise it follows that if there is no specific statutory rule to oppose it, profiting from another's achievement or the appeal of another person's product or service is not unlawful, not even if this harms that other person. In this light, the Dutch Supreme Court did not consider unlawful profiting from the performances of performing artists by using, for commercial purposes, imaginary characters which had become popular as a result of a television series.²⁴ Neither did the Dutch Supreme Court consider advertising on portfolios of popular magazines unlawful towards the publishers of those magazines.²⁵

However, the Dutch Supreme Court did state in these cases that the way in which or the circumstances under which this profiting occurs, may give it an unlawful character. In this light the commercial exploitation of another person's non-portrait elements is unlawful if it also infringes the right to one's personal name (as in Article 1:8 Civil Code), a trademark right, or any other subjective right, or if this profiting occurs under such circumstances that cause the public to be confused or misled.²⁶ However, in those cases, the unlawfulness does not follow from standards specifically aimed at protecting the financial interests of the person whose identity is exploited.

Mere profiting from the performance or reputation of another person, without also infringing an intellectual property right or confusing or misleading the public, is referred to in literature as "*leaning against*"²⁷ or "*performance borrowing*".²⁸ In the "*Decca*" decision the Dutch Supreme Court ruled that if, on the basis of the law of unfair competition, a protection is granted which does not essentially differ from protection by virtue of an absolute intellectual

21. See appendix A.

22. E.g. right to one's name of Art. 1:8 Civil Code, copyright or trademark right.

23. E.g. provisions of the Criminal Act.

24. Supreme Court, January 16, 1970, NJ 1970, 220 (GJS); BIE 1971, no. 24, at 122 (SB); AA 1970, at 377 (HCJ) (*Ja Zuster, nee Zuster*), discussed in § 5.2[B].

25. Supreme Court, June 23, 1961, NJ 1961, 423 (*Bolhoeve/De Geïllustreerde Pers*).

26. See § 5.6[A].

27. *Onrechtmatige Daad* (old Civil Code) VI (Martens) no. 139; Verkade, *Ongeoorloofde mededinging*, 1986, Chapter IX; Nieuwenhoven Helbach, *Industriële eigendom en mededingingsrecht*, 1989, nos. 1262 and 1268-69; Hoogenraad, in: Wichers Hoeth, *Kort begrip van het intellectuele eigendomsrecht*, 1993, at 336; PRAR, Chapter IIID.

28. These words of the Court of Appeals Amsterdam, April 11, 1985 (NOS/KNVB), were adopted by Supreme Court, October 23, 1987, NJ 1988, 310 (LWH); AA 1988, at 461 (HCJ); AMI 1988, at 32 (GAIS) (KNVB/NOS).

property right, it is in principle at least required that the performance that is being profited from is of such a nature as can be ranked with those that justify the adjudgement of an absolute intellectual property right.²⁹

To this day the Dutch Supreme Court has only once granted protection on the basis of the law of unfair competition to a performance that was not protected by an absolute intellectual property right. This case involved the protection of performances by performing artists. The producing and copying of (sound-) recordings of performances by Elvis Presley and the trading of these recordings was considered unlawful, though at that time there was no legal protection for performing artists in the Netherlands.³⁰ The Dutch Supreme Court held that the Court of Appeals had correctly determined that Presley's performances as a performing artist are of such a nature as to allow them to be ranked with those that justify the adjudgement of copyright protection. In principle he is then entitled to protection in order to provide him the opportunity to exploit his performances. From this implication it follows that a phonogram producer making sound-recordings of the performances of a performing artist with this artist's permission, should also be able to oppose, for his own sake, the making of copies of these sound-recordings, even for "some time after the death of the artist."³¹ An important additional circumstance the Dutch Supreme Court referred to was that the Netherlands at that time intended, according to a Bill for a law of approval,³² to accede to the 1961 Rome Convention regarding the protection of performing artists, phonogram producers and broadcasting networks.

[B] Misappropriation of Human Identity

To this day, the Dutch Supreme Court has not commented on the question whether profiting from or "*leaning against*" the identity of persons, without use of their portrait, is unlawful under unwritten tort law. In the "*Ja Zuster, Nee Zuster*" decision,³³ the Dutch Supreme Court did not pursue this question because the Court of Appeals had found that the plaintiffs themselves were not commercially exploited, so it was not a question of "*leaning against*" plaintiffs personally.³⁴ The issue in this case was the question whether defendant Lever's Zeep had committed a tort against plaintiffs, Blok and Jongewaard, by giving

29. Supreme Court, June 27, 1986, NJ 1987, 191 (vNH); BIE 1986, no. 71, at 280; AA 1988, at 257 (HCJ); CR 1986, 176 (EJD); IER 1986, no. 29, at 78 (*Holland Nautic/Racal-Decca*).

30. Supreme Court, February 24, 1989, NJ 1989, 701 (LWH); AA 1989, at 675 (HCJ); AMI 1989, at 70; IER 1989, no. 21, at 41 (JHS); GRUR Int 1990, at 233 (HER) (*Elvis Presley I*).

31. Supreme Court, April 5, 1991, NJ 1991, 819 (DWFV); IER 1991, no. 30, at 82; AMI 1992, at 135 (HCJ) (*Elvis Presley II*); the fact that Elvis Presley died in 1977 does not affect the unlawfulness against the phonogram producer.

32. Hand. II 1986-1987, 20012, R 1330. The Neighboring Rights Act came into force on July 1, 1993 (see Stb. 244).

33. Supreme Court, January 16, 1970, NJ 1970, 220 (GJS); BIE 1971, no. 24, at 122 (SB); AA 1970, at 377 (HCJ).

34. But see Hoogenraad, in: Wichers Hoeth, *Kort begrip van het intellectuele eigendomsrecht*, 1993, at 336-337.

away free key rings with the sale of a detergent without their permission. These key rings contained little plastic figures of "Zuster Klivia," "Gerrit" and "Opa," who owed their popularity to the plaintiffs' performances in the television series "Ja Zuster, Nee Zuster." Lever's Zeep had obtained permission from Annie M.G. Schmidt, the author of the television series. The Court of Appeals had decided that the television performance, names and features³⁵ of plaintiffs could not be traced in the three key ring figures. The Dutch Supreme Court considered that Lever's Zeep had not committed a tort against the performers because

"the circumstance that defendant also profits from the fact that the figures owe their popularity inter alia to the impersonation of plaintiffs does not mean that the defendant's conduct toward plaintiffs is unlawful, whereas the circumstance that the public (as a result of this performance) will associate the figures with plaintiffs does not prompt the conclusion that permission of plaintiffs is needed for the distribution of the figures."

The question whether the person who makes an object (such as a fictitious character) popular can (on the basis of unwritten law) oppose the use of this object for commercial purposes, was negatively answered by the Dutch Supreme Court.³⁶ In this context Beekhuis referred to the example of Bach's Saint Matthew Passion. This composition had become popular owing to the efforts of conductor Mengelberg. Thanks to his unique interpretation, the public had even come to associate this piece of music with conductor Mengelberg. This association, however, did not mean that the conductor obtained commercial rights with respect to Bach's Matthew Passion.³⁷ The fact that the public associated the key ring figures with their impersonators Blok and Jongewaard did not make the commercial use of the fictitious characters invented by Annie M.G. Schmidt unlawful.

However, nothing has so far been said about whether the person who makes himself popular (as opposed to an object) can, on the basis of unwritten tort law, oppose the unpermitted use of his identity for commercial purposes. This last question may be approached in different ways. In the *first* place, an analogy with the above-mentioned "Decca" decision is possible. According to this unfair competition law case, providing protection that is similar to the protection of an intellectual property right requires at least in principle that the plaintiff has given a performance which can be compared with one that justifies the protection of the portrayed. It may be argued that from the words "*at least*" it follows that in these cases more additional circumstances are required for a protection on the basis of unfair competition law.³⁸ The additional circumstance that may be thought of in this context is a (serious) dilution of the (great)

35. Therefore, Art. 21 DCA was not applicable.

36. If the answer had been positive without any further requirements to the act of making an object popular, The Dutch Supreme Court would have created an absolute right in objects without distinctive power.

37. Beekhuis, Nog eens het 'Ja zuster, nee zuster'-arrest, *RMth* 1972, at 42.

38. Cf. *Van Nieuwenhoven Helbach* in his annotation under Supreme Court, June 27, 1986, NJ 1987, 191 (*Holland Nautic/Decca*); *Onrechtmatige Daad* (old Civil Code) VI (Martens) no. 139.5 and PRAR IVB no. 7.

popularity or reputation of the plaintiff, for instance due to the use in a controversial context.³⁹

Second, it may be argued that in the case of profiting from the popularity of people, the doctrine of the "*Schaep met de vijf Pooten*" decision regarding portraits,⁴⁰ can be analogously applied with respect to other non-portrait elements identifying a person.⁴¹ In this case there were no specific quality requirements for the performance of the portrayed. The Dutch Supreme Court only referred to a performance which is given within the practice of a profession and which has resulted in a redeemable popularity. According to this analogy, persons that enjoy a popularity that enables them to commercially exploit their name, voice and other identifying elements, can oppose, on the basis of Article 6:162 Civil Code, unauthorized commercial exploitation. It then depends on the interpretation of this case whether this action can be claimed by anyone whose identity is being exploited for commercial purposes, or only by certain categories of persons.⁴²

In the case law of courts of first instance, the first view is a minority view. There are only *two* decisions in which a claim was denied because of a lack of additional circumstances. The District Court of the Hague held that the mention of the names of the eleven soccer players of the Dutch National Soccer Team in an advertisement for milk in the national newspapers, immediately before an international match, was not unlawful towards the players. The court considered that a professional soccer player with a factual redeemable popularity has a lawful interest in protecting his name from being used in a commercial without prior permission. He can therefore claim a reasonable financial remuneration for giving this permission. However, the court demanded the extra element of a misleading advertisement. Profiting from a current event on a once-only basis in a commercial, in which the name of such a person is mentioned, was not held to be unlawful until the advertised product is linked to the person involved in such a way that it leads the public to think that that person endorses defendant's product. This did not apply in this case. Neither were the names used in an offensive way in the advertisement, so that defendant did not commit a tort.⁴³

The *second* case involved the use of a look-alike in an advertising brochure for computer articles. In look-alike cases it is not possible to appeal to the portrait right since the face of the look-alike and not that of the plaintiff is being portrayed. However, the plaintiff can oppose the unauthorized use of a look-alike

39. Cf. Supreme Court, May 8, 1987, NJ 1988, 36 (LWH); BIE 1987, no. 64, at 265 (vNH) (*Bouwcentrum*): protection of trade name against dilution on the basis of unwritten standards of care. Cf. Pres. District Court Amsterdam, December 19, 1989, IER 1990, no. 12, at 32 (ChG) (*Magic card*): dilution of plaintiff's promotional campaign for motion picture 'Ghostbusters II' is a relevant circumstance for the question whether defendant's act constitutes the tort of unfair competition.

40. Supreme Court, January 19, 1979, NJ 1979, 383 (LWH); BIE 1979, no. 23, at 163, *Auteursrecht* 1979, at 52 (JHS).

41. Cf. with respect to a person's name: Verkade, *Ongeoorloofde mededinging*, 1986, no. 47, at 151, fn. 34.

42. See § 4.6[B]. In the second case, following the "Decca-case," one could reason that the required extra circumstances to state a claim are the fact that plaintiff enjoys a popularity, which is acquired in his profession, and which can be exploited in exchange for financial compensation.

43. District Court the Hague, May 16, 1986, IER 1986, no. 56, at 120 (*Dutch Soccer team*).

on the basis of Article 6:162 Civil Code. However, the Pres. of the Amsterdam District Court held that Sylvia Millecam could not oppose the commercial use of a person that looked exactly like her since defendant had not intentionally profited from the popularity of plaintiff.⁴⁴ The resemblance⁴⁵ was coincidental. As an additional element for unlawfulness, the Pres. required that defendant intended to profit from plaintiff's fame.⁴⁶

In the majority of the decisions, the standards of the commercial portrait right are also applied with respect to identifying non-portrait elements. The "*specific circumstances of the case*" that render the defendant's action unlawful appear to be the same circumstances as mentioned in the "*Schaep met de vijf Pooten*" decision: the plaintiff is a well-known person, who, as a result of his popularity, can ask a financial remuneration for giving permission for the commercial exploitation of his name, voice or other identifying attributes. Sometimes courts mention, without necessarily having to, additional elements such as insult or misleading advertising. Below, this case law with respect to name, voice and typical performances is further examined.

[C] Name, Nickname

The Pres. of the Almelo District Court held that the unpermitted use of the name of plaintiff, television-host Mies Bouwman, in an advertising campaign was unlawful. In 1961, when she was not yet a celebrity, she had read the fairy tale "*Rozemarijnpje*" together with others for the use on records without an advertising text. It was not until two years later, when Mies Bouwman had become very famous with the general public, that defendant used these records as a free gift with its household goods. Mies Bouwman objected to the sole, prominent use of her name as an eye-catcher in this advertising campaign, while two years earlier the issue had only been the fairy tale and not her person. The Pres. considered that, in view of her great fame, plaintiff could have claimed a large sum of money for this use, so that defendant was not free to use her name without permission. In addition, the Pres. stated that the words "*read by Mies Bouwman*" in the advertising material could create the false impression among the public that she was the only person who read the fairy tale. The Pres. prohibited defendant from using the name "*Mies Bouwman*" in its advertising campaign.⁴⁷

The use of the name Mies Bouwman for advertising purposes was again the subject of a dispute in the "*Soup Contest*" case. Mies Bouwman had participated in the Knorr soup test for advertising purposes. Since she preferred California soup to Knorr soup, her name was of no further interest in this advertising campaign. However, Mies Bouwman's preference became public

44. Pres. District Court Amsterdam, December 22, 1994, IER 1995, no. 12, at 1; Mf 1995, B19; AMI 1995, 136 (JHS) (*Millecam/Escom*).

45. The portraits of plaintiff and her look-alike are printed in IER 1995, at 61.

46. But see § 4.9[B][1]: the intention to picture plaintiff is not a requirement for stating a claim for an injunction.

47. Pres. District Court Almelo, April 23, 1963, NJ 1964, 304 (*Bouwman/Spanjaard*).

nevertheless, due to a radio entertainment program and newspaper reports in response to this radio program. California took advantage of this by placing an advertisement in the national papers entitled "*Thanks Mies*". Mies Bouwman stated a claim for damages for the unpermitted use of her name in an advertisement for California soup. The Zwolle District Court considered that using a celebrity's name without permission, and subsequently profiting from her popularity with the general public and from the importance the general public attaches to a statement of such a person, can, under certain circumstances, be unlawful. In this case the circumstances the Court referred to were defendant's commercial purposes and the commercial interests of plaintiff, who was only willing to link her name to an advertising campaign exclusively, and for financial compensation. The Court considered the unpermitted use of her name in a soup advertisement unlawful and awarded damages of NLG 5,000. This was the amount she could have asked for granting permission to commercially exploit her name.⁴⁸

The mention of the name of quiz-master Fred Oster as an eye-catcher in a newspaper advertisement for chairs under the heading "*Fred Oster causes rush on easy chair*" was considered unlawful towards Oster. The District Court Amsterdam held that using plaintiff's name in commercial advertisements without his permission was unlawful towards plaintiff, since he was a well-known television-personality, who could, as such, claim financial compensation for the use of his name in commercial advertisements. Thus, he had an interest in preserving a certain exclusivity. The defendant argued that it had the right to mention in its advertisements that it sold the chair, priced NLG 599 in the "*Wiekent-kwis*" hosted by Oster, for only NLG 399. The Court considered this defense correct only "as far as plaintiff's name is not mentioned in a particularly conspicuous way in defendant's advertisement, in the context of a factual [correct] representation of events." However, the Court held that profiting from plaintiff's popularity by mentioning his name in a conspicuous way in the advertising material was unlawful.⁴⁹

Soccer player Johan Cruyff and coach Rinus Michels could oppose the use of their names in an advertisement for carpets. Defendant, carpet store Henk Nieuwkoop, had broadcast a commercial, which consisted of a staged interview between Henk Nieuwkoop and "*Johan Kluyff*," whose coach "*Linkmiechel*" recommended green carpet, for which Johan Kluyff searched Barcelona in vain. The Pres. of the Amsterdam District Court considered this commercial unlawful towards Johan Cruyff and coach Rinus Michels. In this case the additional circumstance of insult played a role, although the judge implied that even without additional circumstances the commercial could be unlawful. The judge

48. District Court Zwolle, November 24, 1971, NJ 1972, 285 (*Mies Bouwman/Fino Fabrieken*).

49. District Court Amsterdam, November 7, 1984, no. 83.3634; AMR 1985, at 39 (*Fred Oster/De Stam*). De District Court granted *ex aequo et bono* a damage award of NLG 2,000. Except for the legal costs, this decision was affirmed by Court of Appeals Amsterdam, October 10, 1985, no. 67/85; AMI 1986, at 84 (*Fred Oster/De Stam*). The Court of Appeals held it relevant to its judgement that defendant's use of Oster's name in a non-obvious way would not have been unlawful, that defendant had also advertised its chair before Oster's television show, and that Oster's show had a commercial nature.

considered that plaintiffs belong to that category of persons whose cooperation with certain advertising campaigns could be requested many times and who are therefore likely to agree to a cooperation only when financially compensated. Thus, insofar as unlawfulness toward plaintiffs does not already result from the fact that they are celebrities, in this case, there is the additional element that the text may, at the very least, be considered less than flattering to plaintiffs and more or less ridiculing them.⁵⁰

The Amsterdam District Court held that popular ex-racing cyclist Gerrie Kneteman could oppose the use of his name "*Gerrie Kneteman*" and of his nickname "*De Kneet*" in a soft drink manufacturer's advertising campaign. The permission that this soft drink manufacturer had obtained from a foundation which had employed Kneteman for promotional activities, constituted no grounds for justification for the use of his name or nickname in advertisements for soft drinks. The Court awarded damages of NLG 7,000 for lost income. It was taken into account that defendant had immediately ceased its advertising campaign after Kneteman had objected to it.⁵¹

The Rotterdam District Court ordered car manufacturer Honda to pay damages of NLG 50,000 to concert pianist Pogorelich because Honda had used his name without his permission as an eye-catcher in an advertising campaign in national and regional newspapers and magazines for the promotion of the Honda Accord car.⁵² The Court rejected Honda's defense that Pogorelich could not appeal to the protection of the commercial value of his name, since he was not very well-known to the general public. The Court also rejected Honda's defense that "they might just as well have used the name of another concert pianist" stating that the incorrectness of this defense is evident from the fact that Honda did use his name for its advertisement. Finally, the Court rejected the defense that Pogorelich did not suffer damages, since Honda had increased his popularity with its advertising campaign. The Court held that Honda had acted unlawfully by taking away Pogorelich's freedom to decide for himself whether or not and under what circumstances he would like to see his name and qualities connected with another's sales activities.

Sometimes the use of both the plaintiff's name and photograph are prohibited in the same case, on the basis of a reasonable financial interest. The Pres. of the Arnhem District Court prohibited the sale of illegal recordings of musical performances by jazz pianist Bill Evans and also the use of his photograph and name in connection with these recordings. Defendant's defense that it is in fact obliged to mention the names of the performing artists since the latter can oppose the exploitation of their performances without the mention of their

50. Pres. District Court Amsterdam, October 16, 1975, PRAR IVB no. 13b (*Cruyff et al./Henk Nieuwkoop*).
 51. District Court Amsterdam, November 21, 1991, no. 90.2518, discussed in: Van Staveren and Kramer, *Exploitatie van naam, afbeelding en prestatie van de topsporter*, 1992, at 34 (*Kneteman/Hero*).
 52. District Court Rotterdam, February 4, 1994, NJ 1995, 39; IER 1996, no. 20, at 113 (*Pogorelich/Honda*). In its interlocutory judgement, the District Court found that a damage award of NLG 10,000 was a reasonable, and in the relevant sector common compensation. Insofar as Pogorelich claims more damages, he had to prove it. In its final judgement, the District Court granted an award of NLG 50,000, see District Court Rotterdam, June 22, 1995, IER 1996, no. 20, at 116 (*Pogorelich/Honda*).

names was rejected because in this case recordings were involved that had been brought into circulation without prior authorization.⁵³

In a 1957 case the Dutch Supreme Court determined that Dutch law does not prohibit the unauthorized use of another person's name as a trade name or a trademark in general. In the "*Elkington*" decision the Dutch Supreme Court considered that the use of another person's name as a trademark does not constitute a tort on the mere basis that it causes damages to the bearer of that name, but that additional circumstances are required.⁵⁴

The Benelux Countries did not implement in the Benelux Trademark Act the optional provision of Article 4(4)(c)(i) European Trademark Harmonization Directive,⁵⁵ which provides that an EU Member-State may rule that no right to a trademark shall be acquired if it conflicts with a "right to a name." However, one could argue that the registration of another person's name as a trademark may be unlawful towards the bearer of that name, if at the time of registration of the trademark the public already associates that name with its bearer as a result of his fame, and if the depositor attempts to profit from this fame.⁵⁶

[D] Voice, Sounds

A person can also be identified by his voice.⁵⁷ Although there are no cases *published* in which a court prohibited the commercial use of a sound-alike who imitates the distinctive voice of a celebrity, it seems that the use of a sound-alike in a commercial is considered to be unlawful. For example, Aviko used a sound-alike which imitated the voice of Goedele Lievens in a commercial advertising its french fries. Goedele Lievens is well-known for her television program "Over sex gesproken" (talked about sex). Although the imitator's sound was not identical to Lievens' voice, the public associated the commercial with Goedele Lievens because of the imitation of her Flemish accent, and the implicit references to her television program by describing Aviko's french fries in sexual

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53. Pres. District Court Arnhem, November 24, 1993, KG 1994, 23 (*Evans/Timeless Records*). Cf. cases in which defendant used on its products both plaintiff's name and portrait: Pres. District Court the Hague, February 17, 1965; BIE 1966, no. 14, at 44 (vdZ) (*Donners*); Pres. District Court the Hague, April 15, 1964, NJ 1964, 483; BIE 1966, no. 13, at 42 (*Beatles*); District Court Amsterdam, December 12, 1970; BIE 1974, no. 11, at 20 (*Henk van Ulsen/Attema*).
54. Supreme Court, November 29, 1957, NJ 1958, 31; BIE 1958, no. 14, at 45; AA 1957/58, at 145 (DM) (*Technisch Bureau/Dover*): Elkington, who sold manhole covers, could oppose the use of his name as a trademark for manhole covers, on the condition that he proved that he suffered damages by that use. An extra circumstance leading to this conclusion is that defendant's predecessor started using this trademark for products patented by Elkington, without his permission, after the patent rights were lapsed because the predecessor had not paid the patent fees contrary to its contractual obligation.
55. Council Directive 89/104, First Council Directive of 21 December 1988 to approximate the laws of the member states relating to trademarks, OJ 1989 L 440/1.
56. In this case, one could also argue that under Article 4(6) BTA no right to a mark can be acquired by that a filing effected in bad faith.
57. Cf. Pres. District Court Amsterdam, May 6, 1986, KG 1986, 251, aff'd Court of Appeals Amsterdam, October 30, 1986, KG 1987, 27 (*Hans Kok*): injunction to radio broadcast voice-recording, because persons, who wish to remain anonymous, could be recognized by their voice.

terms. When Lievens protested, the case was settled and the commercial was cancelled.⁵⁸

The Dutch Supreme Court has made a connection between the standards that apply to the portrait to those that apply to the voice.⁵⁹ The Pres. of the Amsterdam District Court held that newsreader Bob Meijer (on the grounds of moral objections) did not have to tolerate the use of his portrait and voice in an erotic movie.⁶⁰ The Pres. of the Haarlem District Court held that Mulder (a professing member of the Dutch Reformed Church, and, as was evident from his radio interviews, an enemy of house music) did not have to tolerate that parts of the recordings of his interview were used on a compact disc with house music.⁶¹ Mulder, whose voice was clearly identifiable, was ridiculed on the compact disc. In these cases, however, the plaintiffs appealed to noncommercial interests and not to financial ones.

The playing of a recording of a telephone conversation with Rijk De Gooyer on the Banana Split commercial 06-line (1-900-line), and the advertising in newspapers of this conversation with his name, was considered unlawful towards De Gooyer. In this case the Pres. of the Amsterdam District Court considered that De Gooyer had not given (clear) permission to broadcast the conversation recorded on the tape, and that De Gooyer belongs to those persons who can financially exploit their popularity by giving permission to use their name in connection with publicity actions. He suffered a loss of income, since it could not be ruled out that, under certain circumstances, he would be willing to cooperate with the exploitation of the 06-line in return for financial compensation.⁶²

The Pres. did not reason that De Gooyer belongs to those people who can financially exploit their popularity by giving permission to use their voice in connection with publicity actions, since his voice was not used in the advertisement for the Banana Split 06-line. The Pres. did not pursue the question whether the exploitation of his voice through the Banana Split 06-line was unlawful merely on financial grounds, since the exploitation was already considered

58. See "Goedele pikt imitatie van haar stem niet" in: Adformatie 1996, no. 15, at 17. This article also describes that the Alabastine company got into legal problems after using a sound-alike of Prince Bernhard.

59. Supreme Court, October 16, 1987, NJ 1988, 850 (EAA) (*Driessen/Gelder*), para. 3.3.2. The Dutch Supreme Court reasoned that the unauthorized recording and publication of a portrait is not unlawful under all circumstances. Therefore, it is troublesome to assume that this is unlawful with respect to the recording and publication public of a person's voice.

60. Pres. District Court Amsterdam, November 22, 1974, NJ 1976, 336 (*Bob Meijer in motion picture "Alicia"*): since an order to delete plaintiff's picture and voice from the motion picture would have been too costly for defendant, court ordered plaintiff to place advertisement in four newspapers, informing the public that plaintiff did not render his assistance to the motion picture, nor that he gave his permission to use of his picture and name.

61. Pres. District Court Haarlem, September 20, 1994, KG 1994, 408; Mf 1994, B99; AMI 1995, at 39 (*Mulder/Never Mind Music*).

62. Pres. District Court Amsterdam, February 23, 1989, KG 1989, 124 (*Rijk de Gooyer/Banana-Split*): award of NLG 2,500 for commercial damages, and NLG 2,500 for immaterial damages because of invasion of privacy of De Gooyer.

unlawful on account of invasion of privacy.⁶³ According to Cohen Jehoram, the subjective right to redeemable popularity should, in addition to portrait, also protect name or voice.⁶⁴

A person may also be identified by particular sounds. The public may, for instance, immediately identify a famous drummer by the use of sound samples of his drum performance. Spoor/Verkade do not consider it inconceivable that sound sampling is unlawful towards performers because it involves profiting from their good reputation.⁶⁵ The use of recordings of someone's voice for commercial purposes may also be unlawful on the basis of the Neighboring Rights Act.⁶⁶

[E] Human Beings as Fictional Characters

A person may be identified with a fictional character in such a way that commercial exploitation of this character amounts to exploitation of that person itself.

The above-mentioned "*Ja Zuster, Nee Zuster*" decision⁶⁷ did not involve such an identification. The judges in first instance had determined that the distribution of the key ring plastic figures was an exploitation of the characters that had been created by author Annie M.G. Schmidt. It did not, therefore, involve an exploitation of the performers who had performed those fictive characters.

In the case about the use of the designation "*Max 'n Specs*,"⁶⁸ the Pres. of the Amsterdam District Court appears to reply affirmatively to the question whether the unauthorized use of a fictional character can be unlawful towards its performer, who is identified with that character. Defendant Ilja Gort had composed a piece of music and supplied it with lyrics, consisting of a musical dialogue between the characters of Max (a gangster), Specs (a spectacled gangster) and Trude, which had been created by her. A hit single of this piece of music was marketed under the title "Don't come stoned and don't tell Trude" with the title "*Max 'n Specs*" and a photograph of the characters Max and Specs on its cover. In addition, a television recording of the performance of the piece of music with Max and Specs was made for the use in television rock programs. In this recording Max was impersonated by plaintiff, Lorenzo Mills. After the hit single had become a success, a second hit single of a musical work of defendant with the title "*Max 'n Specs*" was produced, which again involved a dialogue between the characters Max and Specs. This time Max was not impersonated by Mills, but by someone else. Mills did not agree with this course of events and claimed an injunction against the sale of musical productions under

63. The conversation was about De Gooyer' refusal to render his assistance in an advertisement for condoms in the context of an campaign against AIDS.

64. Cohen Jehoram, *Recht op verzilverbare populariteit*, in: *Noten bij noten. Ter herinnering aan Mr L. Wichers Hoeth*, 1990, 33, at 35.

65. *Auteursrecht*, 1993, no. 347.

66. *See* § 5.4.

67. Supreme Court, January 16, 1970, NJ 1970, 220 (GJS); BIE 1971, no. 24, at 122 (SB); AA 1970, at 377 (HCJ).

68. Pres. District Court Amsterdam, March 26, 1981, KG 1981, 40; BIE 1983, no. 32, at 81 (*Max 'n Specs*).

the name "*Max 'n Specs*" recorded without his assistance. He argued that defendant had unlawfully used the name "*Max 'n Specs*," which had become popular as a result of his artistic performance, and that only he himself and the original performers of the first piece of work were entitled to use the name "*Max 'n Specs*" as a band.

The Pres. of the Amsterdam District Court rejected this claim because Mills merely sung the role of Max, and the designation "*Max 'n Specs*" was used to make clear that the piece of music involved a dialogue between these two characters (invented by Gort). Relevant in this respect is the consideration of the Pres.:

"To Mills it may be admitted that situations can occur, in which the performer of a particular role (who uses as a stage name or as the name of the rock band the name of the role(s) performed) may, due to his personal performance and creative effort, become identified as a person, by the public, with that role, to such an extent that another person, by profiting from that acquired fame and popularity, could, under certain circumstances, act unlawfully toward this performer in the sense of Article [6:162] Civil Code."⁶⁹

However, Mills had failed to show that his case was such a situation. Mills was not identified with Max by the public.⁷⁰

The Pres. of the Zutphen District Court ruled that the use of a picture of a clown named "*Bastiaan*" on the cover of the book "*Clowns 2*" about famous clowns constituted an unauthorized exploitation of the popularity of plaintiff Bastiaan Van Toor, who had gained his popularity in his role of the clown "*Bassie*" which he had performed during almost thirty years.⁷¹ The Pres. stated that profiting from another's popularity in itself was not unlawful. However, in this particular case, the defendant acted unlawful because Van Toor gained a substantial part of his income from the exploitation of the popularity of the clown Bassie, and the defendant had changed the name "*Bassie*" in "*Bastiaan*" after Van Toor had asked a reasonable compensation for his permission that she had asked in advance. Therefore, the Pres. did not see any reason to further discuss any claims of copyright or trademark infringement. The Pres. granted an injunction to reproduce and publish the book "*Clowns 2*" insofar as it contains pictures of the clown Bastiaan.⁷²

69. *Id.* KG 1981, 40, para. 8.

70. Perhaps in the "*Sjef van Oekel*" case the public identified plaintiff Brouwers with the fictional character "*Sjef van Oekel*," he had performed. The case of District Court Haarlem, January 22, 1991, AMI 1992, at 188 (JCSP) (*Brouwers/Schippers et al.*) was decided on the grounds of portrait law.

71. Pres. District Court Zutphen, November 29, 1993, BIE 1996, no. 30, at 108 (*Van Toor/Wolters-Van Bemmer*).

72. See for my comment on this case, § 10.3[E][2].

[F] No Assignment of Claim Based on Article 6:162 Civil Code; Position of Licensee

The protection against infringement of commercial interests by third parties, on the basis of the general tort clause of Article 6:162 Civil Code,⁷³ is not susceptible to assignment with respect to unlawful competition that has not yet taken place, i.e. as a future right against possible future debtors.⁷⁴ A right to claim which comes into existence as the result of a tort, is a right to a personal claim against the person who has committed this tort. Article 3:94(1) Civil Code states that for the assignment of claims to be exercised against one or more specifically determined persons, it is required that the debtor(s) is (are) informed. In the "*Elvis Presley*" case the Amsterdam Court of Appeals assumed, under the Civil Code (old version), that the initial plaintiff BMG "had also been assigned the claim for protection that Presley could exercise as a performing artist."⁷⁵ In appeal to the Dutch Supreme Court, initial defendant Boogaard and Co. stated in its incidental cassation plea II.3 that

"a to Presley belonging right to take legal action against the unfair competition and the subsequent right to protection against such a competition, [...] nevertheless is not a right that can be legally assigned, and can therefore not have been assigned to BMG et al. or to one of them."

The Dutch Supreme Court did not comment on this argument because "crucial here is not the question whether Elvis Presley 'assigned' rights to BMG et al. but the question whether BMG et al. made recordings of Elvis' performances with his permission."⁷⁶ With this decision, the Dutch Supreme Court appears to have implicitly rejected the assignment assumed by the Court of Appeals.

An interesting question is whether the exclusive licensee, who with permission of the person involved exploits his name, voice or other identifying characteristics, can himself institute legal action against the unauthorized commercial exploitation by a competitor under unwritten tort law, receive compensation for damages. The Dutch Supreme Court did in fact recognize this construction in the "*Elvis Presley*" decision, shortly before the Neighboring Rights Act was to be implemented. The Dutch Supreme Court held that producers of copies of sound recordings, who produce recordings of the performance of a performing artist with his permission, can, even for some time after the death of the artist, oppose the reproduction of their sound recordings, for which no permission was given by the performing artist, under Article 6:162 Civil Code. The Dutch Supreme Court reasoned that such a cause of action on the side of the licensee was required, because otherwise the possible exploitation

73. See Appendix A.

74. Cf. Van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, 1994, at 311.

75. Court of Appeals Amsterdam, December 3, 1987, NJ 1989, 701, para. 4.1.

76. Supreme Court, February 24, 1989, NJ 1989, 701 (LWH); AA 1989, at 675 (HCJ); AMI 1989, at 70; IER 1989, no. 21, at 41 (JHS); GRUR Int 1990, at 233 (HER) (*Elvis Presley I*).

by a performing artist of his performance would be undermined in an unacceptable way.⁷⁷

On the other hand, the Dutch Supreme Court has clearly denied this construction as far as a licensee opposes the unauthorized exploitation of another person's portrait, since Article 21 DCA assigns the right for this action exclusively to the portrayed and his next of kin.⁷⁸ However, there is no such legal provision limiting the tort action of persons with respect to non-portrait elements. One could therefore argue that the exclusive licensee should also be able to institute an action against a tort, provided that defendant's act is also unlawful towards the licensor. If this argument is accepted, the paradoxical consequence is that the licensee who has the right to use a portrait has a less solid position than the licensee of non-portrait elements, who is not hindered by the provision that after the death of the licensor only specific next of kin can institute legal action.

The question whether, and if so, for what length of time exclusive licensees can institute legal action after the death of the person whose non-portrait elements are being exploited, has not yet been answered in Dutch jurisprudence. Following the 's-Hertogenbosch Court of Appeals, one could argue that this is the responsibility of the legislator and that the courts may not anticipate such regulation.⁷⁹

5.3 Personality Right

[A] Relation Between the Protection of Personality Interests in General and the Portrait Right

A person can, on the basis of non-financial interests, oppose the use of his name, voice or other identifying non-portrait elements on the basis of Article 6:162 Civil Code in conjunction with Article 10(1) of the Dutch Constitution,⁸⁰ which recognizes the right to respect for one's private life, Article 8(1) EHRC (European Convention for the Protection of Human Rights and Fundamental Freedoms),⁸¹ which recognizes the right to respect for one's private and family life,

77. Id. NJ 1989, 701, para. 3.3.

78. Id. NJ 1989, 701, para. 3.3. See § 4.8[C][1].

79. Court of Appeals 's-Hertogenbosch, September 18, 1990, NJ 1991, 281; IER 1990, no. 60, at 129; IER 1991, at 24 (REPdR); AMI 1991, at 48 (DWFV); BIE 1991, no. 91, at 332 (*Van Uden Productions/Winterland Productions*).

80. "Subject to restrictions by virtue of the law, every person has the right to respect for his private life" (eerbiediging van zijn persoonlijke levenssfeer).

81. "Everyone has the right to respect for his private and family life, his home and his correspondence." The European Convention for the Protection of Human Rights and Fundamental Freedoms (EHRC, Treaty of Rome), of November 4, 1950, Trb. 1951, 154 has been ratified by Act of July 28, 1954, Stb. 335, and came into effect on August 31, 1954. By Act of May 25, 1960 (Stb. 226) the Dutch government recognized the right of individuals to complain about a breach of this treaty with the European Commission for Human Rights in Strasbourg.

or Article 17(1) ICCPR (International Convention on Civil and Political Rights),⁸² which protects against invasion of one's privacy and against the violation of one's honor and good reputation. Though these articles are in fact directed at the various governments, citizens should also respect each other's personal life in their mutual relations. One citizen can infringe the right to respect for one's private life of another citizen. The Dutch Supreme Court stated that:

"a right to respect for one's private life should be accepted, that fits with similar developments in other countries and that, as far as its content is concerned, is also defined by Article 8 EHRC, of which it should be presumed that it is also effective between citizens. A violation of this right will in principle result in a tort in the sense of Article [6:162] Civil Code."⁸³

In case decisions, the terms "*privacy right*" or "*right to privacy*,"⁸⁴ "*personality right*,"⁸⁵ or "*general personality right*,"⁸⁶ are mentioned as synonyms of the right to respect for one's privacy or private life. This personal right is non-assignable.⁸⁷ Traditionally the term "*personality rights*" refers to the non-assignable moral rights of the author of a work protected by copyright, such as the right to oppose the publication of this work without the author's name or under a different name, alterations in the work, or distortion or mutilation of his work that could be prejudicial to his honor or reputation or to his value as such. These rights protect the personality interests of the author, who is vulnerable in his person, since the work bears his personal mark.⁸⁸ The author can exercise these rights even after he has assigned his copyright. The term "*personality right*" is also used outside the scope of copyright law. Schuijt, for example, speaks of the "personality rights integrity, privacy, honor and good reputation, but also for

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82. "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation." The International Convention on Civil and Political Rights (ICCPR) of December 19, 1966, Trb. 1969, 99, came into effect in the Netherlands on March 11, 1979, Trb. 1978, 177. The Netherlands recognized the right of individuals to complain about a breach of this treaty. The text of Art. 17(1) ICCPR is similar to the text of Art. 12 Universal Declaration of Human Rights of December 10, 1948, Trb. 1969, 99. This declaration has the status of a recommendation, and cannot be viewed as a decision under international law in the sense of Art. 93 Dutch Constitution, see Regulatory Industrial Organization Appeals Court (CBB), February 23, 1990, AB 1990, 332.
83. Supreme Court, January 9, 1987, NJ 1987, 928 (EAA), AB 1987, 231 (FHvdB), CR 1987, 110 (*Edam welfare mother*), para. 4.4.
84. Cf. Supreme Court, June 12, 1992, NJ 1992, 589 (*Omgangsrecht*), para. 3.4: "the right to respect one's privacy and private life as mentioned in Art. 8 EHRC."
85. Cf. Pres. District Court Maastricht, May 26, 1993, KG 1993, 248, aff'd Court of Appeals 's-Hertogenbosch, February 23, 1994, NJ 1994, 474; AMI 1994, at 97 (GAIS); Mf 1994, B46 (*Prins/Walraven and Weijermans*): in a case of invasion of privacy and personal integrity of plaintiffs, the court used the words: "violation of the personality rights of plaintiffs."
86. Supreme Court, April, 15, 1994, NJ 1994, 608 (WH-S), para. 3.2 (*M. de R./Valkenhorst*); Supreme Court, January 6, 1995, NJ 1995, 422 (EJD); Mf 1995, B13 (*Het Parool et. al./Van Gasteren*), para. 5.10: right to be let alone derives from the "general personality right."
87. This follows from Article 3:83(3) Civil Code. Cf. § 4.8[A].
88. This is a requirement for copyright protection.

example of infringement of the so-called portrait right, as a particularization of this personality right."⁸⁹

This raises the question as to what extent Article 21 DCA, which protects the personality interests of the portrayed, can be seen as a particular expression of the general personality right⁹⁰ as based on Article 10 of the Dutch Constitution, Article 8 EHRC and Article 17 ICCPR. The Dutch Supreme Court ruled in several cases that Article 21 DCA provides the portrayed with protection against infringement of his right to respect for his private life.⁹¹ In the "*Ferdi E.*" case it was concluded that this right was not more absolute than the right to free speech. According to the Dutch Supreme Court, in the case of a publication in which a portrait was used and a conflict between those two freedoms "that are essential for the individual's development and for a democratic society as such," there is no reason to "follow a different procedure than in the case where such a conflict is based on a publication of a different kind, such as that of statements."⁹² According to the Dutch Supreme Court, the judicial development of both the personality right and the right to free speech date from after the implementation of Article 21 DCA, and it was exactly this development that led to the perception that this Article also provided a protection of one's private life. Therefore, Oppenoorth concluded that a reasonable personality interest belongs to general tort law, to which Article 21 DCA does not add anything.⁹³ Since Article 21 DCA does not supply any additional rules, and interests are not balanced in advance by the legislator, it is legally irrelevant to speak of a specific personality right.⁹⁴

[B] Protection of Personality Interests Against Different Acts

Article 6:106 Civil Code provides inter alia that the injured party is entitled to immaterial damages, in cases the person liable had the intended inflicting such harm. The victim also is entitled to immaterial damages, in the event that he has suffered physical injury, injury to honor or reputation, or if his person has been

89. Schuijt, *Onrechtmatige publikaties naar Nieuw BW*, *AMf* 1992, at 10. Cf. Art. 5(1) Neighboring Rights Act with respect to the moral rights of the performing artist.

90. See De Beaufort, *Auteursrecht*, 1932, at 25. But see De Graaf, *Bescherming van persoonlijkheid, privéleven, persoonsgegevens*, 1977, at 89: Dutch law does not recognize a general personality right.

91. Supreme Court, October 16, 1987, NJ 1988, 850 (EAA); NJCM 1988, 639 (L. Verhey) (*Driessen/van Gelder*), para. 3.3.2; Supreme Court, July 1, 1988, NJ 1988, 1000 (LWH); AMI 1988, at 125 (HCJ) (*Vondelpark*), para. 3.3; Supreme Court, October 30, 1987, NJ 1988, 277 (LWH); AMI 1988, at 58 (DEB) (*Naturist*), para. 3.2.

92. Supreme Court, January 21, 1994, NJ 1994, 473 (DWFV); AMI 1994, at 93 (GAIS); Mf 1994, B30 (*Ferdi E./Spaarnestad*), para. 3.5.

93. See Oppenoorth, *Portretten na Hoge Raad 21 januari 1994*, *Mf* 1994, 58. Id. Van Vliet, *Een gewogen afbeelding: een civielrechtelijk model voor het afwegen van belangen bij het openbaar maken van afbeeldingen*, *AA* 1995, 252, at 258.

94. This is different for the portrait right of Art. 20 DCA (see § 4.2[B][5]). The German "right to one's own picture" (Recht am eigenen Bild), which content is defined in specific rules (Artt. 22-23 KUG), is considered as a specific expression of the general personality right. Cf. Helle, *Besondere Persönlichkeitsrechte im Privatrecht, Das Recht am eigenen Bild, das Recht am gesprochenen Wort und der Schutz des geschriebenen Wortes*, 1991 (see § 1.2).

otherwise afflicted. The right to respect for one's private life protects against the violation of the different personality interests of a person. The following distinction is often made:⁹⁵

- 1) *physical* privacy: protection against violation of physical integrity;
- 2) *spatial* privacy: protection of the private sphere;
- 3) *informational* privacy: protection against abuse of information concerning one's person.

Physical integrity is explicitly protected by Article 11 of the Dutch Constitution, which recognizes the inviolability of the body. This right is relevant for instance in cases concerning protection against rape, sexual harassment, examination of or with the body, the obligation or freedom to undergo medical examination,⁹⁶ protection against unlawful deprivation of freedom, protection against harassment in the streets⁹⁷ or noise pollution.⁹⁸

Spatial privacy is inter alia protected by Article 12 of the Dutch Constitution, which states under what strict circumstances the entry into a home against the will of its inhabitant is authorized. The issue here is protection against unlawful entry of a person's spatial privacy, as a result of, for example, trespassing, spying on⁹⁹ or peeping at, whether or not with technical aids such as long-focus lenses, eavesdropping,¹⁰⁰ photographing¹⁰¹ intruding through constantly phoning,¹⁰² interference with the family life or the private communication, or the reading or copying of private documents such as diaries.¹⁰³ There is a distinction made in literature between the different spheres that a person can be in: public life, social life, private life and the intimate life.¹⁰⁴ The more intimate this sphere is, the sooner intrusion will be unlawful.¹⁰⁵

Generally speaking, the publication of information is unlawful if this information has been obtained through unlawful entry into another person's

95. Cf. Kelelaar, Holvast and De Bakker, *Privacy gids*, 1989, at 10-11.

96. Supreme Court, June 18, 1993, NJ 1994, 347 (CIHB) (*Compulsory Aids test after rape*).

97. Pres. District Court Amsterdam, June 12, 1986, KG 1986, 285 (*injunction to visit neighborhood of victim*).

98. District Court Amsterdam, February 12, 1974, NJ 1974, 121 (*Noise pollution of Schiphol Airport*).

99. Supreme Court, January 9, 1987, NJ 1987, 928 (EAA), AB 1987, 231 (FHvdB), NJCM 1987, 295 (Verhey); CR 1987, 110 (EJD) (*Edam welfare mother*).

100. District Court Zutphen, August 29, 1980, NJ 1981, 43 (*overhearing mobile phone conversation*).

101. Art. 139f Criminal Act penalizes the taking of a photograph in a private house by use of trick or skill, see Supreme Court, June 25, 1974, NJ 1974, 455 (ThWvV) (*Party W. Oltmans*). Art. 441b Criminal Act penalizes the secret taking of a photograph of persons in places where food, drinks or other goods are sold to the public.

102. Pres. District Court Haarlem, January 12, 1990, KG 1990, 91 (*Phone nuisance*).

103. Pres. District Court Arnhem, August 8, 1990, KG 1991, 14 (*Reading another's diary*).

104. Cf. Hubmann, *Das Persönlichkeitsrecht*, 1967, at 262-270.

105. Cf. Pres. District Court Alkmaar, June 2, 1967, NJ 1967, 284 (*"Ongewijde aarde"*): motion picture producer invaded private life of family by filming during funeral. Injunction to show motion picture in part of the Netherlands. Pres. District Court Roermond, September 12, 1985, KG 1985, 299: protection of employees against television-camera's in company; Supreme Court, February 2, 1982, NJ 1983, 246: looking into dashboard in the present case no invasion of private life of car-driver.

private sphere, for example under false pretenses.¹⁰⁶ The Dutch Supreme Court has upheld a case of the Amsterdam Court of Appeals which considered the manner in which weekly magazine "Privé" gathered its news an unlawful invasion of the right to respect for the private life of Princess Irene's children. Defendant had posted a reporter in a car outside the new school of Princess Irene's eldest son for four days, in an attempt to gather news about him and/or to take photographs. The Pres. of the Amsterdam District Court prohibited defendant from forcing itself on plaintiffs or to follow them for its (photo) press activities in a manner that was annoying to them. The Court of Appeals upheld the injunction. It took into consideration as relevant circumstances that, though the young members of the Royal Family were in fact public figures (although of minor importance), they had in no way whatsoever given cause for a greater interest of the media in their private lives, and that the news value of the news facts purportedly gathered (the start of a new education) was marginal.¹⁰⁷

Informational privacy is associated with the right of the individual to decide in principle for himself about the release and the use of personal data. In this respect the right to respect for one's private life may be infringed

- a) by *interference* in the communication between the individual and third parties, for instance by breaching the confidentiality of the mail, or telephone and telegraph;¹⁰⁸
- b) by *recording* personal data on a medium, multiplying this medium, or storing personal data on a database and by abusing these data.¹⁰⁹ On the basis of Article 7 Personal Data Act, a general binding decree by order of the council¹¹⁰ has been issued, which provides rules regarding "*sensitive data*" about a person's religion or philosophy of life, race, political conviction, sexuality or intimate conduct in life, and medical, psychological, criminal or disciplinary data; or
- c) by the *publication* of information concerning a person. The question under what circumstances publications concerning a person may be unlawful is dealt with separately below.

106. Cf. Art. 139g Criminal Act; Pres. District Court the Hague, January 29, 1985, KG 1985, 55 (*Cakici/Centrumpartij*); Pres. District Court Amsterdam, February 17, 1983, KG 1983, 94 (*Des Bouvrie/PSP*).

107. Supreme Court, March 4, 1988, NJ 1989, 361 (CJHB) (*Children Princess Irene*).

108. Cf. Art. 139a-e Criminal Act with respect to wire-taping.

109. Art. 10(2) Dutch Constitution provides that rules with regard to the recording and distribution of personal data are dealt with in the Personal Data Act (*Wet Persoonsregistraties*). See *Handboek privacybescherming en persoonsregistratie* (loose-leaf). Kabel, *Informationele privacy als heilige koe*, *AMI* 1993, at 23, restricts the term "informational privacy" for personal data. Other parts of privacy fall into the category "relational privacy" which is protected by the right to select one's contact's with other parties, including the media: a sort general "right to be let alone." Cf. Poulet, *Data Protection Between Property and Liberties. A Civil Law Approach*, in: *Amongst Friends in Computer and Law, A Collection of Essays in Remembrance of Guy Vandenberghe*, 161 (1990) arguing that the data protection should not be viewed as an individual's property right in his "computerized image" but as a (privacy) right to self-controlled autodetermination.

110. Decree Sensitive Data (*Besluit Gevoelige Gegevens*) of February 19, 1993, Stb. 1993, 158, changed by Decree of July 6, 1993, Stb. 399.

[C] Invasion of Private Life by Press Publications

Until 1992 the Civil Code provided special rules for the actions against the torts of slander,¹¹¹ defamatory writing,¹¹² libel,¹¹³ or mere insult.¹¹⁴ In the current Civil Code these rules have been left out and an action against a tort may be instituted as a result of any disclosure, press publication or insult under Article 6:162 Civil Code.¹¹⁵ In the above-mentioned decision about Princess Irene's children, the Dutch Supreme Court held that:

"In the answer, to be found by balancing, to the question whether a press publication that invades another person's right to respect for his private life, is justified by the freedom of speech - the assertion of which constitutional right is inter alia restricted by the rights of others - all particular circumstances of the case in question should be considered."¹¹⁶

In this case, the Amsterdam Court of Appeals had ruled that not only was the manner of news gathering unlawful, but also the report itself. According to the Court of Appeals, the reflections on and suggestions about the children's private affairs constituted an unlawful invasion of their private lives. In appeal, the Dutch Supreme Court held that, in its balancing as meant above, a court may take into account both the nature of the fact or the facts that the press publication is based on, and the interests that the newspaper in question endeavors to serve in general, or with the involved publication in particular. Thus the Court of Appeals was allowed to take into consideration that, according to its judgment, the news value of the facts concerned was marginal.¹¹⁷

It is stated above that in balancing the plaintiff's interests in respect for his private life against the interest in freedom of speech, the Dutch Supreme Court did not make an essential distinction between publications of a portrait and publications without a portrait. This implies that the questions and circumstances listed in § 4.5[B][4][g], which may play a role in the question of the unlawfulness of publications of a portrait, may also be relevant to determine the unlawfulness of press publications of a different nature. The interests of the portrayed, mentioned in that section, to be able to oppose the occurrence of physical danger, the interference with a new life, or the publication of his identity as a victim of a crime may carry equal weight in press publications

111. Art. 261(1) Criminal Act: slander: intentional assault of a person's honor or good reputation by charging a specific offense, with the obvious purpose to give it publicity (=smaad).

112. Art. 261(2) Criminal Act: libel: slander by publication of writings or pictures (=smaadschrift).

113. Art. 262 Criminal Act: slander or libel, while knowing that the charge is false (=laster).

114. Art. 266(1) Criminal Act: intentional defamation which is not slander nor libel (=eenvoudige belediging).

115. See for literature on unlawful press publications: Aubel, *Persoon en pers*, 1968; Grosheide (Red.), *Hoofdstukken mediarecht*, 1991, Chapter V; Kemper, *Pers en Privacy*, *AMI* 1987, at 101; Schuijt, *Is de Hoge Raad bang voor de uitingsvrijheid?*, *AMI* 1990, at 83; Schuijt, *Hoge Raad niet meer bang voor de uitingsvrijheid?*, *AMI* 1996, at 23; *Onrechtmatige Daad* (old Civil Code) IX (Michiels van Kessenich-Hoogendam); *Onrechtmatige Daad* (new Civil Code) VII (Schuijt). See about Artt. 261-266 Criminal Act: Noyon/Langemeijer, *Het Wetboek van Strafrecht*, adapted by Remmelink (loose-leaf).

116. Supreme Court, March 4, 1988, NJ 1989, 361 (CJHB) (*Children Princess Irene*), para. 3.5.

117. *Id.* NJ 1989, 361, para. 3.6.

without a portrait. However, the interest not to be incorrectly connected with an unwanted subject matter is balanced differently in press publications without portraits, than in publications of portraits since it should be avoided that the media, out of fear of civil sanctions, will be less inclined to expose social abuses. It should also be noted that the use of someone's portrait is a more substantial taking of personality, a greater invasion, than to use his name.

In the "*Municipal Councillor*" decision (Gemeenteraadslid X), the Dutch Supreme Court mentioned circumstances that may play a role in press publications in which abuses are exposed.¹¹⁸ The judge then must balance the interests of individual citizens in not being exposed to rash imputations by publications in the press against the interest that abuses which concern society may survive, due to a lack of information among the general public. Which of these interests should be the prevailing in a given case depends, inter alia, on:¹¹⁹

- a) the nature of the imputations made public and the seriousness of the consequences that may be expected with respect to the person they concern;
- b) the seriousness - in the light of public interest - of the abuse that the publication endeavors to denounce;
- c) the extent to which the imputations were, at the time of publication, supported by the factual material available at that time;
- d) the presentation of the imputations viewed in relation to the factors mentioned under a, b and c;
- e) the extent to which it is likely that, even without the litigated press publication, the goal which is pursued in the public interest could have been achieved with a reasonable chance of a rapid success through other means, less harmful to the opposing party;
- f) a possible limitation of the damage caused by the press publication to the person who is affected by it, considering the likelihood that the question would have become public even without the litigated publication being at the disposal of the press;¹²⁰
- g) the authority of the medium;¹²¹
- h) the public position of the plaintiff;¹²²
- i) a possible financial interest in accusing the plaintiff;

118. For other types of publications, other standards could apply: Supreme Court, June 15, 1990, AMI 1990, at 222 (GAS); NJ 1991, 432 (*McDonald's/Wolters-Noordhoff*): use of newspaper article "De vraatzucht van de hamburger" (the gluttony of the hamburger) in educational book is not unlawful towards McDonald's, given the educational background of defendant's publication.

119. Cf. Groen, *preadvies*, De reikwijdte van fundamentele rechten, *HNJV* 1995-I, at 154-155.

120. See for factors a-f: Supreme Court, June 24, 1983, NJ 1984, 801 (MS); NJCM 1984, 43 (Kors); AB 1983, 548, (FHvdB) (*Municipal Councillor*), reversing Court of Appeals Arnhem, April 19, 1982.

121. The authority that third parties may assign to whoever made an actual statement public can be relevant: Supreme Court, February 18, 1966, NJ 1966, 208 (GIS) (*Klokkenspel-Vereniging*); Supreme Court, January 27, 1984, NJ 1984, 803 (CJHB) (*Vara and Bom/Leading Succes People*): Comment in television-program which gives the public the false impression that it derives from an impartial instance working in the public interest.

122. Supreme Court, January 27, 1984, NJ 1984, 802; NJCM 1984, 371 (Kors); AMR 1984, at 92 (De Meij) (*De Telegraaf and the Haariem building fraud*).

- j) the extent to which the plaintiff had an opportunity to answer the imputations.¹²³

In the "*Haarlem building fraud*" case (*Haarlemse Bouwfraude*), the Dutch Supreme Court upheld the decision of the Amsterdam Court of Appeals, in which it stated that daily newspaper "*De Telegraaf*" acted unlawfully against A., since it accused him of having been the brain behind the so-called "*Haarlemse Bouwfraude*" (*Haarlem building fraud*). Here the Court of Appeals took into consideration that, at the time of publication, the published accusations of A. were little supported by the then available factual material, which made it fairly likely that the accusations were unfounded. It also took into consideration the nature of the published accusations, the seriousness of the consequences that could be expected by A. et al. and the fact that the goal pursued by publication could be considered of minor importance, since the accusations were already known to the police and the Public Prosecutor.¹²⁴

Most press publications that are challenged in court are those in which the plaintiff is accused of some wrongful act. In such cases, the most important question seems to be the extent to which the imputation was, at the time of publication, supported by the then available factual material. However, this factor is not relevant in publications in which the truth of the alleged facts is not an issue. For example, the Arnhem Court of Appeals ruled that a (true) press publication of the Police of Arnhem about a criminal action against plaintiff, owner of a garage, was unlawful, because there was no specific need for the police to publish such a publication.¹²⁵ Other examples include the portrait disclosure cases discussed in § 4.5[B][4][a] (intimate parts of body) and § 4.5[B][4][d] (physical danger or danger to a new life).

Schuijt has criticized the doctrine of the Dutch Supreme Court by which, in order to decide whether a press publication unlawfully invades the right to respect for one's private life, all actual circumstances must be taken into consideration. In his opinion, this approach is at odds with Article 10(2) ECHR, which states that freedom of speech may only be limited if necessary in a

123. Factors i) and j) are mentioned by Baarda, *oordeelsvorming in casus van botsende grondrechten*, 1992, at 311. Cf. Pres. District Court Amsterdam, February 2, 1995, KG 1995, 146 (*Van Sprundel/TROS*): tv-broadcasting by TROS in consumer television program "Radar" which showed reporter's unannounced confrontation of plaintiff with complaints of a consumer without giving plaintiff opportunity to reply is contrary to principle of hearing. However, the Pres. did not enjoin the television program because plaintiff was unable provide a valid reason for the problems raised. The plaintiff did not claim a reasonable interest under Art. 21 DCA.

124. Supreme Court, January 27, 1984, NJ 1984, 802; NJCM 1984, 371 (Kors); AMR 1984, at 92 (De Meij) (*De Telegraaf and the Haarlem building fraud*). Cf. Supreme Court, May 17, 1991, NJ 1991, 464 (*NDU/van Kralingen*): accusation that Van Kralingen was involved in drug smuggling not justified in facts or available data; Supreme Court, March 8, 1985, NJ 1986, 437 (CJHB) (*Herrenberg/Het Parool*): articles in newspaper *Het Parool* suggesting that the ambassador of Surinam had relation with drug dealers not unlawful, because the article was a reproduction of what other people had declared.

125. Court of Appeals Arnhem, July 25, 1989, KG 1989, 323 (*State/J.*). Cf. Pres. District Court Amsterdam December 15, 1983, KG 1984, 53 (*De Telegraaf/X*).

democratic society, and for the protection of the rights of others.¹²⁶ However, Schuijt seems to ignore Article 8(2) EHRC which also states that the right to respect for one's private life may be limited only if necessary in a democratic society, and for the protection of the rights and freedoms of others. Schuijt appears to rank the freedom of speech higher than the right to respect for one's private life. The Dutch Supreme Court, however, considers these two basic rights to be equal.¹²⁷

Since the mid 1990's, the Supreme Court explicitly applies the analysis of Article 10(2) EHRC by investigating whether the outcome of the balancing of the specific circumstances by the Court of Appeals was necessary in a democratic society and for the protection of the rights of others.¹²⁸ Therefore, Schuijt concluded that the Dutch Supreme Court now explicitly recognizes the freedom of speech guarantees of Article 10 EHRC in press publication cases.¹²⁹

In addition to an injunction against the publication, and a compensation for material and immaterial damages, the injured party may also claim rectification of defendant's unlawful press publication.¹³⁰ In cases of unlawful press publications, the writer, chief editor and publisher are in principle severally liable for the damage caused.¹³¹

[D] Invasion of Private Life by Fictitious Stories

Persons recognizing themselves in fictitious stories or movies may (under certain circumstances) oppose publication, if the public is led to believe that the described negative context in which this person is placed is not fiction but reality. For example, the Pres. of the Amsterdam District Court prohibited KRO's television screening of Pinto's story "The Woman's Angle" under the title "Louise," since the plaintiff recognized herself in the main character, who was portrayed in the movie as an indecent woman whose political trustworthiness was questioned. The judge was of the opinion that there was sufficient similarity between the life story of plaintiff and that of the main character, whose middle name was Louise. This was not altered by the fact that plaintiff had not opposed

126. Schuijt, *Is de Hoge Raad bang voor de uitingsvrijheid?*, *AMI* 1990, 83, at 86. Article 10 EHRC is discussed at § 9.2[B][2].

127. Supreme Court, January 21, 1994, NJ 1994, 473 (DWFV); *AMI* 1994, at 93 (GAIS); *Mf* 1994, B30 (*Ferdie E./Spaarnestad*).

128. Supreme Court, October 21, 1994, NJ 1996, 346 (CJHB), para. 3.3; *Mf* 1994, B111 (*Blijf van m'n lijf/Multi Magazines*) and Supreme Court, January 6, 1995, NJ 1995, 422 (EJD); *Mf* 1995, B13 (*Het Parool et. al./Van Gasteren*). *Id.* in a trademark and copyright case: Supreme Court October 20, 1995, RVDW 1995, no. 212; *AMI* 1996, at 51; IER 1995, no. 41, at 223 (*Parfums Christian Dior/Evora*).

129. See Schuijt, *Hoge Raad niet meer bang voor de uitingsvrijheid*, *AMI* 1996, 23, at 29-30.

130. Cf. Art. 6:167 Civil Code. See e.g. Pres. District Court Amsterdam, December 12, 1985, KG 1986, 26 (*Prince Willem-Alexander/De Lage Landen*): defendant ordered to rectify suggestions with respect to Prince Willem-Alexander's stay in disco Juliana's and Hilton Hotel, because defendant could not make them plausible.

131. See Court of Appeals Leeuwarden, February 3, 1988, NJ 1989, 314; *AMI* 1990, at 71 (GAIS) (*Rauwerda/Nieuwsblad van het Noorden et al.*).

(the translation of) the English book by Pinto, in which the television story had been embodied.¹³²

The Amsterdam Court of Appeals prohibited the publication of the book "*Seizoenarbeid*" (Seasonal Work) by Lodewijk H. Wiener, insofar as it contains the 27-page short story "*Jansen*". The Court found that plaintiff could recognize himself in the character "Jansen," a Zandvoort restaurant owner, who was caught in a compromising situation with a waitress in the story. The Court held that it would be difficult for those readers who were familiar with Zandvoort to distinguish between reality and fiction, and the reading public would therefore be generally inclined to accept the situations described as the truth.¹³³

However, the sister of Margaretha Geertruida Zelle (better known as Mata Hari) could not oppose the showing of a movie about Mata Hari, in which there is a scene where Mata Hari kills general Shubin. The Pres. of the Rotterdam District Court found that the movie about the exotic dancer and spy for the German government, who stole the heart of Russian lieutenant-airman Alexis Rosanoff, and was eventually fusilladed by the French court-martial, does not represent a historically accurate picture of the life story of Mata Hari. Neither would the public interpret the movie as such. This was not altered by the announcement of the movie as "*Mata Hari's Life Story*," according to the Pres..¹³⁴

Van der Heijden's novel "*Daghani, Daghani*" is based on the works of the Rumanian painter-writer Arnold Daghani (1909-1985). Daghani's next of kin took the view that the story damaged his memory, because Daghani is presented, contrary to the truth, as "a dirty fool; a person who enjoyed a preferential treatment in the concentration camp he stayed in; who was happy and was recognized as an artist only in this camp and who after the war considered a camp bully to be his best friend." Moreover, they argued that the book harmed their own reputation and invaded their right to respect for their private lives. The Pres. rejected the claim to prohibit the circulation of the book. The Pres. held that the disputed extracts must be considered within the context of the published story as a whole. Like the other stories in Van der Heijden's book, it is characteristic for this story that it has a true fact as its starting-point, but is further based on fantasy. The story is clearly a mixture of fiction and reality, based on the works of Daghani, who evoked the image of a particularly kind-hearted man, according to the Pres.. Thus, the content of the story could not be considered needlessly grievous or damaging the memory of Daghani. Moreover, the Pres. did not consider the rights of the next of kin infringed, since they are not mentioned by their real names in the book, live in England, and are not known

132. Pres. District Court Amsterdam, December 4, 1962, NJ 1963, 64 (*Louise*).

133. Court of Appeals Amsterdam, October 12, 1967, NJ 1968, 21 (*Wiener' novel, Jansen*): the reasoning of the Court of Appeals that the novel is not clear fiction because of the triviality of the story, has been criticized by Jessurun d'Oliveira, *Literaire belediging*, in: *Plus est en vous; Opstellen over recht en cultuur*, Pilo-bundel, 1970, 233, and Schuijt, *Dichters liegen de waarheid ofwel: staan schrijvers boven de wet*, *AMI* 1992, 23, at 24.

134. Pres. District Court Rotterdam, October 24, 1932, W 12.510; NJ 1932, at 1602 (*Zelle/Tuschinski et al.*).

in the Netherlands. Therefore, it should be considered out of the question that they will be identified by the Dutch reader.¹³⁵

5.4 Neighboring Rights, Rights of Performing Artist

Since July 1, 1993¹³⁶ the Neighboring Rights Act (NRA) has been effective in the Netherlands.¹³⁷ This law, which enabled the Netherlands to accede to the Rome Convention (RC) of October 26, 1961,¹³⁸ provides performing artists, phonogram producers and broadcasting networks with certain exclusive rights with respect to certain performances.¹³⁹

Under Article 1(a) NRA, a *performing artist* is:

- the actor, singer, musician, dancer and every other person that presents, sings, recites or in any other way performs a work of literature or art,¹⁴⁰ as well as
- the artist who performs a variety or circus act, or puppet show.¹⁴¹

The *object* of protection is the performance by a performing artist. The term "*performance*" is not further defined by the law, but its meaning is deduced from the definition of "*performing artist*." It is essential that an artistic activity is involved. Persons "that perform actions which lack every personal character and which are, for example, purely technical in nature" cannot be considered to be performing artists in the sense of the Neighboring Rights Act.¹⁴² Sportsmen and -women are not included in this definition,¹⁴³ since they are not seen as artists performing the required artistic activity. Included, however, are circus artists, such as clowns, magicians and human cannon balls.¹⁴⁴ Statements made during a radio interview are by no means performances by a performing artist.¹⁴⁵

135. Pres. District Court Amsterdam, October 4, 1990, KG 1990, 335; AMI 1991, at 97 (GAIS) (*Daghani, Daghani*).

136. Stb. 1993, 244.

137. Law of March 18, 1993, Stb. 1993, 178.

138. Trb. 1986, 182.

139. In the Explanatory Statement of the Copyright Act of 1912, the legislator made clear that the act of a performing artist is non-copyrightable. See Snijder van Wissenkerke, *Het auteursrecht in Nederland*, 1913, at 169.

140. It is not necessary that the work (still) enjoys copyright protection.

141. This extension is based on Art. 9 Convention of Rome, which provides that the members may extend the protection to artists which do not perform works of literature or art. Cf. Wallace, *Generalbericht, GRUR Int.* 1960, 609, at 612.

142. Tweede Kamer (Dutch Lower House) 1989-1990, 21.244 no. 6 (MvA), at 16-17.

143. Id. Tweede Kamer 1989-1990, 21.244 no. 6 (MvA), at 16.

144. Cf. Visser, *De bescherming van gewichtheffers, cheerleaders en menselijke kanonskogels*, AA 1993, 20, at 21.

145. Pres. District Court Haarlem, September 20, 1994, KG 1994, 408; Mf 1994, B99; AMI 1995, at 39 (*Mulder/Never Mind Music*): CD of house music mixed with sayings of plaintiff, an opponent of house music, uttered in a radio interview does not violate Art. 2 NRA, but is unlawful because it defames the plaintiff.

Article 2(1) grants the performing artist the exclusive right to give permission to one of the following actions:

- a) recording¹⁴⁶ a performance;
- b) reproducing¹⁴⁷ of (part of) a recording¹⁴⁸ of a performance;
- c) bringing into circulation (reproductions of) a recording of a performance or, for that purpose, importing, offering, or storing it;¹⁴⁹
- d) directly broadcasting or rerunning, or in any other way making public a performance.

It is important to notice that, under the Neighboring Rights Act, the performing artist cannot oppose the imitation of his performance by other performing artists. Contrary to the 1912 Copyright Act,¹⁵⁰ the Neighboring Rights Act does not include an exclusive right to adaptation or imitation in an altered format.¹⁵¹ In addition to these exploitation rights, Article 5 NRA also assigns certain personality rights to the performing artist. Rights which to a large extent resemble the moral rights of the author,¹⁵² such as the right to the mention of one's name and the right to oppose alteration or mutilation of his performance. These rights may still be exercised after exploitation rights have been assigned.

The major difference between the protection performing artists enjoy under the Neighboring Rights Act and the protection persons enjoy against the unauthorized commercial exploitation of their portrait, name, voice or other identifying attributes, lies in the object of legal protection. The performing artist is entitled to the rights provided in Article 2(1) NRA only with respect to his performance of a work of literature or art, a variety or circus act or a puppet show. The law does not require that the public must identify the performing artist from his performance. Both forms of protection may, however, overlap in the event that the performance features the portrait or the voice or other characteristics of the performing artist, and this performance is used without permission in advertisements for another's commercial products. However, if not the performance itself, but an imitation by a look-alike or a sound-alike is being used, the performing artist will not be able to claim an infringement of his neighboring right. He can, however, under certain circumstances, appeal to Article 6:162 Civil Code.¹⁵³

146. See Art. 1(b) NRA: the first recording in fixed form of sounds and/or pictures.

147. See Art. 1(f) NRA: the production of copies of fixations.

148. This is not the making of one or more sound samples, unless the part reproduced is such, that the creative activity of the performing artist is copied. Cf. Hugenholtz and Koedooder, *Klankjatten: juridische aspecten van sound sampling*, *NJB* 1987, 1511, at 1512 with respect to copyright.

149. Pursuant to Art. 2(2) NRA this right is exhausted with respect to copies which are brought into circulation by or with permission of the owner (first sale doctrine).

150. Art. 1 in conjunction with Art. 13 DCA.

151. However, under specific circumstances, an imitation could constitute a form of unfair competition under Art. 6:162 Civil Code, e.g. if defendant suggests that its performance is an original performance.

152. Art. 25 DCA.

153. See §§ 4.5[C] and 5.2.

The rights of actors who perform in a motion picture are restricted. Article 4 NRA provides that the rules of Articles 45a-g DCA are applicable to the performance of performers who act in a film work.¹⁵⁴ Article 45d DCA creates a statutory presumption of assignment to the producer of the film work. All authors and performers are deemed by statute to have assigned their main exploitation rights to the producer, unless they have agreed otherwise in writing.

Under Article 6 NRA the phonogram producer has the exclusive right to reproduction, exploitation, broadcasting and other forms of making his phonogram or a reproduction thereof public. A phonogram is any recording of sounds of a performance or other sounds.¹⁵⁵ The law does not require any innovative or creative qualities in a recording. The right to give permission to record a performance only applies to the performing artist.

Since the legislator wanted to prevent performing artists or phonogram producers from prohibiting the broadcast of phonograms over the radio or on television under respectively Article 2 or Article 6 NRA, Article 7 NRA states that a phonogram or a reproduction thereof which has been launched for commercial purposes, may be broadcast or made public in any other way without the permission of the phonogram producer and performing artist or those who have procured their rights, provided that they are paid a reasonable compensation.¹⁵⁶

Under Article 7 NRA, broadcasting stations have the exclusive right to rerun, record, reproduce, exploit and make public recordings of their programs or the reproductions thereof.

Article 12 NRA fixes the duration of these rights to fifty years after the performance has taken place, the phonogram has been produced or the program has been broadcast. The legislator has limited the content of the exploitation rights of the three owners in Article 10 and 11 NRA. Thus, Article 10, for example, allows recording and reproduction for personal (noncommercial) use and the use of "short fragments" in the coverage of current events.

Before 1993, when the Neighboring Rights Act had not yet been implemented, performing artists and phonogram producers could oppose the producing and trading of unauthorized reproductions under the tort clause of Article 6:162 Civil Code.¹⁵⁷ Article 34 NRA provides that the articles of the Neighboring Rights Act do not preempt an appeal to Article 6:162 Civil Code. This provision may be relevant to performing artists or phonogram producers from countries that have not acceded to the Rome Convention or the Geneva Convention of October 29, 1971.¹⁵⁸ Since, for instance, the United States have not acceded to the Rome Convention, under the Neighboring Rights Act, American performing

154. Article 45a DCA defines a film work as one consisting of a sequence of images with or without sounds, irrespective of the mode of fixation of the work, if it is fixed at all.

155. Art. 1(c) NRA.

156. This collective "secondary" exploitation of phonograms by musicians and phonogram producers is organized by the SENA (Stichting ter Exploitatie van Naburige Rechten), a foundation for exploitation of neighboring rights.

157. Supreme Court, February 24, 1989, NJ 1989, 701 (LWH); AA 1989, at 675 (HCJ); AMI 1989, at 70; IER 1989, no. 21, at 41 (JHS); GRUR Int 1990, at 233 (HER) (*Elvis Presley I*), see § 5.2[F].

158. Trb. 1986, 183.

artists are only able to oppose the trading of recordings of concerts given in the United States in the Netherlands, if this infringes the rights of their phonogram producers.¹⁵⁹ Should this, however, not be the case, they can still institute an action against a tort under Article 6:162.¹⁶⁰

5.5 Trademark Law

Name, portrait or other identifying elements of a person may also be used as a trademark. Once a trademark right has been obtained,¹⁶¹ the Benelux Trademark Act (BTA) provides a solid protection against the unauthorized exploitation of this trademark by a third party. Pursuant to Article 1 BTA in conjunction with Article 39 BTA, designations, drawings, prints, stamps, letters, numbers, forms of goods or of packings and all other signs that are meant to distinguish the goods or services of a company may be considered trademarks or service marks. Once a sign is in fact used as a trademark, trademark protection can only be appealed to if the trademark has been registered.¹⁶² The trademark right is not obtained until a deposit has taken place.¹⁶³

On the basis of Article 13A(1) BTA the trademark owner can oppose:

- a) any use in the course of trade made of the mark for goods for which the mark is registered;
- b) any use in the course of trade made of the mark or of a similar sign for goods for which the mark is registered or for similar goods where there exists a likelihood of association on the part of the public between the sign and the mark;
- c) any use in the course of trade, without due cause, made of a mark that has a reputation in the Benelux territory, or of a similar sign, for goods that are not similar to those for which the mark is registered, where use of such sign takes unfair advantage of or is detrimental to the distinctive character or the repute of the mark;
- d) any use in the course of trade, without due cause, of a mark or a similar sign in any way other than to distinguish goods where use of such sign takes unfair advantage of or is detrimental to the distinctive character or the repute of the mark."

According to the Benelux Court of Justice, a trademark is in principle used in economic intercourse "if used - other than for purely scientific purposes - within

159. The USA is member of the Convention of Geneva.

160. Cf. Cohen Jehoram, *De strijd tegen de platenpiraterij*, *AMI* 1989, 67, at 69. It should be noted that Article 14(1) TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods) provides that performers shall have the possibility of preventing the following unpermitted acts: the fixation of their unfixed performance and the reproduction of such fixation, and the broadcasting by wireless means and the communication to the public of their live performance. This means that under Art. 4(c) TRIPS the right of Art. 7 NRA (right to reasonable compensation for broadcasting of a phonogram) does not have to be granted to performing artists of other TRIPS countries.

161. It is possible that a celebrity who exploits his name as a trademark, infringes another's older trademark. *E.g.* Pres. District Court the Hague, December 11, 1991, BIE 1993, no. 34, at 123; IER 1992, no. 8, at 49 (*Hessels Modeschoeisel/Muelhens*), held that the use of the name of tennis player GABRIELA SABATINI, registered as a mark for cosmetic goods, infringed plaintiff's older mark SABATINI for ladies' shoes.

162. Art. 12A BTA.

163. Art. 3(1) BTA.

the context of a company, a profession, or any other non-private activity aimed at gaining economic advantage.¹⁶⁴ According to the Benelux Court of Justice "a valid reason" means a justification of which

"it should generally be required that for the user of the sign there is such a need for the use of that particular sign, that he cannot be reasonably expected, notwithstanding the damage caused to the trademark owner by that use, to refrain from that use."¹⁶⁵

The content of the trademark right is very large. Profiting from the popularity of another person's trademark, by using it for one's own commercial purposes in connection with non-similar goods or services, usually constitutes an infringement of the trademark right, if the trademark owner can reasonably show that he may suffer damages as a result of diminution of the exclusivity, or the attractive power of the mark.¹⁶⁶ There will be no infringement of the trademark right in cases where a danger of damages does not seem likely.¹⁶⁷

The trading of a popular trademark as a product in itself can also constitute an infringement of the trademark. For example, the 's-Hertogenbosch District Court held that the trading of imitation Michelin dolls was an infringement of the Michelin trademark for car tires, since it may dilute the exclusivity and distinguishing power of the trademark, even though the public was aware of the fact that the dolls were imitations.¹⁶⁸

5.6 Misleading Advertising and Self-Regulation

[A] False or Misleading Advertising

Misleading advertising is the publication of untrue statements or incorrect suggestions about one's own products or services¹⁶⁹ with respect to factors that

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164. Benelux Court of Justice, July 9, 1984, NJ 1985, 101 (LWH); BIE 1985, no. 20, at 59; AA 1985, at 28 (HCJ) (*Tanderi*). It should be noted that this decision has been rendered under the Old Benelux Trademark Act.
165. Benelux Court of Justice, March 1, 1975, NJ 1975, 472 (LWH); BIE 1975, no. 30, at 183; AA 1977, at 664 (HCJ) (*Klaren/Claerijn*). It should be noted that this decision has been rendered under the Old Benelux Trademark Act.
166. Examples of trademark infringement because of dilution: District Court the Hague, December 21, 1978, BIE 1982, no. 13, at 42 (*Christopher Dunhill/Dunhill*): Christoffer Dunhill-sunglasses is infringement of trademark "ALFRED DUNHILL" for smoker's goods; Pres. District Court Brussels, January 5, 1988, BIE 1989, no. 5, at 16 (*Rolls-Royce/Roll's*): the sign "ROLL'S" and a picture of a radiator of a Rolls Royce car on labels of beer bottles infringe the word- and devicemark ROLLS-ROYCE.
167. Cf. Court of Appeals Amsterdam, May 22, 1980, BIE 1981, no. 72, at 324 (*"Jeep" for women's wear*): use of the mark JEEP for women's wear (not similar to cars) does not infringe the trademark JEEP for cars, because there is no dilution; Pres. District Court Amsterdam, October 4, 1991, BIE 1992, no. 73, at 298; IER 1992, no. 3, at 25 (*VOO/Rank Xerox*): Not plausible that plaintiff Veronica suffers or will suffer damages by defendant's use of the word COUNTDOWN in its advertisement for Rank Xerox copy machines.
168. District Court 's-Hertogenbosch, August 27, 1982 and April 29, 1983, BIE 1983, no. 89, at 273 (*Michelin-Bidendum-character*). The decision has been rendered under the old benelux Trademark Act.
169. See for misleading advertisements or product disparagement: *Onrechtmatige Daad* (old Civil Code) VI (Martens) nos. 140-158; Verkade, *Ongeoorloofde mededinging*, 1986, at 108-114 (disparagement) and 154-171 (comparative advertising).

may be relevant in a purchase decision. Article 6:194 Civil Code¹⁷⁰ mentions inter alia as examples of aspects with respect to which a statement may be misleading: the nature, composition, quantity, quality, characteristics, application possibilities, origin, price, testimonials or other opinions of third parties, guarantee, identity or authority of the person by whom, under whose management or supervision or with whose cooperation the goods are manufactured or offered or the services are performed, and the comparison with other goods and services.

On the one hand, misleading advertising is unlawful as it provides the misleading competitor with an illegally obtained competition advantage over his competitors. On the other hand it is unlawful because it creates an incorrect impression with the public. From this double foundation it follows that for the injunction against misleading advertising, it is not required that a consumer is worse off by it, feels deceived or suffers actual damages.¹⁷¹ Even if the consumer is better off because, due to the misleading statement, he has bought a better and cheaper product, the misleading advertisement remains unlawful, since the misleading competitor did not attract clients in a fair manner.¹⁷²

It has been decided in case law that the unauthorized commercial use of a person's name, portrait or other identifying elements may be unlawful towards this person, due to a misleading statement or suggestion concerning a particular link with that person. This link may include the suggestion of an endorsement, recommendation, approval, supervision, use, guarantee, etc. of the product by that person.¹⁷³ Suggesting a non-existent link between a product or service and a particular person may constitute a form of unlawful misleading advertising. In this light, the Pres. of the Rotterdam District Court held that the advertising of Babolat-VS tennis racket strings, in which, contrary to the truth, it was suggested or otherwise stated that Boris Becker had played or was otherwise still (exclusively) playing tennis with a tennis racket with two red strings, was a form of misleading advertising, which was unlawful towards Boris Becker.¹⁷⁴

The misleading attribution of a work to well-known artists may also be unlawful towards them as a result of invasion of their personality rights¹⁷⁵ or of misleading advertising. For example, the Amsterdam Court of Appeals prohibited publisher Terra Nostra creating the false impression that its publication contained drawings by the contemporary artist Joop Geesink. The Publisher had

170. Part of the law of false advertising has been codified in Artt. 6:194 t/m 196 Civil Code.

171. But see Verkade, *Verwarrende verwarring?* in: *Gratia Commertii*, Van Oven- liber amicorum 1981, at 400-401: misleading is "such confusion, that the public, if it therefore would have committed a specific transaction, had reason to feel itself 'cheated.'" Id. Verkade, *Misleidende reclame*, 1992, at 38.

172. Cf. in a case about comparative advertising, Supreme Court, March 29, 1985, NJ 1985, 591 (LWH); BIE 1985, no. 39, at 307 (vNH) (*Substral/Pokon*): "Even if his products, in fact, are better, he tries to get a head start in the competition by falsely informing the public about the composition of his product, against which the Articles mentioned [Artt. 6:194 e. v. Civil Code] intend to protect competitors and consumers."

173. Cf. Art. 6:194 sub a, b, f, h and i Civil Code.

174. Pres. District Court Rotterdam, March 20, 1987, KG 1987, 191 (*Boris Becker/Omnisport Beheer*): injunction against false advertising, and order to rectify.

