

USE OF AN IMAGE OR PERSONAL IDENTIFIER WITHOUT PERMISSION

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This presentation addresses the appropriation or use of a person's image, or an item of a person's identification, for commercial purposes. The appropriation may involve posting the image or identifier on a website for commercial purposes. The presentation will consider issues of right of publicity, false endorsement, copyright law, exemptions from liability of internet website operators, special concerns regarding children's images and identifiers, and issues for consideration with a clearance or release.

A. Right of Publicity.

1. Background.

a. What is the right of publicity? "Fundamentally, the right of publicity 'is the inherent right of every human being to control the commercial use of his or her identity.'" Miller v. Glenn Miller Productions, Inc., 454 F.3d 975, 988-89 (9th Cir. 2006) (applying Cal. right of publicity law).

b. Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953). Defendant used photographs of ballplayers in its gum packs. Judge Franks explains that the right to control a person's image is independent of the right of privacy and the attendant emotional harm. Rather, the publicity issue pertains to the right of a person to control the exploitation of his or her own image or persona independent of the presence of emotional harm.

We think that, in 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 labeled 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 ball-players), far from having their feelings bruised

through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, 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. Id. at 868. [Emphasis added.]

c. Difference between right of privacy and right of publicity.

i. Prosser's four torts of privacy (see, Restatement Second, Torts §652A; Prosser and Keeton on Torts, Ch. 20 (5th ed. 1984)):

a) intrusion on a person's physical solitude (McLain v. Boise Cascade Corp., 271 OR 549, 533 P.2d 343 (1975)).

b) public disclosure of embarrassing private facts (Simpson v. Burrows, 90 F. Supp. 2d 1108 (D. OR. 2000)).

c) placing a person in a false light in the public eye (Marleau v. Truck Insurance Exchange, 333 OR 82, 37 P.3d 148 (2001)).

d) appropriation for commercial benefit of a person's name or likeness.

ii. The right of publicity involves the exclusive right to commercially exploit a person's own image. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

iii. “* * * the right to privacy protects against intrusion upon an individual's private self-esteem and dignity, while the right of publicity protects against commercial loss caused by appropriation of an individual's personality for commercial exploitation.” McCarthy on Trademarks, §28:6 (2007). Right of privacy involves injury to the psyche (emotional distress) while right of publicity concerns injury to the pocketbook. Id.

d. Relation to copyright. Copyright law protects an original work of authorship fixed in a tangible medium. 17 U.S.C. §102(a). Right of publicity claims may not comply with the fixation requirement. Further, a person's persona is not included within the subject matter of copyright and it is not a work of authorship. Id.

e. ORS 163.700: Invasion of personal privacy. Crime of invasion of personal privacy if a person makes a visual recording of another person in a state of nudity without consent and the recorded person is in a place and circumstance where there is a reasonable expectation of privacy.

2. Supreme Court.

a. The First and Fourteenth Amendments do not authorize the taking by news media of a performer's entire act. Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 97 S. Ct. 2849 (1977). Ohio television station filmed the entire 15-second "human cannonball" act of Hugo Zacchini and showed the film on television news later that night. The Ohio Supreme Court determined that the Zacchini had a state law claim for the right of publicity value of his performance. Nevertheless, Ohio held that the TV station had a privilege to report the news of legitimate public interest. The Supreme Court held that the First and Fourteenth Amendment do not provide a privilege from liability when a news outlet copies without consent a performer's entire act.

The broadcast of a film of a performer's entire act poses a substantial threat to the economic value of that performance. *
* * Much of the economic value lies in the 'right of exclusive control over the publicity 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 rationale for (protecting the right of publicity) is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.'" Id. at 575-76.

3. Restatement of the Law, Third. Unfair Competition.

a. §46. Appropriation of the Commercial Value of a Person's Identity: The Right of Publicity.

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

§48. Injunctions: Appropriation of the Commercial Value of a Person's Identity.

