

THE RIGHT OF PUBLICITY IN ILLINOIS: EVOLUTION, A NEW RIGHT OF PUBLICITY STATUTE, AND FEDERAL PREEMPTION IN THE SEVENTH CIRCUIT: WHERE SHOULD THE LAW GO FROM HERE?

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I. Introduction

The right of publicity is a celebrity's right to profit from and control his or her "name, image, likeness, or other indicia of identity."¹ A person's publicity rights are violated when one's name, image, likeness, or other indicia of identity is used by another in conjunction with the other's advertising, goods, or services.² The right of publicity previously existed as a branch of privacy law but seems to have taken on a life of its own.³ Dean Prosser of the University of California School of Law, Berkeley, divided privacy law into four distinct but related torts.⁴ These four torts consist of: "[i]ntrusion upon the plaintiff's seclusion or solitude[;]"⁵ [p]ublic disclosure of embarrassing private facts about the plaintiff[;]⁶ [p]ublicity which places the plaintiff in a false light in the public eye [;]⁷ and [a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness.^{8,9}

Violating an individual's publicity rights generally gives rise to a cause of action for either injunctive relief or money damages.¹⁰ While the right of publicity is usually only violated through the commercial

¹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION §46 (1995).

² *Id.* §§46-47.

³ William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 401 (1960). Indeed, Dean Prosser correctly observed that this branch of privacy law "has bulked rather large." *Id.* at 401. In 1953, Judge Jerome N. Frank coined the term "right of publicity" in *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953). The name which Judge Frank gave to the right he aptly described stuck. Richard S. Robinson, Symposium, *Preemption, the Right of Publicity, and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183, 183 n.1 (1998).

⁴ Prosser, *supra* note 3, at 401. For an Illinois case defining the right of privacy similarly to Dean Prosser, see *infra* Part II(A) (reviewing *Ainsworth v. Century Supply Co.*, 693 N.E.2d 510, 512-513 (1998)).

⁵ The intrusion must be of a nature that would be insulting to the reasonable person. Prosser, *supra* note 3, at 390-391. The defendant must also have invaded the plaintiff's privacy for the plaintiff to succeed on his claim. *Id.* at 391-392.

⁶ While the facts disclosed must be private, the disclosure itself must be public. *Id.* at 393-396. The facts revealed must also be of such nature as to upset the reasonable person. *Id.* at 396-398.

⁷ The false light in which the plaintiff has been placed must be offensive to the reasonable person. *Id.* at 398-401.

⁸ This fourth branch of Prosser's privacy equation is what is now often referred to as the right of publicity. Dean Prosser noted the potential proprietary nature of this right as distinguishing it from the other three, which are more personal. *Id.* at 406-407. Prosser also observed that his fourth branch was the only branch that required that the defendant benefit from his alleged violation of the plaintiff's privacy rights. *Id.* at 407.

⁹ *Id.* at 389.

¹⁰ RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§48-49.

use of a person's name, image, or likeness,¹¹ the right protects both economic and moral values.¹² The economic values are readily apparent, such as an individual's right to profit from the celebrity he or she created.¹³ Additionally, society derives economic benefits by providing incentives for individuals who create celebrities and entertain the public.¹⁴

However, the right of publicity also protects moral values.¹⁵ In general, a person should not be subject to embarrassment and/or debasement,¹⁶ mental anguish,¹⁷ or ridicule because of the unauthorized use of his or her name, image, or likeness for pecuniary benefit.¹⁸ Debasing one's name, image, or likeness is tantamount to debasing the individual. Thus, in the economic or commercial sphere,¹⁹ the law seeks to prevent the possibility of exploitation of and unjust enrichment from the unauthorized use of a person's name, image, or likeness.²⁰ Conversely, the law allows the individual the freedom to profit from and control his or her name, image, or likeness.²¹

The right of publicity, whether recognized as a publicity right or solely as a privacy right,²² is currently established in many jurisdictions by statute, the common law, or both.²³ For example, California, the

¹¹ *Supra* notes 1, 4 and accompanying text.

¹² See *infra* note 197 and accompanying text for the three policies that underlie the right of publicity.

¹³ See *infra* note 197 and accompanying text for the three policies that underlie the right of publicity.

¹⁴ See *infra* note 197 and accompanying text for the three policies that underlie the right of publicity. *Supra* Part III(A) (analyzing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977)).

¹⁵ See *infra* note 197 and accompanying text for the three policies that underlie the right of publicity.

¹⁶ *Infra* Part II(A) (citing *Annerino v. Dell Publ'g Co.*, 149 N.E.2d 761 (Ill. App. Ct. 1958)).

¹⁷ *Infra* Part II(A) (reviewing *Eick v. Perk Dog Food Co.*, 106 N.E.2d 742, 743 (Ill. App. Ct. 1952)).

¹⁸ See *infra* note 197 and accompanying text for the three policies that underlie the right of publicity.

¹⁹ *Supra* notes 1, 4 and accompanying text.

²⁰ See *infra* note 197 and accompanying text for the three policies that underlie the right of publicity.

²¹ See *infra* note 197 and accompanying text for the three policies that underlie the right of publicity.

²² *Supra* notes 1, 4-9 and accompanying text.

²³ Eric J. Goodman, Lead Article, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. LAW 227, 257 (1999). At least 16

home of Hollywood, recognizes the right of publicity via statute and common law.²⁴ Section 3344 of the California Civil Code specifies:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages²⁵ sustained by the person or persons injured as a result thereof.

California's protection of publicity rights has extended to an advertisement for electronic products containing an unauthorized depiction of a robot created in the likeness of Vanna White on the game show "Wheel of Fortune."²⁶

Comparatively, New York recognizes the misappropriation branch of the right of privacy, but does not include the right of publicity.²⁷

states have recognized the right of publicity by way of common law and at least 15 states have passed statutes codifying the right of publicity. *Id.* at 231, 236. There is some overlap, with some states having the right of publicity both by common law and by statute. *Id.* at 243-244. In total, roughly 25 states recognize the right of publicity in some way, shape, or form. *Id.* at 243; *infra* note 108 and accompanying text. With their many celebrities, California and New York are major right of privacy/publicity jurisdictions. Consequently, many commentators have written extensively about their somewhat divergent approaches to the misappropriation of one's name or likeness. However, little has been written about Illinois and the rights of privacy and publicity, and this Note is an attempt to comment on a relatively large and growing area of law on the rights of privacy and publicity in Illinois which has, until now, received little attention.

²⁴ Adrienne Yeung, *What Is a Celebrity's "Right of Publicity,"* 8 Feb. Nevada Lawyer 16, 17-18 (2000).

²⁵ CAL. CIV. CODE §3344(a) (West 1997). As for damages: the person who violated . . . section [3344] shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.

Id.

²⁶ Yeung, *supra* note 24, at 18 (citing *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992)).

²⁷ *Id.*; *Pirone v. MacMillan*, 894 F.2d 579 (2d Cir. 1990) (interpreting *Stephano v. News Group Publ'ns*, 474 N.E.2d 580 (N.Y. 1984)).

Section 50, which criminalizes violations of privacy rights, states:

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.²⁸

Additionally, Section 51 states:

[a]ny person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof. . . .²⁹

In contrast to California's treatment of publicity rights, New York's common law does not expand the privacy rights enumerated by statute.³⁰

While the misappropriation branch of privacy law is similar to the right of publicity, a critical difference exists between the two interests. A privacy right is based in tort law and is merely personal.³¹ By contrast, publicity rights are property rights that may be devised and/or inherited.³² Significantly, this area of the law is still developing. For example, California recognizes that publicity rights are devisable and descendible through the Astaire Celebrity Image Protection Act.³³ By

²⁸ N.Y. CIV. RIGHTS LAW §50 (McKinney 1992).

²⁹ *Id.* §51. An aggrieved party may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait [fig 3], picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages.

Id.

³⁰ Yeung, *supra* note 24, at 18.

³¹ See Goodman, *supra* note 23, at 258 for the fact that not all states have a descendible right of publicity.

³² *Id.* The extent of descendibility varies from state to state. *Id.* at 258-259. Some states restrict descendibility to only the names and likenesses of those persons that had commercial value at the time of their death. *Id.* at 237; *infra* note 33 and accompanying text. Others require that the person benefit from the right while they are still alive. *Id.* at 258. Many states restrict descendibility to a term of years after death after which the deceased's heirs no longer have publicity rights in the deceased's name or likeness. *Id.* at 259; *infra* note 107 and accompanying text.

