



## **Image Rights, Rights of Privacy – Opportunities and Limitation:**

A Legal Overview from a United States Perspective

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*"We are like sculptors, constantly carving out of others the image we long for, need, love or desire, often against reality, against their benefit, and always, in the end, a disappointment, because it does not fit them. "*

-Anais Nin

## Introduction

The extent to which an individual may control or restrict the use of his or her image is a topic which cuts across a number of areas of law. In different contexts, it can place in tension the rights of the individual against the state, the rights of individuals against the media, the rights of individuals against commercial enterprises and the rights of one individual against another. The intricacy and diversity of the interests involved makes this a particularly challenging area of law, and one which is subject to rapid evolution as social, political and technological factors change.

It would be foolhardy to try to present a thorough review of this area of the law, even for one jurisdiction, in what is supposed to be a short presentation. This paper is intended primarily to provide a very general overview of some of the issues which have arisen in this context in the United States, so as to act as an adjunct to the panel discussion to occur in Prague.

## Evolution of Publicity and Privacy Rights in the United States

The United States has a federal system of government. Most issues of tort law, such as invasion of privacy issues (where the essential right is to avoid intrusion on solitude that is personally offensive), or unfair competition law, such as the right of publicity (where the essential right is to prevent diversion of the economic benefit of the use of someone's image or identity), are governed by state law.<sup>1</sup> On occasion, there can be potential overlap with areas of federal law, such as trademark or copyright.

The American law of privacy, perhaps uniquely, has its origin in a law review article. Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890), first articulated the notion that an individual might have some protectible interest in his image. Although one of the authors later became a justice of the U.S. Supreme Court, the article did not carry the day initially. In *Roberson v. Rochester Folding Box Co.*,<sup>2</sup> for example, the New York Court of Appeals rejected a common law right of privacy claim in the context of an individual whose picture had been used without permission in an advertisement.<sup>3</sup> When New York's legislature enacted a statute to reverse the result in *Roberson*, it became the first state to recognize

this interest by statute in what remains as Civil Rights Law §§ 50-51 (see statutory appendix). A majority of U.S. jurisdictions now recognize this interest by statute or by common law.<sup>4</sup>

The protection originally afforded by the New York statute is not as broad as the contemporary usages of commerce. For example, because the statute referred until 1995 to "name, portrait or picture," it was held not to cover the imitation of a distinctive celebrity voice<sup>5</sup> and not to create a right which can be passed on to descendants after death.<sup>6</sup> Moreover, the state's highest court has held the statute to be the exclusive source of such rights in New York.<sup>7</sup>

With further case law development, and with the development through the 20th Century of technologies permitting both more extensive publicity (radio, motion pictures, television and, more recently, sophisticated computer-generated graphics and the Internet<sup>8</sup>) and more invasive intrusion on privacy (electronic eavesdropping, telephoto lenses, and, more recently, reality shows and hacking into computer databases), different strands of interests protected by the privacy concept emerged. In 1960, Dean William Prosser, a prominent academic in the American tort field, identified four species of actionable conduct: (1) unreasonable intrusion upon the seclusion of another person; (2) public disclosure of private facts; (3) publicity placing someone in a false light; and (4) appropriation of an individual's name or likeness for another's advantage.<sup>9</sup>

Other states have gone farther than New York in protecting image rights by statute. In California, for example, Civil Code § 3344 now takes in a person's "name, voice, signature, photograph or likeness"; Civil Code § 3344.1 makes the right descendible, with a 70-year duration. In Florida, Fla. Stat. § 540.08 covers "name, portrait or other likeness"; rights also are descendible, with a 40-year duration. Vanna White's claim that a commercial in which a robot imitated her persona from the enormously successful game show *Wheel of Fortune*, sustained under California common law by the U.S. Court of Appeals for the Ninth Circuit, would have failed in New York.<sup>10</sup> Similarly, Bette Midler's claim against a car company for using an imitation of her voice in radio ads, which also succeeded under California common law,<sup>11</sup> would have failed under New York law.

