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SO MANY ENTERTAINERS, SO LITTLE PROTECTION: NEW YORK, THE RIGHT OF PUBLICITY, AND THE NEED FOR RECIPROCITY

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I. INTRODUCTION

New York – home to Broadway, Carnegie Hall and Radio City Music Hall. California – home to Hollywood and the Walk of Fame. Tennessee – home to Music City USA, the Grand Old Opry and Graceland. These three states comprise the entertainment capitals of the United States. Entertainers of all kinds flock to these states seeking stardom and fame. Upon achieving such fame, celebrities welcome many benefits inherently derived from their hard work and persistence. One such benefit is the right to control the commercial exploitation of their names and likenesses. This right, known as the right of publicity,[1] protects and secures the commercial value of a person's identity[2] and prevents the unjust enrichment of others who wish to appropriate that value for themselves.[3]

Although the protectible aspects of a person's identity differ from state to state, a comprehensive list includes name, picture, portrait, photograph, appearance, mannerisms, characterizations, performing style, likeness, voice, and signature.[4] New York currently protects four of these aspects – name, portrait, picture and voice.[5] New York is one of eight states that allows only statutory protection,[6] and one of two that has expressly rejected a common law right of publicity.[7] California currently protects five aspects by

1. THOMAS J. MCCARTHY, THE RIGHT OF PUBLICITY AND PRIVACY § 1.1[B][2] (2d ed. 2000).

2. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995).

3. *See id.* § 46 cmt. c.

4. *See generally* MCCARTHY, *supra* note 1, ch. 4. The personal identity aspects that are protected are also known as the 'methods of appropriation.'

5. *See* N.Y. Civ. Rights Law § 51 (McKinney 1903) (amended 1995).

6. DOMNA L. CANDIDO, PRACTISING LAW INST., ANNUAL ADVANCED SEMINAR ON TRADEMARK LAW 200 (1997).

7. *See* Stephano v. News Group Publications, Inc., 474 N.E.2d. 580, 584 (N.Y. 1984) (holding that right of publicity is encompassed under Civil Rights Law as aspect of right of privacy and is exclusively statutory in New York). Nebraska is the other state

statute – name, voice, signature, photograph and likeness[8] – and all others under common law.[9] Tennessee currently protects three aspects by statute – name, photograph and likeness[10] – and some others under common law.[11] New York's lack of protection allows advertisers to appropriate, without the need for authorization or compensation, celebrities' identity-aspects absent from sections 50 and 51 of the New York Civil Rights Laws.

Does New York afford enough protection to its entertainers domiciled and residing in its state? How should the economic and employment impact of the entertainment industry on New York influence its level of right of publicity protection? This Note will argue that, in light of its status as an entertainment hub, New York should broaden its right of publicity protection and afford at least as much protection to celebrities as does California and Tennessee.

Part II of this Note examines the development of the right of publicity and the statutory and common law protection afforded in New York, California, and Tennessee - the three states whose economies are impacted the most by the entertainment industry.[12] Part III compares the protection afforded in the three states by looking at the identity-aspects protected under their statutory and common law rights of publicity.[13] Part IV analyzes the economic and employment impact of the entertainment industry on the three states and concludes that New York does not afford enough right of publicity protection in light of its status as a focal point for entertainers; part IV also proposes the statutory amendments necessary to give New York the correct level of protection.[14] Part V concludes that New York, as a hub for entertainers, does not allow celebrities to sufficiently protect their identities and personas from commercial exploitation.[15]

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that has expressly rejected a common law right of publicity. *See* MCCARTHY, *supra* note 1, § 6.8[A].

8. *See* CAL. CIV. CODE § 3344 (1971) (amended 1984).
9. *See infra* notes 55-81, 102-191 and accompanying text.
10. *See* TENN. CODE ANN. § 47-25-1103 (1984).
11. *See infra* notes 82-191 and accompanying text.
12. *See infra* notes 16-101 and accompanying text.
13. *See infra* notes 102-191 and accompanying text.
14. *See infra* notes 192-220 and accompanying text.
15. *See infra* notes 221-23 and accompanying text.

II. THE DEVELOPMENT OF THE RIGHT OF PUBLICITY AND AN OVERVIEW IN NEW YORK, CALIFORNIA AND TENNESSEE

A. The Right of Publicity's Derivation from the Right of Privacy

The right of publicity is rooted in right of privacy laws.[16] In 1890, Samuel D. Warren and Louis D. Brandeis wrote an influential law review article in which they argued for the creation of a right of privacy.[17] It was a concept that existed in England and France, but not in the United States.[18] They described the right as the protection of personal writings and any other productions of the mind or of the emotions.[19] This encompassed the right of a private person to prevent his public portraiture, to protect his pen portraiture, to prevent his private affairs from being discussed by the press, and to protect against reproductions, descriptions and enumerations of such.[20] While highly debated, the Warren and Brandeis article eventually led to the adoption of right of privacy statutes in many states, beginning with New York in 1903.[21]

The right of publicity essentially developed out of the right of privacy in two phases. First, a right to control one's commercial identity developed, yet the label only pertained to unknown persons whose identities were used without their permission.[22] Second, in 1953, a new right was spawned based on famous persons wanting the right to control when, where, and how their identities were used in commercial settings.[23] In *Price v. Hal Roach Studios, Inc.*,[24] the Southern District of New York noted the inherent difference between the right of privacy and the right of publicity: the theoretical basis of the right of privacy is to prevent injury to feel-

16. *See* MCCARTHY, *supra* note 1, § 1.1[B][2].

17. *See* Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890) (hereinafter *Warren*). The right of privacy is beyond the scope of this note. For a more extensive discussion of the right of privacy, see generally MCCARTHY, *supra* note 1.

18. *See Warren*, *supra* note 17, at 201-12, 214.

19. *See id.* at 213.

20. *See id.* at 213-14.

21. *See* MCCARTHY, *supra* note 1, § 1.4; *see also* N.Y. CIV. RIGHTS LAW § 50-51 (McKinney 1903).

22. *See* MCCARTHY, *supra* note 1, § 1.1[B][2].

23. *See id.*; *see also* Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (dubbing the right the 'right of publicity').

24. *See Price*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975).

ings, while the right of publicity, conversely, has a purely commercial nature.[25]

Today the right of publicity incorporates both phases of development and applies to every person, celebrities and non-celebrities alike.[26] The right of publicity, thus, is the right of every person to control and benefit from the commercial use of his or her identity and persona.[27] Today, twenty-five states recognize a right of publicity in some form.[28]

B. New York

In 1902, twelve years after the publication of the Warren and Brandeis article, the New York Court of Appeals first addressed, and rejected the idea of a common law right of privacy in *Roberson v. Rochester Folding Box Co.*[29] In *Roberson*, the Franklin Mills Co., while engaged in the manufacture and sale of flour, obtained, made, printed, sold, and circulated around 25,000 lithographic prints, photographs and likenesses of plaintiff Abigail Marie Roberson, without her consent.[30] The prints were discernibly posted and displayed in stores, warehouses, saloons and other public places.[31] As a result, plaintiff was greatly humiliated and jeered at by her friends and other persons who recognized her face and picture on the advertisement.[32] She sought both equitable and monetary relief: first to enjoin Franklin Mills from making, printing, publishing, circulating or using in any manner her likeness;[33] and second to recover $15,000 in damages for emotional distress.[34]

Upon examining the authorities of the day,[35] the court of appeals held that the right of privacy had not found an enduring

25. *See Price*, 400 F.Supp. 836, 844.

26. *See* McCarthy, *supra* note 1, § 6.4[E][1].

27. *See* Candido, Practising Law Inst., *supra* note 6, at 185.

28. *See id.* at 199-201. Note that some states protect the right of publicity as a subset of the state's right of privacy statute.

29. 64 N.E. 442 (N.Y. 1902).

30. See *id.* at 442.

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.* at 443.

