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The Identity Crisis: A Vision of the Right of Publicity in the Year 2020 [Symposium, moderator]

Beryl R. Jones-Woodin
Brooklyn Law School, beryl.jones@brooklaw.edu

Identity Crisis: A Vision for the Right of Publicity in the Year 2020

A SYMPOSIUM SPONSORED BY
VOLUNTEER LAWYERS FOR THE ARTS*

DAN MAYER[1]: The purpose of tonight's program is to explore the future of art and entertainment law.[2] New technologies and their explosion of growth in the entertainment and art industry has put increased pressure on established legal definitions and traditional relationships between artists, producers, and presenters. This program will examine the right of publicity, or the right of an individual to control the commercial exploitation of his or her identity in our new multi-media society.

Tonight's program has been long in the making and there are several persons who must be thanked. First, I would like to thank the Joe & Emily Lowe Foundation and the Reed Foundation for their generous support in underwriting this program. I would also like to thank Davis Polk & Wardwell for the use of its conference and reception facilities. A special thanks to VLA's Chairman Scott Wise for his assistance and guidance in making sure that this program was a success.

As most of you know, this program is the second half of a pair of programs on the right of publicity. Several weeks ago, Thomas McCarthy delivered the eighth Horace H. Manges lecture entitled *The Human Persona as Commercial Property — The Right of Publicity* at Columbia University School of Law.[3] VLA thanks the Dean of the Faculty of Law and the Center for Law and the Arts at Columbia for their cooperation in jointly sponsoring these programs. In particular, I would like to thank Adria Kaplan who has been a true partner in planning these programs.

I would like to thank the VLA staff who have been working on this program for over a year. Special thanks to Nancy Adelson, who created tonight's hypothetical question and selected our panel of distinguished experts. I appreciate Nancy's efforts and the countless hours that she has spent over the last few months preparing for this event. Also, thanks to Esther McGowan for her assistance in the preparations for tonight.

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* [Eds. note: All footnotes that have an asterisk following the footnote number were added by the editors to help readers locate secondary sources. Footnotes without asterisks were added by the speakers.]

1.* Executive Director, Volunteer Lawyers for the Arts.

2.* March 29, 1995.

3.* For Professor McCarthy's lecture, *see The Human Persona as Commercial Property — The Right of Publicity*, 19 COLUM. - VLA J.L. & ARTS 129 (1995).

I have spoken to a few colleagues who have questioned the meaning of the title of tonight's program. This title has two meanings; first, *Identity Crisis: A Vision for the Right of Publicity in the Year 2020* refers to 20/20 or perfect vision, and we all hope that all of us have perfect insight in the directions the law will take in the future. Second, the title of tonight's program also refers to the year 2020, which will mark the 50th Anniversary of Volunteer Lawyers for the Arts. I'm confident that there will be an even greater need for the services of VLA in the years to come, and that the art and legal communities will continue to support this organization into the next century.

Now, Nancy Adelson will introduce tonight's panelists who will begin the program. Thank you. [Applause]

NANCY ADELSON:[4] Can everyone hear me? I'm delighted to introduce our panelists. Before I do, I want to call your attention to a sheet that you will see in the packet of materials that we've handed out to you. It contains more extensive biographical information about our panelists. My goal is to just whet your appetites; you can fill in the blanks with the biographical sheet.[5]

I'd like to introduce the speakers in alphabetical order. First, Kenneth B. Anderson is a partner at the firm of Loeb and Loeb, where he represents top recording artists, composers, record companies and publishers. He was also involved in some of the leading digital sampling cases during the 1980's.[6] Laura R. Handman is a partner at the firm of Lankenau, Kovner, and Kurtz, where she represents a wide variety of media and publishing clients in the areas of libel, privacy, copyright, and related matters. She has also served as a member of the Board of Directors of Volunteer Lawyers for the Arts.[7]

4.* Nancy Adelson was, until recently, staff attorney for Volunteer Lawyers for the Arts.

5.* The information from the biographical sheet has been inserted following the introduction of each speaker.

6. Kenneth B. Anderson, Esq.: Mr. Anderson is a partner in the New York office of the law firm of Loeb & Loeb, where he specializes in the representation of companies and individuals engaged in the music industry. He represents top recording artists, composers, record companies and publishers in the negotiation of significant transactions. Mr. Anderson also specializes in intellectual property litigation involving new technology and music, including many of the leading cases arising from digital sampling. Mr. Anderson is a graduate of Rutgers University School of Law.

7. Laura R. Handman, Esq.: As a partner in the law firm of Lankenau, Kovner & Kurtz, Ms. Handman represents national magazines, news weeklies, book publishers and broadcasters in the areas of libel, privacy, obscenity, copyright, trademark, unfair competition, advertising and publishing law. She was lead counsel in several important New York right of publicity cases, including *Hampton v. Guare*, in which she successfully defended playwright John Guare against a claim by David Hampton that his "persona" was wrongfully appropriated for the character "Paul" in the award winning play *Six Degrees of Separation*. Ms. Handman served on the Board of Directors of Volunteer Lawyers for the

Next, Rick Kurnit is a partner at Frankfurt, Garbus, Klein & Selz. His clients include advertising agencies, P.R. firms and publishing companies. He also teaches advertising law and has represented defendants in many of the well-known look-alike cases which we'll be discussing tonight.[8] Professor Willajeanne McLean is behind me. She's an Associate Professor of Law at the University of Connecticut School of Law. Professor McLean concentrates in trademark and copyright law and has written and spoken extensively in these areas.[9]

Next, Jonathan P. Reichman is a partner at the firm of Kenyon & Kenyon where, among other aspects of his practice, he licenses and enforces the rights vested in fictional and animated characters. He also chairs the New York State Bar Association's Committee on the Rights of Privacy and Publicity.[10] Stan Winsten, who I know I'm blocking, deserves a special round of applause for his heroic efforts in the face of a VCR monitor which literally committed suicide right before our eyes before the program began. He heads The Winsten Company, a multimedia and music industry consulting firm, and also serves as the Chief Operating Officer of R/GA Interactive, a multimedia company that he

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Arts from 1987-1993, and is a member of the Media Law Committee of the New York State Bar Association. She received her J.D. from Boston University School of Law.

8. Richard A. Kurnit, Esq.: Mr. Kurnit is a partner in the law firm of Frankfurt, Garbus, Klein & Selz, where he represents numerous advertising agencies, public relations, promotion and publishing companies. He teaches advertising law and lectures regularly for the American Association of Advertising Agencies, the Promotion Marketing Association of America and other industry groups, and is on the faculty of the American Law Institute American Bar Association's course on marketing and distribution of products. He is also a trial lawyer and handles cases involving comparative advertising, libel, copyright, trademark, and rights of privacy and publicity. He represented defendants in the "Vanna White," "Woody Allen" and "Jackie Onassis" look-alike cases. Mr. Kurnit is a graduate of Harvard Law School.

9. Professor Willajeanne F. McLean: Professor McLean is an Associate Professor of Law at the University of Connecticut School of Law, where she concentrates in trademark and copyright law. She has authored a variety of articles on these and related topics, including "All's Not Fair in Art and War: A Look at the Fair Use Defense after *Rogers v. Koons*," published in 1993 in the *Brooklyn Law Review*, and lectures frequently on these issues. Prior to embarking on her academic career, Professor McLean was associated with the New York firm of Darby & Darby, P.C. Professor McLean received her J.D. from Fordham University School of Law and an L.L.M. in European Community Law at the Free University of Brussels.

10. Jonathan D. Reichman, Esq.: Mr. Reichman is a partner in the law firm of Kenyon & Kenyon, where he specializes in litigation, licensing and counseling matters in the fields of copyright, trademark, unfair competition and right of publicity law. A major aspect of Mr. Reichman's practice involves the protection, defense, enforcement, licensing and exploitation of rights vested in fictional and animated characters, including Spiderman, Babar the Elephant, and Abbot & Costello. Mr. Reichman successfully represented the Joseph Campbell Foundation in a right of publicity suit over the unauthorized use of the late scholar's name in connection with a mythology book. He has written on copyright, trademark and publicity law and lectures extensively on these topics. He is a graduate of Stanford Law School.

spearheaded the formation of in 1993.[11] Next, Diane Leenheer Zimmerman is a Professor of Law at New York University School of Law and, in fact, she taught me everything I know about real property law. Her other areas of expertise include copyright law and technology and constitutional law, with a particular focus in the areas of First Amendment and right of privacy.[12] And last, but by no means least, directly in front of me is our moderator, Professor Beryl R. Jones. She is a Professor of Law at the Brooklyn Law School, where she concentrates in property, copyright and international intellectual property law. Professor Jones is also a member of the Board of Directors of Volunteer Lawyers for the Arts, and she graciously agreed to serve as moderator when a conflict developed for our initial moderator. We're delighted to have her and I'm pleased to turn the floor over to Beryl.[13] [Applause]

PROFESSOR BERYL JONES: This evening's panel will discuss the legal issues raised by a hypothetical involving a docudrama and the use of a celebrity's images or private person's images in that docudrama. Before we start, I thought it might be helpful to give a very brief outline on the right of publicity for those in the audience who are not familiar

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11. Stan Winsten, Esq.: Mr. Winsten has over fourteen years of experience as a business executive in both the music and interactive multimedia industries. Mr. Winsten heads The Winsten Company, a multimedia and music industry consulting firm, which provides advice and counsel with respect to business development and the acquisition of investment capital and related business plans for its clients, as well as business affairs services in structuring and negotiating agreements related to the interactive multimedia and music industries. In 1993, Mr. Winsten spearheaded the formation of R/GA Interactive and is currently the acting Chief Operating Officer of this multimedia company. Mr. Winsten, who is also an attorney, graduated from South Western University Law School and began his career as an entertainment lawyer.