§49. Monetary Relief: Appropriation of the Commercial Value of a Person's Identity.

b. Restatements are not necessarily authoritative statements of the law of Oregon. Reliance on a principle set out in a Restatement that has not been adopted in Oregon is at the user's risk. Anderson v. Fisher Broadcasting Companies, Inc., 300 OR 452, 712 P.2d 803 (1986); U.S. National Bank v. Fought, 291 OR 201, 213 n. 12, 630 P.2d 337 (1981) ("It [a restatement] cannot substitute for an independent analysis and presentation of the elements that make, or should make, defendants liable to plaintiff in Oregon law, when the relevance of some of the elements to a theory of liability is an open question in this state."); Brewer v. Erwin, 287 OR 435, 455 n. 12, 600 P.2d 398 (1979) ("Such quotations [from a Restatement] should not be relied on in briefs as if they committed this court or lower courts to track every detail of the Restatement analysis in other cases. The Restatements themselves purport to be just that, "restatements" of law found in other sources * * *").

4. Oregon.

a. ORS 163.700: Invasion of personal privacy. Crime of invasion of personal privacy if a person makes a visual recording of another person in a state of nudity without consent and the recorded person is in a place and circumstance where there is a reasonable expectation of privacy.

b. No common law or civil statutory right of publicity. Anderson v. Fisher Broadcasting Companies, Inc., 300 OR 452, 712 P.2d 803 (1986). Defendant's TV cameraman photographed the scene of an automobile accident where the plaintiff was injured. Plaintiff was filmed injured at the scene. The film was not broadcast that day. Some time later, the TV station used a portion of the film of plaintiff without consent in promotional spots to advertise another TV program. Plaintiff sued for defendant's appropriation of plaintiff's picture.

What Anderson SAYS:

When actors, athletes or other performers object, not to a loss of anonymity, but to unauthorized exploitation of their valuable public identities, the remedy should reflect the wrongful appropriation of a 'right to publicity' that has economic value to the plaintiff as well as to the defendant, rather than damages for psychic distress at a loss of 'privacy.' * * * [Citing to Haelen Laboratories v. Topps Chewing Gum.] When a person who neither has nor wants a marketable public identity demands damages for unauthorized publicity, such a person may claim injury to a noneconomic rather than an economic interest in his or her privacy * * *. Id. at 466.

What Anderson DOES:

Because plaintiff's claim is not for the economic value of his endorsement nor for unjust enrichment for wrongful appropriation of a photograph belonging to plaintiff, there is no liability for the factually accurate use of a person's photographic image unless the use of the image is wrongful for some reason other than the lack of consent. "Without a showing that plaintiff's picture was either obtained or broadcast in a manner or for a purpose wrongful beyond the unconsented publication itself, that claim fails." Id. at 469.

Hence, in Oregon, a claim under a "right of publicity" principle must be founded on trademark law, copyright law or conversion.

5. California.

a. Common law right of publicity. "Fundamentally, the right of publicity 'is the inherent right of every human being to control the commercial use of his or her identity.' * * * California law recognizes both a statutory and common law right of publicity." Miller v. Glenn Miller Productions, Inc., 454 F.3d 975, 988-89 (9th Cir. 2006).

b. Statutory right of publicity: Cal Civil Code §3344-3344.1. Prohibition against the unauthorized commercial use of name, voice, signature, photograph or likeness. The rights of a deceased personality (the Astaire Celebrity Image Protection Act) continues for 70 years after the death of the personality. Cal Civil Code §990 permits descendibility.

§3344. (a) 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 damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section 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.

[Exemption for news, public affairs, sports event and political campaign. Other exemptions apply.]

§990 Descendibility.

[(a) Applies to deceased persons.]