175. On the basis of Art. 25(1)(a) and (b) DCA the author has the right to have his name mentioned on reproductions or publications of his work (*droit à la paternité*).

waited 18 years before publishing the drawings for which it had obtained the copyrights. However, the Court of Appeals did allow the publisher to counteract the misleading suggestion by mentioning the date of issue of the drawings.¹⁷⁶

[B] Self-Regulation

Since 1964, the Netherlands has an Advertising Standards Authority (Reclame Code Commissie or RCC) and in appeal a Board of Appeals (College van Beroep or CvB), which examine complaints of contravention of the Dutch Advertising Code (Nederlandse Reclame Code).¹⁷⁷ The Advertising Standards Authority and the Board of Appeals are not government bodies, but private institutions that exercise the self-regulation incorporated in the Advertising Code. In the self-regulation by representatives of advertisers, consumers and media it has been tried, both with respect to its content and organization, to take into consideration all relevant interests.¹⁷⁸ All advertisers, advertising agencies and media that have contracted for compliance with the recommendations, whether public or not, of the Advertising Standards Authority and the Board of Appeals, must comply with their decisions.¹⁷⁹

Article 2 Advertising Code states that every form of advertising should be in accordance with the law, the truth and the requirements of good taste and decency. Article 5 Advertising Code states that advertising manifestations should in form and content be such, that they do not harm the trust in advertisements or advertising.¹⁸⁰ The Advertising Code does not contain any specific rules with respect to the unauthorized use of a person's identifying characteristics in advertisements. In general, the Advertising Standards Authority and the Board of Appeals consider the use of the identity of a person in advertising without his permission a violation of Article 2 Advertising Code, usually because of infringement of the personality right, or sometimes a violation of Article 5 Advertising Code.¹⁸¹

176. Court of Appeals Amsterdam, May 14, 1964, NJ 1964, 453 ("*Sprookjesparade*"), affirming Pres. District Court Amsterdam, August 27, 1963, NJ 1963, 419.

177. Since 1988, STER commercials are examined for compatibility with the rules for Dutch television commercials (Voorschriften voor de Nederlandse etherreclame) by the Board for television commercials of the Advertising Standards Authority (Kamer voor de Etherreclame van de RCC).

178. Cf. Kabel, *Zelfregulering en recht. Basiscriteria voor zelfregulering van reclame in Nederland*, SEW 1983, 151.

179. The civil courts are competent to judge conflicts in which the Advertising Standards Authority (RCC) or the Advertising Board of Appeals (CvB) has given an opinion. See e.g. Court of Appeals Amsterdam, October 30, 1980, NJ 1981, 422 (*Boycot Ouispan Aksie*); Pres. District Court Haarlem, April 2, 1986, IER 1986, no. 22, at 57 (*Best Shops in Town*); Court of Appeals Amsterdam, January 26, 1989, IER 1989, no. 22, at 43 (*OZO/RCC*).

180. The Advertising Code is printed in PRAR XV no. 1.

181. Of course, the use celebrities in advertising can be restricted by advertising rules which protect other interests than the interests of celebrities themselves. A discussion of such rules is beyond the scope of this thesis. See e.g. Pres. Department of Justice of the Council of State (ARRS), June 30, 1987, KG 1987, 273; IER 1987, no. 46, at 79 (*Postbank/Reclameraad*): commercial hosted by Koos Postema is contrary to Art. 6 VNE (old), because of lack of distinction between commercial and television program.

For example, the Board of Appeals held the use of a photograph of a man who, with a rope between his teeth, broke the world record for locomotive towing, in combination with the lines: "People try the craziest things. So why not a X?," a violation of Article 2 Advertising Code, since the advertiser had not convinced himself beforehand that the record-holder did not use his record for commercial purposes himself.¹⁸² In another case, the Advertising Standards Authority considered the insertion without permission of a photograph of soccer players in an advertisement for a television-set, a violation of Article 2 Advertising Code because of negligence.¹⁸³ The unpermitted use of the name of a well-known Volendam athlete on an advertising poster for textiles was considered a violation of Article 5 Advertising Code by the Advertising Standards Authority, because this athlete appeared to own a textile store.¹⁸⁴

However, more stringent was the decision of the Board of Appeals in the case about the "*Heertje Spaarbeertje*" (Heertje, the Saving Teddy) advertising campaign of the ABN Amro Bank aimed at parents and grandparents of young children. The Board of Appeals found that, by this advertisement, the bank did not deliberately want to profit from the reputation of economics professor Heertje. The Board of Appeals did not however exclude that a part of this public briefly associated the campaign with Professor Heertje, as a result of the similarity in the name. Despite this association, the Board of Appeals did not consider the advertising campaign a violation of the Advertising Code, because the public would not think that Professor Heertje had given his assistance to this action, and that he was otherwise not aggrieved.¹⁸⁵

The Advertising Standards Authority and Board of Appeals relatively often pass judgments in cases involving *politicians* and important *businessmen*, who will themselves not be quickly inclined to sue. The defense that politicians, as a result of their public function, may expect to be used in advertisements for commercial products is generally rejected.

For example, the Advertising Standards Authority held the use of a portrait of politician Ruud Lubbers in an advertisement of Etos for shaving articles, negligent toward the portrayed and a violation of Article 2 Advertising Code.¹⁸⁶ Similarly, the Advertising Standards Authority held that the use of a picture of *President Jeltsin* in an advertisement of Gall & Gall for its Vodka constituted a violation of Article 2 Advertising Code.¹⁸⁷

182. Advertising Board of Appeals, September 20, 1979, no. 1679, PRAR IVB no. 13c (*World record locomotive towing*).

183. Advertising Standards Authority, May 31, 1979, no. 1580, PRAR IVB no. 13c (*Player Dutch soccer team*).

184. Advertising Standards Authority, May 31, 1979, no. 1593, PRAR IVB no. 13c (*Volendam Athlete*).

185. Advertising Board of Appeals, November 5, 1992, IER 1993, no. 3, at 14 (*Heertje/ABN Amro*).

186. Advertising Standards Authority, December 20, 1982, no. 3357, PRAR IVB no. 13c (*Etos for Ruud Lubbers*). Cf. Advertising Standards Authority, May 31, 1976, PRAR IV no. 13c (*Dr. Ir. F.J. Philips/Intermediair*): photomontage of Dr. F.J. Philips, holding weekly magazine *Intermediair*, is contrary to Art. 2 Advertising Code; Advertising Standards Authority, May 18, 1989, no. 6267, at 45 (*Rev. Martin Luther King*): use of portrait of Martin Luther King in advertisement is contrary to Artt. 2 and 5 Advertising Code.

187. Advertising Standards Authority, May 29, 1996, no. 9160 and no. 9160A (*President Jeltsin carrying bottles of Vodka*). Id. Board of Appeals, July 29, 1996, no. 9160B (*President Jeltsin carrying bottles of Vodka*).

The use of a photograph, which had previously been used to illustrate news items, of Queen Beatrix and Prince Claus in an advertising brochure for investments in Krugerrands, was considered a violation of Article 2 Advertising Code.¹⁸⁸ The Board of Appeals considered the use of a photograph of Lady Diana and Prince Charles of England in an advertisement for computerization services and the lines "SO MANY THINGS WENT WRONG IN 1992. EXCEPT FOR OUR CUSTOMERS" a violation of Article 5 Advertising Code, since it was not established that the advertiser had obtained permission for the use of the portraits from these persons. The Board of Appeals considered:

"The rule, which may in this case serve as a starting point, that using portraits of well-known persons for commercial purposes without their permission should be considered in defiance of decency as meant in Article 5 Dutch Advertising Code, applies all the more in this case as it has become absolutely clear that advertiser, for the subject that it touched upon - failures in the implementations of computerization orders - has wanted to profit from the generally known marital problems of the persons portrayed."¹⁸⁹

An exception in which a politician himself filed a complaint, involves an advertisement for air journeys in which above the line "We would now advise you to take a short break" a photograph of politician Mr. Kok was shown. The Advertising Standards Authority considered this advertisement a violation of Article 5 Advertising Code because it was established from Kok's complaints that he had not given the advertiser permission to use his photograph for the recommendation of its air journeys. According to the Advertising Standards Authority the advertiser has

"infringed Kok's right to decide for himself whether or not and if so in what way his photograph may be used in a form of advertising. The fact that Mr Kok is a public figure who may, to a certain extent, expect some publicity with respect to his person does not alter this."¹⁹⁰

In the decisions of the Advertising Standards Authority and the Board of Appeals it is not always clear whether violation of the Advertising Code is found on the basis of immaterial or material interests. The Advertising Standards Authority does not distinguish between well-known and unknown persons.¹⁹¹

In some cases the Advertising Standards Authority has considered advertisements for music recordings a violation of Article 7 Advertising Code (mis-

188. Advertising Standards Authority, January 22, 1985, no. 3970, at 23 (*Queen Beatrix and Prince Claus*). Id: Advertising Standards Authority, May 4, 1983, no. 3530, PRAR IVB no. 13c (*Tax course with portrait Queen*): use of photo of Queen Beatrix in advertisement of book "De belastingcursus van Willems." (*The tax course of Willems*).

189. Advertising Board of Appeals, July 9, 1993, no. 748/93 (*Photograph of Diana and Charles*).

190. Advertising Standards Authority, November 30, 1993, no. 93/7924 (*Photograph of Minister Kok*).

191. See for an example of an advertisement with a photograph of a non-celebrity: Advertising Standards Authority, December 4, 1978, no. 1458, PRAR IVB no. 13 (*Nijssen/Nieuwkoop*): advertisement "De belangrijkste kamerbreedportretten van Amsterdam, voor U verzameld door Henk Nieuwkoop" (*The most important wall-to-wall portraits of Amsterdam, collected for you by Henk Nieuwkoop*) with five portraits, including the portrait of plaintiff, invades plaintiff's private life, since defendant did not ask for his permission to use his portrait.

leading advertising), because the advertiser suggested that the music was performed by famous rock bands, while in fact it involved performances by less well-known artists.¹⁹²

192. Advertising Standards Authority. December 4, 1978, no. 1360, PRAR IIA no. 86.2 (p. 491) (*Bee Gee's*): advertisement for music cassette and text: "16 superhits, 16 covertones, 16 Bee Gee's supersongs" is misleading, because the songs were not performed by the Bee Gee's themselves; Advertising Standards Authority. December 4, 1978, no. 1369, PRAR IIB no. 86.2 (*Abba*): advertisement with text: "The Best of Abba," is misleading, because the songs are not performed by Abba. This conclusion is not altered by the fact that STEMRA (Dutch equivalent of BMI) granted permission to sell the records.

PART II
TOWARD A NEW INTELLECTUAL
PROPERTY RIGHT

CHAPTER 6

DEVELOPMENT OF THE RIGHT OF PUBLICITY INTO A NEW INTELLECTUAL PROPERTY RIGHT

6.1 Main Differences Between United States and Dutch Law

[A] Commercial Interests

The right of publicity in the United States is the common name for two different rights. It protects two different objects:¹ a person's identity, and his non-fixed live-performances. These objects are protected against different infringing acts. In the *first* place the right of publicity provides protection against damage to the commercial value of an individual's identity caused by unauthorized commercial use. *Second*, the right of publicity provides protection against the unauthorized reproduction and imitation of a performer's non-fixed live-performance.² The United States does not recognize neighboring rights and is not a member of the Convention of Rome of 26 October 1961, but it does recognize a limited copyright in sound-recordings.³

The Netherlands does not recognize a right which provides protection against unpermitted commercial use of an individual's identity as such. Instead, the Dutch Copyright Act provides specific rules with respect to the use of portraits. Other characteristics which identify a person can be protected on the basis of Article 6:162 Civil Code, which recognizes an open system for tort actions in the event of damages. Performing artists receive protection against unauthorized recording, reproduction, sale of reproductions, and making public their performances of works of art under the Neighboring Rights Act. Thus, unlike the American right of publicity, Dutch law does not provide protection against the imitation of performances, except in cases of unfair competition or infringement of the personality right of the performer.

Under Article 21 DCA, a person can oppose the publication of his portrait insofar as this would conflict with his "*reasonable interest*." In the beginning of this century the legislator only thought of protection of moral interests, but since the end of the 1950s courts have also recognized commercial interests of the portrayed as reasonable.

However, under Dutch law the possibility of commercially exploiting one's own identity is restricted. *First*, the Dutch Supreme Court has only recognized a person's commercial interests with respect to his portrait, which requires at least some elements of a person's face. Actions against unpermitted commercial exploitation of other identifying elements must be based on Article 6:162 Civil Code.⁴ But since this tort protection is essentially equivalent to that enjoyed by virtue of intellectual property rights, it is not clear under what additional

1. See §. 3.3.

2. See § 2.6.

3. See § 3.4[A] and § 11.2[C].

4. One exception is art. 1:8 Civil Code, see § 5.1[C].

circumstances the Dutch Supreme Court will grant protection against unpermitted commercial exploitation of identifying non-portrait characteristics.⁵ This means that the legal criteria for protection of portraits and protection of other identifying characteristics are not necessarily the same.

Second, it is not evident that every person has the right to claim commercial damages caused by unpermitted commercial exploitation of personal identity. The Dutch Supreme Court only recognized the commercial interests of portrayed persons who have such popularity, acquired in their professional career, that a commercial exploitation of their portraits at a charge becomes feasible.⁶

Third, the Dutch Supreme Court only recognized the right to profit from one's popularity. It is not evident that persons can also enjoin the unpermitted commercial exploitation of personal identity.

Fourth, the right to oppose commercial damages caused by unpermitted commercial exploitation of one's portrait or other identifying characteristics cannot be assigned to another party.⁷ Article 21 DCA provides that after the death of the portrayed only the next of kin (the parents, spouse and children) can oppose the publication of his portrait. Therefore, the portrait right, even insofar as it protects only commercial interests, is non-descendible. The Dutch Supreme Court ruled that the licensee of the portrait rights of Elvis Presley had no standing to sue, because according to Dutch law only Presley himself during his life, or his next of kin after his death, could claim infringement of the rights in Presley's portraits.⁸

The American right of publicity is not impeded by such restrictions. Therefore, the right of publicity seems a more suitable basis to commercially exploit one's identity. While traditionally the object was defined as "*name or likeness*,"⁹ today the majority of courts and commentators recognize that the object of protection is not limited to a portrait or other aspects which identify a specific person, since it is not important how the defendant has appropriated the plaintiff's identity, but whether the defendant has done so.¹⁰ The American right of publicity is not restricted to certain plaintiffs. Most courts and commentators agree that every human being has a right of publicity, independent of any prior exploitation.¹¹ In cases of infringement of the right of publicity, not only damages, but also an injunction can be obtained.¹² It is generally held that the right of publicity is assignable and in most States descendible. The right of publicity received its name in 1953 in a case which held that the Haelan Laboratories, which had obtained exclusive licenses from professional baseball players to use their names and pictures on baseball cards for the promotion of its chewing gum, had standing to sue a competitor who commercially used the same

5. See § 5.2.

6. See § 4.6[B].

7. See §§ 4.8[A] and 5.2[F].

8. See § 4.8[C][1].

9. Cf. *Restatement (Second) of Torts* § 652c (1977).

10. See §. 3.3[C][1].

11. See § 2.4.

12. See § 2.9[B].

names and pictures without authorization by the players. This decision is in clear contrast with Dutch decisions which held that only a portrayed or his next of kin have standing to sue.

Dutch civil law does not recognize the award of punitive damages. In most States of the United States courts can award punitive damages in cases where the defendant intentionally infringed plaintiff's rights.

The scope of a trademark right in the Benelux countries is broader than in the United States. In the United States a trademark right is only infringed if defendant's use of plaintiff's mark is likely to cause purchaser confusion as to source of, affiliation with, connection with or sponsorship by the trademark owner or dilutes plaintiff's famous mark.¹³ In the Benelux countries a trademark holder can oppose not only any use made of the mark or a similar sign for similar goods or services in respect of which the mark is registered, but also any other use of the mark or a similar sign made without a valid reason under circumstances likely to cause prejudice to the owner of the mark.¹⁴ Therefore, Benelux trademark law provides a good legal basis to commercially exploit elements of a popular person's identity insofar as these elements can be considered a trademark and are filed in due form with the Benelux Office.

[B] Privacy Interests

In the Netherlands the protection of personality interests is based on the right to respect of one's private life, which is recognized in Article 10 of the Dutch Constitution, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 17 of the Covenant on Civil and Political Rights, which also recognizes one's honor and reputation. The Dutch Supreme Court has ruled that the invasion of this right is a tort which is actionable under Article 6:162 Civil Code. The content of right to respect of one's private life is not precisely defined. Dutch courts are able to protect personality and privacy interests on the basis of the general tort clause of Article 6:162 Civil Code, which is triggered by commercial and/or mental damages, not the infringement of any specific right. Courts have recognized the integrity of one's body and private domain. The Dutch Supreme Court has decided that in the event of media publications in which a person's name, portrait, or other identifying characteristics are mentioned, the plaintiff's right to respect of his private life must be balanced against the defendant's right of freedom of speech, which is guaranteed in Article 7 of the Dutch Constitution, Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 19 of the Covenant on Civil and Political Rights. The Court has ruled that both rights must be treated equally, because there is no hierarchy among these two rights. In cases of a conflict, the answer which of the two rights will

13. See § 3.5.

14. See § 5.5.

prevail must be found on the basis of an ad hoc balancing of all the relevant circumstances of the particular case.¹⁵

In general, lower courts follow decisions of the Supreme Court, but because a stare decisis rule is not recognized in the Netherlands, there is a margin for lower courts to adopt new legal rules in the case of new developments.

In the United States the situation is different. Prosser divided the tort of invasion of privacy into four distinct categories. He suggested that his four torts protected four different interests that are different forms of the interest in being let alone. The intrusion tort protects the interest in freedom from mental distress. The public disclosure and false light torts protect the interest in reputation with the same overtones of mental distress as in defamation. The appropriation tort protects the proprietary interest in name and likeness.¹⁶ Prosser did not really succeed in distinguishing four different interests. His four privacy torts all protect the interest in freedom from mental distress.¹⁷ Bloustein has criticized Prosser's four-part division and argued that the right of privacy should not be seen as four different torts, but as one single tort, which protects against affronts to human dignity and individuality which threaten our liberty.¹⁸ But Prosser's main contribution is not the distinction of four different interests, but the distinction of four different forms of invasion of the general interest in freedom from mental distress. Prosser defined for each privacy tort the elements a plaintiff must state to create liability. Afterwards, courts developed different rules for each tort, which do not exist in the Netherlands.

Most important is the application of the actual malice/negligence requirements, which the U.S. Supreme Court applies to the torts of defamation, false light invasion of privacy, and infliction of mental distress.¹⁹ According to this liability standard, only certain forms of speech are not protected by the First Amendment: false speech which defames a person which is proven by clear and convincing evidence to have been made with knowledge of its falsity or in reckless disregard of whether it was true or false (public figure), or to have been made with negligence as to the falsity (private figure). This balance is the result of the weighing of the state interest in preventing injury to reputation and feelings and the interests protected by the First Amendment. Unlike in the Netherlands, where both interests are protected equally, in the United States the balance is clearly in favor of the First Amendment.

Due to this favored position of the First Amendment, plaintiffs are hardly able to recover damages for invasion of their privacy by public disclosure. The Restatement (Second) of Torts listed as an element of the public disclosure tort that the matter disclosed is not of legitimate concern to the public. But most courts are not willing to conclude that a media publication is not of legitimate concern to the public. In addition, the U.S. Supreme Court has ruled that there

15. See § 5.3 and § 4.5[B](4).

16. See § 3.2 and Prosser, *Privacy*, 48 *Cal. L. Rev.* 383, at 392, 398, 400 and 406 (1960).

17. One exception must be made if one does include the right of publicity in the appropriation/privacy tort.

18. See § 3.2[F].

19. See §§ 3.1[F], 3.2[D](2), and 3.3.

can be no recovery for disclosure of facts, such as the name of an ex-criminal or a rape victim, that are a matter of public record.²⁰ In the Netherlands such a general rule does not exist. A media defendant can be liable for identifying a person in a publication, even if the identity was of public record.²¹

The favored position of the First Amendment in relation to the right of privacy has been criticized by Justice White in his dissenting opinion in *The Florida Star v. B.J.F.*:²²

"By holding that only "a state interest of the highest order" permits the State to penalize the publication of truthful information, and by holding that protecting a rape victim's right to privacy is not among those state interests of the highest order, the Court accepts appellant's [newspaper *The Florida Star*] invitation [...] to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts. W. Prosser, J. Wade, & V. Schwartz, *Torts* 951-952 (8th ed. 1988). Even if the Court's opinion does not say as much today, such obliteration will follow inevitably from the Court's conclusion here. If the First Amendment prohibits wholly private persons (such as B.J.F.) from recovering for the publication of the fact that she was raped, I doubt that there remain any "private facts" which persons may assume will not be published in the newspapers or broadcast on television."²³

Justice White would give the right of privacy more weight in the balancing. In his opinion, fairly defined areas of privacy should have the protection of law if the quality of life is to continue to be reasonably acceptable. The public's right to know is, then, subject to reasonable limitations insofar as this concerns the private facts of its individual members. Therefore, he "would find a place to draw the line higher on the hillside: a spot high enough to protect B.J.F.'s desire for privacy and peace-of-mind in the wake of a horrible personal tragedy. There is no public interest in publishing the names, addresses, and phone numbers of persons who are the victims of crime [...]."²⁴

The advantage of an ad hoc balancing of interests by courts in the Netherlands is that it gives courts more freedom to protect the privacy interests of the individual plaintiff in extreme cases. On the other hand, the disadvantage of this approach is that it is harder to predict the outcome of a case, which therefore could chill the freedom of speech interests.

20. See § 3.2[C][3].

21. See § 4.5[B][4][d].

22. 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443, 16 Media L. Rep. 1801 (1989): publication of name of a rape victim not unconstitutional.

23. *Id.* 491 U.S. 524, at 550.

24. *Id.* 491 U.S. 524, at 553.

6.2 Personal View: From Tort View to Property View. An Intellectual Property Right in Human Identity Based on the Distinction of Two Types of Right of Publicity

[A] Comment on McCarthy's Definition of the Right of Publicity

It seems to me that the most influential definitions of the American right of publicity are given by J. Thomas McCarthy and the Restatement (Third) of Unfair Competition. McCarthy stated in his introduction of his treatise on the Right of Publicity:

"This legal right is infringed by unpermitted use which damages the commercial value of this inherent human right of identity and which is not immunized by principles of free press and free speech."²⁵

The view of the right of publicity as a tort which protects against damage of a commercial value of a person's identity can be denominated the "*tort view*". The tort view of the right of publicity is centered around commercial damages as the triggering fact, in contrast with the right of privacy which is triggered by mental damages. The tort view can be contrasted with the "*intellectual property view*" of the right of publicity, in which the exclusive rights of the right of publicity owner are defined, like in copyright law or patent law. Under the intellectual property view, the starting point is not the plaintiff's commercial damage, but defendant's infringing act. If defendant commits one of the acts protected by the plaintiff's right of publicity, a court will, in principle, grant injunctive and monetary relief without any need to further balance all circumstances of the case.

In a later supplement McCarthy modified his definition by writing that the right of publicity is triggered by presumed injury ("*likely damage*") to a commercial property interest, because "[s]ome damage to the commercial value of identity is presumed once it is proved that defendant has made an unpermitted use of some identifiable aspect of identity in such a commercial context that one can state that such damage is likely."²⁶ Here we see a shift from a tort view toward an intellectual property view, because the focus is less on actual damages and more on the unpermitted commercial acts the owner of the right of publicity can prohibit.

However, McCarthy's definition does not tell which forms of use in a commercial context are unpermitted, and which forms are protected by principles of free press and free speech. With regard to the restriction of the right of publicity by principles of freedom of speech, McCarthy concludes that proposals to "integrate" First Amendment principles into the right of publicity are "laudable but fruitless efforts to bring a high degree of predictability to the conflict between the Right of Publicity and the first amendment. [...] The balance must

25. McCarthy, *The Rights of Publicity and Privacy*, vii (Rev. 1993).

26. *Id.*, § 3.1[B].

be laboriously hacked out case by case."²⁷ Under such a view the right of publicity cannot be precisely defined, but must be found by an ad hoc balancing of interests of the specific case.

[B] Comment on the Restatement (Third) of Unfair Competition §§ 46-49 (1995)

In 1995, the new Restatement (Third) of the Law of Unfair Competition was published by the American Law Institute.²⁸ The members of the American Law Institute are among the most distinguished lawyers, judges and scholars in the U.S. By publishing the Restatements of the specific fields of law, such as torts, property, and contracts, the American Law Institute presents an orderly restatement of the general common law of the United States. Although the Restatements have no official legal status, they have been successful and have had significant influence on the courts.²⁹ The Restatement (Third) of the Law of Unfair Competition §§ 46-49,³⁰ describes the right of publicity under the tort view. Probably, these sections will have an influence in those States which have not yet recognized the right of publicity.

In § 46 the right of publicity is defined as the tort of "Appropriation of the Commercial Value of a Person's Identity." Section 46 provides that

"[o]ne who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49."

Section 48(1) states injunctive relief may be awarded if this is appropriate under the specific circumstances mentioned in § 48(2).³¹ Similarly, with respect to monetary relief, § 49(1) provides that "one who is liable for an appropriation of the commercial value of another's identity under the rule stated in § 46 is liable for the pecuniary loss to the other caused by the appropriation or for the actor's own pecuniary gain resulting from the appropriation, whichever is greater," unless such relief is inappropriate under the rule stated in Subsection (2).³²

The right of publicity is defined as a tort, which is triggered by commercial damages to the value of a person's identity. By definition, the Restatement (Third) of Unfair Competition (1995) only deals with rules affording relief against unfair methods of competition, not against personal injury or invasion of personal interests. Thus the type of harm, commercial or personal injury, determines the cause of action: the right of publicity or right of privacy.³³

27. Id. § 8.6[E] (Rev. 1993). McCarthy's theory is discussed in § 9.3[C][5].

28. See *supra*, § 2.2[D].

29. Cf. Cohen and Berring, *How to Find the Law*, at 460-461 (8th ed. 1983).

30. See Appendix A.

31. See Appendix A. The general rules relating to injunctive relief in tort actions stated in Chapter 48 of the *Restatement (Second) of Torts* are applicable in actions for infringement of the right of publicity. See *Restatement (Third) of Unfair Competition* § 48, comment a. (1995).

32. See Appendix A.

33. See *Restatement (Third) of Unfair Competition* § 46, comment b. (1995).

The outcome of a right of publicity case depends on an ad hoc balancing of all the circumstances of the case. Whether injunctive or monetary relief may be awarded depends upon all specific circumstances of the case, such as the nature and extent of defendant's appropriation, the nature of the interest of the plaintiff, the interests of third persons and of the public, and other factors mentioned in §§ 48-49. The Restatement mentions that the right of publicity serves several interests, such as the protection of an individual's interest in personal dignity, prevention of unjust enrichment, prevention of harmful excessive commercial use, prevention of false advertising, and the creation of an incentive to socially useful conduct.³⁴ Under this ad hoc balancing approach, a court will probably rule that the content of the right of publicity after death is reduced because the dignitary and proprietary interests protected by the right of publicity become attenuated, and postmortem uses are less likely to create a false suggestion of endorsement or sponsorship.³⁵

Under this tort view, it is often hard to predict the outcome of a right of publicity case, since a court must weigh all specific circumstances of the case. However, one could reason that a shift from a tort view toward an intellectual property view, which focuses on defendant's act, can be found in § 47. Under § 46, a defendant is only liable for infringement of the right of publicity if he used another's identity for purposes of trade. Section 47 provides that "*use for purposes of trade*" is similar to advertising use and merchandising use in connection with defendant's products or services, and "does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses." Although the word "*ordinarily*" is vague, § 47 seems to provide a relatively clear guideline to determine whether defendant's acts are unlawful.

However, the comments in the Restatement clarify that § 47 does not provide a definition of plaintiff's exclusive rights, but that courts must always balance the relevant aspects of the case. Thus, in cases of merchandising use

"the informational content of the particular merchandise or its utility to purchasers as a means of expression may justify the conclusion that the use is protected under the first amendment."³⁶

On the other hand, with respect to the exception of "news reporting, commentary, entertainment, works of fiction or nonfiction," the comment states that

"if the name or likeness is used solely to attract attention to a work that is not related to the identified person, the user may be subject to liability for a use of the other's identity in advertising. [...] Similarly, if a photograph of the plaintiff is included in the defendant's publication merely for the purpose of appropriating the plaintiff's commercial value

34. *Restatement (Third) of Unfair Competition* § 46, comment c. (1995). See for my critical comment on these justifications § 7.4.

35. *Restatement (Third) of Unfair Competition* § 46, comment h. (1995).

36. *Restatement (Third) of Unfair Competition* § 47, comment b. (1995).

as a model rather than as part of a news or other communicative use, the defendant may be subject to liability for a merchandising use of the plaintiff's identity."³⁷

The comment also refers "to other substantial appropriations of a person's identity," such as an unauthorized broadcast of the plaintiff's performance or a sustained imitation of the plaintiff's performing style or performing persona that is marketed by the defendant as a simulation of the plaintiff's performance.³⁸

In my opinion, the main disadvantage of the right of publicity as described in the Restatement (Third) of the Law of Unfair Competition §§ 46-49 is that the infringing acts are not clearly defined: "*use for purposes of trade*" is not restricted to advertising use and merchandising use, but includes other substantial appropriations of a person's identity, such as an unauthorized broadcast of the plaintiff's performance or use in the media if the identity is used "*solely*" to attract attention to a work that is not related to the identified person, or is used "*merely*" for the purpose of appropriating the plaintiff's commercial value as a model. In each case, a court must balance all relevant circumstances of the case. One factor is the type of speech. With respect to the scope of injunctive relief the comment states:

"If the infringing use occurs in the context of a work that communicates noncommercial speech, it may be appropriate to limit the scope of the injunction in order to minimize the intrusion on expression."³⁹

Another circumstance to be balanced is the rationale for protection. The comment pronounces that

"[t]he rationales underlying recognition of a right of publicity are generally less compelling than those that justify rights in trademarks or trade secrets. [...] Thus, courts may be properly reluctant to adopt a broad construction of the publicity right."⁴⁰

It seems to me that under this tort view it will be often hard to predict the outcome of a right of publicity case.

[C] Outline of Next Chapters

In the next chapters, I will argue that every human being should have an assignable and descendible intellectual property right in his identity. The concept of the right of publicity, as described in Chapter 2, comes closest to the concept of an intellectual property right, but there are still some important issues that are unresolved. By discussing these issues in the next four chapters, I will argue how the American right of publicity should develop in the future to become a proper intellectual property right, which the Dutch legislature could also adopt for the Netherlands.

37. *Restatement (Third) of Unfair Competition* § 47, comment c. (1995).

38. *Restatement (Third) of Unfair Competition* § 47, comment d. (1995).

39. *Restatement (Third) of Unfair Competition* § 47, comment c. (1995).

40. *Restatement (Third) of Unfair Competition* § 46, comment c. (1995).

In *Chapter 7*, I discuss the justifications for granting every human being an exclusive right to control the commercial exploitation of his identity. The justification will affect the answer to other questions, such as the subject and content of the right of publicity.

Chapter 8 deals with the characterization of the right of publicity as an intellectual property right, its *object*, and its relation to the personal and non-assignable right of privacy. I will discuss the potential *conflict* between privacy interests of the assignor of the right of publicity and the commercial interests of the licensee or assignee. In the continental European countries this potential conflict seems to be the reason for adhering to the concept of a non-assignable personality right instead of an intellectual property right.

In *Chapter 9*, I argue that it is possible to provide a definition of the content of the right of publicity, in which the principles of free trade and free speech are integrated. In *Chapter 10*, I analyze the relevant case law of the United States and the Netherlands in light of the definition proposed in Chapter 9. My conclusion will be that it is possible to define the right of publicity as a proper intellectual property right in persona, provided that one recognizes the distinction between a person's *identity* and his *non-fixed live-performance*. *Supra*,⁴¹ it was said that the American right of publicity protects against different infringing acts, depending on the object of protection: a person's identity or his non-fixed live-performance. The definition of the owner's exclusive rights must be based upon a clear distinction between these two types of the right of publicity, which I will call the "*identity right of publicity*" and the "*performance right of publicity*." The first type was recognized in the "*Haelan*" case in 1953,⁴² the second type by the U.S. Supreme Court in 1977 in the "*Zacchini*" case.⁴³ In Chapters 7 to 10 the focus is on the identity right of publicity. Unless stated otherwise, the term "*right of publicity*" will indicate the identity right of publicity. For the performance type I will use the term "*performance right of publicity*." The performance right of publicity is discussed in Chapter 11.

In *Chapter 12*, I will define the identity right of publicity as a proper intellectual property right in persona, which I will call the "*right of persona*." This right can be adopted in both the United States and the Netherlands.

41. See § 6.1[A] and § 2.3[D].

42. *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (C.A.2 1953).

43. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977).

CHAPTER 7

JUSTIFICATIONS FOR A PROPERTY RIGHT IN HUMAN PERSONA PROTECTING AGAINST UNAUTHORIZED COMMERCIAL EXPLOITATION

7.1 Introduction: Natural Right?

John Locke wrote in his Second Treatise on Government:

"Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to But himself."¹

How can this property right in one's own person be justified? Locke did not justify why every person has a property right in his own person. Lawyers are used to justifying legal principles. Then one asks: what is the justification for a justification? Neither philosophers nor lawyers ever reach a point where the question "why" cannot be further asked. Epistemological stopping points found by philosophers in former centuries were always rejected by later philosophers. But this understanding does not prevent us from stopping to ask the question "why" at a certain point, the point one normally speaks about justice, equity, fairness or natural rights. This is the point where the justification corresponds to our intuitive feeling of justice.

A justification is an "axiomatic" principle, which we presuppose to be right, but which we cannot prove. But it is possible to assume that the justification is right until it is rejected with counter policies or arguments.²

In the same way it is possible to define the justification of a property right in a person's identity: it corresponds to our intuitive feeling of justice to grant every human being a right to control the use of his name, likeness, voice or other identifying aspects by others, until valid counter arguments or policies reject or restrict this right. This right enables every person to financially benefit from the commercial exploitation of his identity by someone not wishing to use his own identity. In this way the right of publicity is presented as a self-evident natural right. According to McCarthy "such a simple, intuitive rationale seems quite sufficient to provide a firm support for the existence of a Right of Publicity. [...]the burden to rebut such an intuitive justification is upon the challenger

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1. Cited from Locke, *Two Treatises of Government (1690): A Critical Edition with an Introduction and Apparatus Criticus* by Peter Laslett, Cambridge University Press (rev. ed. 1964), Second Treatise of Government, Chapter V, 27. Starting from this premise Locke argued that a person's labor justifies a property right in his works. See § 7.4[A].
 2. Cf. Popper, *The Logic of Scientific Discovery*, Ch. 4, Falsifiability, (London 1959, trans. *Logik der Forschung*, Vienna 1934). Although Popper's falsification theory is used to get empirical, not normative, knowledge, the falsification principle can be analogously applied to the discussion of a justification of a right.

of the right."³ In his opinion the right of publicity is a "*commonsensical legal right*."⁴

However, Madow and the Tenth Circuit⁵ have criticized the justification of a new right in this way. An appeal to "*common sense*" will not suffice because "[w]hat appears to be "common sense" may be nothing but the particular view of a matter that most strongly supports and expresses the interests of powerful social groups, or that fits most snugly with other deeply rooted and unexamined beliefs."⁶ In Madow's opinion, it could be possible to treat a famous person's name and face "as a common asset to be shared, an economic opportunity available in the free market system."

Madow also mentioned the following (possible) disadvantages of the recognition of the right of publicity:

- 1) it redistributes wealth upwards because famous people, who are already very handsomely compensated for the primary activities to which they owe their fame, get additional income;⁷
- 2) it could cause an overinvestment in celebrity-production: the right of publicity could induce too many people, especially minority groups, to enter into entertainment and sports careers and stardom, which draws their attention from other ways of making a living;⁸
- 3) it facilitates private censorship of popular culture, because the right of publicity prohibits the unpermitted commercial use of the identity of popular persons, especially with respect to celebrity paraphernalia such as T-shirts, posters, buttons and greeting cards;⁹
- 4) it raises the price of celebrity merchandise and of advertising in general, thereby shifting wealth away from the great mass of consumers to a very small group of persons who are already very handsomely compensated;¹⁰

3. McCarthy, *The Rights of Publicity and Privacy*, § 2.1[A] (Rev. 1993). But see § 2.1[D] where McCarthy explains that this natural rights approach is based on the labor justification: "What I create is mine." The labor justification is discussed in § 7.4[A].

4. *Id.* § 1.11[C].

5. *Cartoons v. Major League Baseball Players Ass.*, --- F.3d ---; 1996 WL 490707; 39 U.S.P.Q.2d 1865 (C.A.10 1996): "McCarthy, however, offers little reason for this assertion, and blind appeals to first principles carry no weight in our balancing analysis."

6. Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 *Cal. L. Rev.* 127, at 136; As an example he cited Nimmer, *The Right of Publicity*, 19 *Law & Contemp. Prob.* 203 (1954), who was counsel for Paramount Pictures when he argued that "it may seriously be doubted that the application of [the right of privacy] satisfactorily meets the needs of Broadway and Hollywood in 1954." See also Pound, *Interests in Personality*, 28 *Harv. L. Rev.* 343 at 353, fn.29 (1915), who emphasizes the purely personal character of "natural rights." As an example he cites Aristotle (*Politics*, Book 1, ch. 5) and *Grotius* (II, 27 § 2 and 29 § 2) who argued that slavery has a natural basis in some cases beyond and apart from law.

7. *Id.* 81 *Cal. L. Rev.* 127, at 136-137.

8. *Id.* 81 *Cal. L. Rev.* 127, at 216-218.

9. *Id.* 81 *Cal. L. Rev.* 127, at 138-146.

10. *Id.* 81 *Cal. L. Rev.* 127, at 218 and 222-224.

- 5) it probably works to the systematic advantage of large over small advertisers, thereby increasing corporate concentration in the general economy.¹¹

In my opinion, the *first* argument against a recognition of the right of publicity does not take into account that the right of publicity protects the identity of every human being, not just famous people. In addition, persons who find that commercial enterprises exploit the commercial value of their persona without their permission may argue that not they, but the commercial enterprises enrich themselves.¹² Further, even if there is a "redistribution of wealth upwards," there are economic arguments that a political solution by way tax regulations is a better solution than simply withholding a right of publicity from famous people.¹³

Similarly, I do not think that the rejection of the right of publicity is the best way to solve a possible problem that too many persons (from minority groups) entering into entertainment and sports careers. There should be better ways to solve such (potential) problems. The incentive theory, which justifies the right of publicity as a means to stimulate people to create valuable identities does not seem very convincing.¹⁴

The *third* argument is that the right of publicity conflicts with the right of free speech. This seems to be the most important argument against the right of publicity, but the solution of this conflict should not be found in an outright rejection of this right, but by a balancing of competing interests, and restricting the content of this right.¹⁵

The *fourth* and *fifth* arguments are dealt with in § 7.3, which discusses the economic aspects of creating an intellectual property right in human identity.

What is important is that Madow with his arguments against the right of publicity has challenged the natural right justification. Instead of asking "*why not?*," advocates of the right of publicity should justify this right with more than just a reference to its self-evidence.

In international literature, several justifications have been suggested for protection against unpermitted commercial use of a person's identity: labor or investment in the creation of a valuable personality, the incentive to create a valuable identity, the prevention of unjust enrichment, the incentive to allocate efficiently a valuable resource, the prevention of destruction of a valuable identity, or the protection of consumer interests. In my opinion an intellectual property right in a person's identity is justified by the fact that it is a human being who is identified. Every person should have the right to develop his own identity and to decide how this personal identity will be shown to the rest of the

11. *Id.* 81 *Cal. L. Rev.* 127, at 224.

12. Of course, this argument is only valid if one assumes that the value "stolen" by the defendant is not only the result of the recognition of the right of publicity itself. See for a discussion of this argument *infra* at 7.4[B] (distinguishing between value added and scarce good values).

13. See *infra* at § 7.3[D].

14. See *infra* § 7.3[B].

15. See Chapters 9 and 10.

world. In § 7.2, this personal autonomy justification is discussed. § 7.3 deals with the economic aspects of creating an intellectual property right in human identity. In § 7.4 it will be argued that the other suggested justifications can justify a property right in human identity, but only partly, depending on the particular circumstances of the case.

7.2 Personal Autonomy Justification: Every Human Being Should Have the Right to Determine the Use of His Identity

Why should a person be able to control the commercial use of his identity? By definition my identity is mine. Whose identity is used, is determined by the test of identification.¹⁶ In my opinion, not the identification in itself, but the fact that it is a human being who is identified, justifies the creation of a property right in human identity. From the principle of personal autonomy it follows that every human being should have the right to develop his own identity and to decide how and what aspects of this personal identity will be shown to the rest of the world.

Murumba concluded at the last page of his book entitled "Commercial Exploitation of Personality:

"[A] decision to attribute private proprietary status to one's personality, likeness and reputation involves a balancing act between the competing values of property and free competition. [...The privatization] of an essentially private good, such as one's personality, likeness and reputation, I suggest is desirable. Whatever weaknesses there may be in the Hegelian theory of private property as an extension of personality, [...] this is one instance in which it is probably vindicated. For we are talking here, not about an individual projecting his personality upon external things to constitute them property, but of a person exercising control over his own personality. If ever there were any natural right to any property, then this would surely be it."¹⁷

Hegel, who most thoroughly developed the personality theory of property,¹⁸ justified property as an expression of the self. Property provides a suitable mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual person.¹⁹ The personality theory is often mentioned in the context of copyright law: the author is the owner of his works of art because the expression is a manifestation of the author's personality or self.²⁰ If a work protected by copyright law can be said to represent the embodiment of an

16. See §§ 2.5 and 4.4.

17. Murumba, *Commercial Exploitation of Personality*, 132 (1986).

18. Grosheide, *Auteursrecht op maat*, 130 (1986) argued that this theory can be traced back to John Locke.

19. Hegel, *Grundlinien der Philosophie des Rechts*, §§ 41-45 (1821). *Id.* *Philosophy of Right*, §§ 41-45 (Trans. by Knox 1967).

20. *Id.* §§ 68-69; Grosheide, *Auteursrecht op maat*, 129-133 (1986) with other references. Cf. Justice Holmes in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, at 250, 23 S.Ct. 298, 47 L.Ed. 460 (1903), characterizing works of art as "the personal reaction of an individual upon nature."

authors's expression, this is even more true for attributes such as an individual's name and likeness.²¹

Hughes has criticized the personality theory as a justification for intellectual property rights in general, because many intellectual products protected by intellectual property rights reflect little or no personality from their creators or inventors.²² But according to Hughes the identity of a person, his persona, is the ideal property for the personality justification, because no intermediary concepts, such as a personal expression, are needed. A property right in identity gives the individual the economic value derived most directly from one's personality.²³

The personality justification explains that every individual will have a personality interest in his of her identity, as long as that individual is identified with that personal identity. Human beings are intrinsically tied to their public identity, into which they have projected a part of their personality, their very "*selves*." The right of publicity should not be restricted to celebrities²⁴ who exhibited some personal or professional achievement.²⁵

Madow has stated that "there is a good deal more than "personality" in the persona."²⁶ He argues that not only the person identified, but also many other persons put labor (time, money, effort) to the creation of a valuable identity, which is commercially exploited. In my opinion, this argument is not an argument against this justification. The fact that other people and the media have contributed to the creation of a marketable identity is not an argument against this justification for a property right, because it is still that one unique human being who is identified. What is relevant is that the object protected, the name, likeness, voice, or other characteristics, identifies a single person. Whether the commercial value of these characteristics is high or low, or whether that value is the result of hard work toward securing a public image, or based on pure chance is not relevant.

One could argue that the personality interest in being able to control the use of one's identity does justify the right of privacy which protects mental or personality interests, but not a property right in human identity, which protects commercial interests. I do not agree with this argument because the person, whose identity is commercially exploited without permission, loses control over his identity, which is an aspect of his personality. This is both true for persons who do and who do not commercially exploit their identity themselves.

21. Cf. Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 *Ind. L.J.* 47, at 60 (1994).

22. Hughes, *The Philosophy of Intellectual Property*, 77 *Geo. L.J.* 287, at 339-350 (1988).

23. *Id.* 77 *Geo. L.J.* 287, at 340.

24. Rein, Kotler, and Stoller, *High Visibility*, at 15 (1987) define a *celebrity* as "a person whose name has attention getting, interest-riveting, profit-generating value." The word originates from the latin word "celebrare" meaning "to honor".

25. If Andy Warhol is right in predicting that in the future, everyone will be world famous for 15 minutes, there is no reason to discriminate between celebrities and non-celebrities.

26. Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 *Cal. L. Rev.* 127, at 196, fn. 338 (1993).

Unpermitted exploitation of an individual's identity does affect the view other people have of that person.

A similar argument can be found in German copyright law, which must be understood against the background of the so-called *monistic* theory. Under the monistic theory, copyright as a whole, that is the author's rights, safeguard both the financial and the personal interests of the author. As a consequence of this theory, an author can not entirely or even partly assign his exclusive (commercial) rights in his work to another party: he can only commercially exploit his copyrights by granting licenses ("simple or exclusive rights of use").²⁷ However, in the United States and the Netherlands, copyrights can be fully assigned, notwithstanding the recognition of moral rights.²⁸

Courts and Commentators support this justification. In the Netherlands, courts sometimes refer to Article 8 EHRC (protection of private life) as the basis for protection of the commercial interest in controlling the commercial use of one's name.²⁹ In Germany, courts have recognized that the general personality right does not only protect privacy interests, but also economic interests. The personality right encompasses the right to intellectual and economic self-determination.³⁰

In the United States, Bloustein argued that the use of a person's name or likeness in a commercial context affronts human dignity, because the identifying features, which are intimately connected with one person, are associated with a commercial product, and the associations for the product creates associations for the person himself, even if there is no false endorsement. A person must have a right to choose the things he wishes to be associated with.³¹ Bloustein was discussing the right of privacy, not the right of publicity. But other commentators have argued that this justification also justifies a property right.³²

In *Pavesich v. New England Life Ins. Co.*,³³ the Georgia Supreme Court recognized for the first time a common law right of privacy which was invaded by unpermitted use of plaintiff's photograph in an advertisement for defendant's life insurance. The court stated:

27. See § 29 German Copyright Act. See Uimer, *Urheber- und Verlagsrecht*, 3d ed. 1980, 114 *et seq.*

28. See *infra* at § 8.3.

29. District Court the Hague, May 16, 1986, IER 1986, no. 56, at 120 (*Nederlands Elftal*).

30. Federal Supreme Court, June 26, 1981, 1 ZR 73/79; BGHZ 81, 75; RzU BGHZ Nr 289 (Hubmann); NJW 1981, 2402; WRP 1981, 846; GRUR 1981, 846 (Wild); IIC 1983, 289 (*Rennsportgemeinschaft/Carrera*). The German Federal Supreme Court stated with respect to the right to one's own picture: "The protected legal right [...] is solely the portrayed person's right, as a natural consequence of his personal rights, to decide freely as to whether and how he chooses to make his image available to business interests of any third party." *Id.* IIC 1983, 289, at 290-291.

31. Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 *N.Y.U.L. Rev.* 962, at 988-89 (1964).

32. Cf. Epstein, Privacy, Property Rights, and Misrepresentations, 12 *Ga. L. Rev.* 455, at 460-461 (1978); Salomon, The Right of Publicity Run Riot: The Case for a Federal Statute, 60 *S. Cal. L. Rev.* 1179, at 1189-90 (1987); A person's public image or identity deserves protection because it is inextricably bound up with the person; Note, Publicity As an Aspect of Privacy and personal Autonomy, 55 *S. Cal. L. Rev.* 727 (1982).

33. 122 Ga. 190, 50 S.E. 68, (1905).

"The knowledge that one's features and form are being used for such a purpose and displayed in such places as such advertisements are often liable to be found brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him, and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is, for the time being, under the control of another, that he is no longer free, and that he is in reality a slave without hope of freedom, held to service by a merciless master [...]."³⁴

This rationale also justifies a right to control over the commercial use of a person's identity. But one should not conclude from this justification that this right is non-assignable or non-descendible. In my opinion, the personal autonomy justification can justify the protection of both commercial and personality interests. Insofar as commercial interests are protected, the right of publicity can be assignable in a similar way as copyrights are assignable in the United States and in the Netherlands. However, an assignment of the right of publicity may have moral consequences. This issue is discussed in § 8.3[B].

7.3 Economic Reasons for an Intellectual Property Right in Human Identity

[A] First Economic Justification: Allocative Efficiency

Economic theory states that private property promotes efficient use of limited resources. The efficiency justification of property states that a property right in scarce sources leads to the efficient outcome, because without property rights the scarce sources will be used more than would be efficient.³⁵ The classic example is the use of land. If herdsmen are free to graze their cows on a pasture without permission or making payment, the pasture will be overexploited until, through exhaustion, the land becomes worthless, because the users ignore the costs they impose on each other in reducing the value of the land.³⁶ But if the land is owned by someone who has the right to exclude users and require payment for admission, the owner will have an incentive to allow the ideal number of cows to graze.³⁷

34. Id. 122 Ga. 190, at 220. The idea that one's identity should not be owned by others is not typical for western civilization. In the 19th century, *Herbert Spencer* described that many cultures fear the magical power conferred by possession of a person's image. *E.g.* native indians, such as the Chinook, if photographed, "fancied that their spirit thus passed into the keeping of others, who could torment it at pleasure." See 1 *Spencer, Principles of Sociology*, at 245 (1898), cited from *Anderson v. Fisher Broadcasting Companies, Inc.*, 300 Or. 452, 712 P.2d 803, at 810, fn.12, 12 Media L. Rep. 1604 (Or. 1986).

35. There are three assumptions: a) there are too many potential users of a property (scarcity), b) the users are rational, utility-maximizing, and c) the costs of transactions between the users are not zero, because otherwise the Coase Theorem implies that only contract rights are needed to achieve the efficient outcome, see *Coase, The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960).

36. *Cf. Hardin, The Tragedy of the Commons*, 162 *Science* 1243, at 1244-45 (1968). The other classic example of the "tragedy of commons" is the over-fishing of a communal stream or lake.

37. *Demsetz, Toward a Theory of Property Rights*, 57 *Am. Econ. Rev.* 347, at 356 (1967); *Posner, Economic Analysis of Law*, 29-33 (3d ed. 1986); *Cooter and Ulen, Law and Economics*, 97 (1988).

Posner has applied this theory to the right of publicity. He stated that the right of publicity prevents inefficient over-exploitation:

"There is a perfectly good economic reason for assigning the property right in a photograph used for advertising purposes to the photographed individual: this assignment assures that the advertiser to whom the photograph is most valuable will purchase it. Making the photograph the communal property of advertisers would not achieve this goal. [...]

Furthermore, the multiple use of the identical photograph to advertise different products would reduce its advertising value, perhaps to zero."³⁸

The right of publicity promotes a more efficient use of valuable aspects of someone's identity. It assures that the user to whom the identity is most valuable will purchase the right or a license to commercially use it at the market price. As Seventh Circuit Judge Posner stated: "Similarly, Robyn Douglass or her agents must have control over the dissemination of her nude photographs if their value is to be maximized."³⁹

Without a right of publicity, the valuable aspects of someone's identity are in the public domain. Advertisers or merchandisers will commercially use these valuable aspects until the value will be so low that it is no longer attractive to continue the exploitation. Because there is no incentive to curtail overexposure, ultimately the value of the identity will be diminished, because consumers are bored with seeing the person identified or the market becomes saturated with merchandise bearing that identity.

This can be stated in economic terms: the right of publicity is efficient, because the production function has a decreasing marginal revenue. Each extra commercial user gets fewer profits and harms the other users, because he reduces the value of the identity, which determines the productivity of the others, and thus exercises a negative external effect on the others. The marginal revenue indicates what a user actually contributes to the increased welfare of an economy. The right of publicity will help each user to choose from all possible choices the alternative that entails the highest possible increase in his individual contribution to marginal revenue.⁴⁰

Judge Posner writes:

"It might seem that creating a property right in such uses would not lead to any socially worthwhile investment but would simply enrich already wealthy celebrities. However,

38. Posner, *The Right of Privacy*, 12 *Ga. L. Rev.* 393, at 411 (1978). *Id.* Posner, *The Economics of Justice*, 255 (1991). Cf. Landes and Posner, *An Economic Analysis of Copyright Law*, 18 *J. Legal Stud.* 325, at 362-63 (1989); arguing that the loss of value can be used as an argument for a descendible right of publicity; Frazer, *Appropriation of Personality New Tort?*, 99 *Law Q. Rev.* 281, at 303-304 (1983).

39. *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, at 1138 (C.A.7 1985).

40. Cf. *Matthews v. Wozencraft*, 15 F.3d 432, 1994 U.S. App. Lexis 3855, at 10-11; 30 U.S.P.Q.2d 1025; 22 *Media L. Rep.* 1385 (C.A.5 1993): "Without the artificial scarcity created by the protection of one's likeness, that likeness would be exploited commercially until the marginal value of its use is zero. [...] For instance, if a well-known public figure's picture could be used freely to endorse commercial products, the value of his likeness would disappear. Creating artificial scarcity preserves the value to him, to advertisers who contract for the use of his likeness, and in the end, to consumers, who receive information from the knowledge that he is being paid to endorse the product."

whatever information value a celebrity's endorsement has to consumers will be lost if every advertiser can use the celebrity's name and picture [...] The value of associating the celebrity's name with a particular product will be diminished if others are permitted to use the name in association with their products."⁴¹

The right of publicity enables the potential licensees to compare the costs, behave according to price theory and consider the economic costs of their use. The right of publicity owner will endeavor to maximize the value of his identity. He will charge commercial users the full cost involved in using his identity: the effect of the licensee's use on the (long-term) value of his identity. The owner will take into account the fact that the commercial use of his identity decreases with its use, because his association with this licensee will make his identity less valuable for other competitors and manufacturers of incompatible products.

Frazer has remarked that since over-use may permanently depress the value of someone's identity, it is important that a property right in identity does not provide protection by way of damages alone, but also by way of injunction.⁴²

Madow has argued that the economic justification of the right of publicity is weak for different reasons.⁴³ *First*, it is not always true that the value in identity diminishes the more it is used, because in the case of merchandising it may well be that the value increases through the use on merchandise such as T-shirts and posters.⁴⁴ *Second*, the economic justification for tangible property is not fully applicable to intangible property. The difference is that unlike an over-grazed pasture, there will always be a certain supply of existing and newly-created personalities to exploit. Thus, over-use of identity is costly for the person identified, but for the society at large it is less costly, because alternative identities exist.⁴⁵ Another dissimilarity is that if the appetite of advertisers for celebrities outstrips the supply, and advertisers at some point run out of celebrities, the tragedy would be different. Land is a necessary factor of production: no land, no corn. Fish is a direct consumption good: no fish, no sushi. But if advertisers were to run out of celebrities, they would simply rely more on other advertising techniques.⁴⁶

In my opinion, Madow's *first* argument is not convincing. It is assumed that the right of publicity owner is profit maximizing. If merchandising activities lead to a greater value, the owner will grant more licenses, or the exclusive licensee will produce more merchandise. But ultimately there will come a

41. See Posner, *Economic Analysis of Law*, § 3.3, at 43 (4th ed. 1992), cited from *Mathews v. Wozencraft*, 15 F.3d 432, 1994 U.S. App. Lexis 3855, at 12; 30 U.S.P.Q.2d 1025; 22 Media L. Rep. 1385 (C.A.5 1993).

42. Frazer, *Appropriation of Personality New Tort?*, 99 *Law Q. Rev.* 281, at 306-307 (1983).

43. The distributional effects of creating a right of publicity is discussed *infra* ad [D].

44. Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 *Cal. L. Rev.* 127, at 222 (1993). *Id.* *Cartoons v. Major League Baseball Players Ass.*, --- F.3d ---; 1996 WL 490707; 39 U.S.P.Q.2d 1865 (C.A.10 1996): "The argument is not as persuasive, however, when applied to nonadvertising uses."

45. *Id.* 81 *Cal. L. Rev.* 127, at 224, citing Frazer, *Appropriation of Personality New Tort?*, 99 *Law Q. Rev.* 281, at 303 (1983).

46. *Id.* 81 *Cal. L. Rev.* 127, at 224-225.

moment that the consuming public will be saturated. A property right will prevent the complete destruction of the value of this identity. Madow's *second* argument holds that the destruction of a value in identity is not so bad as the waste of tangible property. Even if this is true, it is still an inefficient outcome, not only for the right of publicity owner, but also for the public that gets bored or over-saturated. Frazer concluded that "it would be economically efficient to recognize a private property right in respect of personality."⁴⁷

[B] Second Economic Justification: Incentive to Create Valuable Identities

In the economic theory of property, one can distinguish a static and a dynamic analysis. The *static* benefit of property is the promotion of an efficient allocation and use of scarce resources, because users pay the full cost of their activities. This analysis is discussed *supra*. The *dynamic* benefits of private property rights are the incentives they create for a productive investment. This is a long term benefit of property.⁴⁸

In the classic example, a property right in land will encourage the owner to invest time, money, and effort in his land, for example, by raising crops. Without a property right he will not invest in his land, or he will invest less, because he must spend more time in the defense of his land.⁴⁹ Thus, recognition of a property right *ex ante* creates an incentive to investment in that property with as a result *ex post* benefits, in this example crops.

This incentive theory is also a justification for the recognition of intellectual property rights. Intellectual property rights create an incentive to invest in the creation of a resource, because the owner can exclusively appropriate the resource afterwards, and thus earn back the costs of creation or development. The classic examples are patent law and copyright law. The U.S. Constitution Article I, § 8, cl. 8 empowers Congress to grant copyrights and patents in order "[t]o promote the Progress of Science and Useful Arts." The inventor's innovative investment is rewarded by the market price which he obtains through his patent. Copyright law is an incentive for authors to create works of art, because they know that a property right in their works will enable them to earn back their investment.

The U.S. Supreme Court has mentioned the economic incentive justification for the performance right of publicity. The Court stated in the "*Zacchini*" case:

"Of course, Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to

47. *Id.* 99 *Law Q. Rev.* 281, at 309.

48. Posner, *Economic Analysis of Law*, 30-33 (3d ed. 1986).

49. *Cf.* Cooter and Ulen, *Law and Economics*, 96 (1988).

produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court."⁵⁰

Other courts and commentators⁵¹ have stated that the purpose of the identity right of publicity is also to create an incentive for labor, creativity, and investment. For example, Justice Bird stated in *Lugosi v. Universal Pictures*:

"Similarly, providing legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition and assures that the individual will be able "to reap the reward of his endeavors" [...] While the immediate beneficiaries are those who establish professions or identities which are commercially valuable, the products of their enterprise are often beneficial to society generally. Their performances, inventions and endeavors enrich our society, while their participation in commercial enterprises may communicate valuable information to consumers."⁵²

In my opinion this economic incentive theory can only partly justify the identity right of publicity. It derives from the personal autonomy justification⁵³ that the right of publicity protects persons, independent of any effort or creativity they have put in the development of their identity. A baby, newly born and having had no opportunity to invest energy in the creation of her identity, has a right of publicity. In addition, the right of publicity has probably only a marginal incentive effect in increasing effort and creativity in creating a valuable identity.⁵⁴ Without a right of publicity there will remain other incentives for persons to invest time and effort in the creation of a valuable identity. Celebrities with valuable identities earn money through primary exploitation, such as sports, a motion picture, or a musical performance, through which they acquire their popularity. The payments for the primary activities can provide enough incentive to become celebrated. In such cases, the right of publicity protects the secondary exploitation of the value acquired during the primary exploitation. Madow argued that it could even be possible that without the additional income from the

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50. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, at 576, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977).
51. See Felcher and Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 *Yale L.J.* 1125, at 1128 (1980); Gurney, *Celebrities and the First Amendment: Broader Protection Against the Unauthorized Publication of Photographs*, 61 *Ind. L.J.* 697, at 707 (1985).
52. *Lugosi v. Universal Pictures*, 25 Cal.3d 813, at 840, 160 Cal.Rptr. 323, 603 P.2d 425, 10 A.L.R.4th 1150, 205 U.S.P.Q. 1090, 5 Media L. Rep. 2185 (Cal. 1979). Cf. *Martin Luther King Center for Social Change, Inc. v. American Heritage Products, Inc.*, 250 Ga. 135, 296 S.E.2d 697, at 705, 216 U.S.P.Q. 711, 8 Media L. Rep. 2377 (Ga. 1982): "Recognition of the right of publicity rewards and thereby encourages effort and creativity." Cf. *Cartoons v. Major League Baseball Players Ass.*, --- F.3d ---; 1996 WL 490707; 39 U.S.P.Q.2d 1865 (C.A.10 1996): "The principal economic argument made in support of the right of publicity is that it provides an incentive for creativity and achievement."
53. See § 7.2.
54. Cf. McCarthy, *The Rights of Publicity and Privacy*, § 2.2 (Rev. 1993); Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 *Cal. L. Rev.* 127, at 206-215 (Rev. 1993); Cf. *Restatement (Third) of Unfair Competition* § 46, comment c. (1995): "The commercial value of a person's identity often results from success in endeavors such as entertainment or sports that offer their own substantial rewards."

right of publicity, performers would have an incentive to work harder in order to have the same income.⁵⁵

Copyright law and the performance right of publicity can be justified by the incentive justification, because without these rights it would be difficult to exploit the result of the investment: a work of art or a performance. However, without a right of publicity there remain other incentives to become famous, such as motivations to excel in sports, to gain social status, to have the pleasure of being applauded, to exercise one's talents, to liberate from anonymity, etc.⁵⁶ In the "*Zacchini*" case, the U.S. Supreme Court recognized that income from exploitation of identity is more a by-product than income from a performance by stating that "the broadcast of [*Zacchini's*] entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer."⁵⁷

The incentive theory usually describes the encouragement of the individual to invest in the development of his identity. But an effect of the right of publicity is that others are also encouraged to invest in the identity of a celebrity. A public image of a celebrity can be the result of time, money, and effort of the celebrity and a surrounding celebrity industry, creating a certain image for specific marketing purposes.⁵⁸ The principle of the celebrity industry has been described as the "*Pygmalion Principle*: that people can now be manufactured into, and marketed as, celebrities in any field."⁵⁹ Whether one agrees with this principle, or not,⁶⁰ such image creation is encouraged by the right of publicity.

In 1996, the Tenth Circuit agreed that the incentive effect of the right of publicity "has been overstated" because an abolition of the right of publicity would leave unimpaired a celebrity's ability to earn a living from the activities that have generated his publicity value.

55. *Id.* 81 *Cal. L. Rev.* 127, at 211-212.

56. *Id.* 81 *Cal. L. Rev.* 127, at 214.

57. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, at 576, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 *Media L. Rep.* 2089 (1977).

58. See for a description of the celebrity industry and the celebrity-marketing process: Rein, Kotler and Stoller, *High Visibility*, at 32-88 (1987). See for their definition of a celebrity *supra* at § 1.1. Cf. Simensky, *Economic Basis For the Right of Publicity*, 5 *New York L.J.*, at 5-6 and 28 (June 3, 1988). According to Simensky, the right of publicity originates with billing and is developed by successive credits of increasingly more significant stature. Billing, also called credit, is "the listing of a person's or company's name next to the function that person or company performs respecting an entertainment venture." (p. 5).

59. Rein, Kotler and Stoller, *High Visibility*, 4 (1987). Cf. Boorstin, *The Image: A Guide to Pseudo-Events*, at 47 (1961) describing his theory of the power of communication technology to create "well-knownness" or "artificial fame".

60. Critics are suspicious of processes that tend to favor illusion over reality. See Rein, Kotler and Stoller, *High Visibility*, 339 (1987). In their opinion, it would be desirable a) that highly visible people should not receive disproportionate reward and privilege in relation to their real contributions to society, b) that society should do more to nurture real talent and authentic personalities and reward *them* with higher visibility, c) that society's image-makers should restrain their distortions and manipulations of reality. However, they prefer relying on the good sense of audiences rather than on legislation or regulation. *Id.* at 339.

[C] The Right of Publicity Restricts the Free Trade**[1] General Policy: Free Trade and Free Copying**

An important argument against the right of publicity is that it creates a monopoly which restricts the free trade and the freedom of imitation. These freedoms are corollaries of the principle of free competition, which is based on the assumption that competition is both socially and economically desirable. In the United States⁶¹ and the Netherlands,⁶² the general rule is free competition and free imitation: all inventions, writings and symbols, once disclosed to the public, may be freely copied, unless one infringes another's exclusive right, such as a patent, copyright or trademark, or unless one commits a commercial tort: "The general rule of law is, that the noblest of human productions --knowledge, truths ascertained, conceptions, and ideas-- become, after voluntary communication to others, free as the air to common use."⁶³

Exclusive property rights are legal exceptions to the general rule of free copying, created in cases where the interest in a particular exclusive right outweighs the general interest in free competition.⁶⁴ On this ground "islands" of protection have been created at common law,⁶⁵ state law,⁶⁶ and at federal law.⁶⁷

The general presumption in favor of free imitation, free riding, the right to reap where others have sown,⁶⁸ is the idea that the progress of mankind depends on imitation of others: "a dwarf standing on the shoulders of a giant can

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61. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, at 146, 109 S.Ct. 971, 103 L.Ed.2d 118, 9 U.S.P.Q.2d 1847 (1989): "imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy."
62. Supreme Court of the Netherlands. June 27, 1986, NJ 1987, 191 (vNH); BIE 1986, no. 71, at 280; AA 1988, 257 (HCJ); CR 1986, 176 (EJD); IER 1986, no. 29, 78 (*Holland Nautic/Racal-Decca*). Cf. Quaedvlieg, Een studie naar feiten en achtergronden rond sweat of the brow- of prestatiebescherming, BIE 1996, 4, at 5, no. 10.
63. *International News Service v. Associated Press*, 248 U.S. 215, at 250, 39 S.Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293 (1918) (Brandeis, J. dissenting).
64. Cf. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, at 151, 109 S.Ct. 971, 103 L.Ed.2d 118, 9 U.S.P.Q.2d 1847 (1989): "free exploitation of ideas will be the rule, to which the protection of a federal patent is the exception." McCarthy, *Trademarks and Unfair Competition* § 1:15[5] (3d ed. 1992). states that the right to copy is a right reserved to the people by the U.S. Const. Tenth Amendment. According to Sims, Right of Publicity: Survivability Reconsidered, 49 *Fordham L. Rev.* 453, 484-485, fn. 149, (1981) this principle can also be based on the Commerce Clause (U.S. Const. art. 1, § 8, cl. 3).
65. Most famous is *International News Serv. v. Associated Press*, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293 (1918) which held that a news organization had a "quasi-property right" in the news it gathered.
66. E.g. States in the USA which have adopted statutes which protect trade secrets.
67. E.g. the Cable Communication Policy Act of 1984 concerning the unauthorized reception and retransmission of cable television signals by persons with satellite dishes.
68. Cf. Kaplan, *An Unhurried View of Copyright*, 2 (1967): "if man has any 'natural' rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown. Education, after all, proceeds from a kind of mimicry, and 'progress' depends on generous indulgence of copying."

see farther than the giant himself."⁶⁹ According to Gordon, property right protection "may interfere impermissibly with the autonomy of others and with efforts by individuals to achieve cultural self-determination."⁷⁰

[2] Exceptions to the Principle: the Policy of Free Competition and Free Copying

There seems to be a conflict between the economic property theory which states that the creation of intellectual property rights has static benefits by promoting an efficient allocation and use of scarce resources and dynamic benefits by encouraging the owner to invest in his property on the one hand, and the principle of free of trade which states that copying is allowed, on the other hand. Demsetz has explained how property rights come into being: "Property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization."⁷¹ Externalities are the costs that users of a specific property create for others. Without intellectual property rights "intellectual theft" would have remained an externality, because piracy and imitation is practically costfree.

Lehmann explained that recognition of a property right, with its inherent restriction of competition and monopoly cost, can be justified by the fact that property rights promote competition at a higher level of activity.⁷² Ownership of tangible objects creates a permanent restriction of use at the consumption level of the tangible objects owned by one person, but it can create competition at the production level.⁷³ The owner of pasture would not be interested in raising crops if anyone could freely snatch away the result of his labor. Intellectual property rights create a competitive restriction at the production level for the benefit of competition at the innovative level, because of the static and dynamic benefits of property. A publisher can only publish books because he knows that his end product of investment cannot be freely copied. Patent law creates competition between innovators and inventors which leads to progression of technical knowledge. Thus the economic property rights theory states that it is

69. Chafee, *Reflections on the Law of Copyright*, 45 *Colum. L. Rev.* 503, at 511 (1945). According to Nimmer, *Nimmer on Freedom of Speech*, § 2.05[C], fn. 179 (1984), this famous phrase can be traced to R. Burton, *Anatomy of Melancholy* (1618).

70. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 *Va. L. Rev.* 149, at 156-157 (1992).

71. Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev.* 347, at 350 (1967). "Externalities" are one of the sources of market failure. This term refers to economic effects external to a market exchange. A harmful externality is the cost that voluntary actions of one or more people imposes on third parties without their consent. The classic example is a factory that pollutes clean water. The reason that the market fails is that the generator of the externality does not have to pay for harming others. The solution is to induce such generators to "internalize" i.e. to take into account the externalities they produce.

72. Lehmann, *The theory of property rights and the protection of intellectual and industrial property*, 16 *HC* 525, at 537-540 (1985); id. Lehmann, *Property and Intellectual Property- Property Rights as Restrictions on Competition in Furtherance of Competition*, 20 *HC* 1-15 (1989).

73. Cf. Fikentscher, *Wirtschaftsrecht I*, at 41 (1983), stating that without small monopolies, no enterprise system can be established. Property rights and market theory are two paths towards one goal.

efficient to create new property rights as long as the benefits are higher than the inherent costs.

This explains why not all valuable assets deserve the protection of a property right. For example, the right to walk on a street is considered to be a liberty, not a property right, although it is possible to exploit this liberty interest, for example by agreeing not to walk in a certain area or to carry an advertisement for a local shop. The fact of exploitation does not transform a liberty into a property interest. Calabresi and Melamed have developed an economic (and normative) analysis of those entitlements that are not permitted to become the subject of market exchanges. The economic reason that a liberty, such as the right to walk on a street or the right to vote, is inalienable, is that exchange in the marketplace would impose very high or incommensurate costs on third parties.⁷⁴

Therefore it is necessary to investigate the possible costs of recognizing the right of publicity. In literature, the economic aspects of property rights in human identity are not extensively discussed.⁷⁵

[3] Possible Costs of the Right of Publicity

The right of publicity creates a monopoly which restricts the free trade and the free imitation, because the unpermitted commercial use of a person's identity can be prohibited by that person. Thus the right of publicity creates a monopoly in human identity, which, without such a right, would be in the public domain.⁷⁶ In *Carson v. Here's Johnny Portable Toilets, Inc.*,⁷⁷ the Sixth Circuit held that Carson's right of publicity in the phrase "Here's Johnny" was infringed by defendant's commercial use in connection with portable toilets. But Judge Kennedy dissented, stating that "[t]he grant to a person of a publicity right in his or her identity takes this identity away from the public domain, giving a common law monopoly for it."⁷⁸

To what extent does the right of publicity restrict the free trade and competition? A monopolist in antitrust sense is one large dominant seller in the market that sets the price and determines the output of a product with no close substitutes. A monopolist harms society by selling for higher prices and restricting output because it faces a falling marginal revenue curve.⁷⁹ This leads to an inefficient allocation of resources: too few resources will be devoted to producing a particular product, which will be sold at a price that is too high. Thus persons who value the product more than its cost but less than its price, will not

74. Calabresi and Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089 (1972).

75. But the analysis of other intellectual property rights provide a useful guide. See e.g. Ordoover, *Economic Foundations and Considerations in Protecting Industrial and Intellectual Property*, 53 *Antitrust L.J.* 503 (1984); Landes and Posner, *Trademark Law: An Economic Perspective*, 30 *J.L. & Econ.* 265 (1987).

76. Assuming that no other legal rule is infringed.

77. 698 F.2d 831, 218 U.S.P.Q. 1, 9 *Media L. Rep.* 1153 (C.A.6 1983).

78. *Id.* 698 F.2d 831, at 840.

79. If a monopolist sells one unit more, it must drop the price for all buyers. In order to maximize its profits, it will restrict output.

buy it. Any exclusion of users to whom the good has value, is inefficient, because they would benefit and no one else would be disadvantaged.

The right of publicity owner has a monopoly with respect to his identity. The owner is able to restrict output and ask high prices. For example, suppose a bottle of shampoo can be manufactured for \$2.00, and that permission to use the face of a famous actress on the bottle costs an additional \$1.00. The shampoo must sell for at least \$3.00. Without a right of publicity, the manufacturer would not have to ask permission to use the actress' face, and the bottle of shampoo could be sold for \$2.00. Thus the effect of the right of publicity is that people who value the bottle of shampoo at more than \$2.00 but less than \$3.00 will not buy it. This is inefficient. For example, if a consumer values the shampoo \$2.50, both the manufacturer and consumer will lose a 50 cents profit. Thus the right of publicity could result in underproduction and overpricing.

In my opinion, there are convincing arguments to reduce the suggested welfare loss created by the monopoly power of the right of publicity owner who restricts output and asks too high a price.

The degree to which it is possible to restrict the use of a valuable identity to maximize its value depends upon the elasticity level of the demand. If demand is inelastic, there will be an incentive to restrict access, which is inefficient. But if demand is elastic, the owner is less likely to maintain a price that excludes potential users. Since there are many celebrities and non-celebrities, it is highly plausible that there is competition from other right of publicity owners.⁸⁰ Then the nature of supply and demand will set the royalty fee.

Theoretically it is possible that a celebrity is so popular that consumers only want products which are associated with this person. In such a case the effect of the right of publicity will be like a functional monopoly. Then, the attractiveness of someone's identity has become an essential part of the product, for which no substitute products are available. In my opinion, this problem is analogous to the aesthetic functionality doctrine in trademark law.⁸¹ What is categorized as functional can be freely copied and imitated. The aesthetic functionality doctrine states that "[w]hen goods are bought largely for their aesthetic value, their features may be functional because they definitely contribute to that value and thus aid the performance of an object for which the goods are intended."⁸² In the 1952 Pagliero decision,⁸³ the Ninth Circuit held that Wallace China could not prevent competitor Pagliero from copying floral designs on plates. According to the court the issue was not whether customers perceived the floral designs on plates as Wallace's trademark. The court held that the designs were functional because they satisfied a demand for the aesthetic as well

80. Cf. *Grant v. Esquire, Inc.*, 367 F.Supp. 876, at 883 (1973): "With respect to any possible chilling effect of [...] this decision, the court can take judicial notice that there is no shortage of celebrities who-- for an appropriate fee-- are only too happy to lend their faces, names and reputations for exploitations in such enterprises as the one here involved. There is no conceivable artistic or editorial purpose served by Mr. Grant's picture that would not equally well have been served by any one of numerous other celebrities."

81. See McCarthy, *Trademarks and Unfair Competition* § 7:26[4]-[6] (3d ed. 1992). Cf. Art. 1(2) Benelux Trademark Act, according to which shapes which affect their actual value cannot be considered marks.

82. *Restatement of Torts* § 74a, comment a. (1938).

83. *Pagliero v. Wallace China Co.*, 198 F.2d 339, 95 U.S.P.Q. 45 (C.A.9 1952).

as for the utilitarian. In the courts' opinion, free competition permits imitation of trademarks in the absence of a patent or copyright if the particular feature is an important ingredient in the commercial success of the product. Since the plates sold because of the attractiveness and eye-appeal of the floral designs, Pagliero was allowed to copy the design.

Today, this doctrine has been rejected by the majority of courts.⁸⁴ As McCarthy stated: "The "important ingredient in the commercial success of the product" formulation is much too open-ended and vague to be a useful rule of law. Taken literally, it negates protection for all trademarks. How much less than that it may mean is solely in the subjective view that a court may take. The notion of "aesthetic functionality" is an unwarranted and illogical expansion of the functionality policy, carrying it far outside the utilitarian rationale that created the policy."⁸⁵ Because the range of possible aesthetic designs and configurations is infinite, trademark protection for aesthetic features would not greatly hinder competition. Similarly, a possible monopoly effect of the right of publicity is reduced by the vast amount of other celebrities and non-celebrities, whose identity can be used for commercial purposes.

A *second* argument to reduce the welfare loss of the right of publicity is that the owner can maximize profits without reducing outputs, since he can discriminate between his licensees.⁸⁶ Additional licenses will not reduce the price received in other transactions, if licensees who place a higher value on the good can be forced to pay more.⁸⁷

The right of publicity can create some other costs. The cost of transferring or licensing the right of publicity can be so high that it prevents an assignment or license, although without these transaction costs it would be an efficient change of values in the case the identity has a higher value for others than the owner. This is the case if one advertiser is willing to pay \$480,000 for an exclusive license, while at the same time 1,000 small advertisers are willing to pay \$500 for non-exclusive licenses. The efficient outcome would be to grant 1,000 licenses. As long as the small advertisers are not organized, the right of publicity owner will probably grant one exclusive license, even though, in general, the license costs are not too high: a fee for drafting a license.

In my opinion, such transaction costs should not be used as an argument against the economic justification.⁸⁸ If one takes into account such transaction

84. See McCarthy, *Trademarks and Unfair Competition* § 7:26[4][b] (3d ed. 1992). In the Benelux, Art. 1(2) Benelux Trademark Act is restrictively interpreted. According to Benelux Court of Justice, April 14, 1989, NJ 1989, 834 (LWH); IER 1989, no. 30, at 57; BIE 1989, no. 90, at 329 (Ste) (*Burberrys/Superconfex*), Art. 1(2) Benelux Trademark Act is only applicable if the shape significantly affects the trade value, and only insofar as this value is not caused by the selling power of a well-known trademark. Benelux Court of Justice, December 16, 1991, NJ 1992, 596 (DWFV) (*Burberrys/Bossi*) restricted this doctrine to three dimensional shapes of products.

85. *Trademarks and Unfair Competition* § 7:26[5] (3d ed. 1992).

86. This is different for tangible products, because the market would erase the price differences.

87. This is an argument used in antitrust law. It reduces the inefficiency, but not the distributional consequences. Cf. Denicola, *Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols*, 62 *N.C.L. Rev.* 603, at 634-635 (1984), reprinted in 75 *Trademark Rep.* 41 (1985).

88. But see Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 *Cal. L. Rev.* 127, at 223-224 (1993).

costs, the outcome will be different, but the right of publicity will still encourage a more efficient use of valuable identities. Madow's statement that transaction costs favors big advertisers,⁸⁹ is not a convincing argument against the right of publicity. Smaller advertisers can organize themselves. If the market does not work well, a correction based on antitrust regulation should be the remedy.

The costs of protection and enforcement of the right of publicity are generally higher than the costs of protection of tangible property, because it is relatively easy to use someone's identity without paying for it. But these costs can fulfill a useful function. A right of publicity plaintiff will only go to court if the costs of legal protection and enforcement of his right will be lower than the expected awards based on the commercial value of the identity.

Does the right of publicity create "*rent seeking costs*"?⁹⁰ These costs are generated when the potential benefits of an exclusive right seem very high. The resulting competition to get the property right can be costly, much higher than the potential gain. This is the case when many inventors try to invent the same thing, while ultimately only one inventor will get the patent. Madow stated that an effect of the right of publicity could be the overinvestment in celebrity-production by inducing too many people to enter into entertainment and sports careers.⁹¹ This type of cost seems to fit with the incentive theory. In my opinion, this theory is not very convincing because the right of publicity does not protect an invention or work of art, but human identity. Without the right of publicity people would still enter into entertainment and sports careers for other (psychological) reasons.

Hoffman has asserted that the right of publicity encourages irrational celebrity endorsements, resulting in a "*net social disutility*."⁹² McCarthy replied that non-recognition of the right of publicity would result in more, not less, commercial use of celebrity endorsements and tie-ins.⁹³ But do celebrity endorsements create a "net social disutility"? Clearly, such endorsements can influence or change purchasing decisions depending on the value of the mental images created in the advertising. Manufacturers differentiate their products by persuasive (instead of informative) advertising. They add a desired image to the product. An effect of celebrity endorsements is that consumer decisions to purchase are not only based on price and functional quality of the product but also on the desirable image created by advertising.⁹⁴ But how can we say that this is wrong? The consumer in his mind buys both: product plus desirable association. Should the government force consumers not to take into consideration associations with persons they admire? It seems preferable to let consumers decide for themselves. If they think they have to pay too much for a product

89. See *supra* § 7.1.

90. Cf. Posner, *Economic Analysis of Law*, 36-37 (3d ed. 1986).

91. See § 7.1.

92. Hoffman, *Limitations on the Right of Publicity*, 28 *Bull. Copyright Soc'y* 111, at 120 (1980).

93. McCarthy, *The Rights of Publicity and Privacy*, § 2.3 (Rev. 1993).

94. See about possible inefficiencies of advertising with trademarks: Economides, *The Economics of Trademarks*, 78 *The Trademark Reporter* 523, at 533-35 (1988).

which is associated with a celebrity, they can always buy a cheaper product without celebrity association.

[D] Conclusion

In my opinion the economic static advantages, consisting of an efficient allocation and use of valuable identities, and (although perhaps only marginally) the dynamic advantages, consisting of the incentive for people (and the celebrity industry) to invest in valuable identities, outweigh the monopolizing effect of the right of publicity, because this effect is reduced by the numerous alternative persons whose identity can be commercially used and the possibility of discriminating between licensees.

There are distributional consequences, because income is transferred from consumers to right of publicity owners. The distributional consequences seem to be outweighed by the economic advantages. This can be illustrated with the classic example of a pie.⁹⁵ Efficiency corresponds to "*the size of the pie*." The efficiency justification states that through the right of publicity the size of the pie will be greater. The distributional argument says that the "*slice of the pie*" is not fair: consumers get smaller and right of publicity owners get bigger slices. If this consequence is mentioned as an argument against the right of publicity, a choice is made: instead of a bigger pie with unequal slices, a smaller pie with equal slices is preferred. An economic solution would be to have the bigger pie, and then redistribute the slices (income) by tax regulation.

The recognition of the right of publicity will create a market at a higher level for the exchange of the identifying features of persons. It allows competition in the extra dimension of perception advertising which can differentiate otherwise identical products.