³³ CAL. CIV. CODE §3344.1(a)(1) (West Cumulative Pocket Part 2001). The damages one may recover for violating the Act are identical to those recoverable under §3344(a). *Id.*; *supra* note 25.

contrast, privacy rights are neither devisable nor descendible under New York law.³⁴ Similarly, the right of publicity in Illinois was not a devisable or descendible privacy right until recently.³⁵ In 1998, Illinois passed the Right of Publicity Act, which made the right devisable and descendible.³⁶

This Note sets forth some of the recent developments of the rights of privacy and publicity in Illinois and analyzes the effect of federal constitutional and statutory preemption on enforcement of the Act. Additionally, this Note considers the balance struck by the Illinois legislature between private and public interests. Part II of this Note traces the historic development of privacy and publicity rights in Illinois from their inception through recent history. Part II(C) discusses the Illinois Right of Publicity Act which established that an individual's rights in his or her name, image, or likeness are devisable and descendible. Part III elaborates on the preemptive effects of the federal Constitution and federal statutes on the right of publicity, including First Amendment implications on the right of publicity and federal copyright preemption. Part III also discusses the potential preemptive effects of federal trademark law on the Illinois Right of Publicity Act. Part III also addresses the intricacies of the Seventh Circuit's interpretation of federal copyright preemption offered in *Baltimore Orioles v. Major League Baseball Players Association*³⁷ and includes one commentator's critique of the *Baltimore Orioles* decision.³⁸ Finally, Part IV of this Note reflects the author's analysis and thoughts regarding the future of privacy and publicity rights in Illinois.

II. *Privacy and Publicity Rights in Illinois*

A. *The Scope and Development of Privacy Rights in Illinois*

In 1952, the Illinois courts took a critically important first step towards recognizing an individual's right to control the commercial exploitation of his or her name, image, or likeness.³⁹ In *Eick v. Perk*

³⁴ Yeung, *supra* note 24, at 18.

³⁵ *Infra* Part II(B).

³⁶ *Infra* Part II(C).

³⁷ 805 F.2d 663 (7th Cir. 1986).

³⁸ *Id.*

³⁹ *Eick v. Perk Dog Food Co.*, 106 N.E.2d 742 (Ill. App. Ct. 1952).

Dog Food,⁴⁰ the blind plaintiff was depicted as the recipient of a seeing-eye dog.⁴¹ The plaintiff sued in part for the invasion of her right to privacy for the unauthorized use of her image in the defendants' dog food advertisement.⁴² The trial court dismissed the plaintiff's case for failure to state a claim upon which recovery could be based.⁴³ Relying largely upon the guidance of other states as well as on secondary authority and legal history, the appellate court found that the plaintiff presented a valid claim for the violation of her privacy rights.⁴⁴ Specifically, the appellate court held that the unauthorized use of one's name or likeness would be recognized as an invasion of the right of privacy.⁴⁵ The court balanced First Amendment concerns by recognizing that plaintiffs would not have privacy rights "in areas of legitimate public interest."⁴⁶

The Illinois courts further refined their privacy jurisprudence in *Annerino v. Dell Publishing Company*.⁴⁷ In October 1954, Gus Amadeo was detained in Chicago's Criminal Courts Building awaiting arraignment.⁴⁸ With the help of his girlfriend, Amadeo escaped from the detention cell.⁴⁹ Days later, Amadeo fought with a detective at a local bar.⁵⁰ During the scuffle, Amadeo's gun went off several times, hitting the detective's partner, Charles Annerino.⁵¹ Annerino was taken to the hospital where he died on the night of the shooting.⁵² Rose Annerino rushed to the hospital to meet her dying husband.⁵³ The media had

⁴⁰ *Id.*

⁴¹ *Id.* at 743.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 745.

⁴⁵ *Id.*

⁴⁶ *Id.*; *infra* Part III(A).

⁴⁷ 149 N.E.2d 761 (Ill. App. Ct. 1958).

⁴⁸ *Id.* at 761.

⁴⁹ *Id.* Amadeo's girlfriend smuggled a gun to him while he was detained in the Criminal Courts Building. *Id.*

⁵⁰ *Id.* Detective Charles Annerino was performing a routine check at the bar with a fellow detective when he noticed Amadeo. *Id.* Annerino's partner then fought with Amadeo. *Id.*

⁵¹ *Id.* Several bullets were fired accidentally during the scuffle, one of which killed Detective Annerino. *Id.* Amadeo was later shot and killed in a well-publicized gunfight with Chicago police. *Id.*

⁵² *Id.*

⁵³ *Id.*

gathered at the hospital and photographed Annerino's grieving wife.⁵⁴

Three months later, *Inside Detective*, a magazine published by the defendant, published a story on the above incident entitled, "If You Love Me, Slip Me a Gun," and used a photograph of the shocked, grieving plaintiff in conjunction with the article.⁵⁵ The plaintiff claimed that her privacy was invaded by the unauthorized commercial use of her picture.⁵⁶ Since the lower court believed that the defendant's use of the plaintiff's picture furthered the reporting of a news story, the trial court dismissed the plaintiff's claim.⁵⁷

The appellate court reversed, holding that the use of the plaintiff's photograph was not limited to news purposes and that the plaintiff's claim was legally sufficient.⁵⁸ The court further acknowledged that a person's privacy could be legally invaded when legitimate freedom of the press concerns exist.⁵⁹ However, the court did not find legitimate freedom of the press concerns in this case, and labeled the defendant's use of plaintiff's photograph as an attempt to "make[] a strong appeal to the idle and prurient."⁶⁰

The most recent statement in the Illinois state courts on the right of publicity is *Ainsworth v. Century Supply Co.*⁶¹ In *Ainsworth*, the sales manager for the defendant asked plaintiff Charles Ainsworth whether he could be videotaped installing ceramic tile.⁶² Ainsworth was told that the videotaped images would be used in instructional videos for the benefit of Century's customers.⁶³ The plaintiff consented to appear in these instructional videos; however, his image was also used in Century's television commercials.⁶⁴ The plaintiff claimed invasion of privacy for the unauthorized use of his image in the television

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*; *infra* Part III(A).

⁵⁸ Annerino, 149 N.E.2d at 761-764.

⁵⁹ *Id.* at 762; *infra* Part III(A).

⁶⁰ Annerino, 149 N.E.2d at 763; *infra* Part III(A).

⁶¹ 693 N.E.2d 510 (Ill. App. Ct. 1998).

⁶² *Id.* at 511-512 (Ill. App. Ct. 1998). Century's sales manager Tom Parks (also known as Thomas Poczatek) was constructing a house and hired the plaintiff to furnish that house with ceramic tile. *Id.* at 511. The video, which was made in October 1993, included videotaped images of the plaintiff installing tile. *Id.* at 512.

⁶³ *Id.* at 512.

⁶⁴ *Id.*

advertisements.⁶⁵ At the trial court level, co-defendant TCI, the company hired to create the commercials, successfully argued for dismissal of the plaintiff's misappropriation claim while Century successfully moved for summary judgment on the misappropriation claim.⁶⁶

The appellate court reversed, holding that Ainsworth's misappropriation claim was legally sufficient.⁶⁷ After articulating the four torts encompassing privacy law,⁶⁸ the court rebutted the defendants' arguments.⁶⁹ First, the court found that TCI derived commercial benefit from payment in exchange for the creation of a television advertisement for Century.⁷⁰ The court also found that the use of the plaintiff's image in TCI's commercials was not for news purposes, but was made for advertising purposes.⁷¹ Further, the court found that Century derived commercial benefit by using the plaintiff's image in its advertisements.⁷² In addition, the court found the fact that the plaintiff had not suffered mental anguish irrelevant to a misappropriation claim.⁷³

B. *Devisability and Descendibility Prior to the New Illinois Right of Publicity Act*

Although the Illinois courts established the right of privacy through the common law, the courts did not establish a devisable and descendible right of publicity.⁷⁴ In failing to do so, the courts prevented celebrities from passing on the commercial value they had created to

⁶⁵ *Id.* Century hired fellow co-defendant TCI to do the television advertisement in 1994. *Id.* The advertisement was conceived to allow different snippets of videotape to be added into the advertisement. *Id.* In this fashion, different versions of the advertisement were formulated. *Id.* One of these versions contained a few seconds of the plaintiff's images which were videotaped by Century for use in the instructional video. *Id.* This version of the advertisement was shown several times until the commercial was discontinued at the plaintiff's November 1994 request. *Id.* The plaintiff did not contest the use of his image in the instructional video. *Id.*

⁶⁶ *Id.* Century succeeded on moving for summary judgment on a damages issue. *Id.* at 510-515.

