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LEGAL OBSTACLES TO BRINGING THE TWENTY-FIRST CENTURY INTO THE LAW CLASSROOM: STOP BEING CREATIVE, YOU MAY ALREADY BE IN TROUBLE.

ANDRE HAMPTON*

I. INTRODUCTION

In my Contracts course, I attempt to foster interest in the Law of Contracts by informing students that learning Contracts is like learning a new language. I tell them that their objective is to be able to see the world through Contracts. To that end, I advise them that they need to practice translating ordinary events into “Contractese.” I assure them that this will help deepen their understanding of Contracts as well as their enjoyment of the subject. I try to keep them from compartmentalizing the study of Contracts from the “real world.”

To this end, I have often incorporated situations or themes from television shows into my classroom discussions. Episodes of *Seinfeld*,¹

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1. This comedy is a fertile ground for contracts vignettes. In one episode, one of the characters, George Costanza, purchases a used Volvo after the car dealer explains that the car was previously owned by “Jon Voigt.” The dealer means “Jon Voigt” a local dentist, however George mistakenly believes that he means Jon Voigt, the actor. Neither party is aware of the other party's mistaken assumption. This gives rise to a class discussion about mistake in the formation of contracts, as well as whose meaning prevails in the event that parties to a contract attach different meanings to the words that they use. *Seinfeld: The Mom and Pop Store* (NBC television broadcast, Nov. 17, 1994). In another episode, George is so overcome by joy after an on the job tryst with a subordinate that he exclaims “I'm going to get you a raise!” This promise made in consideration of gratitude for past actions by the promisee serves as a sterling example of a gratuitous promise, as well as helping to illustrate the courts' traditional reluctance to enforce such promises based on “transitory feelings or gratitude.” *Seinfeld: The Secretary* (NBC television broadcast, Dec. 8, 1994).

The Brady Bunch,² *Ally McBeal*,³ and other shows have provided the back drop of many classroom discussions about contracts issues. In addition, my class is inhabited by hypothetical situations which involve celebrities: Kid Rock, Devine Brown, Madonna, Dennis Rodman, Don King, and Mike Tyson to name but a few.

I have also begun to incorporate multimedia into my classroom on a limited basis. For example, I currently introduce the first class by showing portions of the movie *The Insider* in order to get students discussing promises and the criteria by which courts should determine whether a promise is or is not enforceable. *The Insider* is the story of Dr. Jeffrey Wigand, a former tobacco company executive who decides to appear on *60 Minutes* to reveal that nicotine is highly addictive and that the tobacco industry knew this. The problem is that Dr. Wigand is prohibited from revealing this information pursuant to the terms of a confidentiality agreement that he entered into with his former employer, the tobacco company, Brown and Williamson. By discussing the film, the students are prompted to examine many of the issues that we will

2. In a notable episode of *The Brady Bunch*, one of the Brady sisters is running for student body president at school, which is a popularity contest. During the campaign she makes a lot of personal promises to potential voters. For example, she indicates if another student votes for her she will be able to get her brother to help that student with the student's math homework. Of course she wins and then has to renege on all of the promises. Aside from the issue of contracts with minors being voidable, the episode also serves as a vehicle for discussing campaign promises and why they are not contractual. *Brady Bunch: Miss Popularity* (ABC television broadcast, Dec. 21, 1973). Note that this same issue regarding the lack of contractual intent inherent in campaign promises also exists in the Republican Party's "Contract with America" which appeared in *Readers Digest Magazine*. See Amy H. Kastely, *Cogs or Cyborgs?: Blasphemy and Irony in Contract Theories*, 90 Nw. U. L. REV. 132, 153 (1995). The ad stated as follows: "A campaign promise is one thing. A signed contract is quite another. Republican House candidates have signed a contract with America. If we break this contract, throw us out. We mean it." *Id.* The ad appeared in *T.V. Guide Magazine* in the October 22-28, 1994 issue. *Id.* at 153 n.88 (crediting this author for the reference).

3. One episode of *Ally McBeal* gave rise to an issue of contract performance when a matchmaker failed to bring about a suitable match for a client who refused to go on any date without bringing her mother along. *Ally McBeal: Playing with Matches* (FOX television broadcast, Jan. 7, 2002). Yet another episode involved an attempt to specifically enforce a personal services contract when a client wanted to sue a preacher for refusing to perform her wedding ceremony. *Ally McBeal: Car Wash* (FOX television broadcast, Nov. 28, 1999). In an episode of another television show about attorneys, *The Practice*, a client wanted to obtain the money that she was promised for the sale of her ova, which occurred pursuant to an online transaction. *The Practice: Bay of Pigs* (ABC television broadcast Nov. 28, 1999). This gives rise to a discussion about the possible defense that the contract was void against public policy.

subsequently explore in the course, such as the theory of consideration and defenses to contract based on public policy.

I have also encouraged my students to look for and report back to me on contract issues in motion pictures, television shows, magazines, newspapers, and other sources. During the Spring of 2001, as a Spring Break assignment, I encouraged my students to bring back a contract issue from a major motion picture. This resulted in a list of seventy-one movie ideas, which included scenes from movies such as *The Three Amigos*, *Brewster's Millions*, *The Godfather*, and *Gladiator* to name but a few.

My vision for a Twenty-First Century Contracts course is a departure from the current format used in first year law classes. Students are currently taught first year Contracts via the "casebook method." Casebooks contain appellate court decisions regarding the appropriate resolution of legal issues arising from a particular fact pattern. Many of the cases are "old chestnuts"—cases that have been around for a couple of centuries. The problem with these chestnuts, however, is that they tend to perpetuate a rather dusty image of the study of Contract law.

For example, *Hamer v. Sidway*⁴ is a classic case which is used to explore the benefit/detriment theory of consideration. In *Hamer*, an uncle promises his nephew that the uncle would pay the nephew the sum of \$5,000 if the nephew would refrain from drinking, using tobacco, swearing, and playing cards or billiards until the nephew reached the age of twenty-one. The case is familiar to most first year law students because it appears in many Contracts casebooks.⁵ However, the facts of the case occur in 1889, which probably does not do much to enamor students to the study of Contracts (or to the doctrine of consideration). This tends to engender the students' belief in the need to divide their study of Contracts from the rest of their world.

I like to use movies and other current media in conjunction with "old chestnuts" in order to engage students' attention and to further encourage them to explore the world outside the classroom through a "Contracts" perspective. To pique my students' interest in *Hamer*, for instance, I asked them to tell me about a movie which involves a similar set of

4. 27 N.E. 256 (N.Y. 1891).

5. The case appears in E. ALLAN FARNSWORTH, WILLIAM F. YOUNG & CAROL SANGER: *CONTRACTS CASES AND MATERIALS ON CONTRACTS* 27 (6th ed. 2001). This book is used in approximately 100 law schools and is considered to be the most widely adopted textbook on the subject of Contracts. See Geoffrey R. Watson, *A Casebook for all Seasons?: Contracts Cases And Materials: 5th ed.*, 20 SEATTLE U. L. REV. 277 (1997) (casebook review noting the textbook's wide spread use in law schools).

circumstances—a promise of a reward for forbearing from engaging in pleasurable but unhealthy pursuits. One student suggested the movie *Easy Money* starring Rodney Dangerfield.⁶ Before assigning *Hamer*, I played a clip from *Easy Money*. The reading assignment included instructions that the student consider what the court in *Hamer* would hold if presented with facts in *Easy Money*.