7.4 Other Suggested Justifications

[A] Labor Justification

The labor justification is a moral argument which states that a person has a property right in the items of value he created. Thus, if I make a boat out of an unowned tree, the boat is mine, because I invested time and labor to create it. This is the traditional Lockean justification for tangible property:

"Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to But himself. The Labour of his Body, and the Work of his Hands, we may say, are property his."⁹⁶

95. Cf. Polinsky, *An Introduction to Law and Economics*, 7 (1983).

96. Locke, *Two Treatises of Government* (1690), *Second Treatise of Government*, Chapter V, 27. See also § 7.1.

Thus since I am the owner of myself, the labor of my body is mine.⁹⁷ Many commentators have mentioned labor as the justification for the recognition of the right of publicity. In his article about the right of publicity Nimmer stated:

"It is also unquestionably true that in most instances a person achieves publicity values of substantial pecuniary worth only after he has expended considerable time, effort, skill, and even money. It would be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations."⁹⁸

This justification states that a property right in identity is something a celebrity deserves for the investment in becoming famous. McCarthy also linked the right of publicity with the labor justification by stating:

"While one person may build a home, and another knit a sweater so also may a third create a valuable personality, and all three should be recognized by the law as 'property' protected against trespass and theft. This could be called a "natural rights" rationale in that it starts with the premise that that which identifies me and what I create is mine, unless there is a strong public policy to the contrary."⁹⁹

Courts have also mentioned labor as the justification of the right of publicity. In *Uhlaender v. Henricksen*, Judge Nevill explained:

"A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics, and other personal characteristics, is the fruit of his labors and is a type of property."¹⁰⁰

Also in Dutch court decisions and literature, protection of commercial interests by Dutch portrait law is justified by the (professional) labor by which the plaintiff became popular.¹⁰¹

However, labor, time, effort, skill, and money can only partly justify the right of publicity. Every human being has a right of publicity, also the person who was simply born with a beautiful face and who did not do any effort to exploit the pulchritude. In the Netherlands the members of the Royal Family are popular by birth, but they should have a right of publicity independent of the amount of labor.

97. But see Nazick, *Anarchy, State, and Utopia*, 174-75 (1974) who asked: "why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea... do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?"

98. Nimmer, *The Right of Publicity*, 19 *Law & Contemp. Prob.* 203, at 216 (1954).

99. *The Rights of Publicity and Privacy*, § 2.1[D] (Rev. 1993).

100. 316 F.Supp. 1277, at 1282, 1971 Trade Cases P 73,414 (D.C.Minn. 1970).

101. Eg. Supreme Court of the Netherlands, January 19, 1979, NJ 1979, 383 (LWH); BIE 1979, no. 23, at 163, *Auteursrecht* 1979, 52 (JHS) ('*Schaep met de vijf Pooten*); Cf. Spoor/Verkade, *Auteursrecht*, no. 190, at 271-272.

Madow argued that the value of someone's identity is often (at least partly) created by others, such as the media and the celebrity industry.¹⁰²

[B] Prevention of Unjust Enrichment Justification

Commentators¹⁰³ and courts have mentioned unjust enrichment as justification for the right of publicity. The U.S. Supreme Court stated in the "*Zacchini*" case, which dealt with the performance right of publicity:

"The rationale for (protecting the right of publicity) is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."¹⁰⁴

Other courts have transferred this justification into the identity right of publicity.¹⁰⁵ The conflict between the plaintiff and the defendant is often formulated as *Sower v. Reaper*.¹⁰⁶ The defendant profits without sharing in the costs of generating the value of the identity he exploits. This enables defendant to compete unfairly with plaintiff's authorized licensees.¹⁰⁷ The defendant is often called the thief, reaper, free rider, or parasite.

One can distinguish two sources of value in persona: the *scarce resource value*, because the persona is protected by the right of publicity, and the *added value*, the value which has been added to the persona by transforming an ordinary citizen into a celebrity.¹⁰⁸ The problem with the unjust enrichment

102. Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 *Cal. L. Rev.* 127, at 182-196 (1993). *Id.* *Cartoons v. Major League Baseball Players Ass.*, --- F.3d ---; 1996 WL 490707; 39 U.S.P.Q.2d 1865 (C.A.10 1996): "Celebrities, however, are often not fully responsible for their fame."

103. Swanson, Are the California Right of Publicity Statutes Unconstitutional? A Second Look at Some First Amendment Problems, in: *Entertainment, Publishing and The Arts Handbook*, 437, at 439 (1987); Hetherington, Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity, 17 *Colum.-VLA J.L. & Arts* 1, at 16 (1992); Kwall, The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis, 70 *Ind. L.J.* 47, at 62 (1994): "the need to prevent unjust enrichment is one of the fundamental rationales underlying the right of publicity." *Id.* at 85-86; *Restatement (Third) of Unfair Competition* § 46, comment c. (1995): "the right of publicity also secures for plaintiffs the commercial value of their fame and prevents the unjust enrichment of others seeking to appropriate that value for themselves."

104. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, at 576, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 *Media L. Rep.* 2089 (1977), citing *Kalven, Privacy in Tort Law Were Warren and Brandeis Wrong?*, 31 *Law & Contemp. Prob.* 326, at 331 (1966).

105. *Cf. Bi-Rite Enterprises, Inc. v. Button Master*, 555 F.Supp. 1188, at 1198, 217 U.S.P.Q. 910, 9 *Media L. Rep.* 1531 (D.C.N.Y. 1983): "It prevents unjust enrichment by providing a remedy against exploitation of the goodwill and reputation that a person develops in his name or likeness through the investment of time, effort, and money." *Id. Hirsch v. S. C. Johnson & Son, Inc.*, 90 Wis.2d 379, 280 N.W.2d 129, at 134, 205 U.S.P.Q. 920 (Wis. 1979).

106. Based on *International News Service v. Associated Press*, 248 U.S. 215, at 239-40, 39 S.Ct. 72, 63 L.Ed. 211, 2 A.L.R. 293 (1918): the defendant "reaps where [he] has not sown."

107. *Cf. Ausness, The Right of Publicity: A 'Haystack in a Hurricane'*, 55 *Temp. L.Q.* 977, at 991 (1982); Note, Human Cannonballs and the First Amendment: *Zacchini v. Scripps-Howard Broadcasting Co.*, 30 *Stan. L. Rev.* 1185, at 1190 (1978).

108. *Cf. Jollymore, Expiration of the Right of Publicity - When Symbolic Names and Images Pass Into the Public Domain*, 84 *Trademark Rep.* 125, at 142 (1994).

argument is that it does not say why the appropriation of someone's identity is not justified. Therefore, the unjust enrichment theory can lead to *circular reasoning* because enrichment is unjustified if another's right has been infringed. The argument that the right of publicity protects a scarce source value in human identity can be rebutted by stating that this value only exists because of the recognition of the right of publicity: without protection there is no value in an intangible good. The argument that the right of publicity is justified because it protects an added value in human identity is similar to the labor justification discussed *supra*.

In my opinion, one should not justify the right of publicity by referring to the unjust enrichment theory. From the principle of free trade and free imitation¹⁰⁹ it follows that enrichment in itself is justified.¹¹⁰ Therefore, a plaintiff who claims that the defendant unjustly enriched himself at the cost of the plaintiff should give extra arguments why in this particular case defendant's conduct is unlawful. That argument should justify the right of publicity, not the unjust enrichment theory itself.

[C] Consumer Protection and Prevention of Fraudulent Business Practices

Felcher and Rubin have stated that a justification of the right of publicity is the prevention of fraudulent business practices, because it prohibits false endorsements.¹¹¹ A side effect of a claim based on the right of publicity can also be that forms of consumer confusion or deception are prevented. But such an effect is not a justification for the right of publicity, since this right is often invoked in cases where there is no confusion or deception of consumers.¹¹² Fraudulent business practices can be prohibited with other actions, such as false advertising. Therefore, this rationale does not justify the right of publicity as a right in itself.¹¹³

109. See § 7.3[C][1].

110. Cf. Haas, *Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising*, 19 U.C. *Davis L. Rev.* 539 (1986). Contra: Van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, 1994, at 177 and 451 who states that unjust enrichment is unlawful if the defendant exploits (instead of merely taking advantage of) the concrete immaterial object of the plaintiff.

111. Felcher and Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 *Yale L.J.* 1577, at 1600 (1979). Cf. Hetherington, *Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity*, 17 *Colum.-VLA J.L. & Arts* 1, at 18 (1992) who mentions consumer protection as a justification for the right of publicity. Id. Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 *Ind. L.J.* 47, at 75-79 (1994); *Restatement (Third) of Unfair Competition* § 46, comment c. (1995): "the right of publicity indirectly affords protection against false suggestions of endorsement or sponsorship."

112. See § 3.6.

113. Id. McCarthy, *The Rights of Publicity and Privacy*, § 2.4 (Rev. 1993), who rejects the falsity justification, except for the cases where there is an element of falsity which does not meet the standard of false advertising. Cf. Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 *Cal. L. Rev.* 127, at 228-236 (1993): the right of publicity parallels federal and state unfair competition, and therefore is an unnecessary right to the extent that it prevents consumer deception. Id. *Cartoons v. Major League Baseball Players Ass.*, --- F.3d ---; 1996 WL 490707; 39 U.S.P.Q.2d 1865 (C.A.10 1996): "The

[D] Protection of Interests of Assignees and Licensees

Swanson stated that a function of the right of publicity is to protect the integrity of contractual relations and the interests of those who purchase a license.¹¹⁴ But such a function is not the justification for the right of publicity, only a consequence.

[E] Trade Practices

In the Netherlands, Boekman has suggested that a reason for protection of the commercial interests of the portrayed must be the fair trade practices among the relevant competitors. She referred to the trade practices to prevent circular reasoning with the "reasonable interest" standard of Article 21 DCA. According to this theory the plaintiff could only claim infringement of commercial interests if other advertisers would have been willing to pay a license for the same type of commercial use.¹¹⁵

However, trade practices generally serve the interests of the relevant competitors. Encoding trade practices in legal rights is not always in the interest of society as a whole, for example if it would abridge others' freedom of speech rights.¹¹⁶

7.5 Conclusion

The right of publicity can be justified morally and economically. From the principle of personal autonomy it follows that every human being should have the right to develop his own identity and to decide how and what aspects of this personal identity will be shown to the rest of the world. This right must include the right to control the commercial use of his own identity, because a person, whose identity is commercially exploited without permission, loses control over an aspect of his personality. The recognition of the right of publicity will also result in an efficient allocation and use of valuable human identities.

Other justifications, such as the labor justification, prevention of unjust enrichment, the protection of consumers, the prevention of fraudulent business

Lanham Act, however, already provides nationwide protection against false or misleading representations in connection with the sale of products."

114. Swanson, *Are the California Right of Publicity Statutes Unconstitutional? A Second Look at Some First Amendment Problems*, in: *Entertainment, Publishing and The Arts Handbook*, 437, at 439 (1987). Cf. Hetherington, *Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity*, 17 *Colum.-VLA J.L. & Arts* 1, at 19 (1992).
115. Boekman, *Publicaties van eens anders portret en onrechtmatige mededinging*, *BIE* 1966, 29, at 32; Cf. Oppenoorth, *Een lastig portret*, *IER* 1986, 85, at 88. The Dutch Supreme Court seemed to have followed this theory in its decision of January, 19, 1979, *NJ* 1979, 383 (LWH); *BIE* 1979, no. 23, at 163. *Auteursrecht* 1979, 52 (JHS) (*'t Schaep met de vijf Pooten*) by referring to the development in social views and the requirement of a popularity that can be exploited. *Id.* Court of Appeals the Hague, April 13, 1960, *NJ* 1961, 160 (*Teddy Scholten*).
116. *See infra*, § 9.3[C][6]. Cf. Verkade, *Intellectuele eigendom, mededinging en informatievrijheid*, at 14, 1990, arguing that there are many pressure groups who lobby for more intellectual property protection, but that there is no powerful pressure group for the free trade and free imitation.

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practices, the protection of interests of assignees and licensees, and trade practices cannot fully justify the right of publicity.

CHAPTER 8

IS THE RIGHT OF PUBLICITY AN INTELLECTUAL PROPERTY RIGHT?

8.1 Characterization of Property

The meaning of property changes over time. In philosophical and legal literature there is discussion of what property ought to be and about what property is, and both discussions influence each other. The word "*property*" is often used as a synonym for a thing. In this sense, there is no need for a concept of property other than physical possession. Therefore, in a legal context, the word "property" is not (mere possession of) a thing, but an individual right in the sense of an enforceable claim (right) to use or benefit of something, that will be enforced by the state. Property is a legal system of rights a person has in relation to other persons. It can be divided in private property and common property. Private property is the right to exclude others from the use or benefit of something. Common property is the right of each person not to be excluded from something, such as common property of the ocean.¹

The word "*interest*" denotes anything which is the object of any human desire. Only insofar as an interest is protected against any form of invasion, it becomes a legal interest. A legal interest is a proprietary or property interest if it is related to something which can be owned by a person. Property comprises the legal relations (rights) between persons with respect to things. The term property is commonly used to describe a person's "*bundle of rights*" in something.²

Depending on the nature of the "*thing*" and on the nature of the person's interest in it, the bundle may be different, but it is possible to make some generalizations about the most important kinds of rights that tend to be found in the property bundle:³

- 1) the right of possession, use, and fruits or profits of the thing;
- 2) the right to exclude others;
- 3) the right to dispose of (*e.g.* to alienate) the thing.

The economic property rights theory states that the system of property rights creates incentives to use resources efficiently if all valuable resources are owned by someone (universality criterium). To create an incentive to incur the (investment) costs required to make an efficient use of that resource, the owner should have the right of possession, use, and fruits or profits of that resource, as well as the right to exclude everybody else from using the resource (exclusivity criterium). To make sure that the resource is used by the person who values it

1. MacPherson, *Property, Mainstream and Critical Positions*, 1-11 (1978). According to MacPherson, state property is private property of the state as a legal person.

2. See Cunningham, Stoebuck and Whitman, *The Law of Property*, § 1.2 (1984).

3. Cf. in the Netherlands, Article 5:1(1) Civil Code provides that "Ownership is the most comprehensive right which a person can have in a [corporeal] thing." The ownership rights include: a) the right to freely use the thing and the right to exclude others (Art. 5:1(2) Civil Code), b) the right to the fruits once separated (Art. 5:1(3) Civil Code), and c) the right to fully dispose of the thing (Articles 3:81(1) and 3:83(1) Civil Code).

most (or can use it most productively) the resource must be freely transferable. If a resource cannot be transferred, a less productive use cannot be shifted into a more productive use through voluntary exchange (transferability criterium).⁴

It is also possible to make some generalizations about the "thing" protected by property rights. We also speak of "intellectual property rights".⁵ Property is not limited to dominion (ownership) over tangible things. In theory property could include all valuable interests, but then the concept of ownership would be threatened by an ever-increasing subdivision of interests in property. The decision whether valuable interests are recognized as property interests depends on public policy. Property rights are the result of a balance of a variety of competing interests that have to be weighed against each other.⁶ The "thing" protected by property rights has two characteristics:

- 1) the thing can be owned in the sense that the owner can for instance possess, use, control, destroy it, or exclude others from it;⁷
- 2) the thing to which the property right is attached must be specific.

If the specificity is lacking, then the right is more a general claim, which one might call a liberty, not property in a legal sense, such as the right to vote or the freedom of speech. In economic terms even an unspecific value, that can produce a future income stream for which a market could develop, is a property interest.⁸ But no lawyer would classify someone's right to walk on a street as a property right. It is a liberty, although the individual can exploit this liberty.⁹ The fact of exploitation does not transform his liberty into a property interest. Calabresi and Melamed explained that there are not only moral reasons, but also economic reasons for not granting a property status to certain entitlements. The economic reason that a liberty, such as the right to walk on a street, the right to vote or the right of free speech, is inalienable, is that exchange in the marketplace would impose very high or incommensurable costs on third parties. Because the subject matter of a liberty is not specific enough, the costs to third

4. See Posner, *Economic Analysis of Law*, 30-33 (3d. ed. 1986). See for a property rights analysis of German law: Lehmann, *The theory of property rights and the protection of intellectual and industrial property*, 16 *IIC* 525, at 526-528 (1985).

5. See § 8.2[C].

6. Cf. Vandevelde, *The New property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 *Buffalo L. Rev.* 325, at 358-66 (1980).

7. E.g. privacy rights are no property rights because its object of protection (insofar as it can be defined) cannot be owned in the sense that the owner can possess, use, control, destroy it, or exclude others from it. Therefore, Pouillet rejected the view that the enactment of data protection regulations should be viewed as the recognition of a property right in one's own (sensitive) personal data, such as a person's race, religious opinion etc. See Pouillet, *Data Protection between Property and Liberties. A Civil Law Approach*, in: *Amongst Friends in Computer and Law, A Collection of Essays in Remembrance of Guy Vandenberghe*, 161, at 163 (1990).

8. See Demsetz, *Toward a Theory of property Rights*, 57 *Am. Econ. Rev.* 347 (1967).

9. See § 7.3[C][2].

parties are not measurable. What are the costs for the society as a whole if I can sell my right of free speech?¹⁰

Terrell and Smith have distinguished four types of valuable interests which have met these two standards and therefore have received the "*property*" label:

- a) tangible property;
- b) interests that have tangible (specific) objects as their ultimate subject matter, such as stocks or a partnership share;
- c) interests that have a specific relational claim as to their subject matter, such as a contract not to do something or an action for damages because of a tort; and
- d) interests that are claims against the whole world regarding some specific intangible subject matter, that does not depend on any particular tangible object or specific relationship. Intellectual property rights, such as copyrights and patents, belong to this category. For example, copyright is restricted to the specific expression of a work of authorship and does not protect the ideas behind the expression.¹¹

8.2 Object of the Right of Publicity

[A] The Right of Publicity Protects a Specific Intangible Good: a *Persona*

What object should be protected by the right of publicity: Fame or popularity? Publicity values in human beings? Publicity values in non-human entities such as animals or popular media symbols? Specific symbols which refer to human persons or popular media symbols, such as the name or likeness? Only tangible objects, such a photographs of human beings or popular objects? All symbols which can identify a specific human being?

It follows from the principle of personal autonomy¹² that all human beings, famous and non-famous, should have a right of publicity. The theory that the right of publicity also protects publicity values in non-human entities, such as animals or famous buildings,¹³ must be rejected. Due to the necessary relation between human beings and the right of publicity, the terms "*object*" and "*subject*" are difficult to distinguish: the object of the right of publicity has a necessary relation with its original subject, the person who is the first owner of the right of publicity.

In my opinion, the right of publicity should protect all symbols or indicia which identify a unique human being. These symbols include the name, likeness, voice, signature, character and other distinctive indicia by which a specific

10. Calabresi and Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 *Harv. L. Rev.* 1089, at 1111-1115(1972).

11. Terrell and Smith, Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of The Inheritability Issue, 34 *Emory L.J.* 1, at 29-32 (1985).

12. See § 7.2.

13. See § 2.3[A].

person is identified by other persons. General term for such symbols are "identity," "personality," and "persona." I prefer "*persona*" above "personality" or "identity" because this term can also be used in the Dutch language without translation.¹⁴ Therefore, the right of publicity should protect a "persona". In my opinion, the persona protected by the right of publicity is sufficiently *specific*, because it protects only indicia which identify a single human being. Since all human beings should have a right of publicity, it is not necessary that this persona has a specific degree of popularity or exploitation value.¹⁵ The question of whether a defendant commercially exploited plaintiff's persona or the persona of another person must be answered by the identification test.¹⁶

[B] Rejection of Other Theories

According to Terrell and Smith, the right of publicity is not a property right but a (non-inheritable) liberty, because it is not attached to any specific object that can take on the characteristics of ownership. In their view, the right of publicity is nothing more than the right of famous people to waive their right of privacy whenever they choose.¹⁷ However, their view is based on a different definition of the right of publicity. In their view, the object protected by the right of publicity is something unspecific as "*fame*" or "*popularity*."¹⁸ Fame is not similar to a persona, the characteristics which identify an unique human being and which can be used for commercial purposes.

Some authors have argued that the object of the right of publicity should not be extended to a person's "*identity*" but should be limited to specific indicia: a person's name, likeness, voice and signature.¹⁹ In my opinion, a person's persona is specific enough, to be protected by an exclusive right, but, like in copyright, patent or trademark cases, there will always be *hard cases* where it is not directly clear whether the defendant's use comes within the scope of

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14. "Recht op persona" or "persona rechten." In Chapter 12, I will discuss the "persona rights," the exclusive rights of the right of persona owner.
 15. But see § 46 of the Restatement (Third) of Unfair Competition providing that the right of publicity protects "the commercial value of a person's identity."
 16. See § 2.5 and § 4.4. Cf. § 3.1[D] and § 5.3[D].
 17. Terrell and Smith, *Publicity, Liberty, And Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue*, 34 *Emory L.J.* 1-64 (1985): "The opportunity to exploit one's notoriety is [...] a general right unassociated with a specific manifestation of one's fame, and is therefore a liberty interest. It is in a sense simply the right to waive one's right of privacy." *Id.* 34 *Emory L.J.* 1, at 52.
 18. But see Cohen Jehoram, *Recht op verzilverbare populariteit*, in: *Noten bij noten. Ter herinnering aan Mr L. Wichers Hoeth*, 1990, 33-36, who discusses a "right to cashable popularity."
 19. Cf. Heberer, *The Overprotection of Celebrity: A Comment On White V. Samsung Electronics America, Inc.*, 22 *Hofstra L. Rev.* 729 at 732 (1994) arguing that the "more abstract characteristics" of a celebrity's identity, beyond attributes such as name, likeness, and voice, "are transitory and do not sufficiently distinguish one personality from another to be deserving of independent legal protection under the right of publicity;" Bloom, *Preventing the Misappropriation of Identity: Beyond the "Right of Publicity"*, 13 *Hastings Comm-Ent L.J.* 489, at 528 (1991) noting that "protection for any "attribute" of "identity" sweeps too broadly;"; Barnett, *First Amendment Limits on the Right of Publicity*, 30 *Tort & Ins. L.J.* 635, at 641 (1995).

plaintiff's exclusive rights. In right of publicity cases the test of identification²⁰ must tell whether the plaintiff is identified or not.

Most authors who are critical about the definition of a person's "*persona*" or "*identity*" as the object of the right of publicity, refer to the controversial "*Vanna White*" case.²¹ The Ninth Circuit held that the plaintiff, *Vanna White*, hostess of the popular "*Wheel of Fortune*" game show, had stated a cause of action for violation of her right of publicity by an advertisement of defendant's electronic products. The advertisement showed a robot performing in the "*Wheel of Fortune*" in 2012 A.D. The message was that defendant's products would be still around in the next century, when Vanna White would have been replaced by a robot. The relevant question was whether the advertisement identified Vanna White.

However, Judge *Alarcon* wrote a dissenting opinion because "[i]t is patently clear to anyone viewing the television commercial that Vanna White was not being depicted. No reasonable juror could confuse a metal robot with Vanna White."²² In his opinion, the elements in the advertisement which in the majority's opinion identified the plaintiff, such as the wig, gown, and jewelry, are not unique to her. They are, instead, common attributes, shared by many other women in the entertainment field. The only characteristic in the commercial that is not common to other female performers and which might possibly lead a viewer to think of Vanna White, is the imitation of the "*Wheel of Fortune*" set. In Judge *Alarcon*'s opinion, the *Wheel of Fortune* set is not an attribute of Vanna White's identity, but an attribute of a television game show, in which Vanna White performs as the current hostess. He agreed that anyone seeing the television commercial would be reminded of Vanna White, "because Vanna White's celebrity is so closely associated with the role."²³ Thus in his opinion the ad was not meant to depict Vanna White, but a robot, playing the role the plaintiff currently plays on the *Wheel of Fortune*. According to the dissent California State court decisions did not support the conclusion of the Federal Ninth Circuit that the use of a likeness is not required under California common law. In his opinion, California case law clearly limits the test of the right to publicity to name and likeness.²⁴

20. See § 2.5 and § 4.4.

21. *White v. Samsung Electronics America Inc.*, 971 F.2d 1395, 23 U.S.P.Q.2d 1583, 20 Media L. Rptr. 1457 (C.A.9 1992), petition for rehearing en banc denied, 989 F.2d 1512, 26 U.S.P.Q.2d 1362, 21 Media L. Rptr. 1330 (C.A.9 1993).

22. *Id.* 20 Media L. Rptr. 1457, at 1464-1465.

23. *Id.* 20 Media L. Rptr. 1457, at 1465.

24. *Id.* 20 Media L. Rptr. 1457, at 1462-1464. In 1993 the Ninth Circuit denied a petition for rehearing. But Judge *Kozinski*, joined by *O'Scannlain* and *Kleinfeld*, wrote a dissenting opinion, stating that the panel's opinion is a classic case of overprotection, which gives every famous person an exclusive right to anything that reminds the viewer of her. "It's the '*Wheel of Fortune*' set, not the robot's face or dress or jewelry that evokes White's image. See *White v. Samsung Electronics America Inc.*, 989 F.2d 1512, 26 U.S.P.Q.2d 1362, 21 Media L. Rptr. 1330, at 1333-1334 (C.A.9 1993). See for my comment on this controversy § 8.2[B].

In 1993, the Ninth Circuit denied a petition for rehearing.²⁵ Judge *Kozinski* wrote a dissenting opinion, because in his opinion, the court should not have recognized that every famous person has an exclusive right to anything that reminds the viewer of that person.²⁶ *Gigliotti* stated that "[t]he majority in *White* simply has gone too far."²⁷ *Barnett* concluded that the *Vanna White* court brings the right of publicity "to the highest point it has yet reached in the United States. No prior case protected an attribute as broad and vague as the "identity" of *Vanna White* [...]"²⁸

In my opinion, the *many critics*²⁹ of the "*Vanna White*" case seem to say that a right of publicity that protects against commercial use of any object that reminds of a famous person, is too broad and threatens the freedom of speech and the right to parody.³⁰ Not all advertisements which show an astronaut on the moon should infringe the right of publicity of Neil Armstrong.³¹

I agree with these critics, that the right of publicity should not prohibit the commercial use of all elements which remind of a famous person even if that

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25. *Welkowitz*, *Catching Smoke, Nailing Jell-o to a Wall: the Vanna White Case and the Limits of Celebrity Rights*, 3 *J. Intell. Prop. L.* 67, at 68 (1995) mentions that in January 1994, in the trial case, the jury awarded *White* \$403,000.
 26. *White v. Samsung Electronics America Inc.*, 989 F.2d 1512, 26 U.S.P.Q.2d 1362, 21 Media L. Rptr. 1330, at 1333-1334 (C.A.9 1993), dissenting opinion joined by O'Scannlain and Kleinfeld.
 27. *Gigliotti*, *Beyond Name and Likeness: Should California's Expansion of the Right of Publicity Protect Non-Human Identity*, 83 *Trademark Rep.* 64, at 76 (1993).
 28. *Barnett*, *At the Crossroads: The Right of Publicity in the United States*, 160 *RIDA* 5, at 35 (1994).
 29. *E.g.* *Borchard*, *The Common Law Right of Publicity is Going Wrong in the United States: Waits v. Frito-Lay and White v. Samsung Electronics*, 3 *Ent. L. Rev.* 208 (1992); *Hyland and Lindquist*, *The wheels of Justice Take an Unfortunate Turn*, 23 *Golden Gate U.L. Rev.* 299-338 (1993); *Pemberton*, *The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity*, 27 *U.C. Davis L. Rev.* 97 (1993); *Clay*, *Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts*, 79 *Minn. L. Rev.* 485 (1994); *Heberer*, *The Overprotection of Celebrity: A Comment On White v. Samsung Electronics America, Inc.*, 22 *Hofstra L. Rev.* 729 (1994); *Lange*, *Shopping for the California Right of Publicity*, 16 *Hastings Comm-Ent L.J.* 151 (1994); *Weiler*, *The Right of Publicity Gone Wrong: A Case For Privileged Appropriation Of Identity*, 13 *Card. Arts & Ent. L.J.* 223, at 252-271 (1993); *Barnett*, *At the Crossroads: The Right of Publicity in the United States*, 160 *RIDA* 5, at 29 *et seq.* (1994); *Hartmann and Kelly*, *Parody (of Celebrities, in Advertising), Parity (Between Advertising and Other Types of Commercial Speech), and (the Property Right of) Publicity*, 17 *Hastings Comm-Ent L.J.* 633, at 607 (1995); *Stack*, *White v. Samsung Electronics America, Inc.'s Expansion of the Right of Publicity: Enriching Celebrities at the Expense of Free Speech*, 89 *Nw. U.L. Rev.* 1189 (1995); *Welkowitz*, *Catching Smoke, Nailing Jello to a Wall: the Vanna White Case and the Limits of Celebrity Rights*, 3 *J. Intell. Prop. L.* 67 (1995); *Barnett*, *First Amendment Limits on the Right of Publicity*, 30 *Tort & Ins. L.J.* 635 (1995); *Rahimi*, *The Power to Control Identity: Limiting a Celebrity's Right to Publicity*, 35 *Santa Clara L. Rev.* 725 (1995); *Sen*, *Fluency of the Flesh: Perils of an Expanding Right of Publicity*, 59 *Alb. L. Rev.* 739 (1995); *Halpern*, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 *Hastings L.J.* 853, at 864-65 (1995); *Id.* *Cartoons v. Major League Baseball Players Ass.*, --- F.3d ---; 1996 WL 490707; 39 U.S.P.Q.2d 1865 (C.A.10 1996): "We disagree with the result in that case for reasons discussed in the two dissents that it engendered."
 30. Some of the critics also argue that unpermitted use of identity in commercial advertisements should be allowed under the First Amendment if the appropriator add something of his own, some humor, parodic wit or artistry: see § 10.1[D][3].
 31. Example given by *Kozinski*, 21 Media L. Rptr. 1330, at 1334, fn. 18.

element became popular through efforts of that person.³² But I do not think that the Ninth Circuit said so. I agree with judge Alarcon that the fact that people think of Vanna White when they see a "Wheel of Fortune" is in itself not enough for infringement of her right of publicity, although the "Wheel of Fortune" became popular through her efforts. It is not likely that this case is similar to the exceptional case, where the public is not able to make a distinction between an actor and the role associated with that actor,³³ since the public can distinguish the "Wheel of Fortune" set from Vanna White. The show can be presented by other show hosts. In other words, advertisers can use the "Wheel of Fortune" show as long as they do not use the likeness, name, voice or other characteristics, which identify the person Vanna White. The Wheel of Fortune in itself is not enough to identify Vanna White, but together with other characteristics it will help to identify her. The Ninth Circuit held that Vanna White submitted a claim for infringement of her right of publicity because of other elements which could identify her: the robot was dressed in a wig, gown, and jewelry which were consciously selected to resemble Vanna White's hair and dress. Together with the "Wheel of Fortune" set, the court held that people could identify the robot with Vanna White. Judge Alarcon dissented, because in his opinion, the wig, gown, and jewelry were common attributes, shared by many other women in the entertainment field. Thus the controversy seems to be based in the factual question whether the attributes of the robot were common attributes shared by many women in the entertainment field, or specifically identified Vanna White. But the Ninth Circuit did not hold that the right of publicity protects all objects which people can remind of a famous person. The triggering test is whether the plaintiff can be identified from defendant's use.³⁴

The object should not be a tangible good, but an intangible persona. The object of the right of publicity cannot be limited to *specific tangible pictures* of a person, because then third parties could escape liability by simply creating another picture of this person.

The right of publicity should not be viewed as an absolute property right in a *person's body parts*. In *Moore v. Regents of University of California*,³⁵ the plaintiff, a patient, alleged that his physician and other defendants had used his unique cells for potentially lucrative medical research without his permission. He claimed that his cells were his tangible personal property, which could be

32. Cf. the example of Bach's Saint Matthew Passion made popular by conductor Mengelberg, discussed in § 5.2[B]. Cf. in France: Trib. gr. inst. November 18, 1987 (*Deneuve/Siemens*): The French actress Catherine Deneuve had consented in being the model for a sculpture of the bust of Marianne symbolizing the 1789 French Revolution. She claimed damages for infringement of the right to her image because defendant had published in News Week magazine an advertisement for Siemens products containing a photograph of this sculpture. The district court rejected her claim, holding that the photograph reproduced the symbol of the French Revolution, not Deneuve. The fact that the sculptor had been inspired by Deneuve's face, did not make it a picture of her face itself. See Logeais, *The French Right to One's Image: A Legal Lure?* 5 *Ent. L. Rev.* 163, at 169 (1994).

33. See § 2.3[C][6] and § 5.2[E].

34. See for pictures of Vanna White and the Samsung ad: Hartmann and Kelly, *Parody (of Celebrities, in Advertising), Parity (Between Advertising and Other Types of Commercial Speech), and (the Property Right of) Publicity*, 17 *Hastings Comm.-Ent. L.J.* 633, at 692-693 (1995).

35. 51 Cal.3d 120, 271 Cal.Rptr. 146, 793 P.2d 479, 15 U.S.P.Q.2d 1753 (Cal. 1990).

exploited due to the commercialization of biotechnology. However, the California Supreme Court rejected the argument of an ownership interest in his cells after they were removed from his body.³⁶ The Court held that a cell line derived from his unique cells, which was patented by the University of California, could not be his property. In my opinion, the main differences between this (rejected) property right in human genes and the right of publicity is that both rights protect different objects against different acts. The value of tangible body parts and patents derived from it stems solely from the fact that it is extracorporeal. The value of an identity derives from its identification with a specific person.

8.3 Assignability

[A] Exploitation of the Right of Publicity

It follows from the allocative efficiency justification³⁷ that the right of publicity should be freely assignable in its entirety, and licensable in whole or in part, unless some convincing counter argument tells that the possibility of assigning this right should be limited. An assignment of the right of publicity conveys all rights to the assignee.

In my opinion, there are no convincing arguments to fully exclude the possibility of assigning the commercial property interests of the right of publicity. A simple reference to the current prevailing view in European literature and case law that personality rights are non-assignable³⁸ should not be such an argument. The reality shows that the portrait, name, and other indicia of celebrities are economic goods that are the object of commercial transactions. Therefore, courts have ruled that the American right of publicity is assignable.³⁹ Persons may have good reasons to transfer their right of publicity.⁴⁰

[B] Conflict with Privacy Interests?

Unlike the right of publicity, the right of privacy is a non-assignable personal right.⁴¹ However, a person who exploits his own right of publicity by granting licenses to other parties, cannot claim invasion of privacy if the licensee acts

36. See for critical comments on *Moore v. Regents of University of California*: Gerike, *Human Biological Material: A Proprietary Interest Or Part Of The Monistic Being?*, 17 *Ohio N.U. L. Rev.* 805 (1991); Note, *The Right of Property in Human Tissue and its Effect on medical Research*, 16 *Rutgers Computer & Tech. L.J.* 629 (1990); Ivey, *Insufficient Protection of Patients' Rights In The Biotechnological Market*, 25 *Ga. L. Rev.* 489 (1991); Lichtman, *Commercial Exploitation of DNA and the Tort of Conversion: A Physician May Not Destroy a Patient's Interest in Her Body-matter*, 34 *N.Y.L. Sch. L. Rev.* 531 (1989).

37. See § 7.3[A]. Cf. Nimmer, *The Right of Publicity*, 19 *Law & Contemp. Prob.* 203, at 212 (1954): "The pecuniary worth of publicity values will be greatly diminished if not totally destroyed if these values cannot be effectively sold."

38. See § 1.2[C].

39. See § 2.8.

40. See *infra* § 8.3[B].

41. See § 3.2[E][2], § 4.8[A] and 5.3.[A]. If an assignment of privacy rights were possible, the assignee, not the assignor, would have standing to sue for mental injury to the assignor.

within the scope of the license. This is a consequence of the *volenti non fit iniuria* principle: an act is not wrongful to the person who consented to that act.⁴² This rule is also applicable if the license is granted by an agent or agency who received the power to grant licenses by the right of publicity owner as a principal.

If an owner assigns his right of publicity in its entirety to another party, the assignor can lose the right to control the commercial use of his identity. But the assignor cannot assign his right of privacy not to be invaded by commercial uses which cause mental distress. This raises the question whether, after an assignment of the right of publicity, the assignor can use his right of privacy to restrict the commercial exploitation of the right of publicity by the assignee. Is the *volenti non fit iniuria* rule also fully applicable after an assignment? Or does the personality justification of the right of publicity⁴³ justify some restrictions of the power to completely alienate the right of publicity in one's identity?

According to the personality justification, every human being has the right to control the commercial use of his identity, because it is a part of a person's personality. The word "*personality*" does not refer only to the noncommercial world. A person can also develop his personality by commercially exploiting his identity. The commercial exploitation affects the way in which other people see the person whose identity is exploited.

Sometimes a legislator restricts the power of alienation to serve the interests of the party who is deprived of the power of transfer, or other interests.⁴⁴ Examples of such restrictions are:

- the requirement of certain formalities for transferring exclusive rights, such as a notarial deed, a written contract,⁴⁵ or a registration of the assignment in a public register;⁴⁶
- a rule of interpretation of an assignment contract in favor of the assignor. Pursuant to Article 2(2) DCA, an author is assumed to have assigned only the rights which are specifically enumerated in the deed, or which necessarily follow from the nature and intention of the title;
- a right to terminate granted rights. The U.S. Copyright Act gives authors an inalienable power to terminate any grant after a specified period of time in

42. Cf. § 4.8[B].

43. See § 7.2.

44. See Calabresi and Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089, at 1092-93 (1972); Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 *Colum. L. Rev.* 931 (1985).

45. E.g. 17 U.S.C. § 204: signed writing required for any transfer of copyright ownership other than transfers by operation of law; Art. 2(2) DCA: transfer of copyright requires delivery by a deed intended for that purpose.

46. Cf. California Civil Code § 990(f), providing that a person claiming to be a successor-in-interest to the rights of a deceased personality may not recover damages for infringement before he registers that claim with the Secretary of State. See Appendix A. Cf. § 12.2[F].

virtually all but work-made-for-hire contexts. This is a limitation of authors' ability to make a full transfer of what they own.⁴⁷

In my opinion, the law should provide that an assignment of the right of publicity is not valid unless it is *in writing* and signed by the owner or duly authorized agent or agency. An outright assignment of the right of publicity should be possible. The more difficult it would be to alienate the right of publicity or the more easily an assignor can prevent the exploitation by the assignee on the basis of privacy rights, the less valuable and the less marketable the right of publicity will be.

The assignment of the right of publicity does not mean that the assignor is obliged to physically help the assignee with the exploitation. The assignee buys the right to commercially exploit the name, likeness, and other identifying attributes, but the assignment in itself does not oblige the assignor to speak specific endorsements or to pose for photographers of the assignee. Whether such obligations exist, depends on the specific contractual relationship.

An outright transfer of the right of publicity does not necessarily mean that the assignor loses control over the commercial use of his identity, if the assignor can control the activities of the assignee. In most reported cases, the assignor kept an interest in being able to control the commercial exploitation by the assignee.⁴⁸ The classic example is the celebrity who, for income tax or estate planning reasons, assigns his right of publicity to a corporation which is controlled by the assignor.⁴⁹ An old celebrity may wish to grant the right of publicity to a spouse or other family member to prevent possible estate problems.⁵⁰

However, one could recognize some exceptions as a consequence of the personality justification of the right of publicity in cases where the assignor validly⁵¹ assigned his right of publicity *without retaining any control* over the commercial use by the assignee. Then an outright transfer of the right of publicity not only means that the assignor completely loses control over the commercial use of his identity, but also that he loses the possibility of further developing that identity if this development conflicts with the commercial exploitation by the assignee. In my opinion, there seem to be three situations where a policy argument can be made that the law should protect the assignor.

47. See 17 U.S.C. § 203. Cf. 17 U.S.C. § 304(c): application of the termination power to the renewal rights in works copyrighted before January 1, 1978.

48. See McCarthy, *The Rights of Publicity and Privacy*, § 10.3[B][2] (Rev. 1993). Cf. Hubmann, annotation under German Federal Supreme Court, October 14, 1986, VI ZR 10/86; RzU BGHZ Nr 356, at 7 (*Nena*) who stated that the German right to one's own picture (*Recht am eigenen Bild*) could be transferable, as long as the assignor can control his personality interests.

49. Elvis Presley assigned to Boxcar Enterprises the exclusive right to print, publish and distribute his name and likeness. He owned 22% of the shares of Boxcar Enterprises, and also received 20% of the royalties from the licensing of merchandising items. See *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, fn. 2, 205 U.S.P.Q. 751, 4 Media L. Rep. 1144 (C.A.2 1978).

50. See *Acme Circus Operating Co., Inc. v. Kuperstock*, 711 F.2d 1538, 221 U.S.P.Q. 420, 9 Media L. Rep. 2138 (C.A.11 1983).

51. I.e. a freely bargained assignment devoid of any pressure, fraud, mistake, coercion, or unfair advantage.

In the *first* place, the law should restrict the possibility for parents or a guardian to assign the right of publicity of their *minor* in its entirety without his consent,⁵² because the minor must have the ability to fully develop his identity in the future.

Second, there should be a rule that a natural person, who has not previously voluntarily transferred his right of publicity, cannot *involuntarily* lose the control over the commercial use of his identity. Bankruptcy proceedings may involve the transfer of the right of publicity as a property right. But if the bankrupt never assigned his right of publicity to another party, the trustee in bankruptcy should not be able to transfer it to a third party who can exploit it against the will of the bankrupt.⁵³ However, if the bankrupt exploited the right of publicity by granting licenses, the profits are not exempt-property. Similarly, the right of publicity which has not previously been transferred voluntarily by its original owner should not be the object of attachment.⁵⁴

In the *third* place it is possible that a person who assigned his right of publicity afterwards changes his conviction. For such a case the law could recognize a moral *right to revoke* his right. An example of such a right can be found in § 42(1) of the German Copyright Act which recognizes the right of an author to revoke a license⁵⁵ if his work of art no longer reflects his views and he therefore can no longer be expected to agree to the exploitation of that work. But the author must equitably indemnify⁵⁶ the licensee, and if he wishes to resume the exploitation of his work after revocation, he must offer the previous licensee the same type of license subject to reasonable conditions.⁵⁷ The right of revocation may not be waived in advance. Its exercise may not be precluded.⁵⁸

One could argue that a person who assigned his right of publicity should also have a similar non-assignable right to revoke his assignment if the assignor can no longer be expected to agree with the commercial exploitation of his identity by the assignee. The same conditions of § 42 German Copyright Act should be applicable: the assignor must indemnify the assignee and is not supposed to continue the exploitation he opposes. The right of revocation cannot

52. But see with respect to the right of privacy: *Shields v. Gross*, 58 N.Y.2d 338, 461 N.Y.S.2d 254, 448 N.E.2d 108, 9 Media L. Rep. 1879 (N.Y. 1983): 17-year-old actress Brooke Shields could not bar a photographer's publication of nude photographs of her when she was ten years old, because the photographs were taken with her mother's consent, who had signed an appropriate release. *Id. Faloon by Fredrickson v. Hustler Magazine, Inc.*, 799 F.2d 1000, 13 Media L. Rep. 1353 (C.A.5 1986): release form signed by mother of minors, which granted all rights in nude photographs of children to photographer, is valid and cannot be voided by minors.

53. *Cf.* Article 21 sub 1 Dutch Bankruptcy Act in conjunction with art. 2(3) DCA: a copyright is exempt from bankruptcy if it belongs to the original author, or after death with respect to non-published works.

54. *Cf.* 17 U.S.C. § 201(e): limitation of involuntary transfer of copyright; Article 2(3) DCA.

55. According to German law, copyright is non-assignable, but the virtual result of an assignment can be created by the granting of exclusive licenses ("Einräumung von Nutzungsrechten") which can be assigned if agreed upon. See § 34(5) in conjunction with § 31(3).

56. Pursuant to § 42(3) German Copyright Act, the indemnification must cover at least the costs incurred by the licensee up to the moment of declaration of the revocation, but does not include costs attributable to profits realized under the license.

57. *Id.* § 42(3)-(4) German Copyright Act.

58. *Id.* § 42(2).

be used for financial reasons. I agree with McCarthy who states that the fact "that an assignment appears financially unwise in retrospect is no reason to undo an otherwise valid transfer."⁵⁹

A revocation right would be the recognition of a moral element in connection with the right of publicity. This is not unusual in intellectual property law. The concept of moral rights in connection with intellectual property rights has been recognized in both the Netherlands⁶⁰ and the United States.⁶¹

8.4 Characterization of the Right of Publicity

[A] Historical Development in the United States

In § 2.2[A] is described that in its early days the right of privacy was sometimes viewed as a property right. A clear distinction between privacy and property interests was not always made.⁶² For example, in the 1907 "*Edison*" case, a New Jersey court found it "difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it."⁶³ But in the first half of this century, the idea of a property right in one's identity was wiped out by the right of privacy,⁶⁴ which developed as a purely personal, non-assignable right, which protects against injury to dignity and feelings, not against commercial injury. The right of privacy was not appropriate to protect the commercial interests of the increasing group of persons who exploited their identity by granting exclusive licenses and who did not base their claim for damages on embarrassment. After 1930,⁶⁵ more and more plaintiffs started to argue that they had a property right in their name and likeness.⁶⁶

In the 1953 "*Haelan*" case,⁶⁷ the Second Circuit recognized the right of publicity "in addition to and independent of that right of privacy."⁶⁸ The court did not characterize the right of publicity as a property right: "Whether it be

59. The Rights of Publicity and Privacy, § 10.3[B] (Rev. 1993).

60. See art. 25 DCA.

61. See § 3.4. The Visual Rights Act is a consequence of the ratification of the Berne Convention for the Protection of Literary and Artistic Works by the U.S. in 1988.

62. E.g. *Corliss v. E.W. Walker Co.*, 64 F. 280, at 281-82 (Mass. 1894), stating that "a private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right."

63. *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136, at 141, 67 A. 392, 3 Buchanan 136 (N.J.Ch. 1907). Cf. *Munden v. Harris*, 153 Mo.App. 652, at 659, 134 S.W. 1076 (1911): "We therefore conclude that one has an exclusive right to his picture, on the score of its being a property right of material profit."

64. According to Gordon, Right of Property in Name, likeness, Personality and History, 55 *Nw. U.L. Rev.* 553, at 558 (1960), this could happen because in most cases the principal element of injury was the humiliation and mental anguish of the plaintiff, rather than commercial damages.

65. See Armstrong, The Reification of Celebrity: Persons as Property, 51 *La. L. Rev.* 443, at 461 (1991).

66. Cf. *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*, 78 F.2d 763, 101 A.L.R. 484 (C.A.5 1935); *Continental Optical Co. v. Reed*, 119 Ind.App 634, 86 N.E.2d 306, 88 N.E.2d 55, 14 A.L.R.2d 743 (Ind.App. 1949).

67. *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (C.A.2 1953).

68. *Id.* 202 F.2d 866, at 868.

labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth."⁶⁹ Four years later in *Hogan v. A.S. Barnes & Co. Inc.*, a Pennsylvania court concluded "that defendant has misappropriated plaintiff's "right of publicity," but that this is simply an application of the doctrine of unfair competition to a property right entitled "right of publicity."⁷⁰

In 1960, Prosser viewed the right of publicity as part of his fourth privacy tort of appropriation of plaintiff's name or likeness, which, in his opinion, protects against both commercial and mental injury.⁷¹ But he did not want to "dispute over whether such a right is to be classified as 'property'" and simply called it a "right of value."⁷² Since the right of privacy is personal, Prosser implicitly said that the right of publicity can neither be assigned to, nor inherited by others.

In 1962, the property characterization of the right of publicity was an important issue in a tax case. Universal Pictures had paid the widow of Glenn Miller the sum of \$409,336.34 for an exclusive right to make a movie about Glenn Miller's life. The Commissioner of Internal Revenue had taxed this sum as ordinary income, but the widow argued that it should be taxed as a gain from the sale of a capital asset. The difference between the parties amounted to about \$160,000. The tax code defined "*capital asset*" as "property held by the taxpayer," but did not define the term "*property*." The widow argued that she had a capitalizable property interest in the right of publicity of her husband. But the Second Circuit held that for income tax computation purposes Universal Pictures did not buy any "*property*" owned by the widow, but rather "the chance that a new theory of 'property' might be advanced, and that a lawsuit predicated on it might be successful. It was a purchase, so to speak, of freedom from fear. In effect, it was a hedge against the chance that the Miller 'property' might exist."⁷³ In the court's opinion, Universal Pictures contracted for a freedom from the danger of a successful motion for a preliminary injunction made by one who claims a 'property right,' but not for property itself. The court compared this situation with the settlement of a tort claim.

69. *Id.*

70. *Hogan v. A.S. Barnes & Co. Inc.*, 114 U.S.P.Q. 314, at 320 (Pa.Ct. 1957). The court found that the use of photographs and the name of professional golfer Ben Hogan in a book "Golf With the Masters" constituted unfair competition because defendant created the false impression that plaintiff participated in the preparation of the book.

71. Prosser, *Privacy*, 48 *Cal. L. Rev.* 383, at 415 (1960).

72. *Id.* 48 *Cal. L. Rev.* 383, at 406 (1960). See also Prosser, *Law of Torts*, 842 (3d ed. 1964): "It seems quite pointless to dispute over whether such a right is to be classified as 'property'; it is at least clearly proprietary in its nature. Once protected by the law, it is a right of value upon which the plaintiff can capitalize by selling licenses." Cf. *Sharman v. C. Schmidt & Sons, Inc.*, 216 F.Supp. 401, at 407 (D.C.Pa. 1963): "In respect to the action based on an invasion of his right of publicity, this, too, is a fledgling branch of the tort of invasion of privacy."

73. *Miller v. C. I. R.*, 299 F.2d 706, at 710 (C.A.2 1962). In footnote 4, the court stated that the 1953 Haelan case carefully avoided terming the right of publicity a property right, in order to avoid unintended consequences which might follow from such classification.

In *Canessa v. J.I. Kislak, Inc.*,⁷⁴ a New Jersey court held that the plaintiffs' claim for appropriation of their likenesses and names for defendant's commercial benefit was not barred by the two-year statute of limitations provided for actions involving injury to person, but fell within the six-year statute of limitations relating to tortious injuries to rights. The court focused on the remedy provided by the different actions and concluded "that the confusion of remedy, i.e., the emphasis on the aspect of 'injury to feelings,' has tended to lose 'the forest for the trees.' The property aspect of suits involving appropriation for commercial advantage has been obscured."⁷⁵ The court recognized that most commercial appropriation cases involved public figures, because the value of their name in the market place is greater than that of one who is not a public figure, but it found the distinction relevant only to the question of damages. Non-public figures also have property rights in aspects of their personality. The pecuniary value would be measured by the value to the defendant who unlawfully appropriated plaintiff's property rights.⁷⁶ The court concluded that "plaintiffs' names and likenesses belong to them. As such they are property. They are things of value. Defendant has made them so, for it has taken them for its own commercial benefit. [...] We therefore hold that, insofar as plaintiffs' claim is based on the appropriation of their likeness and name for defendant's commercial benefit, it is an action for invasion of their 'property' rights and not one for 'injury to the person.'"⁷⁷

In 1969, the Eight Circuit stated that it was no "matter of dispute that plaintiff has a valuable property right in his name, photograph and image and that he may sell these property rights."⁷⁸ Orlando Cepeda, a professional baseball star, had granted to Wilson the exclusive world right and license to manufacture, advertise and sell baseball products identified by his name, facsimile signature, initials, portrait, or by any nickname popularly applied to him, and to license others so to do. Therefore, the court held that Cepeda himself could not recover damages from defendant, a meat processor, who used baseballs, with permission of Wilson, in an advertisement campaign for its meat products by tying the sale of baseballs to meat products.

In 1972, a California court held for the first time that the right of publicity is a property right which continues after death,⁷⁹ but the California Supreme Court reversed because it viewed the right of publicity as a personal privacy right of Lugosi which was non-descendible.⁸⁰ Today the majority view is that the right of publicity is descendible.⁸¹

74. 97 N.J. Super. 327, 235 A.2d 62 (N.J. Super. L. 1967).

75. Id. 97 N.J. Super. 327, at 342.

76. Id. 97 N.J. Super. 327, at 350.

77. Id. 97 N.J. Super. 327, at 352.

78. *Cepeda v. Swift & Co.*, 415 F.2d 1205, at 1206 (C.A.8 1969).

79. *Lugosi v. Universal Pictures Co.*, 172 U.S.P.Q. 541 (1972). See § 2.7.

80. *Lugosi v. Universal Pictures*, 25 Cal.3d 813, 160 Cal.Rptr. 323, 603 P.2d 425, 10 A.L.R.4th 1150, 205 U.S.P.Q. 1090, 5 Media L. Rep. 2185 (Cal. 1979). In 1985, the California legislator overruled this decision by creating a postmortem right of publicity of 50 years. See Civil Code § 990(g).

81. See § 2.7.

Since the 1970s courts have held that a right of publicity owner can assign his right of publicity to another person.⁸²

In 1988, two courts held for the first time that the right of publicity, defined as "*celebrity goodwill*," is also marital property, which is subject to equitable distribution upon divorce.⁸³ In community property states, the value of the right of publicity of both spouses can be viewed as an asset of the community, which must be divided up in the event of divorce.⁸⁴

In 1994 the a District Court in Virginia held that a right of publicity, as embodied in a deceased person's name, is property that can be valued and taxed for federal estate tax purposes.⁸⁵

[B] Right of Publicity is a Property Right

The right of publicity can be properly viewed as a property right because it has the property characteristics identified in § 8.1.

First, the object protected by the right of publicity is specific: a persona: the name, likeness, voice and other indicia which identify a single human being.⁸⁶

Second, the right of publicity can be exploited by granting (exclusive) licenses or by assigning it to another person. The transferability and the relation between the non-assignable right of privacy and the right of publicity after assignment is discussed § 8.3.

Third, the right of publicity grants every human being the right to control the commercial use of his own identity. This right to control consists of the right to use and profit from one's own identity, and the right to exclude others. Its legal recognition is justified in Chapter 7.

82. See § 2.8. Cf. Cal. Civil Code § 990(b), which states that the rights to use a deceased personality's name, voice, signature, photograph or likeness "are property rights, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents[...]."

83. *Golub v. Golub*, 139 Misc.2d 440, 527 N.Y.S.2d 946 (N.Y.Sup. 1988); *Piscopo v. Piscopo*, 231 N.J.Super. 576, 555 A.2d 1190 (N.J.Super.Ch. 1988), aff'd 232 N.J.Super 559, 557 A.2d 1040 (N.J.Super. 1989). Cf. Montes, *Celebrity Goodwill: Nailing Jello to the Wall*, 13 *Loy. L.A. Ent. L.J.* 615 (1993).

84. See Comment, *Community Property Interests in the Right of Publicity: Fame and/or Fortune*, 25 *UCLA L. Rev.* 1095 (1978); Walzer and Gabrielson, *Celebrity Goodwill*, 2 *J. Am. Acad. Matrimonial Law.* 35 (1986); Note, *A Critical Analysis of Celebrity Careers as Property Upon Dissolution of Marriage*, 61 *Geo. Wash. L. Rev.* 522 (1993); McCarthy, *The Rights of Publicity and Privacy*, § 10.16 (Rev. 1993); Kranz, *Sharing the Spotlight: Equitable Distribution of the Right of Publicity*, 13 *Card. Arts & Ent. L.J.* 917 (1995): concluding that the right of publicity is marital property, subject to division.

85. *Estate of Andrews v. United States*, 850 F.Supp. 1279 (E.D. Va. 1994). Cf. Note, *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 *Harv. L. Rev.* 683 (1995), arguing that the right of publicity is a taxable asset, how it should be valued on an estate tax return, and how personalities can decrease their estate tax. Since the resulting tax liability may prove an unreasonable burden on the estates of personalities who do not want their rights of publicity exploited after their death, the author argues that personalities should be allowed to reduce or destroy the value of their rights of publicity. See for a treatise on the valuation of intellectual property rights: Smith and Parr, *Valuation of Intellectual Property and Intangible Assets*, 1988.

86. See § 8.2.

Marks argued that the characterization of the right of publicity as a property right is weak, because it fails "to recognize countervailing social interests in free enterprise and free expression."⁸⁷ In Marks' view a property characterization would mean the recognition of absolute monopoly rights which may chill the exchange of socially desirable information concerning famous persons. But this view does not take into account that the content of property rights can be restricted to certain types of infringement. The absoluteness of property rights depends on the definition of the bundle of rights of the property owner. Like copyright and other intellectual property rights, the content of the right of publicity can be limited to certain types of use, and specific exemptions can be created.⁸⁸

The content of the exclusive rights is discussed in Chapters 9 and 10.

[C] Is the Right of Publicity an Intellectual Property Right?

Because the object is intangible, it can be called an intangible property right. Whether the right of publicity is also an intellectual property right, depends on the definition of intellectual property.

The word "*intellectual*" is generally used to indicate that the protected intangible property is the result of the human mind. Although the right of publicity is, like all property rights, a creation of the human mind,⁸⁹ it does not originate from a specific intellectual creation. Every person as a human being has a right of publicity, independent of any intellectual effort by the owner.

Pursuant to Article 2 (viii) of the Convention Establishing the World Intellectual Property Organization (WIPO) of July 14, 1967⁹⁰ "intellectual property' shall include the rights relating to: [1] literary, artistic and scientific works; [2] performances of performing artists, phonograms, and broadcasts; [3] inventions in all fields of human endeavor; [4] scientific discoveries; [5] industrial designs; [6] trademarks, service marks and commercial names and designations; [7] protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields." This 1967 definition does not mention human identity as an object of intellectual property. But in my opinion, if one agrees that the right of publicity is a property right in an intangible object, it is convenient to view it as an intellectual property right, as long as this label is not used to automatically extend legal consequences of other intellectual property rights to the right of publicity.

There is a difference between copyright law, patent law and trademark law on the one hand, and the right of publicity on the other hand. The first intellectual property rights are recognized in international conventions and codified in the United States Codes and in Dutch laws. The right of publicity is neither based on an international convention which defines the minimum rights of the

87. Marks, *An Assessment of the Copyright Model in Right of Publicity Cases*, 70 *Cal. L. Rev.* 786, at 789 (1982), reprinted in: 32 *Copyright L. Symp. (ASCAP)* i (1986).

88. See next Chapter.

89. See § 8.1.

90. Entered into force in 1970. Both the USA and the Netherlands are a member of this Convention.

right of publicity owner, nor codified in any U.S. federal law or law of the Netherlands.

Closely related to this difference is another important difference. The content, the bundle of rights, of the copyright, patent or trademark owner is relatively precisely defined by the legislator. On the other hand, the right of publicity as a relatively young right is still "crystallizing." The content of the right of publicity is not clearly defined. Definitions of the right of publicity do not tell which acts infringe the right of publicity, but focus on the element of commercial damages. *Supra*, in § 6.2[A], this was called the tort view of the right of publicity: the question whether the right of publicity is infringed, depends on an ad hoc balancing of interests in each case. In such a situation a defendant has more leeway to challenge the plaintiff's assertion that its conduct is tortious. The more precise the definition of the content of the right of publicity, the narrower the range of defenses will be.⁹¹

Some courts⁹² and authors⁹³ have stated that the right of publicity is a cause of action against unfair competition. In my opinion, this is not a correct view, if one limits the term "*unfair competition*" to acts that create confusion with the company, goods or activities of a competitor, and false or misleading allegations or indications,⁹⁴ because then the right of publicity would be redundant.⁹⁵ But such a statement is correct if one views unfair competition as a general commercial tort.⁹⁶ In such a broad definition, infringement of copyright, trademark right or the right of publicity also constitutes unfair competition.⁹⁷ But if the tort view of the right of publicity is shifted toward an intellectual property view, we no longer need a concept of unfair competition.

91. Cf. Patterson, *Free Speech, Copyright and Fair Use*, 40 *Vand. L. Rev.* 1, at 59-62 (1987).

92. Cf. *Hogan v. A.S. Barnes & Co. Inc.*, 114 U.S.P.Q. 314, at 320 (Pa.Ct. 1957), discussed *supra* at [A]; *Lugosi v. Universal Pictures*, 25 Cal.3d 813, at 835, 160 Cal.Rptr. 323, 603 P.2d 425, 10 A.L.R.4th 1150, 205 U.S.P.Q. 1090, 5 Media L. Rep. 2185 (Cal. 1979): "Finally, if one's identity is exploited without permission to promote products similar to those which the individual has already endorsed, the unauthorized use resembles unfair competition." (Bird, dissenting).

93. Ausness, *The Right of Publicity: A 'Haystack in a Hurricane'*, 55 *Temp. L.Q.* 977, at 1054 (1982): "[T]he right of publicity could be classified as a form of unfair competition."

94. Cf. Art. 10bis of the Paris Convention for the Protection of Industrial Property of March 20, 1883. Both the USA and the Netherlands are a member of this Convention.

95. See § 3.6.

96. Cf. the discussion of the right of publicity in *Restatement (Third) of Unfair Competition* (1995), Chapter Four, "Appropriation of Trade Values," Topic 3, §§ 46-49.

97. Cf. McCarthy, *The Rights of Publicity and Privacy*, § 10.2[C] (Rev. 1993): "The term 'unfair competition' is certainly broad enough to include infringement of the Right of Publicity." McCarthy describes the right of publicity as a nominate unfair competition tort, i.e. a tort with a name, see Chapter 28 of his treatise: *Trademarks and Unfair Competition* (3d ed. 1992).

8.5 Conclusion

The right of publicity can be properly characterized as an intellectual property right, since

- a) it recognizes the right to *use* and to *profit* from an "object"
- b) it recognizes the right to *exclude* others from the commercial use of this "object,"
- c) it recognizes the right to *dispose* of, and to *alienate* this "object,"
- d) this object is a *specific* valuable intangible good: a natural persons's identity or "persona," and
- e) it can be *justified*.

The assignment of the right of publicity should not be valid unless it is in writing. In specific situations the law should protect the assignor. However, the policy arguments for the protection of the assignor should not be a reason to completely deny the possibility of an alienation of the right of publicity.

The question whether the right of right of publicity, as a property right, is also *descendible*, depends on its duration.⁹⁸

98. See § 12.2[F].

CHAPTER 9

CONTENT OF THE RIGHT OF PUBLICITY: INTEGRATION OF THE FREEDOM OF SPEECH PRINCIPLES

9.1 Introduction

In the preceding chapters the term "*commercial use*" or "*exploitation*" was used as a synonym for the content of the right of publicity: the right of publicity is the exclusive right to commercially use a person's identity: unauthorized commercial use is an infringement. In this chapter the term "*commercial use*" will be analyzed.

Both the right of publicity in the United States and portrait law in the Netherlands, can be triggered by three different forms of commercial use:¹

- 1) use of a person's identity in connection with commercial merchandise;
- 2) use of a person's identity in advertisements for commercial merchandise, and
- 3) use of a person's identity in the media.

Although the first two categories are not without problems, the third category is the most problematic one, because the distinction between infringing and non-infringing forms of use in the media is vague. Courts reach a decision on the basis of an ad hoc balancing of interests:² only if the informational interests are outbalanced by the commercial interests of the plaintiff, is the defendant's unpermitted use an infringement. For example, the Dutch Supreme Court found that actors in a television series could recover damages for the unauthorized commercial exploitation of an album about that television series, which contained pictures with their portraits.³ And a New York District Court held that the publication in "*Playgirl Magazine*" of a drawing of a nude black man seated in the corner of a boxing ring with the caption "*the Greatest*," infringed the right of publicity of Muhammad Ali.⁴ In both cases the commercial nature of the publication was a relevant factor, but it is not clear how commercial the nature of a media publication must be to lose the protection of constitutional freedom of speech guarantees. Critics of the right of publicity frequently mention the chilling effect such cases have on the freedom of speech.⁵

1. See § 2.6[A] and § 4.5[C][2].

2. Cf. § 6.2[A] and [B].

3. Supreme Court of the Netherlands, January 19, 1979, NJ 1979, 383 (LWH); BIE 1979, no. 23, at 163. *Auteursrecht* 1979, 52 (JHS) (*'t Schaep met de vijf Pooten*).

4. *Ali v. Playgirl, Inc.*, 447 F.Supp. 723, 206 U.S.P.Q. 1021, 3 Media L. Rep. 2540 (D.C.N.Y. 1978).

5. E.g. Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 *Cal. L. Rev.* 127, at 138-146 (1993), who warned that the right of publicity facilitates private censorship of popular culture; Barnett, *At the Crossroads: The Right of Publicity in the United States*, 160 *RIDA* 5, at 23-25 and 51-71 (1994).

In 1994, Jollymore concluded that "[t]he right of publicity has expanded [...] without reference to First Amendment authority. The courts have, instead, fashioned a definition of the right on a case by case basis, adding limitations where they deemed it appropriate."⁶ In my opinion, it is necessary to define, as specifically as possible, the content of the right of publicity for two reasons. *First*, the economic advantages of the right of publicity as an intellectual property right are best served when the right of publicity owners and licensees, advertisers and manufacturers know what they buy. Clarity of the enforceability of licensed and assigned rights encourages an efficient allocation and investment.

Second, a lack of clarity of the content of the right of publicity can have a chilling effect on the media. To prevent a chilling effect, the media should be able to predict when use of a person's identity in the media is immunized from liability by the freedom of speech guarantees. Therefore, a definitional balance of the interests protected by the right of publicity and the freedom of speech is to be preferred above ad hoc balancing. A definition of the right of publicity, which clarifies the term "commercial use" is to be preferred above a standard based on the commercial damages of the plaintiff.

Since 1977, the year the U.S. Supreme Court recognized the performance right of publicity in the "*Zacchini*" case,⁷ many articles have been published in which the author tried to solve the conflict between the right of free speech and the right of publicity.⁸ But although some of the authors recognize the difference

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6. Jollymore, *Expiration of the Right of Publicity - When Symbolic Names and Images Pass Into the Public Domain*, 84 *Trademark Rep.* 125, at 140 (1994).
 7. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 *Media L. Rep.* 2089.
 8. See Ellis, *The Right of Publicity and the First Amendment: a Comment on Why Celebrity Parodies are Fair Game for Fair Use*, 64 *U. Cin. L. Rev.* 575 (1996); Barnett, *First Amendment Limits on the Right of Publicity*, 30 *Tort & Ins. L.J.* 635 (1995); Stack, *White v. Samsung Electronics America, Inc.'s Expansion of the Right of Publicity: Enriching Celebrities at the Expense of Free Speech*, 89 *Nw. U.L. Rev.* 1189 (1995); Kwait, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 *Ind. L.J.* 47 (1994); Hetherington, *Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity*, 17 *Colum.-VLA J.L. & Arts* 1 (1992); Burnett, *The Property Right of Publicity and the First Amendment: Popular Culture and the Commercial Persona*, 3 *Hofstra Prop. L.J.* 171-209 (1990); Haines, *Developments in the Right of Publicity*, 1989 *Ann. Surv. Am. L.* 211 (1989); Coyne, *Toward a Modified Fair Use Defense in Right of Publicity Cases*, 29 *Wm. & Mary L. Rev.* 781 (1988); Swanson, *Are the California Right of Publicity Statutes Unconstitutional? A second Look at Some First Amendment Problems*, 20 *Beverly Hills Bar Ass. J.* 234 (1985-86), *Id. Entertainment, Publishing and The Arts Handbook* 437 (1987); Haas, *Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising*, 19 *U.C. Davis L. Rev.* 539 (1986); Gurney, *Celebrities and the First Amendment: Broader Protection Against the Unauthorized Publication of Photographs*, 61 *Ind. L.J.* 697 (1985); *Report, The Tension Between The First Amendment and the "Right of Publicity,"* 39 *The Record of the Ass. of the Bar of the City of N.Y.* 368 (1984); Williams, *The Right of Publicity Versus The First Amendment*, *Entertainment, Publishing and The Arts Handbook*, 217 (1983); Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 *Tul. L. Rev.* 836, (1983); Ropski, *Further Comments on the Development of the Right of Publicity--a Matter of Life, Death, and Sometimes the First Amendment*, 73 *Trademark Rep.* 278 (1983); Greiner, *The First Amendment v. Right of Publicity in Theatrical Imitations--a Delicate Balance*, 57 *Notre Dame L. Rev.* 658 (1982); Ganesh, *The Right of Publicity vs. the First Amendment: Reconciling the Conflict Between a Proprietary Interest of the Plaintiff and the Constitutional Guarantee of Free Speech*, 27 *Vill. L. Rev.* 1205 (1982); Gross, *The Right of Publicity Revisited: Reconciling fame, Fortune, and Constitutional Rights*, 62 *B.U.L. Rev.* 965 (1982); Kutzick and Hogue, *Chilled Bird: Freedom of Expression in the Eighties*, 14 *Loy.*

between a performance and a person's identity, none of the authors has based the solution upon a clear distinction of the two different types of right of publicity: the identity right of publicity and the performance right of publicity. By not clearly recognizing the difference between the two different rights, both commentators and courts have often reasoned as follows:

- In the "*Zacchini*" case, the U.S. Supreme Court held that even when a publication at issue is clearly "news" and not for commercial purposes, the publisher can infringe the right of publicity of the person whose likeness was used.
- This media publication is clearly not news.
- Thus infringement of the right of publicity would seem even more compelling.⁹

Such a reasoning ignores the difference between protection of a non-fixed live performance against unpermitted broadcasting and use of someone's identity in connection with advertisements or merchandise.

This chapter deals with the difficult relation of the identity right of publicity and the freedom of speech. In my opinion, it is possible to define the content of the right of publicity more precisely, if one recognizes the difference between the two types of right of publicity. I will argue that it is possible to provide a definition of the content of the right of publicity, in which the principles of free trade and free speech are integrated. Such a definition will bring a higher degree of predictability to the conflict between these rights. The relation between the right of publicity and the policy of free trade is discussed in § 7.3[C]. Chapter 11 deals with the performance right of publicity.

9.2 Freedom of Speech Principles

[A] Free Speech Interests Recognized in Free Speech Theories

[1] Enlightenment Interest: Truth and Democracy

Free speech may be looked at from two perspectives: the interest of the public to receive information and the interest of the speaker to speak.

L.A. L. Rev. 57 (1980); Felcher and Rubin, Privacy, Publicity, and the Portrayal of Real People by the Media, 88 *Yale L.J.* 1577 (1979); Hannigan, First Amendment Theory Applied to the Right of Publicity, 19 *Boston College L. Rev.* 277 (1978), reprinted in 19 *Pub. Ent. Advert. & Allied Fields L.Q.* 21 (1980). Other articles about the right of publicity and the First Amendment are mentioned by Lawrence, The Right of Publicity: A Research Guide, *Hastings Comm-Ent L.J.* 143 at 332-39 (1987) and Houdek, Researching the Right of Publicity: a Revised and Comprehensive Bibliography of Law-related Materials, 16 *Hastings Comm-Ent L.J.* 385, at 411-414 (1994).

9. *Cf. Tellado v. Time-Life Books, Inc.*, 643 F.Supp. 904, at 914 (D.N.J. 1986). *Cf. Webner, The Right of Publicity: A Commercial Property Right- Not a Privacy Right*, 84 *Trademark Rep.* 586, at 595 (1994), stating that the *Zacchini* case held "that there was no First Amendment right for taking plaintiff's entire commercial product, his persona as a human cannon ball, without his permission."

The most durable justification for the freedom of speech is the enlightenment function of the audience. The enlightenment theory focuses on the audience. Freedom of speech is seen as a means to the achievement of enlightenment. This function is based on the assumption that people can only make correct decisions if they have access to all relevant information and on the assumption that absolute truth of the information is not possible. The truth of certain information can be rejected if better information becomes available. The freedom of speech guarantee protects free expression because the free dissemination of information is necessary for debate and acceptance or rejection of information necessary for decision making.

Two theories can be distinguished within the enlightenment justification. The first and oldest theory argues that an open discussion is necessary to the discovery of truth. If speech can be prohibited, society will also be deprived of true facts and accurate judgments. This theory stems from John Milton's "*Aeropagitica*" (1644), a speech for the liberty of unlicensed printing, in which he argued that the combat between Truth and Falsehood is to be preferred above licensing the Truth. Today, the truth argument is particularly associated with the book "*On Liberty*" of John Stuart Mill (1806-1873).¹⁰ Mill realized that absolute truth on any issue of fact and opinion is impossible. Human beings act as if the truth is known, but they must be receptive to new data that indicate that their knowledge is questionable or wrong. This view can be illustrated by the concept of the free marketplace of ideas described in a famous dissenting opinion of Justice J. Holmes:

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment."¹¹

This theory states that the government should not interfere in the speech process, because it could only properly do so on the assumption that absolute truths can be determined. Freedom of speech, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."¹²

The second theory focuses on the utility of the enlightenment and justifies freedom of speech as an argument from citizen participation in a democracy. The democratic process suffers insofar as the public is not free to discuss the produced information. This free speech theory can be found in a concurring opinion of Justice Brandeis:

10. See Barendt, *Freedom of Speech*, 8 (1987).

11. *Abrams v. United States*, 250 U.S. 616, at 630, 40 S.Ct. 17, 63 L.Ed. 1173 (1919).

12. *United States v. Associated Press*, 52 F.Supp. 362, at 372 (S.D.N.Y. 1943).

"Those who won our independence believed [...] that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government."¹³

In the United States the political speech argument is associated with Alexander Meiklejohn, who argued that the primary purpose of the freedom of speech is to protect the right of all citizens to understand political issues in order to be able to participate in a democratic society.¹⁴

[2] Self-Fulfillment Interest

The second major justification for freedom of speech is the self-fulfillment theory.¹⁵ In this theory free speech is viewed as an aspect of each individual's right to self-development and self-realization.¹⁶ The self-fulfillment theory focuses on the speaker. Here, freedom of speech is seen not as a means to discovery of truth or to the maintenance of a democracy, but as an end in itself: self-realization through individual self-expression.

The freedom of speech recognizes the psychological passion of human beings to satisfy themselves through expression of their ideas, as part of the development of a personality.¹⁷ If one is not allowed to speak and to respond to the criticisms of others, the development of one's personality is inhibited. Free speech encourages intellectual maturity in individuals.

The European Court of Human Rights (ECHR) recognized the enlightenment and self-fulfillment functions of the freedom of speech, when it stated

"that freedom of expression, as secured in para. 1 of Art. 10 [European Convention for the Protection of Human Rights and Fundamental Freedoms], constitutes one of the essential foundations of a democratic society, indeed one of the basic conditions for its progress and for the self-fulfillment of the individual."¹⁸

13. *Whitney v. California*, 274 U.S. 357, at 375-376, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927).

14. Meiklejohn, *Free Speech and its Relation to Self-Government*, (1948).

15. There are other speech theories, such as the safety valve theory, discussed by Nimmer, *Freedom of Speech* § 1.04 (1984): People will be less inclined to use violence, if they can express their views, because suppression of speech can lead to frustration and violence. It seems that this theory is of less importance for the right of publicity.

16. See Emerson, *The System of Freedom of Expression* 6 (1970). Pound, *Interests in Personality*, 28 *Harv. L. Rev.* 342, at 351-355 and 445, at 453-454 (1915) considered the right of free speech as one of the personality interests.

17. Cf. Dworkin, *Taking Rights Seriously*, 266-78 (1977), who argued that free speech protection is based on the fundamental right to human dignity and the right to equality of concern and respect.

18. ECHR, May 24, 1988, para. 33, Pub ECHR Series A no. 133; NJ 1991, 685 (EAA) (*Müller et al./Switzerland*); Cf. ECHR 7 Dec. 1976, para. 49, Pub ECHR Series A no. 24; NJ 1978, 236 (*Handyside/United Kingdom*) and ECHR 26 April 1979, para. 65, Pub ECHR Series A no. 30; NJ 1980, 146 (*Sunday Times/United Kingdom*).

[B] Legal System**[1] United States**

The First Amendment (1791) to the United States Constitution provides in part: "Congress shall make no law [...] abridging the freedom of speech, or of the press [...]." The First Amendment literally only applies to the laws of Congress, but in *Gitlow v. New York* it has been recognized that freedom of speech and of the press are fundamental personal rights protected from invasion by (the laws of) the states, as well as the Federation, under the Due Process Clause of the Fourteenth Amendment.¹⁹ The First Amendment is applicable to the states by way of the Fourteenth Amendment, U.S. Const. amend. XIV, Section 1 (1868), which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; [...]."

The First and Fourteenth amendments protect against abridgement of speech by federal and state governmental action. If a state tort law directly or indirectly limits free speech, judicial enforcement of a tort cause of action in a civil lawsuit between private parties can conflict with the First Amendment. Private litigation can have an inhibiting effect on the exercise of free speech and therefore that First Amendment protection must be provided in private as well as government lawsuits. For example, in *New York Times Co. v. Sullivan*, the U.S. Supreme Court held that liability based on defamation of a public figure without actual malice of the defendant conflicts with the First Amendment.²⁰

In the "*Zacchini*" case, the U.S. Supreme Court held that private enforcement of Zacchini's claim that the broadcast of his entire human cannon ball act by a media defendant in a news program infringed the Ohio (performance) right of publicity, was immunized by the First Amendment.²¹ As will be discussed infra, the First Amendment also influences the content of the identity right of publicity, because its enforcement may not curtail the freedom of speech of others.

The First Amendment clearly says that "Congress shall make no law [...] abridging the freedom of speech [...]" In an interview, Justice Black once formulated the absolutist position that "no law" literally means "no law."²² But the absolutist position that any law which restricts speech is unconstitutional, has never been accepted by the U.S. Supreme Court, because in the real world courts are necessarily conscious of the vital interests that may be threatened by

19. *Gitlow v. New York*, 268 U.S. 652, at 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925).

20. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

21. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, at 574-75, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977). See § 2.6[B][1]. Cf. *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, fn. 2, 1 U.S.P.Q.2d 1753 (C.A.1 1987): enforcement of anti-dilution statute to prohibit defendant's publication of a trademark parody violated the First Amendment.

22. See *Nimmer on Freedom of Speech*, § 2.01.

unrestricted speech. The absolutist position also ignores that speech restrictions may be justified in order to protect the free speech rights of others.²³

Therefore, during the last fifty years, the U.S. Supreme Court has solved First Amendment questions by the method of balancing of interests.²⁴ But the Constitution itself does not provide a guideline for how courts should balance the interests protected by the First Amendment and other interests, such as public order, national security, the protection of a person's reputation, the protection of children, or the protection of the financial interests of a right of publicity owner.

It has been held that the First Amendment recognizes the two main functions of speech, the enlightenment and self-fulfillment functions. In *Bose Corp. v. Consumers Union of U.S., Inc.*, the U.S. Supreme Court stated:

"The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty - and thus a good unto itself - but also is essential to the common quest for truth and the vitality of society as a whole."²⁵

Not all commentators agree that enlightenment and self-expression are the basic purposes underlying the First Amendment. Some authors argue that self-expression is more important than enlightenment, and others disagree about the type of enlightenment which is protected by the First Amendment. It is possible to place the decisions of the U.S. Supreme Court in the middle of two more extreme theories.

The first theory focuses on the enlightenment function and states that freedom of expression is important as a means toward democratic self-government. Meiklejohn drew a fundamental distinction between "*public speech*," which bears, directly or indirectly, upon issues with which voters have to deal, and "*private speech*," directed at our private interests, private privileges, private possessions.²⁶ In his view the principle of the freedom of speech springs from the necessities of the program of self-government, based on the basic agreement that public issues shall be decided by universal suffrage. Therefore, the First Amendment protects only political or public speech, but that protection is absolute.²⁷ It is commonly accepted that political speech deserves the full First Amendment protection. In *Buckley v. Valeo*, the U.S. Supreme Court stated

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23. In *Schenck v. U.S.*, 249 U.S. 47, at 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919) Justice Holmes stated for an unanimous Court: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."
24. E.g. *American Communications Ass'n v. Douds*, 339 U.S. 382, at 399, 70 S.Ct. 674, 94 L.Ed. 925 (1950): with respect to the conflict between the First Amendment and public order, Justice Vinson stated: "the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."
25. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, at 503-504, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984).
26. Meiklejohn, *Free Speech and its Relation to Self-Government* 94 (1948).
27. Meiklejohn defines political speech broadly. *Id.* at 16-27. Private speech is entitled only to the protection to due process and subject to such abridgements as the general welfare may require. But see Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, at 27-28 (1971), who limits First Amendment protection to political speech, narrowly defined.

that "[t]he First Amendment affords the broadest protection to such political expression [...]."28

The second theory rejects the enlightenment justification and adopts self-fulfillment as the sole justification.²⁹ This view results in the most expansive protection of expression, because all speech can promote self-expression and self-realization. The U.S. Supreme Court has never accepted this view. While, for example, obscenity may be an expression of the speaker's conception of attractiveness, the publication of it can be constitutionally contravened.³⁰

The U.S. Supreme Court has indicated that both the enlightenment and self-expression function are served by the First Amendment. Under the marketplace theory, the First Amendment protects all forms of speech which are able to reach the "truth" such as social "news,"³¹ forms of entertainment,³² commercial speech,³³ and symbolic speech.³⁴ All these forms of speech serve not only to enlightenment, but also to self-expression.

However, the scope of First Amendment protection for these various forms of speech is different. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the U.S. Supreme Court observed that "[w]e have long recognized that not all speech is of equal First Amendment importance."³⁵ Different forms of speech receive different levels of constitutional immunity from liability for torts or invasion of property rights, because "certain kinds of speech are less central to the interests of the First Amendment than others."³⁶ The scope of First Amendment protection depends on the type of speech, its importance of the enlightenment and self-fulfillment function, and the weight of the countervailing interest asserted.

28. *Buckley v. Valeo*, 424 U.S. 1, at 14, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Cf. *Mills v. State of Alabama*, 384 U.S. 214, at 218, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966): "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."

29. See Baker, Scope of the First Amendment Freedom of Speech, 25 *UCLA L. Rev.* 964, at 966; Cf. Dworkin, *Taking Rights Seriously*, 266-78 (1977).

30. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

31. *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, at 223, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967): "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.'" citing *Thomas v. Collins*, 323 U.S. 516, at 531, 65 S.Ct. 315, 89 L.Ed. 430 (1945).

32. *Winters v. People of State of New York*, 333 U.S. 507, at 510, 68 S.Ct. 665, 92 L.Ed. 840 (1948).

33. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, at 765, 96 S.Ct. 1817, 48 L.Ed.2d 346, 1976-1 Trade Cases P 60,930 (1976).

34. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, at 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984): assumption that demonstrative overnight sleeping in a public park "is expressive conduct protected to some extent by the First Amendment."

35. 472 U.S. 749, at 758, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985).

36. *Id.* 472 U.S. 749, at 758, fn. 5.

