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The Right of Publicity as a Means of Protecting Performers' Style

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I. INTRODUCTION

Twenty-five years ago Melville Nimmer, in his seminal article on the right of publicity, recognized the inadequacies of the right of privacy, unfair competition, and other legal theories as a means of preventing the unauthorized use of a celebrity's name, likeness or personality.[1] He seriously doubted "that the application of [the privacy] concept satisfactorily [met] the needs of Broadway and Hollywood in 1954,"[2] and instead, advocated the adoption of the right of publicity, under which the pecuniary value of one's personality could be more adequately protected.[3] It is somewhat ironic, therefore, that a quarter of a century later, when the exploitation of celebrity status has become such "an integral part of American merchandising,"[4] the contours of the right of publicity remain so unclear, and resort must still be had to more traditional, yet inadequate, legal theories.

The combination of the increasingly common problem of the unauthorized commercial appropriation of a performer's likeness, voice, mannerisms and distinctive style, and the absence of the full recognition of the right of publicity as forecast by Nimmer[5] has resulted in a situation in which established performers are unable to control their exposure so as not to diminish either their distinction, or the attendant public attention and economic advantages.

This comment examines the possibility of protection for the unique style and identity of a performer under the doctrine of the right of publicity. Protection would require both a broader reading of the phrase "name, likeness and identity" often used in defining the right of publicity than it has heretofore been given,[6] as well as a more precise

1. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954) [hereinafter cited as Nimmer].

2. *Id.* at 203.

3. *Id.* at 214.

4. Note, Lugosi v. Universal Pictures: *Descent of the Right of Publicity*, 29 HASTINGS L.J. 751, 751 (1978) [hereinafter cited as *Descent of the Right of Publicity*]. Annual royalties for licensing one's celebrity status, in the form of famous names, titles, slogans, etc., are estimated at over $35 million. Brenner, *What's in a Name and Who Owns It?*, Winter 1979 BARRISTER 43 [hereinafter cited as Brenner].

5. Nimmer, *supra* note 1, at 223.

6. *See, e.g.*, Rader, *The "Right of Publicity"—A New Dimension*, 61 J. PAT. OFF. SOC'Y 228 (1979). For an example of the insufficiency of the publicity doctrine when the defini-

delineation of the scope of the doctrine itself. A brief overview of the development of the right of publicity will provide a basis for its application in this regard, and comparison will be drawn with other available theories of protection. The conclusion suggested is that a performer's truly unique and identifiable characteristics are worthy of protection, and the right of publicity provides the suitable means for that protection.

II. AN ANALYSIS OF THE RIGHT OF PUBLICITY

Much of the continuing uncertainty surrounding the right of publicity is due to the fact that it has most often been discussed under the rubric of the right of privacy, and has been said to have evolved from the privacy right.[7] In actuality, however, the two rights are distinguishable, particularly in terms of the respective interests each seeks to protect.

As first articulated in 1890 by Samuel Warren and Louis Brandeis,[8] the right of privacy was concerned with the "right to be let alone"[9] and with the ability to protect against the publication of one's thoughts, sentiments, and other matters relating to the private life of an individual.[10] The most widely accepted modern formulation of the privacy right is that of Dean Prosser, whose analysis treats privacy as a complex of four separate types of invasions, with the only common factor being that "each represents an interference with the right of the plaintiff . . . 'to be let alone'."[11] These are:

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

tional phrase is construed strictly, see Booth v. Colgate Palmolive Co., 362 F. Supp. 343 (S.D.N.Y. 1973), in text accompanying notes 71-73 and 82-83 *infra*.

7. *See Descent of the Right of Publicity*, *supra* note 4, at 752; Note, *Performer's Right of Publicity: A Limitation on News Privilege*, 26 CLEV. ST. L. REV. 587, 595 (1977) [hereinafter cited as *Performer's Right of Publicity*]. The notion that the right of publicity "evolved from" the right of privacy is accurate only in the sense that it was the inadequacies of the right of privacy that necessitated judicial recognition of the right of publicity. *See generally* E. KINTNER & J. LAHR, AN INTELLECTUAL PROPERTY LAW PRIMER 453 (1975) [hereinafter cited as KINTNER & LAHR]; Nimmer, *supra* note 1, at 203-04.

8. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

9. *Id.* at 193.

10. *Id.* at 198, 216.

11. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) [hereinafter cited as *Privacy*].

ness.[12]

It is this fourth type of interest that has been confused with the right of publicity.

Although Prosser did recognize the proprietary nature of the fourth category of appropriation,[13] and distinguished it as the only one involving "a use for the defendant's advantage,"[14] he failed to discuss the possibility that the appropriation of one's name and likeness for the defendant's commercial advantage might have a very different result if that individual himself has undertaken to commercialize his name or likeness. Thus, the category's inclusion within Prosser's definition of privacy "tends to obscure the distinction between appropriation of the name or likeness of a public figure and such appropriation in the case of a private individual."[15] This lack of clarity represents a fundamental inadequacy of the privacy right for protecting the performer whose name, likeness or identity has become commercially valuable.

Moreover, Prosser's statements to the effect that each category involves the right to be let alone, and that each of the four rights is personal and not assignable,[16] are rather misleading, and serve to underscore the confusion caused by the intermingling of the right of privacy and the right of publicity. It is therefore crucial to highlight the differences between the two rights.

The essence of a cause of action for invasion of privacy is "not injury to the character or reputation, but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community."[17] Thus, recovery for an invasion of privacy redresses the plaintiff's mental distress[18] caused by the exposure to unwanted publicity. It would be rather incongruous, however, to suggest that celebrities or well-known personalities suffer the same type of injury by having their names or images publicized, as would the private citizen. Indeed, with celebrities

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12. *Id.*

13. W. PROSSER, LAW OF TORTS § 117, at 807 (4th ed. 1971) [hereinafter cited as PROSSER].

14. *Id.* at 814.

15. Note, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527, 531 (1976) [hereinafter cited as *Protection for Public Figures*].

16. PROSSER, *supra* note 13, at 804, 814-15.

17. Fairfield v. American Photocopy Equip. Co., 138 Cal. App. 2d 82, 86, 291 P.2d 194, 197 (1955).

18. *But cf. Privacy*, *supra* note 11, at 400 (false light cases differ in that the "interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation.").

it is more often the case that "publicity is desired inasmuch as a celebrity's income may be directly proportionate to his or her degree of fame."[19] For example, in *O'Brien v. Pabst Sales Co.*,[20] a well-known football player, seeking to prevent the defendant's use of his picture in a beer advertisement, was denied relief based on a cause of action for invasion of privacy. The court stated that "the publicity [plaintiff] got was only that which he had been constantly seeking and receiving . . . ."[21]

On the other hand, when a celebrity's name or likeness has developed a commercial value, the injury caused by a defendant's exploitation thereof may be only of an economic nature.[22] The "injured" plaintiff in this type of situation objects, not necessarily to the commercial use of his or her name or likeness, but to the fact that such unauthorized use violates his or her right "to control and profit from the publicity values which he has created or purchased."[23]

This distinction between the two interests—emotional and financial—was drawn in *Haelan Laboratories, Inc. v. Topps Chewing*

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19. *Protection for Public Figures*, *supra* note 15, at 533.

20. 124 F.2d 167 (5th Cir.), *cert. denied*, 315 U.S. 823 (1941). *Accord*, Gautier v. Pro-Football, Inc., 304 N.Y. 354, 107 N.E.2d 485 (1952) (action for invasion of privacy in broadcasting plaintiff's trained animal act performed at a football game; real injury was nonpayment). *See also* Nimmer, *supra* note 1, at 203-04.

21. 124 F.2d at 170.

22. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 (9th Cir. 1974). As the court noted, however, the possibility does exist that the appropriation of a celebrity's identity may also cause the type of mental injury normally associated with privacy actions. *Id.* at 824-25 n. 11.

Conversely, it could be suggested that even persons not known to the general public actually have a property right of publicity. This might very well be the case, for example, in situations in which an "ordinary consumer" has been captured by a hidden camera and then made the focus of a commercial campaign. Nevertheless, a private individual has not created the same sort of tangible and saleable product in his or her name or likeness as has the celebrity, and therefore the right of publicity in such cases would be of little, if any, commercial value. *See* Nimmer, *supra* note 1, at 217. The best solution would probably be to permit non-celebrity plaintiffs to prove the pecuniary value, if any of their names and likeness. *See Performer's Right of Publicity*, *supra* note 7, at 601 n. 90. Finally, one commentator has concluded that California Civil Code section 3344 confers a property right (in the form of a right of publicity) on every individual in California in their personal identity by virtue of the minimum statutory damages:

> Any person who knowingly uses another's name, photograph, or likeness, in any manner for purposes of advertising . . . or for purposes of solicitation . . . without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured . . . [and] in an amount no less than three hundred dollars ($300).

Note, *Commercial Appropriation Of An Individual's Name, Photograph Or Likeness: A New Remedy For Californians*, 3 PAC. L.J. 651, 669 (1972).

23. Nimmer, *supra* note 1, at 216.

Gum, Inc.,[24] in which the right of publicity was explicitly recognized for the first time. In *Haelan Laboratories* the plaintiff had an exclusive contract with a baseball player to use the ballplayer's photograph in connection with the plaintiff's sale of bubble gum. The ballplayer was subsequently induced to grant the same right to the defendant, one of the plaintiff's competitors. The plaintiff maintained that the defendant's use of the picture for the same purpose involved plaintiff's exclusive rights. The defendant contended, however, that plaintiff's theory was untenable in that the contracts involved were no more than releases of the liability that the plaintiff would have otherwise incurred by using the picture and thereby invading the ballplayer's privacy; and inasmuch as the privacy right was personal and not assignable, the plaintiff had no standing to sue.[25] The court rejected the defendant's contentions and held for the plaintiff, finding that the ballplayer had assigned a right that was distinguishable from the right of privacy. The court reasoned as follows:

> We think that, *in addition to and independent of* [the] right of privacy . . . a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross," *i.e.*, without an accompanying transfer of a business or of anything else. Whether it be labelled a "property" right is immaterial; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth.
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> This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements [and] popularizing their countenances . . . . This right of publicity would usually yield . . . no money unless it could be made the subject of an exclusive grant . . . .[26]

The court's language clearly appreciated "the pecuniary interest protected by the right of publicity that distinguishes it from the right of privacy."[27] But an even more precise delineation of the distinct interest a celebrity has in his or her name and likeness appeared four years

24. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).
25. *Id.* at 867.
26. *Id.* at 868 (emphasis added).
27. *Protection for Public Figures*, *supra* note 15, at 535.

after the *Haelan Laboratories* decision, in *Hogan v. A.S. Barnes & Co.*[28] In that case the defendant had used the name and picture of the famous golfer, Ben Hogan, on the cover and in the text of a book, in such a manner as to imply that Hogan had participated in some way with its writing.[29] Although Hogan had asserted five different theories for recovery, including invasion of privacy, the court perceived the inappropriateness of the privacy right as a basis for controlling the commercial uses of a celebrity's personal characteristics. Rather, the court said, the true ground of Hogan's cause of action was "the very antithesis of the right of privacy"[30] consisting of the misappropriation of the commercial value of his name and likeness, and the lack of compensation therefor.[31]

However, it was the *Haelan Laboratories* decision that laid the groundwork for many later cases in which a well-known personality's proprietary right in his or her name, likeness and identity was recognized and protected against appropriation for unauthorized commercial purposes.[32]

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28. 114 U.S.P.Q. (BNA) 314 (1957).