When I decided to bring the Twenty-First Century into the classroom, I envisioned the following format for the class. In lieu of a textbook, the students would be given a CD-ROM (or DVD) which contained the materials for the class. This would include text (excerpts from the Restatement of Contracts, cases, and textual explanation of the material). The CD-ROM would also include multimedia material, in the form of music and/or video clips, and clips from newspaper or magazine articles. In addition, my hypotheticals would abandon the customary practice of using standardized characters (such as Betty Buyer and Sam Seller) and use celebrities. I would also give the students the CD-ROM at no charge, except for the actual cost of the physical CD-ROM itself.

Anyone with even a passing acquaintance with the laws governing intellectual property recognizes that this project raises some significant copyright issues. In addition, the use of celebrities in hypothetical situations gives rise to potential problems associated with the “right of publicity.” This article explores legal obstacles to the use of multimedia and pop culture in the classroom.

The second section of this article explores the use of multimedia in teaching and explores the rationale for such use. This section supports the idea that the use of multimedia in teaching has the benefit of reaching students in different ways, as opposed to the traditional format of lecture and discussion of reading. The next section examines the copyright laws and the problems created by the use of multimedia in the classroom. This section also addresses the disappointing fact that there are no bright-line rules which grant *adequate* safe harbor protection for the educational use of multimedia materials. The fourth section examines the extent to which the right of publicity limits the use of a celebrity’s name or likeness. The fifth and final section laments about how the law is

6. In *Easy Money*, Rodney Dangerfield plays Monty Capulleti, a wayward husband whose mother-in-law leaves a will which grants him ownership of a large department store. However, in order to obtain the bequest, Monty must refrain from gambling, drinking, smoking, and philandering for one year. *EASY MONEY* (Orion Pictures 1983). This idea came from one of my first year students, David Collins.

arresting my evolution into a dynamic, hip, and exciting Contracts professor and exhorts the peasants to storm the castle with pitchforks.

II. RATIONALE FOR THE USE OF MULTIMEDIA IN TEACHING

Technology can be used to make learning more interactive, interesting, and fun.⁷ However, the use of multimedia content in the classroom has very strong pedagogical justifications, over and above the desire to have fun.⁸ Among the arguments for using modern content would be that it provides students with material that they find more relevant. This can help promote active learning, which stimulates the learning process. The use of audio-visual material also allows the law professor to reach more of the different learning styles that are prevalent in the student body.

The American Bar Association's 1992 McCrate Report, which advocated for more integration between law schools' curricula and the actual practice of law, is credited with encouraging law professors to use technology in the classroom⁹ There has been an increased emphasis on

7. See James B. Levy, *The Cobbler Wears No Shoes: A Lesson For Research Instruction*, 51 J. LEGAL EDUC. 39, 49 (2001) (explaining the benefits of using a virtual tour of the law library to stimulate student interest in legal research).

8. Apparently, one should not easily dismiss the importance of "fun" in the classroom, even in the law classroom. Having fun is repeatedly invoked in articles on legal education. See, e.g., Kenney Hegland, *Fun and Games in the First Year: Contracts by Roleplay*, 31 J. LEGAL EDUC. 534 (1981); Robert M. Lloyd, *Investigating A New Way to Teach Law: A Computer -Based Commercial Law Course*, 50 J. LEGAL EDUC. 587, 590 (2000) (describing an interactive, online course dealing with the Article 3 of the Uniform Commercial Code: "its interactivity makes learning fun"); Richard H. Seamon & Stephen A. Spitz, *Joint Teaching with A Colleague, For Just A Week or Two*, 52 J. LEGAL EDUC. 258, 266 (2002) (describing one objective of joint teaching would be for the students and the professors to have fun). The authors indicated that "[w]e do not deprecate either the need for students to have fun or the role that a simple change in instructional approach plays in making law school fun." *Id.* at 267. See also Peter W. Murphy, *Teaching Evidence, Proof, and Facts: Providing A Background in Factual Analysis and Case Evaluation*, 51 J. LEGAL EDUC. 568, 590 (2001) (noting that class had "fun with playing cards and dice" in order to understand Bayes Rule of probability); William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL EDUC. 72, 94 (2000) (teaching the United Nations Convention on Contracts for the International Sale of Goods (CISG) is fun for the students and the professor); Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 254 (1992) (describing benefit of learning by problem analysis method as "more fun").

9. See Anna Williams Shavers, *The Impact of Technology on Legal Education*, 51 J. LEGAL EDUC. 407, 409 (2001). The McCrate Report is a product of the Task Force of the American Bar Association Section of Legal Education and Admissions to the Bar, more

the use of technology in the law classrooms through the 1990s and into the new millennium.¹⁰ The rationale for the use of multimedia content in the classroom is that it will stimulate the learning process. There are several arguments that support this rationale. Current multimedia can provide material that the students find more relevant to them. It has been said that "Students are . . . more motivated when they can relate to the subject matter of a course."¹¹ If students have a frame of reference from which to deal with the subject matter of a course, they may be more likely to engage the materials.¹² The use of multimedia can provide the students with concrete examples of the principles covered in their reading.¹³ Such media can stimulate active learning, which is advocated by the Principles of Good Practice in Legal Education.¹⁴ In addition, the use of multimedia can reach a greater number of the different learning

formally entitled *Legal Education and Professional Development-An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (ABA, Chicago, 1992). John J. Costania, *The McCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 162 n.17 (1993). Among other things, the McCrate Report has criticized law schools for failing to prepare students for the practice of law and the schools' failure to address the full range of skills and values needed for professional competence. *Id.* at 174.

10. *Id.* at 409 (explaining that "[t]he proliferation of technology tools includes the legal databases, the Internet, computer networks, listservs, Web-based instruction, e-mail, projection systems in the classrooms, computer-assisted instruction, and conferencing tools"). Professor Shavers also noted that the empirical evidence indicated a rather slow acceptance of the new technology by law professors. *Id.* (citing Robert B. Thompson, *The Basic Business Associations Course: An Empirical Study of Methods and Content*, 48 J. LEGAL EDUC. 438, 445 (1998)). See also Stephen M. Johnson, *www.Lawschool.Edu: Legal Education in the Digital Age*, 2000 WIS. L. REV. 85, 89-90, (2000) (describing the introduction and development of LEXIS, WestLaw, CALI & CALR). See also *id.* at 92-96 (discussing use of Microsoft PowerPoint presentations, electronic-books and the internet).

11. Edith R. Werkentine, *Kingsfield Doesn't Teach My Contracts Class: Using Contracts to Teach Contracts*, 50 J. LEGAL EDUC. 112, 120 (2000).

12. See Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. LEGAL EDUC. 402, 407 (1998) (advising that professors can help students relate to new information by having them create their own hypothetical problems, using situations and names that have meaning to the students).

