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Intellectual Property - Performer's Style - A Quest for Ascertainment, Recognition and Protection

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NOTE

INTELLECTUAL PROPERTY—PERFORMER'S STYLE—A QUEST FOR ASCERTAINMENT, RECOGNITION, AND PROTECTION*

INTRODUCTION

Because performer's "style" is a term which has heretofore eluded accurate legal definition, recognition and protection has not be extended to style as an intangible intellectual property right. The unauthorized use of a performer's voice, mannerisms, gestures, and dress is becoming an increasingly common problem for performers who have developed a "style" immediately identifiable by the public as being associated with the performer. Performers who have sought judicial relief from unauthorized style imitation have been unsuccessful in demonstrating that style is readily capable of ascertainment and that concrete limitations do exist as to what would constitute a protectible style. The judicial stricture that "imitation alone does not give rise to a cause of action" has left the performer legally unprotected from unauthorized uses.[1]

Courts faced with controversies in the field of intellectual property have responded to new challenges by expanding both statutory and common law protection for creative work products. In the resolution of these challenges the interest in freedom in the expression of ideas was balanced with the interest in securing "authors" a right to be free from unfair use of their creative product. A new property right, also worthy of protection, emerges when the issue of providing legal protection for a performer's style is considered.

The purpose of this analysis is dual: to distinguish among the types of style that are sufficiently developed to warrant protection, and then to examine the relevant legal theories under which such protection should be available. This analysis will attempt to

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[1] For cases using this language see Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); Booth v. Colgate-Palmolive Co., 362 F. Supp. 343 (S.D.N.Y. 1973); Davis v. Trans World Airlines, 297 F. Supp. 1145 (C.D. Cal. 1969).

contribute to an understanding of what "style" is, the difficulties involved in attempting to bind it definitionally, and the realization that definitional elusiveness is not an insurmountable hindrance to affording legal protection.

I. PERFORMER'S STYLE: SUCCESSES AND FAILURES IN THE LEGAL ARENA

The difficulty in capturing a judicially acceptable definition of style is well illustrated through a brief factual examination of five major cases in which performers sought protection against unauthorized imitation. In each instance the style seeking legal recognition differed. Damages were sought for injury to professional reputation, public deception, and financial deprivation due to the loss of opportunity for product endorsement. The one common thread running throughout each case is 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.

A. Chaplin v. Amador[2]

Charlie Chaplin brought suit seeking injunctive relief from the unauthorized imitation of his character creation "Charlie Chaplin," a funny little man who wore "a decrepit derby, ill-fitting vest, tight-fitting coat, and trousers and shoes much too large for him, and with this attire, flexible cane usually carried, swung, and bent as he [performed] . . . ."[3] Chaplin developed the idea of "Charlie Chaplin" and infused life into his creation through facial expressions, gestures, and dress, which came to be automatically associated with the character. The defendant, assuming the name "Charlie Aplin," portrayed the character creation of Chaplin through imitation of his gestures, mannerisms, and dress.

The trial court recognized Chaplin's creation "Charlie Chaplin" as a form of unique character expression when it stated that

> the plaintiff is the first person to use the said clothes . . . and it is true that he originated, combined and perfected the manner of acting and mannerisms mentioned herein as used in motion pictures, and . . . is the first person to originate, use, combine, and perfect

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[2] 93 Cal. App. 358, 269 P. 544 (1928).

[3] *Id.* at 360, 269 P. at 545.

> . . . that certain form of acting, those mannerisms, facial expressions and movements of his body . . . .[4]

The court emphasized the concreteness provided the character through Chaplin's creative expression, and awarded injunctive relief on grounds of "passing-off."

And yet it could not have escaped the attention of the court that Chaplin was the creator of the character, directed the character into production, and, through performing the character, gave it essence. In other words, "Charlie Chaplin" was the production of Charlie Chaplin. There were no coexisting rights held by other persons impinging upon the creation. The court did not have to look to copyright protection possessed by another creator of the character nor assess the directorial molding of another as possibly instrumental in the formation of the "style."

B. Lahr v. Adell Chemical Co.[5]

Bert Lahr had become known for his unique vocal characteristics including his timing, inflection, and manner of comic delivery. Lahr's artistic creation was not associated with any particular character as was Chaplin's; in contrast, Lahr's style of vocal delivery existed independent of any character creation, and was a means by which he achieved notoriety and success. Defendant appropriated Lahr's unique vocal creation for the voice of a duck in defendant's commercial. The trial court's dismissal of Lahr's suit was reversed by the appellate court on grounds of defamation, holding "that an entertainer [who] has stooped to perform below his class may be found to damage his reputation . . . ."[6]

C. Booth v. Colgate Palmolive Co.[7]

Shirley Booth, a well-known actress in dramatic and comedy roles, came to be associated by the public with the cartoon character creation "Hazel" through the portrayal of that character in the television series of the same name. Miss Booth's voice, one of her polished dramatic tools, inevitably became associated in the public mind with that of the character. The creator of the cartoon character "Hazel," possessing copyright protection for the cartoon creation, licensed defendant's use of the cartoon character for a laundry detergent commercial.

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[4] *Id.*

[5] 300 F.2d 256 (1st Cir. 1962), *See also* Sims v. H.J. Heinz Co. [1959] 1 All. E.R. 547 (C.A.).

[6] 300 F.2d at 258 (citations omitted).

[7] 362 F. Supp. 343 (S.D.N.Y. 1973).

Although the cartoon-creator of "Hazel" had, for compensation, granted defendant the right to use his copyrighted character, the copyrighted cartoon character *did not possess a voice*. In providing "Hazel" a voice in its commercial, defendant utilized "Hazel's" voice by an imitation of Miss Booth's voice, absent permission or compensation.[8] Irrespective of its unauthorized use, defendant's contention that "imitation of voice without more does not give rise to a cause of action for unfair competition,"[9] was sustained by the court.

Unlike Lahr, Miss Booth had not relied upon a specially created vocal characterization to bring "Hazel" to life in the medium of television. However, to the public Miss Booth's voice when coupled with the cartoon character "Hazel" would constitute the "more" necessary to sustain a cause of action.

D. Davis v. Trans World Airlines[10]

Not only individual performers, but vocal groups as well, have been faced with unauthorized imitation. In *Davis* the well-known group "The Fifth Dimension" brought suit for the unauthorized imitation of its unique vocal sound, particularly associated with the song "Up, Up and Away." The defendant appropriated this unique sound in its use of the song in a television commercial. Once again, the defendant successfully relied upon the notion that "imitation alone does not give rise to a cause of action."[11]

The case parallels *Lahr* in that the vocal group had devel-

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[8] For purposes of their motion, defendants concede that "Ruth Holden's voice as used in the Burst commercials constituted an 'imitation' of the 'normal speaking voice' . . . of Shirley Booth as plaintiff used it and it was heard in the 'Hazel' situation comedy series."

Id. at 345. It has been argued that there are unique vocal qualities which accompany any performer's voice which would not be a quality of style which should be protected. "Even entertainers who make no claim to uniqueness have distinctive vocal characteristics and may be thought to be recognized." 300 F.2d at 259.

[9] 362 F. Supp. at 245.

[10] 297 F. Supp. 1145 (C.D. Cal. 1969).

[11] *Id.* at 1147. It is interesting to note that in none of these cases did the courts offer any judicial reasoning for this statement as it applies to "style." Of such judicial stricture it has observed:

> Such 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, *Tape Piracy—Compulsory Licensing Provision of the Copyright Act*, Edward B. Marks Music Corp. v. Colorado Magnetics, Inc., 497 F.2d 285 (10th Cir. 1974), 52 DENVER L.J. 313, 321 (1975).

oped a unique sound, which identified it and distinguished it from other vocal groups. One could argue also that like Miss Booth's voice association with the character "Hazel," "The Fifth Dimension's" sound was associated with its unique expression of the song. The copyright proprietor of the song granted permission to defendant for the use of the song, not the right to copy "The Fifth Dimension's" expression of that song. As the law currently stands, given license to use the song, a defendant is also free to appropriate the expression of that song created by another. The defendant should be required to create his own expression of that song, or at least be required to compensate the group for the use of its unique expression.

E. Sinatra v. Goodyear Tire & Rubber Co.[12]

Nancy Sinatra achieved instant public and professional recognition through her version of the song "These Boots Are Made for Walkin'," distinguished by a special form of dress and delivery exemplified by high boots and a short skirt, neither in itself nor in concert unique or unusual. Taking advantage of plaintiff's popularity, defendant coined the phrase "Wide-Boots" for a brand of tire, was granted the right to use the song by the copyright proprietor, and attempted to secure the services of Miss Sinatra for endorsement purposes in a proposed television commercial. When no terms acceptable to the company and Miss Sinatra could be reached, the company continued with the idea behind the commercial, deliberately imitating Miss Sinatra's "style" by flashing brief glimpses of a girl, facially unrecognizable, dressed in clothing similar to that of Miss Sinatra, using an *admitted* imitation of her style of delivery in the song as well.

Miss Sinatra was denied relief, *inter alia,* because the court saw an "added clash with the copyright laws [in the] potential restriction which recognition of performers' 'secondary meanings' places upon the potential market of the copyright proprietor."[13] The alleged restriction was that a proposed licensee might become totally discouraged if he had to "pay each artist who has played or sung the composition and who might therefore claim unfair competition-performer's protection . . . ."[14] This author submits that such reasoning is at best without merit. If a licensee

[12] 435 F.2d 711 (9th Cir. 1970), *cert. denied,* 402 U.S. 906 (1971).