29. *Id.* at 318-19.

30. *Id.* at 316.

31. *Id.* The court discussed the specific differences between the right of privacy and the right of publicity:

> On the one hand, where plaintiff is a person previously unknown to the general public, that is, one who has lived a life of relative obscurity insofar as publicity is concerned, the gist of his complaint is that, by reason of the publication of his picture in connection with the advertisement of a product, he has been unwillingly exposed to the glare of public scrutiny. In such a case, plaintiff's right of privacy has truly been invaded.
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> On the other hand, where plaintiff is a person who may be termed a "public figure", such as an actor or an athlete, the gist of his complaint is entirely different. He does not complain that, by reason of the publication of his picture in connection with the advertisement of a product, his name and face have become a matter of public comment, but rather that the commercial value which has attached to his name because of the fact that he is a public figure has been exploited without his having shared in the profits therefrom.

Id. at 315-16.

The court later concluded, however, that the protection offered by the right of publicity was another mode of applying the doctrine of unfair competition. *Id.* at 320. Although the analogy may have been suitable in the circumstances of the *Hogan* case, inasmuch as the defendant's book was actually in competition with Hogan's own writings on golf, the unfair competition doctrine has generally been inadequate for protecting the interests that the right of publicity is designed to protect. *See* Nimmer, *supra* note 1, at 210-14. For a further discussion of these inadequacies, see notes 154-67 *infra* and accompanying text.

32. *See, e.g.*, Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) ("There can be no doubt that Elvis Presley assigned . . . a valid property right, the exclusive authority to print, publish and distribute his name and likeness."); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 844 (S.D.N.Y. 1975) ("We think it is clear that, during their lifetimes, Laurel and Hardy each had such a property right,

In addition to the underlying distinction between the right of privacy as protection for an emotional interest and the right of publicity as protection for an economic interest, there are other important differences between the two rights. A brief discussion of these differences should serve to define the contours of the right of publicity.

One major difference between the rights of privacy and publicity relates to the nature of the rights involved. Specifically, the right of privacy is a personal right,[33] and hence is not assignable,[34] nor does it survive the plaintiff (in the absence of statutory provision).[35] In contrast, the right of publicity is of a proprietary nature, if not an actual property right.[36] As such, it can be assigned and transferred in whole

distinct from . . . statutory protection, in his name and likeness."); Uhlaender v. Henricksen, 316 F. Supp. 1277, 1282 (D. Minn. 1970) ("[A] celebrity has a legitimate proprietary interest in his public personality. . . . That identity, embodied in his name, likeness, statistics and other personal characteristics is the fruit of his labors and is a type of property.").

33. PROSSER, *supra* note 13, at 814; Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U.L. REV. 553, 595 (1960) [hereinafter cited as Gordon].

34. *See, e.g.*, Hanna Mfg. Co. v. Hillerich & Bradsby Co., 78 F.2d 763, 766 (5th Cir.), *cert. denied*, 296 U.S. 645 (1935); PROSSER, *supra* note 13, at 815.

35. Young v. That Was The Week That Was, 312 F. Supp. 1337, 1341 (N.D. Ohio 1969), *aff'd*, 423 F.2d 265 (6th Cir. 1970); PROSSER, *supra* note 13, at 815; Gordon, *supra* note 33, at 595.

36. There apparently remains some hesitancy to accord the right of publicity a well-defined property status. Some courts and commentators have clearly recognized and labeled it a property right. *See* cases cited *supra* note 32; Nimmer, *supra* note 1, at 216; KINTNER & LAHR, *supra* note 7, at 459. Other sources, however, have refused to be so explicit. For example, in the *Haelan Laboratories* decision, although the holding that the right was capable of assignment indicated that it was necessarily viewed as a property right, Judge Frank said that whether the right of publicity "be labelled a 'property' right is immaterial" because "the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth." 202 F.2d at 868. Similarly, Prosser has stated that "[i]t seems quite pointless to dispute over whether such a right is to be classified as 'property;' . . ." PROSSER, *supra* note 13, at 807.

In California, the right of publicity has been relegated to a rather dubious status. In Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979), Bela Lugosi's heirs sued a motion picture company, seeking the profits made by the defendant in selling licenses for the manufacture of various commercial items using Lugosi's likeness in his role as Count Dracula. The plaintiffs alleged that they had inherited Lugosi's exclusive right to exploit the commercial value of his likeness as Dracula. The California Supreme Court rejected this contention, adopting as its own the opinion of a court of appeal, which agreed with Prosser's conclusion that the property label dispute was "pointless," *id.* at 819, 603 P.2d at 428, 160 Cal. Rptr. at 326, and held instead that the right to exploit the publicity value of one's name and likeness is a personal one. *Id.* at 821, 603 P.2d at 431, 160 Cal. Rptr. at 329. The court's basic premise was that this " 'right of value' to create a business, product or service of value" was protectable only by the personal right of privacy, thus leading to the ultimate holding that this right did not survive the death of the actor. *Id.* at 819, 603 P.2d at 428, 160 Cal. Rptr. at 326. According to the court, Lugosi had never exercised his right to exploit the commercial value of his likeness, had not transformed his "right

or in part.[37] Additionally, it may be inherited upon the death of the

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of value" into "things of value," and therefore this unexercised opportunity should not be descendible. *Id.*

In so characterizing the right of publicity, the *Lugosi* court completely failed to disassociate it from the appropriation form of the right of privacy. *See* notes 12-23 *supra* and accompanying text. The court also produced a particularly anomalous result, in that despite the classification of the exploitation right as a personal one, the court acknowledged that the right is assignable, stating that "[a]ssignment of the right . . . by the 'owner' thereof is synonymous with its exercise." 25 Cal. 3d at 823, 603 P.2d at 431, 160 Cal. Rptr. at 329. Nevertheless, the court concluded, the fact that Lugosi had actually made such an assignment of his name and likeness to the defendant for exploitation related to the film *Dracula* was not equivalent to the exercise of the right as to other commercial situations not affected by that assignment. *Id.* More judicious reasoning would have recognized that, even assuming a prerequisite of exercise, the proper question should ask whether the *name and likeness* have been exploited, not whether a particular commercial situation has been exploited. Otherwise, a performer would be unable to protect rights related to exploitations not practicable or possible during his or her lifetime, nor to capitalize on such exploitations for the maximum benefit of his or her heirs in addition to his or her own benefit. *See Descent of the Right of Publicity*, *supra* note 4, at 765. Beyond this, the court's imposition of the requirement of prior exercise lacked convincing rationalization. This, combined with the absence of a clear explanation of the term "exercise," only adds to the remaining confusion surrounding the publicity right.

In addition, the *Lugosi* court failed to justify its rejection of the property label, and, in fact, ignored an earlier interpretation of the concept of property that would readily encompass the publicity right. In Yuba River Power Co. v. Nevada Irrigation Dist., 207 Cal. 521, 523, 279 P. 128, 129 (1929), the court said that the term " 'property' is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value." Adoption of this construction clearly would have suggested a contrary result in the *Lugosi* case.

The Ninth Circuit position is also unclear. In Motschenbacher v. R.J. Reynolds Tobacco, Co., 498 F.2d 821 (9th Cir. 1974), the court recognized the proprietary interest one has in his or her identity, and concluded that the California appellate courts would protect such an interest; but the court declined to speculate as to whether it would be done under the heading of privacy, property or publicity. *Id.* at 825-26. Ironically, the *Motschenbacher* court did acknowledge the *Yuba River* characterization of property and its appositeness to the right of publicity, *id.* at 826 n. 14, but nevertheless failed to expressly recognize publicity right as a property-based one. Unfortunately, their declination appeared to have been a fairly accurate perception of what was to come in the *Lugosi* decision.

It is true that even the courts that have failed to accept the property label have at least recognized the proprietary nature of the publicity right (as the *Lugosi* court did by implication, by accepting Prosser's analysis, see note 13 *supra* and accompanying text). It must be emphasized nevertheless that the property status is, in fact, essential in "furnishing a firm basis for distinguishing between claims which have a solid pecuniary worth and those involving injured feelings," Gordon, *supra* note 33, at 607, in addition to being "the prerequisite to transferability." Note, *Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild*, 22 U.C.L.A. L. REV. 1103, 1117 (1975); *See* text accompanying notes 39-40 *infra*. An express clarification by the courts of the property basis of the right of publicity would undoubtedly help to eliminate the confusion so prevalent in this area of the law.

37. *See, e.g.*, Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969); KINTNER & LAHR, *supra* note 7, at 459. Even courts that have not accepted the "property" label, see note 36 *supra*, have acknowledged the assignability of the publicity right. *See* discussion of Lugosi

person whose efforts created the publicity values.[38] This distinction is crucial, in that "[t]he publicity value of a prominent person's name and portrait is greatly restricted if this value cannot be assigned to others,"[39] and would probably yield "no money unless it could be made the subject of an exclusive grant . . . ."[40]

Another major difference between privacy and publicity involves the measure of damages for a violation of the respective rights. In an action for an invasion of privacy, damages include compensation for the injury to the plaintiff's feelings and for mental distress, as well as special and punitive damages.[41] On the other hand, in a publicity action, damages are measured by the value received by the defendant by virtue of the unauthorized use of the plaintiff's name or likeness,[42] or by the plaintiff's financial loss or impairment of his or her publicity values.[43] This requires consideration of such factors as the fame of the plaintiff, the market value of his or her publicity rights, and the share of the plaintiff's profits diverted to the defendant as a result of the appropriation.[44] Also, as one court has noted, in determining the damages in a publicity action, a court can "take judicial notice that there is a fairly active market for exploitation of the faces, names and reputations of celebrities, and such market—like any other—must have its recognized rules and experts."[45] Thus, even though public figures have often used a theory of invasion of privacy and have sometimes been successful,[46] in actuality they were complaining of the misappropriation of their name and likeness. Recovery in such a situation is restricted by an

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v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979), at note 36 *supra*. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

38. *E.g.*, Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 844 (S.D.N.Y. 1975). *Cf.* Lugosi v. Universal Pictures, 25 Cal.3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979), discussed in note 36 *supra*. As noted, the court in *Lugosi* held that Lugosi had not exercised his right of publicity, and therefore actually left open the question of whether an "exercised" right of publicity would be descendible. For a more complete discussion of the descendibility issue, see *Descent of the Right of Publicity*, *supra* note 4.

39. Nimmer, *supra* note 1, at 209.

40. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

41. *See* PROSSER, *supra* note 13, at 815; Nimmer, *supra* note 1, at 208-09.