⁶⁷ *Id.*

⁶⁸ *Supra* note 4 and accompanying text.

⁶⁹ Ainsworth, 693 N.E.2d at 512.

⁷⁰ *Id.* at 513.

⁷¹ *Id.*; *infra* Part III(A).

⁷² Ainsworth, 693 N.E.2d at 515.

⁷³ *Id.* at 514.

⁷⁴ *Infra* notes 77-99 and accompanying text.

their loved ones at death.⁷⁵ In addition, the courts overlooked a powerful economic incentive for individuals to invest the time and energy to create celebrities for public enjoyment.⁷⁶

Two early cases illustrate that the Illinois courts previously recognized the misappropriation of a person's name, image, or likeness only as a non-descendible privacy right. *Bradley v. Cowles Magazines, Inc.*⁷⁷ concerned the nationally publicized kidnapping and murdering of 14-year old Emmett Till.⁷⁸ Emmett Till's mother, the plaintiff, claimed that the defendant, publisher Cowles, invaded her late son's right to privacy and caused her mental anguish by portraying her son's murder in a false light in Look Magazine.⁷⁹ Her lawsuit concerned two articles published about the murder, one published five months after the murder, and one published 17 months later.⁸⁰

The court ruled in favor of the defendant, holding that the mother could not recover damages for the invasion of her deceased son's privacy rights.⁸¹ The court reasoned that if it extended the son's privacy rights to the mother, the scope of the right of privacy would become too broad.⁸² The court cited numerous cases from Illinois and other

⁷⁵ *Supra* notes 11-21 and accompanying text.

⁷⁶ *Supra* notes 11-21 and accompanying text.

⁷⁷ 168 N.E.2d 64 (Ill. App. Ct. 1960).

⁷⁸ *Id.* at 65.

⁷⁹ *Id.* Note that this is not a right of publicity case, but merely a case illustrating the fact that privacy rights are not descendible. *Supra* notes 4-9 and accompanying text.

⁸⁰ *Bradley*, 168 N.E.2d at 65. The articles gave the alleged (and later acquitted) murderers' account of the murder. *Id.* The plaintiff is only mentioned in a single sentence stating that she was told of the kidnapping. *Id.* The plaintiff unsuccessfully cited to *Eick v. Perk Dog Food Co.*, 106 N.E.2d 742 (Ill. App. Ct. 1952) and *Annerino v. Dell Publ'g Co.*, 149 N.E.2d 761 (Ill. App. Ct. 1958) to support her argument that her son's privacy rights were descendible. *Bradley*, 168 N.E.2d at 65.

⁸¹ *Bradley*, 168 N.E.2d at 65.

⁸² *Id.* The court stated:

Guaranty of the right of privacy is not a guaranty of hermitic seclusion. We live in a society geared in the opposite direction; a society that makes public demands and imposes public duties. Every election thrusts upon the shyest and most retiring citizen demands and obligations. A political campaign brings forth public insistence that he vote. Every television and radio program blares forth exigent calls to do or buy this or that. The census taker asks for the furnishing of private information. The mail brings importunities of every kind. The telephone serves a like purpose. Finally, the revenue collector pries into the very heart of what used to be a person's private affairs—how much he earned, how much he spent, how much he gave away. This is the background of custom and habit against which the right of privacy must be defined. To find an area within which the citizen must be left alone is the purpose of the action.

jurisdictions to support the proposition that the right of privacy should not be extended beyond certain boundaries.⁸³ For example, in *Kolb v. O'Connor*,⁸⁴ the court denied relief to a plaintiff who sued for the return of identification records after being arrested.⁸⁵ In *Branson v. Fawcett Publications, Inc.*,⁸⁶ the court denied relief to an automobile racecar driver whose image was published without his authorization, reasoning that the photograph in which his image appeared was so blurred as to be indecipherable.⁸⁷ Moreover, in *Rozhon v. Triangle Publications, Inc.*,⁸⁸ the court, voicing freedom of the press concerns, denied recovery to a plaintiff whose son's name was used in a magazine article concerning the son's death from drug use.⁸⁹ In *Kelley v. Post Publishing Company*,⁹⁰ a plaintiff who sued to recover a published photograph depicting his daughter dead after a fatal car accident was denied recovery.⁹¹ Furthermore, in *Metter v. Los Angeles Examiner*,⁹² a California court denied recovery to a husband who sued for invasion of his wife's right of privacy because of a photograph and story concerning her suicide.⁹³ The court voiced freedom of the press concerns as well as the view that the right of privacy was purely personal.⁹⁴

Even so, chance or destiny may propel a private citizen into the public gaze. It is important, therefore, that in defining the limits of this right, courts proceed with caution.

Id.

⁸³ *Id.* at 66.

⁸⁴ 142 N.E.2d 818 (Ill. App. Ct. 1957).

⁸⁵ Bradley, 168 N.E.2d at 66 (examining *supra* note 84 and accompanying text).

⁸⁶ 124 F. Supp. 429 (E.D. Ill. 1954).

⁸⁷ Bradley, 168 N.E.2d at 66 (reviewing *supra* note 86 and accompanying text).

⁸⁸ 230 F.2d 359 (7th Cir. 1956).

⁸⁹ Bradley, 168 N.E.2d at 66 (construing *supra* note 88 and accompanying text; *infra* Part III(A)).

⁹⁰ 98 N.E.2d 286, 287-88 (1951).

⁹¹ Bradley, 168 N.E.2d at 66 (citing *supra* note 90 and accompanying text). The Massachusetts court stated:

Many things which are distressing or may be lacking in propriety or good taste are not actionable. Moreover, if the parents had a cause of action in a case like the present there would seem to be no reason why other members of the immediate family, the brothers and sisters, whose sensibilities may also have been wounded should not also be permitted to sue. . . . If there is such a right [to sue] . . . we would not be prepared to extend it to a case like the present.

Id. at 66 (quoting Kelley, 98 N.E.2d at 287-88 (1951)); *infra* Part III(A).

⁹² 95 P.2d 491 (1939).

⁹³ Bradley, 168 N.E.2d at 66 (reviewing *supra* note 92 and accompanying text).

⁹⁴ *Id.* (examining *supra* note 92 and accompanying text); *infra* Part III(A).

In *Maritote v. Desilu Productions*,⁹⁵ a federal court also ruled that Illinois' right of privacy is not descendible.⁹⁶ Plaintiffs Malfada Maritote, the Administratrix of Al Capone's estate; Capone's widow; and Capone's son sued for the misappropriation of Capone's name, likeness, and personality in conjunction with telecasts made 12 ½ years after Capone's death.⁹⁷ The primary issue was whether the right of privacy could be extended to Capone's relatives.⁹⁸ The federal appeals court upheld the district court's dismissal of the case, asserting that the relatives did not have a cause of action for the violation of the late Capone's privacy rights.⁹⁹

C. *The New Illinois Right of Publicity Act*¹⁰⁰

On August 14, 1998, the Illinois state legislature recognized the need for a descendible right of publicity by enacting the Right of Publicity Act.¹⁰¹ The Act, which went into effect on January 1, 1999,¹⁰² established in Illinois for the first time a true, descendible right of publicity.¹⁰³ Under the Act, "[t]he right to control and to choose whether and how to use an individual's identity for commercial purposes is recognized as each individual's right of publicity."¹⁰⁴ The right may be

⁹⁵ 345 F.2d 418 (7th Cir. 1965).

⁹⁶ *Id.*

⁹⁷ *Id.* Al Capone, a famous criminal known for his bootlegging during Prohibition, died in January of 1947. *Id.* at 420. The telecasts in question were broadcast on April 20 and 27 and October 15 and 23, 1959 and thereafter. *Id.*

⁹⁸ *Id.* at 418-419.

⁹⁹ *Id.* at 418-420. The court eloquently stated:

As Shakespeare said, "The evil that men do lives after them. . . ." [citation omitted] What a man does while alive becomes a part of history which survives his death. Comment, fictionalization and even distortion of a dead man's career do not invade the privacy of his offspring, relatives or friends, if they are not even mentioned therein.