12. Professor Diane Leenheer Zimmerman: Professor Zimmerman is a Professor of Law at New York University School of Law. She teaches real property, torts and constitutional law (particularly in the areas of first amendment and right of privacy), copyright, and law and technology, among other subjects. In 1994 she was Distinguished Visiting Professor at the Marshall-Whythe School of Law, College of William and Mary. Among her numerous professional activities, Professor Zimmerman recently served as Chair of the First Amendment Rights Committee, Section of Individual Rights and Responsibilities, American Bar Association. She is a member of the Committee on Communications and Media Law, Association of the Bar of the City of New York. She lectures and publishes extensively on first amendment and related issues. Professor Zimmerman received her J.D. from Columbia University School of Law.

13. Professor Beryl R. Jones, *Moderator*: Professor Jones is a Professor of Law at Brooklyn Law School, where she concentrates in copyright, property and international intellectual property law. Among her many professional activities, Professor Jones serves on the Board of Directors of Volunteer Lawyers for the Arts, is a Trustee of the Copyright Society of the U.S.A., and chairs the Executive Committee of the Intellectual Property Law Section of AALS. She has published extensively on international copyright and related issues. Prior to her academic work, Professor Jones was an Assistant United States Attorney for the Eastern District of New York. She received her J.D. from New York University School of Law.

with the right. I will note, however, that yesterday as I was pondering what I would say, I realized that any way I might describe the right of publicity would certainly conflict with the vision of someone sitting before you here today. If I were to describe the right of publicity as a property interest designed to protect the efforts of someone who had worked hard to develop a particular image, and to allow that individual to participate in any commercial value that might be realized by someone else, some members of the panel would object. In a similar manner, if I were to describe it as a personal right which was designed to protect the integrity or the dignity of individuals providing them with control over those circumstances in which their image was used, that description would conflict with the views of others on our panel. Perhaps the right of publicity falls somewhere in between those two descriptions.

The most common circumstance in which the right is implicated occurs when someone wants to use someone else's image in a traditional advertisement. The right of publicity demands that you get the permission of that individual before you can use that individual's image. The right of publicity is a legal remedy of fairly recent origin. Ben Franklin's image was put on pillboxes and sold outside the Eiffel tower. He received no royalties for those sales. Nevertheless, the right of publicity is alive and flourishing in approximately thirty-two states, either by statute or common law. The absence of case law does not indicate a rejection of the right. Rather, it is my guess that the remaining states have not yet considered the issue. The right of publicity has been expanded or perhaps read more broadly recently in three Ninth Circuit decisions involving Bette Midler, who sued Ford Motor Company for using a singer who imitated her voice in one of its commercials; Tom Waits, who brought a similar kind of suit against Frito-Lay; and Vanna White, who sued because of a commercial in which a robot turned letters in a set that looked like the Wheel of Fortune television show.[14] With that rather modest introduction, let us turn to the hypothetical.

Our hypothetical arises in a nonexistent city in a nonexistent state controlled by no existing body of law. The state is located somewhere in the United States so that we do have federal law. We also have the law in a number of other jurisdictions that we can consider as we attempt to resolve all of our problems. For wont of another name, we are in Gotham. Like New York, Gotham is one of the world's centers for art, literature, media and big business. Like New York, Gotham has recognized the right of publicity; but, unlike New York, it has recognized the right of publicity by common law.

14.* The three cases are: Miller v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993); and White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512 (9th Cir.) (Kozinski, J. dissenting), *cert. denied*, 113 S. Ct. 2443 (1993).

One reported case in Gotham involved a young woman whose name was on a bag of flour. She was a private individual. She objected to the use and brought suit under the common law of Gotham. She was successful in enjoining future use of the advertisement and she received damages. For those of you who are familiar with the right of publicity, a similar suit was brought in New York State; and the plaintiff was unsuccessful.[15] Currently, New York State has only a statutory right of publicity/privacy.[16] There is not a common law right in New York.[17]

In our hypothetical, Robert Porter, a screenwriter and independent producer, is interested in making a one-hour docudrama about the life of Patty Smith, a former ice skater, who won a gold medal in the Olympics during the 1950's. She was the darling of the Olympics. Everyone thought well of her. It looked as if she had a bright future. Unfortunately, someone revealed that she had attended several meetings of a local chapter of the American Communist Party. As a consequence, she was blacklisted, unable to obtain coaching jobs, skate with the Ice Capades or pursue any other kind of employment connected with ice skating. Smith is now a mechanic in a small town in upstate Gotham. She is opposed to publicity about her life, has not spoken with anyone about her past and refuses to do so. Mr. Porter called Ms. Smith on the phone and asked her if she would participate in the project. She refused to cooperate.

Mr. Porter continued with the project and contacted a group called Ice Dreams, Incorporated, the world's largest manufacturer of ice skates. Ice Dreams volunteered to bankroll the project, but only if it is apparent in film that Ms. Smith wore their ice skates during her career, and if someone, during the film, mentions the virtues of Ice Dreams ice skates. Porter was desperate to make the film, and agreed to Ice Dreams' terms. Smith heard about the film and Ice Dreams' contract. She became horribly upset and called her attorney, Jonathan Reichman. Mr. Reichman, can you help her?

JONATHAN REICHMAN: I would say yes, I can.

JONES: Why?

REICHMAN: I think this is a situation where both privacy and publicity grants apply. An argument can be made for some publicity grants in that they have misappropriated an image that she, through her diligent effort over the years, albeit a number of years ago, worked hard

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15.* *See* Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902).

16.* *See* N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1992), *as amended by* Ch. 674, § 1, [Nov. 1, 1995] N.Y. Laws 1665-66 (McKinney).

17.* *See* Stephano v. News Group Publications, Inc., 474 N.E.2d 580 (N.Y. 1984).

to create. As a consequence, she does have a property right. Now, at this point in time, she should be able to control and either exploit or not exploit as she sees fit. On privacy grants, I would take the position that she's no longer a celebrity. She's not been in the limelight for fifteen years. Her "fifteen minutes of fame" have passed and, as a consequence, she should be able to maintain her privacy, retreat into that privacy, and be able to restrict other people from violating that privacy.

JONES: Not surprisingly, having received the call from Mr. Reichman, Mr. Porter is not about to roll over and sack the project. He calls up Ms. Handman and says, "So, what do you think? Can I keep going?"

LAURA HANDMAN: I would say yes, you can. The docudrama is to report on the events that took place very much in the public eye at the time. She cannot own the events that occurred to her. She does not own what happened to her. They're historical events and you can proceed forward. Obviously, you run some risk of libel claims or false light claims if you falsely portray her, but in terms of a right of publicity, she cannot stop you from making a newsworthy docudrama about historical facts. As to the privacy right, and the fact that there's been a passage of time and she is no longer in the public eye, the fact remains that she perhaps epitomizes what was a terrible time in our history of blacklisting, and her story is very much newsworthy then and now as an historical reflection as to what can happen when there is rampant fear and blacklisting.[18]

JONES: Mr. Reichman?

REICHMAN: I would say in response, that with respect to publicity and false light, there is a false light concern here in the sense that if you weigh that Porter is planning to play out her life in this docudrama, it will involve the potential implication that she sponsored or endorsed the Ice Dreams Company product. Can I ask a question, did she in fact wear . . . .

JONES: Yes, she did.

REICHMAN: Okay.

JONES: She did wear Ice Dreams ice-skates.

18.* *See* Sidis v. F-R Publishing Corp., 113 F.2d 806, (2d Cir.) (child prodigy who gained fame in 1910 and who had since then "cloaked himself in obscurity," was still a subject of public interest in 1937), *cert. denied*, 311 U.S. 711 (1940).

REICHMAN: Then, notwithstanding that, to have her life placed in the context of a program where this entity is a sponsor of the program, and also to work into it an endorsement of it, albeit by another character, is to associate her with the product in a way that members of the public could view it, and would be likely to view the program, as implying that she endorsed that product or that company and still does.