42. KINTNER & LAHR, *supra* note 7, at 459; *Protection for Public Figures*, *supra* note 15, at 533.

43. *Performer's Right of Publicity*, *supra* note 7, at 601.

44. Gordon, *supra* note 33, at 611.

45. Grant v. Esquire, Inc., 367 F. Supp. 876, 881 (S.D.N.Y. 1973).

46. *See generally* Gordon, *supra* note 33.

"artificial limitation,"[47] imposed because of the privacy right's personal nature and the attendant rule of damages.

Finally, the Supreme Court, in its acceptance of the right of publicity as distinct from the right of privacy,[48] noted that the two "differ in the degree to which they intrude on dissemination of information to the public."[49] Protection of the interests in a privacy action entails the suppression of the publication in question, whereas in publicity actions, "the only question is who gets to do the publishing."[50] The basis for this distinction was the Court's recognition of the economic interest protected by the right of publicity.

In sum, the common law right of publicity recognizes the commercial value of the name, likeness and identity of a public figure, and therefore protects the proprietary interest in his or her personality. It exists independent of the right of privacy, and provides a basis of recovery distinct from unfair competition, defamation and other traditional legal theories.[51] Admittedly, the scope of the right of publicity is still somewhat hazy, but as the courts continue to define its limits, it should be acknowledged as the appropriate means of protecting a celebrity's identity and personality.

III. APPLICATION OF THE RIGHT OF PUBLICITY TO PERFORMANCE STYLE

Most courts that have expressly or implicitly extended legal protection to the right of publicity have done so only in cases involving the appropriation of a celebrity's name and/or likeness,[52] and have not taken cognizance of other attributes of a performer, such as voice, man-

47. *Descent of the Right of Publicity*, *supra* note 4, at 754.

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

49. *Id.* at 573.

50. *Id.* For a further discussion of the relationship between first amendment principles and the right of publicity, see notes 132-41 *infra* and accompanying text.

51. See notes 144-86 *infra* and accompanying text.

52. *See, e.g.*, Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); Hogan v. A.S. Barnes & Co., 114 U.S.P.Q. 314 (BNA) (1957); *see also* cases cited note 32 *supra*.

A notable exception to this is the case of Price v. Hal Roach Studies, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975), in which the court, upon a determination of the parties' respective rights pursuant to contractual agreements, permanently enjoined the defendants from

> using, selling, licensing, leasing, authorizing the use of or otherwise conveying . . . the names, likenesses, characters, and characterizations, of Stan Laurel and Oliver Hardy, (including, without limitation, use of their photographs or other reproductions of their physical likenesses, *the impersonation of their physical likenesses or appearances, costumes and mannerisms, and/or the simulation of their voices*) for advertising or commercial purposes . . . .

(Court order quoted in Price v. Worldvision Enterprises, Inc., 455 F. Supp. 252, 256

nerisms, gestures, and dress, that could be subject to similar appropriation. Indeed, performance "style" has heretofore been accorded virtually no protection from misappropriation—most commonly seen in the form of an unauthorized imitation in a commercial setting—under either the right of publicity or under any other legal theory.

A major obstacle to the extension of such protection has undoubtedly been the inability to present courts with both an acceptable definition of "style" and a method for determining how and when it should be protected. But demonstration of the fact that style is, in fact, "capable of ascertainment and that concrete limitations *do* exist as to what would constitute a protectible style"[53] should render the issue of legal protection for performance style more than a source of merely "academic" discussion,[54] and instead, place it on par with other protected intangible intellectual property rights,[55] with the concomitant protection being afforded by the right of publicity.

Admittedly, accurate definitions of the term "style" are available to support the arguments of both opponents and advocates of style protection. For example, style can be defined broadly, as a "manner or method of acting or performing [especially] as sanctioned by some standard."[56] Thus, it may be appropriate to say, as has one opponent, that "[s]tyles evolve [and] [t]heir vogue may be fleeting or lasting," and therefore they should not be protected.[57] On the other hand, style is

(S.D.N.Y. 1978), *aff'd*, 603 F.2d 214 (1979), which involved a res judicata application of the *Hal Roach* case to parties in privity with the *Roach* defendants, 455 F. Supp. at 266).

53. Note, *Intellectual Property—Performer's Style—A Quest for Ascertainment, Recognition, and Protection*, 52 DEN. L.J. 561, 561 (1975) (emphasis added) [hereinafter cited as *Performer's Style*].

54. *See* Lang, *Performance and the Right of the Performing Artist*, 21 ASCAP COPYRIGHT L. SYMP. 69, 73 (1974) [hereinafter cited as *Right of the Performing Artist*].

55. Such rights include those protected as trade secrets, which safeguard certain technology and commercial information, under theories such as property, *e.g.*, Ferroline Corp. v. General Aniline & Film Corp., 207 F.2d 912 (7th Cir. 1953), *cert. denied*, 347 U.S. 953 (1954), contract, *see, e.g.*, L.M. Rabinowitz & Co. v. Dasher, 82 N.Y.S.2d 431 (Sup. Ct. 1948), and breach of trust or confidence, *see, e.g.*, Minnesota Mining & Mfg. Co. v. Technical Tape Corp., 23 Misc. 2d 671, 192 N.Y.S.2d 102 (1959), as well as those in ideas and business schemes that have been protected under the same general theories as applied to trade secrets. *See, e.g.*, Hamilton Nat'l Bank v. Belt, 210 F.2d 706 (D.C. Cir. 1953); Liggett & Meyer Tobacco Co. v. Meyer, 101 Ind. App. 420, 194 N.E. 206 (1935) (both involving property theory, based on findings that the respective ideas were both concrete and novel); Desny v. Wilder, 46 Cal. 2d 715, 299 P.2d 257 (1956) (implied contract theory); Carpenter Foundation v. Oakes, 26 Cal. App. 3d 784, 103 Cal. Rptr. 368 (1972) (based on the existence of a confidential relationship). *See generally* M. NIMMER, NIMMER ON COPYRIGHT § 16 (1979) [hereinafter cited as NIMMER].

56. WEBSTER'S NEW COLLEGIATE DICTIONARY 1148 (definition of style 4a(1)) (1979).

57. Liebig, *Style and Performance*, 17 BULL. CR. SOC'Y 40, 40 (1969) [hereinafter cited as Liebig].

also defined as "a manner of expression characteristic of an individual . . . a distinctive or characteristic manner."[58] It is this latter sense of style, as something highly unique and individualized, and immediately identifiable as synonymous with a particular performer, that is susceptible to, and worthy of, legal protection, preferably under the right of publicity.

A brief factual review of the major cases in which performers sought protection against the unauthorized appropriation or imitation of their performance style and/or characteristics exemplifies the problems encountered in seeking protection for style, as well as the need therefore, and lays the groundwork for a discussion of the suitability of the publicity right for affording such protection. *Sinatra v. Goodyear Tire & Rubber Co.*[59] provides a particularly useful example. Singer Nancy Sinatra had recorded a song, "These Boots Are Made for Walkin'." Her version was distinguished by a special mode of dress and delivery typified by high boots, a short skirt, and certain mannerisms, and it became quite popular. Defendant Goodyear coined the phrase "wide boots" as the theme for marketing a line of tires, and secured a license from the copyright proprietor to use the song in its advertising program. Goodyear contacted Sinatra hoping to employ her to sing the song in defendant's radio and television commercials for "wide boots" tires, but no agreement was reached. Goodyear nevertheless continued with the idea for the commercial, intentionally and admittedly[60] imitating Sinatra's performance style by adopting the same vocal arrangement, showing brief glimpses of an otherwise unrecognizable woman dressed in clothes similar to Sinatra's costume, and hiring a singer deliberately chosen on the basis of the similarity of her voice and style to Sinatra's.[61]

The court rejected Sinatra's unfair competition claim[62] and denied any relief, resting its decision primarily on the reasoning that to allow such a cause of action would interfere unduly with the exercise of the rights belonging to the holder of the song's federal copyright.[63] Specifi-

58. WEBSTER'S NEW COLLEGIATE DICTIONARY 1148 (definitions 2a and 4a(2)) (1979).

59. 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).

60. This admission was made by the defendants, and assumed by the district court, for purposes of defendants' motion for summary judgment. 435 F.2d at 713.

61. Liebig, *supra* note 57, at 41. Interestingly, Liebig represented the defendants in both the *Sinatra* case and the *Davis* case discussed at notes 66-70 *infra* and accompanying text.

62. 435 F.2d at 714-16. For a discussion of the inadequacies of unfair competition theory for protection of performance style, see notes 154-67 *infra* and accompanying text.

63. 435 F.2d at 717-18. The court relied specifically on the *Sears-Compco* preemption doctrine. For a discussion of the doctrine and its possible application to the right of publicity see notes 108-19 *infra* and accompanying text.

cally, the court foresaw a "clash with the copyright laws [in] the potential restriction which . . . [would be placed] upon the potential market of the copyright proprietor" if plaintiff were granted the relief sought.[64] Supposedly, proposed licensees would be completely discouraged if required to "pay each artist who has played or sung the composition and who might therefore claim unfair competition—performer's protection . . . ."[65] Such a conclusion clearly fails to recognize the simple fact that by according the protection requested, a licensee would in no way be prohibited from securing the rights to use the song, only from using the distinctive expression of it as created by someone else. The licensee would simply be forced to exercise a certain amount of creativity in place of otherwise facile imitation.

More importantly, the facts of the *Sinatra* case give rise to the definite inference that the song alone was of no commercial value to the defendant unless performed by Sinatra or someone imitating her. In other words, it was the particular rendition of the song, as developed by Sinatra, that was worth something to the defendants, yet they were able to use it without compensating its creator.

A similar result obtained in *Davis v. Trans World Airlines*.[66] In that case the well-known singing group, The Fifth Dimension, objected to the unauthorized imitation of their unique vocal sound and arrangement as exhibited in their performance of the song "Up, Up and Away." Although the song had also been recorded by more than thirty others,[67] the defendants purposefully chose to imitate the plaintiffs' version specifically, in their use of the same song for radio and television commercials.[68] The court, relying on the *Sears-Compco* preemption doctrine,[69] simply concluded that "imitation alone does not give rise to a cause of action."[70] The *Davis* case parallels *Sinatra* in that despite the fact the copyright proprietor of the song had granted permission to the defendants for the use of the song, no such license was granted to copy the plaintiffs' unique and distinctive expression of the song, which was obviously the creation of interest and value to the defendants.

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64. 435 F.2d at 718.

65. *Id.*

66. 297 F. Supp. 1145 (C.D. Cal. 1969).

67. Liebig, *supra* note 57, at 41.

68. As in the *Sinatra* case, the defendants in *Davis* stipulated for purposes of the hearing on their summary judgment motion that their broadcast commercials were imitative of the plaintiffs' recorded performance of the song. 297 F. Supp. at 1146.

69. *See* notes 108-19 *infra* and accompanying text for a discussion of the *Sears-Compco* doctrine and its inapplicability to the right of publicity.

70. 297 F. Supp. at 1147.

Booth v. Colgate-Palmolive Co.,[71] another case involving intentional voice imitation, was brought by the well-known actress Shirley Booth, who had long played, and whose voice had become associated with, the character "Hazel" in a television series. The originator and copyright holder of the cartoon creation "Hazel" licensed the defendants to use the cartoon character in laundry detergent commercials; but in giving the *cartoon* character a voice for the first time, defendants hired someone to do a voice-over imitation of Booth's voice as heard in the "Hazel" television series.[72] Again, however, the court held that "the imitation by defendants of plaintiff's voice without more" was insufficient to state a cause of action.[73] *Booth* is analogous to both *Sinatra* and *Davis* in that the subject matter of the license was apparently valuable to the defendants only when accompanied by the distinctive qualities provided by, and associated with, the respective plaintiffs.[74]

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71. 362 F. Supp. 343 (S.D.N.Y. 1973).

72. *Id.* at 345.

73. *Id.* at 347. *But see* Gardella v. Log Cabin Products Co., 89 F.2d 891 (2d Cir. 1937), in which the plaintiff, known for her portrayal of "Aunt Jemima," brought suit against defendants who broadcast radio commercials allegedly imitating the singing and dialogue voices of "Aunt Jemima." The court said that the plaintiff "may be protected against counterfeiting which deceives the public and perpetuates a fraud upon the public and herself. . . . [Defendant] would have no right to trade upon her reputation or to pass off an imitation of her singing or form of entertainment which either caused deception, . . . or was likely to do so." *Id.* at 895 (citations omitted). One court has distinguished *Gardella* solely on the basis that it was decided prior to the *Sears-Compco* decisions. Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d at 716 n. 11.

74. This type of situation, involved in *Sinatra*, *Davis* and *Booth*, in which the performer's distinctive rendition is the preeminent feature of a particular work, can be profitably compared with certain established copyright law concepts. The first of these relates to derivative works, which are those works "based upon one or more pre-existing works . . . [and] which, as a whole, represent . . . original work[s] of authorship . . . ." 17 U.S.C. § 101 (1976). Thus, any work which is substantially based on another work may be separately copyrighted, if it does not itself constitute an infringement, and as long as it satisfies the requirements of originality. NIMMER, *supra* note 55, § 3.01. The originality requirement is satisfied by anything that renders the derivative work a "distinguishable variation" from the prior work, *id.* § 3.03, and the protection accorded a derivative work by copyright extends only to those original elements in the work, without altering whatsoever the scope of protection accorded the pre-existing work. *Id.* § 3.04. Correspondingly, in the *Sinatra*, *Davis* and *Booth* cases, the plaintiffs' performances were indeed based upon pre-existing works, but included such original stylistic contributions so as to make them clearly distinguishable from either the underlying work itself, or from other renditions of the same work. Moreover, any protection accorded to the specific efforts of the respective plaintiffs would not have to have any effect on the rights of the proprietors of the underlying works.

A similar comparison can be drawn with the copyright protection of fictional characters. The issue there is whether a character can be protected independently of the work in which that character appears. Although there is conflict on the issue, *see generally* NIMMER, *supra* note 55, § 2.12, the principle is most often stated to be that the more developed and distinctive a character is, the more likely it can be copyrighted. Nichols v. Universal Pic-

Performers have had somewhat greater success in situations involving no underlying copyrighted work. For example, in *Lahr v. Adell Chemical Co.*,[75] actor-comedian Bert Lahr brought suit against the producer of a television commercial which featured a cartoon duck whose voice imitated Lahr's unique voice and manner of comic delivery. The appellate court reversed the trial court's dismissal of Lahr's complaint, recognizing that an anonymous imitation of his notorious vocal style did, in fact, give rise to a cause of action for injury to his professional reputation as an entertainer.[76]

Finally, in the early case of *Chaplin v. Amador*,[77] Charles Chaplin

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tures Corp., 45 F.2d 119, 121 (2d Cir. 1930). Even courts taking a more restrictive view of the copyrightability of characters would grant protection to a character that "really constitutes the story being told." Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys., Inc., 216 F.2d 945, 950 (9th Cir. 1954). By the same token, the performance styles of the *Sinatra*, *Davis* and *Booth* plaintiffs were so developed and distinctive that they really constituted the valuable element of the subject matter involved, evidenced by the defendants' deliberate imitation of their styles. In other words, the principal appeal of the works to the defendants lay with the plaintiffs' particular style and rendition, rather than the underlying piece itself.

Finally, copyright law also affords protection to the literal form of expression of a factual account, notwithstanding the unavailability of copyright protection for the facts themselves, as long as such literal form evidences some originality. NIMMER, *supra* note 55, § 2.11 [b]. Such protection prohibits verbatim or even closely paraphrased copying. *Id.* Likewise, the *Sinatra*, *Davis* and *Booth* plaintiffs' original and distinctive forms of expressing an existing work should be the subject of analogous safeguards, notwithstanding the independent protection accorded to the underlying work.

In brief, the essential rationale supporting each of these copyright concepts applies equally to unique and distinctive performance styles: that of protecting manifestations of original and distinguishable intellectual creations. Nevertheless, for a discussion of the unavailability of the copyright laws themselves for offering adequate protection for performers, see notes 176-84 *infra* and accompanying text. See notes 84-86 *infra* and accompanying text for a delineation of the type of protection advocated for performance style.

75. 300 F.2d 256 (1st Cir. 1962). *Cf.* Sim v. H.J. Heinz Co., [1959] 1 W.L.R. 313, in which a well-known British actor with a readily identifiable voice sued to enjoin defendants from using an alleged imitation of his voice in a commercial. An interlocutory injunction was denied, but the court nevertheless concluded that it would be "a grave defect in the law if it were possible for a party, for the purpose of commercial gain, to make use of the voice of another party without his consent." *Id.* at 317.

76. 300 F.2d at 258. The court in *Lahr* suggested that plaintiff's action could be based on grounds of defamation ("A charge that an entertainer has stooped to perform below his class may be found to damage his reputation." *Id.*) or unfair competition ("[P]laintiff here is not complaining of imitation in the sense of simply copying his material or his ideas, but of causing a mistake in identity. Such passing off is the basic offense." *Id.* at 259). For a discussion of the general inadequacies of both of these theories of protection, see notes 172-75 and 154-67 respectively, *infra*, and accompanying text.

Some commentators have labeled the *Lahr* decision as "inconclusive" because it was decided prior to the *Sears-Compco* cases, Liebig, *supra* note 57, at 44, or because the court's opinion only vacated the lower court's dismissal of the complaint and remanded for further proceedings, *Right of the Performing Artist*, *supra* note 54, at 94.

77. 93 Cal. App. 358, 269 P. 544 (1928).

sought to enjoin the defendant from appearing in a movie under the name of "Charlie Aplin" and from imitating the make-up, dress, mannerisms and antics that the plaintiff had made famous in his characterization of the "Little Tramp". The court recognized Chaplin's portrayal as the creation of a unique character expression,[78] and acknowledged his "right to be protected against those who would injure him by fraudulent means; that is by counterfeiting his role . . . ,"[79] and enjoined the defendant "from imitating the plaintiff in such a way as will deceive and defraud the public."[80]

Because it has rarely, if ever, been followed, the *Chaplin* case may serve as a somewhat unreliable foundation for protection against style imitation. It may simply represent the outside limitations to be placed on imitation when it reaches the level of actually perpetrating a fraud on the public. Nevertheless, the important factor shared by *Chaplin* and the other cases discussed is that each involves "the *admitted, deliberate* appropriation by defendant of a vehicle, termed 'style,' through which a character or idea was expressed by the plaintiff, *without disclosing* to the public that defendant's 'expressor' was not the plaintiff."[81]

In addition, all of the cases, with the exception of *Booth*, have in common the fact that the plaintiffs failed to rely on the right of publicity for protection. In *Booth*, the court did acknowledge the plaintiff's allegation of a right of publicity violation, but succinctly rejected it, reasoning that the right had to be supported by a showing that plaintiff's "name or a likeness was used by defendants."[82] Inasmuch as they did not use either Booth's name or likeness, the commercials in question were viewed by the court as anonymous, and the fact that the voice was as readily identifiable as Booth's name or picture was irrelevant. The court thus found no publicity right infringement.[83]

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78. The court accepted the trial court's findings that
> the plaintiff is the first person to use the said clothes . . . that he originated, combined and perfected the manner of acting and mannerisms . . . mentioned herein as used in motion pictures, and . . . that the plaintiff is the first person to originate, use, combine and perfect . . . that certain form of acting, those mannerisms, facial expressions and movements of his body . . . .

Id. at 363, 269 P. at 545.

79. *Id.*, 269 P. at 546.

80. *Id.* at 364, 269 P. at 546 (emphasis omitted).

81. *Performer's Style*, *supra* note 53, at 562 (emphasis in original).

82. 362 F. Supp. at 347.

83. *Id.* The *Booth* court exhibited an obvious misconception of the nature of the right of publicity, treating it merely as a theory on which to base a claim of unfair competition, rather than as an independent legal right. There has been recurrent confusion of the publicity right as a form of the right of privacy (see notes 7-50 *supra* and accompanying text), but the *Booth* court's misstatement appears to be a rather novel one.

The right of publicity, if it is realistically to protect a performer's proprietary interest in his or her personality, cannot be limited so literally to "name and likeness." The inevitable result of the unduly strict construction employed by the *Booth* court, combined with the unavailability of any viable alternative theory, prompts the advocation of the following principle (originally suggested by a rather foresightful commentator,[84] but without any specific label), as the most expedient delineation of the right of publicity:

> Where A, without B's consent, makes an unconscionable use of B's name, *or any essential and identifiable part of B's personality* for any purposes of his own and A's act has caused, or will probably cause, injury to B's reputation, or loss to him in his property, business or profession, . . .[85]

A will be liable for infringing B's right of publicity. Such a rule would finally give recognition to the fact that "[a] voice," and, it is submitted, any other distinct personal trait or developed style, "which *identifies* a famous [person] as clearly as does his name or likeness . . . present[s] simply another manifestation of personality that ought to be likewise protected against *commercial* use."[86]

Application of this formulation to the foregoing fact situations results in the conclusion that in each case the plaintiffs' rights of publicity were infringed upon. In each case, the performer created a unique style, consisting of a single perfected characteristic or of a combination of voice, gestures, and mannerisms; or the performer developed a form of expressing his or her personality or some personal trait to the point that it had a distinctive existence of its own and became identifiable by the public. And in each case the defendant deliberately appropriated—through imitation—that product of the plaintiff's professional efforts.

In the cases discussed above, the injury requirement of the suggested standard was fulfilled. It is indisputable that the use of a prominent performer's persona in connection with the promotion of commercial products has great pecuniary value, as is the fact that the prominence that permits such an economic return may have been reached only after the performer has invested considerable expense, ef-

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84. Comment, *Torts—Libel—"Passing Off" of Actor's Voice—Appropriation of Another's Personality Without His Consent—An Equitable Right of Privacy?*, 39 CAN. B. REV. 409 (1960) [hereinafter cited as *"Passing Off" of Actor's Voice*].

85. *Id.* at 413 (emphasis added). The author therein concludes that protection should be granted equitably through injunction, *id.*, but not necessarily under the rubric of a right of publicity. *Id.* at 431.

86. Netterville, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary*, 35 S. CAL. L. REV. 225, 253 (1962) [hereinafter cited as Netterville].

fort, skill and time.[87] In each of the cases above, the defendant's unauthorized appropriation converted the pecuniary value in the plaintiff's style to the defendant's own advantage, allowing him or her to acquire the benefits of the performer's investment in him or herself.[88]

The specific injury to the plaintiff may consist of the denial of compensation for the use of a creation for which plaintiff otherwise would have been paid. This occurs in a situation in which the defendant's actions have the effect of replacing the plaintiff who has been divested of "the opportunity to exploit the valuable attributes of his [or her] public personality."[89] Such an occurrence is undoubtedly common. It is surely a rare advertiser who would pay a prominent performer for a product endorsement when the benefit of the performer's supposed association with the product can be gained at a much lower cost by imitating him or her. The current law provides no deterrent to such a course of action. Additionally, the unauthorized use may injure the future earning capacity of the performer in a number of ways: by precluding future endorsements of the performer's choice, such as those that would conflict with products the performer had previously been associated with involuntarily by virtue of the defendant's actions; by over-exposing the plaintiff so as to impede his or her career; or by associating the plaintiff with an inferior or questionable product, thereby implying an endorsement of that product,[90] with the probable concomitant damage to his or her professional reputation.[91] Finally, and most

87. Rosemont Enterprises, Inc. v. Urban Sys., Inc., 72 Misc. 2d 788, 790, 340 N.Y.S. 2d 144, 146 (Sup. Ct.), *aff'd as modified*, 42 A.D. 2d 544, 345 N.Y.S. 2d 17 (1973); Nimmer, *supra* note 1, at 215-16.

88. The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay.

Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 331 (1966), *cited in* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977). *See* Palmer v. Schonhorn Enterprises, Inc., 96 N.J. Super. 72, 232 A.2d 458 (Ch. 1967).

89. Netterville, *supra* note 86, at 274. This type of injury was especially evident in the *Sinatra* case, in that it was clear that the defendants were originally interested in securing Sinatra's employment, but were unsuccessful in reaching an agreement with her. 435 F.2d at 713.

90. *See* Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 642-47 (1973). The author therein predicates his argument for protection of public figures from unauthorized product endorsement primarily upon the effects of such conduct on the public. *See also* Lugosi v. Universal Pictures, 25 Cal. 3d 813, 836 n. 11, 603 P.2d 425, 439 n. 11, 160 Cal. Rptr. 323, 337 n. 11 (1979) (Bird, C.J., dissenting).

91. This type of injury to one's professional reputation is to be distinguished from the type involved in the *Lahr* case, discussed at note 76 *supra* and accompanying text. In *Lahr*, the very fact of a performer's apparent association with an advertisement was thought to

importantly, an infringement of a performer's right of publicity via imitation of style violates the performer's "right to enjoy the fruits of his own industry,"[92] as well as the right of exclusive control over the exploitation of the publicity values he or she has created,[93] and hence over his or her very means of livelihood.[94]

The courts in the *Sinatra*, *Davis*, and *Booth* cases unfortunately failed to recognize any need for protecting a performer's style and personality traits. Rather, they considered themselves bound by the judicial stricture that "[i]mitation alone does not give rise to a cause of action."[95] In none of these cases, however, did the court offer any judicial precedence for this statement,[96] which is equally void of legal reasoning. The United States Supreme Court, on the other hand, has provided reasoning that compels a contrary conclusion, by drawing a very appropriate parallel between the right of publicity and patent and copyright laws. In *Zacchini v. Scripps-Howard Broadcasting Co.*,[97] the Court noted that intellectual property is protected under patent and copyright laws pursuant to "the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts,' "[98] and declared that the right of publicity has the same purpose.

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harm his/her reputation by implying that he/she was forced to accept supposedly inferior means of employment. On the other hand, in the type of situation referred to here, there is not necessarily any disparagement stemming solely from the performer's ostensible activity in commercials, but rather from the impression that the performer has sold his/her identity for that particular product or purpose.

92. Uhlaender v. Henricksen, 316 F. Supp. at 1282.

93. Nimmer, *supra* note 1, at 216.

94. *Performer's Style*, *supra* note 53, at 591.

95. Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d at 713; Davis v. Trans World Airlines, 297 F. Supp. at 1147; *see* Booth v. Colgate-Palmolive Co., 362 F. Supp. at 347.

96. It has been aptly noted that "[s]uch . . . language can have its genesis in a first decision, be quoted and followed by successive decisions, and ultimately become the 'law of the land' even though the original language is devoid of legal support or reasoning." Duft & Dorr, *Patents, Trademarks, Copyrights and Unfair Competition* 52 DEN. L.J. 313, 321 (1975).

It might be presumed, however, that the courts somehow deduced the statement from the *Sears-Compco* doctrine, in that the doctrine was often discussed in conjunction with the statement. But such a remark taken out of context, as it was here, can frequently lead to a distorted statement of the law. Specifically, the premise attributed to the *Sears-Compco* decisions should be clarified by noting that imitation does not give rise to a cause of action only if the subject matter copied is susceptible to protection by copyright or patent law, but is not so protected. On the other hand, where a protected work is involved, imitation is expressly what gives rise to liability. *See* note 100 *infra* and accompanying text. For a further discussion of the *Sears-Compco* doctrine and the fact that it does not hamper the right of publicity, see notes 108-19 *infra* and accompanying text.

97. 433 U.S. 562 (1977).

98. *Id.* at 576 (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954)).

The Court recognized that the publicity right, like the patent and copyright laws, offers protection that provides a strong incentive to make the investment, in terms of time and creative effort, to develop the talents and qualities necessary for public recognition and prestige.[99] A natural corollary to the analogy between the copyright laws and the publicity right is the refutation of the *Sinatra*, *Davis* and *Booth* courts' holdings. Under present copyright law, it is precisely an *imitation* of a copyrighted work—one that shows merely a "substantial similarity" to the protected work—that gives rise to a cause of action for copyright infringement.[100] By parity of analysis, the deliberate imitation of a performer's unique style or personality trait that is protected by the publicity right should give rise to an analogous cause of action.

The *Sinatra*,[101] *Booth*,[102] and *Lahr*[103] courts all expressed concern about the difficulties to be encountered by the courts in according protection to performers' styles. It has similarly been argued that it would be impossible for the courts to establish practicable standards for evaluating possible liability in imitation cases.[104] The analogy to the body of copyright law is also instructive in this regard. From the copyright perspective, in determining whether the "substantial similarity" standard has been met, the courts normally rely on an "ordinary observer" test, which asks "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted

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99. *Id.* at 576-77. In *Zacchini*, the right of publicity was actually applied to the appropriation of a performer's entire act (a news broadcast of the plaintiff's "human cannonball" act), rather than to his name, likeness or personality.

One commentator has suggested that in terms of the copyright-publicity right analogy, a distinction must be drawn between performance infringement, as involved in *Zacchini*, and the more "traditional" right of publicity. Note, *State "Copyright" Protection for Performers: The First Amendment Question*, 1978 DUKE L.J. 1198, 1221 (1978) [hereinafter cited as *State "Copyright" Protection for Performers*]. This author submits, however, that it is a distinction without a difference. The protection accorded by both the copyright laws and the right of publicity, whether applied to an entire performance or only a distinctive element thereof, promotes creativity and safeguards a performer's means of livelihood.

100. The case law on this test is extensive. For a survey thereof and specific citations, see NIMMER, *supra* note 55, § 13.03 [A]. Although the test is not specified in the New Copyright Act, which took effect January 1, 1978, this standard was clear under the Old Act, and it seems unlikely that it has changed.

101. 435 F.2d at 718.

102. 362 F. Supp. at 347.

103. 300 F.2d at 259.

104. Liebig, *supra* note 57, at 46. *See also* Comment, *The Rights of Performers in the New Copyright Act and Beyond*, 30 FED. COM. L.J. 149, 169 (1978), [hereinafter cited as *The Rights of Performers*] ("If novelty or some special kind of merit were required for the original performance to obtain protection, the courts would be involved in artistic criticism and evaluation, tasks which they are ill-equipped to perform.").

work."[105] Applying the same criterion to style protection should resolve the doubts expressed by the courts. Specifically, if the ordinary individual either listened to an otherwise anonymous voice imitation and recognized it as that of a celebrity, or viewed a performance utilizing the unique mannerisms, gestures and dress associated with a particular performer and recognized it as a copy of that performer, then style appropriation would be found,[106] and the performer's right of publicity would be found to have been violated. The deliberate imitation of a performer's unique style is as perceptible to the "ordinary observer" as is any imitation giving rise to a copyright infringement action. In other words, inasmuch as "there has been little difficulty in establishing tests for judging the existence of infringement in other artistic areas, style should be no exception if viewed in its most elementary form—the work product of creative effort,"[107] and if protected by the right of publicity as delineated above. Moreover, the mere fact that the rule advocated may ultimately be difficult to apply in no way lessens the deservedness of the protection it would afford.

IV. Overcoming Conflicting Legal Doctrines

A. Federal Preemption

In the *Sinatra*, *Davis*, and *Booth* cases, a major stumbling block to the plaintiffs' attempts to obtain protection for performance style was the courts' reliance on the preemption doctrine, emanating from the Supreme Court's decisions in *Sears, Roebuck & Co. v. Stiffel Co.*[108] and *Compco Corp. v. Day-Brite Lighting, Inc.*.[109] These two cases held that works that are not protected by federal copyright or patent laws are not otherwise protectible by state law. Inasmuch as the creative efforts of Sinatra, Booth and The Fifth Dimension were not subject to copyright law, the courts reasoned that the plaintiffs could not look to state law for protection.[110]

Nevertheless, this contention is no longer tenable, as illustrated by

105. Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 194 U.S.P.Q. 347, 350 (1977) (quoting United Merchants Mfg., Inc. v. K. Gimbel Accessories, Inc., 294 F. Supp. 151, 154 (S.D.N.Y. 1968) and Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966)).

106. *Performer's Style*, *supra* note 53, at 573.

107. *Id.* at 574. The author therein concludes, however, that the proper means for protecting performance style is copyright law. For a contrary conclusion, see notes 167-75 *infra* and accompanying text.

108. 376 U.S. 225 (1964).

109. 376 U.S. 234 (1964).

110. For a discussion of the inadequacies of copyright law in protecting performance style, see notes 176-84 *infra* and accompanying text.

two subsequent Supreme Court decisions.[111] In *Goldstein v. California*[112] (involving copyright law), and *Kewanee Oil Corp. v. Bicron Corp.*[113] (involving patent law), the Court, while not expressly overruling *Sears-Compco*, rejected an interpretation of the doctrine that would require the preemption of all state laws granting protection analogous to the copyright and patent laws. Instead the Court recognized that common law schemes of protection, where not expressly or by obvious implication preempted by federal law, do play a legitimate role, concurrent with federal law, in protecting intellectual property.[114] More significantly, any remaining doubt on this issue was resolved by the *Zacchini* decision, in which the Court, citing both *Goldstein* and *Kewanee*, specifically acknowledged the legitimacy of the right of publicity and stated that "[t]he Constitution does not prevent [a state] from . . . deciding to protect the entertainer's incentive in order to encourage the production of this type of work."[115]

In addition, the New Copyright Act[116] supports the conclusion that the right of publicity is unhampered by the preemption doctrine. The Act eliminates the former distinction between common law copyright and federal stautory copyright by providing that the federal copyright laws will preempt all legal and equitable rights that are the equivalent of federal copyright.[117] But the preemption provisions contain exceptions that allow states to provide statutory or common law

111. *See* Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 846 (S.D.N.Y. 1975).

112. 412 U.S. 546 (1973). In *Goldstein*, the Court upheld the constitutionality of a California penal statute prohibiting the piracy of sound recordings which, at that time, were not subject to federal copyright protection:

> [W]here Congress determines that neither federal protection nor freedom from restraint is required by the national interest, it is at liberty to stay its hands entirely. Since state regulation would not then conflict with federal action, total relinquishment of the State's power to grant copyright protection cannot be inferred.

Id. at 559.

113. 416 U.S. 470 (1974). The *Kewanee* case upheld the validity of Ohio's trade secret law. The Court stated that "[t]he only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress . . . ." *Id.* at 479.

114. Not only does *Goldstein* offer the opportunity to states for "tailor-made" legislation dependent upon individual needs, it also gives the unique opportunity to test the feasibility of copyright protection in new areas on a localized basis without resort to federal copyright protection until such time as interpretative case law emerges. In particular, New York and California, as centers of the entertainment industry are presented with a challenge to respond to the needs of those "authors" of "style" which heretofore have gone unheard.

Performer's Style, *supra* note 53 at 579 n.57 (citing Kaul, *And Now, State Protection of Intellectual Property?*, 60 A.B.A.J. 198, 202 (1974)).

115. 433 U.S. at 577. *See* notes 97-99 *supra* and accompanying text.

116. 17 U.S.C. app. §§ 101-702 (1976 & Supp. III 1979).

117. *Id.*, § 301.

protection for non-copyrightable subject matter,[118] and the House Committee Report specifically includes the right of publicity among those state causes of action that were not intended to be preempted.[119] Thus, the courts' holdings in *Sinatra*, *Davis*, and *Booth*, at least insofar as they rely on the *Sears-Compco* preemption doctrine, should no longer be considered authoritative.

B. Parody, Mimicry, and Satire

On cursory examination, the proposition advanced herein, that a performer's unique style and personality traits should be protected under the rubric of the right of publicity, would seem rather outrageous if applied too broadly so as to preclude the imitation of distinctive performance style for purposes of pure entertainment. Therefore it must be emphasized that it is not this form of imitation that should be the subject of inquiry; instead, a distinction must be drawn between appropriation for commercial (advertising) purposes and entertainment uses.[120]

The concepts of parody, mimicry, and satire, in the appropriate circumstances, should be regarded as exemptions from the publicity right advocated. They are analogous to the fair use doctrine in copyright law, which establishes the basic principle that a copyright is not infringed, nor damages assessed or further copying enjoined, if the copyrighted material is used in a fair and reasonable manner.[121] The doctrine is generally accepted as a defense to copyright infringement when the allegedly infringing acts are deemed to be outside the legitimate scope of protection afforded copyright owners.[122] Similarly, fair

118. *Id.*, § 301(b)-301(c).

119. H.R. REP. No. 1476, 94th Cong., 2d Sess. 132 (1976) [hereinafter cited as HOUSE REPORT].

120. One commentator has observed that the distinction may not always be justified, and that even purely entertainment purposes may also be actionable where a continuing, as opposed to sporadic, use is made so as to divest the performer of the opportunity to fully exploit the valuable attributes of his or her persona. Netterville, *supra* note 86, at 254.

121. *See, e.g.*, H. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY § 125 (1944). The judicially created doctrine of fair use has been given statutory recognition in the New Copyright Act, 17 U.S.C. § 107, but the House Committee Report relative to this section expresses the intention to restate the judicial doctrine, and "not to change, narrow, or enlarge it in any way." HOUSE REPORT, *supra* note 119, at 66.

122. *See, e.g.*, Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348 (S.D. Cal. 1955) (involving a burlesque of the movie "From Here to Eternity" entitled "From Here to Obscurity"); Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (involving Mad Magazine's parodies of the lyrics of plaintiff's songs). *Cf.* Loew's, Inc. v. Columbia Broadcasting Sys., Inc., 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom* Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally*

and reasonable instances of parody, mimicry or satire may be deemed to be outside the legitimate scope of protection to be accorded by the publicity right.

Imitation, in the form of mimicry, parody or satire, is an exercise of the mimic's or humorist's own developed talents.[123] The distinction has been appropriately explained as follows: "[W]here the imitation is of another's unique performance, actions, gestures, tones, etc., and where the imitator's own excellence of talent contributes materially to the acceptability of the imitation and where the imitation is done in good faith, the imitation is not an example of literary larceny,"[124] and thus, would not constitute a right of publicity violation.

The problem encountered, of course, is determining where to draw the line between permissible and infringing imitation. Again, reference to copyright law is instructive. In the majority of cases involving the fair use doctrine, the dispositive issue concerns the extent to which the potential demand for the plaintiff's protected work has been decreased by the defendant's use.[125] Likewise, in imitation cases the determinative factor may be whether or not the imitating performance has the effect of replacing the plaintiff,[126] that is, whether the imitator is acting as a substitute for the plaintiff[127] or lessening the demand for him or her.

Alternatively, it has variously been suggested that the test for establishing liability should be whether it is made to appear that there is an actual association between the plaintiff and imitating performance,[128] or simply whether the imitator is " 'flying under his own ban-

divided court, 356 U.S. 43 (1958), in which Jack Benny's burlesque version of the movie "Gas Light" was found to involve such a substantial taking of plaintiff's copyrighted work as to constitute an infringement.

123. *See* Bloom & Hamlin v. Nixon, 125 F. 977 (C.C.E.D. Pa. 1903).

124. Netterville, *supra* note 86, at 249.

125. KINTNER & LAHR, *supra* note 7, at 425. *See, e.g.*, Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) ("[W]here . . . the parody has neither the intent nor the effect of fulfilling the demand for the original . . . a finding of [copyright] infringement would be improper."). In *Berlin*, for example, the court noted that "Louella Schwartz Describes Her Malady" would not be a likely substitute for a potential patron of "A Pretty Girl Is Like a Melody." 329 F.2d at 543.

The New Copyright Act codifies this principle by including as a factor to be considered in determining whether a use is fair, "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). *See generally* NIMMER, *supra* note 55, § 13.05[B].

126. Netterville, *supra* note 86, at 274.

127. The *Sinatra* case provides a good example of this, inasmuch as the defendants therein had tried to employ the plaintiff before resorting to a singer who could imitate her. 435 F.2d at 713.

128. *"Passing Off" of Actor's Voice*, *supra* note 84, at 425.

ner.' "[129] It would also seem quite appropriate to inquire into the defendant's motives for the allegedly infringing act.[130] Regardless of the test applied, however, recognition of imitation in the form of parody, mimicry or satire, where the imitator acts in good faith, as an independent creative effort properly distinguishes it from those cases in which the originating performer is, in fact, injured in one or more of the manners discussed above.[131]

C. *The First Amendment*

Although the first amendment was not raised as an issue in any of the cases reviewed earlier, and has not been examined in other publicity cases as often as one might expect, the possibility of conflict between the right of publicity and the constitutional guarantees of free speech and press[132] must be at least briefly confronted.[133]

Courts have generally agreed that the publication of news concerning a public figure cannot be restrained by an assertion of the right of publicity.[134] By contrast, however, the use of a performer's name, likeness, or style to enhance commercial advertising conveys neither information nor ideas and contributes virtually nothing to the promotion of first amendment values.[135] Indeed, it is difficult to find "as any

129. Netterville, *supra* note 86, at 250.

130. Such an inquiry would be analogous to the first factor specified in the New Copyright Act as a guideline in the determination of fair use: "[T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. app. § 107(1) (1976 & Supp. III 1979).

131. *See* notes 87-94 *supra* and accompanying text.

132. U.S. CONST. amend. I.

133. For more thorough discussions of the relationship between the first amendment and the right of publicity, see Kulzick & Hogue, *Chilled Bird: Freedom of Expression in the Eighties*, 14 LOY. L.A.L. REV. 57 (1980), *Performer's Right of Publicity*, *supra* note 7, and *State "Copyright" Protection for Performers*, *supra* note 99.

134. "[T]he 'right of publicity' [must] bow where such conflicts with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest." Rosemont Enterprises, Inc. v. Random House, Inc., 58 Misc. 2d 1, 6, 294 N.Y.S.2d 122, 129 (Sup. Ct. 1968), *aff'd mem.*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1969). This position receives additional support from the accurate observation that "[i]n the news broadcasting situation, plaintiff is not possessed of any property right. . . ." KINTNER & LAHR, *supra* note 7, at 459. *Cf.* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

135. *But see* Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968), in which the court held that publication of a poster featuring the plaintiff, a well-known comedian, in a satirical presidential campaign was constitutionally protected because it was "newsworthy and of public interest." *Id.* at 449, 299 N.Y.S.2d at 507. *Cf.* Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 222 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) (poster commemorating Elvis Presley's death not privileged).

It should also be noted that the assertion that the enhancement of advertising conveys no information differs from the proposition that commercial advertising itself conveys no

protected first amendment right a privilege to usurp the benefits of the creative and artistic talent, technical skills, and investment necessary to produce a . . . performance."[136]

Once again, any doubt on this issue was resolved by the *Zacchini* decision, in which the Supreme Court held that the first amendment does not prohibit a state from finding the news broadcast of a performer's entire act to be a right of publicity infringement.[137] Thus, even assuming a direct clash between the publicity right and the first amendment, the competing interests may weigh in favor of the former. On one hand, the state's interest in protecting the performer's economic stake in his or her performance and publicity values would, in the long run, promote the public's first amendment interest in access to entertainment.[138] On the other hand, the Court reasoned, the first amendment interests of the news media and the public in the free dissemination of information would not be served by allowing a defendant to enrich himself unjustly by appropriating a performer's creative efforts.[139]

Moreover, the Court impliedly accepted the proposition that enforcement of the right of publicity does not necessarily place any restraints on the dissemination of information, inasmuch as a defendant can invariably convey the same idea or concept in another way that does not violate another's publicity right.[140] In fact, it has been aptly

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information of public interest. Not only is the latter contention simply untrue, but the Supreme Court clearly refuted such a contention in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1975).

136. United States v. Bodin, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974).

137. 433 U.S. 562, 569-79 (1977).

138. *Id.* at 578. Additionally, in cases where a performer's name, likeness or style has been appropriated for advertisement or endorsement purposes, remedies provided by the right of publicity "may guard against the dissemination of false and misleading advertising," thus promoting first amendment values in another sense. *State "Copyright" Protection for Performers*, *supra* note 99, at 1221 n.121.

139. 433 U.S. at 578.

140. *Id.* at 577-78 n.13. *See also* Grant v. Esquire, Inc., 367 F. Supp. 876 (S.D.N.Y. 1973). The *Grant* case involved an interesting fact situation. In 1946, a photograph of Cary Grant was used with his consent by defendant, a magazine publisher, in connection with an article on celebrities' wardrobe and personal habits. In 1971, the magazine contained an article about the clothing styles of the seventies. Without obtaining Grant's consent, the defendant used the head from Grant's 1946 picture superimposed over the body of an unnamed model in modern apparel. The defendant contended that Grant's lawsuit (which included a cause of action for violation of his right of publicity) was barred by the first amendment. *Id.* at 878. The court rejected the argument, noting that if a publisher wants to trade upon a celebrity's name and reputation, it is free to do so, as long as it pays "the going rate for such benefit." *Id.* at 883. Furthermore, the court stated:

> With respect to any possible chilling effect . . . the Court can take judicial notice that there is no shortage of celebrities who—for an appropriate fee—are

suggested that the *Zacchini* decision may require "that any appropriation must be avoided if the underlying idea can be effectively conveyed in some alternative manner without diminishing the pecuniary value of name and likeness."[141] Indeed, such a requirement, if construed more broadly so as to give equal recognition to the pecuniary value of a performer's style and distinctive traits, would be a very appropriate means of enforcing the right of publicity as advocated in this Comment.

V. INADEQUACIES OF ALTERNATIVE THEORIES OF PROTECTION

The proposition that the right of publicity is the proper means for protecting performance style is reinforced by the fact that traditional legal theories have simply been proven inadequate. With rare exception,[142] both the courts and litigants have attempted to deal with the problem of style protection by relying on conventional causes of action; but in doing so they were "[grasping] at old straws to solve novel problems."[143] By contrast, application of the right of publicity would serve to fill in the gaps, and avoid the limitations of, alternative theories.

A. Right of Privacy

Among the cases discussed earlier, only the plaintiff in *Lahr* asserted an invasion of privacy.[144] Nevertheless, litigants seeking protection of their (more traditional) publicity values have frequently relied on the privacy doctrine, and thus their efforts have frequently been hampered.

The inherent distinctions between the rights of publicity and privacy that render the privacy theory inadequate, especially the differ-

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only too happy to lend their faces, names and reputations for exploitations in such enterprises as the one here involved. . . .

. . . .

. . . [T]he First Amendment does not absolve movie companies—or publishers—from the obligation of paying their help. They are entitled to photograph newsworthy events, but they are not entitled to convert unsuspecting citizens into unpaid professional actors.

Id. at 883-84 (footnotes omitted). Thus, *Grant* also seems to support the conclusion that even though a performer's name, likeness or identity is used in a "news medium," this fact alone does not render the publicity right's protection inapplicable. *Protection for Public Figures*, *supra* note 15, at 551.

141. *Descent of the Right of Publicity*, *supra* note 4, at 772.

142. *See* note 83 *supra* and accompanying text.

143. Netterville, *supra* note 86, at 252.

144. 300 F.2d at 257. The court quickly disposed of the claim: "We see no profit in exploring [the privacy] alternative and, if anything, thornier path." *Id.* at 258.

ences between the interests each theory protects,[145] the personal, rather than proprietary, nature of privacy,[146] and the respective measures of damages,[147] are discussed more fully in section II above. But in addition, other concepts normally associated with the right of privacy emphasize its unsuitability for style protection. The most important of these is the principle of waiver, which holds that the very fact of being a celebrity means that that person " 'has dedicated his life to the public and thereby waived his right to privacy.' "[148] Thus, a plaintiff may be deemed to have consented to the invasion of privacy either expressly or by conduct demonstrating that he or she was actually seeking publicity.[149] Even though most courts have adopted a more limited construction of waiver by affording protection to the aspects of a celebrity's private and non-professional life that are not made public,[150] this offers no comfort to the performer seeking protection from the appropriation of those personal attributes that, by definition, have not only been made public but have probably been widely promoted. The waiver doctrine, therefore, "presents a very real obstacle to the protection by a well known personality of the publicity values which often constitute an important part of his assets."[151]

Additionally, many courts continue to apply the *Restatement Second of Torts* rule that requires an intrusion to be patently offensive before an invasion of privacy action will lie.[152] Accordingly, because most of the appropriation that performers seek to prevent cannot be considered offensive or beyond the bounds of decency,[153] however upsetting it may be to the plaintiff, this rule also contributes to the inadequacy of the right of privacy as a source of performance style protection.

B. Unfair Competition/Misappropriation

The common law theory of unfair competition (and, within the

145. *See* notes 17-31 *supra* and accompanying text.

146. *See* notes 33-40 *supra* and accompanying text.

147. *See* notes 41-47 *supra* and accompanying text.

148. Nimmer, *supra* note 1, at 204 (quoting Yankwich, *The Right of Privacy*, 27 NOTRE DAME LAW. 499 (1952)).

149. PROSSER, *supra* note 13, at 817. *See* O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941), *cert. denied*, 315 U.S. 823 (1942) and Gautier v. Pro-Football, Inc., 304 N.Y. 354, 107 N.E.2d 485 (1952), discussed at notes 20-21 *supra* and accompanying text.

150. KINTNER & LAHR, *supra* note 7, at 453.

151. Nimmer, *supra* note 1, at 206.

152. RESTATEMENT (SECOND) OF TORTS § 652B (1976). *See* Nimmer, *supra* note 1, at 207 (although Professor Nimmer was citing RESTATEMENT OF TORTS § 867 (1939)).

153. Nimmer, *supra* note 1, at 207.

same category, misappropriation)[154] has been the primary source of reliance for performers seeking protection, and was invoked by the plaintiffs in the *Sinatra*, *Davis*, *Booth* and *Lahr* cases. Those cases exemplify the limits of unfair competition relief available to plaintiffs seeking protection for style.

First, an action for unfair competition traditionally requires a showing of actual competition between the plaintiff and defendant; but such competition rarely exists between performers and defendant appropriators.[155] Although the *Lahr* court did not regard the absence of competition as significant,[156] the courts in both *Booth*[157] and *Sinatra*[158] emphasized this factor in rejecting the plaintiffs' unfair competition claims.

Second, an unfair competition claim generally requires an additional showing of passing-off (or palming-off),[159] which consists of making false representations to the public that induce them to believe that the defendant's goods or services are those of the plaintiff. Such a showing is established by proof of the mere likelihood of confusion or deception.[160] In spite of the apparent applicability of this concept to the cases in question, and even though it was unnecessary for the plaintiffs to prove any fraudulent intent on the part of the defendants,[161] this

154. The misappropriation doctrine originated in the case of International News Serv. v. Associated Press, 248 U.S. 215 (1918), which held that the plaintiff news-gatherer could be protected against the appropriation of their news releases by a competing news agency. The Court found a "quasi-property" right in the product of the plaintiff's efforts, and said that the defendant's appropriation of those efforts represented an attempt to "reap where it has not sown" and thus constituted unfair competition. *Id.* at 236, 239.

The *International News Service* (*INS*) theory of misappropriation has been the source of much controversy. One court has stated that the *INS* case was overruled by the *Sears-Compco* decisions. Columbia Broadcasting System, Inc. v. DeCosta, 377 F.2d 315, 318-19 (1st Cir.), *cert. denied*, 389 U.S. 1007 (1967). On the other hand, another court has read the *Goldstein* decision as reviving *INS* and the misappropriation doctrine. Mercury Record Prod., Inc. v. Economic Consultants, Inc., 64 Wisc. 2d 163, 171, 218 N.W.2d 705, 713 (1974), *appeal dismissed*, 420 U.S. 914 (1975).

Regardless, the misappropriation doctrine needs to be acknowledged, and inasmuch as it is basically an "offshoot of the general law of unfair competition," 1 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 10:23, at 318, it is discussed within the rubric of unfair competion.

155. KINTNER & LAHR, *supra* note 7, at 457; Nimmer, *supra* note 1, at 210-11.

156. 300 F.2d at 259.

157. 362 F. Supp. at 348.

158. "There is no competition between Nancy Sinatra and Goodyear Tire Company. Appellant is not in the tire business and Goodyear is not selling phonograph records." 435 F.2d at 714.

159. KINTNER & LAHR, *supra* note 7, at 457; Nimmer, *supra* note 1, at 212.

160. PROSSER, *supra* note 13, at 957-58.

161. *Id.* at 958.

requirement also proved to be a significant obstacle to the plaintiffs' relief. Again, the courts in *Sinatra*[162] and *Davis*[163] found that there had been no passing-off by the defendants because it had not been shown that the defendants tried to mislead the public into believing that the commercials in question were the products of the plaintiffs. Neither court, however, recognized the irrelevance of the presence or absence of such intent to mislead, nor did they comment on the possibility that the public may have been deceived, notwithstanding any finding of a lack of intent on the defendant's part. Even so, it seems particularly ironic to state that there had been no passing-off when, in fact, the defendants had intentionally and admittedly imitated the respective plaintiffs.[164]

Beyond that, it has been noted that the passing off requirement, and with it, the unfair competition theory in general, is inappropriately applied to publicity right cases because the pecuniary values involved may be usurped even without any passing-off by the defendant.[165] Additionally, even though there has been a liberalizing trend in the area of unfair competition, so that recovery will not automatically be denied in the absence of either a competitive atmosphere or passing off,[166] the absence of both requirements will probably defeat an unfair competi-

162. 435 F.2d at 714.

163. 297 F. Supp. at 1147.

164. *See* notes 60-61 and 68 *supra* and accompanying text.

165. Nimmer, *supra* note 1, at 212. One commentator distinguishes misappropriation from unfair competition in this regard, stating that the misappropriation doctrine dispenses with the palming-off requirement, and concludes that there are thus no difficulties encountered in applying the doctrine to situations in which the performer has created the expression of a character. *Performer's Style*, *supra* note 53, at 585-86. Even accepting the lesser requirements of misappropriation, the doctrine remains unsuitable because "a cause of action grounded on misappropriation must allege direct competition with the plaintiff by the use of plaintiff's appropriated materials." Note, *Misappropriation: A Retreat from the Federal Patent and Copyright Preemption Doctrine*, 43 FORDHAM L. REV. 239, 241 (1974). Thus, it is on the same level as general unfair competition theory in terms of inadequacy for style protection purposes. Furthermore, it has been noted that misappropriation is the state common law action most likely to be limited by the New Copyright Act's preemption provisions, *The Rights of Performers*, *supra* note 104, at 159 n.69, despite the fact that the Copyright Act states that it is not to annul or limit "any rights or remedies under the common law or statutes of any State with respect to—activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified." 17 U.S.C. app. § 301(b)(3) (1976 & Supp. III 1979). Interestingly, this section of the Act as reported in the HOUSE REPORT, *supra* note 119, at 24, specifically provided that the right left unaffected included "rights against misappropriation not equivalent to any such exclusive rights" as specified in the Act. *See generally*, NIMMER, *supra* note 55, § 1.01[B][1].

166. *See, e.g.*, Metropolitan Opera Ass'n, Inc. v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), preliminary injunction *aff'd per curiam*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951). In that case, the plaintiff sought to enjoin the defendant from recording performances of the Metropolitan Opera broadcast over the air and distributing those recordings. The court noted that neither palming off nor actual competition

tion cause of action.[167]

Finally, even assuming that the requirements of passing off and actual competition do not thwart an unfair competition claim, another attribute of the theory may have the same effect. Generally, under unfair competition law (and as one branch of it, trademark law), the right to use a name can only be assigned as an appurtenance to the sale of the business and good will with which that name has become so associated[168] as to have acquired a secondary meaning serving to indicate the

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were prerequisites to an unfair competition claim, 199 Misc. at 795-96, 101 N.Y.S.2d at 491-92, and stated that:

> The modern view as to the law of unfair competition does not rest solely on the ground of direct competitive injury, but on the broader principle that property rights of commercial value are to be and will be protected from any form of unfair invasion or infringement and from any form of commercial immorality . . . .

199 Misc. at 796, 101 N.Y.S.2d at 492.

Such broad language would seemingly support the contention that unfair competition theory can and should render all the protection necessary. But the court's statement was actually dicta, since both passing-off and competition were found to exist as a matter of fact. Moreover, the plaintiff in Booth v. Colgate-Palmolive Co., 362 F. Supp. at 345, relied on the *Metropolitan Opera* case, but the court distinguished it as involving a direct appropriation rather than limitation. Finally, Nimmer has pointed out that the language used by the court is simply too uncertain to have any practical application. Nimmer, *supra* note 1, at 214.

167. Nimmer, *supra* note 1, at 213. *But see* Shaw v. Time-Life Records, 38 N.Y.2d 201, 379 N.Y.S.2d 390 (1975). In *Shaw*, the plaintiff brought an unfair competition action alleging that a re-creation of a big band era performance style could be proven at a trial to create a false impression that the original bandleader had participated in the recording (thereby constituting passing-off), even though the infringing product was actually labeled truthfully. The *Shaw* court took a broad view of misappropriation, finding an occurrence of unfair competition by showing only that the misappropriation had been engaged in, and that the plaintiff had been injured. *Id.* at 206-07, 379 N.Y.S.2d at 395.

168. *See* Nimmer, *supra* note 1, at 212. The effect of this principle, as well as the problems to be encountered by reliance on unfair competition theory, is exemplified by the decision in Lugosi v. Universal Pictures, 25 Cal.3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979), discussed in note 36 *supra*. The *Lugosi* court suggested that the only way to protect one's publicity values was through the establishment of a business:

> Lugosi could have created during his lifetime through the commercial exploitation of his name, face and/or likeness in connection with the operation of any kind of business or the sale of any kind of product or service a general acceptance and good will for such business, product or service among the public, the effect of which would have been to impress such business, product or service with a secondary meaning, protectable under the law of unfair competion. . . . The tie-up of one's name, face and/or likeness with a business, product or service creates a tangible and saleable product . . . .

Id. at 818, 603 P.2d at 428, 160 Cal. Rptr. at 326 (citation omitted).

Since Lugosi had not created such a business, the publicity value of his name, likeness and identity were afforded no protection. Had the court accepted the right of publicity as a doctrine distinct from either privacy or unfair competition law, and acknowledged the fact that one's name, likeness and identity are very saleable products even when not "tied-up" with a particular business, the result would most assuredly have been different.

See also Booth v. Colgate-Palmolive Co., 362 F. Supp. 343, 347-48 (S.D.N.Y. 1973), in which plaintiff's secondary meaning theory was rejected.

origin of the business' products.[169] But most performers' publicity values have been established, not in connection with a particular business, but rather through the efforts expended over the course of many performances and appearances.[170] Inasmuch as these values are tremendously restricted if they cannot be effectively assigned,[171] this factor enforces the conclusion that unfair competition theory remains an unsatisfactory means of protection for performers.

C. Defamation

The theory of defamation[172] may also be available to performers, at least where the defendant has created the impression that the plaintiff has been forced to accept performance opportunities below an acceptable status. This was essentially the holding of the *Lahr* court.[173] But inasmuch as not all appropriations are disparaging, a defamation claim will provide inadequate protection if it is upheld only when the performer's attributes are used in an offensive manner.[174] The *Booth* court apparently recognized this when it rejected a claim similar to Lahr's based on the observation that commercial endorsements by performers are quite commonplace and no longer necessarily imply any diminution in talent.[175] (There are undoubtedly performers who would vigorously disagree with this conclusion, however.)

A defamation claim is even more tenuous when it is based on the allegedly inferior quality of the imitation of the plaintiff. This type of allegation may actually refute the plaintiff's claim that the imitation is so similar to plaintiff's unique style as to deceive the public regarding its originator. Absent such a confusion of identity there could be no defamation. On the other hand, the possibility does exist that the imitation is sufficiently similar to the original performance as to cause confusion, but is obviously inferior in quality. In this admittedly implausible situation it would seem that a claim for defamation may be asserted.

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169. KINTNER & LAHR, *supra* note 7, at 237.

170. Nimmer, *supra* note 1, at 213.

171. *See* notes 39-40 *supra* and accompanying text.

172. Defamation as referred to herein can be defined as "that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held." PROSSER, *supra* note 13, at 739.

173. "A charge that an entertainer has stooped to perform below his class may be found to damage his reputation." 300 F.2d at 258.

174. Nimmer, *supra* note 1, at 215.

175. 362 F. Supp. at 349.

D. Federal Copyright Law

Although one commentator has argued extensively that performance style can, and should, qualify for copyright protection,[176] such a conclusion is questionable. To the contrary, copyright law does not provide a viable alternative to the type of protection advocated herein.

The copyright clause of the Constitution limits the scope of federal copyright to "writings" of "authors."[177] While the term "writings" has been construed quite broadly in case law,[178] the New Copyright Act protects only those works fixed in a tangible form.[179] It has been suggested that "[t]angibility requirements can be met by registering tapes of voice or video tapes of the gestures, mannerisms, and style of dress involved in the expression."[180] This theory does seem commendable, especially because the registration of those tangibles would carry with it the added benefit of providing "an objective standard by which [an] alleged infringement . . . could be judged."[181] But the New Copyright Act prevents the realization of this proposal in that the law was specifically intended to subject performance to protection only under state common law or statute.[182]

Upon further consideration, the possibility of "fixing" a performer's identity appears not only improbable, but also inadvisable. The right of publicity protects intangible proprietary interests and intangible creative efforts. These intangibles may gain their value as a result of one's originative intellectual investment, like the tangible works protected by copyright law; but the true publicity value generated thereby is simply not fixed in a tangible form, and cannot be so fixed.[183] "To conclude that the right of publicity is subject to congressional regulation under the copyright clause is to find that not only an author's writings, but also his mind, are subject to such control. Such a

176. *Performer's Style*, *supra* note 53, at 569-76.

177. U.S. CONST. art. I, § 8, cl. 8.

178. *See, e.g.*, Mazer v. Stein, 347 U.S. 201 (1954) (lamp base statuettes); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (photographs); Peter Pan Fabrics, Inc. v. Acadia Co., 173 F. Supp. 292 (S.D.N.Y. 1959) (textile fabric designs).

179. 17 U.S.C. app. § 102 (1976 & Supp. III 1979).

180. *Performer's Style*, *supra* note 53, at 572.

181. *Id.* at 572-73.

182. HOUSE REPORT, *supra* note 119, at 52: "[A]n unfixed work of authorship, such as an improvisation or an unrecorded choreographic work, performance, or broadcast, would continue to be subject to protection under State common law or statute, but would not be eligible for Federal statutory protection . . . ."

183. Lugosi v. Universal Pictures, 25 Cal.3d 813, 849, 603 P.2d 425, 448, 160 Cal. Rptr. 323, 346 (1979) (Bird, C.J., dissenting).

position is untenable."[184]

E. Contractual Protection

One opponent of performance style protection has stated that "the ability to enter into detailed and enforceable contracts," along with the right of privacy, gives performers "*complete* control" over the destiny of their performances.[185] Unfortunately, such an absolute statement is not wholly accurate. While a performer can, through contractual negotiation, ensure certain protections for his or her creative efforts, this protection is necessarily limited by virtue of the fact that it extends only to the parties to such contracts or to those in privity with the contracting parties.[186]

This section does not necessarily exhaust the list of possible theories under which performers may seek protection for their names, likenesses and identities.[187] Indeed, there may be a "veritable smorgasbord of stretchable legal concepts lying around"[188] that litigants can rely on. Rather, this section was intended to emphasize the appropriateness of the right of publicity as a means for protecting performers adequately, as well as the fact that, unlike other legal theories, it need not be stretched far in order to fulfill that purpose.

VI. CONCLUSION

The right of publicity should be fully recognized as a distinct common law property right, protecting the proprietary interest that a celebrity has in his or her persona. As it continues to evolve toward that end, the right of publicity should be construed more broadly so as to encompass performance style, consisting of a unique combination of posture, dress, mannerisms, gestures and vocal delivery that has been sufficiently developed to distinguish a performer from others. Recognition of both performance style as the original creation of an individual's mind and the representation of the ideas that that individual chooses to express, as well as the appositeness of the right of publicity for protecting that creative effort, is a prerequisite to the provision of

184. *Id.*

185. Liebig, *supra* note 57, at 42 (emphasis in original).

186. *See* Nimmer, *supra* note 1, at 214; *The Rights of Performers*, *supra* note 104, at 162.

187. *See, e.g., Performer's Style*, *supra* note 53, at 576-78, for a discussion of the possible application of false advertising remedies under the provisions of section 43(a) of the Lanham Trademark Act, 15 U.S.C. § 1125(a) (1976). The plaintiff's cause of action based thereon was rejected in the *Booth* case. 362 F. Supp. at 348-49.

188. Liebig, *supra* note 57, at 42.

adequate redress for those performers injured by the wrongful appropriation of the pecuniary benefits of their fame.

Acceptable standards for determining the existence of a publicity right violation can be established by reference to such traditional copyright concepts as the substantial similarity test and the fair use doctrine, as well as to unfair competition principles regarding inequitable business practices. But the analogies that can be drawn between the publicity doctrine and other more conventional theories in no way diminish the indisputable fact that the protection provided by these theories has proven inadequate.

Surely there remain unanswered questions concerning the application of the right of publicity as advocated. Ultimately, of course, they can be resolved by the specific facts of each case. But more importantly, the existence of unexplored issues should not detract from the basic point that performers are deserving, and in need, of the safeguards that the publicity right is capable of affording. Once this becomes accepted, then perhaps Professor Nimmer's prediction in 1954, that the right of publicity's full recognition would be assured by the "fundamental fact of community needs,"[189] may be finally realized.

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189. Nimmer, *supra* note 1, at 223.