Id. at 420.

¹⁰⁰ 765 ILL. COMP. STAT. ANN. 1075/1-55 (West Supp. 2001).

¹⁰¹ P.A. 90-747, §§1-55 (codified as 765 ILL. COMP. STAT. ANN. 1075/1-55 (West Supp. 2001)).

¹⁰² *Id.* (codified as 765 ILL. COMP. STAT. ANN. 1075/1-55 (West Supp. 2001)).

¹⁰³ *Infra* note 105. *Contra supra* Part II(B).

¹⁰⁴ 765 ILL. COMP. STAT. ANN. 1075/10 (West Supp. 2001).

"Identity" means any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener, including but not limited to (i) name, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice. "Individual" means a living or deceased natural person, regardless of whether the identity of that individual has been used for a commercial

transferred during the course of one's lifetime in writing, may be devised by will or trust, or descend via intestate succession.¹⁰⁵ In instances of descent via intestate succession, the right may only descend "to an individual's spouse, parents, children, and grandchildren."¹⁰⁶ Beneficiaries of devised or descended rights possess those rights for a maximum of 50 years.¹⁰⁷ Publicity rights terminate if they are not devised or otherwise left through intestate succession.¹⁰⁸ The Act does

purpose during the individual's lifetime.

Id. 1075/5 [emphasis added]; *supra* Part II(B) (discussing *Maritote*, 345 F.2d at 418-421). "Name" means the actual name or other name by which an individual is known that is intended to identify that individual." 765 ILL. COMP. STAT. ANN. 1075/5 (West Supp. 2001). "Commercial purpose" means the public use or holding out of an individual's identity (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; (ii) for purposes of advertising or promoting products, merchandise, goods, or services, or (iii) for the purpose of fundraising." *Id.*

This Act does not apply to the following:

- (1) use of an individual's identity in an attempt to portray, describe, or impersonate that individual in a live performance, a single and original work of fine art, play, book, article, musical work, film, radio, television, or other audio, visual or audio-visual work, provided that the performance, work, play, book, article, or film does not constitute in and of itself a commercial advertisement for a product, merchandise, goods, or services;
- (2) use of an individual's identity for non-commercial purposes, including any news, public affairs, or sports broadcast or account, or any political campaign;
- (3) use of an individual's name in truthfully identifying the person as the author of a particular work or program or the performer in a particular performance;
- (4) promotional materials, advertisements, or commercial announcements for a use described under paragraph (1), (2), or (3) of this section; or
- (5) use of photographs, videotapes, and images by a person, firm, or corporation practicing the profession of photography ("professional photographer") to exhibit in or about the professional photographer's place of business or portfolio, specimens of the professional photographer's work, unless the exhibition is continued by the professional photographer after written notice objecting to the exhibition has been given by the individual portrayed.

Id. 1075/35(b). As far as remedies are concerned, a court may issue, order, or award any legal or equitable relief for violations of the Act, including actual, statutory, or punitive damages; temporary restraining orders, preliminary injunctions, and permanent injunctions; or attorney's fees to the prevailing party. *Id.* 1075/40-45. A court may award statutory damages of up to \$1,000. *Id.* 1075/40(a)(2). Punitive damages may only be awarded if the right of publicity has been willfully violated. *Id.* 1075/40(b).

¹⁰⁵ 765 ILL. COMP. STAT. ANN. 1075/15 (West Supp. 2001).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* 1075/30(b). This is assuming that the deceased did not give written permission to another to appropriate the deceased's publicity rights. *Id.* The rights terminate 50 years after the person in whom they inured died, regardless of how they are transferred after the decedent's death. *Id.*

¹⁰⁸ *Id.* 1075/20.

not apply to events retroactive to its effective date.¹⁰⁹ Barring written consent, one may not appropriate another's publicity rights.¹¹⁰ Finally, the Act purports only to supplant the "common law right of publicity," but not "the common law right of privacy."¹¹¹

III. Federal Constitutional and Statutory Preemption of State Law Publicity Rights

The First Amendment of the United States Constitution, as well as federal trademark law and federal copyright law, may in certain cases limit the scope of right of publicity statutes such as Illinois'.

A. First Amendment Restraints on the Right of Publicity

The First Amendment serves to constitutionally limit the scope of the right of publicity in order to protect individuals' free speech rights. It is not difficult to comprehend the almost inevitable clash between the right of publicity and the First Amendment. Suppose, for example, a

¹⁰⁹ *Id.* 1075/35(a).

¹¹⁰ *Id.* 1075/30(a).

¹¹¹ *Id.* 1075/60. The reference to the "common law right of publicity" in Illinois is curious, since the Illinois state courts had long referred to what is commonly referred to as the right of publicity as a non-descendible privacy right. *Supra* Part II(B). However, what the Illinois legislature seems to be intimating is that the appropriation of one's name, image, or likeness for commercial purposes to one's detriment is a violation of the common law right of publicity, while the appropriation of one's name, image, or likeness for solely noncommercial or non-economic purposes to one's detriment can only be a violation of the common law right of privacy. Scott Shorr, Note, *Personal Information Contracts: How to Protect Privacy Without Violating the First Amendment*, 80 CORNELL L. REV. 1756, 1824-1828 (1995); 765 ILL. COMP. STAT. ANN. 1075/10, 35(b) (West Supp. 2001).

The value of the plaintiff's name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities; nor is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity. No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. *It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded.*

Berkos v. NBC, 515 N.E.2d 668, 679 (Ill. App. Ct. 1987) [emphasis added]. The new Right of Publicity Act, while altering existing caselaw on the devisability and descendibility, does not appear to significantly alter the scope of the misappropriation branch of the right of privacy, commonly referred to elsewhere, and now in Illinois, as the right of publicity. *Id.*; 765 ILL. COMP. STAT. ANN. 1075/10, 35(b) (West Supp. 2001); *supra* note 4 and accompanying text; *supra* Part II(A).

newspaper uses a person's name in its front-page news story.¹¹² Perhaps the story concerns a local natural disaster, a murder, a rape, a fire, a horrific car accident, a political race, or even a sporting event. The individual who is involved then sues the newspaper for violating the person's right of publicity by making unauthorized (and unwanted) use of the person's name, image, and/or likeness for the commercial benefit of the newspaper in the news story. Who wins? The intuitive and correct answer is the newspaper.¹¹³ In this instance, the First Amendment freedom of the press would clearly bar a celebrity from using the state law right of publicity to prevent the press from fully reporting the story.

Rarely, however, is the issue so clear-cut. For example, in *Zacchini v. Scripps-Howard Broadcasting Company*,¹¹⁴ the plaintiff claimed that the unauthorized videotaping and broadcasting of his "human cannonball" act by the defendant's reporter violated his publicity rights.¹¹⁵ The Ohio trial court granted the defendant summary

¹¹² The right of publicity should not be confused with the law of defamation. Whether the person is a public figure or a private figure or the news story about the person concerns a matter of public concern or a matter of private concern is entirely irrelevant in the context of the right of publicity. What is relevant, however, is whether the person's name, image, or likeness has significant, or any, commercial value. *Supra* note 104 and accompanying text; *supra* Part I. Presumably, in most cases, the fact that the media is reporting a story on a person is an indication not only that the person has achieved some minimal amount of fame, but also that the person's name, image, or likeness has some minimal, if relatively insignificant, commercial value.

¹¹³ *Supra* Parts II(A) and II(B). Indeed, most of the cases discussed thus far have had issues of whether what is protected from misappropriation by the right of privacy is truly "news," with underlying First Amendment implications. *Supra* Part II(A); *supra* Part II(B) (construing *Bradley v. Cowles Magazines, Inc.*, 168 N.E.2d 64 (Ill. App. Ct. 1960)). Put another way, is the subject matter intended to be commercial or purely informational? In cases such as *Eick*, where the dog food ad was at issue, or *Ainsworth*, where a television ad was at issue, it was relatively easy to discern that the underlying speech was intended to be commercial in nature. *Supra* Part II(A) (reviewing *Eick v. Perk Dog Food Co.*, 106 N.E.2d 742 (Ill. App. Ct. 1952) and *Ainsworth v. Century Supply Co.*, 693 N.E.2d 510 (Ill. App. Ct. 1998)). Conversely, in *Bradley*, it was clear that the murder of Emmett Till had news value and that the story was informational. *Supra* Part II(B) (citing *Bradley*, 168 N.E.2d at 64-67). *Annerino* was a more difficult case; there, even though the story concerning the photograph was on one level "news," the court found its presentation to resemble gossip more than news, and therefore found the use of the photograph was commercial. *Supra* Part II(A) (construing *Annerino v. Dell Publ'g Co.*, 149 N.E.2d 761 (Ill. App. Ct. 1958)).