35. The court looked to English case law allowing relief for injury to feelings, New York case law, and the laws of other jurisdictions. *See id.* at 444-47 (citing Colonial City Tr. Co. v. Kingston City R.R. Co., 48 N.E. 900 (N.Y. 1897); Marks v. Jaffa, 26 N.Y.S. 908

place in New York jurisprudence because incorporating the doctrine would upset the settled principles of law guiding the public.[36] The court suggested, however, that the legislature could prevent advertisers from using the picture or name of a person without consent.[37]

In response to *Roberson*, in 1903, the legislature enacted sections 50 and 51 of the New York Civil Rights Law to prevent advertisers from using any person's name, portrait or picture without written consent first obtained.[38] Section 51 was later amended in 1921 to create an actionable civil suit.[39] This law stood unchanged for seventy-four years, until "voice" was added to the list of identity-aspects in 1995.[40] During the years in between, there was much confusion in the federal and state courts as to whether New York recognized a common law right of publicity separate from the statutory right of privacy.[41]

The first New York case to recognize a celebrity's right to recover for the unauthorized commercial use of his persona was *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* in 1953.[42] This case involved a famous baseball player who granted Haelan the exclusive right to use his photograph in connection with their gum.[43] Topps knew about the player's contract with Haelan, but nevertheless induced him to sign a contract to allow Topps to use his photograph in connection with their gum.[44] The Second Circuit held that independent of, and in addition to a right of privacy, a man has an exclusive right to publish his picture.[45] Judge Frank dubbed the

(N.Y. Sup. Ct. 1893); Murray v. Gast Lithographic & Engraving Co., 8 Misc. 36 (N.Y. Ct. Com. Pl. 1894); Chapman v. W. Union Tel. Co., 88 Ga. 763 (1892); Corliss v. E.W. Walker Co., 57 F. 434 (D. Mass. 1893); Atkinson v. John E. Doherty & Co., 121 Mich. 372 (1899)).

36. *See Roberson*, 64 N.E. at 447 (discussing the inability to drawn a line of demarcation between public and private characters).

37. *See id.* at 443 (holding that allowing recovery on these grounds would open up a vast field of litigation).

38. N.Y. CIV. RIGHTS LAW § 51 (McKinney 1903).

39. *See id.* (amended 1921).

40. *See id.* (amended 1995).

41. *See* MCCARTHY, *supra* note 1, § 6.9[D].

42. *Haelan*, 202 F.2d 866 (2d Cir. 1953).

43. *Id.* at 867.

44. *Id.*

45. *Id.* at 868.

right the "right of publicity," under the notion that famous persons would be greatly deprived if they no longer received money for authorizing advertisements and popularizing their countenances.[46] The court believed that previous New York decisions implicated a common law right.[47]

Following the decision in *Haelan*, federal and state courts struggled with the idea of a common law right of publicity.[48] In 1985, in *Stephano v. News Group Publ., Inc.*, the New York Court of Appeals ultimately clarified the confusion, asserting that New York does not recognize a common law right of publicity that is independent of the statutory right of privacy.[49] In *Stephano*, the Plaintiff was a model who agreed to pose for an article on men's fall fashion in *New York* magazine.[50] Defendants, however, published the photo in two articles.[51] The court of appeals held that the plaintiff had no statutory cause of action because the fashion articles were newsworthy, and he had no common law cause of action because the right is exclusively statutory in New York.[52] Judge Wachtler noted that the "right of publicity" is encompassed in the Civil Rights Law as a subset of the "right of privacy."[53]

The aftermath of the *Stephano* decision has left persons in New York with only a statutory remedy for invasion of privacy; which in turn has allowed advertisers to benefit from the use of certain as-

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46. *Haelan*, 202 F.2d 566.

47. *See id.* (citing Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917); Madison Square Garden Corp. v. Universal Pictures Co., 7 N.Y.S.2d 845 (App. Div. 1938); Liebig's Extract of Meat Co. v. Liebig Extract Co., 180 F. 688 (2d Cir. 1910)).

48. *See, e.g.*, Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661 (App. Div. 1977) (finding a common law right for performing style appropriation); Groucho Marx Prod., Inc. v. Day and Night Co., 523 F. Supp. 485 (S.D.N.Y. 1981) (finding a common law right for performing style and mannerisms appropriation); Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254 (Sup. Ct. 1984) (finding a common law right for lookalike appropriation). Ironically, the Tennessee courts have noted *Onassis* as persuasive authority. *See infra* notes 149-52 and accompanying text.

49. Stephano v. News Group Publications, Inc., 474 N.E.2d 580, 584 (N.Y. 1984) (professional model could not assert a cause of action for the right of publicity when his picture was published in a magazine article without his consent). Unlike California's right of publicity statute, CAL. CIV. CODE § 3344(e), New York's statute does not allude to a common law right.

50. *Stephano*, 474 N.E.2d at 581.

51. *See id.*

52. *Id.* at 584-85.

53. *Id.*

pects of celebrity identities and personas that are not covered as methods of appropriation in sections 50 and 51 of the New York Civil Rights Law.[54]

C. *California*

One of the earliest California cases bearing on the publicity rights of Hollywood celebrities involved the imitation of the performing style of Charlie Chaplin.[55] In 1928, Charlie Chaplin brought suit to enjoin Charles Amador from imitating his name, performing style and mannerisms in a movie entitled "The Race Track."[56] The court held that Amador could not use the name "Charlie Aplin," or imitate any of Chaplin's mannerisms, because it was likely to deceive the public, and because his whole scheme was undertaken to deceive the public and injure Chaplin's business.[57]

While Chaplin ultimately prevailed on principles of unfair competition and false advertising, his case began the move towards a common law right of publicity in California.[58] Shortly after *Chaplin*, in *Melvin v. Reid*, a California court recognized a common law right of privacy.[59] Subsequently, in *Motschenbacher v. R.J. Reynolds Tobacco Co.*, the Ninth Circuit asserted that California should, and

54. *See, e.g.*, Allen v. National Video, Inc., 610 F. Supp. 612, 621 (S.D.N.Y. 1985) (allowing lookalike appropriation). Although Allen was victorious on a breach of contract claim, the court chose not to resolve the right of privacy or publicity issues because of the confusion among the courts. *See id.* at 625. *See also* Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826 (S.D.N.Y. 1990) (allowing lookalike and soundalike appropriation); Preston v. Martin Bregman Prods., Inc., 765 F. Supp. 116 (S.D.N.Y. 1991) (allowing likeness appropriation); Hampton v. Guare, 600 N.Y.S.2d 57 (App. Div. 1993) (holding that there was no common law right and the actor's name, portrait or picture was not used in the film); Maxwell v. N.W. Ayer, Inc., 605 N.Y.S.2d 174 (Sup. Ct. 1993) (rejecting the plaintiff's section 50 and 51 claim for misappropriation of his voice because there was no cause of action for imitation of voice under New York law).

55. *See* Chaplin v. Amador, 269 P. 544 (Cal. Ct. App. 1928); *see* MCCARTHY, *supra* note 1, § 6.4[D].

56. *Chaplin*, 269 P. at 545. Chaplin was the first person to use the said clothes in his performing style and he originated, combined and perfected the manner of acting, facial expressions, body movements, and other mannerisms used in his motion pictures. *Id.*

57. *Id.* at 546.

58. *See* MCCARTHY, *supra* note 1, § 6.4[D], at n.36.

59. *See* Melvin v. Reid, 297 P. 91 (Cal. Ct. App. 1931).

would recognize a common law cause of action for the right of publicity.[60]

Five years after *Motschenbacher*, the California Supreme Court embraced the Ninth Circuit's conjecture.[61] In 1930, Bela Lugosi contracted with Universal to play Count Dracula in the film "Dracula."[62] Lugosi died in 1956, and in 1966 suit was brought by his widow and surviving son against Universal for the continued appropriation of certain property which they had inherited from Lugosi, and which was not granted to Universal in the 1930 contract.[63] The complaint alleged that Universal had entered into many license agreements for Count Dracula's character and that the character was based on Lugosi's likeness and facial characteristics.[64] While the court was vague and unclear on the issue of post-mortem rights,[65] its holding clearly indicated that Lugosi had a protectible property or proprietary right in his facial characteristics, mannerisms, likeness, and appearance as Count Dracula *during his lifetime.*[66]

Although *Lugosi* determined that a common law right of publicity existed for living persons in California, *Eastwood v. Superior Court* was the first to label this type of claim a "right of publicity" cause of action.[67] The court held that *National Enquirer's* use of Clint Eastwood's name, photograph and likeness in a cover article that was false, but presented as true, was an infringement on Eastwood's right of publicity.[68] Consequently, *Lugosi*, *Eastwood* and

60. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 826 n.15 (9th Cir. 1974).

61. *See* Lugosi v. Universal Pictures, 603 P.2d 425 (Cal. 1979).

62. *Id.* at 426.