(b) The rights recognized under this section are property rights, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents, whether the transfer occurs before the death of the deceased personality, by the deceased personality or his or her transferees, or, after the death of the deceased personality, by the person or persons in whom the rights vest under this section or the transferees of that person or persons.

c. Freedom of Speech Defense. California will balance the right of publicity against free expression. “[T]he state law interest [in the right of publicity] and the interest in free expression must be balanced, according to the relative importance of the interests at stake.” Comedy III Productions, Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 401, 21 P.3d 797 (2001). However, there usually is no First Amendment right in false commercial speech. Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343 (1980).

6. Washington.

a. No common law right of publicity.

b. Statutory right of publicity: Wash. Rev. Code §63.60.010 et seq. Every individual or personality has a property right in the use of their name, voice, signature, photograph or likeness. This law distinguishes between an Individual (a natural person) and a Personality (any individual whose “publicity” has commercial value). The rights of an Individual continue after death for 10 years. The rights of a Personality continue for 75 years after death.

RCW 63.60.010: Every individual or personality has a property right in the use of his or her name, voice, signature, photograph,

or likeness. Such right exists in the name, voice, signature, photograph, or likeness of individuals or personalities deceased before, on, or after June 11, 1998. This right shall be freely transferable, assignable, and licensable, in whole or in part, by any otherwise permissible form of inter vivos or testamentary transfer, including without limitation a will or other testamentary instrument, trust, contract, community property agreement, or cotenancy with survivorship provisions or payable-on-death provisions, whether the will or other testamentary instrument, trust, contract, community property agreement, or cotenancy document is entered into or executed before, on, or after June 11, 1998, by the deceased individual or personality or by any subsequent owner of the deceased individual's or personality's rights as recognized by this chapter; or, if none is applicable, then the owner of the rights shall be determined under the laws of intestate succession applicable to interests in intangible personal property. The property right does not expire upon the death of the individual or personality, regardless of whether the law of the domicile, residence, or citizenship of the individual or personality at the time of death or otherwise recognizes a similar or identical property right. The right exists whether or not it was commercially exploited by the individual or the personality during the individual's or the personality's lifetime. The rights recognized under this chapter shall be deemed to have existed before June 11, 1998, and at the time of death of any deceased individual or personality or subsequent successor of their rights for the purpose of determining the person or persons entitled to these property rights as provided in RCW 63.60.030. This chapter is intended to apply to all individuals and personalities, living and deceased, regardless of place of domicile or place of domicile at time of death. [Emphasis added.]

7. New York.

a. Common law right of publicity. Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

b. Statutory right of publicity: N.Y. Civil Rights Law §50, 51. Prohibits the unauthorized use for advertising or trade purposes of the name, portrait or picture of any living person. No post-mortem rights.

§51. Action for injunction and for damages. Any 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; and 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, 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.

[Multiple exemptions, including for portrait photographers, sound recordings, and others.]

c. Freedom of Speech Defense. “The ‘right of publicity,’ therefore, like that of ‘privacy’ * * * [has] no application where the use of a name or picture * * * is in connection with a matter of public interest.” Paulsen v. Personality Posters, Inc., 299 N.Y.S.2d 501, 508 (1968).

B. Lanham Act (15 U.S.C. §1125(a)) and False Endorsement.

1. What is “false endorsement?” A celebrity’s false association with a product may lead to a likelihood of confusion regarding the celebrity’s endorsement of the product.

Lanham Act §1125. False designations of origin, false descriptions, and dilution [Section 43].

(a) (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. [Emphasis added.]

[Under Lanham Act §1117, Section 35, plaintiff can seek to recover defendant's profits, any damages sustained by the plaintiff, and the costs of the action. Treble damages may be awarded. Attorneys' fees awarded in exceptional cases.]