¹¹⁴ 433 U.S. 562 (1977).

¹¹⁵ *Id.* Plaintiff Hugo Zacchini's "human cannonball" act, which lasted 15 seconds, involved the plaintiff being shot roughly 200 feet into a net from a cannon. *Id.* at 563. In August and September of 1972, the plaintiff performed at the Geauga County Fair in Burton, Ohio, in a fenced area. *Id.* People who paid to attend the fair were not charged an

judgment.¹¹⁶ The Ohio Court of Appeals reversed, finding that the First Amendment did not preempt state law rights.¹¹⁷ The Ohio Supreme Court again reversed, agreeing with the plaintiff that his state law right of publicity was violated by the broadcast, but ruled that the right was preempted by the First Amendment.¹¹⁸

The United States Supreme Court granted certiorari and reversed on policy grounds, ruling that the First Amendment did not preempt state law rights.¹¹⁹ Allowing someone's performance to be taped and broadcast in its entirety, the Court reasoned, as was the case here, is tantamount to allowing people to avoid paying a fee to watch the performance.¹²⁰ This harms both the individual and society.¹²¹ First, the individual is hurt through lost profits and the unjust enrichment obtained by the misappropriation of his or her intellectual property.¹²² Second, society is harmed if it is unable to reap the benefits of public performances because entertainers are not paid market value for their intellectual property.¹²³ Therefore, the First Amendment does not preempt the right of publicity when a performance is taped and broadcast without the entertainer's consent.¹²⁴

additional fee to attend the plaintiff's performance. *Id.* On August 30, a reporter of defendant Scripps-Howard Broadcasting Company came to tape the plaintiff's act. *Id.* The reporter was informed by the plaintiff that he did not have permission to tape the performance, but on the instructions of his boss the defendant came back to the fair the next day and recorded the performance in its entirety. *Id.* at 564. The videotaped performance was then broadcast on the 11 o'clock news. *Id.*

¹¹⁶ *Id.* at 564.

¹¹⁷ *Id.* The Court of Appeals reversed on conversion and common-law copyright grounds, with one judge concurring on right of publicity grounds. *Id.*

¹¹⁸ *Id.* at 565.

¹¹⁹ *Id.* at 578-579. However, the Court left open to the states the possibility of protecting free speech beyond the reach of First Amendment protection in defining the right of publicity. *Id.*

¹²⁰ *Id.* at 575-576. In this case, the loss sustained by the plaintiff did not inhere in the direct loss of admission fees to watch his performance. Rather, the injury to the plaintiff was the loss of value in the plaintiff's performance due to the fact that people no longer had to pay the admission fee to get into the fair to have the opportunity to watch the performance. *Supra* note 115 and accompanying text. The Court drew no distinction. *Zacchini*, 433 U.S. at 575-576.

¹²¹ *Zacchini*, 433 U.S. at 575-576.

¹²² *Id.*; *infra* note 197 and accompanying text.

¹²³ *Zacchini*, 433 U.S. at 575-576.

¹²⁴ *Id.* at 578-579.

B. *Federal Statutory Preemption of State Right of Publicity Statutes*

Notwithstanding constitutional restraints on the right of publicity and the fact that there is no federal right of publicity statute,¹²⁵ federal law may also limit state legislation devised to create descendible rights in a person's name, image, or likeness. Interpretation of federal law by the various circuit courts of appeal could either promote or effectively eviscerate publicity rights.

1. Federal Trademark Law

Federal trademark law may provide in certain instances a right of action when an individual's right of publicity has been violated.¹²⁶ Section 1125(a)(1)¹²⁷ states:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which-

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.¹²⁸

While the intent of federal trademark law is to prevent consumer confusion and deception,¹²⁹ the Illinois Right of Publicity Act was enacted to discourage the unauthorized commercial use of an individual's name or likeness.¹³⁰ Under the Illinois statute, a plaintiff is entitled to recover whether or not a single consumer was confused or deceived as to the source to which a person's name or likeness was

¹²⁵ Goodman, *supra* note 23.

¹²⁶ *Id.* at 240-242 (interpreting *infra* note 127).

¹²⁷ 15 U.S.C. §§1125(a)(1) (1994 & Supp. V 1999).

¹²⁸ *Id.*

¹²⁹ *Id.*; Goodman, *supra* note 23, at 247-248.

¹³⁰ *Supra* note 104 and accompanying text.

attached.¹³¹ Moreover, the basis for recovery under the Illinois statute is significantly broader than the basis for recovery under §1125(a)(1).¹³² Thus, because state law generally allows a more comprehensive basis for recovery, state right of publicity legislation such as Illinois' continues to be preeminent.

2. Federal Copyright Law

The state law right of publicity may also be preempted in certain instances by the federal Copyright Act of 1976.¹³³ Section 102 of the Act protects "original"¹³⁴ works of authorship fixed in any tangible medium of expression."¹³⁵ The term "works of authorship" under §102 encompasses "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings;¹³⁶ and (8) architectural works."¹³⁷ In addition, §103 of the Act protects both derivative and collective works.¹³⁸

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of

¹³¹ Goodman, *supra* note 23, at 247-248 (1999); *supra* note 104 and accompanying text.

¹³² *Supra* note 127.

¹³³ 17 U.S.C. §§101-810 (1994 & Supp. V 1999).

¹³⁴ A work is considered original for the purposes of copyright law if (1) it is more than a mere copy of an already-existing work and if (2) it embodies at least an iota of creativity. *Baltimore Orioles v. Major League Baseball Players Ass'n*, 805 F.2d 663, 668 (7th Cir. 1986). A work need not be novel to be copyrightable; it merely must be creative, or evidence that some minimal quantity of intellectual work has taken place. *Id.* at 668 n.6.

¹³⁵ 17 U.S.C. §102(a) (1994).

¹³⁶ Section 301 of the Copyright Act of 1976 does not apply to sound recordings fixed prior to February 15, 1972, unless a the plaintiff brings a cause of action for copyright infringement of such sound recordings on or after February 15, 2067. *Id.* §301(c) (1994 & Supp. V 1999).

¹³⁷ *Id.* §102(a) (1994).

¹³⁸ *Id.* §103. "Derivative works" are new works based on already-existing ones which, via sufficiently original "editorial revisions, annotations, elaborations, or other modifications" of existing works, are deserving of copyright protection in their own right (e.g., the movie version of a book). *Id.* §101. "Compilations" are new works created from the "select[ion], coordinat[ion], or arrange[ment]" of existing works and/or existing data which are sufficiently original to merit copyright protection. *Id.* "Compilations" include "collective works," which are new works which contain existing works "assembled into a collective whole" (e.g., "a periodical issue, anthology, or encyclopedia"). *Id.*

more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.¹³⁹

Under §106, the Act gives the copyright owner the exclusive rights

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted works;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual works, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.¹⁴⁰

"To 'perform' a work means . . . to show its images in any sequence or to make the sounds accompanying it audible."¹⁴¹

Significantly, §301(a) of the 1976 Copyright Act has the potential to preempt many state intellectual property doctrines, including the right of publicity.¹⁴² Section 301(a) reads:

On or after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.¹⁴³

¹³⁹ *Id.* §101 (1994 & Supp. V 1999).

¹⁴⁰ *Id.* §106.

¹⁴¹ *Id.* §101.

¹⁴² *Id.* §301(a) (1994).

¹⁴³ *Id.* Section 301 does not apply to:

3. Legislative History of §301¹⁴⁴

The legislative history of §301 as it relates to state right of publicity law is ambiguous at best.¹⁴⁵ Congress intended for §301 to preempt all state statutory or common law copyright law to promote national uniformity and efficiency.¹⁴⁶ However, the statutory language used to effectuate that intent is vague.¹⁴⁷ The difficulty arises because many state law doctrines, such as the right of privacy, originated from and are closely related to common law copyright.¹⁴⁸ When §301(b)(3) was submitted to the House in 1965, it contained a list of specific state causes of action that would not be preempted by §301(a), including the "invasion of privacy."¹⁴⁹ The House Report, commenting on §301(b)(3)'s enumerated rights of action, stated that the rights of privacy and publicity would not be preempted "as long as the causes of action contain[ed] elements . . . that are different in kind from copyright protection."¹⁵⁰ The House Report further emphasized that common law copyright was to remain for all "works that have not been 'fixed in any tangible medium of expression,'"¹⁵¹ such as "choreography that has

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal and equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

(4) State and local landmarks, historical preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

Id. §301(b).