[13] *Id.* at 718.

[14] *Id.*

wishes to secure the rights to use a song or a character in his commercial, he has every right to do so. He does not have the right to use the expression of that character which is created by another. If he in good faith uses the licensed work, he should be obliged to create his own expression, not simply appropriate that of another.

The court in *Sinatra* had before it an admitted voice imitation, coupled with court recognition of concomitant imitation of dress and mannerisms following unsuccessful efforts to obtain the services of the performer whose "style" was copied. Was the song of no commercial value to the defendant without Sinatra or a copy of her performance? If so, was she not entitled to compensation for the imitation of her style?

II. WHAT IS STYLE, AND WHY SHOULD IT BE PROTECTED?

The cases demonstrate the complexity of protecting style. One questions the summary denial of protection to performers whose creative efforts have resulted in a style which is admittedly imitated for the commercial advantage of a defendant. The reason behind denial is, in large part, an unwillingness of the courts to enter an area in which the lines have not been drawn regarding what is and what is not "style." This analysis approaches the question from another perspective: Did each or any of the plaintiffs possess something recognizably protectible? If so, is this not "style"?

There are distinctions which go to the very essence of why, when, and most importantly, how protection should be afforded, if at all. In *Chaplin* the performer not only created and originated the character-idea but created and originated the expression of the character by the additional creation of an identifiable, concrete style of dress, posture, and mannerisms. The court in *Chaplin* found little difficulty in recognizing the right to protection of his character creation under existing legal practice. This renders the *Chaplin* fact pattern deceptive in that Chaplin had created both the character and its expression. Possibly *Chaplin* served as the beginning of an almost unattainable standard which a performer must reach before his efforts are worthy of protection. Since *Chaplin* the generalization has arisen, without foundation, that style as a character expression must be equated with the character itself.[15]

[15] One author has observed that "[u]nder pure copyright doctrine . . . a style of

This standard fails in view of those performers who do not create the characters they portray, but create only a unique expression of that character. A contemporary example would be Peter Falk's portrayal of "Columbo." Someone other than Falk created the idea of "Columbo," and there was directorial molding of the character by others. However, Falk created a unique expression of the character no less stylistically distinctive than that of Chaplin's. Falk's gestures, mannerisms, postures, and dress are as uniquely his own interpretation of "Columbo" as Chaplin's of "Charlie Chaplin," and exist independent of the character alone.

Lahr's unique vocal creation for comic delivery was associated with no particular character other than himself. Yet, his "style" of vocal delivery was so unique and well defined that it, too, existed independent of any character. In a similar fashion "The Fifth Dimension" 's vocal style was also unique. Thus, style can and does exist independent of a character.

Miss Sinatra may have indeed created a unique style of performing but she failed to convey to the court that she had crafted either a unique vocal delivery or manner of dress such that a "style" existed.[16] Possibly there are those performers whose style is not sufficiently developed to warrant the kind of protection available to those who have crafted an identifiable, concrete style. The answer appears to be that there is a difference in *degree* which goes to a difference in the *kind* of protection to be afforded.

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delivery is equated to a creative idea, and there can be no cause of action for the copying of an idea." Lang, *Performance and the Right of the Performing Artist,* 21 ASCAP COPYRIGHT LAW SYMP. 69, 72-73 (1974). This same author discounts copyright protection for a *performer's* style based on analogy to artists. He states:

> Picasso might then have sole use of "synthetic Cubism"—or must he share the style with Braque, Max Jacob, Juan Gris and the others who . . . were responsible for the formation of Cubism?

Id. at 95. The author of the instant article would term "synthetic Cubism" a *movement* in art, such as folk music might be termed a "movement" in musical tastes. Within that movement each artist has his own unique style which distinguishes his expression of Cubism from that of others. Certainly no one would argue that no artist other than Picasso could paint in the "synthetic Cubism" movement. Style goes to the individual—*i.e.*, one of the basic methods of artistic analysis of unsigned paintings is by an examination of the method of applying pigments, choice of canvas, and stroke techniques. These are but a few of the considerations given to distinguishing one artist's unique, identifiable style.

[16] The court noted:

> In this case appellant's complaint is not that her sound is *uniquely personal;* it is that the sound in connection with the lyrics and arrangement, which made her the subject of popular identification, ought to be protected.

435 F.2d at 716 (emphasis added). However, Miss Sinatra did allege a unique style of dress as well, which the court did not see fit to discuss.

Only in connection with the character "Hazel" did Miss Booth's voice assume a recognizable quality entitling her to protection from its imitation. What kind of protection should be afforded performers who develop their own best personal traits, which later become either identified with a character creation or identifiable with the performer independent of a character? A number of performers' voices are identifiable as such. Imitation of this voice in a commercial without further identification could mislead the public into believing that the performer was actually endorsing the product. Absent identification, this could be the sponsor's only intent. Such use would constitute "imitation alone," unless the voice becomes associated with an expression of a character or idea as in *Booth*. Here, there exists no infringement of the performer's artistic talents but strictly an infringement of the performer's right to select that with which he will be associated in the public mind.

The thread linking these distinctions remains: the *deliberate, unauthorized,* and *unrevealed* copying of the performer or his unique style by a defendant who has everything to gain and nothing to lose as the law currently stands. If a defendant deliberately appropriates that which is associated with the professional endeavours of another, be it style or personal traits identifiable by the public, the appropriation of these efforts should constitute a cause of action.

III. PROTECTION OF STYLE

The complexities of protecting style should be recognized as overshadowed by the challenge of resolving why and when this style should be protected. The remainder of this analysis will be devoted to a discussion of both statutory and common law protec-

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[17] Article I, section 8, clause 8 of the Constitution states that Congress shall have the power

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . .

Thus, if style can be defined as a "writing" within the meaning given to this term, statutory protection should be available should Congress see fit to include style among those protectible "writings" in 17 U.S.C. § 5 (1970).

One author has noted that "[t]he scope of protectible 'writings' *as defined by the Copyright Law,* is generally considered to be more narrow than the constitutional term 'writings' . . . ." Oler, *Copyright for Characters: The Search for Statutory and State Law Protection,* 16 IDEA 1, 12 (1974) (emphasis added), *citing* W. Derenberg, "The Meaning of 'Writings' in the Copyright Clause of the Constitution," Study No. 3 in COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS AND STUDIES, Nos. 1-34 (1961).

tion which should be afforded to performers by states in the absence of federal protection. First, if style is a "writing" within the framework of the Constitution,[17] copyright protection should be available for those performers who have "authored" a "style." Consideration will also be given to unfair advertising practices, followed by a discussion of unfair competition, misappropriation, defamation, and the right of publicity.

A. *Is Style a "Writing"?*

The proper subject for copyright protection is not the idea but rather the expression of that idea.[18] Viewing a performer's style as the expression of an idea, copyright protection is indeed a possibility for persons possessing a style similar to that exemplified by Chaplin or Lahr. That style can be classified as a "writing" under article I, section 8 of the Constitution is evident from the historical basis of the copyright clause.[19] In keeping with the early views expressed, there has been a gradual and liberal expansion of what constitutes "writings."[20] Case law has so broadly construed "writings" as to include lamp base statuettes as "works

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[18] "It is a fundamental precept of copyright that only the expression of ideas, and not the ideas themselves are copyrightable." 1 M. NIMMER, NIMMER ON COPYRIGHT § 11.1, at 39 (1974). Professor Nimmer further notes that "[t]here have been no cases *squarely* ruling on the question of whether common law copyright may be claimed in a non-tangible oral or visual expression." *Id.* at 40 (emphasis added). However, in Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 346, 244 N.E.2d 250, 254, 296 N.Y.S.2d 771, 777 (1968), the court did recognize the possibility, when it stated: "The principle that it is not the tangible embodiment of the author's work but the creation of the work itself which is protected finds recognition in a number of ways in copyright law." If style is indeed a "non-tangible oral or visual expression" why is not common law copyright available? Must a performer be denied the right to protection merely because his "expression" is concrete but "intangible"? *See* notes 29-32 *infra* and accompanying text.

[19] During the Continental Congress the need was early recognized for protection of literary property in order to advance the arts by securing to authors the exclusive rights to their writings. *See* Selvin, *Parody and Burlesque of Copyrighted Works as Infringement*, 6 BULL. CR. SOC'Y 53, 57 (1958). An excellent article discussing writings under the Constitution interpreted the historical intent and subsequent judicial interpretation of the scope of this clause. *See* Note, *Copyright—Study of the Term "Writings" in the Copyright Clause of the Constitution*, 31 N.Y.U.L. REV. 1263 (1956). In reflecting upon a discussion in THE FEDERALIST No. 43 (J. Madison), the authors conclude:

> The statement places no limitation, either direct or implied, upon the scope of the clause but rather intimates that the types of objects protected will expand when the common law sees fit to expand them.

Id. at 1267.

[20] Note, *supra* note 19, at 1311. *See also* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884). Statutory protection is now afforded to works of art and sound recordings. 17 U.S.C. § 5(g) (1970) (works of art) and § 5(n) (Supp. II, 1972) (sound recordings), which are obviously not "writings" within the literal meaning of this term.

of art."[21] One leading authority has concluded that the constitutional provision intends

> to protect all intellectual property capable of extensive reproduction, and that whenever new methods of reproduction made possible the "pirating" of unprotected works resulting from intellectual effort, the clause could be expanded to include these objects.[22]

The manner in which a performer's style qualifies for copyright protection by meeting the more liberal interpretation of "writings" is analyzed below.