HANDMAN: I would advise Mr. Porter to craft the script in such a way as to remain factually accurate and to not imply any endorsement. I don't think that the mere fact it reports that she wore the skates and that perhaps there is a reference, obviously not a dominating reference, but just a reference to how terrific the skates are, would change this docudrama into an advertisement. Docudramas are sponsored all the time. All T.V. programs are sponsored by commercial companies pumping their products and that doesn't convert what is essentially an artistic work or a news program into an advertisement. I think that some of the concerns that Mr. Reichman raises can be dealt with in the script so as to not suggest any implied endorsement by her that might be false.

JONES: Do you think that would be enough, Mr. Reichman?

REICHMAN: I would say that would help to assuage her concern, but on the other hand, in view of her objective of staying out of the limelight, of not wanting to be in the public eye, and especially not wanting to be viewed as connected with any product, that will probably fall short of what she wants and what she could achieve.

HANDMAN: There could also be a disclaimer that would say that this was an unauthorized docudrama and make clear that she was not cooperating in any way and therefore avoid also any suggestion that she had entered into an agreement with this company to produce this docudrama.

JONES: If I alter the hypothetical somewhat, do we have the same legal issues? Let us say for example that our producer's plan wasn't to produce a docudrama, but rather had been to produce a fictional story loosely based on the life of another in which the main character, a Ms. Brown, was a slalom skier who had been blacklisted. Would that make a difference? Would Ms. Smith be able to bring suit? Or would the factors that Ms. Handman has emphasized, the conveyance of factual information, not be as important?

REICHMAN: Are you saying that Ms. Brown's story would only be an extrapolation of Ms. Smith's story?

JONES: Yes, the story would be based on the life of Ms. Smith. It would simply make the lead character a skier instead of a skater.

REICHMAN: Well, I think that it would be based on if the average viewer of the program would be likely to see it as a *roman à clef* or some sort of a veiled portrayal of Ms. Smith's life, then I think that Ms. Smith could maintain the same position and say that adjustments of the facts would not go far enough to avoid the implication that it's her story being told, her life being portrayed. If, in fact, it were fictionalized to the degree where the average viewer of the program would not know it was her story, then I think it would be a different situation.

JONES: Professor Zimmerman, do you think either story presents a problem?

PROFESSOR DIANE LEENHEER ZIMMERMAN: Not to me it doesn't. At least if I were looking at it from the perspective of a film maker, I don't think it presents a problem. I think it ought to present a real problem for Ms. Smith and her counsel because it seems to me that there are a number of inconsistencies that already have come out in the basic position that is being taken here. On the one hand, this seems to be a person who has a taste for privacy, quite understandable in light of her unfortunate prior history, but who nevertheless wants to claim that she is attempting to exploit her right of publicity or to control how it is exploited. It seems to me there is an internal intellectual inconsistency in the position that I want to control my right of publicity, my economic value, and at the same time I want no one to make any use of it. I think that this is an area of the law where we have manufactured a set of cases that serve no useful purpose.

JONES: What are those cases?

ZIMMERMAN: I think the right of publicity and the privacy cases that involve accurate narrative types of publications.

JONES: Ms. Handman?

HANDMAN: I don't see the shift to fictional work to be a problem at all in several regards. First of all, the *sine qua non* of a right of publicity claim is that the work has to be advertising or trade. Be it a docudrama or a work of fiction, they are not advertising or trade. They are expressive works, one more factual than the other, but still not constituting an advertisement in the sense that we all have come to understand it. Secondly, most of the statutes are fairly narrow in their description, certainly in New York. You have to use a name or likeness; merely evoking the personality or story of someone is not sufficient. In

the case that I handled for John Guare involving *Six Degrees of Separation*, the story of someone masquerading as Sidney Poitier's son and seeking admission into various New Yorkers' homes, is a true story about David Hampton.[19] The character was named Paul, not David, and one of the grounds on which the court dismissed it was the fact that his name, David Hampton, was not used even though everyone conceded that the story was based on David Hampton's life and that others recognized it was David Hampton. I think the question that Mr. Reichman raises, would people be able to still identify the character, raises libel issues because if you say something false about the character, and people are thinking that's really Patty Smith, that can be an issue when people are identifiable, but in terms of the right of publicity, I don't have any problem with a fictionalized version of Ms. Smith's life.

JONES: Mr. Reichman.

REICHMAN: I want to respond to a couple of comments with respect to what Professor Zimmerman said. I don't have a problem in effect taking a position that at the same time, Ms. Smith wants to preserve a privacy interest and a property interest, and preserve the right to either exploit or not exploit as she sees fit. I don't see anything different there than the owner of a copyrighted work, an artist or author who chooses to either exploit or to hold back what he or she creates from exploitation. With respect to Ms. Handman's comment about the fictional work, again, if we operated from the presumption, as I do, that you have a property right, if you are going to take someone's persona and put it down either into something largely biographical or something fictional, again, you are reaping a commercial benefit from that persona for which the owner of that persona, I believe, should share in any kind of economic reward.

JONES: Is this a property right? Is he correct, Professor Zimmerman? Is this a property right over which she has control?

ZIMMERMAN: Well, I think the question is it a property right is possibly not the right way to put it. I think the question is really, "should it be a property right?" It's been recognized as a property right in a number of states. But I think there's a serious question as to how valid a claim of property this is. The justifications for saying that there is this property right strike me as being at least open to serious question. We don't ordinarily say that people are allowed to own their own identity and image and prevent other people from using it.

19.* Hampton v. Guare, 600 N.Y.S.2d 57 (1st Dep't), *appeal denied*, 625 N.E.2d 590 (N.Y. 1993).

The greatest obstacle, I think, to developing a legal right of privacy as a general matter is that we allow the interest of the public in information about other people to trump any kind of right of privacy practically that is raised. What is there about a claim like Ms. Smith's that makes her different from an ordinary private person who would like not to be written about but really has barely a leg to stand on in a court of law in raising that kind of claim? Well, what is said is that she's worth something in a commercial sense. However, it is unclear to me, not that she may be worth something, but whether that which she is "worth" is a result of something that she alone has created and if, indeed, it is entitled to a property protection even if she *has* created some part of it. I think that property rights are not natural rights. They don't flow ineluctably out of some fixed set of circumstances. We conclude as a society that we want to reward or protect certain kinds of things with property laws. I find that asking if somebody has a property right as being a very question-begging kind of place to start. The question is should they, and why should they.

JONES: Mr. Kurnit.

RICHARD KURNIT: Well I think that there is a personal right which is the right of privacy. It is violated only by conduct which society views as so outrageous and malicious and venal as to be despised, and that of course includes advertising. Beyond advertising, privacy claims are fundamentally limited to lies and deceit and truthful publication of embarrassing private facts, which is limited to totally unjustified intentional infliction of emotional distress by publishing someone's most personal and private information, causing grievous emotional injury to a person of normal sensibility.[20] Privacy is the personal right to be left alone where there's absolutely no reasonable social justification for giving publicity to something, and as Gotham develops its common law, it has to look to where the line is to be drawn between privacy and the right to receive information and to engage in social intercourse in a democratic society. I think Gotham would be well advised to follow the rest of the country and certainly would be limited by the First Amendment to restricting that right of privacy to a very small area. Where there is any reasonable relationship to a discussion of a matter of public importance, the right of privacy is going to have to give way to the First Amendment.

The hard question, if there is one, is what value Gotham will put on commercial speech. Whether or not a distinction exists in the year 2020 between so-called commercial speech on the internet and attempts by our hundred and twenty year old Chief Justice Rehnquist to continue to classify speech which is primarily directed toward a commercial

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20.* *See* Dean William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

transaction as being less worthy and therefore not entitled to the same First Amendment protection — that's going to be our hard issue because some kind of bright talismanic notion that something is commercial speech is not going to hold up.

There is also a property right, the right of publicity, and that is the right to exploit what one creates. And the question for Gotham is do we willy-nilly give that to just anybody without regard to whether or not they have imparted any effort and have created something? Or do we look to copyright law as it's developed into 2020 and has been straightened out (and all Ninth Circuit cases have been overruled) and say fundamentally that there is a social good in providing a benefit to someone who through dint of talent and effort (not to be confused with a letter turner on a game show) creates something that is a recognizable, quality contribution to the arts. As the federal constitution recognizes, the public can benefit from exploitation of creation if a copyright monopoly is provided to encourage the useful arts. If limited to a right to benefit from the effort that one undertakes, a right of publicity would not be granted to just anybody who happens through circumstance to have an image that may have some value. For example, because of some involvement in a crime, be they the victim or the perpetrator, a person may become famous. Should this person be granted a reasonable period of time of exclusive rights to permit economic benefit? Does this person have the same rights as accrue to a person who has created something of value by a contribution to the arts or other intellectual property?

Once we have developed the value of the right of publicity, we must then put the concept of right of publicity up against the First Amendment values, recognizing that, like copyright, it too must give way where there is a use for purposes of satire, parody, or explication of ideas in the social interchange under the First Amendment. And then we have this very narrow claim that one might make for being ripped off in terms of what they've created under the right of publicity, or being personally invaded under the right of privacy, and our friend Ms. Smith doesn't come anywhere near being close to presenting a viable claim.