¹⁴⁴ *Id.* §301(c) (1994 & Supp. V 1999).

¹⁴⁵ H.R. REP. NO. 94-1476 (1976) (citing *infra* note 158).

¹⁴⁶ *Id.* (analyzing *infra* note 158).

¹⁴⁷ PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK, AND RELATED STATE DOCTRINES 810 (4th ed. 1999); *infra* note 158.

¹⁴⁸ GOLDSTEIN, *supra* note 147, at 810. Common law copyright's right of first publication, which forbade unauthorized publication, spawned the common law right of privacy. *Id.* A major dilemma under §301 is how to deal with state law rights, such as the right to privacy, which attempt to prevent the reproduction, distribution, performance, or display under §106 of subject matter which can be copyrighted under federal law, but which also protect personal interests which may be distinct from copyright law. *Id.*

¹⁴⁹ *Id.* at 814 (examining H.R. 4347, 89th Congress (1965)).

¹⁵⁰ H.R. REP. NO. 94-1476 (1976); Shelley Ross Saxer, Note, *Baltimore Orioles, Inc. v. Major League Baseball Players Association: The Right of Publicity in Game Performances and Federal Copyright Preemption*, 36 UCLA L. REV. 861, 880 (1989).

¹⁵¹ H.R. REP. NO. 94-1476 (1976) (quoting *supra* note 142).

never been filmed or notated, an extemporaneous speech, 'original works of authorship' communicated solely through conversations or live broadcasts, and a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down."¹⁵² However, the enumerated state law rights that were not to be preempted were deleted at the last minute.¹⁵³ Because these enumerated state law doctrines were contemplated as part of proposed §301 from 1963 until right before the law was passed in 1976, one commentator has suggested that courts should treat those rights as though Congress did not intend to preempt them.¹⁵⁴

A dialogue between two congressmen during debate on the House floor added further confusion to the legislative history of §301.¹⁵⁵ Initially, Congressman Seiberling seemed to indicate that his proposed amendment would allow the preemption of the enumerated state law exemptions.¹⁵⁶ However, after debate with Congressman Railsback on the House floor, Seiberling made the contrary statement that the proposed amendment was intended to ensure that the enumerated rights were *not* preempted through a misinterpretation of §301.¹⁵⁷

4. The Seventh Circuit's Statement on §301's¹⁵⁸ Effect on the Right of Publicity: *Baltimore Orioles v. Major League Baseball Players Association*¹⁵⁹

In *Baltimore Orioles v. Major League Baseball Players Association*,¹⁶⁰ the Major League Baseball Clubs ("the Clubs") and the Major League Baseball Players Association (the "Players") sought a resolution to a decades-long dispute over the rights of the respective parties to revenues stemming from the televised broadcasts of Major

¹⁵² *Id.* (quoting *supra* note 142).

¹⁵³ Saxer, *supra* note 150, at 879; H.R. CONF. REP. NO. 94-1733 (1976).

¹⁵⁴ GOLDSTEIN, *supra* note 147, at 815; *Baltimore Orioles*, 805 F.2d at 676 n.25.

¹⁵⁵ Saxer, *supra* note 150, at 879 n.99 (interpreting 122 CONG. REC. H.10910 (daily ed. Sept. 22, 1976)); *infra* note 158.

¹⁵⁶ 122 CONG. REC. H.10910 (daily ed. Sept. 22, 1976) (statement of Rep. Seiberling). Seiberling stated, "[M]y amendment is intended to save . . . section 301 . . . from being inadvertently nullified because of the inclusion of certain examples in the exemptions from preemption." *Id.*

¹⁵⁷ *Id.* Seiberling stated, "I am trying to have this bill leave the State law alone and make it clear we are merely dealing with copyright laws, laws applicable to copyrights." *Id.*

¹⁵⁸ 17 U.S.C. §301 (1994 & Supp. V 1999).

¹⁵⁹ *Supra* note 37.

¹⁶⁰ *Supra* note 37.

League Baseball games.¹⁶¹ On June 14, 1982, the Clubs filed a complaint in the U.S. District Court for the Northern District of Illinois seeking a declaratory judgment that the Clubs had exclusive rights to broadcast the games and retained exclusive rights to the telecasts.¹⁶² In response, on July 1, 1982, three players filed for declaratory judgment against the Clubs in the United States District Court for the Southern District of New York, asserting that their publicity rights in the telecasts had been violated.¹⁶³ The two cases were consolidated and then transferred to the Northern District of Illinois.¹⁶⁴

On May 23, 1985, the Illinois District Court granted summary judgment on two of the four counts of the Clubs' original complaint.¹⁶⁵ On June 14, 1985, the Players appealed the district court's grant of summary judgment to the Seventh Circuit Court of Appeals.¹⁶⁶ As a threshold issue, the Circuit Court ruled that the Players' publicity rights were preempted by §301.¹⁶⁷ Additionally, the court held that the telecasts of the Players' game-time performances were copyrightable.¹⁶⁸

Further, the court identified the two conditions that must be

¹⁶¹ *Id.* at 665. The parties took their case to court because of letters mailed by the Players to the Clubs and the various television companies under contract to broadcast the games in 1982 stating that (1) the television companies were not authorized to broadcast the games and (2) by broadcasting the games, the television companies had been misappropriating the Players' intellectual property rights in their performances. *Id.*

¹⁶² *Id.* (construing *Baltimore Orioles v. Major League Baseball Players Ass'n*, Copyright L.Dec. (CCH) ¶ 25,882 (N.D. Ill. 1985)). The Clubs filed a four-count complaint in district court. In the first count, the owners sought a declaration that the telecasts were "works made for hire" and therefore were works in which the Players possessed no copyrights. *Id.* at 665, 667 (quoting 17 U.S.C. §201(b) (1994)). The second count concerned state master-servant law. *Id.* at 665-666. The third concerned the collective bargaining agreement between the Clubs and the Players, and the fourth concerned the customs and dealings between the Players and the Clubs. *Id.*

¹⁶³ *Id.* at 666 (examining *Rogers v. Kuhn*, No. 82 C 6377)). The three players filed a six-count complaint alleging that their publicity rights had been violated through the unauthorized use of their names, pictures, and performances; that the Clubs had been unjustly enriched; and that §§50-51 of the New York Civil Right Law had been violated. *Id.* (reviewing *Rogers*, No. 82 C 6377 (construing N.Y. CIV. RIGHTS LAW §§50-51 (McKinney 1992))).

¹⁶⁴ *Id.* (citing *Baltimore Orioles*, Copyright L.Dec. (CCH) ¶ 25,882).

¹⁶⁵ *Id.* (interpreting *Baltimore Orioles*, Copyright L. Dec. (CCH) ¶ 25,882). The owners were granted summary judgment on their copyright and master-servant claims. *Id.* (reviewing *Baltimore Orioles*, Copyright L.Dec. (CCH) ¶ 25,882).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 674-679.

¹⁶⁸ *Id.* at 667-673; *supra* Part III(B)(2).

satisfied in order for federal copyright law to preempt state rights.¹⁶⁹ "First, the work in which the right is asserted must be fixed in tangible form and come within the subject matter of copyright as specified in §102. Second, the right must be equivalent to any of the rights specified in §106."¹⁷⁰ In making its determination, the court found that the telecasts, through simultaneous videotaping and broadcasting, fell within §101 as works "fixed in [a] tangible medium of expression."¹⁷¹ To decide whether the telecasts were "within the subject matter of copyright," the court analyzed the enumerated "works of authorship" found in §102(a).¹⁷² Here, the court found that the telecasts were audiovisual works within the meaning of §102(a)(6) and were therefore "within the subject matter of copyright."¹⁷³

The court rejected the Players' argument that a distinction should be drawn between live game-time performances and the telecasts of those performances.¹⁷⁴ Relying on §101, the court observed that videotaping the live game-time performances fixed them within the meaning of both §101 and §301.¹⁷⁵ The court also noted that creativity did not need to be proven for federal copyright preemption to take effect.¹⁷⁶

Shifting its analysis to the second requirement, the court concluded that the legislative history, taken in its entirety, was simply too ambiguous to have any value.¹⁷⁷ To determine whether the right of publicity was equivalent to copyright, the court looked to §106 to determine if any of the rights protected by copyright were violated by enforcing the Players' claimed right of publicity.¹⁷⁸ In particular, the court examined the protected right of performance and determined that broadcasting baseball games constituted performing.¹⁷⁹ Since the

¹⁶⁹ Baltimore Orioles, 805 F.2d at 674 (construing *supra* note 158).