13. See Werkentine, *supra* note 11, at 120 ("some students learn better from concrete examples").

14. Gerald Hess, *Seven Principles for Good Practice in Legal Education, Principle 3, Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401 (1999) ("Learning is not a spectator sport. Students do not learn much just by sitting in classes listening to teachers . . . They must talk about what they are learning, write about it, relate it to past experiences, apply it to their daily lives. They must make what they learn part of themselves.").

styles present in the law classroom¹⁵ than could the “one size fits all” approach utilized by our standard casebook, lecture, and Socratic approach to legal education.¹⁶ The general approach to teaching the law is tailor-made for students who learn by reading and writing, but does not play to the strengths of students who are visual learners.¹⁷ Therefore,

15. See Jayne Elizabeth Zanglein & Katherine Austin Stalcup, *Te(a)chnology: Web-Based Instruction in Legal Skills Courses*, 49 J. LEGAL EDUC. 480, 482-92 (1999). In this article, which justifies the use of web-based technology in teaching, Professor Zanglein and Ms. Stalcup provide an excellent description of the various learning style theories: “The Learning Style Inventory,” “Right Brain/Left Brain Theories,” “Myers-Briggs Type Indicator,” “Auditory, Visual, and Tactile Learners,” “Multiple Intelligences,” and “Adult Learning Theory.” The different theories attempt to categorize students in accordance with how they approach the learning process and what types of techniques are most effective for them. The article is full of useful information about how students learn and what types of students may be prone to what types of problems in law school. For example, under the Learning Styles Inventory, students may be grouped into two categories: globals and analytics. *Id.* at 482. Global learners:

[A]ppear to work with what teachers describe as distractors; they concentrate better with sound (music or background talking), soft lighting, an informal seating arrangement, and some form of intake. [They] take frequent breaks, . . . and often prefer to work on several tasks simultaneously. . . . [They] prefer learning with their peers rather than either alone or with their teacher, and also often prefer to structure tasks in their own way; they tend to dislike imposed directives.

Id. at 482-83. The global learner is likely to be the applicant with the high LSAT score who performs poorly in law school. . . . Most underachieving students are also global learners. *Id.* On the other hand, analytic learners:

[A]re the sort that every law school is trying to attract It is as if the law school learning environment were developed by an analytic for other analytic learners. Analytics . . . tend to prefer learning in silence, with bright lighting, and a formal design—a conventional classroom. They rarely eat, chew, drink or smoke while learning; instead they eat afterward. Analytics tend to be persistent; they may not always start an assignment immediately, but once they do begin, they have a strong emotional urge to continue until the task is done or until they come to a place where they feel they can stop.

Id. at 483. The point is not that globals are “bad” students. The point is that the instructor must give some care in presenting an approach to teaching that is accessible by each group of learners. *Id.*

16. *Id.* at 481 (noting that “law students are subjected to a one-size fits all teaching approach. They are expected to learn by reading casebooks and attending classes taught by the Socratic method, and to demonstrate their learning on essay exams and multiple-choice tests.”).

17. *Id.* “Global learners rely on the right side of the brain.” *Id.* at 484. This side of the brain is more oriented towards visual thinking. *Id.* Hence, for global learners “words, sentences and paragraphs are not always the most efficient ways to represent

making use of popular, current multimedia in the classroom has the potential for vastly enhancing the process of legal education.¹⁸

III. COPYRIGHT LAWS

Given the educational purpose behind the use of current multimedia in the classroom, it would seem that such use would be permitted by a straightforward application of the exemptions granted under existing copyright law. However, this area is fraught with uncertainties that have the potential to stifle creativity in the law classroom and make the job of introducing the Twenty-First Century to the classroom much more difficult than need be. The initial major obstacle to bringing the Twenty-First Century into the classroom is the Copyright Act of 1976 (Copyright Act).¹⁹

The Copyright Act establishes the exclusive rights of a copyright holder.²⁰ With certain exceptions, the copyright holder has the exclusive right to make copies of the copyrighted material, publicly display the material, or distribute the material.²¹ Copyright protection would cover the most current popular media—motion pictures, television, and music.²² In order for an instructor to bring this media into the classroom without violating the copyright laws, the instructor must either comply with the exemptions provided for the use of copyrighted material, or obtain licenses from the copyright holders.²³

The Copyright Act provides an exemption for fair use of copyrighted work for “purposes such as criticism, comment, news reporting, *teaching (including multiple copies for classroom use)*, scholarship, or research.”²⁴ Thus, the Copyright Act acknowledges that “multiple copies for classroom use” is a potential use of copyrighted material which does not

thinking. Many ideas are better expressed and more easily understood through pictures, maps, diagrams, charts and mind maps.” *Id.* “Visual learners learn best through visual formats, environmental influences, social cues, group learning, graphic organizers, modeling, demonstrations, role playing, student presentations, field trips, motivational accounts or stories, computer aided instruction, webbing (diagramming), activities that allow freedom and emphasize creativity, open-ended questions, and teaching to senses.” *Id.* at 488.

18. And besides that it will probably be “a whole lot o’ fun.” *See supra* note 8.

19. Copyright Act of 1976, 17 U.S.C. §§ 101-1008 (2000).

20. *Id.* at § 106.

21. *Id.* at § 102.

22. *Id.*

23. *Id.*

24. *Id.* at § 107 (emphasis added).

constitute a copyright infringement. However, in order for an educator to safely reproduce copyrighted material for classroom use, the use must still comply with the requirements for “fair use.” The Copyright Act provides that the following factors are to be considered in determining whether a particular use is “fair use”:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁵

The determination of whether a use of copyrighted material is fair use is therefore not subject to any bright-line analysis²⁶ but is fraught with uncertainty.²⁷

Noting the special status of education, the legislative history to the Copyright Act includes a set of Minimum Guidelines for Classroom use of Copyrighted Materials (Guidelines).²⁸ According to the Guidelines, teachers are permitted to make:

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- (A) A chapter from a book;

25. *Id.*

26. See Carol M. Silberberg, *Preserving Educational Fair Use in the Twenty-First Century*, 74 S. CAL. L. REV. 617, 627 (2001) (“[T]he four factors within the Copyright Act of 1976 should be viewed as general guidelines, not bright line rules”). There is no indication as to any particular weight which is to be given to the factors. *Id.*

27. See Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair Use Guidelines*, 62 OHIO ST. L.J. 599, 605 (2001) (“The fair-use doctrine of American copyright law has been derided as among the most hopelessly vague of legal standards, requiring complex and often subjective interpretation”); See also Silberberg, *supra* note 26 (noting that the fair use defense remains one of the most unsettled areas of copyright law).

28. See AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS WITH RESPECT TO BOOKS AND PERIODICALS, H.R. REP. NO. 1476, reprinted in U.S.C.C.A.N. 5659, 5669 (1976).

- (B) An article from a periodical or newspaper;
- (C) A short story, short essay, or short poem, whether or not from a collective work;
- (D) A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.²⁹

In order to make multiple copies for distribution in a class, the teacher's use of the copies must meet four requirements—brevity, spontaneity, cumulative effect and notice.³⁰

Brevity requires that the reproduction not exceed specific limitations on the proportion of the copyrighted material that is copied depending on the type of material. This test permits the teacher to copy the following:

1. an entire copy of a poem of less than 250 words printed on not more than two pages;
2. an excerpt of not more than 250 words of a poem of over 250 words;
3. a complete article, story, or essay of less than 2,500 words;
4. an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words;
5. one chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue;
6. an excerpt comprising not more than two of the published pages and containing not more than 10% of the words found in any special work (a work of less than 2,500 words which combines language with illustrations).³¹

Spontaneity requires that the reproduction be instigated by a thunderbolt of inspiration and not planned. Under this test:

- (i) The copying is at the instance and inspiration of the individual teacher, and
- (ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time

29. *Id.* at 5681-82 (emphasis added).