63. *Id.* at 426-27. Paragraph 4 of the Lugosi contract contains the language, "the producer shall. . .have the right to use and give publicity to the artist's name and likeness, photograph or otherwise." *Id.* at 427 n.2.

64. *See id.* at 427.

65. "Post Mortem" is Latin for "after death." California's post mortem rights will be discussed *infra* at notes 181-86 and accompanying text.

66. *Lugosi*, 603 P.2d at 430-31. The personal decision to exploit one's name and likeness leads to a right during life. However, the court ultimately ruled in favor of Universal because Lugosi's right to exploit his name and likeness must have been exercised during his lifetime. *See id.*

67. *See Eastwood*, 149 Cal. App. 3d. 409, 413 (1983) (commercial appropriation of the right of publicity).

68. *See id.* at 421 (the court noted that Eastwood's rights were infringed under both statutory and common law).

their progeny,[69] encompass a California common law protection that is arguably broader than any other state.[70]

The California statutory right of publicity developed from an issue dealing with millions of California residents, rather than with a celebrity.[71] Constituents of a California Assemblyman complained about letters they received from *Reader's Digest*. The letters solicited subscriptions and contained the names of all the neighbors selected to participate in a sweepstakes contest.[72] The complaining constituents brought a class action suit for the unauthorized use of their names, which purportedly were used to help sell subscriptions.[73] The court of appeals held in favor of *Reader's Digest* because, *inter alia*, it was not possible to measure damages for the commercial value of an ordinary person's name in an advertising solicitation.[74] This case led to the drafting of section 3344 of the California Civil Code in 1972,[75] which included a minimum statutory recovery of $300 per plaintiff.[76]

The California Civil Code now contains two sections for the right of publicity: one for living persons[77] and one for deceased persons.[78] Section 3344 provides for a common law remedy for liv-

69. *See, e.g.*, Cher v. Forum Int'l, 692 F.2d 634 (9th Cir. 1982) (picture and name appropriation); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (sound-alike appropriation); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992) (likeness and lookalike appropriation); Waits v. Frito-lay, Inc., 1992 U.S. App. LEXIS 27031 (9th Cir. 1992) (soundalike appropriation); Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407 (9th Cir. 1996) (birth name appropriation protected even after legally changed); Newcombe v. Adolf Coors Co., 157 F.3d 686 (9th Cir. 1998) (name and likeness appropriation); *but see*, Taylor v. Nat'l Broad. Co., 22 Media L. Rep. 2433 (Cal. App. Dep't Super. Ct. 1994) (likeness used in miniseries documentary is protected by First Amendment); Montana v. San Jose Mercury News, Inc., 34 Cal. App. 4th 790 (1995) (picture and likeness used in newspaper in reference to a sporting event were protected by the First Amendment); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001) (picture in magazine was not pure commercial speech, and thus was protected by the First Amendment).

70. *See* CANDIDO, PRACTISING LAW INST., *supra* note 6, at 209.

71. *See* MCCARTHY, *supra* note 1, § 6.4[E][1].

72. *See* Stilson v. Reader's Digest Ass'n, Inc., 28 Cal. App. 3d 270, 272 (1972).

73. *See id.*

74. *Id.* at 274.

75. *See* MCCARTHY, *supra* note 1, § 6.4[E][1].

76. *See* CAL. CIV. CODE § 3344 (1971) (amended 1984 to increase the minimum statutory recover per plaintiff to $750).

77. *See generally id.*

78. *See generally* CAL. CIV. CODE § 3344.1.

ing persons by specifically stating that "the remedies provided for in this section are cumulative and shall be in addition to any others provided for by law."[79] Moreover, enacted in 1985, Section 3344.1 tracks section 3344's language and provides the equivalent protection for deceased persons.[80] Some commentary suggests that section 3344.1 was enacted mainly to overrule the holding in *Lugosi* that there is hardly ever, and perhaps never, any post-mortem rights.[81]

D. Tennessee

In 1984, the Tennessee legislature enacted The Personal Rights Protection Act.[82] The Act lists three methods of appropriation - name, photograph and likeness.[83] The Act further provides that "any remedies provided in this section are cumulative and shall be in addition to any others provided for by law."[84] Tennessee specifically defines the statutory right of publicity as a property right that survives for ten years after death.[85]

The majority of case law involving the right of publicity in Tennessee has been centered around Tennessee's most famous resident, and one of the most famous musicians of all time: Elvis Presley.[86] After Presley's death in 1977, a mass of litigation arose to determine if his right of publicity survived his death.[87] The first case was *Memphis Dev. Found. v. Factors Etc., Inc.*, a Sixth Circuit decision that did not extend Elvis's right of publicity post-mortem.[88]

In *Factors*, the Memphis Development Foundation (MDF) attempted to honor Elvis after his death by erecting a large bronze

79. CAL. CIV. CODE § 3344(g).

80. *See* CAL. CIV. CODE § 3344.1 (Section 990 amended and renumbered 1999).

81. *See* MCCARTHY, *supra* note 1, § 6.4[E][2].

82. *See* TENN. CODE ANN. § 47-25-1101 to 1108 (1984).

83. *See id.*

84. *See id.* § 47-25-1106(e).

85. *Compare id.* § 47-25-1103 to 1104, *with* CAL. CIV. CODE § 3344.1 (allowing post mortem right of seventy years).

86. *See* MCCARTHY, *supra* note 1, § 6.12[A]. Elvis has also created much case law for the right of publicity outside the state of Tennessee. *See, e.g.*, Elvis Presley Enters., Inc. v. Capece, 141 F.3d 188 (5th Cir. 1998); Factors Etc., Inc. v. Pro Arts, Inc., 541 F. Supp. 231 (S.D.N.Y. 1982); Estate of Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981).

87. *See* MCCARTHY, *supra* note 1, § 6.12[A].

88. *See Memphis Dev. Found.*, 616 F.2d 956 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

statue of him in downtown Memphis.[89] Factors was the holder of Presley's name and likeness, and claimed that it retained Presley's exclusive right of publicity after his death.[90] MDF instituted an action seeking a declaratory judgment that Factors' license did not preclude it from erecting the statue and from distributing miniature versions of the proposed statue to donors of the project.[91] The court held that the right of publicity in Tennessee is not inheritable and that death shifts the right into the public domain.[92] The court went on to note, however, that there is a common law right of action for the unauthorized commercial use of one's name or likeness during life.[93] Subsequently, in 1982, a Tennessee trial court adopted the reasoning in *Factors* and held that Presley's right of publicity did not extend beyond life.[94] Yet the Tennessee Court of Appeals reversed the trial court and held that a post-mortem right of publicity did exist.[95]

Two cases involving Elvis followed the 1982 court of appeals decision. First, in 1987, the court of appeals again held that Presley's right of publicity survived post-mortem.[96] This case involved a dispute between two not-for-profit organizations over the right to use Presley's name in their corporate names.[97] Because Elvis's right of publicity was descendible, the court held that his estate could prevent other organizations from deceptively using his name in their charters.[98] Second, in 1991, the Court of Appeals for the Sixth Circuit held that Elvis Presley Enterprises, the organization set up by Presley's estate, had the exclusive rights to commercially exploit the name, likeness and image of Elvis.[99]

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89. *See Memphis Dev. Found.*, 616 F.2d 956 at 957 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

90. *See id.*

91. *Id.*

92. *Id.*

93. *Id.* at 957-58.

94. The trial court's opinion is unreported. *See* Commerce Union Bank v. Coors of the Cumberland, Inc., 1984 Tenn. App. LEXIS 2950 (1984) (discussing the Chancellor's decision).

95. *See id.*

96. *See* Tennessee *ex rel.* Presley v. Crowell, 733 S.W.2d 89 (Tenn. Ct. App. 1987).

97. *See id.* at 91.

98. *Id.* at 92-93.

99. *See* Elvis Presley Enters. v. Elvisly Yours, Inc., 936 F.2d 889, 897 (6th Cir. 1991).

Although there has been a paucity of Tennessee case-law involving the right of publicity, the few cases decided have established that Tennessee does recognize a common law right of publicity.[100] Furthermore, the enactment of The Personal Rights Protection Act in 1984 has created explicitly detailed language to assist Tennessee courts in deciding right of publicity cases.[101]

III. NEW YORK'S PROTECTION COMPARED TO CALIFORNIA AND TENNESSEE

The methods of appropriating a person's persona or identity differ in scope between New York, California and Tennessee.[102] New York does not provide as much protection for the right of publicity as do California and Tennessee. New York affords no common law protection for the right of publicity, which restricts protection to the list of identity-aspects in section 51. New York has expressly rejected the idea of a common law right of publicity,[103] and federal and state courts have repeatedly construed the statute strictly.[104] In comparing the three states' protection, a consideration of the different methods of appropriation, and whether the cause of action is statutory or common law based, is relevant to determine breadth of protection.