[2] The Netherlands

The Netherlands also guarantees the freedom of speech in Article 7 of the Dutch Constitution, as amended in 1983, Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (EHRC)³⁷ and Article 19 of the International Covenant on Civil and Political Rights.³⁸ In the Netherlands, courts cannot test a law of the Dutch legislature against the Dutch Constitution, because Article 120 of the Dutch Constitution provides that courts cannot evaluate the constitutionality of national laws³⁹ or treaties.⁴⁰ On the other hand, Article 94 of the Dutch Constitution dictates that the laws of the Netherlands shall not be applied if such application is not compatible with generally binding treaty provisions. Thus in the Netherlands, a judge cannot test a national law against Article 7 of the Dutch Constitution, but he must test it against Article 10 EHRC. This Article provides a better point of departure for a balancing of free speech interests and other interests than Article 7 Dutch Constitution that does not tell under what circumstances the legislature may restrict speech.⁴¹ The European Court of Justice in Luxembourg (ECJ) has recognized that the EHRC is a higher regulation than the EC-Treaty.⁴²

Article 10 EHRC provides:

"(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

This provision is different from the First Amendment. Article 10 EHRC is more detailed in the exposition of the interests at stake. It explicitly recognizes both the right to receive information and the freedom to express opinions. But most

37. See about Article 10 EHRC: Van Dijk en Van Hoof, *De Europese conventie in theorie en praktijk*, at 450-477, 1990.

38. Trb. 1969, 99; See about Article 19 of the International Covenant on Civil and Political Rights: Van Dijk et. al., *Het Internationale verdrag inzake burgerlijke en politieke rechten en zijn betekenis voor Nederland*, at 73-75, 1988.

39. Courts must test local laws of the provinces and communities against the Dutch Constitution.

40. This rule was adopted under the influence of French law. After the French Revolution (1789), the predominant idea was that the sovereignty of the people was inconsistent with a judicial review of laws adopted by the legislator elected by the people. See Pou/Donner, *Handboek van het Nederlandse staatsrecht*, 175 (1983).

41. See De Meij, *Uitingsvrijheid. De vrije informatiestroom in grondwettelijk perspectief*, 1989, at 139-140, 221 and 248.

42. E.g. ECJ June 18, 1991 (Case C-260/89) Jur. ECJ 1991, 2925; NJ 1993, 712; CMLRev 1991, 979 (ERT-AE/DEP): reading restrictions of Articles 56 and 66 EC-Treaty in light of Article 10 EHRC. Cf. Article 130U(2) EU-Treaty, which refers to the human rights and fundamental freedoms.

obvious is the extensive list of circumstances in which a restriction of the freedom of expression may be upheld. One might even think that Article 10(2) EHRC virtually removes the right guaranteed by the first paragraph. But the European Court of Human Rights in Strasbourg (ECHR) has made clear that any permissible restriction of speech:

- 1) must be prescribed by law, excluding arbitrary restraints without legal certainty;
- 2) further one of the objects mentioned in art 10(2); and
- 3) must be necessary in a democratic society: i.e.
 - a) based on a pressing social need, and
 - b) proportionate to the legitimate aim pursued.

The *first* requirement is discussed by the European Court in the "*Sunday Times*" case:

"In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law.' Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."⁴³

Thus, laws which contain vague norms, such as "*unfair competition*," should give a citizen guidance to regulate his conduct according such norms.⁴⁴

The *second* requirement is relatively clear. Important is the recognition of the "*rights of others*," such as the right to respect for one's private life or the right of publicity.

The *third* requirement is important because it implies that a necessary balancing of interests starts with a presumption in favor of freedom of expression. Exceptions of speech must be narrowly construed. In the "*Handyside*" case,

43. ECHR 26 April 1979, para. 49, Pub ECHR Series A no. 30; NJ 1980, 146 (*Sunday Times/United Kingdom*).

44. ECHR 20 Nov. 1989, para. 29-30, Pub ECHR Series A no. 165; NJ 1991, 738 (EAA); BIE 1990, no. 72, at 232; Mf 1990, B5 (*Markt Intern/Germany*): the term "honest practices" in art. 1 of the German Unfair Competition Code was not too vague, because case-law, which was clear and abundant and had been the subject of extensive commentary, was such as to enable commercial operators and their advisers to regulate their conduct in the relevant sphere.

the European Court ruled that interference with speech will only be upheld if there is a "*pressing social need*" for it in the particular circumstances.⁴⁵

However, the member States of the European Convention "have a certain margin of appreciation in assessing the necessity of an interference, but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them."⁴⁶ This margin is smaller in cases of a public debate,⁴⁷ and wider in cases of advertising and the field of unfair competition⁴⁸ because these fields lack more generally accepted European standards.⁴⁹

In litigation between private parties, the freedom of speech rules are applicable.

Article 10 EHRC protects against interference by the government. However, Article 10 EHCR has also effect on the "*horizontal*" relation between private citizens. An *indirect* effect is caused by the European Court who can hold a state liable for infringement of Article 10 EHCR if the highest national court, *e.g.* the Dutch Supreme Court, upholds a court decision given in a civil procedure which unjustly restricts the freedom of a private citizen. A *direct* effect is caused by the national courts, that directly apply Article 10 EHCR in cases between private citizens.⁵⁰ Sections 4.5[B][3]-[4] and 5.3[C] describe how the Dutch Supreme Court balances the speech interests against privacy and reputation interests on an ad hoc basis by weighing the relevant circumstances of the specific case. In the Van Gasteren case,⁵¹ the Supreme Court explicitly concluded that the outcome of the ad hoc balancing of interests by the Court of Appeals did not infringe Article 10(2) EHRC.⁵²

45. See ECHR 7 Dec. 1976, para. 48, Pub ECHR Series A no. 24; NJ 1978, 236 (*Handyside/United Kingdom*). See *e.g.* ECHR July 13, 1995, Pub ECHR Series A vol 323; NJ 1996, 544 (EJD); Mf 1995, B101 (*Tolstoy Miloslavsky/United Kingdom*): in defamation case, injunction is appropriate, but damage award of £ 1,500,000 is disproportionate to the legitimate aim of protecting Lord Aldington's reputation or rights, and therefore "not necessary in a democratic society."

46. ECHR, February 24, 1993, para. 50, Pub ECHR Series A no. 285; NJ 1994, 518 (*Casado Coca/Spain*).

47. Cf. ECHR, April 26, 1979, para. 59, Pub ECHR Series A no. 30; NJ 1980, 146 (*Sunday Times/United Kingdom*): "discretionary power of appreciation."

48. ECHR, November 20, 1989, para. 56, Pub ECHR Series A no. 165; NJ 1991, 738 (EAA); BIE 1990, no. 72, at 232; Mf 1990, B5 (*Markt Intern/Germany*): "the prohibited declarations must be placed in their proper context and examined in the light of the particular circumstances of the case." Id. ECHR, June 23, 1994, para. 26, Pub ECHR Series A no. 291; NJ 1995, 365 (EJD) (*Jacobowski/Germany*): "Such a margin of appreciation appears essential in commercial matters, in particular in an area as complex and fluctuating as that of unfair competition. The Court must confine its review to the question whether the measures taken at national level are justifiable in principle and proportionate [...]"

49. Cf. Dommering in para. 6 of his annotation under ECHR, May 23, 1991, Pub ECHR Series A no. 204, in: NJ 1992, 456 (*Oberschlick/Austria*).

50. Cf. Verkade, *Intellectuele eigendom, mededinging en informatievrijheid*, at 18-19, 1990.

51. Supreme Court, January 6, 1995, NJ 1995, 422 (EJD); Mf 1995, B13 (*Het Parool et. al./Van Gasteren*).

52. But see for a comment of this case: Schuijt, Hoge Raad niet meer bang voor de uitingsvrijheid, *AMI* 1996, 23, at 29-30, questioning whether the Supreme Court correctly weighed the right to be let alone in view of the fact that the articles were published shortly after Van Gasteren himself had announced in a newspaper interview that he had plans to make a film about his life during and after the war.

[C] Types of Speech Protected by the Freedom of Speech**[1] Introduction**

In the next sections the scope of the First Amendment protection of three categories of speech will be examined: newsworthy information, entertainment and commercial speech. These categories encompass the relevant types of use of human identity, such as use in a news story, in a fictional entertaining story, in an advertisement, or in connection with commercial merchandise.⁵³ The rationales of the different scope of First Amendment protection for these types of speech influence the content of the right of publicity.

[2] Newsworthy Information: Matters of Public Concern

Someone's identity can be used in a news story in a magazine or other medium. The news can consist of a picture, facts or an opinion about a person, as major or minor subject of the story. What sort of news is protected by the First Amendment? News about political issues and politicians receives the highest level of First Amendment protection, because it can be directly relevant to a voter in a democracy in making a choice based on relevant information.⁵⁴

However, there are many other forms of news which serve the enlightenment function and ultimately influence the opinions of the voting public. The U.S. Supreme Court has recognized this when it said:

"The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. [...]

Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."⁵⁵

Therefore many different types of informational "*matters of public concern*" are protected by the First Amendment. In *Abood v. Detroit Bd. of Ed.*, the U.S. Supreme Court stated that "our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters -to take a non-exhaustive list of labels- is not entitled to full First Amendment protec-

53. Cf. Felcher and Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 *Yale L.J.* 1577, at 1597 (1979).

54. See *Buckley v. Valeo*, 424 U.S. 1, at 14, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254, at 269, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964): "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions." *Connick v. Myers*, 461 U.S. 138, at 145, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983): "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection."

55. *Thronhill v. Alabama*, 310 U.S. 88, at 101-102, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

tion."⁵⁶ The general statement is that "[i]t is speech on 'matters of public concern' that is 'at the heart' of the First Amendment's protection."⁵⁷

However, what are "*matters of public concern*," "matters of public interest" or "newsworthy" matters? This question was raised in § 3.2[C][2] in the context of the privacy tort of public disclosure. The conclusion was that courts "share the Supreme's Court reluctance to engage in line drawing over newsworthiness and simply accept the press's judgment about what is and is not news."⁵⁸ Newsworthy matter is what the media themselves decide to publish or broadcast. The media, not the courts, define what matter is of public interest and thus receive protection under the First Amendment.

This could be seen as a cynical conclusion. But in my opinion, it is the best solution,⁵⁹ as long as it is impossible to determine with any certitude whether certain information is likely to influence the thoughts or (political) decisions of individuals. All information is potentially useful in some way to the public in forming opinions. The First Amendment creates a strong presumption against regulation, precisely because the value of speech is hard to measure. A narrow concept of public interest with uncertain contours might have a chilling effect: self-censorship of the media might result from the uncertainty.

[3] Infotainment and Entertainment

Historically, the U.S. Supreme Court's First Amendment jurisprudence began with speech that can be characterized as political.⁶⁰ In 1948, the Court extended the constitutional protection to entertaining speech, not because it was recognized to be valuable in itself but because of the difficulty of distinguishing entertaining speech from political speech. The Court stated that

"It cannot be doubted that motion pictures are a significant medium for the communication of ideas [...] The line between the informing and the entertaining is too elusive for the protection of the basic [free speech] right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."⁶¹

56. 431 U.S. 209, at 231, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977).

57. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, at 758-59, 86 L.Ed.2d 593 (1985), citing other cases.

58. Zimmerman, *Requiem For A Heavyweight: A Farewell to Warren And Brandeis's Privacy Tort*, 68 *Cornell L. Rev.* 291, at 343 (1983).

59. But, in my opinion, it does not follow from this conclusion that tort claims for invasion of privacy by public disclosure should be automatically immunized by the First Amendment if the topic of the disclosure is itself a matter of public interest. See § 3.2[C][4].

60. *Schenck v. U.S.*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919).

61. *Winters v. People of state of New York*, 333 U.S. 507, at 510, 68 S.Ct. 665, 92 L.Ed. 840 (1948). Cf. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, at 557-58, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) with respect to musical play "Hair:" "By its nature, theater usually is the acting out--or singing out-- the written word, and frequently mixes speech with live action or conduct. But that is no reason to hold theater subject to a drastically different standard." *Id.* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, at 501, 72 S.Ct. 777, 96 L.Ed. 1098 (1952): motion picture "The Miracle."

Thus, like all types of informing matters of public interest, entertaining speech receives First Amendment protection, because it is impossible to determine which information is likely to influence the thoughts of individuals. In the "*Zacchini*" case, the U.S. supreme Court stated that entertainment, such as a human cannon ball act, is entitled to the constitutional protection of the First Amendment:

"There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news."⁶²

The justification for protecting entertainment is that entertaining works frequently embody or evoke 'ideas' that may enlighten the audience. A work of fiction may stimulate intellectual thought as much as a great political treatise. Chief Justice Bird mentioned a second reason for First Amendment protection of entertainment in *Guglielmi v. Spelling-Goldberg Productions*:

"Our courts have often observed that entertainment is entitled to the same constitutional protection as the exposition of ideas. That conclusion rests on two propositions. First [the rationale mentioned in *Winters v. New York* (supra)]. Second, entertainment, as a mode of self-expression, is entitled to constitutional protection irrespective of its contribution to the marketplace of ideas. 'For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. The power to realize his potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted. Hence suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man's essential nature.'⁶³

However, these decisions do not make a distinction between different types of entertainment. Infotainment,⁶⁴ works of art, fictional and factual stories, or docudrama's are fully protected by the First Amendment, because such information can highly influence the thoughts of individuals. But are belly dancing, a soccer match, or other non-intellectual entertainment forms protected by the First Amendment in the same way as infotainment? It can be argued that forms of non-intellectual entertainment deserve less First Amendment protection. In the "*Zacchini*" case, the U.S. Supreme Court held that the First Amendment does protect a performance, such as a human cannon ball act, but this protection is not of the highest degree, since the First Amendment does not immunize the news media if they broadcast a performer's entire "human cannonball act" without compensation.⁶⁵

To be a form of speech which enjoys a different level of protection, it is necessary that the form can clearly be distinguished from speech that is fully

62. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, at 578, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977), citing *Time, Inc. v. Hill*.

63. *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, at 867, 160 Cal.Rptr. 352, 603 P.2d 454, 205 U.S.P.Q. 1116, 5 Media L. Rep. 2208 (Cal. 1979) (concurring opinion), citing Emerson, *Toward A General Theory Of The First Amendment*, 72 *Yale L.J.* 877, at 879 (1963).

64. A popular term for the combination of information and entertainment.

65. *Zacchini v. Scripps-Howard Broadcasting Company* 433, U.S. 562, at 575, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977).

protected by the First Amendment. The distinction between fact and fictional or between news and entertainment is too vague. For the same reason the U.S. Supreme Court did not want to distinguish between "outrageousness intentionally injurious" speech and other speech, because the outrageousness standard "has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."⁶⁶

[4] Commercial Speech

[a] First Amendment Protection for Commercial Speech

Prior to 1976, purely commercial advertisements of services or goods for sale were considered to be outside the protection of the First Amendment.⁶⁷ However, in that year in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁶⁸ the U.S. Supreme Court held that the First Amendment precludes certain forms of regulation of purely commercial speech.

The justification for First Amendment protection of commercial speech is to ensure that commercial sellers are able to disseminate information on what product is available, at what price, and where it can be bought. This constitutional right to "the free flow of commercial information" contributes to enlightened public decision-making.⁶⁹ The First Amendment also protects business ideas in connection with the sale of goods and services. Such protection reduces ignorance of relevant facts and enables a fair competition in the market of commercial ideas, in which the best idea will get itself accepted. Posner argued that protection of commercial speech stimulates economic freedom which is necessary for political freedom.⁷⁰

Although the protection extended to commercial speech has continued to develop, it receives less First Amendment protection than non-commercial communications. Commercial speech can be forbidden and regulated in situations

66. *Hustler Magazine and Flynt v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, at 882, 99 L.Ed.2d 41, (1988). The case is discussed at § 3.3.

67. *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942).

68. 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

69. *Id.* 425 U.S. 748, at 764. *Cf. Bates v. State Bar of Arizona*, 433 U.S. 350, at 364, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977): "The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. [...] And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. [...] In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking [...]." *Id. City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, at 1512.

70. Posner, *Economic Analysis of Law*, 637 (1986): "Political dissent requires financial resources."

in which it is not allowed for noncommercial speech.⁷¹ Commercial speech is protected insofar as it "is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired."⁷²

[b] Lower Level of Constitutional Protection for Commercial Speech

The Supreme Court mentioned two commonsense reasons why commercial speech receives less constitutional protection than noncommercial speech. In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court stated:

"In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does "no more than propose a commercial transaction," [...] and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker."⁷³

Thus, according to the U.S. Supreme Court, the greater objectivity and the commercial self-interest justify a lower level of First Amendment protection.⁷⁴

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71. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, at 504-505, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981): "In *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, [...] we plainly held that speech proposing no more than a commercial transaction enjoys a substantial degree of First Amendment protection. [...] That decision, however, did not equate commercial and noncommercial speech for First Amendment purposes."
72. *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85, at 98, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977), citing 425 U.S. 748, at 771-772.
73. 425 U.S. 748, at 771, fn. 24.
74. *Cf. Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, at 563, fn. 6, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980): "Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. [...] In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." *Cf. United States v. Edge Broadcasting Co.*, 113 S.Ct. 2696; 1993 U.S. LEXIS 4402, at 16; 125 L.Ed.2d 345; 21 Media L. Rep. 1577 (1993): "Our decisions, however, have recognized the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." [...] The Constitution therefore affords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Id. City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, at 1513: "speech proposing a commercial transaction is entitled to lesser protection than other constitutionally guaranteed expression." See also in a copyright context: *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588, 225 U.S.P.Q. 1073, 1985 Copr.L.Dec. P 25,793 (1985): the fact that news reporting was the general purpose of

In the context of political speech, the U.S. Supreme Court stated that "under the First Amendment there is no such thing as a false idea."⁷⁵ However, commercial speech that is false, misleading or deceptive may be prohibited without any First Amendment problem.⁷⁶ In the commercial speech context, one cannot rely on the critical talents of the audience and responsive speech to correct inaccurate statements about an advertised product. Here a consumer would prefer to have the correct answer rather than to pay individually the costs of learning a correct answer.

In *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*,⁷⁷ the U.S. Supreme Court has developed a four-step test to determine whether a regulation of commercial speech violates the First Amendment. This test balances the governmental interest in restriction against the interest in free speech:

- 1) Is the expression protected by the First Amendment? Commercial speech is only protected if it concerns lawful activity and is not misleading.⁷⁸
- 2) Is the asserted governmental interest substantial?
- 3) If the answer to the first two questions is affirmative, does the regulation then directly advance the asserted governmental interest?
- 4) Is the regulation more extensive than necessary to serve that governmental interest?

Thus a restriction to non-misleading commercial speech may be justified if the government's interest in the restriction is substantial, directly advances that government's interest, and is no more restrictive than necessary to serve that interest. This test has been applied to many different regulations.⁷⁹

defendant's use was one fair use factor, but the fact that the publication was commercial as opposed to nonprofit was a separate factor tending to weigh against a finding of fair use.

75. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, at 339, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

76. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, at 566 fn. 9, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980): "Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity;" Cf. *In re R.M.J.*, 455 U.S. 191, at 203, 102 S.Ct. 929, 71 L.Ed.2d 64, 7 Media L. Rep. 2545 (1982): "Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive."

77. 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341, 6 Media L. Rep. 1497 (1980): New York's regulatory ban on promotional advertising by electric utilities held to be unconstitutional.

78. See § 9.3[B][2].

79. *E.g. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985): reversal in part of Ohio decision disciplining an attorney for recommending his services in a newspaper advertisement that included legal advice.; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981): state can ban commercial billboards to improve traffic safety or aesthetics of city, regardless of lack of regulation of political billboards; *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986): state can restrict truthful advertising of casino gambling to reduce demand for casino gambling facilities and to protect health, safety and welfare of citizens; *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 107 S.Ct. 2971, 97 L.Ed.2d 427, 3 U.S.P.Q.2d 1145 (1987), discussed at § 9.3[B][2]; *Florida Bar v. Went For It, Inc., et al.*, 115 S.Ct. 2371; 132 L.Ed.2d 541; 23 Media L. Rep. 1801 (1995): the Florida Bar rules do not violate the First Amendment. It is established that lawyer

[c] Commercial Speech with Some Comment on a Public Issue

Since commercial speech receives a lower level of First Amendment protection, it is necessary to define what commercial speech is. The U.S. Supreme Court has defined it as speech which "does no more than propose a commercial transaction,"⁸⁰ and is "related solely to the economic interests of the speaker and its audience."⁸¹ Does this definition encompass all elements of an advertisement or only the statements relevant to the sale of a product such as its trademark, qualities and price? Or does it also include other elements of an advertisement used to attract attention or to induce a desire to purchase? For example, is an entertaining story or the picture of a celebrity used in an advertisement for a commercial product also part of commercial speech, even though this speech is more than a commercial proposal?

Haas has argued that all this attractive matter of advertising receives full First Amendment protection, because it falls outside the definition of commercial speech, which is restricted to claims about a product. His argument is that this attractive matter may inform or entertain the audience, whatever the motivation of the speaker.⁸²

However, this theory seems inconsistent with the U.S. Supreme Court First Amendment decisions. Although Haas is right that sometimes this information can be valuable to the audience, there are convincing arguments why the First Amendment does not fully protect the attractive matter of an advertisement. *First*, before 1976 commercial speech received no constitutional protection. The rationale for some constitutional protection was to guarantee that sellers are able to distribute information on what product is available, at what price and where it can be bought. The rationale was not to ensure that sellers would receive the attractive matter.

Second, the U.S. Supreme Court has made clear in *Bolger v. Youngs Drug Products Corp.*⁸³ that commercial speech does not lose its commercial character by including an informing story. The Court stated that:

"the informational pamphlets are properly characterized as commercial speech. [...] The mailings constitute commercial speech notwithstanding the fact that they contain dis-

advertising is commercial speech and, as such, is accorded only a limited measure of First Amendment protection; *Rubin, Secretary of the Treasury v. Coors Brewing Co.*, 115 S.Ct. 1585; 131 L.Ed.2d 532; 23 Media L. Rep. 1545 (1994); § 205(e)(2) of the Federal Alcohol Administration Act, which prohibits beer labels from displaying alcohol content, violates the First Amendment's protection of commercial speech, because this rule fails to advance in a direct and material way the government's substantial interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength.

80. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, at 385, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, at 762, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

81. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, at 561, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

82. Haas, *Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising*, 19 *U.C. Davis L. Rev.* 539, at 574-78 (1986).

83. 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983).

cussions of important public issues [...] such as venereal disease and family planning. We have made clear that advertising which "links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech. [...] A company has the full panoply of protections available to its direct comments on public issues, [...] so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions."⁸⁴

Important is the reason why commercial speech which can serve the First Amendment functions is not fully protected: a commercial company will receive full protection for direct comments on public issues. This "alternative way" argument is not valid when speech receives full First Amendment protection.⁸⁵ Most products can be tied to public concerns for the environment, energy, economic policy, or individual health and safety. Speech about such concerns receives full First Amendment protection, unless accompanied by a commercial proposal or tie with a product.

The test to decide whether speech in the context of a right of publicity case is commercial is discussed in § 10.2[B][2].

[d] Advertisements of Noncommercial Speech are Protected as Noncommercial Speech

In *Bolger v. Youngs Drug Products Corp.*, the U.S. Supreme Court made an important exception to the characterization of commercial speech: speech that advertises an activity which is itself protected by the First Amendment will not automatically be considered commercial speech. For example, an advertisement for a book cannot be regulated as commercial speech, because books receive full First Amendment protection.⁸⁶

[5] Protection of Different Types of Speech in the Netherlands

In the Netherlands the three different types of speech, newsworthy information, infotainment/entertainment and commercial speech are also protected by the freedom of speech.

In the "*Handyside*" case, the European Court said that the freedom of expression, as secured in Article 10(1) EHRC, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. Subject to Article 10(2) EHRC, the freedom of expression is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the

84. *Id.* 463 U.S. 60, at 67-68. Citations omitted. *Id.* *Fargo Women's Health Organization, Inc. v. Larson*, 381 N.W.2d 176, at 181 (N.D. 1986): "It is well settled that advertisers cannot, by merely including references to public issues or public debate, thereby take their advertisements out of commercial speech and into the area of fully protected speech."

85. *See* § 9.3[B][2].

86. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, at 67, fn. 14, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983), citing *Murdock v. State of Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), and *Jamison v. State of Texas*, 318 U.S. 413, 63 S.Ct. 869, 87 L.Ed. 869 (1943).

demands of pluralism, tolerance and broadmindedness without which there is no "democratic society."⁸⁷

In the "*Lingens*" case, the European Court asserted that speech about public persons receives a higher protection than speech about private persons:

"Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual."⁸⁸

However, Article 10(2) EHRC enables the reputation of others, including politicians, to be protected. The requirements of such protection have to be weighed against the interests in an open discussion of political issues.

The protection of Article 10(1) EHRC is not limited to political speech, but extends to other areas of "public interest." In the "*Lingens*" case the court stated that

"[w]hilst the press must not overstep the bounds set, inter alia, for the "protection of the reputation of others," it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them [...]."⁸⁹

In the "*Thorgeir Thorgeirson*" case, the government of Iceland argued that Article 10(1) EHRC is limited to political speech, but the European Court replied that "there is no warrant in its case law for distinguishing [...] between political discussion and discussion of other matters of public concern."⁹⁰

In the "*Jersild*" case, the Highest Court of Denmark held that the conviction and sentence of a journalist for having aided and abetted the dissemination of racist remarks of other persons in his television program did not violate his right to freedom of expression. The Court rejected the journalist's defense that, taken in the context of the broadcast as a whole, the offending remarks had the effect of ridiculing their authors rather than promoting their racist views. In appeal before the European Court, the journalist argued that this conviction violated his right to freedom of expression within the meaning of Article 10 EHRC. Defending this decision, the Danish government contended that the journalist had edited the persons who made the racist statements in a sensational-

87. ECHR, December 7, 1976, para. 49, Pub ECHR Series A no. 24; NJ 1978, 236 (EAA) (*Handyside/United Kingdom*).

88. ECHR, July 8, 1986, para. 42, Pub ECHR Series A no. 103; NJ 1987, 901 (EAA) (*Lingens/Austria*). A politician must display a greater degree of tolerance because he inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large. Cf. Pres. District Court Rotterdam, October 5, 1995, Mf 1995, B131 (*Kroes/Rotterdam's Dagblad*): newspaper does not have to rectify a political cartoon.

89. *Id.* para. 41.

90. ECHR, June 25, 1992, para. 64, Pub ECHR Series A no. 239; Mf 1992, B88; AA 1993, 687 (GAIS) (*Thorgeir Thorgeirson/Iceland*).

ist rather than an informative manner and that the news or information value of the television program was minimal and did not justify the dissemination of the offensive remarks. However, the European Court rejected this view, stating that

"[i]t is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the Court recalls that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed."⁹¹

In the "*Müller*" case, the European Court recognized that Article 10(1) EHRC does not distinguish between the various forms of expression, and "includes freedom of artistic expression - notably within freedom to receive and impart information and ideas - which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds."⁹² One argument the Court mentioned is that the second sentence of paragraph 1 of Article 10 EHRC refers to "broadcasting, television or cinema enterprises," media whose activities extend to the field of art.⁹³ A second argument mentioned by the Court is Article 19 paragraph 2 International Covenant on Civil and Political Rights, which specifically includes within the right of freedom of expression, information and ideas "in the form of art."⁹⁴ The Dutch Supreme Court recognized that the hypnosis show of hypnotist "*Rasti Rostelli*" is protected by the freedom of speech. Therefore, the municipality of Rijssel could not refuse to rent its local theater to Rasti Rostelli on the ground that a hypnosis show was a form of entertainment that was contrary to the Christian values as appreciated in Rijssel. The Court rejected Rijssel's argument that Rostelli's show was not protected by the freedom of speech since he had only commercial, not moral intentions.⁹⁵

However, all these forms of expression, artistic expression included, are not immune from possible limitations as provided for in paragraph 2 of Article 10 EHRC. In the "*Müller*" case the Court held that the Swiss courts could reasonably hold that the paintings of Müller and others were obscene, and were entitled to find the painters guilty of an offence under the Swiss Criminal Code.

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91. ECHR, September 23, 1994, para. 31, Pub ECHR Series A no. 298; NJ 1995, 387 (EJD/Kn); Mf 1994, B101; NJCM 1995, 167 (F.Janssens) (*Jersild/Denmark*). In view of this principle, "the Court sees no cause to question the Sunday News Magazine staff members' own appreciation of the news or information value of the impugned item, which formed the basis for their decisions to produce and broadcast it."
 92. ECHR, May 24, 1988, para. 27, Pub ECHR Series A no. 133; NJ 1991, 685 (EAA) (*Müller et al./Switzerland*).
 93. Cf. ECHR, March 28, 1990, para. 55, Pub ECHR Series A no. 173; NJ 1991, 739 (EAA); Mf 1990, B42 (*Groppera/Switzerland*): the Swiss government argued that the content of broadcast programmes was mainly light music and commercials transmitted by cable, not "information" and "ideas." The Court replied that art. 10(1) EHRC protects "broadcasting" without there being any need to make distinctions according to the content of the programmes.
 94. ECHR, May 24, 1988, para. 27, Pub ECHR Series A no. 133; NJ 1991, 685 (EAA) (*Müller et al./Switzerland*).
 95. Dutch Supreme Court, April 26, 1996, para. 3.6, RVDW 1996, no. 99; Mf 1996, B87 (*Rijssen/Universal Star Production*).

Art. 7(4) of the Dutch Constitution explicitly declares that trade advertising is not protected by the Constitution.⁹⁶

However, in defending Article 7(4) Dutch Constitution, the Secretary of the Interior, Mr Wiegel, argued that advertisements for books, newspapers, magazines, education, and other products or services with an idealistic purpose, are not excluded from speech protection by this article, even if such media products are sold for profit.⁹⁷

In the Netherlands, commercial speech is also protected by Article 10(1) ECHR. In the 1979 "*Scientology Church*" case, the European Commission on Human Rights⁹⁸ stated that it "is not of the opinion that commercial 'speech' as such is outside the protection conferred by Article 10(1)" but "it considers that the level of protection must be less than that accorded to the expression of "political" ideas [...]."⁹⁹

In the "*Barthold*" case, the European Court held that the Federal Republic of Germany breached Article 10 ECHR by sanctioning under unfair competition law restrictions on advertising imposed by Professional Rules of a veterinary surgeon. Barthold, who had a veterinary clinic, complained in an interview about the state of veterinary services. The European Court held that the German court decision that Barthold acted unfairly against competitors, infringed his freedom of speech protected by Article 10(1) ECHR. The European Court stated that it was not necessary to decide whether or not advertising as such comes within the scope of the guarantee under this provision. But it found the criterion of the Hanseatic Court of Appeals, that there remains an intent to act for the purposes of commercial competition as long as that intent has not been entirely overridden by other motives, too restrictive:

"A criterion as strict as this in approaching the matter of advertising and publicity in the liberal professions is not consonant with freedom of expression. Its application risk discouraging members of the liberal professions from contributing to public debate on topics affecting the life of the community, if ever there is the slightest likelihood of their utterances being treated as entailing, to some degree, an advertising effect. By the same token, application of a criterion such as this is liable to hamper the press in the performance of its task of purveyor of information and public watchdog."¹⁰⁰

The controversial "*Markt Intern*" case concerned an article which reported the dissatisfaction of a consumer who had been unable to obtain a promised reimbursement for a product purchased from a mail-order firm, and which asked its

96. See for a defense of this rule: De Meij, *Reclame en vrijheid van meningsuiting*, *NJB* 1977, 925.

97. See De Meij, *Uitingsvrijheid. De vrije informatiestroom in grondwettelijk perspectief*, 1989, at 217.

98. The European Commission decides initially whether the application is admissible, and if it is, the case is referred to the European Court. Unlike the decisions of the Court, decisions of the Commission do not bind the State parties to the ECHR.

99. European Commission of Human Rights, May 5, 1979, Application no. 7805/77; Yearbook of the ECHR, 1979, 244, at 252 (*Church of Scientology/Sweden*).

100. ECHR, March 25, 1985, para. 58, Pub ECHR Series A no. 90; NJ 1987, 900 (EAA); GRUR Int. 1985, 468 (*Barthold/Germany*). Cf. Pres. District Court Amsterdam, October 5, 1995, mentioned in Mf 1996, 15 (*Investment Ltd/uitgeverij Contact c.s.*): publication of unpleasant facts about Smeets is not unlawful in view of watchdog function of the press.

readers for information regarding the commercial practices of that firm. The German courts had condemned the article as unfair competition. The European Court stated that the article

"conveyed information of a commercial nature. Such information cannot be excluded from the scope of Art. 10 par. 1 which does not apply solely to certain types of information or ideas or forms of expression [...]."¹⁰¹

The Court just - by the casting vote of its President - found that the Federal Republic had not violated Article 10 of the Convention. The court referred to the margin of appreciation which was "essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition."¹⁰² In this decision, the Court made clear that it tests whether (the application of) a national law of unfair competition does infringe Article 10 EHRC.

The European Court stated in *Casado Coca v. Spain* that Article 10 EHRC guarantees freedom of expression to everyone: "No distinction is made in it according to whether the type of aim pursued is profitmaking or not [...]."¹⁰³ Casado Coca complained of the disciplinary sanction on him by the Barcelona Bar Council for having published notices about his practice in several issues of a local newsletter. The notices provided the lawyer's name, profession, address and telephone number. The European Court held that these notices were protected by Article 10(1) EHRC, even though "[t]hey were clearly published with the aim of advertising [...]."¹⁰⁴ The Court remarked that such commercial speech provided persons requiring legal assistance with information that was of definite use and likely to facilitate their access to justice. But the court held that the disciplinary sanction could be justified by Article 10(2) EHRC within the margin of appreciation. It is not yet clear whether commercial speech that does not provide information of definite use is protected by Article 10 EHRC.

In 1987, the Dutch Supreme Court stated that "*in principle*" commercial speech is protected by Article 10 EHRC and Article 19 International Covenant on Civil and Political Rights.¹⁰⁵

It can be concluded that commercial speech is protected by Article 10 EHRC, but that the level of protection is lower than that of noncommercial speech about "*matters of public interest*."¹⁰⁶

In 1990, Verkade predicted that Article 10 EHRC will have a greater impact on the intellectual property and unfair competition laws in the Nether-

101. ECHR, November 20, 1989, para. 26, Pub ECHR Series A no. 165; NJ 1991, 738 (EAA); BIE 1990, no. 72, at 232; Mf 1990, B5 (*Markt Intern/Germany*).

102. *Id.* para. 33.

103. ECHR, February 24, 1993, para. 35, Pub ECHR Series A no. 285; NJ 1994, 518 (*Casado Coca/Spain*).

104. *Id.* para. 36.

105. Supreme Court of the Netherlands, February 13, 1987, NJ 1987, 899 (JBMV and EAA) (*Beelen/van der Linde*); *Cf.* Court of Discipline, January 4, 1988, NJ 1988, 606.

106. *Cf.* ECHR, June 23, 1994, para. 26, Pub ECHR Series A no. 291; NJ 1995, 365 (EJD) (*Jacobowski/Germany*), stating that the states have a greater margin of appreciation in commercial matters, such as that of unfair competition. But see Verkade, *Intellectuele eigendom, mededinging en informatievrijheid*, at 28, 1990, arguing that because of this margin of appreciation national courts should have a greater obligation to apply Article 10 EHRC.

lands.¹⁰⁷ He concluded that there are several Dutch media and intellectual property rules that might restrict the freedom of speech too much in the light of Article 10 EHRC. He argued that the legislator when creating new intellectual property rules must balance the interests protected by Article 10 EHRC.¹⁰⁸

[6] Conclusion: Two Relevant Speech Categories: Noncommercial Speech and Commercial Speech

In the Netherlands and in the United States, the three distinguished types of speech, newsworthy information, infotainment/entertainment and commercial speech, are protected by the freedom of speech. In both countries the protection is not absolute, but depends on a balancing of interests. The result of such balancing can be different. The interpretation of an international convention by a supra-national court such as the European Court of Human Rights is different from the U.S. Supreme Court which faces a federal constitution. The member states of the EHRC have a greater margin of appreciation in assessing the necessity of an interference in fields where generally accepted European standards are lacking.

Three types of speech were distinguished as different types of use of a person's identity. But based on the level of First Amendment protection, a distinction of two categories can be made:

- 1) informing and entertaining speech, which receives full First Amendment protection, since the line between the two forms of speech is too elusive to exclude entertaining speech from the protection of the basic right. American courts are not inclined to conclude that the content of the speech published by the media is not a matter of public interest.
- 2) commercial speech, which receives a lower First Amendment protection.

In my opinion, the same distinction can be made for the Netherlands. One could argue against a merging of informing and entertaining speech in one category that Dutch courts do not think in such categories, but apply a method of ad hoc balancing of interests. The difference between informing and entertaining speech could be a relevant aspect to the outcome of a case. In privacy cases, Dutch courts have sometimes concluded that the informational value, or the public interest of the published (private) facts was low.¹⁰⁹ Although such an ad hoc balancing method can be justified in privacy cases, I will argue that this method should not be adopted in a right of publicity context. A judicial evaluation of the level of public interest of speech on a case by case basis will have a chilling effect on the media. In the Netherlands, this chilling effect is justified by putting a high value on the privacy interests of the plaintiff who wishes to suppress such speech. But I do not think that this approach can be justified by the commercial

107. See Verkade, *Intellectuele eigendom, mededinging en informatievrijheid*, at 22, 1990.

108. *Id.* *Intellectuele eigendom, mededinging en informatievrijheid*, at 45, 1990.

109. See Supreme Court of the Netherlands, 4 March 1988, NJ 1989, 361 (CJHB) (*Children Princes Irene*), para. 3.6, discussed in § 5.3[C].

interests of a right of publicity plaintiff. In other words, privacy interests may have a greater impact on the freedom of speech than the commercial of the right of publicity owner.

In the next sections, the focus will be on the balance of the American right of publicity and the First Amendment. I conclude that the Dutch legislator also could adopt the outcome of this balance, a right of publicity with a content which can be defined in terms of exclusive powers of the owner. Where relevant, remarks about the law in the Netherlands are added in the next sections.

9.3 Balancing Free Speech Interests Against the Interests Protected by the Right of Publicity

[A] Balancing Methods

Many laws abridge in some way the freedom of speech. For example, copyright abridges this freedom insofar as it punishes expressions which consist of unauthorized use of material protected by copyright. Trademark law abridges the freedom of speech insofar as it punishes expressions in connection with goods and services which consist of use of a trademark that confuses the buying public. Both laws are not unconstitutional because the degree of restraint is justified by countervailing interests.

The determination of the extent of right of publicity protection will turn upon the type of speech in which plaintiff's identity is used and its level of First Amendment protection. Two ways of determining the extent of protection of a right and the First Amendment can be distinguished: balancing of interests on a case-by-case basis, i.e. ad hoc balancing, or on the basis of a general applicable rule, i.e. definitional balancing. It will be argued that a definitional balance is possible and preferable for the right of publicity.

[1] Ad Hoc Balancing

Ad hoc balancing is a case-by-case weighing of competing values and interests to determine whether speech in a particular case deserves constitutional immunity. No rule can be applied, except for the judicial balancing of competing values. Courts have applied this method, for example, when plaintiff claims invasion of privacy by public disclosure of true, embarrassing private facts.¹¹⁰ Ad hoc balancing is the method for solving cases where no general and clear rules can be applied.¹¹¹

Ad hoc balancing has several disadvantages. *First*, there is no rule to be applied, only a weighing of particular interests of the particular case. Therefore, the case remains unpredictable. It does not tell potential future speakers their rights in connection with future speech, because there is no clear rule which judges can apply. *Second*, ad hoc balancing inclines to oppose freedom of

110. See § 3.2[C][4]; for the Netherlands: § 4.5[B][4] and § 5.3[C].

111. Cf. § 6.2[A] and [B].

speech, since the court often balances when a rule has been violated in the context of unsympathetic cases. *Third*, if rules are involved which are enacted recently by the legislator, the judicial deference to the legislative branch can result in a judicial abdication in the balancing process.¹¹²

One could argue that in vacuo ad hoc balancing is more likely to consider fine nuances and therefore produce a more just result.¹¹³ But this advantage is only theoretical when in practice ad hoc balancing may result in an underweighing of the speech interest against the direct injury to a particular speech restriction interest, such as injury to reputation or dignity of a particular person. Also, public and legislative pressures may distort ad hoc balancing.

[2] Definitional Balancing

Definitional balancing¹¹⁴ is a method of defining certain forms of speech as not constituting speech which is constitutionally immunized, such as hard core obscenity,¹¹⁵ or commercial messages that are misleading or relate to illegal activity.¹¹⁶ The U.S. Supreme Court stated in *Gertz v. Robert Welch, Inc.* that the actual malice standard of *New York Times Co. v. Sullivan*¹¹⁷ was an attempt "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment."¹¹⁸ The Court did not balance on an ad hoc basis for the purpose of determining which of the litigants should prevail in that particular case, but balanced for the purpose of defining the nature and extent of First Amendment protection. The Court in effect clarified what sort of defamatory speech is protected by the First Amendment: all speech which defames a "*public official*," made without knowledge that it was false or made without reckless disregard of whether it was false or not, is protected by the First Amendment, independent of the particular facts of the case. The *Gertz* Court stated why ad hoc balancing was not preferable in a libel case:

"this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority."¹¹⁹

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112. See about the disadvantages of the method of ad hoc balancing in resolving free speech issues: *Nimmer on Freedom of Speech* § 2.02 (1984).
113. Cf. Haas, *Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising*, 19 *U.C. Davis L. Rev.* 539, at 574-78 (1986).
114. See *Nimmer on Freedom of Speech* § 2.03 (1984).
115. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).
116. See first step of the Hudson test, discussed in § 9.2[C][4].
117. 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), see § 3.1[F].
118. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, at 325, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).
119. *Id.* 418 U.S. 323, at 343-344.

Definitional balancing of speech and other interests is a method of telling in advance what types of speech are protected by the First Amendment. The definition provides a rule for judging whether particular speech will receive First Amendment protection. Instead of balancing the conflicting interests, later courts apply the rule: does this speech meet the standard given in the definitional balance?

Although it is true that ad hoc balancing is more likely to consider fine nuances of the particular case, the result is not necessarily better because of the possible underweighing of the general speech interests. Nimmer has illustrated the difference between ad hoc and definitional balancing with the following example: In a State one can choose between two maximum speed rules: a) the ad hoc balancing rule that one should not drive with an excessive speed, or b) the definitional balancing rule that one should not drive faster than 65 miles per hour. The disadvantage of the second rule is that a car driver, driving 67 miles per hour, cannot prove that in the given circumstances the weighing of the interest in safe driving against the interest in expeditious travel results in the conclusion that his speed was not excessive. However, this disadvantage is outweighed by the fact that under the first rule car drivers drive slower than the interests of safety require, because they are afraid to drive with an excessive speed.¹²⁰ The advantage of definitional balancing in a First Amendment context is that speakers know in advance what sort of speech will be protected. This avoids a possible chilling effect caused by uncertainty or fear of the discretion of the judge who weighs the particular interests of the specific case instead of more general interests. Unclear rules might result in unwillingness of the media to assume the risks of litigation in borderline cases.

In the Netherlands, the Dutch Supreme Court recognized that rules that restrict the freedom of speech must fall within the limits of Article 10(2) ECHR, and therefore must be clear. In the "*Dressed to Kill*" case, the Court affirmed the Court of Appeals' rejection of plaintiff's argument that defendant's publication was unlawful because it "*inspired to violence against women*" or because it "*presented violence against women as attractive.*" Such criterions were considered too vague. The Supreme Court held that an order to rectify a publication can only be granted if it can be "clearly and convincingly established that and why the publication infringes one of the interests or rights which are limitative enumerated in Article 10(2)."¹²¹

Definitional balancing is only possible if the speech interests and the competing interests can be properly defined and weighed. Therefore, it is essential that the type of speech and the speech interests are correctly defined. Two types of speech interests can be distinguished:¹²²

- 1) anti-speech interests, and
- 2) non-speech interests.

120. See Nimmer on Freedom of Speech § 2.03, at 18-20 (1984).

121. Supreme Court, October 21, 1994, NJ 1996, 346 (CJHB), para. 3.3; Mf 1994, B111 (*Blijf van m'n lijf/Multi Magazines*).

122. See Nimmer on Freedom of Speech § 2.04 (1984).

Anti-speech interests are based upon the premise that certain speech content or subject matter will injure given counter-speech interests in a manner that would not occur if the subject matter were different. The interest not to be injured by libel is an anti-speech interest because this interest is injured by the content of the speech itself.

Non-speech interests restrict the communicative conduct itself, and are not directed at the speech content itself. Such interests result in time, place or manner restrictions. For example, the requirement to request a license to organize a parade can be based on the non-speech interest in preventing chaos of traffic. In *U.S. v. O'Brien*,¹²³ the Supreme Court has suggested a single test that will yield the proper definitional balance of speech and non-speech interests. A time, place or manner restriction is not immunized by the First Amendment if it:

- 1) serves a non-speech interest, i.e. that the restriction is not based on the content of the speech;
- 2) is within the governmental power;
- 3) furthers an important governmental interest; and
- 4) is no greater than necessary.¹²⁴

In general, speech regulation is permissible, given a strong public policy requiring regulation, and on the condition that alternative channels of communication are open.

There exists no single test that will yield the proper definitional balance for all conflicts between speech and anti-speech interests, because the level of First Amendment protection will turn upon the type of speech. The right of publicity serves an anti-speech interest because the commercial injury is caused by the content of defendant's speech, the unpermitted use of plaintiff's identity. On the other hand, a claim for infringement of the right of publicity is based on a financial interest, and normally not on disagreement with the ideological content of defendant's use. The test for commercial speech¹²⁵ is quite similar to the O'Brien test. It is important to see that if the right of publicity only prohibits specific types of commercial use of identity, it restricts only the manner in which the defendant may convey its message, because the defendant is free to use the plaintiff's identity in other (communicative) ways.

There are some First Amendment principles relevant to finding the proper definitional balance between anti-speech and speech interests.¹²⁶ A prior restraint of speech, for example a preliminary injunction directed at infringement of the right of publicity, "carries a heavy burden of justification."¹²⁷

The least restrictive alternative principle states that laws which restrict speech in furtherance of an important governmental interest, may not restrict the

123. 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

124. *Id.* 391 U.S. 367, at 377.

125. See § 9.2[C][4][b].

126. See *Nimmer on Freedom of Speech* § 2.05[B] (1984).

127. *Greer v. Spock*, 424 U.S. 828, at 843, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976).

speech more than is necessary. Court orders must be written in the narrowest possible terms which focus upon the exact remedial objective. Thus, if an advertisement infringes the right of publicity, the court will not prohibit any future advertising of defendant, but only advertisements that use plaintiff's identity.¹²⁸

The "more speech" principle derives logically from the enlightenment function and the concept of the marketplace for ideas. The general rule is that one should not suppress speech if it can be rebutted with more speech. But this principle has no application when the anti-speech interest is injured by the speech itself, and answering the speech does not neutralize the harm.¹²⁹ This is the case of invasion of privacy by disclosure of embarrassing facts, infringement of copyright, or infringement of the right of publicity: the injury caused by defendant's speech itself cannot be countered by more speech.

[B] Examples of Definitional Balancing

[1] Copyright

The definitional balance of copyright and trademark law can be relevant to the right of publicity because of their similar nature as intangible property rights.

The 1978 Copyright Act protects only original works of authorship.¹³⁰ Ideas are not protectable.¹³¹ In *Harper & Row Publishers, Inc. v. Nation Enterprises*,¹³² the U.S. Supreme Court stated that "copyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'"¹³³ This balance is justified because copyright abridges only the freedom of speech insofar as defendant uses the protected expression. Defendant is still allowed to convey the ideas in his own expression. The copyright protection is justified as an incentive to enlighten the public and an incentive to realize self-expression instead of copying the expression of others.¹³⁴

128. Cf. with regard to false advertising: *Allen v. National Video, Inc.*, 610 F.Supp. 612, 226 U.S.P.Q. 483 (D.C.N.Y. 1985): disclaimer favored over outright bans.

129. Cf. *Thornhill v. State of Alabama*, 310 U.S. 88, at 104-105, 60 S.Ct. 736, 84 L.Ed. 1093 (1940): "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

130. 17 U.S.C. § 102a; See § 3.4.

131. See 17 U.S.C. § 102b.

132. 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588, 225 U.S.P.Q. 1073, 1985 Copr.L.Dec. P 25,793 (1985).

133. *Id.* 471 U.S. 539, at 556, citing 723 F.2d, at 203.

134. See Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 *UCLA L. Rev.* 1180 (1970); Goldstein, Copyright and the First Amendment, 70 *Colum. L. Rev.* 983 (1970); Nimmer on *Freedom of Speech* § 2.05[C][2] (1984). See for the Netherlands: Cohen Jehoram, Auteursrecht contra vrijheid van meningsuiting, *NJB* 1974, 1393; Cohen Jehoram, The freedom of expression in copyright and media law, *GRUR Int.* 1983, 385; Hugenholtz, *Auteursrecht op informatie*, Chapter III.5, at 150-169, 1989; Verkade, *Intellectuele eigendom, mededinging en informatievrijheid*, at 45, 1990.

The Dutch Supreme Court ruled that, in principle, a claim based on the plaintiff's copyright, does not infringe the freedom of speech guarantee of Article 10 EHRC. The Court remarked that the freedom of speech can be restricted under Article 10(2) insofar as it is prescribed by law, necessary in a democratic society -amongst others- for the "*rights of others*." The plaintiff's copyrights and trademark rights are such rights.¹³⁵

[2] Trademark Law

Trademarks are symbols adopted and used by a business to identify and distinguish its goods or services. A trademark right is infringed if defendant's use of plaintiff's trademark is likely to cause purchaser confusion as to source of, affiliation with, connection with or sponsorship by the trademark owner.¹³⁶ The scope of the trademark right is defined by consumer conception. What is the definitional balance between trademark law and the First Amendment?

A first definitional balance is that speech which contains another's trademark, receives only First Amendment protection if it concerns lawful activity and is not misleading. In the "*Central Hudson Gas & Elec. Corp.*" case, the U.S. Supreme Court stated:

"The First Amendment's concern for commercial speech is based on the informational function of advertising. [...] Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it [...] or commercial speech related to illegal activity [...]."¹³⁷

More complicated is the use of another's trademark in a non-misleading message. In *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*,¹³⁸ defendants were prohibited from showing and advertising a pornographic film about cheerleaders, because in the film a distinctive uniform was used, which created misleading and confusing associations with plaintiff's service mark in the uniform. The Second Circuit court rejected defendant's First Amendment defense, because "[p]laintiff's trademark is in the nature of a property right, [...] and as such it need not "yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist."¹³⁹

135. Supreme Court October 20, 1995, para. 3.11, RVDW 1995, no. 212; AMI 1996, at 51; IER 1995, no. 41, at 223 (*Parfums Christian Dior/Evora*).

136. See § 3.5.

137. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, at 563-64, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (citations omitted). Cf. *Friedman v. Rogers*, 440 U.S. 1, at 9, 99 S.Ct. 887, 59 L.Ed.2d 100, 4 Media L. Rep. 2213 (1979) rejecting a First Amendment challenge to a Texas statute that prohibited optometrists from practicing their profession under a trade name. The court observed that "[t]he use of trade names in connection with optometrical practice [...] is a form of commercial speech and nothing more." *Id.* 440 U.S. 1, at 11.

138. 604 F.2d 200, 203 U.S.P.Q. 161, 5 Media L. Rep. 1904 (C.A.2 1979).

139. *Id.* 604 F.2d 200, at 206.

The court cited *Lloyd Corp., Limited v. Tanner*,¹⁴⁰ which held that the right of private property owners of a shopping center to exclude unwelcome picketers, is not immunized by the First Amendment. In that case the U.S. Supreme Court reasoned that without such a rule a tangible property right would be diminished, without significantly enhancing the right of free speech because there are sufficient other places and ways to speak. The Dallas court used the same argument for trademark law: there are alternative ways in which defendants may comment on "sexuality in athletics" without using plaintiff's trademark.¹⁴¹

The definitional balance seemed to have been found: no First Amendment protection if it is not necessary to use plaintiff's trademark because alternative ways exist.

However, the definitional balance based on "the alternative way" argument of the Dallas Court conflicts with First Amendment principles.¹⁴² By prohibiting a film because of its content, the Dallas court neglected the important difference between non-speech restrictions, such as the location of speech in the "Lloyd" case, which held that war protesters do not have a First Amendment right to distribute leaflets in a privately owned shopping center, and anti-speech restrictions, which restrict the content of speech or the words the speaker may use. The difference is that a non-speech restriction only requires a speaker to speak at another time, in another place, while an anti-speech restriction requires the speaker to tell another message. The First Amendment does not permit a trademark owner to prescribe the content or form of another's speech simply because his trademark has been used to express unwelcome ideas.

With respect to anti-speech restrictions, the "alternative way" argument is used by the U.S. Supreme Court not in the context of noncommercial speech, but only for commercial speech. In *Cohen v. California*, the U.S. Supreme Court stated:

"[W]e cannot indulge the facile assumption that one can forbid particular words without running a substantial risk of suppressing ideas in the process."¹⁴³

However, commercial speech receives a lower level of First Amendment protection. In the context of commercial speech the alternative way argument can

140. 407 U.S. 551, at 566-67, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972).

141. Cf. *Reddy Communications, Inc. v. Environmental Action Foundation, Inc.*, 199 U.S.P.Q. 630, at 634 (D.D.C. 1977): defendant used plaintiff's Reddy Kilowatt character trademark in materials critical of the electric utility industry. The court found for defendant because of lack of confusion, but rejected defendant's First Amendment defense.

142. See Denicola, Trademarks As Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols, 1982 Wis. L. Rev. 158, at 206 (1982), who warned: "the sweeping rejection of the defendant's First Amendment claim in *Dallas Cowboys Cheerleaders* is dangerously simplistic.

143. *Cohen v. California*, 403 U.S. 15, at 26; 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971): the words "Fuck the Draft" written on a jacket were protected by the First Amendment, even though defendant could have used other words such as "I Hate the Draft." Cf. *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, at 541, fn. 10, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980): "we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression."

be justified by the anti-speech interests. The U.S. Supreme Court made this clear in the "*Central Hudson Gas & Elec. Corp.*" case, when it declared:

"We rule today [...] that utilities enjoy the full panoply of First Amendment protections for their direct comments on public issues. There is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions. [...] This Court's decisions on commercial expression have rested on the premise that such speech, although meriting some protection, is of less constitutional moment than other forms of speech."¹⁴⁴

The "alternative way" standard should not be applied when a trademark is used in the context of noncommercial speech. Some courts have held that the use of a trademark in a title for a literary work, or in a parody in a magazine is protected by the First Amendment. In *L.L. Bean, Inc. v. Drake Publishers, Inc.*,¹⁴⁵ the First Circuit held that the District Court's order under Maine's anti-dilution statute, which enjoined the publication of a magazine parody titled "L.L. Bean's Back-To-School-Sex-Catalog," violated the First Amendment. Defendant had used plaintiff's trademark in an editorial or artistic parody in a magazine article. The trademark was not used to identify or promote goods or services; it was used in an expressive way in a magazine. The Circuit Court of Appeals did not use the argument that defendant could have used alternative means of parodying plaintiff's catalog, and rejected the property analogy of the "*Lloyd*" case. Instead, it formulated a different definitional balance:

"We think the Constitution tolerates an incidental impact on rights of expression of commercial actors in order to prevent a defendant from unauthorizedly merchandising his products with another's trademark. In such circumstances, application of the anti-dilution statute constitutes a legitimate regulation of commercial speech, which the Supreme Court has defined as "expression related solely to the economic interests of the speaker and its audience." [...] It offends the Constitution, however, to invoke the anti-dilution statute as a basis for enjoining the noncommercial use of a trademark by a defendant engaged in a protected form of expression [...]."¹⁴⁶

In *Rogers v. Grimaldi*,¹⁴⁷ the Second Circuit applied a similar test when it held that Ginger Rogers could not prohibit Federico Fellini to name his film "*Ginger and Fred*." Plaintiff Rogers used the "alternative way" argument because the title was not so intimately related to the subject matter of the film that Fellini had no alternative means of expressing what the work is about. But the court stated that in the context of media titles "the 'no alternative avenues' test does not sufficiently accommodate the public's interest in free expression [...]."¹⁴⁸

144. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, at 563, fn. 5, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

145. 811 F.2d 26, 1 U.S.P.Q.2d 1753, 13 Media L. Rep. 2009 (C.A.1 1987).

146. *Id.* 811 F.2d 26, at 32.

147. 875 F.2d 994, 10 U.S.P.Q.2d 1825, 16 Media L. Rep. 1648 (C.A.2 1989).

148. *Id.* 875 F.2d 994, at 999. Cf. *Lucasfilm Ltd. v. High Frontier*, 622 F.Supp 931, at 934, 227 U.S.P.Q. 967 (D.D.C. 1985): owners of the trademark "Star Wars" could not enjoin public interest groups from using that mark in their views on the Strategic Defense Initiative. The District Court stated that trademark rights extend only to injurious, unauthorized commercial uses of the mark by another: "Trademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or

Thus, the definitional balance between trademark law and the First Amendment seems to be based on the distinction of commercial use of a trademark and noncommercial use in media which does not mislead consumers.¹⁴⁹ If use of a trademark causes consumer deception or confusion of source the interest of the trademark owner prevails. A trademark or dilution action prevails when the mark is used in a commercial context, i.e. in connection with (advertising for) commercial products or services which defendant markets. However, the action is immunized by the First Amendment when the trademark is used in connection with media products, such as magazines and films, where the principal purpose is to convey a message.¹⁵⁰

The U.S. Supreme Court has applied the commercial versus communicative use test in *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*,¹⁵¹ which held that the First Amendment does not prohibit Congress from giving the U.S. Olympic Committee exclusive property rights to use the word "Olympic." This right is broader than a trademark right, because the owner does not have to prove a likelihood of confusion. Section 110 of the Amateur Sports Act of 1978 gives the U.S. Olympic Committee the exclusive right to prohibit "certain commercial and promotional uses of the word "Olympic." The Court held that petitioner, the nonprofit organization SFAA, did not have a First Amendment right to use the name "*Gay Olympic Games*" in connection with sport games it was sponsoring, and to sell merchandise such as T-shirts, buttons and bumper stickers emblazoned with the title "*Gay Olympic Games*." Thus, the freedom of speech of the SFAA was restricted insofar as it could not use the word in a commercial or promotional way. The Court stated:

"By prohibiting the use of one word for particular purposes, neither Congress nor the USOC has prohibited the SFAA from conveying its message. [...] Section 110 restricts only the manner in which the SFAA may convey its message. [...] Even though this protection may exceed the traditional rights of a trademark owner in certain circumstances, the application of the Act to this commercial speech is not

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- expressing points of view." Cf. *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, at 200-01, 105 S.Ct. 658, 83 L.Ed.2d 582 (1985): generic use of a term is expressive use. The fair use doctrine of the Lanham Act prevents the creation of "an exclusive right to use language that is descriptive of a product."
149. Langvardt, *Protected Marks And Protected Speech: Establishing The First Amendment Boundaries In Trademark Parody Cases*, 36 *Vill. L. Rev.* 1 (1991), reprinted in 82 *Trademark Rep.* 671, at 742-764 (1994) arguing that commercial trademark parodies at best deserve partial speech protection, and that noncommercial trademark parodies deserve full First Amendment protection. Cf. McCarthy, *Trademarks and Unfair Competition* § 31.37[9] (3d ed. 1992) who states that "it is the medium, not the message, that will often make the difference in result."
150. Cf. *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc.*, 886 F.2d 490, 12 U.S.P.Q.2d 1289, 16 *Media L. Rep.* 2289 (C.A.2 1989): vacating preliminary injunction ordered by the District Court of publication of a parody of cover of the study guide "Cliffs Notes" because it gave consumers a false impression that parody was study guide publisher's product. The Second Circuit held that slight risk of consumer confusion was outweighed by public interest in free expression, since the parody was not an ordinary commercial product: "just as in *Rogers*, where we said that the expressive element of titles requires more protection than the labeling of ordinary commercial products, *Rogers*, 875 F.2d at 998, so here the expressive element of parodies requires more protection than the labeling of ordinary commercial products." *Id.* 886 F.2d 490, at 495.
151. 483 U.S. 522, 107 S.Ct. 2971, 97 L.Ed.2d 427, 3 U.S.P.Q.2d 1145 (1987).

broader than necessary to protect the legitimate congressional interest and therefore does not violate the First Amendment."¹⁵²

The U.S. Supreme Court used the "alternative way" argument because it concluded that the SFAA had used the word "Olympic" as commercial speech. However, use of the word "Olympic" in a noncommercial context is protected by the First Amendment. In *Stop the Olympic Prison v. U.S. Olympic Committee*,¹⁵³ it was held that defendant's use of the Olympic logo on a poster expressing opposition to a planned conversion of the Olympic Village into a prison, did not infringe § 110 of the Amateur Sports Act of 1978. In § 9.4 it will be argued that this definitional balance is also appropriate for the right of publicity.

Trademark law in the Netherlands is based on Benelux Trademark Act.¹⁵⁴ Article 13A(1)(c) and (d) of this Act states that a trademark owner has the exclusive right to oppose

- "c) any use in the course of trade, without due cause, made of a mark that has a reputation in the Benelux territory, or of a similar sign, for goods that are not similar to those for which the mark is registered, where use of such sign takes unfair advantage of or is detrimental to the distinctive character or the repute of the mark;
- d) any use in the course of trade, without due cause, of a mark or a similar sign in any way other than to distinguish goods where use of such sign takes unfair advantage of or is detrimental to the distinctive character or the repute of the mark."

It seems that in the Benelux countries a similar balance with the freedom of speech is found, since Article 13A(1)(c) and (d) provide that defendant's use must be "in the course of trade." The Dutch Supreme Court ruled that, in principle, a claim based on the plaintiff's trademark rights, does not infringe the freedom of speech guarantees of Article 10 EHRC since trademark rights belong to the "rights of others" of Article 10(2) as prescribed by law and necessary in a democratic society.¹⁵⁵ However, under the old Benelux Trademark Act¹⁵⁶ some courts held that a trademark owner could also enjoin communicative use of a trademark in the media. The Amsterdam Court of Appeals held that obscene use of a bottle of Coca Cola by an actress in the film "Alicia" constituted an infringement of trademark rights because the defendant exploited the film in 17 movie theaters.¹⁵⁷ Similarly, the Amsterdam District Court held that the use of a modified trademark of Philips on the cover of a magazine infringed Philips's trademark rights because the illustration was used to make defendant's magazine

152. Id. 483 U.S. 522, at 536 and 540.

153. 489 F.Supp 1112, at 1118-21 (S.D.N.Y. 1980).

154. See § 5.5.

155. Supreme Court October 20, 1995, para. 3.11, RVDW 1995, no. 212; AMI 1996, at 51; IER 1995, no. 41, at 223 (*Parfums Christian Dior/Evora*).

156. The new Benelux Trademark Act came into force on January 1, 1996.

157. Court of Appeals Amsterdam, 18 Dec. 1975, NJ 1977, 59; BIE 1976, no. 62, at 214 (*Scorpio Films/Coca-Cola*).

more attractive to buyers.¹⁵⁸ In the literature, these cases have been criticized for not taking into account the freedom of speech rights of the defendant.¹⁵⁹

[C] Proposals in Literature to Harmonize Free Speech Principles with the Right of Publicity

[1] Context Test: Powell, Bird, Felcher and Rubin

In 1977, Justice Powell dissented in the "*Zacchini*" case,¹⁶⁰ because Zacchini's act was broadcast in a news program on television. He suggested another solution for answering the question whether the First Amendment privileged a television station to show an entire live act on a news program without having to compensate Zacchini for any provable financial injury:

"In my view the First Amendment commands a different analytical starting point from the one selected by the Court. Rather than begin with a quantitative analysis of the performer's behavior is this or is this not his entire act? we should direct initial attention to the actions of the news media: what use did the station make of the film footage? When a film is used, as here, for a routine portion of a regular news program, I would hold that the First Amendment protects the station from a 'right of publicity' or 'appropriation' suit, absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation."¹⁶¹

Powell's test is to look only at the context of defendant's use: is it an action of the news media? If plaintiff does not prove that defendant's use is (a subterfuge for) private commercial exploitation, then it will be protected by the First Amendment as use by the news media. This test is a form of definitional balancing, similar to the test applied in trademark law.

In 1979, Chief Justice Bird wrote a concurring opinion in *Guglielmi v. Spelling-Goldberg Productions*,¹⁶² in which she balanced the right of publicity and the First Amendment. She stated:

"In resolving that question [of infringement of the right of publicity], the context and nature of the use is of pre-eminent concern. Valentino's name and likeness were allegedly used in a work of fiction broadcast on television."¹⁶³

Therefore Bird concluded that Valentino's right of publicity had not been infringed: "While few courts have addressed the question of the parameters of

158. Pres. Amsterdam District Court, July 28, 1981, BIE 1982, no. 12, p.41 (*Philips/HP*).

159. See Van Manen, *Grote merken vangen veel wind*, BIE 1985, 203; id. *Große Marken fangen viel Wind*, GRUR Int. 1986, 25; Visser, *Merkenrecht en vrijheid van meningsuiting*, Mf 1993, 62; Gielen and Wichers Hoeth, *Merkenrecht*, 1991, no. 1216-1217; Ebbink, "Ander gebruik" van andermans merk in de Benelux, 58 BMM-bull. 1990, 8, 14; Verkade, *Intellectuele eigendom, mededinging en informatievrijheid*, at 41, 1990.

160. 433 U.S. 562, at 579-82, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977). Dissenting opinion by Brennan and Marshall. See for the majority opinion § 3.4[B].

161. Id. 433 U.S. 562, at 581.

162. 25 Cal.3d 860, 160 Cal.Rptr. 352, 603 P.2d 454, 205 U.S.P.Q. 1116, 5 Media L. Rep. 2208 (Cal. 1979).

163. Id. 25 Cal.3d 860, at 864-865.

the right of publicity in the context of expressive activities, their response has been consistent. Whether the publication involved was factual and biographical or fictional, the right of publicity has not been held to outweigh the value of free expression. Any other conclusion would allow reports and commentaries on the thoughts and conduct of public and prominent persons to be subject to censorship under the guise of preventing the dissipation of the publicity value of a person's identity."¹⁶⁴

This test is similar to Powell's: the definitional balance will be found by looking at the context of defendant's use. A claim for infringement of the right of publicity is immunized by the First Amendment if defendant used plaintiff's identity in a communicative way in a medium of expression. Kulzick and Hogue summarized this test: "the Bird doctrine of publicity limits liability to cases in which appropriation takes the form of things rather than words."¹⁶⁵

In 1979, Felcher and Rubin published an influential article,¹⁶⁶ in which they proposed a two step test to reconcile the conflict between the interests protected by the First Amendment principles and interests protected by all different legal theories which prohibit media portrayals.¹⁶⁷ The test is applicable to both the right of publicity and the right of privacy:

- 1) Does defendant's portrayal serve an informative or cultural function? If so, the use is protected by the First Amendment. If not, the use merely exploits the individual and one must ask:
- 2) Did the plaintiff suffer "some observable injury, of a generally accepted nature"? If so, the plaintiff will prevail.¹⁶⁸

Without the second step this test is quite similar to Powell's and Bird's solutions. Felcher and Rubin look at the context of defendant's use, and focus on its informational purpose. They distinguish three types of media portrayals: those which inform, entertain, or sell a product. Only the last type is not immunized by the First Amendment, because it is a form of commercial exploitative use.¹⁶⁹

One might conclude that at the end of the seventies the trend was to find the balance between the countervailing interests protected by the First Amendment and the right of publicity by looking at the context: is it a use in a commer-

164. *Id.* 25 Cal.3d 860, at 871-872.

165. *Kulzick and Hogue*, Chilled Bird: Freedom of Expression in the Eighties, 14 *Loy. L.A. L. Rev.* 57, at 64 (1980). Advertisements for things should be included in this statement.

166. Felcher and Rubin, Privacy, Publicity, and the Portrayal of Real People by the Media, 88 *Yale L.J.* 1577 (1979).

167. In their opinion the interest protected by the First Amendment interests are 1) the maintenance of the integrity of our democratic system by granting citizens the right to engage in non-defamatory speech and 2) the communication and enrichment of our cultural experience. The countervailing interests are 1) freedom of the individual, 2) protection against fraudulent business practices and 3) encouragement of achievement. See 88 *Yale L.J.* 1577, at 1599-1601.

168. *Id.* 88 *Yale L.J.* 1577, at 1596 (1979).

169. *Id.* 88 *Yale L.J.* 1577, at 1597 (1979).

cial context or in a communicative media context? No author proposed to have a closer look at the content of the message.

However, in the eighties, commentators who did not clearly distinguish the two types of right of publicity, found that this "*context test*" could not explain the result of the "*Zacchini*" case, in which the U.S. Supreme Court had ruled that use of Zacchini's entire act in a news program did infringe his "right of publicity." Thus, Kulzick and Hogue stated about Bird's test: "it is somewhat difficult, however, to harmonize Chief Justice Bird's concurrence with the United States Supreme Court's opinion in *Zacchini*."¹⁷⁰ Similarly, Samuelson said about Felcher's and Rubin's test: "Their proposal is a slightly modified version of the standard proposed by Powell, but that is not the law."¹⁷¹

Powell's definitional balancing is indeed not the test for the performance right of publicity, since the majority of the Court applied a test based on the economic impact of defendant's use on plaintiff. However, that should be no reason to reject this test for the identity right of publicity.

[2] Fair Use Concept: Ad Hoc Balancing

Many commentators have tried to balance the right of publicity with the First Amendment principles by applying the copyright fair use concept.¹⁷² Barnett argued that denying a fair use defense to right of publicity claims cannot be "*necessary*" to serve the governmental interest in the right of publicity under the fourth prong of the Central Hudson test: "If the stronger governmental interest in copyright can tolerate such a defense, so can the weaker governmental interest in the right of publicity."¹⁷³

Section 107 of the U.S. Copyright Act states that the fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

- 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- 2) the nature of the copyrighted work;

170. Chilled Bird: Freedom of Expression in the Eighties, 14 *Loy. L.A. L. Rev.* 57, at 64-65 (1980).

171. Samuelson, Reviving *Zacchini*: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases, 57 *Tul. L. Rev.* 836, at 876 (1983).

172. See Baird, Human Cannonballs and the First Amendment: *Zacchini v. Scripps-Howard Broadcasting Co.*, 30 *Stan. L. Rev.* 1185, at 1206 (1978); Hoffman, Limitations on the Right of Publicity, 28 *Bull. Copyright Soc'y* 111, at 140 (1980); Ausness, The Right of Publicity: a 'Haystack in a Hurricane', 55 *Temp. L.Q.* 977, at 1048 (1982); Kwall, Is Independence Day Dawning for the Right of Publicity?, 17 *U.C. Davis L. Rev.* 191, at 233 (1983); Samuelson, Reviving *Zacchini*: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases, 57 *Tul. L. Rev.* 836 (1983); Coyne, Toward a Modified Fair Use Defense in Right of Publicity Cases, 29 *Wm. & Mary L. Rev.* 781, at 817 (1988).

173. Barnett, First Amendment Limits on the Right of Publicity, 30 *Tort & Ins. L.J.* 635, at 648 (1995). See for the Hudson test § 9.2[C](4)[b]. I do not agree with this argument, because the exclusive publicity rights are less broad than the exclusive copyrights, which are not restricted to a commercial context.

- 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- 4) the effect of the use upon the potential market for or value of the copyrighted work.

Samuelson has most extensively tried to develop a fair use test for the right of publicity, which could solve all conflicts with the First Amendment. She developed a two-step test to decide whether substantial property interests of the plaintiff have been appropriated by the defendant in such a way that the First Amendment interests are outweighed. Although Samuelson does distinguish between the two different types, she developed a test which can be applied to both the identity right of publicity and the performance right of publicity.

The first step is the fair use test and asks how strongly plaintiff's property interest is impaired. A court must look at the following factors:

- a) the purpose and character of defendant's use of identity, including whether such use is of a commercial nature or for news purposes;
- b) the nature of the publicity right;¹⁷⁴
- c) the amount and substantiality of the appropriation of the identity by defendant, and
- d) the effect of the use upon the potential market for or value of the identity.

If the use is fair, then the right of publicity is not infringed and the analysis is finished. If the use is not fair, the use will be presumed to infringe the (identity and performance) right of publicity unless - this is the second step - the defendant proves that access to the protected matter was necessary to achieve the dissemination of information and public debate objectives which underlie the First Amendment.¹⁷⁵

The advantage of the test is that it suggests an integration of the First Amendment in the right of publicity (first step) with a possible escape in exceptional cases, if defendant proves that his unfair use must be privileged by the First Amendment. The second advantage is that the test recognizes that the fair use doctrine is of help for the performance right of publicity, which has some similarities to copyright law.

However, the disadvantage is that the first step is a form of ad hoc balancing with some guidelines. The test does not provide a clear definitional balancing. The outcome depends on the particular circumstances of the case, and is especially in the case of forms of use of plaintiff's identity in the media highly unpredictable.¹⁷⁶

174. But see Barnett, *First Amendment Limits on the Right of Publicity*, 30 *Tort & Ins. L.J.* 635, at 653-654 (1995) proposing as the second factor: "the nature of the celebrity": is the plaintiff a public official or political leader or a "private sector" celebrity.

175. Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 *Tul. L. Rev.* 836, at 915-16 (1983).

176. Cf. *Nimmer on Copyright*, § 13.05[A] (Rev. 1993) who states that the fair use doctrine does not provide much predictability in copyright cases.

[3] Haas' Hudson Test: Ad Hoc Balancing

Haas has developed a balancing test specifically for use of human identity in advertising. His test is based on a narrow definition of commercial speech. According to Haas' definition all parts of the advertisement which form no part of the commercial proposal itself (A will sell product B of quality C at price D), such as the name and likeness of a celebrity used to attract or persuade consumers, will receive full First Amendment protection, unless the interest of the right of publicity plaintiff outweighs the free speech interests. He has proposed a four-step test to balance the interests of an advertiser to use another's identity in an advertisement for commercial products and the commercial interests of the person whose identity is used without permission:¹⁷⁷

- 1) Would the advertiser's speech be privileged without its commercial advertising context?
- 2) Does the advertisement misrepresent plaintiff's connection to the product?
- 3) How compelling is plaintiff's interest in protection? Relevant questions are: Is the plaintiff associated with the product? for how long? what is the nature and quality of the product? Is plaintiff's damage substantial? Is plaintiff's financial interest in name and likeness diluted?
- 4) Do plaintiff's interests outweigh the value of the speech?

This test is an adaptation of the Hudson test developed by the U.S. Supreme Court to evaluate commercial speech.¹⁷⁸ The *first* and *second* steps are similar to the first step of the Hudson test because false endorsements are not protected by the First Amendment. The *third* step of the Hudson test is removed because it is assumed that the right of publicity directly advances the governmental interest in protecting an individual's commercial interests in his identity.

In my opinion, this test does not provide a good balance between the First Amendment and the right of publicity in an advertising context for two reasons. *First*, Haas' test is based on a too narrow definition of commercial speech, since the U.S. Supreme Court made clear that commercial speech does not lose its commercial character by including an informing story.¹⁷⁹

Second, the test is a form of ad hoc balancing. The *third* and *fourth* steps only tell that one must balance all the interests of the specific case. It does not provide a clear rule. Cases remain unpredictable. For example, what is the outcome if a photograph of an identifiable individual chasing a hat on a windy day in Golden Gate Park on a beautiful summer's day is used in an advertisement for flights to the Caribbean? The photo suggests that those who do not get away are foolish persons. It is given that there is no false endorsement, that the photograph is not highly offensive and that it does not dilute any image. Under Haas' test, all the particular interests of the case must be balanced. According to

177. See Haas, Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising, 19 *U.C. Davis L. Rev.* 539, at 578-80 (1986).

178. See § 9.2[C][4].

179. See § 9.2[C][4][c].

Haas the First Amendment should prevail because it was given that there is no dilution or false endorsement and therefore plaintiff's interest is weak.¹⁸⁰ I do not agree with this outcome. A person should also be able to control the use of his identity in an advertisement for flights if there is no dilution or false endorsement. Such factors are no elements of a prima facie right of publicity claim.¹⁸¹

[4] Kwall: Ad Hoc Balancing

Kwall concluded in 1994 that

"[t]oday, the right of publicity is approaching middle age. In many respects, the right of publicity has fared well in terms of acceptance. Still, both the judiciary and the scholarly commentary in this area have been unable to resolve the operation of this doctrine in cases presenting appropriations that may potentially be justified by the First Amendment."¹⁸²

According to Kwall, part of the difficulty courts have experienced in this area stems from the vast array of potential types of appropriations. Therefore, it is impossible to devise a methodology that will easily resolve this conflict in all situations. She clearly rejects a context test of which the exclusive focus is the medium of the defendant's use, and which suggests "that all informational and entertainment uses should be approved automatically, and that all commercial uses should be enjoined automatically."

Instead, Kwall "calls for the invocation of a more flexible remedial approach [...]"¹⁸³ which also includes the possibility that a court does not enjoin defendant's unpermitted commercial use of plaintiff's identity (property rule), but only mandates that the defendant pays damages to the plaintiff (liability rule). The determination of appropriate relief should be made by balancing the benefits that society receives from allowing the use of unauthorized appropriations against all its harms. According to Kwall, the following harms are relevant:

- 1) economic harms to right of publicity plaintiff;
- 2) moral objections of the right of publicity plaintiff;¹⁸⁴
- 3) potential for consumer deception;

180. Haas, *Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising*, 19 *U.C. Davis L. Rev.* 539, at 594 (1986).

181. See § 3.6.

182. Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 *Ind. L.J.* 47, at 47 (1994).

183. *Id.* 70 *Ind. L.J.* 47, at 52 (1994). Cf. Bodine, *A Picture is Worth \$775.00: the Right of Publicity, an Analysis and Proposed Test*, 17 *Cap. U.L. Rev.* 411, at 427 (1988) proposing a four-prong test for right of publicity claims, in which the publicity interest of the plaintiff, the First Amendment interest of the defendant, the interest of heirs or assignees and damages are relevant factors.

184. According to Kwall, moral objections can also be asserted by an assignee of the individual whose publicity rights have been appropriated, because uses which negatively affect the persona's reputation can diminish the value of existing and future assignments. *Id.* 70 *Ind. L.J.* 47, at 74. In my opinion, in such a case, the assignee asserts not a moral but an economic objection.

- 4) harm to society because of a potential for decreased incentives to invest in the creation of valuable identities;
- 5) potential harms to relatives and assignees of deceased individuals;
- 6) unjust enrichment.¹⁸⁵

The outcome of a balancing can result in no remedy, an award of damages or an injunctive relief. An injunction will be the most appropriate resolution if plaintiff's objection to the defendant's use is economic in nature and the defendant's use is purely commercial. If plaintiff states an economic objection and defendant's use is of a less pure commercial nature the outcome can be that a court decides not to award an injunctive relief, but mandatory damages, depending on the potential for decreased incentives on the part of the user and the level of unjust enrichment. The case for an injunctive remedy is stronger the greater the potential for consumer deception. The First Amendment will probably prevail in situations with little or no risk of consumer deception, a low potential for unjust enrichment, and where the plaintiff has been dead for more than twenty years.¹⁸⁶

In illustrating this balancing approach Kwall uses the categorization of a context test by separately exploring informational, entertainment, and commercial uses. Informational uses are generally protected by the First Amendment and primarily commercial uses will generally be prohibited. In the event that the plaintiff is visually depicted or used in forms of entertainment, all above-mentioned harms must be balanced.¹⁸⁷

In my opinion, there are several problems with this proposal to solve the conflict between the right of publicity and the First Amendment. *First*, not all harms which a court must balance under Kwall's theory are relevant in a right of publicity case. Kwall argues that moral arguments of a right of publicity plaintiff will affect the outcome of her balancing test. But moral interests are protected by the right of privacy, not the right of publicity. Kwall mixes different legal theories. Moral interests should not influence the liability issue in a right of publicity case.¹⁸⁸ Further, the outcome of Kwall's balancing test is also influenced by the risk of consumer deception. But again the risk of consumer deception is no element of a right of publicity claim. There are other legal theories, such as false advertising and trademark law, which protect against the risk of consumer deception.¹⁸⁹ Kwall's test is also influenced by the unjust enrichment argument. But in § 7.4[B] it is argued that unjust enrichment is not a justification for protection of the right of publicity. Kwall's test is clearly based on a tort view, in which the amount of plaintiff's damages influence the question of infringement. In my opinion, the amount of damages should influence the remedy, but not the issue of liability. In addition, Kwall does not distinguish

185. *Id.* 70 *Ind. L.J.* 47, at 69-86 (1994).

186. *Id.* 70 *Ind. L.J.* 47, at 86-88 (1994).

187. *Id.* 70 *Ind. L.J.* 47, at 88-112 (1994).

188. *See* § 2.9[A]. Of course, commercial damages to the value of plaintiff's identity can also be recovered in the event of a morally objectionable infringement of the right of publicity.

189. *See* § 3.5 and § 3.6.

between the identity right of publicity and performance right of publicity. Citing the "*Zacchini*" case, she states that the purpose of the right of publicity is the provision of economic incentives for people to devote themselves to creative activities that will be beneficial from a societal standpoint.¹⁹⁰ Therefore, the potential for decreased incentives is a factor to be balanced. In § 7.3[B] I argued that the incentive theory is not convincing for the right of publicity.

Second, Kwall proposes finding the right balance between the right of publicity and the First Amendment by granting mandatory damages instead of an injunctive relief in cases with an informational aspect and an element of unjust enrichment. For example, in *Pirone v. MacMillan*, defendant had used three photographs of Babe Ruth in and on the cover of its Baseball Engagement Calendar sold for profit. The plaintiffs were the daughters and licensees of Babe Ruth. The court held that under New York law plaintiffs were precluded from suing under the state privacy statute. According to Kwall, under her test, the following factors would be relevant:

- the photographs had strong informational overtones;
- use in a calendar is informational in nature, since the calendar also provided information;
- the public has an interest in informational calendars;
- the daughters and licensees of Babe Ruth had a property interest in his likeness;
- plaintiffs did only assert an economic objection;
- there was no potential for consumer confusion as to sponsorship of the calendar;
- given Ruth's stature and the inclusion of his photograph on the cover of the calendar, defendants were enriched.

According to Kwall, in such a situation, the appropriate remedy would not be an injunction, but an award of damages. The public should not be deprived of information, and the defendant should not profit too much from Ruth's popularity. But since Babe Ruth had been dead for more than forty-five years and Ruth's family and assignees had already had ample time to reap benefits from Ruth's publicity rights, Kwall concluded that in this case no relief at all should be granted.¹⁹¹ In my opinion, a solution based on mandatory damages instead of injunctive relief ignores the fact that the value of a person's identity can only be maximized if others can be excluded.¹⁹²

Third, and most important, Kwall's test provides only a clear guideline for the outcome of the conflict between the right of publicity and the First Amendment insofar as she in fact adopts the test which she says she rejects: in cases where a distinction can be made between primarily informational uses and primarily commercial uses. But in other cases, which involve a mix of

190. *Id.* 70 *Ind. L.J.* 47, at 58, fn. 55 (1994).