2. Celebrity.

a. A celebrity's persona is viewed as "trademark-like" in a false endorsement case under §43(a). White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir, 1992).

b. Strong celebrity identity. Game show hostess Vanna White's celebrity is strong; hence likelihood of confusion based on false endorsement. Id.

c. Limited market celebrity. Abercrombie & Fitch published photographs of notable Hawaiian surfing pioneers. Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001). "A jury could reasonably find that Abercrombie intended to indicate to consumers that these legendary surfers were endorsing Abercrombie's merchandise." Id. at 1008.

d. Weak or no celebrity. No likelihood of confusion based on false endorsement for weak celebrity of a bit part actor. Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 625 (6th Cir. 2000) (applying Ninth Circuit likelihood of confusion analysis).

3. Non-typical celebrity depictions.

a. Nonhuman celebrity depiction. False endorsement claim permitted for use of look-alike robotic figures of Cliff and Norm from Cheers TV program. "The issue is whether a consumer should be confused as to Wendt and Ratzenberger's association [via robotic characters] with or sponsorship of [defendant's] Host's bars." Wendt v. Host Int'l, Inc., 125 F.3d 806, 812-13 (9th Cir. 1997).

b. Celebrity Look-Alikes. False endorsement liability for publication of a photograph of a "celebrity double" resembling Woody Allen. Allen v. National Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985).

c. Voice Misappropriation by Sound-Alike. Use of a sound-alike voice of a highly distinctive and well-known singer can create false endorsement liability under §43(a). Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992). "[W]e conclude that false endorsement claims, including those premised on the unauthorized imitation of an entertainer's voice, are cognizable under section 43(a)." Id. at 1107. And, Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

4. No False Endorsement Liability.

a. No False Endorsement Confusion. No false endorsement claim when it is clear from the context that there is no likelihood that consumers would be confused into believing that the celebrity provided the endorsement. In Kournikova v. General Media Communications Inc., 2002 WL 31628027 (C.D. Cal. 2002), no false endorsement claim available to tennis star Anna Kournikova for nude photos published in magazine of a look-alike falsely identified as Kournikova, when headline (“Caught up close on nude beach”) and story indicated that the pose was not voluntary.

b. Significant amount of uncontrolled and unauthorized use. Princess Diana’s estate did not have a false endorsement claim relating to unauthorized Princess Diana dolls produced by Franklin Mint, since during her life and after her death there was considerable uncontrolled and unauthorized use of Diana’s name and likeness. Cairns v. Franklin Mint Company, 292 F.3d 1139 (9th Cir. 2002).

c. Nominative Fair Use. No false endorsement liability when the unauthorized use does not imply sponsorship or endorsement. In The New Kids on the Block v. News America Publishing, Inc., 971 F.2d 302 (9th Cir. 1992), use of band name in 900-phone promotion did not constitute false endorsement when name is used in a non-trademark sense for ease of identification.

C. Copyright Law (Title 17, U.S. Code) as Applied to Photographs.

1. §102(a) of Copyright Act permits copyrightable protection for photographs if fixed in tangible medium.

2. Minimal creativity required for copyrightable protection. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 4 S. Ct. 279 (1884). Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444 (S.D.N.Y. 2005) (three forms of photographic protection: rendition, timing, subject).

a. Creativity of rendition: selection of lens, shutter speed, focus, film, lighting, depth of field, and other technical considerations. Subject not protectable under copyright but photo is. Id.

b. Creativity of timing: being in the right place at the right time. Subject not protectable under copyright but photo is. Id.

c. Creativity of subject: creating the subject with special pose, special scene or other conduct by which subject is created. Subject is protectable under copyright. Id.

3. Work of Visual Art (§106A – Visual Artists Rights Act). Right of author to attribution and integrity to work of visual art (painting, drawing, print, sculpture or photograph, existing in a single copy or in a limited edition of 200 or fewer copies). Right can be waived in writing only by the author.