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100. *See supra* note 86-99 and accompanying text.

101. *See, e.g.*, Apple Corps Ltd. v. A.D.P.R., Inc., 843 F. Supp. 342 (M.D. Tenn. 1993) (a look-alike performance of the Beatles infringed their right of publicity under The Personal Rights Protection Act because the group name "The Beatles" was a protectible "individual" under the statute, and using the first names of the group members collectively was also protectible); *cf.* Gibbons v. Schwartz-Nobel, 928 S.W.2d 922 (Tenn. Ct. App. 1996) (dismissing a right of publicity claim under the statute).

102. *See* CANDIDO, PRACTISING LAW INST., *supra* note 6, at 186.

103. *See* Stephano v. News Group Publications, Inc., 474 N.E.2d 580, 584 (N.Y. 1984).

104. *See* Allen v. Nat'l Video, Inc., 610 F. Supp. 612, 620-21 (S.D.N.Y. 1985) (stating statute strictly construed). *E.g.*, Shields v. Gross, 448 N.E.2d 108 (N.Y. 1983) (minor model could not disaffirm consent given by her guardian under statute); Ann-Margret v. High Soc'y Magazine, Inc., 498 F. Supp. 401, 404 (S.D.N.Y. 1980) (nude photograph from movie published in magazine not violation of right when not for trade or advertising purposes); Hampton v. Guare, 600 N.Y.S.2d 57 (N.Y. Sup. Ct. 1993) (play inspired by actor convicted of attempted burglary not violation where statute only protects name, portrait or picture).

A. Name

All three state statutes allow for the protection of one's "name" from unauthorized use for advertising purposes.[105] Unlike California and Tennessee, however, New York state courts, and federal courts interpreting New York law, have interpreted "name" strictly.[106] Specifically, New York courts have refused to protect pennames,[107] stage-names,[108] name-sameness,[109] and surnames.[110] All of these courts have noted, in line with *Stephano*, that New York has no common law right of publicity.[111]

California, on the other hand, has demonstrated broad protection for one's "name." California has protected the unauthorized use of a "name" in connection with name-similarity,[112] magazine article publications,[113] false newspaper stories,[114] and even the use of a birth name after it had been legally changed.[115] In *Eastwood v.*

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105. *See* N.Y. CIV. RIGHTS LAW § 51 (McKinney 1995); CAL. CIV. CODE §§ 3344(a), 3344.1(a)(1); TENN. CODE ANN. § 47-05-1105(a).

106. *See* Allen v. Nat'l Video, Inc., 610 F. Supp. at 620-21.

107. *See* Geisel v. Poynter Prods., Inc., 295 F. Supp. 331 (S.D.N.Y. 1968) (Dr. Seuss's penname not protected by statute).

108. *See* Davis v. R.K.O. Radio Pictures, Inc., 16 F. Supp. 195 (S.D.N.Y. 1936) (actor's stage-name not protected under statute).

109. *See* Nebb v. Bell Syndicate, Inc., 41 F. Supp. 929 (S.D.N.Y. 1941) (cartoon entitled "The Nebbs" did not infringe upon name of Mr. and Mrs. Rudy Nebb because name-sameness alone not enough to violate statute); Allen v. Gordon, 446 N.Y.S.2d 48 (App. Div. 1982) (name "Dr. Allen" used in Defendant's book not infringement of real Dr. Allen's name).

110. *See* Pfaudler v. Pfaudler Co., 186 N.Y.S. 725 (Sup. Ct. 1921) (identification not possible if only surname used, full name must be used under statute).

111. *See supra* notes 103-104; *see also Stephano*, 474 N.E.2d. at 584; *cf.* Rosemont Enters., Inc. v. Urban Sys., Inc., 72 Misc. 2d 788 (N.Y. Sup. Ct. 1973) (protecting name pre-*Stephano*); Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (protecting Muhammad Ali's nickname "The Greatest" pre-*Stephano*).

112. *See* Chaplin v. Amador, 269 P. 544 (Cal. App. Ct. 1928); *supra* notes 55-58 and accompanying text.

113. *See* Cher v. Forum Int'l, Ltd., 692 F.2d 634, 638-40 (9th Cir. 1982) (Cher prevented the use of her name in association with a magazine article published by Forum).

114. *See* Eastwood v. Superior Court, 149 Cal. App. 3d. 409 (1983) (Clint Eastwood prevented the National Enquirer from using his name on a cover article with false information about him).

115. *See* Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 409, 414-15 (9th Cir. 1996). GM aired a television commercial during the 1993 NCAA men's basketball tournament which used Abdul-Jabbar's former name, Lew Alcindor, in comparing the number of times he won the 'Most Outstanding Player' award, and the number of times the Oldsmobile Eighty-eight won the 'Consumer Digest's Best Buy' award. *See id.*

Superior Court, involving the publishing of a false newspaper story about Clint Eastwood, the court of appeals found both statutory and common law liability.[116] The *Eastwood* court defined the four-part test for a common law cause of action as follows: "(1) the defendant's use of the plaintiffs identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially *or otherwise*; (3) lack of consent; and (4) resulting injury."[117] This exceeds the breadth of the California statute, in that the common law elements are neither restricted to commercial uses, nor restricted by a list of methods of appropriation.[118]

Tennessee's breadth of protection for "name" lies in-between New York and California. Tennessee has protected, under both statutory and common law, the unauthorized use of a name in a corporate charter,[119] the name of a musical group,[120] and even the individual names of a musical group's four members used collectively.[121]

B. Picture, Portrait, Photograph, Look-Alikes and Image

All three state statutes protect "image" in some respect. New York protects against the unauthorized use of a person's "portrait"

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116. *See Eastwood*, 149 Ca. App. 3d. at 421.

117. *Id.* at 417 (emphasis added).

118. *See* Cal. Civ. Code § 3344(a).

119. See *Tennessee ex rel. Presley*, 733 S.W.2d 89, 91-93 (Tenn. Ct. App. 1987). Elvis Presley's estate sued to dissolve a not-for-profit foundation that was using the name "The Elvis Presley International Memorial Foundation." *Id.* The court held that Presley's estate retained the exclusive right to control the commercial exploitation of his name and likeness. *See id.*; *see supra* notes 96-98 and accompanying text.

120. *See* Apple Corps Ltd. v. A.D.P.R., Inc, 843 F. Supp. 342, 348 (M.D. Tenn. 1993).

121. *See id.* This case involved a Beatles cover band. The District court held that a stage name of a group of individuals is entitled to the same protection as the name of one of the individuals which comprise the group under The Personal Rights Protection Act. *Id.* The court also found that Defendants could not use the combination of the four names "John," "Paul," "George" and "Ringo" in any advertising or promotional materials for their concert because the names had acquired a secondary meaning for the group name 'The Beatles.' *See id.* Even though § 47-25-1102(2) defines individual as "human being, living or dead," section 47-25-1102(1) defines a "definable group" as "an assemblage of individuals existing or brought together with or without interrelation, orderly form, or arrangement, including, but not limited to, a crowd at any sporting event, a crowed in any street or public building, the audience at any theatrical or stage production, a glee club, or a baseball team." *See* TENN. CODE ANN. § 47-25-1105(a).

or "picture,"[122] and California and Tennessee both protect a person's "photograph" or "likeness."[123] Both California and Tennessee also define "photograph" as "any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that a person is readily identifiable."[124]

New York courts have applied the same strict construction to the terms "picture" and "portrait" in section 51[125] as they have to the term "name."[126] The New York Judiciary construes the right recognized by sections 50 and 51 of the Civil Rights Law strictly for two main reasons: (1) it is in derogation of New York common law, and (2) not doing so would create a potential conflict with the First Amendment.[127] In *Arrington v. New York Times Co.*, seventy-two years after *Roberson*,[128] the New York Court of Appeals noted that the legislature has not chosen to enlarge the reach of sections 50 and 51 in the years since *Roberson*.[129] In *Arrington*, the court of appeals found that the *New York Times*' use of a photo of Arrington was not a violation of the statute because the matter was of public interest.[130] As such, the topic was newsworthy and the newspaper's First Amendment rights outweighed Arrington's right of publicity.[131]

A more recent case indicating the breadth of the "newsworthy" exception in New York is *Messenger v. Gruner + Jahr Printing and Publs.*[132] Defendants published plaintiff's photo in a fictional article about teen sex and drugs.[133] The court held that "newsworthiness" is to be construed broadly, noting that it encompasses not only descriptions of actual events, but also articles of political

122. N.Y. CIV. RIGHTS LAW § 51.

123. *See* CAL. CIV. CODE §§ 3344(a), 3344.1(a)(1); TENN. CODE ANN. § 47-25-1105(a).