1. Expression of a Character

Fictional characters standing alone are not subject to copyright protection.[23] However, they are so entitled once incorporated into a book or play because it is "in their relationships and integration with the sequence of incidents, scenes, locale, motivation and *dramatic expression* through which the story, novel or play is evolved,"[24] that the characters move from the realm of ideas to the expressions of those ideas. Examined more closely, the words "dramatic expression" are of significance. Unless formally part of a literary writing, a character to be portrayed by a performer would not be eligible for protection; only through dramatic expression of the character does protection become possible. In order to invoke relationships, motivations, and scenes, the performer dramatizes through voice, mannerisms, and dress, transforming the character-idea into a unique character-expression. The performer thereby creates a style which expresses the charac-

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[21] Mazer v. Stein, 347 U.S. 201 (1954). In construing the meaning of artistic works, hence writings, courts have gone so far as making textile fabric designs eligible for copyright protection "where . . . the designs reflect creative originality and a substantial degree of skill, labor and independent judgment." Peter Pan Fabrics, Inc. v. Acadia Co., 173 F. Supp. 292, 299 (S.D.N.Y. 1959). Even reproductions of paintings are independently copyrightable. Home Art, Inc. v. Glensder Textile Corp., 81 F. Supp. 551 (S.D.N.Y. 1948). "Writings" has been broadened to include items which are not literal writings, as these cases indicate.

[22] Note, *supra* note 19, at 1269.

[23] Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys., Inc., 216 F.2d 945, 950 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955). *But see* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), where Judge Hand recognized that characters, if sufficiently developed to constitute a "distinctive word portrait," they should be protectible "quite independently of the 'plot' proper . . . ." For a more recent discussion of copyright protection for characters see Note, *Characters and the Copyright Clause—Is a Character a Writing?*, 26 BAYLOR L. REV. 222 (1974).

[24] WARNER, RADIO AND TELEVISION RIGHTS, § 231b, at 1003 (1953) (emphasis added). *See also* Kellman, *The Legal Protection of Fictional Characters*, 25 BROOKLYN L. REV. 3, 8 (1958). It is an "idea" which may be copied, not the "expression" of that idea, which distinction gives rise to the excellent discussion by Mr. Kellman.

ter in such defined terms that it exists independent of that character. Since this metastasis is made possible by the performer's style, the style should then become eligible for protection under copyright laws. Just as an author creates the book or play as his expression of an idea, so a performer may create a unique style as his expression.

The protection afforded cartoon characters exemplifies how character-expression has been assessed for copyright purposes in another medium. Cartoons have traditionally been the subject of individual copyright for each strip, no protection being afforded the characters alone.[25] As one court has noted: "[E]very such cartoon embodies a conception of humor or surprise or incredibility . . . [w]hat the owner of the copyright is entitled to is the protection of that embodiment of his concept."[26] In granting relief for infringement upon the "Superman" character, the court explained in its modifying opinion that the character was eligible for protection because the pictorial representations and verbal descriptions of "Superman" embodied an arrangement of incidents and literary expressions as opposed to a mere delineation of the character alone.[27] The court reiterated that a monopoly for a mere character was not allowed, but at the same time ordered the defendant to cease imitating the costume and appearance of "Superman."[28]

Having originated the character-idea "Charlie Chaplin," Chaplin fashioned mannerisms, dress, and gestures by which the

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[25] Note, *Unfair Competition—The Protection Afforded Literary and Cartoon Characters Through Trademark, Unfair Competition and Copyright*, 68 HARV. L. REV. 349, 358 (1954).

This was explained by the court in Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys., Inc., 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955). Here, the court denied that the character "Sam Spade" was protectible apart from the comic strip as a whole; one commentator stated that cartoon characters are protectible within the comic strip because what is appropriated is the "expression and development." Kellman, *supra* note 24, at 10. It may thus be appropriate to say that a performer's style is the method of expression and development of a character. Although it is unfortunate that a character is not in itself protectible, this does not prohibit protection of style if style is defined in terms of expression.

[26] Detective Comics, Inc. v. Bruns Publications, Inc., 28 F. Supp. 399, 400 (S.D.N.Y. 1939), *modified*, 111 F.2d 432 (2d Cir. 1940).

[27] 111 F.2d at 433-34.

[28] *Id.* *See also* Hill v. Whalen & Martell, Inc., 220 F. 359 (S.D.N.Y. 1914), wherein the court found infringement upon the characters of "Mutt and Jeff" because the speech and dress of the characters were substantially copied by defendants, and the representation was intended to and did in fact affect adversely the value of the copyright, even though the characters were set in a different plot.

idea was transformed into an identifiable character. Although "Charlie Chaplin" was not protected under copyright, the court recognized Chaplin's ownership of the character vis-a-vis imitation which might result in public deception. The court did not consider the originator-performer combination as determinative, and the decision appears to have been founded essentially on the performing style by which embodiment of the idea took place. Thus, it can be argued that Chaplin, through dramatic expression, transformed a character-idea into a character-expression, rendering the expression of the character—style—copyrightable. For Mr. Lahr, "The Fifth Dimension," and Mr. Falk, all of whom have created a unique style, such expression exists independently of any "character" creation and is no less definable and concrete than Mr. Chaplin's. Since style can and does exist independent of any character, those who have created their own gestures, mannerisms, timing, and type of vocal delivery have developed a unique artistic expression.

2. Meeting Statutory Standards of "Concreteness"

Before copyright protection may be secured an author clearly must put his ideas into some concrete form, as it is an appropriation of that form which is prohibited.[29] However, there exists a misconception regarding requirements of tangibility and concreteness. The general conclusion is that the Constitution requires tangibility of form.[30] "Tangible" is defined as "capable of being touched; . . . readily apprehensible by the mind; real; . . . ."[31] In contrast, "concrete" is "characterized by immediate experience of realities whether physical things, sensations, or emotions: belonging to or standing for actual things or events: not abstract or ideal."[32] Although there exists no immediate tangibility in a performer's style, an idea, such as style, which is capable of perception is concrete. For purposes of federal copyright protection, style must be reduced to tangible form. Tangibility requirements can be met by registering tapes of voice or video tapes of the gestures, mannerisms, and style of dress involved in the expression of the character portrayed. Upon alleged infringement, these registered tangibles would provide an objective standard by

[29] Note, *supra* note 25, at 356.

[30] Dunlap, *Expansion of the Copyright Law into the Area of Conversations*, 20 BULL. CR. SOC'Y 285, 296 (1973). *See also* 1 M. NIMMER, NIMMER ON COPYRIGHT 302 (1970).

[31] BLACK'S LAW DICTIONARY 1627 (rev. 4th ed. 1968).

[32] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 472 (third definition listed) (P. Gove ed. 1961).

which the alleged infringement of voice, dress, and mannerisms could be judged.

3. Infringement Upon Style

If Congress should include style as a "writing" within the federal copyright statutes, when infringement upon a performer's style were alleged the question as to what constitutes infringement would arise. Infringement of writings is defined as "[a] copy, more or less servile, of a copyrighted work."[33]

In other areas of artistic property, the courts have established various standards for judging infringement. When assessing whether an object had been the subject of copyright infringement, the court in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*[34] stated the test to be whether "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same."[35] The test for evaluating the possible existence of substantial similarity between a copyrighted property and an alleged copy was more liberally stated in *Ideal Toy Corp. v. Fab-Lu Ltd.*[36] as "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."[37]

Style, as the culmination of creative effort by a performer such as Lahr, for example, could be judged by the same criteria: (1) if the average person listening to an unidentified voice imitation would normally assume the voice to have originated from its performer-creator, or (2) if an ordinary individual could visually recognize dress and mannerisms associated with a particular performer's style as a copy of the original, an appropriation of that performer's style would be found. In the area of cartoon characters, items such as dolls[38] and toy horses[39] have been held to infringe upon the copyright of their respective cartoon characters. These items, as an imitation of the original creation, are not in substance different from an unauthorized imitation of a style

[33] BLACK'S LAW DICTIONARY 920 (rev. 4th ed. 1968). In order for the copy to constitute infringement "[T]here must be appropriation of substantial portions of the copyright matter . . . ." Roe-Lawton v. Hal E. Roach Studios, 18 F.2d 126, 127 (S.D. Cal. 1927).

[34] 274 F.2d 487 (2d Cir. 1960).

[35] *Id.* at 489.

[36] 360 F.2d 1021 (2d Cir. 1966).

[37] *Id.* at 1022.

[38] Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc., 73 F.2d 276 (2d Cir. 1934), *cert. denied*, 294 U.S. 717 (1935).

[39] King Features Syndicate v. Fleischer, 299 F. 533 (2d Cir. 1924).

created by a performer. An imitation of a performer's style is as perceptible to the average person as is an imitation of a cartoon character. Because 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.

4. Does a Defense Imply a Cause of Action?

The defense of fair use is allowed in actions for alleged copyright infringement. Fair use is the privilege accorded others to use the copyrighted material in a reasonable manner without the copyright proprietor's consent.[40] In the field of performer's style, mimicry has long been recognized as a separate and distinct talent of its own under the guise of a different variety of the historical art of singing.[41] *Bloom & Hamlin v. Nixon*[42] was a cornerstone

[40] WARNER, *supra* note 24, § 157, at 612. Fair use as well as its relationship to copyright infringement has been the subject of numerous discussions. *See* Cohen, *Fair Use in the Law of Copyright*, 6 ASCAP COPYRIGHT L. SYMP. 43 (1955); Netterville, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary*, 35 S. CAL. L. REV. 225 (1962); Selvin, *supra* note 19; Wyckoff, *Defenses Peculiar to Actions Based on Infringement of Musical Copyrights*, 5 ASCAP COPYRIGHT L. SYMP. 256 (1954).

[41] *See, e.g.*, Murray v. Rose, 30 N.Y.S.2d 6 (Sup. Ct. 1941); Savage v. Hoffman, 159 F. 584 (S.D.N.Y. 1908). Parody, the partner of mimicry, is a humorous or satirical imitation of a serious piece of literature or writing. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1050 (first definition listed) (unabr. ed. 1966). Parody has also been traditionally recognized as a defense to alleged infringement. *See* Green v. Minzensheimer, 177 F. 286 (S.D.N.Y. 1909); *cf.* Green v. Luby, 177 F. 287 (S.D.N.Y. 1908).

The case of 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 sub nom.* Columbia Broadcasting Sys., Inc. v. Loew's Inc., 356 U.S. 43 (1958) (per curiam), had a somewhat sobering effect upon parody as fair use of copyrighted works. Jack Benny's television parody of the play and motion picture *Gas Light* failed to obtain privilege as fair use because of substantial copying. The court felt that there was no authority that would support the idea "that wholesale copying and publication of copyrighted material can *ever* be fair use." 239 F.2d at 536, *quoting* Neon v. Pacific Tel. & Tel. Co., 91 F.2d 484, 486 (9th Cir. 1937). Despite this, fair use as a defense to copyright infringement does exist in the form of parody and mimicry.

[42] 125 F. 977 (E.D. Pa. 1903). The court held that the copyright proprietor of the song "Sammy" had no cause of action against the owners of a musical comedy in which Fay Templeton imitated the original style of delivery of the song created by Lotta Faust. The court recognized that

> where . . . it is clearly established that the imitation is in *good faith* . . . the performance is [not] forbidden . . . . Fay Templeton . . . merely imitates the singer; and the interest in her own performance is due, not to the song, but to the *degree of excellence* of the imitation. This is a distinct and different variety of the histrionic art from the singing of songs . . . .

Id. at 978-79 (emphasis added).

The problem encountered is where to draw the line between permissible fair use and infringement. One commentator has noted that, as in most of the law, drawing the line

case dealing with the imitation of another's performance. One analysis of the court's decision allowing fair use as a defense has noted:

> [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.[43]

Such analysis admits to, yet ignores, a critical issue: the legal system recognizes the existence of style—in its words "actions, gestures, tones"—for which no legal protection is available. Nonetheless, protection in the form of a defense is afforded the imitator in an action for infringement because of the presence of his own excellence of talent, that is, *style.* How can the imitator's own style make him incapable of legally infringing upon the style of another, if the other's style is not entitled to legal protection? The recognition of a defense based upon the copier's own style logically extends to legal recognition of a cause of action for infringement of the style of the performer copied.

5. A Call for Congressional Action

Style, as either a single perfected characteristic or as the combination of voice, gestures, and mannerisms of a performer, can be classified as a writing under the Constitution and copyright protection would be constitutionally available if Congress should so enact. It would appear that Congress should continue the expansion of the term "writings" by providing protection for style through amendment to the present federal copyright laws. Congress might provide that the determination of the style of a particular performer be made by setting requirements for registering style by means of the filing of tapes and pictorial descriptions of the performer's creative work product. In a given case infringement upon style would be determined by the same tests used in establishing infringement in other copyrighted areas. The defense of fair use would, of course, be applicable.

Protection for the expression of characters, both self-created and otherwise, is needed in order to secure to such performers the

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between fair use and infingement is one of degree. Selvin, *supra* note 19, at 63. As Judge Hand stated, the question is "whether the part so taken is 'substantial,' and therefore not a 'fair use' of the copyrighted work." Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied,* 282 U.S. 902 (1931).

[43] Netterville, *supra* note 40, at 249 (emphasis added).

right to be free from unauthorized use, especially where commercial exploitation and public deception result. Copyright offers the possibility of affording protection to those who create the expression of a character, such as Chaplin; and those who create a unique expression per se, such as Lahr.

Since Congress in the past has not seen fit to provide copyright protection to a performer's style, other alternatives must be examined. These alternatives do exist via state statutory and common law theories in light of the Supreme Court decision in *Goldstein v. California*.[44] The following discussion will focus on the legal justification for protection under these legal theories.

B. *Lanham Act § 43(a): False Advertising*[45]

The distinct possibility exists that a performer's style might one day be protected from unauthorized commercial exploitation through section 43(a) of the Lanham Act. Professor McCarthy has noted that "§ 43(a) is designed to protect the right of the consumer to be told the truth."[46] Of the cases discussed in this article[47] only Miss Booth alleged a cause of action under section 43(a).[48] It is indeed unfortunate that the court passed over this

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[44] 412 U.S. 546 (1973).

[45] 15 U.S.C. § 1125(a) (1970). This section provides:

> Any person who shall . . . use in connection with any goods or services . . . a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

[46] 2 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 27:3, at 247 (1973) [hereinafter cited as MCCARTHY]. Professor McCarthy further comments upon the usefulness of section 43(a):

> [W]hatever the explanation for the slow start of § 43(a), the volume of § 43(a) litigation greatly increased in the decade 1960-1970.
>
> Admittedly, § 43(a) is not intended to bring *all* types of unfair competition in interstate commerce within federal jurisdiction. But § 43(a) furnishes a valuable tool for honest commercial concerns, if not consumers, to blow the whistle on the false advertising tactics of sellers.

Id. § 27:9, at 259 (citations omitted). For an excellent critical analysis of section 43(a) see Germain, *Unfair Trade Practices Under Section 43(a) of the Lanham Act: You've Come a Long Way, Baby—Too Far Maybe?*, 49 IND. L.J. 84 (1973).

[47] *See* note 2-14 *supra* and accompanying text.

[48] Booth v. Colgate-Palmolive Co., 362 F. Supp. 343, 348-49 (S.D.N.Y. 1973). The court held:

> It is evident . . . that . . . this alleged cause of action is also insufficient to entitle the plaintiff to relief. There is no indication that plaintiff used her

cause of action so hastily, as the applications of section 43(a) are not yet realized. The Second Circuit apparently has rejected the application of the Act unless the parties are in direct competition, despite the distinct wording of the Act to the contrary.[49] This was one of several reasons given for the denial of Miss Booth's allegation under section 43(a), yet the same court found no such problem in a later case, at least for purposes of issuing a preliminary injunction.[50]

However, Miss Booth did fail to show that her voice in any way functioned as a trademark, which failure would, in and of itself, negate a cause of action in her situation. At this point a question is raised concerning those whose style of performing, be it of a particular character (Chaplin or Falk) or merely a uniquely personal style irrespective of any character (Lahr), serves to identify their performance and distinguish it from that of any other performer. Could this style ever serve as a trademark protectible from unauthorized deceptive imitation in commercial advertising, where that style is used by an advertiser to lead the public into believing that the performer is endorsing the product?

Arguably, Mr. Chaplin and Mr. Lahr would have been able to recover under section 43(a). Each had a style which served to distinguish his performance from those of all others. In keeping with the purpose of protecting the consumer from false designation of product origin, a manufacturer who deceives the public into thinking that a certain performer endorses the product, or another performer who appropriates that style such as in the *Chaplin* case, should be held liable under section 43(a). A singer who has created an identifiable style that has been the key to his

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> voice in connection with any "goods or services," nor that her voice alone can serve as a trademark or trade name, nor that plaintiff and defendants were in competition, nor even that the defendants used any description or made any representation to identify her, apart from the use of the Hazel cartoon character . . . .

Id. (citations omitted).

[49] "It is submitted that such a restrictive reading of § 43(a) is both bad policy and improper judicial interpretation of clear statutory language." 2 McCARTHY § 27:5, at 249.

[50] *See* Geisel v. Poynter Products, Inc., 283 F. Supp. 261 (S.D.N.Y.) (preliminary injunction granted), 295 F. Supp. 331 (S.D.N.Y. 1968), wherein the question of direct competition never arose, at least for purposes of issuing a preliminary injunction under section 43(a). Here defendant, a toy manufacturer, was restrained from representing its dolls as being created and approved by the plaintiff, the author and creator of Dr. Suess characters. An author of cartoons and books is certainly not in direct competition with a toy manufacturer.

success should also be protected here. In this author's mind, there is little difference between a "mark" which distinguishes one person's manufactured or printed product or services from another's and a performer's style which distinguishes one performer's performance from another's. In many situations, the use of such a "mark" upon a product is accompanied by an implication of quality or endorsement. The stamp of a particular performer upon a product certainly carries with it an implication of the latter. The possibilities of protection of style from commercial exploitation under this section are as yet unexplored and one may only speculate at this time that its applications will be expanded.

C. *State Statutory and Common-Law Protection of Style*

The frustrations which have been encountered in obtaining protection for any uncopyrightable creative works were compounded by the decisions in *Sears, Roebuck & Co. v. Stiffel Co.*[51] and *Compco Corp. v. Day-Brite Lighting, Inc.*[52] In these decisions the Supreme Court held that states may not apply state unfair competition laws in order to protect those works not subject to protection under federal patent or copyright law.[53] As a result, at least two cases involving style turned upon these rulings and denied protection.[54]

> One wonders whether the founding fathers who said in the Constitution that Congress had the power to secure to "Authors" the exclusive right to their "writings" would have thought that this meant that the states were thereby prevented from protecting against ap-

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[51] 376 U.S. 225, *rehearing denied*, 376 U.S. 973 (1964).

[52] 376 U.S. 234, *rehearing denied*, 377 U.S. 913 (1964).

[53] [W]hen an article is unprotected by a patent or copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.

Id. at 237. There has been much discussion of the states' rights to afford protection in light of these decisions. *See* Gamboni, *Unfair Competition Protection After Sears and Compco*, 15 ASCAP COPYRIGHT L. SYMP. 1 (1967); Comment, *Copyright Pre-emption and Character Values: The* Paladin *Case as an Extension of* Sears *and* Compco, 66 MICH. L. REV. 1018 (1968); Note, *Unfair Competition Protection After* Sears *and* Compco, 40 N.Y.U.L. REV. 101 (1965); Note, *Unfair Competition After* Sears *and* Compco, 22 VAND. L. REV. 129 (1968).

[54] *See* Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970); Columbia Broadcasting Sys., Inc. v. DeCosta, 377 F.2d 315, 319 (1st Cir. 1967), wherein the misappropriation doctrine was deemed to have been overruled by *Sears-Compco* on the rationale that where a "writing" is within the scope of the copyright clause of the Constitution and "Congress has not protected it, whether deliberately or by unexplained omission, it can be freely copied."

> propriation of distinctive performer characterizations merely because Congress had failed to legislate in this particular matter. Such a denial of state power throws entertainers to the dubious remedy of lobbying in Congress for special interest protective legislation. It is difficult to believe that the Constitution and Sears-Compco policy should be so bent out of shape as to deprive entertainers from making use of common law principles which protect the public from confusion and commercial interests from outright poaching.[55]

Then came the Supreme Court decision in *Goldstein v. California*[56] which opened the door for state statutory and common law protection, particularly protection of style.[57] Professor McCarthy has noted that "the failure of Congress to grant federal copyright protection to distinctive literary and entertainer characterizations does not deprive the states of the power to protect such creations under state unfair competition law."[58] Additionally, *Mercury Record Productions, Inc. v. Economic Consultants, Inc.*[59] has interpreted the decision as extending the right not only to state statutory protection but also to common law protec-

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[55] 1 McCARTHY, § 10:21, at 308.

[56] Goldstein v. California, 412 U.S. 546 (1973), wherein the Supreme Court upheld the constitutionality of a California penal statute prohibiting the piracy of sound recordings. In so doing the court recognized that article I, section 8 of the Constitution does not expressly or by inference vest power to grant copyright protection exclusively in the federal government and that 17 U.S.C. §§ 4, 5 do not preempt state control over all works to which the term "writings" might apply.

See Comment, Goldstein v. California: *Breaking Up Federal Copyright Preemption*, 74 COLUM. L. REV. 960 (1974); Note, *Goldstein v. California: A Validity of State Copyright Under the Copyright and Supremacy Clauses*, HASTINGS L.J. 1196 (1974); Note, *Copyrights: States Allowed to Protect Works Not Copyrightable Under Federal Law*, 58 MINN. L. REV. 316 (1973); Comment, *Copyright—New Light on* Sears *and* Compco*—State Copyright Laws Are Not Totally Preempted by the Copyright Act*, 5 TEX. TECH. L. REV. 843 (1974); Comment, Goldstein v. California—*The Constitutionality of a State Copyright*, 1973 UTAH L. REV. 851; Note, Goldstein v. California *and the Protection of Sound Recordings: Arming the States for Battle with the Pirates*, 31 WASH. & LEE L. REV. 604 (1974).

[57] Kaul, *And Now, State Protection of Intellectual Property?*, 60 A.B.A.J. 198, 202 (1974).

> 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.

[58] 1 McCARTHY, § 10:20, at 13 (Supp. 1973).

[59] 64 Wis. 2d 163, 218 N.W.2d 705 (1974), *appeal docketed*, 43 U.S.L.W. 3332 (U.S. Nov. 29, 1974) (No. 74-674), wherein the Wisconsin Supreme Court upheld the right of a state to assert the common law misappropriation doctrine against tape pirates.

tion as well.[60] The continued development and expansion of common law principles should now freely emerge, unhampered by the remnants of *Sears-Compco,* allowing protection for performers' style.

1. Unfair Competition: Appropriation of Style

In the past, protection of a performer's style has been sought primarily under the theory of unfair competition.[61] Unfair compe-

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[60] We conclude . . . that *Goldstein* permits state protection by common law as well as by statute . . . . The *Goldstein* court pointed out that such a conflict does not arise in the case of recordings of musical performances, because in this category of "Writing," Congress has not drawn a balance. No federal scheme has been devised that is applicable to the subject matter of this action . . . . Under *Goldstein,* a *state is free to apply its own law.*

Id. at 177, 218 N.W.2d at 712 (emphasis added).

[61] *See, e.g.,* Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970), *cert. denied,* 402 U.S. 906 (1971); Columbia Broadcasting Sys., Inc. v. DeCosta, 377 F.2d 315 (1st Cir.), *cert. denied,* 389 U.S. 1007 (1967); Lahr v. Adell Chem. Co., 300 F.2d 256 (1st Cir. 1962); Booth v. Colgate-Palmolive Co., 362 F. Supp. 343 (S.D.N.Y. 1973). Other grounds were indiscriminately alleged in combination, including defamation; the result is an area of law in which no clear-cut answers are available. For example, one commentator has noted that "[t]he overlapping of principles between copyright and unfair competition has caused a great deal of confusion in arriving at solutions to problems involving copyright and unfair competition questions." Leach & Feldman, *The Relationship Between Copyright and Unfair Competition Principles,* 10 ASCAP COPYRIGHT L. SYMP. 266 (1959).

The matter is further complicated when the defense of fair use is applied with equal force to unfair competition problems as well as copyright problems.

> [T]he jurisprudence indicates that the concept of fair use is the same in copyright law and unfair competition; and, consequently, unfair use under unfair competition principles cannot be a fair use for purposes of copyright law, and there will be copyright infringement.

Id. at 279. *See also* Toksvig v. Bruce Pub. Co., 181 F.2d 664, 667 (7th Cir. 1950) (dictum); West Pub. Co. v. Edward Thompson Co., 169 F. 833 (E.D.N.Y. 1909), *modified,* 176 F. 833 (2d Cir. 1910). The result of this overlap is the problem of seeking protection for style under two merging theories of recovery, with a defense which applies to both theories.

The introduction of the Uniform Deceptive Trade Practices Act in 1964 has resulted in codification of many of the unfair competition principles in several states. Thus far, the uniform legislation has received only limited acceptance; those states which have enacted the act have established the prime vehicle for protection of performers and the public from unauthorized appropriation of style and/or personal characteristics. The relevant portion of the statute is delineated in section 2:

> (a) A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation he:
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> (1) *passes off goods or services as those of another;*
>
> (2) *causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;*
>
> (3) *causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another* . . . .
>
> (5) *represents that goods or services have sponsorship approval, characteristics, ingredients, uses, benefits or quantities that they do*

tition is of special significance in prohibiting the exploitation of style through unauthorized imitation in commercial advertising. An examination of unfair competition as it relates to literary property will provide an opportunity to better understand the applicability of unfair competition principles to cases involving appropriation of style.

In an action for unfair competition "a person who establishes a trade name or symbol as the means by which the public identifies his goods may obtain damages and an injunction against another who sells his products under that symbol or name."[62] One author has suggested that unfair competition cases generally fall into three overlapping categories.[63] First is the commonly termed "palming-off" or "passing-off," which consists of making false representations to the public with the intent to deceive, thereby

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not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have . . . .

(12) engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding.

(b) In order to prevail in an action under this Act, a complainant need not prove competition between the parties or actual confusion or misunderstanding

HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 131-32 (1964), *revised* at 306-15 (1966) (emphasis added). As of 1973, the following states have enacted the act, retaining section 2 in substantially the same form: (Colorado) COLO. REV. STAT. ANN. § 6-1-105 (1973); (Delaware) DEL. CODE ANN. tit. 6 § 2532(a) (Rev. 1974); (Georgia) GA. CODE ANN. § 106-702(a)(1) to (12) (1968); (Hawaii) HAWAII REV. STAT. § 481A-3 (Supp. 1974); (Idaho) IDAHO CODE § 48-603 (Supp. 1974); (Illinois) ILL. ANN. STAT. ch. 121½ § 312 (Smith-Hurd Supp. 1974); (Kansas) KAN. STAT. ANN. § 50-626(b) (Supp. 1974); (Maine) ME. REV. STAT. ANN. tit. 10 § 1212 (Supp. 1974-75); (Nebraska) NEB. REV. STAT. § 87-202 (1971 reissue); (New Mexico) N.M. STAT. ANN. § 49-15-2(C) (Supp. 1973); (Ohio) OHIO REV. CODE ANN. § 4165.02 (Page 1973); (Oklahoma) OKLA. STAT. ANN. tit. 78 § 53 (Supp. 1974-75). As recent authorities have noted:

> Several state legislatures passed this Uniform Act. But differences concerning recovery of costs and counsel fees caused a revision of the proposal in 1966. As a consequence of *Sears* and *Compco* decisions . . . the first impetus toward passage of the Uniform Act was slowed down by the understandable desire on the part of the state legislatures to await the effect of these decisions upon this entire area of the law. . . .
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> Eventually, about one quarter of the States enacted one or the other of the Uniform Deceptive Trade Practices Acts. A number of other states passed acts of their own drafting. As a consequence, what prevails now are not fifty different statutory schemes, but about five or six of them.

1 G. ROSDEN & P. ROSDEN, THE LAW OF ADVERTISING, § 13.03[3][a] (1973) (footnotes omitted).

[62] Note, *supra* note 25, at 349. For excellent discussions on background in unfair competition, see Callmann, *What is Unfair Competition?*, 28 GEO. L.J. 585 (1940); Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289 (1940).

[63] P. GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK, AND RELATED STATE DOCTRINES, 107-08 (1973).

inducing it to believe that the goods or services of another are those of the plaintiff.[64] Professor Prosser states the test in such cases to be "whether the resemblance is so great as to deceive the ordinary consumer acting with the caution usually exercised in such transactions, so that he may mistake one for the other."[65] A less stringent standard is now applied in palming-off situations: the plaintiff need not show an actual intent to deceive but only that the false representation is likely to deceive.[66]

The second is secondary meaning, found when an article is used in such a way and to such an extent that the public comes to identify the goods or services as those of the plaintiff, making them distinguishable from all others.[67] The third, usually called trademark, exists when the plaintiff's symbol or device is distinctive and functions exclusively to identify the plaintiff.[68] It is often conclusively presumed that its unauthorized use by another will be attended by consumer deception.[69]

Before examining case law involving performer's style and unfair competition, an important distinction must be drawn between imitation and the elements of fraud and deception. In a case of mere imitation of style, the public would normally be aware that a performance was a duplication of an original. In such case, the privilege of fair use would allow this imitation as mimicry or parody.[70] The applicability of unfair competition to imitation of style arises when the elements of fraud and deception become apparent. Here the public is either intentionally deceived or a likelihood of public deception is present.[71] In other words, the

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[64] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 130, at 957 (4th ed. 1971) [hereinafter cited as PROSSER].

[65] *Id.* at 957-58.

[66] *Id.* at 958. "In an action for unfair competition plaintiff has the burden to prove by whatever means he can that defendant's conduct has or is likely to cause confusion . . . ." Pennsylvania Dutch Co. v. Pennsylvania Amish Co., 184 U.S.P.Q. 41, 45 (C.P. Cumberland County 1974). Herein the court concluded that there are three ways in which a plaintiff may discharge this burden: 1) by showing actual confusion; 2) by relying on experts to testify as to the effect that the conduct and business practices of the parties are likely to have on the average consumer; or 3) by relying on the fact finding ability of the court to determine that the average purchaser will be deceived as to the source of the defendant's goods. *Id.* (citations omitted).

[67] PROSSER at 959.

[68] P. GOLDSTEIN , *supra* note 63, at 108.

[69] *Id.* at 107-08.

[70] *See* notes 40-43 *supra* and accompanying text.

[71] *See, e.g.*, Sweet Sixteen Co. v. Sweet "16" Shop, Inc., 15 F.2d 920 (8th Cir. 1926). *But see* Davis v. Trans World Airlines, 297 F. Supp. 1145 (C.D. Cal. 1969).

style of a particular performer is *passed-off* as that of another, or the imitation is presented in such a way that the public is led to believe that it is the original artist performing. Traditionally, the presence of deception has been the key to a finding of unfair competition.

In *Chaplin* the court found secondary meaning in Chaplin's character-creation "Charlie Chaplin."[72] The public was deliberately led to believe that the imitator was the real Charlie Chaplin, which belief constituted the requisite fraud and deception upon the public to sustain an allegation of "passing-off" thereby justifying the court's grant of injunctive relief from copying. The test for whether the identity of the character was revealed is by judging the probable reaction in the public's mind.[73] As it would apply to style, this test serves as an objective standard: if the ordinary viewer would mistake the style or voice for that of its true creator, then passing-off is present.

A query at this point is whether the tort of passing-off can be extended to voice imitation alone. The leading cases dealing with voice imitation indicate that this is possible. In *Lahr* the First Circuit, in reversing the trial court's dismissal, stated that imitation of the voice could constitute unfair competition by passing-off.[74] In a similar English case, the court did not pass on the question therein, but did recognize "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 without his consent."[75] As one commentator has so accurately observed: "A voice which *identifies* a famous man as clearly as does his name or likeness

[72] 93 Cal. App. at 361, 269 P. at 546.

[73] Gardella v. Log Cabin Prod. Co., 89 F.2d 891, 897 (2d Cir. 1937). Here the plaintiff sought and the trial court granted, relief for unauthorized imitation of the character "Aunt Jemima." The Second Circuit reversed on grounds that the plaintiff could not recover under the Right of Privacy Statute, NEW YORK CIVIL RIGHTS LAW §§ 50, 51 (1903), but that unfair competition could be established only in accordance with the court's directives. *See also* Lone Ranger, Inc. v. Cox, 124 F.2d 650 (4th Cir. 1942). Here the defendant appeared in circuses around the country as the "Lone Ranger." The court directed the lower court to enjoin further performances by the defendant because the performances involved fraudulent appropriation of the plaintiff's character and goodwill established through the original "Lone Ranger" radio program.

[74] 300 F.2d at 259.

[75] Sims v. H.J. Heinz Co. [1959] 1 All. E.R. 547, 551 (C.A.). *See* Mathieson, *"Passing Off" of Actor's Voice—Appropriation of Another's Personality Without His Consent—An Equitable Right of Privacy?*, 39 CAN. B. REV. 409 (1961). The author therein reviews the *Sims* case and concludes that protection should be granted equitably through injunction.

would seem to present simply another manifestation of personality that ought to be likewise protected against *commercial* use."[76] If a character's voice is created by a performer and becomes so identifiable with the performer that the public associates it only with the performer, any imitation which deceives the public into believing that it is the performer's voice would constitute fraud and deception upon the public. A performer's work product, such as Lahr's style of vocal delivery, is as much an expression of creative ability as any book, and as salable as any manufactured goods and services.

Although in *Booth* the New York court denied relief under unfair competition, the rationale of the case seems irreconcilable with the general principles of unfair competition. The court ignored two underlying principles of unfair competition: likelihood of consumer deception, and secondary meaning. The imitation of Miss Booth's speaking voice, arguably not a creative work product, acquired secondary meaning when heard in conjunction with the cartoon character "Hazel." The ordinary viewer of the commercial, with knowledge both of entertainer endorsements and the fact that "Hazel's" voice was Booth's would presume Miss Booth was, in fact, endorsing the product and receiving compensation therefrom.[77] Thus, the combination of voice and character increased the likelihood of consumer deception.

A certain judicial obstructionism has been encountered when bringing actions under unfair competition for imitation of performers' styles. An example is to be found in the *Sinatra* court's rejection of the unfair competition claim because

> [t]here is no competition between Nancy Sinatra and Goodyear Tire Company. Appellant is not in the tire business and Goodyear is not selling phonograph records. There is no passing-off by the defendant of the plaintiff's products as its own either by simulation of name, slogan, device or other unfair trade practice.[78]

The *Lahr* court quite properly saw through this bit of legal obfuscation:

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[76] Netterville, *supra* note 40, at 253.

[77] The court stated: "Neither she nor the plaintiff were *named or identified* during the commercials." 362 F. Supp. at 345 (emphasis added). The court also stated that *Goldstein* reaffirmed the notion of *Sears-Compco* that preserves the right to copy or imitate an idea. *Id.* at 346. This may well be, but voice as it relates to *style* is not an idea, but rather the expression of an idea.

[78] 435 F.2d at 714.

> [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.* True, it was not defendant's product that was offered in competition, but that of the anonymous imposter whom defendant, for its benefit, subsidized. *This is a distinction without a difference.*[79]

2. Misappropriation

"The misappropriation doctrine is a common law, judge-made offshoot of the general law of unfair competition . . . usually invoked by a plaintiff who has what he considers a valuable commercial 'thing' which he sees another has appropriated . . . ."[80] In those jurisdictions recognizing its existence[81] the misappropriation doctrine circumvents the need for proof of fraud upon the public. Relief is granted in cases where no fraud and deception exits, but only a misappropriation for the commercial advantage of one person of a benefit or of a property right of another.[82] Hence a performer's style should now be protectible in those states accepting the misappropriation doctrine, dispensing with the need for an allegation of palming-off or that the parties are competitors.[83]

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[79] 300 F.2d at 259 (emphasis added).

[80] 1 McCARTHY, § 10:23, at 318. Professor McCarthy provides a valuable and intriguing discussion of this doctrine, its origin, the dispute surrounding its acceptance, and possible applications. *See also* Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd,* 279 App. Div. 632, 107 N.Y.S.2d 795 (1st Dept. 1951) (per curiam); Pittsburg Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (W.D. Pa. 1938); Ahrens, *The Misappropriation Doctrine After* Sears-Compco, 2 U. SAN FRAN. L. REV. 292 (1968); Sell, *The Doctrine of Misappropriation in Unfair Competition,* 11 VAND. L. REV. 483 (1958); Note, Goldstein v. California: *A New Look for the Misappropriation Doctrine,* 8 U. SAN FRAN. L. REV. 199 (1973).

[81] (Alaska) Veatch v. Wagner, 116 F. Supp. 904 (D. Alaska 1953); (California) Capitol Records, Inc. v. Erickson, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (1969); (Delaware) Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir.), *cert. denied,* 351 U.S. 926 (1956); (Illinois) Capitol Records, Inc. v. Spies, 130 Ill. App. 2d 429, 264 N.E.2d 874 (1970); (Massachusetts) Uproar Co. v. National Broadcasting Co., 8 F. Supp. 358 (D. Mass. 1934), *modified,* 81 F.2d 373 (1st Cir.), *cert. denied,* 298 U.S. 670 (1936); (New York) Mutual Broadcasting Sys., Inc. v. Muzak Corp., 177 Misc. 489, 30 N.Y.S.2d 419 (1941); (Pennsylvania) Waring v. WDAS Broadcasting Station, Inc., 194 A. 631 (Pa. 1937); (Wisconsin) Mercury Record Prod., Inc. v. Economic Consultants, Inc., 64 Wis. 2d 163, 218 N.W.2d 705 (1974).

[82] P. GOLDSTEIN, *supra* note 63, at 92. One author has stated that a plaintiff seeking protection under this doctrine must prove three elements:

> (1) that time, effort and money has gone into the creation of the thing misappropriated so that there is some "property right" in the thing taken;
> (2) that there is appropriation by the defendant at little or no cost; and
> (3) unless an injunction is granted there will be a diversion of the plaintiff's profits to the defendant.

Ahrens, *supra* note 80, at 295.

[83] P. GOLDSTEIN, *supra* note 63, at 92.

The foundations of the doctrine are credited to the Supreme Court's holding in *International News Service v. Associated Press*.[84] The widespread acceptance of the doctrine was hindered by the holdings in *Sears* and *Compco*,[85] but *Goldstein* appears to have removed any constitutional barriers previously blocking recognition of the misappropriation doctrine.[86] Recently, the doctrine has been extended to protection from tape piracy of sound recordings.[87] The fact that style is an intangible property right makes it no less a protectible property right as a product of a performer's creative efforts. As the court noted in *Mercury*:

> The essence of the cause of action in misappropriation is the defendant's use of the plaintiff's product, into which the plaintiff has put time, skill, and money; and the defendant's use of the plaintiff's product or a copy of it in competition with the plaintiff . . . . The wrong is not in the copying, but in the appropriation, of the plaintiff's time, effort and money.[88]

As the doctrine relates to style, no difficulties are encountered in applying it to either a situation such as *Chaplin*, where the performer created the character as well as the expression of that character, nor a situation such as *Lahr*, where the performer has developed a distinctive vocal quality. In these situations style is as much a product as is a record. In contrast, misappropriation might be an inappropriate form of relief in a *Booth*-type fact pattern, where the imitation is not of a voice creation but merely the performer's own voice.

3. Defamation: A Rear-Guard Action

Closely related to the principles of unfair competition is defamation. In fact, most cases alleging unfair competition have also brought parallel actions for defamation.[89] The overlap between unfair competition and defamation was noted by the court in *Gardella v. Log Cabin Products Co.*[90] The court held that if the

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[84] 248 U.S. 215 (1918) wherein the plaintiff who gathered news for the purpose of lucrative publication was held to have a "quasi-property" right in the product of his efforts. The court afforded equitable relief against the appropriation of those efforts by the defendant which constituted unfair competition. *Id.* at 236.

[85] *See* notes 51-55 *supra* and accompanying text.

[86] Note, *supra* note 80, at 212.

[87] *See* Mercury Record Prod., Inc. v. Economic Consultants, Inc., 64 Wisc. 2d 163, 218 N.W.2d 705 (1974).

[88] *Id.* at 175, 218 N.W.2d at 710.

[89] *See* Lahr v. Adell Chem. Co., 300 F.2d 256 (1st Cir. 1962); Gardella v. Log Cabin Prod. Co., 89 F.2d 891 (2d Cir. 1937); Booth v. Colgate-Palmolive Co., 362 F. Supp. 343 (S.D.N.Y. 1973).

[90] 89 F.2d 891 (2d Cir. 1937).

imitation was of an inferior kind, an action for defamation might arise.[91] The court further recognized that the common element existing between passing-off and defamation is confusion and deception of the public.[92] Thus, if a performer's style has been the subject of an inferior imitation likely to cause damage to the performer's reputation, the performer could successfully maintain an action in defamation.

There is, however, an essential weakness to a defamation allegation based on inferior imitation. When rejecting this aspect of Lahr's defamation claim, the court noted:

> Even entertainers who make no claim to uniqueness have distinctive vocal characteristics and may be thought to be recognized. If every time one can allege, "Your [anonymous] commercial sounded like me, but not so good," and contend the public believed, in spite of the variance, that it was he, and at the same time believed, because of the variance, that his abilities had declined, the consequences would be too great to contemplate.[93]

Nevertheless, the court did argue that an action for inferior imitation would exist if there were some element in addition to the imitation per se which acted to identify plaintiff with the imitation.

On the other hand, the *Lahr* court held that plaintiff's professional reputation might be damaged through unauthorized imitation in a commercial on the defamatory ground of having "stooped to perform below his class."[94] But even this form of defamation was rejected by the *Booth* court, which argued:

> A star performer's endorsement of a commercial product is a common occurrence and does not indicate either a diminution of profes-

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[91] The gravamen of the second phase of the cause of action . . . is that the professional reputation of the appellee has been defamed. Eva Taylor's . . . performance is alleged to have been of inferior quality thus causing deception of the public and inducing the belief that appellee's abilities had deteriorated. If we assume these claims to be true, a cause of action for unfair competition is stated which in turn consists of the tort of defamation.

Id. at 895.

[92] *Id.* at 896.

[93] 300 F.2d at 259.

[94] The court stated:

A charge that an entertainer has stooped to perform below his class may be found to damage his reputation. Plaintiff's allegations in this respect are *not* insufficient. . . .

[i]t has never been held in defamation that a plaintiff must be identified by name.

Id. at 258-59 (emphasis added).

> sional reputation nor a loss of professional talent, though plaintiff herself might prefer to avoid such engagements.[95]

In a sense, defamation requires a tortuous reasoning process, which might successfully destroy any cause of action for the unauthorized use. For example, the allegation of inferior quality might weaken plaintiff's case such that the court will be unwilling to find sufficient similarity to constitute passing-off or public deception. If the imitation is so inferior, how could the public be deceived? Although not impossible, it is improbable. Similarly the theory of "stooping to perform below one's class" conflicts in principle with the misappropriation doctrine, which presumes that the performer's commercial base has been damaged by the unauthorized use. Thus, a defamation action for imitation of a performer's style should be used with circumspection, and pleading in the alternative should be utilized.

4. Right of Publicity

A performer's style has potential protection under the newly emerged doctrine termed the right of publicity. The right of publicity has grown out of the interest and concern with the right to privacy, which protects an individual's interest in being free from unauthorized exploitation of his name or likeness.[96] This protection begins with the tort of appropriation which was first recognized in New York in the case of *Roberson v. Rochester Folding Box Co.*[97] When the court denied the existence of appropriation, the New York legislature in reaction passed a statute making it a misdemeanor and a tort to make use of the name, portrait, or picture of any person for "advertising purposes" or for the purpose of trade without written consent.[98]

From the doctine of appropriation has arisen the right of publicity. Mention of publicity as a protectible right was noted by Warren and Brandeis:[99]

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[95] 362 F. Supp. at 349.

[96] The right of privacy was early recognized by Warren and Brandeis in their article *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *See also* Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637 (1973). *See* notes 104-07 *infra* and accompanying text.

[97] 171 N.Y. 538, 64 N.E. 442 (1902). *Contra*, Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

[98] N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1948) (originally enacted in 1903). *See also* OKLA. STAT. ANN. tit. 21, §§ 839.1-.2 (Supp. 1974); UTAH CODE ANN. §§ 76-4-8 to -9 (1953).

[99] Warren & Brandeis, *supra* note 96.

> The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others . . . . [E]ven if he has chosen to give them expression, he generally retains the power to *fix the limits of the publicity which shall be given them*. The existence of this right does not depend upon the particular method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music . . . .[100]

The right of publicity has been called the antithesis of the right of privacy.[101] The right of privacy protects one from injury to self-esteem.[102] One commentator has noted that in such cases some sort of compensable injury occurs to the sensibilities as a matter of law.[103] The right of publicity protects not injury to self-esteem, but rather recognizes the possibility of economic injury to one's personality.[104] The case of *Hogan v. A. S. Barnes & Co.*[105] illustrates that a celebrity has an economic interest in his personality. Here the court said there was no invasion of privacy, but there was an invasion of the antithesis, the right of publicity.[106]

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[100] *Id.* at 198-99 (emphasis added) (footnotes omitted).

[101] Hogan v. A.S. Barnes & Co., 114 U.S.P.Q. 314 (Pa. C.P. Phila. County 1957).

[102] *See, e.g.*, Lugosi v. Universal Pictures Co., 172 U.S.P.Q. 541 (Cal. Super. Ct. 1972); Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952); Kunz v. Allen, 102 Kan. 883, 172 P. 532 (1918).

[103] Treece, *supra* note 96, at 641. Professor Treece in a discussion of Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952), reaches this conclusion after in essence recognizing that the compensable injury must be based upon the offensiveness to one's sense of justice as opposed to concrete facts. *Id.*

[104] *See* Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938). For an excellent discussion of one author's view of the justification for protection of public figures from unauthorized product endorsement see Treece, *supra* note 96, at 645-47. Professor Treece predicates his argument, with good cause, upon the effects of such conduct upon the public.

[105] 114 U.S.P.Q. 314 (Pa. C.P. Phila. County 1957).

[106] *Id.* The court recognized that the right of publicity is, in effect, another form of unfair competition.

> 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 this 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. . . .
>
> . . . .
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> It is, therefore, our conclusion that the true theory upon which plaintiff seeks to ground defendant's liability to him is the very antithesis of the right of privacy. Plaintiff does not complain that his name should have been withheld from public scrutiny: on the contrary, he asserts that his name has

When an advertiser appropriates that personality without his consent, he injures that economic interest.[107]

The right to privacy protects name and likeness as part of personality. The right of publicity, if it is to protect a celebrity from economic loss to his personality, cannot be so limited.[108] Personality is defined as "the complex of characteristics that distinguishes a particular individual or individualizes or characterizes him in his relationships with others . . . the total of distinctive traits and characteristics . . . ."[109]

Those performers who create the expression of a character,

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great commercial value in connection with the game of golf, and that defendant's use of his name has resulted in damage to him. We therefore hold that plaintiff's right of privacy has not been violated.

. . . .

Therefore, in the instant case, if plaintiff is to recover damages from defendant on the theory of unfair competition he must demonstrate: (1) That he has an enforceable property right in the commercial value of his name and photograph in connection with the game of golf; (2) that he did not authorized defendant to make any commercial use of his name and photograph, and, (3) that the publication, sale and advertisement by defendant of the book "Golf With the Masters" constituted unfair competition as to the plaintiff.

Id. at 314.

[107] Treece, *supra* note 96, at 643. An interesting aspect of this, as well as any of the tort theories discussed herein, would be the possibility of waiving one's cause of action in tort and suing in assumpsit on a quasi-contractual theory. The authorities would indicate that this possibility exists but that courts have been reluctant to allow this. Professor Corbin defines quasi-contract as

> a legal obligation, not based upon agreement, enforced either specifically or by compelling the obligor to restore the value of that by which he was unjustly enriched.

Corbin, *Quasi-Contractual Obligations,* 21 YALE L.J. 533, 550 (1912) (emphasis omitted).

Professor Gordon provides an excellent discussion as to why courts have denied quasi-contract as an alternative in right of privacy situations. He does note, however:

> Since the basis of recovery in quasi-contract is the defendant's enrichment, it is clear that only those tortious acts which produce enrichment can provide the grounds for an action in assumpsit. . . .
>
> . . . .
>
> There is no reason why a tortious invasion of privacy may not produce enrichment for the wrongdoer. Thus, in cases where it does one might reasonably expect that quasi-contractual relief will be granted.

Gordon, *Recoveries for Violation of the Right of Privacy in Quasi-Contract and the Federal Income Tax: An Illustration of Law's Response to Changes in Attitudes About the Personality,* 7 WAYNE L. REV. 368, 370-71 (1964), 7 PEAL 357, 360-61 & n. 17 (1967).

[108] The recent commentators would indicate that privacy itself should be more liberally defined. *See, e.g.,* Parker, *A Definition of Privacy,* 27 RUTGERS L. REV. 275 (1974). This author defines privacy as *"control over when and by whom the various parts of us can be sensed by others." Id.* at 281.

[109] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1687 (fifth definition listed) (P. Gove ed. 1961).

or a unique style of their own, have created a reflection of personality and a form of expressing that personality. Performers such as Miss Booth whose own voice or personal traits are appropriated should be even better protected under this doctrine. Within the framework of the definition of personality, the use of one's own voice in performing comprises an aspect of personality. As Warren and Brandeis noted, the existence of the right to limit publicity is not affected by the "method of expression." Hence, style and personal traits used in performing should be given protection under the right of publicity when an advertiser appropriates that aspect of personality, and deceives the public into believing that the celebrity has endorsed his product.

The celebrity who depends upon an aspect of his personality as his source of income and notoriety has a vested economic interest in that personality as a means of livelihood. The practice of celebrity endorsement of a product has become a common one and is a lucrative source of income for the performer. If a performer's style or voice is appropriated without permission or compensation, future attempts to secure an engagement for product endorsement might be thwarted, since the primary value of celebrity endorsement to the sponsor is the fact that the public is given a feeling of the product's approval by the performer who is associated only with the sponsor's product.

An additional consideration apart from the financial deprivation resulting from unauthorized use is the inability of the performer to control whether or not he wants to be associated with product endorsement in any form. In other words, he is unable to "fix the limits of publicity" given his style. This was exemplified in *Booth* wherein Miss Booth's voice would not in and of itself invoke "Hazel," yet the imitation of Miss Booth's voice coupled with the cartoon character "Hazel" would invoke Miss Booth as the endorser. Miss Booth alone should have the right to determine if and when her voice, in fact or by imitation, is to be used in conjunction with the portrayal of the cartoon character.

CONCLUSION

A performer's style may be the expression of a character or may exist independent of any character expression. A performer begins an unconscious search for style through trial and error, rejecting those techniques which do not meet his attempts at expression. Two things tend to gradually narrow or define the limits of his expression: 1) what a performer wants to do, and 2)

what he is capable of doing best. Inherent in the first is the attempt to meet his own needs of fulfillment. The latter is often determined by audience reaction, *i.e.*, how the performer best conveys meaning to his audience. By trying certain acting techniques, for example, a performer may find that some are not the way in which he best expresses himself or that he does not enjoy that means of expression. At the same time, he may also develop the ability to express to his audience different ideas in different ways by use of a unique combination of technique in a given situation.

Thus, these two factors work together to help the performer realize his limitations, both in capabilities and desires. The word "limitations" is used only in the positive sense of helping narrow the scope of those physical manifestations which are to be solidified into an identifiable style, uniquely personal to that performer. At some point, the performer becomes conscious of the process and is capable of directing and governing the elements which will become his "style." The culmination of this process may take years for some, a relatively short time for others, or may never occur at all. Those performers who successfully create a unique style have used those techniques in a given situation and have continued their expansion and development to meet their needs for creative expression. This style manifests itself in timing, voice, gestures, mannerisms, and dress. What has evolved is personal to the individual. In other words, he has ascertained his limitations and turned to the perfection of the realm within those limitations. This is a creation of that individual's mind and is his representation of the ideas he chooses to express.

"Style" heretofore has been afforded virtually no protection from unauthorized appropriation. As noted above, those performers who have created a unique identifiable style may be one of two types. First, those who create the character *and* the expression of that character, such as Chaplin, are probably the most unusual. From this uniqueness, however, arises the misconception that style must be equated with an idea. But there are the performers such as Falk who create only the expression of the character, and the performers who create a unique style which exists independently of any character portrayed, such as Bert Lahr and "The Fifth Dimension." One point emerges from a comparison of these, *i.e.*, style can and does exist independent of any character-idea.

"Style" consists of a unique combination of posture, dress,

mannerisms, gestures, and/or vocal delivery, that individual combination being sufficiently developed to distinguish that performer from all others. As such, style must be recognized as and afforded its place among those protectible, intangible intellectual property rights. Style is capable of being delineated a "writing" within the constitutional framework and is therefore eligible for copyright protection.

The traditionally liberal defense of fair use would still protect those imitators who act in good faith. The irony of this defense is that for many years, it has protected the imitator because of his own unique "style," yet no protection has been available for the style of the performer imitated. Statutory requirements of tangibility can be met by the filing of pictorial narratives and videotapes as well as tapes of unique vocal style. However, because the statutory "writings" have been more strictly interpreted than constitutionally protectible "writings," Congress will remain reluctant to grant such protection for style. As a result, style must be protected by state and common law theories.

The imitation of style, when done in good faith, is not only permissible but desirable. It is when this style is appropriated for commercial exploitation, either by another performer or an advertiser, that the wrong occurs. The latter is of special importance because of two resulting consequences. The public is deceived into believing that a performer has endorsed a product and has received compensation therefor. But, the performer has *not* received compensation and in fact is deprived of something greater. He is denied the right to choose when, how, and under what circumstances his creative expression, style, is used. His opportunities for future product endorsement are narrowed, and the advertiser is allowed to profit with no need to reveal the source of the imitation. As the law currently stands, such an advertiser would be foolish to offer a performer a chance for product endorsement and to compensate him therefor when he is free to copy that style and pass it off to the public as originating from the original creator with little or no fear of judicial sanction. The problem exists, and will remain as long as courts and legislatures fail to take cognizance and afford protection.

Those performers who have not created an identifiable style and/or have merely developed their own personal traits which have become readily identifiable by the public have not produced a unique expression worthy of copyright protection. However,

they too deserve protection from commercial exploitation in product advertising under the right of publicity, defamation, and unfair competition. For those performers, as well as those who have created a style, secondary meaning may attach under given circumstances such that the voice or style becomes an identifying "mark" and possibly protectible under Lanham Act section 43(a) which is designed to protect the public from such false advertising practices.

The challenge is presented—the answers will emerge only if that challenge is met. Since Congress has failed to act, states are now free to do so and should provide protection for those who have become the "authors" of "style" in order that they may be free from unfair use and "outright poaching" of their creative efforts.

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