191. *Id.* 70 *Ind. L.J.* 47, at 113-115 (1994).

192. *See* § 7.3[A].

informational and commercial uses of plaintiff's identity, the test does not result in any predictable outcome of the conflict.

This can be illustrated by *Cardtoons v. Major League Baseball Players Ass'n*,¹⁹³ in which the court had to answer the question whether unlicensed trading cards containing parodies of active major league baseball players violated the players' right of publicity. The cards featured caricatures of the players' faces and humorous commentary about their careers. Although their names were changed, a person reasonably familiar with baseball would be able to identify the players parodied on the cards. The district court found that the card company's profit motive was decisive, but refused to grant the Association's request for a preliminary injunction because plaintiffs failed to show an irreparable harm. According to Kwall her analysis "would have been of considerable assistance to the court in grappling with the First Amendment." This case involved a commercial use containing substantial creative contributions by the user. Therefore, Kwall concluded:

"the court should have evaluated the potential for decreased incentives, consumer deception, and unjust enrichment presented by the card company's use. In considering the decreased incentives inquiry, the court also should have evaluated whether the card company's use of any one player was de minimis. Moreover, the court's analysis should have emphasized that the Association was objecting to a harm of a primarily economic nature, and explicitly acknowledged the living status of all of the players depicted."¹⁹⁴

Given that the use of the identity of players was not de minimis, what should be the outcome of this case? Unfortunately Kwall does not answer this.¹⁹⁵

[5] McCarthy: Combination of Definitional and Ad Hoc Balancing

Chapters seven and eight of McCarthy's treatise on the right of publicity¹⁹⁶ respectively deal with infringing use of personal identity in a commercial setting, and in the media. The term "[c]ommercial setting denotes use of personal identity in advertising or promotion or in connection with the actual goods or services themselves."¹⁹⁷ The term "*media use*" denotes a use of personal identity which has a reasonable relationship with the normal content of the "*media*": news, commentary on public issues, fiction, and entertainment.¹⁹⁸

193. 838 F.Supp. 1501 (D. Okl 1993).

194. *Id.* 70 *Ind. L.J.* 47, at 110 (1994).

195. But see *Cardtoons v. Major League Baseball Players Ass.*, 868 F.Supp. 1266 (D. Okl 1994), *aff'd* --- F.3d ---; 1996 WL 490707; 39 U.S.P.Q.2d 1865 (C.A.10 1996), discussed in § 10.1[D][3].

196. McCarthy, *The Rights of Publicity and Privacy* (Rev. 1993).

197. *Id.* *The Rights of Publicity and Privacy*, § 7.1[A] (Rev. 1993).

198. *Id.* *The Rights of Publicity and Privacy*, § 7.1[A] (Rev. 1993). Cf. Hetherington, *Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity*, 17 *Colum.-VLA J.L. & Arts* 1, at 30-31 (1992), who defines use which infringes the right of publicity as unpermitted use of identity which is direct in nature and commercial in motivation and for which the user would be expected to pay on the open market, and non-infringing use, which can be denominated as indirect and incidental. The question whether a use is direct or indirect depends on the question whether the "primary purpose" is to sell or promote a product, service or cause or otherwise gain an economic advantage in the marketplace for which the user should be expected to pay. Use is indirect and incidental if it is subordinate to a primary purpose such as

McCarthy states that the First Amendment protection for commercial speech "hardly ever, almost never" justifies the unpermitted use of personal identity in a commercial setting.¹⁹⁹ The right of publicity, which imposes liability for the unpermitted use of personal identity to attract attention to a product, service or its advertisement, does not impair the "free flow of commercial information," or the First Amendment rights of sellers to disseminate information on their products. McCarthy mentions three arguments. *First*, if commercial use were protected by the First Amendment then there could never be a right of publicity.²⁰⁰ *Second*, he uses the "alternative way" argument of the "*Lloyd*" case,²⁰¹ based on the analogy of the right of publicity with property rights: "Just as no advertiser has a "constitutional right" to paste an advertising poster on the side of your house without permission, no one has a "constitutional right" to use your identity to help sell his goods or services."²⁰² *Third*, the person whose identity is commercially used, has a countervailing First Amendment right not to be forced to be used as a vehicle for another's message. The First Amendment also protects the right not to speak.²⁰³

In order to solve the potential conflict between the First Amendment and the right of publicity, McCarthy also suggests looking at the context of defendant's type of use. Referring to case law from California and New York he concludes "that what is crucial is the medium, not the message."²⁰⁴ This is a form of definitional balancing similar to the proposals of Justice Powell, Justice Bird, Felcher and Rubin.²⁰⁵

However, in Chapter eight of his treatise, McCarthy clearly rejects the method of definitional balancing and falls back on an ad hoc balancing of interests protected by the right of publicity and First Amendment for each case:

"In my opinion, the various proposals to "integrate" first amendment principles into the Right of Publicity [...] are laudable but fruitless efforts to bring a high degree of predictability to the conflict between the Right of Publicity and the first amendment. [...] In some cases of media use of human identity, there is indeed a conflict with the first amendment. It is real. Finding the proper balance is sometimes a very difficult job. There is no neatly packaged general rule that can be waved like a magic wand to make the solution any easier. The balance must be laboriously hacked out case by case."²⁰⁶

entertainment, parody, news reporting, scholarship, inspiration for artistic expression or some other activity to which the public should have free access. According to Hetherington, in a commercial setting "the publicity rights of the celebrity will almost always be protected." Similarly, a "public interest setting will usually involve an entertainment or information format." *Id.* at 33. But (exploitative) use in product hybrids that are entertainment presented for pecuniary gain, such as movies, television shows, recorded music, concerts, music videos, legitimate theater, books and professional sports can infringe the right of publicity. *Id.* at 39-40.

199. *Id.* *The Rights of Publicity and Privacy*, § 7.1[B] (Rev. 1993). Unlike Haas, McCarthy uses a broad definition of commercial speech, see *id.* § 7.1[C].

200. This is circular argument if one does not provide a justification for the right of publicity.

201. *See supra* at § 9.3[B][2].

202. *The Rights of Publicity and Privacy* § 7.1[B] (Rev. 1993).

203. *Id.* *The Rights of Publicity and Privacy* § 7.1[B] (Rev. 1993).

204. *Id.* *The Rights of Publicity and Privacy* § 7.6[A] (Rev. 1993).

205. *See supra* § 9.3[C][1].

206. *Id.* *The Rights of Publicity and Privacy* § 8.6[E] (Rev. 1993).

He rejects Powell's context test with its presumption of First Amendment immunity in the case of media use because "its triggering fact -context of use- is within the control of the media. If an announcer says, "And now for some news from Starlite Computers," followed by what appears to be "entertainment" by well-known public personalities, would the presumption be triggered, with the burden on the unpaid entertainer to prove that this is not "news" but advertising?"²⁰⁷ Similarly McCarthy rejects the test of Felcher and Rubin by citing Samuelson: "Although they do not say so, Felcher and Rubin are mounting an indirect attack on the Supreme Court's decision in *Zacchini*. The analytical structure they propose is a slightly modified version of the standard proposed by Justice Powell in his *Zacchini* dissent. [...] The simple response to the Felcher and Rubin proposal is that it is not the law."²⁰⁸

A context test determines whether someone's identity is used in connection with commercial merchandise or in a media context. If the outcome of the test is that the identity is used in an informational or entertaining way in the media, the use is protected by the First Amendment. However, according to McCarthy, the definitional balanced rule that the media are protected by the First Amendment, unless the right of publicity plaintiff proves that the communicative use was in fact (a subterfuge for) commercial use is not the law, and creates "a higher level of media protection and immunity [...] than is created by the U.S. Supreme Court in interpreting the federal Constitution."²⁰⁹

Which are the U.S. Supreme Court decisions which have rejected this definitional balanced rule? Although McCarthy does not mention them after the citation, it seems from preceding sections²¹⁰ that he has three arguments based on three different U.S. Supreme Court cases for his position that unpermitted use of personal identity in the media is not automatically protected by the First Amendment and that the outcome of the cases depends on an ad hoc balancing of countervailing interests.

His first argument is based on the "*Zacchini*" case.²¹¹ Powell's "context test" is not the law because the majority held that defendant's media use did infringe *Zacchini*'s right of publicity under Ohio law. McCarthy concludes: "one obvious lesson of *Zacchini* is that if unpermitted use of identity or performance even in the context of pure "news" can trigger right of publicity infringement without offending first amendment policies, then similar use in the "commercial" context of advertising can more clearly trigger liability."²¹²

In my opinion, this argument is not valid, because McCarthy does not make a distinction between the two types of right of publicity. Powell's test is not the law for the performance right of publicity. But the U.S. Supreme Court

207. *Id.* The Rights of Publicity and Privacy, § 8.4[B][2] (Rev. 1993).

208. *Id.* The Rights of Publicity and Privacy § 8.6[C] (Rev. 1993).

209. *Id.* The Rights of Publicity and Privacy § 8.6[E] (Rev. 1993).

210. *See* The Rights of Publicity and Privacy, § 8.4 and § 8.5 (Rev. 1993).

211. *Zacchini v. Scripps-Howard Broadcasting Company* 433, U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977).

212. The Rights of Publicity and Privacy, § 8.4[B][3] (Rev. 1993), citing *Tellado v. Time-Life Books, Inc.*, 643 F.Supp. 904, at 914. The *Tellado* court mentioned as rationale for the right of publicity the straight-forward one of preventing unjust enrichment by the theft of goodwill.

did not reject this test for the identity right of publicity. The *Zacchini* Court explicitly distinguished the two types of right of publicity:

"Moreover, the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer. Thus, in this case, Ohio has recognized what may be the strongest case for a 'right of publicity' involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place."²¹³

Thus, media use of a performance can infringe the performance right of publicity because this right protects the interest in being able "to earn a living as an entertainer" by the performance itself. In my opinion, this interest is more compelling than the commercial interest in the exclusive commercial use of one's identity, which is protected by the identity right of publicity, because it is less likely that media use of an entertainer's identity will destroy the ability to earn a living as an entertainer.²¹⁴ If media use of personal identity destroys the ability to earn a living, then probably other claims than the identity right of publicity are available, such as false advertising, invasion of privacy by false light or defamation.

Although McCarthy recognizes the difference between the two types of right of publicity,²¹⁵ he reads in the "*Zacchini*" case the "obvious lesson" that unpermitted use of "identity or performance" in the context of pure "news" can trigger right of publicity infringement without offending First Amendment policies. In my opinion, the lesson is only valid for performances, since the U.S. Supreme Court clearly indicated that the "*Zacchini*" case did not involve identity.

Thus, it does not follow from the "*Zacchini*" case that Powell's test applied to the identity right of publicity creates a higher level of media protection and immunity than the First Amendment requires.²¹⁶

The second argument McCarthy uses is based on the analogy between the right of publicity as a property right and other property rights. The argument is that a defendant may not take plaintiff's property without permission in order to use it as a vehicle to attract attention to defendant's protected message, in the assumption that other avenues of expression are open. He mentions this rule in the context of trademark law and shopping centers.²¹⁷ This is the "alternative way" argument of the "*Lloyd*" case.²¹⁸

213. 433 U.S. 562, at 576.

214. For this reason the incentive justification for the identity right of publicity is less convincing, see *supra* § 7.3[B].

215. See *The Rights of Publicity and Privacy*, § 8.13 (Rev. 1993). Cf. McCarthy, *The Human Persona as Commercial Property: The right of Publicity*, 19 *Colum. - VLA J.L. & Arts* 129, at 133 (1995).

216. For the same reason Samuelson's rejection of the context test of Felcher and Rubin (*supra* ad § 9.3[C][1]) cannot be accepted insofar as this argument is based on the "*Zacchini*" case.

217. *The Rights of Publicity and Privacy*, § 8.5[A][2]-[3] (Rev. 1993).

218. *Lloyd Corp., Limited v. Tanner*, 407 U.S. 551, at 566-67, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972).

However, *supra*,²¹⁹ it is argued that the U.S. Supreme Court uses the alternative way argument with respect to anti-speech restrictions only for commercial speech, not in the context of noncommercial speech. The "alternative way" argument may not be used to justify right of publicity (anti-speech) restrictions of noncommercial speech. Otherwise the right of publicity is used to restrict the content of noncommercial speech with the argument that it was not necessary for the speaker to use the identity of the plaintiff in his speech. Then the right of publicity would give the owner the potential right to suppress unpopular ideas.

McCarthy's "alternative way" argument is only valid insofar as the plaintiff's identity is used in a commercial way, and therefore receives the lower level of First Amendment protection for commercial speech. The First Amendment permits a right of publicity plaintiff to require the commercial speaker to speak in another way, i.e. in the form of noncommercial speech.

McCarthy's *third* argument is that a right of publicity plaintiff has his own countervailing First Amendment right not to speak.²²⁰ This right prohibits courts to require an individual to unwillingly participate in the dissemination of another's ideological message. This argument is based on *Wooley v. Maynard*,²²¹ which held that a state could not require a Jehovah's Witness to display an automobile license plate with the state motto of "*Live Free or Die*."

However, the U.S. Supreme Court ruled that this First Amendment right to refrain from speaking at all is only violated if the message is "readily associated" with the disseminator.²²² McCarthy argues that when a person's identity is used as a vehicle to convey a political or social message the public might well attribute this message to the person.

The problem with this argument is that it is only valid if the message is associated with the right of publicity plaintiff. Association is no part of proving an infringement of the right of publicity. If there is a false association, then there are other legal theories available, such as defamation, false light invasion of privacy and false advertising. "Ready association with the speaker" is not an element of a *prima facie* case for liability pursuant to the right of publicity. Therefore, it is not valid to rebut a First Amendment defense of a media defendant with this argument in a right of publicity case.²²³

The conclusion is that there are no U.S. Supreme Court decisions which support McCarthy's opinion that unpermitted use of personal identity in the media should not be presumed immune under the First Amendment. The rule of

219. See § 9.3[B](2).

220. *The Rights of Publicity and Privacy*, § 8.5[B] (Rev. 1993).

221. 430 U.S. 705, at 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977).

222. *Id.* 430 U.S. 705, at 713-14. Cf. *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, at 87, 100 S.Ct. 2035, 6 Media L. Rep. 1311, 64 L.Ed.2d 741 (1980), which held that the right to peaceful expressive activity (petition) in a privately owned shopping center does not violate the shopping center owner's property rights or his First Amendment right not to speak because the owner chooses to open his property up to the public, the views expressed by the speakers will not likely be identified with those of the owners, no specific message was dictated by the State to be displayed in the shopping center, and the owner could publicly dissociate himself from the views of the speakers.

223. Cf. McCarthy, *The Rights of Publicity and Privacy*, § 8.10[A] (Rev. 1993), has used a similar argument to reject the theory that "falsity" neutralizes defendant's First Amendment defense.

the "*Zacchini*" case is only applicable to non-fixed live performances, not human identity in itself. Therefore, McCarthy's rejection of Powell's context test is invalid with respect to the identity right of publicity.

[6] Trade Practices

In the Netherlands, courts and commentators have indicated that the content of the commercial portrait right is influenced by the relevant trade practices.²²⁴ A reason for protection of the commercial interests of the portrayed can be the fair trade practices among the relevant competitors. In an ad hoc balancing of interests, the relevant trade practices are only one factor to be weighed. Trade practices are established when commercial users are willing to pay a license for the same type of commercial use.

In my opinion, this ad hoc balancing approach which refers to trade practices should not be used to find the proper balance between the content of the right of publicity and the First Amendment. Trade practices can be established by traders who are uncertain about the question whether they need a license, and require certainty. They prefer to pay for a license to be sure that in the future no legal problems will arise. A good example is the "*Glen Miller*" case, discussed supra at § 8.2[A]. Universal Pictures paid the Glenn Miller's widow the sum of \$409,336.34 for an exclusive right to make a movie about Glenn Miller's life. In my opinion, this is a type of use which should not infringe the right of publicity.²²⁵ The Second Circuit stated that Universal Pictures paid for a freedom from the danger of a successful motion for a preliminary injunction made by one who claims a property right. It paid for

"the chance that a new theory of 'property' might be advanced, and that a lawsuit predicated on it might be successful. It was a purchase, so to speak, of freedom from fear. In effect, it was a hedge against the chance that the Miller 'property' might exist."²²⁶

Other firms will conclude from the fact that Universal paid for a license, that it is common to pay for a license. In this way trade practices can be established. The next step is that courts recognize trade practices as the law.

This process does not take into account the interests protected by the policy of free trade. This has been recognized by the Dutch Supreme Court when it ruled that in unfair competition law, trade practices are not in themselves decisive.²²⁷ But this process can also restrict the freedom of speech. If media

224. See § 7.4[E].

225. See *infra* at § 10.3.

226. *Miller v. C.I.R.*, 299 F.2d 706, at 710 (C.A.2 1962).

227. Cf. Supreme Court of the Netherlands, January 8, 1960, NJ 1960, 415 (HB); BIE 1960, 60; AA 1960/61, 19 (vdG) (*Scrabble*); Supreme Court of the Netherlands, June 27, 1986, NJ 1987, 191 (vNH); BIE 1986, 280; AA 1988, 257 (HCJ); IER 1986, 78 (*Holland Nautic-Decca*); *Verkaede, Ongeoorloofde mededinging*, 1986, no. 20; Van Nieuwenhoven-Helbach, *Industriële eigendom en mededingingsrecht*, 1989, no. 1258-59. *Onrechtmatige daad* (old Civil Code) VI (Martens), no. 33.

start paying fees for use of portraits in albums about a television series,²²⁸ other types of media use can follow. Such practices should not be recognized as the law, without balancing the interests protected by the freedom of speech.²²⁹

9.4 Conclusion: Definitional Balance of Right of Publicity

[A] Problem of Ad Hoc Balancing Tests

The main problem of most proposed tests is that they do not clearly distinguish between the two different types of right of publicity. As a result, the arguments which the Zacchini Court mentioned for the performance right of publicity have been used to reject a context test for the identity right of publicity, which concentrates on the type of use. Instead, many authors have proposed ad hoc balancing tests to determine whether defendant's liability is immunized by the First Amendment. Under such an approach Kwall and Haas concluded that use not in a traditional medium of expression, but in connection with commercial products can be protected by the First Amendment if in addition some useful information is provided. On the other hand, McCarthy concluded that unpermitted use of personal identity in the media is not presumed immune under the First Amendment, and will infringe the right of publicity if there is no reasonable relation between the topic and plaintiff's identity.

[B] Personal View: Context Test and Definitional Balancing

In my opinion, a definitional balancing based on a context test, as proposed by Powell and others, is the best test to solve the conflict between the identity right of publicity and the freedom of speech. Of all the articles which dealt with the balancing problem, only one report came close to such a test.²³⁰ In this report it was stated that

"when the scope of the right of publicity and the right to prevent commercial misappropriation are properly understood, the torts (or tort) will be strictly confined to commercial contexts. If that limitation is effectively imposed, the tension or conflict between these torts and primary values underlying the First Amendment will be eased."²³¹

Important is that this report recognized a difference between the performance and identity right of publicity when it warned that "misappropriation of a "whole

228. See Supreme Court of the Netherlands, January 19, 1979, NJ 1979, 383 (LWH); BIE 1979, no. 23, at 163, Auteursrecht 1979, 52 (JHS) ('*Schaep met de vijf Pooten*).

229. Cf. Spoor, in his annotation of Supreme Court, January 19, 1979, Auteursrecht 1979, 52 ('*Schaep met de vijf Pooten*), who argued that it is not inconceivable that the trade practice of the media to pay high prices for exclusive publication rights will be extended to portraits that are still free today.

230. See *Committee Report*, The Tension Between The First Amendment and the "Right of Publicity," 39 *The Record of the Ass. of the Bar of the City of N.Y.* 368 (1984).

231. *Id.* 39 *The Record of the Ass. of the Bar of the City of N.Y.* 368, at 369 (1984).

act" [...] does not delineate the First Amendment limitations on right of publicity claims in other contexts."²³²

Not all context tests are similar. A context test is not per definition a form of definitional balancing. That depends on the question how it is decided whether plaintiff's identity is used in a commercial context or not. One can distinguish several context tests to answer this question:

- 1) The right of publicity is infringed if it must be concluded from all circumstances of the specific case that defendant's unpermitted use of plaintiff's identity is more commercial than communicative in nature.
- 2) Defendant's unpermitted use of plaintiff's identity is only immune from right of publicity liability if:
 - a) the defendant used plaintiff's identity in an informing or entertaining story in a media product, and
 - b) there is a reasonable relationship between the plaintiff's identity and the subject of the story.
- 3) Defendant's unpermitted use of plaintiff's identity is presumed to be immune from right of publicity liability on freedom of speech grounds, if the defendant used plaintiff's identity in a media product, unless the plaintiff proves that the story is in fact an advertisement for commercial products.
- 4) Defendant's unpermitted use of plaintiff's identity is always immune from right of publicity liability if the defendant used plaintiff's identity in an informing or entertaining message in a media product.

The *first* test is a clear example of ad hoc balancing, while the fourth test is a clear example of definitional balancing. The disadvantages of an ad hoc balancing test are discussed supra. The main disadvantage is that it does not provide a clear rule.²³³

The *second* test is more a form of ad hoc balancing than the third test, because in the second test a court must also decide whether there is a reasonable relationship between the content of defendant's story and plaintiff's identity. I do not agree with the second test because if it is given that plaintiff's identity is used in an informing or entertaining story in a media product, a court should not investigate whether there is a satisfactory relationship between plaintiff's identity and defendant's speech. According to McCarthy, "unpermitted use of identity in media "news" usage requires that there be a reasonable relationship between the plaintiff's identity and the subject of the story."²³⁴ In his opinion, the right of publicity will be infringed if there is no reasonable relationship. But this rule

232. Id. 39 *The Record of the Ass. of the Bar of the City of N.Y.* 368, at 380-81 (1984).

233. The First Amendment rules must be as clear as possible, since unclear rules could result in a chilling effect when media are reluctant to assume the risks of litigation in borderline cases. See § 9.3[A]{2}.

234. *The Rights of Publicity and Privacy*, § 8.8[D] (Rev. 1993).

seems contrary to freedom of speech principles, since this test is similar to the "alternative way" test. If a court concludes that the defendant's use infringes the right of publicity because there is no reasonable relationship, the court in fact concludes that defendant could also have published the message without plaintiff's identity. As stated *supra*, the alternative way test can be applied to commercial speech,²³⁵ but not to decide whether the nature of defendant's speech is commercial or noncommercial.

The *third* test is to be preferred above the fourth test, because a plaintiff must be allowed to prove that defendant's media story is in fact a commercial advertisement for commercial products. Therefore, of the four different tests, the third test is to be preferred. The definitional balance between the identity right of publicity,²³⁶ and the freedom of speech can be based on the types of speech in which someone's identity is used: on the one hand informing or entertaining speech, or on the other hand commercial speech, which receives a lower level of freedom of speech protection, since the alternative of noncommercial speech remains available.

Therefore, I suggest that the question whether the right of publicity is infringed will be answered by the question whether plaintiff's identity is used in connection with (the advertisement for) a commercial nonmedia product or service or in (an advertisement for) a media product or service. Under this test unpermitted use of a person's identifying characteristics will infringe the right of publicity if this use can be classified as a use in connection with commercial nonmedia products. The right of publicity will not be infringed if defendant's use can be characterized as use in (an advertisement for) a media product or service. I will call this test "*the context test*."

An example of the context test can be found in the California Civil Code in a provision which applies only to the protection of the identity of deceased personalities. Cal. Civ. Code § 990(a)²³⁷ prohibits any unauthorized use of "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." Cal. Civ. Code § 990(j) exempts from § 990(a) any use "in connection with any news, public affairs, or sports broadcast or account, or any political campaign." The same rules exist with respect to the identity of living persons in Cal. Civ. Code § 3344(a) and § 3344(d).²³⁸ However, the regulation of the right of publicity of deceased persons contains an extra exemption, which does not exist in any regulation for living persons, and which is similar to the context test. California Civil Code § 990(n) provides that section 990

235. See § 9.3[B](2); *Cf.* § 9.3[C](5).

236. The definitional balance found for the performance right of publicity is not based on a distinction between commercial versus communicative use, nor on the subjective standard of the level of newsworthiness of the live act, but depends on the provable economic effects of the amount of the appropriation on the performer's exploitation of the act and/or the level of defendant's creativity: see § 11.3[E].

237. As amended by Stats. 1984, c. 1704, s 2. Effective as of January 1, 1985. See Appendix A.

238. Added by Stats. 1971, c. 1595, at 3426, s 1. Amended by Stats. 1984, c. 1704, s 2. Effective as of January 1, 1985. See Appendix A.

"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)."

Under this rule the right of publicity is not infringed if the defendant used the deceased personality's identity in one of the enumerated media, unless it is an advertisement for nonmedia products. But the context test should not be restricted to the identity of deceased persons, and should also include the identity of living persons.

The context test provides a relatively clear rule to predict the outcome of cases in which the interests protected by the right of publicity and the freedom of speech conflict. A court must focus on the medium of the defendant's use. The right of publicity will be infringed if defendant used plaintiff's identity in connection with (an advertisement for) commercial (nonmedia) products and services. Use of identity in media products or services does not infringe the right of publicity, unless the plaintiff proves that this use is in fact an advertisement for products or services which are not protected by the freedom of speech. Thus, to solve a conflict between the right of publicity and the freedom of speech, a court must answer the following questions:

- 1) Is plaintiff's identity used in connection with a commercial nonmedia product or service? Then the right of publicity will be infringed. If plaintiff's identity is used in a media product, the second question must be answered.
- 2) If plaintiff's identity is used in a media product, the right of publicity is not infringed, unless defendant's use is not a form of informational or entertainment use, but in fact an advertisement for products or services which are not protected by the freedom of speech principles.

I admit that the context test will not effortlessly solve all borderline cases. In fact, the test shifts the problem of solving the conflict between the right of publicity and the freedom of speech to the following issues:

- a) What is the difference between commercial products or services on the one hand, and media products on the other hand?
- b) What is the difference between informational or entertaining speech and an advertisement for commercial nonmedia products?

The advantage of the context test is that it provides a relatively clear rule, which indicates the two issues that have to be dealt with. The commercial speech doctrine will be helpful in answering these questions. In § 9.1 it was stated that the most problematic category of cases are those which have held that use of a person's identity in the media infringed plaintiff's right of publicity. Under the

context test, this category is no longer problematic, since the media do not infringe the right of publicity unless the unpermitted media use is an advertisement for commercial products or services. In § 10.3[E] the case law which conflicts with the outcome of the context test is discussed.

[C] Terminology

In the preceding chapters, the term "*commercial use*" was used as a synonym for the content of the right of publicity: the right of publicity is the exclusive right to commercially use a person's identity. As synonyms of the term "*infringing use*," I use the terms "*commercial use*," "use in a commercial context," "use in connection with commercial products or services," or "*non-communicative use*." As synonyms for "non-infringing use," I use the terms "*communicative use*," or "*noncommercial use*."

Under the context test, the question whether defendant's use must be denominated commercial or noncommercial depends on the type of medium in which defendant used plaintiff's identity. The test defines commercial use as use of plaintiff's identity in connection with (or in advertising for) a nonmedia product. This use can be called "*nonmedia use*," although advertisements for such products are published in media products. Similarly, under the context test, non-infringing or communicative use is similar to use in a media product, which is not an advertisement (in disguise) for a nonmedia product. This communicative use can be denominated "*media use*."

The context test implies that commercial use is similar to nonmedia use, and noncommercial use is similar to media use. But courts have held that use of plaintiff's identity in a media product can infringe the right of publicity if the nature of defendant's use is primarily commercial.²³⁹ And sometimes, courts have held that use in a nonmedia product did not infringe the right of publicity.²⁴⁰ Thus, while there is a general understanding that it is "*commercial use*" that will infringe the right of publicity, there is no agreement that it should only be limited or extended to forms of nonmedia use. Therefore, I will not conclude that the terms "*nonmedia use*" and "*media use*" are synonyms for commercial use and noncommercial use. Instead, in the next paragraphs of this chapter, I will analyze the definition of the right of publicity based on a nonmedia-media distinction, and investigate whether there can be forms of "*nonmedia use*" which do not infringe the right of publicity, and forms of "*media use*" which do. If so, exceptions to the distinction will be recognized and defined.

[D] Analysis of the Context Test: Commercial Nonmedia Use versus Communicative Media Use Dichotomy

The context test is the result of a definitional balance between the two major interests protected by the First Amendment, the enlightenment of the audience

239. See third category of cases mentioned in § 9.1 and § 10.3[E].

240. See cases discussed in § 10.1[D].

and the self-fulfillment of the speaker as an end in itself, and the two interests protected by the right of publicity, the autonomy interest of every individual to control the use of his identity by others and the economic interest in an allocative efficiency.²⁴¹ Under the context test, use of a person's identity, i.e. use in an informational, factual, fictive, infotaining or entertaining story in a media product does not infringe the right of publicity, because the interests protected by the freedom of speech are more compelling than the interests protected by the right of publicity. On the other hand, the interests protected by the right of publicity are more compelling if someone's identity is used without permission in connection with nonmedia products or services, or in advertising for such products or services. The test integrates the freedom of speech principles in a clear definition of the content of the right of publicity: it is an intellectual property right which invests every human being with the exclusive right to control use of his identity in a commercial nonmedia context.

[1] Too Much Protection for a Right of Publicity Owner?

A first question is whether the commercial nonmedia use versus communicative media use dichotomy does not provide too much protection to the right of publicity owner. Speakers are prohibited from using the identity of another person in their commercial speech in connection with nonmedia products. In the case of commercial speech, a court will apply the Hudson test²⁴² to analyze whether a commercial speech regulation by the right of publicity is constitutional. The right of publicity protects the interest of every citizen to control the use of his identity and the interest in allocative efficiency of personal identity. The right of publicity directly advances these interests in protection of personal identity by an injunction and the award of damages for the unpermitted personal use in a commercial context. The right of publicity does not exist to diminish other evil. Assuming that defendant's unpermitted commercial use of plaintiff's identity did not mislead the public, the relevant question is whether the right of publicity is no more extensive than necessary to serve the governmental interest in protecting the two right of publicity interests. Since the right of publicity is only restricted to unpermitted use in connection with commercial nonmedia products, the right of publicity seems in principle not more extensive than necessary. The defendant's pecuniary interest in speaking diminishes the threat of a chilling effect. In addition, the defendant is still allowed to use the plaintiff's identity in a noncommercial context, i.e. in media products. Often the defendant's right of free speech is abridged only insofar as it is required to share some of its profits with the individual whose likeness is helping to stimulate the sale of defendant's products and services.

With respect to the self-expression interest, one could argue that the purchase and display of a commercial product decorated with the name or picture of a celebrity serves the consumer's freedom of speech interest to

241. See § 7.2 and 7.3[A].

242. See *supra* § 9.2[C](4)[b].

expression about that celebrity and self-fulfillment. A right of publicity defendant enables a consumer to become a speaker. Should the possible speech interests of a consumer who buys defendant's commercial nonmedia products protect the defendant against a right of publicity claim? In my opinion, the interests protected by the right of publicity still outweigh the speech interests of the defendant plus his consumers, because an alternative direct way is available: the consumer can express himself through direct ways of communication or a self-made object, or can buy an authorized product. Similarly, a defendant who infringes the copyright in a painting of a portrait by producing and selling unauthorized posters or T-shirts with that portrait, has no freedom of speech defense that his act enables buyers to express them.²⁴³

However, this argument seems more compelling when the plaintiff is a political figure and the product is suited for the buyer to express his political opinion. For example, during the Gulf war, Americans could buy a darts game with the face of Saddam Hussein in the heart of the board. Should the ambassador of Iraq be able to prohibit the sale of such a game on right of publicity grounds?²⁴⁴

With respect to the enlightenment interest, one could argue that a commercial speaker should have the right to provide non-misleading true factual information about the connection of the plaintiff with defendant's commercial product or service. Such commercial information can contribute to enlightened decision-making of a consumer. The enlightenment interest becomes even more compelling when the plaintiff's name provides a consumer essential factual information about the product or service itself, which can be relevant to a purchase decision, and the "alternative way" of noncommercial speech would not reach all potential consumers.²⁴⁵ This public interest could be a ground to recognize an exception to the right of publicity to provide factual information about a product, such as the name of the author or performer who has created a work of art. However, should a manufacturer of tennis shoes be allowed to say in his advertisements that a famous tennis player once won a tournament while wearing the advertiser's shoes without permission? Such a rule has been defended by some authors,²⁴⁶ and is discussed in § 10.1[D][2].

243. Accord on other grounds: McCarthy, *The Rights of Publicity and Privacy*, § 7.6[B] (Rev. 1993). He argues that this theory based on the speech interest of the buyer of celebrity merchandise should be rejected because 1) the defendant in a right of publicity case is not the speaker, 2) the activity of the buyer is similar to symbolic speech which receives less First Amendment protection, and 3) normally the plaintiff does not want to suppress speech, but wants to be paid.

244. See further § 10.1[D][1].

245. Cf. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, at 651, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985): "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides."

246. E.g. Haas, *Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising*, 19 *U.C. Davis L. Rev.* 539, at 594 (1986).

[2] Insufficient Protection for a Right of Publicity Owner?

A second question is whether the commercial nonmedia use versus communicative media use dichotomy does provide the right of publicity owner insufficient protection. The right of publicity owner can only prohibit the commercial use of his identity, i.e. use in connection with nonmedia products. It does not prohibit speakers from using the identity of another person in informational, factual, fictive or entertaining stories or in advertisements for the media products in which the stories appear. If the right of publicity also prevented speakers from using another's identity in noncommercial speech in media products, a court would apply the standard content-neutral analysis,²⁴⁷ and would hold that the restriction on expression is greater than necessary to further the governmental interest in protecting the right of publicity plaintiff.

With respect to the commercial interest of the right of publicity owner, one could argue that the freedom of speech enables the media to attract consumer attention and to increase sales and profits by featuring on its cover a photo of a celebrated personality, who is the subject of a story inside. In contrast to the commercial nonmedia speaker, the communicative media speaker has no obligation to provide compensation for the exploitation of the commercial value of the celebrity's identity. This difference can be justified on the grounds that for the communicative speaker -unlike for the commercial speaker- a free "*alternative way*" is not available. The interests protected by freedom of speech outweigh the interest of the right of publicity owner to alter the content of defendant's communicative media use.

Under the context test, courts are not allowed to investigate whether there exists a reasonable relationship between plaintiff's identity and the topic of defendant's informing or entertaining story in a media product. This means that the media are even more free to use the identity of famous celebrities to make their media products more attractive. The freedom of speech "*subsidizes*"²⁴⁸ the press by immunizing it from paying for damages to the right of publicity plaintiff. For example, a publisher can publish a fictional comic book series named after a famous celebrity to make the series more attractive. In my opinion, such "*exploitative*" use should not infringe the right of publicity, because courts should not investigate whether a reasonable relationship exists. However, the suggestion that publishers under such a rule are completely free to exploit a celebrity's identity is not true. If the media use creates any false association, other legal theories will be available, such as defamation, false light invasion of privacy or false advertising. Since that risk exists, the media will usually ask for a license to create a movie or a comic book series based on the real (or fictional) adventures of a celebrity.

Insofar as a person suffers financial harm by not being compensated for use of his identity in a media product, the person's commercial interest is

247. The test of *U.S. v. O'Brien*, 391 U.S. 367, at 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), discussed in § 9.3[A][2].

248. See McCarthy, *The Rights of Publicity and Privacy*, § 8.1[C] (Rev. 1993).

outweighed by the greater potential harm to society as a whole if the free flow of ideas is restricted.

One could also argue that the media immunity created by the freedom of speech prevents an efficient allocation of valuable identities. To prevent a celebrity's over-exposure by the media, the right of publicity owner should be able to restrict the publications by the media. Then, the media that most value an article about that celebrity will get a license. This argument should be rejected because it does not take into account the potential costs of a restriction of a free flow of information for society. As long as these costs are immeasurable, the freedom of speech interests should prevail, since media use of personal identity in a non-misleading communicative way serves the enlightenment function.

In the next paragraphs, legal cases from different countries, in which the commercial interests of the plaintiff and the freedom of speech interests conflicted, will be analyzed under the context test. It will be investigated how the context test will solve "*hard cases*," where the defendant mixed forms of communicative and commercial use.

CHAPTER 10

CONTENT OF THE RIGHT OF PUBLICITY: DISCUSSION OF CASE LAW

10.1 Use of Identity in Connection with Commercial Merchandise and Services: Nonmedia Use is Infringement

[A] Introduction: Use in Connection with Nonmedia Products

Under the context test, unpermitted use of identity in connection with (advertisements for) *nonmedia products*, services or companies will infringe the right of publicity, while such use in connection with media products will be immunized from liability by the principles of freedom of speech. In my opinion, the term "use" is not problematic, since the experience with this term in trademark law is helpful. The term "use" should include the affixing of the identity on nonmedia products or on their packaging, the offering, putting on the market or stocking of these nonmedia products for such purposes, and importing or exporting these nonmedia products.¹ It should also include the registration as a trademark of elements that identify a specific person.²

The distinction between media and nonmedia products is crucial. *Supra*,³ it was stated that an unpermitted use of someone's identity on, or in connection with, commercial merchandise will infringe the rights of the plaintiff under both American and Netherlands law. For example, use of the nickname "Crazylegs" as a trademark for a moisturizing lady's shaving gel was held to infringe the right of publicity of football player Hirsch, who was identified by that name.⁴ The rental and sale of "Here's Johnny" portable toilets infringed the right of publicity of Johnny Carson, who was identified by the phrase "Here's Johnny."⁵ The use of a picture of a family in frames displayed for sale by a manufacturer of picture frames was held to be a use for trade purposes.⁶ Also use in connec-

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1. Cf. Article 13(2) Benelux Trademark Act: "For the purposes of paragraph 1, use of a mark or a similar sign shall mean, in particular: (a) the affixing of the sign on goods or on their packaging; (b) the offering, putting on the market or stocking of goods for such purposes under that sign; (c) importing or exporting the goods under that sign; (d) using the sign on business papers and in advertising." Cf. Article (3) First Council Directive 89/104 of December 21, 1988 to approximate the laws of the member states relating to trademarks, OJ 1989 L 440/1.
 2. Cf. with respect to a person's name: Article 4(4)(c)(i) European Trademark Harmonization Directive, discussed at § 5.3[C]. Cf. Hirsch case discussed in § 2.6[A][1]. See also Article 52(2)(a) and (b) Council Regulation (EC) No 40/94 of December 20, 1993 on the Community trademark, OJ 1994, L 11/1, providing that upon request a Community trademark may be declared null and void if its use may be prohibited on the basis of a national right to one's name or likeness.
 3. In § 2.6[A][1] and § 4.5[C][2][a].
 4. *Hirsch v. S. C. Johnson & Son, Inc.*, 90 Wis.2d 379, 280 N.W.2d 129, 205 U.S.P.Q. 920 (Wis. 1979).
 5. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 218 U.S.P.Q. 1, 9 Media L. Rep. 1153 (C.A.6 1983).
 6. *Faber v. Condecor, Inc.*, 195 N.J.Super. 81, 477 A.2d 1289 (N.J.Super.A.D. 1984): The court held that defendant's commercial use invaded the privacy of the family members by appropriation. Plaintiffs did not claim infringement of the right of publicity.

tion with commercial services can infringe the right of publicity. For example, the Third Circuit held that McFarland stated a claim for infringement of his right of publicity, when a restaurant started offering its services under the name "*Spanky McFarland*," a character performed by McFarland.⁷

Products like shaving gel and portable toilets are clearly nonmedia products. A restaurant can be considered a nonmedia service. In most cases a commonsense distinction can easily be drawn between such nonmedia products, and media products, such as a book, magazine, newspaper, or television program.

[B] Distinction Between Nonmedia Products and Media Products

[1] Introduction

Not all products and services clearly fall in the media or nonmedia product category. What is the status of a poster which is included in a magazine? Or a sports calendar, which provides information about famous football players? Or a game with questions about famous entertainers? Or a commercial phone service which provides information about members of a famous rock group at a charge of 95 cents per minute? Due to transformations in the technological and economic structure of the communications industry, there will be an increasing convergence of media and nonmedia products. Therefore, the terms media and nonmedia products need a closer examination.

A *media product* is a medium of expression through which ideas and opinions are regularly disseminated or communicated, such as a television show, radio broadcast, performance, play, book, disc, pamphlet, magazine, newspaper, musical composition, film, or video tape.⁸ The Tenth Circuit held that baseball trading cards are a traditional medium of expression that receive full First Amendment protection:

"Baseball cards have been an important means of informing the public about baseball players for over a century. [...] In addition, non-sports trading cards have also been an important medium for disseminating information. Some recent examples feature topics such as saints, Norman Rockwell paintings, presidential candidates, the rise and fall of the Soviet Union, local police officers, and Rodney King. All of these trading cards, regardless of their topic, convey information about their subject and therefore constitute an important means of expression that deserves First Amendment protection."⁹

7. *McFarland v. Miller*, 14 F.3d 912, 1994 U.S. App. Lexis 1225, 29 U.S.P.Q.2d 1586, 22 Media L. Rep. 1205 (C.A.3 1993).

8. *Cf. Hicks v. Casablanca Records*, 464 F.Supp. 426, 204 U.S.P.Q. 126 (D.C.N.Y. 1978): More than "posters, bubble gum cards, or some other such "merchandise," books and movies are vehicles through which ideas and opinions are disseminated and, as such, have enjoined certain constitutional protection."

9. *Cardtoons v. Major League Baseball Players Ass.*, --- F.3d ---; 1996 WL 490707; 39 U.S.P.Q.2d 1865 (C.A.10 1996).

Forms of entertainment, such as a live show or live performance in which someone's identity is used, are media products.¹⁰ The function of a media product is primarily to convey information of public interest or entertaining information.

Nonmedia products, such as "plastic toy pencil sharpeners, soap products, target games, candy dispensers and beverage stirring rods [...] are not vehicles through which ideas and opinions are regularly disseminated."¹¹ Swanson has suggested drawing a line between media and nonmedia products based on the American copyright definition of a useful article.¹² The U.S. Copyright Act defines a "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information [...]."¹³ One could say that a media product has as function the conveyance of information, while a nonmedia product has other intrinsic utilitarian functions than merely conveying information. Under such a definition, semi-media products, such as T-shirts, calendars, and games, are in a right of publicity case considered to be nonmedia products, since they also have other functions than to convey a message. In my opinion, the problem with a definition of nonmedia products based on the useful article theory is that this theory is used to prevent protection of utilitarian aspects of products. Such aspects can only be protected by patent law.¹⁴ The problem in a right of publicity case is not the issue of utilitarian functionality, but the relation with the freedom of speech.

At least in a right of publicity context, media products should not be defined as products of institutional media organizations. The organized press does not have a monopoly on the freedom of speech nor on the ability to enlighten. The U.S. Supreme Court stated in *Branzburg v. Hayes* that "the informative function asserted by representatives of the organized press" to justify greater privileges under the First Amendment was also "performed by lecturers, political pollsters, novelists, academic researchers, and dramatists."¹⁵ In *First National Bank of Boston v. Bellotti*,¹⁶ the U.S. Supreme Court said:

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10. See for the protection of performers in the Netherlands: § 5.4, in the United States, Chapter 11.
 11. *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, at 874, 160 Cal.Rptr. 352, 603 P.2d 454, 205 U.S.P.Q. 1116, 5 Media L. Rep. 2208 (Cal. 1979) (Concurring opinion of Chief Justice Bird).
 12. Swanson, Are the California right of publicity Statutes Unconstitutional? A second Look at Some First Amendment Problems, 20 *Beverly Hills Bar Ass. J.* 234 (1985-86) reprinted in *Entertainment, Publishing and The Arts Handbook*, 437 at 451-53 (1987). According to Swanson the outcome of a conflict between the right of publicity and the First Amendment turns on the interplay of three variables: a) the status of the plaintiff (entertainer, athlete, politician, a private figure); b) the motive or purpose of the defendant: providing information, advertising through endorsements, or selling goods; and c) the product of embodiment: book, live performance, film, or useful article. He states that "the interplay of the variables is analogous to the action of a kaleidoscope; a slight shift and the picture (and often the holding) changes." *Id.* at 446.
 13. 17 U.S.C. § 101.
 14. Cf. Brown, Design protection: An Overview, 34 *UCLA L. Rev.* 1331 (1987); Denicola, Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles, 67 *Minn. L. Rev.* 707 (1983).
 15. 408 U.S. 665, at 705, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).
 16. 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).

"The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."¹⁷

Commercial enterprises outside the realm of the press can still produce and sell media products. The main feature of a media product seems to be that it carries within it a prima facie claim to convey information. This claim is based on the manner of its dissemination rather than on its content.

The word "*multimedia*" is a relatively new term for a medium of storing and presenting a combination of different types of information, such as text, sounds and motion pictures, which are stored in such a way that the user, by use of a computer, is able to select, read and to work on the information he is interested in. In my opinion, at least in a right of publicity context, multimedia must be treated similarly to other media products.¹⁸

[2] Sale of Copies of Paintings, Sculptures, and Photographs

If an artist paints a painting of a supermodel without her permission, the right of publicity should not come into play. A painting is a traditional medium of expression, even if this painting is first displayed in an exhibition and then sold for profit. Our desire to encourage artistic expression prevails.¹⁹ But what if subsequently a licensee of the painter starts selling postcards of this painting without the model's permission? Although one could argue that a post card is a media product, I think that it should be denominated as a commercial (nonmedia) product because the use is more commercial than informational. The person painted should be able to state a claim for infringement of the right of publicity.

The same must be true in the case an artist creates a sculpture of a person. If this person does not like the sculpture, he can possibly state a claim for defamation, but not a claim for infringement of the right of publicity. The right of publicity comes into play when the sculptor decides to exploit that statue as a *mass-produced* plastic bust. In the "*Martin Luther King*" case, plaintiffs, the Martin Luther King, Jr. Center for Social Change, and Coretta Scott King, alleged that defendant, a business which manufactured and sold various plastic products as funeral accessories, infringed the descendible right of publicity of Martin Luther King, because it was marketing plastic busts of him for \$29.95, without permission of plaintiffs. The Supreme Court of Georgia held that the right of publicity was descendible, and could be infringed by defendant's commercial use, without violation of the free speech rights.²⁰

However, Justice Weltner concurred because of First Amendment concerns. According to him a statue can be an expression of sentiments. He rejected

17. *Id.* 435 U.S. 765, at 777.

18. *Cf. McCarthy, The Human Persona as Commercial Property: The right of Publicity*, 19 *Colum. - VLA J.L. & Arts* 129, at 148 (1995).

19. *Cf. Kwall, The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 *Ind. L.J.* 47, at 107 (1994).

20. *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*, 296 S.E.2d 697, 250 Ga. 135, 216 U.S.P.Q. 711, 8 *Media L. Rep.* 2377 (Ga. 1982).

the majority's distinction based on the motive of financial gain of the defendant. In his opinion, the outcome "must be grounded in the community's judgment of what, *ex aequo et bono*, is unconscionable."²¹

In my opinion, Weltner is right that the profit motive of the defendant in itself is not sufficient to constitute an infringement. The relevant extra factor seems to me that it was a bust, produced as a *mass consumer product*. This factor could be the reason that Cal. Civ. Code § 990(n)(3) provides that the right of publicity of a deceased personality does not apply in the case of use in "*single*" and original works of fine art.²²

Similarly, under Dutch law, the sale of pictures of well-known soccer players in closed paper bags has been held to be a form of commercial exploitation.²³

The sale of copies of an old news photograph has been held actionable by the person who was depicted. In *Mendonsa v. Time, Inc.*,²⁴ a court held that Time's initial publication in 1945 of Albert Eisenstadt's famous photograph of a sailor kissing a nurse on V-J Day in New York City's Times Square, was not for "*purposes of trade*," since it was an illustration of the reaction to Japan's surrender. However, the court ruled that the sailor submitted a claim for invasion of his "right to be secure from an appropriation of one's name or likeness," by Time's subsequent exploitation in 1987 of copies of the photograph as "collectors' edition copies" for \$1,600 per copy.

Traditional media products, such as paintings, sculptures, or photographs, will infringe the right of publicity of the portrayed in such works, if they are sold for profit in the form of large-scale copies.

[3] Sale of Copies of Works of Authorship that Can be Publicly Performed

Traditional media products, which can be performed or displayed to the public in immaterial form, such as motion pictures or musical compositions, are also sold as commercial (entertainment) products in the form of video's, CD's, or other discs. Unlike the merchandising of paintings, sculptures or photographs, the

21. *Id.* 296 S.E.2d 697, at 709.

22. *Cf.* 17 U.S.C. § 101, definition of a "work of visual art," which includes a painting, drawing, print, sculpture, or still photographic existing in a single copy, or in a limited edition of at the most 200 copies. See § 3.4.

23. Pres. District Court Utrecht, January 16, 1980, NJ 1980, 481 (*Ajax/Panini*). *Cf.* In Germany: Federal Supreme Court, February 20, 1968, VI ZR 200/66; BGHZ 49, 288; GRUR 1968, 652 (Kleine); 55 UFITA (1970) 293; RzU BGHZ Nr 150 (Neumann-Duesberg); NJW 1968, 1329 (Lessmann) (*Ligaspieler*): The purpose of conveying information was secondary to the intent to exploit the collecting enthusiasm of buyers of the pictures; In Supreme Court, January 16, 1970, NJ 1970, 220 (GIS); BIE 1971, no. 24, at 122 (SB); AA 1970, at 377 (HCJ) (*Ja Zuster, nee Zuster*) the issue was whether defendant Lever's Zeep had committed a tort against plaintiffs, actors Blok and Jongewaard, by giving away free key rings with little plastic figures of "Zuster Klivia," "Gerrit" and "Opa" with the sale of a detergent without their permission. These figures owed their popularity to the performance by the plaintiffs in the tv-series "Ja Zuster, Nee Zuster." The plaintiffs lost the case because the figures did not represent their portraits. If the figures had represented the plaintiffs' portraits they should have won the case.

24. 678 F.Supp 967, 6 U.S.P.Q.2d 1140, 15 Media L. Rep. 1017 (D.C. R.I. 1988).

mass production and sale of such works does not affect the freedom of speech protection afforded to such works. In § 10.3[D] it is argued that unpermitted use of a person's identity in works such as a motion pictures, musical compositions, live-performances, or comic books, may give rise to a cause of action for invasion of privacy or defamation, but should not infringe the right of publicity. The sale of copies of such works does not infringe the right of publicity.

However, one could argue that the right of publicity will be infringed if the sale of such works is illegal under other theories. Under this theory, for example, the use of a performer's identity on the lay-out of CD's of his performances can also infringe his right of publicity if the sale of these CD's is unlawful under other legal theories, such as infringement of copyright or the performance right of publicity.²⁵ For example, in the Netherlands, courts have held that use of portraits of performers on the cover of pirated records of their performances, constituted an infringement of their commercial portrait rights.²⁶ This theory will be further discussed in § 10.4[C][2].

[4] Semi-Media Products

Some products have a position somewhere between conventional media and nonmedia products. Examples are T-shirts, posters, buttons, badges, calendars, and games. Such products are traditionally not held to be media products, but they can fulfill informational functions. In such cases it is difficult to apply a context test the outcome of which depends on the qualification of such a product as a nonmedia or media product. To which category do such "*semi-media*" products belong?

In American case law, courts have held that unpermitted use of a person's identity on board games, T-shirts, posters, buttons, and calendars are forms of commercial use which are not protected by the First Amendment.²⁷ It is argued

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25. See § 11.3. Cf. *Ventura v. Titan Sports, Inc.*, 1995 U.S. App. LEXIS 25332 (C.A.8 1995): Titan's videotape exploitation of Ventura's commentary and use of likeness of Ventura on videotapes produced by Titan can infringe his right of publicity under Minnesota law.
 26. Pres. District Court Utrecht, February 20, 1986, AMI 1986, 62; IER 1986, no. 15, at 48 (*Motown/Rec Track*), and District Court Haarlem, August 8, 1989, AMI 1990, 225 (HCJ) (*Kierke/EMI and CBS et al.*).
 27. E.g. *Rosemont Enterprises, Inc. v. Choppy Productions, Inc.*, 74 Misc.2d 1003, 347 N.Y.S.2d 83 (N.Y. Sup. 1972): Unpermitted use of identity of Howard R. Hughes on T-shirts, sweatshirts, and buttons, offering satirical comment on Howard Hughes is not protected by the First Amendment, and violates N.Y. Civil Rights Law § 50; *Palmer v. Schonhorn Enterprises, Inc.*, 96 N.J. Super. 72, 232 A.2d 458 (N.J. Super. Ch. 1967), *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1971 Trade Cases P 73,414 (D.C. Minn. 1970) and *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*, 72 Misc.2d 788, 340 N.Y.S.2d 144 (N.Y. Sup. 1973), aff'd 42 A.D.2d 544, 345 N.Y.S.2d 17 (N.Y.A.D. 1973): unpermitted use of identity in connection with commercial games not protected by First Amendment; *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F. Supp. 1188, 217 U.S.P.Q. 910, 9 Media L. Rep. 1531 (D.C.N.Y. 1983): Unauthorized sale of buttons bearing likenesses or logos of rock musicians violates right of publicity both of musicians and of authorized licensee. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 222, 205 U.S.P.Q. 751, 4 Media L. Rep. 1144 (C.A.2 1978): Poster which depicted Elvis Presley and the words "In Memory... 1935-1977" sold three days after his death held to be infringement of right of publicity; *Brinkley v. Casablanca*, 80 A.D.2d 428, 438 N.Y.S.2d 1004, 212 U.S.P.Q. 783, 7 Media L. Rep. 1457 (N.Y.A.D. 1981): Use on poster of photograph of model Christie Brinkley made from an unapproved shot at a photo session is commercial use actionable under § 51, New York Civil Rights Law; *Titan Sports, Inc.*

that such products are more exploitative than informational.²⁸ A poster on a wall in China conveying news can be an important media product.²⁹ But a poster with the likeness of a celebrity, of the type suitable for framing, and printed on high quality, heavy bond paper, is a commercial product, even if also some messages are printed.³⁰

For example, in *Beverly v. Choices Women's Medical Center, Inc.*,³¹ the plaintiff was a physician, who protested against the use of her name, professional title and photograph in a calendar that was distributed by defendant, a for-profit medical center, to its patients and prospective patients in order to solicit patronage. The defendant argued that the calendar depicted people and events it considered important in the women's movement, and discussed matters of public interest. But the New York Court of Appeals held that the calendar was used "for advertising purposes" under New York law, since it displayed the center's name, logo, address and telephone number and contained glowing endorsements of services. The Court held that a commercial advertiser "may not unilaterally neutralize or override the long-standing and significant statutory privacy protection by wrapping its advertising message in the cloak of public interest however commendable the educational and informational value."³²

However, in 1979, the German Federal Supreme Court held that a wall calendar "*Soccer 1977*" with pictures of soccer players did not infringe the right to one's own picture of plaintiff, Franz Beckenbauer.³³ The calendar contained plates of 73 cm by 52.5 cm. The text indicating the days of the relevant month was printed on a part of 6 cm by 52,5 cm. Under this text was a picture of 37 by 46,5 cm, which could be detached. The Court held that Beckenbauer was a public figure, and that the public interest in the information about typical soccer

v. Comics World Corp., 870 F.2d 85, 10 U.S.P.Q.2d 1311 (C.A.2 1989): "In contrast to the treatment of newsworthy items, it seems clear that photographs marketed as posters are used for the purposes of trade"; *Winterland Concessions Co. v. Fenton*, 835 F.Supp. 529; 29 U.S.P.Q.2d 1630 (D.Cal. 1993): Injunction against selling posters, posterbooks and calendars, which contain photographs of the musicians.

28. See McCarthy, *The Rights of Publicity and Privacy*, § 7.7[C] (Rev. 1993).

29. Cf. Williams, *The Right of Publicity Versus the First Amendment*, *Entertainment, Publishing and the Arts Handbook*, 217, at 236, fn.63 (1983).

30. But see *Montana v. San Jose Mercury News, Inc.*, 34 Cal.App.4th 790; 40 Cal.Rptr.2d 639; 23 Media L. Rep. 1920; 35 U.S.P.Q.2d 1783 (App.Cal. 1995): To celebrate the fact that in 1990 the Football team San Francisco 49'ers won an unparalleled four championships in the 1980 to 1990 decade, defendant SJMN issued a special "Souvenir Section" in its Sunday, February 4, 1990, edition, devoted exclusively to the 49'ers. The souvenir section, entitled "Trophy Hunters," carried an artist's rendition of plaintiff, 49'ers quarterback Montana on the front page. Two weeks later, the page was reproduced in poster form of its original printing in the newspaper and was made available for sale to the general public: SJMN sold 30 percent of the posters for \$5 each, and gave away the remaining posters, mostly at charity events. The court held that the poster represented newsworthy events and that the defendant newspaper has a constitutional right to promote itself by reproducing its news stories: see *infra* at § 10.4[B].

31. 78 N.Y.2d 745, 579 N.Y.S.2d 637, 587 N.E.2d 275, 21 U.S.P.Q.2d 1313, 19 Media L. Rep. 1724 (N.Y. 1991).

32. *Id.* 78 N.Y.2d 745, at 752.

33. Federal Supreme Court, February 6, 1979, VI ZR 46/77; GRUR 1979, 425 (Schaeffer); 85 UFITA (1979) 264; RzU BGHZ Nr 255 (Schulze); NJW 1979, 2203; WRP 1979, 536; AfP 1980, 101 (*Franz Beckenbauer*). Cf. Court of Appeals Hamburg May 17, 1984, 3 U 1/84; AfP 1985, 120; ZUM 1985, 100 (*Rock-Gruppe BAP*): Music group could not claim the usual license fee for publication of a postcards of the music group with a facsimile signature in a magazine for young persons.

scenes outweighed his commercial interest in payment. The Court found it relevant that the calendar was not used to sell other commercial products or services. Apparently the Court viewed the calendar more a media than a nonmedia product, even though the pictures could be detached and used as posters.

Courts and commentators have argued that use of semi-media products in a political context should be protected by the freedom of speech principles.³⁴

[5] Nonmedia Products Included in a Media Product

Unpermitted use of identity in a media product does not infringe the right of publicity. What is the status of a product which is connected to, or included in a media product? Of course, selling a lady's magazine with a (free) tube of moisturizing shaving gel does not change the status of the gel in a media product. But with semi-media products, such as posters or cards, the outcome is less obvious. For example, in the last decades, the magazine industry has answered to desire of purchasers to remove photographs from magazines and to pin them up on their walls, with "fold-outs," "centerfolds" and "posters" of celebrities. Such semi-media products are generally held to be commercial products which can infringe the right of publicity. Do such posters get the constitutional protection of the magazine?

Illustrative is *Titan Sports, Inc. v. Comics World Corp.*,³⁵ In this case, the question was whether oversized photographs of professional wrestlers, folded and stapled inside defendant's magazines, were used for trade purposes and not entitled to First Amendment protection. The District Court found no infringement because there was a reasonable relation between the newsworthy stories about wrestling and the photos of wrestlers:

"Each issue contains news about wrestling, and excerpts from interviews with the wrestlers, and every issue apparently has a full-page report about each of the wrestlers featured in the large photographic insert section. The mere fact that the inserts are most often found in the center of the magazine, and are often stapled in such a way as to make it impossible to view them completely without removing them from the magazine does not change the fact that they correspond to and are part of the dissemination of matters of public interest."³⁶

The District Court held that the photos were constitutionally protected. The format of the photos was not relevant because the Court "need not go further than to point out that the constitutional protection of the freedom of the press does not stop at 8" X 11." On appeal, the Second Circuit reversed and remanded the case.³⁷ An item physically attached within the covers of a magazine is not automatically entitled to First Amendment protection. In determining whether the large photos folded and stapled inside the magazine are distributed

34. See *infra* at § 10.1[D](1).

35. 870 F.2d 85, 10 U.S.P.Q.2d 1311 (C.A.2 1989).

36. See *Titan Sports, Inc. v. Comics World Corp.*, 690 F.Supp. 1315, at 1319 (D.C.N.Y. 1988).

37. 870 F.2d 85, 10 U.S.P.Q.2d 1311 (C.A.2 1989).

for the purposes of trade and not entitled to First Amendment protection, the Second Circuit applied the following test:

"the trial court must consider whether these photos are included primarily for their "public interest aspect" or whether whatever public interest aspect might be involved "is merely incidental to (the distributors) "commercial purpose."³⁸

The court stated that a magazine could not staple a T-shirt bearing the likeness of a Titan wrestler between magazine covers and claim First Amendment protection for a "wrestling T-shirt magazine". However, the court agreed with the district court that "the constitutional protection of the freedom of the press does not stop at '8" X 11"'. But it was an issue of fact as to whether defendant used photographs of Titan wrestlers for the purposes of trade or not. The court mentioned the following factors which a trial court must consider in solving this issue:

- 1) the nature of the item,
- 2) the extent of its relationship to the traditional content of a magazine,
- 3) the ease with which it may be detached from the magazine,
- 4) whether it is suitable for use as a separate product once detached, and
- 5) how the publisher markets the item.

In a similar case, a Dutch District Court held that a poster of Olympic silver medal winner Arnold Vanderlijde included in Panorama magazine constituted a form of commercial exploitation, which infringed his commercial portrait right.³⁹ The District Court rejected the defendant's argument that the poster was not a form of commercial exploitation, but an illustration of a newsworthy article about earnings of Olympic athletes, since, in the Court's opinion, the poster was more than merely an illustration. The District Court mentioned the following factors: the portrait was printed on two pages, in the middle of the magazine, and advertised as "Poster on page 54." In addition, defendant had printed it Panorama logo on Vanderlijde's boxing gloves and shirt. The Court of Appeals affirmed, holding that the poster constituted a publication for primarily commercial purposes.⁴⁰ The Court of Appeals noted that the defendant had used Vanderlijde's portrait for commercial purposes since, due to the way of publication, to a certain extent the portrait had become a collectors item, a product in itself, independent of the content of the article.⁴¹

38. *Id.* 870 F.2d 85, at 89.

39. District Court Haarlem, November 6, 1990, AMI 1991, 198 (JCSP) (*Vanderlijde/Panorama*).

40. Court of Appeals Amsterdam, May 27, 1993, NJ 1994, 658; AMI 1995, 96 (HCJ) (*Vanderlijde/Panorama*).

41. In his annotation under this decision, AMI 1995, 96, at 97, *Cohen Jehoram* criticized the Court's criterion of a "publication for primarily commercial purposes." In his opinion, the Court should have rejected defendant's the free speech argument by referring to Article 10(2) EHRC (rights of others). However, under this approach Cohen Jehoram assumes that defendant's use is a form of infringing commercial use. In my opinion, the Court correctly analyzed the difficult question whether defendant's use constituted a form of commercial exploitation by pointing to the commercial elements of defendant's use, without investigating the relation between the portrait and the content of the article.

The Amsterdam District Court held that use of a picture of composer Vangelis in a booklet about Syntrance synthesizers, which had been included in the sleeve of one of his records, constituted a form of commercial use which infringed his commercial portrait right.⁴²

[C] Use of Identity by Institutions with No Profit Motive

The naming of a public institution, such as a building, street, park, school, theater, after a public personality does not infringe the right of publicity. Use in connection with public institutions is not considered to be a form of commercial use. Usually such a naming takes place after the personality dies. In *Antonetty v. Cuomo*,⁴³ a New York court held that the surviving husband and children of Evelina Antonetty could not prevent the Urban Development Corporation of renaming a park "the Evelina Antonetty Mall and Park," because Antonetty's privacy right was terminated at her death. The heirs wished to reject the honor because the purpose of the mall was not relevant to her dedication to the diverse ethnic groups in the borough of the Bronx. With respect to a claim of the heirs themselves, the court held that "the property dedicated to Antonetty is on public land and not intended or to be used for commercial trade purposes."⁴⁴

Under Dutch law, heirs can claim damages suffered by injury to the memory of the deceased, provided that the this injury took place in a fashion which would have given the deceased, had he still been alive, the right to reparation of injury to honor or reputation.⁴⁵

In contrast, the renaming of a privately owned theatre in Manhattan after Tennessee Williams was held to infringe the right of publicity of the estate of the late playwright.⁴⁶ His name was used for a commercial service, not for a media product, such as a theatre play.

A non-profit organization is not immunized from liability for infringement of the right of publicity, only because it has an idealistic goal. Whether its use of another's identity will infringe the right of publicity depends on the type of use. In my opinion, in principle, unauthorized use of a person's identity in solicitations for contributions or memberships by nonprofit entities such as charitable or religious organizations, should infringe the right of publicity.⁴⁷ For example, a public institution, such as a public park, will infringe the right of publicity if it

42. District Court Amsterdam, May 15, 1985, AMI 1986, 61 (*Vangelis*).

43. 131 Misc.2d 1041, 502 N.Y.S.2d 902 (N.Y. Sup. 1986).

44. *Id.* 131 Misc.2d 1041, at 1046.

45. Art. 6:106 Civil Code.

46. *Southeast Bank N.A. v. Lawrence*, 104 A.D.2d 213, 483 N.Y.S.2d 218, 224 U.S.P.Q. 961, 11 Media L. Rep. 1216 (N.Y.A.D. 1 Dept. 1984), reversed on other grounds, 66 N.Y.2d 910, 498 N.Y.S.2d 775, 489 N.E.2d 744, 227 U.S.P.Q. 1054, 12 Media L. Rep. 1430 (N.Y. 1985); holding that under Florida law, plaintiff had no enforceable right of publicity, since Tennessee Williams had no surviving spouse and children.

47. *Cf. Restatement (Third) of Unfair Competition* § 47, comment a. (1995).

tries to generate income by using a person's identity without permission in an advertisement for its products or services.⁴⁸

However, this can be different if the idealistic goal is related to the right of publicity subject. For example, in *Memphis Development Foundation v. Factors, Inc.*,⁴⁹ a District Court held that the plaintiff, a not-for-profit corporation, was allowed to build a Presley memorial in the form of a \$200,000 bronze statue of Presley, which would be erected in his home city, Memphis. But the court prohibited the foundation from manufacturing, selling or distributing any eight-inch pewter replicas of the statue to persons who contribute \$25.00 or more to the foundation, or utilizing commercially the name, image, photograph or likeness of Elvis Presley.⁵⁰

In *O'Hair v. Skolrood*,⁵¹ a non-profit organization had used plaintiff's name in its newspaper advertisement which sought support for its efforts to oppose plaintiff's campaign to remove the word "God" from U.S. currency. The court held that such an advertisement involved a matter of public concern, and could not give rise to cause of action for appropriation, even though the advertisements were also designed to solicit funds for its idealistic goal. Thus, if a non-profit organization uses a person's identity in a noncommercial advertisement for an idealistic goal related to that identity, the right of publicity does not come into play. However, such an advertisement can be unlawful under other theories, such as false light or defamation law.

[D] Exemptions: Non-Infringing Use of Identity in Connection with Nonmedia Products

[1] Politicians Exemption

Both in the United States⁵² and in the Netherlands,⁵³ political speech receives the highest level of freedom of speech protection. As a result, courts are also more reluctant to prohibit political speech under the right of publicity theory. This seems to have resulted in a lower level of right of publicity protection for political figures, defined as persons with a substantial governmental power,⁵⁴ and the candidates for such power during an elective period.

Although politicians are supposed to have assumed the risk of public commentary and have better possibilities of counter-acting unwelcome publicity

48. But see *Schifano v. Greene County Greyhound Park Inc.*, 21 Media L. Rptr. 1794 (Ala. Sup.Ct 1993): Park's use, in advertising brochure, of photograph of plaintiffs taken as they sat in the park, does not give rise to cause of action for intrusion, false light, or for misappropriation. Plaintiffs were held to have consented to having their photograph taken at the Park.

49. 441 F.Supp. 1323 (D.C.Tenn. 1977).

50. In *Memphis Development Foundation v. Factors Etc., Inc.*, 616 F.2d 956, 205 U.S.P.Q. 784, 5 Media L. Rep. 2521 (C.A.6 1980), the Sixth Circuit reversed this decision, erroneously holding that the right of publicity is not descendible. See § 2.7.

51. 17 Media L. Rep. 1869 (D.C.Tex. 1990).

52. See § 9.2[C][2].

53. See § 9.2[C][5].

54. E.g. presidents, vice-presidents, generals, police chiefs, mayors, secretaries of state, etc.

than private figures, they still have a right of publicity. Political persons should receive the normal right of publicity protection if their identity is used without permission in connection with clear nonmedia products, such as shaving gel and portable toilets.⁵⁵

However, with respect to semi-media products, the outcome seems to be different if the plaintiff is a political person. Some courts have held that unpermitted use of the identity of a political person in connection with semi-media products, such as posters, t-shirts and badges, did not infringe the right of publicity, because defendant's use contained a political message. In *Paulsen v. Personality Posters, Inc.*,⁵⁶ it was held that the plaintiff, Pat Paulsen, a well-known television performer and comedian, could not enjoin defendant from marketing and selling a commercial humorous poster embodying his photograph with the addition of the words "FOR PRESIDENT." Defendant's poster was a reaction on Paulsen's mock political campaign for presidency. His candidacy had been the subject of comment by other communications media, and he had received several votes in primary elections. Paulsen argued that since he was only kidding and his presidential activities were really only a publicity stunt, they fell outside the scope of constitutionally protected matters of public interest. Therefore, defendant's poster, which was sold for profit, should not receive the normal speech protection. But the court found such premise wholly untenable:

"When a well-known entertainer enters the presidential ring, tongue in cheek or otherwise, it is clearly newsworthy and of public interest. A poster which portrays plaintiff in that role, and reflects the spirit in which he approaches said role, is a form of public interest presentation to which protection must be extended."⁵⁷

The fact that his campaign might appear more entertaining than informing, did not alter its protected status.

In *Penthouse Intern., Ltd. v. Koch*,⁵⁸ a court held that the defendant could not refuse to display a Penthouse advertising poster in the New York City subway system. The defendant argued that it had the right to refuse to display the advertisement for Penthouse magazine which depicted a caricature of presidential candidate Walter Mondale, because it was a form of commercial speech. But the court rejected this defense, because it considered the advertisement was a form of political speech.⁵⁹

The reason for a political figure exception to the right of publicity is the importance for the whole society that the political process functions well, and that the democratic majority chooses the best persons as their political represen-

55. It could be argued that an advertiser should have the right to freely use politician's identity as a symbol for his political function. I do not agree. By way of exception, a commercial advertiser should be allowed to use words as "President," or "Prime Minister," even if the public will think of the politician who at that moment fulfills that official function. But there is no need to use the name and likeness of that politician.

56. 299 N.Y.S.2d 501, 59 Misc.2d 444 (N.Y. Sup. 1968).

57. *Id.* 299 N.Y.S.2d 501, at 507.

58. 599 F. Supp. 1338 (D.C.N.Y. 1984).

59. Penthouse had argued that it wanted to disseminate the cartoonist's satirical view of Mondale as pandering to his feminist supporters.

tatives. Insofar as commercial exploitation serves this interest the exception can be justified. However, one should realize that a rule which restricts the right of publicity (and right of privacy) level of protection too much for political persons will create a disincentive to enter the political field. This could result in an election of less qualified politicians. In the Netherlands, the Advertising Standards Authority held that the unauthorized use of politicians in advertisements for commercial products is not in accordance with the requirements of good taste and decency.⁶⁰

[2] Limited Factual Information Exemption

Some courts and authors⁶¹ have stated that the freedom of speech interest in enlightenment of consumers implies that commercial speakers have the right to provide in their advertisements non-misleading information about the relation that exists between a person and their products. Under such a view, an unpermitted use of a person's identity in connection with (an advertisement for) a product does not infringe the right of publicity if this information is true and non-misleading. The argument is that such information can be relevant to a consumer's purchase decision. If such an exemption to liability for violating the right of publicity is recognized, how far should it extend?

Haas argued that the First Amendment protects an advertiser's true statement that a celebrity used its product.⁶² For example, a manufacturer of tennis rackets should have the right to truthfully tell in an advertisement that Boris Becker won in 1989 Wimbledon and the U.S. Open Championship with its X-mark tennis racket, absent any (breach of) contract provisions. In Haas' opinion, Becker cannot state a claim for infringement of his right of publicity, because the consumer interest in such factual information prevails.

Similarly, Shiffrin argued that without consent of Frank Sinatra, Mercedes Benz may truthfully advertise that Sinatra drives a Mercedes.⁶³ In the absence of deception, Mercedes Benz should have the right to tell the public which public figures buy their products. The public has a right to such non-intimate information without the permission of the public figure. What is being weighed is the freedom to communicate the truth against the creation of a property right allowing the plaintiff to control the dissemination of truth for his own profit. According to Shiffrin, recognition of the right of publicity "seems to be a clear case of limiting freedom of speech in pursuit of excessive capitalism."⁶⁴

60. See § 5.6[B]. Cf. Advertising Standards Authority, May 29, 1996, no. 9160 and no. 9160A (*President Boris Jeltsin carrying bottles of Vodka*) and Board of Appeals, July 29, 1996, no. 9160B (*President Jeltsin carrying bottles of Vodka*): Use of picture of Boris Jeltsin in an advertisement for Vodka violates Article 2 Advertising Code.

61. See *infra*.

62. Haas, *Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising*, 19 *U.C. Davis L. Rev.* 539, at 568 (1986).

63. Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 *Nw. U.L. Rev.* 1212, at 1257, fn. 275 (1983).

64. *Id.* 78 *Nw. U.L. Rev.* 1212, at 1257, fn. 275.

I do not agree with this view, because the speech which is restricted is only a specific form of speech in a commercial context. The alternative way to provide this speech in a noncommercial way is not restricted. A newspaper or magazine is free to write that Frank Sinatra drives a Mercedes Benz car. If such a message is uttered in a media product, it will not infringe the right of publicity. I agree with Shiffrin that what is weighed is the interest of the consumer in free dissemination of speech about the "relation" between personalities and commercial products, and the interest of the right of publicity owner to control the use of his identity in connection with such commercial products. Unlike Haas and Shiffrin, I think that the interests of the right of publicity owner should prevail, because the relation is too attenuate. The name of Sinatra in the advertisement adds little essential information about Mercedes Benz cars. Therefore, in such a case, Frank Sinatra should have the autonomy to decide whether and how he will exploit his identity in connection with nonmedia products.

It is conform the context test that in this example Mercedes Benz infringes the right of publicity of Frank Sinatra. In my opinion, this rule also applies to similar advertisements for media products. If, for example, Time magazine truthfully advertises: "Frank Sinatra doesn't want us to tell you this, but he is one of our regular readers," the magazine will infringe Sinatra's right of publicity.⁶⁵

On the other hand, it is recognized that unpermitted use of the identity of a person in connection with media products created or performed by that person does not infringe the right of publicity.⁶⁶ In such a case, the interests of the right of publicity owner are outweighed by the public interest in knowing the identity of the author or performer who created the product it intends to buy. For example, an author who has sold his copyrights in a book, cannot prevent the publication of this book on the grounds that the printing of his name on the cover infringes his right of publicity.

In *Shaw v. Time-Life Records*,⁶⁷ it was held that Artie Shaw, a band leader and musician of great renown in the 20's, 30's and 40's could not prevent the defendant from using his name in connection with the sale of recordings which imitated the Artie Shaw "sound," as long as they were not presented as his own performances. Artie Shaw did not hold the copyrights to the musical compositions which he arranged, and his arrangements of those compositions were not copyrightable. Therefore, the defendant had the right to market

65. This example is given by Shiffrin. I agree with him that the outcome of both examples should be the same. See *Id.* 78 *Nw. U.L. Rev.* 1212, at 1257, fn. 275 (1983). Although Sinatra's identity is used in connection with a media product, the outcome is not inconsistent with the context test, see § 10.4[C][1].

66. See McCarthy, *The Rights of Publicity and Privacy*, § 7.4 (Rev. 1993): "The general rule is that it is permissible to use the name of an author or artist to correctly and truthfully identify works created by that person." A wrong decision seems *Philadelphia Orchestra Assn. v. Walt Disney Co.*, 821 F.Supp. 341, 27 U.S.P.Q.2d 1107, Copy. L. Rep. P27,091 (D.E.Pa 1993) which held that use of the name of Philadelphia Orchestra by Disney in connection with a home video release of the film "Fantasia," would have infringed the right of publicity of the Orchestra, if there had been no factual issue as to whether the 1939 agreement between Disney and the Orchestra included the home video release of "Fantasia." In my opinion, an Orchestra has no right of publicity (See § 7.2), and should the exemption apply.

67. 38 N.Y.2d 201, 379 N.Y.S.2d 390, 341 N.E.2d 817, 190 U.S.P.Q. 573 (1975).

imitations of his arrangements, and the right to truthfully tell that the arrangements are made by Shaw.⁶⁸

However, use of personal identity in connection with media products does not infringe the right of publicity. The relevant question here is whether the outcome should be different if the product involved is not a media product of an author or performer, but a commercial nonmedia product.

In *Nature's Way Products, Inc. v. Nature-Pharma, Inc.*,⁶⁹ the court held that unpermitted use of the name of a person who had developed herbal products in connection with the exploitation of such products constituted an infringement of the right of publicity. The case involved the use of the name of Dr. John Christopher, a well-known author and lecturer on herbal medicine, who died in 1983. Christopher owned and operated a retail herb store which he had sold to a predecessor of defendant. The plaintiff was a new corporation formed by Dr. John Christopher, in which he had placed all of his assets of trademarks, formulas, trade names, and exclusive rights to use his endorsements and name in connection with selling herb products. Defendant argued that the right of publicity should not protect the dissemination of historical information. Therefore, it had the right to advertise that Dr. Christopher was a founder of their business and that their products are based on his formulas. But the court rejected this exception by distinguishing between media and nonmedia products:

"In the instant case, the defendants are not marketing a book or record dealing with the life of Dr. John R. Christopher. Instead, they are using an historical fact to market a different product-- namely, herbal medicines. [...] Because "historical information" is being used in the instant case to market a product that is independent of the information itself, defendants' argument is without merit and is rejected."⁷⁰

The court clearly applied the context test and held that unpermitted use in connection with a nonmedia product infringes the right of publicity. But is the outcome of this case right? Kwall has criticized this decision because in her opinion, the defendant provided factual true information about a product and its history.⁷¹ In my opinion, the decision can be justified because the name of a creator of a media product (work of art, performance) is probably more important for a consumer than the name of a manufacturer of a medicine or other nonmedia products.

However, in my opinion, a factual information exemption to the right of publicity can make sense under certain circumstances. For example, if a (semi-media) product is designed by a specific designer, the identity of the designer can be relevant to a consumer. But if such an exemption is recognized, it should be narrowly construed. In the following two cases, courts have extended the exception too far.

68. The question whether use of Artie Shaw's sound in an advertisement for nonmedia products could infringe his right of publicity is problematic; see at the end of § 3.4[D].

69. 736 F.Supp. 245, 16 U.S.P.Q.2d 1063 (D.Utah 1990).

70. *Id.* 736 F.Supp. 245, at 253.

71. Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 *Ind. L.J.* 47, at 90-91 (1994).

In *Vinci v. American Can Co.*,⁷² it was held that Charles Vinci, the 1956 and 1960 weight-lifting Olympic gold medalist, could not state a claim for infringement of his right of publicity for defendants' use of his name and likeness on a series of promotional disposable drinking cups sold as Dixie Cups. The cups also mentioned the name and likeness of other athletes. The court found that the mention of the athletes' names within the context of accurate, historical information was incidental to the promotion of the Dixie Cups by a partnership between the defendant and the United States Olympic Committee. According to the court, the reference to the athletes and their accomplishments was purely informational.

In my opinion, the use of the names and likeness of athletes in connection with nonmedia products such as Dixie Cups is a form of commercial use, which infringes the right of publicity. The fact that the defendant also provided some historical information does not turn commercial speech into protected noncommercial speech. The Dixie Cup promotion was intended to put Dixie Cups and defendant's Minute Maid products before the public in a favorable light. Such use is not purely informational.

The second case is a Dutch case from the Amsterdam District Court.⁷³ The defendant, who sold armchairs, had advertised one of its armchairs for NLG 399 with the text: "Fred Oster causes rush for armchair." Fred Oster was a quizmaster who had given away the same armchair for NLG 599 in his television show the day before. Fred Oster claimed damages for misappropriation of his name. The defendant argued that it had a right to tell the public that its armchair was cheaper than the armchair given away by Fred Oster. The district court held that the unpermitted commercial use of the name of Fred Oster constituted a tort, but the court agreed with the defendant that it had the right to provide this information on the condition that it would not display Fred Oster's name in an eye-catching way. In appeal, Oster argued that any use of his name in the advertisement was unlawful. But the court of Appeals affirmed, stating that it was relevant to its decision that Oster's quiz had a commercial nature, and that the defendant had advertised the armchair before the broadcast of the quiz.⁷⁴

In my opinion, any unpermitted use of Oster's name in connection with an advertisement for armchairs should infringe his right of publicity. The relation between Oster's identity and the armchair was only based on the fact that this armchair had been given away in his television show. Such a relation is too attenuate to justify a factual information exception to the right of publicity.

72. 69 Ohio App.3d 727, 591 N.E.2d 973 (Ohio App. Ct. 1990).

73. District Court Amsterdam, November 7, 1984, AMR 1985, 39 (*Fred Oster/De Stam*).

74. Court of Appeals Amsterdam, October 10, 1985, AMI 1986, 84 (*Fred Oster/De Stam*).

[3] Parody or Generic Use Exception

Should there be a "parody" defense to avoid liability for infringement of the right of publicity?⁷⁵ The word "parody" originates from the Greek word "parodos" which means "a beside-song" i.e. a song which does not belong to the main song but is sung alongside. Today, an essential element of a parody is that it imitates "something" for a comic effect. In most definitions the word "parody" is defined as a work that imitates the characteristic style of an author or a work of authorship for a comic effect.⁷⁶ But also other recognizable objects, such as a trademark, company name, or famous person can be parodied.