124. *See* Cal. Civ. Code § 3344(b); TENN CODE ANN. § 47-25-1102(5). The Tennessee statute tracks California's definition of "photograph" verbatim.

125. *See Allen*, 610 F. Supp. at 620-21.

126. *See supra* notes 106-111 and accompanying text.

127. *See Allen*, 610 F. Supp. at 620-21 (the right of publicity is simply a misnomer for the privacy interest protected by the New York Civil Rights law).

128. *See supra* notes 29-38 and accompanying text.

129. *See* Arrington v. New York Times Co., 434 N.E.2d 1319, 1321-22 (N.Y. 1982).

130. *Id.*

131. *See id.* at 1322; *see also Stephano*, 474 N.E.2d. 580 (N.Y. 1984) and *supra* notes 49-54 and accompanying text.

132. *Messenger*, 727 N.E.2d 549 (N.Y. 2000).

133. *See id.* at 550.

events, social trends, or any subject of public interest.[134] Indeed, there have been an immoderate number of New York "photograph" appropriation cases that have exonerated the defendant under "newsworthy" pretenses.[135]

In a few cases, however, the courts did construe the terms "picture" and "portrait" broadly enough to include look-alikes and the appropriation of likeness.[136] Other New York courts have found statutory violations for the appropriation of photographs under the common law,[137] yet all of these cases were decided before the *Stephano* court, which rejected all common law remedies.[138]

Contrary to New York, most California courts have interpreted the term "photograph" broadly. There were, however, courts that upheld the use of a picture because the use met the First Amendment "newsworthiness" exception.[139] In *Montana v. San Jose Mercury News*, the California Court of Appeals held that *San Jose Mercury News* accounts of Joe Montana in association with four superbowl victories were newsworthy because the publication was a matter of

134. *Messenger*, 727 N.E.2d at 552.

135. *See, e.g., Stephano*, 474 N.E.2d. 580 (fashion article is newsworthy); Abdelrazig v. Essence Comm., 639 N.Y.S.2d 811 (App. Div. 1996) (picture of plaintiff in African garb is newsworthy); Creel v. Crown Publishers, Inc., 496 N.Y.S.2d 219 (App. Div. 1985) (picture illustrating a nude beach); Lopez v. Triangle Communications, Inc., 421 N.Y.S.2d 57 (App. Div. 1979) (make-over picture in Seventeen magazine); Stern v. Delphi Internet Servs. Corp., 626 N.Y.S.2d 694 (Sup. Ct. 195) (lewd photo used in connection with ISP); Namath v. Sports Illustrated, 363 N.Y.S.2d 276 (Sup. Ct. 1975) (photo of plaintiff in promotional materials); Ann-Margaret v. High Soc'y Magazine, Inc., 498 F. Supp. 401 (2d Cir. 1980) (topless photo of plaintiff).

136. *See* Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254 (Sup. Ct. 1984) (defendant's use of an Onassis look-alike in a pictorial advertisement was held to be a statutory violation); Allen v. Nat'l Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985) (defendant used look-alike of Woody Allen holding a Clarinet on the VIP card for their video stores); Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826 (S.D.N.Y. 1990) (defendants used look-alikes of the Fat Boys in a beer advertisement). It should be noted that while the Southern District denied Miller Brewing's motion to dismiss the look-alike claim, the court granted Defendant's motion to dismiss the sound-alike claim. *See id.* at 837-38.

137. *See, e.g.*, Bi-rite Enters. v. Button Master, 555 F. Supp. 1188 (S.D.N.Y. 1983) (holding that photos of band placed on buttons and logos were violation); Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (holding that drawing of boxer in boxing ring was a violation and not newsworthy).

138. *See Stephano*, 474 N.E.2d. at 580 (holding that New York has no common law remedy for right of publicity).

139. *See, e.g.*, Montana v. San Jose Mercury News, Inc., 34 Cal. App. 4th 790 (1995).

public interest entitled to First Amendment protection.[140] In *Hoffman v. Capital Cities/ABC, Inc.*, the court held that a computer-generated image depicting Dustin Hoffman in a red dress from the movie "Tootsie" was not pure commercial speech, and thus was protectible under the First Amendment.[141]

Nothwithstanding the aforementioned cases, the majority of California courts presiding over a "picture" appropriation case have held that a newsworthy exception did not outweigh the protection of the plaintiff's identity.[142] In *Eastwood v. Superior Court*, for example, the court held that a newsworthy article must be true information.[143]

Moreover, the California courts have construed "likeness" broadly. In *Int-Elect Eng'g, Inc. v. Clinton Harley Corp.*,[144] the Northern District of California held that plaintiff's painting on the side of his motorcycle was a readily-identifiable artistic creation, and that fact alone was sufficient to state a right of publicity claim.[145] In reaffirming the breadth of protection for "photographs," the court remarked that California courts have expanded the definition of "likeness" to include more than just a person's physical attributes.[146]

Unlike California, Tennessee has only had one significant case involving the appropriation of "likeness" and "image."[147] In *Apple Corps Ltd. v. A.D.P.R., Inc.*, defendants produced posters depicting themselves as the Beatles from the album cover for 'A Hard Days'

140. *See* Montana, 34 Cal App. 790, 794 (1955).

141. *See Hoffman*, 255 F.3d 1180 (9th Cir. 2001).

142. *E.g.*, Eastwood v. Superior Court, 149 Cal. App. 3d 409 (1983); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001) (holding that there was no First Amendment defense to California right of publicity claim when artistic expression takes the form of literal depiction or imitation of celebrity for commercial gain); Newcombe v. Adolf Coors Co., 157 F.3d 686 (9th Cir. 2001) (reversing summary judgment to defendants where picture of pitcher in beer advertisement was placed in magazine without consent); *but cf.* Int-Elect Eng'g, Inc. v. Clinton Harley Corp., 1993 U.S. Dist. LEXIS 11510, 11-15 (N.D. Cal. 1993) (holding that publication was newsworthy where photo of artistic creation did not falsely imply endorsement of defendant's magazine).

143. *See Eastwood*, 149 Cal. App. 3d at 425; *see supra* notes 116-17 and accompanying text.

144. *Int-Elect Eng'g*, 1993 U.S. Dist. LEXIS 11510 (N.D. Cal. 1993).

145. *See id.* at 11.

146. *Id.* at 10 (citing Motsenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974)).

147. *See* Apple Corps Ltd. v. A.D.P.R., Inc., 843 F. Supp. 342 (M.D. Tenn. 1993).

Night."[148] The court noted that there was no Tennessee case on point involving look-alikes, and ironically looked to the New York *Onassis* case.[149] With emphasis added, the court held that permitting defendants to use the image of the Beatles would be sanctioning an obvious loophole to evade the statute; stating that "the essential purpose of the statute must be carried out by giving it a common sense reading which bars easy evasion."[150] The Tennessee court was persuaded by the logic of the New York *Onassis* court, and avowed that it is important to note that the Tennessee statutory right of publicity was more broadly worded than the New York statute.[151] Indeed, Tennessee's section 47-25-1105(a) prohibits the use of another's "likeness," while New York only prohibits the use of another's "portrait" or "picture."[152]

C. *Appearances, Mannerisms, Characterizations and Performance Style*

California and Tennessee, unlike New York, protect against the appropriation of one's "likeness" in statute.[153] Tennessee's statute even defines "likeness" as "an image of an individual."[154] The omission of "likeness" from the New York statute, however, did not prevent many pre-*Stephano* courts from protecting one's unique mannerisms, characterizations and performing styles under common law.[155] By rejecting a common law right of publicity, *Stephano*

148. *See Apple Corps Ltd.*, 843 F. Supp. at 348.

149. *See id.* Note that the *Onassis* decision was before *Stephano* in New York. *See supra* note 48.

150. *Id.* at 349.

151. *Id.*

152. *Id.*

153. *See* CAL. CIV. CODE § 3344; TENN. CODE ANN. § 47-25-1005.

154. TENN. CODE ANN. § 47-25-1002(3).

155. *See, e.g.*, Groucho Marx Prods., Inc. v. Day and Night Co., 523 F. Supp. 485, 486 (S.D.N.Y. 1981) (regardless of a common law right of publicity, the New York statute recognizes protection for the commercial value of one's likeness); Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661 (App. Div. 1977). The *Lombardo* court noted that the Civil Rights law is not to be applied to prevent the portrayal of an individual's personality or performing style, yet there is no question that a celebrity has a legitimate proprietary interest in his public personality. Because Lombardo had invested forty years in developing his performance style, he should be able to commercially exploit his public personality. *See id*; Onassis v. Christian Dior – New York, Inc., 472 N.Y.S.2d 254 (Sup. Ct. 1984) (look-alike of Jacqueline Kennedy Onassis was an infringement of likeness); *but cf.* Wojtowicz v. Delacorte Press, 374 N.E.2d 129 (N.Y. 1978) (an identifiable description of a person in a true story drama without showing his

all but eliminated any action for appropriation of appearance, mannerisms, characterizations, or performing style in New York.[156]

California has recognized the protection of one's mannerisms, characterizations, and performing style dating back to 1928.[157] More recently, California has demonstrated that appearance,[158] mannerisms,[159] characterizations[160] and performing style[161] are at the least protected under the common law right of publicity. Vanna White, for example, successfully sued an electronics company for appropriation of appearance where a commercial depicted a robot with a blonde wig, gown and jewelry, standing in White's customary "Wheel of Fortune" stance, turning letters on a "Wheel of Fortune"-like gameshow.[162] George Wendt and John Ratzenberger (the "Cheers" actors who played "Norm" and "Cliff"), likewise, were successful in an action where defendants used animatronic figures resembling the two "Cheers" characters in their bar.[163] Similarly, *Motschenbacher v. Reynolds Tobacco Co.* demonstrates the breadth of California's protection for distinct characterizations, holding that plaintiff's racecar was readily identifiable and as such, his car's characteristics were protectible.[164]

The only Tennessee case involving appearance, mannerisms, characterizations and performing style is *Apple Corps Ltd. v. A.D.P.R., Inc.*[165] The holder of the Beatles' right of publicity prevented defendants from using the group's appearance, manner-

face or using his real name is not a statutory violation because the statute only protects against name, portrait, or picture).

156. *See Stephano*, 474 N.E.2d 580 (N.Y. 1984) (no common law right of publicity).

157. *See* Chaplin v. Amador, 269 P. 544 (Cal. Ct. App. 1928) and *supra* notes 55-58 and accompanying text.

158. *See* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1991) (robot lookalike); Lugosi v. Universal Pictures, 603 P.2d 425 (Cal. 1979) (Count Dracula appearance); Wendt v. Host Int'l, Inc., 1995 U.S. App. LEXIS 5464 (9th Cir. 1995) (Cheers character appearance).

159. *Lugosi*, 603 P.2d 425 (mannerisms as Count Dracula).

160. Motschenbacher v. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) (racecar characterizations).

161. *Lugosi*, 603 P.2d at 425 (Bela Lugosi performing style as Count Dracula).

162. *See White*, 971 F.2d at 1396.

163. *See Wendt*, 1995 U.S. App. LEXIS 5464 at 1.

164. *See Motschenbacher*, 498 F.2d at 825-27. (finding that plaintiff was readily identifiable where he was a well-known racecar driver who consistently individualized his cars to set them apart from those of other drivers).

165. *Apple Corps Ltd.*, 843 F. Supp. 342 (M.D. Tenn. 1993).

isms, characterizations and performing style in recreating Beatles' performances from the 1960s.[166]

D. Voice and Sound

New York added "voice" to its section 51 methods of appropriation in 1995.[167] It is still unclear, however, as to whether New York recognizes protection for the appropriation of other voice-related elements, such as sound[168] and sound-alikes.[169] Both federal and state courts have rejected the idea of protection for sound and sound-alikes, citing New York's strict application of the statute.[170]

California, on the other hand, has found in two instances that a voice is protected from sound-alike imitation under the common law right of publicity. In *Midler v. Ford Motor Co.*, the Ninth Circuit held that Bette Midler had no cause of action under section 3344 where Ford used a sound-alike singer in a commercial because it was not Midler's actual "voice" that was used, but another singer's.[171] The court found that the statute, however, "[did] not preclude Midler from pursuing any cause of action she may have at common law; the statute itself implies that such common law causes of action do exist because it says its remedies are 'merely cumula-

166. *See Apple Corps Ltd.*, 843 F. Supp. 342 (M.D. Tenn. 1993).

167. N.Y. CIV. RIGHTS LAW § 51 (McKinney 1903) (amended 1995).

168. *See, e.g.*, Shaw v. Time-Life Records, 341 N.E.2d 817, 820 (N.Y. 1975) ("Artie Shaw does not have any property interest in the Artie Shaw 'sound,' . . . competitors might meticulously duplicate or imitate his renditions of musical compositions").

169. *See, e.g.*, Booth v. Colgate-Palmolive Co., 362 F. Supp. 343 (S.D.N.Y. 1973) (holding that there was no way of identifying plaintiff's voice as cartoon character so cannot show name or likeness appropriation); Maxwell v. N.W. Ayer, Inc., 605 N.Y.S.2d 174 (Sup. Ct. 1993) (holding that New York has not yet recognized remedy for voice imitation and courts have consistently held that there is no cause of action under sections 50 and 51 for misappropriation or imitation of voice); Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826, 837-38 (S.D.N.Y. 1990) ("The statute is very specific . . . New York Civil Rights Law does not yet extend to sound-alikes").

170. *See* Booth, *supra* note 169, at 349 (citing Lahr v. Adell Chemical Co., 300 F.2d 256 (1st Cir. 1962)); *see also* Arrington v. New York Times Co., 434 N.E.2d 1319, 1321-22 (N.Y. 1980) (statute's narrow application).

171. *See Midler*, 849 F.2d 460, 461-63 (9th Cir. 1988). The singer was told by many personal friends that they thought it was Midler singing the commercial, and Ken Fritz, a personal manager in the entertainment business declared by affidavit that he heard the commercial on more than one occasion and thought Midler was doing the singing. s*ee id. See* CAL. CIV. CODE § 3344, preventing the use of "another's. . .voice," but not imitation of another's voice.

tive.'"[172] The court held that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs.[173] The same result was reached in *Waits v. Frito-Lay, Inc.*, involving the sound-alike imitation of Tom Waits' distinct voice in a potato chip commercial.[174] California's common law protection for voice, sound and sound-alikes evinces a right of publicity that is thus broader than New York's strict application of the Civil Rights statute.

Although Tennessee has had no case law involving the appropriation of voice, sound or sound-alike imitation, the statute does provide that "the remedies provided for in this section are cumulative and shall be in addition to any others provided for by law."[175] Therefore, Tennessee will most likely allow for protection of voice, sound and sound-alike imitation at common law because, under a plain reading of the statute, and pursuant to the courts' willingness to recognize various common law right of publicity remedies, these remedies are "in addition" to the statutory protection.[176]

E. Post Mortem Rights

Unlike California and Tennessee, New York does not recognize a right of publicity after death. Both California and Tennessee have explicit statutory protection for post-mortem rights.[177]

There were a number of New York cases which held that the right of publicity extended post-mortem.[178] However the court of

172. *Midler*, 849 F.2d at 461-63 (citing CAL. CIV. CODE § 3344(g)).

173. *Id.* at 463.

174. *See Waits*, 978 F.2d 1093 (9th Cir. 1992).

175. TENN. CODE ANN. § 47-25-1106(e).

176. *See id.*

177. *See* CAL CIV. CODE § 3344.1; TENN. CODE ANN. §§ 47-25-1103(b), 1104(a).