¹⁷⁰ *Id.* (examining 17 U.S.C. §§102, 106 (1994 & Supp. V 1999)).

¹⁷¹ *Id.* at 668 (interpreting *supra* note 139).

¹⁷² *Id.* at 668-669 (construing *supra* note 135).

¹⁷³ *Id.* at 668-669 (reviewing *supra* note 135).

¹⁷⁴ *Id.* at 674-676 (interpreting *supra* notes 139, 158).

¹⁷⁵ *Id.* at 675-676 (exploring *supra* notes 139, 158); *supra* Part III(B)(2).

¹⁷⁶ Baltimore Orioles, 805 F.2d at 675-676 (citing *supra* note 142); *supra* note 134; *supra* Part III(B)(2).

¹⁷⁷ Baltimore Orioles, 805 F.2d at 676-677 n.25 (construing *supra* notes 140, 158); *supra* Part III(B)(2).

¹⁷⁸ Baltimore Orioles, 805 F.2d at 676 (citing *supra* notes 140, 158); *supra* Part III(B)(2).

¹⁷⁹ Baltimore Orioles, 805 F.2d at 677 (construing *supra* note 139); *supra* Part III(B)(2).

Players claimed publicity rights in their performances, and the right to perform is one of the rights protected by copyright, the court found that the Player's publicity rights were equivalent to rights that the Clubs possessed through copyright.¹⁸⁰

The Players argued that there were different policies underlying federal copyright law and the right of publicity.¹⁸¹ According to the Players, federal copyright law seeks to benefit the public, while the right of publicity ensures monetary gain to the individual whose name, image, or likeness is used.¹⁸² According to the court, however, the policies behind federal copyright law and the right of publicity are identical: to benefit the public by ensuring that those who create and contribute intellectual property are duly compensated for their efforts.¹⁸³ Thus, the court held that the Players' publicity rights were in fact preempted by §301.¹⁸⁴

5. The Saxer Critique of *Baltimore Orioles*

In her Comment on the *Baltimore Orioles* case, Shelley Ross Saxer agrees with the Players, contending that the court erred in several respects. Saxer first argues that the court failed to distinguish between videotapes of game-time performances and the performances themselves.¹⁸⁵ The copyrightability of a play is illustrative.¹⁸⁶ While the script of a play is usually fixed in writing and therefore copyrightable, the actual *performance* of that script is not permanently fixed in a tangible medium of expression as required by §101.¹⁸⁷ Baseball games, however, are not scripted, and consist merely of the Players' transient game-time performances. As a result, there is nothing tangible to

¹⁸⁰ *Baltimore Orioles*, 805 F.2d at 677 (reviewing *supra* notes 140, 158); *supra* Part III(B)(2).

¹⁸¹ *Baltimore Orioles*, 805 F.2d at 677-678.

¹⁸² *Id.*; *infra* notes 217-223 and accompanying text.

¹⁸³ *Baltimore Orioles*, 805 F.2d at 677-679 (quoting and construing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573, 576 (1977)) [stating that the policy behind the right of publicity is "closely analogous" to the policy underlying copyright]; *supra* Part III(A); *infra* notes 196-201 and accompanying text.

¹⁸⁴ *Baltimore Orioles*, 805 F.2d at 677 (construing *supra* note 158).

¹⁸⁵ Saxer, *supra* note 150, at 869-870, 874-877; *supra* notes 151-152 and accompanying text.

¹⁸⁶ Saxer, *supra* note 150, at 870; *supra* notes 151-152 and accompanying text.

¹⁸⁷ Saxer, *supra* note 150, at 870 (examining *supra* note 139); *supra* Part III(B)(2); *supra* notes 151-152 and accompanying text.

copyright.¹⁸⁸ What may make videotapes of game-time performances copyrightable, Saxer asserts, is not the Players' game-time performances, but the additional originality exercised by the cameramen in deciding what to broadcast.¹⁸⁹ Thus, if the telecasts of the Players' performances are copyrightable, their live performances are not copyrightable.¹⁹⁰ As a result, the Players' publicity rights in those performances, rather than in the telecasts, may not be preempted as long as the Players did not assign their publicity rights to the Clubs.¹⁹¹

The ramifications of this logic are that, again assuming that the Clubs have the copyrights in the telecasts, the Players would still have a cause of action for the unauthorized use of their names and likenesses in the telecasts.¹⁹² This logic would allow the right of publicity and copyright to coexist.¹⁹³ Conversely, if one were to take the court's reasoning to its logical extreme, federal copyright preemption would virtually eliminate the right of publicity.¹⁹⁴ Indeed, all that would be necessary to preempt the right of publicity would be to fix one's name, image, or likeness in a writing, photograph or videotape, and then copyright that work.¹⁹⁵

Second, Saxer supports the Players' position on the issue of equivalence.¹⁹⁶ Saxer sets forth three policy rationales behind the right of publicity: (1) to allow a celebrity to profit from the time and effort expended to create that celebrity, (2) to prevent unjust enrichment through others' use of another's celebrity, and (3) to give people an incentive to create their celebrity for the good of the public.¹⁹⁷ However, the only professed rationale behind copyrights in the text of the Constitution, "[t]o promote the Progress of Science," is essentially identical to Saxer's third policy rationale behind the right of publicity.¹⁹⁸ According to Saxer, the *Baltimore Orioles* court erred in reasoning that

¹⁸⁸ Saxer, *supra* note 150, at 870.

¹⁸⁹ *Id.* at 869 n.46; *supra* note 134.

¹⁹⁰ Saxer, *supra* note 150, at 875-877.

¹⁹¹ *Id.* at 875-877 (interpreting *supra* note 158).

¹⁹² *Id.* at 876 (citing *supra* note 158).

¹⁹³ *Id.* at 887 (construing *supra* note 158).

¹⁹⁴ *Id.* (construing *supra* note 158).

¹⁹⁵ *Id.* at 887, 887 n.134 (1989) (reviewing *supra* note 158) and *Factors Etc., Inc., v. Pro Arts, Inc.*, 496 F.Supp. 1090, 1100 (S.D.N.Y. 1980)).

¹⁹⁶ *Id.* at 882-884.

¹⁹⁷ *Id.* at 887.

¹⁹⁸ *Id.* at 883-884 (quoting *infra* note 221).

the right of publicity was equivalent to copyright.¹⁹⁹ In addition, Saxer argues that the right of publicity and copyright are not equivalent because of opposing requirements concerning whether or not the work at issue must be fixed in a tangible medium of expression.²⁰⁰ While someone's name, image, or likeness need not be fixed in a tangible medium of expression for publicity rights to vest, a person's copyrightable ideas must be fixed in a tangible form to warrant protection.²⁰¹

IV. Conclusion

The right of publicity serves an important role in a free society in protecting the economic and moral interests of individuals and society.²⁰² However, absolute protection of publicity rights could be as deleterious as not protecting publicity rights at all. For example, if the Constitution were amended to specify that the First Amendment could never preempt the right of publicity, serious freedom of the press concerns would arise.²⁰³ Under this hypothetical scenario, a member of the news media would have to obtain an individual's permission, or perhaps pay the individual for the right to use their name, image, or likeness before reporting a news story.²⁰⁴ This would likely have a chilling effect on speech and violate public policy.

For example, suppose that an absolute right of publicity existed, First Amendment preemption of the right of publicity was banned via constitutional amendment, and the Oklahoma City bombing²⁰⁵ occurred. Further, Timothy McVeigh²⁰⁶ did not give the news media permission to

¹⁹⁹ *Id.* at 884, 886-887 (examining Baltimore Orioles, 805 F.2d at 676-679).

²⁰⁰ *Id.* at 882 (construing Baltimore Orioles, 805 F.2d at 676-679).