30. *Id.* at 5682-83.

31. *Id.* at 5682.

that it would be unreasonable to expect a timely reply to a request for permission.³²

The copying must also comply with the cumulative effect test, which requires that:

- (i) The copying of the material is for only one course in the school in which the copies are made.
- (ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
- (iii) There shall not be more than nine instances of such multiple copying for one course during one class term.³³

Additionally, each copy must include a notice of copyright³⁴ and the copying cannot be used to create or to replace or as a substitute for anthologies, compilations, or collective works.³⁵ “Copying shall not:

- (a) substitute for the purchase of books, publishers' reprints or periodicals;
- (b) be directed by higher authority; or
- (c) be repeated with respect to the same item by the same teacher from term to term.”³⁶

The restrictions imposed by the Guidelines significantly impair the ability of a professor to bring copyrighted material into the classroom without first obtaining permission from the copyright holder. Accordingly, the Guidelines have been the subject of much criticism.³⁷

32. *Id.* at 5683.

33. *Id.*

34. *Id.* at 5684.

35. *Id.* at 5683.

36. *Id.*

37. See Silberberg, *supra* note 26, at 637-39. Professor Silberberg describes the criticisms lodged against the Guidelines by the American Association of University Professors and the Association of American Law Schools Guidelines. These associations of educators complained that: (1) the Guidelines chill academic endeavors and create confusion over secondary uses because academic institutions conservatively adopt the Guidelines as the maximum permissible use whereas they were intended to operate as only safe harbors; (2) the Guidelines are overly restrictive; and (3) the courts are confused about the whether the Guidelines are persuasive legal authority due to the fact

However, with respect to the textual material covered by the Guidelines, at least there is a centralized source for the educator to obtain the necessary licenses—the Copyright Clearance Center.³⁸

When it comes to dealing with multimedia content, the problems associated with the copyright materials are even greater. The Convention on Fair Use (CONFU) has established a set of proposed guidelines for dealing with the educational use of copyrighted multimedia material (Multimedia Guidelines).³⁹ The Multimedia Guidelines apply to projects that incorporate an “educators’ original material, such as course notes or commentary, together with various copyrighted media formats including but not limited to, motion media,

that they were not adopted by the legislature. *Id.* According to Professor Silberberg, courts have incorrectly used the Guidelines to establish a bright line test for the maximum extent of educational fair use of copyrighted materials, when in fact the Guides were intended only to reflect acceptable minimum uses. *Id.* at 652. *See also* Crews, *supra* note 27, at 602 (“[T]he Guidelines . . . have been the source of misconstructions of fair use in judicial rulings”). Professor Crews argues that the Guidelines have actually weakened protection for educators by substituting the four flexible and equitable standards in the Copyright Act with mandates and outright prohibitions. *Id.* at 618.

38. *See* Silberberg, *supra* note 26, at 617 (“the Copyright Clearance Center has evolved to facilitate the copyright approval process”). *See also* Copyright Clearance Center, Inc., website at <http://www.copyright.com> (last visited Apr. 5, 2003). According to the company’s website, Copyright Clearance Center, Inc. is

[T]he largest licensor of text reproduction rights in the world, [and] was formed in 1978 to facilitate compliance with U.S. copyright law. CCC provides licensing systems for the reproduction and distribution of copyrighted materials in print and electronic formats throughout the world. [It] currently manages rights relating to over 1.75 million works and represents more than 9,600 publishers and hundreds of thousands of authors and other creators, directly or through their representatives. CCC-licensed customers in the U.S. number over 10,000 corporations and subsidiaries (including 92 of the Fortune 100 companies), as well as thousands of government agencies, law firms, document suppliers, libraries, academic institutions, copy shops and bookstores.

39. *See* CONVENTION ON FAIR USE, FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE, PROPOSAL FOR FAIR USE GUIDELINES FOR EDUCATIONAL MULTIMEDIA, Appendix J, page 49 available at <http://www.uspto.gov/web/offices/dcom/olia/confu/confurep.pdf> (last visited Apr. 5, 2003) [hereinafter MULTIMEDIA GUIDELINES]. The Convention on Fair Use (CONFU) is an informal group of parties interested in copyright issues which was organized under the auspices of the U.S. Patent and Trademark Office to provide input on a wide variety of issues related to the fair use exemption under the Copyright Act. *Id.* at 2. As of 1997, the CONFU consisted of representatives of approximately one hundred organizations. *Id.* The CONFU consists of members from publishing, education, and library associations. *See* Crews, *supra* note 28, at 627.

music, text material, graphics, illustrations, photographs and digital software which are combined into an integrated presentation.”⁴⁰

The amount of a copyrighted work that an educator can reasonably use in educational multimedia projects is limited to the following:

1. “Up to 10% or 3 minutes, whichever is less . . . of a copyrighted motion media work . . . ;”⁴¹
2. “Up to 10% or 1000 words, whichever is less . . . for a copyrighted work consisting of text material . . . ;”⁴²
3. “An entire poem of less than 250 words . . . but no more than three poems by one poet, or five poems by different poets from any anthology . . . ;”⁴³
4. “For poems of greater length, 250 words may be used but no more than three excerpts by a poet, or five excerpts by different poets from a single anthology . . . ;”⁴⁴
5. “Up to 10%, but in no event more than 30 seconds, of the music and lyrics from an individual musical work . . . ;”⁴⁵
6. An entire photograph or illustration, “but no more than 5 images by an artist or photographer . . . ;”⁴⁶
7. “[N]ot more than 10% or 15 images [or illustrations], whichever is less, . . .” from a published collective work;⁴⁷
8. “Up to 10% or 2500 fields or cell entries, whichever is less, . . . from a copyrighted database or data table”⁴⁸

These limitations apply cumulatively to each educator’s multimedia project(s) for the same academic semester, cycle, or term.⁴⁹ In addition, the educator is only permitted to make three copies of the material; two for use and the other for preservation.⁵⁰

It has not been contemplated that the copies of the multimedia would be distributed to the students in the class. In accordance with the

40. MULTIMEDIA GUIDELINES, *supra* note 39, at 51 § 1.3.

41. *Id.* at 53 § 4.2.1.

42. *Id.* at § 4.2.2.

43. *Id.*

44. *Id.*

45. *Id.* at 54 § 4.2.3.

46. *Id.* at § 4.2.4.

47. *Id.*

48. *Id.* at § 4.25.

49. *Id.* at 53 § 4.2.