178. *See, e.g.*, Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 844 (S.D.N.Y. 1975) (holding that death of actors Laurel and Hardy did not extinguish their right of publicity held by grantee of right). The court noted that the theoretical basis of the right of privacy is to prevent injury to feelings, thus the right is not transferable or assignable, and death is a logical conclusion to any claim. Conversely, there is no logical reason to terminate the right of publicity upon death because the right has a purely commercial nature, and thus the right is assignable and transferable. *See id.*; *Contra* Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978) (no post mortem right for Elvis); Price v. Worldvision Enters., Inc., 455 F. Supp. 252 (S.D.N.Y. 1978) (Laurel and Hardy); Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978) (Agatha

appeals in *Stephano* eliminated any common law right of publicity causes of action.[179] This proscribed any post-mortem right in New York because there was, and still is, no statutory protection after death.[180]

California's post-mortem right is codified in section 3344.1, which protects "a deceased personality's name, voice, signature, photograph, or likeness."[181] The Act is known as the Astaire Celebrity Image Protection Act.[182] It was amended and given a broader scope after a California court refused to allow Fred Astaire's widow to recover for appropriation of his image in a series of dance instructional videotapes.[183] The statute specifically states that the rights under this section are property rights transferable by contract or trust or testamentary documents.[184] The rights' duration was amended and increased in 1999 from fifty years to seventy years, currently one of the longest of any state.[185] One applicability limitation, however, is that a "deceased personality" must be a natural person whose particular aspect of identity in question has "commercial value at the time of his or her death," regardless of whether or not that person used that aspect commercially during his or her lifetime.[186]

Tennessee's post-mortem right is narrower than California's in one respect and broader than California's in another.[187] The statute provides for a post-mortem right in duration of ten years,[188] which is much shorter than the seventy-year duration in California.[189] The Tennessee statute, however, does not require that a

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Christie); Groucho Marx Prods., Inc. v. Day and Night Co., 523 F. Supp. 485 (S.D.N.Y. 1981) (Groucho Marx and the Marx Brothers).

179. *See Stephano*, 474 N.E.2d. 580, 584 (N.Y. 1984) ("Since the right of publicity is encompassed under the Civil Rights Laws as an aspect of the right of privacy, which, as noted, is exclusively statutory in this state, plaintiff cannot claim an independent common law right of publicity.").

180. *See id.* (no common law right).

181. CAL. CIV. CODE § 3344.1(a)(1).

182. *See id.* § 3344.1(o).

183. *See* Astaire v. Best Film & Video Corp., 1997 U.S. App. LEXIS 41260 (1997).

184. CAL. CIV. CODE § 3344.1(b).

185. *See* MCCARTHY, *supra* note 1, § 9.5[A].

186. CAL. CIV. CODE § 3344.1(h).

187. *Compare* TENN. CODE ANN. § 47-25-1103 to 1104, *with* CAL. CIV. CODE §3344.1.

188. TENN. CODE ANN. § 47-25-1104.

189. *See supra* note 185 and accompanying text.

person's property right have commercial value at the time of his or her death, as does California.[190] The statute rather allows for a post mortem right regardless of commercial value during life or at death.[191]

IV. SHOULD NEW YORK BROADEN ITS RIGHT OF PUBLICITY PROTECTION?

In *Zachini v. Scripps-Howard Broad. Co.*,[192] Justice White of the United States Supreme Court articulated that "the State's interest in permitting a right of publicity is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment."[193] California understands the necessity of protecting its celebrities' identities. California has the largest number of resident entertainers,[194] and the economic impact these entertainers have had on the state is greater than in any other respective state.[195] Correspondingly, California arguably has the broadest right of publicity protection of any state.[196] This connotes a reciprocal relationship,[197] in that the entertainment industries' impact on California has at least some bearing on the level of right of publicity protection. Although New York has a greater number of entertainers than Tennessee,[198] and the entertainment industry has had a greater economic impact on New York than Tennessee,[199] Tennessee's right of publicity protection is broader than New York's protection.[200] How should the correct level of right of publicity protection be determined?

The number of entertainers in the state, and their economic impact on the state, should have some bearing on the level of right

190. *See* TENN. CODE ANN. § 47-25-1103(b); *see supra* note 186 and accompanying text.

191. *See* TENN. CODE ANN. § 47-25-1103(b).

192. 433 U.S. 562 (1977).

193. *Id.* at 573.

194. *See infra* text and bar graph accompanying notes 207-09.

195. *See infra* text and bar graph accompanying notes 210-14.

196. *See supra* text accompanying notes 102-191.

197. 'Reciprocal' is a term of the author, it is not found in any other reference to any right of publicity writings.

198. *See infra* text and bar graph accompanying notes 207-09.

199. *See supra* text accompanying notes 210-14.

200. *See supra* text accompanying notes 102-191.

of publicity protection. These factors need not be dispositive – such that the level of protection should be proportionate to the economic impact – yet they should have some weight in determining the breadth of protection. These reasons are inherent in the reciprocal relationship between entertainers and their state, as noted by Justice Nelson of the Ninth Circuit:

> "California has an overriding interest in safeguarding its citizens from the diminution in value of their names and likenesses, enhanced by California's status as the center of the entertainment industry."[201]

Currently, as evinced by its narrow protection,[202] New York does not factor in the economic impact of entertainers in safeguarding its citizens from diminution in value of their names and likenesses. Yet the fundamental reasons for having broad right of publicity protection in California and Tennessee are also applicable in New York. All three states are focal points for entertainers, and their respective economies thrive as a result of these entertainers' endeavors. In protecting entertainers' identities and personas, the state is in turn securing and increasing the economic impact of the entertainment industry on the state.

The entertainment industry has been described as being "finely woven into the fabric of [New York's] economy, benefiting related industries and enhancing community attractiveness."[203] A study conducted by the Alliance for the Arts in 1995 revealed numerous reasons for the importance of the entertainment industry in New York: (1) it influences other industries such as fashion, publishing and advertising; (2) it fosters major job creation for artists and non-artists; (3) it attracts many visitors who spend money (labeled an 'export industry'); and (4) it is a major motivation for people choosing to move to New York.[204] Similarly, "Tennessee's reputation as a music center was the most frequently cited advan-

201. Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1202 (9th Cir. 1988).

202. *See supra* text accompanying notes 102-191.

203. Alliance for the Arts, *The Economic Impact of the Arts on New York City and New York State* (1995), *at* http://hellskitchen.net/develop/news/alliance.html (last accessed Apr. 9, 2003).

204. *Id.*

tage to doing business [in the state];"[205] and "the motion picture and television industry is a leading contributor to the robust economic recovery and future financial well-being of [California]."[206] As such, a determination of the number of entertainers in New York, California and Tennessee, and the economic impact they have had on their respective state is pertinent to this analysis.

The local unions and guilds, and their memberships, provide evidence of the number of entertainers residing in California, New York and Tennessee. The following unions and guilds are most relevant: the Screen Actors Guild (SAG), which represents screen actors; the American Federation of Television and Radio Artists (AFTRA), which represents actors, broadcasters, dancers, and singers; the Actors Equity Association (Actors Equity), which caters to stage performers; the American Federation of Musicians (AFofM), which represents performing and studio musicians; the American Guild of Musical Artists (AGMA), which represents opera, choral and dance performers; and the National Academy of Recording Arts & Sciences (NARAS), whose members consist of musicians, producers, songwriters and other music professionals.[207] The following bar graph compares the membership of the union and guild locals in the three major entertainment cities: Los Angeles, California; New York, New York; and Nashville, Tennessee.[208]

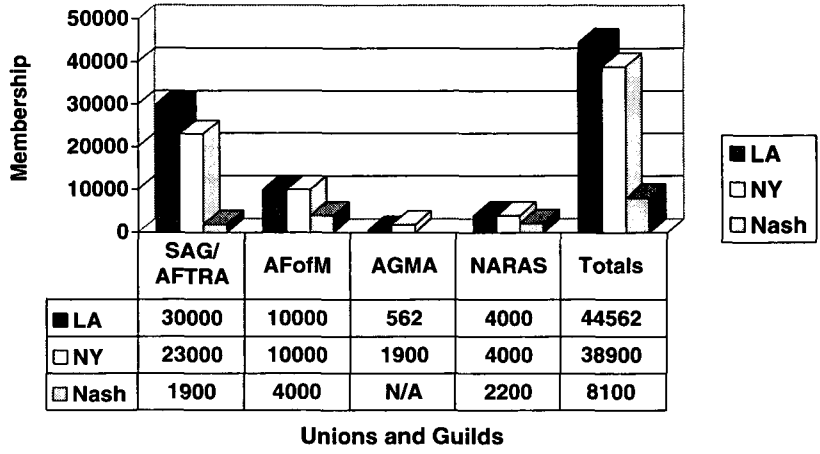
205. Larry Nager, *Recording Weak Here But Music Remains a Big Draw*, THE COMMERCIAL APPEAL, Feb. 23, 1992, at J10 (on file with author).

