# SHOW AND TELL: MISAPPROPRIATION OF THE RIGHT OF PUBLICITY

**By: Gregory L. Curtner, Atleen Kaur, and Suzanne L. Wahl**[1]

Today it is commonplace to turn on the television and see well known public figures endorsing products.[2] Indeed, successful

[1] The authors are lawyers with Miller, Canfield, Paddock and Stone in New York City and Ann Arbor, Michigan who represent the NCAA in some cases discussed in this article. The views expressed are those of the authors and not the NCAA.

[2] Recent humorous examples abound. Chevy Chase promotes the Chase Sapphire Card. Actress and singer Queen Latifah is a spokesperson for Jenny Craig. Actress Pamela Anderson is a spokeswoman for PETA. TV show host Ellen DeGeneres endorses American Express, CoverGirl and Vitamin Water. Actress Phylicia Rashad is a spokeswoman for Jenny Craig. Boston Celtics forward Kevin Garnett's face is on Wheaties FUEL cereal boxes. LeBron James of the Miami Heat endorses Nike and McDonald's. Actress Kate Hudson endorses Almay. Derek Jeter of the New York Yankees represents Ford, Gatorade, Gillete and Nike. Actress Jennifer Aniston endorses Glaceau and Smartwater. Tennis star Roger Federer represents Gillette, Mercedes-Benz, Rolex and Credit Suisse. Though golfer Tiger Woods was dropped by AT&T and Gatorade, he still makes plenty of money lending his name to Nike, Electronic Arts and Upper Deck. Country star Kenny Chesney endorses Corona and MasterCard. Model and reality show host Heidi Klum lends her face to Diet Coke, McDonald's and Volkswagen. Singer Lady Gaga represents Polaroid and Virgin Mobile. Actress Kirstie Alley is a spokeswoman for Jenny Craig. Michael Jordan has endorsed Nike, Gatorade, Hanes and Upper Deck. Singer Britney Spears represents Candies' and Elizabeth Arden. Actress Valerie Bertinelli is also a spokesperson for Jenny Craig. Colts QB Peyton Manning does ads for MasterCard, Gatorade and Oreo cookies. The Black Eyed Peas represent Honda, Target and Apple. Actress Drew Barrymore lends her face to CoverGirl.

celebrities derive a significant portion of their income from endorsements.[3] In the world of sports, corporations pay "big money" for endorsements by popular athletes. NASCAR fans are legendary for their loyalty to the brands that sponsor the sport and to any brand that is endorsed by star drivers. It is not surprising, then, that celebrities vigorously pursue their rights to retain the monetary value in their persona in order to reap the reward of their celebrity status. This "right" has come to be known as the "right of publicity." But the law regarding this right of publicity is of dubious origin, varies widely from state to state, and continues to be in flux in the face of changing technologies and multiple consumer interfaces. This article recaps the literature, examines the historical source and development of the right of publicity, and describes the current state of the law. Finally, it discusses some

[3] Michael Jordan's annual income from endorsements was estimated at over $40 million. http://www.forbes.com/lists/2008/53/celebrities08_Michael-Jordan_UGGU.html. Though Tiger Woods' endorsements for 2010 are estimated to be worth $22 million less than last year, his estimated total earnings are still more than $90 million. http://articles.latimes.com/2010/jul/21/sports/la-sp-newswire-20100722. Before his recent endorsement deal with Under Armour, Tom Brady was estimated to make $3-$4 million a year in endorsements. http://online.wsj.com/article/SB10001424052748704402404574527711601616216.html.

current key disputes and ends with some predictions for the law going forward.

***How did the Right of Publicity Develop?***

In 1890, Warren and Brandeis published their seminal article titled "The Right to Privacy."[4] The article is widely credited as establishing a new area of the law.[5] The article argued there was a need for the law to recognize an individual's right to privacy and could easily have been written for modern technology developments. It expressed concern over the violation of an individual's privacy from the "[i]nstantaneous photographs and news paper enterprise [invading] the sacred precincts of private and domestic life; and numerous mechanical devices threaten[ing]"

[4] Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harvard. L. Rev. 193 (1890). Brandeis, of course, went on to become an Associate Justice on the United States Supreme Court. Warren married the daughter of a Senator and took over the family business. See, Amy Gajda, *What if Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage that Led to "The Right to Privacy*," 2008 Mich. St. L. Rev. 35 (Spring 2008).

[5] The article is regarded as the prime example of using scholarship to change the law. Judge Cooley had earlier described the right "to be let alone." Cooley, Torts 29 (2d ed. 1888).

wide publication of private information.[6] The article recognized that an individual has the right to refrain from publication of his or her "thoughts, sentiments, or emotions."[7]

Warren and Brandeis recognized the intersection of the right to privacy they were advocating with copyright. Copyright is essentially a right to property which protects the monetary value of physical manifestations of thoughts, sentiments or emotions. But, they explained, "where the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of

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[6] *Id*. at 195. "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pained and distress, far greater than could be inflicted by mere bodily injury." *Id.* at 196 (1890).

[7] *Id*. at 198.

property."[8] In this regard, their concern was more akin to the torts of defamation or outrage where the focus is on hurt feelings or mental distress. Warren and Brandeis saw something different than the deprivation of property in instances where privacy was invaded and analogized this right to the law of libel and defamation. This dichotomy between concepts borrowed from the law of property and those from the law of mental distress by intrusion or publication has continued to confound the law of privacy, which has developed both a "let alone" and a commercial exploitation branch, often intertwined.

Perhaps due to the obviousness of their motive[9] or the youth of the authors,[10] the courts did not initially accept Warren and Brandeis. New York courts rejected it,[11] as did Michigan.[12] in response, the New York legislature promptly enacted legislation to

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[8] *Id*. at 200.

[9] William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 383 (1960) ("Mr. Warren became annoyed.").

[10] *Id.* at 382-3, "In the Harvard Law School class of 1877 the two authors had stood respectively second and first…."

[11] *Id.* at 383, "The article had little immediate effect on the law."

[12] *Id.* at 385.

reverse the Court of Appeals.[13] The Supreme Court of Georgia went with Warren and Brandeis.[14]

In 1960 Dean Prosser wrote his seminal article on the right to privacy.[15] Prosser offered four categories where privacy had been recognized:

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[13] *Id.*

[14] *Id.*

[15] *Id.* Prosser notes in the year 1890 Mrs. Samuel D. Warren, "a young matron of Boston, which is a large city in Massachusetts, held at her home a series of social entertainments on an elaborate scale. She was the daughter of Senator Bayard of Delaware, and her husband was a wealthy young paper manufacturer, who only the year before had given up the practice of law to devote himself to an inherited business. Socially Mrs. Warren was among the elite; and the newspapers of Boston, and in particular the *Saturday Evening Gazette*, which specialized in "blue blood" items, covered her parties highly personal and embarrassing detail. It was the era of "yellow journalism," when the press had begun to resort to excesses in the way of prying that have become more or less commonplace today; and Boston was perhaps, of all of the cities in the country, the one in which a lady and a gentleman kept their names and their personal affairs out of the papers. The matter came to a head when the newspapers had a field day on the occasion of the wedding of a daughter, and Mr. Warren became annoyed. Mason Brandeis, A Free Man's Life 70 (1946). It was an annoyance for which the press, the advertisers and the entertainment industry of America were to pay dearly over the next seventy years. Mr. Warren turned to his recent law partner, Louis D. Brandeis, who was destined not to be unknown to history. The result was a noted article, *The Right of Privacy*, in the *Harvard Law Review*, upon which the two men collaborated. It has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law."

> "1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. 2) Public disclosure of embarrassing private facts about the plaintiff. 3) Publicity which places the plaintiff in a false light in the public eye. 4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness."[16]

The Sixth Circuit has explained that the "fourth type [of Prosser's privacy rights] has become known as the 'right of publicity.'"[17] Prosser recognized that "these four types of invasion may be subject, in some respects at least, to different rules; and that what is said as to any one of them is carried over to another, it may not be at all applicable and confusion may follow."[18]

Indeed, confusion has followed. Prosser found that following Warren and Brandeis in 1890 "[f]or the next thirty years there was a continued dispute as to whether the right of publicity existed at all" but "in the thirties with the benediction of the Restatement of Torts, the tide set in favor of recognition."[19] As of

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[16] *Id*. at 389.

[17] *Carson v. Here's Johnny Portable Toilets, Inc*., 698 F.2d 831, 834 (6th Cir. 1983) (internal citations omitted).

[18] Prosser, supra note 9 at 389.

[19] *Id.* 386 (citing Restatement of Torts §867 (1939)).

1960, Prosser counted as 27 states as having recognized the right of publicity in "one form or another," including Michigan; seven more likely to accept it; four states having adopted statutes, including New York, which had overruling its Court of Appeals; and only four having rejected it.

Although the Fifth Circuit notably declined,[20] the tide of recognition rolled on with an influential article by Nimmer[21] and a chewing gum trading card case from the Second Circuit with echoes of today's video game disputes.[22] Prosser, while seemingly less than convinced about the wisdom of this new right, accurately reflected the law as of 1960.

Following Prosser, the Restatement (Second) of Torts adopted the four part test,[23] the Ninth Circuit applied it for the

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[20] *O'Brien v. Pabst & Sales Co.*, 124 F.2d 167 (5th Cir. 1941), where the unfortunate plaintiff was a football star at TCU who opposed the use of alcohol and whose likeness was used to endorse the sale of beer.

[21] Nimmer, The Right of Publicity, 19 Law of Contemp. Problems 203 (1954).

[22] *Haelan Labs., Inc. v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953) (predating Prosser and recognizing fourth prong as "right of publicity").

[23] Restatement (Second) of Torts §652A (1977).

benefit of a race car driver whose image had been altered,[24] and the Restatement (Third) of Unfair Competition § 46 pronounced:

> The Right of Publicity:
> One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49.

***Modern Formulation of the Right of Publicity***

Although "[t]he right of publicity has developed to protect the commercial interest of celebrities in their identities, it is probably not so limited. The theory of the right is that a celebrity's identity can be valuable in the promotion of products and the celebrity has an interest that may be protected from the unauthorized exploitation of that identity."[25] Although many argue that the right of publicity should be limited to celebrities, the rationale of protecting the value in a person's name or likeness seemingly has evolved into a property right which protects the economic value of a person's identity rather than protecting the

[24] *Motschenbacher v. RJ Reynolds,* 498 F.2d 821 (9th Cir. 1974).

[25] *Carson,* 698 F.2d at 835.

individual from exposure of private or embarrassing facts.[26] As Judge Frank noted in 1953 – before Prosser's article – "it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways."[27] It is this right to monetize one's likeness that is protected by the modern right of publicity, which is much more analogous to the exploitation of one's property for profit than to defamation or other actions for mental distress.

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[26] "Today it is possible to state with clarity that the right of publicity is simply this: it is the inherent right of every human being to control the commercial use of his or her identity. The right of publicity is a state-law created intellectual property right whose infringement is a commercial tort of unfair competition. It is a distinct legal category, not just a "kind of" trademark, copyright, false advertising or right of privacy. While it bears some family resemblances to all these neighboring areas of the law, the right of publicity has its own unique legal dimensions and reasons for being. The right of publicity is not merely a legal right of the "celebrity," but is a right inherent to everyone to control the commercial use of identity and persona and recover in court damages and the commercial value of an unpermitted taking." J. Thomas McCarthy, The Rights of Publicity and Privacy §1.3 (2d Ed. 2009)

[27] *Haelan Labs.*, 202 F.2d 868.

This rationale is central to the Supreme Court's only opinion on the common law right of publicity.[28] In *Zacchini*, the plaintiff performed a "human cannonball" act where he was thrown out of a cannon and landed in a net 200 feet away. During one of plaintiff's performances at a county fair in Burton, Ohio, a freelancer, years before YouTube, for a local TV station taped the entire act, which was then broadcast by the TV station during the daily newscast. Plaintiff brought an action for "unlawful appropriation of [his] professional property." The Supreme Court of Ohio found that plaintiff had pled a violation of his right of publicity, but granted judgment to the defendant TV station. The Supreme Court granted certiorari for the limited question of whether the newscast was protected by the First Amendment. The Court found that the newscast was not so protected because the broadcast of plaintiff's "entire act pose[d] a substantial threat to the economic value of that performance" and affected his very ability to earn a living as a "human cannonball" entertainer.[29] The Supreme Court found that such usurpation of the plaintiff's

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

[29] *Id.* at 575-576.

economic value was not protected by the First Amendment. The Court focused on the commercial nature of the property misappropriated rather than the noncommercial nature of the medium appropriating it.

In distinguishing its earlier decision in *Time Inc. v. Hill*,[30] which dealt with false light invasion of privacy, the Supreme Court explained the differences between false light right of privacy and the right of publicity: "the State's interests in providing a cause of action in each instance are different. The interests protected in permitting recovery for placing the plaintiff in a false light is clearly that of reputation, with the same overtones of mental distress as in defamation. By contrast, the State's interest in permitting a right of publicity is in protecting a proprietary interest of the individual in his act in part to encourage such entertainment. …[T]he State's interest is closely analogous to patent or copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or

[30] 385 U.S. 374 (1967).

reputation."[31] Therefore, the Supreme Court recognized that the right of publicity protects only the economic value of a person's name or likeness and is distinct from any other protection given to a person's feelings under other legal theories. The right of publicity is more akin to a property right such as copyright or patent rights.