## Interaction of State Law with Federal, Particularly Constitutional, Law

The impact of federal law on image/privacy rights is largely negative, in that it operates as a potential brake on the extent to which states can protect such rights.<sup>12</sup> The most notable example is the First Amendment's guarantee of

expressive freedom. In view of the line of Constitutional decisions beginning with *New York Times Co. v. Sullivan*,<sup>13</sup> no public figure could object to media discussion of him or her without establishing the factual falsity of the statement and so-called Constitutional malice, and no individual, famous or not, could recover without demonstrating falsity and at least some degree of fault in the reporting.<sup>14</sup> When the Rev. Jerry Falwell, a conservative Christian evangelist active in national politics, sued *Hustler Magazine*, a *Playboy* wannabe with fewer pretensions to suavity, over a scandalous humorous advertisement parody it invented and won a verdict for intentional infliction of emotional distress, the U.S. Supreme Court held the matter was not actionable because Constitutional malice (falsity plus knowledge of or reckless disregard for falsity) could not be established, in part because the ad parody could not be understood to be making substantive statements. In particular, pointing to Thomas Nast's 19th Century cartoons pillorying William M. "Boss" Tweed, of New York City, the Court noted that political visual images often are pointed and that core First Amendment expression could be chilled if outrage to the subject's feelings were the standard.<sup>15</sup>

The U.S. Supreme Court decision to address the interaction between the appropriation aspect of publicity rights and the First Amendment most directly is now almost 30 years old. In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the Court reversed a decision of the Ohio Supreme Court which had rejected a claim by a somewhat unusual plaintiff. Mr. Zacchini performed an act at county fairs and circuses which consisted of being shot out of a cannon. While performing at a fair in Ohio, he was approached by a reporter from a local television station, but he asked the reporter not to film his performance. The reporter acquiesced that day, but returned the next and filmed Zacchini's entire 15-second flight. The film was broadcast that night on the local newscast, with an accompanying flattering commentary by the anchor. Mr. Zacchini sued, claiming the television broadcast had misappropriated the entire value of his act, which had required considerable training and practice (not to mention luck) to perfect.

The basis for the Ohio court's rejection of the claim had been its conclusion that the First Amendment barred such relief. The Supreme Court, in a 6-3 decision, held otherwise. Critical to the Court's rationale was that the broadcast of the film of the entire performance appropriated the value of Zacchini's dare-deviltry, making it far less likely people would pay to see the act. Drawing an analogy to patent and copyright law, Justice White's opinion articulated "the right of the individual to keep the reward of his endeavors." 433 U.S. at 573. In this respect,

protection of the individual's publicity right has common roots with the provision of an economic incentive to create recognized by copyright or patent law. The more prominent the celebrity, and therefore the greater the economic value of using the celebrity's image, it would seem, the broader the protection to be afforded - a rationale which could leave lesser or accidental celebrities with less protection.<sup>16</sup>

The results in two recent cases involving an odd genre of "reality" video almost seem to reflect this. In one case, a young woman on spring break and not hitherto in the public eye bares her breasts in exchange for Mardi Gras-style beaded necklaces from a fellow with a video camera, believing he is making the recording only for his own use.<sup>17</sup> In the other, another woman, an anchor for a television station in another city, is videotaped as she removes all her clothing while taking part in a "wet t-shirt" contest while on vacation, despite signs warning that participation in the contest is a consent to the taping.<sup>18</sup> Both women find their images being used to promote the sale of videotapes or web sites displaying the tapes of them disrobing, among other footage. There the similarity ends, however. The invasion of privacy claim of the unknown bead recipient is denied, while the more celebrated newscaster won a preliminary injunction.<sup>19</sup> Neither of these cases, however, involved the appropriation of the value of an act the individual performed for a living, although the ensuing controversy did cost Catherine Bosley her job.