D. Exemption from Liability of E-Commerce Operators for Posting of Images.

1. Digital Millennium Copyright Act (DMCA) Safe Harbor (17 U.S.C. §512(c)). If safe harbor rules complied with, then no liability to ISP for copyright infringement or for blocking or screening of subscriber's posting.

a. No general duty for ISP to scour website looking for infringing or wrongful postings. But ISP may have a duty to act based on actual knowledge.

b. ISP must designate agent for service of take down notice, and must file designation with Copyright Office.

c. Requirements for valid take down notice (ISP need not comply with a take down notice that fails to satisfy each of the notice requirements):

i. Signature.

ii. Identification of copyrighted work.

iii. Identification of material.

iv. Identification of complaining party.

v. Statement of good faith belief (this includes an obligation on the party of the copyright owner to consider the claimed infringer's likely defenses and exemptions from infringement, including the fair use exemption) (see, Lenz v. Universal Music Corp., 2008 WL 3884333 (N.D. Cal. 2008)).

vi. Statement that information is accurate (“under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.”).

d. Counter notice and put back obligation.

2. Section 230 Communications Decency Act (47 U.S.C. §230).

a. No liability for a provider of an “interactive computer service” that merely publishes information provided by others. If the interactive computer service is

merely a passive repository and publisher of information, then it may not be liable under the Act when the public posting is harmful or defamatory.

b. In Fair Housing Council of San Fernando Valley v. Roommates.com LLC, 521 F.3d 1157 (9th Cir. 2008), the Ninth Circuit held that the Act does not exempt liability when the Internet site actively induces subscribers to post roommate preferences in violation of the federal Fair Housing Act. The proactive involvement of the Web site inducing the public posting of information in violation of law converts the Web site into a type of content provider — a poster — rather than a mere publisher.

c. Barnes v. Yahoo!, Inc., ___ F.3d ___, 2009 WL 1232367 (9th Cir., May 7, 2009): where plaintiff's former boyfriend posted embarrassing intimate photographs and other material, and where Yahoo promised to "take care of it," but failed to remove the material, the Ninth Circuit held that (i) a Section 230 defense must be pled as an affirmative defense, (ii) Section 230 bars liability for an Oregon claim of negligent undertaking or negligent provision of services, and (iii) Section 230 does not bar an Oregon claim for breach of contract under a theory of promissory estoppel.

d. Section 230 does not provide an exemption from criminal laws and intellectual property laws.

E. Use of Children's Images. No per se rule prohibiting the taking or use of children's images, but:

1. Criminal law.

a. 18 U.S.C. §110 – Sexual Exploitation and other Abuse of Children (a "minor").

b. PROTECT Act (Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today) (117 Stat. 650). Prohibits, among many things, display of virtual images (computer generated graphical designs, drawings, sculptures, and pictures) of children (anyone under 18 years) in sexually explicit images. The provision dealing with pandering or solicitation of child pornography, 18 U.S.C. §2252A(a)(3)(B), was found not overbroad under the First Amendment nor impermissibly vague under the Fifth Amendment's due process clause in U.S. v. Williams, 553 U.S. ___, 128 S. Ct. 1830 (2008).

c. ORS 163.665 – 693 – Visual Recording of Sexual Conduct of Children (under the age of 18 years).

2. Children's Online Privacy Protection Act (COPPA) (16 U.S.C. §§6501-6508)

- a. Child is an individual under 13 years.
- b. An operator is a person who operates an Internet website that collects personal information from users or visitors.
- c. Regulates personal information (name, address, e-mail address, social security number, phone number, and other identifiers) collected from children by the website operator when website is "directed to children."
 - i. Notice on the website of what information is collected from children by the operator, how the operator uses such information, and the operator's disclosure practices for such information; and
 - ii. Verifiable parental consent for the collection, use, or disclosure of personal information from children.
 - iii. Additional information to be provided by operator to parent upon request.
 - iv. Certain exemptions when parental consent not required.
- d. Regulates the collection of personal information by an operator from a child in order to participate in a contest or game.
- e. Certain exemptions for non-profits.
- f. Rulemaking and non-exclusive enforcement authority by Federal Trade Commission. FTC has approved certain safe harbor website disclosure language. Some safe harbor language was submitted by:
 - i. The Children's Advertising Review Unit of the Council of Better Business Bureaus (CARU).
 - ii. Entertainment Software Rating Board (ESRB).
- g. FTC has settled several cases against website operators that collect personal information from children without parental permission, including:
 - i. Girls Life (collected personal information from children using online advice columns, contests and pen-pal opportunities).