50. *Id.* at §4.3. Only one copy may be placed on reserve. *Id.*

Multimedia Guidelines, educators may perform and display their own educational multimedia projects for:

- (1) face-to-face instruction.⁵¹
- (2) "assign[ment] to students for directed self-study."⁵²
- (3) remote instruction to students enrolled in curriculum-based courses and located at remote sites, provided over the educational institution's secure electronic network in real-time, or for after class review or directed self-study, provided there are technological limitations on access to the network and educational multimedia project (such as a password or PIN) and provided further that the technology prevents the making of copies of copyrighted material.⁵³

What is evident from the Multimedia Guidelines is that they do not contemplate that an instructor will be able to use copyrighted materials over an extended period of time in a course without obtaining the permission of the copyright holder. The educator's use of the educational multimedia is limited to a period of up to two years after the first instructional use within a class.⁵⁴ Any additional use "requires permission for each copyrighted portion incorporated in the production."⁵⁵

Presumably, two years is thought to be sufficient time for the professor to secure the necessary copyright permissions. However, it appears that obtaining such permission will be a rather daunting task. Unlike textual material, there does not appear to be a single source for obtaining licenses to use copyrighted multimedia. The Motion Picture

51. *Id.* at 52 § 3.2.1.

52. *Id.* at § 3.2.2.

53. *Id.* at § 3.2.3.

If the educational institution's network or technology used to access the educational multimedia project . . . cannot prevent duplication of copyrighted material, students or educators may use the multimedia educational projects over an otherwise secure network for a period of only 15 days after its initial real-time remote use in the course of instruction or 15 days after its assignment for directed self-study. After that period, one of the two use copies of the educational multimedia project may be placed on reserve. . . . [S]tudents shall be advised that they are not permitted to make their own copies of the educational multimedia project.

Id.

54. *Id.* at 53 § 4.1.

55. *Id.*

Licensing Corporation and Movie Licensing USA provide umbrella licenses to show copyrighted motion pictures.⁵⁶ However, it is apparent that the services of these organizations are not available to colleges or law schools.⁵⁷ At any rate, the licenses offered by these organizations do not cover reproduction of the copyrighted material.⁵⁸

It appears that obtaining licenses will be an arduous task. In the course of conducting this research, my research assistant and I accessed the websites of several major studios in order to determine their copyright licensing processes and prices.⁵⁹ Unfortunately, not all of the

56. See Motion Picture Licensing Corporation (MPLC), available at <http://www.mplc.com/index2.htm> (last visited on Apr. 6, 2003). See also Licensing USA, available at <http://www.movlic.com> (last visited on Apr. 6, 2003). MPLC "represents over 60 producers and distributors, including such studios as Walt Disney Pictures, Warner Bros., Scholastic Entertainment, Mc-Graw Hill, Sony Pictures Classics, Tommy Nelson and World Almanac." American Library Association, available at <http://www.ala.org/library/fact7.html> (last visited Apr. 6, 2003). Movie Licensing USA is the licensing agent for Walt Disney Pictures, Touchstone Pictures, Hollywood Pictures, Warner Bros., Columbia Pictures, TriStar Pictures, Paramount Pictures, DreamWorks Pictures, Metro-Goldwyn-Mayer, Universal Pictures, Sony Pictures, United Artists, and a number of independent studios.

57. My research assistant contacted the MPLC by telephone and was told that we would need to contact each motion picture company separately because MPLC does not cover schools. Movie Licensing USA's homepage indicates that it provides licenses for K-12 public schools. Movie Licensing USA, available at <http://www.movlic.com> (last visited Apr. 6, 2003). An educator in a nonprofit educational institution should not need such a license to show motion pictures in connection with face to face teaching. See 17 U.S.C. § 110 (2000). This provision of the Copyright Act provides an exemption for "... display of a work by instructors . . . in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction." *Id.* This exemption, however, does not extend to the display of a motion picture by means of a copy that was not lawfully obtained under the Copyright Act. *Id.* Any such reproductions would have to fall within the uses permitted under the fair use exemption of section 107 or pursuant to a license obtained from the copyright holder. Therefore, if you are still showing your class excerpts from *Forrest Gump* that you copied from a Blockbuster rental onto your own VHS, stop. You may already be in trouble.

58. See Movie Licensing USA, Public Schools, Frequently Asked Questions, available at <http://www.movlic.com/qaschool.html> (last visited Apr. 6, 2003) (indicating that the license does not grant the right to duplicate the movies without specific authorization from the copyright holder). MPLC's web site does not indicate the limits of its license; however, the license appears to authorize showing copies obtained from an authorized source.

59. Motion picture studios that we accessed via the web included: Universal Studios, available at http://www.universalstudios.com/homepage/html/contact_us (last visited Apr. 6, 2003); Metro-Goldwyn-Mayer, available at <http://www.mgm.com/home.do> (last visited Apr. 6, 2003); 20th Century Fox, available at <http://www.fox.com/home.htm> (last visited Apr. 6, 2003); Paramount Pictures, available at <http://www.paramount.com> (last

studios have licensing information on the web. Metro-Goldwyn-Meyer (MGM) appears to have the most developed online clip licensing service. It has an online vault and licensing forms for the copyrights held by MGM.⁶⁰ As of this writing, Columbia/Sony does not have an online clip licensing service.⁶¹ In order to obtain a license from Columbia/Sony, a professor must submit a written request by fax or mail and state the purpose of the clip, as well as a synopsis of the text, and show how the material requested is relevant to the material being taught.⁶² Paramount Studios' website indicates that it has 3000 archived titles to choose from and directs the reader to submit licensing requests by fax.⁶³ Fox provides a telephone number for clip licensing requests.⁶⁴ Universal Studios has an online clip licensing service, but its website indicates that it does not enter into clip licensing agreements with individuals.⁶⁵

Even once the educator contacts the copyright holder of the movie, the copyright holder can only license that material for which it holds a copyright. The educator may still need to obtain the permission of the actors who appear in the film, the screenwriter, and others. The MGM clip licensing page underscores the complexity of the task that may be involved in obtaining all of the permissions necessary to reproduce copyrighted material for use in the classroom. The website contains the following advisory in its "Frequently Asked Questions" section:

- Do I have to clear the actor(s) in the Film Clip(s) or Still(s)?

visited Apr. 6, 2003); Warner Bros. Studios, *available at* <http://www.paramount.com> (last visited Apr. 6, 2003).

60. See MGM's Clip Licensing section, *available at* <http://www.mgmstills.com/MainRoot.php3?location=> (last visited Apr. 6, 2003). The site contains a search engine that allows registered users to input information about the film and the actor. Once the film is identified, the registered user may order and pay for a time coded copy of the film to view for selection of the needed clips. *See id.*

61. Based on telephone recording accessed by my research assistant, Mark Chisolm; the telephone number for Columbia/ Sony was (310) 244-6306.

62. *Id.*

63. See Paramount Studio website description of Clip Licensing service, *available at* <http://www.paramount.com/studio> (last visited on Apr. 6, 2003). The fax number given is (323) 862-2231.

64. See the Fox UK website describing Terms and Conditions, *available at* <http://www.fox.co.uk/terms.html> (last visited Apr. 6, 2003). Persons interested in licensing any Fox Material are directed to contact the Fox Clip Licensing Department at 001 (310) 369-3605.

65. See Universal Studios On-line Media Licensing, *available at* http://www.universalstudios.com/homepage/html/contact_us (last visited Apr. 6, 2003).

Yes. The actor(s) must be contacted for a written release for the use of their likeness and for payment of re-use fees they may be entitled to. . . .

- Do I need to clear a deceased actor?

Yes. You must contact the estate of the deceased actor for use of his/her likeness.

- Do I have to clear stuntmen?