Parody is a form of expression. In my opinion, in principle, the context test is appropriate to answer the question whether defendant's parody is a form of expression that invades the right of publicity. The test is similar to the test developed by American courts to balance trademark claims against works of artistic expression, including parodies.⁷⁷

Use of plaintiff's identity in a parody in an advertisement for commercial nonmedia products should not be a form of protected speech.⁷⁸ In *White v. Samsung Electronics America inc.*,⁷⁹ the defendant argued that its advertisement was protected by the First Amendment as parody. The court rejected this defense:

"This case involves a true advertisement run for the purpose of selling Samsung VCRs. The ad's spoof of Vanna White and Wheel of Fortune is subservient and only tangentially related to the ad's primary message: "buy Samsung VCRs." Defendants' parody arguments are better addressed to non-commercial parodies."⁸⁰

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75. Cf. Pemberton, *The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity*, 27 *U.C. Davis L. Rev.* 97 (1993), arguing that commercial parodies should not be prohibited by the right of Publicity; Hartmann and Kelly, *Parody (of Celebrities, in Advertising), Parity (Between Advertising and Other Types of Commercial Speech), and (the Property Right of) Publicity*, 17 *Hastings Comm-Ent L.J.* 633 (1995).
76. See Van Dale, *Groot Woordenboek der Nederlandse taal* (10th ed. 1982); *The American Heritage Dictionary* (3d ed. 1992). Cf. *Acuff-Rose Music, Inc. v. Campbell*, 114 S.Ct. 1164, 127 L.Ed.2d 500, 29 U.S.P.Q.2d 1961; Copy. L. Rep. P27,222; 22 *Media L. Rep.* 1353, at 1358 (U.S. 1994): essential is "the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."
77. See § 9.3[B][2].
78. Cf. *Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.*, 737 F.Supp. 826, 1990 Copr.L.Dec. P 26,577, 15 U.S.P.Q.2d 1412, 17 *Media L. Rep.* 2273 (S.D.N.Y. 1990): plaintiffs stated a claim for appropriation of their identity by defendant's use of look-alikes in commercial for beer. With respect to defendant's parody defense in context of copyright infringement claim, the court stated: "defendants' commercial does not qualify as parody. The commercial's use is entirely for profit: to sell beer." *Id.* 737 F.Supp. 826, at 832. Cf. in a copyright context: *Acuff-Rose Music, Inc. v. Campbell*, 114 S.Ct. 1164, 127 L.Ed.2d 500, 29 U.S.P.Q.2d 1961; Copy. L. Rep. P27,222; 22 *Media L. Rep.* 1353, at 1360 (1994): "The use, for example, of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry, than the sale of a parody for its own sake [...]."
79. 971 F.2d 1395, 23 U.S.P.Q.2d 1583, 20 *Media L. Rptr.* 1457 (C.A.9 1992).
80. *Id.* 20 *Media L. Rptr.* 1457 at 1462. In footnote 3 at 1462, the Ninth Circuit indicated that the First Amendment will bar most right of publicity actions against expressive activity which relies on identity evocation, but "in the case of commercial advertising, however, the first amendment hurdle is not so high. Realizing this, Samsung attempts to elevate its ad above the status of garden-variety commercial speech by pointing to the ad's parody of Vanna White. Samsung's argument is unavailing. (cit. omitted).

The Circuit rejected a petition for rehearing the case.⁸¹ In a dissenting opinion, Judge Kozinski stated "[t]he public will be robbed of parodies of celebrities, and our culture will be deprived of the valuable safety valve that parody and mockery create."⁸² Judge Kozinski wondered why Vanna White's right to exclusive for-profit use of her persona is superior to Samsung's right to profit by creating its own inventions.⁸³ The answer derives from the justification for recognizing a right of publicity,⁸⁴ and the balance with the freedom of speech principles. I agree with the Ninth Circuit that Samsung's interest in being free to use another's identity to sell its products in an advertisement, whether in parody form or not, is outweighed by Vanna White's interest in a right to control the commercial use of her identity.⁸⁵

Use of plaintiff's identity in a magazine, book or motion picture does not infringe the right of publicity.⁸⁶ Use in such media products is protected by the freedom of speech. For such products, there is no need for recognition of a parody exception. However, should a parody exception be recognized for unpermitted use of a person's identity in connection with semi-media products?

In *Cardtoons v. Major League Baseball Players Ass.*,⁸⁷ a parody exception was recognized. Plaintiff, Cardtoons, sought declaratory judgment that it does have a First Amendment right of free expression to market and sell its "Baseball Parody Cards," labeled as "Cardtoons," without a right of publicity license from defendant, the Major League Baseball Players Association. The 130 Cardtoons, sold in smaller packages,⁸⁸ depicted the likenesses and parody names of actual Major League Baseball players, and were printed in the same card form as the official cards of defendant, in order to be an effective parody of defendant's cards. Each card was labeled as "parody," and proclaimed that the cards were "NOT licensed by Major League Baseball Properties of Major League Baseball Players Association."⁸⁹

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81. *White v. Samsung Electronics America Inc.*, 989 F.2d 1512, 26 U.S.P.Q.2d 1362, 21 Media L. Rptr. 1330 (C.A.9 1993).
82. *Id.* 21 Media L. Rptr. 1330, at 1334-1335 (C.A.9 1993), dissenting opinion by Kozinski, joined by O'Scannlain and Kleinfeld.
83. *Id.* 21 Media L. Rptr. 1330, at 1335.
84. See § 7.2 and § 7.3[A].
85. It seems to me that the dissenting opinion must be read in the light of the controversy about the identification issue in this case. See *supra*, § 8.2[B].
86. *Guglielmi v. Spelling-Goldberg Productions*, 160 Cal.Rptr. 352, at 358, 25 Cal.3d 860, 603 P.2d 454, 205 U.S.P.Q. 1116, 5 Media L. Rep. 2208 (Cal. 1979): "The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire." (Bird, Chief Justice, concurring). *Id.* *White v. Samsung Electronics America Inc.*, 971 F.2d 1395, 23 U.S.P.Q.2d 1583, 20 Media L. Rptr. 1457, fn.3 (C.A.9 1992) stating that in cases of noncommercial parodies, "the first amendment hurdle will bar most right of publicity actions against those activities" (citing *Fatwell*, 485 U.S. at 46 (1988)).
87. 868 F.Supp. 1266, 1994 U.S. Dist. LEXIS 16615 (D. Okl 1994), *aff'd* --- F.3d ---; 1996 WL 490707; 39 U.S.P.Q.2d 1865 (C.A.10 1996).
88. See Hartmann and Kelly, *Parody (of Celebrities, in Advertising), Parity (Between Advertising and Other Types of Commercial Speech), and (the Property Right of) Publicity*, 17 *Hastings Comm-Ent L.J.* 633, at 655 (1995).
89. The district court found that Cardtoons' parody cards created no likelihood of confusion. The effect of a parody is to amuse rather than confuse.

The District court found that the Cardtoons were a parody, because the general style of baseball cards had been imitated, but the images of the players and the biographical material had been exaggerated. The court rejected both plaintiff's assurance that the cards were non-commercial, and defendant's portrayal of the Cardtoons as purely commercial. The cards were not a successful commercial counterfeit, but a new creation that did not exist before, and that could never be mistaken for its progenitor. Therefore, the court rejected a simple application of the context test resulting in the conclusion that the right of publicity of the players prevails. In answering the question whether there can be a First Amendment 'parody' defense for such a product, the court adopted an ad hoc balancing approach based on the fair use test of the U.S. Copyright Act.⁹⁰

With respect to the *first* fair use factor, the purpose and character of the use, the court found in favor of Cardtoons because the commercial parody was not used to sell another commercial product, such as VCRs in the "*Vanna White*" case, but it was a commercial parody as a product itself. The court found it too complicated to apply the *second* factor, the nature of the copyrighted work, that it transformed in the context of this case in the nature of the interest in controlling one's own identity. *Further*, it found that Cardtoons did not take more than was necessary to accomplish its parody purpose. And with regard to the important *fourth* factor of the effect of the use upon the potential market of the owner, the court found that the Cardtoons trading cards were not a substitute product, and could not fulfill demand for the original. Therefore, it held that Cardtoons trading cards were a "fair use" of the identity of the players, despite the fact that it is a parody that is sold for commercial gain. In doing so, the court recognized a parody exception to the right of publicity.

The Tenth Circuit affirmed the district court's decision.⁹¹ However, the Tenth Circuit refused to apply the district court's fair use analysis in a right of publicity case. Similarly, the court refused to apply the parody test developed in trademark cases because the right of publicity does not recognize the likelihood of confusion criterion. Instead, the court applied an ad hoc balancing test after it had found that the parody trading cards infringe upon MLBPA's property rights as established by Oklahoma's right of publicity statute, and that the cards were fully protected by the First Amendment. In balancing the interests the court analyzed the First Amendment interests in publishing the parody trading cards

90. "The Court will not firmly employ any one test in weighing MLBPA's right of publicity, for the simple reason that one has not yet been devised." *Id.* 1994 U.S. Dist. LEXIS 16615, at 9. The court rejected an analysis similar to the one for trademark law, because this case did not involve any element of consumer confusion. *Id.* at 14. The four fair use factors are listed in § 9.3[C][2]. Unlike the U.S. Copyright Act, the Dutch Copyright Act (DCA) recognizes only the exceptions listed in Articles 15-24 DCA, and does not recognize a general fair use exception. But Article 13 DCA provides that a copyright owner cannot prohibit the adaptation of a work of art into a new work of art. A parody can be a new work, see Snijder van Wissenkerke, *Het auteursrecht in Nederland*, at 200 (1913). I do not agree with Quaedvlieg, *De parodiërende nabootsing als een bijzondere vorm van geoorloofd citaat*, *RMh* 1987, 279, that a parody is a citation exempted under Article 15a DCA. See for the different theories to deal with a parody in a copyright context: Hefti, *Die Parodie im Urheberrecht*, Berlin, 1977, at 57.

91. *Cardtoons v. Major League Baseball Players Ass.*, --- F.3d ---; 1996 WL 490707; 39 U.S.P.Q.2d 1865 (C.A.10 1996).

and the justifications for the right of publicity.⁹² *First*, the court found that parody is protected by the First Amendment as social criticism and a means of self-expression, that parodies of celebrities are an especially valuable means of expression because of the important role celebrities play in modern society, that MLBPA would never license a parody which poked fun at the players, and that an injunction of the parody trading cards would not only allow MLBPA to censor criticism of its members, but would also have a chilling effect upon future celebrity parodies.

Second, the court analyzed the *effect* of an infringement upon MLBPA's right of publicity. The court found that the argument that publicity rights provide an incentive to create valuable identities is less compelling in the context of celebrity parodies, since celebrities will seldom give permission for their identities to be parodied. The court found that the efficient allocation justification is most persuasive in the context of advertising, but not as persuasive when applied to nonadvertising parody uses because celebrities with control over the parodic use of their identities would not use this power to maximize their value, but instead, use that power to suppress criticism. The court rejected McCarthy's natural rights justification,⁹³ and found the labor and prevention of unjust enrichment justifications non-compelling in the case of a parody, "because there is little right to enjoy the fruits of socially undesirable behavior," and because *Cardtoons* "is not merely hitching its wagon to a star," but "added a significant creative component of its own to the celebrity identity and created an entirely new product." Therefore, the court concluded that the "application of the Oklahoma publicity rights statute to *Cardtoons*' trading cards presents a classic case of overprotection."

I do not agree with the analysis of District Court.⁹⁴ *First*, the district court defended its copyright fair use analysis by referring to the fact that the U.S. Supreme Court in the "*Zacchini*" case had noted that the goals of the right of publicity are closely analogous to the goals of patent and copyright law.⁹⁵ The copyright analogy is correct for the performance right of publicity, but not the identity right of publicity. The "*Cardtoons*" case dealt with the identity right of publicity. *Second*, the court closely followed in its analysis the U.S. Supreme Court decision *Acuff-Rose Music, Inc. v. Campbell*,⁹⁶ which dealt with the issue of fair use of a parody of copyrighted works. The U.S. Supreme Court reversed the Sixth Circuit's decision that the rap music group 2 Live Crew' song, "*Pretty Woman*," was not a fair use parody of the rock ballad "Oh Pretty Woman." The

92. The Court discussed the *economic* justifications (stimulating athletic and artistic achievement; promoting the efficient allocation of resources, and protecting of consumers) and *noneconomic* justifications (natural rights; securing the fruits of celebrity labors; preventing unjust enrichment; averting emotional harm). See for a discussion of these justifications *Chapter 7*.

93. See *supra*, § 7.1.

94. However, the *Cardtoons* district court's analysis is supported by Ellis, *The Right of Publicity and the First Amendment: a Comment on Why Celebrity Parodies are Fair Game for Fair Use*, 64 *U. Cin. L. Rev.* 575, at 603-608 (1996).

95. *Id.* 1994 U.S. Dist. LEXIS 16615, at 15.

96. 114 S.Ct. 1164, 127 L.Ed.2d 500, 29 U.S.P.Q.2d 1961; Copy. L. Rep. P27,222; 22 *Media L. Rep.* 1353 (1994).

Sixth Circuit found that the parody constituted an infringement of Acuff-Rose's copyright in the ballad because of the commercial nature of the parody song, which was sold for profit. The U.S. Supreme Court ruled the commercial nature of the rap song did not thereby mean that its use of another's copyrighted work is presumptively unfair. The commercial nature is only one element to be weighed in a fair use enquiry.⁹⁷ Therefore, the case was remanded to weigh the degree of copying. In following this decision, the *Cardtoons* Court did not discuss whether there is a difference between a media product, such as a song, as was the case in the Acuff-Rose case, and trading cards. *Third*, by omitting the second factor, defined as the interest protected by the right of publicity, the District Court discarded an important factor to be weighed.

I do also not agree with the analysis of the Tenth Circuit. The Court applied a two step test in which it balanced *Cardtoons'* First Amendment interests against the interests protected by the right of publicity. However, in my opinion, the outcome of this case seems not to be the result of the balancing of interests, but simply the result of the court's finding that trading cards are a traditional medium for disseminating information, which "regardless of their topic" deserve full First Amendment protection.⁹⁸ Then, the conclusion would in fact have been that the cards are media products. For such products there is no need for a parody exception, because use in connection with media products does not infringe the right of publicity. Courts are not allowed to use the alternative way argument in cases which involve a traditional medium of expression.

Some of the critics⁹⁹ of the *Vanna White* case have argued that an unpermitted use of identity in commercial advertisements should be allowed under the First Amendment if the commercial appropriator adds something of his

97. The Court ruled that in a copyright fair use enquiry, a parody's commercial character is only one element to be weighed and that the Sixth Circuit gave insufficient consideration to the nature of parody. The Court noted that the "fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use" [...] "But that is all, and the fact that even the force of that tendency will vary with the context is a further reason against elevating commerciality to hard presumptive significance. The use, for example, of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry, than the sale of a parody for its own sake, let alone one performed a single time by students in school." *Id.* 114 S.Ct. 1164, at 1174. The Court noted that the central purpose of the fair use enquiry is to investigate whether the use supersedes the objects of the original creation "or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." "[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Id.* 114 S.Ct. 1164, at 1174.

98. See *supra*, § 10.1[B].

99. See Barnett, First Amendment Limits on the Right of Publicity, 30 *Tort & Ins. L.J.* 635, at 657-661 (1995). Cf. Kozinsky, dissenting opinion in *White v. Samsung Electronics America Inc.*, 989 F.2d 1512, 26 U.S.P.Q.2d 1362, 21 *Media L. Rptr.* 1330 (C.A.9 1993); Lurie, Copyright In The Twenty-first Century: *Waits v. Frito-lay: The Song Remains The Same*, 13 *Card. Arts & Ent. L.J.* 187, at 214-216 (1994). Cf. *Cardtoons v. Major League Baseball Players Ass.*, --- F.3d ---, 1996 WL 490707; 39 U.S.P.Q.2d 1865 (C.A.10 1996): "We disagree with the result in that case for reasons discussed in the two dissents that it engendered."

own, some parodic or artistic wit: then the use is "transformative."¹⁰⁰ However, I agree with McCarthy who defended the outcome of the Vanna White case by replying that

"the First Amendment is stretched beyond recognition if it is read as permitting advertisers to use without consent anyone's identity to attract attention to commercial messages. Regardless of any incidental societal messages or attempts at humor, the paramount message of any advertisement is "buy", and that is why it is dubbed "commercial speech" and not given the same degree of immunity as political, social or entertainment speech."¹⁰¹

Should there be an exception for the use of extremely famous persons, whose persona has been transformed into a tool of communication, much like any other word in the dictionary? Madow argued that celebrities are significant symbols of our popular culture and, therefore, are appropriate targets of parodies and critical comment. He warned that the right of publicity might deprive the public of access to its collective *cultural icons*.¹⁰² Similarly Halpern stated that at a certain level of abstraction, the expressive content of a celebrity's persona may become evocative of some more general concept:

"At some point some aspect of a celebrity may transcend his own persona and become evocative of some more general, if not generic, concept. The issue may thus be not whether use of the identifier evokes the celebrity, but whether the particular use of the persona evokes a broader concept that is properly a part of the public domain and therefore not within the right of publicity."¹⁰³

Jollymore went even further, and argued that the right of publicity should expire and revert to the public domain when a living or deceased person's persona becomes a convenient shorthand communication for a concept, an historical era, or even a symbol for a character, even this person objects the unpermitted commercial use of his identity:

"At some point in time, certain celebrities cease to be mere persons and are anointed, in effect, as cultural icons by virtue of their notoriety and renown. Some of these icons, at some other point in time, become such a locus of reference in contemporary communication that mere invocation of their name or image conveys meaning. It is at that point that the right of publicity should expire."¹⁰⁴

In his opinion, advertisers should have a right to use famous personas to "convey meanings which would otherwise take volumes of words to explain."¹⁰⁵ As

100. See *Acuff-Rose Music, Inc. v. Campbell*, 114 S.Ct. 1164, at 1174, discussed *supra*.

101. McCarthy, Commentary: Is Vanna White Right and Judge Kozinsky Wrong? *Ent. L. Rep. Sept.* 1993, at 1.

102. Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 *Cal. L. Rev.* 127, at 136-147 (1993). Cf. Pemberton, The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity, 27 *U.C. Davis L. Rev.* 97 at 118-119 (1993).

103. Halpern, The Right of Publicity: Commercial Exploitation of the Associative Value of Personality, 39 *Vand. L. Rev.* 1199, at 1254-1255 (1986).

104. Jollymore, Expiration of the Right of Publicity - When Symbolic Names and Images Pass Into the Public Domain, 84 *Trademark Rep.* 125, at 141 (1994).

105. *Id.* 84 *Trademark Rep.* 125, at 125 (1994).

examples of persons with such a persona he suggested Babe Ruth ("nearly synonymous with home run hitting prowess"), Marilyn Monroe, Martin Luther King Jr., and (then living) Richard Nixon and Muhammed Ali.¹⁰⁶

"If, for example, a court declared that Marilyn Monroe was a symbol and that her persona had passed into the public domain, her image could be used for a destination travel advertisement for Hollywood. If a court found that Richard Nixon's persona had expired, his photo might be used [...] for an ad for non-erasable dictation equipment."¹⁰⁷

I do not agree with Jollymore's argument. To me it seems possible to advertise a destination travel for Hollywood without Monroe's name. Similarly it is possible to advertise non-erasable dictation equipment without the identity of Nixon. Therefore, I do not see why advertisers need to use their personas to sell their commercial products or services. Everyone should have a right to use the names of Marilyn Monroe or Nixon in a communicative way in a media product. But in connection with commercial products or services, the right of publicity prevails.¹⁰⁸ If Jollymore's argument were valid, advertisers could also argue that they have the right to use famous marks because of their symbolic meaning. In trademark law this argument has been rejected.¹⁰⁹

However, it seems wise not to exclude the possibility of a parody exception. There may be situations that a parody exception can be justified as a corollary of the factual information exception in connection with semi-media products.¹¹⁰ If such an exception is recognized, it should be narrowly construed. For example, if a parody of an artist's work on a T-shirt also identifies the artist himself, a parody exception may be justified.¹¹¹ The examples given by Jollymore are no such exceptions.

[4] De Minimis Use Exception

Some courts have held that a mere incidental commercial use of a person's identity is not actionable. For example, in *Moglen v. Varsity Pajamas, Inc.*,¹¹² the plaintiff, who described himself as the "No. 1 tennis player for Columbia College," had once played and lost a match at a tournament in Kingston, Jamaica. A Kingston newspaper published an accurate and truthful account of the

106. *Id.* 84 *Trademark Rep.* 125, at 146 and 150 (1994).

107. *Id.* 84 *Trademark Rep.* 125, at 150 (1994).

108. On the condition that the postmortem right of publicity did not lapse because of its durational limit. This argument is similar to the "alternative way" which cannot be applied when a persona is used in the context of noncommercial speech. If the speech is commercial, the argument is valid. See § 9.3[B][2] and § 9.4[D][2].

109. See § 7.3[C][3] regarding the "aesthetic functionality" doctrine. Cf. Webner, *The Right of Publicity: A Commercial Property Right- Not a Privacy Right*, 84 *Trademark Rep.* 586, at 596 (1994).

110. Cf. *Cartoons v. Major League Baseball Players Ass.*, --- F.3d ---; 1996 WL 490707; 39 U.S.P.Q.2d 1865 (C.A.10 1996), discussed supra, if the court had not found that trading cards are a media product.

111. Cf. *Hughes v. Plumsters*, 11 U.S.P.Q.2d 1573, 17 *Media L. Rep.* 1186 (D.C. N.Cal. 1989); California right of publicity statute Cal. Civ. Code § 990, may be unconstitutional to action by deceased artist's estate against production and sale of a T-shirt, if defendants show that T-shirt is a parody of the artist's work.

112. 13 A.D.2d 114, 213 N.Y.S.2d 999 (N.Y.A.D. 1961).

match. One of the defendants manufactured a fabric which reproduced an irregular torn-out portion of that newspaper article. The other defendant used this fabric in making and selling underwear and pyjamas. The plaintiff claimed appropriation of his name. The court rejected his claim. It found that the article occupied probably seven or eight percent of the area of the fabric, which also contained portions of two other articles. None of the articles could be read fully. It took close and careful inspection to find plaintiff's name. The court said:

"The pattern of the newspaper page as a patch in the fabric, taken in its entirety, is incidental to the design of the fabric; and the articles which are in the portion of the page, seem a mere choice of hazard and to have themselves no rational significance in the design or in promoting the sale of the fabric. Even more casual and incidental than the articles is the appearance of plaintiff's name in the text."¹¹³

However, Justice Steuer dissented because "[w]here the article refers to the plaintiff specifically and concerns him [...] the use is not incidental and it may reasonably be inferred in this case that the printing was designed for the sole purpose of soliciting customers for defendants' products."¹¹⁴

The de minimis use exception, or incidental use exception, is only relevant in cases where the plaintiff is identifiable from defendant's use in connection with (advertising of) nonmedia products. If such an exception is recognized, how far should it extend?

Nowadays, it is relatively simple to manipulate photographs with the help of computer techniques.¹¹⁵ Therefore, in my opinion, advertisers should be obliged to make the persons who involuntarily appear in their advertisements unrecognizable. If the identity of a specific person is not relevant to an advertiser, then the identifying characteristics should be discarded. From the fact that an advertiser did not want to make the plaintiff unrecognizable, it can be inferred that the name of the plaintiff had a value for the defendant, for which it did not want to pay. Therefore, I agree with the dissenting opinion of Justice Steuer that the use of the name of a tennis player on a pyjamas was not incidental.

Given the simple techniques to make persons unrecognizable, I find it hard to think of examples of unpermitted use of a person's identity in connection with (advertising for) nonmedia products or services, where the de minimis exception will be applicable. One could argue that the exception should apply to pictures of a group of persons, for example a picture taken during a sports game in a stadium. However, in recognizing such an exception, one should realize that such a group photo could be retouched so as to make the faces unrecognizable.¹¹⁶

An example of a de minimis use could be the use of statistical data in a board game, if this game is not centered around specific persons. The use of one

113. Id. 13 A.D.2d 114, at 116.

114. Id. 13 A.D.2d 114, at 117-118.

115. See § 11.5.

116. See McCarthy, *The Rights of Publicity and Privacy*, § 4.12[F](3), discussing group scenes in commercial advertisements.

question card, out of many cards, which refers to specific statistical data about a person should be considered *de minimis*.

[5] Exhaustion

The right of publicity is exhausted with respect to products after their first proper (first) sale into commerce. The right of publicity owner cannot prevent the further trade of these products.¹¹⁷ But the use of such products to advertise other products is not exhausted.¹¹⁸

The question remains whether the scope of exhaustion is national or international. In my opinion, the exhaustion rule should only have a national effect because the exploitation of a person's identity can be frustrated by the international exhaustion rule, for example, if the products which are brought into circulation with permission in different countries are of a different quality. However, under influence of international treaties, the territory scope of exhaustion can become wider.¹¹⁹

117. See § 2.6[A] and § 4.5[A][2].

118. See Pres. District Court Haarlem, June 26, 1974, NJ 1974, 415; BIE 1977, nos. 3 and 4, at 11 and 13 ("*De slag om het voetbalgoud I en II*"): Use of book about with picture of plaintiffs to sell alcoholic beverage is infringement of commercial portrait right. See § 4.5[A][2]. But see *Randall v. Demille*, 21 Media L. Rptr. 1362 (N.Y. Sup.Ct 1992): author's allegations that a bookstore placed her book next to the novel published by defendant for purposes of promoting defendant's novel without her consent does not give rise to cause of appropriation under New York Civil Rights Law § 50 and § 51.

119. Article 6 of the Agreement on Trade-Related aspects of Intellectual Property rights, including trade in counterfeit goods (TRIPS-Agreement) provides that "[f]or the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 above nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights." However, since the Netherlands is a member of the European Union (EU) and European Economic Area (EEA), the right of distribution should be exhausted in the Netherlands upon first sale in any other member country. See Articles 30, 34 and 36 EU-Treaty (Treaty of Rome) in conjunction with jurisprudence of the EU Court of Justice (ECJ) mentioned *supra*, in § 4.5[A][2], Articles 11, 12 and 13 of the EEA Agreement, and Article 2 Protocol 28 of the EEA Agreement, which provide that the EU rules and ECJ jurisprudence on exhaustion of intellectual property rights will apply equally in the EEA. However, an exception to this principle should be recognized if the goods are imported from a member state that does not grant a similar protection: See ECJ May 17, 1988 (Case 158/86), Jur. ECJ 1988, 2605; NJ 1990, 246; AA 1990, at 176 (HCJ); AMI 1990, at 28 (HCJ); TVVS 1989, 318 (MRM) (*Warner Brothers/Christiansen*): A copyright owner may properly oppose the hiring out of a video cassette in a Member State where legislation entitles him to restrict this, even though it was placed on the market and purchased in another Member State that did not recognize such rental right. Cf. ECJ January 24, 1989 (Case 341/87), Jur. ECJ 1989, 791; NJ 1990, 558; AA 1990, at 550; AMI 1989, at 83 (HCJ) (*EMI Electrola/Patricia*): A copyright owner may properly resist the import of goods in one Member State where the work is in copyright even though the goods were previously marketed lawfully (without his consent) in another Member State where copyright protection has expired.

10.2 Use of Identity in Advertisement for Commercial Merchandise and Services: Advertisement for Nonmedia is Infringement

[A] Introduction: Advertisement for Nonmedia Products

Most of the right of publicity cases deal with advertising for nonmedia products. *Supra*,¹²⁰ it was stated that an unpermitted use of someone's identity in an advertisement for commercial merchandise will infringe the rights of the plaintiff under both American and Netherlands law. An advertisement for nonmedia products is a form of commercial speech, which receives a lower protection by the principles of the freedom of First Amendment. The interest of the right of publicity owner to control the use of his identity outweighs the interest of the commercial speaker to use the identity without permission.¹²¹

In most cases, it is directly clear that defendant's use is an advertisement for nonmedia products. Most advertisements are made public in clearly marked advertising parts of media products, such as newspapers, magazines, or radio and television programs. For example, in the "*Bette Midler*" case, it was clear that defendant had aired a commercial for the Ford Lincoln Mercury. The issue was whether Midler's right of publicity could be infringed by a voice-alike.¹²² In the "*Motschenbacher*" case, defendant had used the car of Lothar Motschenbacher in a television commercial for Winston cigarettes. The issue was whether use of his car could infringe his right of publicity.¹²³

However, if an advertisement also contains a discussion of a matter of public interest, the question arises whether defendant's speech must be treated as a commercial advertisement or fully protected speech. Two situations can be distinguished: defendant's message is presented as a commercial advertisement, but includes some other newsworthy matter, and a message which is presented as a newsworthy story, but which according to the plaintiff is in fact "advertising in disguise".

[B] Advertisement or Noncommercial Speech?

[1] Advertisement Including Speech

An advertiser cannot avoid liability for infringement of the right of publicity by simply adding to its advertisement for its nonmedia product some commentary on matters of public interest. The U.S. Supreme Court made clear "that advertising

120. In § 2.6[A][2] and § 4.5[C][2][b].

121. See § 9.4[D].

122. *Midler v. Ford Motor Co., Motor Co.*, 849 F.2d 460, 1988 Copr.L.Dec. P 26,313, 7 U.S.P.Q.2d 1398 (C.A.9 1988), discussed at § 3.3[C][4].

123. *Motschenbacher v. R. J. Reynolds Tobacco Co.* 498, F.2d 821 (C.A.9 1974), discussed at § 2.3[C][5].

which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech."¹²⁴

In *Flores v. Mosler Safe Co.*,¹²⁵ the New York Court of Appeals held that Flores stated a claim for appropriation of his name under New York Civil Rights Law, because the defendant, who sold safes, had reprinted in its advertisement a news account about him. The advertisement consisted of a reprint of a news article with a photograph which had appeared in *The New York Times*. The photo was an eye-catching picture of a burning building. The news report told the story of Flores, a motel keeper, and a second man, who was the lessee of the property. While Flores was returning merchandise to the lessee, the lessee dropped his keys and, there being no illumination, both men started lighting matches to find the key. One of the matches ignited nylon netting and started the fire. Flores' name was mentioned three times. Under the reprint, the defendant, Mosler Safe, urged readers to protect their business records from destruction by fire by the use of one of its safes. Mosler Safe defended that it had the right to mention the news report, that Flores' name was merely an incidental mentioning of this report, that his name did not appear in the advertisement material, but in the original news account of the fire, and that there was no implication that Flores endorsed the product. The Court of Appeals rejected all defenses, stating that "the fact remains that defendant freely and deliberately chose to adopt and reprint the entire original photograph, captions, and the news account which contained plaintiff's name in its circular."¹²⁶ The court agreed with Flores that Mosler Safe could have cut out the parts which identified him.

[2] Advertisement in Disguise: Test for Commercial speech

More complicated is the situation where defendant's message is not made public as an advertisement. It could be a newsworthy or entertaining story. Then, unpermitted use of plaintiff's identity is protected by the principles of free speech. But it could also be that the message is in fact an advertisement for defendant's nonmedia product, even though it is presented as noncommercial information. What on its face appears to be only a news story is in fact an advertisement in disguise, a subterfuge or cover for a commercial advertisement.

The difference from the former situation of an advertisement for a nonmedia product which includes some (reprint of) news, is that in this case the assumption will be that plaintiff's identity is used in a fully protected speech. The plaintiff bears the burden of proof that defendant's speech is in fact commercial speech. The U.S. Supreme Court, while admitting that it is a "common

124. *Boiger v. Youngs Drug Products Corp.*, 463 U.S. 60, at 67-68, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983), quoting *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, at 563, fn. 5, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Cf. *Fargo Women's Health Organization, Inc. v. Larson*, 381 N.W.2d 176, at 181 (N.D. 1986): "It is well settled that advertisers cannot, by merely including references to public issues or public debate, thereby take their advertisements out of commercial speech and into the area of fully protected speech." See discussion at § 9.2[C][4][c].

125. 7 N.Y.2d 276, 196 N.Y.S.2d 975, 164 N.E.2d 853 (1959).

126. *Id.* 7 N.Y.2d 276, at 284.

sense distinction,¹²⁷ has provided some guidelines on how to decide whether speech must be categorized as commercial or noncommercial speech.

In *Bolger v. Youngs Drug Products Corp.*,¹²⁸ the U.S. Supreme Court held that pamphlets, mailed to the general public by a contraceptives manufacturer, which contained references to its products, were a form of commercial speech, even though they also contained discussions of important public issues such as venereal disease and family planning. The traditional definition of commercial speech as speech which does "no more than propose a commercial transaction,"¹²⁹ did not apply, because Youngs' informational pamphlets could not be characterized merely as proposals to engage in commercial transactions. The Court mentioned three factors for its conclusion that the pamphlets constituted commercial speech:

- 1) Youngs paid for its message to be made public. Therefore, the pamphlets were conceded to be paid advertisements;
- 2) The message referred to specific products or services of Youngs; and
- 3) Youngs had an economic motivation for mailing the pamphlets.

The Court stated that each factor in itself would clearly be insufficient to turn the speech into commercial speech. The mere fact that speech is made public in the form of a paid advertisement does not compel the conclusion that it is commercial speech.¹³⁰ Similarly, the reference to a specific product does not in itself render a message commercial speech. For example, business section editorials or business section news reporting in a newspaper is noncommercial speech, even if its effect will be the promotion of the demand for a specific product or service.¹³¹ And a speaker's economic motivation or self-interest does in itself not reduce the level of constitutional protection.¹³² But the combination of the three characteristics provided a "strong support" for a commercial speech characterization.¹³³ Therefore, "commercial speech may be broadly defined as an express-

127. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, at 637, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985).

128. 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983).

129. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, at 385, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973).

130. *New York Times v. Sullivan*, 376 U.S. 254, at 266, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); paid advertisement soliciting financial support for political cause was held to be noncommercial speech. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, at 761, 96 S.Ct. 1817, 48 L.Ed.2d 346, 1 Media L. Rep. 1930 (1976): "speech does not lose its First Amendment protection because money is spent to project it, is in a paid advertisement of one form or another."

131. *Cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, at 761, 96 S.Ct. 1817, 48 L.Ed.2d 346, 1 Media L. Rep. 1930 (1976).

132. *Id.* 425 U.S. 748, at 761: if it were, most books and newspapers would consist of commercial speech; *Bigelow v. Virginia*, 421 U.S. 809, at 818, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).

133. *Id.* 463 U.S. 60, at 67. *Cf. Kabel, Uitingsvrijheid en absolute beperkingen op handelsreclame*, at 26-27 (1981) lists the following six features of commercial (consumer) advertising: 1) the announcement is made public; 2) the announcer has an individual independent interest in the audience helping to realize the purpose of the announcement; 3) the content of the announcement refers to specific (material) products or services; 4) the announcer (or its principal) markets such goods or services in a systematic manner (by professional or industrial means); 5) the purpose of the announcement is to establish a preference for products or services named in the announcement, or to reinforce an existing preference; 6) the recipients of

ion related to the economic interests of the speaker and its audience, generally in the form of a commercial advertisement for the sale of goods and services."¹³⁴

A court must look at the nature of the speech taken as a whole.¹³⁵ But in *Board of Trustees of State University of New York v. Fox*,¹³⁶ the U.S. Supreme Court held that AFS' "Tupperware" parties at a party hosted in a student dormitory constituted commercial speech, since they proposed commercial transactions. The Court rejected the Fox' position that the commercial speech was inextricably intertwined with other noncommercial speech about subjects, such as how to be financially responsible and run an efficient home, and therefore in its entirety had to be classified as noncommercial speech. The Court stated that "[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares."¹³⁷

If a plaintiff in a right of publicity case claims that defendant's message is in fact an advertisement in disguise for nonmedia products, a court cannot simply refer to the media context of defendant's use, but must analyze the content of the speech. Courts are not inclined to conclude that a story in a magazine is not a matter of public interest, but in fact a cover for a commercial advertisement. The fact that the unpermitted use of a person's identity has an incidental promotional effect upon the sale of the media product alone does not give rise to liability for identity of the right of publicity.¹³⁸ It is not possible to draw a clear line between an incidental promotional effect and an incidental public interest effect of a message in a media product. Therefore, the media publisher gets the benefit of the doubt. The right of publicity plaintiff bears a heavy burden to prove that defendant's is in fact commercial speech.¹³⁹ As a result, there are only very few cases in which a court did conclude that a story in a magazine was in fact an actionable advertisement.

One of the first cases which recognized the advertisement in disguise exception is *Griffin v. Medical Soc. of New York*,¹⁴⁰ which involved the publi-

the announcement perceive it as one directed to them in their capacity as consumers of the goods or services concerned. This definition is provided in a discussion of anti-speech restrictions of commercial advertising. Because of the sixth element, his definition seems less suitable to distinguish advertisements in disguise.

134. *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, at 933, 14 U.S.P.Q.2d 1257, 17 Media L. Rep. 1681 (C.A.3 1990): Statements which advertise health insurance services in media is commercial speech since they were advertisements, specifically referred to a product, were motivated by desire for revenue, and were not susceptible to "chill." Such statements are not entitled to protection of heightened actual malice standard in defamation case.
135. *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, at 796, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988).
136. 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388, 1989-1 Trade Cases P 68,637 (1989).
137. *Id.* 492 U.S. 469, at 474.
138. See § 10.3[B][1].
139. Cf. *Grant v. Esquire, Inc.*, 367 F.Supp. 876, at 879 (D.C.N.Y. 1973): "Plaintiff contends, however, that he should be allowed to prove that defendants had some covert arrangement with each other which converted the [...] article into a paid advertisement for the co-defendant forum. As to that, it seems highly unlikely-- in light of the detailed affidavits submitted by defendants on this motion-- that plaintiff will be able to establish such a contention."
140. 7 Misc.2d 549, 11 N.Y.S.2d 109 (1939).

cation of before-and-after photographs of the plaintiff as part of an article on "Saddle Nose" in a medical magazine. The plaintiff stated that defendants, who were doctors, had used his photographs "for advertising purposes, or for the purposes of trade."¹⁴¹ The defendants contended that the photographs were used solely for scientific purposes. The court denied defendant's motion to dismiss, holding that it was an issue for the jury to investigate whether the "article [...] may be nothing more than someone's advertisement in disguise,"¹⁴² because it might fairly be inferred from the complaint that the article and photographs were published to advertise the doctors and their handiwork.

In *Selsman v. Universal Photo Books, Inc.*,¹⁴³ defendant had published a "Minox Manual," in which a photograph of the plaintiff, an actress and model, appeared, while she was focusing a Minox camera. Under the photograph was written: "While on location, shooting the Walt Disney motion picture 'The Light in the Forest,' star Carol Lynley and the film's promotion director took over a hundred Minox pictures, of which these are representative." The "Minox Manual" expounded the versatility, effectiveness and virtues of the Minox camera. The plaintiff claimed that defendant had used her name and picture "for advertising purposes or for the purposes of trade" without permission. The defendant stated that the inclusion of her picture was intended to show another use of the Minox camera for existing owners, along with other usages as covered throughout the book, that the whole tone of the book was to maximize the satisfaction to be derived by those who are already owners of the camera, and that the manual, which was sold at \$5.00 per copy, was likely to be bought only by owners of a Minox, and therefore did not advertise the Minox camera. The court rejected this defense because the publication had a value in the sale of accessories and additional cameras. It found that in the light of its content, concerned solely with the Minox camera, the evident purpose was to extol the virtues not of miniature cameras generally, but of the Minox camera in particular. The court stated:

"Although in a broad sense the manual serves an educational purpose, nevertheless it does advertise the Minox camera. The ultimate objective of commercial advertising is to educate the public as to the advantages and virtues of commodities and thereby stimulate demand therefor."¹⁴⁴

In *Sinatra v. National Enquirer, Inc.*,¹⁴⁵ Frank Sinatra claimed that an article in *National Enquirer* about defendant, "*Clinic La Prairie*," a Swiss medical clinic, infringed his right of publicity. The article, entitled "*Sinatra Injected with Youth Serum*," falsely stated that Sinatra visited and was given youth regeneration treatments at the Clinic. After this publication, the Clinic did not want to

141. New York Civil Rights Law, §§ 50, 51.

142. *Id.* 7 Misc.2d 549, at 550.

143. 18 A.D.2d 151, 238 N.Y.S.2d 686 (1963).

144. *Id.* 238 N.Y.S.2d 686, at 687 (1963). In his dissenting opinion, Justice Rabin suggested that the use made of plaintiff's name and picture was -in the overall context of the book- so incidental as not to constitute commercial use. *Id.* at 688.

145. 854 F.2d 1191, 15 Media L. Rep. 1949 (C.A.9 1988).

deny the reported facts, but stated that the wording of the article "protects the Clinic." Later it came out that when representatives of the Enquirer contacted the Clinic inquiring about an alleged visit by Sinatra, the Clinic had offered not to deny the false statements if the Enquirer would send an editor to Switzerland to do a full feature on the Clinic. The Clinic essentially viewed the article as a free advertisement that could reach between five million and twenty million people in its target market. The court concluded that the Clinic concocted a false story as part of its effort to solicit clients through the use of American media and advertising:

"The defendant, although lacking complete control over dissemination, intentionally used another's name for the defendant's commercial benefit."¹⁴⁶

In a Dutch case, a cantonal court held that the publication of an interview with a picture of the plaintiff, Haye van der Heyden, in the magazine ELLE, constituted an infringement of his commercial portrait right. During the interview, Van der Heyden was asked to put on other clothes to get a better picture for the publication. The picture was published with the names of the shops that sold the clothes Van der Heyden was wearing. The court found that use of a picture of Van der Heyden in connection with the names of the shops constituted a commercial advertisement. The court rejected the magazine's defense that Van der Heyden must have understood that the names of the shops would be mentioned in exchange for the clothes.¹⁴⁷

However, in the majority of case law, plaintiff's allegation that defendant's article is an advertisement in disguise is rejected. For example, in *Pagan v. New York Herald Tribune, Inc.*,¹⁴⁸ the picture of two boys playing on a beach was published in a magazine supplement circulated with the Sunday edition of the New York Herald Tribune, in connection with an article on fashion. The plaintiffs argued that the article was in fact an advertisement for the products discussed in it. But court concluded that the publication was a dissemination of fashion news of legitimate public interest, notwithstanding the fact that the name of Lord & Taylor, a constant advertising client of defendant Herald Tribune, was mentioned.¹⁴⁹

The fact that a media publication about products also mentions trademarks does not change it in an advertisement. In *Lopez v. Triangle Communications, Inc.*,¹⁵⁰ a publication in "Seventeen" magazine, which featured a "make-over"

146. *Id.* 854 F.2d 1191, at 1192. The Ninth Circuit affirmed the district court's judgment in Sinatra's favor, awarding \$350,000 in compensatory damages and \$100,000 in punitive damages.

147. Cantonal Court Amsterdam, August 7, 1991, AMI 1991, 207 (*Van der Heyden/Hachette*).

148. 32 A.D.2d 341, 301 N.Y.S.2d 120 (1969), *aff'd* 26 N.Y.2d 941, 310 N.Y.S.2d 327, 258 N.E.2d 727 (N.Y. 1970).

149. *Cf. Everett v. Carvel Corp.*, 70 Misc. 734, 334 N.Y.S.2d 922 (N.Y. Sup. 1972): publication in defendant's newspaper of a photograph of the plaintiff eating an ice cream cone with a caption underneath that the infant plaintiff was the 10,000th visitor to attend the children's ice cream manufacturing tour sponsored by the other defendant Carvel Corporation, held to be non-actionable publication of news item, not an advertisement.

150. 70 A.D.2d 359, 421 N.Y.S.2d 57, 5 Media L. Rep. 2039 (N.Y.A.D. 1979).

section in which teenagers were given makeup, clothing, and hairstyling, and in which "before-and-after" pictures were published, was held to be a newsworthy article. The fact that the article included a discussion of the brand names of products which were used, and that the same issue contained an advertisement of a company, one of whose products was mentioned, did not change the article to an advertisement. The court stated that the article was prepared wholly without regard to advertising, and that brand names were customarily described as a service expected by readers.¹⁵¹

It seems to me that the essence of the advertisement in disguise claim should be that the content of the media publication is influenced by the wish to promote defendant's nonmedia products or services. The best way to show this influence is to prove that the defendant paid or otherwise favored the publisher in exchange for the media attention. The "*Sinatra*" case is a good, but exceptional, example.

See, for the question whether a non-infringing documentary can be transformed into an advertisement for commercial products when sponsored and shown by a corporation which produces nonmedia products, § 10.3[B][3].

10.3 Use of Identity in Media Products: No Infringement

[A] Introduction

Use of identity in a media product can defame the plaintiff's reputation, or invade his privacy, but does not infringe the right of publicity. The definitional rule which emerged from the context test is that only commercial use infringes the right of publicity, not communicative use: the right of publicity will not be infringed if defendant has used plaintiff's identity in a *media product*, such as a television show, radio broadcast, performance, play, book, disc, pamphlet, magazine, newspaper, musical composition, motion picture, video tape, etc., unless it is an advertisement (in disguise) for nonmedia products.¹⁵²

This rule is not limited to non-fictional (newsworthy) stories, but also applies to fictive or entertaining, because both forms of speech are protected by the principles of free speech. The interests in enlightenment and self-development of the speaker outweigh the interests protected by the right of publicity owner.¹⁵³ This rule conflicts with the decisions of courts in both the United States and the Netherlands, which have held that unpermitted use of identity in

151. *Cf. Stephano v. News Group Publications, Inc.*, 98 A.D.2d 287, at 297, 470 N.Y.S.2d 377 (N.Y.A.D. 1984), rev'd 64 N.Y.2d 174, 485 N.Y.S.2d 220, 474 N.E.2d 580 (N.Y. 1984): "The use of the brand name, price and available sources to purchase the clothing did not detract from its informational purpose but rather added to that purpose. Readers of magazines and newspapers expect to be informed not only of the latest movies, plays, restaurants, styles of clothing, etc. They expect and are told where the movie or play can be seen, where and how delicious (or ill-prepared) the food is at the latest most popular dining place. Certainly, they expect to be told which clothing will soon become stylish and where it can be bought. This sort of featured item may be found in virtually every newspaper and periodical today". (Dissenting opinion, Justice Asch).

152. See for the distinction of media products and nonmedia products §§ 10.1[A] and 10.1[B].

153. See §§ 9.2[C][3], [5] and [6].

the media can infringe the commercial interests of the plaintiff.¹⁵⁴ In this paragraph this case law will be analyzed.

[B] Commercial Media

[1] Media for Profit

Why is use of someone's identity in a media product a non-infringing use, and not a form of commercial use if the media operate for profit? For freedom of information, ideas, and entertainment, our society relies primarily on privately owned communication media, operating at private cost and seeking private profit, notwithstanding government regulation. Most of the media products, such as radio or television broadcasts, books, newspapers, magazines, films and shows are produced and distributed at private cost and for private profit. Therefore, the mere fact that a medium operates for profit does not exempt it from the constitutional free speech protection. This rule is generally accepted in both the United States¹⁵⁵ and the Netherlands.¹⁵⁶

It would clearly be an unconstitutional interference with the freedom of speech if a court held that use of a person's identity in a media product is actionable as commercial use solely because it was produced for profit. Even the fact that magazines frequently divide up articles into two or more parts, placing one part at the front and the rest in later parts, in order to force the reader's attention to later portions of the magazine and advertisements therein that the reader might not normally see, does not affect the protection by the freedom of speech.¹⁵⁷

154. See § 2.6[A][3] and § 4.5[C][2][c].

155. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, at 501-502, 72 S.Ct. 777, 96 L.Ed. 1098 (1952): the First Amendment is not limited to those who publish without charge: "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Id.* *New York Times Co. v. Sullivan*, 376 U.S. 254, at 266, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964); *Time, Inc. v. Hill*, 385 U.S. 374, at 397, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967).

156. ECHR, May 22, 1990, para. 47, Pub ECHR Series A no. 178; NJ 1991, 740 (EAA) (*Autronic/Zwitzerland*): "In the Court's view, neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Art. 10. The Article applies to 'everyone', whether natural or legal persons. The Court has, moreover, already held on three occasions that it is applicable to profit-making corporate bodies [Cit. omitted]." *Id.* ECHR, February 24, 1993, para. 35, Pub ECHR Series A no. 285; NJ 1994, 518 (*Casado Coca/Spain*) stating "that Article 10 guarantees freedom of expression to 'everyone'. No distinction is made in it according to whether the type of aim pursued is profit-making or not [...]."

157. *Cf. Ann-Margret v. High Soc. Magazine, Inc.*, 498 F.Supp. 401, at 406, 208 U.S.P.Q. 428, 6 Media L. Rep. 1774 (D.C.N.Y. 1980): "is well established that simple use in a magazine that is published and sold for profit does not constitute a use for advertising or trade sufficient to make out an actionable claim, even if its "manner of use and placement was designed to sell the article so that it might be paid for and read." (Cit. omitted).

[2] Commercial Media Products?

Due to the technological development of the communications industry, the variety of media products is rapidly growing. Some media are more profitable than others. This provides an opportunity to raise the alternative way argument. If defendant used plaintiff's identity in a commercial medium, for example pay television, could the plaintiff rebut a freedom of speech defense with the argument that the defendant could have used an alternative, less-commercial medium?

This argument has been raised in the *"New Kids on the Block"* case.¹⁵⁸ The defendants had published "articles" in their newspapers, USA Today and Star Magazine, in which they announced that it would conduct a survey to find out who was the most popular or sexiest of the five members of the music group New Kids on the Block, and asked the readers to call a 900 number¹⁵⁹ for voting. Callers who phoned USA Today were charged 50 cents per minute.¹⁶⁰ Readers of Star Magazine were asked to cast their vote at a charge of 95 cents per minute. When a reader called Star Magazine's 900 number to name the sexiest New Kid, the magazine also advertised its "Star Magazine's Entertainment Trivia Game," a separate 900 number service. The New Kids claimed infringement of their right of publicity, stating that the magazine "articles" were advertisements for a collateral commercial product, the 900 number service. The New Kids argued that defendants could have used an 800 number, but instead used a 900 number to commercially misappropriate the value of their identity. The defendants stated that their use of the New Kids name and likeness was protected by the First Amendment since it was related to constitutionally protected news gathering and dissemination. The District Court admitted that

"[p]laintiffs have raised an interesting issue in that the 900 number services could be construed as a commercial enterprise as distinguishable from the commercial enterprise of running the publication itself."¹⁶¹

The court did not follow this argument in this case. It applied the context test of *Felcher and Rubin*,¹⁶² stating that if the purpose of the defendant's use is "informative or cultural" the use is immune. It found that the use of the New Kids name was related to the constitutionally protected activity of news gathering and dissemination and therefore constitutionally protected. The court noted that First Amendment protection does not hinge upon whether or not an activity is profitable or unprofitable. The Ninth Circuit affirmed without discussing the question raised by the New Kids. It simply held that the New Kids' right of

158. *New Kids on the Block v. News America Publishing Inc. d/b/a Star Magazine*, 745 F.Supp. 1540, 16 U.S.P.Q.2d 1283, 18 Media L. Rep. 1089 (C.D.Cal. 1990), *aff'd* 971 F.2d 302, 23 U.S.P.Q.2d 1534, 20 Media L. Rptr. 1468 (C.A.9 1992).

159. Cf. *In the Netherlands: 06-telephone numbers*.

160. USA Today stated that its profits from this phone line would go to charity. *Id.* 20 Media L. Rptr. 1468 at 1469.

161. *Id.* 745 F.Supp. 1540, at 1546.

162. See § 9.3[C](1).

publicity claims were barred by Cal. Civ. Code § 3344(d), which exempts from liability any use "in connection with any news, public affairs, or sports broadcast or account." According to the Court of Appeals this exemption "is designed to avoid First Amendment questions in the area of misappropriation by providing extra breathing space for the use of a person's name in connection with matters of public interest."¹⁶³

Some authors have criticized the outcome of this case. According to Piccionelli,¹⁶⁴ the newspaper "articles" were unpermitted advertisements for commercial 900 numbers. The newspapers could have used an alternative medium. Technologically, anything that can be done by a 900-number service can also be done by using a free 800-number or standard telephone service. In my opinion, the question whether the articles in USA Today and Star Magazine infringed the New Kids' right of publicity depends on the status of the 900 number service: is the operation of a 900 number service a form of commercial use which infringes the right of publicity, or a form of media use which is protected by the freedom of speech principles? Only in the first case, could the articles have been actionable as an advertisement in disguise for a commercial product. In a dictum, the district court stated about this question, raised by the position of the New Kids:

"Had the plaintiffs shown that USA Today or Star Magazine began running a 900 number in a manner that was wholly unrelated to news gathering and reporting, the First Amendment would provide no protection. For example, if the defendants provided 900 number services that had no relation to any proposed article or continued running the 900 number service past the time of the publication of the article, plaintiffs could sustain their burden of showing that a defendants' use of the New Kids name was not related to a protected First Amendment activity and constituted commercial exploitation."¹⁶⁵

The district court seems to say that use of the New Kids' identities in a 900 number is a form of commercial exploitation which infringes their right of publicity. Only in this case, the exploitation was permitted, because it was related to news gathering and did not continue after publication of the gathered information.

I have some difficulty with this position. *First*, it seems clear that a 900 number service is a medium to communicate and receive information. It is a media product, not a nonmedia product. Like most of the other media products, such as the USA Today and Star Magazine papers, a 900 number service is operated for profit. The New Kids and the district court seem to say that it is unlawful to use the most profitable medium, or that there is an obligation to use the least commercial medium. If the defendant chooses to use the plaintiff's identity in a 900 number service, it will infringe the right of publicity because it

163. *Id.* 20 Media L. Rptr. 1468, at 1474, fn. 10.

164. News Gathering, Intangible Property Rights And 900-Line Telephone Services: One Court Makes a Bad Connection, 11 *Loy. L.A. Ent. L.J.* 535, at 552-553 (1991). *Id.* Frisch, New Technologies on the Block, 10 *Card. Arts & Ent. L.J.* 51, at 66 (1991). *Cf.* Baker, 1-900 New Kids: The Clash between Newsgathering and the Right of Publicity, 2 *J. Art & Ent. L.* 1 (1991).

165. *Id.* 745 F.Supp. 1540, at 1547.

could also have used a standard telephone service. Such a rule is only tenable if one provides a clear criterion for distinguishing exploitative media such as a 900 number service from other media which are protected by the freedom of speech. The district court nor the New Kids provided such a criterion.¹⁶⁶ Therefore, the rule seems unsound as long as we do not have a clear criterion for distinguishing the different media. The profit motive of the media in itself cannot be such a criterion, since a profit motive does not exempt the media from the constitutional free speech protection.

Second, how can one use the identity of the New Kids in a 900 number service in a way wholly unrelated to news gathering and reporting? According to the district court, running a 900 number service past the time of the publication of the article could be a form of commercial exploitation. But if one agrees with my first point that a 900 number service, in principle, deserves the same protection as other media, then reporting of both news and entertaining information about the New Kids will be protected by the freedom of speech.

However, under influence of the technological development of the communications industry, the question whether certain new commercial media must be distinguished from the traditional media of expression, will need further study. The 900 number phone service in the "*New Kids on the Block*" case is still a protected as a media product. However, in my opinion, this can be different if a company offers a commercial multimedia service via the *World-Wide-Web of Internet*.¹⁶⁷ Internet is a medium. In principle, an informational use of persona via Internet should not infringe the right of publicity, while an unpermitted use of a person's identity in advertisements (in disguise) for commercial products, services or companies that are made public via Internet should infringe the right of publicity. However, it is also possible to provide other *commercial* services via Internet. For example, if a company offers in digital form high quality pictures of celebrities, that can be printed as a poster, to Internet viewers who pay with their credit card or with "ecash,"¹⁶⁸ the celebrities may argue that this use is similar to the sale of posters.

[3] Media Products Sponsored by Commercial Enterprises

Unpermitted use of human identity in a media product does not infringe the right of publicity unless it is an advertisement for commercial nonmedia products. The fact that media products are sold for profit does not alter this rule. But could a right of publicity owner claim that a media product becomes an advertisement for nonmedia products if it is sponsored by a manufacturer in order to advertise

166. The fact that a 900 number service allows a caller to engage in conversation or to vote by punching in the appropriate number on a touch tone phone, is, in my opinion, not the distinguishing element.

167. Name of the largest available computer network. It includes connections in over hundred countries and millions of users.

168. Ecash is a digital currency developed by DigiCash, that can be used by Internet-users.

its nonmedia products? The answer is negative, unless this media product is in fact an advertisement in disguise.¹⁶⁹

Illustrative is *Benavidez v. Anheuser Busch, Inc.*¹⁷⁰ The National Association of Latino Elected and Appointed Officials had requested Busch Creative Services, a subsidiary of Anheuser Busch Companies, to produce a documentary film which recounted the exploits of Hispanic Congressional Medal of Honor recipients. In an eighty second segment of the thirteen minute film, titled "*Heroes*," the heroic conduct of plaintiff, Roy Benavidez, was depicted without his permission. The Corporate Relations Department of Anheuser Busch Companies, which was responsible for the corporation's relationship with the Hispanic community, both supervised and paid for the "*Heroes*" project. The Department then made the documentary available to schools, government agencies, veterans organizations, Hispanic organizations, and sponsored hospitality centers where it distributed free refreshments from its subsidiaries, including beer from defendant, Anheuser Busch, Inc. (ABI). Benavidez claimed that ABI had misappropriated his name and likeness for its own commercial purposes.

The Fifth Circuit held that ABI had not commercialized Benavidez's personality, because the film did not advertise or promote ABI or its products. The film's only reference to ABI was an "innocuous statement, shown in the credits at the end of the film, that "*Heroes*" was "(m)ade possible by Anheuser Busch, Inc. and its family of wholesalers."¹⁷¹ The court rejected Benavidez' argument that by showing "*Heroes*" at hospitality centers where ABI's and product logos were prominently displayed and where free beer was being distributed, defendant made the film much more than a mere documentary, because "that would not transform the otherwise unobjectionable documentary into a commercial advertisement for ABI." It recognized that ABI may enjoy increased goodwill in the Hispanic community as a result of the production and showing of "*Heroes*," but "[t]his incidental benefit, however, does not rise to the level of commercial benefit sufficient to support a claim for misappropriation."¹⁷²

However, the Fifth Circuit expressly stated that by telling Benavidez's story in the documentary, the makers of the film were not undertaking to increase the sales of ABI's products. If a sponsor influenced the content of the

169. Cf. Court of Appeals Düsseldorf (Germany), September 30, 1969, 20 U 80/69; GRUR 1970, 618; 64 UFITA (1972) 328; RzU OLGZ Nr 102 (Neumann-Duesberg); ArchPR XV 1970, 131 (*Schleppjagd*): use of picture of plaintiff in a commercial magazine sent to clients of defendant held to be an infringement of the German right to one's own picture. The fact that the picture was placed on the front in the editorial part and not in the advertising part of the magazine, did not alter the outcome, because the only function of the editorial part was to support the advertising. The Court mentioned the fact that people could see the picture on the front in one view with an advertisement on the back.

170. 873 F.2d 102, 11 U.S.P.Q.2d 1237, 16 Media L. Rep. 1733 (C.A.5 1989).

171. Id. 873 F.2d 102, at 104.

172. Id. 873 F.2d 102, at 104.

documentary in order to advertise its products, the documentary could in fact be an advertisement in disguise.¹⁷³

[C] Use of Identity in Non-Fictional Information and Biographies

[1] Matters of Political and Public Interest

If a person's identity is used in a "newsworthy" story, a story about "matters of public interest," the right of publicity does not come into play. Newsworthy matter is what the media themselves decide to publish or broadcast. The media, not the courts, define what matter is of public interest and thus receive the free speech protection. Courts are reluctant to engage in line drawing over newsworthiness and simply accept the press's judgment about what is and is not news.¹⁷⁴ Beneath some examples are given of publications of "matters of public interest" which were held not to infringe the right of publicity or the commercial portrait right in the Netherlands.

- Use of a recording of a telephone conversation with Charlie Chaplin, and use of his name in a NBC radio program which was critical about his political views does not infringe Chaplin's right of publicity.¹⁷⁵
- Publication in a magazine of a photograph of actress Ann-Margret, taken from a successful movie, in which she, for only the second time in her screen career, appeared in one scene unclothed from the waist up with one of her breasts quite visible. According to the court "the fact that the plaintiff, a woman who has occupied the fantasies of many moviegoers over the years, chose to perform unclad in one of her films is a matter of great interest to many people. And while such an event may not appear overly important, the scope of what constitutes a newsworthy event has been afforded a broad definition and held to include even matters of 'entertainment and amusement, concerning interesting phases of human activity in general.'¹⁷⁶
- Publication of cartoons and statements concerning plaintiff, an antipornography advocate, in *Hustler*, a sexually explicit magazine, is a publication about matters of public concern.¹⁷⁷

173. *Cf. Delan by Delan v. CBS, Inc.*, 91 A.D.2d 255, at 259, 458 N.Y.S.2d 608, 9 Media L. Rep. 1130 (N.Y.A.D. 1983): "The fact that a telecast is commercially sponsored does not make such telecast one for advertising purposes if there is no connection between the performance and the commercial." See § 10.2[B][2].

174. See § 9.2[C][2].

175. *Chaplin v. National Broadcasting Co.*, 15 F.R.D. 134, at 140 (D.C.N.Y. 1953): "Plaintiff seems to argue that entertainment is the commodity being sold through the use of his name and voice in the radio broadcasts. That contention is no more persuasive under this theory than it was under the privacy theory."

176. *Ann Margret v. High Soc. Magazine, Inc.*, 498 F.Supp. 401, at 405, 208 U.S.P.Q. 428, 6 Media L. Rep. 1774 (D.C.N.Y. 1980). The fact that defendant's magazine was specialized in printing photographs of well-known women caught in the most revealing situations and positions did not alter the outcome of the case.

177. *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 16 Media L. Rep. 1113 (C.A.9 1989).

- Book about George Balanchine's Nutcracker ballet production, which extensively mentions and pictures Balanchine, does not infringe the right of publicity, but "conveys interesting information concerning life around us."¹⁷⁸
- Sale of a videotape of Jesse Jackson's speech before the Democratic National Convention does not infringe his right of publicity "[i]n light of the fact that the evidence appears to support defendants' claim that they were engaged in news reporting."¹⁷⁹
- Television network's broadcast as part of its "Street Stories" program, of a Mobile Crisis Intervention Team's visit to the plaintiff, who had reported an incident of domestic violence, does not infringe his right of publicity. Although not a traditional news show, the broadcast involves public affairs.¹⁸⁰
- Use in a book about a rock musician of the name and likeness of plaintiff, who served as bodyguard of this musician, does not infringe plaintiff's right of publicity. The public has an interest in reading about his personal life.¹⁸¹
- Publication of nude pictures of plaintiff Van Drumpt from the film "*De gulle minnaar*" in Playboy magazine did not infringe her commercial portrait rights, because Playboy's freedom to disseminate news cannot be restricted by the wish of Van Drumpt to be paid for such use.¹⁸²
- Publication of a book about World Soccer Championship 1974 with pictures of soccer players does not infringe the commercial portrait rights of players.¹⁸³
- Publication of a four year-old photograph of an artist selling peanuts in an article about a summer festival does not infringe his commercial portrait rights, notwithstanding fact that the artist wishes to use his pictures for merchandising purposes.¹⁸⁴

[2] Educational Use

Unauthorized use of someone's identity in educational media products does not infringe the right of publicity. In Germany, the Frankfurt Court of Appeals held that tennis player Boris Becker could not request any payment for use of his

178. *Horgan v. MacMillan, Inc.*, 621 F.Supp. 1169, at 1170, 227 U.S.P.Q. 975, 1986 Copr.L.Dec. P 25,866, 12 Media L. Rep. 1623 (D.C.N.Y. 1985).

179. *Jackson v. MPI Home Video*, 694 F.Supp. 483, at 492, 8 U.S.P.Q.2d 1572, 1988 Copr.L.Dec. P 26,341, 15 Media L. Rep. 2065 (N.D.Ill. 1988). Jackson did not claim infringement of his performance right of publicity.

180. *Baugh v. CBS Inc.*, 828 F.Supp. 745, 21 Media L. Rep. 2065 (N.D.Cal. 1993).

181. *Warner v. Monk*, 22 Media L. Rep. 1667 (Cal. Ct. App. 1994).

182. District Court Haarlem, February 8, 1994, AMI 1995, 93 (GAIS); Mf 1994, B35 (*Van Drumpt/Uitgeverij Spaarnestad*).

183. Pres. District Court Haarlem, June 26, 1974, NJ 1974, 415; BIE 1977, nrs. 3 en 4, at 11 en 13 ("*De slag om het voetbalgoud I en II*").

184. Court of Appeals Amsterdam, January 10, 1991, AMI 1991, 200 (JCSP) (*Van de Leende/Courant Nieuws van de Dag*).

picture on the cover of a tennis book about tennis skills of top tennis players.¹⁸⁵ According to the court the public interest in the information value outweighed the interest of financial interests of Becker. In the United States, courts have reached the same outcome in cases involving invasion of privacy by appropriation.¹⁸⁶

[3] Unauthorized Biography

An unauthorized biography does not infringe the right of publicity of the person whose life is described in it, nor does it infringe the right of publicity of other persons mentioned in the biography. This rule is not altered by the circumstance that the authorized biography only sells because of the fame of the personality whose life is depicted, or because it will negatively influence the market for the authorized biography. Similarly, the fact that the biography contains errors or fictional parts, such as a fictional dialogue to enhance its entertainment value, will not trigger liability for infringement of the right of publicity.¹⁸⁷ Such circumstance can be relevant to other claims, such as infringement of copyright,¹⁸⁸ false advertising,¹⁸⁹ invasion of privacy by false light,¹⁹⁰ public disclosure,¹⁹¹ or defamation.

Illustrative is *Rosemont Enterprises, Inc. v. Random House, Inc.*¹⁹² which dealt with a biography written by John Keats, entitled 'Howard Hughes.' The plaintiff was a corporation established to prevent the publication of biographical material which Hughes could not control, because Hughes had 'a publicized passion for personal anonymity.' The plaintiff, alleging that it had acquired "the

185. Court of Appeals Frankfurt (Germany), January 21, 1988, 6 U 153/86; WRP 1988, 311; AfP 1988, 62; ZUM 1988, 248; NJW 1989, 402 (*Boris Becker-Tennis Lehrbuch*). I do not agree with Poll's criticism that the court should have granted a damages award because the publisher profited from Becker's popularity. See Poll, Die Entwicklung des "Rechts am eigenen Bild". Eine kritische Bestandsaufnahme der BGH- und OLG-Rechtsprechung, ZUM 1988, 454 at 458.

186. *E.g. Klein v. McGraw-Hill, Inc.*, 263 F.Supp. 919 (D.D.C.1966): a high school student, who had made an important advance in radio communications and had received a significant public notice in this field, was not entitled to share in the profits for use of his picture on cover of textbook intended for persons interested in radio; *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 43 Cal.App.3d 880 118 Cal.Rptr. 370 (Cal.App. 1974): Johnson who had found and returned \$240,000 lost by an armored car company, could not prohibit the publication of an article describing the unusual act of honesty, as an educational tool in a college English textbook.

187. See McCarthy, *The Rights of Publicity and Privacy*, § 8.9[F] (Rev. 1993), discussing the various legal theories in connection with an unauthorized biography.

188. *Cf. New Era Publications International, ApS v. Carol Publishing Group*, 904 F.2d 352 (C.A.2 1990): unauthorized biographer's use of quotations from copyrighted works by L. Ron Hubbard, founder of the Church of Scientology, was fair use.

189. *Cf. Hicks v. Casablanca Records*, 464 F.Supp. 426, 204 U.S.P.Q. 126 (D.C.N.Y. 1978): Use of the name "Agatha" and "Agatha Christie" does not cause confusion in the minds of the public in general, and Agatha Christie readers in particular, to the effect that the movie and novel were authorized or even written by Mrs. Christie.

190. See Pilgrim, *Docudramas and False-Light Invasion of Privacy*, 10 *Comm-Ent L.J.* 3 (1988).

191. See Katz, *Unauthorized Biographies and Other 'Books of Revelations': A Celebrity's Legal Recourse to a Truthful Public Disclosure*, 36 *UCLA L. Rev.* 815 (1989).

192. 294 N.Y.S.2d 122, 58 Misc.2d 1 (N.Y. Sup. 1968), *aff'd* 32 A.D.2d 892, 301 N.Y.S.2d 948 (N.Y.A.D. 1969).

sole and exclusive world-wide rights to exploit commercially in any manner the name, personality, likeness or the life story or incidents in the life of Hughes" claimed that defendants invaded his privacy by appropriation and his right of publicity. The court rejected his claims:

"The Biography of Howard Hughes, published by defendants herein, irrespective of its literary merit or style, [...] falls within those 'reports of newsworthy people or events' which are constitutionally protected and which are outside the proscription of the New York 'Right of Privacy' statute. [...] The publication of a biography is clearly outside the ambit of the 'commercial use' contemplated by the 'right of publicity' and such right can have no application to the publication of factual material which is constitutionally protected. 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."¹⁹³

In *Frosch v. Grosset & Dunlap, Inc.*,¹⁹⁴ the court dismissed a right of publicity claim against Norman Mailer's allegedly fictionalized biography of late Marilyn Monroe, because a fictional biography, or any other kind of literary work is protected because of the right of free expression.

Some authors¹⁹⁵ have argued that a right of publicity owner must have the right to prevent the creation of a "docudrama," which is a documentary combined with fiction which depicts the life of a person.¹⁹⁶ Manson argued that an unauthorized docudrama infringes the right of publicity because, by its nature, it creates viewer confusion between what is documentary and what is fiction, and therefore damages and dilutes the value of the person's identity.¹⁹⁷ I do not agree. A docudrama is an entertaining work which is also protected by the freedom of speech.¹⁹⁸ If the public is confused into thinking that a docudrama is a non-fictional documentary, the theories of false or misleading advertising or invasion of privacy are available.

193. *Id.* 294 N.Y.S.2d 122, at 128-129.

194. 75 A.D.2d 768, 427 N.Y.S.2d 828, 6 Media L. Rep. 1272 (N.Y.A.D. 1980).

195. *E.g.* Lazar, Towards a Right of Biography: Controlling Commercial Exploitation of Personal History, 2 *Comm-Ent Law Journal* 489 (1980), defending a right to control commercial exploitation of biography.

196. Glatt, Trial by Docudrama: Fact or Fiction, 9 *Card. Arts & Ent. L.J.* 201 at 201 (1990): "A documentary is a non-fictional story that maintains strict fidelity to fact, whereas a docudrama is a creative interpretation of reality."

197. Manson, The television Docudrama and the Right of Publicity, 7 *Com. & L.* 41, at 61 (1985). Although no right of publicity case involving docudramas has ever gone to trial, Manson discusses *Taylor v. American Broadcasting Co.*, No. 82 Civ. 6977 (S.D.N.Y. 1982): Elizabeth Taylor sued ABC for developing a biographical docudrama of Taylor's life. She claimed infringement of her right of publicity, stating that "her life story is a commercial property which she alone has the right to exploit." Taylor dropped lawsuit, when ABC decided to stop the project "for creative reasons." *Id.* 7 *Com. & L.* 43, at 41-44. In my opinion, Taylor's right of publicity claim should have been rejected. Cf. *Taylor v. National Broadcasting Co. Inc.*, 22 Media L. Rep. 2433 (Cal. Super.Ct. 1994): television mini-series about Taylor constitutes protected expression. Court rejected argument that the mini-series is a commercial product which capitalizes on her name, life and career.

198. Cf. Lawrence, Television Docudramas and the Right of Publicity: Too Bad Liz, That's Show Biz, 8 *Hastings Comm-Ent L.J.* 257, at 287 (1986): "The public interest in being informed and entertained outweighs the celebrity's interest in being compensated for the use of his life story."

[D] Use of Identity in a Fictive or Entertaining Story**[1] Use of Identity in a Media Product of Entertainment**

Like factual stories about "*matters of public interest*," entertaining or fictional stories in media products are protected by the freedom of speech guarantees.¹⁹⁹ Works of entertainment serve the two main interests protected by the free speech principles: enlightenment of the audience and self-fulfillment of the speaker. Justice Bird stated:

"It is clear that works of fiction are constitutionally protected in the same manner as political treatises and topical news stories. Using fiction as a vehicle, commentaries on our values, habits, customs, laws, prejudices, justice, heritage and future are frequently expressed. What may be difficult to communicate or understand when factually reported may be poignant and powerful if offered in satire, science fiction or parable."²⁰⁰

Therefore, if a person's identity is used in a work of fiction, or other non-factual information, the right of publicity does not come into play. Courts should not evaluate the value of fictive stories and weigh it against the interests protected by the right of publicity. The fact that plaintiff's identity is only added to a fictive media product in order to create a higher profit does not affect this rule.²⁰¹

The argument that a work of fiction deserves less protection, because it is inherently "*false*" should be rejected. Falsity is only an issue if a media product is presented as a factual true work. Then the falsity issue can be relevant to state a claim for false advertising, defamation, or invasion of privacy. But falsity is not an element of a right of publicity claim.²⁰² Justice Bird stated:

"I disagree with those decisions to the extent they suggest the fictionalization of a portion of an individual's life is actionable in the absence of any invasion of privacy or defamation. I find the interest in free expression paramount and overrides a plaintiff's ability to control the publicity values in his name."²⁰³

Therefore, also the argument that a work of fiction is published with "*knowledge*" of its falsity should be rejected.²⁰⁴ Most courts have held that unpermitted use of identity in a work of entertainment does not infringe the right of publicity. Armstrong stated:

"Courts long ago recognized that a celebrity's right of publicity does not preclude others from incorporating a person's name, features or biography in a literary work, motion

199. See § 9.2[C][3] and § 9.2[C][5].

200. *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, at 867-868, 160 Cal.Rptr. 352, 603 P.2d 454, 205 U.S.P.Q. 1116, 5 Media L. Rep. 2208 (Cal. 1979) (concurring opinion).

201. See *supra* § 10.3[B][1].

202. See § 3.6.

203. *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, at 874, 160 Cal.Rptr. 352, 603 P.2d 454, 205 U.S.P.Q. 1116, 5 Media L. Rep. 2208 (Cal. 1979) (concurring opinion).

204. See § 10.3[E][1] for a discussion of decisions which held that falsity is an element to rebut defendant's freedom of speech defense.

picture, news or entertainment story. Only use of the individual's identity in advertising infringes on the persona."²⁰⁵

Illustrative is *Hicks v. Casablanca Records*,²⁰⁶ which involved the motion picture "Agatha" and the book "Agatha," which presented a fictionalized account of the mysterious temporary disappearance of late Agatha Christie during her first marriage. She was "portrayed as an emotionally unstable woman, who, during her eleven-day disappearance, engages in a sinister plot to murder her husband's mistress, in an attempt to regain the alienated affections of her husband." The court dismissed the claim for infringement of the right of publicity. It held that the fictionalization was protected by the First Amendment, because defendants had not represented the events as the truth and readers and viewers would understand that the events portrayed were fictitious by the presence of the word "novel" on the book.²⁰⁷

In *Valentine v. C.B.S., Inc.*,²⁰⁸ the plaintiff claimed that unpermitted use of her name in a song, called "Hurricane," written by Bob Dylan and Jacques Levy about a murder trial in which the plaintiff was a witness, infringed her right of publicity. The Eleventh Circuit rejected her claim, stating:

"The trial court properly held that, as a matter of law, the ballad "Hurricane" did not commercially exploit Valentine's name. The defendants did not use her name to directly promote a product or service. Use of a name is not harmful simply because it is included in a publication sold for profit."²⁰⁹

*Matthews v. Wozencraft*²¹⁰ involved the book "Rush" written by Wozencraft. Her ex-husband Matthews claimed infringement of his right of publicity because the character "Jim Raynor" in Rush was based upon him. The book was labeled as a novel and stated on its copyright page that it "is a work of fiction. Any resemblance its characters may have to persons living or dead is purely coincidental." The Fifth Circuit found in favor of defendant, holding that the right of publicity does not encompass a narrative of an individual's life. The court concluded that

205. Armstrong, The Reification of Celebrity: Persona as Property, 51 *La. L. Rev.* 443, at 467 (1991).

206. 464 F.Supp. 426, 204 U.S.P.Q. 126, 4 *Media L. Rep.* 1497 (D.C.N.Y. 1978). Cf. *Brown v. Twentieth Century Fox Film Corp.*, 799 F.Supp. 166, at 172; 26 U.S.P.Q.2d 1626 (D.D.C. 1992), aff'd 15 F.3d 1159 (C.A.1 1994); defendants' use in their movie "The Commitments" of name of James Brown and a 27-second "clip" of his performance on a 1965 television show does not infringe his right of publicity.

207. But see Gyarfas, Right of Publicity v. Fiction-Based Art: Which Deserves More Protection?, 15 *Loy. L.A. Ent. L.J.*, 381 at 408-110 (1995) arguing that Hicks should have lead to a successful right of publicity cause of action, since, in his opinion, since fiction based art works should receive less protection than fact based art works.

208. 698 F.2d 430, 9 *Media L. Rep.* 1249 (C.A.11 1983), holding that plaintiff failed to state cause of action for defamation, public disclosure, and right of publicity.

209. 698 F.2d 430, at 433.

210. 15 F.3d 432, 1994 U.S. App. Lexis 3855; 30 U.S.P.Q.2d 1025; 22 *Media L. Rep.* 1385 (C.A.5 1993).

"Wozencraft's novel falls within the protection of the First Amendment. It is immaterial whether RUSH 'is viewed as an historical or a fictional work,' [...] so long as it is not 'simply a disguised commercial advertisement for the sale of goods or services.'"²¹¹

[2] Use of Identity in a Title of a Work of Entertainment

The use of the name of a celebrity in the title of a work of entertainment does not infringe the right of publicity, unless the title is "wholly unrelated" to the content of that work.²¹² There must be at least some relation between the title and the content of the work. If that celebrity is also somehow related to the content of that work, a court should not analyze whether there is also a reasonable relation between the celebrity and the content.²¹³

Illustrative is the "*Ginger and Fred*" case.²¹⁴ Federico Fellini's film "*Ginger and Fred*" is a fictional work that depicts the bittersweet reunion of Pippo and Amelia, two retired dancers who, decades earlier, had made a living in Italian cabarets imitating the legendary dancers Fred Astaire and Ginger Rogers. Therefore, they got the nickname "*Ginger and Fred*." Ginger Rogers sought a permanent injunctive relief and money damages for infringement of her right of publicity, false light invasion of privacy, and for false advertising because the film creates a false impression that Rogers endorsed or was involved in the film. The district court rejected these claims. With respect to the right of publicity the court asserted:

"Like the film and book "*Agatha*," "*Federico Fellini's 'Ginger and Fred'*" is not a piece of "merchandise" like a perfume or line of apparel, whose name would likely bear no relation to the product. To the contrary, the Film is a protected work of artistic expression, the product of one of the world's great cinematic artists, clearly labeled as such in every poster and advertisement."²¹⁵

[E] Discussion of Cases Which Held Media Use a Form of Commercial Exploitation

[1] Fictionalization and Falsity Cases

The majority view is that unpermitted use of a person's identity in a work of fiction does not infringe the right of publicity. However, in 1994, Jollymore stated that "[t]here is a good deal of uncertainty concerning how freely a

211. *Id.* 1994 U.S. App. Lexis 3855, at 18, citing *Rogers v. Grimaldi*, 875 F.2d 994, at 1004 (C.A.2 1989).

212. *Cf.* a "*Rudolph Valentino's Cookbook*," which describes only recipes or menus which were unrelated to the actor Valentino. Example mentioned by Chief Justice Bird in *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, at 865, fn. 6, 160 Cal.Rptr. 352, 603 P.2d 454, 205 U.S.P.Q. 1116, 5 Media L. Rep. 2208 (Cal. 1979) (concurring opinion).

213. *Cf.* § 10.3[E][4].

214. *Rogers v. Grimaldi*, 695 F.Supp. 112, at 122, 8 U.S.P.Q.2d 1562, 15 Media L. Rep. 2097 (S.D.N.Y. 1988), *aff'd* 875 F.2d 994, 10 U.S.P.Q.2d 1825, 16 Media L. Rep. 1648 (C.A.2 1989).

215. *Id.* 695 F.Supp. 112, at 122. *Aff'd* 875 F.2d 994, at 1004-1005: "the title "*Ginger and Fred*" is clearly related to the content of the movie and is not a disguised advertisement for the sale of goods or services or a collateral commercial product."

celebrity's persona may be used in films, plays and stage presentations."²¹⁶ Sometimes American courts have held that use of a personality's identity in a work of fiction is a form of commercial use, which is not protected by the First Amendment.

The majority of these decisions applied New York Civil Rights Law §§ 50-51, which defines the right of privacy as protecting against unpermitted use "for advertising purposes or for the purposes of trade."²¹⁷ In New York, all right of privacy and right of publicity claims must be formulated in terms of this appropriation privacy statute, because the New York courts have refused to recognize any common law privacy rights,²¹⁸ or right of publicity.²¹⁹ As a consequence, New York courts have discussed the invasion of privacy through false light cases in terms of appropriation. The New York cases which held forms of media use actionable under the appropriation statute, but which must be understood as false light cases, do not support the theory that media use can infringe the right of publicity.

One of the first cases which held use of a person's identity in a work of fiction to be a form of unpermitted commercial use, is *Binns v. Vitagraph Co. of America*.²²⁰ Plaintiff, Binns, was an operator of a wireless telegraphy machine on a ship. He was the first man to use wireless telegraphy resulting in saving hundreds of lives, for when his ship collided with another steamship, he was the person who had been able to ask for help. Defendant, a movie studio, produced a movie which pictured the rescue operation, with an actor playing Binns' role. Binns asserted that the motion picture held him up to the public ridicule and contempt. The court held that Binns' name and likeness had been used "for advertising purposes or for the purposes of trade" under New York law. It stated that use of a name or portrait in truthfully recounting an actual event in a newspaper does not violate the statute, but that this case involved "not true pictures of a current event, but mainly a product of the imagination [...]." According to the court, "[t]he defendant used the plaintiff's alleged picture to amuse those who paid to be entertained."²²¹

The distinction between "true" pictures and pictures of "imagination" made it possible to bring under the appropriation statute the privacy false light tort. For example, in *Sutton v. Hearst Corporation*,²²² a New York Court held that the plaintiff claimed that an article published by defendant, Hearst Corporation, appropriated her name and likeness, because its purpose was not to educate or

216. Jollymore, *Expiration of the Right of Publicity - When Symbolic Names and Images Pass Into the Public Domain*, 84 *Trademark Rep.* 125, at 151 (1994).

217. See appendix A.

218. *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, at 182, 485 N.Y.S.2d 220, 474 N.E.2d 580, 11 *Media L. Rep.* 1303 (N.Y. 1984): "Since the adoption of the statutes, this court has repeatedly held that the right of privacy is governed entirely by statute in this State."

219. *Id.* 64 N.Y.2d 174, at 183: "Since the 'right of publicity' is encompassed under the Civil Rights Law as an aspect of the right of privacy, which, as noted, is exclusively statutory in this State, the plaintiff cannot claim an independent common-law right of publicity."

220. 210 N.Y. 51, 103 N.E. 1108 (N.Y. 1913).

221. *Id.* 210 N.Y. 51, at 58.