ii. American Pop Corn Company (makers of Jolly Time Popcorn) (\$10,000 penalty for collecting personal information from children using its Kids Club feature involving games, jokes, etc.).

iii. Lisa Frank (manufacturer of girls' toys and school supplies) (\$30,000 penalty, required children to provide personal information in order to register to use site).

iv. Mrs. Fields Cookies (\$100,000 penalty for collecting personal information from children during the operation of a birthday club).

v. Hershey Foods (\$85,000 penalty from collecting personal information from children from candy sites without reasonably verifying that parents had provided consent).

F. Clearance/Release Language.

1. Consent by subject, parent/guardian of minor, or owner for photograph and for scope of use of photograph. Be certain to determine the true owner of photograph for purpose of granting consent.

a. Joint owner (if grant non-exclusive, then approval of all owners not required; if grant is exclusive, then approval of all owners required) (17 U.S.C. §201(a)).

b. Community property – marital asset (both spouses may need to provide exclusive transfer).

c. Work for hire (right to transfer owned by employer of author) (17 U.S.C. §201(b)).

d. Security interest.

2. Statute of frauds requires written transfer instrument. 17 U.S.C. §204(a).

3. Careful definition of scope of use, new medium, and term. Ninth Circuit applies a narrow interpretation of scope of use if dispute as to extension to new medium. Cohen v. Paramount Pictures Corp., 845 F.2d 851 (9th Cir. 1988).

4. But, early termination rights under Copyright Act §§203, 304 (termination at 35th year following grant for post 1-1-1978 grants; termination at 57th year after copyright secured, or else at 76th year, for pre-1978 grants).

5. Waiver of attribution right under Visual Artists Rights Act (VARA) (Copyright Act §106A).

6. Consideration: fully paid up or future consideration.

7. Understand any limitations on consent (exclusive or non-exclusive, type of medium, limited term, limited use within medium).

G. Personal Jurisdiction.

1. Long arm statutes. Conduct originating in Oregon can create a harmful effect in foreign jurisdiction having right of publicity laws or other relevant laws. Oregon LAS:

ORCP Rule 4C: Local act or omission. Personal jurisdiction over any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant. [Emphasis added].

ORCP Rule 4 L: Other actions. Notwithstanding a failure to satisfy the requirement of sections B through K of this rule, in any action where prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States.

2. Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482 (1983). Due process clause permits personal jurisdiction over a defendant in any state where minimum contacts are present. Intentional tort of libel was committed by defendant (The National Inquirer) in Florida, where it is located and operates. The plaintiff (actress Shirley Jones) was harmed in California where she lives and works. The harm targeted plaintiff and her interest in California in that the intentional tort was anticipated to injure plaintiff in California. The Florida libelous conduct had its “effect” in California. The defendant knew that the brunt of the injury suffered by plaintiff would occur in California. It was not unreasonable to expect defendant to respond to the injury in California. First Amendment concerns are not to be addressed in a due process analysis for personal jurisdiction.

* * * the brunt of the harm, in terms both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the “effects” of their Florida conduct in California. Id. at 789.

In summary, be cautious what you put on the Internet relating to other people, living, dead, young or look-alikes. The foregoing information is by its nature a summary of broad and complex law that each practitioner should examine in greater detail in advising a client. The foregoing information does not constitute a complete statement of the law regarding the areas herein addressed.

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