Yes. You must clear all stunt persons appearing in any stunt identifiable in the Film Clip(s). The Stunt Coordinator, who can be located via the Screen Actors Guild . . . or the Internet Movie Database (www.imdb.com), can help you identify and locate the stunt person.

- Is the music included in the Film Clip contract?

No. You must contact MGM Music . . . and/or the music publishers if any music is included in the Clips

- Are there other guilds I need to contact to clear clip(s) and/or stills?

There may be clearance necessary with the Writer's Guild (800.548.4532) and the Director's Guild (800.421.4173).⁶⁶

Thus, it appears that the current state of copyright law presents an educator with a formidable problem. The Multimedia Guidelines do not provide a very meaningful safe-harbor for reproduction of multimedia for educational projects. In fact, the Multimedia Guidelines would require that I alter my original plan for my Twenty-First Century Contracts class. I cannot distribute the content to my students, even at no cost, and I am prohibited from displaying the project for more than two

66. See MGM Clip+Still FAQ in the Clip Licensing section of MGM's website, available at <http://www.mgmstills.com/MainRoot.php3?location=> (last visited Apr. 6, 2003).

years.⁶⁷ On the other hand, the task of obtaining the licenses for use of the material seems pretty daunting. As an aside, this article does not address the licensing fees involved, which are enough to make a pirate out of even the most law abiding educator.⁶⁸

IV. RIGHT OF PUBLICITY

It has been stated that:

[B]ecause celebrities take on personal meanings to many individuals in the society, the creative appropriation of celebrity images can be an important avenue of individual expression. As one commentator has stated: "Entertainment and sports celebrities are the leading players in our Public Drama. We tell tales, both tall and cautionary, about them. We monitor their comings and goings, their missteps and heartbreaks. We copy their mannerisms, their styles, their modes of conversation and of consumption. Whether or not celebrities are 'the chief agents of moral change in the United States,' they certainly are widely used—far more than are institutionally anchored elites—to symbolize individual aspirations, group identities, and cultural

67. Unless you want to take the course chartered by the Duke University Law School. Duke Law School has created a Contracts course on DVD-ROM to replace the first year Contracts textbook. See 88 DUKE MAG. 32, 36 (2002). The DVD contains multi-media content. However, the educators had to develop their own footage. The project involved filming more than sixty hours of interviews . . . and twenty additional days filming "hypotheticals" and case re-enactments. Instead of starring Tom Cruise or Julia Roberts or other glamorous denizens of the silver screen, the Duke DVD features "forty-three high profile legal scholars, and judges" including such luminaries as Ralph Nader, Richard Posner, Frank Easterbrook, Richard Epstein, Melvin Eisenberg, and Richard Speidel. *Id.* This is a major step in the right direction, and just adding the multi-media enhances the students' appreciation of the course. But come on, I don't think that I'm aware of a less attractive looking cast of characters since the actors who played the slave owners in *Roots*. You tell me, would most of your students rather see Ralph Nader teaching unconscionable consumer contracts or Liz Hurley drawing Brendan Frazier into an unconscionable contract of adhesion for his soul in the movie *Bedazzled*? I am hoping that we can take advantage of all of the richness that popular media has to offer our students and build a bridge between the Twentieth Century (with which we professors seem to be so enamoured) and the Twenty-First Century that our students prefer to inhabit when outside the classroom.

68. Remember that excerpt from *Forrest Gump* that you copied onto VHS from your Blockbuster rental that you keep showing your class. See MULTIMEDIA GUIDELINES, *supra* note 39, which advises you to stop.

values. Their images are thus important expressive and communicative resources: the peculiar, yet familiar idiom in which we conduct a fair portion of our cultural business and every day conversation.”⁶⁹

Given the interest in celebrities, they apparently have a lot of relevance to our students, as well as to the rest of society. Therefore, references to celebrities in the classroom or in teaching materials would stimulate learning by students.⁷⁰ When such use is not for profit, as in when the materials are distributed to students at no charge, the use most certainly should be free from restriction. Unfortunately, unlike with the Copyright Acts, there is no standardized articulation of an educational fair use of celebrities’ names or images in educational materials.

An educator who desires to borrow on the excitement generated by a celebrity should be aware of the “right of publicity.”⁷¹ The right of publicity protects an individual’s right to control the commercial exploitation of the individual’s name, likeness, or personality.⁷² It gives celebrities the right to control the use of their name or likeness for profit.⁷³ This right emerged from the right of privacy⁷⁴ and it is governed by state common law or state statutes.⁷⁵ To the extent that the instructor utilizes motion picture clips or introduces hypothetical situations which

69. *Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 106 Cal. Rptr. 2d 126, 134 (Cal. 2001) (quoting Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 128 (1983)).

70. See Werkentine, *supra* note 11 (relating to students’ need for material that has relevance to them).

71. The fact that there might be some problem with using a celebrity’s name or likeness in educational materials occurred to me when I realized that most textbooks that I have observed do not use real characters in the hypotheticals given in the textbooks. I queried both a colleague who is versed in First Amendment law as well as my spouse (who possesses a good sense of the practical) about this absence of celebrities in textbooks. They both gave me similar answers that pointed to “right of publicity” as a potential obstacle. Thus began this odyssey of tipping at windmills.

72. Balaram Gupta, *Names and Logos: Protection Under Intellectual Property Laws and Consequences*, 2 SPORTS LAW. J. 245, 265 (1995).

73. *Id.* at 264.

74. *Id.* at 264-65 (noting that Professors Prosser and Nimmer are credited with development of the right of privacy and that right, as contemplated by Prosser and Nimmer, included a component which addressed “appropriation”).

75. *Id.* (noting that “[s]ince the right of publicity evolved out of tort concepts, there is no federal protection applicable. A plaintiff can bring an action under state common law or state statutes”).

involve celebrities, the instructor needs to be aware of the right of publicity.

The right of publicity may become an issue for an educator under several circumstances. First, the educator may desire to use a celebrity's name in hypothetical situations in the classroom in order to stimulate discussions of concepts, or in written or multimedia material that the educator distributes to the class or otherwise makes available to the class to use outside of the classroom. Second, the educator may want to incorporate the celebrity's likeness in classroom presentations of multimedia material or in multimedia material, which is made available to students outside of the class.

The right of publicity might prohibit an educator from using a celebrity's likeness in educational materials that the instructor sells for profit. As discussed below, this depends on whether the courts would determine that such use is protected by the First Amendment. The right of publicity should not prohibit the educator from utilizing a celebrity's name or likeness in the classroom. Nor should it prohibit the educator from using the celebrity's likeness in study aides or class preparation materials distributed to the class for their use outside of the classroom, as long as the materials are not distributed for a profit. Unfortunately, there are no guidelines available for educational fair use that apply to the right of publicity. This area is largely governed by judicial interpretations or varying state laws and not subject to an overarching federal scheme like the Copyright Act.⁷⁶

The Restatement (Second) of Torts articulates protection against the appropriation of one's name under a right of privacy and provides "[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."⁷⁷ The Restatement (Second) Torts further explains that this right is in the nature of a property right and protects mainly the use of a name or likeness for commercial purposes.⁷⁸ Similarly, the Restatement (Third) of Unfair Competition describes protection under the right of publicity. It provides that "[o]ne who appropriates the commercial value of a

76. This is assuming that the use does not provide the elements necessary to make out a violation of the Lanham Act, 15 U.S.C. § 1125 (2000), the federal law that protects trademarks. See Patrick Whitman, *Everyone's a Critic: Tiger Woods, The Right of Publicity and the Artist*, 1 HOUS. BUS. & TAX L.J. 41, 49 (2001). This statute requires that the celebrity's image be used to create the impression that the celebrity actually endorses the product. *Id.* at 49 n.54.