222. 98 N.Y.S.2d 233, 277 A.D. 155 (N.Y.A.D. 1 Dept. 1950).

inform, but to amuse and astonish the reading public. The magazine article related the story of a pilot who was shot down during World War II, and of his strange bequest of giving one rose a week to the plaintiff, who was married to another man. The plaintiff contended that the total impression conveyed was not a true picture of the actual facts, but a dramatic fiction for trade purposes. The court held that it was for the triers of the facts to determine whether the article and its surrounding illustrations were limited to reporting fairly past or current events, whether it is educational or informative, or whether the primary purpose was to amuse and astonish the reading public, stating that

"a sensationalized version of facts embellished with matters drawn from the author's imagination, and may well be found by the triers of the facts to go far beyond the scope of proper immunity pertaining to the publication of current or past news."²²³

In *Holt v. Columbia Broadcasting System, Inc.*,²²⁴ a New York court held that plaintiff, who had participated in the popular '\$64,000 Challenge' television show, submitted a claim for appropriation of his name and likeness, because without his knowledge the program was conducted fraudulently and dishonestly.

A biography about baseball player Warren Spahn was held to be unlawful under the New York appropriation statute, because it contained material and substantial falsification, such as fabricated events, imaginary dialogue, erroneous statistical data, etc., which was published with reckless disregard for the truth.²²⁵ The court applied the actual malice after *Time, Inc. v. Hill*,²²⁶ ruled that this liability standard is applicable in cases which involve an element of false speech by the media.

This line of cases has influenced the right of publicity. In *Ali v. Playgirl, Inc.*,²²⁷ a preliminary injunction was granted, restraining the publication in

223. Id 98 N.Y.S.2d 233, at 235. Cf. *Hazlitt v. Fawcett Publs., Inc.*, 116 F.Supp. 538 (D. Conn. 1953): "If so much of the story as is relied on was fictionalized and dramatized, I may not now rule, as a matter of law, that it was of legitimate public interest because informational and on that account not actionable;" *Annerino v. Dell Publ. Co.*, 17 Ill.App.2d 205, at 209, 149 N.E.2d 761 (Ill.App. 1 Dist. 1958): "Reading the article itself in the light of plaintiff's allegations of "exploitation" for the personal "gain and profit" of defendant, this court cannot say as a matter of law that it was solely a factual account and published for its informational value as defendant contends."

224. 253 N.Y.S.2d 1020, 22 A.D.2d 791 (N.Y.A.D. 1964).

225. *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 274 N.Y.S.2d 877, 221 N.E.2d 543 (N.Y. 1966), aff'd 21 N.Y.2d 124, 286 N.Y.S.2d 832, 233 N.E.2d 840, 30 A.L.R.3d 196 (N.Y. 1967). Cf. *Sinatra v. Wilson*, 2 Media L. Rep. 2008 (S.D.N.Y. 1977): allegation that "unauthorized" biography of Sinatra contains "false and fabricated" reports of his statements, impressions, and emotions, sets forth valid claim for invasion of privacy under §§ 50 and 51 N.Y. Civil Rights Law; *Fils-Aime v. Enlightenment Press, Inc.*, 133 Misc.2d 559, 507 N.Y.S.2d 947, 13 Media L. Rep. 1971 (N.Y.Sup. 1986): Newspaper's misleading juxtaposition of photograph of plaintiff, taken when she was high school student, with article concerning child pornography constitutes use of photograph for purposes of trade under §§ 50 and 51 N.Y. Civil Rights Law.

226. 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967). The U.S. Supreme Court remarked that "[t]he text of the statute appears to proscribe only conduct of the kind involved in *Roberson*, that is, the appropriation and use in advertising or to promote the sale of goods, of another's name, portrait or picture without his consent [...] An application of that limited scope would present different questions of violation of the constitutional protections for speech and press."

227. 447 F.Supp. 723, 206 U.S.P.Q. 1021, 3 Media L. Rep. 2540 (D.C.N.Y. 1978).

"Playgirl Magazine" of a fictionalized drawing of heavyweight boxing world champion Muhammed Ali as a nude black man seated in the corner of a boxing ring. The District Court stated that

"[i]n the instant case there is no such informational or newsworthy dimension to defendant's unauthorized use of Ali's likeness. Instead, the picture is a dramatization, an illustration falling somewhere between representational art and cartoon, and is accompanied by a plainly fictional and allegedly libellous bit of doggerel. Defendants cannot be said to have presented 'the unembroidered dissemination of facts' or 'the unvarnished, unfictionalized truth.'"²²⁸

In my opinion, the outcome of this case is wrong.²²⁹ A court should not evaluate the informational value of defendant's speech in a right of publicity case. The fact that Ali's identity was used in a magazine immunizes defendant's use against liability for infringement of the right of publicity, unless it is an advertisement for nonmedia products. Of course, Ali could have stated other causes of action, such as defamation and invasion of false light privacy. The Ali court noted that the portrayal was an "offensive illustration."²³⁰ But offensiveness is not an element of a right of publicity claim.

In *Eastwood v. Superior Court for Los Angeles County*,²³¹ a California court implicitly stated that use of identity in a media product can infringe the right of publicity. Actor Clint Eastwood objected to the use of his name and photograph on the cover of "*National Enquirer*," which featured an article entitled "*Clint Eastwood in Love Triangle with Tanya Tucker*." Eastwood claimed that the article was false and that the unauthorized use of his name and photograph infringed his right of publicity. The court held that the *Enquirer* had commercially exploited Eastwood's identity because it

"used Eastwood's personality [...] to generate maximum curiosity and the necessary motivation to purchase the newspaper.

Moreover, the use of Eastwood's personality in the context of a news account, allegedly false but presented as true, provided the *Enquirer* with a ready-made "scoop"--a commercial advantage over its competitors which it would otherwise not have.

Absent a constitutional or statutory proscription, we find that Eastwood can show that such use is a subterfuge or cover-up for commercial exploitation."²³²

Eastwood argued that the article, and thereby the related advertisements, were not entitled to either constitutional protection or exemption from liability as a news account, because the article is a calculated falsehood. The court did not agree and held that actual malice of the falsehood was the proper standard of fault to impose liability on the *Enquirer*. Citing the "*Zacchini*" case, the court was "quite sure that the First Amendment does not immunize *Enquirer* when the

228. *Id.* 447 F.Supp. 723, at 727.

229. *Id.* Report, *The Tension Between The First Amendment and the "right of publicity,"* 39 *The Record of the Ass. of the Bar of the City of N.Y.* 368, at 383-84 (1984), stating that entertainment is protected by the First Amendment.

230. *Id.* 447 F.Supp. 723, at 728, fn.9. Ali did not state a claim for defamation, *Id.* at 725, fn.3.

231. 149 Cal.App.3d 409, 198 Cal.Rptr. 342, 10 Media L. Rep. 1073 (Cal.App.2 Dist. 1983).

232. *Id.* 149 Cal.App.3d 409, at 420.

entire article is allegedly false."²³³ However, since Eastwood had not alleged that the article was published with knowledge or in reckless disregard of its falsity, he failed to state a claim for infringement of the right of publicity.

One can read the Eastwood court as holding that an article in a magazine about a celebrity can infringe the right of publicity if that article contains false allegations published with actual malice. In my opinion, use of Eastwood's identity in a media product should not infringe his right of publicity, even if it contains falsehoods. In such a case, Eastwood should state a claim for false light invasion of privacy, or defamation, not infringement of the right of publicity. I agree with McCarthy who has criticized this decision.²³⁴ The injury to Eastwood caused by the article owed from the falsity. The Eastwood court seems to mix these claims with a claim for infringement of the right of publicity by allowing Eastwood to rebut defendant's First Amendment defense in a right of publicity case on grounds of falsity. But falsity is not an element of a right of publicity claim, since the commercial value of plaintiff's identity lies in the recognizability, which is independent of the truth or falsity of defendant's message.²³⁵

[2] Use in a Commercial Work of Entertainment

A few courts have held that use of a personality's identity in a work of fiction can infringe the right of publicity, not because of an element of falsity, but because of the primarily commercial nature of that work. The above-mentioned "*Binns*" case could be viewed as part of this category. Illustrative is the "*Laurel and Hardy*" case. In *Price v. Worldvision Enterprises, Inc.*,²³⁶ the widows of Stanley Laurel and Oliver Hardy and their exclusive licensee alleged that defendant's producing and distributing a television series, entitled the "*Stan 'n Ollie*" show, in which actors portrayed the comedians, infringed their right of publicity. The defendants argued that they had obtained the right to do so from third party Hal Roach Studios, but the court held that Roach itself did not have this right, because it had only certain copyrights to Laurel and Hardy motion pictures.²³⁷ The court stated:

"it cannot be gainsaid that the present defendants have embarked upon a comparable commercial usage of "the name and likenesses of Laurel and Hardy." Defendants' television pilot and proposed series, "Stan 'n Ollie," features actors manifestly made up

233. *Id.* 149 Cal.App.3d 409, at 425, citing 433 U.S. 562, at 574-575.

234. McCarthy, *The Rights of Publicity and Privacy*, § 8.10[C] (Rev. 1993).

235. See § 3.6. In § 10.4[C][2] I will modify this reasoning for cases in an advertising context.

236. 455 F.Supp. 252, 4 Media L. Rep. 1301 (D.C.N.Y. 1978), *aff'd* without opinion, 603 F.2d 214 (C.A.2 1979).

237. The court referred to *Price v. Hal Roach Studios, Inc.*, 400 F.Supp. 836 (S.D.N.Y.1975) which involved a conflict between the widows of Oliver Hardy and Stanley Laurel and their exclusive licensee who had the right to utilize and merchandise the names, likenesses, characters and characterizations of Laurel and Hardy, and defendant Roach, the holder of certain copyrights to Laurel and Hardy motion pictures. The district court held that despite employment contract with defendant, the right of publicity in their names and likenesses belonged to Laurel and Hardy, which descended to their heirs and which had not been waived or abandoned.

to resemble Laurel and Hardy; any doubt is dispelled by the text accompanying Worldvision's printed flyer advertising the series, which is subtitled: "Laurel and Hardy The Perfect Combination for Primetime Access Programming [...]"²³⁸

The court rejected defendant's defense that plaintiffs' protected rights were "limited to the use of the names and likenesses of the team in conjunction with the sale of products," by citing *Price v. Hal Roach Studios*, in which the court enjoined

"the impersonation of (Laurel and Hardy's) physical likenesses or appearances, costumes and mannerisms, and/or the simulation of their voices, for advertising or commercial purposes, including their use in or in connection with [...] the production of animated cartoons or motion pictures [...]"²³⁹

Similarly, the court rejected defendants argument that they were engaged only in "mere imitation" of Laurel and Hardy, an activity to which the legally protected right of publicity does not extend, because "[w]e are clearly dealing with more than "imitation" in the case at bar."²⁴⁰ The court granted a permanent injunction which followed the format of the injunction issued in the "Roach" case.

This case clearly held that use of the identity of Laurel and Hardy in a television series infringed the widows' right of publicity in the identity of the late comedians. In my opinion, the outcome of this case is wrong. *First*, the court rejected defendant's argument that such use does not infringe the right of publicity by a simple reference to the *Price v. Hal Roach Studios*. But in that case the only issue was which party owned the rights of publicity of Laurel and Hardy, not the content of the right of publicity itself. *Second*, I think that the court mixed the two types of right of publicity. The question whether (the heirs of) Laurel and Hardy can prohibit an imitation of their performances in a motion picture, depends on the definition of the content of the performance right of publicity,²⁴¹ but not on the identity right of publicity. In my opinion, the identity right of publicity should not be used to prohibit media products, such as a (commercial) television series, if it is given that defendant's television series does not infringe any copyrights, trademark rights, or performance right of publicity, and does not confuse viewers into believing that the series was created by, or sponsored by (the heirs of) Laurel and Hardy. This is the consequence of the protection of works of entertainment by the freedom of speech.²⁴²

In *Guglielmi v. Spelling-Goldberg Productions*,²⁴³ the plaintiff, a nephew and heir of world-renowned silent motion picture actor Rudolph Valentino, alleged that the film entitled "*Legend of Valentino: A Romantic Fiction*" infringed the right of publicity in Valentino's identity. He stated that defendant's fictionalized film was a misappropriation of commercial value of Rudolph

238. Id. 455 F.Supp. 252, at 257.

239. Id. 455 F.Supp. 252, at 257-258.

240. Id. 455 F.Supp. 252, at 259.

241. See § 11.3[E] and § 11.4[A].

242. See *supra* at § 10.3[D][1].

243. 25 Cal.3d 860, 160 Cal.Rptr. 352, 603 P.2d 454, 205 U.S.P.Q. 1116, 5 Media L. Rep. 2208 (Cal. 1979).

Valentino's personality. The plaintiff prayed for a preliminary and permanent injunction restraining defendants from commercially exhibiting the film without his permission, and damages. The defendant won the case. The Court of Appeals and the California Supreme Court held that the right of publicity protects against the unauthorized use of one's name, likeness or personality, but that this right was not descendible and expired upon the death of the person protected. Unfortunately, the Supreme Court did not discuss the question whether unpermitted use of a personality's identity in a motion picture could infringe the right of publicity. But I agree with the famous concurring opinion of Justice Bird,²⁴⁴ who argued that use of Valentino's name and likeness in a fictional film exhibited on television did not constitute an actionable infringement of his right of publicity. Otherwise, "[a]n important avenue of self-expression would be blocked and the marketplace of ideas would be diminished. As one commentator recently observed, 'it is difficult to imagine anything more unsuitable, or more vulnerable under the First Amendment, than compulsory payment, under a theory of appropriation, for the use made of (an individual's identity in a work of fiction).'²⁴⁵

Similarly, in *Declemente v. Columbia Pictures Indus.*,²⁴⁶ a court held that the motion picture "*The Karate Kid*" did not infringe the right of publicity of DeClemente, who claimed to be the original Karate Kid. The court found that DeClemente had not shown that his public personality as "*The Karate Kid*" was so notorious to the public that it would identify him from the movie character. But in my view, even if the public would have identified him, his right of publicity would not have been infringed.²⁴⁷

Some Netherlands courts have held that use of a portrait in a work of fiction can infringe the commercial portrait right. Most famous is a Supreme Court decision of 1979.²⁴⁸ The Court held that actors had the right to share in the profits made by an "*album*" about the television series "*'t Schaep met de vijf Pooten*" in which they had performed roles. Both the District Court and the Court of Appeals made a distinction between a publication in a news magazine to inform the public and the album. The Amsterdam Court of Appeals²⁴⁹ found the following differences:

- the album was not a regular magazine, but a one-time published edition;

244. 25 Cal.3d 860, at 862-876. See also *supra* at § 10.3[D][1].

245. 25 Cal.3d 860, at 872, citing Hill, *Defamation and Privacy Under the First Amendment* 76 *Colum. L. Rev.* 1205, at 1305. Cf. 25 Cal.3d 860, at 868: "Indeed, Dickens and Dostojevski may well have written more trenchant and comprehensive commentaries on their times than any factual recitation could ever yield. Such authors are no less entitled to express their views than the town crier with the daily news or the philosopher with his discourse on the nature of justice."

246. 860 F.Supp. 30; 33 U.S.P.Q.2d 1564 (E.D.N.Y. 1994).

247. Cf. *Newton v. Thomason*, 22 F.3d 1455; 1994 U.S. App. LEXIS 8965; 30 U.S.P.Q.2d 1633; 22 *Media L. Rep.* 1609 (C.A.9 1994): defendant's use of character "Wood Newton" in television show "Evening Shade" does not infringe right of publicity of plaintiff woodcarver Wood Newton, because nothing indicated that the fictional character was the plaintiff.

248. Supreme Court of the Netherlands, January 19, 1979, NJ 1979, 383 (LWH); BIE 1979, no. 23, at 163. *Auteursrecht 1979*, 52 (JHS) (*'t Schaep met de vijf Pooten*).

249. Court of Appeals Amsterdam, July 7, 1977, NJ 1979, 383, para. 24.

- which contained only a fictional story with illustrations, which, therefore, was more similar to an illustrated novel;
- which content was not new, but was similar to the television series, in order to enable the viewer-reader to recall the story for purposes of entertainment.

The court admitted that also people who had not seen the television series could read the album. The court held that use of pictures in such an album was a form of "isolated" use, similar to use of a picture in an advertisement for commercial products such as beer. It found that in the Netherlands, it was common practice to pay for use of portraits for such "isolated" forms of commercial use.²⁵⁰ Unfortunately, in cassation, this distinction between news media and a commercial album was not challenged. The Supreme Court found in favor of the persons portrayed in the album.

In my opinion, the arguments stated by the Court of Appeals to distinguish an album from other informational media are not convincing, and contrary to the principles of free speech.

In the "*The Bold & The Beautiful*" case, the Pres. of the District Court the Hague granted an injunction to sell defendant's book about the television series "*The Bold & The Beautiful*" for copyright infringement. However, the Pres. also stated that since the actors portrayed in the book had not given their written permission, it was at least doubtful whether the publication of the portrait was lawful.²⁵¹ In my opinion, the use of the portraits in a book should not be unlawful if the publication of the book itself is not unlawful.²⁵²

In the Dutch "*Sjef van Oekel*" case,²⁵³ plaintiff Dolf Brouwers alleged that the use of the character "*Sjef van Oekel*" in a comic book series after that character infringed his personality right and commercial portrait right. The Van Oekel character was concocted by Wim T. Schippers, and performed by Brouwers in a successful television series. Schippers and Van den Boogaard later started a comic book series based on this character, which pictured the likeness of Brouwers. Brouwers stated that the public identified him from the Van Oekel character in the comic books. He objected to the fact that the Van Oekel character sometimes appeared in obscene and pornographic situations, and the fact that he did not share in the profits made by the series. The district court held that the comic book character portrayed Brouwers, and that he had a reasonable privacy interest in prohibiting the publication of his portrait in an obscene and/or pornographic interest.

However, the court also found that Brouwers had a commercial interest in sharing in the profits made by the comic book series, stating that this interest was insufficiently denied by the defendant. In my view, if the defendant had

250. The Court of Appeals ignored the opinion of the photographer, who has stated that in his opinion, use of his photographs in the "album" was not a form of "isolated" use, similar to use in an advertisement for beer products. See Court of Appeals Amsterdam, July 7, 1977, NJ 1979, 383, para. 16.

251. Pres. District Court the Hague, January 3, 1995, Mf 1995, B21 (*Bell Phillip Television Prod./Bzzd6h*).

252. But see for an exception, *infra* § 10.4[C][2].

253. District Court Haarlem, January 22, 1991, AMI 1992, 188 (JCSP) (*Brouwers/Schippers et al.*).

argued that its comic books were protected by the freedom of expression, the commercial interest of Brouwers should have been denied.²⁵⁴

The Pres. of the Zutphen District Court granted an injunction to reproduce and publish the book "*Clowns 2*" insofar as the cover or content contained pictures of the clown "*Bastiaan*." The book "*Clowns 2*" informed the reader how to create copies of famous clowns. The Pres. ordered the injunction because the defendant unlawfully profited from the popularity of plaintiff Bastiaan Van Toor, who had gained his popularity by performing the role of the clown "*Bassie*" a character which he had developed. The clown "*Bastiaan*" was clearly based on the clown "*Bassie*".²⁵⁵

In my opinion, this case is wrongly decided. The right to control the commercial exploitation of one's popularity should not include the right to enjoin books. The fact that defendant had first asked permission to use the clown "*Bassie*" on the cover, and changed the name "*Bassie*" in "*Bastiaan*" after Van Toor had asked a reasonable compensation for his permission, does not alter this view, but might be relevant to Van Toor's other claim that defendant infringed his copyright in the character Bassie. The outcome of the case could have been the same, if the Pres. had ruled that defendant had infringed Van Toor's copyright in the clown Bassie. However, the Pres. did not find it necessary to discuss the copyright issue.

[3] Performance Cases

A person's performance, or acts in a public place, can be filmed and broadcast by the media. This could infringe the performance right of publicity, as is shown by the "*Zacchini*" case.²⁵⁶ However, if such a broadcast is not a commercial for nonmedia products, the identity right of publicity will not be infringed. Some courts have not clearly distinguished between the two different rights.

For example, in *People for the Ethical Treatment of Animals v. Berosini*,²⁵⁷ respondent, world-renowned animal trainer Bobby Berosini, claimed that defendants, animal rights organizations, defamed him and invaded his privacy because they had made a videotape which showed him back-stage before the beginning of his show, shaking and punching his trained orangutans and hitting them with some kind of rod. The district court found in favor of Berosini, but in appeal, the Supreme Court of Nevada reversed, because there was no evidence presented which would support a conclusion that the tape, either visually or auditorily, was, of itself, false. The Supreme Court rejected Berosini's privacy claim for appropriation of his name and likeness, because Berosini claimed commercial, not immaterial damages. The court stated that Nevada provides a statutory remedy in cases of invasion of the right of publicity

254. See also my note in AMI 1992, 188, at 193.

255. Pres. District Court Zutphen, November 29, 1993, BIE 1996, no. 30, at 108 (*Van Toor/Wolters-Van Bemmer*). See § 5.2[E].

256. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977).

257. 867 P.2d 1121, 22 Media L. Rep. 1769 (S.Ct. Nev. 1994).

and for protection against "any commercial use within this state of a living or deceased person's name, voice, signature, photograph or likeness [...]" but that Berosini had not argued the commission of this tort in his appeal. In my opinion, the videotape of Berosini's acts cannot infringe the right of publicity, unless it is used as a commercial for nonmedia products. The performance right of publicity is discussed in Chapter 11.

[4] No Reasonable Relation

In New York case law, some courts have indicated that use of a person's name or likeness in the media can constitute a use "for advertising purposes or for the purposes of trade," if there is no reasonable relation between that person and the content of the story. For example, in *Sarat Lahiri v. Daily Mirror*,²⁵⁸ a court stated that there may be liability

"if the photograph used has so tenuous a connection with the news item or educational article that it can be said to have no legitimate relation to it and be used for the purpose of promoting the sale of the publication."²⁵⁹

However, courts have hardly²⁶⁰ concluded that there was no reasonable relation between plaintiff's picture and the topic of the publication, since such a test is similar to a newsworthiness test. In *Finger v. Omni Publications Intern., Ltd.*,²⁶¹ the New York Court of Appeals held that a defendant could publish a photograph of plaintiffs and their six children in its magazine, because it was reasonably related to an article on caffeine-aided fertilization:

"The theme of fertility is reasonably reflected both in the caption beneath the picture, 'Want a big family?', and the images used --six healthy and attractive children with their parents to whom each child bears a striking resemblance. Clearly then, there is a 'real relationship' between the fertility theme of the article and the large family depicted in the photograph. That the article also discusses in vitro fertilization as being enhanced by 'caffeine-spritzed sperm' does no more than discuss a specific aspect of fertilization and does not detract from the relationship between the photograph and the article.

258. 295 N.Y.S. 382, 162 Misc. 776 (N.Y. Sup. 1937).

259. 295 N.Y.S. 382, at 389. Court held that photograph of well-known Hindu musician, playing a musical instrument as an accompaniment to an Indian female dancer had a relationship to the article: "It is used to illustrate one of the points made by the author--the mystical quality of the East."

260. Exceptions seem to occur in the context of public disclosure privacy cases, which under New York law are necessarily discussed in terms of appropriation. See *e.g. Barrows v. Rozansky*, 111 A.D.2d 105, 489 N.Y.S.2d 481 (N.Y.A.D. 1 Dept. 1985): defendant, the former lover of plaintiff, the daughter of a socially prominent family, had taken photographs of her in the nude during their relationship. These nude photographs were published eleven years later, when her arrest on a charge of promoting prostitution was sensationalized by the local news media. The court found no reasonable connection between an arrest story and the use of eleven year old nude pictures of the arrested person. In my opinion, the argument that the pictures are eleven years old is in itself not sufficient to counter-act a freedom of speech defense. Newspapers publish old photographs of persons who reappear in the news. In this case an extra circumstance was the breach of an (implied) contract not to publish nude photographs taken during a relationship.

261. 77 N.Y.2d 138, 564 N.Y.S.2d 1014, 566 N.E.2d 141, 38 Media L. Rep. 1555 (N.Y. 1990).

As we have noted, the 'newsworthiness exception' should be liberally applied [...]. Moreover, questions of "newsworthiness" are better left to reasonable editorial judgment and discretion [...].²⁶²

The reasonable relation requirement has also been imported into the right of publicity. McCarthy stated:

"The use of plaintiff's identity may be merely commercial and exploitative, with the plaintiff's name or picture merely serving to draw attention to a media publication to increase sales. This could give rise to invasion of "appropriation" privacy or infringement of the Right of Publicity. This is similar to the argument that inserting a person's identity into a fictional story merely to make the story more saleable is an exploitative, non-first-amendment use."²⁶³

In *Grant v. Esquire, Inc.*²⁶⁴ the reasonable relation test has been applied in a right of publicity case. Defendant Esquire published an article in 1946 about the clothing tastes and habits of six Hollywood stars, including plaintiff Cary Grant, which was illustrated with pictures of these stars. In 1971, Esquire republished the same picture with the modification that everything below the collar line had been replaced with the figure of another model in other clothes. Under this picture appeared the following text: "to give a proper good riddance to the excesses of the peacock revolution we have tried a little trickery. And what better way to show the longevity of tradition than by taking the pictures of six modish men that appeared in Esquire in 1946 and garbing the ageless enchantment of these performers in the styles of the seventies. Above, Cary Grant in a descendant of the classic cardigan, an orlon double-knit navy, rust, and buff sweater-coat (forum, \$22.50)."²⁶⁵ The court observed that this text could be considered interesting and informative, but in the court's opinion

"neither the picture nor the caption tells the reader anything about Mr. Grant. One is not told whether Mr. Grant ever wore a cardigan sweater jacket, or anything else about him except his one-time appearance in the pages of Esquire. Mr. Grant's face serves no function but to attract attention to the article."²⁶⁶

The court did not see a reasonable relation between Cary Grant and the content of this article. It rejected defendant's First Amendment defense, because there was no fear for a "*chilling effect*" of a threat of litigation in the sense that other publishers who might learn of this decision would tend to inhibit in the exercise of any rights guaranteed by the First Amendment. The court said that if the

262. *Id.* 77 N.Y.2d 138, at 143. Citations omitted.

263. McCarthy, *The Rights of Publicity and Privacy*, § 8.8[D][1] (Rev. 1993). *Cf. Restatement (Third) of Unfair Competition* § 47, comment c. (1995): if the name or likeness is used solely to attract attention to a work that is not related to the identified person, the user may be subject to liability for a use of the other's identity in advertising. Similarly, if a photograph of the plaintiff is included in the defendant's publication merely for the purpose of appropriating the plaintiff's commercial value as a model rather than as part of a news or other communicative use, the defendant may be subject to liability for a merchandising use of the plaintiff's identity.

264. 367 F.Supp. 876 (D.C.N.Y. 1973).

265. *Id.* 367 F.Supp. 876, at 878.

266. *Id.* 367 F.Supp. 876, at 878.

publisher feels impelled to trade upon the name and reputation of a celebrity, it must pay the going rate for such benefit. There would be no chilling effect, because there was no shortage of celebrities who -for an appropriate fee- are only too happy to lend their faces, names and reputations for exploitations in such enterprises as the one here involved.²⁶⁷ The court compared defendant with

"a painter who feels he needs certain pigments and oils to create a contemplated masterpiece. While a more sympathetic case might be made for an impecunious painter than for an abundantly solvent publisher, nobody would seriously contend that artistic need would authorize a painter to walk into a supply store and help himself to whatever he might require."²⁶⁸

In my opinion, the reasonable relation test may be appropriate in privacy cases,²⁶⁹ but should be rejected for the right of publicity. Therefore, I do not agree with the court's reasoning in the "*Cary Grant*" case. The incorrect painter-publisher comparison illustrates the problem. The painter is impeded by non-speech restrictions, but the publisher is restricted by anti-speech restrictions which force the speaker to alter its message. *Supra*,²⁷⁰ it was argued that anti-speech restrictions are only permissible with respect to commercial speech. But first the court noted about the article that "provides the reader-in succinct form-with a fair amount of information about Mr. Grant's habits and life style. A considerable segment of the population might well consider this both interesting and informative."²⁷¹ And then it concluded:

"There is no conceivable artistic or editorial purpose served by Mr. Grant's picture that would not equally well have been served by any one of numerous other celebrities."²⁷²

Such a content based test for noncommercial speech clearly conflicts with the principle of free speech. A court should not tell a magazine to use other words. In my view, the court should have rejected the subjective reasonable relation test. Instead, it had only to investigate whether the magazine article was in fact an advertisement in disguise.²⁷³ If so, the right of publicity of Cary Grant would have been infringed. If not, the magazine article would not have infringed his rights.

Other cases which McCarthy cites as a support for the reasonable relation requirement in right of publicity cases,²⁷⁴ are in fact (New York) privacy

267. 367 F.Supp. 876, at 883.

268. *Id.* 367 F.Supp. 876, at 883.

269. *See* § 3.2[C][4] and § 4.5[B][4][e].

270. *See* § 9.2[C][4][c] and § 9.3[B][2].

271. *Id.* 367 F.Supp. 876, at 877.

272. *Id.* 367 F.Supp. 876, at 883.

273. *See* § 10.2[B][2]. Grant contended that he should be allowed to prove that defendants had some covert arrangement with each other which converted the *Esquire* article into a paid advertisement for the co-defendant Forum. Although the court found it highly unlikely -in light of the detailed affidavits submitted by defendants- that Grant would be able to establish such a contention, it ruled that he should have the opportunity to establish such a case. *Id.* 367 F.Supp. 876 at 879.

274. The cases cited in McCarthy, *The Rights of Publicity and Privacy*, § 8.8[D][1] (Rev. 1993).

cases, or right of publicity cases in which the plaintiff complained about the advertisements for a media product, not about the media publication itself. These cases are discussed in § 10.4[C][1] and [2].

[5] Breach of Contract

In *Douglass v. Hustler Magazine, Inc.*,²⁷⁵ the Seventh Circuit held that an unpermitted publication of nude photographs of actress and model Robyn Douglass in "provocative" Hustler magazine violated her right of publicity. The infringing nude pictures were photographed with her permission, but she had only given permission for publication in Playboy magazine. However, the publication of stills from her movies and television shows did not violate her right of publicity, because these pictures were in the public domain. The court reasoned that unpermitted media use can infringe the right of publicity:

"Although originally the forbidden use was putting one's name or picture into an advertisement, it is apparent from *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977), that the right can extend to publication in the nonadvertising portions of a magazine or broadcast."²⁷⁶

The court found this case "easier" than the "*Zacchini*" case, because there the performance had been in public. The court rejected Hustler's defense that Douglass was newsworthy and that "*Robyn Douglass Nude*" was fair comment on her career with the argument that in the "*Zacchini*" case, the station could have done a story on Zacchini without showing his entire act. Citing the above-mentioned "*Cary Grant*" case the court said:

"Hustler can run a story on her and use any photographs that are in the public domain or that it can buy but it cannot use photographs made by others for commercial purposes and (temporarily) withheld from public distribution."²⁷⁷

The court found that Robyn Douglass or her agents can only maximize the value of her nude photographs if she can control the dissemination of her pictures. The unauthorized publication did impair the commercial exploitation of her pictures. The Seventh Circuit invented a new rule: Douglass would have no right of publicity claim if the photographer had gotten a general release from her. However, by executing only a limited release, Douglass retained a right in the photos he took of her, which is protected by the right of publicity.

Although perhaps an attractive theory for professional models, it must be rejected, because it puts the extra element of a breach of contract into the right of publicity. That is wrong, and conflicts with the principles of free speech. Similarly, one should not intertwine the tort of intrusion of privacy with the right of publicity. Hustler acted unlawfully if it invaded Douglass privacy by putting her in the false light that she freely chose to pose for Hustler, or if it forced the

275. 769 F.2d 1128, 11 Media L. Rep. 2264 (C.A.7 1985).

276. *Id.* 769 F.2d 1128, at 1138.

277. *Id.* 769 F.2d 1128, at 1138.

photographer into a breach of his contract with her. However, in my opinion, Hustler did not infringe her right of publicity. Unpermitted media use of personal identity does not infringe the identity right of publicity. The Seventh Circuit conclusion that the right of publicity extends to publication in the nonadvertising portions of a magazine or broadcast is wrong, because it failed to recognize that the "*Zacchini*" case involved a completely different right, the performance right of publicity.

[F] Conclusion

A study of the right of publicity cases in which the conflict with the free speech principles was apparent, shows that this right should not be extended to unpermitted nonadvertising use of identity in the media. The fact that a media product is a work of fiction or that its purpose is to entertain, should not alter this conclusion. Unpermitted use of identity in media products can trigger other legal theories, such as false advertising, the right of privacy, or defamation law.

Most cases which are cited in support of the theory that the right of publicity also encompasses types of nonadvertising media use, are not right of publicity cases, but privacy cases. The few cases which have held that unpermitted media use infringes the right of publicity, such as the "*Muhammed Ali*," "*Cary Grant*" or "*Robyn Douglass*" cases had incorrectly been decided on right of publicity grounds.

10.4 Media Advertisement Exemption for Non-Infringing Uses: No Infringement

[A] Principle: Advertisement for Media Product Shares Freedom of Speech Protection

Courts have generally concluded that if use of a person's identity in the media is protected by the freedom of speech, the advertising for such non-infringing media products will also be immune from liability for infringement of the right of publicity.²⁷⁸ This is an exception to the general rule that advertisements for commercial nonmedia products trigger the right of publicity.

Similarly, Dutch courts have held that use of a portrait in an advertisement for a magazine is not unlawful because a magazine must have the right to inform its readers about its nature.²⁷⁹

The U.S. Supreme Court has suggested the principle that speech that advertises an activity, which is itself protected by the First Amendment, will not

278. see § 2.6[A][3].

279. § 4.5[C][c].

be considered commercial speech.²⁸⁰ The reason is that it would be illogical to permit media products themselves, but prohibit their promotion.²⁸¹

[B] Media Advertisement Exemption

Use of plaintiff's identity in an advertisement for a media product which gives news or entertaining information about this plaintiff does not infringe the right of publicity. The same rule should apply to advertisements for products which are exempted from right of publicity liability, such as a poster portraying a political candidate. The advertisements share the freedom of speech privileges enjoyed by the products they promote. For example, in *Newton v. Thomason*,²⁸² the Ninth Circuit stated that use of a person's name in a television program advertisement that highlights a program in which this person appears, does not infringe the right of publicity. However, most case law involves cases where plaintiff's identity is used in a reprint of an old story in an advertisement for similar media products. Such use does not infringe the right of publicity, because the media are allowed to give their consumers an impression of the nature and content of their media products.²⁸³

Illustrative is *Booth v. Curtis Publishing Co.*²⁸⁴ In this case, in June 1959, the publisher of Holiday magazine published a full-page advertisement for Holiday in other periodicals, which consisted of a dramatic photograph of well-known actress Shirley Booth. This photograph was taken in the winter of 1957-1958, and originally appeared as an illustration to an article in the February 1959 issue of Holiday, without Booth' permission. The republication did not

280. See § 9.2[C]{4}[d].

281. This rule can be seen as a corollary of the "anti-ignorance principle," recognized in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748, at 769, 96 S.Ct. 1817, 48 L.Ed.2d 346, 1 Media L. Rep. 1930 (1976), which states that speech may not be restricted on the grounds that it will disclose facts which may persuade those learning such facts to engage in conduct which is regarded as harmful, if such conduct is not in itself unlawful. Cf. Kabel, *Uitingsvrijheid en absolute beperkingen op handelsreclame*, at 93-108 (1981). The U.S. Supreme Court seems to have rejected this principle with respect to conduct not protected by the freedom of speech. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266, 13 Media L. Rep. 1033 (1986), the Court upheld a Puerto Rico statute prohibiting gambling casino advertisements aimed at residents of Puerto Rico, although gambling itself was not illegal because it attracted tourists from other states. But see *Nimmer on Freedom of Speech* § 2.05[B] (1984) who defends the anti-ignorance principle in general.

282. 22 F.3d 1455; 1994 U.S. App. LEXIS 8965; 30 U.S.P.Q.2d 1633, 22 Media L. Rep. 1609 (C.A.9 1994).

283. *Int-Elect Engineering Inc. v. Clinton Harley Corp.*, 21 Media L. Rptr. 1762 (D.C. Cal. 1993); *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, at 872-873, 160 Cal.Rptr. 352, 603 P.2d 454, 205 U.S.P.Q. 1116, 5 Media L. Rep. 2208 (Cal. 1979) (Bird concurring); *Lawrence v. A.S. Abell Co.*, 299 Md. 697, at 704-705, 475 A.2d 448, 10 Media L. Rep. 2001 (Md. 1984); *Namath v. Sports Illustrated*, 48 A.D.2d 487, 371 N.Y.S.2d 10, 1 Media L. Rep. 1843 (N.Y.A.D. 1975), aff'd 39 N.Y.2d 897, 386 N.Y.S.2d 397, 352 N.E.2d 584 (N.Y. 1976); *Velez v. VV Pub. Corp.*, 135 A.D.2d 47, 524 N.Y.S.2d 186, 14 Media L. Rep. 2290 (N.Y.A.D. 1988). Cf. *Restatement (Third) of Unfair Competition* § 47, comment a. (1995): "The rule allowing use of a person's identity to advertise a permissible use of the identity has been extended beyond advertisements for the particular work or issue in which the identity is used to general advertising for the medium in which the use appears."

284. *Booth v. Curtis Publishing Company*, 15 A.D.2d 343, 223 N.Y.S.2d 737, 1 Media L. Rep. 1784 (N.Y.A.D. 1962), aff'd 11 N.Y.2d 907, 228 N.Y.S.2d 468, 182 N.E.2d 812 (1962).

suggest Booth's endorsement of the magazine. The court held that the advertisement was protected by the First Amendment, because the previous article was also protected speech. The court stated:

"It stands to reason that a publication can best prove its worth and illustrate its content by submission of complete copies of or extraction from past editions. Nor would it suffice to show stability of quality merely to utilize for that purpose a current issue. Moreover, the widespread usage over the years of reproducing extracts from the covers and internal pages of out-of-issue periodicals of personal matter relating to all sorts of news figures, of public or private stature, is ample recognition that the usage has not violated the sensibilities of the community or the purport of the statute."²⁸⁵

The media may even advertise their media products by selling posters. In *Montana v. San Jose Mercury News, Inc.*,²⁸⁶ the California Court of Appeal denied football star Joe Montana's claim that a newspaper's use of his image, taken from its Super Bowl cover story and sold in poster form, violated his right of publicity. The Court ruled that the poster represented newsworthy events and that the defendant newspaper has a constitutional right to promote itself by reproducing its news stories.

In the Netherlands, the Amsterdam Court of Appeals stated that use of the portraits of political persons in a television commercial for "*Volkskrant*" newspaper was not contrary to the politicians' financial interests.²⁸⁷

[C] Exception to Media Advertisement Exemption

[1] Plaintiff Does Not Appear in the Media Product Advertised

The advertisement exemption for the media is not applied if plaintiff's identity does not appear in the media product advertised.²⁸⁸ Illustrative is *Tellado v. Time-Life Books, Inc.*²⁸⁹ Defendant had used a picture of plaintiff, an ex-Vietnam soldier, in an advertisement for a multi-volume series of illustrated books concerning the war in Vietnam, although he did not appear in any of the books. The plaintiff claimed invasion of privacy and misappropriation of his likeness. The court denied the defendant's contention that its use of the photo-

285. *Id.* 15 A.D.2d 343, at 349.

286. 34 Cal.App.4th 790; 40 Cal.Rptr.2d 639, at 641-42; 23 Media L. Rep. 1920; 35 U.S.P.Q.2d 1783 (App. Cal. 1995).

287. Court of Appeals Amsterdam, November 28, 1985, KG 1986, 12; IER 1986, no. 4, at 12; AMI 1986, 145 (*STER/volkskrant*); *Id.* Advertising Standards Council (Reclame Raad), June 18, 1985, IER 1985, no. 58, at 117 (*Volkskrant/STER*). *Cf.* Pres. District Court Amsterdam, September 20, 1984, KG 1984, 287; AMI 1986, 62, *aff'd* Court of Appeals Amsterdam, December 13, 1984, AMI 1986, 62 (*Bhagwan I*): Use of picture of Bhagwan in advertisement for NRC Handelsblad newspaper held to be not actionable; *Id.* Advertising Standards Authority (RCC), March 26, 1985, AMI 1986, 62 (*Bhagwan II*).

288. *Caraway v. L.S. Agency*, 1986 WL 12529 (S.D.N.Y. 1986): Publication of picture of Caraway on cover of defendant's "Gung-Ho," magazine was not protected by any article in that magazine: "None of these articles appear to bear any relationship whatsoever to Mr. Caraway's picture, and defendants have not presented any evidence of such a relationship." Use of this cover in subsequent advertisements for "Gung-Ho" magazine held to be appropriation under New York law.

289. 643 F.Supp. 904, 13 Media L. Rep. 1401 (D.N.J. 1986).

graph was privileged under the First Amendment because the photograph was taken in a public place during a war and, although it was not used in the book, it could have been used as such. The court reasoned

"that defendant did not use plaintiff's photograph in any part of the books themselves. Had plaintiff's picture been used to depict the history of the Vietnam war, defendant's use clearly would have been protected by the First Amendment [...] It is important to remember here that defendant used plaintiff's photograph solely to hype its product. Plaintiff should be permitted to seek compensation for this use."²⁹⁰

Suppose Time magazine writes a story on Mercedes Benz cars, and uses a picture of Frank Sinatra driving a Mercedes Benz car on the cover, and in advertisements for Time Magazine. Suppose also that there is no element of false advertising or false endorsement. Could Sinatra claim infringement of his right of publicity if his name and likeness do not appear in the article itself? The answer is negative, because the picture is not wholly unrelated to the product advertised.²⁹¹ Courts are reluctant to apply the exception, because it is always possible to find some relation between plaintiff's identity and defendant's media product. If plaintiff's name but not his picture is mentioned in a book, the publication of a photograph of the plaintiff in an advertisement for that book does not infringe the right of publicity.²⁹²

In *Dallesandro v. Holt & Co.*²⁹³ it was held that use of a picture of plaintiff, a longshoreman and union member, talking to Father Corridan, a priest who was the subject of the book, on the cover of a book entitled "*Waterfront Priest*," was protected by the First Amendment, even though plaintiff was not mentioned in the book. The court argued that the picture was as an attempt to pictorialize the theme of the book. The picture was illustrative for a story of a priest's "one-man crusade against gangsterism and terror on the New York waterfront."²⁹⁴

In *Rand v. Hearst Corp.*,²⁹⁵ defendant used author Ayn Rand's name in an advertisement for a book by another writer. The defendant had printed on the back cover of this book an excerpt from a critical newspaper review which favorably compared it with a work of Ayn Rand. The court rejected Ayn Rand's

290. 643 F.Supp. 904, at 914.

291. The example is taken from Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 *Nw. U.L. Rev.* 1212, at 1257, fn. 275 (1983).

292. *Cf. Groden v. Random House, Inc.*, 22 Media L. Rep. 2257 (S.D.N.Y. 1994); Robert Groden, author and lecturer on the Kennedy assassination, could not prohibit publication of his name and likeness in advertisement of Gerald Posner's book "Case Closed" which challenged many conspiracy theories, including his theory. *Id. Lane v. Random House, Inc.*, 1995 U.S. Dist. LEXIS 1332 (D.D.C. 1995); Mark Lane, one of the protagonists in the controversy over the Kennedy assassination, could not oppose the use of his picture in an advertisement for Gerald Posner's book "Case Closed" which challenged his theory.

293. 4 A.D.2d 470, 166 N.Y.S.2d 805 (N.Y.A.D. 1957), *aff'd* 7 N.Y.2d 735, 193 N.Y.S.2d 635, 162 N.E.2d 726 (N.Y. 1959).

294. Justice Peck dissented, on the grounds that there was no justification for using on the jacket of a book a photograph of worker on the waterfront not connected with the text of the article. *Id.* 4 A.D.2d 470, at 471.

295. *Rand v. Hearst corporation*, 31 A.D.2d 406, 298 N.Y.S.2d 405 (N.Y.A.D. 1969), *aff'd* 26 N.Y.2d 806, 309 N.Y.S.2d 348, 257 N.E.2d 895 (N.Y. 1970).

claim for appropriation of her name. The court found that "books and publications have a special position in the law," and that a publisher must have the right to quote from a prior review.

[2] Use of Identity in Advertisement for Media Product Which Invades Other Rights of the Plaintiff

A difficult question is whether use of plaintiff's identity in an advertisement for a media product can infringe the right of publicity if this media product is unlawful for invasion of other interests of the plaintiff. For example, suppose that a magazine article contains false statements and invades plaintiff's false light privacy. Such a media product is no longer protected by the freedom of speech. An advertisement for such a product cannot share the freedom of speech protection. Does the advertisement infringe the right of publicity?

Some courts have held that the right of publicity will be infringed if the plaintiff can rebut defendant's freedom of speech defense on grounds of falsity. For example, in *Cher v. Forum Intern., Ltd.*,²⁹⁶ defendant magazine Forum had truthfully published an interview with Cher, which she had originally intended for publication in competitor's magazine US. Forum falsely advertised that Cher endorsed Forum: "*Cher tells Forum things that she would never tell US.*" The Ninth Circuit ruled that Cher's right of publicity would be infringed if she showed that Forum knew that their statements were false or published in reckless disregard of the truth.²⁹⁷

I agree with McCarthy that this decision wrongly mixed the separate legal theories of false advertising, false light privacy and the right of publicity.²⁹⁸ The court reasoned that defendant's media advertisement exemption was not applicable and hence the right of publicity claim revived, if defendant had exceeded the exception by falsely advertising that celebrity Cher endorsed the magazine. To prove this, Cher had to prove actual malice. The decision erroneously holds that in such falsity cases actual malice is an element of a right of publicity claim. Neither falsity nor actual malice are elements of a right of publicity claim.²⁹⁹

Because falsity is no issue in a right of publicity case, McCarthy would answer the question stated supra, negatively. In his opinion, in falsity media cases, such as the "*Cher*" and "*Clint Eastwood*" cases, the plaintiff's right of publicity is sufficiently immunized by a First Amendment defense, but the plaintiff could state a claim for false advertising, invasion of false light privacy or defamation, since the only injury flows from falsity. According to McCarthy, there is no injury caused by the use of plaintiff's identity alone that would not have been caused without an element of falsity.³⁰⁰

296. 692 F.2d 634, 639, 217 U.S.P.Q. 407, 8 Media L. Rep. 2484 (C.A.9 1982).

297. Cf. *Eastwood v. Superior Court for Los Angeles County*, 149 Cal.App.3d 409, 198 Cal.Rptr. 342, 10 Media L. Rep. 1073 (Cal.App.2 Dist. 1983) discussed supra at § 10.3[E][1].

298. See McCarthy, *The Rights of Publicity and Privacy*, § 8.10[C] (Rev. 1993).

299. See § 3.6 and § 3.1[H].

300. See McCarthy, *The Rights of Publicity and Privacy*, § 8.10[C] (Rev. 1993).

Although I agree with McCarthy that falsity is no element of a right of publicity claim, I do not agree that this necessarily implies that an advertisement for a media product which on falsity grounds is not protected by the freedom of speech cannot infringe the right of publicity. The media advertisement exemption to a right of publicity claim should not be valid if defendant's advertisement no longer shares the freedom of speech protection because it is actionable as false advertising, or because the underlying media product loses its speech protection on privacy or defamation grounds. This implies that in such a case, the plaintiff can only prevail if he proves both the elements of the falsity claim and the right of publicity claim. A cumulation of different legal theories is not redundant insofar as the remedies of both theories are different, for example immaterial damages for invasion of privacy, and commercial damages for harm caused to plaintiff's identity by defendant's advertisements for its unlawful article.

For example, in *Maples v. National Enquirer*,³⁰¹ plaintiff Mr. Maples was the father of Marla Maples, who was alleged to have a relationship with Donald Trump. According to the popular press, this relationship was one of the reasons for the breakup of the Trump marriage. Defendant, publisher of the *National Enquirer*, published an "exclusive interview" with Mr. Maples. The cover of the magazine edition featured the headline "Marla's Angry Dad Warns: TRUMP MISTRESS CLOSE TO SUICIDE," and the words "He threatens to punch out Donald for dumping her." Mr. Maples alleged that defendant's article contained false information and was falsely advertised as an "exclusive" interview. He stated a claim for defamation, invasion of privacy-false light and commercial appropriation of his identity. With respect to the appropriation claim, the defendant stated that the article was protected by the First Amendment. The court rejected this defense because of the false statements, and held that "[c]onsequently, Plaintiff's claim for commercial appropriation cannot be dismissed as a matter of law." In this view, if Mr. Maples succeeds on his false light or defamation claim, he could also claim damages to the value of his identity caused by the advertisement on right of publicity grounds. But one may not infer from a cumulation of different theories that falsity or actual malice may become part of a right of publicity claim.

10.5 Conclusion: Integration of Freedom of Speech into the Right of Publicity

In the preceding chapters, the exclusive acts of the right of publicity owner were summarized with the term "*commercial use*." In Chapter 2 the actual situation of the right of publicity in the United States is described. The term "*commercial use*" encompasses three different types of acts: use of a person's identity in connection with commercial merchandise, in advertisements for such products, and in the media. In Chapter 4, a similar conclusion is reached with respect to the acts which infringe the Dutch commercial portrait right.

301. 763 F.Supp. 1137 (N.D.Ga. 1990).

In Chapter 9, the meaning of the term "*commercial use*" and its relation with the freedom of speech is analyzed. To harmonize the right of publicity, which protects against unpermitted forms of commercial use of personal identity, with the freedom of speech rights of others, two balancing methods were distinguished.

The first method is a form of ad hoc balancing to decide whether defendant's use is primarily commercial in nature. A court must weigh all relevant circumstances of the specific case. In this "*tort*" approach, courts and commentators (e.g. Haas, Kwall) have weighed different considerations, such as the following questions:

- what identifying element of the plaintiff is used: only plaintiff's name, or also the likeness or other identifying elements?
- to what extent is the plaintiff recognizable? Is the use of plaintiff's identity incidental or de minimis, or intended to attract buyers? Did the defendant intend to identify the plaintiff?
- who is the defendant and what is the intention of defendant's use? Was the use of plaintiff's identity necessary for that purpose?
- in what type of medium is plaintiff's identity used: is the use informational, entertaining or purely commercial?
- did the defendant make a substantial creative contribution?
- how large is the public that will come into contact with defendant's use?
- what is common trade practice with respect to defendant's type of use?
- who is the plaintiff? A politician, public figure, or private figure?
- in what way was the plaintiff harmed: purely economically, or also reputation or emotional interests?
- to what extent is the defendant enriched by use of plaintiff's identity?
- does defendant's message contain some falsehoods?
- is plaintiff still alive? If not, how long ago did he die?
- what is the harm to society? Is there an element of consumer deception or confusion of the public?

This method of an ad hoc balancing of such different factors has been rejected, because it does not provide a clear rule which enables future actors to predict the outcome of the conflict between the right of publicity and the freedom of speech.

Instead, in § 9.4, a definitional balance based on the media versus nonmedia use distinction has been defended. According to this context test, the term "*commercial use*" can be defined as use in connection with (advertising for) nonmedia products, services or companies. Non-infringing or "*communicative use*" has been defined as use in connection with (advertising for) media products. Because this definition is dissimilar to the actual legal situation as described in Chapters 2 and 4, in Chapter 10 relevant case law of the United States and the Netherlands has been analyzed in the light of the definitional balance.

My conclusion is that the definitional balance found in § 9.4 is appropriate to describe the content of the right of publicity. Most decisions which have held that use of plaintiff's identity in a media product did infringe the right of publicity, must be read in the light of the right of privacy, or the performance

right of publicity. All decisions which have held that media use of plaintiff's identity was actionable on genuine right of publicity grounds, have been rejected.

Although the definition of "*commercial use*" is relatively clear, its application can be difficult if plaintiff's identity is used in connection with semi-media products, which do not clearly fall into the categories media or nonmedia product or in a news story, which is in fact an advertisement for nonmedia products in disguise. In my opinion, an analysis of case law shows that courts are indeed able to resolve such "*hard*" cases.

In § 10.1[D] some exemptions have been discussed which modify the outcome of the definition of commercial use in favor of the freedom of speech in connection with semi-media products: use of the identity of politicians, in a parody, to provide factual information about the creator, and de minimis use. Such exemptions should be construed narrowly.

The outcome of the definitional balance is a definition which describes the content of the right of publicity in terms of exclusive acts of the plaintiff. Such an approach fits with a "*property view*" of the right of publicity, as opposed to a "*tort view*." The tort view of the right of publicity does not specifically tell which acts the plaintiff can prohibit, but provides factors which can be relevant in finding the answer to the question whether defendant's act is unlawful.

The property view of the right of publicity provides a definition of the content of the right of publicity in which the principles of freedom of speech are integrated. The right of publicity can be defined as an intellectual property right which grants every human being the exclusive right to commercially use his identity. Commercial use is defined as use in connection with (advertisements for) nonmedia products.

CHAPTER 11

PROTECTION OF PERFORMERS

11.1 Introduction

Section 2.3[D] described the American right of publicity as not only protecting recognition values in a person's identity, but also performance values in a performance. Most right of publicity cases involve the use of plaintiff's identity in connection with (an advertisement for) nonmedia products. But some courts have also extended the right of publicity to protect non-copyrightable performances against unpermitted media broadcasts and exploitative imitations. In § 6.2[C], I have distinguished the identity right of publicity and the performance right of publicity, depending on the object of protection, a person's identity or a non-copyrightable performance. Many courts¹ and authors² have ignored this distinction when they concluded that use of plaintiff's identity in a media product can infringe the identity right of publicity.³ In my view, such a distinction is important, because the object of protection, justification for protection, and the content of both rights are different. The only common feature of both rights seems that they protect a "*publicity value*" in a person's identity or performance.

A comprehensive discussion of rights of performers in the United States and the Netherlands is beyond the scope of this thesis. The rights of performers in the Netherlands are discussed in § 5.4, which deals with neighboring rights. In this chapter, I discuss the American performance right of publicity in order to demonstrate its difference with the identity right of publicity.

11.2 Federal Copyright Protection for Performers in the United States

Not all recorded acts of human beings should be considered a "*performance*." In the Netherlands, the Neighboring Rights Act (*Wet Naburige Rechten*) defines a "*performer*" as "the actor, singer, musician, dancer, and any other person who performs a work of literature or art," and "the artist who performs a variety, circus, or puppet show." This definition is based on Article 3(a) and Article 9 of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention of Oct. 26, 1961). The United States is not a party to the Rome Convention because it provides for performance rights in sound recording copyrights, a right which the U.S. legislator did not recognize in the 1978 Copyright Act.

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1. E.g. *Eastwood v. Superior Court for Los Angeles County*, 149 Cal.App.3d 409, at 425, 198 Cal.Rptr. 342, 10 Media L. Rep. 1073 (Cal.App.2 Dist. 1983); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, at 1138, 11 Media L. Rep. 2264 (C.A.7 1985). But see for an exception: *Cardtoons v. Major League Baseball Players Ass.*, --- F.3d ---; 1996 WL 490707; 39 U.S.P.Q.2d 1865 (C.A.10 1996): The "distinction between the value of a person's identity and the value of his performance explains why *Zacchini v. Scripps-Howard Broadcasting Corp.*, 433 U.S. 562 (1977), the Supreme Court's sole case involving a right of publicity claim, is a red herring."
 2. E.g. § 9.3[C][4] (Kwall) and § 9.3[C][5] (McCarthy).
 3. See § 9.1.

The 1978 Copyright Act only provides protection for works of authorship which are fixed in any tangible medium of expression. Performances can be fixed on records, discs, tapes, cassettes, films, etc. In the following three situations performers receive protection under American copyright law: a) the performer owns a copyright in the underlying work which he performs, b) the performance is fixed in an audiovisual work, or c) the performance is fixed in a sound recording.

[A] Copyright in an Underlying Work

A performer can own a copyright in the underlying work which he performs, such as a musical work, dramatic work, pantomime or choreographic work.⁴ This situation is not problematic. If the performer controls the copyright in the underlying performed work, he can prohibit any unauthorized recording, broadcast, or imitation of his performance of the underlying work.⁵

[B] Copyright in an Audiovisual Work

A performance can be fixed in an audiovisual work, such as a motion picture.⁶ Such works receive full copyright protection. But due to the "*work for hire*" doctrine,⁷ most actors or singers in films or television videotapes are statutorily alienated from the copyright in the work they create, unless they are in a position that they can bargain for specific rights to the use of that work. But most performers sign contracts which provide that their contribution will be considered a work for hire.

[C] Copyright in a Sound Recording

The performance is fixed in a sound recording. A sound recording is a work "that result[s] from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual

4. Cf. Pasek, *Performers' Rights in Sport: Where Does Copyright Stand?* 8 *Copyright World*, 13 (1990) providing examples of routines of sportsmen that could receive copyright protection.

5. Cf. *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 229 U.S.P.Q. 684, 1986 Copr.L.Dec. P 25,930, 12 Media L. Rep. 2114 (C.A.2 1986): test for determining whether copyright in choreography of George Balanchine's *Nutcracker* ballet was infringed by printing of photographs in book was not whether the ballet could be reproduced from the photographs but whether the photographs were substantially similar to the ballet.

6. 17 U.S.C. § 101 defines "audiovisual works" as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied," and "motion pictures" as "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any."

7. See 17 U.S.C. § 201(b): "In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."

work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."⁸ A sound recording is a work of authorship, which can be embodied in numerous copies, called "*phonorecords*."⁹ Of course, in order to receive copyright protection, the recording must be a "*work of authorship*." While in the Netherlands the rights of performers and the recording industry are recognized as separate neighboring rights, the U.S. legislator chose to combine these two rights in one copyright. The House Report stated:

"The copyrightable elements in recorded sounds will usually, although not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and processing the sounds, and compiling and editing them to make a final sound recording. There may, however, be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element on the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable."¹⁰

The U.S. Legislator did not want to fix the authorship or resulting ownership, "but leaves these matters to the employment relationship and bargaining among the interests involved."¹¹ Therefore, in the absence of any contractual assignment or employment contract, ownership of the sound recording copyright will be with the parties who made an original contribution. If both performers and sound recorders have made an original contribution, they have joint ownership.

Compared to copyright in other works, copyright in a sound recording is limited in two ways.

First, the exclusive right of reproduction is limited to forms of "*piracy*," i.e. the exclusive right to duplicate the sound recording in works "that directly or indirectly recapture the actual sounds fixed in the recording."¹² This means that the owner of a copyright in a sound recording cannot prohibit the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds "*imitate or simulate*" those in the copyrighted sound recording. Therefore, a performer cannot prohibit the creation of a second recording of the sounds of another performer who deliberately attempts to imitate the first performer's sounds or style.

8. See 17 U.S.C § 101. Cf. § 3.4[D].

9. 17 U.S.C. § 101 defines "phonorecords" as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed."

10. H. Rep. No. 94-1476, at 56 (Sept. 3, 1976).

11. H. Rep. on the Sound Recording Amendment of 1971, No. 92-487, at 5 (Sept. 22, 1971).

12. 17 U.S.C. § 114(a). The exclusive right of the owner of copyright in a sound recording to prepare derivative works is limited to works in which the "actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality." *Id.*

Second, the copyright in a sound recording does not include the exclusive right to perform the work publicly.¹³ Therefore, if a third party, for example a radio station, broadcasts a phonorecord, it does not infringe the copyright in the sound recording.¹⁴ The radio station must pay copyright owners of the underlying musical composition, normally the publisher and/or composer but not the performers.¹⁵

11.3 State Protection for Performers

[A] Preemption of Federal Copyright Act

Section 301(a) of the 1978 Copyright Act provides that the individual States may not recognize under common law or statute law any "rights that are equivalent to any of the exclusive rights¹⁶ within the general scope of copyright [...] in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright." Thus, the States may recognize rights which are not equivalent to the exclusive rights of federal copyright, or which do not protect fixed works within the subject matter of copyright. For example, the identity right of publicity is not preempted by the federal 1978 Copyright Act, because it protects a person's name, likeness, voice, and other identifying elements, objects which are not a fixed work within the subject matter of copyright.¹⁷ Similarly, a State may recognize property rights in performances or other acts of entertainers which are not fixed or do not come within the subject matter of copyright.

[B] Recognition of the Performance Right of Publicity

The performance right of publicity is recognized in Ohio, and was held to be constitutional in the famous U.S. Supreme Court decision in the "*Zacchini*"

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13. See 17 U.S.C. § 114(a) and § 114(c). According to 17 U.S.C § 114(d) the Register of Copyrights had to submit a report setting forth recommendations as to whether § 114 had to be amended to provide for performers and copyright owners of copyrighted material any performance rights in sound recordings. Notwithstanding § 114(d), to date any performance right in sound recordings has not been recognized. Apparently, the lobbying power of performers is not as powerful as the one of the broadcasting industry.
 14. The situation in the Netherlands is different. Art. 2(1)(d) of the Neighboring Rights Act (NRA) recognizes also the exclusive right to broadcast a performance. Art. 6(1)(c) grants the producer of a phonogram a similar right with respect to its phonogram. But Art. 7 NRA rules that a commercial phonogram can be made public without permission of the performing artist or its producer, if a reasonable compensation is paid to performing artist and producer. If parties cannot agree on the amount of a reasonable compensation, it will be fixed by the District Court in The Hague.
 15. Authors are paid a performance fee through one of the large collection societies, such as ASCAP, BMI and SESAC for any public use of their work, see Korman and Koeningsberg, *Performing Rights in Music and Performing Rights Societies*, 33 *J. Copyright Soc'y* 352 (1986).
 16. According to 17 U.S.C. § 106 the copyright owner has the exclusive rights to 1) reproduce, 2) prepare derivative works, 3) distribute copies or phonorecords, 4) perform publicly, and 5) display publicly the copyrighted work.
 17. Cf. McCarthy, *Rights of Publicity and Privacy*, § 11.13[C] (Rev. 1993).

case.¹⁸ In this case, Hugo Zacchini, the great "*Human Cannonball*," sued the operator of a television station because it had filmed and showed in its entirety on the eleven o'clock television news program his performance "invented by his father and ... performed only by his family for the last fifty years" at a county fair in Ohio. The entire performance lasted 15 seconds. During this time Zacchini was shot from a cannon into a net some 60 meters away. He contended that defendant's broadcasting of his act in a news program was an "unlawful appropriation of his professional property."

The trial court and the majority of the Court of Appeals of Ohio held that Zacchini's complaint submitted a claim for infringement of a "common-law copyright." But one judge concurred on the grounds that the complaint stated a cause of action for appropriation of petitioner's "*right of publicity*" in the film of his act. Then, the Ohio Supreme Court rested Zacchini's state law action on his "right to the publicity value of his performance"¹⁹ The main question was whether the First Amendment privileged the television station to show an entire performance on a news program without having to compensate the plaintiff for any financial injury he could prove. The Ohio Supreme Court stated that Zacchini had a right to the publicity value of his performance under Ohio law, but gave the television station an absolute privilege to report on its news programs matters of public interest.²⁰

The U.S. Supreme Court was forced to follow the labeling of Zacchini's action as a claim for infringement of his right of publicity.²¹ The Court reversed. The First Amendment does not immunize the news media if they broadcast his entire act without compensation:

"The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner [...] or to film and broadcast a prize fight, [...] or a baseball game [...], where the promoters or the participants had other plans for publicizing the event"²²

[C] Justification for Recognizing the Performance Right of publicity

The U.S. Supreme Court recognized the interest protected by the performance right of publicity:

18. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977).

19. *Zacchini v. Scripps-Howard Broadcasting Co.*, 351 N.E.2d 454, at 455, 47 Ohio St.2d 224, 2 Media L. Rep. 1199; 193 U.S.P.Q. 734 (Ohio 1976).

20. *Zacchini v. Scripps-Howard Broadcasting Co.*, 351 N.E.2d 454, 47 Ohio St.2d 224, 2 Media L. Rep. 1199 (Ohio 1976). The Ohio Supreme Court relied on *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) for its conclusion "that the press has a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private."

21. *Id.* 433 U.S. 562, at 565.

22. *Id.* 433 U.S. 562, at 575.

"[T]he State's interest in permitting a [performance] '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."²³

Like patent law and copyright law, the performance right of publicity encourages the creation of socially useful works. It induces individuals to undertake the personal efforts necessary to create works, such as a human cannonball act, by granting protection against appropriation by third parties. The U.S. Supreme Court mentioned several justifications why a live act of a performer can be protected against appropriation by the media. First the Court mentioned the labor justification. One should pay for seeing Zacchini's act because his performance is the product of his own talents and energy, the end result of much time, effort, and expense.

The Court distinguished the performance right of publicity from the identity right of publicity:

"Moreover, the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer."²⁴

Much of the economic value depends on the exclusivity of the act. The broadcast of a film of petitioner's entire act poses a substantial threat to this economic value of that performance. If the public can see the act free on television, it will be less willing to pay to see it at the fair.

The Court also mentioned the social utility justification:

"protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court."²⁵

This theory is based on the assumption that the protected act or performance advances public welfare.

Based on these considerations, the Court concluded that "[t]he rationale for (protecting the right of publicity) is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."²⁶

23. *Id.* 433 U.S. 562, at 573.

24. *Id.* 433 U.S. 562, at 576. Cf. 433 U.S. 562, at 573, fn. 10: "the case before us is more limited than the broad category of lawsuits that may arise under the heading of 'appropriation.' Petitioner does not merely assert that some general use, such as advertising, was made of his name or likeness; he relies on the much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform."

25. *Id.* 433 U.S. 562, at 576.

26. *Id.* 433 U.S. 562, at 576, citing Kalven, *Privacy in Tort Law Were Warren and Brandeis Wrong?*, 31 *Law & Contemp. Prob.* 326, at 331 (1966). In my opinion, the unjust enrichment rationale is not a justification in itself, if it is not told why the enrichment is unjust.

[D] Object of the Performance Right of publicity**[1] Live Acts**

The U.S. Supreme Court recognized that Ohio could recognize a "right of publicity" which protects a live circus act against unpermitted broadcasting. This protection is similar to the protection granted under the misappropriation theory, which is generally invoked if plaintiff's valuable object cannot be protected under patent law, copyright law or trademark law, nor under any of the traditional theories of unfair competition, such as false advertising or theft of trade secrets. Under this misappropriation or performance right of publicity theory, courts have granted protection against the unauthorized broadcasting or selling of copies of an unpermitted recording of non-copyrightable live-events such as a prize fight, a baseball game, or a human cannonball act.

For example, in *Redmond v. California Pictures Corp.*,²⁷ the plaintiff, a professional golfer and trick shot artist, had given, without compensation, a private exhibition of trick shots for the Fox News. Fox exhibited the film as part of a newsreel. Thereafter, defendant purchased the film from Fox and incorporated it into a short, humorous feature film entitled 'Golfing Rhythm'. The New York Court of Appeals upheld a \$1,500 verdict for the plaintiff.²⁸

In *Ettore v. Philco Television Broadcasting Corp.*,²⁹ the Third Circuit upheld a damage recovery for plaintiff Ettore, who sued defendant for telecasting a movie of a 1936 prize fight between him and Joe Louis, in which he was knocked down in the fifth round. The court recognized Ettore's right to control the production of his boxing performance:

"Where a professional performer is involved, there seems to be a recognition of a kind of property right in the performer to the product of his services. The theory may be summed up as follows: The performer, as a means of livelihood, contracts for his services with an entrepreneur. The finished product is, for example, a motion picture in which the performer's services are embodied. If the motion picture is employed for some use other than that for which it was intended by the performer and the entrepreneur, the motion picture is employed in such a way as to deprive the performer of his right to compensation for the new use of the product."³⁰

The court admitted that this theory "is a somewhat hazy one; but that is not unusual where the laboratories of the courts are working out the development of a new common law right."³¹

The misappropriation theory or performance right of publicity should not be used as a general theory to protect all live acts or events. It derives from the incentive justification that not all human acts will receive protection against unpermitted recordings or broadcasts, but only socially useful acts, such as

27. 253 App. Div., 1 N.Y.S.2d 643, 708 (N.Y.A.D. 1937).

28. The court applied the New York privacy statute.

29. 229 F.2d 481, 108 U.S.P.Q. 187 (C.A.3 1956).

30. *Id.* 229 F.2d 481, at 487.

31. *Id.* 229 F.2d 481, at 490.

works of entertainment. And it derives from the labor justification that the performer must put in his act his talents, time, effort, and expense. Therefore, Charlie Chaplin could not enjoin the radio broadcast of a common telephone interview on (performance) right of publicity grounds.³²

The misappropriation theory or performance right of publicity cannot be used to protect live events on public places, such as the Boston Marathon. In *WCVB-TV v. Boston Athletic Ass'n*,³³ the First Circuit held that Channel 4 (WBZ-TV), who was the "official" station to broadcast the Boston Marathon, could not enjoin Channel 5 (WCVB-TV) from televising the Boston Marathon. The use of the sporting event title "*Boston Marathon*" was not likely to confuse viewers into thinking that they are seeing the official broadcast. The court said:

"As a general matter, the law sometimes protects investors from the "free riding" of others; and sometimes it does not. [...] But, the man who clears a swamp, the developer of a neighborhood, the academic scientist, the school teacher, and millions of others, each day create "value" (over and above what they are paid) that the law permits others to receive without charge. Just how, when and where the law should protect investments in "intangible" benefits or goods is a matter that legislators typically debate, embodying the results in specific statutes, or that common law courts, carefully weighing relevant competing interests, gradually work out over time."³⁴

[2] Preemption if Simultaneously Fixed

Live acts of performers come within the sphere of the Federal Copyright Act when they are simultaneously "fixed in a tangible medium of expression" with permission of the performer(s). Under § 101 of the 1978 Copyright Act, a work consisting of sounds, images, or both, that are being transmitted, is "fixed" if a fixation of the work made simultaneously with their transmission. Therefore, live broadcasts of sports, news coverage, live performances or other events can be copyrighted if they are fixed during its transmission. The unauthorized reproduction or (re)broadcast of a simultaneously fixed live broadcast by a third party constitutes an infringement of federal copyright, even if not the tape used for fixation but the live transmission is copied.³⁵ If Zacchini had given permission to record his live act, and this recording would have been broadcast, his state (performance) right of publicity action would have been preempted by federal

32. *Chaplin v. National Broadcasting Co.* 15 F.R.D. 134 (S.D.N.Y. 1953). *Id.* *Current Audio, Inc. v. RCA Corp.*, 71 Misc.2d 831, 337 N.Y.S.2d 949, 176 U.S.P.Q. 271 (N.Y.Sup. 1972); sale of unauthorized recording of an Elvis Presley press conference held not subject to liability on right of publicity grounds.

33. 926 F.2d 41, 17 U.S.P.Q.2d 1688, 18 Media L. Rep. 1710 (C.A.1 1991).

34. *Id.* 18 Media L. Rep. 1710, at 1712. Cf. *Production Contractors, Inc. v. WGN Continental Broadcasting Co.*, 622 F.Supp. 1500, at 1504 (N.D. Ill. 1985): parade's promoter who had granted "exclusive" rights to another station could not enjoin other station from televise its public parade. But the media have no constitutional right to access plaintiff's property in order to film a sporting event, see *Post Newsweek Stations-Connecticut, Inc. v. Travelers Ins. Co.*, 510 F.Supp. 81, 6 Media L. Rep. 2540 (D.C.Conn. 1981).

35. See H. Rep. 94-1476, at 52-53 (Sept. 3, 1976). If the images to be broadcast are first recorded on a tape and then transmitted, the recorded work would be considered a motion picture. The legislator extended the definition of the term "fixation" because it wanted to prevent that live broadcasts would be treated differently under state common law.

Copyright. But any unauthorized reproduction and broadcast of his live act can infringe his state performance right of publicity.

In *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*,³⁶ the professional baseball players of Baltimore Orioles claimed that they had a (performance) right of publicity in their game performances. The players argued that the broadcasts of telecasts of their baseball games infringed their right of publicity. The Seventh Circuit held that the Clubs' copyright in the fixed telecasts of major league baseball games preempts the Players' rights of publicity in their game-time performances.³⁷ The court reasoned that the players' performances have sufficient artistic merit to contribute to the copyright in the telecast.³⁸ The court explicitly stated that the clubs' copyright claim in the telecasts of major league baseball games is limited to games that are fixed in tangible form.³⁹ The players are employees of their respective clubs. Therefore, the clubs are considered to be the author under the "works made for hire" doctrine.⁴⁰

The court did not view the copyright in the telecast independent of the event filmed. Therefore, the court did not distinguish between the copyright questions of the telecast of the games and the question whether the players could prohibit the creation of the telecast. Zacchini could prohibit the unauthorized filming and broadcasting of his performance under his performance right of publicity. In this way, he could use this right to exploit his performance. But the Seventh Circuit held that the baseball players could not use their right of publicity to ask payment for the filming and broadcasting of their games, since their right was held to be preempted by copyright law.

Several authors have criticized this decision.⁴¹ Nimmer stated that the Seventh Circuit erroneously held that baseball games are copyrightable works of authorship.⁴² However, the court's decision is not based on a copyright in baseball games itself.⁴³ The court concluded that both the players and the camera team contribute creative labor to the telecasts. The Seventh Circuit seemed to have reasoned that if copyright in a sound recording generally includes creative contributions by both the recorder and the performers whose

36. 805 F.2d 663, 231 U.S.P.Q. 673, 1986 Copr.L.Dec. P 26,024, 13 Media L. Rep. 1625, GRUR Int. 1988, 791 (C.A.7 1986).

37. *Id.* 805 F.2d 663, at 674-675.

38. *Id.* 805 F.2d 663, fn. 7: "The Players argue that their performances are not copyrightable works because they lack sufficient artistic merit. We disagree."

39. 805 F.2d 663, at 679, fn. 30.

40. See 17 U.S.C. § 201(b). A "work made for hire" is defined as "a work prepared by an employee within the scope of his or her employment," see 17 U.S.C. § 101.

41. Trechak, *The Seventh Circuit Beans Performer Publicity Rights in Baseball's Telecast Rights Rhubarb*, 8 *Loy. L.A. Ent. L.J.* 75, at 88 (1988): "The Seventh Circuit was in error when it concluded that a baseball game is itself fixed in tangible form when it is videotaped;" Saxer, *The Right of Publicity in Game Performances and Federal Copyright Preemption*, 36 *UCLA L. Rev.* 861, at 888 (1989): "The performance must not be merged into a copyrightable work, merely because it has been filmed." Singer, *The Right of Publicity: Star Vehicle or Shooting Star?*, 10 *Card. Arts & Ent. L.J.* 1, at 44 (1991).

42. *Nimmer on Copyright*, § 2.09[F]. (Rev. 1993).

43. *Cf.* *Right of Publicity and Copyright Preemption after Baltimore Orioles*, 40 *Rutgers L. Rev.* 971, at 989-990 (1988).

performances are captured, copyright in a telecast of a baseball game includes creative contributions by both the recorder and the baseball players.⁴⁴ The court did not distinguish the players' performances from the clubs' (or television station's) copyright in the telecasts. It reasoned that "once a performance is reduced to a tangible form, there is no distinction between the performance and the recording of the performance for the purpose of preemption under § 301(a)."⁴⁵

I agree with Shipley, who criticized this analysis because the copyright in the telecast does not protect the interests of the players in their performances against third parties who first record the game themselves without copying the telecast, and then exploit their own recording.⁴⁶ In his opinion, the court should have held that the players stated a valid claim for infringement of their right of publicity by televising their game performances without their consent, but then the court might have held that their claim failed on the merits of employment and contract principles.⁴⁷

In *National Football League v. Alley, Inc.*,⁴⁸ the court granted a permanent injunction against the unpermitted interception of private satellite transmissions of National Football League game telecasts, but not on right of publicity grounds. It held that Florida's statutory (identity) right of publicity was not violated, because defendants did not exploit the Dolphins players' appearances in the intercepted transmissions and defendant's broadcast was of legitimate public interest. It also reasoned that if the right of publicity had also encompassed performances and "a prohibited use had occurred, the players' contractual consent to appear in game telecasts constituted waiver of their rights under the Florida statute."⁴⁹

[E] Content of the Performance Right of publicity: Protection Against Reproduction and Broadcasting of Actual Performance

The performance right of publicity protects against unpermitted broadcasting and sale of (copies of) recordings of plaintiff's actual performance.⁵⁰ But it is not clear how far this protection extends, because the content of the performance right of publicity is not clearly defined. The media have a First Amendment

44. See 805 F.2d 663, at 669, fn. 7.

45. Id. 805 F.2d 663, at 675.

46. Shipley, *Three Strikes and They're Out at the Old Ball Game: Preemption of Performers' Rights of Publicity Under the Copyright Act of 1976*, 20 *Ariz. St. L.J.* 369, at 410-411 (1988).

47. Id. 20 *Ariz. St. L.J.* 369, at 382, fn. 84 (1988).

48. 624 F.Supp. 6 (S.D.Fla. 1983).

49. Id. 624 F.Supp. 6, at 10.

50. *Cf. Apple Corps Ltd. v. Adirondack Group*, 124 Misc.2d 351, 476 N.Y.S.2d 716 (N.Y.Sup. 1983): preliminary injunction to restrain defendants from manufacturing and distributing record album and tape of their "Christmas Messages," recorded by the Beatles during the years 1963-1969 and distributed each Christmas to members of the Beatles' Fan Clubs. Because the recordings were made before February 15, 1972, they could not be protected under the federal Copyright Act. According to 17 U.S.C. § 301 such recordings can be protected under state law.

privilege to report newsworthy facts about a performer's act. In the "*Zacchini*" case, the U.S. Supreme Court did not draw a line between media reports that are protected and those that are not. Instead, it only stated that it was "quite sure that the First and Fourteenth Amendments do not immunize the media if they broadcast a performer's entire act without his consent."⁵¹

To define the content of the performance right of publicity, one must balance the interests in protection thereof against the interests protected by the First Amendment and free trade principles. One could argue that labor and social utility justifications dictate that a balance should not depend on the newsworthiness of the act, but on the economic effects of defendant's use of plaintiff's property. Under such a balance, the media are privileged to show parts of plaintiff's performance, provided they do not appropriate a material or substantial part of the performer's act, which poses a substantial threat to the economic value of that performance or affects the earning potential of the performer.⁵² Justice Celebrezze said in a concurring opinion in the "*Zacchini*" case on remand:

"the court [should] determine whether any salient, essential and nuclear portions of a performer's act have been appropriated. [...] It would seem that in order to reconcile the media's right to inform the public about newsworthy entertainment with the entertainer's right to enjoy the fruits of his own industry, some degree of restriction on freedom of the press is unavoidable."⁵³

Because of the similarities to copyright law, the copyright fair use test can be appropriate to balance the performance right of publicity with the First Amendment.⁵⁴ Important factors will be the level of creativity or distinctiveness of plaintiff's performance, and the economic impact on plaintiff's market for his performance. In *Man v. Warner Bros. Inc.*,⁵⁵ the plaintiff, a professional musician, had by his own volition placed himself on stage at the renowned Woodstock Festival, held at Bethel, New York, in August 1969. His performance on his Flugelhorn was subsequently used in Michael Wadleigh's classic film "*Woodstock*." The plaintiff argued that defendant appropriated his performance under the New York privacy statute. The court rejected his claim. It held that the New York privacy statute was never intended to apply to professional entertainers who are shown giving a performance before a public audience, and

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51. *Id.* 433 U.S. 562, at 574-75 (1977). Powell, Brennan and Marshall dissented essentially on the grounds that the criterion "a performer's entire act" is not adequate to provide "a standard clear enough even for the resolution of this case," *id.* 433 U.S. 562, at 579 (1977).
 52. See Hannigan, First Amendment Theory Applied to the Right of Publicity, 19 *Boston College L. Rev.* 277 (1978), reprinted in 19 *Pub. Ent. Advert. & Allied Fields L.Q.* 21, at 44-45 (1980); Williams, The Right of Publicity versus the First Amendment, *Entertainment, Publishing and the Arts Handbook*, 217, at 220-21 (1983).
 53. *Zacchini v. Scripps-Howard Broadcasting Co.*, 54 Ohio St.2d 286, at 290, 376 N.E.2d 582, 3 *Media L. Rep.* 2444 (Ohio 1978).
 54. See Baird, Common Law Intellectual Property and the Legacy of *International News Service v. Associated Press*, 50 *U. Chi. L. Rev.* 411 (1983); Note, Human Cannonballs and the First Amendment: *Zacchini v. Scripps-Howard Broadcasting Co.*, 30 *Stan. L. Rev.* 1185 (1978); Note, State "Copyright" Protection of Performers: The First Amendment Question, 1978 *Duke L.J.* 1198 (1978).
 55. 317 F.Supp. 50 (S.D.N.Y. 1970).

that the incidental use of his forty-five second performance in defendants' four-hour motion picture about this public event was de minimis.⁵⁶

11.4 Extension of Performance Right of Publicity to Imitation of Performance

[A] Overview of Case Law

In § 2.6[B][2] it is described that the content of the performance right of publicity is not limited to protection against unpermitted reproduction or broadcasting of the actual performance. Courts have extended the protection to exploitative forms of imitation of a performer's performance.

In the "*Marx brothers*" case,⁵⁷ the district court held that the imitation of the appearance and comedy style of the Marx brothers in defendant's musical play, "*A Day in Hollywood/A Night In the Ukraine*," was not privileged by the First Amendment without paying damages to plaintiffs. The court did not clearly distinguish the two types of right of publicity when it held that the play did not involve the publication of a book discussing the lives or careers of the Marx brothers, but an unauthorized appropriation of the Marx brothers' characters by imitation of their act. It found that

"the defendants' production of the play is not protected expression. [...] Although entertainment can merit first amendment protection, entertainment that merely imitates "even if skillfully and accurately carried out, does not really have its own creative component and does not have a significant value as pure entertainment." [...] Although literary commentary may have been the intent of the playwright, any such intent was substantially overshadowed in the play itself by the wholesale appropriation of the Marx Brothers characters."⁵⁸

The court found support for this position in the U.S. Supreme Court "*Zacchini*" decision which held that a broadcast of his entire performance was similar to an appropriation of the very activity by which the entertainer acquired his reputation. The fact that the defendants had not rebroadcast the Marx brothers acts but

56. But see *Taggart v. Wadleigh-Maurice, Ltd.*, 489 F.2d 434 (C.A.3 1973): the plaintiff was an employee of a Port-O-San which was engaged in furnishing and servicing portable latrines. In August, 1969, he was sent by his employer to Bethel to service such latrines at the Woodstock music festival. While he was servicing the latrines he was interviewed and filmed by defendants. This two minute film was subsequently used in the film "*Woodstock*." The plaintiff felt that the film was edited in such a way as to achieve, at his expense, a comic effect. The Third Circuit rejected defendant's defense that a he was a participant in a newsworthy event, and remanded for further proceedings to find whether plaintiff's right to privacy had been invaded.