²⁰¹ *Id.* at 884, 886-887 (1989) (interpreting Baltimore Orioles, 805 F.2d at 676-679).

²⁰² See *supra* note 197 and accompanying text for the three policies underlying the right of publicity.

²⁰³ *Supra* Part III(A).

²⁰⁴ *Supra* Part III(A).

²⁰⁵ On April 19, 1995, the Alfred P. Murrah Federal Building in Oklahoma City was bombed, killing 168 people, including eight federal agents. Kevin Q. Murphy, *Grand Jury Indicts 3 in Bombing; McVeigh, Nichols Could Face Death. Third Man Enters Guilty Plea*, THE KANSAS CITY STAR, August 11, 1995, at A1.

²⁰⁶ On June 11, 2001, Timothy McVeigh was executed for plotting and carrying out the Oklahoma City bombing. Ellen Gamerman, *U.S. Executes McVeigh, 'Unbowed' till the End; Victims, Survivors of Bombing Given Justice, Bush Says, Not an Act of 'Vengeance'; Attorney Attempts to Humanize Killing of a 'Sergeant,' a Son*, THE BALTIMORE SUN, June 12, 2001, at 1A; *supra* note 205.

use his name, image, and likeness. If a deal for McVeigh's publicity rights could not be struck, the public would be denied the identity of the perpetrator of a tragic bombing. In all probability, however, a deal would be struck, since the economic benefits of revealing the identity of the Oklahoma City bomber would likely outweigh the costs. McVeigh (and now, after his execution, McVeigh's relatives)²⁰⁷ would be allowed to profit from the Oklahoma City bombing by selling his publicity rights to the media. This is an absurd result.

McVeigh and his relatives could also profit by selling his publicity rights to interested history book publishers, forcing publishers to either pay McVeigh or withhold his identity. In addition, devisability and descendibility would be unlimited, meaning that McVeigh's relatives could at least theoretically profit in perpetuity by selling McVeigh's publicity rights. Moreover, celebrities such as entertainers and sports figures would have their publicity rights protected long after they were forgotten, or long after their publicity rights had any significant value.

Perhaps an appropriate suggestion is to balance a person's right to control and profit from their name, image, and likeness with society's general interest in an informed and educated citizenry.²⁰⁸ The four branches of the right of privacy grew out of this need for balance.²⁰⁹ The right of publicity was the only branch that could redress economic gain caused by illicit use.²¹⁰ Hence, it was appropriate for Illinois' legislature and courts to restrict the right of publicity to the *commercial* use of one's name, image, or likeness. Furthermore, the legislature struck a sensible balance by restricting devisability and descendibility.²¹¹

However, unless the Seventh Circuit significantly alters its federal copyright preemption jurisprudence, legislative schemes such as Illinois' right of publicity law could continually be thwarted.²¹² The *Baltimore Orioles*²¹³ decision was erroneous and should be overruled. As Saxer noted, the court should have found that the rights of publicity and copyright are not equivalent.²¹⁴ The court should have realized the fundamental differences between copyrightable subject matter versus

²⁰⁷ *Supra* note 206.

²⁰⁸ *Supra* note 82.

²⁰⁹ *Supra* notes 5-9 and accompanying text.

²¹⁰ *Supra* notes 5-9 and accompanying text.

²¹¹ *Supra* Part I.

²¹² *Supra* notes 185-195 and accompanying text.

²¹³ *Supra* note 37.

²¹⁴ *Supra* notes 185-195 and accompanying text.

the subject matter that gives rise to publicity rights.²¹⁵ Furthermore, although the legislative history is ambiguous, the court should have at least considered the list of enumerated items that had been part of the bill since 1963.²¹⁶

The court also failed to appreciate the moral values protected by the rights of publicity²¹⁷ and copyright, but this did not distort the court's equivalency analysis.²¹⁸ Saxer's analysis is flawed in failing to recognize the moral values protected by copyright law. Copyright, like the right of publicity, allows individuals to reap the rewards of their original²¹⁹ efforts to create intellectual property (e.g., books, playwrights, movies, sports telecasts, etc.). In addition, copyright prevents others from being unjustly enriched by using someone else's original work.²²⁰ The text of the Copyright Clause²²¹ seems to stress the economic policy rationales behind copyright law. Despite Saxer's contrary view, this does not mean that the Framers discredited other rationales, or that there are no other legitimate policy motives behind copyright law other than "[t]o promote the Progress of Science. . ."²²² Since the economic and moral values behind copyright law and the right of publicity are the same, the *Baltimore Orioles* court correctly concluded that the policies behind copyright and the right of publicity were identical.²²³

Furthermore, as Saxer opined, the court should have found that the Players' actual, live game-time performances in which the Players had publicity rights were not fixed in a tangible medium of expression.²²⁴ Holding that the Players had preempted publicity rights in the telecasts,

²¹⁵ *Supra* note 151 and accompanying text, *supra* notes 196-201 and accompanying text.

²¹⁶ *Supra* Part III(B)(3).

²¹⁷ *Supra* notes 11-21 and accompanying text; *supra* notes 196-201 and accompanying text.

²¹⁸ *Contra supra* notes 196-201 and accompanying text.

²¹⁹ *Supra* note 134.

²²⁰ *Supra* Part III(B)(2); *supra* Part III(B)(5).

²²¹ U.S. CONST. art. I, §8, cl. 8.

²²² *Id.*; *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 577 (1977) [Copyright "laws perhaps regard the 'reward to the owner [as] a secondary consideration,' [citation omitted], but they were 'intended to grant valuable, enforceable rights' in order to afford greater encouragement to the production of works of benefit to the public [citation omitted]."] *Supra* notes 196-201 and accompanying text.

²²³ *Baltimore Orioles*, 805 F.2d at 676-679; *supra* Part III(B)(2); *supra* Part III(B)(5). *Contra supra* notes 196-201 and accompanying text.

²²⁴ *Supra* notes 185-195 and accompanying text.

rather than in their live performances,²²⁵ was a bad decision that threatened to completely preempt the right of publicity.²²⁶ The court should have considered the legislative history of §301 and realized that without the enumerated state law rights, Congress was wary of exempting the right of publicity from preemption. However, considering the long legislative history of §301, this did not mean that Congress intended to completely preempt the right of publicity either.²²⁷ Thus, the court should have tailored a result consistent with this reasoning and held that the Players' right of publicity was not preempted by §301.

As Saxer reasoned, the negative ramifications of the *Baltimore Orioles*²²⁸ decision could completely nullify statutes such as the Illinois Right of Publicity Act in given cases.²²⁹ The right of publicity exists to protect important economic and moral values.²³⁰ The Illinois Right of Publicity Act was an attempt by the Illinois legislature to alter the scope of the right of privacy created by the common law.²³¹ The Right of Publicity Act converted the misappropriation branch of the right of privacy into publicity rights descendible for up to 50 years.²³² While First Amendment preemption serves to keep the scope of the right of publicity within reasonable bounds,²³³ and federal trademark preemption complements values already preserved by the Right of Publicity Act,²³⁴ federal copyright preemption as interpreted by the Seventh Circuit could eviscerate the Right of Publicity Act in given cases.²³⁵ As was the case in *Baltimore Orioles*,²³⁶ publicity rights in performances not fixed in tangible form, such as baseball games, plays, and unrecorded lectures, could merely be preempted by fixing them in a secondary tangible form.²³⁷ In this manner, the scope of publicity rights in Illinois and elsewhere in the Seventh Circuit could be significantly reduced,

²²⁵ *Supra* Part III(B)(4) (interpreting *supra* note 158).

²²⁶ *Supra* notes 185-195 and accompanying text.

²²⁷ *Supra* Part III(B)(3) (interpreting *supra* note 158).

²²⁸ *Supra* note 37.

²²⁹ *Supra* Part II(C); *supra* notes 192-195 and accompanying text.

²³⁰ *Supra* notes 11-21 and accompanying text.

²³¹ *Supra* Part II.

²³² *Supra* Part II(C).

²³³ *Supra* Part III(A).

²³⁴ *Supra* Parts II(C), III(B)(1).

²³⁵ *Supra* Part III(B)(2)-(5).

²³⁶ *Supra* Part III(B)(4).

²³⁷ *Supra* notes 185-195 and accompanying text.

and important policies advanced by the Illinois Right of Publicity Act could be thwarted by federal copyright preemption.²³⁸

²³⁸ *Supra*.notes 185-195 and accompanying text.