JONES: Mr. Reichman, people aren't born champion ice skaters. It takes years of practice, years of hard work, years of development of a particular ability, just like it takes years to master the craft of writing a novel. Thus, like Kurt Vonnegut, Ms. Smith has developed her craft, ice skating, which is about to be exploited by Ms. Handman's client, Mr. Porter.

KURNIT: He, as I understand it, has no intention of using her performance, her art or her craft, merely her story, which is incidental to that effort. If we look to copyright law and the question of whether or not it is a fair use to exploit something that exists, under the second factor we look at whether or not the artist would have created it

independently of licensing or remuneration.[21] If we were going to use her performance, assuming that she owned that performance, then we would have what the United States Supreme Court has mistakenly called the right of publicity, which is of course, the *Zacchini* case, our only Supreme Court teaching on the subject, and it has nothing to do with the right of publicity.[22] *Zacchini* has to do with where you use somebody's whole performance, and it provides the basic guiding principle and defining principle that you cannot use the whole performance. Beyond that, it tells us very little. If we use her whole performance from some event, then we might be reaping what we haven't sown and she might be entitled to some compensation. But the story of her being a victim of blacklisting is not something that she created out of her intelligence, her art or her craft.

JONES: Mr. Reichman.

REICHMAN: Yes, I agree with the part about the blacklisting being the toughest part for my client, but I certainly feel comfortable in treating the right of publicity as we treat copyright rights — as a property right — that can take precedence over the First Amendment. And I think picking up on something that I answered earlier in terms of taking the question that there is a property right, I think that like so many rights in our society, they follow as a result of commercial and marketplace realities; the right that was laid down by Brandeis in his article, that, I think was a reflection of evolving commercial reality.[23] I think what you have here in this day and age is a situation that you have TV movies, docudramas, that are very, very big bucks commercial properties and I feel that it is entirely appropriate for someone who has invested the effort in building up a career to be able to share and take advantage and control that. I make a distinction between TV movies and theatrical motion pictures on the one hand and books on the other. In the book field, the marketplace will support an authorized biography and the unauthorized biography, whereas I think the TV movie field is more of a one shot thing, unless you're dealing with a unique situation like Amy Fisher where you've got three simultaneous TV movies at the same time. This may be the only opportunity for her to reap the benefit of her life story, and once it's done by Mr. Porter that may be it, and there may be no further commercial opportunity available.

21.* 17 U.S.C. § 107 (1994).

22.* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

23.* Samuel D. Warren and Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

KURNIT: You really believe she's earned society's protection of her right to benefit from shooting someone in the face?

REICHMAN: Who are you talking about, Amy Fisher?

KURNIT: That's her only accomplishment and contribution to society that I'm aware of . . . . [Laughter]

REICHMAN: I was thinking more of just Joey Buttafuoco's contributions to society.

JONES: Mr. Porter has been terribly intrigued by the fact that we are approaching a new millennium. He would like to use some new technologies in his docudrama. He turned to Mr. Winsten, who's the CEO of Technologies Tomorrow for advice, consultation and assistance. Mr. Winsten, can you help us? Can you give him (and us) some ideas?

STAN WINSTEN: I could show you. Could you dim the lights? I could tell you what's technologically possible. The first two commercials I'm going to show you are the Reebok spots we did, the "Shaq vs. Shaq" commercials. I don't know if any of you have seen them, but what's particularly unique about these two commercials is that we cyber-scanned through the use of an infrared laser a 3-D model of Shaq's head, and believe it or not, we were able to find nine seven foot body doubles that could play basketball and we basically cloned the 3-D model of Shaq's head, with his cooperation, and composited it onto the body double. Let me just show you.

[Video footage of Reebok, "Shaq vs. Shaq" commercial shown]

WINSTEN: There was a segment on Dateline NBC of how this was done, I think a picture speaks a thousand words."

[Dateline NBC segment shown on video][24]

WINSTEN: Okay, a couple of things I want to say about this before we go on to the next segment. The blue screen and the green screen photography shot of the bench is similar to the technique you see everyday with your weatherman in front of the weather map. Basically, visual images are broken up into red, blue and green wavelengths, and what blue and green screen photography does is electronically make

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24.* *Dateline NBC, Profile: State of the Art; how commercial featuring nine Shaquille O'Neals was made*, (NBC television broadcast, Jan 31, 1995), transcript available at 1995 WL 6295625.

those certain colors disappear, and you can photograph images and then digitally composite those images into any background footage. But what was more difficult in this particular commercial was the fact that there was physical contact. With respect to the special effects for *Last Action Hero*, you may recall, there were all these scenes with Arnold Schwarzenegger, but if you recall the film, for those few of you who have seen it, they never actually made contact.

What was so difficult with this project is you had people playing basketball really fast and hard and they were touching each other and it was impossible to digitally composite Shaq in each shot and actually have them make contact. And that was the necessity for the 3-D model of his head. The only reason it worked under today's technology was the fact you saw Shaq's head in a background shot and it was there for a second or two, but even with this cyber-scanned infrared laser mapping 3-D model technique, it was impossible to get all the imperfections of the cyberscanned face. Luckily, he shaves his head, but if we were dealing with somebody with a nice mane of hair, it would have been very difficult to get life-like looking hair. Nor, if it was a close-up shot could we have been able to pick up pores in a face or scars or lines; the face close-up would have had a very mannequin-like look and quality to it, so it worked in this particular scene. I should also note that we can't currently do this with the whole body for the same reasons.

In a technique you'll see later on called motion capture, we can capture in real-time organic movement, and give that organic or life-like movement to synthetic or computer generated imagery, but you can't pick up hairs on legs, creases as a leg bends and a lot of other things that would really give it away.

The next two spots I'm going to show you are very well known Diet Coke commercials. They've been called the "Dead Actor" commercials. The first one is called *Night Club* with Elton John playing with Louis Armstrong. Jimmy Cagney's in it, Humphrey Bogart and someone else. The second one was much more difficult, that's the Paula Abdul dance spot, where she's dancing with Gene Kelly. What was much more difficult about the second spot as you'll see, since I did not bring a how-to spot, was that Paula Abdul had to learn the exact dance steps of the Gene Kelly footage that was extrapolated out of, I think *Anchors Aweigh*, where he was dancing with Frank Sinatra, and they're dancing side by side. You'll see that there's no actual physical contact during the dance. You'll also see Cary Grant pour a bottle of Diet Coke towards the end of the spot. The footage that we actually used after going through hundreds and hundreds of hours of film footage was Cary Grant pouring a champagne bottle. We matted out the champagne bottle and were able to substitute in a Diet Coke bottle, but under current technology we couldn't have made Cary Grant with archival footage perform an action that he hadn't done in the archival footage, so take a look at those spots . . . . Why, isn't this going. [Laughter]

[Video footage of two Diet Coke commercials shown]

WINSTEN: All the lines that the dead actors said, with the exception of Gene Kelly (I believe he's still alive, is that correct? [Yes.]) were their actual words from archival films. I'm sure everybody in the room has seen *Forrest Gump*. ILM, i.e. Industrial Light and Magic, George Lucas' special effects company, took this process one step further. He put Tom Hanks in archival footage with Lyndon Baines Johnson and whoever else, and what they did was they used a digital retouching technique to manipulate the mouths of the famous people depicted in the footage with Tom Hanks and then they lip-synched in conversation directly with Tom Hanks, which was taking this particular technology to the next level.[25] The other way they could have done that is if they had access to the individuals that they wanted to say things other than what they had originally said, they could shoot a lot of footage, and then through hundreds and hundreds of quick edits, you could manipulate the mouth to make it look like somebody was saying something they actually didn't say.

The next thing I'm going to show you is a little ten second spot from some work we did on Woody Allen's film *Zelig*. In this situation, we shot original footage of Woody Allen and we digitally composited it in archival footage with Babe Ruth. We also did some of the special effects for the feature film *In the Line of Fire*. In that film, we digitally composited Clint Eastwood in archival footage of John F. Kennedy and Lyndon Baines Johnson, but the problem was that we couldn't find any archival footage of Clint Eastwood that exactly fit the circumstances of him being a secret service agent, so you'll see how we digitally altered Clint Eastwood's appearance from archival footage before we composited it into the archival footage with John F. Kennedy.

[Video of scene from *Zelig* shown]

WINSTEN: That's Babe Ruth in the front.

[Video segment from Entertainment Tonight explaining *In the Line of Fire* special effects shown][26]

25.* *See Dateline NBC, Profile: State of the Art; Industrial Light and Magic, computer graphics company, creates effects for Forrest Gump*, (NBC television broadcast, August 2, 1994), transcript available at 1994 WL 3764484; *Dateline NBC, Profile: State of the Art; Actor Tom Hanks appears with President Kennedy in Forrest Gump via high-tech cinematography*, (NBC television broadcast June 30, 1994), transcript available at 1994 WL 3764588.

26.* No transcript is available for this segment from *Entertainment Tonight*.

WINSTEN: Next I'm going to show you a Revlon "Revolutionary Color" spot we did with footage of Claudia Schiffer. The digital programmer that worked on this was looking at Claudia Schiffer for about four weeks without stopping, until they actually ended up having to put him in an oxygen tent. [Laughter] We thought he had hyperventilated. But you'll see that the digital manipulations that we did in this spot are very similar to what we did with Clint Eastwood in *In the Line of Fire*. We actually matched up her lip color and her dress color to samples that Revlon gave us. We didn't shoot her with different lipsticks and different dress colors and then composite her in. We took footage and then digitally manipulated all of the lip and dress colors that you see. Another note on *In the Line of Fire* — that feature film sat on the shelf for about eight or nine years because the technology wasn't there to composite JFK with Clint Eastwood as a secret service agent thirty years before. Similarly that's one of the reasons why *Forrest Gump* took nine or ten years to get made also.

[Video of Revlon's "Revolutionary Color" commercial shown.]

WINSTEN: Alright now here's how it was done.

[Video segment showing how images were composited.]

WINSTEN: Okay, this is the last thing I'm going to show you. This is the most cutting edge technique for capturing motion and translating it to computer generated imagery, so that the computer generated imagery moves in a life-like fashion with all the imperfections of human movement, because in traditional cell animation or computer-generated imagery, it looks very robotic. This particular technique utilizes a system called the "Flock of Birds," which captures real-life human movement and translates that movement to a wireframe computer-generated image.

[Video of Shell Oil commercial with dancing cars and Dateline NBC segment describing "motion capture" techniques shown.][27]

WINSTEN: Okay that's it. [Applause.] If you can get Mikhail Baryshnikov then we can get a car that dances like he dances, or if we can get Michael Jordan, then we can get a computer generated image to dunk basketballs and jumps the way he jumps, etc. I thought that these examples were illustrative of ascribing the likeness or physical character-

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27.* *Dateline NBC, Profile: State of the Art; special effects used in television advertisements*, (NBC television broadcast, August 30, 1994), transcript available at 1994 WL 3764538.

istics of somebody well-known to a computer generated image. If Walter Brennan were still alive — you recall that funny-like limp that he had from the Real McCoys, if you remember that show — we could ascribe some of the physical characteristics of his gait to a computer generated character using the motion capture technique.

JONES: Back to Mr. Porter and Ms. Smith. Mr. Porter was enchanted with opportunities offered by Mr. Winsten. He's decided to use technology and have the role of Ms. Smith played by Heather Woods. Heather Woods also was an Olympic skater in 1950. She skated at the same time as Ms. Smith. Ms. Woods died in 1953. Before her death she was able to transform her career as an Olympic skater into a career as a Hollywood star. There is a large amount of film footage of Heather Woods skating, talking, acting, moving around. Ms. Woods will star in the docudrama as Ms. Smith. Mr. Anderson, Heather Woods' daughter comes to you deeply upset. Ms. Woods, the skater, hated communism. Under no circumstance does the daughter want her mother starring in the role of a communist. Can you help her?

KEN ANDERSON: I believe so. At least in this jurisdiction, I think I might be able to. I would say that the right of publicity here exists at least for a reasonable period of time after the death of the person portrayed. It is a right which the heirs should have standing to assert for a number of important commercial reasons, and also because in Gotham we want to encourage people who are creative, people who we want to devote careers to the pursuit of artistic matters. To achieve this encouragement, we must provide not only for the performer but for the heirs as well. Assuming that our jurisdiction, Gotham, is an important center of arts and commerce, this public policy should be controlling.

JONES: Can you give us a little bit of background about the possibility of someone actually being able to use existing state law to assert a publicity claim for an individual who is dead?

ANDERSON: I would only say generally there is a great variation in the ability to do so. There is new legislation in a number of states and there is almost any possible combination of conditions precedent to an estate asserting rights. There may be a time limitation involved; it may be fifty years or one hundred years after death. There may or may not be a condition precedent of exploitation either during the course of the celebrity's lifetime or perhaps even a second chance for the estate to exploit the personality and publicity aspects for a period of time after

death in order to get that right. But the key, I think, to my mind, is that it varies fairly widely. The law of publicity is by no means uniform.[28]

JONES: Mr. Reichman, New York law.

MR. REICHMAN: New York law does not recognize a post mortem right of publicity. To the extent there is a right of publicity, that is part of the New York privacy statute sections 50 and 51 of the Civil Rights Law.[29]

JONES: Tennessee, with Elvis Presley?

REICHMAN: In Tennessee, I believe, there is a limited post mortem right; limited in the sense of years you have to exploit. I think it's within ten years after death, and once it is exploited if you continue to add, sort of like a trademark statute, as long as you keep exploiting it the right remains in effect.[30] If you stop doing it for, I think it's two years, there is a prima facie assumption of loss of rights, the two year trademark abandonment provision of the Lanham Act.[31]

JONES: And can someone help us and describe California Law?

REICHMAN: California follows the copyright law of life plus fifty.[32]

KURNIT: If the Ninth Circuit hasn't been reversed by a Municipal Court Judge in the State of California, and mistakenly the state courts have left to the Ninth Circuit the determination of state law, then the common law right of publicity enunciated in *Midler*, *Waits*, and *White* would suggest that if anybody out there happens to have a passing thought about a particular celebrity in watching a work, if it's deemed to be commercial, however that's defined, there would be a violation of the right of persona.[33] We'll have to see whether or not the California state courts will determine that the Ninth Circuit is correct to ignore the California legislature's statement of the law in the Celebrity Rights Act of 1985 and to develop an unbounded common law right of publicity. But this being 2020, by now French jurisprudence with respect to *droit morale* has completely swept the country and the Lanham Act has been

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28.* *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. h (1995).

29.* *See supra* note 16.

30.* TENN. CODE ANN. § 47-25-1104 (Michie 1988).

31.* 15 U.S.C. § 1127 (1994) (definition of "abandoned"). As a result of the Uruguay Round Agreement Act, Pub. L. No. 103-465, 108 Stat. 4981 (1994), the term for prima facie nonuse under the federal trademark law will become three years, effective January 1, 1996.

32.* CAL. CIV. CODE § 990(g) (Deering 1994).

33.* *See supra* note 14.

amended to provide for rights of attribution and integrity. Our best shot is in arguing some ill-defined concept of an extension of copyright law in the choreography and in the performance as well as marrying it to the *Zacchini* case and arguing that "they took the whole performance." This seems to be the guiding principle of this other kind of common law right of publicity. You may be able to argue a Lanham Act claim that there is a false implication of authorization, participation, or association by the estate in terms of lending itself to this film and therefore a violation of the rights of the estate. I would advise Ms. Woods' heirs to incorporate as the Estate of Heather Woods, to develop trademark rights, and to develop the ability to argue that the public has come to understand that the estate is in the business of exploiting their dead relatives, and therefore anyone who sees one of their dead relatives should assume that the estate is in charge here and is benefitting from it. In the realm of the Lanham Act, and conceivably *droit morale* and copyright, *Zacchini* may finally be put to rest.

JONES: Well, in fact, that's just the case. Woods sold skating outfits when she was alive; her family's been selling skating outfits since her death. There is a picture of Woods on the label that is sold with her skating outfits. Professor McLean, does she have a trademark claim? Does the Lanham Act cover this?

PROFESSOR WILLAJEANNE MCLEAN: Section 43(a) of the Lanham Act deals effectively with this situation. It says, loosely paraphrased, that any person, who, on or in connection with any goods or services . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation or association of such person with another shall be liable. . .[34] Ms. Woods, and/or her heirs, could say emphatically that she would not be a party to this portrayal. Furthermore, based on the provisions of §43(a), it could be contended that the performance is a

34. *See* 15 U.S.C. § 1125(a) (1) (1994) which states, in pertinent part:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
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> (A) 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 . . . shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

misrepresentation.[35] Therefore, Mr. Porter should not be allowed to use Ms. Woods' performance or her persona in order to portray Ms. Smith, someone whom Ms. Woods detested.

HANDMAN: I think, though, that Mr. Porter might be well advised to use Ms. Woods' performance in another way and not use her as a substitute for Ms. Smith. Perhaps he should use her in a manner that was used in *Forrest Gump*. In this way, she would appear in part of the story as herself. I think that would be fine.

ANDERSON: I have another suggestion. If Woods had appeared in motion pictures, I would suggest that we advise that the producer obtain a license of the motion picture footage used and integrate that into the movie. It's likely in many instances that she would waive any moral right or any right under the Lanham Act to make a claim as a part of the agreement that she entered into when she performed the role. This includes the right to make a claim respecting editing and changes to a portion of the performance, no matter how significant and no matter how used, in whatever context, including morphing and creating an entirely new persona out of it. That's what I'd look for, because then I think any claim that there's an independent right that exists notwithstanding the fact that this performance was fixed in a tangible medium, that it was licensed, that all rights were waived, I think begins to run into a number of problems such as preemption.[36] If there is a valid license under copyright, perhaps you're now trying to create the equivalent of a copyright right and flying in the face of another party's rights under the copyright law and the commercial practices of the industry.

JONES: What if we utilize the footage in the manner that Mr. Anderson has suggested? She will walk on and perform during an Olympic competition. As you recall, she did perform in Olympic competitions during the period when Ms. Smith was at her prime. Is Mr. Porter vulnerable to suit, Mr. Anderson?

ANDERSON: I think he's in better shape than before. If I were representing the estate I certainly would be most interested in pursuing the Lanham Act issue if she's being connected with this picture when there was no original factual connection whatever. However, I think there are still some problems even with some factual connection.

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35. *See generally* Diana Elzey Pinover, *The Rights of Authors, Artists and Performers Under Section 43(a) of The Lanham Act*, 83 TRADEMARK REP. 38, 54-63 (1993) (discussing the use of Section 43(a) in considering right of publicity claims).

36. *See* 17 U.S.C. § 301 (1994).

JONES: Mr. Reichman?

REICHMAN: I agree.

JONES: Why would there be any problems? This is an accurate statement. She skated, so did Ms. Smith.

REICHMAN: In a different context. She is now being transplanted into a different work, a different product environment, that I think does create the potential of a misrepresentation.

KURNIT: No. We didn't take the whole performance. [Laughter]

ANDERSON: I'm not sure you have to take the whole performance. It was hard to take Zacchini's performance without taking the whole performance, I would say.

KURNIT: Zacchini was a human cannonball. And a local news program in talking about how the circus had come to town showed Mr. Zacchini's entire act of being shot out of the cannon and safely landing. He sued claiming that now that people knew how his act ended (would there otherwise be greater suspense or mystery?), nobody would come and see it. The Supreme Court, faced with this issue, basically said that Ohio seems to call this a right of publicity. Since we here in the Supreme Court know next to nothing about copyright, we will go along with that and dub it the right of publicity, and since they showed Zacchini's whole act, it's not fair. That's the overall principle, and I invite you to read the case.[37] It seems to be that it's not a fair use, and it is a violation of Zacchini's rights because they took the whole act. It was sort of a melding of copyright notions.

REICHMAN: It wasn't preempted because Mr. Zacchini was not fixed in a tangible medium of expression, which, I guess as long as he lands in the net, he's not going to be.
[Laughter]

HANDMAN: The entire act took fifteen seconds from start to finish. I have a problem with the notion that if you use Ms. Woods' performance in a historical way in the movie as being who she was, an Olympic performer, that anyone would think that there was an implied endorsement of a product. I think that's quite different than the Coke ads we saw, which I think arguably do raise the question of implied endorse-

37.* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

ment by the estates of the deceased stars of a product, mainly Coca-Cola. I think that's very different.

JONES: Professor McLean?

MCLEAN: I would like to know how much of the performance would be used. There's a case where James Brown sued the owners/distributors of the movie, *The Commitments*.[38] James Brown sued because portions of one of his performances, approximately twenty-seven seconds worth, were used in the movie. In addition, the characters in the movie mentioned him by name. James Brown argued, *inter alia*, that the use of his name, likeness and persona was a violation of his right of publicity. The court determined that the use of Brown's "persona" did not rise to the level of actionable appropriation; rather, it was *de minimis*.[39]

Under those circumstances, it does not seem possible that Ms. Wood has a cause of action here, particularly where she is not playing the role of Ms. Smith, but is just skating on and off the screen. How does that pose a problem?

KURNIT: I think it would pose a real problem if we prohibit using material accurately, where there is a reasonable relationship to the subject matter, in a work of art. People cannot prevent communication about themselves that is truthful and accurate, that is a contribution to art as well as public discussion under the First Amendment. In these circumstances, the First Amendment rights are, to my mind, overwhelming as opposed to any assertion of any other claims we might otherwise develop.

ANDERSON: Where are you now where you have the crossover into pure entertainment and pure artistic expression — performer, musician, a dancer — and I don't think you can so easily say that you're telling news or that there's a First Amendment right to relate back to events. After all, the actor creates a character in a role, so I suppose you could say it's an event. Then why can't everyone simply use that for free forever? It goes back to the concept that in order to sustain an environment where the arts are fostered you have to have a reward at the end of the rainbow for the creative people. So wherever you've got that kind of labor involved you must look for that.

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38. *See* Brown v. Twentieth Century Fox Film Corp., 799 F. Supp. 166 (D. D.C. 1992) (granting summary judgment to defendants), *aff'd*, 15 F.3d 1159 (D.C. Cir. 1994) (unpublished disposition).

39. *See Brown*, 799 F. Supp. at 172 (holding that a single use of Brown's name did "not constitute the type of wholesale appropriation that has been recognized as giving rise to a right-of-publicity claim.").

REICHMAN: I agree. I keep coming back to copyright analogy. In this docudrama, if they want to use music from the fifties period, period songs to invoke the era, they're going to have to pay for them. If they want to use the performance — even part of the performance of another skater — I think that they should be required to pay for that and receive permission. I think, following up on the copyright analogy, you can incorporate a fair use doctrine in that if the portion you're taking of the performance is sufficiently *de minimis*, then maybe ultimately the contribution of that performance portion is sufficiently small enough so that there should be an exemption. But certainly as a matter of basic principle, I follow the copyright analogy.

KURNIT: Well, if I get you guys to give me full First Amendment protection and fair use protection on the right of publicity, I go home happy.

ZIMMERMAN: I'd like to know how you define a performance. I mean, were John Kennedy and Lyndon Baines Johnson performing in that segment that we saw from the film? Because if that is the case, then it seems to me that you would never be able to use any kind of historical footage in a later production, fiction or otherwise. And that does seem to be a bit of a problem. So unless you can define performance for me in a way that is somewhat narrower, that would avoid leading us to conclude that Lyndon Baines Johnson and John F. Kennedy had their right of publicity violated by appearing in that film, I would be a little worried about it.

REICHMAN: I think that politicians create a hard example here. Since they have in effect by becoming involved in the public sector and dedicating themselves from a career standpoint (supposedly) to public service, there's arguably more of a concession or dedication type of analogy that comes into play. And I guess it's just a question of line drawing between something that falls under the arena of traditional entertainment, performance and public figures who may be acting in the sphere of their businesses but just who happened to be captured on film like Lyndon Baines Johnson or John F. Kennedy.

KURNIT: Can I get you to throw Amy Fisher in? How about a letter turner on a game show? Are we within the realm of people whose creative contributions society should not hold up above First Amendment values?

REICHMAN: I have to say maybe it's a function of my having practiced in California, but I feel very comfortable with the California line of cases. I continue to feel that if people are going to reap commer-

cial benefits from this type of exploitation, they should be required to pay for it.

JONES: I want to go back to an earlier question. If Ms. Wood is dead, should her daughter be able to bring suit against Mr. Porter? She can't be particularly worried about her image. Ms. Handman, do you think the state of Gotham should recognize the descendibility of the publicity right?

HANDMAN: Well, I think one problem is that we need to respect that at moments in time, people and events pass into history and therefore become in the public domain. In the libel context, by analogy, the deceased person cannot sue because they have passed into the realm of history. And maybe death is a somewhat arbitrary line drawing because obviously the family members don't think that so much time has passed and that their reputations don't matter, but it's a line that we draw, and I think a suitable line also for the right of publicity where it is recognized.

ANDERSON: I think you're looking at the difference between a tort and a property right. There is a different rationale behind it.

HANDMAN: Well, that's where we perhaps disagree whether this is properly viewed as a property right or not.

ANDERSON: I think a lot of it has to do with, what's the reason for it? Why are we creating this? What's the purpose of creating this law?

HANDMAN: I think, you know, the more you stray from its core purpose which is to prevent false, implied endorsements — which is what I think is really at the core and the value of the right to publicity, suggesting that someone is endorsing Coca-Cola when they don't intend to — when you stray from that pure value which is really the commercial value and get into story, books, entertainment, whatever it may be, about a person, I think you've gotten away from the commercial value and you're starting to head into the very strong First Amendment interests that apply. I think that similarly, with the right of publicity, the argument goes, and I think these are perhaps good examples for Coca-Cola, that these are humorous and these people have become cultural icons and they have reaped the rewards, unlike politicians. They've reaped the rewards during their lifetimes. So I don't think that they necessarily need more incentive after their death to have commercialized their image.

ANDERSON: It's hard to believe that we would not have a copyright law which has protection after the death of the author.

HANDMAN: That's the act of creation. That's something different than your personality and who you are.

REICHMAN: Isn't the philosophy behind it the same in the idea that you are rewarding effort and initiative?

HANDMAN: But to the extent that they have created something, they are rewarded.

ZIMMERMAN: On the copyright model, they would be protected only for the actual expression that they fixed. To the extent that what we're doing with the right of publicity is giving people some sort of amorphous and very broad right well beyond "expression" that we justify by saying we are protecting their effort or labor, it seems to me it doesn't fit with a copyright analogy at all.[40] If we use a copyright analogy, maybe the *Zacchini* case has something to teach us after all. At least what was being protected there was a captured performance. You could say that this person went out there to do a particular act which he normally sold the right to see. If somebody takes the performance of his entire act as opposed to taking his physical image or his vocal style or some other attribute, then maybe that's a bit like violating a copyright. If we want to think about protecting something like that, we could fit it into the same set of justifications and narrow principles that copyright has long abided by and I think thrives under.

MCLEAN: Maybe we should look at it from a trademark perspective. Once a trademark reaches such a level of popularity that it becomes synonymous with the good it represents, it is deemed generic.[41] Once generic, a registered trademark no longer qualifies for protection.[42] It is free to be used by all.

Similarly, one could say that at some point, a popular cultural icon, a popular figure, reaches such a level of popularity, and has so captured the public's imagination that it becomes synonymous with what it

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40.* *See* Feist Publications, Inc. v. Rural Telephone Services Co., 499 U.S. 340, 359 (1991) (copyright protects originality rather than the "sweat of the brow").

41. A term is deemed generic when it refers to a type or class of goods; for example, the term "safari" is generic for expedition into the African wilderness. *See* Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 11 (2d Cir. 1976) (defining generic terms). A mark can also become generic through usage; for example, the term "aspirin" was once a trademark. *See, e.g.*, Bayer Co. v. United Drug Co. 272 F. 505 (S.D.N.Y. 1921).

42. *See* § 14(3) of the Lanham Act, 15 U.S.C. § 1064(3) (1994) (allowing cancellation of registered marks which have become generic).

represents and it, too, becomes generic.[43] Therefore, the icon no longer needs protection.[44] It has reaped the benefits of popularity. It has been used, talked about, and has entered into the popular culture lexicon. It should be used.[45]

KURNIT: I think you have a trademark at least in the sense of the extensions of the Lanham Act in false implication of endorsement or authorization cases. That's going to be there and that protects one side. And you have a copyright law, and that protects a great deal of what we're talking about here, except to the extent of the performer or the performer's heirs who are trying now to evade the fact that they didn't retain the copyright. They might have retained an interest in the copyright and they didn't. Now they are trying to create another right which will interfere with the copyright owner's ability to license his property. The question is how you balance the rights. I dare say we have to leave Amy Fisher out because her celebrity does not arise out of any contribution to society.

I think that the problems inherent in the Ninth Circuit's decision in *White* become clear where the Court talks about the importance of expanding the common law right of publicity because actors and artists, through dint of their talent and hard work, develop something of value in society, and then they apply it to Vanna White.[46] So they're going down the right road, but then there's this unbelievable awe that we have about celebrities and we ignore why there are celebrities. So at least let's limit our right to publicity to those people who have created through dint of hard effort some kind of performance, as in *Zacchini* or maybe some quasi-copyrighted character as in the Marx Brothers, and say this is something that someone has created which we will permit him to

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43. *See* Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 865 (1995) (noting that "at some point some aspect of a celebrity may transcend his or her own persona and become evocative of a more general, if not generic concept.").

44. *Id.*, at 865 (noting that it would be inappropriate to protect a "generic persona" under the right of publicity). *See also* Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 370 (1992) (arguing that the celebrity image is overly, and indefensibly, protected since the image is a "form of cultural bricolage").

45. *See* David Lange, *Recognizing the Public Domain*, LAW & CONTEMP. PROBS., Autumn 1981, at 147, 165 (noting the negative effects of over-protection thusly: "[a]s access to the public domain is choked, or even closed off altogether, the public loses . . . the rich heritage of its culture, the rich presence of new works derived from that culture and the rich promise of works to come."); *accord*, Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws & Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991) (discussing the often negative impact of intellectual property laws on creativity).

46.* *See White*, 971 F.2d 1395, 1401 (9th Cir. 1992) (question of fact for the jury), *reh'g denied*, 989 F.2d 1512 (9th Cir.) (Kozinski, J. dissenting), *cert. denied*, 113 S. Ct. 2443 (1993).

exclusively exploit for fifty years. But let's not impinge on copyright, and let's be informed by copyright concepts of fair use so we don't let publicity rights become the tool used by people who wish to obstruct discussion of their lives or commentary and criticism of their lives. The right of publicity will be abused if we are not sensitive to how we develop it.

HANDMAN: Rick, I just have to take issue, I think, with endowing a court with the power to judge between low art and high art . . . .

KURNIT: They can judge one shade of blue from another according to Justice Breyer.[47] Give me an alternative.

HANDMAN: You know, perhaps Vanna White on the east coast doesn't hold quite the same important symbolism that she does on the west coast, but I just don't think we can get into that kind of line drawing of who's a valid celebrity and who's an illegitimate one.

KURNIT: I already got it. I'm trying to get these guys further over to our place. You and I are going to leave and say, you know, anything short of the rankest commercial speech is totally protected by the First Amendment and if it's a docudrama, we're going to shut out the right of publicity entirely.

JONES: I want to give the audience the opportunity to participate in the conversation. But before I open the conversation, one last issue I'd like to discuss is the great disparity in protection we see in different jurisdictions. Should we have federal legislation? Would it provide needed uniformity on issues such as what is and is not protected; whether the right is descendible; how long it descends; and what you have to establish in order to assert a descendible right?

KURNIT: Well, I think it would make sense because, first of all, it gives us the opportunity to throw out the Ninth Circuit cases. [Laughter] Well, I commend them to you for their logic and reasoning. What we have now is a grab bag that's becoming slightly unseemly. I mean, the Nevada legislature enacted a right of publicity statute at the behest of the agents for several dead people and it specifies that Nevada will apply its law regardless of what law is applicable.[48] And this kind of attempt to find friendly legislatures to pass a statute will then inhibit communication on a national level. These agents will tell you "we will sue in

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47.* *See* Qualitex Co. v. Jacobson Products Co., 115 S. Ct. 1300 (1995) (color alone may, in some cases, entitle one to a trademark).

48.* NEV. REV. STAT. 597.780 (Michie 1994).

Nevada" when you're using a person whose rights of publicity don't exist under the applicable law. The New York Court of Appeals has said that the applicable principles and law should be where the estate is. (In the case of a use in New York of Tennessee Williams, who lived in New York, they said they would apply Florida law where he went to die — as so many New Yorkers do because Florida has no estate tax).[49] The copyright law is a national law and preempts state law in order to facilitate national publications. Similarly, it would be appropriate for the right of publicity to be national and to avoid this kind of activity. The only problem I have is that those people who seem to have seized the Restatement actually think the Vanna White case is correct.[50]

HANDMAN: As the only member of this panel that currently resides in Newt Gingrich's Washington, I would, while it may be appropriate, not want to see Congress at the moment muck around with the right of publicity.

ZIMMERMAN: I have to say I'd like to know what's going to be in the law before I say whether I want [laughter] the package. But I'd like to say that I think that maybe it would be an awful lot of effort for absolutely nothing because, as I was watching the footage on the screen, I began to think that what we were really seeing here is the beginnings of technological obsolescence for the human performer, and that all of this may be somewhat irrelevant in the year 2020 — that we may have all of these computer-generated dancing cars and telephone booths and people and what have you, and we won't need to worry anymore about those individuals investing time and energy building up their rights of publicity. We're going to have totally made up characters who will become our cultural icons of the future. Mickey Mouse as a genuine appearing-human virtual human-being.

REICHMAN: I would recommend a federal statute. We are talking about rights that are exploited on a national level. You might think that, as a practical matter, advertisers who are worried about these concerns have to assume the worst-case scenario because they will be exploiting their ads on a national level. I would analogize to the trademark law or the copyright law. I think, historically, trademark law was rooted in common law, and I think that, for sheer efficiency and the way the marketplace operates, it made sense to have federal trademark law. I think the same principles apply to the rights of publicity.

49.* Southeast Bank, N.A. v. Lawrence, 489 N.E.2d 744 (N.Y. 1985).

50.* *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (1995).

JONES: Thank you very much. I'd like to turn to the audience. [Audience claps.] Is there someone in the audience who would like to participate in the conversation and ask a question of our panelists?

QUESTIONER: I wonder if anyone on the panel thinks that the filmmakers of *Forrest Gump* should have gotten permission from the Kennedy and Johnson estates?

HANDMAN: I don't.

ZIMMERMAN: I don't either.

KURNIT: No.

QUESTIONER: Politicians are in the public domain?

HANDMAN: It's a work of art. I don't consider it advertising and trade.

REICHMAN: I suppose I'm the one [on the panel] who should come closest to saying that they should [ask for permission], but again, I think in connection with politicians, I am comfortable with the idea that there's a dedication; that it could be exploited without permission from the estates.

KURNIT: Note that there were several other people standing around the politicians in that movie who had done nothing to make themselves public or otherwise. I don't think it's a question of politicians being in the public domain. For me, in the first instance, it's a work of art, and as long as it's got anything to do with the work of art, I don't believe the right of publicity is implicated, and it has really very little to do with someone being a political figure. If I were free to make my choice, I'd give even Newt Gingrich more rights than Amy Fisher.

JONES: Let me ask the question, what if we take it out of the movie and have a poster advertising the movie, for example, a poster with JFK and Tom Hanks? Will it be a commercial context, exploiting this movie?

HANDMAN: If it's a clip from the movie then I think it's an incidental use promoting the movie as it was used in the movie, and it won't be a violation of the right of publicity.[51]

51.* *See* Namath v. Sports Illustrated, 371 N.Y.S.2d 10 (1st Dep't 1975), *aff'd*, 352 N.E.2d 584 (N.Y. 1976).

JONES: Mr. Anderson.

ANDERSON: I think you have a danger that you're taking, maybe taking, at some point, you may be taking someone's *de minimis* appearance or otherwise historical context out of context, turning it into an endorsement that would never have been intended and involved a whole new different set of rights. Whether that's possible, you're coming so close to First Amendment freedoms when you're talking about political, a political person, a President, that the issue becomes much, much hazier to pinpoint, I think, when the First Amendment concerns overwhelm just about any use that you'd make.

QUESTIONER: Just to follow up on that same thing, I wonder, how would Richard and the other [panelists] feel about whether the clearance of the film-maker had to be obtained in the Johnson and Kennedy uses, with the copyright owner of the film.

HANDMAN: I think the clip was so short, first of all, that I think it would come under fair use.

ANDERSON: I'm not sure. I think you said in the analysis of, if you're looking at a clip, the analysis as to whether it's fair use would depend on whether you were having an effect on the market value and if you are usurping what would ordinarily be a license. That is, if the film-owner regularly licensed clips from that film for those purposes, I think you have a copyright problem. But as to whether there's a fair use, I'm not sure. In a commercial exploitation, there are other sources that could have licensed it.

KURNIT: I would call it a fair use, but the errors and omissions carrier is going to want you to get a license before going ahead.

QUESTIONER: I have a question directed to the panel, but particularly to Mr. Anderson. I know that your firm is heavily involved with representing entertainment clients, particularly on the west coast, and given the death of the studio system and the emergence of the free agent system for movie stars, are you finding that artists are reserving to themselves the right for future uses of their performances?

ANDERSON: Well, obviously if we're representing the artists, we try and do that. If we're representing the production company, we try and prevent that from happening. It's really a matter of bargaining power at this point and probably for a very long time into the future will be, if you have an artist with extreme leverage and bargaining power, a great superstar, there will be a very substantial reservation of ancillary rights in all categories, whether they are well known today, such as merchan-

dising, typical merchandising rights, all the way through the interactive technologies, all the way through the very latest and technologies unknown. But if it's your first picture, I think you can waive all of those goodbye until the union has the ability to negotiate those on your behalf.

REICHMAN: My understanding is that it is, in a number of contracts, becoming part of the language. There was an interesting situation I think involving the movie, *The Crow* with Brandon Lee, who died during the filming, and the studio ended up manipulating some of the existing footage to sort of fill in the blanks of the scenes. And they had to go back to the estate of, I think to his mother, to get permission to do that. Maybe that was mandated by the errors and omissions carrier. But they felt that contractually they were not on solid footing so they did, they did go back.

KURNIT: There is an "errors and omissions insurance." The movie industry tends to defer to the insurance company's extraordinary conservatism on these issues.

QUESTIONER: A question directed to the practitioners about the past, and the contracts under which actors performed in the studio system here. To what extent do those contracts preclude claims against use and new technologies today? We had the discussion about the skater who had appeared in motion pictures. My impression would have been that all sorts, that any conceivable right of publicity related to that picture would have been given to the studio under a standard contract, thereby precluding under contract law any claim now. Is that correct?

ANDERSON: Well, by and large it is. My expectation would be that that's what I would find. However, the contracts vary substantially from company to company in terms of the form that's used. Sometimes, it will be a historical period where the draftsperson had not thought of something that came along, and there will be a range of several years where there will be a form that will have a gap in it in that particular area. But you also have to be prepared that during the course of negotiation, almost anything can happen to the form. In my experience in the music industry, there are basic forms which will take a certain direction — you can pretty much expect that those rights are given, but in a particular instance almost anything can happen.

QUESTIONER: So in a dispute today, you have to try to find the contracts that were signed?

ANDERSON: That's just the first thing to do.

QUESTIONER: And what if you can't? Is there a presumption, an industry presumption, a professional presumption?

ANDERSON: If you can't, the presumption is the errors and omissions insurance company being very concerned of your going and doing whatever you want without checking your rights, and that tends to be a general commercial practice. Also, if you're going to exploit any product, the last thing you really want with the, depending on, if you're looking for controversy, you're looking for controversy, certain motion pictures or certain recording artists may be, that's exactly what they're looking for. But in many instances, you don't want to release a recording, and at the same time, face a lawsuit by someone claiming that the recording is a piece of garbage that tramples on the image of the artist. It's really not a positive way to start things off, so you'll look to avoid it.

REICHMAN: My understanding is that in a lot of the old movie contracts, the actors did convey all rights to the studio. I think even under those old contracts there was a caveat for endorsing products, that the actor's image won't be used to endorse products . . . .

QUESTIONER: Question for the panel. If we assume, as I think is probably correct, that the United States is a net exporter of celebrity talent, how ought the United States, what sorts of rights should we extend to foreign celebrities in the United States and what sorts of rights should we expect American celebrities to enjoy overseas?

ANDERSON: I think that moral rights are certainly more prevalent overseas than they are here although there is some, those are the rights not to have your work mutilated in some way that doesn't accurately portray the authorship. That's a right that I think, because of the expansion of Section 43(a) here, is although everyone says there are no moral rights in the United States law, I think it's becoming part of the law. I think we've seen under copyright law an effort to join the rest of the world community and to try to have a more uniform copyright law.

There is still a considerable way to go, and hopefully as we look to reap the benefits from exploitation in other territories, we'll bring more of a uniform protection that's available in some other countries, particularly performance rights in sound recordings in the United States. We'll see it in a few years. We've never had that here. The record gets played on the radio or on television. There's no right, no remuneration at all to the record company or the performing artist, only to the publisher of the song. Throughout the rest of the world that's not the case. And as we see interactive technology become the primary source of listening to music, where you just go in and push a button and pick whatever you want instantaneously from any record ever recorded — pull it up on your computer and there it is — there's going to have to be

a change in the law to get some protection, otherwise no one will want to be a recording artist if no one will pay for it.[52]

KURNIT: I would hope that we would continue to lead the world in putting a premium value on the free exchange of information and ideas, and I would ask what is so deficient in the copyright law and in the Lanham Act concept that we already have precluding false implication of endorsement, authorization, or association. Do we really want to add an additional burden that anytime you want to use something, you have to go find the heirs of the actor, and in addition to licensing the copyright from the copyright owner, license the sort of parallel rights of publicity? I suggest that we would all be better off if these artists have the economic power that they share in the copyright. If they have the ability, go off and form "Dreamworks," and own the copyright, be my guest, rather than setting up an ill-defined parallel set of rights, which will have to be cleared every time you want to use a photograph or a piece of footage or otherwise exploit existing material in new media.

Right now in California, there is a case in which the two actors who had subsidiary roles in the T.V. show *Cheers* are claiming that they have publicity rights which must be licensed in licensing *Cheers* from the owner of the copyright to set up venues in bars in airports because they have two characters who are not look-alikes of the actors, although one is rather chubby as I understand it, and one is a mailman as I understand it.[53] The two actors who played those roles are asserting that under the "Vanna White Principle," people walking into a bar named "Cheers" and seeing two guys at the end of the bar in addition to thinking of the characters, will also think of the actors who played those characters. So now I have to go out and license again, this additional right. You are putting up roadblocks on the information highway if you follow down the road of expanding a parallel set of publicity rights on top of copyright, trademark, and Lanham Act. I suggest the United States should keep publicity rights as small as possible based on the balancing of First Amendment interests to these very narrow property rights and personal rights that I have advocated earlier.

ANDERSON: I advocate the First Amendment, but I'd rather see one uniform set of these rules than fifty.

52.* After the symposium, Congress enacted the Digital Performance Right In Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995), *amending* 17 U.S.C. §§ 106, 114 (1994), granting a limited right of performance in sound recordings.

53.* *See* Wendt v. Host International, 50 F.3d 18 (9th Cir. 1995) (unpublished disposition) (reversing District Court's grant of summary judgment to the defendants).

JONES: On that note, I would like to thank the panel very much and thank the audience.

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54.* The following "Selected Table Of Authorities" was distributed at the Symposium.

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