57. *Groucho Marx Productions, Inc. v. Day and Night Co., Inc.*, 523 F.Supp. 485, 212 U.S.P.Q. 926, 7 Media L. Rep. 2030 (D.C.N.Y. 1981), rev'd on other grounds, 689 F.2d 317, 216 U.S.P.Q. 553, 8 Media L. Rep. 2201 (C.A.2 1982).

58. *Id.* 523 F.Supp. 485, at 493. In appeal the Second Circuit reversed because not New York law but California law applied which did not recognize a descendible right of publicity, see *Groucho Marx Productions, Inc. v. Day and Night Co., Inc.*, 689 F.2d 317, 216 U.S.P.Q. 553, 8 Media L. Rep. 2201 (C.A.2 1982).

had reproduced their manner of performances by imitating their style and appearance did not alter the outcome of the case.

In *Presley's Estate v. Russen*,⁵⁹ it was held that the live stage production, entitled "*The Big El Show*," of defendant, a performer who closely imitated the appearance, dress and style of the late Elvis Presley, infringed Presley's descendible right of publicity because the show was predominantly designed to commercially exploit his likeness and performances without contributing any significant informational values of a biographical work, parody, satire or the like. Defendant's *The Big El Show* ran for approximately ninety minutes. In the show, an imitator named "*Big El*," performed his Elvis Presley impersonation. He closely resembled Presley and imitated his appearance, dress, and characteristic performing style. Customers were charged a fee to view *The Big El Show*.

The court investigated whether a live theatrical presentation or concert designed to imitate a famous entertainer's own past stage performances was "to be considered primarily as a commercial appropriation by the imitator or show's producer of the famous entertainer's likeness or as a valuable contribution of information or culture." The court found that although *The Big El Show* contains an informational and entertainment element, the show serves primarily to commercially exploit the likeness of Elvis Presley without contributing anything of substantial value to society. It noted that the First Amendment protection for entertainment did not apply to "entertainment that is merely a copy or imitation, even if skillfully and accurately carried out, [which] does not really have its own creative component and does not have a significant value as pure entertainment."⁶⁰ In the court's opinion, the information about Presley which *The Big El Show* provided was of limited value. Relying on the "*Zacchini*" case, the court said that "[t]o some degree, the defendant has appropriated the 'very activity (live stage show) by which (Presley initially) acquired his reputation [...].'"⁶¹ It found that although the defendant had not shown a film of an Elvis Presley performance, he had engaged in a similar form of behavior by presenting a live performance starring an imitator of Elvis Presley.

The court concluded that defendant's *The Big El Show* production would likely constitute an infringement of plaintiff's rights of publicity. However, the court did not issue a preliminary injunction because plaintiff did not prove that defendant's show caused an immediate, irreparable harm to the commercial value of the right of publicity. The court an extra damage requirement built into the right of publicity.⁶²

59. 513 F.Supp. 1339, 211 U.S.P.Q. 415 (D.C.N.J. 1981).

60. Id. 513 F.Supp. 1339, at 1359.

61. Id. 513 F.Supp. 1339, at 1361, citing 433 U.S. 562, at 576. The court also relied on *Price v. Worldvision Enterprises, Inc.*, 455 F.Supp. 252, 4 Media L. Rep. 1301 (D.C.N.Y. 1978) which held that imitation of Laurel and Hardy in a television series constituted an infringement of right of publicity. The outcome of this case is rejected in § 10.3[E][2].

62. Id. 513 F.Supp. 1339, at 1379. This requirement was proposed by Felcher and Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 *Yale L.J.* 1577, at 1608-16 (1979), who discussed a test for all types of media portrayals.

In *Apple Corps Limited v. Leber*,⁶³ it was held that defendant's "Beatlemania" stage show violated the right of publicity of the Beatles, because the Beatles' persona and performances were imitated. The court awarded \$7,625,000 damages. The court believed that the defendants' primary purpose was "to capitalize on and exploit the concededly great value of simulating the Beatles in performance and the tremendous demand to see them perform."⁶⁴ The court recognized that the mixed-media presentation was a top quality performance,

"but such only provided the setting for what was a fantasy concern by persons who so accurately imitated the Beatles in concert that the audience, according to contemporary viewers, in great part suspended their disbelief and fell prey to the illusion that they were actually viewing the Beatles in performance."⁶⁵

In the "*Janis Joplin*" case,⁶⁶ a different outcome was reached under California law.⁶⁷ It was held that Joplin's estate could not enjoin on right of publicity grounds a two-act play about renowned rock and blues singer Janis Joplin, who died at an early age in 1970. The first act fictionally portrayed her experiences over the course of a day previous to an evening's concert performance. The second act simulated an evening's concert performance by Joplin. The plaintiff argued that the second act infringed copyright law and Janis Joplin's right of publicity. The court noted that a right of publicity must be applied to the play as a whole. It noted that identical use in the context of a play is protected by the First Amendment:

"the protection of the right of free expression is so important that we should not extend any right of publicity, if such exists, to give rise to a cause of action against publication of a [...] work about a deceased person."⁶⁸

[B] Personal View: Imitations Should Not Infringe the Performance Right of Publicity

In my opinion, the content of the performance right of publicity should not be extended to forms of imitation of a performer's performance. The outcome of the "*Janis Joplin*" case is to be preferred above the outcome in the "*Marx brothers*," "*Elvis Presley*" and "*Beatlemania*" cases. Insofar as the identity of the Marx brothers, Elvis Presley or the members of the Beatles has been used in an entertaining show or a theater play, the identity right of publicity does not come into play because their identities are used in a media product. The interests in

63. 229 U.S.P.Q. 1015, 12 Media L. Rptr. 2280 (Cal. Sup.Ct. 1986).

64. See Sonner, Did Beatlemania Infringe the Beatles' Right of Publicity? 17 Sw. U.L. Rev. 755, at 780 (1988), citing from Statement of Decision.

65. Id. 229 U.S.P.Q. 1015, at 1017.

66. *Joplin Enterprises, v. Allen d/b/a New Orleans Performance Hall*, 795 F.Supp. 349, 19 Media L. Rep. 2093 (D.C.W. Wash. 1991).

67. The court applied California Civ. Code § 990, but noted that the same outcome would be reached if it had applied the law of the state Washington.

68. Citing *Frosch v. Grosset & Dunlap, Inc.*, 75 A.D.2d 768, 427 N.Y.S.2d 828, at 829 (App. Div. 1980).

showing such media products is protected by the freedom of speech and outweigh the interests protected by the identity right of publicity.⁶⁹

The question remains whether a (large scale) imitation of a performer's style should be viewed as an infringement of the performance right of publicity. In my opinion, the law should not recognize such a right. Imitators should have the right to imitate other performers.⁷⁰

This right should not depend on the quality of the imitation. For example, it is generally agreed that an imitation constituting a parody is protected by the freedom of speech. I do not think that a court should adopt a quality standard, and decide on the question whether defendant's imitation is protected by the freedom of speech by investigating whether or not it is a parody or satire, or otherwise contains any significant informational values.

In my opinion, imitations of living or deceased persons in motion pictures should not be held unlawful under the performance right of publicity. Producers should have the right to use imitators. If the defendant tries to fulfill the demand for the entertainment services of the original actor by use of an imitator, other theories such as defamation law, privacy law, unfair competition, false advertising or copyright law come into play. If the imitator does not act unlawfully under such legal theories, the imitation of another performer's style should not be actionable under the performance right of publicity. In my view, an imitation should be allowed if the defendant imitator has a copyright license to perform the songs of the original performer, does not pass himself off as the original performer, and does not otherwise cause any confusion of the public as to its source or sponsorship. If such legal theories are not involved, it seems to me that the interests of the original performer in being able to enjoin another performer who imitates his style or actual performance, is outbalanced by the societal interest in free trade and free expression of such imitations. Then the societal interest in free imitations outweighs any economic impact on plaintiff's own exploitation of his performance or performing style.

With respect to imitations of sounds of performers, the U.S legislator ruled that imitators are free to create any independent imitation of a performer's sounds, even if such sounds "*imitate or simulate*" those in the copyrighted sound recording.⁷¹ In my opinion, the same rule should apply with respect to imitations of movements or other non-copyrightable aspects of performances.⁷²

69. See § 10.3.

70. Cf. *Murray v. Rose*, 30 N.Y.S.2d 6, at 7 (N.Y.Sup. 1941): "As to the imitation of [plaintiff's] rendition, it is a matter of common knowledge that skilled performers have become famous and successful financially as 'imitators'."

71. See § 11.2[C].

72. In decisions decided under the old federal 1909 Copyright Act, which for federal protection did not require that a work is fixed, courts have held that imitation of the peculiar actions, gestures, and tones of another performer does not infringe copyright. See *Bloom & Hamlin v. Nixon*, 125 F. 977 (C.C.Pa. 1903): no injunction of imitation by actress of song by another actress, in which she attempted to mimic the postures and gestures of the original actress; *Supreme Records v. Decca Records*, 90 F.Supp. 904, at 909, 85 U.S.P.Q. 405 (S.D. Cal. 1950): particular impersonation or performance is not subject to copyright protection, "for if it were, 'Mr. Charles Laughton, for instance, could claim the right to forbid anyone else from imitating his creative mannerisms in his famous characterization of Henry VIII, or Sir Laurence Olivier could prohibit anyone else from adopting some of the innovations which he brought to the

Similarly, in the Netherlands, performing artists only receive protection against unauthorized recording, reproduction, sale of reproductions, and making their actual performances of works of art public under the Neighboring Rights Act. This Act does not provide protection against the imitation of performances.

In the "*Elvis Presley*" case the district court did not want to issue a preliminary injunction against The Big El Show. In the "*Marx brothers*" case, the Court of Appeals reversed the district court's decision on the choice of law issue, and needed not to rule on the First Amendment aspects of the case. But in a footnote the appellate court noted "that any consideration of such questions would have to examine closely defendants' substantial argument that their play is protected expression as a literary work, especially in light of the broad scope permitted parody in First Amendment law."⁷³

The Beatlemania consisted of Beatles look-alikes and sound-alikes who performed live on stage twenty-nine Lennon/McCartney songs. Defendants had obtained a copyright license to perform the songs.⁷⁴ The court rejected defendants' First Amendment defense that the Beatlemania show was not simply imitation, but rather an historical overview of the 1960's, and that the show contained significant political and social comment upon that era. Relying on the "*Zacchini*" case, the court found that the defendants' taking or use amounted to virtually a complete appropriation of the Beatles "*persona*" at least in a qualitative sense. In my opinion, liability for both types of right of publicity should have been immunized by the First Amendment. However, the outcome of the case can be justified on other grounds. The court also found unfair competition in that the audiences at the Beatlemania show were likely to be confused into thinking that the Beatles had consented to its production.

In another Beatles performance imitation case,⁷⁵ the court did not want to enjoin the imitation of a Beatles performance itself, but enjoined the use of the name of the Beatles in advertisements for the show. Defendants were members of a performing group known as "*1964 as the Beatles*." They sought to recreate for profit a Beatles concert from the years 1964 to 1966. The group's objective was to look and sound as much as possible like The Beatles. Toward that end, they imitated the overall appearances, hairstyles, dress, mannerisms, voices, equipment and musical performances of The Beatles. On stage, they referred to each other as "*John*," "*Paul*," "*George*" and "*Ringo*," adopted Liverpool accents, and performed songs of The Beatles. They had placed The Beatles' logo on the group's bass drum. In advertising their performances, they published posters and flyers in which they were photographed to look like The Beatles on the cover of the album "*A Hard Day's Night*."

performance of Hamlet."

73. *Groucho Marx Productions, Inc. v. Day and Night Co., Inc.*, 689 F.2d 317, at 319, fn.2, 216 U.S.P.Q. 553, 8 Media L. Rep. 2201 (C.A.2 1982).

74. Because they did not get a copyright license from George Harrison, no Harrison songs were performed. See Note, *Apple Corp. v. Leber, Did Beatlemania Infringe the Beatles' Right of Publicity?* 17 *Sw. U.L. Rev.* 755, at fn.28 (1988).

75. *Apple Corps Ltd. v. A.D.P.R., Inc.*, 843 F.Supp. 342, 22 Media L. Rep. 1562 (D. Tenn. 1993).

The court denied plaintiff's claim for a permanent injunction upon the fact that the defendants caused the likelihood of public confusion. But the court found that the use of the likenesses of the Beatles in poster photographs to persuade people to attend their shows infringed the right of publicity of The Beatles. It permanently enjoined defendants from using the combination of the names John, Paul, George, and Ringo, the name "*The Beatles*," and any likeness of the group members in advertising or promoting its performances or products. This injunction included the use of the name "*The Beatles*" in the name of defendants' performing group.

The outcome of this decision seems half-hearted, because the court did not enjoin the imitation of a performance of the Beatles itself. It seems to me that if the organization of a Beatles imitation show is in itself not unlawful, the advertisements for such a show must be allowed.⁷⁶ As long as the defendants were not using the identity of members of The Beatles in connection with (advertisements for) commercial nonmedia products, they did not infringe their identity right of publicity. The (advertisement for a) show which imitates a Beatles show should not infringe the performance right of publicity.

11.5 Computer Simulations of Human Beings

It is technically possible to suggest the appearance of a living or deceased performer or any other person in a motion picture, who in reality did not perform in that movie. The process whereby a computerized animated version of a celebrity is created and so closely resembles the actual celebrity that the two are visually indistinguishable could be referred to as "*reanimation*." Technology is on the verge of providing filmmakers with the option of using reanimated actors in a film, rather than hiring the live actor.⁷⁷

The unauthorized reanimation of living or deceased persons raises the issue of liability under the right of publicity. Beard concluded that in some instances, it may be legally permissible to reanimate a deceased celebrity without the celebrity's consent, but that to reanimate a live actor would violate the right of publicity in "virtually every jurisdiction."⁷⁸ Kunath predicted that the courts will probably decide that this does constitute a violation because the conduct would otherwise be allowed to pass without any remedy being available. However, in order to prevent that the right of publicity "would provide the celebrity with an obscene windfall" and "will tempt many to litigate with every new technological advance", she proposed that a compulsory licensing scheme be set up, enabling

76. See principle discussed in § 10.4[A].

77. See Kunath, Lights, Camera, Animate! The Right of Publicity's Effect on Computer-animated Celebrities, 29 *Loy. L.A. L. Rev.* 863, at 866 (1996). At 868-870 she describes the state of technology of computer-generated imagery (CGI). Cf. for a description of some examples of CGI: *Winsten in: Identity Crisis: A Vision for the Right of Publicity in the Year 2020*, 20 *Colum.-VLA J.L. & Arts* 1, at 15-18 (1995).

78. Beard, Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers-A 21st Century Challenge for Intellectual Property Law, 8 *High Tech. L.J.* 101, at 108, fn.29 and 146 (1993).

celebrities to retain some rights in their persona, but to preclude them from retaining all rights.⁷⁹

However, Beard and Kunath do not distinguish between the two types of right of publicity. The reanimator does not record or imitate a performer's performance. He creates a new work in which he uses an image of another person. Therefore, it would seem logical for the identity right of publicity to spring to mind. However, in my opinion, the unauthorized reanimation should only infringe the identity right of publicity if it is used in connection with (advertisements for) nonmedia products, for example, in a television commercial for soft drinks. However, the use of an unauthorized reanimation in an informative or entertaining motion picture should not infringe the identity right of publicity.⁸⁰

This raises the interesting question whether persons should have the right to oppose unauthorized reanimations in informative or entertaining motion pictures under (an extended) performance right of publicity (or some other misappropriation theory). An intuitive feeling says that filmmakers should not have the simple option to use a reanimated famous actor if, for example, the live actor would be too costly.

However, I doubt whether there is a need for such a right. A filmmaker who uses a reanimated actor instead of the real actor might be liable for defamation, invasion of the actors privacy, unfair competition, false advertising or infringement of some specific copyright. Under such theories, it will be unlawful to deceive viewers into believing that the reanimated likeness of the actor was, in fact, the actual actor.

Suppose that the public realizes that the reanimated actor is not the real person, and that he is not shown in a denigrating context, should the real person have a right to oppose the film? In my opinion, the answer is negative with respect to deceased actors. Living actors should not be able to prohibit the use their reanimated persona in media products on the basis of their identity right of publicity. However, if a living actor can show that the use of his reanimated persona in a motion picture "goes to the heart of [his] ability to earn a living as an entertainer,"⁸¹ the performance right of publicity or some other misappropriation theory may help him.

11.6 Conclusion: Difference Between Two Types of Right of Publicity

American courts have recognized two different rights under one heading: the right of publicity. Both rights recognize a property interest in a publicity value. But they protect different objects. The performance right of publicity protects against appropriation of a performer's performance. The identity right of

79. Kunath, *Lights, Camera, Animate! The Right of Publicity's Effect on Computer-animated Celebrities*, 29 *Loy. L.A. L. Rev.* 863, at 897-906 (1996).

80. See § 10.3.

81. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, at 576, 97 S.Ct. 2849, 53 L.Ed.2d 965, 205 U.S.P.Q. 741, 2 Media L. Rep. 2089 (1977).

publicity protects a person's identity. Both rights provide protection against different acts. While the identity right of publicity is only triggered by use in connection with nonmedia products, the performance right of publicity is triggered by use in a media product.

If a defendant uses plaintiff's performance in a commercial for commercial products, both rights can be infringed.⁸² For example, the unpermitted use of the film of Zacchini's entire cannon ball act in an advertisement for nonmedia products would infringe both his identity and performance right of publicity.⁸³

However, the fact that there can be some overlapping of both actions should not be a reason to treat both rights as one single right of publicity. The famous U.S. Supreme Court decision in the "*Zacchini*" case involved the performance right of publicity. This case has also stimulated the recognition of the identity right of publicity. But courts should not ignore the different justifications and different content of both rights.

82. *Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.*, 737 F.Supp. 826, 1990 Copr.L.Dec. P 26,577, 15 U.S.P.Q.2d 1412, 17 Media L. Rep. 2273 (S.D.N.Y. 1990): plaintiffs', "rap" singers' allegation that actors employed in defendants' beer commercial are physically similar to plaintiffs, states viable claim for appropriation of likeness under New York law. But see *Motown Record Corp. v. George A. Hormel & Co.*, 657 F.Supp. 1236, 1987 Copr.L.Dec. P 26,145, 3 U.S.P.Q.2d 1124 (C.D.Cal. 1987): Use of tune of song, entitled "Baby Love," performed by music group The Supremes and image of The Supremes in commercial for defendant's beef stew. With respect to the claim for infringement of the identity right of publicity, the court held that plaintiffs "may have a difficult time proving that they have an interest in the "image" of "The Supremes" -especially due the fact that the three recording artists in "The Supremes" changed throughout the years."

83. Similarly, a performer can be identified by his performance of a fictional character. Use of this character can infringe the identity right of publicity. See § 2.3[C]{6}.

CHAPTER 12

CONCLUSION: THE RIGHT OF PERSONA, A NEW INTELLECTUAL PROPERTY RIGHT

12.1 Disadvantages of Current Legal Theories

In all Western countries, human beings receive some legal protection against the unpermitted use of their identifying elements in connection with (advertisements for) commercial merchandise, services or companies. In § 1.2 three different legal theories of such protection have been distinguished. All three theories have disadvantages.

[A] Passing Off Theory

The passing off theory provides protection against appropriation of a person's identity if there is an element of consumer confusion. If there is no libel, and no confusion as to source (England and Australia) or as to sponsorship or authorization (Australia), the unpermitted use of a celebrity's identity for commercial purposes is not unlawful. As a result, commercial enterprises are free to use the identity of celebrities without their permission for advertising or merchandising purposes, as long as they use disclaimers, or otherwise make it clear that their advertised product or service does not originate from, and is not sponsored or authorized by the celebrity.

The disadvantage of this practice is that it ignores the principle of personal autonomy. Celebrities and other persons cannot fully control the development of their identity. They cannot decide how and what aspects of their personal identity will be shown to the rest of the world. This approach is also not efficient. Since a non-confusing exploitation by third parties cannot be prohibited, the owner cannot grant exclusive licenses. For these reasons, I do not agree with the outcome of the "*Olivia Newton-John*" case in Australia.¹ Olivia Newton-John should have the right to enjoin an advertisement for defendant's cosmetics which shows an Olivia Newton-John look-alike, even if there is no element of confusion of consumers because a slogan states that the look-alike is not Olivia Newton-John. In my view, Olivia Newton-John should have the right to decide whether, and how, she will exploit her identity for another's cosmetics.²

[B] Personality Right: Protection of Portrait, Name and Voice

Germany, France, Italy, Spain, the Netherlands, Canada and Japan, in principle, all recognize a person's commercial interest in having protection against the unauthorized commercial use of identifiable characteristics, such as his name or picture. However, because of the personal character of this protection, these countries do not recognize any assignable right. The main disadvantage of the

1. See § 1.2[B].

2. This derives from the justification for protection. See *infra* § 12.1[B](1) and §§ 7.2 and 7.3.

reluctance to recognize such a right is that it restricts the possibility of fully exploiting one's identity.³ Another disadvantage is that the national regulations do not protect a person's identity as such, but merely specific characteristics, such as a person's likeness or name, which are granted varying levels of protection.

[C] American Right of Publicity

The right of publicity, as recognized in the United States, provides protection against the misappropriation of the commercial value of another's identity by unpermitted commercial use. One advantage of the American right of publicity concept is that under the majority view, the object of protection is not limited to a portrait or other specific aspects, but encompasses all attributes which can identify a human being. Another advantage is that according to the majority view every human being has a right of publicity, not only celebrities. An important advantage is that the right of publicity is considered to be a property right, which can be exploited, and which, in most states, is held to be assignable and descendible. Since 1953 it has been held that an exclusive licensee has standing to sue and can recover its own damage in the event of infringement of the right of publicity of the licensor.

In §§ 6.2[A] and [B], I described what is, in my opinion, the main problem with the American right of publicity: it is not clearly defined as an intellectual property right which describes the exclusive rights of the owner. The right of publicity is defined as a tort, in terms of commercial damages, to contrast it with the right of privacy. The disadvantage of this tort view is that its content can be unclear. The tort view seems also to be influenced by the fact that the right of publicity, for historical reasons, protects two different objects under one heading: not only a person's identity, but also a performer's non-copyrightable performance. Courts and commentators have ignored the fact that a distinction must be made between these objects in order to define the right of publicity in terms of exclusive rights, since a person's identity and a performer's performance are protected in different ways.⁴

The current broad definition of the right of publicity as a right which provides protection against commercial damage caused by the unpermitted commercial use of a person's identity or performance, has generated critical comments that the right of publicity conflicts with the freedom of speech.⁵

3. Furthest in its development seems to be Germany, because in 1986 the German Federal Supreme Court ruled that a collecting society had a right to recover the unpaid fees on the basis of unjust enrichment from a defendant who, without permission, commercially exploited the portrait of a famous singer who had granted this society on a worldwide and exclusive basis, the right to permit third parties to commercially exploit her likeness at a fee; see § 1.2[C]. However, the possibility to fully exploit the right to one's own picture in Germany is restricted by the fact that this right is non-assignable and non-descendible.

4. See § 11.5.

5. See § 7.1.

12.2 Personal View: The Right of Persona Defined as an Intellectual Property Right

In § 1.5, I listed some questions that can be asked about intellectual property rights in general. In this paragraph, the answers are provided for a right of publicity defined as an intellectual property right in persona. I call this the "*right of persona*," which, unlike the American right of publicity, does not encompass the protection of non-copyrightable performances. I will call the exclusive rights of the right of persona owner the "*persona rights*."

[A] Justification

The right of persona can be justified morally and economically. In § 7.2 it is argued that the personality justification for this protection derives from the principle of personal autonomy: every human being should have the right to develop his own persona or identity and to decide how and what aspects of this personal persona will be shown to the rest of the world. Therefore, every person should be able to control the commercial use of his own persona, because every individual has a personality interest in his or her persona, as long as that individual is identified by that persona. A person, whose persona is commercially exploited without permission, loses control over an aspect of his personality.

In § 7.3 it is argued that protection in the form of an exclusive property right in human persona can also be justified for economic reasons, because it will result in an efficient allocation and use of valuable identities. The recognition of an exclusive property right will create a market at a higher level for the exchange of the attributes which identify specific persons. Less clear is whether such protection also results in an incentive for people (and the celebrity industry) to invest in socially valuable human identities.

[B] Subject

It derives from the moral and economic justification that not only celebrities but all human beings should have a right of persona. No specific amount of labor,⁶ prior exploitation,⁷ or creativity is required for protection under the right of persona.

[C] Object

The right of persona should not be conceived as a general merchandising right which grants protection against misappropriation of popular symbols, such as popular animals or historical buildings.⁸ The right of persona should not protect live-performances as such. The object of the right of persona should be the

6. Cf. § 4.6.

7. Cf. § 2.4.

8. Cf. § 2.3(A).

"*persona*"⁹ or identity of a person insofar as it can be perceived by other people. The right of persona should not be an absolute property right in a person's body.¹⁰ The object should not be a tangible, (part of) a person himself, but something intangible: all symbols that identify a unique human being, independent of their publicity value. Examples of such symbols are the name, nickname, likeness, voice, typical objects, or a characterization which identify a specific person. General terms for these aspects are "*identity*," "*personality*," or "*persona*." I prefer the term "persona" because this term can also be used in the Dutch language, and is not associated with the non-assignable general personality right.

Under the traditional tort view, the American right of publicity is infringed by unpermitted commercial use which damages the commercial value of another's identity. Therefore, American courts have held that the American right of publicity plaintiff must prove that his persona has a commercial value.¹¹ Similarly, Dutch courts have stated that a plaintiff, claiming infringement of his commercial portrait right, must have a professional popularity which can be exploited.¹² But under the intellectual property view, the right of persona is infringed if the defendant has used plaintiff's persona in a way that can be brought under his exclusive rights. The question of damages should be relevant to the remedy issue, not the liability issue. Whether plaintiff can be identified from defendant's use is answered by the test of identification.

[D] Scope

The right of persona only comes into play if the plaintiff is identifiable from defendant's use. It is not relevant how the defendant's use identifies the plaintiff. It is not necessary that the defendant used actual images of the plaintiff. The right of persona is also infringed if the public identifies the plaintiff from defendant's use of a look-alike or a computer simulation.

If the defendant argues that its commercial use does not identify the plaintiff, but a third person, the court must apply the test of identification to decide whether the defendant has used plaintiff's persona. If plaintiff's name, likeness, voice, or other attributes are unique, actual use of such elements will help identify the plaintiff. But if defendant has used attributes which are less distinctive, such as a common name, a court must look to the context of defendant's use to determine whether this use, in combination with other elements, identifies the plaintiff. Legislators should not define specific tests of identification,¹³ but should leave the development of such tests to the courts. In my opinion, the test should not be so moderate that some vague resemblances between the plaintiff and the person used by the defendant will trigger the right of persona.

9. See § 8.2[A].

10. See *supra*, § 8.2[B].

11. See § 2.3[B].

12. See §. 4.6[B].

13. Cf. §§ 2.5 and 4.4.

It derives from its justification that the right of persona should only come into play if defendant's use identifies the plaintiff. Therefore, the right of persona is not an absolute property right which provides protection against the use of elements of a person independent of any identification by other people. If, for example, in its commercial advertisement, a defendant uses a photograph of only a foot or a leg of another person, who is able to prove that it is indeed his foot or leg which has been pictured, the right of persona probably does not come into play, because a foot or a leg, unlike a name or a picture of a face, is not traditionally an element by which other people identify a person.

[E] Content

Under the tort view, the American right of publicity is defined as the right to oppose an unpermitted use which damages the commercial value of another's persona as long as it is not immunized by principles of free speech. The question whether a use is a constitutionally protected form of expression is answered on an ad hoc, case by case, basis.

In order to define the right of persona as an *intellectual property right*, the owner's exclusive rights must be balanced with the principle of free speech. In Chapter 9 it is argued that such a balance should not be found in an ad hoc, case by case, balancing, but by a definitional balancing of relevant interests. A context test has been defended which does not focus on the content of defendant's speech, but on the medium of defendant's use. As a result of the context test, the exclusive right of the right of persona owner has been defined as the *exclusive right to use one's own persona in connection with (advertisements for) nonmedia products or services or companies*.¹⁴ The term "use" includes the affixing of the elements of the persona on nonmedia products or on their packaging, the offering, putting on the market or stocking of these nonmedia products for such purposes, importing or exporting these nonmedia products, and the registration as a trademark of identifying elements of the persona.¹⁵

The question whether the right of persona is infringed, depends on the question whether plaintiff's persona is used in connection with a commercial nonmedia product or service, or in connection with a media product. If plaintiff's persona is used in a media product, the right of persona should not come into play, unless defendant's use is in fact an advertisement for commercial products or services, which are not fully protected by the freedom of speech principle.

Since this definition is not similar to the actual legal situation as described in Chapters 2 and 4, in Chapter 10, relevant case law of the United States and the Netherlands has been analyzed in the light of this definition. My conclusion is that the definition is appropriate to describe the content of the right of persona, and that case law holding that defendant's use of plaintiff's persona in (advertising for) a media product, such as a fictional film or book, constituted an

14. See § 9.4[B].

15. See § 10.1[A].

infringement of the right of persona, must be rejected or read in the light of other rights.¹⁶

The application of this definition can be difficult in two situations. In the *first* situation the distinction between communicative media products and commercial nonmedia products is not clear: plaintiff's persona is used in connection with commercial semi-media products. For such cases, exceptions to the right of persona for *politicians*, *parody*, *factual information*, and *de minimis use* have been proposed to modify the outcome of the definition of commercial use in favor of the freedom of speech.¹⁷

In the *second* case, the distinction between noncommercial speech and commercial speech in a media product is unclear: the plaintiff claims that his persona is not used in a news story, but in an advertisement in disguise for commercial nonmedia products. To resolve such hard cases, courts should follow the criteria developed to distinguish commercial speech from noncommercial speech. In my view, an analysis of relevant case law shows that courts are indeed able to resolve such "*hard*" cases.

The right of persona can be defined as an intellectual property right which grants every human being the exclusive right to commercially use his own persona. To balance this right with the freedom of speech guarantees, the term "*commercial use*" must be defined as use in connection with (advertising for) nonmedia products and/or services. Like other intellectual property rights, some exceptions to this exclusive right should be recognized. Exceptions could be recognized for political figures, for the use of a persona to provide important factual information, for parodies, and for the use of a person in an indeterminate group or crowd of persons. If a general fair use exception is recognized, it should be narrowly construed. In principle, a fair use exception should only apply to the use of the persona of politicians in connection with semi-media products.¹⁸

The right of persona will be exhausted with respect to products after their first proper first sale into commerce. Therefore, the right of persona owner cannot prevent the further trade of such products.¹⁹

[F] Duration

Unlike the right of privacy, and like other intellectual *property* rights, the right of persona should be descendible. It is a valuable capital asset that will benefit the owner's heirs and assignees after his death. In the US, postmortem rights varying from ten to one-hundred years have been recognized.²⁰

In my view, the most important reason for recognizing the right of persona as a descendible right is that licensees and other persons who exploit the persona of the deceased need to have some time to prepare for the moment at which the

16. See § 10.5.

17. See § 10.1[D].

18. See § 10.1[D][1]-[4].

19. See § 10.1[D][5].

20. See § 2.7.

persona they are exploiting enters the public domain. If a person's persona were to enter the public domain upon death, the value of licenses would be diminished, since that point in time is uncertain. It is a task for the legislator to define a specific duration.

The *term* of the right of persona should be *ten years* postmortem. This term fits with the ten year postmortem protection of the portrait rights in the Netherlands, and the right to one's own picture in Germany.²¹ Interest groups will probably lobby for a longer term that is in keeping with copyright law: life plus *fifty* years (in the United States)²² or life plus *seventy* years (in the European Union Member States).²³ Such a longer term of protection can be justified by the economic argument that it incites an efficient allocation and use of valuable identities of deceased persons. However, since such a longer term cannot be justified by the personality justification, I would conclude that a duration of ten years is sufficient.

Section 990(f) of the California Civil Code provides that a successor-in-interest to the rights of a deceased personality may not recover damages for infringement before he registers his claim with the Secretary of State.²⁴ In practice, it can be very difficult to find all successors-in-interest of the persona rights of the person who died. Therefore, a rule could be providing that the right of persona will end after death, unless the successors-in-interest, such as heirs or assignees, register their claim to the rights of a deceased personality with a public registry for persona rights, within, for example, one year. The advantage of this rule is that third parties, who wish to exploit a specific persona, can simply find out whether any rights exist, and who they must ask for permission to exploit such rights. However, the law should not (yet) recognize such a rule.²⁵ It would complicate the law by creating an extra formality which could be very disadvantageous for foreign celebrities who are not aware of such a rule.²⁶

21. See § 4.7 (Netherlands) and § 1.2[C]: Germany.

22. See 17 U.S.C. § 302(a).

23. See Article 1 of Directive 93/98/EEC of October 29, 1993, OJ 1993 L 290/9, harmonizing the term of protection of copyright and certain related rights. Article 3(1) of this Directive provides that the duration of the neighboring right of performers (see *supra* § 5.4) in the EU member states must be 50 years from the date of the performance.

24. See Appendix A. Cf. Lange, Shopping for the California Right of Publicity, 16 *Hastings Comm-Ent L.J.* 151, at 183-185 (1994), proposing that assignees should also be able to register their rights during life.

25. However, if the duration of postmortem rights will not be ten years, but for example fifty, such as in California (§ 990(g) Civil Code), the argument to create an obligation to register publicity rights becomes more convincing, since, as the years pass by, it will become harder to find all heirs or assignees.

26. Cf. Article 14(5) Benelux Designs Act provides that in the matter of "facts which substantiate an infringement upon a design only, no claim can be filed on the basis of the law of unfair competition". Often, in the Benelux, especially foreign companies, who were not aware that they had to file a design right application in time, do not receive protection against confusion caused by the imitation of the non-functional elements of their products. Such situations should be prevented insofar as possible.

[G] Exploitation

The right of persona owner can grant a licensee an exclusive or non-exclusive license to use his persona within the limits of the license. The licensee does not acquire the right of persona itself. The licensor can limit the license with respect to specific elements of his persona, types of use, types of product, duration, or territory. A person who exploits his own right of persona by granting licenses to other parties, cannot claim invasion of privacy if the licensee acts within the scope of the license. The licensee's commercial use outside the scope of the license will constitute an infringement of the right of persona and a breach of contract.

The right of persona should be assignable. An assignment of the right of persona should not include the obligation to physically help the assignee with the exploitation of this right. In general, assignors should try to retain a right to control the activities of the assignee. In § 8.3 I argued that an outright assignment of the right of persona can conflict with the autonomy justification of the right of persona if the assignor completely loses control over the commercial use of his persona. Such a loss could include the possibility to further develop that persona if this development conflicts with the commercial exploitation by the assignee. Therefore, the law should recognize some restrictions to protect the assignor. Parents should not be able to assign all rights of publicity of their minors. Persons who never assigned their right of persona, should not involuntarily lose this right, for example, in the event of bankruptcy. The law should also recognize a non-assignable moral right which grants a person, who has assigned his right of persona, the right to revoke this assignment on moral grounds, because he can no longer be expected to agree with the commercial exploitation of his persona by the assignee. However, the exercise of this moral right must be subjected to stringent conditions. The assignor must indemnify the assignee and may not continue the exploitation he opposes.

There is no need to register an exclusive or non-exclusive license since persons are presumed to own all rights in their persona. Similarly, I do not feel there is a need to recognize an obligation to register an assignment of the right of persona.²⁷

Since all natural persons should have a right of persona, notorious persons charged or convicted of crimes might also be able to exploit their persona. After bad experiences with famous murderers, who were able to sell their crime stories to the media for large sums, while leaving the victims without compensation, since 1977 some forty states and the federal government have enacted rules which require that funds from such publication agreements be placed in an escrow account. If the accused is convicted, the victim or the family members may receive money from this account. For example, the 1984 federal statute permits a court to order the forfeiture of proceeds from a contract relating to a depiction of a federal crime resulting in physical harm to an individual, after the conviction of a defendant for such a crime. The forfeited proceeds may be used

27. See for the registration of postmortem rights § 12.2[F].

to satisfy the victim. However, 20 percent of the funds are excluded for legal representation of the accused.²⁸ Such a regulation should not be restricted to the earnings from publication agreements, but, also include any earnings from the exploitation of the convicted's right of persona.

[H] Remedies

To create liability for infringement of the right of persona, the plaintiff must prove that:

- a) he has standing to sue, i.e. that he is the owner or a licensee with standing to sue,
- b) defendant used without permission
- c) indicia which identify the plaintiff
- d) in connection with (advertising for) nonmedia products.

In principle, only the right of persona owner should have standing to sue, not his licensee. However, the position of a licensee should be strengthened by two rules. *First*, the right of persona owner should also have a right to claim damages on behalf of the licensee for the damage suffered by that licensee. *Second*, the licensee should have an own independent right to claim his own damages or defendant's profits, on the condition that he has stipulated such a right, before or after the infringement.²⁹ In general, the exclusive licensee will stipulate such a right.

The remedies in the event of an infringement of the right of persona should be similar to general remedies that are available to the owner of other intellectual property rights:

- a) injunctive relief;
- b) monetary relief: damages or the infringer's profits;
- c) recall or destruction of infringing articles, such as labels, packages and advertisements, bearing the plaintiff's persona;³⁰

28. 18 U.S.C. §§ 3671-3672. See McCarthy, *Rights of Publicity and Privacy*, § 10.14[A] (Rev. 1993); Franks, "Son of Sam" laws After *Simon & Schuster v. New York Crime Victims board: Free Speech Versus Victim's Rights*, 14 *Hastings Comm.-Ent L.J.* 595 (1992).

29. Cf. Article 27a(2) DCA.

30. Cf. In the *United States*: 17 U.S.C. § 503(b) Copyright Act; § 36 Lanham Act= 15 U.S.C. § 1118; *Restatement (Third) of Unfair Competition* § 35, comment g. (1995): "The court may require, for example, the recall of infringing goods or the recall or destruction of deceptive promotional materials." In the *Netherlands*: Article 30 and Article 28(1) and (3) DCA; Article 13bis(1) and (3) Benelux Trademark Act: "1. The owner of a mark shall have the faculty of claiming ownership of any moveable goods that have infringed his right or of goods that have served to produce such goods or to demand that they be destroyed or rendered unusable. [...] The petition shall be rejected if the infringement was not made in bad faith." "3. The court may order that surrender shall be subject to payment by the plaintiff of an indemnity that it shall determine."

- d) information at the defendant's disposal with respect to the origin of the infringing articles and with respect to the scope of the infringement.³¹

Damages can consist of the fair market value of defendant's use of plaintiff's persona, damage to the value of the right of persona, and the profits the defendant made by its infringing use.³² Punitive damages can be awarded under American law, but not under Dutch law.

The right to recover damages for *mental* distress is a personal non-assignable right, while the right of persona is a divisible, assignable, descendible and taxable intellectual property right. A violation of the right of persona may also induce mental distress, which should be recoverable. This raises the question whether a claim for mental damages should be based on the right of privacy,³³ or on the right of persona? An argument to separate the two claims is that the commercial right of persona itself cannot be a basis for mental damages after an assignment. However, it is possible to incorporate some moral aspects of the right of privacy into the right of persona.³⁴ The right to claim moral damages for unpermitted use in connection with (advertising for) nonmedia products could be incorporated into the right of persona as a non-assignable "*droit moral*," like the moral rights of authors in copyright law, which recognize personality interests of authors in their work which survive a transfer of their economic rights.³⁵

Such an incorporation seems suited on two conditions. *First*, a unification of the two claims in one single right of persona should not lead to the problems caused by (Prosser's) incorporation of the right of persona into appropriation of privacy tort.³⁶ It should be realized that the right of persona is not incorporated into the non-assignable privacy right, but that only a non-assignable moral right is incorporated into the right of persona. After an assignment of the right of persona, the successors-in-interest cannot invoke this moral right. *Second*, the requirements to state a claim for invasion of this moral right should not differ from the requirements to state a claim for invasion of the right of privacy.

31. Cf. in the Netherlands: Article 13bis(5): "5. At the request of the proprietor of a mark, the court may order the person who has infringed his right to supply to the proprietor all information at his disposal with respect to the origin of the objects that have infringed the mark and to communicate to him all relevant data;" Cf. Dutch Supreme Court, November 27, 1987, NJ 1988, 722 (LWH); BIE 1988 nr. 25, p. 88 (*Chloë/Peeters*).

32. See § 2.9[C] and § 4.9[B][3].

33. In the Netherlands: the general personality right to respect for one's private life; in the United States: the appropriation type of right of privacy.

34. See also § 12.3[A][2].

35. Cf. Article 6bis(1) Berne Convention: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation." The Netherlands and the United States are a member of the Berne Convention.

36. See § 3.2[E][2] and the conclusion that the right of publicity is non-assignable.

[I] Nature of the Right of persona

The right of persona is a proper *intellectual property right* because it is justified, it recognizes exclusive rights to use and exploit a specific intangible and valuable distinctive object -a person's persona,- and it does not impinge on countervailing social interests in free enterprise and free speech any more than necessary.³⁷

Insofar as the right of persona also recognizes the right to claim moral damages for mental distress caused by a violation of the right of persona, and the right to revoke an assignment on moral grounds, the right of persona also encompasses non-assignable *moral rights*. Such rights can only be exercised by the original owner, not successors-in-interest such as heirs or assignees.

[J] Cumulation with Other Legal Theories

The right of persona is an independent form of protection, whose presence or absence does not preclude protection under other legal theories, such as copyright law, trademark law, false advertising, defamation law, or invasion of privacy. It is possible that defendant's use of plaintiff's persona is unlawful under one or more of these legal theories. If that use is not unlawful under one theory, it can still be unlawful under another legal theory. The exclusive persona rights do not encompass all possible types of use of a person's persona. Types of use which are not actionable under the right of persona, can still be actionable under other legal theories.

The presence of a copyright or trademark right does not preclude protection under the right of persona. Thus, a producer of a motion picture, who owns all copyrights, including the copyright in the main character, cannot grant a license to use this character to advertise other merchandise, if that commercial use infringes the right of persona of the single actor who is identified with that character by the public.³⁸ Similarly, it is possible that a person's name, image, or other identifying elements are registered as a trademark. The trademark rights can be owned separately from the right of persona. Termination of the postmortem right of persona will not affect the validity of the trademark rights.

12.3 Suggestions for Future Development**[A] United States****[I] Identity Right of Publicity**

The American right of publicity is a well-recognized legal doctrine in approximately half of the states. Disagreement still exists with respect to its subject, object, scope, content, duration and remedies.³⁹ Although the absence of

37. See Chapters 7-10.

38. See § 2.3[C][6].

39. See Chapter 2, *passim*.

complete uniformity on these aspects does not threaten the doctrine itself, a uniform resolution of these issues would certainly be desirable.

The main critics of the right of publicity⁴⁰ argue that the American right of publicity enables celebrities, their assignees and licensees, and their estates to control the meaning of the celebrity image in a fashion which deprives the public of access to its collective cultural icons and the ability to reflect upon their historical significance. Such criticism on First Amendment grounds should not result in an argument for an outright rejection of the right of publicity, but in a definition of its content which is in balance with the principles of free speech.⁴¹

In my opinion, courts should clearly recognize the difference between the objects of the identity right of publicity and the performance right of publicity. As a result, they should also recognize the difference between the content of the identity right of publicity and the performance right of publicity. It is important that courts clearly recognize that use of a person's identity in a work of entertainment, such as a book, motion picture, or theatre play, does not infringe the identity right of publicity. The U.S. Supreme could clarify this area of law by recognizing the proper content of the identity right of publicity.

The American right of publicity can be developed further by federal and state courts. Today, under either common law or statute, the right of publicity has been recognized as the law of at least twenty-four states.⁴² Probably, under the influence of the new Restatement (Third) of Unfair Competition §§ 46-49 (1995), more states will recognize the American right of publicity in the near future. However, in the new Restatement, the right of publicity is defined as a general commercial tort which encompasses the performance right of publicity.⁴³

The American right of publicity is state law. There is no uniform American right of publicity. An advertiser who wishes to air an commercial nationally must comply with the different laws of all states. In the law of many states the outcome of a right of publicity case is rather unpredictable. Under the tort view of the right of publicity propagated by the Restatement (Third) of Unfair Competition §§ 46-49 (1995), the outcome in a case of unpermitted commercial use of another's identity depends on a balancing of all relevant circumstances of that case.⁴⁴ As a consequence, the legal costs for instituting action against infringers and bargaining licenses for the relevant states are relatively high.

40. Barnett, First Amendment Limits on the Right of Publicity, 30 *Tort & Ins. L.J.* 635 (1995); Barnett, At the Crossroads: The Right of Publicity in the United States, 160 *RIDA* 4-89 (1994); Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 *Cal. L. Rev.* 127 (1993); Coombe, Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue, 69 *Tex. L. Rev.* 1853, at 1879 (1991); Coombe, Authorizing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders, 10 *Card. Arts & Ent. L.J.* 365, at 368-76 (1992).

41. See the exemptions discussed in § 10.1[D], such as the limited factual information exemption and the parody exemption.

42. See § 2.2[C].

43. See § 6.2[B].

44. See § 6.2[B].

The obvious solution is a harmonization by one federal right of persona statute,⁴⁵ which preempts the different state laws which recognize equivalent rights. In my view, this federal law should recognize the right of persona as an intellectual property right with a definition of the owner's exclusive rights. The question is whether today this right is sufficiently crystallized to be codified in one statute. In my opinion, the answer is positive, if this right is defined in line with § 9.4 and Chapter 10.

[2] Right of Privacy

Some authors have suggested that the right of publicity and the appropriation right of privacy should merge into one single right. Kwall stated:

"It is entirely appropriate for the right of publicity to redress both economic and emotional injuries that stem from an unauthorized appropriation of an individual's persona."⁴⁶

Similarly, McCarthy seems to advocate a unification of the right of privacy against appropriation and right of publicity into a "right of identity" that would cover both emotional distress and pecuniary loss:

"Undoubtedly, the law today would be more coherent and neat if it had developed such that courts would recognize a sui generis legal right labeled something like a "right of identity" with damages measured by both mental distress and commercial loss. If the law had such a separately entitled category, things would be considerably easier to sort out compared to our present world of "separate" rights of privacy by appropriation and a Right of Publicity."⁴⁷

Some courts have indeed held that infringement of the right of publicity can result in an award of damages measured by both mental distress and commercial loss.⁴⁸

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45. Cf. McManus, *Right of Publicity, -the need for a durational limit on the Right of Publicity-* 14 *Seton Hall L. Rev.* 190 (1983); Salomon, *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 *S. Cal. L. Rev.* 1179 (1987); Singer, *The Right of Publicity: Star Vehicle or Shooting Star?*, 10 *Card. Arts & Ent. L.J.* 1, at 47 (1991); Moore, *Regulating Publicity: Does Elvis Want Privacy?*, 5 *J. Art & Ent. L.* 1, at 2 (1994); "the right of publicity is a classic example of a valid interstate commerce concern worthy of unitary federal protection;" Webner, *The Right of Publicity: A Commercial Property Right- Not a Privacy Right*, 84 *Trademark Rep.* 586, at 604 (1994); "The Federal Trademark Act (Lanham Act) provides a logical, convenient and appropriate place for a federal right of publicity." Reichman in *Identity Crisis: A Vision for the Right of Publicity in the Year 2020*, 20 *Colum. - VLA J.L. & Arts* 1, at 29 (1995); McCarthy, *The Human Persona as Commercial Property: The right of Publicity*, 19 *Colum. - VLA J.L. & Arts* 129, at 142 (1995); "sometime within the next ten years, some group will push for a federal statute."
46. Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 *Ind. L.J.* 47, at 70 (1994).
47. McCarthy, *Rights of Publicity and Privacy*, § 1.11[C] (Rev. 1993), referring to Frazer, *Publicity, Privacy and Personality*, 6 *Eur. Intell. Prop. Rev.* 139 (1983).
48. E.g. *Waits v. Frito-Lay Inc.*, 978 F.2d 1992, 23 U.S.P.Q.2d 1721, 20 *Media L. Rptr.* 1585 (C.A.9 1992): affirming a jury award of \$200,000 for mental injury of well-known songwriter and singer Tom Waits, caused by infringement of his right of publicity.

I can agree with an incorporation of the right of privacy against appropriation into a new future right of persona under the two conditions mentioned in § 12.2[I]. It is important that a recognition of a claim for moral damages on the basis of the right of persona does not lead to the conclusion that the commercial part of this right is non-assignable and non-descendible.

However, as long as there is no federal right of persona, it seems to me that it is most convenient to distinguish two causes of action, the right of publicity oriented toward the protection of property, and the appropriation privacy tort toward the protection of dignity. Under this solution, the traditional definition of this tort in Restatement (Second) of Torts § 652c should be reformulated, since it protects against appropriation which causes both mental or commercial damage to the plaintiff.⁴⁹ To focus clearly upon the protection of human dignity, the appropriation privacy tort should be redefined in normative terms, which include the requirement that defendant's use of plaintiff's identity must be highly offensive to a reasonable person.

With respect to the tort of invasion of privacy by public disclosure, it is my personal feeling that the American courts should put a higher value on the privacy interests of plaintiffs. I agree with Justice White⁵⁰ that fairly defined areas of privacy should have the protection of law if the quality of life is to continue to be reasonably acceptable. Therefore, the public's right to know should be subject to reasonable limitations with respect to the private facts of individual persons. The interests protected by the right of privacy should outbalance the public interest in publishing the names, addresses, and phone numbers of persons who are the victims of a crime. If the majority of the U.S. Supreme Court cannot find sufficient support for protection of the right of privacy in the Constitution of the United States, Congress could recognize this right in a new Amendment to the Constitution.

[3] Performers

Courts should no longer extend the protection of the performance right of publicity to forms of imitation of performances in which the plaintiff's actual acts are not reproduced from a recording. Protection against such imitations should only be based on other legal theories, such as defamation, invasion of privacy, trademark infringement, false advertising, or copyright infringement.

Congress should recognize a performance right in a sound recording. Then, the United States could become a member of the International Convention

49. Restatement (Second) of Torts § 652c (1977): "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." See § 3.2[E][2].

50. See his dissenting opinion in *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443, 16 Media L. Rep. 1801 (1989), which held that the publication of name of a rape victim was not unconstitutional. See § 6.1[B].

for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention of Oct. 26, 1961).⁵¹

[B] The Netherlands

[1] What Courts Can Do

In Chapters 4 and 5, the legal situation in the Netherlands is analyzed. No specific Dutch law exists which recognizes a right which provides protection against unpermitted commercial use of an individual's persona as such. Protection depends on the attribute of plaintiff's persona which has been used by the defendant. If it is a portrait, Article 21 DCA applies. Since 1959, the courts have recognized that Article 21 DCA not only protects privacy interests, but also the commercial interest in sharing in the financial benefit of a commercial exploitation of a portrait. Lower courts have held that other identifiable attributes can be protected by Article 6:162 Civil Code, which is a general tort provision for civil liability in cases relating to damage.

In my opinion, the Dutch courts, including the Dutch Supreme Court, should recognize the principle that every human being must be able to control the use of his persona in connection with (advertisements for) nonmedia products and/or services. This principle is a corollary of the principle that every human being must be able to develop his own personality and to decide in which manner and which aspects of his persona will be shown to the rest of the world, and can be inferred from Article 10 (private life), Article 11 (integrity of human body) of the Dutch Constitution, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 17 of the Covenant on Civil and Political Rights. The courts are able to recognize this principle under Article 6:162 Civil Code, which provides a general tort provision for civil liability cases relating to damage.

Under this principle, courts could develop Dutch law further with respect to the following current issues. *First*, courts should grant protection against the unpermitted commercial use of an individual's persona as such. To date, the Dutch Supreme Court has only recognized a person's commercial interests with respect to his portrait, but this protection should be extended to all other elements that identify the plaintiff. *Second*, courts should recognize that every human being must be able to control the use of his persona in connection with (advertisements for) nonmedia products and/or services. Courts should not restrict the protection granted under Article 6:162 Civil Code to persons who

51. Then performances of American performers rendered in one of the Rome member states shall receive protection against exploitation of illegally produced copies. *E.g.* the German Federal Supreme Court held that Bob Dylan could not enjoin the sale in Germany of illegally produced records of performances which were rendered outside Germany. See Federal Supreme Court, November 14, 1985, I ZR 68/83; GRUR 1986, 454; NJW 1986, 1253; IIC 1987, 418 (*Bob Dylan*). But see Article 3 (national treatment) TRIPS-Agreement, and Article 4(b) and (c) (most-favored nation treatment) TRIPS-Agreement, exempting rights of performers, producers of phonograms and broadcasting organizations not provided under the TRIPS-Agreement.

have a popularity acquired in their professional career, that can be commercially exploited at a charge. *Third*, courts should not limit the protection against unpermitted commercial use of an individual's persona to a right to share in the profits that can be made from that use, but they should also recognize the right to claim injunctive relief. *Fourth*, courts should not recognize the relevant trade practices as the leading principle in granting protection and solving "*hard cases*," because this can result in not taking fully into account the interests protected by the free trade and freedom of speech.⁵²

[2] What the Legislator, Not Courts, Can Do

The development by courts of the right to oppose commercial damage caused by unpermitted commercial exploitation of one's portrait is impeded by the text of Article 21 of the 1912 Copyright Act. After the death of the portrayed, only the next of kin, defined as the parents, spouse and children,⁵³ can oppose the publication of his portrait if they have their own reasonable interest. Therefore, the portrait right is non-assignable and non-descendible. From this non-assignability it follows that a licensee has no standing to sue. In 1989, the Dutch Supreme Court held that the licensee of the portrait rights of Elvis Presley had no standing to sue, because such an action could only be claimed by his next of kin. This means that damage suffered by the licensee cannot be recovered.

It has been argued that removing Article 21 from the Copyright Act would be sufficient to enable courts to further develop protection against unpermitted commercial use of portraits under Article 6:162 Civil Code.⁵⁴ I agree that this would be a step forward, because then courts could better recognize the interests of licensees. However, such an approach would still leave courts with many unresolved issues and problems they cannot solve.

Under Dutch law, only the legislator, and not courts can recognize new intellectual property rights. The protection against unpermitted use of another's persona in connection with (advertisements for) nonmedia products and/or services on the basis of Article 6:162 Civil Code is different from the recognition of the right of persona as a new intellectual property right.

The main difference is that intellectual property rights are clearly described property rights which are valid against the whole world. Intellectual property rights are descendible, can be pawned, fall into the bankrupt's estate, are part of a marital community, and can be assigned to parties, who step into the position of the assignor. Such legal acts have effect against third parties. Under Dutch law, private parties cannot create similar situations by contract law. The protection granted under Article 6:162 Civil Code is a personal claim and cannot exist independently of the person whose interests are invaded. Therefore, the right to recover damages under Article 6:162 Civil Code for any future infringement

52. See § 9.3[C](6).

53. See Art. 25a DCA.

54. Cf. Oppenoorth, *Een lastig portret*, *IER* 1986, 85, at 88.

cannot be alienated as such. Only if the name of the defendant is known, can a plaintiff sell his claim to recover damages from this particular defendant.⁵⁵

Another difference is that infringement of an intellectual property right is in itself unlawful, while protection under the general tort clause of Article 6:162 Civil Code always depends on an ad hoc balancing of all particular circumstances of the case. However, this difference is only a relative one, since intellectual property rights often contain vague norms that must be interpreted by the courts,⁵⁶ while norms applied under Article 6:162 Civil Code can crystallize into rules, whose outcome is relatively predictable.

An important difference is that intellectual property laws specify the duration of exclusive rights. No rule exists which states how long protection granted under Article 6:162 Civil Code lasts. It could be argued that as long as no specific law exists, courts should not extend protection after death. On the other hand, it could be argued that protection must at least continue for a certain period of time after death in order to be able to exploit one's persona.⁵⁷ It is clear that it is more a task for the legislator than for courts to define a proper duration.

In my opinion, the legislator should adopt a new law which recognizes a right of persona as outlined in § 12.2. Since the Netherlands should not be the only European country which recognizes this right, I opine that it is also a task for the European legislator to harmonize the law in this field in all EU Member States.

55. See Art. 3:94(1) Civil Code which requires for a transfer of rights to be exercised against a specific party a deed intended for that purpose and notice thereof given by the alienator or acquirer to this person.

56. E.g. Art. 13A(1)(d) Benelux Trademark Act. See § 4.2[B]{3}.

57. This argument was made by the Supreme Court of the Netherlands in the "Elvis Presley" case, February 24, 1989, NJ 1989, 701 (LWH); AA 1989, 675 (HCJ); AMI 1989, 70; IER 1989, no. 21, at 41 (JHS); GRUR Int 1990, 233 (HER). See § 5.2[F].

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- *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct 1505: **9.2[C][4][a]**; **9.2[C][4][b]**
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- *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984): **9.2[B][1]**
- *Cliffs Notes, Inc., v. Bantam Doubleday Dell Pub. Group, Inc.*, 886 F.2d 490, 12 U.S.P.Q.2d 1289, 16 Media L. Rep. 2289 (C.A.2 1989): **9.3[B][2]**
- *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d. 284 (1971): **9.3[B][2]**
- *Columbia Broadcasting System Inc., v. Springboard International Records*, 429 F. Supp. 563, 199 U.S.P.Q 422 (D.C.N.Y. 1976): **3.6**

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- *Commerce Union Bank v. Coors of the Cumberland, Inc.*, 7 Media L. Rep. 2204 (Tenn. Ct. 1981): 2.7
- *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983): 9.2[C][2]
- *Consolidated Edison Co. of New York, Inc., v. Public Service Commission of New York*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980): 9.3[B][2]
- *Continental Optical Co. v. Reed*, 119 Ind.App 634, 86 N.E.2d 306, 88 N.E.2d 55, 14 A.L.R.2d 743 (Ind.App. 1949): 8.4[A]
- *Corliss v. E.W. Walker Co.*, 64 F. 280 (Mass. 1894): 8.4[A]
- *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975): 3.2[C][3]; 3.2[F]
- *Crump v. Beckley Newspapers, Inc.*, 173 W.Va. 699, 320 S.E.2d 70 (W.Va. 1984): 3.2[D][2]
- *Current Audio, Inc., v. RCA Corp.*, 71 Misc.2d 831, 337 N.Y.S.2d 949, 176 U.S.P.Q. 271 (N.Y.Sup. 1972): 11.3[D][1]
- *Dallas Cowboys Cheerleaders, Inc., v. Pussycat Cinema, Ltd.*, 604 F. 2d 200, 203 U.S.P.Q. 161, 5 Media L. Rep. 1904 (C.A.2 1979): 9.3[B][2]
- *Dallesandro v. Holt & Co.*, 4 A.D.2d 470, 166 N.Y.S.2d 805 (N.Y.A.D. 1957), aff'd 7 N.Y.2d 735, 193 N.Y.S.2d 635, 162 N.E.2d 726 (N.Y. 1959): 10.4[C][1]
- *Davis v. High Soc. Magazine, Inc.*, 90 A.D.2d 374, 457 N.Y.S.2d 308, 9 Media L. Rep. 1164 (N.Y.A.D. 1982): 2.5
- *Declemente v. Columbia Pictures Indus.*, 860 F. Supp. 30, 33 U.S.P.Q.2D 1564 (E.D.N.Y 1994): 10.3[E][2]
- *Delan by Delan v. CBS, Inc.*, 91 A.D.2d 255, 458 N.Y.S.2d 608, 9 Media L. Rep. 1130 (N.Y.A.D. 1983): 2.4[A]; 10.3[B][3]
- *Diaz v. Oakland Tribune, Inc.*, 139 Cal.App.3d 118, 188 Cal.Rptr. 762, 8 Ed.Law Rep. 746, 9 Media L. Rep. 1121 (Cal.App. 1983): 3.2[C][4]
- *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 11 Media L. Rep. 2264 (C.A.7 1985): 2.9[A]; 3.2[D][2]; 7.3[A]; 10.3[E][5]; 11.1
- *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985): 3.1[F][1]; 9.2[B][1]; 9.2[C][2]
- *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 16 Media L. Rep. 1113 (C.A.9 1989): 10.3[C][1]
- *Eagle's Eye, Inc., v. Ambler Fashion Shop, Inc.*, 627 F.Supp. 856, 227 U.S.P.Q. 1018 (D.C.Pa. 1985): 2.3[A]
- *Eastwood v. Superior Court for Los Angeles County*, 149 Cal.App.3d 409, 198 Cal.Rptr. 342, 10 Media L. Rep. 1073 (Cal.App. 2 Dist. 1983): 3.1[H]; 10.3[E][1]; 10.4[C][2]; 11.1
- *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136, 67 A. 392, 3 Buchanan 136 (N.J.Ch. 1907): 2.2[A]; 3.6; 8.4[A]
- *Elvis Presley Enterprises, Inc., v. Elvisly Yours, Inc.*, 936 F.2d 889, 19 U.S.P.Q. 1377, 19 Fed.R.Serv.3d 1397, 19 U.S.P.Q.2d 1377 (C.A.6 1991): 2.9[B]
- *Estate of Andrews v. United States*, 850 F. Supp. 1279 (E.D. Va. 1994): 8.4[A]

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- *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 108 U.S.P.Q. 187 (C.A.3 1956): **11.3[D][1]**
- *Everett v. Carvel Corp.*, 70 Misc. 734, 334 N.Y.S.2d 922 (N.Y.Sup. 1972): **10.2[B][2]**
- *Faber v. Condecor, Inc.*, 195 N.J.Super. 81, 477 A.2d 1289 (N.J.Super.A.D. 1984): **10.1[A]**
- *Factors Etc., Inc., v. Pro Arts, Inc.*, 444 F.Supp. 279 (D.C.N.Y. 1977): **2.3[C][1]**
- *Factors Etc., Inc., v. Pro Arts, Inc.*, 579 F.2d 215, 205 U.S.P.Q. 751, 4 Media L. Rep. 1144 (C.A.2 1978): **2.3[C][2]; 2.8 8.3; 8.3; 10.1[B][4]**
- *Fairfield v. American Photocopy Equipment Co.*, 138 Cal.App.2d 82, 291 P.2d 194 (Cal.App. 1955): **2.9[A]**
- *Faloona by Fredrickson v. Hustler Magazine, Inc.*, 799 F.2d 1000, 13 Media L. Rep. 1353 (C.A.5 1986): **3.2[D][3]; 8.3**
- *Falwell v. Flynt*, 797 F.2d 1270, rev'd on other grounds, *Hustler Magazine and Flynt v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41, 14 Media L. Rep. 2281 (1988): **3.1[B][2]**
- *Fargo Women's Health Organization, Inc., v. Larson*, 381 N.W.2d 176 (N.D. 1986): **9.2[C][4][c]; 10.2[B][1]**
- *Feist Publications, Inc., v. Rural Telephone Service Co., Inc.*, 111 S.Ct. 1282, 113 L.Ed.2d 358, 1991 Copr.L.Dec. P 26,702, 18 U.S.P.Q.2d 1275, 18 Media L. Rep. 1889 (1991): **3.4[A]**
- *Fils-Aime v. Enlightenment Press, Inc.*, 133 Misc.2d 559, 507 N.Y.S.2d 947, 13 Media L. Rep. 1971 (N.Y.Sup. 1986): **10.3[E][1]**
- *Finger v. Omni Publications Intern., Ltd.*, 77 N.Y.2d 138, 564 N.Y.S.2d 1014, 566 N.E.2d 141, 18 Media L. Rep. 1555 (N.Y. 1990): **10.3[E][4]**
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- *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 196 N.Y.S.2d 975, 164 N.E.2d 853 (1959): **10.2[B][1]**
- *Florida Bar v. Went For It, Inc., et al.*, 115 S. Ct. 2371, 132 L. Ed. 2d 541, 23 Media L. Rep. 1801 (1995): **9.2[C][4][b]**
- *Forsher v. Bugliosi*, 26 Cal3d 792, 163 Cal.Rptr 628, 608 P2d 716 (1980): **3.2[C][4]**
- *Friedman v. Rogers*, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100, 4 Media L. Rep. 2213 (1979): **9.3[B][2]**
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- *Gilbert v. Medical Economics Co.*, 665 F.2d 305 (C.A.10 1981): **3.2[C][3]**

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- *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925): **9.2[B][1]**
- *Golub v. Golub*, 139 Misc.2d 440, 527 N.Y.S.2d 946 (N.Y.Sup. 1988): **8.4[A]**
- *Grant v. Esquire, Inc.*, 367 F.Supp. 876 (D.C.N.Y. 1973): **2.4[C]; 2.6[A][3]; 3.5; 10.2[B][2]; 10.3[E][4]**
- *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976): **9.3[A][2]**
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- *Groucho Marx Productions, Inc., v. Day and Night Co., Inc.*, 689 F.2d 317, 216 U.S.P.Q. 553, 8 Media L. Rep. 2201 (C.A.2 1982): **2.6[B][2]; 11.4[A]; 11.4[B]**
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- *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (C.A.2 1953): **1.2[D]; 2.2[C]; 2.8; 3.2[E][2]; 3.5 6.2[C]; 8.4[A]**
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- *Hamberger v. Eastman*, 106 N.H. 107, 206 A.2d 239, 11 A.L.R.3d 1288 (N.H. 1965): **3.2[B]**
- *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*, 78 F.2d 763, 101 A.L.R. 484 (C.A.5 1935): **2.2[B]; 2.2[C]; 8.4[A]**
- *Harper & Row Publishers, Inc., v. Nation Enterprises*, 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588, 225 U.S.P.Q. 1073, 1985 Copr.L.Dec. P 25,793 (1985): **9.2[C][4][b]; 3.2[C][2]; 9.3[B][1]**
- *Hazlitt v. Fawcett Publs., Inc.*, 116 F.Supp. 538 (D. Conn. 1953): **10.3[E][1]**
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- *Honey v. Australian Airlines Ltd.*, 14 IPR 264 (1989): **1.2[B][2]**
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- *Hughes v. Plumsters*, 11 U.S.P.Q.2d 1573, 17 Media L. Rep. 1186 (D.C. N.Cal. 1989): **10.1[D][3]**
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- *International News Serv. v. Associated Press*, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293 (1918): **7.3[C][1]; 7.4[B]**
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- *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 43 Cal.App.3d 880 118 Cal.Rptr. 370 (Cal.App. 1974): **10.3[C][2]**
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- *Lane v. Random House, Inc.*, 1995 U.S. Dist. LEXIS 1332 (D.D.C. 1995): **10.4[C][1]**
- *Lawrence v. A.S. Abell Co.*, 299 Md. 697, 475 A.2d 448, 10 Media L. Rep. 2001 (Md. 1984): **10.4[B]**
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- *Linmark Associates, Inc., v. Willingboro Tp.*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977): **9.2[C][4][a]**

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- *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972): **9.3[B][2]**; **9.3[C][5]**
- *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661, 2 Media L. Rep. 2321 (N.Y.A.D. 1977): **2.3[C][6]**; **2.6[A][2]**; **2.8**
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- *McCabe v. Village Voice, Inc.*, 550 F.Supp. 525 (E.D.Pa. 1982): **3.2[C][1]**
- *McFarland v. Miller*, 14 F.3d 912, 1994 U.S. App. Lexis 1225, 29 U.S.P.Q.2D 1586, 22 Media L. Rep. 1205 (C.A.3 1993): **2.3[C][6]**; **2.6[A][1]**; **10.1[A]**
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- *Miller v. C. I. R.*, 299 F.2d 706 (C.A.2 1962): **8.4[A]**; **9.3[C][6]**
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- *Moglen v. Varsity Pajamas, Inc.*, 13 A.D.2d 114, 213 N.Y.S.2d 999 (N.Y.A.D. 1961): **10.1[D][4]**
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- *Newton v. Thomason*, 22 F.3d 1455, 1994 U.S. App. LEXIS 8965, 30 U.S.P.Q.2D 1633, 22 Media L. Rep. 1609 (C.A.9 1994): **2.3[C][3]; 10.3[E][2]; 10.4[B]**
- *Nice Man Merchandising, Inc., v. Logocraft Ltd.*, 23 U.S.P.Q.2d 1290 (E.D.Pa. 1992): **1.2[B][1]; 2.3[A]**
- *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (C.A.2 1930): **2.5**
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- *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (C.A.5 1941): **2.2[B]; 2.2[C]; 2.4[C]**
- *O'Hair v. Skolrood*, 17 Media L. Rep. 1869 (D.C.Tex. 1990): **10.1[C]**
- *Onassis v. Christian Dior-New York, Inc.*, 122 Misc.2d 603, 472 N.Y.S.2d 254, 10 Media L. Rep. 1859 (N.Y.Sup. 1984): **2.3[C][2]**

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- *Pacific Dunlop Ltd. v. Hogan*, 83 ALR 403 (Gummow, J.) and 87 ALR 14 (1989) (Federal Court): 1.2[B][2]
- *Pagan v. New York Herald Tribune, Inc.*, 32 A.D.2d 341, 301 N.Y.S.2d 120 (1969), aff'd 26 N.Y.2d 941, 310 N.Y.S.2d 327, 258 N.E.2d 727 (N.Y. 1970): 10.2[B][2]
- *Pagliero v. Wallace China Co.*, 198 F.2d 339, 95 U.S.P.Q. 45 (C.A.9 1952): 7.3[C][3]
- *Palmer v. Schonhorn Enterprises, Inc.*, 232 A.2d 458, 96 N.J.Super. 72 (1967): 2.6[A][1]; 10.1[B][4]
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- *Park 'N Fly, Inc., v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 105 S. Ct. 658, 83 L.Ed.2d 582 (1985): 9.3[B][2]
- *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 59 Misc.2d 444 (N.Y.Sup. 1968): 10.1[D][1]
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- *Peck v. Tribune Co.*, 214 U.S. 185, 29 S.Ct. 554, 53 L.Ed. 960 (1909): 3.1[I]
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- *People for the Ethical Treatment of Animals v. Berosini*, 867 P.2d 1121, 22 Media L. Rep. 1769 (S.Ct Nev. 1994): 10.3[E][3]
- *Philadelphia Orchestra Assn. v. Walt Disney Co.*, 821 F. Supp. 341, 27 U.S.P.Q.2D 1107, Copy. L. Rep. (CCH) P27,091 (D.E.Pa 1993): 2.3[A]; 10.1[D][2]
- *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 13 U.S.P.Q.2d 1799, 17 Media L. Rep. 1472 (C.A.2 1990): 2.7; 9.3[C][4]
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- *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F.Supp. 490 (D.C.Pa. 1938): 2.3[D]
- *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973): 9.2[C][4][c]; 10.2[B][2]
- *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986): 9.2[C][4][b]; 10.4[A]
- *Post Newsweek Stations-Connecticut, Inc., v. Travelers Ins. Co.*, 510 F.Supp. 81, 6 Media L. Rep. 2540 (D.C.Conn. 1981): 11.3[D][1]
- *Presley's Estate v. Russen*, 513 F.Supp. 1339, 211 U.S.P.Q. 415 (D.C.N.J. 1981): 2.9[A]; 11.4[A]
- *Price v. Hal Roach Studios, Inc.*, 400 F.Supp. 836 (S.D.N.Y. 1975): 2.3[C][6]; 2.4[C]; 2.7; 10.3[E][2]
- *Price v. Worldvision Enterprises, Inc.*, 455 F.Supp. 252, 4 Media L. Rep. 1301 (D.C.N.Y. 1978), aff'd without opinion, 603 F.2d 214 (C.A.2 1979): 10.3[E][2]; 11.4[A]
- *Pring v. Penthouse Int.*, 695 F.2d 438 (C.A.10 1982): 3.1[F][3]

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- *Production Contractors, Inc., v. WGN Continental Broadcasting Co.*, 622 F.Supp. 1500 (N.D. Ill. 1985): **11.3[D][1]**
- *Prudhomme v. Procter & Gamble Co.*, 800 F.Supp 390, 24 U.S.P.Q.2d 1627, 20 Med. L. Rptr. 1900 (D.E.La. 1992): **2.3[C][2]**
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- *Redmond v. California Pictures Corp.*, 253 App. Div., 1 N.Y.S.2d 643, 708 (N.Y.A.D. 1937): **11.3[D][1]**
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- *Rosemont Enterprises, Inc., v. Choppy Productions, Inc.*, 74 Misc.2d 1003, 347 N.Y.S.2d 83 (N.Y.Sup. 1972): **10.1[B][4]**
- *Rosemont Enterprises, Inc., v. Random House, Inc.*, 294 N.Y.S.2d 122, 58 Misc.2d 1 (N.Y.Sup. 1968), aff'd 32 A.D.2d 892, 301 N.Y.S.2d 948 (N.Y.A.D. 1969): **2.4[C]; 10.3[C][3]**
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- *Rosenfeld v. W.B. Saunders, Inc.*, 728 F.Supp. 236, 15 U.S.P.Q.2d 1423 (S.D.N.Y. 1990): **2.9[B]**
- *Rubin, Secretary of the Treasury v. Coors Brewing Co.*, 115 S. Ct. 1585, 131 L.Ed.2d 532, 23 Media L. Rep. 1545 (1994): **9.2[C][4][b]**
- *Russell v. Marboro Books*, 18 Misc.2d 166, 183 N.Y.S.2d 8 (N.Y.Sup. 1959): **3.1[I]**
- *San Francisco Arts & Athletics, Inc., v. U.S. Olympic Committee*, 483 U.S. 522, 107 S.Ct. 2971, 97 L.Ed.2d 427, 3 U.S.P.Q.2d 1145 (1987): **9.2[C][4-][b]; 9.3[B][2]**
- *Sarat Lahiri v. Daily Mirror*, 295 N.Y.S. 382, 162 Misc. 776 (N.Y.Sup. 1937): **10.3[E][4]**
- *Schenck v. U.S.* 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919): **9.2[B][1]; 9.2[C][3]**
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- *Selsman v. Universal Photo Books, Inc.*, 18 A.D.2d 151, 238 N.Y.S.2d 686 (1963): **10.2[B][2]**
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- *Southeast Bank N.A., v. Lawrence*, 104 A.D.2d 213, 483 N.Y.S.2d 218, 224 U.S.P.Q. 961, 11 Media L. Rep. 1216 (N.Y.A.D. 1 Dept. 1984), reversed on other grounds, 66 N.Y.2d 910, 498 N.Y.S.2d 775, 489 N.E.2d 744, 227 U.S.P.Q. 1054, 12 Media L. Rep. 1430 (N.Y. 1985): **10.1[C]**
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TABLE OF CASES: UNITED STATES

- *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S.Ct. 2603, 105 L. Ed. 2d 443, 16 Media L. Rep. 1801 (1989): 3.2[C][3]; 6.1[B]; 12.3[A][2]
- *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945): 9.2[B][1]
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- *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967): 9.2[B][1]
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- *Valentine v. C.B.S., Inc.*, 698 F.2d 430, 9 Media L. Rep. 1249 (C.A.11 1983): 10.3[D][1]
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 - *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977): 2.2[C]; 2.2[D]; 2.3[A]; 2.3[D]; 2.4[A]; 2.6[B][1]; 3.2[D][4]; 3.4[B]; 6.2[C]; 7.3[B]; 7.4[B]; 9.2[B][1]; 9.2[C][3]; 9.3[C][1]; 9.3[C][5]; 10.3[E][3]; 10.3[E][5]; 11.3[B]; 11.5
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- Pres. District Court Utrecht, May 9, 1995, Mf 1995, B80; KG 1995, 347; AMI 1995, 178 (*"Sex, de stand van zaken" I*): 4.8[B]
- Pres. District Court Amsterdam May 19, 1995, Mf 1995, B96, aff'd Court of Appeals Amsterdam, December 21, 1995, KG 1996, 51; Mf 1996, B26; AMI 1996, at 90 (*Essaïdi c.s./TROS*): 4.5[B][4][e]; 4.5[B][5]
- Pres. District Court Amsterdam, June 1, 1995, Mf 1995, at B97; AMI 1995, at 196 (*"Bed en andere geheimen"*): 4.5[B][4][a]; 4.8[B]

TABLE OF CASES: NETHERLANDS AND OTHER COUNTRIES

- European Court of Human Rights, July 13, 1995, Pub ECHR Series A vol 323; NJ 1996, 544 (EJD); Mf 1995, B101 (*Tolstoy Miloslavsky/United Kingdom*): 9.2[B][2]
- Pres. District Court Rotterdam, October 5, 1995, Mf 1995, B131 (*Kroes/Rotterdams Dagblad*): 9.2[C][5]
- Pres. District Court Amsterdam, October 5, 1995, Mf 1996, 15 (*Investment Ltd/uitgeverij Contact c.s.*): 9.2[C][5]
- Supreme Court October 20, 1995, RVDW 1995, no. 212; AMI 1996, at 51; IER 1995, no. 41, at 223 (*Parfums Christian Dior/Evora*): 5.3[C]; 9.3[B][1]; 9.3[B][2]
- Pres. District Court Amsterdam October 23, 1995, Mf 1995, B128, aff'd Court of Appeals Amsterdam June 6, 1996, Mf 1996, B97 (*Party/Lubbers e.a.*): 4.5[B][4][g]
- Court of Appeals Amsterdam, October 26, 1995, Mf 1996, B22 (*TROS/Philip and Tholen*): 4.8[B]
- Pres. District Court Amsterdam, November 2, 1995, Mf 1996, 14 (*Van Asten/De Telegraaf and Henk van der Meyden*): 4.9[B][1][4]
- Court of Appeals Amsterdam, December 21, 1995, KG 1996, 51; Mf 1996, B26; AMI 1996, at 90 (*Essaïdi c.s./TROS*): 4.5[B][4][e]; 4.5[B][5]
- Pres. District Court Amsterdam March 3, 1996, Mf 1996, B67; KG 1996, 132; AMI 1996, at 92 (*Stimezo e.a./EO*): 4.5[B][4][g]
- Supreme Court, April 26, 1996, RVDW 1996, no. 99; Mf 1996, B87 (*Rijssen/Universal Star Production*): 9.2[C][5]
- Advertising Standards Authority, May 29, 1996, no. 9160 and no. 9160A (*President Boris Jeltsin carrying bottles of Vodka of Gall & Gall*): 5.6[B]; 10.1[D][1]
- Board of Appeals, July 29, 1996, no. 9160B (*President Boris Jeltsin carrying bottles of Vodka of Gall & Gall*): 5.6[B]; 10.1[D][1]

APPENDIX A: SOME IMPORTANT REGULATIONS

Restatement of the Law, Third, Unfair Competition, American Law Institute, 1995

Chapter Four, Appropriation of Trade Values, Topic 3. Right of Publicity: § 46-49

§ 46 Appropriation of the Commercial Value of a Person's Identity: The Right of Publicity

One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49.

§ 47 Use for Purposes of Trade

The name, likeness, and other indicia of a person's identity are used "for purposes of trade" under the rule stated in § 46 if they are used in advertising the user's goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user. However, use "for purposes of trade" does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.

§ 48 Injunctions: Appropriation of the Commercial Value of a Person's Identity

(1) If appropriate under the rule stated in Subsection (2), injunctive relief may be awarded to prevent a continuing or threatened appropriation of the commercial value of another's identity by one who is subject to liability under the rule stated in § 46.

(2) The appropriateness and scope of injunctive relief depend upon a comparative appraisal of all the factors of the case, including the following primary factors:

- (a) the nature of the interest to be protected;
- (b) the nature and extent of the appropriation;
- (c) the relative adequacy to the plaintiff of an injunction and of other remedies;
- (d) the relative harm likely to result to the legitimate interests of the defendant if an injunction is granted and to the legitimate interests of the plaintiff if an injunction is denied;
- (e) the interests of third persons and of the public;
- (f) any unreasonable delay by the plaintiff in bringing suit or otherwise asserting his or her rights;
- (g) any related misconduct on the part of the plaintiff, and
- (h) the practicality of framing and enforcing the injunction.

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§ 49 Monetary Relief: Appropriation of the Commercial Value of a Person's Identity

(1) One who is liable for an appropriation of the commercial value of another's identity under the rule stated in § 46 is liable for the pecuniary loss to the other caused by the appropriation or for the actor's own pecuniary gain resulting from the appropriation, whichever is greater, unless such relief is precluded by an applicable statute or is otherwise inappropriate under the rule stated in Subsection (2).

(2) Whether an award of monetary relief is appropriate and the appropriate method of measuring such relief depend upon a comparative appraisal of all the factors of the case, including the following primary factors:

- (a) the degree of certainty with which the plaintiff has established the fact and extent of the pecuniary loss or the actor's pecuniary gain resulting from the appropriation;
- (b) the nature and extent of the appropriation;
- (c) the relative adequacy to the plaintiff of other remedies;
- (d) the intent of the actor and whether the actor knew or should have known that the conduct was unlawful;
- (e) any unreasonable delay by the plaintiff in bringing suit or otherwise asserting his or her rights; and
- (f) any related misconduct on the part of the plaintiff.

New York Civil Rights Law

§ 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 section fifty of this article, the jury, in its discretion, may award exemplary damages. But nothing contained in this article shall be so construed as to prevent any person, firm or corporation from selling or otherwise transferring any material containing such name, portrait or picture in whatever medium to any user of such name, portrait or picture, or to any third party for sale or transfer directly or indirectly to such

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a user, for use in a manner lawful under this article; nothing contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this article shall be so construed as to prevent any person, firm or corporation from using the name, portrait 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.

California Civil Code

§ 3344

Use of another's name, voice, signature, photograph, or likeness for advertising or selling or soliciting purposes

- (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.

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- (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.

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California Civil Code

§ 990

Deceased Personality's Name, Voice, Signature, Photograph, or Likeness in Advertising or Soliciting (January 1, 1985).

- (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 such rights vest under this nor 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 subdivision (b), or if no such transfer has occurred, then by the person or persons to whom such right of consent (or portion thereof) has 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 such 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

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- 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 on a per stirpes basis 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. For the purposes of this section, "per stirpes" is defined as it is defined in Section 240 of the Probate Code.
- (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

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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 videotape of live television transmission, of any person, such that the deceased personality is readily identifiable. A d 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 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 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 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, 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).

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Dutch Copyright Act 1912

Article 21

If a portrait has been produced without any particular instructions given to the author by or on behalf of the portrayed, or to his benefit, the publication of that portrait by the person who owns the copyright, is prohibited, as far as a reasonable interest of the portrayed or, after his death, of one of his next of kin, opposes publication.

Article 25a

In this section the term "next of kin" refers to the parents, spouse, and children. The rights of the next of kin can be exercised independently by each of them. In case of a conflict, the court may give a binding decision

Article 35

- 1) Whoever publicly exhibits a portrait without authorization, will be punished with a fine of the fourth category.
- 2) An infringement of this rule is an offense, not a felony.

Dutch Civil Code

Article 6:162

1. A person who commits an unlawful act toward another which can be imputed to him, must repair the damage which the other person suffers as a consequence thereof.
2. the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct are deemed to be unlawful, except where there is a ground of justification.
3. An unlawful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion.