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THE PROFESSIONAL ATHLETE'S RIGHT OF PUBLICITY

LAURA LEE STAPLETON & MATT MCMURPHY¹

The celebrity in the public eye has two concerns that go beyond his or her creative efforts. First, is to guard against intrusions to what exists of a private life. Second, is to protect the value of the celebrity's name, image and other attributes surrounding the person. A celebrity's name and image in our star-conscious society are valuable commodities. They can be commercially marketed and reap substantial rewards if done with expertise and intelligence. The celebrity's concern is that others, without authorization, will attempt to exploit their name or image.²

I. GENTLEMEN. . . START YOUR ENGINES: INTRODUCTION

America is a land absolutely fascinated with professional sports. All one need do is turn on the television and surf through the channels to see that, as David Letterman would say, we have a sports "jones." There are many networks that carry all sports all the time, including: CNN, ESPN, ESPN2, ESPN Classic, Fox Sports News, and the Golf Channel. Professional athletes are our heroes and villains. In many ways, we live vicariously through them, feeling both the thrill of victory and the agony of defeat, while glued to our television sets in our living rooms. We identify with them. Our infatuation with our favorite sports heroes is so strong that many advertisers pay professional athletes millions of dollars in order to entice more people to buy their products.

For many professional athletes, the amount of money they can make from licensing the use of their name or image is astronomical. In fact, for such athletes as Michael Jordan, Shaquille O'Neal, Tiger Woods, Arnold Palmer, Ken Griffey, Jr., Andre Agassi, Greg Norman, and Jeff Gordon, the money they can make from endorsements now rivals or exceeds the money they are paid for competing in their sport. Therefore, it is no wonder that professional athletes and their agents have become

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2. MARTIN J. GREENBERG & JAMES T. GRAY, *SPORTS LAW PRACTICE* § 7.10(1), at 685 (2d ed. 1992) (quoting DONALD E. BIEDERMAN ET AL., *LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES* 555 (1987)).

extremely dedicated to the concept of protecting the commercial viability of their name and image. Marcia Chambers of the *New York Times* notes, "[I]n the 1990's many entertainment and sports stars, guided by agents and law firms, have demanded control of their names and images. They or their agents maintain that in an age of rampant commercialism they must hold onto the hottest property they know: themselves."³

One of the driving factors behind an athlete's ability to profit off of the commercial value of his name and likeness is the relatively recent development of the right of publicity. Athletes vigorously defend their right to be paid for the use of their name, and the right of publicity is one of their greatest weapons.

The value of an athlete's name and image has become so significant that he/she will go to great lengths to protect it. For example, ETW Corporation was created to control the marketing of Tiger Woods' image.⁴ Since 1997, ETW has sued six companies that it alleges have interfered with Woods's right of publicity.⁵ On April 15, 1998, Tiger Woods received a "substantial monetary settlement" and a permanent injunction barring the Franklin Mint's use of his likeness.⁶ This settlement was achieved due to the efforts of ETW Corp., which filed suit against the Franklin Mint for using Woods' image on one of its commemorative coins.⁷ In June 1998, ETW Corp. was at it again, this time filing suit against an artist who painted pictures of Tiger Woods' victory at the Masters in 1997, making prints of the paintings and selling 879 of them without getting Woods' consent.⁸

Other professional athletes have used this tool to attempt to protect their interests as well. Notable examples include Kareem Abdul-Jabbar, Joe Montana, Arnold Palmer, and Muhammad Ali. But what is the right of publicity and what interests does it protect?

II. X'S AND O'S: THE NATURE AND HISTORY OF THE RIGHT OF PUBLICITY

"The right of publicity is the inherent right of every human being to control the commercial use of his or her identity."⁹ "This means that it is

3. Marcia Chambers, *Lawsuit Pits Artists' Rights vs. Athletes*, N.Y. Times, Feb. 16, 1999.

4. *See id.*

5. *See id.*

6. *News Briefs*, Golfweek, April 25, 1998.

7. *See id.*

8. Reggie Rivers, *Selling of Woods' Likeness by Artist Goes Out of Bounds*, DENV. ROCKY MTN. NEWS, Feb. 28, 1999 at 4C.

9. 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 28:1, at 28-3 (1996).

illegal under the right of publicity to use, without a license, the identity of a real person to attract attention to an advertisement or product.”¹⁰

One commentator has characterized the right of publicity in the following manner: “The right of publicity protects athletes’ and celebrities’ marketable identities from commercial misappropriation by recognizing their right to control and profit from the use of their names and nicknames, likenesses, portraits, performances (under certain circumstances), biographical facts, symbolic representations, or anything else that evokes this marketable identity.”¹¹ Under this description, “any trait that uniquely identifies celebrities or athletes implicates their marketable identities”¹² and should therefore be protected.

The elements of a violation of the right of publicity are relatively straightforward. In order to make out a *prima facie* case for a violation of the right of publicity, the complaining party must prove the following elements:

1. *Validity*. Plaintiff owns an enforceable right in the identity of a human being.
2. *Infringement*.
 - a. Defendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant’s use.
 - b. Defendant’s use is likely to cause damage to the commercial value of that persona.¹³

These elements will be discussed in far greater detail later in this article. Before doing an in depth analysis of the right of publicity, it is important to have some basic understanding of what it encompasses.

The right of publicity, like any other right, has its limitations. As Professor McCarthy notes:

It can give every person the right either to prevent or to permit for a fee, the use of his or her identity in an advertisement to help sell someone’s product. But the right of publicity cannot be used to prevent someone’s name or picture in news reporting. It cannot be used to prevent the use of identity in an unauthorized biography. It cannot prevent use of identity in an entertainment

10. J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 130 (1995).

11. Pamela Edwards, *What’s the Score?: Does the Right of Publicity Protect Professional Sports Leagues?*, ALB. L. REV., 579, 581 (1998) (citations omitted).

12. *Id.*

13. MCCARTHY, *supra* note 9, § 28:7, at 28-10.

parody or satire, such as that of Rich Little or Saturday Night Live.¹⁴

In order to better understand the strengths and weaknesses of the right of publicity as a tool for protecting the commercial value of the professional athlete's identity, one needs to understand where the right of publicity comes from.

A. The Checkered Past of the Right of Publicity: Privacy's Stepchild and Property's Adopted Son

The right of publicity was born out of the right of privacy, and later developed into a property right of sorts. However, the fact that it was originally considered part of the right of privacy has confused many courts over the years, and in turn has flummoxed many commentators and attorneys. Understanding the course of development of the right of publicity is essential to a proper understanding of the nature of the right.

In 1890, Samuel D. Warren and Louis Brandeis wrote an article in the *Harvard Law Review* titled "The Right to Privacy,"¹⁵ which suggested that "the common law creates a 'common zone' in each person's life that is immune from the prying of neighbors, the press and the public."¹⁶ The article suggested that the law should protect people's feelings from public intrusion, and not just protect individuals from physical harm.¹⁷ One commentator has noted that Warren and Brandeis viewed the right of privacy "as preventing truthful but intrusive and embarrassing disclosures by the press,"¹⁸ separate from the protections that already existed for false intrusions.

"Cases early in the twentieth century concerned a variation on the theme of the 1890 Warren and Brandeis article: the unpermitted use of a person's name or picture in advertising."¹⁹ A split of authority quickly developed regarding the applicability of the right of privacy in such cases.²⁰ The cases that did grant redress for the unauthorized use of a person's name or picture in advertising did so based on traditional tort

14. McCarthy, *supra* note 10, at 130-131 (citations omitted).

15. See Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

16. Martin P. Hoffman, *Trademarks, Copyrights, and Unfair competition for the General Practitioner and the Corporate Counsel: The Rights of Publicity and Privacy*, SC68 A.L.I.-A.B.A. 217, 219 (1998).

17. See *id.*

18. MCCARTHY, *supra* note 9, § 28:3, at 28-4.

19. *Id.*

20. See *id.*

law concepts such as personal injury to dignity or state of mind.²¹ In such cases, damages were typically measured by amount of mental distress.²² Recovery in these cases was based on the concept that when a person's photograph is used for purposes of selling a product against his consent, it affronts his humanity, and damages his dignity.²³ Granting relief based on these grounds, the courts were still focusing on Warren's and Brandeis' concept of the "right to be left alone."²⁴ However, whenever high profile individuals sought redress for unauthorized use of their picture in advertising, courts were less willing to grant damages. The rationale for the courts' refusal to apply the right of privacy to celebrity figures in these situations was that celebrities should not be heard to complain about being thrust into the limelight when they have become celebrities precisely because they have sought such attention and profited from it.²⁵

A 1941 Fifth Circuit case, *O'Brien v. Pabst Sales*²⁶ is a good example of a court's reluctance to apply the protections embodied in the right of privacy to professional athletes. Davey O'Brien was an All-American quarterback at Texas Christian University (TCU) who went on to play for the Philadelphia Eagles. He was also a member of the Allied Youth of America, which championed young people avoiding alcohol. Pabst obtained permission from TCU's publicity department to use O'Brien's picture in its annual football calendar. A picture of O'Brien preparing to throw the ball was displayed prominently at the top of the calendar, right next to a glass and bottle of Pabst Blue Ribbon beer. O'Brien sued Pabst for invasion of privacy based on the claim that he had not given Pabst permission to use his picture in its calendar and that Pabst's placement of his picture next to the glass of beer "embarrassed and humiliated" him.²⁷ The court dismissed his claims based on the finding that the calendar did not contain an explicit endorsement by O'Brien of Pabst

21. *See id.*

22. *See id.*

23. *See id.* § 28:3, at 28-4 to 28-5.

24. *Id.* § 28:3, at 28-5.

25. *See* PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* 422 (2d ed. 1998) ("There were serious doubts about whether this personal protection against the psychological injury (hurt feelings) from having such intrusion upon their lives extended to athletes (or entertainers) who had actively sought to make themselves into celebrated public figures.") *Id.*; *see also* MCCARTHY, *supra* note 9, § 28:4, at 28-5 ("[W]hen a plaintiff whose identity was already well known sued under [a right of privacy theory], judges were unable to see how there could be 'indignity' or 'mental distress' to a plaintiff whose identity was already in widespread circulation in the news media.")

26. 124 F.2d 167 (5th Cir. 1941).

27. *See id.* at 169.

beer and that "the publicity he got was only that which he had been constantly seeking and receiving" throughout his career as a football player.²⁸ As has been noted, cases like *O'Brien* resulted in the inability of some of America's most celebrated athletes — including Red Grange, Joe DiMaggio, Joe Louis, Bill Tilden, and even Babe Ruth himself — to take advantage of a right of publicity during their careers.²⁹

The woeful inability of the right of privacy to protect the ability of individuals to determine the use of their own name and likeness in advertising, due to conservative judicial interpretation, laid the foundation for a new approach to questions of commercial appropriation. As Professor McCarthy notes:

Rights and remedies cast in the mental distress mode were not adequate when the real grievance was "uncompensated, rather than unwelcomed, publicity." Locked into the incantation of a right to be left alone, privacy law seemed unable to accommodate the view that human identity constituted an intellectual property right with commercial value measured by supply and demand in the marketplace of advertising. The situation was ripe for a break in traditional thinking.³⁰

That break in traditional thinking would come a little more than a decade after the *O'Brien* decision.

In 1953, in the case of *Haelan Lab. v. Topps Chewing Gum*,³¹ Judge Jerome Frank was the first to introduce the phrase "right of publicity." Haelan entered into a contract with a baseball player for the exclusive right to use his photograph in connection with the sale of its gum packs, which included baseball cards. Topps knew of the agreement, but convinced the ballplayer to give Topps a similar right to the use of his photograph for purposes of selling its gum. Haelan brought an action for inducement to breach contract against Topps.³²

Topps argued that the contract entered into between Haelan and the player amounted to nothing more than a release of liability under New York law, because in New York "a man [had] no legal interest in the publication of his picture other than his right of privacy, i.e., a personal and non-assignable right not to have his feelings hurt by such a publication."³³ Topps' argument essentially attempted to take advantage of the

28. *Id.* at 170.

29. See WEILER & ROBERTS, *supra* note 25, at 423.

30. MCCARTHY, *supra* note 9, § 28:4, at 28-5.

31. 202 F.2d 866 (2nd Cir. 1953).

32. See *id.* at 866-868.

33. *Id.* at 868.

limitations of the right of privacy in New York to gain access to ballplayers with whom its competitor had already contracted. The argument was essentially that because the New York right of privacy was personal in nature, it could not be assigned. Since the contracts with the ballplayers had not vested any property rights in Haelan, it had no action against Topps.³⁴

Judge Frank, writing for the majority in a divided decision, rejected Topps' position. He held that a common law assignable right of publicity did exist in addition to the statutory right of privacy in New York. In an opinion worth quoting, Judge Frank held:

[I]n addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled [sic] a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth.

This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ballplayers), 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. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.³⁵

Because the court held that the ballplayer did have a property interest in the use of the player's photograph, the court was able to recognize the exclusive nature of the agreement between Haelan and the ballplayer. The court noted that Haelan's interest in the exclusive right to the photograph was entitled to protection against third parties inducing

34. *Id.*; see also WEILER & ROBERTS, *supra* note 25, at 423 ("Topps' defense was that both sets of contracts amounted to no more than the players giving Haelan a release from liability for invasion of the privacy right not to have their feelings hurt by unconsented-to publication: under the governing New York law there was no separate right in the commercial value of one's name and likeness.")

35. See *Haelan Lab.*, 202 F.2d at 868.

breach.³⁶ "The judicial ruling in *Haelan* gave an entirely different *property* twist to the traditional *tort* slant to privacy doctrine."³⁷

As will be seen, the lack of confidence many courts have in whether the right of publicity is primarily a creature of privacy or property causes them to have problems applying the doctrine. "As the right of publicity grew out of the law of privacy, the basic law of privacy itself was being reorganized."³⁸ This reorganization led to further confusion as to the nature of the fledgling right of publicity.

B. Prosser's Four Torts of Privacy: Adding Fuel to the Confusion Fire

Dean William Prosser divided the "amorphous collection of civil wrongs falling within the category called 'invasion of privacy'"³⁹ into four categories:

1. Intrusion upon the plaintiff's physical solitude;
2. Public disclosure of embarrassing private facts;
3. Placing the plaintiff in a false light in the public eye; and the plaintiff in a false light in the public eye; and
4. Appropriation for commercial benefit of the plaintiff's name or likeness. . . .⁴⁰

These four categories make up Prosser's oft-cited "Four Torts of Privacy," which courts almost universally follow.⁴¹ The fact that the right of publicity so closely resembles the misappropriation category, coupled with the fact that Prosser is such a respected expert on the law, made many courts reluctant to classify the right of publicity as a property right.

C. Dispelling the Confusion: The Difference Between the "Right of Privacy" and the "Right of Publicity"

As the right of publicity gained more and more recognition, courts began to recognize that it was justifiable on separate grounds than those on which the right to privacy rested.⁴² In *Hirsch v. S.C. Johnson & Son, Inc.*, the Supreme Court of Wisconsin distinguished the right of publicity

36. *See id.* at 867-869.

37. WEILER & ROBERTS, *supra* note 25, at 423.

38. MCCARTHY, *supra* note 9, § 28:5 at 28-6.

39. *Id.* § 28:5, at 28-7.

40. *Id.*

41. *See id.*

42. It is said that the right of publicity owes its judicial acceptance to Professor Melville Nimmer, whose seminal article *The Right of Publicity* called attention to Judge Frank's creation of this new right. *See* MCCARTHY, *supra* note 9, § 28:5, at 28-6 (citing Melville Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954)); Kym Carrier, *Right of Publicity: Cartoons, L.C. v. Major League Baseball Players Association*, 51 OKLA. L. REV. 159, 160-

from the right of privacy.⁴³ The court indicated that the right of publicity “protects a property right, not only the right of a person to be let alone or to live his life in seclusion without mention in the media.”⁴⁴ As Professor McCarthy indicates, the differences between the protections provided by the right of privacy and those provided by the right of publicity are “relatively simple and straightforward.”⁴⁵

Privacy rights are personal rights. Damage is to human dignity. Injury caused by an invasion of privacy is measured primarily by “mental distress” and damages causally connected to mental distress.

On the other hand, the *right of publicity* is a property right. Damage is commercial injury to the business value of personal identity. For example, damages for infringement of the right of publicity can include the fair market value of the plaintiff’s identity; unjust enrichment and the infringer’s profits; and damage to the business of licensing plaintiff’s identity.⁴⁶

Courts do not always find this distinction as straightforward as Professor McCarthy does. While the majority of jurisdictions that discuss the right of publicity do seem to view it as a property right, some still see it as a subset of the right of privacy based on the fact that it initially developed in right of privacy cases and that Dean Prosser includes it as the fourth of his “Four Torts of Privacy.”⁴⁷

D. Gaining Maturity: The Right of Publicity is Recognized by the Supreme Court

In 1977, the Supreme Court acknowledged that violation of the right of publicity and invasion of the right of privacy were two distinct torts.⁴⁸ “[W]hile this new property right (and its tortious invasion) was born in the ‘right of privacy’ family, it has gradually matured since 1953 into an

61 (1998) (“The widespread acceptance of the right is largely attributable to an article written by Melville Nimmer shortly after *Haelan*.”).

43. 280 N.W.2d 129, 130-132 (Wis. 1979).

44. *Id.* at 134.

45. McCarthy, *supra* note 10, at 134.

46. *Id.*

47. One such jurisdiction is New York, which sees the right of publicity as merely an aspect of the New York statutory right of privacy. See McCarthy, *supra* note 10, at 134 (citing *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984).)

48. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 571-72 (1977) (noting that the case the Ohio Supreme Court relied on dealt with a claim under the New York “Right of Privacy,” which it characterized as “an entirely different tort from the ‘right of publicity’ recognized by the Ohio Supreme Court.”)

independent legal right with its own distinct characteristics. It is entitled to its own descriptive and distinctive name: the 'right of publicity.'⁴⁹

Another indication that the right of publicity has achieved maturity is its inclusion, for the first time, in the *Restatement* in 1995.⁵⁰ To date, the right of publicity exists in some form in twenty-seven states.⁵¹ It is becoming so popular that its development has prompted one judge to note, "I find no reason to believe that Connecticut would buck the apparent trend in the law towards recognizing the right of publicity."⁵²

III. FROM DAVEY O'BRIEN TO TIGER WOODS: HOW THE RIGHT OF PUBLICITY APPLIES TO THE PROFESSIONAL ATHLETE

A list of the professional athletes who have sued or whose licensees or agents have sued for violation of their right of publicity reads like a transcript of ESPN's SportsCenter: Michael Jordan,⁵³ Joe Montana,⁵⁴ Elroy "Crazylegs" Hirsch,⁵⁵ John Riggins,⁵⁶ Joe Namath,⁵⁷ Tiger Woods, Kareem Abdul-Jabbar,⁵⁸ Ben Hogan,⁵⁹ Arnold Palmer,⁶⁰ Gary Player,⁶¹ Jack Nicklaus,⁶² Muhammad Ali,⁶³ "Smokin'" Joe Frazier,⁶⁴ Albert Et-

49. MCCARTHY, *supra* note 9, §28:7, at 28-9.

50. RESTATEMENT (THIRD) OF THE LAW OF UNFAIR COMPETITION, §§ 46-49 (1995).

51. See 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY, § 6.1[B] at 6-6 to 6-8, § 6.3[A] at 6-13 to 6-15 (Rev. 1999). McCarthy lists seventeen states as having adopted a version of the right of publicity under the common law as of March, 1999: Alabama, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Utah and Wisconsin. See *id.* § 6.1[B], at 6-7 to 6-8. He lists ten states as having enacted a statute that encompasses most of the aspects of the right of publicity: Indiana, Massachusetts, Nebraska, Nevada, New York, Oklahoma, Rhode Island, Tennessee, Virginia, and Washington. See *id.* § 6.1[B], at 6-6. The right of publicity exists in New York, but only "within the framework of the New York statute." *Id.* § 6.1[B], at 6-7 (citing *Stephano v. News Group Publications*, 64 N.Y.2d 174 (N.Y. 1984)).

52. *Id.* § 6.1[C], at 6-9 (citing *Jim Henson Prods. v. John T. Brady & Assocs.*, 867 F. Supp. 175, 34 U.S.P.Q.2d (BNA) 1001 (S.D.N.Y. 1994) ("I am of the opinion that the Supreme Court of Connecticut, like the vast majority of courts that have considered the issue, would find [the policy goals of a post mortem Right of Publicity] relevant and persuasive."))

53. See *MJ Partners Restaurant Ltd. Partnership v. Zadikoff*, 10 F. Supp. 2d 922 (N.D. Ill. 1998).

54. See *Montana v. San Jose Mercury News, Inc.*, 34 Cal. Rptr. 2d 639 (Cal. Ct. App. 1995); *Upper Deck Authenticated, Ltd. v. CPG Direct*, 971 F. Supp. 1337 (S.D. Cal. 1997).

55. See *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979).

56. See *Town & Country Properties, Inc. v. Riggins*, 457 S.E.2d 356 (Va. 1995).

57. See *Namath v. Sports Illustrated*, 371 N.Y.S. 10 (N.Y. Sup. Ct. 1975).

58. See *Abdul-Jabbar v. General Motors Corp.*, 75 F.3d 1391 (9th Cir. 1996).

59. See *Hogan v. A.S. Barnes & Co., Inc.*, 114 U.S.P.Q. (Pa. 1957).

60. See *Palmer v. Schonhorn Enters.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).

61. See *id.*

62. See *id.*

63. See *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

tore,⁶⁵ Mark Messier,⁶⁶ Mickey Mantle,⁶⁷ the '69 Mets,⁶⁸ Hulk Hogan,⁶⁹ "Rowdy" Roddy Piper,⁷⁰ Ricky Steamboat,⁷¹ Jesse "The Body" Ventura,⁷² Mario Andretti,⁷³ and Lothar Motschenbacher.⁷⁴ All have had their names or likenesses involved to some extent in a dispute over the right to publicity that made it to the courts. Some won and some lost. Some, such as Joe Louis, were only mentioned tangentially. Perhaps more than any other area of the law, professional athletes have played a defining role in the development of the right of publicity.⁷⁵

As noted earlier, it was a case involving a professional athlete,⁷⁶ Davey O'Brien of the Philadelphia Eagles, that drew attention to the fact that the right of privacy was inadequate for the needs of celebrities and high profile athletes in protecting their right to control the commercial dissemination of their own names. Ultimately, it was a case involving the agreements that a number of baseball players had made with two baseball card distributors that prompted Judge Frank, in *Haelan*, to first coin the phrase "right of publicity."⁷⁷ There is no doubt that sports figures are some of the primary recipients of the benefits of the right of publicity. Over the years, a number of cases involving professional athletes have helped to mold the state of the right of publicity.

As noted earlier, the elements of a right of publicity claim include:

1. *Validity*. Plaintiff owns an enforceable right in the identity or persona of a human being.
2. *Infringement*.
 - a. Defendant, without permission, has used some aspect of identity or persona [of the plaintiff] in such a way that plaintiff is identifiable from defendant's use.

64. See *Frazier v. South Florida Cruises*, 19 U.S.P.Q.2d 1470 (E.D. Pa. 1991).

65. See *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3rd Cir. 1956).

66. See *Hillerich & Bradsby Co. v. Christian Brothers, Inc.*, 943 F. Supp. 1136 (Minn. 1996).

67. See *Upper Deck Authenticated, Ltd. v. CPG Direct*, 971 F. Supp. 1337 (S.D. Cal. 1997).

68. See *Shamsky v. Garan, Inc.*, 632 N.Y.S.2d 930 (N.Y. Sup. Ct. 1995).

69. See *Titan Sports, Inc. v. Comics World Corp.*, 690 F. Supp. 1315 (S.D.N.Y. 1988).

70. See *id.*

71. See *id.*

72. See *Ventura v. Titan Sports, Inc.*, 65 F.3d 725 (8th Cir. 1995).

73. See *Andretti v. Rolex Watch U.S.A., Inc.*, 437 N.E.2d 264 (N.Y. 1982).

74. See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

75. See *WEILER & ROBERTS*, *supra* note 25, at 425 ("The sports world not only created the right of publicity but has also contributed a number of interesting cases regarding the scope and limits of such a right.")

76. See *O'Brien v. Pabst Sales*, 124 F.2d 167 (5th Cir. 1941).

77. See *Haelan Lab. v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953).

- b. Defendant's use [of plaintiff's identity or persona] is likely to cause damage to the commercial value of that [identity or] persona.⁷⁸

With this framework in mind, this paper will now attempt to analyze the right of publicity from the unique perspective of the professional athlete.

A. *Validity or Standing to Sue*

In order to bring a valid claim for infringement of the right of publicity, the plaintiff must first meet the "validity" element. However, it is thought that the validity of the right asserted will not usually be a material issue in right of publicity cases.⁷⁹ The argument is that as long as the plaintiff asserts a right of identity in a human being, the existence of the right will not be an issue unless the applicable state law does not recognize commercial rights in human identity.⁸⁰

The validity element is connected very closely to the concept of "standing to sue." In the context of the right of publicity, "enforceable right" means that either the plaintiff's own identity is at issue or that plaintiff is an assignee or exclusive licensee of someone else's Right of Publicity.⁸¹ Therefore, an athlete or his agent will not have standing to sue unless his own identity is at issue or he has been assigned or licensed the right to use the identity or persona at issue.⁸²

In *Upper Deck Authenticated, Ltd. v. CPG Direct*,⁸³ a sports memorabilia dealer brought an action against its competitor. The court held that Upper Deck lacked standing to assert a claim for misappropriation of the rights of publicity (a California common law claim) of Joe Montana and Mickey Mantle. The court based its decision on the fact that Upper Deck had not received an exclusive license to the publicity rights in question, noting that a non-exclusive licensee cannot assert a

78. MCCARTHY, *supra* note 51, § 3.1[B], at 3-3.

79. *See id.* § 3.1[C], at 3-4.

80. *See id.* (noting that validity will be an issue if the right of publicity is claimed in something other than a human being, such as a corporation, partnership, institution or animal). *But see* Edwards, *supra* note 11 (arguing that the National Basketball Association should be able to assert a right of publicity, and further asserting that it probably can assert a right of publicity in states with statutes that do not explicitly prohibit entities from making such claims).

81. *See* MCCARTHY, *supra* note 51, § 3.1[B]-[C], at 3-3 to 3-4.

82. Even when the plaintiff has been assigned or licensed the right of publicity in question, standing to sue may be an issue. McCarthy notes: "An exclusive licensee of a Right of Publicity has standing to sue for infringement of the rights which it owns. Defendant may challenge "standing" in two senses: that plaintiff does not in fact hold any exclusive license; or that while plaintiff is a valid exclusive licensee, defendant's use does not infringe upon any rights which the licensee-plaintiff possesses." MCCARTHY, *supra* note 51, § 3.1[C], at 3-4.

83. 971 F. Supp. 1337 (S.D. Cal. 1997).

claim for misappropriation of the right of publicity, especially where the person on whose behalf the claim is brought objects to the suit.

In *MJ & Partners Restaurant Ltd. Partnership v. Zadikoff*,⁸⁴ standing to bring a claim for invasion of the right of publicity was also at issue. In this case, Michael Jordan had granted an exclusive license to the use, in the restaurant business, of his name and likeness in the Chicago area to a restaurant company. Subsequently, Jordan allegedly entered into a tacit agreement with the C.E.O. of the licensee to develop a rival restaurant which would also be allowed to use different facets of his persona. The rival restaurant would allegedly have had a humidor with Jordan's name on it displayed prominently in the front area of the restaurant, served "North Carolina" style food in honor of Jordan's home state, and prominently displayed Jordan automobiles with vanity license plates in front of the restaurant whenever Jordan was on the premises. The defendant argued that the plaintiff did not have standing to sue for violation of Jordan's right of publicity because in Illinois, the tort of common law misappropriation (the equivalent of Prosser's fourth tort of privacy, and essentially the same as the right of publicity in Illinois) is a derivative of the right of privacy, and can therefore only be asserted by the person whose privacy is invaded.⁸⁵ The court found that, unlike the other privacy torts, misappropriation protects pecuniary and proprietary interests while the right of privacy protects emotional interests.⁸⁶ The court then noted, "Since the tort of misappropriation is premised on a person's economic interest in publicity rights, the range of plaintiffs who have standing to make a misappropriation claim expands to the extent that such publicity rights are assignable."⁸⁷ The court held that Illinois courts would "side with the great weight of authority and hold that a licensee of a celebrity's name may state a cause of action for misappropriation of the right to publicity."⁸⁸ It is not clear whether the court would have come to the same conclusion if the license in question had not been exclusive – one can see why it would not.

B. Identification for Purposes of Infringement

The second element that must be violated in a right of publicity case is that of infringement. The test for this element is "identifiability." For

84. 10 F. Supp.2d 922 (N.D. Ill. 1998).

85. *See id.* at 930.

86. *See id.*

87. *Id.*

88. *Id.* at 931.

this element to be satisfied, the defendant must use some aspect of the plaintiff's identity or persona in such a way that the plaintiff is identifiable. Statutory versions of the right of publicity, including those that derive a right of publicity from a statute based on the right of privacy, such as New York, generally will spell out which aspects of the persona are protected.

It is important to emphasize that the test for infringement is identifiability, and not confusion as to endorsement by the person. Deception and false endorsement are not needed for a violation of the right of publicity.⁸⁹ Professor McCarthy notes:

Identity can be stolen and used to attract attention to an advertisement or product without giving rise to a valid claim of false endorsement. The identity of a famous person is used to cut through the clutter of advertising and to merely draw attention to the advertisement. It is common in advertising just to use the picture or name of a celebrity or a person prominent in a certain field without any hint of endorsement.⁹⁰

Examples of this type of advertisement include, "Jerry Rice and Utopian Bell phones — both top receivers in their field"⁹¹ and "Troy Aikman may have won three Super Bowls, but he's never smoked Cowboy cigarettes." These examples demonstrate how the right of publicity may be violated without any message of endorsement being attached.⁹² These hypothetical advertisements would be actionable under the right of publicity, whereas they might not be actionable under the Lanham Act.⁹³

The number of people that need to be able to recognize that the infringing use of identity or persona is that of the plaintiff is not set in stone. Professor McCarthy has described the proper test of "identifiability" as one of "unaided identification."⁹⁴ By this phrase he means that courts should ask the question, "[C]an more than a de minimis number of ordinary viewers identify the plaintiff by looking at . . . the defendant's advertisement?"⁹⁵ He observes, "[t]he Wisconsin Supreme Court has indicated that in a right of publicity case, the fact that the proof might show that only a few people would reasonably identify

89. See McCarthy, *supra* note 10, at 135.

90. *Id.*

91. *Id.*

92. See *id.*

93. See *id.*; 15 U.S.C. § 1125(a).

94. McCarthy, *supra* note 10, at 135.

95. *Id.*

plaintiff would 'not vitiate the existence of a cause of action' but would 'affect the quantum of damages.'"⁹⁶

In *Ali v. Playgirl, Inc.*⁹⁷ Playgirl Magazine included in its February 1978 issue a cartoon of a nude black man seated in the corner of a boxing ring, with both hands taped and resting on the ropes. The picture was captioned "Mystery Man," and the identification of the portrayed individual was further implied by an accompanying reference to "the Greatest." Ali claimed that it bore an unmistakable resemblance to him, and that the picture violated his right of publicity. The court took judicial notice of the fact that Ali had "regularly claimed that appellation for himself and that his efforts to identify himself in the public mind as 'the Greatest' [had] been so successful that he [was] regularly identified as such in the news media."⁹⁸ The court further commented, "[t]he cheekbones, broad nose and widest brown eyes, together with the distinctive smile and close cropped black hair are recognizable as the features of the plaintiff, one of the most widely known athletes of our time."⁹⁹ The court noted that in New York, recognition is the proper standard regarding whether there has been a violation of the right of publicity.¹⁰⁰ Finding a clear resemblance between the cartoon and Ali, the court concluded that Ali's right of publicity had been violated.

*Motschenbacher v. Reynolds Tobacco Co.*¹⁰¹ was another case discussing the level of recognition necessary to infringe upon the right of publicity. The infringing representation was not as recognizable as the picture of Ali. This case involved Lothar Motschenbacher's appeal of the district court's decision that he was not recognizable in the advertisement in question. Motschenbacher was a professional race car driver known to racing fans internationally. His solid red car with a narrow white pinstripe and white oval surrounding the number eleven was equally well known to car racing enthusiasts. R.J. Reynolds Tobacco Co.

96. *Hirsch v. S.C. Johnson & Sons, Inc.* 280 N.W.2d 129, 137 (1979); see also *Negri v. Schering Corp.*, 333 F. Supp. 101, 104 (S.D.N.Y. 1971) ("In any event, the number of people who recognize the photograph in the advertisement as that of [plaintiff], while it may be relevant on the question of damages, is not material on the issue of liability. On that issue the question is whether the figure is recognizable, not the number of people who recognized it.")

97. 447 F. Supp. 723 (S.D.N.Y. 1978).

98. *Id.* at 727 (noting that the cover of the February 27, 1978 issue of *Time* featured a photograph of Ali, captioned "'The Greatest' is Gone").

99. *Id.* at 726.

100. See *id.* at 726 (citing *Negri v. Schering Corp.*, 333 F. Supp. 101, 104 (S.D.N.Y. 1971) for the proposition that the New York statute in question applies to any representations that are "recognizable as likenesses of the complaining individual.")

101. 498 F.2d 821 (9th Cir. 1974).

produced and televised a commercial which included an altered version of Motschenbacher's car in the foreground. Rather than an eleven, the car now had a seventy-one, and the producers of the commercial made it look as if the car had a spoiler on the back with the word "Winston" on it. Defendants made no other changes to the car. After concluding that California courts would afford legal protection to an individual's proprietary interest in his own identity, the court turned to the issue of "identifiability."¹⁰² The court of appeals agreed with the district court that Motschenbacher's likeness itself was unrecognizable.¹⁰³ However, the court of appeals determined that the district court had erred in its conclusion that the driver of the car was not identifiable as Motschenbacher because it "fail[ed] to attribute proper significance to the distinctive decorations appearing on the car. . . . [T]hese markings were not only peculiar to the plaintiff's cars but they caused some persons to think the car in question was plaintiff's and to infer that the person driving the car was the plaintiff."¹⁰⁴ Based on the uniquely distinguishing features that the court found, it determined that it was an issue for the jury whether Motschenbacher's proprietary interest in his own identity had been violated.¹⁰⁵

Cases have also held that the "name" protected by the right of publicity extends beyond given names to nicknames. In *Hirsch v. S.C. Johnson & Son, Inc.*,¹⁰⁶ Elroy "Crazylegs" Hirsch, of University of Wisconsin and Los Angeles Rams football fame, brought a right of publicity action against a company for its unauthorized use of Hirsch's nickname "Crazylegs" on its brand of women's shaving cream.¹⁰⁷ In overruling the lower court's award of summary judgment to the defendant, the Wisconsin Supreme Court decided to recognize the right of publicity.¹⁰⁸ The court further held that all that is required with regard to identity is that the name clearly identify the wronged person.¹⁰⁹ Because the court found that the nickname "Crazylegs" clearly identified Hirsch, the court

102. *See id.* at 826.

103. *See id.* at 827.

104. *Id.* at 827.

105. *See id.* at 825-826.

106. 280 N.W.2d 129 (Wis. 1979).

107. The court explains that in one game, while playing for the University of Wisconsin in 1942, Hirsch completed a sixty-two yard touchdown run in which he wobbled down the sideline, looking as if he might step out of bounds at any moment. The court notes that his unique running style, "which looked something like a whirling eggbeater," caused a sportswriter to nickname him "Crazylegs." He was known by that moniker from that day forward. *Id.* at 131.

108. *See id.*

109. *See id.* at 137-140.

found that the lower court erred in granting summary judgment to defendant.¹¹⁰

In a recent case in California, the court stretched the concept of recognition to its furthest reach yet.¹¹¹ In *White v. Samsung Electronics America, Inc.*, Vanna White of "Wheel of Fortune" fame sued Samsung alleging that Samsung had violated her statutory and common law rights of publicity under California law.¹¹² The dispute in this case arose out of an ad campaign that Samsung ran. Each add was set in the twenty-first century and conveyed the idea that Samsung products would last until then. The commercial which led to this action

depicted a robot, dressed in a wig, gown, and jewelry which [had been] consciously selected to resemble White's hair and dress.

The robot was posed next to a game board which [was] instantly recognizable as the Wheel of Fortune game show set. . . . The caption of the ad read: 'Longest running game show. 2012 A.D.'¹¹³

This ad was referred to by Samsung as the "Vanna White" ad, and unlike the other celebrities depicted in the ad campaign, White did not consent to the ad and was not paid for the ad.

The court first dismissed White's statutory right of publicity claim, because Samsung's use of the robot did not rise to the level of a "likeness" as contemplated by the California publicity statute.¹¹⁴ However, as the court had done on previous occasions, it held that the common law right of publicity claim could survive even though the statutory claim had been dismissed.¹¹⁵ The court then held that, unlike the statutory right which is limited to the appropriation of name or likeness, the common law right of publicity is based on the "use of any indicia by which the plaintiff is identifiable."¹¹⁶

The court drew an analogy which is central to the professional athlete's right of publicity, and accordingly should be relayed in full.

Consider a hypothetical advertisement which depicts a mechanical robot with male features, and African-American complexion, and a bald head. The robot is wearing black hightop Air Jordan basketball sneakers, and a red basketball uniform with black trim, baggy shorts, and the number 23 (though not revealing "Bulls" or

110. *See id.* at 140.

111. *See* McCarthy, *supra* note 10, at 136.

112. 971 F.2d 1395 (9th Cir. 1992).

113. *Id.* at 1396.

114. *See id.* at 1397.

115. *See id.*; *see also* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983).

116. McCarthy, *supra* note 10, at 136.

"Jordan" lettering). The ad depicts the robot dunking a basketball one-handed, stiff-armed, legs extended like open scissors, and tongue hanging out. Now envision that this ad is run on television during professional basketball games. Considered individually, the robot's physical attributes, its dress, and its stance tell us little. Taken together, they lead to the only conclusion that any sports viewer who has registered a discernible pulse in the past five years would reach: the ad is about Michael Jordan.¹¹⁷

The court concluded that Vanna White is the only one that dresses like the robot, turns letters, and does the "Wheel of Fortune" game show. Based on this conclusion, the court held that White had alleged facts showing that Samsung had appropriated her identity and should accordingly survive the motion for summary judgment.¹¹⁸

In support of the opinion, McCarthy remarks that "the only appeal of the Samsung advertisement lies in the viewer's immediate recognition that this is not just any game show robot, this is a Vanna White robot."¹¹⁹ Since the ad would be worthless without the inclusion of the image of Vanna White, it seems logical that Samsung should not be able to make the ad without compensating White.

Related tangentially to the issue of "identifiability" is the issue of abandonment. While a name may have been identifiable with an individual at one time, can it be abandoned so that the individual can no longer claim a right of publicity if someone else subsequently uses it in a commercial way? This issue was broached in *Abdul-Jabbar v. General Motors Corp.*¹²⁰ Kareem Abdul-Jabbar, the former L.A. Lakers superstar famous for the "sky hook," was named Ferdinand Lewis ("Lew") Alcindor when he was born. He retained that name throughout his college career and into the early years of his career in the National Basketball Association. While in college, he converted to Islam and began to be called "Kareem Abdul-Jabbar" by his friends. In 1971, he chose to record the new name officially under an Illinois name recordation statute. After the name change, he played basketball and received endorsements under the name "Kareem Abdul-Jabbar."

The dispute arose due to a GMC television commercial aired during the 1993 NCAA men's basketball tournament. It asked the question, "Who holds the record for being voted the most outstanding player of this tournament?" The answer to the question, as shown on the televi-

117. See *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992).

118. See *id.*

119. McCarthy, *supra* note 10, at 137.

120. 75 F.3d 1391 (9th Cir. 1996).

sion screen, was "Lew Alcindor, UCLA, '67, '68, '69." The commercial then made a comparison between that feat and the fact that the Oldsmobile '88 had made the best buy list more than once. Abdul-Jabbar brought a state law right of publicity claim against GMC due to the mention of his former name in the commercial.¹²¹

The district court found that Abdul-Jabbar had abandoned the name Lew Alcindor when he recorded his new name in Illinois.¹²² Abdul-Jabbar argued that abandonment is not a defense to a violation of the right of publicity because the right of publicity protects not only a celebrity's "sole right to exploit his identity," but also his "decision not to use his name or identity for commercial purposes."¹²³ The court, in overturning the district court's grant of summary judgment to the defendant, held that it is not possible for a person to lose rights in their own name or likeness through non-use.¹²⁴ It seems worth noting that it does not seem that Abdul-Jabbar merely did not use his previous name, he actually changed his name legally. Such action seems like it goes beyond non-use. If changing one's name is not enough to abandon the old one, then it is hard to imagine a situation where one could abandon his name.

C. Commercial Value of Identity or Persona

The third element of a violation of the right of publicity requires plaintiff to prove that defendant used plaintiff's identity or persona in a way that is likely to cause damage to the commercial value of that identity or persona. This element was discussed in *Gautier v. Pro-Football, Inc.*¹²⁵ The court found that a broadcast of an animal trainer's halftime show by a sports league, contrary to his contract, did not violate his New York statutory right of privacy.¹²⁶ Although there had been a commercial announcement immediately preceding plaintiff's performance and immediately following the performance of those who performed after the plaintiff, the plaintiff's name and picture were in no way connected with the commercial announcements. The commercial announcements were presented at usual and appropriate intervals. The court gleaned that:

[I]t was nothing more than coincidence that one such announcement [commercial], made at the close of the first half, occurred

121. See *id.* at 1393.

122. See *id.*

123. *Id.* at 1400.

124. See *id.* at 1396.

125. 107 N.E.2d 485 (N.Y. App. 1952).

126. See *id.* at 489.

immediately prior to his act. He was not connected with the product either by visual, oral or other reference, nor was any issue of fact created by the physical juxtaposition of the single announcement prior to his performance.¹²⁷

The court concluded that his name or picture had not been used for advertising purposes within the meaning of the New York right of privacy statute.¹²⁸

IV. CLEARING THE PUCK OUT OF THE ZONE: DEFENSES TO THE RIGHT OF PUBLICITY CLAIM

There are two main defenses available to the defendant when the plaintiff asserts a right of publicity claim. The first defense is consent, and the second is the First Amendment. Parody also arises as a defense, though it is best described as a subset of the First Amendment defense. The consent defense is really just an offshoot of the validity element. If the defendant has the consent of the person whose right of publicity is in question, then there is no violation of that right of publicity. Discussion of this issue generally centers around whether the defendant had consent to take the particular actions in question.

A. Consent Defense

In *Sharman v. C. Schmidt & Sons, Inc.*, the court considered the consent defense. Plaintiff William Sharman played for the Boston Celtics in the early 1960s.¹²⁹ He obtained the services of an agent to find employment for him as a model for advertisements. His agent connected him with a commercial photographic studio, which took some photographs of Sharman, including one in which he was bowling.¹³⁰ Sharman was paid one hundred and twenty-five dollars for the use of his likeness in the campaign.¹³¹ At the time his photograph was taken, he executed two releases, which permitted the defendant to use his picture, either as taken or "distorted in character, or form," for advertising purposes and gave unrestricted rights to all persons and corporations to use Sharman's name in conjunction with his picture.¹³² The defendant company purchased the rights to Sharman's picture from the commercial photographic studio. The defendant later engraved a beer glass and bottle on

127. *Id.* at 488.

128. *See id.*

129. 216 F. Supp. 401 (E.D. Pa. 1963).

130. *See id.* at 403.

131. *See id.*

132. *See id.* at 404.

the advertisement and subsequently used the picture in an advertising campaign promoting its beer.¹³³

Sharman brought an action based on an invasion of his right of publicity.¹³⁴ He maintained that although he did consent to the use of the bowling picture, the amendment of the picture to include the beer glass and bottle exceeded the authorization of the release, effectively nullifying his consent.¹³⁵ Sharman cited cases holding that altered pictures can exceed the consent conferred by a release.¹³⁶ The court found that it had been "contemplated by all parties involved that the picture would be used for a commercial purpose."¹³⁷ Since the sale of beer is a commercial purpose, the court rejected Sharman's argument that the form of his picture exceeded his consent.¹³⁸ The court noted, "[a] sports figure can complain when his name or likeness is used to advertise a product but he can recover damages only if he has not consented to such use or the advertising exceeds the consent granted."¹³⁹ Since the court concluded that the defendant's use of Sharman's picture did not exceed the parameters of his consent, it denied Sharman's claim.¹⁴⁰

Andretti v. Rolex Watch U.S.A., Inc., involved a dispute between the famous race car driver and the famous watch manufacturer.¹⁴¹ Mario Andretti brought an action against Rolex for allegedly using his name and picture in advertisements without his consent.¹⁴² Rolex advanced the defense that it did have Andretti's consent.¹⁴³ Before the advertisements in question were published, Andretti accepted a Rolex watch worth approximately six thousand dollars and sent an autographed photograph to the president of Rolex with the handwritten inscription, "[T]o Rene . . . it's good to be a member of your Rolex Club! All the best, Mario Andretti."¹⁴⁴ The lower court had granted summary judgment to Andretti on the ground that the signed statement on the photograph could not "fairly be construed as a written consent to the use of [Andretti's] name or picture for advertising purposes or for the purposes of

133. See *id.* at 403.

134. *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401, 402 (E.D. Pa. 1963).

135. See *id.* at 405.

136. See *id.*

137. *Id.* at 406.

138. See *id.*

139. *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401, 407 (E.D. Pa. 1963).

140. See *id.* at 408.

141. 437 N.E.2d 264 (N.Y. 1982).

142. See *id.* at 264-265.

143. See *id.* at 265.

144. *Id.*

trade.”¹⁴⁵ The Court of Appeals of New York overturned summary judgment, stating that factual issues existed “as to what membership in the Rolex Club entailed, i.e., whether [Andretti] thereby consented to the use of his name and likeness in Rolex advertisements.”¹⁴⁶ It noted that parol evidence might be introduced to establish that the writing in question was intended as the expression of the necessary consent.¹⁴⁷

B. First Amendment Defense

Legal scholars claim that the most difficult defense to deal with in a right of publicity case is the assertion of the First Amendment.¹⁴⁸ Freedom of speech and of the press, as protected by the First Amendment, can limit the application of the right of publicity.¹⁴⁹ Discussing the limitations posed on the right of publicity by the First Amendment, a New York court stated:

[W]here the right to publicity is recognized, it does not invest a prominent person with the right to exploit financially every public use of name or picture. What is made actionable is the unauthorized use for advertising purposes in connection with the sale of a commodity. The “right of publicity,” therefore, like that of “privacy” . . . would be held to have no application where the use of a name or picture . . . is in connection with a matter of public interest. That such use is constitutionally protected and must supersede any private pecuniary considerations is conceded even by those who urge more widespread recognition of a distinct right of publicity.¹⁵⁰

Courts are forced to conduct a very delicate balancing act in determining where “newsworthy” ends and “commercial” begins.

One prominent scholar on right of publicity law explains the highly fact specific analysis as follows:

[I]n general, with a balancing between the property right of the right of publicity and the policy of free speech, a given unauthorized use of a person’s identity will fall within one of two categories: the challenged use is either “communicative” or “commercial.” A “communicative” use is one in which the policy of free speech predominates over the right of a person to his identity, and no infringement of the right of publicity takes place. A

145. *Andretti v. Rolex Watch, U.S.A., Inc.*, 440 N.Y.S.2d 212, 214 (N.Y. App. Div. 1982).

146. *Andretti*, 437 N.E.2d at 265.

147. *See id.*

148. *See McCARTHY*, *supra* note 51, § 3.1[F], at 3-5.

149. *See id.*

150. *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 508 (N.Y. 1968).

“commercial” use is one in which the right of publicity is infringed because, while there are overtones of ideas being communicated, the use is primarily commercial. The medium used will often determine the result. For example, the unpermitted use of a person’s identity on a product such as a coffee mug or a T-shirt will be “commercial” and require a license. But the unpermitted use of a person’s identity and picture to illustrate a story in a newspaper, magazine or television news program will be “communicative” and immune.¹⁵¹

With the type of fact specific analysis described above taking place, this is the area of the right of publicity law in which it is most difficult to predict the outcome of cases.

In *Zacchini v. Scripps-Howard Broadcasting Co.*, Hugo Zacchini was a daredevil whose “human cannonball” act involved his being shot out of a cannon into a waiting net some 200 feet away.¹⁵² The act took approximately 15 seconds to complete. A reporter covering the county fair where Zacchini was performing videotaped the entire 15 second act after Zacchini asked him not to and played it on his television station’s 11 o’clock news program that night. The reporter admonished the television audience that they really needed to see the act in person to appreciate it. Zacchini brought an action against the television station claiming that his right of publicity had been violated.¹⁵³ A divided Supreme Court decided in a five to four decision that granting relief to Zacchini on the state law right of publicity claim would not infringe on the television station’s First Amendment rights.¹⁵⁴ The United States Supreme Court noted that Zacchini’s right of publicity claim would not prevent the television station from reporting the newsworthy aspects of Zacchini’s act.¹⁵⁵ However, the court held that when a member of the media broadcasts a performer’s entire act without his consent, the First and Fourteenth Amendments do not immunize his conduct.¹⁵⁶ In a famous passage, the court explained the rationale for its decision:

The broadcast of a film of [Zacchini’s] entire act poses a substantial threat to the economic value of that performance. . . . [T]his act is the product of [Zacchini’s] own talents and energy, the end result of much time, effort, and expense. Much of its economic value lies in the “right of exclusive control over the publicity

151. MCCARTHY, *supra* note 9, § 28:41, at 28-49 to 28-50 (citations omitted).

152. 433 U.S. 562 (1977).

153. *See id.* at 564.

154. *See id.* at 578.

155. *See id.*

156. *See id.* at 578-579.

given to his performance;" if the public can see the act free on television, it will be less willing to pay to see it at the fair. The affect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee. . . . [and] goes to the heart of petitioner's ability to earn a living as an entertainer.¹⁵⁷

The opposing principles that collided in this landmark right of publicity case were both important.

The one side, emphasized by the dissent, is that this case involved a newscast, worthy of far greater constitutional protection than commercial marketing. The other side, focused on by the majority, was that this broadcast was not simply an "appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place."¹⁵⁸

In *Zacchini*, the delicate balancing act tipped in favor of the right of publicity.

However, the First Amendment does not often play second fiddle to the right of publicity in cases involving "communicative" uses of a persons persona.¹⁵⁹ Professional athletes have encountered this phenomenon in a number of cases. The first such case was *Namath v. Sports Illustrated*, decided in 1975.¹⁶⁰ Joe Namath, quarterbacking legend of the New York Jets, sued *Sports Illustrated* for invasion of privacy under Civil Rights Law in New York State court for its publication of a photograph of him in conjunction with advertisements promoting subscriptions to the magazine without his consent.¹⁶¹ *Sports Illustrated* ran a number of articles about the Jets victory in Super Bowl III on January 20, 1969. In a later promotional push to sell more magazines, *Sports Illustrated* ran the famous picture under the captions, "The Man You Love loves Joe Namath," and "How to get Close to Joe Namath."¹⁶²

157. *Zacchini*, 433 U.S. at 575, 576.

158. WEILER & ROBERTS, *supra* note 25, at 425.

159. For discussion of the term "communicative," see text discussion *supra* page 30.

160. 371 N.Y.S.2d 10 (N.Y. 1975).

161. See *id.* at 11. In New York, right of publicity claims have to be brought within the rubric of §§ 51 and 52 of the New York Civil Rights Laws because a New York Court of Appeals has ruled that there is neither a common law right of publicity nor a common law right of privacy in New York. See *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580 (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, the plaintiff cannot claim an independent common law right of publicity.").

162. *Namath*, 371 N.Y.S.2d at 13.

The court admitted that the magazine's republication of Namath's picture was "in motivation, sheer advertising and solicitation," but concluded that "[t]his alone is not determinative of the question so long as the law accords an exempt status to incidental advertising."¹⁶³ Therefore, the court found that *Sports Illustrated's* use of Namath's photograph was "merely incidental advertising of defendants' magazine in which [Namath] had earlier been properly and fairly depicted" and so was not a violation of the Civil Rights Law.¹⁶⁴

A similar result was reached in *Montana v. San Jose Mercury News, Inc.*, decided in a California state court in 1995.¹⁶⁵ Another superstar quarterback, champion of four super bowls and in many people's minds the greatest quarterback of all time, sued the *San Jose Mercury News* on common law and statutory commercial misappropriation claims. On January 22, 1989, Joe Montana led the San Francisco 49ers to a twenty to sixteen last minute victory over the Cincinnati Bengals in Super Bowl XXIII. The next day, the *Mercury News* ran a front page story paying homage to the accomplishment and depicting four players, including Montana, celebrating on the field. The very next year, after Montana's 49ers vanquished the Denver Broncos in an even more impressive fifty-five to ten pounding in Super Bowl XXIV, the *Mercury News* once again ran stories celebrating San Francisco's success, accompanied by pictures of Montana during the game. In 1990, Joe Montana and the 49ers won yet another Super Bowl, giving them an unparalleled four championships in the decade prior to 1990. This time, the *Mercury News* commemorated all four victories by issuing a special "Souvenir Section" in its Sunday, February 4, 1990, edition, which was devoted exclusively to the 49ers, a "team of destiny." The souvenir section, titled "Trophy Hunters," carried an artist's rendition of Montana on the front page.¹⁶⁶ Within two weeks, each of the newspaper pages from the "Souvenir Section" was reproduced in poster form and made available for sale to the general public.¹⁶⁷

Almost two years after production of the posters was completed, Montana brought suit against the *Mercury News* alleging common law and statutory misappropriation of his name, photograph, and likeness.¹⁶⁸ The court noted that "no cause of action will lie for the 'publication of

163. *Id.* at 11-12.

164. *Id.* at 11.

165. 40 Cal. Rptr. 2d 639 (Cal. Ct. App. 1995).

166. *See id.* at 640.

167. *See id.*

168. *See id.*

matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it” and that “a matter in the public interest is not restricted to current events but may extend to the reproduction of past events.”¹⁶⁹ Montana conceded that the articles themselves were entitled to First Amendment protection.¹⁷⁰ However, he argued that the reproduction of the newspaper pages in poster form was not entitled to First Amendment protection.¹⁷¹

The court granted the *Mercury News*’ motion for summary judgment on two First Amendment grounds.¹⁷² First, the court found that “Montana’s name and likeness appeared in the posters for precisely the same reason they appeared on the original newspaper front pages: because Montana was a major player in contemporaneous newsworthy sports events.”¹⁷³ Therefore, the *Mercury News* had a worthy purpose, other than merely extracting the commercial value from Montana’s face and name. Second, the court found that a newspaper has a constitutional right to promote itself by reproducing its news stories.

The cases thus far discussed have dealt with “communicative” speech. When the right of publicity finds itself opposite to First Amendment rights in “commercial” speech cases, the right of publicity usually triumphs.¹⁷⁴ One illustrative case involving a professional athlete is *Abdul-Jabbar v. General Motors Corp.*, discussed earlier for its holding that a person cannot abandon his name through non-use for purposes of the right of publicity.¹⁷⁵ The court in this case also discussed defendant General Motors’ contention that its use of the name Lew Alcindor was “incidental” and therefore not actionable, citing *Namath*.¹⁷⁶ The court distinguished *Namath* and *Montana*.¹⁷⁷ In dismissing General Motors’ position, the court noted that while the basketball record of Lew Alcindor may be said to be “newsworthy,” it is not automatically privileged. The court held that because General Motors used the information in the context of an automobile advertisement (a “commercial” use),

169. *Id.*

170. *See Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 641 (Cal. Ct. App. 1995).

171. *See id.*

172. *See id.* at 643.

173. *Id.* at 641.

174. For discussion of the term “commercial,” see text discussion *supra* III(C).

175. *See Abdul-Jabbar v. General Motors Corp.*, 75 F.3d 1391 (9th Cir. 1996).

176. 371 N.Y.S.2d 10 (N.Y. Sup. Ct. 1975).

177. *Montana v. San Jose Mercury News*, 40 Cal. Rptr.2d 639 (Cal. Ct. App. 1995).

rather than in a sports or news account, the use was privileged under the First Amendment.¹⁷⁸

C. Parody

A controversial issue currently in the forefront of discussions regarding the right of publicity involves the role that parody should play in the courts' First Amendment analysis. *White v. Samsung Electronics America, Inc.*, discussed earlier for its analysis of "identifiability," explored the extent to which parody should be considered a defense in right of publicity cases involving commercial speech.¹⁷⁹ The court recognized that the advertisement in question was run for the purpose of selling Samsung VCRs. In that context, the court remarked, "[t]he ad's spoof of Vanna White and Wheel of Fortune is subservient and only tangentially related to the ad's primary message: 'buy Samsung VCRs.'"¹⁸⁰ Therefore, the court held that Samsung's parody arguments were better suited to non-commercial parodies, where the First Amendment hurdle is higher, cautioning, "[t]he difference between a 'parody' and a 'knock-off' is the difference between fun and profit."¹⁸¹

As demonstrated by the Ninth Circuit's decision in *White*, the parody defense may not be very effective when the court classifies the use in question as "commercial," rather than "communicative." However, it should be apparent even to the casual observer that the issue of whether a particular use is "commercial" or "communicative" is not exactly set in stone. Courts apply a highly fact sensitive analysis, which is subjective in nature. It stands to reason, then, that when embroiled in a right of publicity suit, defendants will desire to convince the court that for one reason or another, the use they are being sued for is in fact "communicative," and worthy of the highest level of First Amendment protection.¹⁸² Fueling this speculation is *Cardtoons, L.C. v. Major*

178. See *Abdul-Jabbar v. General Motors Corp.*, 75 F.3d 1391, 1401 (9th Cir. 1996).

179. See 971 F.2d 1395 (9th Cir. 1992).

180. *Id.* at 1401.

181. *Id.* at 1401 n.3.

182. For many years, some commentators have called for courts to apply a copyright "fair use" analysis to right of publicity cases for consistency reasons. See Carrier, *supra* note 42, at 162 (citing Randall T.E. Coyne, *Toward a Modified Fair Use Defense in Right of Publicity Cases*, 29 WM. & MARY L. REV. 781, 782 (1988); H. Lee Hetherington, *Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity*, 17 COLUM.-VLA J.L. & ARTS 1, 28-30 (1992)). In 1994, the United States Supreme Court upheld the use of parody as a valid defense to "commercial" use in a copyright case, applying the "fair use" doctrine. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). If courts begin to apply the Supreme

League Baseball Players Association,¹⁸³ in which the court determined that defendant's use of parody should be subject to the highest level of protection.

In that case, Cardtoons, L.C. represented to the court that it was "formed in late 1992 to produce parody trading cards featuring caricatures of major league baseball players. Cardtoons contracted with a political cartoonist, a sports artist, and a sports author and journalist, who designed a set of 130 cards."¹⁸⁴ The cards lampooned various aspects of baseball and its players, including the players' substantial salaries,¹⁸⁵ player vanity,¹⁸⁶ and the physical characteristics of the players.¹⁸⁷ When the Major League Baseball Players Association (MLBPA), which "acts as the assignee of the individual publicity rights of all active players,"¹⁸⁸ discovered Cardtoons plans to distribute the cards in question, it wrote a cease and desist letter to Cardtoons. In response, Cardtoons filed suit seeking declaratory judgment that its cards did not violate the publicity rights of the players or the MLBPA, and that it could distribute its parody baseball cards without the consent of the MLBPA.¹⁸⁹

The court employed a three part test to figure out whether Cardtoons should be granted the relief it sought: (1) whether the cards infringed upon MLBPA's right of publicity, (2) whether the cards are protected by the First Amendment, and (3) a balancing test to determine the relative importance of the rights at stake if both parties have been determined to have cognizable rights.¹⁹⁰ The court initially noted that all of the elements of the Oklahoma right of publicity statute in question had been met, and that the only possibility of relief for Cardtoons was a First

Court's analysis in that case to right of publicity cases, it will not be as harmful to defendants to have the use in question characterized as "commercial."

183. 95 F.3d 959 (10th Cir. 1996).

184. *Id.* at 962.

185. One card referred to San Francisco Giants outfielder Barry Bonds as "Treasury Bonds" of "the Gents," noting that he "plays so hard he gives 110 percent, compounded daily," and "always cashes in on the payoff pitch." *Id.* at 962-63.

186. One card referred to Ricky Henderson, who played for the Oakland Athletics at the time, as "Egotisticky Henderson" of the "Pathetics," and described a scene in which he accepted the "Me-Me Award" at a fan club banquet. *See id.* at 963.

187. One card referred to the 6'10" Randy Johnson, who then played for the Seattle Mariners, as "Cloud Johnson" of the "Mari-Nerds." *See id.* at 963.

188. *Cardtoons, L.C. v. Major League Baseball Players Ass'n.*, 95 F.3d 959, 963 (10th Cir. 1996).

189. *See id.* at 964.

190. *See id.* at 966.

Amendment defense.¹⁹¹ Therefore, the court moved on to the second step in its analysis.¹⁹²

The court unexpectedly found that baseball cards “receive full protection under the First Amendment.”¹⁹³ The court referred to baseball cards as “commentary on an important social institution”¹⁹⁴ and “an education in baseball.”¹⁹⁵ It further held that the cards were not subject to a lesser degree of protection based on the fact that they were humorous.¹⁹⁶ To the contrary, the court noted, “[s]peech that entertains, like speech that informs, is protected by the First Amendment because ‘[t]he line between the informing and the entertaining is too elusive for the protection of that basic right.’”¹⁹⁷ The court specifically addressed the issue of commercial speech, noting that it is afforded a lower level of First Amendment protection, but finding that Cardtoons’ trading cards did not fall within the commercial speech category because “they do not merely advertise another unrelated product.”¹⁹⁸

Since the court found that the MLBPA’s right of publicity had been violated, and that Cardtoons’ free speech had been implicated, it proceeded to the third step of its analysis which involved weighing the two rights against each other to determine which right should prevail.¹⁹⁹ The court found that Cardtoons could not have achieved its purpose through less invasive means.

Cardtoons’ expression requires use of player identities because, in addition to parodying the institution of baseball, the cards also lampoon individual players. Further, Cardtoons’ use of the trading card format is an essential component of the parody because

191. *See id.* at 968.

192. *See id.* at 968.

193. *Cardtoons, L.C. v. Major League Baseball Players Ass’n.*, 95 F.3d 959, 969 (10th Cir. 1996). It has been said that the court took this unexpected step in its decision in an attempt to avoid the “commercial use” problem. *See Carrier, supra* note 37, at 170 (raising the possibility that by avoiding the “commercial use” problem, the court may have “opened the door” for non-parodic baseball cards to distribute cards without seeking a licensing agreement, because if baseball cards are “education[s] in baseball,” licenses may no longer be required).

194. *Cardtoons*, 95 F.3d at 969 (“The cards provide social commentary on public figures, major league baseball players, who are involved in a significant commercial enterprise, major league baseball [sic]. While not core political speech (the cards do not, for example, adopt a position on the Ken Griffey, Jr., for President campaign), this type of commentary is an important social institution.”).

195. *Id.*

196. *See id.*

197. *Id.* (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)).

198. *Cardtoons, L.C. v. Major League Baseball Players Ass’n.*, 95 F.3d 959, 970 (10th Cir. 1996).

199. *See id.* at 970.

baseball cards have traditionally been used to celebrate baseball players and their accomplishments.²⁰⁰

The court concluded that the First Amendment right of Cardtoons trumped the right of publicity because otherwise, Cardtoons would have to get the MLBPA's consent to distribute the cards.²⁰¹ The court thought such consent was unlikely, effectively preventing the cards from entering the public discourse.²⁰² The court decided that such censorship of player criticism was "clearly undesirable," and accordingly granted Cardtoons declaratory judgment.²⁰³ This decision dealt a significant blow to the publicity rights of professional athletes with respect to trading cards.²⁰⁴ There is the possibility that the decision may be even more significant, allowing all trading card companies to stop paying licensing fees to players and players associations.²⁰⁵

Since the majority in *Cardtoons* cited the dissent in *White*, it seems that this is not the end of the parody argument. Furthermore, the courts have yet to address in a meaningful way the situation where commercial speech is implicated and a parody defense is asserted. Commentators who hoped that the Tenth Circuit would carve out a parody defense for commercial speech are probably disappointed by the fact that the court did not address that issue.²⁰⁶ Commercial speech is not afforded the same level of protection as fully protected speech, but courts have not

200. *Id.* at 971.

201. *See id.* at 972.

202. *See id.* The response to Carrier's concern, may lie in this portion of the court's decision. *See Carrier, supra* note 42, at 70. The court's fear of censorship would not seem to apply to traditional baseball card distributors. Therefore, in a case involving non-parodic baseball cards, the court's balancing step analysis could swing in favor of the MLBPA.

203. *See Cardtoons*, 95 F.3d at 972-73 (quoting Judge Kozinski's dissent in *White v. Samsung Elecs. Amer., Inc.*, 989 F.2d 1395, 1519 (9th Cir. 1992) ("The last thing we need, the last thing the First Amendment will tolerate, is a law that lets public figures keep people from mocking them."))

204. Carrier states:

The effect of the Tenth Circuit's decision on at least one segment of the trading card market is clear: Cardtoons creates an exception in the right of publicity for trading card parodists. One company began selling trading card parodies of National Basketball Association players in 1994. The NBA did not file an action against that company, choosing to await the outcome of *Cardtoons*. Other sports cards' parodists will surely join the market.

Carrier, supra note 42, at 169-70.

205. *See id.* at 170.

206. *See id.* (citing Michal E. Hartmann & Daniel R. Kelly, *Parody (of Celebrities, in Advertising), Parity (Between Advertising and Other Types of Commercial Speech), and (the Property Side of) Publicity*, 17 HASTINGS COMM. & ENT. L.J. 633, 687 (1995)).

yet developed a test that would balance rights of publicity against commercial free speech. This is an issue that will surely arise again.

IV. FALSE START, NUMBER 79 OFFENSE, 5 YARD PENALTY, REPEAT SECOND DOWN: REMEDIES IN RIGHT OF PUBLICITY CASES

Plaintiffs, including professional athletes, who successfully bring a right of publicity action are entitled to both injunctive relief and monetary damages.²⁰⁷ The monetary damages in a right of publicity action are awarded for damage done to the commercial value of a proprietary right of the plaintiff, as opposed to damages under misappropriation claims, which are awarded for mental anguish.²⁰⁸ Perhaps the easiest way to conceptualize the difference between the two is that a violation of the right of publicity implicates injury to the pocketbook whereas an invasion of privacy focuses on the injury to the psyche.²⁰⁹

A. Injunctive Relief

Injunctive relief is the standard remedy for preventing continuous violations of the plaintiff's right of publicity.²¹⁰ Professor McCarthy writes:

It is difficult to envision a case where infringement of publicity rights . . . has been found where money damages are adequate to compensate for the future and continuing unpermitted use of a person's identity. If an injunction were denied, the court would be telling plaintiff to sit by and watch defendant continue to infringe upon plaintiff's rights until such time as plaintiff decided to sue again for money damages as compensation.²¹¹

Courts have often recognized that failure to grant an injunction in a right of publicity case leaves the plaintiff with an inadequate result.²¹²

Uhlaender v. Henrickson involved an action by several professional baseball players, appearing through Ted Uhlaender and the Major League Baseball Players Association, against the manufacturer of two games that they claimed violated their right of publicity.²¹³ The games

207. Alexander Margolies, *Sports Figures' Right of Publicity*, 1 SPORTS LAW. J. 359, 367 (1994).

208. See 2 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY, § 11.8, at 11-43 to 11-44 (Rev. 1999).

209. See *id.* § 11.8, at 11-44.

210. See Margolies, *supra* note 206, at 367; MCCARTHY, *supra* note 207, § 11.6[A], at 11-26.

211. MCCARTHY, *supra* note 207, § 11.6[A], at 11-26.

212. See *id.*

213. 316 F. Supp. 1277 (D. Minn. 1970).

capitalized on the names and professional statistical information such as batting, fielding, and earned run averages of over 500 major league baseball players. The players sought to enjoin the commercial use of the games in question.²¹⁴ The court observed:

It seems clear to the court that a celebrity's property interest in his name and likeness is unique, and therefore there is no serious question as to the propriety of injunctive relief. Defendants have violated plaintiffs' rights by the unauthorized appropriation of their names and statistics for commercial use. The remedy at law, considering particularly the difficulty in determining and measuring damages, past or future, is inadequate.²¹⁵

The court granted the injunction.

One big advantage in granting an injunction in a right of publicity case is "that it can be carefully tailored to preserve whatever rights defendant possesses to proper use of plaintiff's identity."²¹⁶ This technique could prove useful in a case in which the defendant has been assigned some rights to use the plaintiff's persona in advertising, but has exceeded the terms of the agreement, maybe even by mistake.²¹⁷ The injunction could require the defendant to stay within the terms of the agreement (thereby clearing up the nature of the assignment), but need not take away all rights to use the name. Similarly, when issues of free speech are involved, an injunction can effectively prohibit the illegal behavior while affecting the free speech as little as possible, allowing courts to follow the "least restrictive alternative" rule.²¹⁸

Preliminary injunctions are more difficult to get than are injunctions against infringement. In deciding whether to grant a preliminary injunction, most courts will weigh the following five criteria:

1. Can plaintiff show a probability of success at the ultimate trial on the merits?
2. Can plaintiff show that it will suffer "irreparable injury" pending a full trial on the merits?
3. Will a preliminary injunction preserve the "status quo" which preceded the dispute?
4. Do the hardships balance in favor of plaintiff?
5. Is a preliminary injunction helpful to protect third parties?²¹⁹

214. *See id.*

215. *Id.* at 1283.

216. MCCARTHY, *supra* note 207, § 11.6[A], at 11-27.

217. *See id.*

218. *See id.*

219. *Id.*, § 11.6[B], at 11-28 to 11-29 (noting also that the Second and Ninth Circuits have developed a more complex test for deciding when a preliminary injunction should be granted).

In *Ali v. Playgirl, Inc.*,²²⁰ examined above for its discussion of “identifiability,” the court also considered at length the concept of “irreparable injury” with regard to the use of a depiction of the famed boxer without his consent.²²¹

As has been noted, in the course of his public career plaintiff has established a commercially valuable proprietary interest in his likeness and reputation, analogous to the good will accumulated in the name of a successful business entity. To the extent that defendants are unlawfully appropriating this valuable commodity for themselves, proof of damages or unjust enrichment may be extremely difficult. . . . [F]urthermore, defendants appear not only to be usurping plaintiff’s valuable right of publicity for themselves but may well be inflicting damage upon this marketable reputation. . . . [T]he “likeness” of Ali which has been published is a full frontal nude drawing, not merely a sketch or photograph of him as he appears in public. Damages from such evident abuse of plaintiff’s property right in his public reputation are plainly difficult to measure by monetary standards.²²²

The court concluded that the difficulty of establishing monetary damages left Ali without an adequate remedy at law and sufficiently established the requisite irreparable injury. Therefore, the court granted a preliminary injunction.

It is the rule in America that a court has the power to control the actions of a person over whom it has personal jurisdiction, even if that person ventures beyond the scope of the court’s territorial jurisdiction.²²³ Therefore, state courts can enjoin activities outside of their state.²²⁴ However, courts do not always exercise this power, in part due to the fear that the conduct in question is not illegal in other jurisdictions.²²⁵ The *Restatement* takes the view that in right of publicity cases, injunctions national in scope are preferred over those limited to one state.²²⁶ The rationale is that a nationwide injunction keeps the court from having to utilize scarce resources in determining which other jurisdictions have the same right of publicity rules as the forum jurisdiction. It is easier to put the burden on the defendant to demonstrate that the

220. 447 F. Supp. 723 (S.D.N.Y. 1978).

221. See MCCARTHY, *supra* note 207, § 11.6[B], at 11-28.

222. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978).

223. See MCCARTHY, *supra* note 207, § 11.6[D], at 11-32.

224. See *id.*

225. See *id.*

226. See *id.*, § 11.6[D], at 11-33.

conduct the court has determined infringes upon the right of publicity in one state does not violate the law of another state.²²⁷

B. *Compensatory Damages*

Three types of damage awards exist for plaintiff's who bring successful right of publicity cases. McCarthy characterizes them as: "fair market value of identity," "damage to professional standing and publicity value," and "unjust enrichment and infringer's profits."²²⁸ All three kinds of monetary damages have been awarded in right of publicity cases involving professional athletes. Furthermore, because the fair market value of identity method and the damage to professional standing methods address different injuries, the plaintiff may recover under both theories in one action. The unjust enrichment measure may be awarded in conjunction with the other two to the extent that such award does not result in double recovery.²²⁹

Furthermore, as pointed out in the *Restatement of Unfair Competition*, whether the defendant intended to violate the plaintiff's right of publicity is more appropriately addressed at the damages stage of a court's analysis, than at the liability stage. Therefore, a defendant can be found liable to a plaintiff for violation of his right of publicity even though the defendant did not intend to infringe upon that right. However, the defendant's lack of intent may be considered a mitigating factor reducing the amount that the court awards in damages.

1. Fair Market Value of Identity

The first and most obvious potential measure of damages in a right of publicity case is the "market value of the use of plaintiff's identity or persona in the commercial setting in which defendant has used it."²³⁰ For celebrities, including professional athletes, market value can be determined easily through expert testimony as to the kind of fees that simi-

227. See *id.* (citing Mansfield's dissent in *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 289-90 (2nd Cir. 1981); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 48 cmt. c (1995) ("[A]lthough a court may have jurisdiction to grant broader relief, an injunction protecting the right of publicity should ordinarily be limited to conduct in jurisdictions that provide protection comparable to the forum state. A procedure permitting the defendant to request a modification of a geographically unlimited injunction upon a showing that the conduct is lawful under the law of another state can be an efficient method of resolving this issue.")

228. MCCARTHY, *supra* note 207, § 11.8[B], at 11-45.

229. See *id.* § 11.8[D], at 11-51.

230. *Id.*, § 11.8[B], at 11-45.

larly situated individuals get for similar uses of their persona.²³¹ This method of determining has been used by courts in many cases.

Town & Country Properties, Inc. v. Riggins, a Virginia Supreme Court case, involved this method of computing damages.²³² John Riggins, the former New York Jets and Washington Redskins Pro Football Hall of Fame running back, sued his ex wife, a real estate agent who worked for Town & Country Properties, under a statutory invasion of privacy claim. The statutory right is violated "if a person's 'name, portrait, or picture' is used for 'advertising purposes or for the purposes of trade' without written consent."²³³ The claim is essentially a right of publicity claim, though Virginia courts do not refer to it as such. Riggins alleged that his ex wife had advertised a house as "John Riggins' former home" on a flyer without his consent, in order to drum up interest in the house and get a better sale price, thus violating his statutory right.²³⁴ The court first upheld the lower court's finding that Riggins' statutory right had been violated, and then turned to the issue of damages.²³⁵

At trial, expert testimony had been given by Riggins' expert, Frederic A. Fried, as to the amount of damages that the jury should award.²³⁶ The expert in question was the owner of a sports marketing company that specialized in marketing and promoting athletes. The expert's clients had included, at one time or another: Boomer Esiason, who at the time was quarterback of the New York Jets; Jim Kelly, then quarterback of the Buffalo Bills; Troy Aikman, still quarterback of the Dallas Cowboys; and Michael Jordan, the recently retired Chicago Bull. Fried had never represented Riggins. Fried's company handled all types of corporate sponsorship and marketing deals for players in all major sports. Fried testified that in his expert opinion, Riggins was "a proven commodity," and that it would be common in the sports marketing business for an ex-athlete with Riggins' credentials to charge a fifty thousand dollar fee for lending his name to a flyer such as the one in question.²³⁷ The jury awarded damages of twenty-five thousand dollars to Riggins.²³⁸ Town & Country argued that the trial court "erred in admitting the opinion of [Riggins'] expert because the opinion lacked an 'adequate founda-

231. *See id.*

232. 457 S.E.2d 356 (Va. 1995).

233. *Id.* at 361.

234. *Id.* at 362.

235. *See id.* at 363-365.

236. *See id.* at 364.

237. *See Town & Country Properties, Inc. v. Riggins*, 457 S.E.2d 356, 362 (Va. 1995).

238. *See id.* at 361.

tion' and because there was no 'causal connection' between the expert's testimony and 'the pertinent issue.'"²³⁹

The Virginia Supreme Court held that Town & Country's attack on Fried's testimony as lacking any "causal connection" to the issues merely went to the weight to be given to the expert's testimony, and not to its admissibility.²⁴⁰ Furthermore, the court found that the jury's award of twenty-five thousand dollars to Riggins was supported by the expert's testimony, as well as by Riggins own estimation that he normally charged endorsement fees ranging from twenty to ninety thousand dollars.²⁴¹ Therefore, the court found that there was "ample credible evidence to support the jury's assessment of compensatory damages," and upheld the lower courts decision to allow a sports marketing expert to testify as to the fee amount that a plaintiff who is a former athlete would normally charge for the use of his name.²⁴²

It is very important that counsel for a professional athlete plaintiff introduce evidence such as that introduced in the *Riggins* case when claiming a violation of the athlete's right of publicity. "If plaintiff introduces no evidence as to the commercial value of his or her identity, the court has no choice but to award only 'nominal' damages."²⁴³

One other important note should be made here: it may be inherently unfair to limit the plaintiff's monetary award to the fair market value of the plaintiff's persona. If the court merely awards the fair market value measure of damages, the defendant is no worse off than if it had obtained a license from the plaintiff in the first place (except, of course, to the extent of attorney's fees). This situation may not give the defendant the proper incentive to get the plaintiff's consent in advance. Furthermore, the fair market measure of damages does not compensate the plaintiff for the harm to him in not being able to control the way in which his image or likeness is used. In order to prevent unjust enrichment and insure adequate deterrence the *Restatement of Unfair Competition* advises courts to give the plaintiff the benefit of the doubt when using this measure of damages.²⁴⁴ The *Restatement* appears to advocate a sort of "tie goes to the runner" rule. In other words, when a court is determining the proper measure of damages, it should resolve any

239. *Id.* at 364.

240. *See id.* at 364.

241. *See id.* at 364.

242. *Town & Country Properties, Inc. v. Riggins*, 457 S.E.2d 356, 364 (Va. 1995).

243. *McCarthy*, *supra* note 207, § 11.8[B], at 11-49.

244. *See id.* § 11.8[C], at 11-50 to 11-51; *RESTATEMENT (THIRD) OF UNFAIR COMPETITION* § 49 cmt. d (1995).

doubts it may have as to the proper award of "fair market value" in favor of the plaintiff. Essentially, the *Restatement* is encouraging courts to skew their figures slightly higher than the actual fair market value in order to compensate for the built in injustices of the system.

2. Damage to Professional Standing and Publicity Value

This second measure of damages granted to successful plaintiffs in right of publicity cases, damage to professional standing and publicity value, is utilized when use of plaintiff's identity without his consent can amount to more than just the fair market value of the particular use of the identity.²⁴⁵ The reasoning behind this measure of damages is that "[t]he timing or context of defendant's use may damage plaintiff's professional standing and reasonable expectation of income, as well as the future publicity value of the plaintiff's identity."²⁴⁶ Examples of this kind of damage occur when defendant's infringing use involves: endorsement of a shoddy product, a product outside the scope of the plaintiff's carefully developed image, goods that are similar to other goods plaintiff endorses (causing dilution of value in actual endorsement), a plaintiff that has never licensed his identity for like goods before (this may prevent further licensing possibilities), overexposure of plaintiff's identity, or a product that the public knows plaintiff does not use or support (destroying plaintiff's credibility).²⁴⁷

In *Hirsch v. S.C. Johnson & Son, Inc.*, mentioned earlier for its examination of the application of the right of publicity in situations involving plaintiff nicknames, the Supreme Court of Wisconsin also briefly discussed this measure of damages.²⁴⁸ The court noted that investment of work, time and money by an athlete all combine to build the publicity value in the athlete's name.²⁴⁹ Therefore, the court found that an appropriate remedy for appropriation of a person's name for trade purposes would take into account that the "economic damage caused by unauthorized commercial use of a name may take many forms, including damage to reputation if the advertised product or service is shoddy and the dilution of the value of the name in authorized advertising."²⁵⁰

245. See McCARTHY, *supra* note 207, § 11.8[C], at 11-50.

246. *Id.*

247. See *id.*

248. See 280 N.W.2d 129 (Wis. 1979).

249. See *id.* at 134-135.

250. *Id.* at 138.

3. Unjust Enrichment and Infringer's Profits

Recovery of profit made by defendant as the fruit of the infringing use is a standard form of damages in trademark and copyright infringement cases, which are analogous to cases involving the right of publicity.²⁵¹ Therefore, there is a good argument that "the large body of case law on recovery of profits in cases of infringement of copyrights and trademarks should provide useful guidance in determining recovery of profits in cases of infringement of the Right of Publicity."²⁵² The *Restatement (Third) of the Law of Unfair Competition* takes the view that this type of damages is an "ordinarily available" remedy in right of publicity cases.²⁵³ In addition, some state statutes explicitly provide for unjust enrichment as an ordinary measure of damages in such cases.²⁵⁴

Not all courts, however, view the profits of the infringer as the proper measure of damages in a right of publicity case. Some take the view that the infringer's profits are merely one factor to look at in the determination of damages. *Hogan v. A.S. Barnes & Co., Inc.*, decided in 1957, involved golf legend Ben Hogan's right of publicity action against the publisher (Barnes & Co.) of a book discussing the techniques of many famous golfers around the world.²⁵⁵ The author of the book took pictures of Hogan at Baltusrol and subsequently offered to pay Hogan one hundred dollars if Hogan would allow him to use the pictures in his book. Hogan responded to the author's request by writing him a note that simply said, "Are you kidding?" Despite Hogan's flat denial of his request, the author used the photographs in his book.²⁵⁶ The book did not make any money. The court held that the fact that the defendant's book "proved to be unprofitable" did not limit Hogan to the recovery of nominal damages.²⁵⁷ The court found that because Hogan was

claiming damages for injury to his own 'right of publicity . . . the question of whether the publication of the book resulted in profit or loss to defendant is neither determinative of [Hogan's] right to damages nor the extent thereof, although it may be one of the factors to be considered in assessing the amount of damages.²⁵⁸

251. See MCCARTHY, *supra* note 207, § 11.8[D], at 11-51.

252. *Id.* § 11.8[D], at 11-51 to 11-52.

253. See *id.* at 11-52 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. d (1995)).

254. See MCCARTHY, *supra* note 207, § 11.8[D], at 11-52 (citing TENN. CODE ANN. § 47-25-1106(d); WIS. STAT. § 895.50(1)(b)).

255. 114 U.S.P.Q. 314 (Pa. 1957).

256. See *id.* at 315.

257. *Id.* at 321.

258. *Id.*

C. Punitive Damages

In right of publicity cases, “[p]unitive damages are available according to state law.”²⁵⁹ Courts have usually required proof of “premeditated or knowing” use of plaintiff’s identity by the defendant before an award of punitive damages can be justified.²⁶⁰ Some courts have held that willful behavior may not be enough to support punitive damages, even where defendant blatantly disregards plaintiff’s refusal to grant consent, if a determination is made that defendant acted without the intent to specifically exploit the plaintiff. In *Hogan v. A.S. Barnes & Co., Inc.*, discussed in the previous section, Hogan argued that he should be awarded punitive damages because, despite the fact that his response to defendant’s request to use pictures of Hogan in defendant’s book was “Are you kidding?” defendant used the pictures anyway.²⁶¹ The court refused to award punitive damages. First, the court noted that “an award of punitive damages must be based on ‘malicious, wanton, reckless, willful or oppressive conduct on the part of the defendant.’”²⁶² Then the court stated that while defendant’s conduct may have been willful “in the sense that it made use of [Hogan’s] name and photographs over his express protest,” the court found “no basis for holding that defendant’s conduct. . . was malicious, wanton, reckless or oppressive,” since the evidence showed that defendant never intended to specifically exploit Hogan in that Hogan’s “name, skill and photographs were not singled out for prominent display in the defendant’s publication.”²⁶³ The court accordingly rejected Hogan’s request for punitive damages.²⁶⁴

More recently, in 1991, punitive damages were awarded by a district court in Pennsylvania based on willful disregard of the publicity rights of former heavyweight champion of the world “Smokin’” Joe Frazier. *Frazier v. South Florida Cruises* involved the promotion by defendant of a cruise that would “attract customers interested in the sport of kings.”²⁶⁵ Potential customers were told that on this cruise, many former boxing champions would be on hand to sign autographs and mingle with the passengers. The defendant advertised that among those invited were Frazier, Rocky “Dead End” Graziano, Jake “Bronx Bull” LaMotta, Carlos Palamino, and Danny “Little Red” Lopez. What defendant failed to

259. Margolies, *supra* note 206, at 368.

260. MCCARTHY, *supra* note 207, § 11.9, at 11-57.

261. 114 U.S.P.Q. (BNA) 314, 315 (Pa. 1957).

262. *Id.* at 322.

263. *Id.* at 322-323.

264. *See id.* at 321-323.

265. 19 U.S.P.Q.2d 1470, 1471 (E.D. Pa. 1991).

mention was that Frazier had already rejected the proposal, and had not consented to the use of his name in connection with the cruise. In considering the issue of whether the jury's award of punitive damages at trial was justified, the court observed that the defendant had "commenced its advertising campaign without any genuine belief that the plaintiff had granted, or would grant, permission to use his name to promote the venture."²⁶⁶ The court held that this fact justified both the jury's conclusion that the defendant acted with willful disregard for Frazier's right of publicity and the jury's award of punitive damages.²⁶⁷

V. EXTRA INNINGS: THE POSTMORTEM RIGHT OF PUBLICITY

Traditional privacy rights protect "the dignitary, reputational, emotional and physical rights of persons."²⁶⁸ Privacy rights do not survive the death of the individual whose privacy they are intended to protect, since once the person is dead, his protection is no longer necessary. On the other hand, property rights survive death, passing to heirs or assignees.²⁶⁹ The right of publicity is once again haunted by the specter of the right of privacy. Courts that view the right of publicity as a subset of the right of privacy will not grant a postmortem right of publicity, while courts that view the right of publicity as more akin to a property right will recognize a postmortem right.

It appears that the "overwhelming majority rule under either statute or common law is that the right of publicity is descendible property and has an unconditional postmortem duration."²⁷⁰ The reasons for recognizing a post mortem right of publicity were laid out in *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*, in which the heirs and assignees of Martin Luther King, Jr. alleged that the defendant had infringed upon Dr. King's right of publicity by selling plastic busts of Dr. King.²⁷¹ The Eleventh Circuit, finding that case law in Georgia was sparse regarding the right of publicity, certified a number of questions to the Supreme Court of Georgia, including

266. *Id.* at 1472.

267. *See id.*

268. MCCARTHY, *supra* note 9, § 28:42, at 28-54.

269. *See id.* § 28:43, , at 28-54 to 28-55.

270. *Id.* § 28:45, at 28-57 (calling Ohio "a lonely minority of one" among jurisdictions with "a decision still outstanding and not overruled by statute which rejects the existence of a common law postmortem right of publicity.") *See Reeves v. United Artists*, 572 F. Supp. 1231 (N.D. Ohio 1983) (holding that the right of publicity does not survive the death of the person it protects.)

271. 694 F.2d 674 (11th Cir. 1983).

whether the right of publicity survives the death of its owner.²⁷² The Supreme Court of Georgia held that "the right of publicity survives the death of its owner and is inheritable and devisable."²⁷³ In support of its conclusion, the Court noted:

Recognition of the right of publicity rewards and thereby encourages effort and creativity. If the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished because the celebrity's untimely death would seriously impair, if not destroy, the value of the right of continued commercial use. Conversely, those who would profit from the fame of a celebrity after his or her death for their own benefit have failed to establish their claim that they should be the beneficiaries of the celebrity's death. Finally, the trend since the early common law has been to recognize the survivability.²⁷⁴

Based on reasons such as these, most courts which have visited the issue have decided that the right of publicity does survive the death of its owner.

Sixteen states have statutes which recognize the post mortem right of publicity, either explicitly or implicitly through the right of privacy.²⁷⁵ The length of time that the right survives varies from ten years to one hundred years to no stated duration.²⁷⁶ Five states which have statutes that either explicitly or implicitly recognize the right of publicity do not extend those rights beyond the death of their owner. Therefore, the majority rule among states with statutory rights of publicity is also that a post mortem right of publicity does exist.

Some courts have attempted to form a compromise between the competing views of the right of publicity, privacy versus property, by holding that the right of publicity lasts after death only if the person who holds the right exploited it during his lifetime. This position is referred to as the "lifetime exploitation requirement,"²⁷⁷ and can be viewed as a conditional post mortem right of publicity. The lifetime exploitation requirement has increasingly come under attack by the commentators, and has accordingly declined in importance.²⁷⁸ Two indicators of the decline in importance of the lifetime exploitation requirement are California

272. See *id.* at 674, 680.

273. *Id.* at 682.

274. *Id.*

275. See McCARTHY, *supra* note 51, § 6.3, at 6-13 to 6-14; McCARTHY, *supra* note 9, § 28:45, at 28-57.

276. See McCARTHY, *supra* note 51, § 6.3, at 6-13 to 6-14.

277. McCARTHY, *supra* note 9, § 28:44, at 28-55.

278. See McCARTHY, *supra* note 207, § 9.3[B][2], at 9-22 to 9-24.

Civil Code section 990 and an opinion by the Eleventh Circuit regarding whether the right of publicity survives the death of the individual whose rights it is designed to protect.²⁷⁹

In 1985, the California legislature enacted California Civil Code section 990, which created a statutory postmortem right of publicity lasting fifty years.²⁸⁰ California Civil Code § 990 rejects the lifetime exploitation requirement.²⁸¹ The statute grants a post mortem right of publicity "whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods or services."²⁸² The statute makes clear that no lifetime exploitation by the individual is necessary to bring the post mortem right into effect.

In *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*, discussed earlier in this section, the Eleventh Circuit certified the question to the Supreme Court of Georgia whether commercial exploitation of the right of publicity during life is necessary for the right of publicity to survive the death of its owner.²⁸³ The Supreme Court of Georgia held that commercial exploitation was not a prerequisite to the postmortem right of publicity.²⁸⁴ The Court found:

That we should single out for protection after death those entertainers and athletes who exploit their personae during life, and deny protection after death to those who enjoy public acclamation but did not exploit themselves during life, puts a premium on exploitation. Having found that there are valid reasons for recognizing the right of publicity during life, we find no reason to protect after death only those who took commercial advantage of their fame . . . Dr. King could have exploited his name and likeness during his lifetime. That this opportunity was not appealing to him does not mean that others have the right to use his name and likeness in ways he himself chose not to do. Nor does it strip his family and estate of the right to control, preserve and extend his status and memory and to prevent unauthorized exploitation

279. See CAL. CIV. CODE § 990 (West 1985); *Martin Luther King, Jr., Ctr. For Soc. Change, Inc. v. American Heritage Prod., Inc.*, 694 F.2d 674 (11th Cir. 1983).

280. CAL. CIV. CODE § 990 (West 1985).

281. See MCCARTHY, *supra* note 9, § 28:42, at 28-56.

282. CAL. CIV. CODE § 990 (West 1985).

283. See 694 F.2d 674 (11th Cir. 1983).

284. See *id.* at 683-684.

of his likeness in a manner they consider unflattering and unfitting.²⁸⁵

It appears that only Utah still adheres to the lifetime exploitation requirement.²⁸⁶

VI. CONCLUSION

Over the last fifty years, the right of publicity has been gaining increasing momentum. Beginning with the *Haelan* decision in 1953 then the *Nimmer* article in 1954 and finally the RESTATEMENT's adoption of the right in 1995, there appears to be a strong push for the recognition of this right throughout the land. As of the this writing, fifteen states have adopted statutory protection and seventeen states have adopted common law protection for the right of publicity. Because some of those states have adopted both, the total number of states that have recognized the right in one form or another is almost half of all of the United States – twenty four to be exact, and one can expect that number to keep growing.

285. *Id.* at 683.

286. See MCCARTHY, *supra* note 9, § 28:45, at 28-57 (citing *Nature's Way Prods. Inc. v. Nature-Pharma, Inc.*, 736 F. Supp. 245 (D. Utah 1990) and noting that the court was under the mistaken impression that the lifetime exploitation requirement was the rule in other states).

APPENDIX A
CHART COMPARING SOURCES OF LAW FOR RIGHT OF PUBLICITY

State	Statute	Statutory Post Mortem Rule	Statutory Aspects of Identity (see code)	Statutory Remedies (see code)	Common Law	Common Law Post Mortem Rule	Common Law Aspects of Identity	Statute of Limitation (yrs)
Alabama					Yes	L, I, N, P		
Alaska								
Arizona								
Arkansas								
California	CAL. CIV. CODE §§ 990, 3344	50 years; registration required	L, N, P, S, V	A[C], C, D, P, Pr,	Yes	No	I, L, N, P, V	1
Colorado								
Connecticut					Yes	Yes	L, N	
Delaware								
Florida	FLA. STAT. ch. 540.08	40 years; right inheres only in surviving spouse and children	L, N, P, Pr	D, I, P	Yes	Undetermined	N, P	4 or 2
Georgia					Yes	Yes	L, N, P	
Hawaii					Yes	Undetermined	N, P	
Idaho								
Illinois					Yes	Undetermined	I, N, P	2
Indiana	IND. CODE ANN. §§32-13-1-1 through 32-13-1-20	100 years	I, L, N, O, P, S, V	A[C], C, D, I, P, Pr, 3X	No			
Iowa								
Kansas								
Kentucky	KEN. STAT. ANN. §391.170	50 years	L, N		Yes	Undetermined	L, N, P	5
Louisiana								