In other contexts, however, First Amendment considerations have been a more significant limitation on the right of publicity. In 1968, comedian Pat Paulsen launched an ostensible candidacy for President on the nationally televised program *The Smothers Brothers Comedy Hour*. When he later brought suit under the New York Civil Rights Law to block a poster company's distribution of a humorous photograph of him with the words "for President" added, the public interest of the subject matter doomed the claim.<sup>20</sup> Other courts have rejected claims where the item objected to was a parody, also on free expression grounds.<sup>21</sup> The interest protected goes beyond the political and works of parody to include other expressive ones, such as works of fiction.<sup>22</sup> It has been argued that in these and other contexts, the celebrity serves a critical, symbolic function, embodying moral values, which are then used as "expressive and communicative resources" by the larger community.<sup>23</sup> In this view, the more prominent the celebrity, the more limited may be the ability to prevent her image being borrowed as part of the broader social discourse.

Other potential areas where state and federal law can brush up against one another include copyright protection and trademark protection. Under Section 301 of the

Copyright Act, federal copyright law is deemed to pre-empt any state law which seeks to protect the same rights. Generally speaking, however, what is being protected in a publicity/appropriation context is not copyrightable, that is, a particular expression in some fixed form.<sup>24</sup>

A person's name ("Gianni Versace") or likeness could function as a trademark if it identifies the source of goods. While trademark infringement requires the showing of confusion or potential confusion, that is not an element of a publicity/appropriation claim, although it may bear on damages.

### My Image or Your Work of Art?

More difficult issues have arisen where the use of the individual's image is said to be the basis for the creation of an original work - Andy Warhol's canvases of Marilyn Monroe, for example. The California Supreme Court has articulated a test which tries to assess the "transformative" nature of the use of the image. Thus, t-shirts with original artwork employing the images of the comedy team The Three Stooges were found to be insufficiently transformative and primarily an exploitation of the commercial value of the images.<sup>25</sup> The Court of Appeals for the Sixth Circuit followed a similar approach in rejecting a claim by professional golfer Tiger Woods against an artist who had created paintings of golfers playing at the U.S. Open.<sup>26</sup>

A later case, in which a comic book portrayed two evil, half-worm, half-human characters fairly plainly based on the musicians Johnny and Edgar Winter - among other things, the characters were musicians, named "Johnny and Edgar Autumn," they were albinos and the issue of the comic book was titled "The Autumn of Our Discontent"-nevertheless was found to be sufficiently transformative not to be actionable.<sup>27</sup> The test for making this determination was described as "whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question."<sup>28</sup> The test seems to draw upon the "fair use" concept in the copyright context. The *Winter* court noted specifically that consumers would find the half-worm cartoons "unsatisfactory as a substitute for conventional depictions."<sup>29</sup>

### The Accidental Celebrity

The case of a celebrated personality whose image is used by another for profit raises the issue of misappropriation of commercial value, but usually does not present any question of forcing into the public spotlight an individual who wished to stay out of it. Almost by definition, the

person whose image is involved has sought out public attention, although perhaps not in the same context in which the image is used. What of the individual who truly has fame thrust upon him or her? Oliver Sipple's was such a case.

On September 22, 1975, an ex-Marine named Oliver Sipple was standing outside the St. Francis Hotel near Union Square in San Francisco with many others, waiting to see Gerald Ford, then President of the United States, who was about to deliver a speech. Sipple saw a woman, Sara Jane Moore, point a gun at the President. Thinking quickly, Sipple grabbed Moore's arm, causing her shot to go wild and miss President Ford. Overnight, Sipple was being hailed as a national hero.

Two days later, the renowned San Francisco newspaper columnist Herb Caen wrote a story about Sipple's friends celebrating his action at a bar. One could infer that they and Sipple were part of the city's gay community; the friends said they were proud of Sipple --- "maybe this will help break the stereotype." Other coverage followed, identifying Sipple as a prominent member of the gay community, particularly after President Ford wrote Sipple a thank you note, but did not invite him to the White House. Some speculated this was because Sipple was gay.

Sipple had grown up in Detroit, about 2,000 miles away from San Francisco, and had never disclosed his homosexuality to his family. They learned of it first from the media coverage which followed Sipple's heroism. There can be little question of its harmful impact; his father never spoke to him again. Sipple himself became an alcoholic.

Sipple sued for invasion of privacy and lost.<sup>30</sup> The California Court of Appeal, in affirming dismissal of the suit, noted that "even a tortious invasion of one's privacy is exempt from liability if the publication of private facts is truthful and newsworthy."<sup>31</sup> The Court reasoned that Sipple's homosexuality was not a private fact, pointing to his participation in various gay community events in San Francisco and around the country (but not in Detroit). Moreover, in concluding that not only Sipple's interference with the shooting but his sexual orientation were newsworthy, the Court noted:

Moreover, and perhaps even more to the point, the record shows that the publications were not motivated by a morbid and sensational prying into appellant's private life but rather were prompted by legitimate political considerations, i.e., to dispel the false public opinion that gays were timid, weak and unheroic figures and to raise the equally important political question

whether the President of the United States entertained a discriminatory attitude or bias against a minority group such as homosexuals."

One could argue that this rationale runs at cross-purposes to the incentive rationale adopted by courts in the right of publicity context -- such invasions of privacy can only discourage future acts of heroism. Moreover, it takes the argument that the symbolic function of a celebrity justifies the community appropriation of image very far indeed.

### Conclusion

"In the future," Andy Warhol said, "everyone will be famous for 15 minutes." For some, that is 15 minutes too much, for they do not wish to share their lives with the world at large. For others, 15 minutes - or 15 years - is agreeable, for they are keen to be celebrated, as long as they are compensated. And from yet other perspectives, neither interest should be allowed to curb the discussion of societally important issues or the means of individual expression. The interplay of these shifting influences can lead to results in cases which are particularistic and strongly fact-driven. Their dynamic is likely to continue to be affected by technological developments as well.

## STATUTORY APPENDIX

### CALIFORNIA

Civil Code § 3344. Unauthorized commercial use of name, voice, signature, photograph or likeness

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

prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.

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

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

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

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

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

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

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

the paid advertising as to constitute a use for which consent is required under subdivision (a).

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

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

#### FLORIDA

Fla. Stat. § 540.08. Unauthorized publication of name or likeness

(1) No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use given by:

(a) Such person; or

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

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

(2) In the event the consent required in subsection (1) is not obtained, the person whose name, portrait, photograph, or other likeness is so used, or any person, firm, or corporation authorized by such person in writing to license the commercial use of her or his name or likeness, or, if the person whose likeness is used is deceased, any person, firm, or corporation having the right to give such consent, as provided hereinabove, may bring an action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.

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

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

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

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

(4) No action shall be brought under this section by reason of any publication, printing, display, or other public use of the name or likeness of a person occurring after the expiration of 40 years from and after the death of such person.

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

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

#### 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.

Civil Rights Law & 51. Action for injunction and for damages

Any person whose name, portrait, picture or voice 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, picture or voice, 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, picture or voice 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, picture, or voice in whatever medium to any user of such name, portrait, picture or voice, or to any third party for sale or transfer directly or indirectly to such 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, picture or voice 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, picture or voice used in connection therewith; or from using the name, portrait, picture or voice 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, picture or voice used in connection therewith. Nothing contained in this section shall be construed to prohibit the copyright owner of a sound recording from disposing of, dealing in, licensing or selling that sound recording to any party, if the right to dispose of, deal in, license or sell such sound-recording has been conferred by contract or other written document by such living person or the holder of such right. Nothing contained in the foregoing sentence shall be deemed to abrogate or otherwise limit any rights or remedies otherwise conferred by federal law or state law.

## About the Author

David Jacoby concentrates his practice in intellectual property and litigation. He has tried or argued cases in state and federal trial and appellate courts, in private arbitrations and at the Iran-U.S. Claims Tribunal at The Hague. His intellectual property-related work has included matters in the haute couture, motion picture, financial and software industries, involving trademarks, anti-counterfeiting, copyrights, trade secrets and contract rights. His general litigation practice has involved telecommunications issues, environmental claims, insurance coverage issues, trusts and estates disputes, defamation claims, and matters involving art galleries, limited partnerships and real estate.

Mr. Jacoby has lectured and written on intellectual property, litigation, environmental, insurance, freedom of information law, Internet and other topics in the United States and abroad, including at the International Bar Association and the American Bar Association. His articles have appeared in treatises and the *National Law Journal*, *International Legal Practitioner*, and *The Insurance Advocate*, among other periodicals, and he has been quoted on legal topics in *Women's Wear Daily* and various general circulation newspapers.

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## References

<sup>1</sup> The Restatement (Third) of Unfair Competition (hereinafter, "Restatement") identifies *Haelan Laboratories, Inc. v Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953), as the first case to draw the privacy/publicity distinction. § 46, Comment b. The distinction is now well-established. The Restatement treats the "publicity" claim under the heading of unfair competition, and the "privacy" claim under tort.

<sup>2</sup> 171 N.Y. 538 (1902)

<sup>3</sup> The Warren-Brandeis article was more persuasive to the Georgia Supreme Court, which relied upon it in *Pavesich v New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1905), to sustain a complaint under common law principles.

<sup>4</sup> Peles, *The Right of Publicity Gone Wild*, 11 UCLA Ent. L. Rev. 301 n.1 (2004). Needless to say, the legal variations among jurisdictions only makes outcomes in this field even more difficult to predict. *Id.*, at 322.

<sup>5</sup> *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F.Supp. 826 (S.D.N.Y. 1990). The New York statute later was amended. *Cf.* Restatement § 46 ("name, likeness or other indicia of identity"). Notable cases have sustained claims involving use of a racing driver's distinctively painted car, *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974), use of a television host's distinctive introduction phrase, *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (on right of publicity but not right of privacy grounds), or use of a distinctive performing persona, *Estate of Presley v. Russen*, 513 F.Supp. 1339 (D.N.J. 1981).

<sup>6</sup> N.Y. Civil Rights Law § 50 speaks of "any living person"; see *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 585 (2d Cir. 1990). This was pointed up by the recent decision in *Orbach v. Hilton Hotels (Sup. Ct. N.Y. Co.) N.Y.L.J.*, (August 1, 2005) p. 18, where the suit was allowed to continue because it was pending already at plaintiff's death.

<sup>7</sup> *Stephano v. News Group Publications Inc.*, 64 N.Y.2d 174, 182-83, 485 N.Y.S.2d 220 (1984).

<sup>8</sup> For an intriguing discussion of some of the issues raised by the last two, see Pessino, Note, *Mistaken Identity: A Call to Strengthen Publicity Rights for Digital Persons*, 4 Va. Sports & Ent. L.J. 86 (2004).

<sup>9</sup> Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960). In many states, the fourth variety of claim requires a use for purposes of trade. See Restatement § 47.

<sup>10</sup> Compare *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992), cert. denied, 508 U.S. 951 (1993), with *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (2d Dep't 1977) (rejecting privacy claim under statute but recognizing publicity claim under common law; in light of the later-decided *Stephano, supra*, the common law route is foreclosed in New York, unlike California.).

<sup>11</sup> *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

<sup>12</sup> This is not to say that there are not numerous ways in which federal law creates privacy rights or limits privacy intrusions. For example, federal statutes protect privacy by prohibiting wiretaps, 18 U.S.C. § 2511, and restricting disclosure of certain information by the federal government (such as tax returns, 26 U.S.C. § 6103(a)) and state governments (Driver's Privacy Protection Act, 18 U.S.C. § 2721 et seq., dealing with driver's license records). Some of the Supreme Court's most controversial decisions also have their grounding in a notion of privacy rights under the Constitution, see, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking Texas sodomy statute); *Roe v. Wade*, 410 U.S. 113 (1973) (invalidating state restrictions on certain abortions); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating Connecticut statute restricting sale of birth control items). However, none of these limitations addresses the issue of image.