77. RESTATEMENT (SECOND) OF TORTS § 652c (1977).

78. *Id.*

person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability."⁷⁹ These rules protect the commercial value of one's identity.

State courts have recognized a right of publicity under the common law.⁸⁰ Additionally, most states have also adopted legislation affording protection for a right of publicity.⁸¹ There is some variation among the states as to what the right covers. California, for example, provides broad protection of the right of publicity, which would arguably extend to protect the residents of the state, regardless of where the violation of the right of publicity occurs.⁸² California provides both a common law and statutory cause of action for commercial misappropriation for one's name or likeness.⁸³ Under its common law, a cause of action is alleged by pleading "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."⁸⁴ The statutory cause of action complements the common law cause of action and it is codified at California Civil Code section 3344.⁸⁵ The statute states "[a]ny person who knowingly uses another's name, . . . photograph, or likeness, in any manner, on or in products, merchandise, goods or services, without such person's prior consent, . . . shall be liable for any damages sustained by the person or persons injured as a result thereof."⁸⁶ The California courts recognize a violation of the statute when a person's name is used either "on or in a product," as well as when it is used in "advertising or selling" a product.⁸⁷

79. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

80. See Whitman, *supra* note 76, at 48-49 (noting that "the right of publicity remains firmly grounded in most jurisdictions, although the claim has been established more by the judiciary than state legislatures").

81. *Id.*

82. *Id.* (noting that "the right of publicity established in one state protects a resident celebrity in all other states" and indicating that broad protection is provided in California, New York and Illinois).

83. See Comedy III Prod., Inc., v. Gary Saderup, Inc., 106 Cal. Rptr. 2d 126, 129 (Cal. 2001).

84. White v. Samsung Electronics America, Inc., 971 F.2d 1395, 1397 (9th Cir. 1992) (applying California common law in a claim brought by Vanna White against Samsung which used a robot with mechanical features identifiable with her persona from the *Wheel of Fortune* game show).

85. CAL. CIV. CODE § 3344 (2003).

86. *Id.*

87. Newton v. Thomason, 22 F.3d 1455, 1461 (9th Cir. 1994) (recognizing that "California courts have liberally defined commercial purpose to include more than traditional direct advertising").

Notwithstanding the protection afforded by the right of publicity, even in California, courts have held that the First Amendment protects the use of fictionalized accounts of individuals, so long as they are not portrayed as true. For example, in *Guglielmi v. Spelling-Goldberg*,⁸⁸ the California Supreme Court dealt with a misappropriation of the right of publicity claim that was brought by a representative of the estate of Rudolph Valentino. Mr. Valentino's name and likeness were used in a fictionalized account of his life in a film. Writing a concurring opinion, Chief Justice Bird stated: "[f]ilm is a 'significant medium for the communication of ideas'",⁸⁹ which is protected by the First Amendment.⁹⁰ The Chief Justice stated that the fact the work was fictional, and thus entertainment (as opposed to a news account), did not lessen the constitutional protection afforded to the work.⁹¹ Furthermore, the fact that the film was done for profit also did not lessen its constitutional protection.⁹²

Chief Justice Bird also noted in *Guglielmi* that few courts had considered the constraints of the right of publicity in the context of expressive activities, but that those which have held that the right of publicity does not outweigh free expression, regardless of whether the work was fact or fiction.⁹³ In fact, courts have consistently turned aside claims by celebrities and non celebrities when the alleged violation of the right of publicity stems from a fictionalized account involving the plaintiff.⁹⁴ These decisions appear to be supported by the Restatement

88. *Guglielmi v. Spelling-Goldberg Prod.*, 160 Cal. Rptr. 352 (Cal. 1979).

89. *Id.* at 355 (quoting from *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952)).

90. *Id.* ("Whether exhibited in theaters or on television., a film is a medium which is protected by the constitutional guarantees of free expression.") Justice Bird wrote that "[u]sing fiction as a vehicle, commentaries on our values, habits, customs, laws, prejudices, justice, heritage and future are frequently expressed. What may be difficult to communicate or understand when factually reported may be poignant and powerful if offered in satire, science fiction or parable." *Id.* at 357.

91. *Id.* at 356-57. The court stated "Our courts have often observed that entertainment is entitled to the same constitutional protection as the exposition of ideas." *Id.* In addition, "[i]t is clear that works of fiction are constitutionally protected in the same manner as political treatises and topical news stories." *Id.* at 357.

92. *Id.* ("Whether the activity involves newspaper publication or motion picture production, it does not lose its constitutional protection because it is undertaken for profit.")

93. *Id.* at 359-60.

94. See *Ruffin-Steinback v. dePasse*, 267 F.3d 457 (6th Cir. 2001). In this case the federal court applied Michigan law to reject right of publicity claims arising from fictionalized television mini series depicting the trials and tribulations of the singing group the Temptations. *Id.* at 462. The court held that "the use of plaintiffs' fictionalized

(Third) of Unfair Competition at section 47, which states that the use of a person's identity as prohibited by the Restatement "does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses."⁹⁵

This caselaw and secondary authority would seem to allow an educator to freely spinout hypothetical situations involving celebrities as long as they are clearly represented as fiction. The educator is free to use these hypotheticals in class, as well in published materials. This protection would also appear to apply even if the fictionalized hypotheticals are contained in materials that the educator develops and sells for a profit.⁹⁶

A more problematic question, however, is whether the educator can use the celebrity's image—via a photograph or film clip—in educational materials. This raises a problem earlier foreshadowed when MGM's Clip Licensing Web Page was mentioned.⁹⁷ Having obtained a license

likenesses in a work protected by the First Amendment and the advertising incidental to such uses did not give rise to claim for relief under the plaintiff's right of publicity." *Id.* See also *Polydoros v. Twentieth Century Fox Film Corp.*, 79 Cal. Rptr. 2d 207 (Cal. Ct. App. 1997). The court rejected plaintiff Michael Polydoros' claim that his right of publicity was violated by depiction of the character Michael Palledorous in the movie *The Sandlot*. *Id.* at 212. It was obvious that the character in *The Sandlot* was based on Mr. Polydoros. The film's director was his schoolmate. *Id.* at 208. The movie character had the same nickname ("Squints"), wore similar attire, and enjoyed the same hobbies and had the same brashness of character as the plaintiff. *Id.* Notwithstanding all of these obvious similarities, the court held that "[b]ecause respondents were creating a fictionalized artistic work, their endeavor is constitutionally protected. This right is not diminished when respondents advertised then sold their work as mass public entertainment." *Id.* at 212. See also *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996) (rejecting right of publicity claim by former Black Panther member Bobby Seale against producers of the movie, *Panther*, which was a fictionalized account of the exploits of key figures in the Black Panther Party, including Mr. Seale). The decision was based in part on the First Amendment rights attaching to fictionalized accounts. *Id.* at 337. See also *Hicks v. Casablanca Records*, 464 F.Supp. 426 (S.D. N.Y. 1978) (rejecting right of publicity claim by Agatha Christi against producers of a movie presenting a fictionalized account of a true event in the author's life). Agatha Christi was reported missing for eleven days in 1926. *Id.* at 429. According to the court, her true whereabouts and the reasons for her disappearance are, to this day, a "mystery." *Id.* The film, *Agatha*, was a fictionalized account of her mysterious disappearance. The court held "the First Amendment protection usually accorded novels and movies outweighs whatever publicity rights plaintiffs may possess and for this reason their complaints must be dismissed." *Id.* at 433.

95. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995).

96. So please, no more hypos involving Betty Buyer and Sammy Seller.

97. See *supra* note 66 and accompanying text describing admonition contained in the

from the copyright holder, or having determined that our use of multimedia content falls within the fair use exemption, does the celebrity's right of publicity stand as a separate obstacle to use of the celebrity's image? This issue is problematic because, unlike the use of celebrities' names in fictionalized biographies, there does not appear to be a clear cut First Amendment protection for the use of a celebrity's likeness. It appears that the outcome is dependent upon whether the court characterizes the use of the celebrity's image as commercial or non-commercial, and whether the use of the image is transformative.

Applying California law, the United States Court of Appeals for the Ninth Circuit considered this question in *Hoffman v. Capital Cities/ABC, Incorporated*.⁹⁸ Dustin Hoffman sued the *Los Angeles Magazine* for using a computer-altered photo of him from the movie *Tootsie* in an article entitled "Grand Illusions."⁹⁹ The article made use of computerized alterations of sixteen familiar film scenes making it appear that the actors were dressed in Spring 1997 fashions.¹⁰⁰ In the photo from *Tootsie*, Mr. Hoffman's face appeared as it did in the original still from which the image was taken; however, his body and the dress from the movie were "replaced by the body of male model in the same pose, wearing a spaghetti-strapped, cream colored, silk evening dress and high-heeled sandals."¹⁰¹ The text indicated that the still came from the movie *Tootsie*, and stated: "Dustin Hoffman isn't a drag in a butter—colored silk gown by Richard Tyler and Ralph Lauren heels."¹⁰²

The Ninth Circuit acknowledged that California protects the right of a person to control the commercial use of his or her identity, but noted that this protection must be balanced with the First Amendment.¹⁰³ The circuit court disagreed with the lower court's ruling that the use of Mr. Hoffman's image was an "exploitative commercial" use that was not entitled to full First Amendment protection.¹⁰⁴ The court explained that "the core notion of commercial speech is that it does no more than

FAQ section of MGM's Clip Licensing web site that licensee would still need to obtain permission from the actors appearing in the film clip.

98. 255 F.3d 1180 (9th Cir. 2001).

99. *Id.* at 1183.

100. *Id.* Notable scenes from *North by Northwest*, *Saturday Night Fever*, *Rear Window*, *Gone with the Wind* and others were included in the altered photography, along with the photo that gave rise to Mr. Hoffman's suit. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1183-84 (noting "the careful balance that courts have gradually constructed between the right of publicity and the First Amendment").

104. *Id.* at 1184

propose a commercial transaction.”¹⁰⁵ In other words, commercial speech is advertising. The court noted that a common feature among cases in which the courts have held that the speech was commercial speech occurs when “the defendant used an aspect of the celebrity’s identity entirely and directly for the purpose of selling a product.”¹⁰⁶ In the court’s view, the defendants in *Hoffman* did not use Mr. Hoffman’s image in a commercial advertisement, but rather used it as part of an article that was a “combination of fashion photography, humor, and visual and verbal editorial comment on classical films and famous actors.”¹⁰⁷ Because the defendant’s use of Mr. Hoffman’s likeness did not constitute commercial speech, the use was protected by the First Amendment.¹⁰⁸

A contrast to the result in *Hoffman*, however, is found in *Comedy III Productions, Inc. v. Gary Saderup*,¹⁰⁹ which also involved California law. In this case, the registered owner of all rights to the former comedy act *The Three Stooges* brought suit for violation of the right of publicity against a creator of T-shirts featuring artistic reproductions of the images of Larry, Moe, and Curly.¹¹⁰ The court determined that the T-shirts constituted non-commercial speech, which is generally subject to First Amendment protection.¹¹¹ However, the court was faced with the fact that although the use was not for advertising purposes, it still appeared that the defendant’s purpose was to use the Three Stooges’ images to promote sales of the T-shirts.

The court held that in order to gain First Amendment protection for the use of the celebrities’ images, the defendant would need to show that the work was sufficiently transformative or that its value did not derive primarily from the celebrities’ fame.¹¹² The test for whether the use is transformative is whether it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹¹³ The court stated that:

105. *Id.*

106. *Id.* at 1185.

107. *Id.*

108. *Id.* at 1186 (“We have concluded that [defendant] is entitled to the full First Amendment protection accorded noncommercial speech”). The court noted that the case would be otherwise if the picture had been used in a Ralph Lauren advertisement. *Id.* at 1185.

109. 106 Cal. Rptr. 2d 126, 134 (Cal. 2001).

110. *Id.* at 130-31.

111. *Id.* at 133.

112. *Id.* at 142.

113. *Id.* at 139.

Another way of stating the inquiry is whether the celebrity's likeness is one of the "raw materials" from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness. And when we use the word "expression," we mean expression of something other than the likeness of the celebrity.¹¹⁴

The court held that the images of The Three Stooges were not significantly transformative or creative, and therefore not subject to First Amendment protection.¹¹⁵

What this case law tells us about the use of celebrities' images in educational materials is that in order to garner First Amendment protection, the use of the images must not constitute commercial speech. As described by the court in *Hoffman*, this would appear to be an easy standard to achieve if the use of the celebrities' images is restricted to use in the classroom, or in materials that are distributed exclusively to students at no cost for their outside preparation for class and study. This would not involve advertising, which is the benchmark for "commercial speech." In addition, there would be no reason to think that the celebrity's images were being used to promote the sale of a product. However, if the educator decided to market materials and sell them for a profit, then the educator would need to show that the use of the celebrities' images was transformative or creative, within the context of teaching. It could be said that transformation or creativity, in this context, is inherent in the fact that the educator would need to make numerous decisions regarding the juxtaposition of celebrity images with the educational concepts that the educator is trying to impart to the student. Arguably, it does not appear that the right of publicity will be a separate problem for the educator who sets out to bring the Twenty-First Century into the classroom.

114. *Id.* at 141.

115. *Id.* at 143.

V. CONCLUSION

There are unimaginable benefits available if legal educators can bring the Twenty-First Century into the law class room. This will help make the course material more relevant to our students. Relevant material will in turn assist the legal educator in convincing the students that mastery of the legal concepts has a value beyond the grade the student will receive on an examination. With the introduction of “pop culture,” the professor can permanently alter the student’s view of the course material. What was once an onerous chore, can become part of the student’s world view, or at least more fun.¹¹⁶ The sad fact is, that in order to effectively teach law, we need to overcome the restraints that law places on educational creativity.

116. Ah, there’s that word again. *See supra* note 8.