***Current State of the Law***

The right of publicity is usually a creature of common law. In some states, including California, it is also a creature of statute. In yet other states, including New York and Indiana, the right is recognized only by statute. Navigating the right of publicity waters, especially in actions that purport to join together nationwide classes, requires careful analysis of the differences in the law of the various states. In 2009, thirty states recognized the right of publicity under either statute or common law.[32] Of these, twenty recognized the right under the common law. Eight of these twenty states also had statutes recognizing the right of publicity.

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[31] *Zacchini*, 433 U.S. at 573. Of course, patent and copyright protection are, like the First Amendment, quoted in the United States Constitution, unlike publicity.

[32] McCarthy, *supra* note 26 at 822.

In addition, ten states had statutes that included aspects of the right of publicity.[33] Even though at least thirty states recognize the right of publicity either by common law or statute, there are significant differences in the extent of protection granted by each state, differences in the extent of proof required by plaintiffs, and in the defenses available.[34]

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[33] *Id*. According to McCarthy, the 20 states in which courts have recognized a common law right of privacy are: Arizona, Alabama, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, Texas, Utah, West Virginia, and Wisconsin. *Id*. at pp. 823-826. Eight of these twenty states also have statutes: California, Florida, Illinois, Kentucky, Ohio, Pennsylvania, Texas and Wisconsin. *Id*. at p. 822 n. 8. The ten states that only have statutes that establish the right of publicity are: Indiana, Massachusetts, Nebraska, Nevada, New York, Oklahoma, Rhode Island, Tennessee, Virginia, and Washington. *Id*. at p. 822, n. 9. A recent attempt to survey the status found 19 states with right of publicity statutes, 28 more recognizing by judicial decision, and several considering statute revisions, including California. Jonathan Faber, *Right of Publicity*: *Statutes*, *available at* http://rightofpublicity.com/statutes (last visited January 2, 2011).

[34] The Media Law Resource Center compiles an invaluable 50 state survey of media, privacy and related laws, which helps understand the differences among states. Media Privacy and Related Law 2010-11 (Media Law Resource Center, Inc. ed. 2010). A recent article in the ABA Entertainment and Sports Lawyer Journal (Summer 2009) usefully reviewed these concepts and applied them to "NCAA Student-Athletes' Rights of Publicity, EA Sports, and the Video Game Industry." Anastasios Kaburakis et al., *NCAA Student-Athletes' Rights of Publicity, EA Sports, and the Video Game Industry*, 27 Ent. & Sports Law. 1 (Summer 2009).

***Key Cases and Issues***

The case law is richly muddled, but not lacking in interesting facts. Does the actual name or image need to be appropriated? Probably not, although it may vary by state. In *Here's Johnny*, the use, to promote portable toilets, was of a phrase associated with a celebrity by his announcer.[35] In the *Motschenbacher*[36] and Vanna White[37] cases, the celebrities' image was altered or parodied by a robot, yet they prevailed. In *Newcombe v. Adolf Coors Co.*, 157 F.3d 686 (9th Cir. 1998), a retired major league pitcher was entitled to a trial where a drawing based on a photograph of him was used in a beer advertisement. However, in the Edgar Winter case the transformation of the celebrities' images was so significant (they were portrayed as comic half-beasts) that the court found transformative use and First

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[35] *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983). The well-known phrase "here's Johnny" was associated with Johnny Carson and its use to promote sale of portable toilets constituted a misappropriation of Carson's likeness/identity.

[36] *Motschenbacher*, 498 F.2d 821.

[37] *White v. Samsung Electronics*, 971 F.2d 1395 (9th Cir. 1992), *rehearing en banc denied*, 989 F.2d 1512 (9th Cir. 1993). Vanna White complained that the use of a robot dressed like her and standing next to a wheel, even if the robot did not "look" like her, was a violation of her right of publicity. White prevailed.

Amendment protection.[38] In similar fashion, the courts have found against Tiger Woods[39] and Joe Montana,[40] but in favor of the Three Stooges[41] and Paris Hilton.[42]

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[38] *Winter v. DC Comics*, 30 Cal. 4th 881 (2003) provides guidance on the application of the "transformative use" test. The Court reversed a Court of Appeals decision that had reinstated a right of publicity claim brought by musicians Johnny and Edgar Winter against the authors and publisher of a comic book series that featured half human characters called the "Autumn Brothers" that were suggestive of plaintiffs. The Court of Appeals declined to rule that the portrayal was transformative as a matter of law, instead ruling that it presented a jury question – thus rendering the *Comedy III* test highly factual and uncertain. *See Winter v. DC Comics*, 99 Cal. App 4th 458, 121 Cal. Rptr. 2d 131 (2002). Reversing, the California Supreme Court held that it could "readily ascertain that they are not just conventional depictions of plaintiffs but contain significant expressive content other than plaintiffs' mere likenesses" and thus the comic book characters were sufficiently "transformative" as a matter of law to merit constitutional protection. 30 Cal. 4th at 890. *See also Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47, 50 Cal. Rptr. 3d 607, 35 Media L. Rep. 1075 (2006) (First Amendment was complete defense to statutory and common law claims of misappropriation where video game character was sufficiently transformative).

[39] *ETW Corp. v. Jireh Publishing*, 332 F.3d 915 (6th Cir. 2003). Artist did not violate Tiger Woods' right of publicity by making and selling a painting of Woods during his first Masters win with various golf personalities in the background. The Sixth Circuit found that the use of Woods' image was transformative.

[40] *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 40 Cal. Rptr. 2d 639 (Cal. App. 6 Dist. 1995). The reproduction in poster form of newspaper pages containing Joe Montana's photograph and an artist's rendition of Montana was protected by the First Amendment. The original pages documented a newsworthy event, and the newspaper had a constitutional right to promote itself by reproducing its originally protected articles or photographs.

[41] *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 106 Cal. Rptr. 2d 126 (Cal. 2001). A literal sketch of the Three Stooges reprinted on the shirts violated their right of publicity. The sketch was not protected by the First Amendment because there was no significant transformative or creative contribution in the artist's work, which was simply a literal, conventional depiction of the Three Stooges.

[42] *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010). Use of Paris Hilton's image on a greeting card with her trademark phrase "that's hot" could be a violation of her right of publicity. *See also*:

- *Facenda v. NFL*, 542 F.3d 1007 (3d Cir. 2008). The use of Facenda's baritone voice in NFL promotional videos constituted a commercial use that was akin to an endorsement and, hence, a violation of Facenda's right of publicity.
- *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619 (6th Cir. 2000). Actor claimed violation of his right of publicity from sales of action figure of one of his characters from a movie. The court found that although the right of publicity was not preempted by the Copyright Act, there was no violation of the actor's right of publicity because the action figure invoked the character, not the actor's own persona.
- *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996). Use of athlete's former name, which may have been abandoned by athlete, could constitute misappropriation of the athlete's right of publicity.
- *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996). Use of players' likeness on "parody" trading cards was protected by the First Amendment.
- *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992). Use of Tom Waits imitator in commercial violated Waits' right of publicity.
- *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). Use of Bette Midler imitator in commercial violated Waits' right of publicity.

The First Amendment has remained a battleground, particularly in sports cases.[43] In *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007) the court found that a combination of names and statistics of real life players used in fantasy league games was protected by the First Amendment because the information was already in the public domain. *See also CBS Interactive Inc. v. National Football League Players Association, Inc.*, 259 F.R.D. 398 (D. Minn. 2009) (finding that, under *C.B.C. Distribution*, the First Amendment right to use the names and statistics of the individual players supersedes the players' right of

- *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 114 Cal. Rptr. 2d 307 (Cal. App. 1 Dist. 2001). The court held that MLB's posting of information and images on websites, media guides and programs was protected because MLB was not selling a product or making a typical commercial use.
- *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 198 Cal. Rptr. 342 (Cal. App. 2 Dist. 1983). The use of Clint Eastwood's name, photograph and likeness in a National Enquirer article constituted commercial exploitation and was not exempt from liability as a news account.

[43] As Jerry Seinfeld reportedly said, "People who watch sports are cheering for laundry."

publicity).[44] In *Keller v. Electronic Arts, Inc.*[45] and *Brown v. Electronic Arts, Inc.*,[46] the Ninth Circuit will be faced with the proper application of the First Amendment to video games using avatars as football and basketball players on college and professional teams. These cases have attracted substantial amicus attention[47] with a number of media companies arguing for the adoption of the Second Circuit's *Grimaldi* test (no artistic

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[44] Copyright preemption has trumped publicity in *Baltimore Orioles v. MLBPA*, 805 F.2d 663 (7th Cir. 1986) and *Laws v. Sony*, 448 F.3d 1134 (9th Cir. 2006). But in *Dryer v. NFL*, 689 F. Supp. 2d 1113 (D. Minn. 2010), the court denied defendant's motion to dismiss claims for violation of right of publicity by promotional use of video footage from games in which plaintiffs played. The court rejected the copyright preemption argument without much analysis. *See also*, *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970) (baseball players prevail over early fantasy league).

[45] *Keller v. Electronic Arts, Inc.*, No. 10-15387 (9th Cir.).

[46] *Brown v. Electronic Arts, Inc.*, No. 09-56675 (9th Cir.).

[47] The brief of Advance Publications, A&E Television Networks, Allied Daily Newspapers of Washington, Association of American Publishers, Activision, California Newspaper Publishers Association, Capcom USA, Comic Book Legal Defense Fund, E! Entertainment Television, ESPN, First Amendment Coalition, First Amendment Project, Freedom Communications, The Gannett Company, Gawker Media, Hybrid Films, ITV Studios, Konami Digital Entertainment, The Los Angeles Times, The McClatchy Company, Namco Bandai Games America, Original Productions, The Press-Enterprise Company, Radio Television Digital News Association, Sirens Media, Take Two Interactive Software, THQ, Viacom,The Washington Newspaper Publishers Association, and Wenner Media is available at www.pacer.gov, *Brown v. EA*, No. 09-56675 (9th Cir.) (Dkt. 42).

relevance or purely commercial appropriation) instead of California's transformative use test. The *Grimaldi* test borrows heavily from Lanham Act jurisprudence and asks whether the use that is alleged to violate plaintiffs' right of publicity is "wholly unrelated" to the new product or is "simply a disguised commercial advertisement for the sale of goods or services." This test, therefore, asks whether the use of plaintiffs' likeness deprives plaintiff of the opportunity to reap profits from the endorsement of the products.

*Brown* involves NFL great and movie actor Jim Brown suing over what the lower court described as his "doppëlganger." That court applied the *Grimaldi* test and held that the First Amendment provided a complete defense where Brown's valuable persona arose from publicity rights, the games were entitled to protection as non-commercial speech, and there was no express or implied endorsement.[48]

[48] The lower court in *Brown* relied on *E.S.S. Entm't 2000, Inc v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008) as having adopted *Grimaldi* and asking whether the "public interest in avoiding consumer confusion *outweighs* the public interest in free expression." *See also*, *Romantics v. Activision Publ'g, Inc.*, 574 F.Supp.2d 758, 765-66 (E.D. Mich. 2008) (music video).

***Predictions – "All art is theft, great art is grand larceny."***[49]

Although these cases appear to be all over the map, a careful analysis shows that in those cases where plaintiff has been able to show significant usurpation of the economic value of his/her likeness, the plaintiff is likely to prevail. Returning to *Zacchini* – the question is whether the new work will take away the entire economic value of the original work. In *Brown* the court applied the *Grimaldi* test to dismiss Brown's claim based on the use of his likeness in EA's video game because the use was not misleading about Brown's endorsement. Essentially, Brown was not deprived of the right to commercially exploit his own fame and notoriety. Going forward, as courts sort out the confusion between right to privacy and rights of publicity, they will recognize that the latter is really more akin to a property right and resolve cases based on an analysis of the misappropriation of the commercial

[49] A slightly different version is attributed to T.S. Eliot: "good poets borrow, great poets steal." However what T.S. Eliot really said in his critical essay of the playwright Philip Massinger follows. "One of the surest tests [of the superiority or inferiority of a poet] is the way in which a poet borrows. Immature poets imitate; mature poets steal; bad pets deface what they take, and good poets make it into something better, or at least something different." In the following video clip from 1994 about the creation of the Macintosh, Steve Jobs is quoted as saying that Picasso said "good artists copy, great artists steal." http://www.youtube.com/watch?v=CW0DUg63lqU.

value of plaintiffs' identity.[50] The Supreme Court may clarify the role of the First Amendment in video games in *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), *cert. granted, Schwarzenegger v. Entertainment Merchants Ass'n*, 130 S. Ct. 2398, 176 L. Ed. 2d 784 (2010) which involves mandatory labeling of video games.

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[50] A recent attempt to bring order to this confusion is Cotter and Dimitrieva, "Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis," 33 Colum. J.L. & Arts 165 (2010).