There are other areas of federal law which affect the use of image - for example, the ability to register a trademark for a person's name, 15 U.S.C. § 1052(c), and, indeed, one of the policy arguments for permitting an individual to control use of his or her image is that, as with trademarks and copyrights, the financial benefits of that control afford an incentive to develop images.

<sup>13</sup> 376 U.S. 254 (1964).

<sup>14</sup> See generally, *Time, Inc. v. Hill*, 385 U.S. 374 (1967), in which a "false light" privacy claim arising under the New York statute was held subject to the *Sullivan* standards.

<sup>15</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). An invasion of privacy claim had been dismissed by the trial court.

<sup>16</sup> However, to the extent courts weigh whether the use of the celebrity's image will undercut the celebrity's ability to earn income from her primary activity, such as professional sports, it could have the opposite effect. "The result is that fame may have the effect of infamy when a well-known plaintiff attempts to assert his right of publicity." Sloan, Note, Too Famous for the Right of Publicity: ETW Corp. and the Trend Towards Diminished Protection for Top Celebrities, 22 *Cardozo Arts & Ent. L.J.* 903, 907 (2005).

<sup>17</sup> *Lane v. MRA Holdings, LLC*, 242 F.Supp.2d 1205 (M.D.Fla. 2002).

<sup>18</sup> *Bosley v. WildWetT.com*, 310 F.Supp.2d 914 (N.D. Ohio 2004).

<sup>19</sup> The grant of the injunction is all the more striking because the *Boslev* court is in the Sixth Circuit, which previously had reversed a district court's injunction against publication of information, obtained in violation of a Court confidentiality order, on First Amendment grounds. *Procter & Gamble Corp. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996). An initial injunction in *Bosley* also was vacated by the Sixth Circuit. The cited decision concluded there was at most "commercial speech" in the tapes, which enjoys less protection.

<sup>20</sup> *Paulsen v. Personality Posters, Inc.*, 59 Misc.2d 444, 299 N.Y.S.2d 501 (Sup. Ct. N.Y. Co. 1968).

<sup>21</sup> See, e.g., *Cardtoons, L.C. v. Major League Baseball Players Association*, 95 F.3d 959 (10th Cir. 1996) (baseball cards); *World Wrestling Federation Entertainment Inc. v. Big Dog Holdings, Inc.*, 280 F.Supp.2d 413 (W.D.Pa. 2003)(dog caricatures of wrestling characters on t-shirts and other merchandise).

<sup>22</sup> See, e.g., *Tyne v. Time Warner Entertainment Co., L.P.*, 204 F.Supp.2d 1338 (M.D. Fla. 2002)(rejecting claim of survivors of decedents whose story provided the basis for the motion picture *The Perfect Storm*), question certified, 336 F.3d 1286 (11th Cir. 2003), certified question answered, 901 So.2d 802 (Fla. Sup. Ct. 2005).

<sup>23</sup> See, e.g., Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 *Cal. L. Rev.* 125 (1993).

<sup>24</sup> See e.g., *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905 (7th Cir. 2005) (Illinois law).

<sup>25</sup> *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387, 106 Cal. Rptr.2d 126 (2001), cert. denied. 534 U.S. 1078 (2002).

<sup>26</sup> *ETW Corp. v. Jireh Publishing Inc.*, 332 F.3d 915 (6th Cir. 2003).

<sup>27</sup> *Winter v. DC Comics*, 30 Cal.4th 881, 134 Cal. Rptr.2d 634 (2003).

<sup>28</sup> *Id.*, 30 Cal.4th at 888.

<sup>29</sup> *Id.* At 891. Peles, *supra*, criticizes this as inconsistent with the Court's statement that, if the work is sufficiently transformative to earn First Amendment protection, the economic impact is irrelevant. *Id.* at 316.

<sup>30</sup> *Sipple v. Chronicle Publishing Co.*, 154 Cal. App.3d 1040, 201 Cal. Rptr. 665 (1st Dist. 1984). The facts in the three preceding paragraphs are drawn from the opinion and Wikipedia.

<sup>31</sup> *Id.*, 154 Cal. App.3d at 1045.