206. Letter from Jack Valenti, President and CEO of the MPAA, (April 23, 1998), *in State of the Industry: The Economic Impact of the Entertainment Industry on California*, MOTION PICTURE ASSOCIATION OF AMERICA, INC., 1998 RELEASE 4, *available at* http://www.mpaa.org/useconomicreview (on file with author).

207. *See* http://www.naras.org/academy. Note that some members of NARAS may also be members of one or more of the other unions and guilds.

208. Interviews with SAG/AFTRA, AFofM, AMGA, NARAS, in Los Angeles, CA, Nashville, TN, and New York, NY (November 11, 2001, January 15, 2002, and January 22, 2002) (on file with author).

FIGURE 1. UNION AND GUILD MEMBERSHIP



	SAG/ AFTRA	AFofM	AGMA	NARAS	Totals
LA	30000	10000	562	4000	44562
NY	23000	10000	1900	4000	38900
Nash	1900	4000	N/A	2200	8100

Unions and Guilds

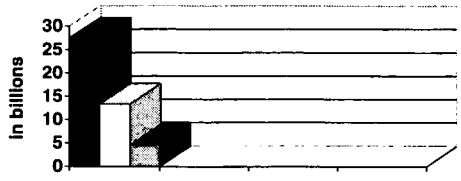
A comparison of the locals in the smaller cities suggests a similar pattern.[209] Totaling the largest union and guild locals reveals that Los Angeles has the largest number of entertainers with approximately 44,500, New York City has the second largest with approximately 38,900, and Nashville has the third largest with approximately 8,100.

Yet of more importance than the number of entertainers in each state is the impact these entertainers have had on the state. The following bar graphs compare the total economic impact, total industry job employment, total industry taxes returned to the state, and Gross State Product in various years.[210] These numbers, however, relate to the film, television and art industries, which exclude the sound recording industry.

209. Interviews with SAG/AFTRA, AFofM, AMGA, NARAS, in various cities (November 11, 2001, January 15, 2002, and January 22, 2002) (on file with author).

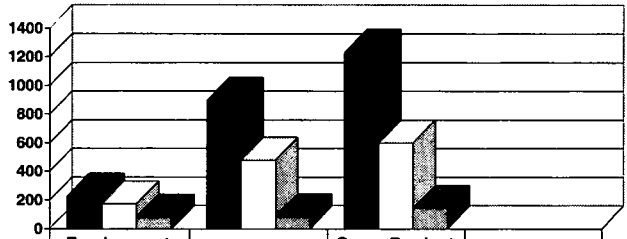
210. *See generally State of the Industry, supra* note 208; Press Release, Governor Don Sundquist, Governor Reports Record Year For Tennessee Entertainment (March 25, 1997), *available at* http://www.state.tn.us/governor/mar1997/tfc.htm (on file with author); Larry Nager, *Recording Weak Here But Music Remains a Big Draw*, THE COMMERCIAL APPEAL, Feb 23, 1992, at J10 (on file with author); BUREAU OF ECONOMIC ANALYSIS, U.S. DEPARTMENT OF COMMERCE, REGIONAL ACCOUNTS DATA, GROSS STATE PRODUCT DATA (2002), *at* http://www.bea.doc.gov/bea/regional/gsp. (on file with author).

FIGURE 2. TOTAL ECONOMIC IMPACT OF THE ENTERTAINMENT INDUSTRY



CA in 98'	27.5			
NY in 95'	13.4			
TN in 96'	4.6			

FIGURE 3. OTHER IMPACT



	Employment (in thousands)	Tax (in millions)	Gross Product (in billions)	
CA in 98'	226	895	1229	
NY in 95'	174	480	598	
TN in 96'	78	81	142	

The New York study conducted by the Alliance of the Arts estimated that the total impact of the entertainment industry on New York in 1997 would be $16 billion, a nineteen percent increase in two years.[211] Thus, the total economic impact of the entertainment industry on New York in 1998 would be about two-thirds that of the impact on California, yet still significantly larger than Tennessee's projected 1998 impact. These entertainment statistics follow the same pattern as the Gross State Product in each year.[212]

One other major contributor to the entertainment industry is the sound recording industry. The Recording Industry Association

211. Alliance for the Arts, *supra* note 203.
212. *See supra* note 210, accompanying text and bar graph.

of America (RIAA) reported that the overall size of the U.S. sound recording industry in 1999 was approximately $14.6 billion.[213] The majority of this industry thrives in Los Angeles, Music City USA Nashville, and New York City.[214] Moreover, the number of members of AFofM evinces that the sound recording industry has as much of a presence in New York as it does in California.[215]

These statistics weigh in favor of increasing New York's right of publicity protection. Currently, New York's level of protection does not connote a reciprocal relationship. California and Tennessee can give guidance in this respect. The optimal solution for increasing protection, of course, would be for the New York legislature to create an entirely new statute for the right of publicity, instead of viewing it as a subset of the right of privacy. The inherent differences in the two rights warrant separate codification.[216]

At a minimum, however, the legislature should make four amendments to section 51. First, "likeness" should be added to the methods of appropriation, such that section 51 should read, "name, portrait, picture, voice or likeness."[217] Second, to eliminate confusion and inconsistency between the courts, the terms "likeness," "portrait," and "picture," should be defined and codified.[218] Third, a post-mortem right should be created with duration somewhere between ten and seventy years.[219] Lastly, language, such as "the remedies provided for in this section are cumulative and shall be in addition to any common law remedy," should be added to explicitly supercede the *Stephano* decision.[220] These amendments would effectively broaden New York's right of publicity protection and thus evince a reciprocal relationship.

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213. *See* RECORDING INDUSTRY ASSOCIATION OF AMERICA, 2000 CONSUMER PROFILE, *at* http://www.riaa.com/PDF/1999_consumer_profile.2.pdf (last visited Apr. 9, 2003). The figure is based on the the manufacturers' shipments at suggested list prices. *See id.*

214. *See Marketing your music to the USA*, *at* http://www.troubledclef.com/tc_art5-1.html (on file with author).

215. *See supra* notes 207-09, accompanying text and bar graph.

216. *See supra* notes 24, 25, 178 and accompanying text.

217. While both California and Tennessee contain "likeness," California also contains "signature." *See* CAL. CIV. CODE § 3344 and TENN. CODE ANN. § 47-25-1103.

218. TENN. CODE ANN. § 47-25-1102 defines "definable group", "individual," "likeness," "person," and "photograph"; Cal Civ Code § 3344 defines "photograph."

219. *See* CAL. CIV. CODE § 3344.1(g) (duration 70 years); TENN. CODE ANN. § 47-25-1104 (duration 10 years).

220. *See* CAL. CIV. CODE § 3344(g); TENN. CODE ANN. § 47-25-1106(e).

V. CONCLUSION

New York currently does not allow celebrities to sufficiently protect their identities and personas from unauthorized commercial exploitation.

> "If we truly value the right of [publicity] in a world of exploitation, where every mark of distinctiveness becomes grist for the mills of publicity, then we must give it more than lip service and grudging recognition."[221]

In *Abdul-Jabbar v. Gen. Motors Co.*, the Ninth Circuit held that a rule which only allows infringement of the right of publicity through the use of the nine different methods of appropriating an identity in the statute simply challenges the clever advertising strategist to come up with the tenth.[222] New York's Civil Rights Law section 51 lists only four methods of appropriation.[223] Thus, the statute allows advertisers to use any other plausible method of appropriation without permission, and without compensation. Essentially, the lack of a common law right of publicity in New York, unlike in California and Tennessee, eliminates the ability of entertainers to sufficiently protect themselves from the appropriation of all other identity-aspects not listed in section 51.

Entertainers do so much for New York and its economy. In the spirit of a true reciprocal relationship, New York should do more to protect entertainers from unauthorized commercial exploitation; not only for the entertainers, but also for the stability and future of the state's economy.

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221. *Apple Corps Ltd.*, 843 F. Supp. at 349.
222. 85 F.3d 407, 414 (9th Cir. 1995).
223. *See* N.Y. CIV. RIGHTS LAW § 51.